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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re: CCA Construction, Inc., Debtor.	(Hon. Christine M. Gravelle) Chapter 11 Case No. 24-22548-CMG

STATEMENT AND RESERVATION OF RIGHTS OF BML PROPERTIES, LTD. TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY TO PROSECUTE AN APPEAL

BML Properties, Ltd. ("BMLP"), by and through its undersigned counsel, hereby submits this Statement and Reservation of Rights to the *Debtor's Motion for Entry of an Order Granting Relief from the Automatic Stay to Prosecute an Appeal* [Docket No. 14] (the "Motion"), and respectfully represents as follows:

STATEMENT

CCA owes BMLP more than $1.6 billion under an enforceable New York State court judgment, making BMLP by far the largest creditor of CCA. After discussing changes to the proposed form of order with CCA's proposed counsel and obtaining a commitment from counsel to provide BMLP with certain financial reporting, BMLP does not object to CCA's request to modify the automatic stay to permit CCA to continue with the Appeal of the New York judgment.

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However, the Motion and other first-day pleadings provide a remarkably one-sided and incomplete picture of the litigation between CCA and BMLP and warrant significant clarification so that this Court has a clear picture of CCA's conduct that precipitated this Chapter 11 case.

Tellingly, CCA chose not to provide this Court with the 74-page post-trial decision (the "New York Decision") that sets forth the New York court's detailed findings of fact and conclusions of law that followed seven years of litigation and an eleven-day bench trial. A true and correct copy of the New York Decision is annexed hereto as Exhibit 1. As the decision explains, the litigation in New York arose from a scheme by CCA and its nominal affiliates (but, in fact, its alter egos) to defraud and loot assets from its former business partner BMLP in connection with developing the Baha Mar resort complex in the Bahamas. Following a bench trial, the New York court found "by clear and convincing evidence" that CCA "committed at least four instances of fraud," including by diverting resources intended for the project "to buy a competing hotel development down the road." Ex. 1 at 1, 5. The New York Decision speaks for itself.

The Debtor's first day pleadings repeatedly try to disclaim CCA's role in the fraud, but the New York court specifically rejected CCA's feigned corporate separateness, finding that CCA and its nominal affiliates "conflated and blurred beyond independent recognition their purportedly separate corporate existences." Ex. 1 at 68. Among other findings, the supposedly separate entities had the same officers and directors, *id*. at 68; "often used CCA, Inc. letterhead, emails, and signatures," *id*. at 68; their decisions were made by the corporate parent located in China, CSCEC, Ltd., *id*. at 69; and they "commingled their financial obligations," *id*. at 69. The New York court thus found that judgment should be entered against all three nominal defendants, including CCA, because at the time of the fraud:

> (i) the Defendants shared ownership, officers, and directors; (ii) the Defendants shared offices and addresses; (iii) CCA, Inc., acting through Mr. Yuan, controlled CCAB and CSCECB; (iv) commingled assets; (v) paid or guaranteed obligations of one another; (vi) were not treated as separate profit centers; (vii) did not deal with one another at arm's length; and (viii) otherwise conflated their corporate identities. CCA, Inc. (through its boss Mr. Yuan), in particular, dominated the other entities and, as discussed above, used that domination and commingling of assets and corporations to perpetrate a wrong on BMLP.

Ex. 1 at 70.

Consistent with the New York Decision, the New York court entered a money judgment against CCA and two other nominal entities in the sum of $1,642,598,593.15, plus interest accruing at a rate of 9% per annum. *See* Ex. 2 at 3 (Judgment dated October 31, 2024).

Prior to commencing this Chapter 11 case, CCA sought to stay enforcement of the judgment in New York pending appeal, making the same argument to the New York Supreme Court Appellate Division that it re-hashed to this Court in its first day motions: that the New York Decision "rests on numerous errors of law and fact." *See* Ex. 3 at 7 (Motion for a Stay of Enforcement Pending Appeal, at page 2 of the affirmation in support thereof). BMLP squarely refuted these arguments when it timely opposed that motion. Ex. 4 (Opposition to Motion for a Stay Pending Appeal). And, after considering BMLP's opposition—including that "CCA's appeal is meritless," *id*. at 3—the Appellate Division wholly denied CCA's motion for a stay of enforcement pending appeal. Ex. 5 at 1 (Order). While the Appellate Division has yet to decide the merits of CCA's appeal, this Court should bear in mind that the Appellate Division has already considered CCA's self-serving claims that it is likely to succeed on appeal when it entered that order denying a stay.

BMLP has no doubt that it will successfully defend the appeal in New York and fully intends to vindicate its rights in this Chapter 11 proceeding, including but not limited to pursuing

any and all claims that may lie against nominally separate affiliates of CCA such as its ultimate corporate parent CSCEC, Ltd.

RESERVATION OF RIGHTS

BMLP reserves all rights in the Chapter 11 case, including, without limitation, to seek to dismiss this Chapter 11 proceeding, to seek appointment of an independent examiner, to seek the appointment of a Chapter 11 trustee, to seek to recharacterize or avoid intercompany indebtedness, and/or to seek standing to bring claims on behalf of CCA if the Debtor unreasonably fails to do so.

Dated: December 27, 2024
Newark, New Jersey

GIBBONS P.C.

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EXHIBIT 1

New York Decision

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** 53

Justice

----------X

BML PROPERTIES LTD.,

Plaintiff,

- v -

CHINA CONSTRUCTION AMERICA, INC.,NOW KNOW AS CCA CONSTRUCTION, INC.,CCA CONSTRUCTION, INC.,CSCECBAHAMAS, LTD., CCA BAHAMAS LTD., DOES 1 THROUGH 10,

Defendant.

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INDEX NO. 657550/2017

POST-TRIAL DECISION and ORDER

This case was tried without a jury over the course of approximately 11 days (August 1, 2024 - August 15, 2024).

As discussed below, at trial BML Properties Ltd. (**BMLP**) more than met its burden in proving (i) by a preponderance of the evidence that the CSCECB Board Member (hereinafter defined) breached the Best Interests Obligation (hereinafter defined) set forth in Section 4.7 of the Investors Agreement (hereinafter defined) no fewer than six times and (ii) by clear and convincing evidence committed at least four instances of fraud, and that as a direct and proximate cause of such conduct, BMLP suffered damages in the amount of its entire $845 million investment. The evidence firmly established that the first breach occurred as of May 1, 2014. Inasmuch as the cause of action accrued as of such date, BMLP is entitled to pre-judgment interest as of May 1, 2014. The evidence adduced at trial also firmly established that piercing the corporate veil as against all Defendants is warranted such that the BMLP may

OTHER ORDER – NON-MOTION

submit judgment in the amount of $845 million with statutory interest accruing as of May 1, 2014, as against all Defendants.

As discussed below, BMLP's witnesses' testimony was credible and consistent with the contemporary documents. The Defendants' witnesses' testimony by contrast was often inconsistent with their own internal communications or otherwise confirmed their many instances of breach and fraud. Indeed, and in perhaps one of the only moments of true candor, and as discussed below, Tiger Wu testified that when he became the CSCECB Board Member he was not even aware of the Best Interests Obligation (*i.e.*, the obligation to act in the best interests of BML). He never read the Investors Agreement and Ning Yuan, his predecessor as the CSCECB Board Member, never told him about the Best Interests Obligation:

Q Now, if you look at the last part of this provision, sir, it states that the China State Board Member shall at all times act in the best interests of the company. You're aware that have provision, correct, sir?

A I was not aware of it at the time.

Q So, let me make sure I understand this. You replace Ning Yuan as the China State Board member, right?

A That is correct.

Q And that happened around May of 2014; is that right?

A I think it is around that time.

Q And when that transition occurred, you did not take the time to review this document to see what your responsibilities would be as the China State Board member, is that your testimony?

A Yes.

Q And you did not discuss with Mr. Yuan what the responsibilities would be of the China State Board member, correct?

A I didn't.

Q So you went into this job without really understanding what you could or could not do in that role; is that fair?

A I don't understand the provision at that time in this document.

Q You would agree with me, though, whether or not you knew about this provision, you would agree with me that it would be in the best interests of Baha Mar to be ready to open its doors on March 27th, 2015, when guests with reservations were due to arrive, correct?

A That's correct.

…

Q You would agree with me, sir, it would not be in the best interests of the Project to intentionally slow down the progress of the Project, right?

A Yes, I agree.[1]

(tr. 1149:5-1150:8, 1150:15-18). As discussed below, appointing a CSCECB Board Member who did not even know that he was obligated to act in the Best Interests of BML was the first breach of the Investors Agreement. This occurred in May 2014. The breach was further compounded by the fact that Mr. Wu was hopelessly conflicted in this role. As discussed further below, he was the Executive Vice President of CCAB (hereinafter defined), the construction manager and general contractor of the Project, which was also responsible for the clandestine acquisition of the competing Hilton project (tr. 1167:3-19; JX 593).

Fraud was also established beyond doubt. CCAB knowingly and falsely told BML and its representatives that substantial completion would occur by March 27, 2015, and Mr. Wu voted to authorize a BML board resolution announcing such opening date to the public without any plan

[1] Yet, as discussed below, the evidence adduced at trial showed this is exactly what Mr. Wu did, and admitted to doing.

in place to achieve it, and which the uncontroverted testimony adduced indicated was done with the knowledge that if that date was missed it would be "disastrous" (JX 581). After the Board (that he served on) authorized that announcement, and without telling the Board, Mr. Wu had Mr. Yuan (his boss) write to CSCEC Ltd, the parent company located in China, explaining that the situation was dire and that the March 27, 2015 date was in danger:

> Dear Chairman Yi of CSCEC,
>
> Under the care and guidance of the joint-stock company, the work of the large-scale island resort project in the Bahamas is actively advancing towards the established targets. At present, the project has entered the critical stage of final full-scale shock work. However, due to the failure of the professional companies participating in the construction to replenish the labor force promptly in the early stage, many of the project's scheduled construction targets were not achieved on time, and the completion time of each bidding section was delayed again and again, which directly affected the realization of the project's target of full opening on March 27, 2015.
>
> At present, ***the production situation of the project is extremely severe, and if the situation cannot be fundamentally reversed, it will cause irreparable and catastrophic losses***. Not only will the project suffer a delay fine of up to USD 250,000 per day, but it will also have an immeasurable negative impact on the entire brand of CSCEC. We hereby sincerely implore the joint-stock company to strictly order all professional companies participating in the construction ***to take urgent measures immediately***, ***quickly organize the dispatch of the additional labor force, and dispatch skilled workers and experienced management personnel*** to the site for the final shock work before the end of January, so as to ensure that the project's scheduled target of full opening on March 27, 2015 can be achieved. At present, it is imminent to increase the number of personnel in the project. We have officially sent letters to all participating units and asked them to dispatch additional labor force according to the following requirements. ***Among them, there are no less than 200 people from China State Decoration Group Co., Ltd. (CSD), no less than 100 people from First Group Decoration, no less than 100 people from China Construction Industrial & Energy Engineering Group Co., Ltd. (CCIEE), and no less than 50 people from CSCEC Electronic.*** If each unit cannot dispatch personnel as required, the completion target of the Bahamas project ***will not be achieved, and the consequences will be disastrous***. We sincerely implore the joint-stock company to strongly support it!
>
> Hereby report, please instruct.

