SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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| U.S. IMMIGRATION FUND LLC, U.S. IMMIGRATION FUND-NY LLC, 701 TSQ 1000 FUNDING, LLC, and 701 TSQ 1000 FUNDING GP, LLC, | : | Index No. 159222/2018 |
| Plaintiffs, | : | IAS Part 34 |
| - against - | : | Justice Carmen Victoria St. George |
| DOUGLAS LITOWITZ, ESQ., XUEJUN MAKHSOUS a/k/a MA XUEJUN a/k/a ZOE MA, and REVIV-EAST LEGAL CONSULTANTS (HK) LTD. a/k/a HONG KONG ZHENDONG LEGAL SERVICES CONSULTING CO., LTD., | : | |
| Defendants. | : | |

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS, MOTION TO STRIKE AND MOTION FOR SANCTIONS**

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Plaintiffs U.S. Immigration Fund LLC, U.S. Immigration Fund-NY LLC, 701 TSQ 1000 Funding, LLC, 701 TSQ 1000 Funding GP, LLC (collectively "Plaintiffs"), submit this Memorandum of Law in opposition to the motions by Defendant Douglas Litowitz, Esq. ("Litowitz"), pursuant to: (a) CPLR 3211(a)(8) to dismiss on the ground that the court has no jurisdiction of the person; (b) CPLR 3024(b) to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading; and (c) 22 NYCRR 130-1.1 for sanctions.

## PRELIMINARY STATEMENT

The motions should be denied. Litowitz consented to personal jurisdiction in this court by executing a certain "Attorney's Eyes Only Confidentiality Agreement" and by virtue of his serving as the legal representative of certain clients who entered into "Withdrawal Agreements" that on their face provided that Litowitz was to be bound, and which also conferred personal jurisdiction in this court. He is also subject to jurisdiction because the harm caused by his misconduct was most critically realized in New York. Furthermore, the motions to strike and to impose sanctions asserted in connection with what Litowitz maintains was scandalous or frivolous allegations is belied by the fact that each allegation in the Verified Amended Complaint was relevant to the causes of action, were of colorable merit, and were not made in bad faith.

## STATEMENT OF FACTS

Plaintiffs filed this action because the misconduct of Litowitz and Zoe Ma, together with Reviv-East -- the entity they created to further their fraud -- not only harmed Plaintiffs, but they also harmed Plaintiffs' investors. Defendants' misrepresented their false "expertise" in the EB-5 field, they breached agreements of confidentiality with Plaintiffs and they defamed the people, the work and the results of Plaintiffs' EB-5 real estate developments in two projects ongoing in Times Square, New York City (the "701 Project" and the "702 Project").

They denigrated Plaintiffs, the 701 Project and the 702 Project so as to scare Plaintiffs' immigrant investors under the EB-5 Program into believing that Plaintiffs' business is a sham and that they will lose their substantial investment. They harmed Plaintiffs, in that some Chinese investors were motivated by Defendants misconduct and withdrew their investments from these New York projects. They further harmed Plaintiffs in New York and elsewhere because their defamatory statements were false facts that tend to injure a plaintiff in its business, trade or profession. They also harmed the Chinese investors who, because of Defendants, received withdrawals of their EB-5 investments, but were unable to get the green cards for which they strived so long to attain.

Plaintiffs' investors at issue are all Chinese nationals who each invested $500 thousand and for years have maintained demanding requirements under EB-5 investment requirements to reach the ultimate goal of receiving a coveted green card for themselves and immediate family members. The EB-5 Program, which was created by the government to promote investment in U.S. real estate development and to create jobs in the United States for American workers, requires that the EB-5 investment remain "at risk" during the visa process, which means it must stay deployed in an ongoing job creation enterprise. In recent years an administrative backlog for approvals of EB-5 visas for Chinese nationals has resulted in the completion of some development projects, resulting in a repayment of EB-5 investments, before the green cards are approved. Rather than start from the beginning in a brand new undertaking the onerous bureaucratic process for green card approval, which was already undergone by the immigrant investors, EB-5 regulations under these circumstances permit the redeployment of the same EB-5 investment into another qualified project, so as to maintain the investment "at risk" until the ongoing visa process is approved.

