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

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In the Matter of the Application of

YANG ANG, RENYI CAO, FENGHUA CHEN, WEILUN CHEN, JIANG CHEN, JINGKE CHEN, WEIQI CHEN, XIULING CHEN, GUOJIAN CHEN, JIAN CHENG, JIHONG CUI, WENTING CUI, ZHENHUI CUI, CHENGLING DENG, YIHONG DING, JING FU, JUANJUAN FU, HONGMEI FU, BO GAO, DAN GAO, ZIMING GU, YAN GU, JIANGHONG HE, MINGYUAN HUA, ZEHONG HUANG, BEI HUANG, XIAOYAN HUANG, JIANPING JIANG, YAN JIN, XIAONAN JING, JUNYAN KANG, LIHUA KUI, QIN LI, YUNSHAN LI, QIANG LI, XIAOHONG LI, ZHEN LI, HAOJUN LING, XIAOYANG LIU, FEN LIU, YIHUA LIU, JIN LIU, YUFEI LUO, KAI LUO, HONGXIA MA, ZHENBIN MO, ZHENNING MU, QINGLI PANG, JING PENG, NING QU, YAN REN, ANQI SHI, YUJIA SHI, LI SHI, LING SU, HAITAO SUN, ZHAOHONG SUN, YANFU SUN, JIAN SUN, LI SUN, LI SUN, WEI SUN, XIANGQIONG TANG, RUJUN TAO, JING TIAN, AIRONG TIAN, QIJIA TONG, XIAONAN WANG, FUBAO WANG, YE WANG, XIAOTING WANG, AIHUA WANG, ZHEN WANG, BIQING WANG, QUN WANG, YIYU WANG, YINGXUAN WANG, XUEMEI WEI, SHUZHEN WU, JIAPING WU, ZHAOHUI WU, DONG WU, ZHENG XI, ZUOHAN XIAOHOU, YAN XIAO, XIAO XIAO, HONG XIE,YUNING XIE, GUOFEN XU, DONGYAN XU, PEI XU, ZIXI XU, JIEWEI XU, LING XUE, YAN YANG, QINGFA YANG, LEI YANG, ZHIWEI YAO, YIQING YE, JIANJUN YIN, JIA YU, YI YUAN, LIU YUAN, HU ZENG, HAIYING ZENG, XIAOLIN ZENG, MEILING ZHAN, WEI ZHANG, YANPING ZHANG, WEIFAN ZHANG, YAN ZHANG, JIE ZHANG, JIANBO ZHANG, JIEYUN ZHANG, XIAOHUI ZHANG, YAN ZHANG, YAN ZHANG, YUCHI ZHANG,

Index No. _____

**VERIFIED PETITION FOR INJUNCTION IN AID OF ARBITRATION PURSUANT TO CPLR 7502(C) AND 6301**

MUMU ZHAO, ZICHU ZHENG, QUN ZHOU, JINGXING ZHOU, MEI ZHOU, and YAMIN ZHU,

Petitioners,

-against-

U.S. IMMIGRATION FUND-NY LLC, 701 TSQ 1000 FUNDING GP, LLC, 701 TSQ 1000 FUNDING, LLC, and NICHOLAS MASTROIANNI,

Respondents.

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Petitioners YANG ANG, RENYI CAO, FENGHUA CHEN, WEILUN CHEN, JIANG CHEN, JINGKE CHEN, WEIQI CHEN, XIULING CHEN, GUOJIAN CHEN, JIAN CHENG, JIHONG CUI, WENTING CUI, ZHENHUI CUI, CHENGLING DENG, YIHONG DING, JING FU, JUANJUAN FU, HONGMEI FU, BO GAO, DAN GAO, ZIMING GU, YAN GU, JIANGHONG HE, MINGYUAN HUA, ZEHONG HUANG, BEI HUANG, XIAOYAN HUANG, JIANPING JIANG, YAN JIN, XIAONAN JING, JUNYAN KANG, LIHUA KUI, QIN LI, YUNSHAN LI, QIANG LI, XIAOHONG LI, ZHEN LI, HAOJUN LING, XIAOYANG LIU, FEN LIU, YIHUA LIU, JIN LIU, YUFEI LUO, KAI LUO, HONGXIA MA, ZHENBIN MO, ZHENNING MU, QINGLI PANG, JING PENG, NING QU, YAN REN, ANQI SHI, YUJIA SHI, LI SHI, LING SU, HAITAO SUN, ZHAOHONG SUN, YANFU SUN, JIAN SUN, LI SUN, LI SUN, WEI SUN, XIANGQIONG TANG, RUJUN TAO, JING TIAN, AIRONG TIAN, QIJIA TONG, XIAONAN WANG, FUBAO WANG, YE WANG, XIAOTING WANG, AIHUA WANG, ZHEN WANG, BIQING WANG, QUN WANG, YIYU WANG, YINGXUAN WANG, XUEMEI WEI, SHUZHEN WU, JIAPING WU, ZHAOHUI WU, DONG WU, ZHENG XI, ZUOHAN XIAOHOU, YAN XIAO, XIAO XIAO, HONG XIE,YUNING XIE,

GUOFEN XU, DONGYAN XU, PEI XU, ZIXI XU, JIEWEI XU, LING XUE, YAN YANG, QINGFA YANG, LEI YANG, ZHIWEI YAO, YIQING YE, JIANJUN YIN, JIA YU, YI YUAN, LIU YUAN, HU ZENG, HAIYING ZENG, XIAOLIN ZENG, MEILING ZHAN, WEI ZHANG, YANPING ZHANG, WEIFAN ZHANG, YAN ZHANG, JIE ZHANG, JIANBO ZHANG, JIEYUN ZHANG, XIAOHUI ZHANG, YAN ZHANG, YAN ZHANG, YUCHI ZHANG, MUMU ZHAO, ZICHU ZHENG, QUN ZHOU, JINGXING ZHOU, MEI ZHOU, and YAMIN ZHU (collectively, "Petitioners"), by and through their attorneys, for their Verified Petition for an Injunction in Aid of Arbitration pursuant to CPLR 7502(c) and 6301, allege as follows:

**Preliminary Statement**

1. Petitioners are a group of 124 EB-5 investors ("Investors") in 701 TSQ 1000 Funding, LLC ("Company"). Petitioners each invested $500,000 in the Company as part of the U.S. Government's EB-5 investor immigration program.