(the **Hidden Dire Need Letter**; JX 581 [emphasis added]).

Meanwhile, CCAB was reassuring BMLP that the Project was on track:

> Dear Tom,
> Sorry for replying late.
> I think there might be some confusion, all the overhead ceiling inspections, life safety inspections, ***TCO pre-inspections are still going well following the schedule***.

(JX 649 [emphasis added]).

Aside from never telling BML of the urgent need for more workers, as he was obligated to do as the CSCECB Board Member, these assurances by Mr. Wu and his subordinates were false and designed to induce reliance by BMLP and in Daniel Liu's words ultimately "turn passive into active" and cause a liquidity crisis pushing BMLP out of its $845 million investment. This is exactly what happened.

Additionally, the Defendants committed fraud by making the representation that they needed a $54 million payment so that they could pay subcontractors. The evidence adduced at trial established they did not need it or use it for that purpose. They wanted it and used it to buy a competing hotel development down the road (*i.e.*, the **Hilton**).

Messrs. Yuan, Wu, Daniel Liu, and David Wang also used their various different entities that they ran without regard to corporate form and to further the scheme by comingling their financial and corporate obligations and rights. By way of example, their marketing materials had CCA,

Inc. take credit for CCAB's work. When Mr. Yuan reached out to the parent company to get more people, he did not write on behalf of CCAB, he wrote on behalf of CCA, Inc. (JX 581).[2]

For the avoidance of doubt, and as discussed more completely below, the Defendants utterly failed to prove their counterclaims or any damages in support of their counterclaims stemming from BMLP's alleged breach or otherwise.

The Relevant Procedural History

On December 12, 2017, BMLP sued (NYSCEF Doc. No. 1) the Defendants, alleging that they committed fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing. Subsequently (with leave of court), BMLP supplemented its complaint with a cause of action sounding in unjust enrichment (NYSCEF Doc. No. 403). The gravamen of BMLP's complaint was that the Defendants hatched a scheme to defraud and breach its contracts with BMLP in order to delay the opening of the Project, extort extra payments from BMLP, and wrest control of the Project from BMLP. As alleged, the Defendants carried out this scheme by intentionally misleading BMLP as to the Defendants' ability to meet their obligations and open the Project when and as planned, including by, among other things, diverting resources and manpower to competing projects, concealing those diversions, and even engaging in outright sabotage of the Project.

[2] When he was asked about this at trial, he merely said that he wrote on behalf of the other company because he thought it was more respectful to use his "higher title." This was however not the only example of Mr. Yuan signing on behalf of the wrong entity improperly (tr. 964:13-17 [CCA, Inc. instead of CCAB]).

The Defendants initially moved to compel BMLP to arbitrate the dispute pursuant to a certain Amendment No. 9 to the MCC or, in the alternative, to dismiss the complaint. By Decision and Order dated January 24, 2019 (the **Prior Decision**; NYSCEF Doc. No. 154), the court (Scarpulla, J.) denied the motion because BMLP was not a party to Amendment No. 9 and held, among other things, that the fraud claims were not duplicative of the breach of contract claims because (i) the fraud claims relied on misrepresentations of then-current facts regarding the Project, and (ii) the damages sought under the fraud claims were for mitigation expenses and investment efforts based on those misrepresentations, not the contract value (NYSCEF Doc. No. 154, at 21-22). On appeal, the Appellate Division affirmed, holding that the alleged false statements concerning the Project's status and the workforce and resources available to meet deadlines were collateral to the contracts (*BML Properties Ltd. v China Constr. Am. Inc.*, 174 AD3d 419 [1st Dept 2019]). The trial court had also held that BMLP's claims are direct, not derivative claims, because BMLP alleged that CCA, the only other shareholder in BML, did not sustain a proportionate loss to that sustained by BMLP (NYSCEF Doc. No. 154, at 19). This too was affirmed on appeal.

CSCECB then served an answer with counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and shareholder oppression under the Bahamas Companies Act (NYSCEF Doc. No. 161). BMLP moved to dismiss CSCEC's third counterclaim for shareholder oppression and strike CSCEC's demand for punitive damages. By Decision and Order dated March 17, 2020, the court (Scarpulla, J.) granted the motion (NYSCEF Doc. No. 265). Note of Issue was filed on September 19, 2022 (NYSCEF Doc. No. 410). In

advance of adjudication of the motions for summary judgment, and for the purposes of trial, the parties entered into a joint stipulation (NYSCEF Doc. No. 415) narrowing the parties' claims.

By Decision and Order dated May 25, 2023, the Court denied the Defendants' motion for summary judgment in its entirety and granted BMLP's motion to extent of dismissing (i) CSCEC's counterclaim for breach of contract as to Sections 4.7, 4.8(g), and 4.8(l) of the Investors Agreement, and (ii) several of the Defendants' affirmative defenses (NYSCEF Doc. No. 649, at 2).

On appeal, the Appellate Division modified the Court's summary judgment decision to the extent of (i) dismissing BMLP's request for lost profits damages "because the parties did not contemplate liability for lost profits at the time of contracting," (ii) dismissing BMLP's claims for unjust enrichment and breach of the implied covenant of good faith and fair dealing, and (iii) denying BMLP's motion to dismiss the Defendants' counterclaims under sections §§ 4.7 and 4.8(g), and otherwise affirmed holding, among other things that (x) BMLP's claims are direct, not derivative, and (y) BMLP's fraud claims are not duplicative of its breach of contract claims (*BML Properties Ltd. v China Constr. Am., Inc.*, 226 AD3d 582 [1st Dept 2024]):

> Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about May 25, 2023, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's motion for summary judgment dismissing the counterclaims for breach of §§ 4.7, 4.8 (g), and 4.8 (l) of the Investors Agreement and the affirmative defenses that plaintiff's claims were derivative and released, unanimously modified, on the law, to grant defendants motion as to the unjust enrichment and implied covenant of good faith and fair dealing claims and request for lost profits damages, to deny plaintiff's motion as to the counterclaims for breach of IA §§ 4.7 and 4.8 (g), and otherwise affirmed, without costs.
>
> Plaintiff's claims are not derivative because they involve the breach of a duty independent of any duty owed to the company (*see generally Abrams v Donati*, 66 NY2d 951, 953

[1985]). Plaintiff was a party to the subject Investors Agreement and there is no indication that § 4.7's "best interests" obligation was owed to the company alone. Indeed, § 4.10 of the agreement specifically authorized plaintiff to bring suit individually. "[W]here an independent duty exists, a shareholder may sue on his own behalf even for the loss of value in his investment" (*Solutia Inc. v FMC Corp.*, 385 F Supp 2d 324, 332 [SD NY 2005]; *see also Lawrence Ins. Group v KPMG Peat Marwick*, 5 AD3d 918, 919 [3d Dept 2004]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to the disproportionate loss exception to the derivative claims rule.

The motion court properly denied summary judgment dismissing plaintiff's breach of contract claim. Issues of fact exist as to whether the representatives of defendant CSCECBahamas, Ltd. (CSCECB) failed to act in the best interests of the company by diverting resources to other projects and authorizing the removal of 700 workers from the project as it was nearing its deadline, despite concerns about meeting that deadline, which they did not communicate to the company. It does not matter that the focus of the Investors Agreement is not construction management, as the CSCECB representatives were required to act "at all times" in the company's best interests (*see Falle v Metalios*, 132 AD2d 518, 520 [2d Dept 1987]).

The motion court also properly denied summary judgment dismissing plaintiff's fraud claims. This Court has already decided that the fraud claims are not duplicative of the breach of contract claim (*BML Props. Ltd. v China Constr. Am. Inc.*, 174 AD3d 419, 419 [1st Dept 2019]). Fact development has not created a basis to modify this legal determination. Issues of fact exist with respect to justifiable reliance. Evidence was presented that plaintiff, which had day-to-day responsibility for the company, relied on defendants' misrepresentations by taking reservations, preparing for opening, and refraining from seeking additional financing or labor. Evidence was also presented that, although plaintiff had some sense that defendants were not telling the truth, it lacked the ability to definitively verify their claims—especially in view of defendants' apparent concealment of information.

The breach of the implied covenant of good faith and fair dealing claim should, however, have been dismissed as duplicative of the breach of contract claim because "both claims arise from the same facts" and the conduct at issue clearly falls within the ambit of the contractual best efforts obligation (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Even if the unjust enrichment claim is not duplicative, it should also have been dismissed because plaintiff did not establish that it made the subject payments or otherwise had a legal entitlement to the funds used to make them (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; cf. *245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 606 [1st Dept 2024]).

The request for lost profits damages should also have been dismissed because the parties did not contemplate liability for lost profits at the time of contracting (*see generally Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986] [*Kenford I*]; *Awards.com v*

Kinko's, Inc., 42 AD3d 178, 183 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). It is not enough that CSCECB expected that the project would make money, as that is not the same thing as expecting to be held liable for lost profits (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-320 [1989]; *Awards.com*, 42 AD3d at 184; *Bersin Props., LLC v Nomura Credit & Capital, Inc.*, 74 Misc 3d 1209[A], 2022 NY Slip Op 50084 [U], *16 [Sup Ct, NY County 2022]). Section 11.10 of the Investors Agreement expressly waived consequential damages—notwithstanding "[a]nything herein contained, and anything at law or in equity, to the contrary" (*see Kenford I*, 67 NY2d at 262; *Awards.com*, 42 AD3d at 183-184). The lost profits sought here are consequential in nature because they stem from collateral business arrangements—i.e., the loss of contracts with potential hotel guests (*see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805-808 [2014]). Section 11.10 is not unenforceable because "the misconduct for which it would grant immunity smacks of intentional wrongdoing" as "a party can intentionally breach a contract to advance a 'legitimate economic self-interest' and still rely on the contractual limitation provision" (*Electron Trading, LLC v Morgan Stanley & Co. LLC*, 157 AD3d 579, 580-581 [1st Dept 2018]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to causation and the capability of measuring damages with reasonable certainty.

Defendants' affirmative defense that plaintiff's claims are derivative was properly dismissed for the reasons stated above. Defendants' affirmative defense that plaintiff's claims were released was properly dismissed because plaintiff was not a party to the releases, which at any rate applied to claims under a separate contract.

CSCECB's counterclaim for breach of § 4.7 of the Investors Agreement should not have been dismissed. There is evidence in the record of at least one unanswered request for books and records, in a March 13, 2015 letter, which was reiterated in March 25 and May 6, 2015 letters. Although the company was not obliged to create new documents in response to this request, it should have had some existing documentation responsive thereto. Issues of fact exist also exist as to whether the company's failure to provide this information caused CSCECB damages, as it could have taken steps to mitigate if it had evidence of financial mismanagement.

CSCECB's counterclaim for breach of § 4.8 (g) of the Investors Agreement also should not have been dismissed. It is undisputed that plaintiff breached this provision by filing for reorganization without CSCECB's consent and issues of fact exist as to whether CSCECB was damaged as a result. CSCECB's counterclaim for breach of § 4.8 (l) of the Investors Agreement was, however, properly dismissed, as there is no evidence that the subject loan damaged CSCECB in any way.

(*BML Properties Ltd.*, 226 AD3d 582 [1st Dept 2024]).

