

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

DIVINE CAPITAL, L.L.C. and
KB CAPITAL, L.L.C.

Plaintiffs,

-against-

LEGADO INVESTMENT GROUP, L.L.C.,
ROD SIMON, and DOES 1-100.

Defendants.

Index No. 650535/2018

**FIRST AMENDED
COMPLAINT**

Plaintiff DIVINE CAPITAL, L.L.C., doing business in New York State as DIVINE CAPITAL NY, L.L.C., and Plaintiff KB Capital, L.L.C., pursuant to CPLR § 1003 and by way of this First Amended Complaint against Defendants LEGADO INVESTMENT GROUP, L.L.C., ROD SIMON, and DOES 1-100 (the “Defendants”) allege and say as follows:

INTRODUCTION

1. This is an action by Plaintiff DIVINE CAPITAL, L.L.C., doing business in New York State as DIVINE CAPITAL NY, L.L.C. (“Divine”), and Plaintiff KB Capital, L.L.C. (“KB Capital,” together with Divine, “Plaintiffs”) against Defendants to recover four million dollars (\$4,000,000) in funds Plaintiff Divine entrusted to Defendant LEGADO INVESTMENT GROUP, L.L.C (“LIG”) to provide a reserve fund for an investment in a specific proposed assisted living facility in New Windsor, New York (the “New Windsor Project”).

2. On information and belief, the \$4,000,000 that Divine entrusted to LIG is deposited in an account at Merrill Lynch under the name “LIG.Divine” (the “LIG.Divine Account”)

3. On information and belief, the principal balance in the LIG.Divine Account was

\$4,158,000 as of February 14, 2018.

4. Plaintiff Divine entrusted \$4,000,000 to LIG under a Project Equity Reserve Agreement between the parties (the “Divine PERA”), to finance the New Windsor Project, under the condition that LIG could close a construction loan with the developer of the New Windsor Project. The Divine PERA is attached as Exhibit A.

5. Divine’s \$4,000,000 was transferred to an LIG bank account at Merrill Lynch through KB Capital, which acted solely as a passthrough entity. All parties involved, including Defendants, understood that the \$4,000,000 belonged to Divine.

6. The Divine PERA further provides that the entrusted funds “shall accrue a non-compounding fixed rate of return of 6.0% annually and is managed by LIG’s Merrill Lynch Wealth Managers. Final fixed income return to be transferred to a [Divine] determined account on a quarterly basis.”

7. At all times during which Divine’s funds have been entrusted to LIG under the Divine PERA, the funds continued to belong to Divine and Divine has retained legal title.

8. Divine entrusted the funds to LIG and to its principal, Defendant Rod Simon (“Simon”) based upon their representations that Simon was an expert investor with substantial experience funding real estate transactions and that Simon had substantial wherewithal and connections that would enable him to obtain funding for the project. Defendants LIG and Simon held themselves out to be highly skilled experts and understood that Divine was relying on their advice. Divine placed a high degree of confidence and reliance in defendants LIG and Simon based on their representations of superior skill and experience.

9. Subsequently, when it was established that LIG would not be involved in the financing of the New Windsor Project, the Divine PERA became impossible to perform, and was

rendered null and void under its terms, thus obligating LIG to immediately return to Divine its \$4,000,000 plus any accrued interest. Nonetheless, notwithstanding that the Divine PERA had been rendered null and void, Defendant LIG refused to return the \$4,000,000 to Divine and has not paid accrued interest as it came due.

10. Upon information and belief, Defendants LIG and/or Simon have instead encumbered Divine's \$4,000,000 to obtain funds for their other unrelated investments at other financial institutions to divert profits to Defendants' own benefit.

11. Despite continued due demand by Divine for return of the four million dollars (\$4,000,000) it entrusted to LIG under the Divine PERA, LIG has refused to return the entrusted funds to Divine. Additionally, LIG has refused despite due demand by Divine to provide it with a full and complete accounting of the four million dollars (\$4,000,000) plus the 6% annual interest, payable on a quarterly basis, owed to Plaintiff Divine.

12. Throughout Divine and LIG's pre-litigation communication, despite its refusal to return the money, never once did LIG allege that the \$4,000,000 did not belong to Divine. Instead, throughout the parties' pre-litigation negotiations, both Divine and LIG acknowledged and operated under the shared understanding that the \$4,000,000 in the LIG.Divine Account was governed by the Divine PERA.