It is against this backdrop that Defendants' egregious conduct entered the picture. At a time when these Chinese investors were most vulnerable, Defendants told lies to them that Plaintiffs' business was all a sham. They lied that the Times Square project they had been invested in during this entire time, the 701 Project, was a bad investment. They lied that the second qualified project that Plaintiffs recommended for redeployment of their EB-5 investment, the 702 Project -- also in Times Square --was also a bad investment. They did so without any regard for the truth.

They did so to try and scoop up these Chinese investors as legal clients, with promises that solely because of their faux expertise they will succeed in rescuing their EB-5 investments, which they further lied Plaintiffs will not permit them to withdraw. They did so in order to take an exorbitant fee for their "services" when the truth is that the withdrawal of EB-5 funds could have been accomplished without use of legal services and without these Chinese investors paying any fee, let alone an exorbitant one.

Plaintiffs filed the Verified Amended Complaint in this action and set forth the allegations revealing these Defendants as frauds. It shows that Litowitz and Zoe Ma had recently experienced severe financial hardship, which gave rise to their scheme to defraud and defame so as to make money off these Chinese investors. Verified Amended Complaint ¶¶ 1, 4, 31-34. It alleges facts that exposed the misrepresentations that Defendants made in their website and in a chat room that was created and reserved for these Chinese investors, which was infiltrated by Zoe Ma, who spoke their language. Verified Amended Complaint ¶¶ 1-4, 34-38, 42-44. It revealed the lies that they were experts in the field of EB-5 investments, that Litowitz is a law professor and Zoe Ma is a Chief Investigator for Litowitz, and that their business has been successfully rescuing EB-5 investments since 2017, when in fact in 2017 Litowitz worked as an

in-house counsel for two companies, from both of which he was fired and had to declare bankruptcy, that Zoe Ma was actually a manager of a health care facility in Wisconsin, which was in fact a failed business in which she had lost her life savings. Verified Amended Complaint ¶¶ 29-44. And far from designs to embarrass Defendants, the facts alleged concerning the pressures that arose from Defendants' immense financial hardships, which gave rise to a high level of malicious conduct by Defendants, was set forth in the Verified Amended Complaint to provide the legal basis for certain claims where a demonstration of malice is an important component, as is more fully discussed below.

Plaintiffs also alleged facts that demonstrated that Zoe Ma touted to these Chinese investors in the online chat room that Litowitz had successfully joined an ongoing lawsuit brought in Supreme Court, New York County (the "NY Action") to champion the cause of EB-5 investors, but where the truth was that Litowitz's attempt to intervene in that NY Action was never litigated. The Verified Amended Complaint further alleged the fact that what Litowitz did accomplish was that he was able to get his hands on a confidential term sheet setting forth the proposed (now finalized) settlement of the NY Action, which was brought by other Chinese investors against some of the Plaintiffs and affiliates of the Plaintiffs in this action. Verified Amended Complaint ¶¶ 29-44.

The NY Action was commenced by those other Chinese investors to enjoin the redeployment of their EB-5 investments into the 702 Project while the parties arbitrate the merits of the redeployment of over $200 million. The terms of the settlement of the NY Action were provided to Litowitz, as ordered by Hon. Saliann Scarpulla, pursuant to the "Attorneys' Eyes Only Confidentiality Agreement," which Litowitz promptly breached by revealing it to Zoe Ma, who then made statements about it in the chat room. A copy of the Attorneys' Eyes Only

Confidentiality Agreement is annexed to the accompanying affidavit of Jason Metula (the "Metula Aff.") as Exhibit B. The pertinent provisions of the Attorneys' Eyes Only Confidentiality Agreement provides:

1. Any documents provided to Litowitz by Petitioners or Respondents will be treated as "Attorneys Eyes Only" material, which Litowitz may not disclose to any other person or party, including the Litowitz Clients, although Litowitz is permitted to discuss the substance of information contained in "Attorneys Eyes Only" material with the Litowitz Clients, subject to their written agreement not to disclose any such information to any other party or person.

2. Any "Attorneys' Eyes Only" material shall be utilized by Litowitz solely for purposes of determining whether the Litowitz Clients will join the agreed-upon settlement between Petitioners and Respondents, and for no other purposes.

