MARK ANCHOR ALBERT & ASSOCIATES
MARK ANCHOR ALBERT, State Bar No. 137027
albert@lalitigators.com
601 S. Figueroa Street, Suite 2370
Los Angeles, California 90017
Telephone: (213) 687-1515
Facsimile: (213) 622-2144

Attorneys for Plaintiffs

Emmett McDonough, individually and as Trustee of the McDonough Family 1996 Trust dated June 11, 1996, John T. McDonough Family Limited Partnership , Stephen E. McDonough Family Limited Partnership, and David J. McDonough Family Limited Partnership

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

EMMETT MCDONOUGH, Individually and as Trustee of the MCDONOUGH FAMILY 1996 TRUST DATED JUNE 11, 1996; JOHN T. MCDONOUGH FAMILY LIMITED PARTNERSHIP; STEPHEN E. MCDONOUGH FAMILY LIMITED PARTNERSHIP; and DAVID J. MCDONOUGH FAMILY LIMITED PARTNERSHIP,

Plaintiffs,

v.

BROWNE GEORGE ROSS, LLP, a California Limited Liability Partnership; ERIC M. GEORGE, an individual; PETER W. ROSS, an Individual; JONATHAN L. GOTTFRIED, an individual; and DOES 1 through 20,

Defendants.

Case No.

COMPLAINT FOR:

1. **PROFESSIONAL NEGLIGENCE (LEGAL MALPRACTICE);**
2. **BREACH OF CONTRACT;**
3. **BREACH OF FIDUCIARY DUTY; and**
4. **CONVERSION**

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I. INTRODUCTION

1. This case arises from a highly-prejudicial error by a business litigation and trial boutique -- Browne George Ross LLP ("BGR") -- its named partner, lead complex business trial attorney Peter W. Ross ("Ross") and his litigation partner, Jonathan L. Gottfried ("Gottfried"): the inexcusable and unjustifiable abandonment of an obviously-meritorious claim at an October 2014 trial in Santa Barbara Superior Court that resulted in the total loss of a case that should have been won handily. This entirely-avoidable loss resulted in approximately $6 million in damages to BGR's former clients, Emmett McDonough ("McDonough") and various McDonough family trusts and partnerships (collectively "Plaintiffs"). The Plaintiffs who lost their meritorious case in the Santa Barbara Superior Court trial (Case No. 1415005, before the Honorable Thomas P. Anderle [the "Knell Action"]) are the Plaintiffs in this lawsuit. BGR, Ross and his partners compounded their professional negligence by systematically over-billing and over-staffing the case – racking up in a relatively short amount of time a heavy-handed bill of more than $2 million for a case involving damages estimated to be only $2.8 million. BGR, acting through named partner Eric M. George ("George"), then refused, despite repeated requests, to timely turn over the entire client file to Plaintiffs' successor counsel, including original hard-copy documents and electronically-stored information, all of which are Plaintiffs' property, as required by the California State Bar Rules of Professional Conduct and applicable case law.

2. Turning a blind eye to their incompetent trial performance and the harm it caused to McDonough and his family, BGR, Ross, Gottfried and George then had the gall to seek to compel Plaintiffs to pay an additional approximately $1.25 million in costs and fees on top of the approximately $732,000 Plaintiffs previously paid to them for their utterly failed representation. Defendants not only are not entitled to receive another penny from their grievously-harmed former clients, they instead should be required to pay to Plaintiffs millions of dollars in damages Defendants' professional negligence, fiduciary and contractual breaches, and conversion proximately caused Plaintiffs to suffer.

3. In the Knell Action, Plaintiffs sued McDonough's investment partner, James Knell ("Knell") and certain Knell investment and management companies for fraud, breach of contract,

breach of fiduciary duties, and related claims for failing to disclose Knell's prior real estate fraud conviction, misrepresenting the profitability of Plaintiffs' investment interests in financial statements that did not comply with Generally Accepted Accounting Principles (GAAP), and failing to pay required contractual obligations to Plaintiffs (among other charges). Based upon Knell's contractual and fiduciary breaches, and related fraudulent misconduct, Plaintiffs sought to compel Knell to purchase their investment interests in Knell partnership entities that owned various commercial income properties via a so-called "put option" in a Second Restated Agreement Regarding Partnership Interests (the "Second Restated Agreement"). The Second Restated Agreement contained, in Section 7, a fiduciary duty provision entitled "Obligation of Good Faith and Fair Dealing" that required Knell and his partnership entities to fully disclose to McDonough all facts which may potentially adversely affect Plaintiffs' investment interests and to take no action which would result in Knell's gaining any unfair economic advantage at the expense of Plaintiffs' interests. The "put option" provision of the Second Restated Agreement, at Section 5, provided that Plaintiffs could require Knell to purchase Plaintiffs' interests at contractually-determined prices (the "strike price") if Knell breached the Second Restated Agreement, including the Section 7 fiduciary duty provision.

4. Inexplicably and ill-advisedly, Ross, Gottfried, and BGR failed to assert and advance that straightforward contractual "put option" claim at the trial of the Knell Action, which took place between October 9 (opening statements) and October 29, 2014 (jury verdict). Ross – who was lead trial counsel -- failed to address, not even once,

- in his opening statement,
- during the body of the trial,
- in BGR's brief regarding contract interpretation,
- in BGR's proposed jury instructions,
- in BGR's joint verdict form, or
- in Ross' closing statement

the critical claim that Knell's breaches of fiduciary duty necessarily breached Section 7 of the Second Restated Agreement (the "Obligation of Good Faith and Fair Dealing") which in turn

necessarily triggered McDonough's put option rights under Section 5. It was a simple, domino-effect claim that should have won the day.

5. Gottfried attended the trial and he was the primary drafter of BGR's First Amended Complaint that contained, in so many words, the critical claim that Ross failed to articulate and advance at trial:

> Knell's fiduciary breach = breach of Section 7 of the Second Restated Agreement = trigger of Plaintiffs' put option right under Section 5(3) & (4) and Plaintiffs' right to receive prevailing party attorneys' fees.

Yet Gottfried did not speak up to correct Ross' fatal omission of that critical claim.

6. Ross', Gottfried's and BGR's failure to assert and advance that critical claim at trial was not a carefully-considered, researched, and analyzed judgment call. It was an erroneous omission, pure and simple. Any attempt to justify the failure to assert that obviously-meritorious claim as a reasoned and calculated tactical decision fails. No reasonably competent complex business trial lawyer, much less a specialist in that area, would abandon that claim under the facts of the Knell Action. Further, the claim's abandonment was never discussed with Plaintiffs. Failing to assert and advance it before the jury constituted manifest error. The claim that Knell's breach of fiduciary duties constituted a breach of the Second Restated Agreement, which triggered Plaintiffs' "put option" right to require Knell to purchase McDonough's investment interests at the agreed-upon strike price, was a "no-brainer." It had virtually zero downside risk in being asserted but had a significant, fatal downside risk in being abandoned: a downside risk that was entirely foreseeable, indeed likely to occur, and which in fact did occur, with predictably disastrous results for McDonough and his family.

7. Because of Defendants' failure, the jury returned a special verdict in which they found that Knell breached his fiduciary duties and intentionally withheld material information from Plaintiffs, yet found at the same time that Knell did not breach the Second Restated Agreement and that Plaintiffs suffered no damages. In short, despite his jury-acknowledged fiduciary breaches, Knell nonetheless won the case and was the "prevailing party" for purposes of the prevailing party attorneys' fee provision in the Second Restated Agreement.

8. In the face of the jury's seemingly contradictory special verdict findings -- *i.e.*, that Knell breached his fiduciary duties and committed fraud but did not breach the Second Restated Agreement or cause any damages to Plaintiffs -- Ross and BGR finally raised the breach of fiduciary duty/breach of contract connection for the first time post-trial in a JNOV motion. But under applicable law, the belated assertion of that claim was "too little, too late," as new arguments which contradict the theory of the case that actually was presented to the jury cannot be raised for the first time in a post-trial motion, which is what the trial judge correctly ruled. Nor did this critical but tardily-raised claim give rise to a winnable appellate issue, because it was not raised first during the trial itself. Claims not presented at trial under these circumstances cannot properly be raised for the first time on appeal.

9. As a direct and proximate cause of Defendants' abandonment of this clearly meritorious claim at trial, Plaintiffs (i) did not receive their required pay out, (ii) lost their Knell investment interests (worth approximately $2.8 million), in satisfaction of the costs and prevailing party attorneys' fee award against them, and (iii) were compelled to pay additional prevailing party attorneys' fees in the amount of $500,000, on top of the more than $1,240,000 in attorneys' fees and costs Plaintiffs previously paid to BGR and prior counsel. McDonough also suffered a nervous breakdown due to the stress of the family losses he incurred as a result of Defendants' incompetence. In response, the Defendants did not show compassion, much less regret for their manifest error, but instead blamed McDonough for their loss, insisted they had performed superbly, and demanded payment of another $1.25 million in fees and costs for their services which devastated McDonough and his family.

10. This lawsuit seeks to hold Defendants accountable for failing to advance, until it was too late, this clearly meritorious claim resulting in the loss of the case and in devastating financial and emotional consequences to their former client, McDonough and his wife and children. BGR's exorbitant billing practices and failure to promptly turn over Plaintiffs' entire client files to new counsel compounded Defendants' breaches of their duties and constitute conversion of Plaintiffs' property for which they also should be held to account.

II. THE PARTIES

A. THE PLAINTIFFS

11. Plaintiff McDonough is an individual whose principal residence is located in Santa Barbara, California. McDonough was and is Trustee of the McDonough Family 1996 Trust, dated June 11, 1996, a California trust.

12. Plaintiff John T. McDonough Family Limited Partnership was and is a California limited partnership with Emmett McDonough as its Managing Partner.

13. Plaintiff Stephen E. McDonough Family Limited Partnership was and is a California limited partnership with Emmett McDonough as its Managing Partner.

14. Plaintiff David J. McDonough Family Limited Partnership was and is a California limited partnership with Emmett McDonough as its Managing Partner.

15. The McDonough Family 1996 Trust, John T. McDonough Family Limited Partnership, Stephen E. McDonough Family Limited Partnership and David J. McDonough Family Limited Partnership are collectively herein referred to as the "McDonough Family Holdings" and, with McDonough, "Plaintiffs."

B. THE DEFENDANTS

16. George, an individual, is an attorney admitted to practice law in California, is a named partner of BGR, and, on information and belief, works and resides in the County of Los Angeles, California.

17. Ross, an individual, is an attorney admitted to practice law in California, is a named partner of BGR, and, on information and belief, works and resides in the County of Los Angeles, California.

18. Gottfried, an individual, is an attorney admitted to practice law in California, is a partner of BGR, and, on information and belief, works and resides in the County of Los Angeles, California.

19. BGR is vicariously-liable for Ross' manifest error in abandoning a clearly-meritorious claim that should have prevailed at trial. BGR was and is a California Limited

Liability Partnership with its principal place of business at 2121 Avenue of the Stars #2400, Los Angeles, CA 90067.

C. THE DOE DEFENDANTS

20. Plaintiffs allege at all times mentioned herein, the true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOES 1 through 100, inclusive, are unknown to Plaintiffs and therefore Plaintiffs sue these DOE defendants by such fictitious names. Plaintiffs will amend this Complaint to allege their true names and capacities when ascertained. Plaintiffs are informed and believe and based thereon allege that each of these fictitiously-named defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiffs' damages as herein alleged were proximately (legally) caused by their conduct. (BGR, George, Ross, Gottfried, and the DOE defendants hereafter sometimes are referred to collectively as the "Defendants.")

D. VENUE

21. Venue is properly laid in Los Angeles County because BGR, Ross, George, and Gottfried maintain an office in this County where much of the deficient legal services at issue were provided, the individual Defendants work and/or reside in this County, and the facts and circumstances giving rise to this lawsuit occurred in substantial part in this County.

III. COMMON ALLEGATIONS

A. KNELL AND THE SIMA ENTITIES

22. Knell is a well-known real estate investor and investment manager operating primarily in Santa Barbara, California.

23. SIMA Corporation ("SIMA") was and is a California corporation, with its principal place of business at 1231-B State Street, Santa Barbara, California. Knell founded SIMA in 1984 to redevelop and manage income properties Knell had acquired, often with other investors. Knell was and is SIMA's Chief Executive Officer.

24. SIMA Management Corporation ("SIMA Management") was and is a California corporation, with its principal place of business at 1231-B State Street, Santa Barbara, California. Knell was and is SIMA Management's Chief Executive Officer.

25. Plaintiffs are informed and believe that at all relevant times Knell held a controlling interest in, SIMA and SIMA Management (collectively, the "SIMA Entities").

B. THE APPLICABLE KNELL PARTNERSHIP ENTITIES IN WHICH PLAINTIFFS INVESTED

26. Between 2003 and 2010, McDonough and the McDonough Family Holdings made substantial investment in various SIMA-managed income properties through the purchase of membership interests in various limited liability companies controlled and managed by Knell and the SIMA Entities, including investments in the following entities:

A. a $345,800 capital contribution in SIMA Cascade Village, LLC ("CASCADE"), an Oregon Limited Liability Company, which was later subsumed within SIMA Mountain View, LLC ("SIMA MOUNTAIN VIEW"), a California Limited Liability Company;

B. a $150,000 capital contribution in SIMA Coronado Plaza, LLC ("CORONADO"), a California Limited Liability Company;

C. a $300,000 capital contribution in SIMA Promenade/Briarwood, LLC ("PROMENADE"), a California Limited Liability Company;

D. a $470,327 capital contribution in SIMA Village Faire, LLC ("VILLAGE FAIRE"), a California Limited Liability Company;

E. a $420,000 capital contribution in 4333 Park Terrace, LLC ("PARK TERRACE"), a Delaware Limited Liability Company; and

F. a $180,000 capital contribution in 975 Business Center, LLC ("BUSINESS CENTER"), a Delaware Limited Liability Company.

27. At all relevant times, Knell, directly or indirectly through the SIMA Entities, controlled, directed, and managed CORONADO, PROMENADE, VILLAGE FAIRE, CASCADE, PARK TERRANCE, and BUSINESS CENTER (collectively, the "Knell Partnership Entities"). Each of the Knell Partnership Entities owned an income-generating, commercial office building located in California, except for SIMA MOUNTAIN VIEW, which owned an income-generating shopping center located in Oregon.

C. THE VARIOUS KNELL PARTNERSHIP ENTITY OPERATING AGREEMENTS AND RELATED AGREEMENTS REGARDING PARTNERSHIP INTERESTS

28. Plaintiffs' investments in the Knell Partnership Entities were made pursuant to Operating Agreements for each of the Knell Partnership Entities, as well as the related Restated Agreement Regarding Partnership Interests (the "Restated Agreement") (a true and correct copy of which is attached hereto as Exhibit A), a First Restated Agreement Regarding Partnership Interests (the "First Restated Agreement") (a true and correct copy of which is attached hereto as Exhibit B), and a Second Restated Agreement Regarding Partnership Interests (the "Second Restated Agreement) (a true and correct copy of which is attached hereto as Exhibit C). The Restated Agreement, First Restated Agreement, and Second Restated Agreement hereafter sometimes are collectively referred to as the "Restated Agreements" (but for convenience were referred to as "Side Letters" during the trial of the Knell Action).

29. The Restated Agreements were entered into subsequent to the execution of the various Operating Agreements governing each of the pertinent Knell Partnership Entities and were intended to and did supersede the Operating Agreements' provisions regarding the buy-out of Plaintiffs' investment interests in the various Knell Partnership Entities.

30. In that regard, the Second Restated Agreement contained the final, operative buy-out provisions that were negotiated between Knell and SIMA, on the one hand, and Plaintiffs McDonough Family Holdings, on the other hand. This granted to Plaintiffs McDonough Family Holdings, acting through McDonough, the right, but not the obligation, to compel Knell and SIMA to purchase Plaintiffs' interests in the Knell Partnership Entities (the "put option") at predetermined formulaic prices (sometimes called a "strike price"), as follows:

> Put Option on Change of Manager/General Partner. Family Holdings shall have the sole right, but not the obligation, to compel Knell and/or Sima, either separately or jointly, to complete the purchase of Family Holdings' interest in Village Faire, OAC. LC Apartments, or any of the Family Holdings' interest in the Prior Partnership Agreements within one hundred and twenty (120) days, upon written notice by Family Holdings of the occurrence of any of the following events (the "Notice"): (1) Knell and/or Sima is removed, resigns, withdraws, and/or is no longer the Manager/General Partner of the Partnership Entities; (2) Knell/Sima, Village Faire, LC Apartments, and/or OAC has instituted a legal action (either through arbitration or judicially) against Family Holdings or has an action instituted against it/him in which Family Holdings is named as a party; (3) if Village Faire,

> LC Apartments, Knell and/or Sima has breached this Agreement , either jointly or separately; or (4) if there is any breach of Prior Partnership Agreements by Knell and/or Sima concerning Family Holdings interests therein.

(*See* Second Restated Agreement (Exhibit C hereto) § 5.)

31. All of the Knell Partnership Entities at issue are referenced either in the Restated Agreement (*i.e.*, BUSINESS CENTER, PROMENADE, CASCADE, PARK TERRACE), the First Restated Agreement (*i.e.*, CORONADO, and SIMA MOUNTAIN VIEW), or the Second Restated Agreement (*i.e.*, VILLAGE FAIRE). (*See* Restated Agreement (Exhibit A hereto) at pg. 1; First Restated Agreement (Exhibit B hereto) at pg. 2; Second Restated Agreement (Exhibit C hereto) at pg. 1.) The Second Restated Agreement's "put option" at Section 5 refers to and encompasses the "Prior Partnership Agreements" which refer to the Restated Agreement and the First Restated Agreement. Consequently, if and when the put option in the Second Restated Agreement was triggered, Knell and SIMA could be required to purchase Plaintiffs' interests in all of the Knell Partnership Entities.

32. Specifically, if any of the triggering events occurred under Section 5 of the Second Restated Agreement – *i.e.*,

1) if Knell and/or SIMA was removed, resigns, withdraws, and/or was no longer the Manager/General Partner of any of the Knell Partnership Entities;
2) if Knell, SIMA, or VILLAGE FAIRE had instituted a legal action (either through arbitration or judicially) against Plaintiffs McDonough Family Holdings or had an action instituted against it/him in which McDonough Family Holdings was named as a party;
3) if VILLAGE FARE, Knell and/or SIMA breached the Second Restated Agreement, either jointly or separately; or
4) if there was any breach of the Restated Agreement or First Restated Agreement by Knell and/or SIMA concerning McDonough Family Holdings' interests therein –

then, if any one of those conditions occurred (Section 5(1)(2)(3) or (4)), Plaintiffs would be entitled to exercise their "put option" to compel Knell and SIMA to purchase their respective investment interests in the Knell Partnership Entities at the predetermined formulaic "strike" price.

33. The "strike price" for Knell and SIMA to re-purchase Plaintiffs' interests in the Knell Partnership Entities was the greater of: (i) Plaintiffs' paid-in capital, or (ii) the appraised value of their ownership interests in the Partnership Entities. In addition, Plaintiffs were entitled to receive any accrued "preferred returns" and other distributions, together with interest on any unpaid balances due after 120 days. (*See* Second Restated Agreement, Exhibit C hereto, at § 5.) The Second Restated Agreement also contained a prevailing party attorneys' fee provision (Exhibit C hereto) at § 9). Thus, if Plaintiffs were successful at trial demonstrating that Knell's fiduciary breaches entitled Plaintiffs to exercise their "put option" to force Knell and/or SIMA to purchase their investment interests at the "strike price," Plaintiffs also would be entitled to receive prevailing party attorneys' fees.

34. As of October 2014, the "strike price" for Knell or SIMA to re-acquire Plaintiffs' interests in the six Knell Partnership Entities at issue – comprised of Plaintiffs' capital contributions, plus the applicable "Preferred Return," plus accrued interest -- was calculated, approximately, as follows:

Knell Partnership Entity	Capital Contribution	Preferred Return	Accrued Interest	Total Strike Price
BUSINESS CENTER	$180,000	$67,835	$12,494	$260,329
CASCADE / MOUNTAIN VIEW	$345,800	$194,813	$69,891	$610,504
CORONADO	$115,685	$0	$18,396	$134,081
PARK TERRACE	$420,000	$249,814	$51,051	$720,865
PROMENADE	$300,000	$145,500	$33,918	$479,418
VILLAGE FAIRE	$470,327	$157,774	$27,276	$655,377
Total	**$1,831,812**	**$815,736**	**$213,026**	**$2,860,574**

35. The Restated Agreements also each contained a broad fiduciary duty provision, entitled "Obligation of Good Faith and Fair Dealing," which imposed upon Knell, SIMA, and the Knell Partnership Entities (i) an affirmative duty to disclose to Plaintiffs all facts that may

adversely affect Plaintiffs' investment interests in the Knell Partnership Entities, and (ii) an additional affirmative duty to refrain from any acts giving Knell or the Knell Partnership Entities any unfair economic advantage at Plaintiffs' expense, as follows:

> [t]he parties agree that in addition to all the fiduciary duties which the Partnership Entities and Knell individually owe to Family Holdings by virtue of their relationship with [me], both Knell individually, and Partnership Entities acknowledge that it/he have additional fiduciary duties to fully disclose to Family Holdings all facts which may potentially adversely affect Family Holdings' interests in the Partnership Entities. Knell and the Partnership Entities represent that it/he will take no action which would result in any of the partnership Entities or Knell gaining any unfair economic advantage at the expense of Family Holdings' interests.

(*See* Restated Agreement (Exhibit A hereto) § 8; First Restated Agreement (Exhibit B hereto) § 7; Second Restated Agreement (Exhibit C hereto) § 7.)

36. The relevant Operating Agreements for the Knell Partnership Entities at issue in this case (which are called "LLCs" in the Operating Agreements) also explicitly required Knell and the Partnership Entities to provide financial statements to Plaintiffs in accordance with GAAP on an accrual basis:

> Annual Accounting. Within 90 days after the close of each Fiscal Year of the LLC, the LLC shall (a) cause to be prepared and submitted to each Member a balance sheet and income statement for the preceding Fiscal Year of the LLC (or portion thereof) in conformity with generally accepted accounting principles on an accrual basis (unless otherwise required under the Code), and (b) provide to the Members all information necessary for them to complete federal and state tax returns.

37. Knell's duty to provide accurate, GAAP financial statements to Plaintiffs with respect to the Knell Partnership Entities also was subject to the express, contractual fiduciary duty of disclosure set forth in the Restated Agreements requiring Knell and SIMA to fully disclose to McDonough and the McDonough Family Holdings "all facts which may potentially adversely affect [their] interests in the Partnership Entities." (*See* Exhibit C hereto, § 7.)

38. Accordingly, under subsections 3 and 4 of Section 5 of the Second Restated Agreement, if Knell or SIMA breached the Second Restated Agreement, either jointly or separately (subsection 3), or breached the prior Restated Agreement or First Restated Agreement, either jointly or separately (subsection 4), Plaintiffs would have the right to exercise their "put

option" to compel Knell and SIMA to purchase Plaintiffs' interests in the Knell Partnership Entities at the contractually-determined “strike” price.

39. This meant that any breach by Knell or SIMA of their fiduciary obligation "to fully disclose to Family Holdings all facts which may potentially adversely affect Family Holdings' interests in the Partnership Entities," or any breach of their fiduciary obligation to "take no action which would result in any of the [Knell] Partnership Entities or Knell gaining any unfair economic advantage at the expense of [McDonough] Family Holdings' interests," would necessarily constitute a breach of the "Obligation of Good Faith and Fair Dealing" in Section 7 of Second Restated Agreement, which would in turn necessarily trigger Plaintiffs' "put option" rights under subsections 3 and 4 of Section 5 of the Second Restated Agreement. Indeed, that was Plaintiffs' primary goal for the entire Knell Action and the central purpose of Plaintiffs' retention of BGR.

D. THE EXERCISE OF PLAINTIFFS’ PUT OPTIONS REGARDING THE KNELL PARTNERSHIP ENTITIES

40. On September 28, 2011, Plaintiffs exercised, in writing, their put option as to PROMENADE. In May 2012, Plaintiffs exercised in writing their put options as to CORONADO, BUSINESS CENTER, PARK TERRACE, and CASCADE. In October 2012, Plaintiffs exercised their put option as to VILLAGE FAIRE. All of the "puts" were predicated on Knell's and SIMA's breaches of their fiduciary duties owed to Plaintiffs. Knell and SIMA, however, refused to honor the foregoing "puts," did not purchase Plaintiffs' investment interests in the Knell Partnership Entities at the contractually-agreed upon strike price, and failed to make all other required payments to Plaintiffs. This misconduct precipitated the Knell Action.

E. THE KNELL ACTION

1. Prior Counsel for Plaintiffs

41. Plaintiffs commenced the Knell Action against Knell, the SIMA Entities, and the Knell Partnership Entities on December 21, 2012. At that time, Plaintiffs were represented by the Santa Barbara law firm of Lynn & Obrien, LLP, and its named partner, Joshua Lynn. On October 31, 2013, Plaintiffs retained as new litigation counsel A. Barry Capello (“Cappello”) and his Santa Barbara law firm, Cappello & Noel, LLP.

42. In February 2014, Cappello and his law firm were disqualified as Plaintiffs' counsel because Cappello was a former partner of Knell's current counsel, Peter Bezek of Foley Bezek Behle & Curtis, LLP, who had represented Knell in connection with his criminal fraud conviction that was one of the key bases for Knell's material non-disclosures that constituted breaches of his fiduciary duties to Plaintiffs in the Knell Action.

2. McDonough's Retention of BGR and Peter Ross as Lead Trial Counsel Based On Their Representation That Ross Had Specialized Expertise And Experience As A Complex Business Litigation Trial Lawyer

43. Shortly after Cappello and his law firm were disqualified, McDonough was introduced to Ross and BGR as replacement litigation and trial counsel. In seeking his retention as Plaintiffs' new litigation and trial counsel, Ross and BGR did not hold Ross out to Plaintiffs (or to the general public) as merely having the skill, prudence, and diligence of lawyers possessing only ordinary skill, judgment, and capacity. Instead, Ross and BGR held Ross out to Plaintiffs and the general public as having specialized expertise and experience as an extraordinarily successful complex business litigation trial lawyer, winning over 90% of his complex business trials. Having held himself out as a specialist in trying and winning high-dollar, complex business cases, Ross was required to exercise the skill, judgment, and diligence exercised by other such specialists in the same field in California. Ross and BGR therefore were required to exercise a higher and more stringent standard of care in representing Plaintiffs in the Knell Action than would ordinary, everyday litigation lawyers.