13. After Divine initiated this litigation, Defendants, through their counsel, manufactured an argument that the \$4,000,000 in the Account somehow was invested under a Project Equity Reserve Agreement, dated January 3, 2017, between KB Capital and LIG (the "KB PERA," attached hereto as Exhibit B). Defendants, through their counsel, told the Court that KB Capital is an indispensable party to this litigation.

14. Nevertheless, Defendants, through their counsel in sworn testimony, also admitted

that the KB PERA, were it the agreement governing the \$4,000,000, would allow KB Capital to withdraw the money early with a 10% termination penalty. (Exhibit C (Affidavit of William R. Fried, dated February 14, 2018), at ¶ 10.)

15. In an effort to minimize the scope of this dispute and to reduce the amount in controversy, KB Capital sent a written request to LIG's counsel to demand the return of the investment funds as required under Defendants' own theory. (Exhibit D (William King Letter to William R. Fried, dated February 26, 2018).)

16. Nevertheless, on March 15, 2018, LIG's counsel, in total contradiction to his sworn testimony, told KB Capital in a letter that in fact, the Divine PERA controlled the \$4,000,000 and KB Capital is not entitled to demand the return of the money. (Exhibit E (William R. Fried Letter to William King, dated March 15, 2018).)

17. Defendants' bad faith conduct makes it necessary to join KB Capital as a party in this case; otherwise, Defendants will continue to take contradictory positions in an attempt to escape its contractual obligations in complete disregard of the rules, laws and their duty of candor to the Court.

18. Accordingly, Plaintiff Divine and Plaintiff KB Capital seek relief against Defendants in a minimum amount of four million dollars plus interest, any gains made by Defendants on investments leveraged with Divine's funds, attorney's fees and costs to remedy Defendants' unlawful behavior as well as punitive and exemplary damages resulting from Defendants' breach of their fiduciary duties to Divine and their bad faith conduct in this litigation.

PARTIES

19. Plaintiff Divine Capital, L.L.C. is a California limited liability company whose

main office is located at 2674 Orange Avenue, Unit C1, Costa Mesa, California 92627.

20. Plaintiff Divine Capital, L.L.C. is registered to do business in New York State as Divine Capital NY, L.L.C.

21. Plaintiff KB Capital, L.L.C. is a California limited liability company whose main office is located in San Clemente, California.

22. Upon information and belief, Defendant Legado Investment Group, L.L.C. is a Wyoming limited liability company.

23. Upon information and belief, Defendant Rod Simon is an individual residing in San Francisco, California. Mr. Simon is the chief executive officer and managing member of Defendant Legado Investment Group L.L.C.

24. Plaintiffs are informed and believe, and hereby allege, that at all times herein mentioned, each of the Defendants sued herein as DOES 1 through 100 were in some manner or fashion, by agreement or otherwise, the agents, partners, co-venturers, attorneys, successors, or assigns, or were otherwise involved with Defendants in the claims asserted by Plaintiffs in this action.

25. Plaintiffs are ignorant of the true names and capacities of the Defendants sued herein as Does 1 through 100, inclusive, and therefore sue these parties by such fictitious names. Plaintiffs will amend this Complaint to allege their true names and capacities when ascertained.

JURISDICTION AND VENUE

26. This Court has subject matter jurisdiction over this action pursuant to Section 140-b of the New York Judiciary Law, which provides that Supreme Court of New York has general jurisdiction.

27. This Court has personal jurisdiction over all Defendants pursuant to N.Y.

C.P.L.R. §§ 301 and 302 because Defendants have transacted business in New York and contracted to supply goods or services in New York in connection with matters giving rise to this suit.

28. This Court further has personal jurisdiction over Defendants under N.Y. General Obligations Law §§ 5-1401 and 5-1402 because this action arises out of the Divine PERA, a contract for a transaction in excess of \$1,000,000 setting forth a choice of New York law and a voluntary submission to the jurisdiction of New York courts.

