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EB-5 Mezzanine Financing: A Real World Example

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## “EB-5 Mezzanine Financing: A Real World Example”<sup>1</sup>

### Introduction

EB-5 mezzanine loan term sheets rarely become public. However, when The Carlton Group, LTD (“Carlton”) filed a lawsuit on March 15, 2016, to collect a fee for arranging an \$175 Million EB-5 mezzanine loan made by an affiliate of the U.S. Immigration Fund, LLC (“USIF”), the Term Sheet was filed as Exhibit C to the complaint.<sup>2</sup> The status of Carlton as one of the most prominent NYC brokers and USIF as owner-operator of one of the largest and most successful group of regional centers in the United States makes the Term Sheet especially noteworthy.<sup>3</sup> This article examines the terms and conditions of that Term Sheet.<sup>4</sup>

Our “Roadmap to the Use of EB-5 Capital” paper includes a sample Mezzanine Loan structure and sample loan terms.<sup>5</sup> The Roadmap points out that the world of EB-5 capital is very secretive. USCIS is not transparent. FOIA requests for loan documents and other offering materials result in heavily redacted documents. Similarly, developers and regional centers refuse to share their “secret sauce.”

Thus, the sample terms contained in the Roadmap were based on our exhaustive review of websites, including those of overseas migration agents who solicit potential immigrant investors. We did not view any real world examples of mezzanine loan documents or term sheets because documents were not readily available on the internet or in form books.

However, the Term Sheet to fund the construction of the 275 unit luxury condominium project known as 125 Greenwich Street (the “Property” or the “Project”) in the Financial District of Manhattan sheds light on the terms and conditions of EB-5 mezzanine loans for large-scale projects. The defendants listed in the complaint include developers Michael Shvo and Davide Bizzi, and their respective entities controlled by each of them. The developer and owner of the Property is VS 125 LLC (“Developer”).

We emphasize that the Term Sheet in the form attached to the complaint is not executed. Further, even if it were executed, by its terms, the Term Sheet states that it is for discussion purposes only and does not constitute a loan commitment.<sup>6</sup> However, as discussed below, many of the provisions were designed to take effect upon the execution of the Term Sheet.<sup>7</sup>

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<sup>1</sup> Professor Jeanne Calderon and Scholar-in-Residence Gary Friedland, NYU Stern School of Business

<sup>2</sup> *The Carlton Group, LTD v. VS 125 LLC et al*, Index No. 651377/2016, filed on March 15, 2016 in the Supreme Court of the State of New York, New York County. The summons and complaint (the “Complaint”) is available from the New York State Supreme Court website – Supreme Court Records On-Line Library (“SCROLL”).

<sup>3</sup> The authors learned about the lawsuit by reading an article in The Real Deal, written by E.B. Solomont, <http://therealdeal.com/2016/03/16/carlton-group-sues-bizzi-shvo-over-commission-at-125-greenwich/>.

<sup>4</sup> The Term Sheet was filed as Exhibit C. The Term Sheet is available from the New York State Supreme Court website – Supreme Court Records On-Line Library (“SCROLL”).

<sup>5</sup> “A Roadmap to the Use of EB-5 Capital: An Alternative Financing Tool for Commercial Real Estate Projects,” by Jeanne Calderon and Gary Friedland, NYU Stern Center for Real Estate Finance Research (May 22, 2015), <http://www.stern.nyu.edu/sites/default/files/assets/documents/EB5%20paper%20final%2005.24.2015.pdf> (the “Roadmap”). Appendix A to the Roadmap contains the structure and sample loan terms. As explained in the Roadmap, in the current market the immigrant’s investment capital is most commonly deployed to a real estate development project by a mezzanine loan from the EB-5 lender (New Commercial Enterprise or “NCE”) to the mezzanine borrower that owns 100% of the equity of the entity which owns the project.

<sup>6</sup> As noted below, by its terms, certain provisions of the Term Sheet were intended to be binding on the parties.

<sup>7</sup> The loan agreement, guarantees, pledge and security agreement and other legal documentation were to be incorporated in Definitive Agreements, per Paragraph A of the Term Sheet.