2. Petitioners seek this injunction to prevent the Respondents, U.S. Immigration Fund – NY LLC ("USIF"), 701 TSQ 1000 Funding GP, LLC ("Manager"), and their controlling principal, Nicholas Mastroianni ("Mastroianni"), from implementing a proposal ("Proposal") to reinvest the Company's EB-5 capital into a different USIF project controlled by Mastroianni, a high risk real estate development project located at 1568 Broadway, New York ("702 Times Square Project").

3. As fiduciaries, Respondents owe a duty of undivided loyalty to the Company and to its members. Their job is to protect the interests of the Company and the members, without elevating their own self-interest above those they are obligated to protect.

4. In disregard of these fiduciary duties, the self-dealing Proposal will enrich

Respondents at the Investors' expense, place investor capital at undue risk, and destroy the immigration eligibility of the Investors who opposed the transaction.

5. Moreover, Respondents used a one-sided, coercive and unfair solicitation process to force the members to vote for the Proposal.

6. The Investors were explicitly and repeatedly threatened that if they do not vote in favor of the unfair Proposal, Respondents will take affirmative steps to ensure that those Investors will not get green cards by (i) placing their capital in a bank account for an indefinite period of time in violation of EB-5 requirements, and (ii) notifying the government that since the capital will be indefinitely sitting in a bank account, the Investors are no longer green-card eligible.

7. The vote for the Proposal was thoroughly corrupted by this coercive process and is therefore invalid under applicable Delaware law. *See In re Saba Software, Inc. Stockholder Litig.*, 2017 WL 1201108, at *7 (Del. Ch. Mar. 31, 2017).

8. Moreover, as self-dealing fiduciaries who stand on both sides of the Proposal, Respondents have the burden to show that the transaction is "entirely fair" in all respects. *William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011); e*Bay Domestic Holdings, Inc. v. Newmark,* 16 A.3d 1, 46 (Del. Ch. 2010). Respondents will be wholly unable to make the required showing.

9. On July 5, 2018, Respondents claimed that they received the required number of votes in favor of the Proposal and that they intend to proceed immediately with this self-dealing transaction and to reinvest investor capital in the 702 Times Square Project.

10. For those investors who refused to vote in favor of the Proposal, Respondents have stated that they will leave their EB-5 capital in a bank account for an indefinite period in

violation of the EB-5 program's "at-risk" requirement and -- in an astonishingly spiteful act by these fiduciaries -- to notify the USCIS that these investors are disqualified from obtaining a green card as a result.

11. Petitioners will forthwith commence an Arbitration to invalidate the purported investor vote in favor of the Proposal and to permanently enjoin the implementation of the Proposal (the "Arbitration") per the dispute resolution provision in the Operating Agreement of the Company.[1]

12. In the Arbitration to be commenced, Petitioner will assert claims against Respondents for, *inter alia*, (i) breach of fiduciary duty and (ii) breach of the Operating Agreement, based on the coercive and unfair Proposal and the unrelentingly vindictive manner in which Respondents have conducted their self-interested campaign to push it forward.

13. If Respondents are permitted to proceed with the Proposal, the Investors stand to be irreparably harmed by having more than $100 million of EB-5 capital locked away in a risky investment for four to six years, if not longer, pursuant to the Proposal.

14. For those investors who refused to vote in favor of the Proposal, they stand to be irreparably harmed by Respondents' vindictive threat to destroy their green-card eligibility, even though these investors have already fulfilled their obligation to create 10 jobs, seek to have their capital reinvested in compliance with EB-5 requirements by properly functioning fiduciaries, and have every interest in obtaining a green card.

15. To ensure that an Award in the Arbitration in Petitioners' favor will be effectual, Petitioners hereby seek an Injunction in Aid of Arbitration pursuant to CPLR 7502(c) and 6301(c), to enjoin Respondents from implementing the Proposal.

[1]The Operating Agreement requires arbitration of disputes arising out of or in connection therewith under the rules of the American Arbitration Association, with venue in New York, New York.

## Parties

16. Petitioners are all citizens of China who have invested in the Company pursuant to the U.S. Government's EB-5 investor immigration program. Petitioners are members of the Company. All of the Petitioners are listed on **Exhibit A**.

17. Respondent 701 TSQ 1000 Funding, LLC ("Company"), a Delaware limited liability company, is the entity in which Petitioners invested.

18. Respondent 701 TSQ 1000 Funding GP, LLC ("Manager"), a Delaware limited liability company, is the Manager of the Company.

19. Respondent U.S. Immigration Fund-NY LLC ("USIF"), a New York limited liability company, is the Regional Center that sponsored the development of a mixed-used hotel and retail project located at 701 Seventh Avenue, New York, New York ("701 Times Square Project") as well as the 702 Times Square Project.

20. Respondent Nicholas Mastroianni is the individual who dominates and controls the activities of USIF, the Manager and the Company.

## Jurisdiction and Venue

21. This Court has jurisdiction over the Respondents based on CPLR 301 (presence in New York), CPLR 302(a)(1) (transaction of business in the State) and CPLR 302(a)(2) (commission of tortious act in the State). In addition, because they have agreed in the Operating Agreement to adjudicate the parties' disputes in New York, Respondents have consented to jurisdiction here.