Prior to trial, the Defendants brought two motions *in limine*, seeking to exclude (i) evidence relating to BMLP's loss of its approximately $830 million initial investment in the Project, alleging such damages were consequential, not direct, and (ii) certain "parol evidence" that the Defendants claimed would vary the meaning of Section 4.7 of the Investors Agreement. By Decision and Order dated July 24, 2024 (NYSCEF Doc. No. 736), and for the reasons set forth in that Decision and Order, the Court denied both motions.

The Trial

At trial, BMLP adduced the following witnesses:

1. Sarkis Izmirlian (fact witness by live testimony)
2. Thomas Dunlap (fact witness by live testimony)
3. Patrick Murray (fact witness by deposition)
4. Allen Jude Manabat (fact witness by deposition)
5. Steven Collins (expert witness by live testimony)
6. Margaret Myers (expert witness by live testimony)
7. Daniel Liu (fact witness by deposition)
8. Paul Pocalyko (expert witness by live testimony)
9. David Bones (expert witness by live testimony)
10. Tiger Wu (fact witness by live testimony)
11. David Wang (fact witness by live testimony)
12. Ning Yuan (fact witness by live testimony)

The Defendants adduced the following witnesses at trial:

1. Jason McAnarney (fact witness by live testimony)
2. David Pattillo (expert witness by live testimony)
3. Rodney Sowards (expert witness by live testimony)
4. Douglas Ludwig (fact witness by deposition)
5. James Kwasnowski (fact witness by deposition)
6. Augustin Barrera (fact witness by deposition)
7. Gregory Djerejian (fact witness by deposition)
8. Ann Graff (fact witness by deposition)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following trial, the court makes the following findings of fact and comes to the following conclusions of law:

I. The Parties and Witnesses

1. BMLP is a company organized under the laws of the Commonwealth of the Bahamas and was the parent company of Baha Mar Ltd. (**BML**), the former owner and developer of the multi-billion-dollar Baha Mar resort complex in the Bahamas (the **Project**).

2. CCA Construction, Inc. (**CCA, Inc.**), CSCEC (Bahamas), Ltd. (**CSCECB**),[3] and CCA Bahamas, Ltd.'s (**CCAB**; CCA, Inc., CSCECB, and together with CCAB, hereinafter, collectively, the **Defendants**) are affiliated companies which invested in the Project and acted as the general contractor and construction manager for the Project.

3. Sarkis Izmirlian was the Chairman and CEO of BMLP and BML (tr. 95:21-23, 122:8-11). Mr. Izmirlian, as the principal of both BMLP and BML, was a central player in the events which give rise to this case and testified credibly as to the BMLP's investment and as to the Defendants' many acts of fraud and breach of the Investors Agreement. Trial revealed that Mr. Izmirlian at all times as to the issues tried in this case acted commercially reasonably, honorably, and in the bests interests of the Project.

[3] In the Investors Agreement, CSCECB is referred to as "China State."

4. Thomas Dunlap was the President of BMLP (tr. 281:1-3). Mr. Dunlap testified credibly to, among other things, various instances of the Defendants' conduct which frustrated progress on the Project, including turning off the lights on the Project work site over "commercial disputes" (JX 450; tr. 299:11-300:19).[4]

5. Patrick Murray was the Operations Director of Mace International (**Mace**), the Owner's Representative for the Project (PX 2 at 7:23-8:03, 10:11-10:18). Mr. Murray testified to the scope of Mace's duties as the Owner's representative on the Project.[5]

6. Allen Jude Manabat was CCAB's head scheduler for the Project (PX at 11:16-17:11). Mr. Manabat testified to the importance of scheduling to the Project and how he was repeatedly diverted to work on other CCAB or CCA, Inc. projects (e.g., the Hilton) and in Panama.

7. Steven Collins is an expert on the subject of construction management (tr. 475:19-23). Mr. Collins testified to the importance of comprehensive schedules to a construction project of this size, the inadequacy of the schedules created by CCAB, and the unique ability of the construction manager to keep track of the progress of the work.

8. Margaret Myers is an expert on the subject on China's economic policy in Latin America and the Caribbean (tr. 636:25-637:3). She testified to the practices of a "policy bank" like

[4] Trial revealed that "commercial disputes" often referred to certain disputed change orders or other demands for the release of retainage not required by the contract.
[5] As discussed below, trial revealed that the BMLP's reliance on the Defendants continued assurances that the Project would be open on March 27, 2015 and substantially completed was nonetheless reasonable under the circumstances.

the Chinese Export-Import Bank (**CEXIM**), the lender in this case, namely the goal to advance China's economic foreign policy goals and the requirements as to using Chinese-based companies.

9. Paul Pocalyko is an expert in forensic accounting and construction cost analysis (tr. 660:14-18). His testimony demonstrated that CCAB used Project money to buy the Hilton rather than pay subcontractors and described the Defendants' commingling of assets.

10. David Bones is an expert in economic loss, valuation, and damages (tr. 776:4-8). He testified to BMLP's economic loss.

11. Daniel Liu was a Senior Vice President of both CCA, Inc. and CCAB (tr. 9:12-12:19). Mr. Liu was the lead negotiator for CCAB's purchase of the Hiton (PX 2, at 43:23-44:11).

12. Mr. Yuan was, at the least, the Chairman and President of CCA, Inc., Chairman of CCAB, and a director of CSCECB (tr. 883:20-884:20, 902:22-24). In his testimony, Mr. Yuan disagreed with BMLP's contention that held himself out as both Chairman and President of CCAB and CSCECB (tr. 884:5-885:10). BMLP adduced a certain Acknowledgement Regarding Equity Investment and Advance Payment, which Mr. Yuan signed on behalf of both CCAB and CSCECB, giving his title under each signature block as "Chairman & President" (JX 66). On this point, as on others, Mr. Yuan's testimony was not credible and

was inconsistent with the contemporaneous documents adduced at trial.[6] Mr. Yuan was the first CSCECB Board Member, later replaced by Mr. Wu (tr. 897:23-898:14). Mr. Yuan was the senior-most officer for all of the Defendants (and other related entities not a part of this case) in the western hemisphere, and as discussed above was also a board member of at least some of these entities (tr. 885:13-886:14). Messrs. Wu, Liu, and Wang all reported to Mr. Yuan (tr. 885:13-17).

13. Mr. Wang was a Vice President of both CCA, Inc. and CCAB (tr. 1059:11-1060:13). Mr. Wang was one of CCAB's officers charged with working full-time at the Project (tr. 1059:15-17, 1060:17-22; JX 495, at 5).

14. Mr. Wu was the Executive Vice President of CCAB and CCA, Inc. (tr. 1146:3-12). As discussed above, Mr. Wu reported to Mr. Yuan (tr. 1148:2-5). Mr. Wu was the most senior executive at CCAB that was tasked with working full-time in the Bahamas (tr. 1148:15-17). Mr. Wu was appointed as the CSCECB Board Member in May 2014. Trial revealed the extent of Mr. Wu's conflict of interest (and its effects) between his role as the executive in charge of CCAB (the general contractor) and as the CSCECB Board Member (*i.e.*, the joint venture partner's board member). Although he did not appreciate the conflict, the potential for this type of conflict had been contractually addressed in the Investors Agreement pursuant to the Best Interests Obligation.[7]

[6] The Court notes that, to the extent there is any confusion about Mr. Yuan's roles, it is a confusion of the Defendants' own making and only underscores the degree to which the Defendants operated as a single economic entity and conflated their corporate identities.
[7] Indeed, his failure to appreciate the conflict and to otherwise understand the Best Interests Obligation led to the many breaches and fraud proved at trial.

15. Jason McAnarney was the Executive Director of CCAB's Mechanical, Electrical, and Plumbing team, which had critical responsibilities relating to achieving the Temporary Certificate of Occupancy (**TCO**) by the March 27, 2015 planned opening date (tr. 1387:14-25; tr. 1398:24-1401:4; tr. 1446:24-1447:13). Mr. McAnarney reported to Mr. Wu (tr. 1388:1-3).

16. Ann Graff was BMLP's corporate representative (tr. 1505:13-18).

17. Greg Djerejian was an executive with BML (JX 896).

18. Douglas Ludwig was BML's Chief Financial Officer (tr. 1505:21-22).

19. James Kwasnowski was the Executive Vice President for design and construction for BML (tr. 1506:8-9).

20. Augustin Berrera was the vice president of AECOM, BML's architect for the Project (tr. 1508:11-14).

21. David Pattillo is an expert in construction management and forensic schedule delay (tr. 1514:18-24).

22. Rodney Sowards is an expert in forensic accounting and economic damages (tr. 1640:13-16). As discussed below, Mr. Sowards' testimony failed to rebut the testimony of Mr. Pocalyko which demonstrated the Defendants' use of Project funds to purchase the Hilton and commingling of assets.

II. The Investors Agreement

23. On January 13, 2011, BMLP, BML and CSCECB entered into the Amended and Restated Investors Agreement (the **Investors Agreement**; JX 34), pursuant to which the parties agreed that BMLP made an $830 million equity investment into the Project and received 100% of BML's voting shares, and CSCECB agreed to invest $150 million into the development project in exchange for 150,000 shares of Series A Preferred Stock in BML; As discussed below, BMLP later made a further $15 million equity contribution.

24. Pursuant to the Investors Agreement, BMLP was responsible for BML's day-to-day management, subject to the direction of the Board of BML. BML's Board was made up of five members. Pursuant to Section 4.2 of the Investors Agreement, CSCECB was entitled to appoint one member of the Board of BML (the **CSCECB Board Member**). The remaining four Board members were appointed by BMLP. CSCECB was also entitled to appoint five representatives (the **CSCECB Representatives**) who would be seconded to the Project.

25. To avoid the effect of any potential conflict of interest between CSCECB and BMLP, the parties agreed in Section 4.7 of the Investors Agreement, that (i) the CSCECB Board Member was required to "at all times act in the best interests" of BML and that (ii) the

CSCECB Board Member was also required to report to the Board of BML as to CSCECB's findings, concerns, and recommendations. To ensure that the CSCECB Board Member could meet his obligations, the parties further agreed that the CSCECB Representatives were to have reasonable access to the books, records, communications, and other documents of the Project and BML's staff in order to monitor the Project's schedule, budget, and similar matters in the interest of BML.

III. BMLP Proved it Made an $845 Million Investment in the Project

26. At trial, Mr. Izmirlian, the Chairman and Chief Executive Officer of BMLP, testified. As indicated above, his testimony was credible and corroborated by various contemporaneous documents introduced into evidence.

27. Mr. Izmirlian testified that beginning in the early- and mid-2000s, he began to assemble a valuable collection of assets, including some 1,000 acres of land and existing structures, in the area of Cable Beach on the island of New Providence in the Bahamas, just to the west of that nation's capital city of Nassau, with the purpose of building a luxury resort on this site (tr. 97:19-98:18; 101:1-11). These efforts included moving the island's main thoroughfare and the purchase of assets from the Bahamian government, including the purchase of a police station and the Prime Minister's offices (tr. 100:13-25; 101:1-15; 103:11-18).

28. Mr. Izmirlian's efforts in acquiring this assemblage of assets were memorialized in a Heads of Agreement dated April 6, 2005, between a predecessor company of BMLP (this

predecessor defined in the agreement as Baha Mar) and the Bahamian government (JX 4; tr. 99:5-18). The Agreement described Baha Mar's efforts to date, including the purchase of several existing hotels and a casino holding one island's only two gaming licenses (JX 4 at 1-2; tr. 101:16-102:10).