3. The BGR Engagement Letter and Related BGR Standard Terms and Conditions, and Plaintiffs' Lack of Consent To BGR's Arbitration Provision

44. On or about February 24, 2014, BGR, acting through Ross, presented McDonough with an engagement letter (the "BGR Engagement Letter") that provided, among other things, that, "McDonough would pay an initial retainer fee of $35,000 and would pay Ross $650 per hour for his services," a true and correct copy which is attached hereto as Exhibit D. Ross also sent to McDonough the Standard Terms of Retention of Browne George Ross LLP (the "Standard Terms"), a true and correct copy which is attached hereto as Exhibit E.

/ / /

45. The Standard Terms contained an arbitration provision at Paragraph 25, entitled "Dispute Resolution," that provided as follows:

> BGR AND THE CLIENT AGREE THAT ANY DISPUTE BETWEEN THEM REGARDING ANY MATTER RELATED TO OR ARISING OUT OF BGR'S ENGAGEMENT BY THE CLIENT, OR ANY PARTY'S PERFORMANCE OF THE AGREEMENT GOVERNING BGR'S SERVICES (INCLUDING, BUT NOT LIMITED TO, THE QUALITY OF THE SERVICES THAT BGR RENDERS, CLAIMS FOR MALPRACTICE OR PROFESSIONAL NEGLIGENCE, OR COLLECTION OR PAYMENT OF BILLS, FEES OR COSTS) SHALL BE RESOLVED BY CONFIDENTIAL ARBITRATION IN LOS ANGELES, CALIFORNIA, BY A SINGLE ARBITRATOR FROM JAMS, WHO MUST BE A RETIRED JUDGE, HAVING SERVED ON ANY FEDERAL COURT LOCATED IN CALIFORNIA, OR THE CALIFORNIA SUPERIOR COURT, OR A HIGHER COURT OF THE STATE OF CALIFORNIA. THE RULES AND PROCEDURES OF JAMS SHALL GOVERN THE PROCEEDINGS, INCLUDING THE SELECTION OF THE ARBITRATOR. BOTH BGR AND THE CLIENT HEREBY WAIVE ANY CLAIM THAT LOS ANGELES, CALIFORNIA IS AN INCONVENIENT FORUM, OR THAT EITHER PERSONAL OR SUBJECT MATTER JURISDICTION IS LACKING IN LOS ANGELES, CALIFORNIA. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, BGR AND THE CLIENT AGREE THAT ALL QUESTIONS, AS TO WHETHER OR NOT AN ISSUE CONSTITUTES A DISPUTE SUBJECT TO ARBITRATION UNDER THIS SECTION, SHALL BE RESOLVED BY ARBITRATION IN ACCORDANCE WITH THIS SECTION. ALL DISPUTES SHALL BE RESOLVED IN ACCORDANCE WITH THE SUBSTANTIVE LAW OF THE STATE OF CALIFORNIA (INCLUDING BUT NOT LIMITED TO ALL STATUTES OF LIMITATION APPLICABLE TO ANY CLAIM ASSERTED IN THE ARBITRATION), WITHOUT REGARD TO CONFLICT-OF-LAW PRINCIPLES. THE ARBITRATOR SHALL HAVE THE POWER TO IMPOSE ANY SANCTION AGAINST ANY PARTY PERMITTED BY CALIFORNIA LAW. ANY AWARD SHALL BE FINAL, BINDING AND CONCLUSIVE UPON THE PARTIES, AND A JUDGMENT RENDERED THEREON MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. THE CLIENT IS ADVISED THAT, BY AGREEING TO THIS PROVISION, THE CLIENT IS GIVING UP THE RIGHT TO A JURY OR COURT TRIAL AND THE RIGHT TO APPEAL.
>
> NOTWITHSTANDING THE ABOVE, THE CLIENT MAY FIRST RESORT TO NON-BINDING ARBITRATION PURSUANT TO THE FEE ARBITRATION PROCEDURES OF THE STATE BAR OF CALIFORNIA, AS SET FORTH IN CALIFORNIA BUSINESS & PROFESSIONS CODE SECTIONS 6200 ET SEQ. IF THE CLIENT CHOOSES TO RESORT TO SUCH NON-BINDING ARBITRATION AND THE NON-BINDING ARBITRATION FAILS TO RESOLVE FULLY THE PARTIES' DISPUTE, EITHER PARTY MAY THEN DEMAND BINDING ARBITRATION PURSUANT TO THE TERMS OF THIS SECTION 24 WITHIN 90 DAYS AFTER RECEIVING THE AWARD IN THE NON-BINDING ARBITRATION.

(*See* Standard Terms, Exhibit E hereto, § 24, at pgs. 6 & 7.)

46. McDonough signed the BGR Engagement Letter but deliberately did not initial each page of the Standard Terms, including pages 6 and 7 which contained the arbitration

provision, because he did not agree to arbitrate, either for himself of for McDonough Family Holdings.

47. In that regard, the penultimate paragraph of the BGR Engagement Letter provided as follows:

> To indicate your understanding of and agreement to the foregoing terms and conditions, including the accompanying Standard Terms, please sign this letter, initial each page of the Standard Terms, and return both to me for our records.

(*See* BGR Engagement Letter, Exhibit D hereto, at pg. 4 [underlying added].)

48. Notwithstanding the above language requiring that Plaintiffs affirmatively signal their consent to the provisions of the Standard Terms by initialing each page thereof, the BGR Engagement Letter included this last sentence before the signature lines:

> I confirm that I have read, understand, and agree to all terms and conditions as set forth above and in the Standard Terms.

(*Ibid.*)

49. As noted above, the BGR Engagement Letter expressly and unambiguously required that, "to indicate [McDonough's] understanding of and agreement to the . . . Standard Terms," McDonough (for the Plaintiffs) was required to "initial each page of the Standard Terms." But McDonough did not do so. Instead, McDonough only signed the BGR Engagement Letter, indicating the nature and scope of the engagement and McDonough's agreement to pay BGR's fees and costs, together with a substantial "success" fee. That agreement is severable from the arbitration agreement to which Plaintiffs did not consent.

50. Mutual assent is required for there to be an enforceable agreement to arbitrate disputes. Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute to which he has not agreed. There is no public policy favoring arbitration of disputes when both parties have not agreed to arbitrate. An essential element of any contract is the consent of the parties, or mutual assent, which must be communicated by each party to the other. (Civ. Code, § 1565, subd. 3.) Accordingly, a party can be compelled to submit a dispute to arbitration only if he or she has agreed in writing to do so. Plaintiffs did not agree to arbitrate with BGR.

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51. McDonough's execution of the BGR Engagement Letter for Plaintiffs, and his refusal to initial the pages of the Standard Terms, including the blank initial spaces on the pages containing the arbitration provisions, are entirely consistent. By agreeing to "all terms and conditions as set forth above and in the Standard Terms," McDonough agreed to the requirement that he must initial each page of the Standard Terms to which he consented in order for the terms and conditions set forth on each page to become operative. Conversely, if he declined to initial any page that would signal his lack of consent to the terms and conditions set forth on that page so that they would not take effect.

52. The initials block on the right hand corner of each page of the Standard Terms is one of the provisions of the Standard Terms: the provision for the client to signal his or her consent to such terms on each such page, if he writes his or her initials on that page, or the client's refusal to consent to such terms on those pages in which he or she declines to write his or her initials. By executing the BGR Engagement Letter, McDonough agreed that the provisions of the Standard Terms would only be effective when a page is initialed with respect to the provisions on that page, as the requirement to initial each page is itself a provision of the Standard Terms for that page. Pursuant to the BGR Engagement Letter and Standard Terms, the initialing requirement to signal consent to effectuate the terms set forth on each page of the Standard Terms, as it is printed, is controlling as to all terms that are printed on that page of the Standard Terms.

53. Rather than unilaterally imposing an arbitration requirement, therefore, the BGR Engagement Letter told McDonough that he must signal his affirmative consent to arbitrate any disputes with BGR by initialing each page of the Standard Terms containing the arbitration provision, indicating that it was not effective until (and unless) McDonough did so. Because McDonough never initialed the pages of the Standard Terms containing the arbitration agreement, the existence of such an agreement between the parties cannot be inferred, implied, or imputed.

54. No one from BGR ever insisted that McDonough initial the pages of the Standard Terms containing the arbitration provision as a condition precedent to BGR's representation of McDonough. No one from BGR ever informed McDonough that BGR and its partners would contend that McDonough nonetheless agreed to arbitrate, for himself and McDonough Family

Holdings, any and all possible claims with BGR, including malpractice claims, even though McDonough intentionally declined to initial the arbitration pages of BGR's Standard Terms. Neither Ross nor any other BGR attorney ever discussed with or explained to McDonough the arbitration provision in the Standard Terms or their contention that, even though McDonough did not initial the pages containing the arbitration provisions, they would nonetheless assert that his signing of the BGR Engagement Letter constituted a waiver of each of the Plaintiffs constitutional right to a jury trial. As stated in a formal opinion of the State Bar of California, although "there is nothing inherently improper about an arbitration agreement between a lawyer and client which extends to malpractice claims, the client must be "fully advised of the possible consequences of that agreement." (Cal. Compendium on Prof. Responsibility, pt. IIA, State Bar Formal Opn. No. 1977-47, p. 1 [emphasis added].) In violation of their ethical obligations, BGR, Ross, George, and Gottfried failed to discuss at all, much less fully advise Plaintiffs of the possible consequences of the arbitration provision, including the possible waiver of their constitutional right to a jury trial if they signed the Engagement Letter without amendment, notwithstanding the fact that Plaintiffs specifically and deliberately declined to initial the pages of the Standard Terms containing the arbitration provisions.

55. The law will not decree a forfeiture of such a valuable right – the right to a jury trial -- where, as here, the clients' attorneys failed to discuss the existence of an arbitration provision and its serious implications especially when, as here, the clients deliberately did not initial the pages of the Standard Terms containing the arbitration provision. Absent notification and at least some explanation, a client cannot be said to have exercised a real choice in selecting arbitration over litigation under these circumstances. Indeed, the very opposite is true here: BGR's clients made a deliberate choice to reject arbitration in favor of litigating in Superior Court any disputes they might have with BGR and its attorneys.

56. In summary, there is no implied or constructive consent by McDonough to the arbitration provision in the Standard Terms because BGR's Engagement Letter required McDonough to signal his consent to the arbitration provisions by formally acknowledging the arbitration agreement by initialing each of the pages of the Standard Terms (6 and 7).

McDonough did not do so. Plaintiffs accordingly signaled their intent that the courts, not arbitrators, would preside over any disputes with BGR and, further, that the courts, not arbitrators, would decide any "gateway" questions about arbitrability, including the threshold question of whether any agreement to arbitrate existed at all given that Plaintiffs refused to initial the pages of the Standard Terms containing the relevant arbitration provision. This is clear and unmistakable evidence of Plaintiffs' lack of consent to the proposed arbitration agreement and their lack of consent to allow arbitrators, rather than the Superior Court, to decide the "gateway" issue of arbitrability.

4. The First Amended Complaint Prepared By BGR

57. On or about April 14, 2014, Plaintiffs filed their First Amended Complaint, voluntarily dismissing Plaintiff Emmett McDonough, as an individual, from the action. The Complaint named SIMA, Knell, and the Partnership Entities as defendants, asserting five Causes of Action for: 1) Fraud; 2) Breach of Contract; 3) Negligent Misrepresentation; 4) Breach of Fiduciary Duty; and 5) Open Book Accounting. (A true and correct copy of BGR's First Amended Complaint (the "FAC"), without exhibits, is attached hereto as Exhibit F.)

58. In the FAC, the claims for Breach of Contract (2nd Cause of Action), Negligent Misrepresentation (3rd Cause of Action), and Breach of Fiduciary Duty (4th Cause of Action) all are predicated on three key facts that Plaintiffs did not know and could not reasonably have discovered prior to investing with Knell. Specifically, as alleged by BGR in the Knell Action, Knell and SIMA failed to disclose to Plaintiffs the following:

A. The Knell had a prior federal felony conviction for making false statements in loan applications that could adversely impact his ability to secure future loans;

B. That Knell had lied about his prior felony conviction on loan applications for the properties in which Plaintiffs invested; and

C. That Knell provided inaccurate financial statements and information to Plaintiffs which overstated the profitability of the Knell Partnership Entities and failed to conform to GAAP.

59. In the FAC's Second Cause of Action for Breach of Contract, BGR alleged that, because of the foregoing three facts (among others), Knell and SIMA breached the "Obligation of Good Faith and Fair Dealing" provision of the Restated Agreements, which imposed upon Knell and SIMA a fiduciary duty to disclose to Plaintiffs all facts that may adversely affect Plaintiffs' investment interests in the Knell Partnership Entities and to refrain from any acts giving Knell or the Knell Partnership Entities any unfair economic advantage at Plaintiffs' expense. (*See* FAC, Exhibit F hereto, §§ 95 & 96.)

F. THE TRIAL OF THE KNELL ACTION

60. The Knell Action came on for trial on October 7, 2014, in Department 3 of the Superior Court for Santa Barbara County (Anacapa Division), the Honorable Thomas P. Anderle presiding. The McDonough Plaintiffs appeared by attorneys Ross and his partner, Jonathan L. Gottfried, of BGR. The Knell defendants appeared by attorneys Peter J. Bezek and Robert A. Curtis of Foley, Bezek, Behle & Curtis, LLP. A jury of 12 persons and 4 alternates was regularly impaneled and sworn.

1. At Trial, Ross, Gottfried, And BGR Failed To Assert And Advance The Obviously-Meritorious Claim That Knell's Fiduciary Breaches Constituted A Breach Of The Second Restated Agreement, Thereby Triggering Plaintiffs' Put Option Rights To Require Knell And SIMA To Purchase Plaintiffs' Interests In The Knell Partnership Entities

61. During his opening statement, Ross argued that Knell had failed to disclose his prior felony fraud conviction and that he was fraudulently misrepresenting that the Knell Partnership Entities were profitable when in fact they were losing money. Ross did not argue in his opening statement that Knell's fraudulent non-disclosure and misrepresentations breached Knell's Obligation of Good Faith and Fair Dealing under the Second Restated Agreement, thereby triggering Plaintiffs' put option right under subsections 3 and 4 of Section 5 of the Second Restated Agreement.

62. During the body of the trial, Ross elicited testimony showing, among other things, that Knell (i) failed to disclose his prior real estate fraud conviction to Plaintiffs, (ii) prepared misleading loan applications for the Knell Partnership Entities by not disclosing on the applications his prior fraud convictions, (iii) failed to provide accurate financial statements to

Plaintiffs in conformity with GAAP, and (iv) engaged in various financial and accounting chicaneries that misrepresented the financial condition of the Knell Partnership Entities while he and his companies profited from them at the expense of Plaintiffs and other investors.

63. Ross, Gottfried, and BGR, however, never elicited any testimony, or asked any questions, tying Knell's breaches of his fiduciary duties and related fraudulent misconduct to a breach of the Second Restated Agreement's "Obligation of Good Faith and Fair Dealing" provision as a trigger for Plaintiffs' put option rights. Nor did Ross present or request any jury instruction in that regard. Instead, in "[BGR's] Brief Regarding Contract Interpretation" filed during the course of the trial and set for hearing on October 24, 2014 – three days before the parties' closing arguments – Ross and BGR argued that Plaintiffs' right to obligate Knell and SIMA to purchase the Plaintiffs' interests in the Knell Partnership Interests was triggered only by Knell's and SIMA's (1) breach of their obligation to buy back PROMENADE (and another investment property), and (2) Plaintiffs' filing of the Knell lawsuit itself. Ross and BGR did not argue, or seek a jury instruction, that Knell's fraudulent non-disclosure and misrepresentations breached his Obligation of Good Faith and Fair Dealing in the Second Restated Agreement which triggered Plaintiffs' put option rights. (Again, Gottfried did not intervene or otherwise take any steps to correct Ross' omission of the key claim.)

64. Ross, Gottfried, and BGR followed the same exact same approach – and made the identical, critically-material omission -- in his closing argument (on October 27, 2014).

65. The parties' special Joint Verdict Forms submitted to the jury were as follows: (a) Special Verdict Form on Negligent Misrepresentation; (b) Special Verdict Form on Intentional Misrepresentation; (c) Special Verdict Form on Concealment; (d) Special Verdict Form on Breach of Contract; and (e) Special Verdict Form on Breach of Fiduciary Duty.

66. Again, consistent with their prior pattern of failing to assert and advance the meritorious claim that Knell's breaches of fiduciary duty under Section 7 of the Second Restated Agreement triggered Plaintiffs' put option rights under Section 5 of that Agreement, Ross, Gottfried, and BGR, on the Special Verdict Form for Breach of Contract, failed to include a question of whether Knell or SIMA (i) failed to fully disclose to Plaintiffs all facts which may

potentially adversely affect their interests in the Knell Partnership Entities, or (ii) took actions which would result in any of the Knell Partnership Entities or Knell gaining any unfair economic advantage at Plaintiffs' expense. Nor did it include, as an alternative, a question of whether Knell or SIMA failed to disclose an important fact Plaintiffs did not know and could not reasonably have discovered, which question also would have implicated the "Obligation of Good Faith and Fair Dealing" in the Second Restated Agreement (§ 7). The Special Verdict Form on Breach of Contract should have had one or more of those questions together with an instruction (in substance) that if the jury answered that question in the affirmative, then they must find that the Second Restated Agreement was breached and that Knell was required to purchase Plaintiffs' investment interests in the Knell Partnership Entities under Section 5 of the Second Restated Agreement. Neither was done.

67. As a direct and proximate result of this failure and omission by Ross, Gottfried, and BGR, the jury returned inconsistent special verdict findings that:

A. Knell and SIMA "intentionally fail[ed] to disclose an important fact that Plaintiffs did not know and could not reasonably have discovered" (see Special Verdict Form on Concealment, Exhibit G hereto, question no. 1 [12 votes "yes," 0 votes "no"]);

B. Knell and SIMA "intend[ed] to deceive Plaintiffs by concealing the fact or . . . disclose[d] some facts to the Plaintiffs but intentionally failed to disclose other facts, making the disclosures deceptive" (*id.*, question no. 2 [same result]);

C. Knell "breach[ed] his fiduciary duties to Plaintiffs" (see Special Verdict Form on Breach of Fiduciary Duties, Exhibit H hereto, question no. 1 [10 votes "yes," 2 votes "no"];

D. but Knell and SIMA nonetheless did not "do something that the 'side letter agreement[s]' required them to do" (see Special Verdict Form on Breach of Contract, Exhibit I hereto, question no. 4 [0 votes "yes," 12 votes "no"]); and

E. Plaintiffs were not "harmed" as a result of Knell's and SIMA's breaches of their fiduciary duties. (*See* Special Verdict Form on Breach of Fiduciary Duties, Exhibit H hereto, question no. 2 [2 votes "yes," 10 votes "no"].)

68. Defendants' extraordinary error in failing to advance and argue a patently meritorious claim -- indeed, the most important and obviously-valid claim (Knell's fiduciary breach = breach of Section 7 of the Second Restated Agreement = trigger of Plaintiffs' put option right under Section 5(3) & (4) and Plaintiffs' right to receive prevailing party attorneys' fees) -- was not the product of a reasoned judgment call at trial. It was not a considered choice among other possible courses of action or the exercise of informed judgment with respect to an unsettled state of the law that was the subject of professional advice. It was not a calculated decision that was discussed with McDonough and no written analysis or consideration of the wisdom or lack thereof of not advancing this critical claim was ever presented to him.

69. In short, the omission of this meritorious claim was not a rational, professional judgment that would have been made by other reputable attorneys in the community under the same or substantially similar circumstances. No reasonably prudent complex business litigation lawyer -- much less a specialist in complex business litigation trials -- would ever have abandoned this meritorious claim under the facts and circumstances of the Knell Action. The failure to advance this simple but powerful claim resulted in a conflicting special jury verdict that instead should have read, in sum and substance:

> "We the jury find that Knell breached his fiduciary duty under the Obligation of Good Faith and Fair Dealing provisions of the Restated Agreements, which triggers Plaintiffs' put option rights under subsections 3 and 4 of Section 5 of the Second Restated Agreement, requiring Knell to purchase his Plaintiffs' investment interests in the Knell Partnership Entities."

70. Even if the abandonment of this obviously-meritorious claim were deliberate (which is so far-fetched as to strain credulity), it was never discussed with or approved by Plaintiffs; and such an ill-advised judgment call, if it was in fact made, was so manifestly erroneous that no prudent attorney ever would have made that same judgment call under the same or similar circumstances.

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2. Defendants' Belatedly Raised their Meritorious Claim For the First Time in their Motion for Judgment Notwithstanding the Verdict

71. On November 20, 2014, BGR brought before the trial court a JNOV motion in order to set aside the seemingly-inconsistent jury verdict. Defendants finally argued, for the first time, that the jury's special verdict findings regarding Knell's concealment and breach of fiduciary duty necessarily established a breach of the Second Restated Agreement as a matter of law and, therefore, the jury's special verdicts were inconsistent and irreconcilable, and should have been set aside. Attached hereto as Exhibit J is a true and correct copy of the applicable BGR JNOV motion.

72. The trial court denied Defendants' JNOV motion on December 16, 2014, ruling that a party cannot raise new arguments that were not presented to the jury for the first time post-trial in a JNOV motion, and Defendants were estopped from using a JNOV to create a causal link between the existing breach of fiduciary duty and breach of the Second Restated Agreement because Defendants' argument was inconsistent with the position they advanced at trial. As stated by the trial court in its Tentative Ruling denying Defendants' JNOV motion (which the trial court adopted as its final decision):

> The claim [Ross and BGR] make now is inconsistent with the position they took at the outset of the trial and throughout the trial of this lawsuit. The application of the doctrine [judicial estoppel] is discretionary with the Court (People v Torch (2002) 102 Cal. App. 4th 181). The Court elects to apply it here.

This ruling – a true and correct copy of which is attached hereto as Exhibit K, was entirely correct. Claims and arguments not made during trial to the jury cannot be raised for the first time in a post-trial motion (absent unusual circumstances not present here).

3. Defendants' Pointless Appeal of the Knell Judgment And Settlement With Knell and SIMA

73. Attempting to salvage the disastrous result they achieved at trial, due to their inexcusable failure to assert and advance an obviously meritorious claim, Ross and BGR told McDonough that the Knell Judgment had a strong likelihood of being reversed on appeal. However, Plaintiffs chose to dismiss the appeal for a variety of reasons, including because they

believed it would be unsuccessful and a waste of money, and that it would be wiser to use the appeal as leverage to work out a settlement with Knell and his lawyers regarding their prevailing party fee and cost request (which was over $2 million).

74. In particular, an expensive and time-consuming appeal -- which would have required a bond tying up Plaintiffs' assets while the judgment accrued interest -- in all likelihood would have failed because a party may not withhold a theory from the jury and obtain appellate review of the evidence and reversal of the judgment on a theory never tendered at all to the jury or tendered in a different form to the jury. Raising a new or inconsistent theory for the first time on appeal is unavailing because the other side did not have an opportunity to attack it factually or legally in the trial court during the actual course of the trial. In any event, Plaintiffs were injured by Ross' and BGR's professional negligence whether or not a reviewing court might have ultimately reversed the judgment in whole or in part. Whether or not Plaintiffs ultimately might have been able to obtain relief on appeal (which is very doubtful as explained above), Ross' and BGR's professional negligence placed Plaintiffs in a position where they found it necessary to seek relief from harm.

75. Plaintiffs subsequently settled with Knell and the SIMA Entities by, among other concessions, dismissing Plaintiffs' appeal, giving up their respective interests in the Knell Partnership Entities (and other investments valued in excess of $2.8 million), paying an additional $500,000 in attorneys' fees, and exchanging reciprocal releases.

4. As A Direct And Proximate Result Of Defendants' Inexcusable Abandonment Of A Clearly Meritorious Claim, Plaintiffs Have Incurred Substantial Emotional And Financial Damages, Estimated To Total Approximately $6 Million

76. As a direct and proximate cause of BGR's and Ross' abandonment of this clearly meritorious claim at trial, McDonough not only did not receive his interests and payments as promised in the Restated Agreements, he lost all of his Knell investment interests (worth approximately $2.8 million) and was required to pay prevailing party attorneys' fees to opposing counsel in the amount of $500,000, on top of paying $1,240,000 in attorneys' fees and costs to BGR and prior counsel, all while facing an outstanding claim by BGR for unpaid fees and costs in

the purported amount of approximately $1,250,000. Total damages are anticipated to exceed $6 million.

77. These enormous financial losses put a tremendous emotional strain on McDonough, his wife, and sons (who lost millions of dollars also). Under the crushing weight of these financial losses directly and proximately caused by Defendants' professional negligence and fiduciary and contractual breaches, McDonough suffered a nervous breakdown in February of 2015. Rather than express compassion for a client suffering emotionally and psychically from $6 million in losses due to their incompetent trial performance, and their bill padding and over-billing, the Defendants instead took the "low road," blaming the victim of their negligence and misconduct, suggesting that the trial was lost because the jury did not believe his testimony, that he was a "crazy man" who simply could not accept that the jury disbelieved him, and that he should pay up another $1.25 million to them for the valuable service they rendered to him. The callous insensitivity and hubris of BGR, Ross, George, and Gottfried are appalling.

IV. CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(For Professional Negligence [Legal Malpractice] Against Defendants BGR, Ross, and Gottfried)

78. Plaintiffs reallege and incorporate Paragraphs 17 through 77, above, as though fully set forth herein.

79. On February 24, 2014, pursuant to the BGR Engagement Letter, Plaintiffs retained Ross and BGR to provide legal services to Plaintiffs in connection with the Knell Action, thereby establishing an attorney-client relationship between the parties.

80. As Plaintiffs' counsel in the Knell Action, BGR and Ross owed a duty of care to Plaintiffs, requiring them to exercise the knowledge, skill and ability ordinarily exercised by other similarly situated lawyers. Further, as a purported specialist in litigating and trying high-stakes, complex litigation cases, the professional services rendered by Ross and BGR should have been comparable to other complex business trial specialists, imposing upon Ross and BGR a higher, specialist standard of care.

81. Contrary to that duty, BGR, Ross, and Gottfried were professionally negligent in not making and advancing at trial the obviously meritorious claim that a finding by the jury that Knell breached his fiduciary duties to Plaintiffs constituted a breach of Section 7 of the Second Restated Agreement ("Obligation of Good Faith and Fair Dealing") which in turn triggered Plaintiffs' put option rights under Section 5 (3) and (4) of the Second Restated Agreement, requiring Knell and SIMA to purchase Plaintiffs' interests in the Knell Partnership Entities at the contractually-agreed strike price. Even though Ross was the lead trial lawyer, Gottfried, his partner, had asserted the critical claim in BGR's FAC and should have brought to Ross' attention the critical need to assert that claim at trial. His failure to do so was professionally negligent.