The lively email exchanges among the parties surrounding the introduction of USIF to the Developer, as well as the preliminary negotiations, indicates that the Developer had provided the draft Term Sheet to its counsel for review and comment.<sup>8</sup> One would expect that the law firm proposed some revisions to the terms and conditions of the Term Sheet. However, it is not possible for us to determine the terms and conditions of the executed Term Sheet.<sup>9</sup> Nevertheless, the Term Sheet provides a rare glimpse of the types of provisions contained in EB-5 mezzanine financing documents for a large-scale real estate project.

We recognize that the EB-5 capital arena has rapidly evolved over the past few years. The discussion and negotiation of the Term Sheet occurred during the summer of 2014.<sup>10</sup> Thus, many of the provisions of the Term Sheet may be outdated or may not reflect provisions currently offered for EB-5 mezzanine financing by USIF or other regional centers. Obviously, many factors affect the terms available for a specific transaction, including the participants (the regional center and the developer), the property type and location, as well as the size of the transaction.

It is our understanding that typically a third-party broker is not involved in arranging an EB-5 loan between an EB-5 lender (typically an affiliate of the regional center) and a real estate developer. Now that EB-5 financing has become a well-publicized, mainstream source of capital, major developers directly contact regional centers in their local market to pursue these loans.

However, in the Carlton case, a third-party broker was involved in this EB-5 mezzanine financing. According to the complaint, Carlton was engaged by Shvo, apparently an entity, pursuant to an Exclusive Debt and Equity Advisory Agreement dated June 10, 2014 (the “Advisory Agreement”). A copy of the Advisory Agreement was filed as Exhibit A to the complaint. Unlike the Term Sheet, the Advisory Agreement was executed by the parties.<sup>11</sup> The email exchanges included in Exhibit C suggest that Shvo was not very familiar with EB-5 financing at the time of this transaction.

## Term Sheet

This section examines the provisions of the Term Sheet. We also comment on some of these provisions. The paragraph number references immediately follow each heading. The provisions are not presented in the same sequence as the Term Sheet.

### **Parties (Par. A):**

The mezzanine lender is identified as 125 Greenwich Street 1100 Funding, LLC (for ease of reference, we will refer to this entity as “Mezz Lender,” even though the Term Sheet refers to it as “Lender”). USIF, the owner-operator of the U.S. Immigration Fund – NY LLC Regional

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<sup>8</sup> The email states that the Developer delivered the Term Sheet to “GT”, presumably a reference to the well-known law firm, Greenberg Traurig LLP, that represents many developers and regional centers in the EB-5 industry. Greenberg Traurig represented Developer in connection with the purchase of the Property. See the Real Property Transfer Report, RP-5217NYC filed with the Deed on August 28, 2014, based on a search of ACRIS, as of March 16, 2016.

<sup>9</sup> Furthermore, it is possible that rather than sign a Term Sheet Developer and Mezz Lender may have proceeded directly to the negotiation and execution of loan documents.

<sup>10</sup> VS 125, LLC acquired the Property on August 28, 2014. The email exchanges included in Exhibit C to the complaint occurred between July 29 and August 5, 2014.

<sup>11</sup> The Advisory Agreement was signed by the “Director of Development” on behalf of “Shvo.” The Complaint refers to several entities that include the name “Shvo.”

Center, is included as a party. Presumably, USIF formed the Mezz Lender for the purpose of making this particular Mezzanine Loan to Developer. The Mezz Lender would be formed as a Special Purpose Entity. The principal of USIF was listed as the managing member of USIF and the Mezz Lender.<sup>12</sup>

The name of the Developer was left blank and included Developer's affiliates. The Term Sheet indicates that the Developer would be the borrower and sole member of the owner of the Property.<sup>13</sup>

Carlton, the Broker, was not referenced in the Term Sheet. According to the Complaint, the Developer or its affiliates was responsible for payment of any brokerage fees relating to the EB-5 financing, pursuant to the Advisory Agreement. The Broker did not name USIF or Mezz Lender as a defendant in the complaint.

**The Property (Par. A):**

The property is the condominium project with ancillary retail space located at 125 Greenwich Street, in New York City.<sup>14</sup>

**Principal Amount (Par. 1):**

The Term Sheet states that the Principal Amount will be \$160 Million. However, the Complaint lists the Principal Amount as \$174 Million and news reports list the amount as \$175 Million. One article quotes the CEO of USIF confirming that the amount of the Mezzanine Loan is \$175 Million.<sup>15</sup> For the purposes of this article, we will assume the amount is \$174 Million, consistent with the complaint.