22. Venue is proper in New York County pursuant to CPLR 7502(a).

23. CPLR 7502(c) permits the Court to entertain an application for a preliminary injunction "in connection with an arbitration that is pending or that is to be commenced . . . upon

the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." If the arbitration is not yet pending, it must be commenced within 30 days after the grant of the provisional relief. CPLR 7502(c). Petitioners will timely commence an Arbitration in compliance with CPLR 7502(c).

## Statement of Facts

### Overview of EB-5 Program

24. The EB-5 program administered by the U.S. Citizenship and Immigration Services ("USCIS") permits qualified foreign investors to obtain U.S. lawful permanent residence by investing at least $500,000 in a "new commercial enterprise" ("NCE") that meets certain qualifications, including creating or preserving at least ten jobs per investor. (See generally www.uscis.gov/eb-5)

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

26. Within two years after receiving a conditional green card, the investor must file with USCIS a Form I-829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status ("I-829 Petition") to show that the investor satisfied the investment and job creation requirements of the EB-5 program. 8 U.S.C. § 1186b(c); 8 C.F.R. § 216.6(a) and (c). Upon satisfaction of these requirements, USCIS will approve the I-829 Petition and grant the investor lawful permanent residence status, concluding the immigration process. 8 C.F.R. §

216.6(d)(1). If the I-829 Petition is denied, USCIS will terminate the conditional green card and institute removal proceedings to deport the investor from the United States. 8 C.F.R. § 216.6(d)(2).

27. Critically, EB-5 investors are required to maintain their investments "at risk" until two years after they receive their conditional green card ("Investment Period"). 8 C.F.R. § 204.6(j)(2); USCIS Policy Manual (rev. June 14, 2017).

28. For EB-5 investors, the required Investment Period can potentially range from two to five or more years from the date of initial filing of their I-526 petitions due to the EB-5 backlog in recent years.

29. If they do not maintain their capital "at risk" for this period, they will not satisfy EB-5 requirements and will not get a green card. If their immigration petition is denied and they are in the United States, they will be subject to deportation.

30. EB-5 projects often involve the extension of loans by the NCE for construction projects. If the loan is repaid to the NCE, it will need to be reinvested or "redeployed" to maintain compliance with the EB-5 program's "at risk" requirement. The money cannot sit in a bank account for an indefinite period. USCIS permits "redeployment" if it satisfies certain requirements, including that it is done "within a commercially reasonable time" after the initial loan to the EB-5 investment project is repaid to the NCE. *See* USCIS Policy Manual (rev. June 14, 2017).

31. During the redeployment period, however, the investors are not required to create more jobs if the job creation requirements were met through the original EB-5 investment project.

32. Once the initial loan has been repaid and sufficient jobs have been created for EB-

5 purposes, the investors' investment objectives shift: They no longer need to create jobs through their EB-5 investment. Instead their focus is now on redeploying their EB-5 capital in a less risky investment with increased liquidity while waiting for approval of their immigration application, so long as the reinvestment complies with EB-5 "at risk" requirements during the Investment Period.

33. The managers in charge of an NCE have a fiduciary duty to act in the best interests of the investors to identify suitable reinvestment alternatives.

**The 701 Times Square Project**

34. Petitioners are 124 Chinese investors, each of whom invested $500,000 in the 701 Times Square Project, in connection with his or her EB-5 immigration application. According to the offering materials provided to the EB-5 Investors, each investor was solicited to invest $500,000 to become a member of the Company. The Company is the "NCE" in EB-5 parlance.

35. As part of their investments in the Company, the members signed the Company's Operating Agreement, which was countersigned by Mastroianni on behalf of the Manager and the Company. The Operating Agreement is attached as **Exhibit B**.

36. The Company is a limited liability company organized under the laws of Delaware, and the Operating Agreement provides that it is governed by Delaware law. (Ex. B, §20.9)

37. The purpose of the Company was to raise capital through the EB-5 program and then to loan the EB-5 investments in the form of a mezzanine loan in connection with the 701 Times Square Project, for the development of a mixed-use hotel and retail project at 701 Seventh Avenue in Times Square, New York.

38. Section 4.1 of the Operating Agreement provides that "[t]he Company has been

formed for the purpose of making a Loan (the "Loan") to the Developer for funding of the development of the Project." (Ex. B, §4.1). Section 8.4, entitled "Compliance with EB-5 Restrictions," provides: "The Manager shall operate the Company in a manner that is designed to comply with legal and policy requirements of the [EB-5] Pilot Program administered by USCIS, as advised by the Regional Center. In particular, the Manager shall: (a) deploy the Capital Contributions of the Members to make the Loan; [and] (b) avoid reserve accounts designed to evade at risk investment . . . ." (Ex. B, §8.4).

39. Through the offering, the Company raised $200 million from 400 EB-5 investors.

40. In November 2016, the Company made a $200 million loan to the Developer of the 701 Times Square Project ("Loan"). Under the terms of the Loan as later modified, the Developer was prohibited from prepaying the Loan during a "lock-out" period that would not expire until April 2019.

41. Upon information and belief, despite the clear prohibition on early prepayment of the Loan, Respondents recently permitted the Loan to be prepaid, necessitating redeployment of the EB-5 investor capital to maintain its "at risk" status.

42. The acceptance of the early prepayment of the Loan brought no substantive benefit to the members of the Company. Rather, upon information and belief, the primary purpose of accepting the early prepayment of the Loan was to enable USIF to use the repayment proceeds to recapitalize its faltering 702 Times Square Project, as to which construction has been lagging for lack of adequate financing from major financial institutions and banks for the past two years.

43. In light of the repayment of the Loan, Respondents owe contractual and fiduciary obligations to the members of the Company to identify alternative reinvestment options to ensure

their continuing compliance with EB-5 requirements while avoiding undue risk and illiquidity of their investments.