82. The negligent acts and omissions of Ross, Gottfried, and BGR were below the standard of care for comparable attorneys who practice in this community, especially attorneys, like Ross, who specialized in handling complex business trials. Defendants' professional's negligence was a substantial factor in Plaintiffs' loss of the Knell Action. The proper handling of the trial of the Knell Action by Ross and BGR would have resulted in a collectible judgment in Plaintiffs' favor, and would have resulted in a collectible, prevailing party attorneys' fee award in Plaintiffs' favor under the Second Restated Agreement (instead of the other way around).

83. As a direct and proximate result of Defendants' incompetence and professional negligence, Plaintiffs have suffered compensatory damages in an amount to be proven at trial, but estimated to be approximately $6 million.

SECOND CAUSE OF ACTION

(For Breach of Contract Against Defendants Ross and BGR)

84. Plaintiffs reallege and incorporate Paragraphs 17 through 77, above, as though fully set forth herein.

85. On or about February 24, 2015, Plaintiffs, on the one hand, and BGR and Ross, on the other hand, entered into the BGR Engagement Letter (Exhibit D hereto) whereby Plaintiffs retained BGR and Ross to provide certain legal services in connection with the Knell Action in a competent fashion. Plaintiffs contract with BGR and Ross did not include Plaintiffs' consent to any of the provisions of BGR's Standard Terms (Exhibit E hereto), because McDonough did not

signal his consent to such terms by initialing the consent provisions on the underline space on the right hand bottom corner of each page of the Standard Terms.

86. Plaintiffs performed all conditions, covenants, and promises required on their part be performed in accordance with the BGR Engagement Letter, with the exception of those conditions which Plaintiffs were prevented and/or relieved from performing by the acts and omissions of the Defendants. Implicit in the parties' contract for legal services was the requirement to perform such services competently and to not require payment for incompetent services, to not bill excessively or dishonestly and to not require payment of excessive or dishonest bills, and for BGR and its attorneys to comply with the Rules of Professional Conduct (and other applicable laws) in the provision of their services and to not require payment of services violating the Rules of Professional Conduct or other applicable laws.

87. Defendants BGR and Ross breached the BGR Engagement Letter by incompetently failing to assert and advance at trial a clearly meritorious claim that should and would have prevailed, and by over-filling and over-staffing the case, charging over $2 million in fees and costs in a case in which the damages were only $2.8 million, and by refusing to turn over all client files to Plaintiffs.

88. As a direct and proximate result of Defendants' incompetence and contractual breaches, Plaintiffs have suffered compensatory damages in an amount to be proven at trial, but estimated to be approximately $6 million.

THIRD CAUSE OF ACTION

(For Breach of Fiduciary Duty Against All Defendants)

89. Plaintiffs reallege and incorporate Paragraphs 17 through 77, above, as though fully set forth herein.

90. A client's retention of a law firm gives rise to a fiduciary relationship between the parties. The scope of an attorney's fiduciary obligations are determined as a matter of law based on the California Rules of Professional Conduct, together with other statutes and general principles relating to other fiduciary relationships. These fiduciary duties include duties of care and loyalty, an obligation to keep the client informed, and on termination, a duty to promptly release to the

client, at the client's request, all client papers and property, irrespective of whether the client has paid for those materials.

91. In breach of their fiduciary duties and professional responsibilities to Plaintiffs, Defendants BGR, Gottfried, and Ross committed the following wrongful acts and omissions:

A. Improperly staffed the underlying legal actions resulting in unnecessary and excessive fees;

B. Failed to properly instruct, direct, assign, monitor and supervise the work of attorneys and support staff, resulting in the unnecessary and duplicative expenditure of time and excessive and unnecessary fees and costs;

C. Failed to conduct proper research, analysis and investigation regarding the meritorious claim that should have been (but was not) asserted and advanced on Plaintiffs' behalf, and regarding the related jury instructions and a special jury verdict form for breach of contract that should have been (but was not) prepared and submitted to the jury;

D. Failed to assert and advance the obviously meritorious claim that a finding by the jury that Knell breached his fiduciary duties to Plaintiffs necessarily constituted a breach of Section 7 of the Second Restated Agreement ("Obligation of Good Faith and Fair Dealing") which in turn triggered Plaintiffs' put option rights under Section 5 (3) and (4) of the Second Restated Agreement, requiring Knell and SIMA to purchase Plaintiffs' interests in the Knell Partnership Entities at the contractually-agreed strike price; and

E. Failed to prepare and submit a related jury instruction and a proper special verdict form for breach of contract in that regard.

92. Pursuant to California State Bar Rules of Professional Conduct 3-700(D) and 4-100(B)(4), an attorney must release the client file to the client or the client's successor attorney even if the client already has a copy of all or part of the file. Virtually everything in the client file is the client's property. The principle of what constitutes a client's papers and property remains unaffected by the termination of the attorney-client relationship or by the client's failure and/or

refusal to pay outstanding legal fees or costs. Defendants BGR, Ross, Gottfried, and George breached their fiduciary duties to Plaintiffs by refusing to deliver Plaintiffs' entire client files to BGR's successor counsel in order to conceal from Plaintiffs the full nature and extent of the deficiencies of Defendants' incompetent representation of Plaintiffs in the Knell Action. Defendants' actions were contrary to Plaintiffs' best interests and were done in the absence of good faith and with a reckless disregard for Defendants' fiduciary obligations to their former clients.

93. As Plaintiffs' attorneys, Defendants also owed a duty to comply with California State Bar Rule of Professional Conduct 4-200 and not to unreasonably or excessively bill Plaintiffs. Defendants' fiduciary duties to Plaintiffs also included the obligation that Defendants would perform the legal services in an efficient and cost effective manner, would not pad or engage in deceptive and abusive billing practices, would charge litigation costs and expenses to Plaintiffs at their own cost and without increase, and that Defendants would exercise their fiduciary duty in respect to their fees, billings and costs charged. Defendants breached their fiduciary duties to Plaintiffs by unreasonably and excessively billing Plaintiffs for the ultimately incompetent legal services performed which caused millions of dollars in damages to Plaintiffs.

94. As a direct and proximate result of Defendants' various fiduciary breaches, Plaintiffs have suffered compensatory damages in an amount to be proven at trial, but estimated to be approximately $6 million.

FOURTH CAUSE OF ACTION

(For Conversion Against All Defendants)

95. Plaintiffs reallege and incorporate Paragraphs 17 through 77, above, as though fully set forth herein.

96. Rule 3-700(D) of the State Bar of California Rules of Professional Conduct provides, in pertinent part, as follows:

> Subject to any protective order or non-disclosure agreement, [the law firm must] promptly release to the client, at the request of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items

reasonably necessary to the client's representation, whether the client has paid for them or not."

97. It is settled in California that the "client papers and property" that the client is entitled to receive under Rule 3-700(D) belong to the client, and not to the law firm. The client's ownership is not altered by the circumstances or the timing of the termination of the attorney-client relationship, or by whether the attorney has been paid for his or her services.

98. Accordingly, Plaintiffs are the owners of and have an immediate right to possess the entirety of their client file presently in the possession of BGR (and its attorneys and staff), including hard-copy documents and electronically-stored information. Plaintiffs' BGR client file is Plaintiffs' personal property.

99. BGR, Ross, George and Gottfried have intentionally and substantially interfered with Plaintiffs' personal property – their client file -- by failing and refusing to turn over the entire and complete client file (including all hard-copy documents and electronically-stored information), despite repeated requests. Rather than turn over Plaintiffs' entire client file, as required by law, Defendants have made a single, wholly-incomplete and inadequate production of files and has refused to make the complete and fulsome production of Plaintiffs' property. On information and belief, Defendants also have destroyed or failed to preserve client files despite notice of their pending fee and malpractice dispute with Plaintiffs.

100. Plaintiffs did not consent to Defendants' withholding and destruction of documents and digitally-stored information that constituted Plaintiffs' client file, which was and is their personal property.

101. Plaintiffs have been harmed by Defendants' withholding and destruction of Plaintiffs' client file in an amount subject to proof at trial; and Defendants' misconduct was a substantial factor in causing Plaintiffs' harm.

102. Among other relief, Plaintiffs are entitled to reasonable compensation for the time and money spent by Plaintiffs in attempting to recover their complete client file; for emotional distress suffered by Plaintiffs as a result of their misconduct; and for such other special damages as may be permitted under applicable law.

103. Special damages are warranted because conversion of a client file by a law firm is not readily amendable to a fair market valuation because the value of the file cannot be readily determined. It was reasonably foreseeable that special injury or harm would result from the conversion of Plaintiffs' client file and reasonable care on Plaintiffs' part would not have prevented the loss.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray that this Court enter Judgment against Defendants, and each of them, as follows:

A. For compensatory damages for the acts complained of herein, in an amount to be proven at trial;

B. For special damages as permitted by law;

C. For such pre- and post-judgment interest as permitted by law; and

D. For such other and further relief as the Court deems necessary or proper.

DATED: December 1, 2015

MARK ANCHOR ALBERT & ASSOCIATES

By: 

Mark Anchor Albert
Attorneys for Plaintiffs
Emmett McDonough, individually and as Trustee of the McDonough Family 1996 Trust dated June 11, 1996, John T. McDonough Family Limited Partnership , Stephen E. McDonough Family Limited Partnership, and David J. McDonough Family Limited Partnership

EXHIBIT A

RESTATED AGREEMENT REGARDING PARTNERSHIP INTERESTS

Parties

This AGREEMENT is entered into among the following parties:

Family Holdings: The 1966 McDonough Family Trust, the John T. McDonough Family Limited Partnership, the Stephen E. McDonough Family Limited Partnership, and the David J. McDonough Family Limited Partnership (collectively the "Family Holdings"); and

Partnership Entities: 4333 PARK TERRACE , LLC and its manager, James P. Knell; (collectively "4333 PARK TERRACE"); SIMA/CARIBBEAN ISLE, LLC; James P. Knell, its Manager (collectively "SIMA/CARIBBEAN ISLE"); 975 BUSINESS CENTER , LLC; James P. Knell, its Manager (collectively "975 BUSINESS CENTER"); STONEBROOK SQUARE, LTD; James P. Knell, its General Partner (collectively "STONEBROOK"): SIMA PROMENADE/BRIARWOOD, LLC, a California limited liability company ("PROMENADE") having James Knell and/or Sima Corporation as its General Manager; SIMA MOUNTAIN VIEW, LLC, a California limited liability company; James P. Knell, its Manager (collectively "SMV"), (which is a merger of SMV and 215 Exchange, LLC a Delaware limited liability company ["1219 Exchange"], and Cascade Village, LLC, a Delaware limited liability company ["CASCADE"], collectively referred to herein for all purposes as "SMV";.with all of the above partnerships are collectively referred to herein for all purposes as the "Partnership Entities (Entity)"; and

Knell: James P. Knell ("Knell"), an individual; and

Sima Corporation: Sima Corporation, its affiliates and subsidiaries ("Sima"); and

Yamshon Trust: Steven Lee Yamshon, Trustee of the Steven Yamshon Living Trust dated July 6, 1999.

Parties: Family Holdings, Knell, Partnership Entities, and Sima are collectively herein referred to as the "Parties."

Recitals

WHEREAS, Knell, Sima, as well as certain Limited Partnership entities have previously agreed to be obligated subject to certain terms and conditions pursuant to a written agreement with Family Holdings entitled "AGREEMENT REGARDING CHANGES TO PARTNERSHIP/LLC INTERESTS," dated February 19, 2003(the "Partnership Agreement");

and

WHEREAS, the parties to the Partnership Agreement agree that the Partnership Agreement shall be replaced in its entirety by this Agreement entitled the "Restated Agreement Regarding Partnership Interests" (hereinafter "Restated Partnership Agreement"): and

WHEREAS, SMV has substituted a "Second Amended and Restated Limited Liability Company Operating Agreement" for the Sima Mountain View, LLC dated as of February 1, 2004, and a First Amendment to Cascade Operating Agreement dated February 1, 2004, as a new operating agreement; and

WHEREAS, Family Holdings is desirous of investing Two Hundred and Eighty Thousand ($280,000) Dollars (the "Reinvestment Monies") into SMV; and

WHEREAS, Family Holdings is additionally desirous of investing the sum of Three Hundred Thousand ($300,000) Dollars in PROMENADE subject to the terms and conditions of this Agreement; and

WHEREAS, the Yamshon Trust is also desirous of investing One Hundred Thousand ($100,000) dollars into PROMENADE with the same rights as to PROMENADE which Family Holdings has under this Restated Partnership Agreement; and

WHEREAS, the Parties herein, for valuable consideration, receipts of which are hereby acknowledged, have each agreed to modify their respective agreements with Family Holdings and Yamshon Trust in writing as set forth herein below.

Operative Provisions

NOW, THEREFORE, based upon the warranties and covenants contained herein, the Parties agree as follows:

1. **Restated Partnership Agreement**. This Restated Partnership Agreement shall replace the Partnership Agreement, with all of the Parties hereto bound by the terms and conditions as set forth herein.

2. **Access to Information.** Without any limitation to the rights concerning inspection and audit rights which Family Holdings has in each of the Partnership Entities, Family Holdings shall additionally have all statutory rights for inspection and access to the books and records of each of the Partnership Entities as described in California Corporations Code Section 15634. Family Holdings shall have the same access as the Manager/ General Partner would have to said books and records without limitation or restriction. Family Holdings shall have the right to access the books and records of Sima of or concerning the interests which Family Holdings has in the Partnership Entities.

3. **Financial Statements.** Without any limitation as to the rights concerning inspection and audits which each partner/member may have under the terms of the respective agreements concerning the Partnership Entities, Family Holdings shall additionally be provided quarterly and annual financial statements from the Partnership Entities. Family Holdings shall have the right to require the Partnership Entities to provide all necessary information and access to their respective books and records in order to have Family Holdings conduct a full and unabridged independent audit of the Partnership Entities financial statements. The Parties agree that reasonable notice to conduct such audits shall be two (2) calendar weeks. Any such audit shall be conducted during regular business hours at the offices of the respective Partnership Entities.

4. **Allocation of Distributions as to Partnership Entities**. As to each of the Partnership Entities, except as otherwise set forth hereunder, the amount of compensation from net operating cash flow, above the amount of the "preferred return" paid to the Manager/General Partner, shall be reduced from fifty (50%) percent to twenty-five (25%) percent with the Family Holdings' percentage increased from fifty (50%) percent to seventy-five (75%) percent. The Manager's participation in the Net Refinancing or Net Sales Proceeds on the sale or refinance (after repayment of all investor capital) shall be reduced from twenty-five (25%) percent to twelve and one-half (12.5%) percent, and Family Holdings shall be increased from seventy-five (75%) percent to eighty-seven and one-half (87.5%) percent.

5. **Increase in Preferred Return for SMV and PROMENADE**. As it relates to SMV and PROMENADE, Family Holdings shall be entitled to an increase in the "Preferred Return" from eight (8%) percent up to ten (10%) percent in the event there is income in excess of eight (8%) percent from the net operating cash flow necessary to pay the"Preferred Return" due investors.

6. **Put Option on Change of Manager**. Family Holdings shall have the sole right, but not the obligation, to compel any of the Partnership Entities and/or Knell separately and/or jointly, to purchase the Family Holdings' interest in the Partnership Entities within one hundred and twenty (120) days, upon the occurrence of any of the following events: Knell/Sima is removed, resigns, withdraws, and/or is no longer the Manager/General Partner of any one of the Partnership Entities; Knell/Sima; any of the Partnership Entities, has instituted an action (either through arbitration or judicially) against Family Holdings or has an action instituted against it/him in which Family Holdings is a party.;

The purchase price for Family Holdings' interest by Partnership Entities/Knell for Family Holdings' interest(s) under this paragraph shall be the greatest of the following amounts:

a) the amount of Family Holdings' pro rata interest as last established by an appraisal completed within one year prior to the notice of intent to exercise this Put Option; or

b) an amount equal to the fair market value of Family Holdings' pro rata interest

as of the date of notice of intent to exercise this Put Option as established by an appraisal by a certified appraiser selected by Family Holdings and the respective Partnership Entity, which appraisal shall be completed within ninety (90) days of Family Holdings' notice and paid by the involved Partnership Entity.

c) The principal amount of the initial capital contribution made by Family Holdings, as to each Partnership Entity (which are agreed to be for all purposes as follows):

i) 4333 PARK TERRACE the sum of Four Hundred and Twenty Thousand ($420,000) Dollars;

ii) SIMA/CARIBBEAN ISLE the sum of Three Hundred Thousand ($300,000) Dollars;

iii) 975 BUSINESS CENTER the sum of One Hundred and Eighty Thousand ($180,000) Dollars;

iv) STONEBROOK the sum of Three Hundred and Seventy-Five Thousand ($375,000) Dollars;

v) SMV the sum of Two Hundred and Eighty Thousand ($280,000) Dollars.

vi) PROMENADE the sum of Three Hundred Thousand ($300,000) Dollars.

vii) PROMENADE, as to the Yamshon Trust, the sum of One Hundred Thousand ($100,000) Dollars.

d) Family Holdings shall retain its ownership as to the subject Partnership Entity and all rights thereto until full payment is made. In the event Family Holdings' interest is not timely purchased by the respective Partnership Entity and/or Knell as set forth herein within one hundred and twenty (120) days respectively, then interest shall accrue until such time as the consideration to be paid under this paragraph is received by Family Holdings at the greater rate of ten (10%) percent, simple interest, per annum, or the then existing current investor yield.

7. **Put Option As to PROMENADE/SMV** . In addition to the Put Option as set forth in paragraph 6 herein above, for a period of forty-eight months from May 1, 2004, Family Holdings shall have the sole right, for any reason whatsoever in its sole discretion, but not the obligation to obligate PROMENADE/SMV and Knell both individually and/or jointly to purchase the Family Holdings interest in PROMENADE/SMV for the sum equal to the initial capital contribution for

each PROMENADE/SMV, plus any accrued and unpaid preferred return or other member distribution, to which Family Holdings would be entitled to at the time of transfer of its interest to PROMENADE/SMV on the following terms and conditions:

a) payment shall be made within one hundred and twenty (120) days after a demand in writing to Knell/PROMENADE/SMV to repurchase its interest by Family Holdings;

b) Family Holdings shall not be obligated to release its interest in PROMENADE/SMV until full payment is made;

c) in the event Family Holdings is not purchased by PROMENADE/SMV and/or Knell as set forth herein within one hundred and twenty (120) days then interest shall accrue until such time as the initial capital contribution is paid in full at the greater rate of ten (10%) percent simple interest per annum or the then existing current investor yield.

8. **Obligation of Good Faith and Fair Dealing**. The Parties agree that in addition to all the fiduciary duties which the Partnership Entities and Knell individually owe to Family Holdings by virtue of their relationship with Family Holdings, both Knell individually, and Partnership Entities acknowledge that it/he have additional fiduciary duties to fully disclose to Family Holdings all facts which may potentially adversely affect Family Holdings' interests in the Partnership Entities. Knell and the Partnership Entities represent that it/he will take no action which would result in any of the Partnership Entities or Knell gaining any unfair economic advantage at the expense of the Family Holdings' interests.

9. **Attorneys Fees and Costs.** In the event of breach of this Agreement, all reasonable costs and attorneys' fees incurred, or reasonably related to the enforcing of this Agreement, including, but not limited to, the enforcement of the Put Option as described herein above, and all the reasonable costs and expenses incurred in any proceeding, including bankruptcy, associated herewith, shall be paid to the prevailing party. Interest on any unpaid amount due hereunder shall bear interest at the rate of ten (10%) percent, simple interest, per annum. In addition, all costs and attorneys' fees incurred in collecting any judgment shall be added to the judgment upon application to the court.

10. **Miscellaneous.**

Authority. The execution, delivery and performance of this Agreement have been duly and effectively authorized by each of the Partnership Entities. No other actions on the part of any of the Partnership Entities are necessary to authorize this Agreement or the transactions contemplated hereby. Each of the Partnership Entities shall provide an opinion letter by its counsel that this Agreement is enforceable and that there are no further actions necessary to ensure the validity of this Agreement. Each of the Partnership Entities and Knell, jointly and

severally, agree to hold harmless, indemnify and defend Family Holdings from any claim asserted against Family Holdings by any third party contesting the validity or enforce ability of this Agreement.

Law. For all purposes, this Agreement shall be construed in accordance with the laws of the States of California. Venue for all purposes of this Agreement shall be Santa Barbara County Superior Court, Anacapa Division, in Santa Barbara, California.

Successors/Transfers of Interest. This Agreement shall be binding upon and shall inure to the benefit of each of the Parties hereto and their respective subsidiaries, affiliates, predecessors, successors, divisions, members, partners, managers, attorneys, agents, representatives, heirs, and upon all assigns, transferees. This Agreement shall be binding upon any of Partnership Entities, irrespective of any merger and/or change of ownership. This Agreement shall be binding upon, and inure to the benefit of the respective successors and permitted assigns of the Parties.

Partial Invalidity. In case anyone or more of the provisions contained in this Agreement should be invalid, illegal or unenforceable in any respect, such provision shall be deemed modified to the extent necessary to permit its enforcement under applicable law and the validity, legality or enforce ability of the remaining provisions hereof shall not be affected nor impaired and shall remain in full force and effect.

Notices. All notices, requests, instructions and other documents to be given herein shall be deemed duly given if in writing and sent by registered or certified mail:

If to Family Holdings:

Emmett McDonough
1201 Las Alturas
Santa Barbara, CA 93103

If to Yamshon Trust:

Steven Yamshon
P.O. Box 7428
Newport Beach, CA 92657
Fax #: (714) 667-3552

With a copy to:

Thomas J. Dietsch, Esq.
924 Anacapa Street, Suite 1-T
Santa Barbara, CA 93101

Fax #: (805) 963-2273

If to any of the Partnership Entities and/or Knell:

115 W. Canon Perdido Street, Suite 200
Santa Barbara, CA 93101

11. YAMSHON TRUST. The rights and obligations as set forth in paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of this Restated Partnership Agreement shall apply with full force and effect as between the Yamshon Trust, on the one hand, and PROMENADE, Knell and Sima, on the other hand.

IN WITNESS WHEREOF, the Parties, through their duly authorized representatives, as appropriate, have hereunto set their hands and caused this Agreement to be duly executed as of the date and year first above written.

SIGNATURE PAGE FOLLOWS:

JAMES P. KNELL

Dated: May _____ 2004

_____

JAMES P. KNELL, individually

SIMA CORPORATION

Dated: May _____ 2004

By: _____

Name: _____

Its: _____

PARTNERSHIP ENTITIES

SIMA MOUNTAIN VIEW, LLC

Dated: May _____ 2004

By: _____

Name: _____

Its: _____

4333 PARK TERRACE, LLC

Dated: May _____ 2004

By: _____

Name: _____

Its: _____

SIMA PROMENADE/BRIARWOOD, LLC

Dated: May_____ 2004

By: _____

Name: _____

Its: _____

Dated: May _____ 2004

STONEBROOK SQUARE, LTD

By: _____
Name: _____
Its: _____

Dated: May _____ 2004

SIMA/CARIBBEAN ISLE, LLC

By: _____
Name: _____
Its: _____

Dated: May _____ 2004

975 BUSINESS CENTER, LLC

By: _____
Name: _____
Its: _____

YAMSHON TRUST

THE YAMSHON LIVING TRUST DATED JULY 6, 1999

By Steven Lee Yamshon Trustee
Name: Steven Lee Yamshon
Its: Trustee

EXHIBIT 41-0009

FAMILY HOLDINGS

THE 1966 McDONOUGH FAMILY TRUST

Dated: May 11th 2004

By _____
Name: Emmett McDonough
Its: trustee

THE JOHN T. McDONOUGH FAMILY LIMITED PARTNERSHIP

Dated: May 11th 2004

By _____
Name: Emmett McDonough
Its: trustee

THE STEPHEN E. McDONOUGH FAMILY LIMITED PARTNERSHIP

Dated: May 11th 2004

By _____
Name: Emmett McDonough
Its: trustee

THE DAVID J. McDONOUGH FAMILY LIMITED PARTNERSHIP

Dated: May 11th 2004

By _____
Name: Emmett McDonough
Its: trustee

EXHIBIT B

Exhibit

FIRST RESTATED AGREEMENT REGARDING PARTNERSHIP INTERESTS

Parties

This AGREEMENT is entered into among the following parties:

Family Holdings: The 1966 McDonough Family Trust, the John T. McDonough Family Limited Partnership, the Stephen E. McDonough Family Limited Partnership, and the David I. McDonough Family Limited Partnership, which are collectively referred to as the "Family Holdings"; and

Partnership Entities: SIMA MOUNTAIN VIEW, LLC, a California limited liability company; JAMES P. KNELL, its Manager, SIMA CASCADE VILLAGE, LLC, James P. Knell, its Manager which collectively is refered hereto as "SMV", and SIMA CORONADO PLAZA, LLC., a California limited liability company and its Manager, James P. Knell/Sima Corporation, which are collectively referred to herein for all purposes as "CORONADO"; with all of the above partnerships collectively referred to herein for all purposes as the "Partnership Entities" ("Entity"); and

Knell: James P. Knell ("Knell"), an individual; and

Sima Corporation: Sima Corporation, its affiliates and subsidiaries ("Sima"); and

Parties: Family Holdings, Knell, Partnership Entities, and Sima are collectively herein referred to as the "Parties."

Recitals

WHEREAS, Knell, Sima, as well as certain Limited Partnership entities have previously agreed to be obligated subject to certain terms and conditions pursuant to a written agreement with Family Holdings entitled "AGREEMENT REGARDING CHANGES TO PARTNERSHIP/LLC INTERESTS," dated February 19, 2003 which was thereafter replaced by a written agreement entitled "RESTATED AGREEMENT REGARDING PARTNERSHIP INTERESTS" dated May 2004 (collectively the "Prior Partnership Agreements"); and

WHEREAS, this Agreement is intended to affect only Family Holdings interest in SMV and CORONADO and no other parties or entities in the Prior Partnership Agreements which shall remain in full force and effect without modification, alteration or amendment herein unless expressly set forth in this Agreement; and

WHEREAS, SMV is now offering "Additional Units" for sale in SMV for the purpose of purchasing and development and improvement of a seven acre parcel contiguous to Phase 1 of the Project ("Phase 2") to be managed and governed by a Second Amended and Restated Limited Liability Company Operating Agreement dated February 1, 2004, as amended by a First Amendment to Second Amended and Restated Limited Liability Company Operating Agreement dated April 2, 2004 (the "SMV Operating Agreement"); and

WHEREAS, Family Holdings now holds interests in SMV in Phase 1 in the sum of $280,000 (the "Original Investment") and desires to invest the total additional sum of $66,800 in the Additional Units of Phase 2 (the "Additional Investments"); and

WHEREAS, Family Holdings intends to invest the sum of One Hundred Fifty Thousand ($150,000) Dollars in CORONADO; and

WHEREAS, the Parties herein, for valuable consideration, receipt of which is hereby acknowledged, have each agreed to amend and clarify Family Holdings rights as to the Original Investments and Additional Investments in SMV and also as to Family Holdings investment in CORONADO in writing as set forth herein below.