29. In the Heads of Agreement, Baha Mar committed to, among other things, build a large-scale resort with a casino and other amenities and attractions, spend a minimum of $1 billion on the project, bear the expense of relocating certain government offices including the Prime Minister's, and create jobs for 3,500 Bahamians (JX 4; tr. 103:2-194:8). In return, the Bahamian government made valuable commitments to support the planned project, including waiver of property taxes and duties on materials, contributing millions of dollars to marketing, and guaranteeing no new gaming licenses would be issued in Nassau for 20 years (JX 4 at 9, 11-12, 15; tr. 104:9-20).

30. As Mr. Izmirlian testified, when the Baha Mar's original partners in the planned project dropped out around the time of the 2008 financial crisis, he sought a new lender for the project and settled on CEXIM (tr. 105:21-107:12), which agreed to lend to the Project on the condition that BMLP use a Chinese contractor for the project (CCAB; tr. 108:5-19).

31. Mr. Izmirlian also testified that the "main deal point" of BMLP's agreement with CEXIM was the debt-to-equity ratio (tr. 109:6-17). In the end, the parties agreed on a 70-30 debt-to-equity ratio for the anticipated credit facility (*id.*).

32. The value of BMLP's equity contribution was appraised by Jones Lang LaSalle Hotles (**JLL**) to be worth $1.267 billion in a May 28, 2009, report prepared at the request of BMLP and China State Construction Engineering Corporation Limited (**CSCEC Ltd**), the parent company of the Defendants (JX 19, at 4). BMLP, CSCEC Ltd, and CEXIM then commissioned BNP Paribas to review JLL's conclusions and provide comments and opinions on the value of BMLP's equity contribution. In its report, BNP Paribas appraised the value of the equity contribution to be between $725 million and $811 million (JX 20, at 8). The BNP Paribas valuation did not however include the value of the concession of the Bahamian Government memorialized in the Heads of Agreement (JX 4; JX 25; JX 26). The credible evidence adduced at trial suggested that this accounted for the disparity.

33. In any event, and significantly, BMLP, BML, CSCECB and CEXIM contractually agreed that ***the value of BMLP's initial equity contribution was $830 million*** ($745 million of asset contribution plus $85 million of cash contribution).

34. To wit, in the Investors Agreement, signed January 13, 2011, by and between BMLP and CSCECB, pursuant to which BMLP made an $830 million equity investment into the Project and received 100% of BML's voting shares, and CSCECB agreed to invest $150 million into the development project in exchange for 150,000 shares of Series A Preferred Stock in BML, CSCECB and BMLP agreed that the "Baha Mar Closing Contribution" shall have the meaning set forth in the Subscription and Contribution Agreement (JX 34, annex 1).

35. In the Subscription and Contribution Agreement by and between BMLP, BML, and CSCECB dated March 30, 2010, the parties agreed that the deemed value of BMLP's equity contribution, excluding its cash contribution of $85 million, was $745 million:

> 4.6 Value of Baha Mar Total Contribution. The Parties agree that the aggregate value of the Baha Mar Closing Contribution together with the Relevant Land Parcels identified on Part 2 of Schedule 6 to the Facility Agreement (excluding the Baha Mar Cash Contribution of $85,000,000) to be delivered, transferred, conveyed and assigned to [BML] by [BMLP] pursuant to this Agreement (or, with respect to the Relevant Land Parcels identified on Part 2 of Schedule 6 to the Facility Agreement, the Investors Agreement) is deemed to be Seven Hundred Forty-Five Million Dollars ($745,000,000).
>
> (JX 25, at 7).

36. In the Credit Facility Agreement dated March 31, 2010, by and between BML and CEXIM, pursuant to which BML and CEXIM agreed that CEXIM would provide BML with a $2.45 billion credit facility, based on a 70-30 debt-to-equity ratio (JX 26). The Credit Facility Agreement defined "Appraised Value" as "US$745,000,000" (*id*., at 3).

37. Mr. Izmirlian testified that, during the entire course of the construction of the Project, none of the Defendants ever questioned the agreed upon $745 million value of the assets contributed to the Project (tr. 119:20-24).

38. As discussed further below, when the agreed upon March 27, 2015 opening was missed, BMLP later contributed a further $15 million in equity (tr. 155:8-156:9). Thus, and as BMLP's damages expert estimated in this report and testified to at trial, BMLP's total equity investment amounted to $845 million (JX 980, at 9-10; tr. 777:10-16).

39. As such, BMLP proved that its equity contribution was $845 million.

IV. The Best Interests Obligations

40. As discussed above, pursuant to Section 4.2 of the Investors Agreement (JX 34) CSCECB had the right to appoint one member of BML's board and pursuant to Section 4.7, the CSCECB Board Member was required to "at all times act in the best interests of [BML]" (the **Best Interests Obligation**):

> 4.2 Board. The business of the Company shall be managed under the direction of the Board in accordance with applicable law and subject to the provisions of Section 4.8 relating to Material Decisions. The Board shall consist of five (5) members. Baha Mar shall be entitled to nominate and have appointed three (3) members of the Board and the Chairman of the Board (for a total of four (4) of the five (5) Board members). China State shall be entitled to nominate and have appointed one (1) member of the Board (the "CSCECB Board Member"). Baha Mar designates Sarkis D. Izmirlian as the initial Chairman of the Board. The board of directors or other governing body of each Subsidiary shall be constituted in a manner functionally equivalent to the Board.
>
> …
>
> 4.7 China State Oversight. During the period from the Closing Date until the date of Substantial Completion of the Project, the CSCECB Board Member and five (5) additional representatives of China State (the "China State Representatives") shall be seconded to the Project. The China State Representatives shall be employed by the Company in residence in The Bahamas in management positions with duties to be mutually determined between the Company and China State, including one (1) China State Representative to be elected a vice president of the Company. The China State Board Member and the China State Representatives shall be given reasonable access to the books, records, communications and other documents of the Project and the Company's staff for the purpose of monitoring the Project Works schedule, Project Works budget and similar matters in the interest of the Company. The CSCECB Board Member shall report to the Board from time to time in order to advise the Company of China State's findings and any concerns it may have with respect to the proper and efficient prosecution of the design and construction work expenditures, and any other recommendations China State may have to benefit the investment of China State and any other investors of the Company. The Company shall provide salaries, housing, benefits, office space and support facilities to the CSCECB Board Member and the China State

> Representatives in accordance with the Company's standard personnel policies. The Company shall use commercially reasonable efforts to assist the CSCECB Board Member and the China State Representatives in obtaining work permits, that are required to permit such persons to be employed in the Bahamas for a minimum of three (3) years, and pay all fees charged by any applicable Governmental Authority of the Government to obtain and maintain such work permits. China State understands that, although the CSCECB Board Member and the China State Representatives shall be appointed by China State, such individuals shall be appointed to assist the Company in furtherance of the Project and ***shall at all times act in the best interests of the Company*** (and shall have no authority to bind the Company or any of its Affiliates). China State recognizes that these personnel will need to abide by confidentiality and conflicts-of-interest requirements from time to time reasonably required by the Company.
>
> (JX 34, §§ 4.2, 4.7 [emphasis added]).

41. As an initial matter, the Defendants dispute the nature of the Best Interests Obligation, arguing they are not a 24/7 commitment, and that Section 4.7 contemplates that the Defendants may wear different hats at different times such that they are not required to always act in the best interests of BML (tr. 1252:2-7; tr. 1253:24-1255:1). In particular, the Defendants pointed out that Mr. Izmirlian and others representing BML at the November 2014 Beijing Meeting and subsequent Bahamas meeting did not at those times tell Mr. Wu that he had a conflict of interest (tr. 1248:5-13; tr. 1253:2). The argument fails. They were not required to tell Mr. Wu anything. They were entitled to rely on Mr. Wu's Best Interests Obligation that they had bargained for in the Investors Agreement. The Court further notes that the Defendants concede that the Best Interest Obligation contemplated something higher than a fiduciary duty (tr. 1254:11-15). "At all times" means exactly that and Mr. Wu (who admitted he did not know understand this obligation) was not entitled to avoid it by putting on a "different hat" (*BML Properties Ltd.*, 226 AD3d 582 [1st Dept 2024]; *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

42. The argument also fails because (i) the Appellate Division has already rejected the "multiple hats" argument (*see BML Properties Ltd. v China Constr. Am., Inc.,* 226 AD3d 582, 583 [1st Dept 2024]), and (ii) Section 4.2 of the Investors Agreement gives CSCECB the *right* to appoint a person to the BML board. It was CSCECB's choice (which BML had no ability to deny or contest) to appoint an obviously conflicted executive of one of its affiliated entities. And, as discussed below, this choice was but one of many made by the Defendants demonstrating that these entities operated as one, such that piercing the corporate veil is appropriate.

43. As discussed above, the initial CSCECB Board Member was Mr. Yuan (tr. 897:23-898:14). From May 2014 onward, the CSCECB Board Member was Mr. Wu.[8] At this time Mr. Wu was also an Executive Vice Present of CCAB and the senior-most executive of CCAB who worked full-time in the Bahamas (tr. 1148:15-18).

44. At trial, Mr. Wu admitted that when he was appointed as the CSCECB Board Member by Ning Yuan (Mr. Wu's predecessor CSCECB Board Member) on May 1, 2014, he had absolutely no knowledge of his Best Interest Obligation; he never discussed it with Mr. Yuan (JX 495, at 2; tr. 1149:5-1150:2) and he did not read the Investors Agreement when he was appointed to the BML board.[9] Put another way, he did not even know that he was supposed to act in BML's best interests. As discussed below, this was the first moment that

[8] As discussed above, Section 4.7 also provides CSCECB with the right to appoint the CSCECB Representatives. BMLP confirmed at trial that it withdraws any claims based on the conduct of the CSCECB Representatives, and its breach of contract claim is predicated solely on the actions of the CSCECB Board Member at the relevant times (tr. 125:4-18).

[9] The Court notes that Mr. Yuan, on the other hand, testified that he was aware of his Best Interests Obligation during his time as the CSCECB Board Member (tr. 898:11-19).

the breach of the Investors Agreement occurred. As a result of this breach and Mr. Wu's conduct, BMLP lost its entire $845 million investment.

V. The March 27, 2015 Substantial Completion Date

45. The parties initially agreed upon a December 2014 substantial completion date for the Project. This was reflected in the Master Construction Contract (**MCC**; NYSCEF Doc. Nos. 62-63; tr. 130:1-3).[10] As discussed more completely below, when it became apparent that the December 2014 date would not be achieved, the parties met in November 2014 in Beijing, China, and agreed that, by March 27, 2015, (i) the Project would be substantially completed, and (ii) the resort would be opened to guests.

46. In the Spring of 2014, however, it became clear to the parties that this date would not be achieved (JX 341; tr. 130:4-7). Certain commercial disputes also arose between the parties around this time, including contested change orders (tr. 132:17-23).