44. Thus, as set forth above, Section 8.4 of the Operating Agreement is entitled "Compliance with EB-5 Restrictions" and obligates the Manager to "operate the Company in a manner that is designed to comply with legal and policy requirements of the [EB-5] Pilot Program administered by USCIS" and to "avoid reserve accounts designed to evade at risk requirement." (Ex. B, § 8.4(b))

45. The Manager likewise has fiduciary duties to act in the best interests of the Company and its Members. These duties were explicitly spelled out by the Manager's counsel in a letter recently disclosed to the investors:

> "**Section 18-1104 of the DE LLC Act imposes fiduciary duties of care and loyalty on the Manager as the default standard with respect to the governance of the Company. The Operating Agreement does not eliminate or diminish this standard in any manner.** Under the default standard, a manager of a limited liability company owes to the company and its members duties of care and loyalty. In simplest terms, the duty of care requires that the manager act on an informed basis after careful deliberation and that it exercise the care that an ordinary prudent person would exercise under similar circumstances. The duty of care places an affirmative burden upon the manager to assume an active role in the decision process. All significant information reasonably available should be considered and the manager should avoid decisions that appear hasty or ill-considered, or in disregard of significant information. **The duty of loyalty prohibits unfaithfulness and self-dealing, and requires that the manager serve the company and its members to the exclusion of all other interests. The manager is required to act in good faith, in a manner reasonably believed to be in the best interests of the company. To do so, the manager must be both disinterested (i.e. not on both sides of the transaction or deriving financial benefit from it in the sense of self-dealing) and independent**." (emphasis added)

(The letter from the Manager's counsel to the Manager is attached as **Exhibit C**.)

46. Respondents have flatly ignored their own counsel's advice to honor their fiduciary duties of care and loyalty to the investors, including the Petitioners, in all dealings.

**The Proposal**

47. Having manufactured the need to redeploy Investor EB-5 capital by accepting early prepayment of the Loan, Respondents put into motion a consent solicitation process attempting to seek a majority vote of the members of the Company to approve their self-interested Proposal, rife with conflicts of interest and self-dealing.

48. The Proposal was first announced through a consent solicitation dated June 5, 2018.

49. According to the Consent Solicitation Statement (attached as **Exhibit D**), the Proposal was designed to address the need to redeploy investor capital.

50. The Proposal asks the members of the Company to approve an amendment to the Operating Agreement that would permit the Company to operate as a commercial real estate debt fund with discretionary authority to invest EB-5 capital in one or more commercial real estate investments. The proposed Amended and Restated Operating Agreement is attached as **Exhibit E**.

51. However, the Consent Solicitation Statement then explains that the Manager intends to reinvest all of the loan repayment proceeds into a particular reinvestment project, in the form of a $200 million preferred equity investment in the 702 Times Square Project.

52. The Consent Solicitation Statement contains risk disclosures that highlight a litany of benefits that Respondents will obtain from approval of the Proposal as well as the conflicts of interest between their role on behalf of the Company and the other economic interests they will have in the 702 Times Square Project.

53. For example, the Proposal outlined the following conflicts of interest and self-dealing by Respondents:

- "Conflicts of interest associated with investments in different levels of the capital structure. . . . [The Company's] affiliate may manage an investment made at a different level of the project's capital structure, and such investment may be senior to and have rights and interests different from the investment made by the Company." (See Ex. D, p.7)

- "[T]he Manager will have interests in the [702 Times Square Project] that are different from the interests of the Company, and it is possible that such interests may conflict with those of the Members." (See Ex. D, p.11)

- "The Amended and Restated Operating Agreement has not been negotiated at arm's length. The Manager has developed the Amendment Proposal and has established the terms of the Amended and Restated Operating Agreement, which were not the result of negotiations on an arm's-length basis . . . . [The terms of the reinvestment] were determined by the Manager and are not based on a prevailing market survey or other independent criteria." (See Ex. D, p.12)

- "In connection with the USIF Mezzanine Loan [for the 702 Times Square Project], the USIF Mezz Loan Manager [an affiliate of Respondents controlled by Mastroianni] would receive significant fees and other compensation from the New Developer or its affiliates." (See Ex. D, p. 11)

- "The Manager may structure its financial interest in the Company so that one or more of the operators of the authorized immigration agencies utilized by the Company in connection with the offering of Units (the "Co-Owner") participates in the distributions made to the Manager pursuant to the Amended and Restated Operating Agreement. The level of participation will be determined at the time of investment." (See Ex. D, p.2).

- "The Manager may receive significant origination and other fees and other compensation from developers in connection with the origination of Target Investments. These fees will be retained by the Manager." (See Ex. D, p.2)

- "The Manager may pursue transactions that provide its affiliates with economic and tax benefits not shared with the Members." (See Ex. D, p.8).

54. The Proposal sets forth three alternatives for the investors:

a. Alternative 1 - the investor can vote to approve the Proposal and the Amended Operating Agreement, and to have his or her capital reinvested in the 702 Times Square project.

b. Alternative 2 – the investor can vote to withdraw his or her capital from the Company (and give up his or her rights to a green card), as long as he or she votes in favor of the Proposal.

c. Alternative 3 – the investor can vote no (or abstain from voting), in which case if the Proposal passes, the investor's capital will not be reinvested, will be held in a bank account by Respondents, and will no longer be at risk for EB-5 purposes, and the investor will not get the money back until all of the investors' I-829 Petitions have been adjudicated.

55. On June 25, 2018, the Proposal was supplemented by Supplement No. 1 to Consent Solicitation Statement ("Supplement"). (See **Exhibit F**). The Supplement purported to clarify that investors who elected Alternative 2 would be able to receive their capital back upon prepayment of the Loan, which was expected to occur in the near future (and which USIF has since announced has already occurred). As a further inducement for withdrawing investors to vote in favor of the Proposal, the Supplement provided:

> *"Even if the Amendment Proposal is not approved, the Manager plans to exercise its discretion under the existing Operating Agreement to permit any Member who elects Alternative 2 . . . to withdraw from the Company no later than 30 days following the repayment of the EB-5 Loan in full . . . ."*
> (Ex. F, p.2)

56. In the 10-day period after the Supplement was issued on June 25 leading to the July 5 voting deadline, Respondents doubled down on their coercive solicitation campaign to extract the necessary votes to pass the inequitable Proposal.