Operative Provisions

NOW, THEREFORE, based upon the warranties and covenants contained herein, the Parties agree as follows:

1. CORONADO/SMV Partnership Operating Agreement. This Agreement shall be effective as to the Family Holdings interest in CORONADO and its partnership Operating Agreement. This Agreement shall also apply to and be enforceable as to Family Holdings interest in SMV as to both the Original Investment and the Additional Investment in SMV's Operating Agreement with all of the Parties hereto bound by the terms and conditions as set forth herein.

2. Access to Information. Without any limitation to the rights concerning inspection and audit rights which Family Holdings has in each of the Partnership Entities, Family Holdings shall additionally have all statutory rights for inspection and access to the books and records of each of the Partnership Entities as described in California Corporations Code Section 15634. Family Holdings shall have the same access as the Manager/ General Partner would have to said books and records without limitation or restriction. Family Holdings shall have the right to access the books and records of Sima concerning, referencing or relating to the interests which Family Holdings has in the Partnership Entities.

3. Financial Statements. Without any limitation as to the rights concerning inspection and audits which each partner/member may have under the terms of the respective agreements concerning the Partnership Entities, Family Holdings shall additionally be provided quarterly and

annual financial statements from the Partnership Entities. Family Holdings shall have the right to require the Partnership Entities to provide all necessary information and access to their respective books and records in order to have Family Holdings conduct a full and unabridged independent audit of the Partnership Entities financial statements. The Parties agree that reasonable notice to conduct such audits shall be two (2) calendar weeks. Any such audit shall be conducted during regular business hours at the offices of the respective Partnership Entities.

4. Allocation of Distributions as to Partnership Entities. As to each of the Partnership Entities, except as otherwise set forth hereunder, the amount of compensation from net operating cash flow, above the amount of the "Preferred Return" paid to the Manager/General Partner, shall be reduced from fifty (50%) percent to twenty-five (25%) percent with the Family Holdings' percentage increased from fifty (50%) percent to seventy-five (75%) percent. The Manager's participation in the Net Refinancing or Net Sales Proceeds on the sale or refinance (after repayment of all investor capital) shall be reduced from twenty-five (25%) percent to twelve and one-half (12.5%) percent, and Family Holdings shall be increased from seventy-five (75%) percent to eighty-seven and one-half (87.5%) percent.

5. Increase in Preferred Return for SMV and CORONADO.

As to SMV: Family Holdings shall be entitled to an increase in the "Preferred Return" from eight (8%) percent up to ten (10%) percent in the event there is income in excess of eight (8%) percent from the net operating cash flow necessary to pay the Preferred Return due investors.

As To CORONADO: Family Holdings shall be entitled to an increase in the Preferred Return from seven (7%) percent up to ten (10%) percent in the event there is income in excess of seven (7%) percent from the net operating cash flow necessary to pay the Preferred Return due investors.

6. Put Option on Change of Manager. Family Holdings shall have the sole right, but not the obligation, to compel SMV, CORONADO, Knell and/or Sima either separately or jointly, to complete the purchase of Family Holdings' interest in SMV and/or CORONADO within one hundred and twenty (120) days, upon written notice by Family Holdings of the occurrence of any of the following events (the "Notice"): (1) Knell and or Sima is removed, resigns, withdraws, and/or is no longer the Manager/General Partner of either of the Partnership Entities; (2) Knell/Sima and/or either SMV and/or CORONADO has instituted a legal action (either through arbitration or judicially) against Family Holdings or has an action instituted against it/him in which Family Holdings is named as a party; (3) if SMV, CORONADO, Knel and or Sima has breached this Agreement either jointly or separately (4) if there is any breach of Prior Partnership Agreements by Knell and/or Sima concerning Family Holdings interests therein.

The purchase price for Family Holdings' interest under this paragraph 6 shall be the greatest of the following amounts:

a) the dollar amount equal to Family Holdings' pro rata interest in CORONADO and/or SMV (without any discount as to marketability or as to minority interest) as last established by an appraisal completed within one year prior to the notice of intent to exercise this Put Option; or

b) the dollar amount equal to the fair market value of Family Holdings' pro rata interest (without any discount as to marketability or as to minority interest) in CORONADO and/or SMV as of the date of notice of intent to exercise this Put Option as established by an appraisal by a certified appraiser selected by Family Holdings and the respective Partnership Entity, which appraisal shall be completed within ninety (90) days of Family Holdings' notice and paid by the involved Partnership Entity.

c) the total principal amount of the Total Capital Invested made by Family Holdings, as to CORONADO and/or SMV, together with any accrued and/or unpaid Preferred Return or any other distributions due Family Holdings. The Total Capital Invested for the purpose of this paragraph 6 shall be as follows:

SMV:

	Original Investment	Additional Investment	Total Capital Invested
The 1966 McDonough Family Trust	$100,000	$ 23,500	$123,500
John F. McDonough Family Limited Partnership	$ 60,000	$ 14,100	$ 74,100
Stephen E. McDonough Family Limited Partnership	$ 60,000	$ 14,100	$ 14,100
David J. McDonough Family Limited Partnership	$ 60,000	$ 14,100	$ 14,100

CORONADO: $150,000

d) the determination of the value of Family Holdings' interest in CORONADO and/or SMV shall be completed within ninety (90) days of the Notice. If not, then Family Holdings shall elect the method of valuation and complete the same.

c) Family Holdings shall retain its ownership as to either CORONADO and/or SMV and all rights thereto until full payment of the amount determined hereinder is made. In the event Family Holdings' interest is not completed by the full payment of cash by CORONADO and/or SMV as set forth herein within one hundred and twenty (120) days, then interest of the total amount due shall accrue until such time as the consideration to be paid under this paragraph is received by Family Holdings at the greater rate of ten (10%) percent, simple interest, per annum, or the then existing current investor yield.

7. General Put Option As to CORONADO/SMV. In addition to the Put Option as set forth in paragraph 6 herein above, for a period of forty-eight months from May 1, 2005, Family Holdings shall have the sole right, for any reason whatsoever in its sole discretion, but not the obligation to obligate CORONADO/SMV and Knell both individually and/or jointly to purchase the Family Holdings interest in CORONADO/SMV for the sum equal to the Total Capital Investment and accrued interest as set forth in paragraph 6 above, for either CORONADO and/or SMV, plus any accrued and unpaid preferred return or other member distribution, to which Family Holdings would be entitled to at the time of transfer of its interest to CORONADO and/or SMV on the following terms and conditions:

a) payment shall be made within one hundred and twenty (120) days after a demand in writing to Knell, Sima, CORONADO, and/ or SMV to repurchase the subject interest by Family Holdings;

b) Family Holdings shall not be obligated to release its interest in CORONADO and/or SMV until full payment is made;

c) in the event Family Holdings is not purchased by CORONADO, SMV, and/or SIMA and/or Knell as set forth herein within one hundred and twenty (120) days, then interest shall accrue until such time as the initial capital contribution is paid in full at the greater rate of ten (10%) percent, simple interest per annum, or the then existing current investor yield.

8. Obligation Of Good Faith and Fair Dealing. The Parties agree that in addition to all the fiduciary duties which the Partnership Entities and Knell individually owe to Family Holdings by virtue of their relationship with Family Holdings, both Knell individually, and Partnership Entities acknowledge that it/he have additional fiduciary duties to fully disclose to Family Holdings all facts which may potentially adversely affect Family Holdings' interests in the Partnership Entities. Knell and the Partnership Entities represent that it/he will take no action which would result in any of the Partnership Entities or Knell gaining any unfair economic advantage at the expense of the Family Holdings' interests.

9. Attorneys Fees and Costs. In the event of breach of this Agreement, all reasonable costs and attorneys' fees incurred, or reasonably related to the enforcing of this Agreement, including, but not limited to, the enforcement of the Put Option as described herein above, and all the reasonable costs and expenses incurred in any proceeding, including bankruptcy, associated herewith, shall be paid to the prevailing party. Interest on any unpaid amount due hereunder shall bear interest at the rate of ten (10%) percent, simple interest, per annum. In addition, all costs and attorneys' fees incurred in collecting any judgment shall be added to the judgment upon application to the court.

10. Miscellaneous.

Authority. The execution, delivery and performance of this Agreement have been duly and effectively authorized separately by CORONADO, SMV, Knell, and Sima. No other actions on the part of any of the Partnership Entities are necessary to authorize this Agreement or the transactions contemplated hereby. CORONADO and SMV agree as a material provision hereof to provide an opinion letter by its counsel that this Agreement is enforceable and that there are no further actions necessary to ensure the validity of this Agreement. CORONADO, SMV, Knell and Sima each, jointly and severally, agree to hold harmless, indemnify and defend Family Holdings from any claim asserted against Family Holdings by any third party contesting the validity or enforce ability of this Agreement or any portion hereof.

Law. For all purposes, this Agreement shall be construed in accordance with the laws of the States of California. Venue for all purposes of this Agreement shall be Santa Barbara County Superior Court, Anacapa Division, in Santa Barbara, California.

Successors/Transfers of Interest. This Agreement shall be binding upon and shall inure to the benefit of each of the Parties hereto and their respective subsidiaries, affiliates, predecessors, successors, divisions, members, partners, managers, attorneys, agents, representatives, heirs, and upon all assigns, transferees. This Agreement shall be binding upon any of Partnership Entities, irrespective of any merger and/or change of ownership. This Agreement shall be binding upon, and inure to the benefit of the respective successors and permitted assigns of the Parties.

Partial Invalidity. In case anyone or more of the provisions contained in this Agreement should be invalid, illegal or unenforceable in any respect, such provision shall be deemed modified to the extent necessary to permit its enforcement under applicable law and the validity, legality or enforce ability of the remaining provisions hereof shall not be affected nor impaired and shall remain in full force and effect.

Notices. All notices, requests, instructions and other documents to be given herein shall be deemed duly given if in writing and sent by registered or certified mail:

If to Family Holdings:

Emmett McDonough
1201 Las Alturas
Santa Barbara, CA 93103

With a copy to:

Thomas J. Dietsch, Esq.
924 Anacapa Street, Suite 1-T
Santa Barbara, CA 93101
Fax #: (805) 963-2273

If to any of the Partnership Entities and/or Knell:

115 W. Canon Perdido Street, Suite 200
Santa Barbara, CA 93101

11. Family Holdings Rights. Any rights and obligations as set forth in paragraphs 6, 7 and 10 of this Agreement shall apply with full force and effect as between the Family Holdings on the one hand, and Knell and/or Sima on the other hand as to the Prior Partnership Agreements. In the event of a conflict of terms then Family Holdings shall have the right but not the obligation to elect to enforce the terms of this Agreement as set forth in paragraphs 6, 7 and 10 herein.

IN WITNESS WHEREOF, the Parties, through their duly authorized representatives, as appropriate, have hereunto set their hands and caused this Agreement to be duly executed as of the date and year first above written.

SIGNATURE PAGE FOLLOWS:

Dated: April 25, 2005

JAMES P. KNELL

JAMES P. KNELL, individually

Dated: April 25, 2005

SIMA CORPORATION

By: _____
Name: _____
Its: _____

PARTNERSHIP ENTITIES

Dated: April 25, 2005

SIMA MOUNTAIN VIEW, LLC

By: _____
Name: _____
Its: _____

Dated: April 25, 2005

SIMA CORONADO PLAZA, LLC

By: _____
Name: _____
Its: _____

FAMILY HOLDINGS

Dated: April 6th, 2005

THE 1966 McDONOUGH FAMILY TRUST

By _____
Name: R. Emmett McDonough
Its: trustee / manager

Dated: April 6th 2005

THE JOHN T. McDONOUGH FAMILY LIMITED PARTNERSHIP

By: R. Emmett McDonough
Name: Emmett McDonough
Its: trustee / manager

Dated: April 6th 2005

THE STEPHEN E. McDONOUGH FAMILY LIMITED PARTNERSHIP

By: R. Emmett McDonough
Name: R. Emmett McDonough
Its: trustee / manager

Dated: April 6th 2005

THE DAVID J. McDONOUGH FAMILY LIMITED PARTNERSHIP

By: R. Emmett McDonough
Name: Emmett McDonough
Its: trustee / manager

WP\WPDOC\MCDONO [illegible]

EXHIBIT C

SECOND RESTATED AGREEMENT REGARDING PARTNERSHIP INTERESTS

Parties

This AGREEMENT is entered into among the following parties:

Family Holdings: The 1966 McDonough Family Trust; the John T. McDonough Family Limited Partnership; the Stephen E. McDonough Family Limited Partnership; and the David J. McDonough Family Limited Partnership, which are collectively referred to as the "Family Holdings"; and

Partnership Entities: SIMA Village Faire, LLC , a California limited liability company, and its Manager, James P. Knell/Sima Corporation, which are collectively referred to herein for all purposes as "Village Faire"; OAC Athletic, LLC which is referred to herein for all purposes as "OAC", LC Apartments, LLC which is referred to herein for all purposes as "LC Apartments", with all of the above partnerships collectively referred to herein for all purposes as the "Partnership Entities"; and

Knell: James P. Knell ("Knell"), an individual; and

Sima Corporation: Sima Corporation, its affiliates and subsidiaries ("Sima"); and

Parties: Family Holdings, Knell, Partnership Entities, and Sima are collectively herein referred to as the "Parties."

Recitals

WHEREAS, Knell, Sima, as well as certain Partnership Entities have previously agreed to be obligated subject to certain terms and conditions pursuant to a written agreement with Family Holdings entitled "AGREEMENT REGARDING CHANGES TO PARTNERSHIP/LLC INTERESTS" dated February 19, 2003 which was thereafter replaced by a written agreement entitled "RESTATED AGREEMENT REGARDING PARTNERSHIP INTERESTS" dated May 2004 and thereafter replaced by a written agreement entitled "FIRST RESTATED AGREEMENT REGARDING PARTNERSHIP INTERESTS" dated April 25, 2005 (collectively the "Prior Partnership Agreements"); and

WHEREAS, this Agreement is intended to affect Family Holdings interest in Village Faire, OAC, LC Apartments and all of the other partnership interests in the Prior Partnership Agreements which shall remain in full force and effect without modification, alteration or amendment herein unless expressly set forth in this Agreement; and

WHEREAS, Family Holdings has acquired an interest in Village Faire as a part of a refinance of its interest in SIMA/Carribean Isle, LLC, a Delaware limited liability company ("Carribean Isle"); and

WHEREAS, Family Holdings is acquiring four (4) units costing Two Hundred Thousand Dollars ($200,000) in OAC; and

WHEREAS, Family Holdings is in the process of acquiring a Two Hundred and Fifty Thousand ($250,000) Dollar interest in LC Apartments; and

WHEREAS, Family Holdings wishes to incorporate the terms of this Agreement as a part of the operating agreements regarding its interest in Village Faire, OAC and LC Apartments; and

WHEREAS, the Parties herein, for valuable consideration, receipt of which is hereby acknowledged, have each agreed to amend and clarify Family Holdings' rights in Village Faire, OAC and LC Apartments, and as to all other Family Holdings investments as set forth herein below.

Operative Provisions

NOW, THEREFORE, based upon the warranties and covenants contained herein, the Parties agree as follows:

1. Village Faire/OAC/LC Apartments. This Agreement shall be effective as to the Family Holdings interests in Village Faire, OAC and LC Apartments. This Agreement shall also apply to and be enforceable as to Family Holdings interests in all investments it holds as identified in the Prior Partnership Agreements with all of the Parties hereto bound by the terms and conditions as set forth herein.

2. Access to Information. Without any limitation to the rights concerning inspection and audit rights which Family Holdings has in each of the Partnership Entities, Family Holdings shall additionally have all statutory rights for inspection and access to the books and records of each of the Partnership Entities as described in California *Corporations Code* Section 15634. Family Holdings shall have the same access as the Manager/ General Partner would have to said books and records without limitation or restriction. Family Holdings shall have the right to access the books and records of Sima concerning, referencing or relating to the interests which Family Holdings has in the Partnership Entities.

3. Financial Statements. Without any limitation as to the rights concerning inspection and audits which each partner/member may have under the terms of the respective agreements concerning the Partnership Entities, Family Holdings shall additionally be provided quarterly and annual financial statements from the Partnership Entities. Family Holdings shall have the right to require the Partnership Entities to provide all necessary information and access to their

respective books and records in order to have Family Holdings conduct a full and unabridged independent audit of the Partnership Entities financial statements. The Parties agree that reasonable notice to conduct such audits shall be two (2) calendar weeks. Any such audit shall be conducted during regular business hours at the offices of the respective Partnership Entities.

4. **Allocation of Distributions as to Partnership Entities**. The following described division of distributions shall be effective for all of Family Holdings interests in the Partnership Entities (Village Faire/OAC/LC Apartments), and all Family Holdings interests in the Prior Partnership Agreements. The amount of compensation from net operating cash flow and Net Portfolio Income above the amount of the Preferred Return and/or Additional Monthly Return paid to the Manager/General Partner, shall be reduced to twenty (25%) percent with the Family Holdings' percentage increased to seventy-five (75%) percent; the Manager/General Partner's participation in the Net Refinancing or Net Sales Proceeds/ Net Capital Proceeds on the sale or refinance (after repayment of all investor capital) shall be reduced to twelve and one-half (12.5%) percent, and Family Holdings shall be increased to eighty-seven and one-half (87.5%) percent.

Family Holdings shall be entitled to an increase in the "Preferred Return" in each of the Partnership Entities from the stated existing Preferred Return up to ten (10%) percent in the event there is income in excess of the amount necessary to pay the respective Preferred Return due investors, in each of the Partnership Entities, from the net operating cash flow.

5. **Put Option on Change of Manager/General Partner**. Family Holdings shall have the sole right, but not the obligation, to compel Knell and/or Sima, either separately or jointly, to complete the purchase of Family Holdings' interest in Village Faire, OAC, LC Apartments, or any of Family Holdings interest in the Prior Partnership Agreements within one hundred and twenty (120) days, upon written notice by Family Holdings of the occurrence of any of the following events (the "Notice"): (1) Knell and/ or Sima is removed, resigns, withdraws, and/or is no longer the Manager/General Partner of the Partnership Entities; (2) Knell/Sima, Village Faire, LC Apartments and/or OAC has instituted a legal action (either through arbitration or judicially) against Family Holdings or has an action instituted against it/him in which Family Holdings is named as a party; (3) if Village Faire, OAC, LC Apartments, Knell and/or Sima has breached this Agreement, either jointly or separately; or (4) if there is any breach of Prior Partnership Agreements by Knell and/or Sima concerning Family Holdings interests therein.

The purchase price for Family Holdings' interest under this paragraph 5 shall be the greater of the following amounts:

a) the dollar amount equal to Family Holdings' pro rata interest in Village Faire/OAC/LC Apartments (without any discount as to marketability or as to minority interest) as last established by an appraisal completed within one year prior to the notice of intent to exercise this Put Option; or

b) the dollar amount equal to the fair market value of Family Holdings' pro rata interest

(without any discount as to marketability or as to minority interest) in Village Faire/OAC/LC Apartments as of the date of notice of intent to exercise this Put Option as established by an appraisal by a certified appraiser selected by Family Holdings and the respective Partnership Entity, which appraisal shall be completed within ninety (90) days of Family Holdings' notice and paid by the involved Partnership Entity.

c) the total principal amount of the Total Capital Invested made by Family Holdings, as to OAC, LC Apartments, and up to Ninety Five Thousand ($95.000) as to Village Faire, together with any accrued and/or unpaid Preferred Return or any other distributions due Family Holdings.

d) the determination of the value of Family Holdings' interest as set forth in paragraphs a), b), or c) above in Village Faire/OAC/LC Apartments shall be completed within ninety (90) days of the Notice. If not, then Family Holdings shall elect the method of valuation and complete the same.

e) Family Holdings shall retain its ownership as to Village Faire/OAC/ LC Apartments and all rights thereto until full payment of the amount determined under this paragraph 5 is made. In the event Family Holdings' interest is not completed by the payment of cash by Knell/ Sima as set forth herein within one hundred and twenty (120) days, then interest of the total amount due shall accrue until such time as the consideration to be paid under this paragraph is received by Family Holdings at the then existing current investor yield or ten percent (10%), whichever is greater.

6. **General Put Option as to Sima Promenade/Briarwood LLC**. On April 20. 2009, Family Holdings validly exercised a general put pursuant to the First Restated Agreement dated April 25, 2005 as to its interests in Sima Coronado Plaza, LLC, Sima Cascade Village, LLC ("SMV"), and Sima Promenade/Briarwood LLC. The Parties agree that that exercise of the general put option is withdrawn, except that Family Holdings retains its right to exercise a general put option only as to Sima Promenade/Briarwood LLC until December 31, 2011 under the First Restated Agreement dated April 25, 2005, subject to the following terms and conditions:

Family Holdings shall have the sole right, for any reason whatsoever in its sole discretion, but not the obligation to obligate Sima and Knell both individually and/or jointly, to purchase the Family Holdings interest in Sima Promenade/Briarwood LLC for the sum equal to the total investment and the then accrued interest for Sima Promenade/Briarwood LLC, plus any accrued and unpaid Preferred Return or other distribution, to which Family Holdings would be entitled to at the time of transfer of its interest on the following terms and conditions:

a) payment shall be made within one hundred and twenty (120) days after a demand in writing to Knell, Sima, and Sima Promenade/Briarwood LLC to repurchase the subject interest by Family Holdings;

b) Family Holdings shall not be obligated to release its interest until full payment is made;

c) in the event Family Holdings is not purchased as set forth herein within one hundred and twenty (120) days, then interest shall accrue at the greater of ten percent (10%) or the then existing investor yield until such time as the initial capital contribution is paid in full.

7. **Obligation of Good Faith and Fair Dealing**. The Parties agree that in addition to all the fiduciary duties which the Partnership Entities and Knell individually owe to Family Holdings by virtue of their relationship with Family Holdings, both Knell individually, and Partnership Entities acknowledge that it/he have additional fiduciary duties to fully disclose to Family Holdings all facts which may potentially adversely affect Family Holdings' interests in the Partnership Entities. Knell and the Partnership Entities represent that it/he will take no action which would result in any of the Partnership Entities or Knell gaining any unfair economic advantage at the expense of the Family Holdings' interests.

8. Attorneys Fees and Costs. In the event of a breach of this Agreement, all reasonable costs and attorneys' fees incurred, or reasonably related to the enforcing of this Agreement, including, but not limited to, the enforcement of the Put Option as described herein above, and all the reasonable costs and expenses incurred in any proceeding, including bankruptcy, associated herewith, shall be paid to the prevailing party. Interest on any unpaid amount due hereunder shall bear interest at the rate of ten (10%) percent, simple interest. per annum. In addition, all costs and attorneys' fees incurred in collecting any judgment shall be added to the judgment upon application to the court.

9. Miscellaneous.

Authority. The execution, delivery and performance of this Agreement have been duly and effectively authorized separately by Sima and Knell. No other actions on the part of any of the Partnership Entities are necessary to authorize this Agreement or the transactions contemplated hereby. Knell, and Sima agree as a material provision hereof to provide an opinion letter by its counsel that this Agreement is enforceable and that there are no further actions necessary to ensure the validity of this Agreement. Knell, and Sima each jointly and severally agree to hold harmless, indemnify and defend Family Holdings from any claim asserted against Family Holdings by any third party contesting the validity or enforce ability of this Agreement or any portion hereof. The execution of this Agreement by James P. Knell as General Partner and Member additionally obligates the Partnership Entities as identified in the Prior Partnership Agreements to the terms and conditions which obligate them under this Agreement.

Law. For all purposes, this Agreement shall be construed in accordance with the laws of the States of California. Venue for all purposes of this Agreement shall be Santa Barbara County Superior Court, Anacapa Division, in Santa Barbara, California.

Successors/Transfers of Interest. This Agreement shall be binding upon and shall inure to the benefit of each of the Parties hereto and their respective subsidiaries, affiliates, predecessors, successors, divisions, members, partners, managers, attorneys, agents, representatives, heirs, and upon all assigns, transferees. This Agreement shall be binding upon any of Partnership Entities, irrespective of any merger and/or change of ownership. This Agreement shall be binding upon, and inure to the benefit of the respective successors and permitted assigns of the Parties.

Allocation of Interests Among Family Holdings. Emmett McDonough shall have the right to allocate the investment made by the various members of Family Holdings as the funds are invested which shall not affect any of the provisions of this Agreement.

Partial Invalidity. In case anyone or more of the provisions contained in this Agreement should be invalid, illegal or unenforceable in any respect, such provision shall be deemed modified to the extent necessary to permit its enforcement under applicable law and the validity, legality or enforce ability of the remaining provisions hereof shall not be affected nor impaired and shall remain in full force and effect.

Notices. All notices, requests, instructions, and other documents to be given herein shall be deemed duly given if in writing and sent by registered or certified mail:

If to Family Holdings:

Emmett McDonough
1201 Las Alturas
Santa Barbara, CA 93103

If to any of the Partnership Entities and/or Knell:

115 W. Canon Perdido Street, Suite 200
Santa Barbara, CA 93101

10. **Family Holdings' Rights.** Notwithstanding anything to the contrary contained in this Agreement, all the rights without exception of Family Holdings in the Prior Partnership Agreements shall apply with full force and effect as between the Family Holdings on the one hand, and Knell and/or Sima on the other hand.

IN WITNESS WHEREOF, the Parties, through their duly authorized representatives, as appropriate, have hereunto set their hands and caused this Agreement to be duly executed as of the date and year below.