47. In order to address the need for a scheduled and firm substantial completion date and the change order disputes, representatives from BML, CCAB, and CEXIM held a series of meeting on November 17 and 18, 2014, in Beijing (the **November 2014 Beijing Meeting**; JX 462). The parties memorialized the consensus reached between them at these meetings in a set of meeting minutes signed by BML and CCAB and witnessed by CEXIM (the

[10] The MCC was executed on March 9, 2009, between Baha Mar JV Holdings Ltd., an affiliate of BMLP, and China State Construction Engineering Corp. Ltd. ("CSCEC"), an affiliate of CCA. The parties' rights and obligations under the MCC were assigned to BML and CCA, respectively.

November Meeting Minutes; JX 462).[11] Mr. Izmirlian, among others, attended on behalf of BML, and CCAB was represented by Messrs. Yuan, Wu, and Wang (*id*.).

48. At trial, BMLP established by clear and convincing evidence that the Defendants made a firm commitment to a substantial completion date of March 27, 2015. This involved substantial compromise as to what was meant by substantial completion. To wit, the parties agreed to scale back the items needed to be finished in order to open Baha Mar. It was also firmly established at trial that the promise to achieve substantial completion made in Beijing with the CSCECB Board Member (and again subsequently in the BML Board Meeting discussed below in which Mr. Wu voted to authorize the announcement of the Baha Mar opening) was made without any plan whatsoever.

49. Indeed, at trial, BML established by clear and convincing evidence that the meeting was an absolute sham and shakedown of Mr. Izmirlian designed to induce BML to release $54 million of disputed change order money for use to purchase the Hilton (rather than to pay subcontractors or to otherwise advance the Project), and that CCAB had no plan to achieve substantial completion by March 27, 2015 when it promised to do so.

50. As documented in the November Meeting Minutes, CCAB (and Mr. Wu, the CSCECB Board Member) represented that it would bring the Project to "Substantial Completion" (with the understanding that the scope of the work would be substantially reduced, to achieve only a partial opening or "operational start") by March 27, 2015, and would

[11] For the avoidance of doubt, BMLP's breach of contract claim is not predicated on the failure to meet the March 27, 2015 deadline. It is predicated based on the CSCECB Board Member's breach of his Best Interests Obligation.

produce the necessary manpower, management, and other resources necessary to do so. For its part, BML agreed to pay CCAB $54 million in partial settlement of certain commercial issues raised by CCAB, making an emergency utilization request on its credit facility with CEXIM to do so:

> A series of meetings were held among China Exim Bank ("CEXIM Bank"), Baha Mar Ltd. ("BML") and CCA Bahamas, Ltd. ("CCA") in November 17th and 18th, 2014. In order to resolve the financial and schedule disputes between CCA and BML in a timely manner and to ensure that the construction work will be completed by March 27th, 2015 substantially, these Minutes reflect the consensus reached between CCA and BML on the following matters:
>
> 1. Completion on time. CCA agrees to achieve Substantial Completion of the Project (excluding exemption list to be agreed within 7 days from the date of these Minutes) by **March 27th, 2015** on condition that CCA and BML each provides necessary assistance and cooperation and that CCA's responsibility is for Substantial Completion to achieve operational start for paying guests in hotels including amenities. The detailed Schedule Compliance and Milestones (to be agreed within 7 days from the date of these Minutes) will be agreed between CCA and BML and conducted accordingly by CCA with best efforts.
>
> 2. Improvement of work productivity. CCA agrees to ensure the achievement of Substantial Completion and operational start for paying guests in all hotels, including amenities, on time by all necessary methods, including but not limited to the maintenance of sufficient manpower, both local and international, with a minimum of 200 new Chinese workers within 30 days from the date of these Minutes and working overtime as necessary.
>
> 3. Enhancement of on-site management. CCA agrees to take necessary measures to enhance the on-site management to ensure the construction will be conducted in an orderly manner, and the works will be completed on time and in the required quality.
>
> 4. Settlement for unresolved financial disputes. BML agrees to make an emergency Utilization Request within 3 business days from the date of these Minutes for a payment of US$54,622,l 14.7 to be paid as follows: 50% of US$15,102,556 (in dispute) to be paid immediately, 70% of US$45,815,481 (under review) to be paid immediately, and US$l5,000,000 (to be paid as formerly agreed as final settlement). CCA promises that upon Jan 19th, 2015, except for the wedding chapel and elevator tower, the rest of the Convention Centre will be Substantially Complete and ready for operational start for paying guests, or BML is entitled to receive claw-back payment in an amount equal to 50% of US$15,102,556 from CCA (except in the case whereby the sole reason that the Convention Center is not Substantially Complete is because the Ministry of Works of The Bahamas has not signed the CCA-submitted generator-

> farm TCO despite CCA having completed in a timely manner all necessary works for a January 19th TCO). For the payment of US$45,815,481 to CCA which is under review, BML and CCA will mobilize sufficient resources to complete the review of all the pending financial matters within 30 calendar days from the date of these Minutes, and the final settlement amount after identified and agreed by the two parties will be adjusted accordingly. For any unresolved dispute, BML and CCA will work in an amicable manner to find mutually acceptable solutions, and any dispute unsolved after the completion of review will be brought to DRB for resolution within 45 calendar days from the date of these Minutes.
>
> CEXIM Bank, in witnessing and facilitating the discussion between BML and CCA, acts in a neutral and objective manner, and acknowledges that the related funding requests will be processed in a timely manner in accordance with, and subject to, the provisions of the Credit Facility Agreement (including, without limitation, the submission of all necessary supporting documents for such funding requests by BML in a timely manner). All three parties agree that these minutes do not waive or amend any of the executed project documents or finance documents.
>
> (JX 462 [emphasis in original]).

51. Ultimately, and as discussed further below, the $54 million was not used to advance the Project by paying subcontractors. It was used to buy the Hilton – a competing project down the road. BMLP only found out about this on or about the closing of the Hilton acquisition.

52. In addition to the commitments made in the November Meeting Minutes, BML and CCAB held a follow-up meeting in the Bahamas on November 27, 2014. The representatives from BML included Messrs. Izmirlian and Dunlap; CCAB was represented by Messrs. Wu and Wang (JX 476). At this follow-up meeting the parties discussed each paragraph of the November Meeting Minutes, reiterated their respective commitments, and again commemorated the consensus reached at this meeting in a second set of meeting minutes (the **Bahamas Meeting Minutes**; JX 476). In regard to the March 27 opening date, the parties noted in these Bahamas Meeting Minutes:

> Minutes Paragraph 1: Sarkis noted that the paragraph means that the ***resort must be open by March 27, 2015*** to paying guests other than the exception list to he reviewed in the meeting, and that BML and CCA understood what was meant by the use of Substantial Completion. CCA stated its concern that Baha Mar has an obligation to complete its own works such as the nightclub, in addition to CCA's obligation to deliver the remainder of the Project by that date, and Sarkis acknowledged that such were the respective duties of BML and CCA. He further noted that ***finding solutions to items on the exceptions list is critical***, such as through shipping and suppliers. ***David and Tiger said they would use best efforts to get this done as soon as possible***.
>
> (JX 476, at 1 [emphasis added]).

53. Mr. Dunlap's uncontradicted testimony is that nobody at the November 27, 2014, Bahamas meeting expressed disagreement as to the March 27, 2015 date (tr. 302:16-19). This accords with Mr. Izmirlian's testimony (tr. 139:7-10). Mr. Yuan testified that he understood "on time" to mean March 27, 2015 (tr. 917:11-14, 917:21-918:3).

54. Mr. Izmirlian's testimony emphasized the critical importance of the March opening date. First, it was important for the financial success of the Project that it open to paying guests before the end of the tourist season, running from November through June (tr. 130:8-16). Second, it was important that the Project open at a ***date certain***, because once BML publicly announced an opening date and opened reservations to guests, BML would have to expend significant sums in preparation, including marketing and the hiring and training of a significant staff (tr. 143:4-15;147:9-12;148:14-21).

55. During a December 5, 2014, meeting of the BML board of directors (of which Mr. Wu was at that time a member pursuant to the Investors Agreement), the directors "participated in discussions regarding the Construction report and the prospect of announcing a March 27,

2015 opening date" (JX 495, at 5). Mr. Izmirlian "***emphasized that once announced***" the opening date "***is difficult to change***" (*id*. [emphasis added]). The board (again, including Mr. Wu) then unanimously adopted a resolution once again reiterating the commitment to the March 27, 2015 opening:

> RESOLVED, that the opening date of the resort to the public, including all hotels and amenities except for the limited exceptions described, will be March 27, 2015 and that the Company would proceed to announce the date internally and open reservations to the public for March 27.
>
> (*id*., at 6).

56. Mr. Izmirlian publicly announced the March 27, 2015 opening date on December 9, 2014 (JX 500). In an email Mr. Izmirlian sent to CEXIM that same day, on which Mr. Yuan was copied, Mr. Izmirlian wrote that he was taking this step "***based on the minutes of the Beijing meeting and CCA's assurances***, and given the need for our staff, retail, restaurant and other partners to prepare to open the hotels and casino ***by a date certain***" (JX 499 [emphasis added]). Mr. Izmirlian testified that he took the step of publicly announcing this date in reliance of these repeated commitments made by the Defendants, and that up to this point the Defendants never objected to the March date or voiced reservation about their ability to meet this date (tr. 144:18-145:6, 146:15-147:16).

57. The Defendants also confirmed their understanding of the importance of these dates. In an email dated January 4, 2015, Mr. Yuan wrote to Mr. Izmirlian that "the Jan. 19th and March 27th milestones ***could not be changed***" (JX 560, at 1-2). As discussed above, in the Hidden Dire Need Letter that Mr. Wu composed for Mr. Yuan to send to Chairman Yi of

CSCEC Ltd., Mr. Wu wrote if additional labor was not sent and the March 27 opening date was missed, "it will cause irreparable and catastrophic losses," and that the "consequences will be disastrous" (JX 581). Neither the substance of the Hidden Dire Need Letter nor the Hidden Dire Need Letter itself was ever shared with BML by Mr. Wu – the CSCECB Board Member.

58. On January 27, 2015, Mr. Yuan wrote that "everyone knows that March 27 is the date when the Project is to be open to business to the general public" (JX 597, at 3).

59. At trial, however, the Defendants repeatedly insisted that in the November and Bahamas Meeting Minutes they committed only to using their "best efforts" to achieve the March 27, 2015 partial opening date and that this date was only a "target" or "goal" (tr. 914:7-8; 922:8-12; 968:10-16; 1113:9-11). Mr. Yuan insisted that the decision to publicly announce the March 27 opening was that of BML alone (tr. 965:19-966:1). Thus, the Defendants argue, BMLP did not act in reasonable reliance on these assurances.

60. The Defendants' testimony in this regard was simply not credible. Initially, the Court notes that the language of the November Meeting Minutes and the Bahamas Meeting Minutes which (particularly when read with the understanding of the state of the Project at this time and what the parties were attempting to accomplish in these meetings, including the release of $54 million as to contested money) demonstrates that the entire point of this exchange was for a firm commitment to a March 27, 2015 firm opening date – not merely a "best efforts" obligation. And in fact, in the Bahamas Meeting Minutes, which the parties put

together for the specific purpose of clarifying their mutual understanding of the November Meeting Minutes, Messrs. Wu and Wang promised to "use best efforts" to "find[] solutions to items on the exceptions list," *i.e.*, to complete the balance of the work (JX 476, at 1). To be sure, BMLP wanted as much of the Project and its various amenities and attractions open as possible, *so long as* the Project opened on March 27, 2015. Equally importantly, Mr. Yuan's assertion that the March 27, 2015 date was BML's (or even BMLP's) decision alone is disingenuous at best. Mr. Wu, as the CSCECB Board Member, voted to authorize the public announcement as to such date by adopting the Board Resolution authorizing such announcement. [12]

61. In addition, and as discussed above, even if the "best efforts" language in the minutes could be read as applying to achieving the March 27 date (which following trial it cannot), this promise nevertheless certainly became a firm commitment upon which BMLP could reasonably rely on December 5, 2014, when the BML Board, *of which Mr. Wu was then a member*, unanimously resolved to publicly announce the opening date and open reservations after Mr. Izmirlian specifically reminded the Board that, once announced, the opening date would be difficult to change. And, as set forth above, the Defendants repeatedly reaffirmed this commitment after the December board meeting in various communications with BMLP.