57. On July 5, 2018, Respondents claimed that they had enough votes for the Proposal to pass but refused to provide the vote count or any other information about the vote-count process.

**The Coercive Consent Solicitation Process**

58. Under Delaware law, an investor vote will be invalidated "by a showing that the structure or circumstances of the vote were impermissibly coercive." *In re Saba Software, Inc. Stockholder Litig.*, 2017 WL 1201108, at *7 (Del. Ch. Mar. 31, 2017).

59. Courts will find wrongful coercion where investors are induced to vote "in favor of the proposed transaction for some reason other than the economic merits of that transaction." *Id.* The coercion inquiry focuses on "whether the shareholders have been permitted to exercise their franchise free of undue external pressure created by the fiduciary that distracts them from the merits of the decision under consideration." *Id.* The vote must be structured in such a way that allows shareholders a "free choice between maintaining their current status [or] taking advantage of the new status offered by" the proposed deal. *Id.* at 15.

60. Under these governing legal standards, the consent solicitation process employed by Respondents here was plainly coercive.

61. First, USIF manufactured the need to redeploy assets for its own gain. Under the loan agreements with the Developer, the prepayment of the Loan should not have occurred until April 2019. Nevertheless, USIF made the decision to accept early prepayment of the Loan and thereby created an artificial need to redeploy investor EB-5 capital to satisfy the "at-risk" requirement. USIF seeks to exploit this manufactured crisis to coerce the investors into a proposal that will result in the enrichment of USIF and the destruction of valuable investor rights.

62. Second, USIF has engaged in scare tactics and false threats. In its campaign to lobby for votes, Respondents have stooped to base intimidation and clearly punitive measures to create an inequitable "take it or leave it" situation.

63. In a PowerPoint used to persuade investors to vote for the Proposal, USIF pressured the investors to vote for the proposal out of a concern that otherwise they will notify USCIS that the investors' EB-5 capital is no longer "at risk" and that they therefore will not receive a green card:

> "AS A REMINDER THE VOTING FORM WILL BE THE PRIMARY EVIDENCE WHEN FILING YOUR I-829 PETITION NEEDED TO SHOW THAT YOU HAVE SUSTAINED YOUR INVESTMENT AT RISK. USCIS WILL BE MADE AWARE OF YOUR CHOICE AND IF YOU DO NOT REDEPLOY OR FAIL TO RESPOND, THEN USCIS WILL KNOW YOUR CAPITAL IS NO LONGER AT RISK." (See the last page of the PowerPoint attached as **Exhibit G**.)

64. The PowerPoint similarly warns investors that if they vote against the Proposal, "Your capital will not be redeployed," and that "Investors that check box 3 or do not return a vote will have their capital held by the NCE [the Company] in a depository until such time all of the members I-829 petitions have been approved (per the terms of the original operating agreement)." (**Exhibit G**, second to last page.)

65. Similar statements were repeated throughout the solicitation materials and in emails and WeChat messages, in which the Investors were advised that if they did not approve the Proposal, their funds would be left in bank deposits and their capital would not be deemed "at risk" for EB-5 purposes. For example, in an email dated June 28, 2018 from USIF to the Investors, USIF warned the Investors that:

> "[W]e are writing to remind you that your voting form must be submitted in a week by July 5, 2018. THIS DEADLINE IS FINAL and necessary to timely redeploy the funds and close the proposed deal. *Failure to respond will be deemed a "no" vote for purposes of redeploying your funds. Final votes (or non-votes) and supporting document will be submitted to USCIS after July 5 such that USCIS will be aware that your capital is no longer at-risk should you chose not to redeploy yours funds or fail to timely respond.*" (emphasis added).
>
> (See **Exhibit H**)

66. In another email dated July 3, 2018, USIF made the same threat to the Investors:

> "Following the conclusion of the July 5 voting, we will promptly confirm your voting selection with you. For those who did not vote we will confirm that you chose not to sustain your investment at risk and USCIS will be notified of the same in accordance with our reporting obligations."
>
> (See **Exhibit I**)

67. On July 5, 2018, the date of the voting deadline, USIF reiterated the same threat to the Investors. (See **Exhibit J**).

68. Petitioners should not be unfairly and coercively subject to this "take it or leave it" ultimatum to remain green-card eligible.

69. Contrary to these statements, the Petitioners' reason for not voting was not that they do not wish to sustain their EB-5 capital at risk. As investors who seek to remain eligible for a green card, the investors must maintain their EB-5 capital in compliance with the USCIS "at risk" requirement. The Proposal and the entire consent solicitation process, however, is a product of the Respondents' coercive efforts to force the investors into accepting an unfair proposal that benefits themselves rather than an exercise of their contractual and fiduciary duties to the investors to redeploy EB-5 capital in a way that serves the best interest of the investors.

70. The Manager has a contractual and fiduciary duty to propose alternative redeployment options that satisfy USCIS requirements. Section 8.4 of the Operating Agreement requires the Manager to "operate the Company in a manner that is designed to comply with the legal and policy requirements" of the EB-5 Program and to "avoid reserve accounts designed to evade at risk investment" – which is precisely what Respondents threaten to do with the capital of those investors who opposed the Proposal. (Ex. B, § 8.4).

71. The Manager is required – even for investors opposing the Proposal – to take all required steps to ensure that the EB-5 capital is redeployed in conformity with the EB-5 requirements.

72. In light of the foregoing, the Manager does not have the contractual or fiduciary right to simply leave the capital in a bank account, and its threat to do so with respect to those investors voting against the Proposal – and to notify USCIS that it has done so – is coercive and

renders the solicitation process fatally flawed. *See Lacos Land Co. v. Arden Grp., Inc.*, 517 A.2d 271, 276 (Del. Ch. 1986) (shareholder vote found to be coercive based on defendant's threat that unless the proposed amendments were approved, the defendant would use his power to block transactions that were in the best interests of the Company).