29. Alternatively, under Defendants' theory that this action arises out of the KB PERA, this Court also has personal jurisdiction over Defendants under N.Y. General Obligations Law §§ 5-1401 and 5-1402 because the KB PERA is also a contract for a transaction in excess of \$1,000,000 setting forth a choice of New York law and a voluntary submission to the jurisdiction of New York courts.

30. Venue is appropriate under § 503 of the N.Y. C.P.L.R.

FACTUAL ALLEGATIONS

I. The Divine PERA and Its Termination

31. In or about December 2016, Simon, the Chief Executive Officer and Owner of LIG, entered into negotiations with Dennis Shen, at that time the managing member of Plaintiff Divine, for the proposed financing of the construction of the New Windsor Project. LIG proposed to Divine that LIG would obtain or provide a first-mortgage construction loan of approximately \$17,000,000 for the New Windsor Project if Divine would entrust \$4,000,000 to LIG as a reserve fund for the financing of the New Windsor Project.

32. Simon represented to Divine that Simon was an expert investor with substantial experience funding real estate transactions and that Simon had substantial wherewithal and

connections that would enable him to obtain funding for the project. Defendants LIG and Simon held themselves out to be highly skilled experts and understood that Divine was relying on their advice.

33. Based upon Simon's representations, Divine agreed to Simon's proposal. On December 22, 2016, Simon, on behalf of LIG, entered a term sheet with CNW Real Estate LLC, the manager of the New Windsor Project, that sets forth terms and conditions for LIG to provide a first mortgage construction loan of \$17,416,000 for the development of the New Windsor Project ("the New Windsor Term Sheet"). The term sheet is attached hereto as Exhibit F.

34. In or about early January 2017, relying on Simon's representation that LIG would be able to secure the first mortgage construction loan, Divine decided to go forward with LIG regarding the proposed investment project.

35. Pursuant to LIG's instruction, Divine transferred \$4,000,000 through KB Capital to an account in LIG's name at Merrill Lynch.

36. Specifically, On or about January 3, 2017, KB Capital received \$4,004,310.24 from Divine with the instruction to transfer \$4,000,000 to LIG.

37. Attached hereto as Exhibit G is a true and correct copy of an Account Activity statement of Divine's Bank of America account in January 2017, which is maintained in KB Capital's business records. This statement shows the transfer of \$4,004,310.24 from the Divine account to KB Capital's bank account at Bank of America on January 3, 2017.

38. Attached hereto as Exhibit H is a true and correct copy of an Account Activity statement of KB Capital's Bank of America account in January 2017 that shows the transfer of \$4,004,310.24 into KB Capital's account on January 3, 2017.

39. On or about January 4, 2017, KB Capital transferred \$4,000,000 of the funds it

received from Divine to an account at Merrill Lynch that was under LIG's name. Attached hereto as Exhibit I is a true and correct copy of the January 2017 bank statement of KB Capital's bank account at Bank of America that reflects this transfer.

40. Pursuant to Divine and LIG's agreement, the money was to be placed in a Money Market Account in LIG's name at Merrill Lynch (the "PER account") to be held as a reserve fund for investment in the New Windsor Project.

41. On May 26, 2017, Defendant LIG and Plaintiff Divine finalized and executed the Divine PERA. The Divine PERA states that the PER account shall accrue a non-compounding fixed rate of return of 6.0% annually and the fixed income return are to be transferred to a Divine determined account on a quarterly basis.

42. The Divine PERA also includes a provision that if LIG does not close any form of financing for the construction of the New Windsor Project, the Divine PERA and the provisions thereof shall be considered null and void.

43. Beginning in August 2017, it began to become clear that LIG would not be involved in providing a construction loan with the developer for the development of the New Windsor Project.

44. This was confirmed on September 13, 2017. On that date, Michael Zukerman, on behalf of WRC Development Partners, LLC ("WRC"), the developer of the New Windsor Project, stated to Rod Simon that WRC would not accept financing from LIG for the New Windsor Project.

45. Mr. Zukerman stated that: "...the construction loan is not proceeding and we will not be closing with Legado Investment Group LLC on any form of financing including but not limited to a senior secured loan for the construction of the New Windsor project." The letter

from WRC is attached hereto as Exhibit J.

46. The New Windsor Term Sheet was never developed into a final deal and LIG never provided the promised construction loan.