***

5. This Confidentiality Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York without regard to any conflict of law provisions thereof that would cause the application of the laws of any jurisdiction other than the state of New York. **The Parties hereby irrevocably: (a) submit to the jurisdiction of any court of the State of New York or any federal court sitting in the State of York for the purposes of any suit, action or other proceeding arising out of this Confidentiality Agreement which is brought by or against either Party; (b) agree that all claims in respect of any suit, action or proceeding may be heard and determined in any such court**; and (c) to the extent that any Party has acquired, or hereafter may acquire, any immunity from jurisdiction of any such court or from any legal process therein, such Party hereby waives, to the fullest extent permitted by law, such immunity. **The Parties hereby waive, and the Parties agree not to assert in any such suit, action or proceeding, in each case, to the fullest extent permitted by applicable law, any claim that: (i) it is not personally subject to the jurisdiction of any such court**; (ii) it is immune from any legal process (whether through service or notice, attachment prior to judgment, attachment in the aid of execution, execution or otherwise) with respect to it or its property; (iii) any such suit, action or proceeding is brought in an **inconvenient forum**; (iv) the **venue** of any such suit, action or proceeding is improper; or (v) this Confidentiality Agreement may not be enforced in or by any such court.

(Metula Aff. Exhibit B at 1-2).

But that is not the only breach committed by Litowitz. The Verified Amended Complaint further alleges that in its dealings with Defendants separate and apart from the NY

Action, in connection with the withdrawals being sought for three of Defendants' clients[1], Plaintiffs stood by the terms of the agreements with their investors and upon proper documentation and proceedings it processed the return of withdrawals to some of those who engaged Defendants. In doing so, each such investor signed documents that included a release and a confidentiality agreement that was binding upon both them and their "legal representatives" (the "Withdrawal Agreements"). A copy of the Withdrawal Agreements is annexed to the accompanying Metula Affidavit as Exhibit C. More specifically, the Withdrawal Agreements all provide the following terms:

> "This Agreement shall be binding upon . . . the Parties hereto, **and their respective . . . legal representatives**...."
>
> * * *
>
> Governing Law; Jurisdiction provides:
>
> This Agreement shall be interpreted construed, enforced and administered in accordance with the laws of the State of New York. **Each of the Parties consents to the jurisdiction of any court in New York, New York for any action arising out of matters related to this Agreement.** Each of the Parties hereby waives the right to commence an action in connection with this agreement in any court outside of New York County, New York.

(Metula Aff. Exhibit C) (emphasis added). It also set forth terms in the Withdrawal Agreements that emphasized the confidential nature of the Withdrawal Agreements and further prohibited disparaging remarks, both of which Litowitz breached by allowing Zoe Ma to describe the terms in the chat room, while continuing to disparage Plaintiffs:

> Confidentiality; Non-disparagement provides:
>
> The terms and conditions of this agreement are absolutely confidential between the parties and shall not be disclosed to anyone else, except as shall be necessary to effectuate its terms. **Any disclosure in violation of this section shall be**

[1] Verified Amended Complaint ¶ 61 alleges Zoe Ma's comments in the chat room revealing refunds of "3 in total" clients, which at $500,000 each combines to a total of $1.5 million.

> **deemed a material breach of this agreement**. The investor further agrees he/she will not disparage the Releasees or otherwise take any action which could reasonably be expected to adversely affect the personal or professional reputation of the Releasees. Please be advised that the information contained in the documents previously provided to you is confidential and such documents should be destroyed immediately or returned to the Company. Effective as of the date of the Company's countersignature, the Investor shall cease to be a Member of the Company.

(Metula Aff. Exhibit C) (emphasis added).

## ARGUMENT

### POINT I

### THIS COURT HAS JURISDICTION OVER THE PERSON OF LITOWITZ

On a motion to dismiss pursuant to CPLR § 3211 (a), the court is required to accept the facts alleged in the complaint as true and grant the plaintiff every favorable inference, deciding only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001); *See also Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Further, although plaintiff bears the ultimate burden of proof concerning personal jurisdiction, "'to defeat a CPLR 3211(a)(8) motion to dismiss a complaint, the plaintiff need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court.'" *Shatara v. Ephraim*, 137 A.D.3d 1248, 1249 (2d Dep't 2016) (citation omitted). Moreover, "[t]hat burden … does not entail making a prima facie showing of personal jurisdiction; rather, the plaintiff need only demonstrate that facts 'may exist' to exercise personal jurisdiction over defendant." *Brinkmann v. Adrian Carriers, Inc.*, 29 A.D.3d 615, 616 (2d Dep't 2006) quoting *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 407-08 (2d Dep't 2005).

