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GOTTEX FUND MANAGEMENT LTD.

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

GOTTEX FUND MANAGEMENT LTD., a Delaware corporation,

Plaintiff,

vs.

MKA REAL ESTATE OPPORTUNITY FUND I, LLC, a California limited liability company, **MKA CAPITAL GROUP ADVISORS, LLC**, a California limited liability company, **JASON SUGARMAN**, an individual; **MICHAEL ABRAHAM**, an individual; and **DOES 1-10**,

Defendants.

Case No.

SACV12 1172 AG (RNB)

COMPLAINT FOR:

- (1)-(6) BREACH OF CONTRACT**
- (7)-(8) CLAIM AND DELIVERY**
- (9) CONVERSION**
- (10) AIDING AND ABETTING CONVERSION**
- (11) FRAUDULENT CONVEYANCE**
- (12) BREACH OF FIDUCIARY DUTY**
- (13) MONEY HAD AND RECEIVED**

Plaintiff Gottex Fund Management Ltd. ("Gottex Agent") as an administrative agent to Gottex ABI Master Fund, Limited ("Gottex ABI"), Gottex ABL (Cayman) Limited ("Gottex Cayman"), Hudson ABL Fund Limited ("Hudson"), GVA ABL Portfolio Limited ("Gottex ABL") ("Noteholders" and, collectively with the Gottex Agent, the "Gottex Entities") alleges as follows:

INTRODUCTION

1
2 1. The Gottex Agent, on behalf of secured creditor Noteholders, seeks
3 damages, injunctive relief and a receiver to remedy misappropriations, diversions of
4 funds, and other financial wrongdoings by defendants MKA Real Estate Opportunity
5 Fund I, LLC (“MKA Fund”), MKA Capital Group Advisors, LLC (“MKA
6 Advisors”), Jason Sugarman, and Michael Abraham. Noteholders loaned \$100
7 million to Defendant MKA Fund for MKA Fund to make real estate secured loans and
8 other related investments. In exchange, MKA Fund granted the Noteholders first
9 priority blanket security interests in all of its existing or future property and assets,
10 including MKA Fund loans, proceeds from the sales of the property securing payment
11 of those loans, and collections on judgments or settlements enforcing MKA Fund
12 loans or guaranties. To protect the Noteholders’ security interests, MKA Fund agreed
13 that all proceeds from collateral collected by MKA Fund would be deposited into a
14 “Control Account” (sometimes also referred to as a “Custody Account”) controlled by
15 the Gottex Agent on behalf of the Noteholders. Defendants, however, diverted money
16 that was otherwise earmarked for that Control Account into accounts owned by them
17 and their attorneys, without the authorization by any Gottex Entity. Defendants used
18 and are using that money to settle the personal lawsuits of insiders, pay unjust secret
19 distributions, and avoid the Noteholders’ security interests and rights of possession.

20 2. The Gottex Entities seek damages for these improper transfers and to
21 hold liable Defendants and any managers, officers, or members of MKA Fund or
22 MKA Advisors who benefited from – or knowingly participated in – the forgoing
23 conduct. They also seek the appointment of a receiver and an injunction in support of
24 receivership to enforce Noteholders’ first priority blanket security interests in
25 Defendant MKA Fund’s assets and property because MKA Fund has breached its loan
26 and security agreements and has refused to recognize the authority of the Gottex
27 Agent to take possession and control of those assets on behalf of the Noteholders.
28

PARTIES AND RELATED ENTITIES

1
2 3. Noteholders Gottex ABI, Gottex Cayman, Hudson, and Gottex ABL are
3 corporations engaged in the business of lending and investing.

4 4. Plaintiff Gottex Agent is the duly appointed administrative agent for
5 Noteholders, with authority to assert the rights of the Noteholders. The Gottex Agent
6 is a corporation organized and existing under the laws of the state of Delaware with its
7 principal place of business in Boston, Massachusetts. The Noteholders have
8 appointed the Gottex Agent as their duly authorized agent to assert legal rights
9 regarding the debts and other obligations alleged in this case.

10 5. Defendant MKA Fund is a limited liability company organized under the
11 laws of the State of California and located in Orange County, California; it is the
12 debtor to the Noteholders and the signatory of all the contracts in this action. MKA
13 Fund previously sued the Gottex Entities in federal court on diversity grounds. On
14 information and belief, none of the members of MKA Fund is a resident of any state
15 where any Gottex Entity is a citizen or resident.