The Term Sheet states that the size of the Mezzanine Loan will be based on the Economic Report to be prepared by an economist retained by USIF. It does not address the size of the "job cushion" that will be required for these purposes. Since the amount of the loan was apparently greater than the amount stated in the Term Sheet, we assume that the Economist Report and other conditions justified a greater loan amount.

**Term (Par. 2):**

Sixty (60) months is the Maturity Date. Developer is granted two options for a period of one year each, upon payment of an option fee equal to .75% multiplied by the amount of the then outstanding Principal Amount.

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<sup>12</sup> USIF's regional centers operates as third-party regional centers. They sponsor EB-5 projects and form an affiliated entity to serve as the New Commercial Enterprise which deploys the EB-5 proceeds to the project by making a mezzanine loan to the mezzanine borrower entity that owns 100% of the equity in the entity that owns the property. See the Roadmap discussion of EB-5 projects sponsored by USIF's regional centers and the list of their projects included in Appendix B to the Roadmap.

<sup>13</sup> According to the Complaint, the property owner is VS 125, LLC. This is consistent with a property search on ACRIS, as of March 16, 2016.

<sup>14</sup> The Property is located in the Financial District of Manhattan. It is also known as 18-22 Thames Street or 123-131 Greenwich Street. The property will be a luxury condominium over 1,000 feet tall. Rafael Vinoly, the renowned architect, designed the building. <http://therealdeal.com/2016/01/15/shvo-and-bizzis-125-greenwich-to-house-275-condos/>

<sup>15</sup> <http://therealdeal.com/2015/07/10/shvo-witkoff-look-to-get-800m-in-eb-5-funding/>

**Loan Funding Schedule (Exhibit C):**

Funding will be effected through a series of construction draws. Alternatively, the Mezzanine Loan may be deposited with the Developer's senior lender for distribution. The Term Sheet contemplates that milestone dates will be set for the raise of the EB-5 capital and the funding of the loan, after the negotiations proceed further. The documents contemplate that the initial funding will be \$40 Million.

**Escrow and Early Release (Exhibit C):**

Only 5% of the Principal Amount will remain in escrow pending approval by USCIS of the immigrant investors' I-526 petitions. This type of arrangement is known as an "early release escrow with a holdback". It is unclear as to the minimum amount of the capital raise before any funds will be released from escrow.

In any case, this type of early release seems much more generous to the Developer than the more typical early release with holdback that is generally available. The more common arrangement requires a holdback in the range of 20% of the Principal Amount.

This type of arrangement is extremely valuable to the Developer. It may enable the Developer to avoid, or at least reduce, the need for bridge financing until the balance of the escrow is released. Bridge financing sources are limited. Where EB-5 bridge financing is available, it is generally provided at higher rates and fees than EB-5 mezzanine loans. Furthermore, bridge financing imposes an additional layer of closing costs and fees.<sup>16</sup>

The earlier availability of the proceeds to the project may motivate the senior lender to fund the senior loan. This would enable the developer to proceed with, and presumably complete, construction earlier. Thus, Developer may be willing to pay a higher interest rate and/or other fees (such as the Loan-Related Fees referred to below) in consideration of this generous early release escrow.

**Interest (Par. 4):**

Interest only payments are due throughout the term of the Mezzanine Loan.

Interest rate: 7% per annum. Based on a Principal Amount of \$174 Million, the total interest payable per year would be \$12,180,000.

Interest payments: at closing, interest is to be paid into an interest-bearing account controlled by the Mezz Lender in an amount equal to 12 months of interest based on the Principal Amount advanced at closing.<sup>17</sup> Similar advance interest payments are required for future periods until the first certificate of occupancy is issued.

The Term Sheet does not address how the interest is to be allocated among (1) the immigrant investors who contributed the capital to the Mezz Lender entity, (2) the migration agents and (3) the Mezz Lender and/or USIF. Presumably, less than 1% will be allocated to the immigrant investors, in accordance with typical mezzanine loan structures. Thus, at least 6% would be available to be split between the migration agents, on the one hand, and the Mezz Lender and USIF, on the other.<sup>18</sup>

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<sup>16</sup> See the discussion of bridge financing in the Roadmap.

<sup>17</sup> This arrangement seems to have the effect of compounded interest.