[12] The Defendants position that this was merely a "best efforts" obligation was not credible and inconsistent with the contemporaneous communications and facts presented at trial. The Court notes that even if it were only a "best efforts" obligation, as the Defendants strain to argue, BMLP still has proved breach as of May 2014 of the Best Interests Obligation and fraud because, among other things, of the clandestine letter sent at Mr. Wu's request by Mr. Yuan requesting substantial additional personnel on the ground in order to meet the March date while simultaneously telling the Board that everything was on track.

VI. BMLP Proved by a Preponderance of the Evidence that CSCECB Committed Multiple Material Breaches of Section 4.7 of the Investors Agreement Starting in May 2014

62. To establish its claims for breach of contract, BMLP needed to prove "(1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages" (*Alloy Advisory, LLC v 503 W. 33rd St. Assocs., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]). The parties do not dispute that the Investors Agreement was a binding contract between BMLP and CSCECB (NYSCEF Doc. No. 735 ¶ 1, footnote 2).

A. The First Breach: CSCECB Appointed Mr. Wu as the CSCECB Board Member in May of 2014 without Informing Him of His Best Interest Obligations

63. As discussed above, the initial CSCECB Board Member was Mr. Yuan (tr. 897:23-898:14). From May, 2014 onward, the CSCECB Board Member was Mr. Wu. At this time, Mr. Wu was also an Executive Vice Present of CCAB and the senior-most executive of CCAB who worked full-time in the Bahamas (tr. 1148:15-18).

64. At trial, Mr. Wu admitted that when he was appointed as the CSCECB Board Member by Ning Yuan (Mr. Wu's predecessor CSCECB Board Member) on May 1, 2014, he had absolutely no knowledge of his Best Interest Obligation; he never discussed it with Mr. Yuan (JX 495, at 2; tr. 1149:5-1150:2) and he did not read the Investors Agreement when he was appointed to the BML board. Put another way, he did not even know that he was supposed to act in BML's best interests. This was the first moment that the breach of the Investors Agreement occurred. As a result of this breach and Mr. Wu's subsequent conduct, BMLP lost its entire $845 million investment.

B. The Second and Third Breaches: CSCECB Breached the Investors Agreement by Diverting Project Resources to the Hilton Development

65. CCAB, of which Mr. Wu was Executive Vice President, diverted Project funds intended for subcontractors to purchase the Hilton, a competing hotel property.

66. Unbeknownst to BMLP, on October 21, 2014, CCAB signed a Contract of Sale to purchase the Hilton, located just some 15 minutes away from the Project (JX 419; tr. 136:17-138:4, 297:17-298:2). The Contract of Sale called for a $3 million deposit, with $54 million due at closing (*id*.). CCAB closed on the Hilton transaction on December 16, 2014, tendering the $54 million (JX 521).

67. The November Meeting Minutes (signed just some 3-4 weeks after CCAB signed the Contract of Sale for the Hilton) memorialize BML's agreement, at CCAB's urging, to place an emergency Utilization Request from BML's credit facility with CEXIM in the amount of approximately $54 million in order to pay this sum to CCAB (JX 462). BML made this utilization request on November 21, 2024 (JX 465). CCAB represented to BML that this money was urgently needed to pay subcontractors (tr. 135:7-10). The Defendants' representatives testified repeatedly at trial that this $54 million was used to pay subcontractors (tr. 990:16-20; tr. 1168:22-1169:10). During discovery, the Defendants submitted a Rule 11(f) response in lieu of testimony stating that "the entirety of the $54,622,114.70 paid to CCA Bahamas, Ltd. was used to either pay subcontractors for work done on the Project, or to reimburse CCA Bahamas, Ltd. for payments made to subcontractors for work done on the Project" (JX 970, at 8). This was false.

68. Initially the Court notes that this $54 million figure was not the result of a simple addition of unpaid claims; rather, it was a product of negotiation between the parties at the November 2014 Beijing Meeting (tr. 1168:3-21) the purpose of which trial revealed was to secure exactly that sum necessary to close on the Hilton hotel down the street.

69. More importantly, however, using CCAB's consolidated bank statements and other contemporaneous documentary evidence, BMLP's forensic accounting expert, Paul Pocalyko, credibly demonstrated that at least a significant portion of BML's $54 million payment was used to purchase the Hilton the property, because but for monies received from BML, CCAB's bank account would have had insufficient funds after CCAB closed on the Hilton (tr. 680:9-19, 680:25-681:12, 681:1-682:2; JX 481). Mr. Pocalyko also gave uncontradicted testimony that there was no evidence that CCAB used the entirety of this $54 million payment to pay subcontractors, as it had promised BMLP it would do and as it later represented it did in its Rule 11(f) response (tr. 683:12-25). In his expert report and in his testimony he also pointed to numerous examples of subcontractors requesting payment from CCAB *after* CCAB received the $54 million payment (JX 983, at 8-13; tr. 686:12-20).

70. The testimony of the Defendants' accounting expert, Rodney Sowards, was not persuasive. Mr. Sowards did not even attempt to verify the payments to subcontractors claimed by the Defendants in their Rule 11(f) response. Indeed, he conceded that he was not retained to look at that (tr. 1699:9-19).

71. Mr. Wu admitted in his testimony that, at the time he was working on the Hilton transaction, he simply "didn't think about" whether acquiring the Hilton was in the best interest of BML (tr. 1167:9-12). This too was a breach. He was both required to think about it and also to disclose the acquisition to the Board of BML. He did neither.

72. Lastly, Mr. Wu admitted that this $54 million could have otherwise been used to pay subcontractors on the Project, which would have alleviated CCAB's liquidity problem in March of 2015 (tr. 1204:9-14) and likely averted what happened – *i.e.*, BMLP would not have lost its investment.

73. Thus, the credible evidence demonstrates that CCAB requested and used the $54 million payment from BMLP in the November 2014 Beijing Meeting to purchase the Hilton, rather than for its stated purpose to pay subcontractors. Put another way, Mr. Wu's assertion that the $54 million payment request from BML and $54 million payment for the Hilton represent merely an "exact coincidence" (tr. 1169:5-10) is simply incredible.

74. CCAB diverted other Project resources to the support its acquisition of the Hilton. CCAB's head scheduler, Mr. Manabat, who served under the direction of Mr. Wang and Mr. Wu, was also diverted from his work on the Project to produce at least one schedule for the Hilton in February 2015 (JX 616; JX 585). This was also a breach of the Best Interest Obligation because the Project did not have an appropriate schedule and BML needed and was entitled to expect Mr. Manabat's attention to provide them with accurate information as to when and how substantial completion was to occur.

75. CSCECB breached the Best Interest Obligation both by diverting Project funds to purchase the competing Hilton property and by not using those funds for their intended use, *i.e.*, to pay subcontractors. Mr. Wu, in failing to pay CCAB's subcontractors and permitting the $54 million to be used to purchase the Hilton was a breach of the Best Interests Obligation to BML.

C. Fourth Breach: CSCECB Breached the Investors Agreement by Diverting Project Resources to CCAB Business Opportunities in Panama

76. At the same time BML, BMLP, and CCAB were contemplating an accelerated schedule in the lead up to the November 2014 Beijing Meeting, CCAB was exploring business opportunities in Panama. In September 2014, Mr. Liu, then the Senior Vice President of both CCA, Inc., and CCAB, wrote to Mr. Wu, ordering him to put a team together to prepare for submitting bids on a certain "Panama Metro 2" project (JX 395). Neither Messrs. Wu or Liu told BML they were involved in coordinating bids for CCA projects in Panama (PX 1054, at 135:22-136:08).

77. Mr. Wu's testimony that he was not involved in the Panama project (tr. 1156:8-10) was also false. In March of 2015, with work on the Project at a critical stage, Mr. Wu attended multiple meetings on the prospective Panama project (tr. 1156:11-1157:11; tr. 1157:24-1158:11; JX 681; JX 692). When asked if taking time away from the Project to attend meetings on Panama was in the best interests of BML, Mr. Wu avoided the question, saying only "[i]t is a different project" (tr. 1159:4-8).

78. Thus, in sum, Mr. Wu's position was that when he acted in a different role with respect to another company (*i.e.*, CCA or CCAB [which companies had a conflict of interest with BML], as the case may be), he could shed and no longer be bound by his Best Interests Obligation. Put another way, his testimony amounts to the view that the Best Interests Obligation (which he did not know about and did not consider) could be flipped on and off like a light switch by merely by saying that he was working on a different job. This is the very position this Court and the Appellate Division already rejected.

79. Mr. Wang, a Vice President at both CCA, Inc. and CCAB, and who had promised BML that he would work full-time on the Project, testified that he was in charge of establishing CCA's business in Panama (tr. 1060:7-1061:4; tr. 1066:21-24). This too was evidence of breach. Mr. Wang took multiple trips to Panama during for this purpose between the time of the November Meeting Minutes and the March 27, 2015 substantial completion date, and helped to set up CCA's office in Panama and coordinate CCA bids on projects in Panama (tr. 1061:5-11; tr. 1070:16-24). At trial, Mr. Wang testified that he thought he told BML of his work on Panama. This testimony was false and inconsistent with his deposition testimony where he had said that he did not inform anyone at BML of his work on CCA's Panama projects because doing so would not be "necessary" (tr. 1061:12-1064:6). Mr. Wang continued to work on Panama through March 2015 (tr. 1071:23-1072:5).

80. In his deposition testimony, Mr. Liu admitted (after first denying that he worked on CCA's projects in Panama) that he had travelled to Panama several times and was involved in setting up CCA's regional office in Panama (PX 1054, at 58:18-59:24; 111:12-112:3).

81. Finally, it is undisputed that Mr. Wu ordered CCAB's head scheduler, Mr. Manabat, to divert his efforts away from the Project and to work on Panama (tr. 1162:12-17).[13] This was at a critical time period during which schedule updates and coordination were needed to keep BML informed.

82. Mr. Manabat's involvement in Panama was under the direction of Messrs. Wu and Wang (JX 585; tr. 1072:9-18). On January 14, 2015, Mr. Manabat wrote to Mr. Wang that he was travelling to Panama the next day (JX 575). Mr. Wang emailed other CCA employees, asking that they arrange for Mr. Manabat to be picked up from the airport (*id*.). On January 30, 2015, Mr. Manabat wrote an email, copying Mr. Wang, confirming that he would be travelling to Panama the following week and staying for several days (JX 601). On February 19, 2015, Mr. Manabat wrote to Mr. Wang that he was "fully engage[d] in the Panama project now" and preparing for his next trip (JX 656). On February 24, 2015 (a Tuesday), Mr. Manabat wrote to Mr. Wang that he was considering extending his stay until Sunday (JX 666). Mr. Manabat reiterated his intent to stay longer in an email sent the following day (JX 670).