Such facts not only "may exist" here, they most definitely do exist here. More specifically, Litowitz executed the Attorneys' Eyes Only Confidentiality agreement and acted as

the legal representative of at least three investors who executed the Withdrawal Agreements. All of these agreements contained forum selection clauses establishing exclusive jurisdiction in New York and unambiguously consented to personal jurisdiction in this Court. Under New York law, these provisions confer personal jurisdiction over Litowitz.

Moreover, even if Litowitz was not bound by these agreements, the fraud, defamation and breaches of confidentiality alleged to have been carried out by Litowitz in the Verified Amended Complaint harmed Plaintiffs the most in New York, where the 701 and 702 Projects are located in Times Square, and where the impact from investor withdrawals, the slander and the breaches of confidentiality was most critical. Accordingly, while these facts demonstrate conclusively that this Court has personal jurisdiction over the person of Litowitz, at a minimum they demonstrate that facts "may exist" to deny the motion to dismiss.

A. **Litowitz Consented to Personal Jurisdiction in this Court**

New York's General Obligations Law § 5-1402 provides

> 1. Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section thirteen hundred fourteen of the business corporation law and subdivision two of section two hundred-b of the banking law , any person may maintain an action or proceeding against a foreign corporation, **non-resident**, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to **section 5-1401** and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.
> 2. Nothing contained in this section shall be construed to affect the enforcement of any provision respecting choice of forum in any other contract, agreement or undertaking.

(Emphasis added). New York's General Obligations Law § 5-1401 provides:

> 1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a

> transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, **may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state.** This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code .
> 2. Nothing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement or undertaking.

(Emphasis added).

**1. Litowitz's Consent in the Attorneys' Eyes Only Confidentiality Agreement Confers Personal Jurisdiction**

Litowitz consented to personal jurisdiction in New York in the Attorneys' Eyes Only Confidentiality Agreement, as set forth in the Verified Amended Complaint as the subject of the Third Cause of Action (Breach of Contract). *See Verified Amended Complaint* ¶¶82-89 (Metula Aff. Exhibit A). Indeed, as described above, the Attorneys' Eyes Only Confidentiality Agreement was created specifically for the purpose of allowing Litowitz to know the terms of the settlement of the NY Action. The NY Action was commenced to enjoin USIF from redeploying the EB-5 money of the plaintiffs in the NY Action into the 702 Project from the 701 Project, in which "[t]he accredited Chinese Members each invested $500,000 into the Company, which pooled all of the investments . . . in the amount of $200,000,000..." *See* Metula Aff. Exhibit A, the Verified Amended Complaint at ¶ 22. By executing the Attorneys' Eyes Only Confidentiality Agreement, Litowitz consented to exclusive jurisdiction in New York and waived the argument that he is not subject to personal jurisdiction by this Court.

Under these circumstances, New York's General Obligations Law § 5-1402 applies and the agreement to consent to personal jurisdiction is enforceable in New York:

> A forum selection clause affords a sound basis for the exercise of personal jurisdiction over a foreign defendant (*see National Union Fire Ins. Co. of Pittsburg v. Weir,* 131 AD2d 380, 381 [1st Dept. 1987]. Such clauses are prima facie valid and should be enforced unless the party resisting enforcement shows that the clause results from fraud or overreaching, that it is unreasonable or unfair, or that enforcement would violate some strong public policy of the contractual forum (*Sterling Natl. Bank as Assignee of NorVergence, Inc. v. Eastern Shipping Worldwide, Inc.,* 35 AD3d 222, 222 [1st Dept. 2006]; *National Union Fire Ins. Co. of Pittsburg, PA. v. Williams*, 223 AD2d 395, 397 [1st Dept. 1996]). Unreasonableness or unfairness generally means that a trial in the contractual forum would be so difficult and inconvenient that the objecting party would, for all practical purposes, be deprived of his or her day in court (*Sterling Natl. Bank*, 35 AD3d at 222; *Shah v. Shah,* 215 AD2d 287, 288 [1st Dept. 1995]; *British W. Indies Guar. Trust Co. v. Banque Internationale A Luxembourg,* 172 AD2d 234, 234 [1st Dept. 1991]).