<sup>18</sup> As mentioned in this article, the number of regional centers approved by USCIS has dramatically increased in recent years. Thus, more potential EB-5 lenders are available to supply mezzanine loans and other form of EB-5 capital to projects. Furthermore, the number of projects seeking exemplar approval surged since the introduction

As demand has increased, the fees charged by Chinese migration agents have risen in recent years – reportedly upwards of 3% to 4% per year.<sup>19</sup> In addition to the annual fee, the migration agent is often allocated a substantial portion of the administrative fee (typically in the \$50,000 range) paid by each immigrant investor to the Regional Center, together with his or her \$500,000 capital investment. Undoubtedly, the total costs and fees charged to the developer in an EB-5 loan transaction must be much lower than construction mezzanine loan terms available from conventional sources. Otherwise, the developer would not be willing to pay the additional fees – higher loan related fees and unique EB-5 transaction related fees (described below) - coupled with the requirements of the securities laws and the risk that the capital will not be raised in a timely fashion or raised at all.

Assuming the migration agent fee were only 2% per year (rather than 3% or 4%), the fee payable to the agent per investor would be \$10,000. If that agent represented all of the 358 investors in this \$174 Million raise, the migration brokerage fee would exceed \$3.5 Million per year. If the remaining 4% were allocated to USIF and/or the Mezz Lender, their fee would approach \$7 Million per year.<sup>20</sup>

In contrast, Carlton, the broker that claims to have arranged the Mezzanine Loan charges a fee of 2% of the Principal Amount of the Mezz Loan, or approximately \$3.4 Million, a one-time fee payable at the loan closing.

Estimates vary as to the rate charged for EB-5 mezzanine loans in the current market. The number of regional centers has risen dramatically in recent years from 11 in 2007 to 806 as of March 8, 2016.<sup>21</sup> Even though some of these are formed by developers as their own in-house regional center, many third party regional centers have been formed, presumably willing and available to sponsor projects and make loans at competitive rates.

The third-party regional center generally serves as an intermediary with a limited capital investment<sup>22</sup> since it utilizes the immigrant investors' capital to fund the loan to the project developer. Thus, one would expect increasing competition to exist among lenders. However, reportedly many regional centers have not sponsored a single project, and have no demonstrated track record of raising capital, especially at levels approaching the \$174 Million level required for the 125 Greenwich project.

### **Prepayment (Par. 5):**

Developer has the right to prepay in whole, or in part, after the expiration of 48 months, subject to payment of the Make Whole Fee and Exit Fee (discussed below).

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of S. 1501, which would have increased the minimum investment requirements and tightened the TEA definitions. Projects continue to rush to file for exemplar approval, due to the threatened changes in the law that might be enacted by September 30, 2016. Thus, it would not be surprising if some developers and/or regional centers seek to incentivize migration agents to recommend their projects to investors by offering the agents higher fees.

<sup>19</sup> These high fees have incentivized some developers and regional centers to seek migration agents to find investors in other countries, such as Viet Nam, where the agents charge a lesser fee.

<sup>20</sup> Obviously, USIF and its Mezz Lender must pay overhead and other expenses.

<sup>21</sup> <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>

<sup>22</sup> Obviously, the regional center makes a capital investment to fund its operations and to administer the investment and oversee the immigration process.

The email correspondence between the Broker and Developer indicates that the loan might be prepayable sooner, based on release prices as condominium units are sold.<sup>23</sup> Condominium developers typically seek the ability to prepay, in part, a mezzanine loan as they sell units so that the Principal balance does not continue to accrue interest when the Developer has funds available to repay Principal. Presumably, the offering documents and operating agreement to which the immigrant investors are parties provides for the reinvestment of the prepaid loan proceeds, rather than the distribution of such proceeds to the investors, in order to comply with USCIS' interpretation of the "sustained investment" and "at-risk" requirement.<sup>24</sup>

### **Loan-Relate Fees (Par. 3):**

**Origination Fee:** At the loan closing, Developer shall pay a fee equal to three percent (3%) of the Principal Amount advanced at the closing. Presumably, the loan will be advanced in stages as construction progresses. Surprisingly, the provision does not address whether the Origination Fee will apply to advances made subsequent to the loan closing. This origination fee seems to be higher than the one percent (1%) or two percent (2%) fee charged in the case of the typical mezzanine loan.