47. Because LIG would not be providing any financing for the New Windsor Project, at least as of September 13, 2017, the Divine PERA became null and void under its terms, obligating LIG to immediately return to Divine the \$4,000,000 it entrusted with LIG and any accrued interest.

48. However, despite due demand, LIG breached the Divine PERA by failing and refusing to return Divine's \$4,000,000 to it, or any part thereof.

49. LIG additionally breached the PERA by failing to fully remit to Divine quarterly interest payments of \$60,000 beginning no later than August 26, 2017.

50. In September 2017, LIG paid Divine a partial installment of \$27,000 owed on the first \$60,000 interest payment, but despite due demand by Divine, LIG failed and refused to remit the additional \$33,000 owed to Divine.

51. Attached hereto as Exhibit K is a true and correct copy of a 2017 Form 1099-INT that LIG issued to Divine showing an interest payment of \$27,000 from LIG to Divine in 2017.

52. Defendant LIG also failed to remit to Divine the subsequent one or more quarterly interest payment of \$60,000.

II. Defendant LIG Encumbered Divine's \$4,000,000 for LIG and Simon's Own Benefit

53. Upon information and belief, Defendant LIG and/or Defendant Simon encumbered Divine's \$4,000,000 to obtain funds for other unrelated investments at other financial institutions.

54. On information and belief, Defendants LIG and Simon are using the funds

collateralized by Plaintiff's funds to obtain profits for themselves while the risk of loss is shifted to Divine.

55. Defendants did not have, and have never had, any permission or authorization by Divine to encumber Divine's \$4,000,000 for unrelated investments for Defendants' own benefit.

56. Defendants' actions were not permitted under the Divine PERA and was a breach of the Divine PERA and Divine's trust in Defendants.

57. Defendants' actions with respect to the unrelated transactions placed—and continue to place – Divine's \$4,000,000 at risk of total loss.

58. Divine has demanded a full accounting from Defendant LIG detailing these transactions at Merrill Lynch and other relevant financial institutions, but Defendant LIG has failed and refused to provide one.

59. As a result of Defendants' acts and omissions as set forth above, Plaintiff Divine has suffered damages of no less than \$4,150,000, consisting of its \$4,000,000 it entrusted with Defendant LIG, plus no less than \$150,000 in quarterly interest due and payable as well as the amount of any gains made by LIG and/or Simon on investments leveraged with Divine's funds.

60. Prior to the inception of this litigation, although Defendants refused to return the \$4,000,000, they never once denied that the money belonged to Divine.

61. Divine's prior counsel, Robert Ouriel, worked to recover the \$4,000,000 from LIG from September to December 2017. Mr. Ouriel had multiple communications with LIG over several months and never once did LIG allege that the money in the LIG.Divine Account did not belong to Divine. Nor did LIG ever allege that the money in the LIG.Divine Account belonged to KB Capital.

62. Throughout Mr. Ouriel's negotiations with LIG in that three-month period, both

Divine and LIG acknowledged and operated under the shared understanding that the \$4,000,000 deposited in the LIG.Divine Account was governed by the Divine PERA.

63. The KB PERA, on the other hand, was not funded and KB Capital never provided LIG with any funds pursuant to that agreement.

64. As recently as December 22, 2017, in response to a request by Divine for a current account statement for the \$4,000,000, LIG's counsel, Jeffrey Black, provided the account balance sheet for the LIG.Divine Account and described it as "the December account balance *per the PERA agreement for Divine.*" (Exhibit L (Hui Liu letter to Jeffrey Black dated December 20, 2017) and Exhibit M (Jeffrey Black letter to Hui Liu dated December 22, 2017 and attachment).)

65. LIG clearly understood that the money in the LIG.Divine Account belonged to Divine.

66. Nevertheless, after Divine initiated this litigation, and in an effort to defeat Divine's motion for a pre-judgment attachment, Defendants, through their counsel, manufactured an argument that the \$4,000,000 in the LIG.Divine Account was governed by the KB PERA.

67. LIG has since then directly contradicted that position in a letter to KB Capital. (Ex. E.)

FIRST CAUSE OF ACTION

BREACH OF CONTRACT (Against Defendant LIG)

68. Plaintiffs repeat and re-allege the preceding paragraphs and incorporates them as if fully set forth herein.

69. Plaintiff Divine and Defendant LIG duly entered into the Divine PERA and Simon signed the Divine PERA on behalf of LIG. Pursuant to the terms of the Divine PERA,

Divine duly entrusted \$4,000,000 to LIG to be managed by Simon.