83. As late as March 19, 2015, with the planned partial opening supposedly a mere eight days away and the critical TCO not yet approved, Mr. Manabat confirmed that he had not updated the TCO schedule ***since January***, writing "[n]o I haven't updated any schedule except the monthly report," which he had delegated to a subordinate, because Mr. Manabat

[13] Mr. Wang was also well aware of Mr. Manabat's involvement in Panama (JX 585, at 3; tr. 1072:9-18).

was "busy with our project in Panama" (JX 723). Mr. Manabat testified in his deposition that his work was especially important to the Project as the March 27, 2015 deadline approached (PX 1053, at 69:18-69:21).

84. Mr. Wu, as the highest CCAB executive who was full-time in the Bahamas, breached his Best Interest Obligation by diverting his own efforts and ordering or condoning the diversion of other CCAB employees' (including Mr. Manabat's) efforts away from the Project and towards CCAB's business opportunities in Panama.

D. Fifth Breach: CSCECB Allowed Hundreds of Workers to Return to China for Chinese New Year Without Ensuring Adequate Appropriate Workers to Meet the March 27, 2015 Deadline

85. As discussed above, in the November Meeting Minutes and subsequent Bahamas Meeting Minutes, CCAB and the CSCECB Board Member committed "to ensure the achievement of Substantial Completion and operational start for paying guests in all hotels, including amenities, ***on time by all necessary methods, including but not limited to the maintenance of sufficient manpower***," and that "no workers are leaving" (JX 462; JX 476 [emphasis added]). In other words, CCAB and the CCSECB Board Member made an unequivocal commitment to provide a net increase of sufficient Chinese laborers and supervisors to complete the Project on time.

86. In fact, as Mr. Wu admitted at trial, the number of Chinese workers on the Project *decreased* between November 2014 and March 2015, and that the number of Chinese workers on the Project peaked some 2-3 months *before* the November 2014 Beijing

Meeting (tr. 1177:15-18; tr. 1187:1-7). Mr. Wu approved of the departures of some 700 workers from the Project between December 2014 and February 2015, and helped arrange their travel out of the Bahamas (tr. 1187:8-13) without arranging for replacement workers so that there were sufficient workers to complete the job "on time." This was a breach of the Best Interests Obligation.

87. The Defendants argued at trial that CCAB's laborers were free to leave as they pleased, and that CCAB had a contractual obligation to arrange for their travel home (tr. 1025:11-13; tr. 1186:19-25). The argument misses the mark. The CSCECB Board Member Best Interest Obligation required ensuring sufficient manpower either by compensating workers to stay to finish the job or otherwise hiring enough of the right kinds of workers (*i.e.*, the trades and the supervisors) to complete the job on time and to have planned to do this knowing that Chinese New Year was coming. This he did not do. Worse – he knew it and he concealed from BML telling them exactly the opposite – *i.e.*, that everything was on track.

E. Sixth Breach: CSCECB Purposefully Delayed Work on the Project

88. BMLP adduced evidence of several instances in which CCAB recommended delaying or did purposefully delay work on the Project, often in connection with attempts to resolve so-called "commercial issues."

89. On November 14, 2014, just days before the November 2014 Beijing Meeting at which the parties would discuss and resolve pending disagreements about the scope of the work, the

new opening date, and commercial issues, Mr. Dunlap emailed Mr. Wang to protest CCAB's deliberately turning off the lights on the Project work site, which both stopped all work after dark and presented an immediate danger to the safety of workers, in order to pressure BML to yield on a disputed commercial issue (JX 450; tr. 299:11-300:19). Mr. Dunlap testified to his belief that a decision of this importance to the Project could only have been made by Messrs. Wang or Wu (tr. 300:22-301:9). The Defendants offered no alternative explanation at trial.

90. On February 5, 2015, CCAB ordered its workmen not to allow any FF&E (furniture, fixtures, and equipment) loading or use of elevators for such purpose pending resolution of yet another disputed commercial issue (JX 619; tr. 313:23-315:2).

91. On February 9, 2015, James Kwasnowski, BML's Executive Vice President of Design and Construction, wrote in an email (copying Mr. Wang) that an additional 200 workers had stopped work over payment concerns (JX 628). To be clear, the evidence at trial suggested that there would have been no money issues had $54 million not been diverted away from the Project to buy the Hilton.

92. On February 16, 2015, Mr. Dunlap wrote to Messrs. Wang and Wu that there were "additional stopped works today regarding inspections," *i.e.*, work critical to preparing for the TCO (JX 649). Mr. Wang wrote back, saying "TCO pre-inspections are still going well following the schedule" (*id*.). As discussed above, Mr. Wang's email made no reference to the fact that CCAB had already missed the February 15 deadline for submitting the TCO

application that its head scheduler, Mr. Manabat, had called "critical" (JX 512). Mr. Wang then admitted that CCAB had suspended room handover "because there is still a big commercial issue pending for resolution" (*id*.). Mr. Wu was copied on this email (*id*.). As discussed above, Mr. Wu told no one.

93. In a March 3, 2015, email sent by Mr. Wang and cc'ing Mr. Wu (the CSCECB Board Member and Executive Vice President of CCAB), CCAB requested that, in addition to its normal progress payment, BML also pay it (i) 70% of change orders under review, (ii) some $13 million of MEP allowance under review, and (iii) 50% of withheld retainage (JX 694). Mr. Dunlap testified that CCAB's request for release of retainage was totally improper, as the requirements for its release (substantial completion of the entire Project, as certified by the architect of record) were not yet met, and the other two items were under dispute and BML thought them inflated (tr. 321:18-323:4).

94. Despite this, rather than negotiating in good faith to resolve these disputes, Mr. Wang wrote on March 10, 2015, to express disappointment with the amount of money BML had authorized to be released and wrote "I think it is unacceptable to CCA and will cause significant impact to CCA's performance" (JX 694). After raising the issue of a possible additional equity contribution, Mr. Wang continued "[t]he project is at the critical moment, if we couldn't raise enough fund, there will be no way to timely complete the project" (*id*.).

95. Mr. Wang's tying the progress of the Project to BML's payment, in full, of disputed amounts of change orders and other funds, can only be seen as a veiled threat to slow the work and purposefully endanger the achievement of the March 27, 2015 opening date.

96. **If there were any doubt as to whether the CSCECB caused CCAB to deliberately slow its work against the interests of BML, Mr. Izmirlian gave unrebutted testimony that Mr. Wu admitted during an April 7, 2015, meeting attended by the Prime Minister of the Bahamas, Ambassador Yuan, and Mr. Izmirlian himself, that CCAB was deliberately slowing the work (JX 777; 160:11-20). Slowing down the work was a breach of the Best Interests Obligation. As discussed above, Mr. Wu himself admitted this at trial.**

97. The trial record was replete with numerous other examples of CCAB employees threatening or suggesting work stoppages. On November 10, 2014, CCAB employee Pengfei Yu suggested that CCAB should slow down the work in order to pressure BML to pay disputed change orders, because CCAB wouldn't have as much negotiating leverage after the Project was completed (JX 445; tr. 1150:19-1151:23). On December 10, 2014, Mr. McAnarney suggested stopping work on the convention center to force payment on the MEP allowance (JX 501; tr. 1445:7-9; tr. 1445:21-1446:2). These workers all reported to the CSCECB Board Member, Mr. Wu, Executive Vice President of CCAB.

98. By ordering or condoning the slowing or stopping of work on the Project at various points both before and after the November 2014 Beijing Meeting for the sole purpose of furthering CCAB's commercial interests, Mr. Wu continually breached his Best Interests Obligation.

F. BMLP Performed

99. BMLP demonstrated that it performed its obligations under the Investors Agreement, and the Defendants failed to show any material breach by BMLP, let alone any breach that occurred prior to the Defendants' multiple material breaches. Any suggestion to the contrary by counsel was simply not supported by the credible evidence at trial.[14]

VII. BMLP Proved by Clear and Convincing Evidence that CCAB Committed At Least four Instances of Fraud

A. The First Fraud: The Defendants Committed to the March 27, 2015 Partial Opening Date Without Having a Plan in Place

100. When during the November 2014 Beijing Meeting Mr. Dunlap unequivocally informed the Defendants that "we need a detailed and complete schedule" (JX 455), the Defendants gave a firm commitment to achieve Substantial Completion (albeit on a reduced scope basis) by March 27, 2015. However, as discussed above, they had absolutely no plan as to how to do it. This was fraud and designed to induce the release of the $54 million of disputed change order money so that they could close on the Hilton with this money instead of paying their sub-contractors. This (together with other Defendant conduct) caused a liquidity crises.[15]

[14] For the avoidance of doubt, the subsequent filing of bankruptcy can not be considered a default and in any event the Defendants failed to prove any damages flowing from such filing.
[15] To the extent that the Defendants argued that years earlier there had been some over budget costs, the credible evidence adduced at trial did not suggest that any of these earlier costs had anything to do with the liquidity crises that the Defendants created based on their unlawful conduct.

101. CCAB, as Construction Manager and pursuant to the MCC and General conditions of the Contract for Construction, was responsible for developing and maintaining accurate schedules for the Project using the critical path method (**CPM**) (JX 13, § 3.10; JX 15). CCAB was also responsible for achieving the TCO certification necessary to open the Project (tr. 318:13-17, 331:24-332:1, 478:9-22, 1447:8-13, 1475:1-12, 1480:2-6, 1485:4-10, 1106:16-17; DX 4 at 126:01-25; JX 649; JX 418).

102. Steven Collins, BMLP's expert witness on the subject of construction management, credibly testified to the owner's dependence on the construction manager to accurately track manpower, resources, and the Project's overall progress. As the Construction Manager on the Project, only CCAB had the relationships with contractors and sub-contractors and ability to track all work on the Project necessary to keep BMLP accurately apprised of the true progress on the Project (tr. 479:8-480:2; tr. 500:25-501:20). Yet, as Mr. Collins testified, "there was never a realistic, fully-developed, manpower-loaded schedule for the resources to achieve the March date" (tr. 476:14-16).

103. The Defendants' corporate representatives testified that they assured themselves that the March 27, 2015 was achievable by checking in with their contractors and subcontractors from Beijing, and thus their promise was not fraudulent. The evidence of their contemporary communications adduced at trial, however, demonstrated exactly the opposite -- the absence of a clear plan and an acknowledgement that the dates being given to BML were just phony.

104. **By way of example, in August 2014, when an acceleration schedule was first being contemplated for the Project, CCAB's Executive Director of MEP (Mechanical, Electrical, and Plumbing), Jason McAnarney, wrote to CCAB's head scheduler, Allen Manabat, that CCAB needed to "commit to an executable plan, not just dates but actually 'how' we are going to do it," otherwise, said Mr. McAnarney, "this will be just another empty schedule and empty promise to the Owner [BML] that we failed to deliver" (JX 377).**

105. Referencing Mr. Dunlap's email emphasizing the need for a detailed schedule so that the Project could open for business on March 27, Mr. Wang wrote to Messrs. Manabat and McAnarney on November 17, 2014 at 9:34pm that "the expected completed sates [sic] Tom wanted is unachievable" (JX 455). Instead of communicating this to BML and giving them a real completion date that could be committed to, by 2:39pm the next day, Mr. Manabat wrote to his team of schedulers that "we need to produce a schedule to comply with the 15March2015 BAHA MAR opening" because Messrs. Wang and Wu had "directed us to produce a schedule" (*id.*). This too confirms the fraud.