**Make Whole Fee:** The loan provides for a yield maintenance type payment in the case of any prepayment before 60 months.<sup>25</sup>

**Exit Fee:** An additional payment of 2.5% of the Principal Amount (or \$4,350,000) shall be paid at the earlier to occur of (i) the Maturity Date, (ii) prepayment of the Mezzanine Loan or (iii) acceleration of the Mezzanine Loan pursuant to the terms of the Definitive Agreement.<sup>26</sup> This exit fee seems more typical of the type of fee imposed in the case of mezzanine loans before the financial crisis.

This provision does not address whether the migration agent will be allocated any portion of these fees. A developer might seek to allocate some as an added incentive for migration agents to recommend the project to investors, particularly in today's competitive EB-5 market.

### **Use of Proceeds (par. 6):**

The proceeds shall be used exclusively for the construction of the project **on** the Property (hard and qualified EB-5 soft costs) in accordance with the Business Plan and Economic Report. This allows the use of the proceeds to reduce or pay any new Project debt incurred after the date of the Term Sheet.<sup>27</sup>

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<sup>23</sup> See email dated July 30, 2014 at 7:15 p.m. re "EB-5 Financing Summary" included in Exhibit C.

<sup>24</sup> The proceeds generally cannot be distributed to the investors until after their respective I-829 petitions are approved by USCIS. In August 2014 USCIS issued a draft Policy Memorandum on the sustained investment requirement.

[https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft\\_Policy\\_Memo\\_Guidance\\_on\\_the\\_Job\\_Creation\\_Requirement\\_and\\_Sustainme.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/PED-Draft_Policy_Memo_Guidance_on_the_Job_Creation_Requirement_and_Sustainme.pdf). No action has been taken on this Policy Memorandum.

<sup>25</sup> The Term Sheet appears to contain a typographical error. It states that the Mezz Lender is entitled to the amount of interest that would have accrued and been paid through the end of 60 months. Presumably, that amount is to be reduced by the amount of interest actually paid.

<sup>26</sup> Presumably, the Principal Amount would be accelerated in the case of any default.

<sup>27</sup> These proceeds would count towards the EB-5 job creation requirement, based on USCIS' interpretation of bridge financing, as set forth in the May 30, 2013 Policy Memorandum.

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>



**Security (par. 7):**

Security for the Mezzanine Loan will include, but not be limited to: (1) a first priority pledge of the Developer's ownership of 100% of the equity interests in the owner of the Property; and (2) a collateral assignment of any Owner's title insurance proceeds. These are typical mezzanine loan terms.

The Mezz Lender will permit the Property owner to obtain senior mortgage financing of 60% to 65% of the total Project Cost. However, the total of the senior loan and the Mezzanine Loan shall not exceed 80% of the total Project Costs.<sup>28</sup>

**Inter-creditor Agreement (par. 7):**

At closing, the senior mortgage lender and the Mezz Lender must enter into an inter-creditor agreement in form and substance agreeable to both lenders. The inter-creditor agreement must allow any transferee of the Mezz Lender to proceed with a foreclosure of the Mezzanine Loan, so long as it is a qualified "replacement developer" acceptable to the senior lender in its reasonable discretion.

This provision seems to limit the senior lender's discretion to a greater degree than many senior lenders are willing to allow, especially in the case of EB-5 mezzanine loans. Many lenders are reluctant to approve in advance a replacement developer unless the senior lender is familiar with that developer or has underwritten the particular developer and its capabilities. Perhaps, USIF reviews the senior lender's requirements before it consents to the senior loan.<sup>29</sup>

**Equity Requirement (par. 8):**

The Developer must provide written documentation that it has equity in the Property of at least \$80 Million. and that it has invested at least \$60 Million. Presumably, this equity requirement was set at this level because this represents 50% of the total Principal Amount to be funded. Presumably, these amounts were adjusted when the Principal Amount was raised to \$174 Million.

Upon proof that the required equity exists and the equity is invested, Mezz Lender will fund up to \$75 Million of the \$160 Million Principal Amount. Any excess will not be funded until Developer funds the balance of the equity. The equity can be a combination of cash, land equity and/or preferred equity, including a co-mezzanine loan.

**Guarantees (Par. 11):**

The Mezzanine Loan shall be nonrecourse, except for the required limited guarantees.