*Deephaven Market Neutral Master Fund, LP v Schnell*, No. 0600667/2007 at *8, 2007 WL 4476787 (Sup. Ct. N.Y. Cty., Dec. 12, 2007). As such, the motion to dismiss should be denied.

**2. Litowitz's Consent in the Withdrawal Agreements Confers Personal Jurisdiction**

Litowitz also is bound by the consent to jurisdiction agreed to by Litowitz's clients who executed the Withdrawal Agreements, and for whom Litowitz acted as their "legal representative[]." These Withdrawal Agreements are the subjects of the Fourth Cause of Action (Breach of Contract) in the Verified Amended Complaint, whereby at least three of his client received a total withdrawal refund of $1.5 million ($500 thousand each). *See Verified Amended Complaint* ¶¶ 90-94) (Metula Aff. Exhibit A). Accordingly, as before, the forum selection clauses consenting to personal jurisdiction in this Court is enforceable pursuant to New York GOL § 5-1402.

This is so, despite Litowitz's assertions that he personally was not a party to, and did not sign, those contracts. There is no dispute that Litowitz was the attorney for these clients who executed the Withdrawal Agreements. There also is no dispute that the Withdrawal Agreements all specifically stated that the terms therein "shall be binding upon . . . the Parties hereto, **and**

**their respective . . . legal representatives**...." *See* (Metula Aff. Exhibit C). Such language makes it clear that Litowitz will be bound by it. Indeed, because of the attorney-client relationship that Litowitz enjoyed with these signatories to the Withdrawal Agreements, he is bound by the terms therein, including the consent to jurisdiction provision in the forum selection clause:

> [Defendant] further argues that the forum section clauses do not apply to him because he was not a party to the IMAs. It is true that the impact of a forum selection clause generally depends upon consent. By entering into an agreement with a forum selection clause, a party signifies that he or she submits to the jurisdiction of the chosen forum (*see National Union Fire Co. of Pittsburg, PA v. Worley*, 257 AD2d 228, 231 [1st Dept. 1999]). Nonetheless, a forum selection clause may be enforced against a nonparty to the agreement, if the nonparty is so '"closely related to the dispute such that it becomes foreseeable that it will be bound."' (*International Private Satellite Partners, L.P. v. Lucky Cat Ltd.*, 975 F.Supp 483, 485-486 [W.D.N.Y. 1997][internal quotation marks and citations omitted]; *see also Rohrbaugh v. United States Mgt. Inc.*, 2007 WL 1965417, *4, 2007 US Dist LEXIS 47978, *11 [E.D.N.Y. July 2, 2007]; *Quebecor World (USA), Inc. v. Harsha Assoc.*, 455 F.Supp 2d 236, 245 [W.D.N.Y 2006]; *Weingrad Telepathy, Inc.*, 2005 WL 299065, *5, 2005 US Dist LEXIS 26952, *16 [S.D.N.Y. Nov. 7, 2005]; *Dogmoch Intl. Corp. v. Dresdner Bank AG,* 304 AD2d 396, 396 [1st Dept. 2003]; *L-3 Communications Corp. v. Channel Tech., Inc.,* 291 AD2d 276, 277 [1st Dept. 2002]). "A non-party is 'closely related' to a dispute if its interests are 'completely derivative' of and 'directly related to, if not predicated upon' the signatory party's interests or conduct" (*Weingrad*, 2005 WL 2990645, *5, 2005 US Dist LEXIS 26952, *16 [citations omitted].

*Deephaven Market Neutral Master Fund, LP v Schnell,* No. 0600667/2007 at *9, 2007 WL 4476787 (Sup. Ct. N.Y. Cty., Dec. 12, 2007).

It is hard to imagine any non-party being more "closely related" to a dispute than an attorney hired by his clients to help resolve that dispute. Indeed, as a result of Litowitz being engaged by those clients, his interests were "completely derivative" of and "directly related to, if not predicated upon" his clients' interests in the resolution of that dispute – as well as their conduct to resolve the dispute, namely the execution of the Withdrawal Agreements.

Accordingly, since the consent to jurisdiction is enforceable, the motion to dismiss should be denied.

**B. Litowitz's Misconduct Harmed Plaintiffs in New York**

Litowitz is also subject to personal jurisdiction in this Court because his misconduct harmed Plaintiffs most critically in New York, where the 701 Project and the 702 Project are located in Times Square, where the withdrawal of the EB-5 money from Litowitz's clients was most felt, and where the fall-out from the defamatory statements will cause the most damage.