//

JAMES P. KNELL

Dated: September _____, 2010

JAMES P. KNELL, individually

JAMES P. KNELL

Dated: September _____, 2010

JAMES P. KNELL, as Managing Member
and General Partner

SIMA CORPORATION

Dated: September _____, 2010

By: _____

Name: _____

Its: _____

SIMA Village Faire, LLC

Dated: September _____, 2010

By: _____

Name: _____

Its: _____

SIMA Promenade/Briarwood, LLC

Dated: September _____, 2010

By: _____

Name: _____

Its: _____

OAC ATHLETIC, LLC

Dated: September _____, 2010

By: _____

Name: _____

Its: _____

LC APARTMENTS, LLC

Dated: September _____, 2010

By: _____

Name: _____

Its: _____

FAMILY HOLDINGS

THE 1966 MCDONOUGH FAMILY TRUST

Dated: September 20, 2010

By: _____

Name: R. Emmett McDonough

THE JOHN T. MCDONOUGH FAMILY LIMITED PARTNERSHIP

Dated: September 20, 2010

By: _____

Name: R. Emmett McDonough

Its: manager

THE STEPHEN E. MCDONOUGH FAMILY

LIMITED PARTNERSHIP

Dated: September _____, 2010

By: _____

Name: R. Emmett McDonough

Its: manager

THE DAVID J. MCDONOUGH FAMILY LIMITED PARTNERSHIP

Dated: September _____, 2010

By: _____

Name: R. Emmett McDonough

Its: manager

EXHIBIT D

BGR BROWNE GEORGE ROSS
LOS ANGELES • SAN FRANCISCO

Andrew A. August
Ira G. Bibbero
Lori S. Brody
Allan Browne
Eric M. George
Jonathan L. Gottfried
Christopher K. Lui
Elena Nutenko
Kevin F. Rooney
Peter W. Ross
Joseph P. Russoniello
Benjamin D. Scheibe
Peter Shimamoto
Lee A. Weiss
Keith J. Wesley
Russell F. Wolpert
Lauren Woodland

February 24, 2014

Peter W. Ross
pross@bgrfirm.com

File No.

VIA U.S. MAIL AND EMAIL – emmettmcdonough@gmail.com

Mr. Emmett McDonough
Trustee of the McDonough Family 1996 Trust, dated June 11, 1996
1201 Las Alturas Road
Santa Barbara, CA 93103

John T. McDonough Family Limited Partnership
Stephen E. McDonough Family Limited Partnership
David J. McDonough Family Limited Partnership
c/o Mr. Emmett McDonough
1201 Las Alturas Road
Santa Barbara, CA 93103

Re: *Emmett McDonough, Trustee of the McDonough Family 1996 Trust, etc., et al. v. James Knell, et al.*,
Santa Barbara Superior Court Case No. 1415007

Dear Emmett:

Pardon the formality of this letter, but California law requires that attorney fee agreements be in writing. Consequently, this letter – together with the accompanying Standard Terms of Retention of Browne George Ross LLP ("Standard Terms") – will serve as the fee agreement between John T. McDonough Family Limited Partnership, Stephen E. McDonough Family Limited Partnership, David J. McDonough Family Limited Partnership, and you, as Trustee of the McDonough Family 1996 Trust, dated June 11, 1996, (collectively, "you" or "Clients"), on the one hand, and Browne George Ross LLP ("BGR"), on the other hand, and will confirm the scope and terms of our engagement. This agreement may not be changed or modified except by a subsequent document signed by all of us.

Scope of Representation

Subject to the terms of this engagement letter, we will represent your interests with respect to the case referenced above through trial and any post-trial motions.

Joint Clients/Conflict of Interest

We will be representing all of you in this matter.

Multiple representation may result in economic or tactical advantages. You should be aware, however, that multiple representation may also involve significant risks. Most important, multiple representation may result in divided or at least shared attorney-client loyalties.

Based on the information that has been provided to us, we do not believe that our representation currently involves any *actual* conflict of interest. However, because we will be simultaneously representing multiple clients, there exists a *potential* conflict of interest insofar as each clients may have different potential liabilities, benefits or views regarding strategy and settlement. In the course of our representation, should any of the interests of our joint clients actually conflict, we will endeavor to apprise you promptly of any such conflict so that you can decide whether you wish to obtain independent counsel.

Although we are not currently aware of any actual or reasonably foreseeable adverse effects of such divided or shared loyalty, it is possible that our representation of you and of the other clients we are representing may subsequently be materially limited because of issues that arise. Furthermore, because we will be jointly retained by multiple clients, in the event of a dispute between them, the attorney-client privilege generally will not protect communications that have taken place between those clients (including you) and attorneys in our firm. Moreover, pursuant to this "joint client" arrangement, anything you disclose to us may be disclosed to any other jointly represented clients.

Notwithstanding these risks, you have advised us that in this matter at the present time you do not desire to seek other counsel, but instead you desire that we represent the multiple interests and clients described above. We are required to bring this matter to your attention and obtain your consent, as well as the consent of all co-clients, before representing you in this matter.

Retainer

We have requested an initial retainer for this matter of $35,000. We will not be able to undertake any work or make any appearances on your behalf until the retainer has been paid and you have signed this fee agreement letter, initialed each page of the Standard Terms, and returned both to us. The retainer will be placed in our client trust account and will be applied against payment of our last statement for services and fees. As soon as it has been determined that all costs pertaining to this matter have been billed to BGR by the respective service suppliers, if there is any excess of the retainer over the amount of the last statement and final costs, the excess will be refunded to you at that time.

Fees For Services Rendered And Costs Advanced

All attorney and paralegal time will be billed at the standard hourly rates currently prevailing at my firm. Please be advised, however, these rates are subject to revision as set forth in the accompany Standard Terms. My current hourly rate is $650. I anticipate that the work on your file will be carried out by me or attorneys billing at a lower hourly rate. In addition, we will incur various costs and expenses in performing legal services on your behalf, and you agree to pay for those costs and expenses in addition to our hourly fees.

Success Fee

In addition to the compensation referenced above, you agree to pay BGR a success fee of 10% of all monies recovered on your behalf (whether by judgment or settlement) if the total recovery exceeds $10 million. This fee is not established by law and is subject to negotiation between the parties.

Binding Agreement

Please carefully review this letter, as well as the accompanying Standard Terms.

You hereby acknowledge and represent that you have been advised to obtain independent counsel to review and advise you regarding the terms, obligations, and consequences of this agreement, including the accompanying Standard Terms, and you acknowledge that you have done so, or, having been so advised, have voluntarily chosen not to seek any such advice.

To indicate your understanding of and agreement to the foregoing terms and conditions, including the accompanying Standard Terms, please sign this letter, initial each page of the Standard Terms, and return both to me for our records.

Thank you for retaining BGR. We appreciate the confidence which you have placed in our firm, and we intend to represent you vigorously in this matter. Please feel free to call me if you have any questions.

Very truly yours,

Peter W. Ross

I confirm that I have read, understand, and agree to all terms and conditions as set forth above and in the Standard Terms.

Dated: 3/7, 2014

By _____
Emmett McDonough, Trustee of the
McDonough Family 1996 Trust,
dated June 11, 1996

John T. McDonough Family Limited Partnership

Dated: 3/7, 2014

By _____

Its _____

[Signatures continue on next page]

Stephen E. McDonough Family Limited Partnership

Dated: 3/7, 2014

By _____

Its Manager

David J. McDonough Family Limited Partnership

Dated: 3/7, 2014

By _____

Its Manager

EXHIBIT E

STANDARD TERMS OF RETENTION
OF BROWNE GEORGE ROSS LLP

Except as modified in writing by the accompanying engagement agreement or in another writing signed by Browne George Ross LLP ("BGR") and the Client (as set forth in the accompanying engagement agreement), the following provisions shall apply to the relationship between BGR and the Client. **These provisions are important and should be reviewed carefully by the Client prior to executing the accompanying engagement agreement.**

1. **Fees.** Fees for BGR's services shall be based on time spent and the hourly billing rates in effect at the time that the services are performed. By retaining BGR, the Client is agreeing to each of the following billing practices:

(a) **Block Billing.** BGR's customary practice is for each timekeeper (including attorneys, paralegals, legal assistants and clerks) to aggregate the activities performed on a given matter during a particular day and to provide only a general description of those activities without identifying how much time was spent on each particular task (i.e., time is not broken out for individual tasks where more than one task is performed in a block of time).

(b) **Minimum Time Increments.** Unless otherwise specifically agreed in writing, BGR's attorneys, paralegals, legal assistants, clerks, and other timekeepers shall bill their time in minimum increments of a quarter of an hour.

(c) **Billing Rate Increases.** The billing rates of BGR's attorneys, legal assistants, clerks, and other timekeepers vary, depending generally on the experience and capabilities of the persons involved, and BGR adjusts these rates from time to time. The Client specifically agrees that BGR shall not be required to provide the Client with any notice of such increases beyond setting forth the applicable hourly rates in the monthly invoices that are provided to the Client.

(d) **Tasks That Will Be Billed to the Client.** The time for which the Client will be charged includes all time spent by BGR's personnel on behalf of the Client including, but not limited to, in telephone and office conferences with the Client and with other attorneys, witnesses, consultants, court personnel, and others; in conferences among BGR's legal personnel; performing factual investigation; performing legal research; drafting letters, emails, agreements, pleadings, briefs and other documents; traveling; waiting in court; and on depositions and other discovery proceedings. Consistent with a "team approach," BGR may use multiple personnel, including multiple attorneys, on the same or similar activities and may charge for each individual involved in such activities, including but not limited to (i) preparing for and attending depositions, (ii) preparing for and attending court hearings, (iii) preparing for and attending meetings with the Client or others, or in conversations with the Client or others, and (iv) engaging in intra-office conferences among attorneys, paralegals, and others.

2. **Costs and In-House Services.** In addition to fees, BGR will bill for costs and expenses incurred and ancillary services provided. The Client agrees to pay for those costs and expenses in addition to BGR's hourly fees. The costs and expenses commonly include, but are

not limited to, computer research time (including among others Westlaw or Lexis), process servers' fees, fees fixed by law or assessed by courts or other agencies, photocopying costs, messenger fees, delivery service fees, travel expenses (including mileage, parking, airfare, lodging, meals, and ground transportation), long-distance telephone charges, word processing expenses, secretarial overtime, and filing fees. Certain of such items may be charged at more than BGR's direct cost to cover its estimated, associated overhead. Unless special arrangements are made, BGR does not take responsibility for paying fees and expenses of third parties (such as, for example, court reporters and videographers) which will be the Client's responsibility and may be billed directly to the Client.

3. **Retainer Payments.** In addition to any retainer to which we have currently agreed, BGR reserves the right, as a condition to the provision of further services, to require an increase in the retainer: (i) within 60 days of trial or arbitration, (ii) in the event that the amount of work which BGR is called upon to perform, or expenses BGR is required to incur, exceeds BGR's current expectation, or (iii) in the event of the Client's failure to make timely payment of BGR's invoices. BGR reserves the right to apply any retainer held by BGR on the Client's behalf to satisfy any unpaid invoice for fees or expenses owed to BGR, even if that retainer was initially provided for a matter different from the one to which the retainer is applied. As set forth more fully in Section 20, the Client grants BGR a security interest in all retainers paid to BGR to secure payment of BGR's invoices for fees and expenses.

4. **Estimates Not Binding.** Although BGR may furnish estimates of fees or costs that are anticipated to be incurred, these estimates are not binding, are subject to unforeseen circumstances, and are by their nature inexact. Accordingly, the Client shall remain obligated to pay BGR's fees and costs irrespective of whether they exceed any estimates or budgets that BGR may provide, unless otherwise agreed in a signed document.

5. **Billing and Payment.** Fees and expenses are generally billed monthly and are due and payable within 30 days of the date of our statement. BGR expects prompt payment. BGR reserves the right to postpone or defer providing additional services or to discontinue the representation if billed amounts are not paid when due. In addition, BGR reserves the right to charge simple interest at 10% per annum on all sums, whether for fees or costs, not paid within 30 days of the date of our statement. BGR's failure to impose this interest charge on any particular occasion, or on multiple occasions, is not a waiver of BGR's right thereafter to impose this charge on any other occasion. Questions regarding the amount or descriptions set forth on a bill must be raised in writing within 30 days of receipt of the bill, or they are waived.

6. **Insurance.** Unless otherwise agreed in a signed document, BGR shall have no responsibility to investigate or evaluate whether insurance is available for any matter covered by this engagement or to tender any matter covered by this engagement to any insurance carrier.

7. **Termination by the Client.** The Client has the right at any time, in the Client's sole discretion, to terminate BGR's services and representation, provided that any court in which BGR is representing the Client allows BGR's withdrawal from such representation. Upon termination, the Client will remain obligated to pay for all services rendered and costs incurred on the Client's behalf prior to the date of such termination or which are reasonably necessary thereafter.

8. **Termination by BGR.** BGR reserves the right to withdraw from representing the Client for any reason, including among other things the Client's failure to honor the terms of this engagement agreement, the Client's failure to make timely payment of any invoice, the Client's failure to cooperate or follow BGR's advice on a material matter, or if any fact or circumstance arises that, in BGR's view, renders our continuing representation unlawful or unethical. If BGR elects to withdraw, the Client will take all steps necessary to free BGR of any obligation to perform further services, including the execution of any documents necessary to complete BGR's withdrawal and/or the substitution of other attorneys in place of BGR. BGR will be entitled to be paid immediately at the time of withdrawal for all services rendered and costs incurred on the Client's behalf.

9. **Date of Termination.** BGR's representation of the Client will be considered terminated at the earlier of (i) the substantial completion of BGR's substantive work for the Client, (ii) the Client's termination of the representation, provided BGR's withdrawal is allowed by each court in which BGR is representing the Client, or (iii) BGR's withdrawal from the representation.

10. **Related Activities.** If any claim or action is brought against BGR or any of its personnel based on the Client's negligence or misconduct, or if any employee or member of BGR's professional staff is asked or required to testify or produce documents as a result of BGR's representation of the Client, or if BGR must defend the confidentiality of the Client's communications in any proceeding, the Client agrees to pay BGR for any resulting attorney's fees, costs, or damages, including the hourly charges of BGR's professional staff, even if BGR's representation of the Client has ended.

11. **No Guarantee of Outcome.** BGR does not and cannot guarantee any outcome in a matter. Rather, any expressions on BGR's part concerning the potential outcome of the Client's legal matters are expressions of BGR's best professional judgment. Such opinions are necessarily limited by BGR's knowledge of the facts and are based upon the state of the law at the time they are expressed. BGR does not guarantee the outcome of the matter on which BGR is representing the Client, and the Client agrees to pay BGR's fees and costs regardless of any outcome, absent a specific written agreement to the contrary signed by the Client and BGR.

12. **Identity of the Client.** BGR's client for the purpose of its representation is only the person or entity identified as the Client in the engagement agreement accompanying these Standard Terms of Retention. Unless expressly agreed in a signed document, BGR is not undertaking the representation of any related or affiliated person or entity, nor any parent, sister, subsidiary, or affiliated corporation or entity, nor any of their or the Client's officers, directors, agents, partners, or employees (except that BGR may elect to represent, at the Client's request, certain of the Client's officers, directors, or employees solely in their representative capacities as constituents of the Client, and not in their individual capacities, without a further signed document.) The Client acknowledges and agrees that there are no third-party beneficiaries of any kind to BGR's engagement.

13. **Client's Duty of Cooperation/Notice of Material Client Events.** The Client will cooperate fully in BGR's efforts on the Client's behalf. Moreover, the Client will cooperate with BGR in efforts to comply with BGR's professional responsibilities relating to the

representation, including responsibilities relating to conflicts of interest as well as other matters. Without limiting the foregoing, the Client (i) acknowledges that any change of control, merger, consolidation, recapitalization, insolvency, bankruptcy, reorganization, acquisition or sale of material assets or equity interests, or similar transaction or event involving the Client (any such transaction or event, a "Material Client Event") may have conflict-of-interest and other implications for BGR's representation of Client, and (ii) agrees to notify BGR promptly in writing of any such Material Client Event and to provide BGR such information as it may reasonably request relating to such Material Client Event, to provide BGR with a reasonable opportunity to adequately evaluate and address any implications of the Material Client Event.

14. **Client's Duty To Preserve Evidence.** Because this matter involves litigation, the Client has a legal duty (i) to preserve, and (ii) to stop implementing any policies or practices that involve destruction, deletion, and/or overwriting of, documents, records, data, and/or other evidence (including, but not limited to, email messages and other documents, records, and data that are electronically stored) that have, or might be claimed by any party to have, any relevance whatsoever to the facts, circumstances, events, and/or issues involved in this matter, or that might be claimed by any party to have the potential to lead to the discovery of any relevant evidence concerning this matter. The Client agrees to comply with the duties set forth above, and agrees to take all actions necessary to ensure those duties are complied with (including, but not limited to, notifying and instructing orally and in writing all appropriate employees and other persons in the Client's control to take all actions necessary to comply with those duties.) The Client acknowledges that its failure to comply with these duties could potentially result in serious negative consequences to the Client in this matter, including but not limited to (i) court orders striking the Client's pleadings, entering judgment against the Client, precluding the Client from introducing evidence and precluding the Client from disputing certain issues, (ii) giving instructions to the jury that are damaging to the Client's case, and (iii) imposing monetary sanctions or awards requiring the Client to pay the other parties' attorneys' fees and costs.

15. **Payment Notwithstanding Dispute.** In the event of any dispute that relates to BGR's entitlement to any payment, all amounts billed by BGR shall be paid by the Client, which may thereafter dispute the propriety of the billing and seek a refund.

16. **BGR's Document Retention and Destruction Policy.** It is BGR's policy to maintain documents in storage for a period of one (1) year after the conclusion of a matter. Upon the expiration of that period, all documents in a file will be destroyed and discarded without further notice to Client. Accordingly, if there are any documents or papers that the Client wishes to remove from its file at the conclusion of a matter, the Client must advise BGR of that request to ensure that the documents are not destroyed.

17. **Patents and Trademarks.** Unless otherwise agreed in a signed writing, BGR does not undertake to advise or to provide reminders to the Client with respect to the due date of maintenance fees for any patent or trademark or to pay such fees on the Client's behalf.

18. **Disqualification of Other Counsel.** It is a serious matter to seek to disqualify an attorney or law firm from representing another party in a legal proceeding or transaction. The Client agrees that BGR shall have the discretion to decide, in its sole judgment, whether to seek to disqualify an attorney or law firm from representing another party in a legal proceeding or

transaction, irrespective of the basis on which disqualification could be sought. If BGR declines to seek to disqualify an attorney or law firm from representing another party in a legal proceeding or transaction, the Client shall remain entitled to engage alternative counsel to undertake such work.

19. **Claims Against Other Attorneys.** Unless otherwise specifically agreed in writing, BGR does not, and will not, undertake to advise the Client with respect to any claims or potential claims that the Client may have against other law firms or attorneys who either currently represent, or have previously represented, the Client. The Client hereby agrees and acknowledges that unless BGR specifically agrees in writing to undertake such a duty, BGR shall have no duty to advise the Client concerning such matters, even if BGR actually knows or should know of the existence of such claims or potential claims. The Client further agrees that unless otherwise specifically agreed in writing, to the extent the Client wishes to consider any claims or potential claims against any other law firms or attorneys who either currently represent, or have previously represented, the Client, the Client shall consult with other counsel of its own choosing concerning such claims or potential claims. Further, the Client acknowledges that the statute of limitations in California for bringing claims against attorneys is generally one year from the date the Client suffers any injury, though that period may be tolled or extended under certain circumstances as provided by law.

20. **Attorneys' Lien; Security Interest.** The Client hereby grants to BGR (i) a contractual lien pursuant to California Civil Code section 2881 on any and all claims or causes of action (and all proceeds thereof) that are the subject of BGR's representation of the Client and (ii) a security interest in any retainer paid to BGR in connection with BGR's representation of the Client (and all interest thereon and other proceeds thereof). This attorneys' lien, as well as this security interest in any such advance, will each be for any sums due and owing to BGR for its services and any amounts advanced by BGR on the Client's behalf. This attorneys' lien will attach to any recovery that the Client may obtain, whether by arbitration, mediation, judgment, settlement or otherwise. If requested by BGR, the Client agrees to execute a financing statement (UCC-1) and/or an appropriate deposit account or securities account control agreement in connection with the attorneys' lien and/or the security interest granted to us hereby.

21. **Scope of Representation; Application to Subsequent Matters.** The scope of BGR's representation of the Client is limited to the specific matter or matters identified in the accompanying engagement agreement and such additional matters as to which the Client and BGR may in their mutual discretion agree from time to time. In each case, BGR's agreement to any expansion of the scope of its representation of the Client will be subject, among other things, to such additional conflict checks, waivers, retainers, approvals, and other arrangements as BGR may in its professional judgment deem necessary or appropriate in the circumstances. Except as otherwise expressly provided in any written engagement agreement (or a written amendment of a prior engagement agreement) between BGR and Client entered into in connection with such expansion of the scope of BGR's representation, the agreement reflected in these Standard Terms of Retention, and in the accompanying engagement agreement, applies to BGR's current representation of the Client and to any subsequent matters that BGR agrees to undertake on the Client's behalf.

22. **No Modification Except by Signed Writing.** No provision of the engagement agreement or the Standard Terms of Retention can be waived, modified, amended, or supplemented except in a writing that is signed by authorized representatives of both BGR and the Client.

23. **Integrated Agreement.** The engagement agreement and these Standard Terms of Retention constitute the entire understanding and contract between the Client and BGR with respect to the subject matter referred to herein. Any and all other representations, understandings, or agreements, whether oral, written, or implied, are merged into and superseded by the terms of the engagement letter and the Standard Terms of Retention.

24. **Dispute Resolution.** BGR AND THE CLIENT AGREE THAT ANY DISPUTE BETWEEN THEM REGARDING ANY MATTER RELATED TO OR ARISING OUT OF BGR'S ENGAGEMENT BY THE CLIENT, OR ANY PARTY'S PERFORMANCE OF THE AGREEMENT GOVERNING BGR'S SERVICES (INCLUDING, BUT NOT LIMITED TO, THE QUALITY OF THE SERVICES THAT BGR RENDERS, CLAIMS FOR MALPRACTICE OR PROFESSIONAL NEGLIGENCE, OR COLLECTION OR PAYMENT OF BILLS, FEES OR COSTS) SHALL BE RESOLVED BY CONFIDENTIAL ARBITRATION IN LOS ANGELES, CALIFORNIA, BY A SINGLE ARBITRATOR FROM JAMS, WHO MUST BE A RETIRED JUDGE, HAVING SERVED ON ANY FEDERAL COURT LOCATED IN CALIFORNIA, OR THE CALIFORNIA SUPERIOR COURT, OR A HIGHER COURT OF THE STATE OF CALIFORNIA. THE RULES AND PROCEDURES OF JAMS SHALL GOVERN THE PROCEEDINGS, INCLUDING THE SELECTION OF THE ARBITRATOR. BOTH BGR AND THE CLIENT HEREBY WAIVE ANY CLAIM THAT LOS ANGELES, CALIFORNIA IS AN INCONVENIENT FORUM, OR THAT EITHER PERSONAL OR SUBJECT MATTER JURISDICTION IS LACKING IN LOS ANGELES, CALIFORNIA. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, BGR AND THE CLIENT AGREE THAT ALL QUESTIONS, AS TO WHETHER OR NOT AN ISSUE CONSTITUTES A DISPUTE SUBJECT TO ARBITRATION UNDER THIS SECTION, SHALL BE RESOLVED BY ARBITRATION IN ACCORDANCE WITH THIS SECTION. ALL DISPUTES SHALL BE RESOLVED IN ACCORDANCE WITH THE SUBSTANTIVE LAW OF THE STATE OF CALIFORNIA (INCLUDING BUT NOT LIMITED TO ALL STATUTES OF LIMITATION APPLICABLE TO ANY CLAIM ASSERTED IN THE ARBITRATION), WITHOUT REGARD TO CONFLICT-OF-LAW PRINCIPLES. THE ARBITRATOR SHALL HAVE THE POWER TO IMPOSE ANY SANCTION AGAINST ANY PARTY PERMITTED BY CALIFORNIA LAW. ANY AWARD SHALL BE FINAL, BINDING AND CONCLUSIVE UPON THE PARTIES, AND A JUDGMENT RENDERED THEREON MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. THE CLIENT IS ADVISED THAT, BY AGREEING TO THIS PROVISION, THE CLIENT IS GIVING UP THE RIGHT TO A JURY OR COURT TRIAL AND THE RIGHT TO APPEAL.

NOTWITHSTANDING THE ABOVE, THE CLIENT MAY FIRST RESORT TO NON-BINDING ARBITRATION PURSUANT TO THE FEE ARBITRATION PROCEDURES OF THE STATE BAR OF CALIFORNIA, AS SET FORTH IN CALIFORNIA BUSINESS & PROFESSIONS CODE SECTIONS 6200 ET SEQ. IF THE CLIENT CHOOSES TO RESORT TO SUCH NON-BINDING ARBITRATION AND THE NON-BINDING ARBITRATION

FAILS TO RESOLVE FULLY THE PARTIES' DISPUTE, EITHER PARTY MAY THEN DEMAND BINDING ARBITRATION PURSUANT TO THE TERMS OF THIS SECTION 24 WITHIN 90 DAYS AFTER RECEIVING THE AWARD IN THE NON-BINDING ARBITRATION.

25. **Severance.** If any provision of these Standard Terms of Retention of BGR is held invalid, void or unenforceable, the balance of the provisions shall, nevertheless, remain in full force and effect and shall in no way be affected, impaired or invalidated. The waiver of any one provision shall not be deemed a waiver of any other provision herein.

EXHIBIT F

BROWNE GEORGE ROSS LLP
Peter W. Ross (State Bar No. 109741)
pross@bgrfirm.com
Jonathan L. Gottfried (State Bar No. 282301)
jgottfried@bgrfirm.com
2121 Avenue of the Stars, Suite 2400
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697
Attorneys for Plaintiffs
EMMETT McDONOUGH, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA – ANACAPA DIVISION

EMMETT MCDONOUGH, as Trustee of the MCDONOUGH FAMILY 1996 TRUST DATED JUNE 11, 1996; JOHN T. MCDONOUGH FAMILY LIMITED PARTNERSHIP; STEPHEN E. MCDONOUGH FAMILY LIMITED PARTNERSHIP; and DAVID J. MCDONOUGH FAMILY LIMITED PARTNERSHIP,

Plaintiffs,

vs.

JAMES KNELL; SIMA CORPORATION; SIMA MANAGEMENT CORPORATION; WEST COAST ATHLETIC CLUBS; 4333 PARK TERRACE, LLC; 975 BUSINESS CENTER, LLC; CASCADE VILLAGE, LLC; SIMA PROMENADE/BRIARWOOD, LLC; SIMA CORONADO PLAZA, LLC; LC APARTMENTS, LLC; SIMA VILLAGE FAIRE, LLC; SIMA/CARIBBEAN ISLE, LLC; and DOES 1 to 100, inclusive,

Defendants.