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<sup>28</sup> This provision does not seem entirely consistent with the Equity Requirement set forth in Paragraph 8 of the Term Sheet.

<sup>29</sup> Furthermore, some developers are more concerned with placing the senior loan and satisfying that lender's requirements than dictating to the lender the type of inter-creditor agreement that will be acceptable to it and the Mezz Lender. For a simple discussion of inter-creditor agreements in the context of EB-5 mezzanine loans, see <https://commercialobserver.com/2015/12/eb-5-and-the-american-dream/>



An affiliate of Developer, reasonably acceptable to the Mezz Lender, shall execute a non-recourse carve-out guaranty (“bad boy guaranty”), in form reasonably satisfactory to the Mezz Lender.<sup>30</sup> The guaranty must include a minimum net worth and liquidity requirement.

**Loan Documentation; Initial Funding (Par. 12); Projected Closing (Par. 9):**

The Term Sheet provides for the capital to be raised in accordance with a timeline. If the EB-5 capital is raised, Developer is obligated to fund the interest payments based on an implied loan schedule, even if Developer elects to delay the funding of the principal amount.<sup>31</sup> The Mezzanine Loan closing is not dependent on the filing or approval by USCIS of any I-526 petitions.

**Break-Up Fees (Par. 13):**

If USIF raises at least \$100 Million of the \$160 Million (or \$174 Million) capital raise, and Mezz Lender is willing and able to close and fund the Mezzanine Loan, and Developer is unable or elects not to accept the funding by an agreed upon date, Developer shall be obligated to pay a break-up fee of \$5 Million. In that case, the Mezz Lender will have no further obligations to Developer. This represents a fee of almost 3% of the Principal Amount. This fee is in addition to the other fees, such as the EB-5 related fees of \$300,000 discussed below.

**USIF Responsibilities (Par. C):**

The responsibilities of USIF and its regional center will include: (i) preparing and filing offering documents; (ii) preparing and filing form I-526 Exemplar with USCIS; (iii) preparing the Mezz Lender’s offering documents to comply with the registration exemption requirements under the Securities Act of 1933<sup>32</sup>; and (iii) administering all filings with USCIS with respect to the Project.

**Conditions and Miscellaneous (Par. D):**

**No commitment (Par. D-1):**

The Term Sheet is not a loan commitment. The Mezzanine Loan is subject to satisfactory completion of various conditions by USIF and the Mezz Lender.

**EB-5 Program Fees and Costs (Par. D-2 and Exhibit A-1 and A-2):**

Upon execution of the Term Sheet, Developer shall pay USIF \$300,000 to cover all out-of-pocket costs and expenses incurred in connection with the preparation of all documents necessary to qualify and obtain approval of the Project by USCIS, as well as travel expenses to China and other Asian-Pacific countries. These fees are referred to as “Service Fees.”

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<sup>30</sup> Given the wide range of bad-boy guarantees found in the marketplace, one would expect the Developer’s attorney to require that the form of the bad boy guaranty be agreed to before the Term Sheet was executed.

<sup>31</sup> The Term Sheet sometimes refers to the Developer as Borrower.

<sup>32</sup> Presumably, this would be prepared to comply with the exemption under both Regulation S and Regulation D for the Mezz Lender. This is in addition to any exemption from registration relied upon by the Property owner entity for its issuance of securities.

These Service Fees are unique to an EB-5 mezzanine loan and would not be incurred by a mezzanine borrower in a conventional mezzanine loan. The Service Fees represent less than 1/5 of 1% of the total Principal Amount.

In addition, Developer shall pay for all of Lender's actual reasonable out-of-pocket legal fees and costs of preparing and negotiating the Definitive Agreements. Developer shall pay to Mezz Lender's counsel an initial retainer of \$40,000 before it starts preparation of the documents.

**Application Fee (Exhibit A-3):**

Upon execution of the Term Sheet, Developer shall pay to USIF an "application fee" in the amount of \$75,000. Apparently, this fee is unrelated to any application fee payable to USCIS. The Term Sheet provides that "[T]his application fee will be non-refundable, regardless of whether this Term Sheet is terminated for any reason or the Mezzanine Loan otherwise fails to close for any reason except as set forth in D2 of the Term Sheet."