16 6. Defendant MKA Advisors is a limited liability company organized under
17 the laws of the State of California and with its principal place of business in Orange
18 County California. It is the “manager” of MKA Fund and the signatory of several of
19 the contracts in this action. On information and belief, none of the members of MKA
20 Advisors is a resident of any state where any Gottex Entity is a citizen or resident.

21 7. Defendant Jason Sugarman is a citizen of Orange County, California and
22 a principal of MKA Advisors and one or more of its affiliates.

23 8. Defendant Michael A. Abraham is a citizen of Orange County, California
24 and a principal of MKA Advisors and one or more of its affiliates.

1 **JURISDICTION AND VENUE**

2 9. This court has jurisdiction over this matter pursuant to Title 28 of the
3 United States Code section 1332, as complete diversity exists between the parties and
4 the matter in controversy exceeds \$75,000.

5 10. Venue is proper in this court because the contracts at issue in this action
6 were made and executed, and were to be performed, in whole or in part in Orange
7 County, California. Also, the Gottex Entities and Defendants agreed that any legal
8 action or proceeding with respect to the contracts at issue in this case may be brought
9 in any federal court sitting in Los Angeles County, California.

10 **FACTS COMMON TO ALL CAUSES OF ACTION**

11 **The Amended Notes**

12 11. In 2006, the Noteholders agreed to loan MKA Fund \$60 million, as
13 originally reflected in six notes signed by MKA Fund for the benefit of the
14 Noteholders. Shortly thereafter, a loan for an additional \$40 million was agreed to.
15 The existing seven (7) notes were amended and restated in or around November 2007
16 providing for a maturity date of April 2008¹ (herein, "Amended Notes").

17 12. MKA Fund used the proceeds of this \$100 million financing transaction
18 to make real estate secured loans. MKA Fund also pursued claims, settlements, and
19 judgments related to its assets.

20 13. To manage the deposit and disbursement of assets and proceeds to repay
21 the Amended Notes, MKA Fund and the Gottex Agent entered into that certain
22

23 ¹ (1) That certain "Amended and Restated Registered Note" dated as of April 12, 2006
24 between MKA Fund and Gottex Cayman for \$12,000,000; (2) That certain "Amended and Restated
25 Registered Note" dated as of April 12, 2006 between MKA Fund and Gottex Cayman for
26 \$5,000,000; (3) That certain "Amended and Restated Registered Note" dated as of June 30, 2006
27 between MKA Fund and Gottex Cayman for \$9,000,000; (4) That certain "Amended and Restated
28 Registered Note" dated as of June 6, 2006 between MKA Fund and Gottex ABL (later assigned to
Hudson) for \$5,000,000; (5) That certain "Amended and Restated Registered Note" dated as of June
30, 2006 between MKA Fund and Gottex ABL for \$21,000,000; (6) That certain "Amended and
Restated Registered Note" dated as of April 12, 2006 between MKA Fund and Gottex ABL for
\$8,000,000; (7) That certain promissory note made by MKA in favor of Gottex ABI dated as of
February 15, 2007 for \$40,000,000.

1 “General Terms for the Deposit Account Control Agreement” (herein, “Control
2 Account Agreement”) dated as of June 30, 2006, which created a Control Account
3 into which all proceeds of any Collateral (as defined in the Security Agreement)
4 would be deposited for the benefit of the Noteholders. Attached hereto as **Exhibit 1** is
5 a true and correct of the **Control Account Agreement**. The Control Account was
6 established first at Alliance Bank. Later, the account was moved in an agreement
7 signed by MKA Fund, the Gottex Agent, and Banco Popular entitled “Instruction
8 Letter Agreement related to Custody Accounts” (herein “Control Account Letter
9 Agreement”). Attached hereto as **Exhibit 2** is a true and correct copy of the Control
10 Account Letter Agreement. In the Control Account Letter Agreement, Mr. George
11 Baker, the President of MKA Fund, and Mr. Kenneth Lipinski, the Chief Financial
12 Officer of MKA Fund, reaffirmed, on behalf of MKA Fund, that “all Proceeds of the
13 Collateral will be deposited into the Control Account.” Gottex had exclusive approval
14 rights for distribution of funds from the Control Account.

15 The Security Agreement

16 14. At or around the time that the Amended Notes were signed, the parties
17 entered into an “Amended and Restated Security Agreement” (herein, as amended,
18 “Security Agreement”) dated as of April 12, 2006. Attached hereto as **Exhibit 3** is a
19 true and correct of the **Security Agreement**.