70. The Divine PERA Provides that it shall be considered null and void if LIG “for any reason, [did] not close any form of financing including but not limited to a Senior Secured Loan” for the New Windsor Project.

71. LIG failed to close a loan for the New Windsor Project. Accordingly, the Divine PERA cannot be performed, and is null and void by its terms, obligating LIG to immediately return the \$4,000,000 Divine entrusted to LIG along with any accrued interest.

72. LIG breached the Divine PERA by refusing to return the \$4,000,000 and any accrued interest to Divine, or any part thereof.

73. LIG also breached the agreement by failing to fully remit to Divine quarterly interest payments of \$60,000 beginning no later than August 26, 2017.

74. In September 2017, LIG paid Divine a partial installment of \$27,000 owed on the first \$60,000 interest payment, but despite due demand by Divine, failed and refused to remit the additional \$33,000 owed to Divine.

75. Defendant LIG failed to remit to Divine any subsequent one or more quarterly interest payment of \$60,000.

76. As a proximate result of Defendant’s breach, Plaintiff has suffered damages of no less than \$4,311,000, consisting of \$4,158,000 of the principal balance in the LIG.Divine Account, plus \$153,000 or more in quarterly interest due and payable.

SECOND (ALTERNATIVE) CAUSE OF ACTION

**BREACH OF CONTRACT
(Against Defendant LIG)**

77. Plaintiffs repeat and re-allege the preceding paragraphs and incorporates them as if fully set forth herein.

78. Under Defendants' own representation to the Court, the \$4,158,000 currently deposited in the LIG.Divine Account was transferred to LIG by Plaintiff KB Capital and is governed by the KB PERA. Further, Defendants represented to the Court that KB Capital has the right to demand the return of the funds, less a 10% termination penalty pursuant to the KB PERA.

79. On February 26, 2018, KB Capital duly demanded in writing that LIG return the funds in the LIG.Divine Account pursuant to the KB PERA, plus any accrued interest under the KB PERA.

80. On March 15, 2018, LIG, through its counsel, refused to return the funds in the LIG.Divine Account.

81. Under LIG's own representation to the Court regarding the KB PERA, LIG breached the KB PERA by refusing to return the funds in the LIG.Divine Account and any accrued interest to KB Capital, or any part thereof, upon due demand by KB Capital.

82. Under LIG's own representation to the Court regarding the KB PERA, Plaintiff KB Capital has suffered damages of no less than \$4,037,000, consisting of the principal balance of \$4,158,000 currently in the LIG.Divine Account less any termination penalty, plus \$295,000 or more in interest due and payable under the KB PERA.

THIRD CAUSE OF ACTION

BREACH OF FIDUCIARY DUTY (Against Defendants LIG and Simon)

83. Plaintiffs repeat and re-allege the preceding paragraphs and incorporates them as if fully set forth herein.

84. Based upon Simon's representations to Divine that Simon was an expert investor with substantial experience funding real estate transactions and that Simon had substantial

wherewithal and connections that would enable him to obtain funding for the project, Plaintiff Divine entrusted \$4,000,000 with Defendant LIG under the PERA to invest in the New Windsor Project. Defendant LIG and its principal Simon are under a fiduciary duty to act for the benefit of the Plaintiff Divine within the scope of that fiduciary relationship.

85. Defendants breached their fiduciary duty to Plaintiff Divine by refusing to return Plaintiff's \$4,000,000 when the Divine PERA became void.

86. Upon information and belief, Defendants further breached their fiduciary duty to Plaintiff Divine by encumbering Divine's \$4,000,000 for unrelated investments at other financial institutions for Defendants' own benefit.

87. Defendants' self-dealing actions have placed, and continue to place Divine's \$4,000,000 at risk of total loss, and were not authorized by Plaintiff Divine, and were not permitted under the Divine PERA,

88. As a proximate result of Defendants' breach of fiduciary duty, Plaintiff Divine has been damaged in an amount equal to the principal balance in the LIG.Divine Account, plus interest due under the PERA and any gains made by Defendants on investments leveraged with Divine's funds.