Case No.: 1415007
The Honorable Thomas P. Anderle

FIRST AMENDED COMPLAINT FOR

1. Fraud
2. Breach of Contract
3. Negligent Misrepresentation
4. Breach of Fiduciary Duty
5. Open Book Accounting

DEMAND FOR JURY TRIAL

Action filed: December 21, 2012
Trial Date: October 7, 2014

1. All allegations made in this complaint are based upon information and belief, except those allegations which pertain to the named Plaintiffs, which are based on personal knowledge. The allegations of this complaint stated on information and belief are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

SUMMARY OF CASE

2. This case concerns a Ponzi scheme. Starting in 2003, James Knell agreed to guarantee Plaintiffs' investments in certain real-estate ventures. After Plaintiffs invested their money, Knell falsely represented that Plaintiffs' investments were profitable and claimed to pay distributions to Plaintiffs from these profits. In fact, the ventures were losing money, and Knell paid distributions to Plaintiffs from their own equity.

3. Knell falsely represented to Plaintiffs that he would be a fiduciary and disclose all facts that could potentially adversely affect Plaintiffs' interests in the investments. Knell neither disclosed to Plaintiffs that he had a prior federal conviction for lying on loan applications nor did he disclose that he had continued to lie on real estate loan applications for properties in which Plaintiffs invested.

4. Meanwhile, Knell and the other Defendants profited handsomely from their scheme by secretly loaning money to the real-estate ventures, charging high interest rates, and then timely paying themselves back using the capital of Plaintiffs and other investors.

5. When Plaintiffs attempted to cash out of their investments and obtain their promised return, Defendants refused and exposed the reality of their Ponzi scheme.

6. The conduct of Knell and the other defendants was, among other things, fraudulent, in breach of their contracts, and in breach of their fiduciary duties. As a direct and proximate result of Knell and the SIMA Defendants' unlawful behavior, Plaintiffs have suffered substantial damages in an amount to be proven at trial.

JURISDICTION AND VENUE

7. The Superior Court of Santa Barbara County has jurisdiction to hear this case because the damages sought exceed the jurisdictional minimum necessary to constitute an unlimited civil case.

8. The circumstances from which this case arises occurred within the County of Santa Barbara, State of California.

PARTIES

A. The Plaintiffs:

9. At all times mentioned herein, Plaintiff Emmett McDonough was and is Trustee of the MCDONOUGH FAMILY 1996 TRUST, dated June 11, 1996, a California trust. In all agreements between the parties, MCDONOUGH FAMILY 1996 TRUST is erroneously referred to as "The 1996 McDonough Family Trust."

10. At all times mentioned herein, Plaintiff JOHN T. MCDONOUGH FAMILY LIMITED PARTNERSHIP was and is a California limited partnership with Emmett McDonough as its Managing Partner.

11. At all times mentioned herein, Plaintiff STEPHEN E. MCDONOUGH FAMILY LIMITED PARTNERSHIP was and is a California limited partnership with Emmett McDonough as its Managing Partner.

12. At all times mentioned herein, Plaintiff DAVID J. MCDONOUGH FAMILY LIMITED PARTNERSHIP was and is a California limited partnership with Emmett McDonough as its Managing Partner.

13. The MCDONOUGH FAMILY 1996 TRUST, JOHN T. MCDONOUGH FAMILY LIMITED PARTNERSHIP, STEPHEN E. MCDONOUGH FAMILY LIMITED PARTNERSHIP and DAVID J. MCDONOUGH FAMILY LIMITED PARTNERSHIP were established for the benefit of Emmett McDonough, his wife Jadwiga McDonough and their three sons, John, Stephen, and David McDonough.

14. The MCDONOUGH FAMILY 1996 TRUST, JOHN T. MCDONOUGH FAMILY LIMITED PARTNERSHIP, STEPHEN E. MCDONOUGH FAMILY LIMITED PARTNERSHIP and DAVID J. MCDONOUGH FAMILY LIMITED PARTNERSHIP are collectively herein referred to as "Plaintiffs" or "Family Holdings." Emmett McDonough is and has been primarily responsible for the management and investment decisions for Plaintiffs.

B. The Defendants:

1. *James Knell*

15. Plaintiffs allege, at all times mentioned herein, Defendant JAMES KNELL ("Knell") was and is an individual, residing in the County of Santa Barbara, State of California.

2. *The SIMA Defendants*

16. Plaintiffs allege, at all times mentioned herein, Defendant SIMA CORPORATION ("SIMA") was and is a California corporation, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. SIMA was founded by Knell in 1984 to redevelop and manage properties that Knell had previously acquired. Knell was and is the Chief Executive Officer and Chairman of SIMA.

17. Plaintiffs allege, at all times mentioned herein, Defendant SIMA MANAGEMENT CORPORATION ("SIMA MANAGEMENT") was and is a California corporation, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. At all times mentioned herein, Knell was and is the President of SIMA MANAGEMENT.

18. Plaintiffs are informed and believe that at all relevant times KNELL was, is, or acted as the President and Chief Executive Officer of, and held a controlling interest in, SIMA, SIMA MANAGEMENT, and West Coast Athletic Clubs ("WCAC") (hereinafter jointly referred to as the "SIMA Defendants").

3. *The Partnership Entities*

19. Plaintiffs allege, at all times mentioned herein, Defendant SIMA Coronado Plaza, LLC ("CORONADO") was and is a California Limited Liability Company, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. At all times mentioned herein, Knell and/or SIMA was and is the Manager of CORONADO.

20. Plaintiffs allege, at all times mentioned herein, Defendant LC Apartments, LLC ("LC APARTMENTS") was and is an Oregon Limited Liability Company, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. At all times mentioned herein, Knell was and is Manager, Director, Owner, CEO, and Member of LC APARTMENTS.

21. Plaintiffs allege, at all times mentioned herein, Defendant SIMA Promenade/

Briarwood, LLC ("PROMENADE") was and is a California Limited Liability Company, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. At all times mentioned herein, Knell and/or SIMA was and is the General Manager of PROMENADE.

22. Plaintiffs allege, at all times mentioned herein, Defendant SIMA Village Faire, LLC ("VILLAGE FAIRE") was and is a California Limited Liability Company, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. At all times mentioned herein, Knell and/or SIMA was and is the Manager of VILLAGE FAIRE.

23. Plaintiffs allege, at all times mentioned herein, Defendant Cascade Village, LLC ("CASCADE") was and is a California Limited Liability Company, with its principal place of business at 115 W. Canon Perdido Street, Suite 200, Santa Barbara, State of California. At all times mentioned herein, Knell was and is the Manager of CASCADE.

24. Plaintiffs allege, at all times mentioned herein, Defendant 4333 Park Terrace, LLC ("PARK TERRACE") was and is a Delaware Limited Liability Company, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. At all times mentioned herein, Knell was and is the Manager of PARK TERRACE.

25. Plaintiffs allege, at all times mentioned herein, Defendant 975 Business Center, LLC ("BUSINESS CENTER") was and is a Delaware Limited Liability Company, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. At all times mentioned herein, Knell was and is the Manager of BUSINESS CENTER.

26. Plaintiffs allege, at all times mentioned herein, Defendant SIMA/Caribbean Isle, LLC ("CARIBBEAN ISLE") was and is a Delaware Limited Liability Company, with its principal place of business at 1231-B State Street, Santa Barbara, State of California. At all times mentioned herein, Knell was and is the Manager, Director, Owner, CEO, and Member of CARIBBEAN ISLE.

27. Plaintiffs are informed and believe and thereon allege that Defendant KNELL controlled, managed, directed and was the Manager of Defendants CORONADO, LC APARTMENTS, PROMENADE, VILLAGE FAIRE, CASCADE, PARK TERRACE, BUSINESS CENTER, and CARIBBEAN ISLE (hereafter referred to collectively as the

"Partnership Entities").

4. *The DOE Defendants*

28. Plaintiffs allege at all times mentioned herein, the true names or capacities, whether individual, corporate, associate, or otherwise, of Defendants DOES 1 through 100, inclusive, are unknown to Plaintiffs and therefore Plaintiffs sue these Defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and based thereon alleges that each of these fictitiously named Defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiffs' damages as herein alleged were proximately (legally) caused by their conduct.

C. The Joint and Several Liability of Defendants

29. Plaintiffs are informed and believe, and based thereon allege, that Defendants at all times relative to this action, were the agents, servants, partners, joint venturers, and employees of each of the other Defendants and in doing the acts alleged herein were acting with the knowledge and consent of each of the other Defendants in this action.

30. Plaintiff is informed and believes and based on such information and belief alleges that at all times mentioned, Defendant Knell was the agent of codefendants SIMA Defendants and the Partnership Entities, and in committing the acts alleged herein was acting within the scope of such agency.

31. Because of the acts or neglect of Defendant Knell, Plaintiffs were led to believe that Defendant Knell was acting as an agent for each of the SIMA Defendants and the Partnership Entities. These acts included that Knell affirmatively represented he had authority to and did execute all of the relevant agreements with Plaintiffs. Knell interacted with Plaintiffs for all financial transactions and information concerning their investments. As a result, Plaintiffs' reliance on Knell's apparent actual and ostensible authority was reasonable, and Plaintiffs have suffered damages as more particularly described herein as a result thereof.

32. At all times mentioned herein, each of the Defendants conspired with each other to commit the wrongful acts complained of herein. Although not all of the Defendants committed all of the acts of the conspiracy or were members of the conspiracy at all times during its existence,

each Defendant knowingly performed one or more acts in direct furtherance of the objectives of the conspiracy. Therefore, each Defendant is liable for the acts of all of the other conspirators.

ALLEGATIONS COMMON TO ALL CLAIMS

A. Defendants Run a Ponzi Scheme.

33. Around 1998, Emmett McDonough was introduced to Knell in Santa Barbara by mutual friends. Knell held himself out as having significant experience and a track record of success in assisting local Santa Barbara individuals and their families in making real estate investments that paid reliable and secure income. McDonough was unsophisticated in making real estate investments.

34. Around 2003, Knell contacted McDonough about an opportunity for Plaintiffs to invest in a shopping center in Bend, Oregon known as Cascade Village, LLC ("CASCADE"). Due to his inability to clearly understand the offering materials supplied to him, McDonough was not willing to make investments on behalf of Family Holdings until Knell made verbal and written assurances that such investments would be secure, and that Knell and the Partnership Entities would guarantee them.

35. Knell represented to Plaintiffs that:

a. his proffered real estate investments would safely provide steady income for Plaintiffs;

b. as a fiduciary, he would always put their financial interests ahead of his own; and

c. he would personally guarantee the repayment of Plaintiffs' paid-in-capital entrusted to him and provide a better interest rate and "preferred return" (as high as 10%) than that of the standard subscription agreement regarding any investment in which Plaintiffs were a part.

36. Plaintiffs' consequently invested with Defendants the following amounts between 2003 and 2010 in CASCADE as well as in other Partnership Entities:

a. $795,800 in CASCADE or Sima Mountain View, LLC; SIMA Mountain View subsequently became part of CASCADE;

b. $420,000 in PARK TERRACE;

c. $300,000 in CARIBBEAN ISLE;

d. $180,000 in BUSINESS CENTER;

e. $375,000 in SIMA Stonebrook, LLC;

f. $300,000 in PROMENADE;

g. $150,000 in CORONADO

h. $470,327 in VILLAGE FAIRE.

37. After obtaining Plaintiffs' investments, Defendants falsely represented to Plaintiffs that their investments were yielding profits from the properties. For example:

(a) The Yield to Investor figures in the CORONADO annual reports claimed positive income returns. In reality, CORONADO was losing money. Table A below shows the "Yield to Investor" from the annual reports for years 2005 through 2010 next to the property's actual net income or loss as reported on CORONADO tax returns, showing the extreme variation between yields reported to Plaintiffs and the actual financial performance of CORONADO. As an example, in 2006, Defendants reported a positive Yield to Investors of 7.00%; in that same year CORONADO reported a tax loss of $1,145,728.

Table A – SIMA Coronado "Yield to Investor" versus actual tax gains (losses)

	2005	2006	2007	2008	2009	2010
Reported "Yield to Investor"	4.80%	7.00%	9.23%	6.21%	3.42%	1.18%
Actual Tax Gain (Loss)	$1,857	($1,145,728)	($586,824)	($869,059)	($674,640)	($254,933)

(b) Knell and SIMA sent letters to Plaintiffs and other investors that stated that the properties were profitable. But Knell and SIMA misled investors by, among other ways, reporting only net operating income without reference to financing activities like debt service and additional loans.

(c) Knell falsely represented to Plaintiffs in 2009 that the Partnership Entities were good investments, Class A properties with solid, stable financials.

38. Defendants hid the poor performance of the Partnership Entities and perpetuated their scheme by paying returns to Plaintiffs from Plaintiffs' and other investors' own capital (instead of from any profit earned by the investment). For example, the yields paid to Plaintiffs and other investors on the CORONADO investment were drawn (on information and belief) from the investors' own money or SIMA loans, not from property income. While Defendants misled

Plaintiffs into believing that they were obtaining positive income returns, CORONADO was actually losing money and Plaintiffs' equity was being eroded.

39. Defendants profited from their scheme by (among other ways) loaning money to the Partnership Entities at high interest rates and preferentially repaying Defendants' loans from the investors' capital. For example:

(a) From approximately 2007 through 2009, Knell and SIMA (unbeknownst to Plaintiffs) loaned money to CORONADO, wrongfully characterized the loans as income on the annual reports, and ultimately paid themselves back to the detriment of Plaintiffs.

(b) Around February 2011, CORONADO was restructured. Knell did not disclose to Plaintiffs that, from the restructured monies, he repaid himself more than $3 million in principal and interest on a personal loan he had secretly made to CORONADO, as well as having paid himself approximately $90,000 in interest on his loans to CORONADO after discontinuing all payments of interest to Plaintiffs. On information and belief, this strategy to drain CORONADO of its capital in favor of Knell and SIMA was well thought out with the knowledge and assistance of MetWest, Knell's equity partner in the restructure, long in advance of the plan being implemented. Knell and the SIMA Defendants benefitted themselves to the detriment of Plaintiffs and continued to pay themselves for fees and loan repayments, draining money from CORONADO.

(c) Knell repaid himself approximately $487,059 in principal and interest on a secret personal loan he had made to VILLAGE FAIRE. More than $70,000 of Knell's repayment was loan interest he received after first discontinuing all payments of interest to Plaintiffs.

40. Defendants also profited from their scheme by paying themselves high "management fees" in connection with the Partnership Entities. Defendants inflated their management fees by characterizing tax and insurance payments as revenue and then improperly charging Plaintiffs a management fee based on the overstated return. By characterizing tax and insurance receipts as revenue to inflate management fees, Defendants enriched themselves at the expense of Plaintiffs.

41. Defendants' misrepresentations to Plaintiffs also included the following:

(a) Knell concealed from Plaintiffs that he had a prior federal felony conviction for making false statements in loan applications. This information was material because Defendants' real-estate investments were highly leveraged properties; and Knell's often-mandatory disclosure of prior felony convictions to lenders would likely have resulted in denials of Knell's loan applications or less preferential mortgage terms in connection with the properties in which Plaintiffs invested.

(b) Knell concealed from Plaintiffs that he was lying about his felony conviction on loan applications for the properties in which Plaintiffs invested—misconduct that was

material in that it could have resulted in private lawsuits in connection with the properties or additional government action against Knell.

(c) Knell secretly restructured investor equity in CORONADO and VILLAGE FAIRE into "classes" of LLC interests that subordinated and diluted Plaintiffs' equity.

(d) The SIMA Defendants represented to Plaintiffs that interest-only payments were being accepted by the lienholder, Berkadia Mortgage, in connection with a loan modification for CORONADO. In fact, the lienholder's note went into default; and a Notice of Default was received from Berkadia on May 7, 2010. Knell's mortgage default triggered a "Cash Sweep Trigger Event" whereby all rents received from CORONADO were to go into an account supervised by Berkadia. Neither the Notice of Default nor the Cash Sweep Trigger Event were disclosed to Plaintiffs.

(e) Knell did not disclose to Plaintiffs that a lawsuit had been filed on March 1, 2011 in Santa Barbara Superior Court (Case No. 1379762) against Knell and his entities for breach of fiduciary duty, fraud, and financial elder abuse that involved CORONADO and VILLAGE FAIRE.

42. Plaintiffs would never have invested with Defendants from the beginning, or continued to invest, had they known about these misrepresentations.

B. Defendants' Ponzi Scheme Cracks When Plaintiffs Attempt to Cash Out.

43. Plaintiffs' investments were made pursuant to several written agreements, including a Restated Agreement Regarding Partnership Interests ("Restated Agreement") (attached hereto as Exhibit 1), a First Restated Agreement Regarding Partnership Interests ("First Restated Agreement") (attached hereto as Exhibit 2), and a Second Restated Agreement Regarding Partnership Interests ("Second Restated Agreement) (attached hereto as Exhibit 3).

44. Under these agreements, Plaintiffs had the right, in the form of put options, to require Knell and other Defendants to re-purchase Plaintiffs' interest in the Partnership Entities for the greater of: (i) Plaintiffs' paid-in capital, or (ii) the appraised value of Plaintiffs' ownership interest in the Partnership Entities. Furthermore, under these agreements, Plaintiffs would obtain any accrued preferred returns, interest and other distributions. In the event of a put, Plaintiffs maintain their ownership interest in the Partnership Entities, including the rights to all preferred returns and other equity distributions until full payment by Defendants. The agreements also provide for interest on any unpaid balances due after 120 days.

45. Plaintiffs' exercise of their put options risked revealing Defendants' Ponzi scheme.

Consequently, Defendants attempted to convince Plaintiffs—sometimes successfully using new misrepresentations—not to cash out their investments.

46. For example, around April 2009, Plaintiffs exercised their put options as to CORONADO, CASCADE, and PROMENADE due to general concerns about the viability of real estate investments in the market at the time. Plaintiffs exercised their put options through a letter to Knell (attached hereto as Exhibit 4).

47. Using false representations, Knell, acting individually and on behalf of the other Defendants, induced Plaintiffs to withdraw the three puts. Knell falsely represented that the properties had stable financials. Knell also promised Plaintiffs in 2009 the right to invest $250,000 in LC APARTMENTS—a new real estate investment that Knell claimed would yield a substantial and immediate income stream.

48. Knell's promise regarding the LC Apartments was false. From July 7, 2010 to March 3, 2011, Plaintiffs requested in writing on numerous, separate occasions that Defendants honor their promise to give Family Holdings the right to invest in LC APARTMENTS. On March 7, 2011, Knell gave notice to Plaintiffs that investments in LC APARTMENTS had closed during the first week of December 2010.

49. On September 28, 2011 (after being left out of the opportunity to invest in LC APARTMENTS), Plaintiffs exercised in writing their put option as to PROMENADE (the "Promenade Put"). The terms of the put provided that payment should be made within 120 days from September 28, 2011.

50. Defendants refused to honor the Promenade Put, and in May 2012, Plaintiffs exercised in writing the put options as to CORONADO, BUSINESS CENTER, PARK TERRACE, and CASCADE (the "May 2012 Put").

51. In October 2012, Plaintiffs exercised their put option as to VILLAGE FAIRE.

52. In June 2013, Plaintiffs exercised their put option as to CARIBBEAN ISLE.

53. Despite Plaintiffs' valid exercise of the puts as to PROMENADE, CORONADO, BUSINESS CENTER, PARK TERRACE, CASCADE, VILLAGE FAIRE, and CARIBBEAN ISLE, Defendants have refused to honor all puts, and appropriate payments have not been made to

Plaintiffs as required under the terms of the contracts.

FIRST CAUSE OF ACTION

Fraud

(Plaintiffs Against Knell, the SIMA Defendants, and the Partnership Entities)

54. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all prior paragraphs as though fully incorporated herein and made a part hereof.

55. As described above, Defendants ran a scheme in which they convinced Plaintiffs to invest in allegedly profitable opportunities with guaranteed, consistent returns. In particular, Defendants promised to Plaintiffs a preferred return as high as 10%. In addition, Defendants promised to Plaintiffs (whenever Plaintiffs decided to cash out their investment) payments that included: their paid-in capital, accrued interest, and accrued and unpaid preferred return (up to 10%).

56. In order to perpetuate the scheme, Defendants paid yields from Plaintiffs' own capital that Defendants falsely portrayed as investment profits. For example, annual reports from Defendants to Plaintiffs claimed positive "Yield to Investor" income returns, even though the real-estate investments were losing money and Plaintiffs' equity was being eroded.

57. Defendants also perpetuated their scheme by misrepresenting the investments in other ways. For example,

(a) Investor letters sent by SIMA to Plaintiffs made it appear that Plaintiffs' investments with Defendants were more profitable than they were because Defendants hid significant financing expenses by only reporting net operating income to investors.

(b) Around May 2010, the SIMA Defendants falsely represented to Plaintiffs that interest payments were accepted by the lienholder Berkadia Mortgage while a loan modification was being negotiated in connection with CORONADO. In fact, interest-only payments were not accepted by the lienholder; the lienholder's note went into default; and—unbeknownst to Plaintiffs—a Notice of Default was sent by Berkadia around May 7, 2010. Knell's mortgage default triggered a "Cash Sweep Trigger Event" whereby all rents received from CORONADO were to go into an account supervised by Berkadia. Neither

the Notice of Default nor the Cash Sweep Trigger Event were disclosed to Plaintiffs.

58. Defendants profited from their scheme by (among other ways) loaning money to the real-estate investments at high-interest rates and ensuring that Defendants were timely repaid from the investors' capital. For example, from approximately 2007 through 2009, Knell and SIMA loaned money to CORONADO, wrongfully characterized the loans as income on the annual reports to Plaintiffs, and ultimately paid themselves back to the detriment of Plaintiffs.

59. When Plaintiffs attempted to cash out their investments by exercising their put options, Defendants attempted to dissuade them by making additional misrepresentations. Around April 2009, Plaintiffs exercised their put options as to CORONADO, CASCADE, and PROMENADE due to concerns about the viability of real estate investments in the market at the time.

60. Using false representations, Knell, acting individually and on behalf of the other Defendants, induced Plaintiffs to withdraw the three puts. Among other misrepresentations, Knell promised Plaintiffs in 2009 the right to invest $250,000 in LC APARTMENTS—a new real estate investment that Knell claimed would yield a substantial and immediate income stream.

61. Knell falsely represented that the properties had stable financials.

62. In reliance on Knell's representations, Plaintiffs withdrew put options that they had exercised as to CORONADO, CASCADE, and PROMENADE on September 20, 2010.

63. From July 7, 2010 to March 3, 2011, Plaintiffs requested in writing on numerous separate occasions that Defendants honor their promise to give Family Holdings the right to invest in LC APARTMENTS. On March 7, 2011, Knell gave notice to Plaintiffs that the LC APARTMENTS investment had closed during the first week of December 2010.

64. When Plaintiffs ultimately exercised their puts in PROMENADE, CORONADO, BUSINESS CENTER, PARK TERRACE, CASCADE, VILLAGE FAIRE, and CARIBBEAN ISLE between September 2011 and June 2013, Defendants refused to honor the put options—despite Defendants' prior representations to pay Plaintiffs the greater of: (1) their pro rata interest in the appraised value of the Partnership Entities, or (2) their paid-in capital. Under the agreements, Plaintiffs would also be paid: accrued interest, any accrued and unpaid return (as high

as 10%), and any other ownership distribution to which Plaintiffs were entitled until payment of their put option.

65. Defendants made the above described representations knowing them to be false, in order to deceive and induce Plaintiffs into withdrawing their puts.

66. At the time these representations were made, and at the time Defendants took the actions alleged herein, Plaintiffs were ignorant of the falsity of Defendants' representations and believed the representations to be true.

67. Plaintiffs reasonably relied on Defendants' representations given that Defendants and their affiliates held themselves out as experienced, reputable professionals in the real estate business with superior knowledge of the specific details of the market and of each of Plaintiffs' investments. Defendants induced Plaintiffs to withdraw their validly exercised puts and to invest money with Defendants.

68. Defendants' misrepresentations were the proximate cause of Plaintiffs' losses. Had Defendants not made these misrepresentations, Plaintiffs would not have withdrawn their puts or made investments with Defendants.

69. The above described conduct has caused Plaintiffs to suffer substantial losses in an amount to be proven at trial.

70. Plaintiffs are entitled to: (the fair market value that they would have received if Defendants' representations had been true) minus (the fair market value of what Plaintiffs received), in an amount to be proven at trial.

71. The aforementioned misrepresentations were made with the intention on the part of Defendants of depriving Plaintiffs of their money. As such, Defendants acted in a willful, wanton and malicious manner; in callous, conscious, and intentional disregard for the interests of Plaintiffs; and with knowledge that their conduct was substantially likely to vex, annoy, and injure Plaintiffs. As a result, Plaintiffs are entitled to recover exemplary and punitive damages.

SECOND CAUSE OF ACTION

Breach of Contract

(Plaintiffs Against Defendant Knell)

72. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all prior paragraphs as though fully incorporated herein and made a part hereof.

KNELL BREACHED HIS CONTRACTUAL OBLIGATION BY REFUSING TO MAKE PAYMENTS ON PLAINTIFFS' PUTS

-PROMENADE Put made on September 28, 2011

73. The parties' agreements, signed by Knell and Plaintiffs, provided that: "[Plaintiffs] shall have the sole right, for any reason whatsoever in its sole discretion," to obligate Knell to purchase the Plaintiffs' interest in PROMENADE for: (i) Plaintiffs' total paid-in capital, (ii) accrued interest, and (iii) any accrued and unpaid Preferred Return or other distribution to which Plaintiffs are entitled at the time of the transfer of the interest.

74. The parties' agreements further provided: "[Plaintiffs] shall be entitled to an increase in the 'Preferred Return' in each of the Partnership Entities from the stated existing Preferred Return up to ten (10%) percent in the event there is income in excess of the amount necessary to pay the respective Preferred Return due investors [...] from the net operating cash flow."

75. Knell reassured Plaintiffs that their unpaid distributions would be paid by accounting for them as liabilities on financial statements. Accrued and unpaid investor distributions for PROMENADE appeared as "Distributions Payable" on financial statements at all relevant times leading up to the Promenade Put.

76. In September 2011, Plaintiffs exercised their put as to PROMENADE. But, in breach of the parties' agreements, Knell refused to pay—and still has not paid—amounts owing under the parties' agreements, including the greater of: (1) an amount equal to the fair market value of Plaintiffs' pro rata interest as established by a certified appraiser, or (2) Plaintiffs' paid-in capital. Plaintiffs should also have been paid any accrued and unpaid preferred return or other ownership distributions. Additionally, Plaintiffs are to maintain their ownership interests until full

payment of the put and to accrue interest on the unpaid balance from January 26, 2012 (the Promenade Put date plus 120 days). The parties' agreement signed by Knell and Plaintiffs provided that Plaintiffs will retain their ownership interests as to PROMENADE until payment is made of all distributions owed, with interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

-CORONADO, BUSINESS CENTER, PARK TERRACE and CASCADE Puts Made on May 24, 2012

77. The parties' agreements signed by Knell and Plaintiffs provided that the purchase price for Plaintiffs' interest in CORONADO, BUSINESS CENTER, PARK TERRACE and CASCADE would be the greater of: (1) an amount equal to the fair market value of Plaintiffs' pro rata interest as established by a certified appraiser, or (2) the total paid-in capital invested by Plaintiffs in these entities. Under the parties' agreements, the Plaintiffs should also be paid any accrued and/or unpaid preferred return or any other ownership distributions now due to Plaintiffs until all amounts are paid in full.