20 15. In light of the substantial financing from the Noteholders, the Security
21 Agreement granted the Gottex Agent, as agent to the Noteholders, expansive powers
22 over the assets of MKA Fund including (1) an assignment of all collateral as well as
23 first priority blanket security on any assets acquired or owned by MKA Fund at any
24 time as well as first priority liens on the proceeds from any sale of those assets, and,
25 (2) automatic attorney-in fact power over all the “Collateral” upon any event of
26 default under the Security Agreement or the Amended Notes, as they may be
27 amended.

1 16. Pursuant to paragraph 4 of the Security Agreement, MKA Fund agreed
2 that:

3 As security for the full and prompt payment, performance and
4 discharge when due ... of the Secured Obligations, Debtor
5 [MKA Fund] hereby pledges and grants Administrative Agent,
6 as agent for the Secured Parties, a Lien on and security interest
7 in and right of set-off against ..., *and assigns to* Administrative
8 Agent, as agent for the Secured Parties, all of Debtor's rights,
interests, powers and privileges in and to the following assets of
Debtor, wherever situated, now existing or hereafter arising
(collectively, the "Collateral"):

9 (i) all Accounts;

10 (ii) all Investment Property;

11 (iii) all Contract Rights, Commercial Tort Claims,
12 cash, Deposit Accounts (including, but not limited to, the
13 Custody Account, and all assets therein), General Intangibles
(including Payment Intangibles and Software), Instruments
14 (including any Promissory Notes), Inventory, Letter-of-Credit
Rights and all Supporting Obligations;

15 (iv) all Documents; and

16 (v) all Proceeds of any and all of the foregoing.

17 [Collateral]

18 17. The secured obligations included all amounts due to the Gottex Entities
19 under the Amended Notes, as well as all interest, fees, expenses, and costs of
20 administering and maintaining the Collateral, as defined therein. (Security Agreement
21 ¶ 5.) As set forth in Exhibit 2, these terms make clear that the Gottex Agent has a
22 right of possession and control of the Proceeds from the sale of any collateral (as
23 defined in paragraph 4(i)-(v) and the definitions).

24 18. The Security Agreement further required that all proceeds from the sale
25 of any asset that MKA Fund invested in or owned, directly or indirectly, must be
26 deposited into the Control Account described above (which was called a "Custody
27 Account" in the Security Agreement, referring to the same account at all times).

1 (Security Agreement ¶ 6(b).) Paragraph 9(e) also requires MKA Fund to turn over all
2 distributions it receives from the collateral to the Gottex Agent.

3 19. MKA Fund agreed that, upon the occurrence of any default under the
4 Security Agreement, the Gottex Agent would become MKA Fund's "true and lawful
5 attorney-in-fact, with full power of substitution and full power and authority to
6 acknowledge, swear to, record, file for any purpose and vote or consent to actions in
7 respect of the Collateral without any notice to, or consent of, Debtor being required."

8 (Security Agreement ¶ 9(h).)

9 20. The Security Agreement defined the following events of default, *inter*
10 *alia*: (i) "the transfer, sale or encumbrance of all or any portion of the Collateral in
11 violation of this Agreement ..." (ii) the occurrence of any default under any "Note."

12 (Security Agreement ¶ 10.)

13 21. MKA Fund's obligations under the Security Agreement were "absolute
14 and unconditional" under paragraph 13 and not subject to any defense other than
15 actual repayment.

16 The Current Notes

17 22. On April 9, 2008, the Gottex Entities sent a Notice of Default to MKA
18 Fund claiming several defaults.

19 23. After service of the Notice of Default, MKA Fund, MKA Advisors, and
20 the Gottex Entities entered into a "Waiver Agreement" dated as of April 1, 2008.
21 Attached hereto as **Exhibit 4** is a true and correct copy of the **Waiver Agreement**.

22 24. At or after the time they entered the Waiver Agreement, the Amended
23 Notes were amended and restated by entering into the following operative notes:

- 24 a. That certain "**Amended and Restated Promissory Note**" made by MKA
25 Fund in favor of Gottex ABI as of April 1, 2008 for \$36,970,548 at a
26 15% interest rate, with monthly interest due on the 10th of each month
27 and a maturity date of December 1, 2008. Attached hereto as **Exhibit 5**
28 is a true and correct copy of this agreement.

1 b. That certain “**Second Amended and Restated Promissory Note**” made
2 by MKA Fund in favor of Gottex Cayman as of April 1, 2008 for
3 \$26,052,961 at a 15% interest rate, with monthly interest due on the 10th
4 of each month and a maturity date of December 1, 2008. Attached hereto
5 as **Exhibit 6** is a true and correct copy of this agreement.