D2 of the Term sheets provides for the refund of the Application Fee and any "unused" Service Fees, only if the Mezzanine Loan does not close due to a default by Mezz Lender or USIF, or USIF does not raise at least \$100 Million of EB-5 capital.

Thus, \$375,000 is payable by Developer upon execution of the Term Sheet.

**Exclusivity and Non-Circumvention (D3):**

The Mezz Lender does not guaranty its ability to raise the EB-5 capital from immigrant investors. If it does not raise the capital in accordance with specified milestones, Developer has the right to terminate the Term Sheet.

**Termination of the Term Sheet - TEA Changes (D4):**

The Term Sheet emphasizes the importance to the Developer and Mezz Lender of the Project qualifying as a Targeted Employment Area (TEA), as well as potential changes to the EB-5 law. The Term Sheet terminates if either: (i) the Project does not qualify as a TEA which would permit the \$500,000 minimum investment from foreign investors, or (ii) the EB-5 law changes with the result that the Project does not qualify for a \$500,000 minimum investment by the immigrants. Presumably, 125 Greenwich Street qualified as a TEA location as of the date of the Term Sheet's preparation.

It is noteworthy that this Term Sheet was prepared in the summer of 2014, nearly a year before S.1501 (the Grassley-Leahy Bill) was introduced into Congress. The bill would have increased the minimum amount from \$500,000 to \$800,000 for a TEA project, and to \$1.2 Million for a project not located in a TEA. It also would have changed the TEA definition<sup>33</sup>

If the Grassley-Leahy Bill passed in the form introduced, the Project would not qualify for a \$500,000 minimum investment. It would not be surprising if the loan documents evidencing the ultimate Mezzanine Loan made by the Mezz Lender to Developer contained a similar termination provision tied to the minimum investment requirement applicable to the Project.

**EB-5 Document List (Exhibit B):**

Exhibit B contains a non-exhaustive list of documents to be delivered to the Mezz Lender as a condition to the Mezzanine Loan closing. This list includes a senior loan term sheet or

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<sup>33</sup> See the discussion in <http://www.stern.nyu.edu/sites/default/files/assets/documents/What%20TEA%20Projects%20Might%20Look%20Like%20under%20EB5%202.0%20Alternatives%20with%20Maps%20and%20Data%202%206%2016.pdf>

expression of interest from a senior lender for an amount up to the senior loan amount. The list also includes an estimated construction timeline from a construction company depicting a minimum of a 28 month construction period for the Project. This requirement might have been included to ensure that the project would be eligible for a higher job count.<sup>34</sup>

**Confidentiality (D5):**

The Term Sheet provided that Developer's disclosure of its terms would be limited. Obviously, this would apply only if it were executed.

**Boilerplate (D7-9):**

The Term Sheet included typical boilerplate relating to governing law, jurisdiction, counterparts, and joint and several obligations. It did not contain an attorneys' fee provision or arbitration provision.

**Signatories:**

The signatories are: 125 Greenwich Street 1100 Funding GP, LLC, a to be formed LLC to serve as the Mezz Lender and NCE; USIF; and Developer.

The managing member of the Mezz Lender and USIF is the same individual because the companies are affiliates. The Developer's name is omitted.<sup>35</sup>

## Final Thoughts

The Term Sheet does not include any of the covenants that might be required by the loan documents. EB-5 loan documents are known to contain lesser covenants and other protections compared to those required by conventional lenders.

The substantial fees imposed in this case illustrate why those developers who have the expertise and financial wherewithal to form their own in-house regional center do so to save some of these fees. Furthermore, in-house regional centers often have the ability to negotiate more attractive loan terms because typically the immigrant investors lack the leverage or sophisticated counsel that a third-party regional center might possess.

It will be interesting to review the defendants' responses to the complaint and whether any additional documents will be filed. In any case, this Term Sheet sheds some light on a nontransparent subject.

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<sup>34</sup> See

[https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/eb5\\_17jun09.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/eb5_17jun09.pdf)

<sup>35</sup> As indicated earlier, VS 125, LLC is the entity which took title to the Property. Its sole member would be the Developer. However, we have no evidence that the Term Sheet was signed. If it were signed, it may have been signed before VS 125, LLC took title to the Property as the last email communication included in the Exhibit C was dated August 5, 2014 and the deed by which VS 125, LLC took title was dated August 28, 2014.