> A court may assert personal jurisdiction over a non-domiciliary defendant under CPLR 302 (a) (3) where that defendant, under certain circumstances, "commits a tortious act without the state causing injury to person or property within the state." NY CPLR 302. The location of the injury for jurisdictional purposes is not merely the state in which the plaintiff resides but instead the injury is where "the critical events associated with the dispute took place."

*Smith v Morris & Manning*, 647 F. Supp. 101, 103-04 (1986) (quoting *American Eutectic Welding Alloy Sales Co. v Dytron Alloys Corp.*, 439 F.2d 428, 433 (2d Cir. 1971). The facts herein constitute such circumstances. Accordingly, the motion to dismiss should be denied.

## POINT II

## THE MOTIONS TO STRIKE AND FOR SANCTIONS SHOULD BE DENIED

Each and every allegation set forth in the Verified Amended Complaint was asserted with the purpose of establishing the required elements of the various causes of action, which are : (1) fraud (Verified Amended Complaint ¶¶67-74); (2) defamation (Verified Amended Complaint ¶¶75-81); (3) breach of the Attorneys' Eyes Only Confidentiality Agreement (Verified Amended Complaint ¶¶82-89); (4) breach of the Withdrawal Agreements (Verified Amended Complaint ¶¶90-94); (5) Tortious Interference with a Business Relationship (Verified Amended Complaint ¶¶95-100); and Prima Facie Tort (Verified Amended Complaint ¶¶101-106). While Litowitz

may be uncomfortable with these allegations, that does not take away from the legitimate purpose for pleading these facts. (Metula Aff. Exhibit A).

Some legitimate allegations, upon which Litowitz bases his Motion to Strike The Complaint and Impose Sanctions Under NYCRR 130-1.1, on pages 4 through 8, which was originally filed on October 9, 2018, were pled to demonstrate support for the allegations that Defendants committed fraud by pretending to be experts in the field of EB-5 visas so as to convince prospective clients to engage Litowitz to withdraw their EB-5 investments from Plaintiffs' 701 and 702 Projects. Other allegations were pled as support for showing demonstrable malice, which is an important component of several causes of action asserted in the Verified Amended Complaint, including defamation and prima facie tort.

More specifically, the allegations in support of the fraud claim included, as stated by Litowitz: (a) "Paragraph 29" that alleges he "never achieved tenure status and never became a full professor," which was alleged in the Verified Amended Complaint to highlight the misrepresentation Litowitz made on the website page for Reviv-East, wherein he refers to himself as a "law professor" (Verified Amended Complaint, Exhibit F at 3/6); (b) "Paragraph 40" that makes reference to "an agreement between Litowitz and a creditor," which in fact was an Agreed Judgment of Nondischargeability pursuant to 11 U.S.C. Section 523 (a)(2), which demonstrates that a portion of Litowitz's debt was nondischargeable as it was obtained by Litowitz under "false pretenses, a false representation, or actual fraud" (Verified Amended Complaint, Exhibit A); (c) "Paragraph 35" which demonstrates that "Litowitz and Zoe Ma changed the name of a Hong Kong Entity" to Reviv-East and "unveiled a sham organization," which Litowitz denies, but is belied by the documents attached to the Verified Amended Complaint as Exhibit E and Exhibit F showing that the original name of Reviv-East was a

jewelry company; (d) "Paragraph 41" which includes an allegation that "suggests that Litowitz committed fraud on the bankruptcy court in his federal district by not disclosing his alleged interest in a Hong Kong company," which Litowitz denies having any interest in, but which denial is belied by the website for Reviv-East, wherein it sets forth Litowitz and Zoe Ma as the principals of the company, gives their contact information, and includes Litowitz's blog about the EB-5 program as a scam (*See* Metula Aff. Exhibit A, Verified Amended Complaint, Exhibit F at 3/6- 5/6); (e) "Paragraph 42" which states that Zoe Ma "started the campaign to spread lies and defamation;" (f) "Paragraph 43" which "asserts that Litowitz violated the laws of Hong Kong by illegally practicing law there without a license;" and

(g) "Paragraph 44" which "asserts that Litowitz has been acting as an unlicensed investment adviser," which is inaccurate in that the Verified Amended Complaint alleges that Zoe Ma and Reiv-East were acting as unlicensed investment advisers.