6 c. That certain “**Second Amended and Restated Promissory Note**” made
7 by MKA Fund in favor of Hudson as of April 1, 2008 for \$4,986,536 at a
8 15% interest rate, with monthly interest due on the 10th of each month
9 and a maturity date of December 1, 2008. Attached hereto as **Exhibit 7**
10 is a true and correct copy of this agreement.

11 d. That certain “**Second Amended and Restated Promissory Note**” made
12 by MKA Fund in favor of Gottex ABL as of April 1, 2008 for \$1,061,659
13 at a 15% interest rate, with monthly interest due on the 10th of each
14 month and a maturity date of December 1, 2008. Attached hereto as
15 **Exhibit 8** is a true and correct copy of this agreement.

16 (Collectively herein, as amended, “Current Notes”)

17 25. The Current Notes required timely repayment; they contain a series of
18 affirmative and negative covenants; and they define various events of default.

19 26. The Security Agreement remained in full force and effect as to the
20 Current Notes and all references to the notes in the Security Agreement applied and
21 now apply to the Current Notes.

22 Modification Agreement

23 27. As of December 2008, MKA Fund was in default on its interest payments
24 due under the terms of the Current Notes and was in default on its obligation to
25 provide auditing information.

26 28. As of December 2008, MKA Fund, MKA Advisors, and the Gottex
27 Entities entered into a “**Modification Agreement**,” a true and correct copy of which is
28 attached hereto as **Exhibit 9**.

1 29. The Modification Agreement provided for a revised maturity date on the
2 Current Notes to December 2009. (Modification Agreement ¶ 4(d).)

3 30. The Modification Agreement required MKA Fund to make three
4 “Periodic Payments of Principal” from March 1, 2009 to September 1, 2009 totaling
5 **\$36,000,000**. (Modification Agreement ¶ 4(a)-(c).)

6 31. The Modification Agreement amended the Security Agreement to make
7 clear that the definition of “Control Account” would include any replacement of the
8 then-current account at Alliance Bank. (Modification Agreement ¶ 3(a).)

9 32. The Modification Agreement amended paragraph 4 of the Waiver
10 Agreement to require MKA Fund to provide a first deed of trust in the Gottex Entities’
11 favor on any properties acquired by MKA through foreclosure or otherwise.

12 33. Under the Modification Agreement, MKA Fund and MKA Advisors
13 reaffirmed the obligation to grant the Noteholders a first priority security interest in all
14 real property owned by MKA Fund, directly or indirectly, including “REO” properties
15 (*i.e.* properties that MKA Fund acquired by foreclosure or credit bid or by any other
16 manner as a lender or investor) and including, but not limited to, a list of properties set
17 forth in Exhibit E thereto.

18 34. The Modification Agreement required the Gottex Entities’ prior written
19 approval before paying to MKA Advisors any fees or expenses. (Modification
20 Agreement ¶ 10.)

21 35. Simultaneously with the Modification Agreement, MKA Fund, MKA
22 Advisors, the Gottex Agent, and each of the Noteholders parties entered into a series
23 of “**Second Amendments**” to the Current Notes, true and correct copies of which are
24 attached hereto as **Exhibit 10**. The Second Amendments confirmed the extension of
25 the maturity date to December 2009. Further, both MKA Fund and MKA Advisors
26 acknowledged the outstanding debts of MKA Fund to the Gottex Entities at that time:

- 27 a. \$33,468,610 owed by MKA Fund to Gottex ABI;
28 b. \$23,585,176 owed by MKA Fund to Gottex Cayman;

- c. \$4,514,200 owed by MKA Fund to Hudson;
- d. \$961,067 owed by MKA Fund to Gottex ABL.