78. The parties' agreements defined "Preferred Return" with respect to these entities as either: (1) the preferred return provided in the entity's operating agreement, or (2) up to 10% of Plaintiffs' paid-in capital, "in the event there is income in excess of the amount necessary to pay the respective Preferred Return due investors [...] from the net operating cash flow."

79. In addition, the parties' agreements signed by Knell and Plaintiffs provided that Plaintiffs will retain their ownership interests as to CORONADO, BUSINESS CENTER, PARK TERRACE, and CASCADE until Plaintiffs receive full payment, with interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

80. Knell breached the parties' agreements by refusing to honor Plaintiffs' September 28, 2011 put on PROMENADE.

81. As a result of Knell's breach of the parties' agreements, Plaintiffs exercised their put options with respect to CORONADO, BUSINESS CENTER, PARK TERRACE and CASCADE in May 2012. But, in breach of the parties' agreements, Knell refused to pay—and still has not paid—the greater of: (1) an amount equal to the fair market value of Plaintiffs' pro

rata interest as established by a certified appraiser, or (2) the total paid-in capital invested by Plaintiffs in these entities. Plaintiffs should also be paid any accrued and/or unpaid preferred return or any other ownership distributions due to Plaintiffs. Furthermore, Knell has not paid additional amounts now owing under the parties' agreements, including the interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

-VILLAGE FAIRE Put Made on October 16, 2012

82. The Second Restated Agreement, signed by Knell and Plaintiffs, provided that if Knell breached the Second Restated Agreement, then Plaintiffs could demand within 120 days as to VILLAGE FAIRE the greatest of several amounts, which were valued using three different formulae. Paragraph 5 of the Second Restated Agreement further provided that if Knell failed to complete the valuation of Plaintiffs' interest in VILLAGE FAIRE within 90 days of Plaintiffs' written notice regarding exercise of their put option, then Plaintiffs "shall elect the method of valuation."

83. In addition, the Second First Restated Agreement, signed by Knell and Plaintiffs, provided that Plaintiffs will retain their ownership interests as to VILLAGE FAIRE until Plaintiffs receive full payment, with interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

84. Knell breached the parties' agreements by refusing to pay to Plaintiffs, within 120 days of exercise of their put as to PROMENADE in September 2011: amounts owing under the parties' agreements, including Plaintiffs' total investment and accrued interest with respect to PROMENADE and all unpaid preferred return to which Plaintiffs are entitled by the put's exercise.

85. Knell further breached the parties' agreements by refusing to pay to Plaintiffs, within 120 days of exercise of their put as to CORONADO, BUSINESS CENTER, PARK TERRACE, and CASCADE in May 2012: paid-in-capital plus any accrued and/or unpaid preferred returns, and all other ownership distributions due to Plaintiffs in connection with these entities until the payment of these put amounts are paid in full. Additionally, Knell has not paid additional amounts now owing to Plaintiffs under the agreements, including the interest accruing

at the greater rate of 10 percent per annum or the then existing current investor yield.

86. As a result of Knell's breach of the parties' agreements, Plaintiffs exercised their put option with respect to VILLAGE FAIRE in October 2012. Knell failed within 90 days of Plaintiffs' written notice regarding exercise of their put option to complete the valuation of Plaintiffs' interest in VILLAGE FAIRE. Consequently, under paragraph 5 of the Second Restated Agreement, Plaintiffs have elected the method of valuation of their interest in VILLAGE FAIRE. Plaintiffs are therefore due: (1) the dollar amount equal to the fair market value of Plaintiffs' pro rata interest (without any discount as to marketability or as to minority interest) in VILLAGE FAIRE as established by a certified appraiser selected by Plaintiffs, (2) any accrued and/or unpaid preferred return or any other ownership distribution due to Plaintiffs until the put is paid in full, and (3) additional amounts now owing under the parties' agreements, including the interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

87. In breach of the parties' agreements, Knell has not paid the amounts due to Plaintiffs.

-CARIBBEAN ISLE Put Made on June 3, 2013

88. The parties' agreements signed by Knell and Plaintiffs provided that the purchase price for Plaintiffs' interest in CARIBBEAN ISLE would be the greater of: (1) an amount equal to the fair market value of Plaintiffs' pro rata interest as established by a certified appraiser, or (2) the total paid-in capital invested by Plaintiffs in this entity. In addition, under the parties' agreements, Plaintiffs should be paid any accrued and/or unpaid preferred return or any other ownership distributions due to Plaintiffs until the put is paid in full.

89. The parties' agreement defined "Preferred Return" with respect to CARIBBEAN ISLE as either: (1) the preferred return provided in CARIBBEAN ISLE's operating agreement, or (2) up to 10% of Plaintiffs' paid-in capital "in the event there is income in excess of the amount necessary to pay the respective Preferred Return due investors [...] from the net operating cash flow."

90. In addition, the parties' agreements signed by Knell and Plaintiffs provided that Plaintiffs will retain their ownership interests as to CARIBBEAN ISLE until Plaintiffs receive full

payment, with interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

91. Knell breached the parties' agreements by refusing to pay to Plaintiffs, within 120 days of exercise of their put as to PROMENADE in September 2011, the greater of: (1) an amount equal to the fair market value of Plaintiffs' pro rata interest as established by a certified appraiser, or (2) the total paid-in capital invested by Plaintiffs in these entities. In addition, under the parties' agreements, Plaintiffs should be paid any accrued and/or unpaid preferred return or any other ownership distributions due to Plaintiffs until the put is paid in full. Additionally, Knell has not paid other amounts now owed to Plaintiffs, including the interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

92. Knell further breached the parties' agreements by refusing to pay to Plaintiffs, within 120 days of exercise of their put as to CORONADO, BUSINESS CENTER, PARK TERRACE and CASCADE made on May 2012 the greater of: (1) an amount equal to the fair market value of Plaintiffs' pro rata interest as established by a certified appraiser, or (2) the total paid-in capital invested by Plaintiffs in these entities. In addition, under the parties' agreements, Plaintiffs should be paid any accrued and/or unpaid preferred return or any other ownership distributions due to Plaintiffs until the put is paid in full. Furthermore, Knell has not paid additional amounts now owing under the parties' agreements, including the interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

93. Knell further breached the parties' agreements by refusing to pay to Plaintiffs, within 120 days of exercise of their put as to VILLAGE FAIRE in October 2012: (1) the dollar amount equal to the fair market value of Plaintiffs' pro rata interest (without any discount as to marketability or as to minority interest) in VILLAGE FAIRE as established by a certified appraiser selected by Plaintiffs, and (2) any accrued and/or unpaid preferred return or any other ownership distribution due to Plaintiffs in connection with VILLAGE FAIRE. Furthermore, Knell has not paid additional amounts now owing under the parties' agreements, including the interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

94. As a result of Knell's breaches of the parties' agreements, Plaintiffs exercised their put options with respect to CARIBBEAN ISLE in June 2013. But, in breach of the parties' agreements, Knell refused to pay—and still has not paid— the greater of: (1) an amount equal to the fair market value of Plaintiffs' pro rata interest as established by a certified appraiser, or (2) the total paid-in capital invested by Plaintiffs in this entity. In addition, under the parties' agreements, Plaintiffs should be paid any accrued and/or unpaid preferred return or any other ownership distributions due to Plaintiffs. Furthermore, Knell has not paid additional amounts now owing under the parties' agreements, including the interest accruing at the greater rate of 10 percent per annum or the then existing current investor yield.

KNELL BREACHED HIS CONTRACTUAL OBLIGATION TO FULLY DISCLOSE ALL FACTS WHICH MAY POTENTIALLY ADVERSELY AFFECT PLAINTIFFS' FINANCIAL INTERESTS

95. Each of the Restated Agreement, First Restated Agreement, and the Second Restated Agreement contained the following:

> **Obligation of Good Faith and Fair Dealing.** The Parties agree that in addition to all the fiduciary duties which the Partnership Entities and Knell individually owe to Family Holdings [Plaintiffs] by virtue of their relationship with Family Holdings, both Knell individually, and Partnership Entities acknowledge that it/he have additional fiduciary duties to fully disclose to Family Holdings all facts which may potentially adversely affect Family Holdings' interests in the Partnership entities.

The "Partnership Entities" included defendants BUSINESS CENTER, PROMENADE, CASCADE, CORONADO, PARK TERRACE, CARIBBEAN ISLE, VILLAGE FAIRE, and LC APARTMENTS.

96. Knell violated these terms by failing to disclose facts that could potentially adversely affect Plaintiffs' interests in CORONADO, BUSINESS CENTER, PARK TERRACE, CASCADE, VILLAGE FAIRE, PROMENADE, and CARIBBEAN ISLE, including the following facts:

(a) Knell had a prior federal felony conviction for making false statements in loan applications that may adversely impact his ability to secure future loans.

(b) Knell failed to disclose to Plaintiffs that he was lying about his prior felony conviction on loan applications for the properties in which Plaintiffs invested—misconduct that could have resulted in private lawsuits in connection with the properties, or possible additional governmental action against Knell.

(c) Defendants were not properly servicing the debt on CORONADO which had led to an undisclosed notice of default and cash sweep trigger event.

(d) A lawsuit had been filed in March 2011 in Santa Barbara Superior Court against Knell and his entities for breach of fiduciary duty, fraud, and financial elder abuse involving CORONADO and VILLAGE FAIRE.

(e) The location of PROMENADE was toxic in the market and could not be leased sufficiently to cover operating costs, the loan went into default, and the property was foreclosed.

(f) The true "Yield to Investor" in the CORONADO annual reports was negative. The Yield to Investor figures reported to Plaintiffs claimed positive income returns, even though the entity was actually losing money and the investors' equity was being eroded.

(g) The properties in which Plaintiffs invested were performing more poorly than Knell represented. For example, investor letters sent by Knell and SIMA to Plaintiffs represented net operating income without referencing financing activities like debt service and additional loans, which significantly (and negatively) affected net operating income.

KNELL BREACHED HIS CONTRACTUAL OBLIGATION TO TAKE NO ACTION THAT WOULD RESULT IN KNELL OR HIS ENTITIES GAINING AN UNFAIR ECONOMIC ADVANTAGE AT PLAINTIFFS' EXPENSE.

97. In the Restated Agreement, First Restated Agreement, and Second Restated Agreement, Knell agreed that, "he will take no action which would result in any of the Partnership Entities or Knell gaining any unfair economic advantage at the expense of the Family Holdings' [Plaintiffs'] interests." Knell violated this term, including by doing the following:

(a) Knell secretly restructured investor equity in CORONADO into "classes" of LLC interests that subordinated and diluted Plaintiffs' equity to "Class B shares" while Knell took the preferable Class A shares for himself and investment colleague Rich Hollander, CEO of Met West Ventures.

(b) Knell secretly restructured investor equity in VILLAGE FAIRE into "classes" of LLC interests that subordinated and diluted Plaintiffs' equity to "Class B shares" while Knell took the preferable Class A shares for himself and investment colleague Joe Geeb.

(c) From approximately 2007 through 2009, Knell and SIMA loaned money to CORONADO, and hid the debt from Plaintiffs by wrongfully characterizing the loans as income on the annual reports to Plaintiffs, and ultimately paying themselves back to the detriment of Plaintiffs. For example, Knell repaid himself more than $3 million principal and interest on a personal loan he had secretly made to CORONADO, as well as paying himself approximately $90,000 in interest on his loans to CORONADO after discontinuing all payments of interest to Plaintiffs.

(d) Knell repaid himself the sum of approximately $487,059 in principal and interest on a secret personal loan he had made to VILLAGE FAIRE. More than $70,000 of Knell's repayment was loan interest received after first discontinuing all payments of interest to Plaintiffs.

(e) Knell improperly inflated his management fees on properties in which Plaintiffs invested by improperly including tax and insurance payments as "income," then using the overstated income as the basis for his management fees.

***

98. Plaintiffs have at all times performed the terms of the Restated Agreement, First Restated Agreement, and Second Restated Agreement in the manner specified, or were excused in any alleged non-performance.

99. Defendant Knell's failure and refusal to perform his obligations under the parties' agreements has directly damaged Plaintiffs because Plaintiffs have exercised their puts but their interests have not been purchased according to the contractual terms.

100. As a result of Defendants' breaches and defaults, Plaintiffs are entitled to, among other things, the full amounts due as a result of the exercise of their put rights, interest thereon, and attorney fees and costs, in an amount to be proven at trial.

THIRD CAUSE OF ACTION

Negligent Misrepresentation

(Plaintiffs Against Defendants Knell and the SIMA Defendants)

101. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all prior paragraphs as though fully incorporated herein and made a part hereof.

102. Defendants represented to Plaintiffs that they would purchase their interests under specified terms if and when Plaintiffs exercised their put options and Defendants were capable of doing so.

103. Defendants made other representations to Plaintiffs, including the following:

(a) Annual reports from Defendants to Plaintiffs claimed positive income returns, even though the real-estate investments were losing money and Plaintiffs' equity was being eroded.

(b) Investor letters sent by Knell and SIMA to Plaintiffs made it appear that Plaintiffs' investments with Defendants were more profitable than they were because

Defendants hid significant financing expenses by only reporting net operating income to investors.

104. Defendants' representations to Plaintiffs were not true, and Defendants had no reasonable grounds for believing the representations to be true when they were made.

105. Defendants intended Plaintiffs to rely on their representations and to proceed with their efforts to enter into the contracts containing put options.

106. Plaintiffs reasonably relied on Defendants' representations and entered into the contracts when they otherwise would not have done so.

107. Defendants' representations caused Plaintiffs to suffer substantial losses, according to proof at trial.

FOURTH CAUSE OF ACTION

Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty

(Plaintiffs Against Knell and the Partnership Entities)

108. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all prior paragraphs as though fully incorporated herein and made a part hereof.

109. In the Restated Agreement, First Restated Agreement and Second Restated Agreement, and by virtue of the trust and confidence Plaintiffs reposed in Knell and the Partnership Entities, a fiduciary relationship existed between the parties.

110. Pursuant to that fiduciary relationship Knell and the Partnership Entities owed Plaintiffs a duty to fully disclose all facts which might potentially adversely affect Plaintiffs' interests in any of the Partnership Entities, a duty to take no action which would result in the Defendants gaining an unfair economic advantage at the expense of Plaintiffs' interests, a duty of loyalty, and a duty not to collude amongst themselves and with the SIMA Defendants.

111. Defendants breached their fiduciary duty to Plaintiffs by taking the actions described above to gain an unfair economic advantage at the expense of Plaintiffs' interests. Those actions included:

a. Failing to disclose that Knell had a prior federal felony conviction and that he misrepresented this prior felony conviction on loan applications in

connection with the properties in which Plaintiffs invested;

b. Issuing investor letters that made it appear that the properties (and therefore Plaintiffs' investments) were profitable when they were not;

c. Failing to disclose that Plaintiffs' equity was being eroded by Defendants' actions;

d. Failing to service properly the debt on the properties;

e. Misrepresenting efforts to modify the debt when Defendants were actually engaging in self-dealing and equity restructuring that would dilute Plaintiffs' investment to the benefit of Knell and SIMA;

f. Secretly loaning money to the properties and wrongfully characterizing the loans as income on the annual reports, and ultimately paying themselves back to the detriment of Plaintiffs;

g. Failing to disclose that the properties were not Class A and/or were not in suitable locations;

h. Excluding Plaintiffs from investing in the LC APARTMENTS opportunity; and

i. Failing to disclose a lawsuit against Knell involving CORONADO and VILLAGE FAIRE.

112. On information and belief, the SIMA Defendants knowingly provided substantial assistance that aided and abetted other Defendants' breaches of fiduciary duties owed to Plaintiffs. SIMA's failure to take remedial action against Knell and its failure to divest itself from Knell's conduct acted as a ratification of Knell's conduct by the SIMA Defendants.

113. Plaintiffs had placed trust and confidence in Knell and the Partnership Entities and reasonably and justifiably relied on them and had no good reason not to trust or have confidence in them under the circumstances.

114. In doing the acts herein alleged, it was reasonably foreseeable to Knell and the Partnership Entities that Plaintiffs would suffer damages and the loss of their investments.

115. Defendants' breach of their fiduciary duties and the SIMA Defendants' aiding and

abetting those breaches was a direct and proximate cause of Plaintiffs' damages, in an amount to be proven at trial.

116. The aforementioned conduct was done in a willful, wanton and malicious manner and in callous, conscious disregard for the interests of Plaintiffs. As a result, Plaintiffs are entitled to recover exemplary and punitive damages.

FIFTH CAUSE OF ACTION

Open Book Accounting

(Plaintiffs Against Defendants)

117. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all prior paragraphs as though fully incorporated herein and made a part hereof.

118. Defendants promised in the Restated Agreement, the First Restated Agreement, and the Second Restated Agreement to give Plaintiffs all inspection and audit rights both required by law and according to the California Corporations Code. Under these agreements, Plaintiffs were also granted the right to access all books and records of each of the Partnership Entities as though they were the Manager/General Partner of said Partnership Entities. Plaintiffs were to be provided with quarterly and annual financial statements from the Partnership Entities. Additionally, Plaintiffs were given the right to require the Partnership Entities to produce all necessary information and access to their respective books and records in order to have Plaintiffs conduct a full and unabridged independent audit of the Partnership Entities' financial statements.

119. Plaintiffs invested approximately $2,991,127 with Defendants.

120. Plaintiffs have exercised their put options as to all Partnership Entities invested in, except Stonebrook. No part of said sums have been paid, despite Plaintiffs' demands to Defendants. As to certain of these investments, Defendants contend that no money is available. Therefore, Plaintiffs demand an open book accounting of Defendants' financial statements.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants of: actual damages (including the fair market value that Plaintiffs would have received if Defendants' representations had been true, minus the fair market value of what Plaintiffs received), specific performance of the

put options, punitive damages, attorney's fees and costs pursuant to the parties' agreements and statute, interest pursuant to the parties' agreements and statute at the legal rate, an open-book accounting, and such other relief as the Court may deem proper.

DATED: April 14, 2014

BROWNE GEORGE ROSS LLP
Peter W. Ross
Jonathan L. Gottfried

By _____
Jonathan Gottfried
Attorneys for Plaintiffs
EMMETT McDONOUGH, et al.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury of all issues so triable.

DATED: April 14, 2014

BROWNE GEORGE ROSS LLP
Peter W. Ross
Jonathan L. Gottfried

By _____
Jonathan Gottfried
Attorneys for Plaintiffs
EMMETT McDONOUGH, et al.

EXHIBIT G

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

EMMETT McDONOUGH, et al

Plaintiffs

vs

JAMES KNELL, et al

Defendants

Case No. 1415007

SPECIAL VERDICT FORM
ON
CONCEALMENT

We answer the questions submitted to us as follows:

1. Did Defendants intentionally fail to disclose an important fact that Plaintiffs did not know and could not reasonably have discovered? (Answer as to each specific Defendant.)

James Knell 12 Yes 0 No
SIMA Corporation 12 Yes 0 No
SIMA Management Corporation 12 Yes 0 No

If your answer to question 1 is yes as to any Defendants then answer question 2 as to those Defendant(s). If you answered no as to all Defendants, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Defendants intend to deceive Plaintiffs by concealing the fact or did the Defendants disclose some facts to the Plaintiffs but intentionally failed to disclose other facts, making the disclosure deceptive?

12 Yes Ø No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Had the omitted information been disclosed, would Plaintiffs reasonably have behaved differently?

1 Yes 11 No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was Defendants concealment a substantial factor in causing harm to Plaintiffs?

____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are Plaintiffs' damages, if any?

		James Knell	SIMA Corp.	SIMA Management Corp.
SIMA Promenade/Briarwood, LLC	Capital Contribution			
	Preferred Return			

SIMA Coronado Plaza, LLC	Capital Contribution			
	Preferred Return			
975 Business Center, LLC	Capital Contribution			
	Preferred Return			
4333 Park Terrace, LLC	Capital Contribution			
	Preferred Return			
Cascade Village, LLC	Capital Contribution			
	Preferred Return			
SIMA Village Faire, LLC	Capital Contribution			
	Preferred Return			
	TOTAL			

If Plaintiffs have proved any damages, then answer question 7. If Plaintiffs have not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did Plaintiffs prove by clear and convincing evidence that James Knell engaged in the conduct with malice, oppression, or fraud?

Yes _____ No _____

Was James Knell an officer, director, or managing agent of SIMA Corporation acting on behalf of SIMA Corporation?

Yes _____ No _____

Was James Knell an officer, director, or managing agent of SIMA Management Corporation acting on behalf of SIMA Management Corporation?

Yes _____ No _____

Dated: OCT 21 2014 Signed: [signature]
Presiding Juror

After all verdict forms have been signed, notify the bailiff that you are ready to present your verdict in the courtroom.

EXHIBIT H

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

EMMETT McDONOUGH, et al

Plaintiffs

vs

JAMES KNELL, et al

Defendants

Case No. 1415007

SPECIAL VERDICT FORM
ON
BREACH OF FIDUCIARY DUTY

We answer the questions submitted to us as follows:

1. Did James Knell owe a fiduciary duty to Plaintiffs?

12 Yes Ø No

If your answer to question 1 is yes, then answer question 2. If you answered no, then stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did James Knell breach his fiduciary duty to Plaintiffs?

10 Yes 2 No

If your answer to question 2 is yes, then answer question 3. If you answered no to question 2 then stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Were Plaintiffs harmed?

2 Yes 10 No

If your answer to question 3 is yes, then answer question 4. If you answered no, then stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was James Knell's conduct a substantial factor in causing Plaintiffs' harm?

____ Yes ____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. What are plaintiffs' damages, if any?

		James Knell
SIMA Promenade/Briarwood, LLC	Capital Contribution	
	Preferred Return	
SIMA Coronado Plaza, LLC	Capital Contribution	
	Preferred Return	
975 Business Center, LLC	Capital Contribution	
	Preferred Return	
4333 Park Terrace, LLC	Capital Contribution	
	Preferred Return	

Cascade Village, LLC	Capital Contribution	
	Preferred Return	
SIMA Village Faire, LLC	Capital Contribution	
	Preferred Return	
	TOTAL	

If Plaintiffs have proved any damages, then answer question 6. If Plaintiffs have not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did Plaintiffs prove by clear and convincing evidence that James Knell engaged in the conduct with malice, oppression, or fraud?

Yes _____ No _____

Dated: Oct 29, 2014

Presiding Juror

After all verdict forms have been signed, notify the bailiff that you are ready to present your verdict in the courtroom.

EXHIBIT I

FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

OCT 29 2014

Darrel E. Parker, Executive Officer
BY M. Ayala, Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

EMMETT McDONOUGH, et al

Plaintiffs

vs

JAMES KNELL, et al

Defendants

Case No. 1415007

SPECIAL VERDICT FORM
ON
BREACH OF CONTRACT

We answer the questions submitted to us as follows:

1. Did Plaintiffs and Defendants enter into "side letter agreement(s)?"

12 Yes Ø No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did Plaintiffs do all, or substantially all, of the significant things that the "side letter agreement(s)" required them to do?

12 Yes Ø No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did all the conditions that were required for Defendants' performance occur or were they excused?

12 Yes Ø No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did Defendants fail to do something that the "side letter agreement(s)" required them to do? (Answer as to each specific Defendant.)

James Knell Ø Yes 12 No
SIMA Corporation Ø Yes 12 No
SIMA Management Corporation Ø Yes 12 No

If you answered yes to any of the Defendants in question 4, then answer question 5 as to those Defendant(s). If you answered no to all of the Defendants listed in the question, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Were Plaintiffs harmed by that failure?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no to the question stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are Plaintiffs' damages, if any?

		James Knell	SIMA Corp.	SIMA Management Corp.
SIMA Promenade/Briarwood, LLC	Capital Contribution			
	Preferred Return			

SIMA Coronado Plaza, LLC	Capital Contribution			
	Preferred Return			
975 Business Center, LLC	Capital Contribution			
	Preferred Return			
4333 Park Terrace, LLC	Capital Contribution			
	Preferred Return			
Cascade Village, LLC	Capital Contribution			
	Preferred Return			
SIMA Village Faire, LLC	Fair market value of Plaintiffs' interest in Village Faire			
	TOTAL			

Dated: Oct 29, 2014

Presiding Juror

After all verdict forms have been signed, notify the bailiff that you are ready to present your verdict in the courtroom.

EXHIBIT J

BROWNE GEORGE ROSS LLP
Peter W. Ross (State Bar No. 109741)
pross@bgrfirm.com
Jonathan L. Gottfried (State Bar No. 282301)
jgottfried@bgrfirm.com
Jordan B. Kushner (State Bar No. 229477)
jkushner@bgrfirm.com
2121 Avenue of the Stars, Suite 2400
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

VIA FAX

Attorneys for Plaintiffs
EMMETT McDONOUGH, as Trustee, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA – ANACAPA DIVISION

EMMETT MCDONOUGH, as Trustee of the MCDONOUGH FAMILY 1996 TRUST DATED JUNE 11, 1996; JOHN T. MCDONOUGH FAMILY LIMITED PARTNERSHIP; STEPHEN E. MCDONOUGH FAMILY LIMITED PARTNERSHIP; and DAVID J. MCDONOUGH FAMILY LIMITED PARTNERSHIP,

Plaintiffs,

vs.

JAMES KNELL; SIMA CORPORATION; SIMA MANAGEMENT CORPORATION; WEST COAST ATHLETIC CLUBS; 4333 PARK TERRACE, LLC; 975 BUSINESS CENTER, LLC; CASCADE VILLAGE, LLC; SIMA PROMENADE/BRIARWOOD, LLC; SIMA CORONADO PLAZA, LLC; LC APARTMENTS, LLC; SIMA VILLAGE FAIRE, LLC; SIMA/CARIBBEAN ISLE, LLC; and DOES 1 to 100, inclusive,

Defendants.