73. Third, Alternative 2 exacerbates the coercive nature of the consent solicitation. The coercive nature of the consent solicitation is compounded by "alternative 2," which purports to allow the investors to request immediate withdrawal of their capital, but only if they vote in favor of the Proposal to redeploy capital to the 702 Times Square Project.

74. Alternative 2 improperly tangles the investors' right to withdraw their EB-5 capital with a vote in favor of the amendment proposal -- even though these investors will have no continuing interest in the company and no further concern regarding the safety and liquidity of the redeployed capital. There is no legitimate reason to condition the investors' right to withdraw from the 701 Times Square Project on a vote in favor of redeployment to the 702 Times Square Project and doing so unfairly seeks to pit the withdrawing investors against those investors who oppose the 702 Times Square Project.

75. Under the existing Operating Agreement, investors have a clear right to withdraw their capital once the Developer repays the loan. Section 11.8(a)(ii) provides: "The Cash Flow that arises from any repayment of principal under the Loan shall be allocated to the Members." (Ex. B, §11.8(a)(ii)) Section 11.8(c) provides: "The portion of the Cash Flow allocated to the Members under Section 11.8(a)(ii) will be distributed to the Members in return of their Capital Contributions. These distributions will be allocated amount [sic] the Members in proportion to the amount of their Capital Contributions." (Ex. B, §11.8(c)).

76. There is no legitimate reason why a vote in favor of the Proposal is required as a

condition to being permitted to withdraw. It is a purely coercive vote-grabbing ploy by Respondents.

77. To make matters worse, USIF promised to reward those investors who voted in favor of alternative 2 and to punish investors who voted against the proposal. Thus, USIF announced that even if the vote did not pass, investors who selected alternative 2 would be permitted to withdraw in an expedited process, whereas investors who voted against the Proposal would remain indefinitely locked in. USIF explicitly wrote in its Supplement to the Proposal:

> ***"Even if the Amendment Proposal is not approved, the Manager plans to exercise its discretion under the existing Operating Agreement to permit any Member who elects Alternative 2 . . . to withdraw from the Company no later than 30 days following the repayment of the EB-5 Loan in full . . . ."***

(Ex. F, p.2).

78. In recent emails, USIF stated that the only way to ensure the withdrawal of the investor's capital was to vote for alternative 2:

> "The simplest way to expedite a return of your capital should you wish to end the EB-5 process is to vote for [Alternative] 2 by July 5[.]"
>
> (See Ex. H).
>
> "[F]or those of you who vote for [Alternative] 2 ahead of the July 5 deadline, we anticipate a fast and easy withdrawal process for the 100% return of your capital contribution as we have now been repaid in full by the Developer. *Refusing to vote will significantly slow down this process.*"
>
> (See Ex. I).

79. There is no legitimate reason that the process of returning capital contributions to those investors who seek to withdraw from the Company should be "slow[ed] down" for investors who did not vote for the Proposal. It is a transparently coercive device to garner more votes in favor of the 702 Times Square Project.

80. Fourth, investors who were misled by the Proposal and submitted a consent form

were not permitted before the deadline to revoke their consent. On information and belief, there are at least five investors who notified USIF prior to the July 5 voting deadline that their prior votes were based on a misunderstanding of the Proposal and that they revoked their votes. Despite these clear notices -- and despite USIF's own campaign to get investors to switch "no" votes to votes in favor of the Proposal – USIF refused to recognize the investors' revocation of their votes and has improperly counted these as votes in favor of the Proposal.

81. Moreover, despite announcing that they had sufficient votes for the Proposal to pass, Respondents have refused despite request to provide the vote numbers or any other information to enable Petitioners to assess the voting process.

82. Fifth, Respondents have further sought to derail opposition to the Proposal by attempting to interfere with the attorney-client relationship between Petitioners and their counsel. Respondents have disseminated false information to tarnish Petitioners' counsel's reputation and to impugn their competence by falsely asserting that counsel unsuccessfully litigated a case in which counsel in fact had no involvement.

83. For these reasons, the consent solicitation process was coercive, a breach of Respondents' fiduciary duties, and subject to invalidation.

**Respondents Will Not Be Able To Demonstrate The Entire Fairness of the Proposal**

84. As set forth above, because Respondents are self-dealing fiduciaries who stand on both sides of the Proposal, they will have the burden to show that the transaction is entirely fair in all respects, both procedurally and substantively. *William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011); e*Bay Domestic Holdings, Inc. v. Newmark,* 16 A.3d 1, 46 (Del. Ch. 2010). There is no chance Respondents will be able to make the required showing.

85. The procedural defects of the coercive consent solicitation process are detailed

above. This process was not "entirely fair" and should be invalidated in the Arbitration.

86. In addition, aside from its coercive and procedurally unfair features, the Proposal is also substantively unfair to the Investors.

87. Among other problems, the Proposal has the following defects:

- Elimination of Fiduciary Duties
- Conflicts of Interest
- Self-Dealing
- Undue Risk / Lack of Diversification
- Illiquidity
- Abnormally high management fees versus low return to EB-5 investors

88. Elimination of Fiduciary Duties. If it is approved, Section 8.12 of the Amended Operating Agreement (attached at Exhibit E, §8.12) will completely eliminate all fiduciary duties owed by the Manager and its affiliates to the Company and to the EB-5 Investors, to the full extent permitted by law. There is no good faith reason for the Manager to have included such a provision in the Proposal eliminating all fiduciary duties, especially when USIF has created this need for redeployment and now seeks to exploit this situation to fundamentally change the parties' rights and obligations.