MKA Fund's Defaults

36. In breach of its obligations under the Current Notes, Security Agreement, Control Account Agreement, Control Account Letter Agreement, and Modification Agreement, MKA Fund:

- a. Failed to make monthly interest payments (Current Notes ¶ 5(b));
- b. Failed to make the Periodic Payments of Principal (Modification Agreement ¶ 4);
- c. Failed to repay the amounts due upon the amended maturity date of December 1, 2009 (Current Notes ¶ 5(a), as amended by the Second Amendment);
- d. Made unauthorized payments of funds to MKA Advisors, which funds were used to pay Defendants Jason Sugarman and Michael Abraham (Modification Agreement ¶ 10);²
- e. Made illegal distributions/dividend payments, whether open or disguised, on account of equity interests in the property, without consent from MKA Fund (Current Notes ¶ 5(n)(ii));
- f. Failed to record a first priority deed of trust or mortgage on certain REO assets (Modification Agreement ¶¶ 1-2);
- g. Made unauthorized payments as purported "expenses" incurred in the sale of property that were in fact expenses unrelated to the sale of the property (Waiver Agreement ¶ 4(b));
- h. Failed to maintain sufficient capitalization and thereby committed a Collateral Breach (Current Notes ¶ 5(j));

² As set forth herein, these and other payments constitute fraudulent conveyances because they were made to avoid paying Gottex and because MKA Fund was insolvent at the time they were made.

- 1 i. Granted liens to other parties in the Collateral (Current Notes ¶
- 2 5(g), Security Agreement ¶ 6(c));
- 3 j. Failed to provide Gottex with all of the required monthly reports
- 4 including the “Loan List,” the list of Impaired Loans, the statement
- 5 of redemption requests, financial statements, Manager
- 6 certification, and/or other items (Current Notes ¶ 8(i));
- 7 k. Failed to deposit Proceeds of the Collateral into the Control
- 8 Account.
- 9

10 37. By letter dated June 13, 2012, counsel for the Gottex Entities notified
11 counsel for MKA Fund about certain of these breaches. Gottex demanded a return of
12 proceeds from the sale of certain collateral which proceeds should have been
13 deposited to the Control Account. MKA Fund did not comply.

14
15 To Avoid Paying Gottex, Defendants Engaged in Conversion, Fraudulent
16 Conveyance, and Other Bad Faith Conduct

17 38. While MKA Fund was in default on its obligations to the Gottex Entities
18 and not paying its debts as and when due, Defendants acted in concert with their
19 attorneys and other agents to defraud the Gottex Entities and to misappropriate monies
20 that were owned directly and/or beneficially by the Gottex Entities. Under the terms
21 of the agreements discussed above, all property owned by MKA Fund – directly or
22 indirectly – and the proceeds from the property (by sale or otherwise) was assigned to
23 the Gottex Agent and the Gottex Agent was the attorney-in-fact of said property.
24 Defendants violated these property rights. Among other things, MKA Fund sold
25 several assets (commonly known as Belaflorea and MKA-GPS (Central Valley)) which
26 produced around one million dollars in proceeds. Under the parties’ agreements and
27 practice, the Gottex Entities had a right of possession to said funds. In a deliberate
28 and intentional effort to avoid the Gottex Entities’ contractual right to sweep the funds

1 or to control how costs were paid on those properties, Defendants, acting in concert
2 with their attorneys and other individuals, diverted money required to be paid into the
3 Control Account. Instead, they paid the money into an account that only Defendants
4 controlled, as MKA has admitted. Defendants then used that money to pay MKA
5 Advisors, Sugarman, Abraham, and other individuals and/or entities who were not
6 entitled to payments ahead of the Gottex Entities. Defendants undertook these actions
7 intentionally to avoid detection from the Gottex Entities and to make preferential
8 payments to themselves, their owners, and to preferred creditors who are subordinate
9 to the Gottex Entities.

10 39. Among other things, Defendants undertook these acts with respect to a
11 lawsuit settlement regarding a junior creditor. This junior creditor sued Sugarman and
12 Abraham in Washington State on personal guaranties regarding MKA Fund loans
13 ("Washington Action"). (The junior creditor was barred from suing MKA for
14 damages because it was and is subordinate to Gottex.) The court entered judgment
15 against Sugarman and Abraham personally for millions of dollars. In order to pay this
16 junior creditor, Defendants, in concert with their attorneys and others, directed that
17 funds from the sale of MKA Fund assets be diverted in such a manner that they would
18 evade the Gottex Entities' attention.

19 Basis for a Receiver

20 40. Absent a receiver and injunctive relief in aid of the receivership,
21 Defendants will continue to divert funds and other assets that should be paid and/or
22 turned over to the Gottex Entities

23 41. On June 22, the Gottex Entities sent a memorandum to MKA Fund
24 seeking assurances that upcoming receivables and loan payments would be delivered
25 to the Control Account. MKA Fund, acting through counsel, did not confirm as
26 requested. Instead, MKA Fund's counsel expressly stated that it believed
27 (erroneously) that other creditors needed to be paid out of the money in which Gottex
28 has a possessory interest.