FOURTH CAUSE OF ACTION

INDUCEMENT OF BREACH OF FIDUCIARY DUTY (Against Defendant Simon)

89. Plaintiffs repeat and re-allege the preceding paragraphs and incorporates them as if fully set forth herein.

90. To the extent that Simon is not directly liable to Plaintiff Divine as a fiduciary, Simon is liable for inducing LIG's breach of fiduciary duty.

91. Plaintiff Divine entrusted its \$4,000,000 with Defendant LIG under the Divine

PERA to invest in the New Windsor Project. Defendant Simon is the principal of LIG and its primary decision-maker. LIG is under a fiduciary duty to act for the benefit of Plaintiff Divine with respect to the funds entrusted to it by Divine under the Divine PERA.

92. LIG breached its fiduciary duty to Plaintiff Divine by refusing to return Divine's \$4,000,000 when the PERA became void. Such breach was at Simon's direction.

93. Upon information and belief, LIG, at Simon's direction, further breached its fiduciary duty to Plaintiff Divine by encumbering Divine's \$4,000,000 for unrelated investments at other financial institutions for Defendants' own benefit.

94. Defendants' self-dealing actions have placed, and continue to place Divine's \$4,000,000 at risk of total loss, and were not authorized by Plaintiff Divine, and were not permitted under the Divine PERA,

95. As a proximate result of LIG's breach of fiduciary duty, said breach at Simon's direction, Plaintiff Divine has been damaged in an amount equal to the principal balance in the LIG.Divine Account, plus interest due under the Divine PERA and any gains made by Defendants on investments leveraged with Divine's funds.

FIFTH CAUSE OF ACTION

CONVERSION

(Against Defendants LIG and Simon)

96. Plaintiffs repeat and re-allege preceding paragraphs and incorporate them as if fully set forth herein.

97. Plaintiff Divine is the legal owner of the \$4,000,000 entrusted to Defendants under the Divine PERA. Plaintiff Divine is entitled to possession of the \$4,000,000 it furnished pursuant to the Divine PERA because the Divine PERA is null and void.

98. Defendants LIG and/or Simon unlawfully and without authorization have

assumed and exercised dominion and control over the \$4,000,000 to the exclusion of, and inconsistent with, Plaintiff Divine's rights under the Divine PERA.

99. Plaintiff Divine has demanded return of its \$4,000,000.

100. Defendants have refused to return the \$4,000,000 to Plaintiff Divine.

101. Plaintiff Divine has been injured by Defendants' conversion of the \$4,000,000 and any gains Defendants made by utilizing Divine's funds without authorization.

SIXTH CAUSE OF ACTION

UNJUST ENRICHMENT (Against Defendants LIG and Simon)

102. Plaintiffs repeat and re-allege the preceding paragraphs and incorporate them as if fully set forth herein.

103. At all times material to this First Amended Complaint, Defendants, by their acts and omissions, benefited from, and increased their income, profits and personal compensation by Defendant LIG failing to return to Plaintiffs the \$4,000,000 and any accrued interest.

104. Defendants have accepted, received, and retained the \$4,000,000 at the expense of Plaintiffs.

105. It is inequitable and unjust for Defendants LIG and/or Simon to retain all or any part of the \$4,000,000 and any accrued interest.

106. Plaintiffs are entitled to relief for this unjust enrichment in an amount equal to the principal balance in the LIG.Divine Account unjustly retained by Defendants, plus interest on these amounts and any gains Defendants made utilizing the funds.

SEVENTH CAUSE OF ACTION

ACCOUNTING (Against Defendants LIG and Simon)

107. Plaintiffs repeat and re-allege the preceding paragraphs and incorporate them as if

fully set forth herein.

108. By virtue of the Divine PERA, and the transactions contemplated thereby, including Plaintiff Divine's entrustment of its \$4,000,000 with Defendant LIG, Defendants LIG and Simon owed a fiduciary duty to Plaintiff Divine to act at all times with the utmost care, honesty, undivided loyalty, and fidelity in its business dealings with Plaintiff Divine.

109. Plaintiff Divine entrusted to the Defendants of its \$4,000,000 with respect to which the Defendants were bound to reveal their dealings.