89. Conflicts of Interest. By the Manager's own admission in the Consent Solicitation Statement as set forth above, the Proposal is rife with conflicts of interest, including conflicts of interest with USIF affiliates at different levels of the capital structure and the myriad other conflicts outlined in the consent solicitation materials. (Ex. D, at 2, 7, 8, 11, 12)

90. Self-Dealing. Again, by the Manager's own admission in the Consent Solicitation Statement, nearly all of the potential benefits flowing from the Proposal will

inure to the Manager, USIF, and their affiliates, and those benefits have not been fully disclosed despite our request. (*Id.*)

91. Undue Risk / Lack of Diversification. The proposed reinvestment into the 702 Times Square Project is far riskier than other redeployment options available to the Manager, including investment into a fund of stabilized assets. The proposed investment is in the form of preferred equity, which is in fact far riskier than the secured loan previously made by the Company that has now been repaid. Having already satisfied job-creation requirements under the EB-5 program, there is no reason for the investors' capital to be reinvested into a riskier investment than the original one.

92. Illiquidity. The Proposal makes clear that investors who seek to maintain their capital at risk will be locked into the 702 Times Square Project for 4 to 6 years, if not longer. There is no legitimate reason for this level of illiquidity for these EB-5 investors who have already successfully funded a project resulting in the required job creation numbers for EB-5 purposes. There are far more liquid redeployment options available to the Manager. Moreover, those investors who obtained their conditional green cards should be allowed to withdraw from the NCE and make their own investment decision, instead of being locked into the NCE for another 4-6 years, or longer.

93. Disproportionate Return to the Manager and Abnormally High Management Fees. Under the Proposal, the Manager is expected to earn 9% interest per annum while the Investors are to receive only 3%. Nine percent is far above market range for the largely administrative services to be performed by the Manager. In contrast, under the existing Operating Agreement, the Manager earns a management fee that amounts to 5.35% interest per annum.

94. In view of the serious problems with the substantive terms of the Proposal, as well as the coercive and procedurally unfair process employed, Respondents will not be able to establish the entire fairness of the Proposal and it will therefore be subject to invalidation in the Arbitration.

**What A Fair Process Should Look Like**

95. If Respondents acted as true fiduciaries and honored their commitments under the Operating Agreement, they would have followed a very different path from the one they have chosen.

96. Among other things, they would:

- not have permitted early prepayment of the loan, affording sufficient time to formulate fair reinvestment options for the investors;
- allow any members who want to redeem their investments to do so immediately in light of the prepayment of the Loan, without regard to their vote on the Proposal (or to vote separately on the issue of investor redemption);
- provide investors with alternative redeployment opportunities on advantageous terms to the Company given the strong bargaining power represented by up to $200 million in investment capital;
- with the investors' consent, redeploy the funds within a commercially reasonable time;
- not condition the reinvestment proposal on the elimination of fiduciary duties owed by Respondents; and
- fulfill the Manager's contractual and fiduciary duty to comply with the regulations of the EB-5 program to enable the investors to obtain permanent US residency.

**An Injunction In Aid of Arbitration Is Warranted**

97. Under CPLR 7502(c), the Court is empowered to issue a preliminary

injunction "in connection with an arbitration that is pending or that is to be commenced . . . upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." If the arbitration is not yet pending, it must be commenced within 30 days after the grant of the provisional relief. CPLR 7502(c). Petitioners will promptly commence an Arbitration in compliance with CPLR 7502(c).

**i. An Arbitration Award Will Be Ineffectual Absent Injunctive Relief**

98. In the Arbitration, Petitioners will seek an Order invalidating the Proposal, the consent solicitation process, and the Amended Operating Agreement based on Respondents' breach of fiduciary and contractual duties. If a preliminary injunction is not granted by this Court, Petitioners will be unable to obtain an effective Award in Arbitration.

99. Absent the injunction, Respondents will place the capital of the investors who voted against the Proposal in a bank account and notify USCIS that these investors are disqualified from getting a green card. An Arbitration award prohibiting Respondents from this vindictive conduct will be meaningless if Respondents have already acted on their threats.

100. Moreover, absent the injunction, Respondents will proceed to reinvest more than $100 million of investor capital in the 702 Times Square Project in the form of a preferred equity investment.

101. According to the disclosures set forth in the Proposal, once this investment is made, the capital will be locked up for 4 to 6 years, or longer.

102. Thus, even if Petitioners obtain an Award invalidating the investor vote,

there will be no practical way at that point to unwind the investment into the 702 Times Square Project and to have that investor capital available for a proper reinvestment plan.

**ii. The Preliminary Injunction Elements Are Satisfied**

103. Petitioners also readily meet the traditional standards for a preliminary injunction, consisting of (i) likelihood of success, (ii) irreparable harm absent the injunction, and (iii) balance of equities in the Petitioners' favor. *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981).

104. Likelihood of Success. As detailed above, Petitioners have a strong likelihood of success on the merits of their claims against Respondents for breach of fiduciary duty and breach of the Operating Agreement.

105. There is simply no good-faith explanation for the coercive and punitive actions undertaken by Respondents. Under applicable law, the coercive nature of the consent solicitation process subjects Respondents to liability for breach of fiduciary duty and renders the vote invalid. *See In re Saba Software, Inc. Stockholder Litig.*, 2017 WL 1201108, at *7 (Del. Ch. Mar. 31, 2017).

106. Moreover, as self-dealing fiduciaries who stand on both sides of the Proposal, Respondents will be unable to meet their high burden to show that the transaction is "entirely fair" in all respects, procedurally and substantively. *See William Penn P'ship v. Saliba*, 13 A.3d 749, 758 (Del. 2011); e*Bay Domestic Holdings, Inc. v. Newmark,* 16 A.3d 1, 46 (Del. Ch. 2010). Absent such a showing, Respondents will be liable for breach of fiduciary duty.

107. Finally, the Manager and the Company will be liable for breach of their obligations under the Operating Agreement to ensure compliance with EB-5 requirements

by having tendered a proposal that will result in leaving the capital of investors who oppose the unfair Proposal remaining indefinitely idle in a bank account in violation of the EB-5 "at risk" requirement.