Case No. 1415007
The Honorable Thomas P. Anderle

PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, A NEW TRIAL ON PLAINTIFFS' CLAIMS FOR BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY AND FRAUDULENT CONCEALMENT

MOTION NO. 2

Judge: Hon. Thomas P. Anderle
Date: December 16, 2014
Time: 9:30 a.m.
Dept.: 3

Action filed: December 21, 2012
Trial Date: October 7, 2014

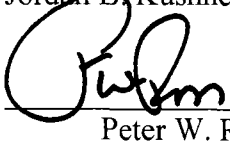
TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on December 16, 2014, at 9:30 a.m. or as soon thereafter as the matter may be heard, before the Honorable Thomas P. Anderle in Department 3 of the Santa Barbara Superior Court, 1100 Anacapa Street, Santa Barbara, CA 93101, Plaintiffs will, and hereby do move for judgment notwithstanding the verdict on Plaintiffs' breach of contract claim, or alternatively, a new trial.

The motion will be made pursuant to California Code of Civil Procedure §§ 629 and 657, on the grounds that the jury's special findings of fact – on fraudulent concealment and breach of fiduciary duty – establish that Plaintiffs are entitled to judgment on their breach of contract claim as a matter of law, or the verdicts otherwise are irreconcilably inconsistent and therefore "against law." This motion is further based on this notice of motion, the pleadings, records and files in this action, the attached Memorandum of Points and Authorities, the Declaration of Jordan B. Kushner, all matters which this Court must or may judicially notice, and upon such other documentary evidence as may be presented at the hearing of this motion.

Dated: November 20, 2014

BROWNE GEORGE ROSS LLP
Peter W. Ross
Jonathan L. Gottfried
Jordan B. Kushner

By 
Peter W. Ross
Attorneys for Plaintiffs
EMMETT McDONOUGH, et al.

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I. INTRODUCTION

In this case, the jury made some very serious findings against the Defendants. In this respect, the jury expressly found that defendants – managers of other people's real estate investments – had breached their fiduciary duties to the Plaintiffs – who are several of their investors – and had attempted to defraud the Plaintiffs. Specifically, the jury found:

1) "Defendants intentionally fail[ed] to disclose an important fact that Plaintiffs did not know and could not reasonably have discovered;"

2) "Defendants intend[ed] to deceive Plaintiffs by concealing the fact or…disclose[d] some facts to the Plaintiffs but intentionally failed to disclose other facts, making the disclosure deceptive;" and

3) "James Knell breach[ed] his fiduciary duty to Plaintiffs."

On the other hand, the jury found that the fraud and breach of fiduciary duty had not damaged these Plaintiffs. And the jury also found that Defendants had not breached their contractual obligations to Plaintiffs.

By this motion, Plaintiffs request judgment notwithstanding the verdict on their contract claim. The jury's special findings regarding concealment and fiduciary duty established breaches of their "side letter" contracts as a matter of law. In addition, it is undisputed that a breach of the side letters entitled Plaintiffs to the return of their investments, and Defendants refused to return those investments, which establishes harm. Because every element of Plaintiffs' breach of contract claim is met, Plaintiffs are entitled to judgment on that claim notwithstanding the verdict.

Plaintiffs anticipate that Defendants will ask the Court to defer to the jury's breach of contract verdict, and the jury's conclusion that Defendants did not "fail to do something that the 'side letter agreement(s)' required them to do." But the only way to reconcile that conclusion with the jury's other findings, is to assume that the jury did not consider the contractual provisions requiring Defendants to comply with their fiduciary duties and disclose all material facts to Plaintiffs. To the extent that this Court can reconcile those verdicts, it should do so, and Plaintiffs are still entitled to win on their contract claim.

On the other hand, to the extent the jury's breach of contract verdict is presumed to encompass all of the contractual provisions, that conclusion is incompatible with the jury's special findings regarding Defendants' fraudulent concealment and breach of fiduciary duties, because the contracts unambiguously required Defendants to act as fiduciaries and disclose all important facts. When faced with irreconcilable verdicts, courts have two possible responses. First, "[w]here a special finding of facts is inconsistent with [a] general verdict, the former controls the latter, and the court must give judgment accordingly." C.C.P. § 625. Second, where § 625 does not apply, and the verdicts must be given equal weight, the Court must grant a new trial. *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal. App. 4th 668, 682 ("Inconsistent verdicts are against the law and are grounds for a new trial").

The jury's findings that Defendants concealed important information and that Knell breached his fiduciary duty are indisputably special verdicts, because they are each a discrete "ultimate fact in the case." *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal. App. 4th 949, 959-960. The jury's finding regarding Defendants' performance under the contract is more akin to a general verdict, because it "implies findings on all issues" arising out of Defendants' various obligations under the side letters, including contract interpretation. *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal. App. 4th 949, 959-960. Accordingly, the jury's special findings regarding concealment and fiduciary duty should override the jury's verdict regarding Defendants' breach of contract claim, and Plaintiffs are still entitled to judgment on their breach of contract claim, as discussed above. Alternatively, to the extent the jury's verdicts are all special verdicts and must be given equal weight, Plaintiffs are entitled to a new trial on breach of contract, breach of fiduciary duty and fraudulent concealment, because those verdicts are irreconcilable.

For the above reasons, Plaintiffs respectfully request judgment notwithstanding the verdict regarding their breach of contract claim, or alternatively, a new trial on that claim.

II. FACTUAL BACKGROUND

A. The McDonough Family Invests With James Knell's Companies.

Emmett McDonough is the trustee of the McDonough Family 1996 Trust, dated June 11,

1996 ("the McDonough Trust"). He is also the managing partner of limited partnerships named after his three children: the John T. McDonough Family Limited Partnership, the Stephen E. McDonough Family Limited Partnership, and the David J. McDonough Family Limited Partnership (collectively, with the McDonough Trust, the "McDonough Family" or "Plaintiffs").

James Knell convinced Mr. McDonough to make, on behalf of the McDonough Family, over $1.8 million in investments beginning in the early 2000's and continuing through 2010 in the following properties: 975 Business Center, LLC ("Business Center"), Cascade Village, LLC ("Cascade"), Sima Promenade/Briarwood, LLC ("Promenade"), Sima Coronado Plaza, LLC ("Coronado"), Sima Village Faire, LLC ("Village Faire"), 4333 Park Terrace, LLC ("Park Terrace"), and Sima/Caribbean Isle, LLC ("Caribbean Isle") (collectively, "the LLCs"). James Knell, or an entity that he controlled, was the managing member of these LLCs. In this brief, James Knell, Sima Corporation and Sima Management Corporation will be collectively referred to as "Defendants."

B. The Parties' Agreements Explicitly Required Defendants To Disclose Material Facts, Act As Fiduciaries, And Purchase Plaintiffs' Investments In The Event Of A Breach.

Each of the LLCs had an operating agreement that governed the manner in which the LLC's funds can be used. To further protect their investments, Plaintiffs obtained additional contractual guarantees from James Knell and the companies that he controlled in written agreements referred to during trial as the "side letters." First, the side letters contractually obligated Knell to act as Plaintiffs' fiduciary and to disclose to Plaintiffs all material information relating to their investments:

> **7. Obligation of Good Faith and Fair Dealing**. The Parties agree that in addition to all the fiduciary duties which the Partnership Entities and Knell individually owe to Family Holdings by virtue of their relationship with Family Holdings, both Knell individually, and Partnership Entities acknowledge that it/he have additional fiduciary duties to fully disclose to Family Holdings all facts which may potentially adversely affect Family Holdings' interests in the Partnership Entities.

(*E.g.*, Ex. A, Tr. Ex. 46-0005, ¶ 7, emphasis added.)[1]

Second, the side letters provided Plaintiffs with two types of "put options," which empowered Plaintiffs to obligate Defendants to buy Plaintiffs' investments with 120 days' notice. The first type of put option is conditional, and could be exercised only under certain circumstances that include a breach by Defendants of the side letters:

> **5. Put Option on Change of Manager/General Partner**. Family Holdings shall have the sole right, but not the obligation, to compel Knell and/or Sima, either separately or jointly, to complete the purchase of Family Holdings' interest in [the LLCs] within one hundred and twenty (120) days, upon written notice by Family Holdings [that] Knell and/or Sima has breached this Agreement, either jointly or separately [or] if there is any breach of Prior Partnership Agreements by Knell and/or Sima concerning Family Holdings interests therein.

(*Id.* at 46-0003, ¶ 5) (emphasis added). The second type of put option is a "general put option," which empowered Plaintiffs to obligate Defendants to buy out Plaintiffs' investment in one property, Promenade, with 120 days' notice for *any* reason:

> **6. General Put Option as to Sima Promenade/Briarwood LLC** … Family Holdings shall have the sole right, for any reason whatsoever in its sole discretion, but not the obligation to obligate Sima and Knell both individually and/or jointly, to purchase the Family Holdings interest in Sima Promenade/Briarwood LLC for the sum equal to the total investment and the then accrued interest for Sima Promenade/Briarwood LLC, plus any accrued and unpaid Preferred Return or other distribution, to which Family Holdings would be entitled to at the time of transfer of its interest.

(Ex. A, Ex. 46-0004, ¶ 6, emphasis added.)

C. Plaintiffs Exercised Their Put Options, But Defendants Did Not Pay.

Plaintiffs exercised their general put option on Promenade in September 2011. The Plaintiffs then exercised their conditional put options on Coronado, Business Center, Park Terrace, Village Faire and Cascade in May and October of 2012. (Exs. K-M, Tr. Exs. 49, 156, 259, respectively.) Defendants failed to tender any money in response to the conditional put options. (Ex. N, 10/20/14 Tr. Tran. at 44:14-46:14) Plaintiffs filed this lawsuit in December of 2012,

---

[1] The parties entered into several side letter agreements beginning in February 2003. (*E.g.*, Ex. C, Tr. Ex. 40). All such agreements contained the same "Obligation of Good Faith and Fair Dealing" provision.

alleging breach of contract, fraudulent concealment, and breach of fiduciary duty, among other claims.

D. The Jury Found That Defendants Concealed Important Information And That Knell Breached His Fiduciary Duty.

In their special verdict regarding Plaintiffs' fraud and fiduciary duty claims, the jury unanimously found the following:

1) Defendants "intentionally fail[ed] to disclose an important fact that Plaintiffs could not know and could not reasonably have discovered." (Ex. O at 1-2.)

2) Defendants "intend[ed] to deceive Plaintiffs by concealing the fact or … disclose[d] some facts to the Plaintiffs but intentionally failed to disclose other facts making the disclosure deceptive." (*Id.*) And,

3) Knell "breach[ed] his fiduciary duty to Plaintiffs." (Ex. P at 1.)

The jury also unanimously found that three out of the five elements of Plaintiffs' breach of contract claim were met. Specifically, the jury found that: i) the side letters were valid agreements; ii) Plaintiffs fully performed under the side letters; and iii) all conditions required for Defendants' performance were met. (Ex. Q at 1-2.)

But despite the fact that the jury found that Defendants' concealed material facts and failed to act as fiduciaries, the jury found that Defendants did not "fail to do something that the 'side letter agreement(s)' required them to do." (*Id.* at 2.) As a result of that finding, the jury did not reach the question of whether Defendants' conduct under the side letters harmed Plaintiffs.

III. PLAINTIFFS ARE ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT ON THEIR BREACH OF CONTRACT CLAIM.

"A JNOV must be granted where, viewing the evidence in the light most favorable to the party securing the verdict, the evidence compels a verdict for the moving party as a matter of law." *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal. App. 4th 1175, 1194.

The elements of Plaintiffs' breach of contract claim are:

1. That Plaintiffs and Defendants entered into a contract;

2. That Plaintiffs did all, or substantially all, of the significant things that the contract required them to do;

3. That all conditions required by the contract for Defendants' performance had occurred or were excused;

4. That Defendants failed to do something that the contract required them to do; and

5. That Plaintiffs were harmed by that failure.

(CACI 303.)

The jury correctly determined that the first three elements of the cause of action are met. (Ex. Q at 1-2.) The fourth and fifth elements of the claim (failure to do something the contract requires; and harm) are also met, as a matter of law, based on the jury's other findings and on the undisputed evidence.

A. Defendants Failed To Do Something The Side Letters Required Them To Do.

1. The Jury Correctly Found That Defendants Failed To Disclose Material Facts And Breached Their Fiduciary Duties.

The side letters require Defendants to do at least two things the jury unanimously found Defendants failed to do. *First*, the side letters unambiguously imposed on Knell an obligation to disclose all material facts relating to Plaintiffs' investments:

> [B]oth Knell individually, and Partnership Entities acknowledge that it/he have additional fiduciary duties to fully disclose to Family Holdings all facts which may potentially adversely affect Family Holdings' interests in the Partnership Entities.

(Ex. A, Tr. Ex. 46-0005, ¶ 7.) And the jury explicitly found that Defendants failed to disclose all such facts:

> Did Defendants intentionally fail to disclose an important fact that Plaintiffs did not know and could not reasonably have discovered? James Knell. 12 yes, 0 no. SIMA Corporation. 12 yes, 0 no. SIMA Management Corporation. 12 yes, 0 no.

(Ex. O at 1:20-24.)

Second, the side letters unambiguously imposed on Knell an obligation to act as a fiduciary towards Plaintiffs:

> The Parties agree that in addition to all the fiduciary duties which

> the Partnership Entities and Knell individually owe to Family Holdings by virtue of their relationship with Family Holdings, both Knell individually, and Partnership Entities acknowledge that it/he have additional fiduciary duties.

(Ex. A, Tr. Ex. 46-0005, ¶ 7.) And the jury explicitly found that Knell failed to act as a fiduciary:

> Did James Knell breach his fiduciary duty to Plaintiffs? Ten yes, Two no.

(Ex. P at 1:26-27.)

The jury's findings that Defendants concealed important facts and failed to act as fiduciaries unequivocally establish, as a matter of law, that that Defendants failed to comply with the above provisions in the side letters and therefore "failed to do something that the [side letters] required them to do." (CACI 303.)

2. Defendants' Concealment And Breach Of Fiduciary Duties Triggered Plaintiffs' Right To Exercise Their Conditional Put Options.

The Second Restated Side Letter states that Plaintiffs have the right "to compel Knell and/or Sima, either separately or jointly, to complete the purchase of Family Holdings' interest in Village Faire, OAC, LC Apartments, or any of Family Holdings interest in the Prior Partnership Agreements" (*i.e.*, any of Plaintiffs' SIMA investments) in the event Defendants breach the side letters:

> **5. Put Option on Change of Manager/General Partner**. Family Holdings shall have the sole right, but not the obligation, to compel Knell and/or Sima, either separately or jointly, to complete the purchase of Family Holdings' interest in [the LLCs] within one hundred and twenty (120) days, upon written notice by Family Holdings [that] Knell and/or Sima has breached this Agreement, either jointly or separately [or] if there is any breach of Prior Partnership Agreements by Knell and/or Sima concerning Family Holdings interests therein.

(Ex, A, Tr. Ex. 46-0002, ¶ 5, emphasis added.) As discussed above, the jury's findings that Defendants concealed information and breached their fiduciary duties demonstrate, as a matter of law, that Knell breached the Second Restated Side Letter. Further, these findings meet the unambiguous conditions in Paragraph 5 of the Second Restated Side Letter triggering Plaintiffs' put options with respect to all of Plaintiffs' SIMA investments. And it is undisputed that by

means of the Complaint in this action Plaintiffs gave Defendants written notice that they breached the agreements and that Plaintiffs were requesting that Defendants purchase their interests in all the LLCs pursuant to the "put option" provision of the side letters. (See also Exs. K-M, Tr. Exs. 49, 156, 259.) It is also undisputed that Defendants failed to tender any money in response to all but one of these put options. (Ex. N, 10/20/14 Tr. Tran. at 44:14-46:14.)

B. Plaintiffs Were Harmed By Defendants' Failure To Return The Principal Of Plaintiffs' Investments.

Defendants acknowledge that, in the event they breached the side letters, Plaintiffs' entitlement to their paid-in capital (plus interest) would be more than $1.8 million. This is Defendants' own damages figure, calculated by Defendants' own expert.[2] (Ex. R, 10/17/14 Tr. Tran. at 107-109.) Thus, Defendants' refusal to tender any money for most of those investments harmed Plaintiffs by depriving them of at least $1.8 million.

However, Plaintiffs' actual damages are more than $1.8 million. In general, the put options entitle the Plaintiffs to recover the greater of the following amounts for each property:

> a) the McDonoughs' pro rata interest in the equity of that property "as last established by an appraisal completed within one year prior to the notice of intent to exercise" the put option, or
>
> b) the principal of the McDonoughs' investment in the property. (Ex. A, Tr. Ex. 46-0003, ¶ 5; Ex. AA, Tr. Ex. 42-0003, ¶ 6; Ex. BB, Tr. Ex. 41-0003, ¶6.)[3]

The principal amount for each investment (option (b)) is recorded in defense expert William Ackerman's report. (Ex. CC, Tr. Ex. 85, p. 18.) Plaintiffs' "pro rata interest" in the investments (option (a)) can be determined by multiplying Plaintiffs' percentage interest in each LLC by the equity of each LLC entity as of the relevant date. Plaintiffs' percentage ownership for each property is stated in Ackerman's report. (*Id.*at 21, 25, 30, 34, 36, 41, and 46.) To determine the equity of each LLC, we must determine the relevant appraisal dates. The

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[2] The figure does not include Plaintiffs' preferred return, which Defendants dispute is owed. The $1.8 million figure is limited to Plaintiffs' paid-in capital and interest thereon.

[3] There is one nuance here. For Village Faire, the recovery of principal is limited to $95,000. (Ex. A, Tr. Ex. 46-0003, ¶ 5(a).)

Promenade/Briarwood puts were exercised in 2011. (Ex. K, Tr. Ex. 49.) Therefore, the relevant date – of an appraisal "completed within one year prior to" the exercise of the put – would be December 31, 2010. All the other puts were exercised in 2012. (Exs. L and M, Tr. Exh. 156 and 259, respectively.) Therefore, the relevant date for all other properties would be December 31, 2011. SIMA did appraisals for each property on the relevant dates. (Tr. Exs. 795, 883c, 149, 655, 430, and 431A.) Exhibit Z to the Declaration of Jordan B. Kushner, filed concurrently herewith, sets forth the calculations. Plaintiffs' total damages due as of December 16, 2014, including prejudgment interest, is $2,011,877.

The jury's findings and the undisputed facts establish that all five elements of Plaintiffs' breach of contract claim are met. Accordingly, Plaintiffs are entitled to judgment on that claim as a matter of law.

IV. THE JURY'S FINDINGS REGARDING CONCEALMENT AND FIDUCIARY DUTIES OVERRIDE THE JURY'S BREACH OF CONTRACT VERDICT.

Plaintiffs anticipate that Defendants will argue that the Court should defer to the jury's finding that Defendants did not "fail to do something that the 'side letter agreement(s)' required them to do." (Ex. Q at 2.) Such deference would be improper. "Where a special finding of fact is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." C.C.P. § 625. A general verdict "implies findings on all issues in favor of the plaintiff or defendant." *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal. App. 4th 949, 959-960. In contrast, "a special verdict presents to the jury each ultimate fact in the case." (*Id.*) The controlling nature of special findings is warranted because "the response of the jury to the special issues or particular questions of fact may show that no judgment can properly be entered ... for a defendant [because] the special findings, together with the facts admitted on the record, may show that the plaintiff is entitled to a judgment notwithstanding the general verdict against him." *Plyler v. Pacific Portland Cement Co.* (1907) 152 Cal. 125, 130. "The theory is that jurors, unskilled in the law, may make mistakes in applying it to the facts to reach a general verdict, but that they are more trustworthy in weighing conflicting evidence and reaching a conclusion on a particular issue of fact." 7 Witkin, Cal. Proc. 5th (2008) Trial, § 347.

"A special finding is inconsistent with the general verdict only when, as a matter of law, the special finding when taken by itself would authorize a judgment different from that which the general verdict will permit." *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 404 (internal quotation marks omitted).

The jury's determination that Defendants "intentionally fail[ed] to disclose an important fact" is a discrete finding of pure fact. In contrast, the jury's determination that Defendants did everything the side letters required them to do was more akin to a general verdict, because it implied an array of subsidiary findings that Defendants performed all of the discreet obligations imposed by the side letters. These include Defendants' obligations to disclose all material facts and to purchase Plaintiffs' interest in Promenade LLC pursuant to their general put, as well as Knell's duty to act as a fiduciary. Moreover, the breach of contract verdict also required the jury to construe the side letters – an act that is ordinarily a legal issue for the Court. *E.g.*, *Kitty-Anne Music Co. v. Swan* (2003) 112 Cal. App. 4th 30, 37 ("Interpretation of a written instrument is generally a question of law"). Thus, the contract verdict, like a general verdict, merely "implie[d] findings on all [such] issues in favor of the ... defendant." *Myers Building*, 13 Cal .App. 4th at 959-960.

Pursuant to C.C.P. § 625 and the policies underlying that statute, the jury's specific finding that Defendants concealed important facts overrides the jury's inconsistent general determination that Defendants performed all of their obligations under the side letters. Because the jury's specific findings conclusively establish that Defendants did not perform their obligations under the side letters, that element of Plaintiffs' breach of contract cause of action is met as a matter of law. As discussed above, those findings, taken together with the jury's other findings and the undisputed facts, entitle Plaintiffs to judgment on their breach of contract claim notwithstanding the verdict.

V. PLAINTIFFS ARE, ALTERNATIVELY, ENTITLED TO A NEW TRIAL DUE TO THE JURY'S INCONSISTENT FINDINGS.

Verdicts that are irreconcilably inconsistent with one another are "against law" under § 657 and are grounds for a new trial. As the court explained in *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.*:

> Inconsistent verdicts are against the law and are grounds for a new trial. The inconsistent verdict rule is based upon the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence .... An inconsistent verdict may arise from an inconsistency between or among answers within a special verdict or irreconcilable findings. Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law. The appellate court is not permitted to choose between inconsistent answers.

(2005) 126 Cal. App. 4th 668, 682 (quotations and citations omitted); *see also Lambert v. General Motors* (1998) 67 Cal. App. 4th 1179, 1186 ("Having determined that the verdict is fatally inconsistent and must be reversed, we do not need to address the multitude of evidentiary and misconduct issues raised by General Motors. The proper disposition, in our view, is to remand for a new trial.").

To the extent the jury's verdicts regarding concealment, fiduciary duty, and breach of contract are given equal force, those verdicts are hopelessly incompatible and are grounds for a new trial. As discussed above, the jury's findings that Defendants concealed information and that Knell breached his fiduciary duties establish, as a matter of law, that Defendants failed to perform their obligations under the "Obligation of Good Faith and Fair Dealing" provision of the side letters. That conclusion is directly at odds with the jury's finding that Defendants did not "fail to do something that the side letter agreements required them to do." Accordingly, a new trial is necessary to resolve these inconsistencies.

The Court of Appeal in *Singh v. Southland Stone, U.S.A., Inc.* reversed the trial court's refusal to grant a new trial under similar circumstances. *Singh* involved the alleged breach of an employment agreement. The plaintiff argued that the defendant fraudulently lured him to the United States with the false promise of long term employment, and then prematurely terminated

that employment. The jury found that defendants "had made no important promise that they had no intention of performing at the time the promise was made," but also found that "defendants had intentionally or recklessly misrepresented an important fact and intentionally concealed an important fact." *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal. App. 4th 338, 359. The court held that these findings "cannot be reconciled," because plaintiff's misrepresentation claim was based on the alleged false promise of long-term employment. As a result, the court ordered a new trial. *Id.* at 359, 369. The Court of Appeal reached a similar decision in *Oxford v. Foster Wheeler LLC*, where the court ordered a new trial in a product liability case because the jury reached inconsistent verdicts that 1) there was no defect with respect to a product's warnings, and 2) the defendants were liable on a negligent failure to warn claim. *Oxford v. Foster Wheeler LLC* (2009) 177 Cal. App. 4th 700, 721.

The jury in this case reached verdicts that are similarly inconsistent. The jury's verdict that 1) Defendants concealed important facts and Knell breached his fiduciary duties, and 2) Defendants complied with their contractual obligations to disclose potentially adverse facts and act as fiduciaries cannot be reconciled and are grounds for a new trial.

VI. CONCLUSION.

For the above reasons, Plaintiffs respectfully requests that the Court enter judgment on their breach of contract claim in the amount of $2,011,877 (or at least the $1.8 million Defendants' expert testified Plaintiffs would be owed in the event of a breach). Alternatively, Plaintiffs request that the Court grant a new trial on their claims for breach of contract, breach of fiduciary duty and intentional concealment.

Dated: November 21, 2014

BROWNE GEORGE ROSS LLP
Peter W. Ross
Jonathan L. Gottfried
Jordan B. Kushner

By _____
Peter W. Ross
Attorneys for Plaintiffs
EMMETT McDONOUGH, et al.

EXHIBIT K

Plaintiffs' (1) Motion for Judgment Notwithstanding the Verdict concerning Contract Interpretation, and (2) Motion for Judgment Notwithstanding the verdict concerning Inconsistent Verdicts, in their entirety.

Ruling:

Both motions are DENIED.

Analysis:

The two extensive motions (comprising about a total of 25 pages) are very well written and both are buttressed by the declaration of Jordan Kushner with exhibits A through CC.

The motions are extensively (about 30 pages) opposed by the defendant and the response is buttressed by the declaration of Peter Bezek and Exhibits A through S.

Plaintiffs filed a reply of about 15 pages buttressed by an appendix.

I have read it all; your commitment to detail is acknowledged.
But the fact is that the Court agrees with the analysis of the defendant on all points.
Additionally, the Court will point out once more that the question of whether any questions were going to be addressed to the Court at the conclusion of the case was specifically addressed at the pretrial conference and both sides intentionally and deliberately expressed that there were no issues being reserved for the Court to decide. A CMCO was crafted at the conclusion of that conference reflecting those facts. The Court relied on that representation. There is a very specific reason for doing that. This Court takes these cases very seriously and if the Court will be asked to decide any issues at the conclusion of the case the Court takes extensive notes (I have real time on my bench lap-top computer) and has the opportunity and indeed the expectation of asking questions of witnesses and/or of the lawyers as the case progresses on issues of fact and the applicable law. It is decidedly untimely to ask the Court to make important factual and legal decisions at the conclusion of the case just before the matter goes to the jury in such a complex case with such serious financial ramifications. This Court imposes the doctrine of judicial estoppel against the plaintiffs. Judicial estoppel (also known as estoppel by inconsistent positions) is an estoppel that precludes a party from taking a position in a case that is contrary to a position a party has taken earlier in the same or other legal proceedings. At the outset of this case plaintiffs knew precisely what their claims were and when their counsel reported to the bench at the pretrial conference there were no reserved issues for the Court to decide, it was a defining moment for the plaintiffs and the Court.

The claim they make now is inconsistent with the position they took at the outset of the trial and throughout the trial of this lawsuit. The application of the doctrine is discretionary with the Court (People v Torch (2002) 102 Cal. App. 4th 181). The Court elects to apply it here.