The allegations in support of demonstrating malice by Litowitz and Ma include: (a) "The very first sentence of the Complaint" which makes reference to the "seedy side of the legal profession," and referring "to Litowitz as a 'desperate, bankrupt lawyer' who conspired with Zoe Ma to create a business for the purpose of fraud and 'maliciously inserting themselves' into Plaintiff's (sic) business;" (b) "Still in the first paragraph" referencing "numerous 'violations of the codes and canons of legal ethics;'" (c) "Paragraph 4" referencing "Litowitz's employment history, detailing that he got fired from certain jobs and had to file bankruptcy;" (d) attaching "Litowitz's bankruptcy petition," which not only was offered in support of demonstrating the desperation of Litowitz giving rise to his malicious conduct, but also to provide support from references therein concerning Litowitz's being fired from his last two jobs and concerning the fact that he did not list Reviv-East or any other business interest for 2017, yet represents in the

Reviv-East website that they were in business in 2017 having recovered $500,000 "In December 2017" for "Investor Z" (*See* Metula Aff. Exhibit A, Verified Amended Complaint, Exhibit F at 1/6); (e) "Paragraph 29 and 30 reveal that Litowitz was fired from some jobs;" (f) "Paragraph 32" discussing "how Zoe Ma lost her life savings;" (g) attaching the "entire Wisconsin Eastern District federal court decision," which in addition to demonstrating the financial hardship giving rise to malice, but also provides support for quotes in the Verified Amended Complaint describing how Zoe Ma was being sanctioned for violations at her adult care facility, which had taken the form of the Wisconsin Department of Health Services directly "debiting [her] bank account" to the point where she claims it "has cost her all of her life savings"( *See* Metula Aff. Exhibit A, Verified Amended Complaint, Exhibit C); (h) "Paragraph 33" referencing "nefarious means;" (i) "Paragraph 39" which references "that Litowitz had a non-dischargeable debt to the First Bank of Omaha;" and (j) "Paragraph 45" which "asserts that Litowitz 'screams' when he negotiates with Plaintiffs."

**A. <u>The Motion to Strike Should be Denied</u>**

CPLR 3024(b) states:

> (b) Scandalous or prejudicial matter. A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.

If the material included in the pleading is relevant to a cause of action, it will not be struck from the pleading even though it is scandalous or prejudicial. *New York City Health and Hospitals Corp. v. St. Barnabas Community Health Plan*, 22 A.D.3d 391 (1st Dep't 2005); *Bristol Harbour Assoc. v Home Ins. Co.*, 244 A.D.2d 885 (4th Dep't 1997). As set forth above, each and every allegation set forth in the Verified Amended Complaint was asserted with the purpose of establishing the required elements of the various causes of action. As such, the

allegations are relevant to the causes of action. Accordingly, the motion to strike should be denied.

**B. The Motion for Sanctions Should be Denied**

22 NYCRR 130-1.1 provides the law in New York concerning sanctions, and in pertinent part provides:

> **Section 130-1.1 Costs; sanctions.**
>
> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under Article 3, 7 or 8 of the Family Court Act.
>
> * * *
>
> (c) For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the (1) circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.
>
> (d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

As set forth above, each and every allegation set forth in the Verified Amended Complaint was asserted with the purpose of establishing the required elements of the various causes of action. Courts in New York will not impose sanctions under such circumstances:

> Section 130–1.1(c) defines conduct as frivolous if, inter alia, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (§ 130–1.1[c][1] )."
>
> * * *
>
> Although ultimately rejected by the motion court, the arguments advanced by GGI as to Kugler were of colorable merit, and were not made in bad faith (see Yenom Corp. v. 155 Wooster St. Inc., 33 AD3d 67, 70 [1st Dept 2006] "(courts) must be careful to avoid the imposition of sanctions in cases where the (party) asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure"] ).

*Gordon Grp. Investments, LLC v. Kugler*, 127 A.D.3d 592, 8 N.Y.S.3d 115 (1st Dep't 2015). As such, the motion to impose sanctions should be denied.

## CONCLUSION

For all of the foregoing reasons, the motions to dismiss, to strike pleading and to impose sanctions should be denied.

Dated: November 2, 2018

OTTERBOURG P.C.

By: _____

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