108. Irreparable Harm. For the same reasons that an arbitral award will be ineffectual absent injunctive relief, so too will Petitioners be irreparably harmed by the denial of an injunction, by having investors' EB-5 capital invested pursuant to a corrupt and coercive process and, more devastatingly, by having their green card eligibility destroyed.

109. Absent injunctive relief, Respondents have stated they will notify USCIS that investors who voted against the Proposal are disqualified from obtaining a green card. The irreparable harm to these investors of having their immigration prospects destroyed by the vindictive actions of Respondents is manifest.

110. Petitioners will also suffer irreparable harm if the Company proceeds to reinvest investor capital into the 702 Times Square Project. Once this risky and illiquid investment is made, it will be effectively locked up for 4 to 6 years, or longer, on terms unfavorable to the Company, and there will be no way to unwind this investment even if Petitioners prevail on their claims.

111. It is no answer for Respondents to say that investors who voted against the Proposal will have not have their capital reinvested into the 702 Times Square Project.

112. Petitioners will be irreparably harmed in that situation because they will be precluded from ever participating in a fair and non-coercive reinvestment plan formulated by fiduciaries acting in the best interests of the Company, as is their right. *See Oracle Real Estate Holdings I LLC v. Adrian Holdings Co. I, LLC*, 582 F. Supp. 2d

616, 626 (S.D.N.Y. 2008) (irreparable harm demonstrated where investor rights would be irrevocably lost in the absence of an injunction).

113. Moreover, because the reinvestment into the 702 Times Square Project will be irreversible, Petitioners will lose any ability to participate in a reinvestment plan that uses the collective bargaining power of the Company's investor capital to negotiate favorable terms. Thus, if Respondents are permitted to proceed with reinvesting in the 702 Times Square Project, a sizable portion of the $200 million EB-5 capital will be reduced and that portion of the capital will be locked away for at least 4 to 6 years in a preferred equity position in the project. The Company's bargaining power for sourcing favorable redeployment opportunities will be greatly diminished.

114. Finally, Petitioners will be irreparably harmed by the amendment to the Operating Agreement that eliminates all fiduciary duties owed to them by Respondents. (Ex. E, § 8.12). In light of Respondents' inequitable conduct as set forth above *at a time when they are fiduciaries*, permitting Respondents to act unconstrained by fiduciary obligations portends disastrous consequences for the investors.

115. Balance of Equities. Finally, the balance of equities overwhelmingly favors Petitioners. Petitioners are citizens of a foreign county who seek to immigrate to this Country and who have been mistreated by their fiduciaries. Respondents, on the other hand, have no equities on their side. They have engaged in ugly, avaricious, and spiteful conduct to foist their preferred self-interested plan upon the investors.

**iii. Any Required Undertaking Should Be For A Nominal Amount**

116. The Court should exercise its discretion to set the amount of any required undertaking under CPLR 6312(b) at a nominal amount.

117. The injunction sought by Petitioners here is simply to ensure that a fair and non-coercive process is used by Respondents in proposing how they intend to reinvest investor funds.

118. Respondents will suffer no damages from the injunction where they retain the power to submit a reasonable proposal based on a fair and non-coercive process. *See Bluff Point Townhouse Owners Ass'n, Inc. v. Kapsokefalos*, 53 Misc. 3d 1208(A), 48 N.Y.S.3d 264 (N.Y. Sup. Ct. 2016) (court exercised discretion to require undertaking in nominal amount where there is no proof of significant damages to defendants in the event the injunction is found to have been unwarranted).

**Prayer for Relief**

Wherefore, Petitioners respectfully request that this Court enter an Order:

(1) Pursuant to CPLR 7502(c) and 6301, enjoining Respondents during the pendency of the Arbitration to be commenced by Petitioners from:

a. Reinvesting, redeploying, or transferring the capital contribution of any member of 701 TSQ 1000 Funding, LLC ("Company") into a real estate development project located at 1568 Broadway, New York ("702 Times Square Project") pursuant to the consent solicitation proposal circulated to the Petitioners on June 5, 2018, as supplemented on June 25, 2018 ("Proposal");

b. Coercing, harassing, and threatening the members of the Company in relation to the Proposal or otherwise;

c. Continuing to solicit the vote or consent of the members of the Company for the Proposal, directly, indirectly, or through Respondents' agents, through means including but not limited to, telephone, fax, email, letter, and electronic messaging system such as WeChat;

d. Eliminating fiduciary duties owed to the members of the Company;

e. Adopting, or operating the Company pursuant to, the Amended Operating Agreement;

f. Notifying USCIS that investors who did not approve or voted against the Proposal will not have their capital at risk;

g. Disseminating false information about Petitioners and their representatives, including Petitioners' counsel; and

h. Otherwise implementing the Proposal;

(2) Pending a hearing on this application, enjoining Respondents from any of the acts set forth in Prayer for Relief 1(a) to 1(h) above;

(3) Pursuant to CPLR 6312, requiring an undertaking in a nominal amount; and

(4) Granting such other relief as the Court may deem just and proper.

No previous application for the relief requested has been made to this or any other Court.

Dated: July 9, 2018.

By: _____

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*Attorneys for Petitioners*

VERIFICATION

Pursuant to CPLR 2106 and 3020(d)(3), I, Matthew Sava, affirm under penalties of perjury that I am the attorney for Petitioners in this proceeding and that the foregoing Petition is true to my knowledge, except as to matters alleged on information and belief, and that as to those matters I believe them to be true; that the grounds of my knowledge and belief are the documents, correspondence, and writings furnished to me by Petitioners and communications with Respondents' counsel; and that the reason why the verification is not made by Petitioners is that they are citizens of China and not within New York County; moreover, given the exigent circumstances, there was insufficient time for verifications to be obtained and signed before the appropriate government officials in China.

Dated: July 9, 2018

Matthew Sava