110. As a result of the acts set forth herein, Defendants LIG and Simon have received or utilized money of which \$4,000,000 is due to Plaintiff Divine from Defendants.

111. Defendants breached their fiduciary duty by failing and refusing to reveal their dealings, render an accounting or make payments to Divine of its \$4,000,000 and interests.

112. The amount of money due from Defendants to Plaintiff Divine is unknown to Divine and cannot be ascertained without an accounting of the financial records relating to the Defendants' receipts and disbursements relating to these funds.

113. Plaintiff Divine accordingly requests the Court for an accounting from Defendants to ascertain the amount due from Defendants to Plaintiff Divine.

EIGHTH CAUSE OF ACTION

CONSTRUCTIVE TRUST (Against Defendants LIG and Simon)

114. Plaintiffs repeat and re-allege the preceding paragraphs and incorporate them as if fully set forth herein.

115. By virtue of the Divine PERA, and the transactions contemplated thereby, including Plaintiff Divine's entrustment of its \$4,000,000 to Defendant LIG, Defendants LIG and Simon owed a fiduciary duty to Plaintiff Divine to act at all times with the utmost care,

honesty, undivided loyalty, and fidelity in its business dealings with Plaintiff Divine.

116. Divine's entrustment of its \$4,000,000 to Defendant LIG was premised on LIG closing the financing for the New Windsor Project.

117. LIG failed to close any form of financing for the construction of the New Windsor project, and Divine's funds must be returned according to the Divine PERA.

118. Defendants breached their fiduciary duty to Plaintiff Divine by improperly retaining and refusing to return Divine's \$4,000,000 and encumbering Divine's \$4,000,000 to obtain funds for unrelated investments at other financial institutions for Defendants' own benefit.

119. Defendants were unjustly enriched as a result of their breach of their fiduciary duty.

120. By virtue of the foregoing, a constructive trust should be placed upon the assets of Plaintiff Divine which were wrongfully retained and transferred by Defendants.

NINTH CAUSE OF ACTION

BAILMENT

(Against Defendants LIG and Simon)

121. Plaintiffs repeat and re-allege the preceding paragraphs and incorporate them as if fully set forth herein.

122. Plaintiff Divine transferred, through KB Capital acting solely as a passthrough entity, its \$4,000,000 to Defendants for the exclusive purpose of investing in the New Windsor Project.

123. Defendants accepted possession of the funds with the understanding that Plaintiffs expected Defendants to adequately safeguard the funds. Accordingly, a bailment was established for the mutual benefit of the parties.

124. During the bailment, Defendants owed Plaintiffs a duty to exercise reasonable

care diligence, and prudence in protecting Plaintiffs' assets.

125. Defendants breached their bailment and their duty of care by refusing to return the funds upon failing to close a loan for the New Windsor Project and on information and belief, encumbered the funds for unrelated investments at other financial institutions for their own benefit.

126. As a result of these breaches of duty, Plaintiffs have suffered harm in an amount equal to the principal balance in the LIG.Divine Account unjustly retained by Defendants, plus interest on these amounts and any gains made by Defendants on investment leveraged with the funds.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request relief from this Court as follows:

1. For judgment in favor of Plaintiffs against Defendants on all counts;
2. For a determination by the Court that the Divine PERA has been rescinded and ordering restitution of the consideration paid by Plaintiff Divine in the sum of \$4,000,000, with all interest;
3. For an accounting and ordering Defendants to disgorge to Divine any gains Defendants have made on investments leveraged with Divine's funds;
4. As an alternative ground for the return of the funds and under Defendants' own representations to this Court, for an order that Defendants return to Plaintiffs the principal balance in the LIG.Divine Account, less any termination penalty, and plus all accrued interest, pursuant to the KB PERA;
5. For an award of attorney's fees and costs;
6. For an award of pre-judgment interest and post-judgment interest authorized by law;

7. For an award of punitive and exemplary damages; and
8. For other further relief as this court deems just and proper.

Respectfully submitted this 29th day of March 2018.

MAURIEL KAPOUYTIAN WOODS LLP



By _____

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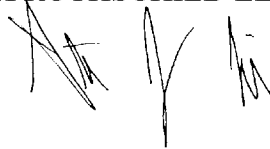
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