106. **In fact, at trial, Mr. Wang confirmed that he had agreed to the March 27, 2015 opening date *before* asking Mr. Manabat to create a compliant schedule (tr. 1089:23-1090:1). Mr. McAnarney, who led the MEP team charged with ensuring the Project received the TCO, similarly testified that CCAB did not seek his input before CCAB committed to the March 27, 2015 opening date (tr. 1451:24-1452:4).**

107. Thus, BMLP proved that the Defendants committed fraud beyond any doubt by giving a firm commitment to open the Project on March 27, 2015 without having any plan in place by which it could meet that commitment and thereby made an empty, fraudulent promise which misrepresented its present ability to perform (*Shear Enterprises, LLC v Cohen*, 189 AD3d 423, 424 [1st Dept 2020]).

108. CCAB's utter failure to verify its ability to meet the promised deadline constitutes a "reckless disregard" of the truth (*DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 303 [1st Dept 2005]), demonstrating the Defendants' opinion was "based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth" (*Curiale v Peat, Marwick, Mitchell & Co.*, 214 AD2d 16, 28 [1st Dept 1995]).

109. And, for the avoidance of doubt, the Court notes that each time CCAB reaffirmed its commitment to the March 27, 2015 date without having a plan in place—including in the November Meeting Minutes, in the Bahamas Meeting Minutes, and during the December 5, 2014 BML board meeting—constitutes a separate act of fraud.

B. The Second Fraud: CCAB Requested $54 Million from BMLP for the Purpose of Paying Subcontractors, But Used it to Purchase the Hilton Development

110. As set forth above, CCAB used the $54 million paid to it by BML to purchase the Hilton. In representing that these Project funds would be used to pay subcontractors and diverting them to purchase the Hilton, CCAB committed an act of fraud. The $54 million payment

request from BML and $54 million payment for the Hilton are not an "exact coincidence" (tr. 1169:5-10).

C. The Third Fraud: CCAB Misappropriated Project Funds for the Personal Use of its Officers

111. Mr. Pocalyko also presented uncontradicted evidence that the Defendants' corporate officers misappropriated project funds for personal use. Unquestionably, this was evidence of the extent of the fraud and course of conduct at issue here.

112. By matching up Project expenses marked as "General Condition" with the underlying receipts, Mr. Pocalyko demonstrated in his expert report and testimony that CCAB's officers and employees spent Project funds on various personal goods such as scarves, golfing equipment, and cigars (JX 983, at 19-22; JX 943; tr. 692:11-697:11).

113. While the amounts of these expenses may *de minimis* in the context of a multi-billion dollar mega-resort (although the true amount of these diversions were not calculated at trial), the Court notes that the diversions of Project funds for personal items is just as fraudulent as the diversion of $54 million to buy the Hilton. To the extent that these Project funds were not used to pay subcontractors or other legitimate expenses relating to the Project (as the Defendants represented they had been in their Rule 11[f] response), they are indicative of a fraudulent course of dealing and a disrespect for the observation of corporate formalities on behalf of the Defendants and further evidence as to why piercing the corporate veil is appropriate under the circumstances.

D. The Fourth Fraud: CCAB Knew it Had Insufficient Manpower, Management, and Resources to Achieve the March 27, 2015 Partial Opening Date, Knew the Date was in Jeopardy, and Hid this Knowledge from BMLP

114. During the November 2014 Beijing Meeting, as memorialized in the November Meeting Minutes set forth above, CCAB and the CSCECB Board Member also committed to increasing the manpower and management devoted to the project, including "a minimum of 200 new Chinese workers within 30 days" and enhancements of the "on-site management" (JX 462, at ¶¶ 2-3) specifically and generally to provide sufficient workers to be able to achieve Substantial Completion (based on the reduced scope) by March 27, 2015.

115. The commitments were further memorialized in the follow-up Bahamas Meeting Minutes, which make clear that the CCSEB Board Member and CCAB would provide "as many workers as needed," that "no workers are leaving," and that CCAB would engage in "daily and weekly tracking of workers against the construction schedule" so as to achieve Substantial Completion by March 27, 2015:

> Minutes Paragraph 2: CCA and Baha Mar agreed that 200 additional workers is the minimum, to be measured against workers in place at the time of the Beijing meeting, and that CCA ***would add as many workers as needed***. CCA acknowledged that Chairman Yi approved CCA sourcing workers from the Bahamas and anywhere in the world. ***CCA stated that no workers are leaving***, whether hired by CCA or its subcontractors, and that 30 Bahamian painters would be in place on December 1. The group discussed ***daily and weekly tracking of workers against the construction schedule***. If dates are missed, then Baha Mar will push to add workers in certain areas.
>
> Minutes Paragraph 3: Sarkis stated that Chairman Yi and China EXIM recognized that additional experienced management personnel would be necessary. CCA stated that current senior managers would remain and that CCA is bringing in 15 people at the level of manager. CCA further stated that the company is offering positions in the U.S. to certain people following the completion of the resort, and that managers will stay on, including through the summer as necessary. Sarkis directed Jim Kwasnowski to make a 30-day plan for management enhancements and to work with CCA, and to report back within 7 days of the meeting. Sarkis stated to the group that he was responsible to report

to Governor Yuan every 2 weeks starting next week, so the 7-day schedules set in this meeting are important.

(JX 476, at 1-2).

116. Indeed, in the November Meeting Minutes themselves, the parties made clear that the obligation was to provide sufficient workers were onsite for on time completion – i.e., "to ensure the achievement of Substantial Completion and operational start for paying guests in all hotels, including amenities, ***on time by all necessary methods, including but not limited to the maintenance of sufficient manpower***" (JX 462, at 2 [emphasis added].[16]

117. Trial revealed that they as of January 1, 2015, they knew the labor was insufficient and the concealed it when the CSCECB Board Member drafted the Hidden Dire Need Letter which he never shared with BML while nonetheless representing to BML that the Project was on track for March 27, 2015 opening. By hiding this information, CCAB and the CSCECB Board Member committed fraud.

118. To wit, in the January 21, 2015 Hidden Dire Need Letter drafted by Mr. Wu and sent by Mr. Yuan (notably, on the letterhead of the Defendant CCA, Inc., rather than CCAB), Mr. Yuan wrote to CSCEC Ltd's Chairman Yi to request some 450 additional laborers, including from trades critical to achieving the TCO, and warned that if the labor does not

[16] At trial, the Defendant made much of the 200 number and whether this meant 200 new workers or 200 net new workers. As an initial note, the Court notes that Mr. Izmirlian credibly testified that this meant net taking into account (tr. 140:6-16; JX 462) and Mr. Yuan confirmed in his testimony that CCAB "promised to send ***additional*** 200 Chinese laborers" (tr. 927:1-5 [emphasis added]). But as discussed above the argument misses the mark. These were minimums. The point is that the parties reached an accord that the Defendants would provide sufficient labor for on time completion.

come the March 27 opening date "will not be achieved" and "the consequences will be disastrous" (JX 581).

119. Mr. Wu confirmed that he did not tell BMLP that CCA, Inc. and CCAB were urgently requesting additional labor, or share their view that the March 27 date was in danger (tr. 1185:10-1186:14; 1367:13-19).

120. As early as December 13, 2014, Mr. Manabat identified February 15, 2015 as a "critical target date[]" by which time the application for the TCO should have been submitted (JX 512).

121. In a January 24, 2015 exchange between Mr. Manabat and Mr. McAnarney, Mr. Manabat requested "completion dates for the fire system" (*i.e.*, work necessary for the TCO) from Mr. McAnarney (JX 589). Mr. McAnarney removed BML's representatives from the email chain before responding to Mr. Manabat and cc'ing Mr. Wu, saying "we are 4 weeks behind schedule" (*id*.). Mr. Wu – the CSCECB Board Member never brought this to BML's attention. This too was fraud (and a breach of the Best Interests Obligation).

122. On February 13, 2015, Mr. Dunlap wrote to Messrs. Wang and Wu reporting that there were "additional stopped works today regarding the inspections" (JX 649, at 2). In reply, Mr. Wang confirmed that CCAB had indeed caused work stoppages, but insisted to Mr. Dunlap that all "***TCO pre-inspections are still going well following the schedule***" (*id*., at 1 [emphasis added]). Trial revealed that this was just false. They had missed their

inspections and were not on schedule and knew then that March 27, 2015 was not on track. They told no one. This was fraud.

123. In fact, Mr. Wang wrote that CCAB had suspended handing over rooms to BML, and admitted that it had done so in order to resolve a "commercial issue," because it would be "hard for CCA to revisit" the issue after the rooms were handed over and BML had changed the locks (*id*.). Contradicting his testimony at trial, Mr. Wang admitted in his deposition testimony that suspending the handover of rooms might impact the March 27, 2015 opening date (tr. 1093:9-1094:24). Mr. Wang's attempt on the stand to muddy the waters between the March 27, 2015 opening date and the later date for completion of the balance of the work on the Project was simply not credible. These communications centered on BML's concern about the March 27, 2015 opening date. Mr. Wang misled Mr. Dunlap and BML about the progress of the work while at the same CCAB time caused work stoppages that by his own admission would slow that progress, and did so in order to secure payment on disputed claims.

124. As late as March 3, 2015, Mr. Wang continued to represent to Mr. Dunlap and BML that the TCO inspections were on track, and again tried to further shakedown BML to make payments on disputed claims (JX 694; tr. 322:21-323:4).

125. The stark contrast between CCAB's reassurances given to BML and the acknowledgements in its internal communications that the work was not on track and that the TCO and March 27, 2015 deadlines were in danger permit the rational inference that CCAB's misstatements

were knowingly and intentionally false when made, designed to induce reliance, did cause reliance and damages (*Cordaro v AdvantageCare Physicians, P.C.*, 208 AD3d 1090, 1093 [1st Dept 2022]).

E. CCAB Intended to Induce BMLP's Reliance, and BMLP did Reasonably Rely on CCAB's False Assurances

126. CCAB intended to induce BMLP's reliance on its false assurances, and BMLP reasonably relied on their repeated assurances that they were on track to meet the March 27, 2015 partial opening deadline (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020]).

127. As discussed above, the Defendants' representatives at the November 2014 Beijing Meeting committed to a firm date for the partial opening on March 27, 2015. CCAB understood that this was not a mere "best efforts" commitment to meet a "target" or "goal." And, they CCAB understood that BMLP would rely on its repeated reassurances about achieving the opening date. Mr. Izmirlian specifically warned the Defendants that an opening date, once announced, would be difficult to change. Yet, up until the denial of the TCO made opening on March 27, 2015 impossible, the Defendants gave no indication to BML or BMLP that this date was in jeopardy and in fact told them the opposite – that everything was on track. The Defendants knew that BMLP would rely on its false assurances. The Defendants always intended to use the $54 million extracted from BMLP to buy the Hilton, not to pay subcontractors.

128. CCAB and the CSCEBC Board Member made these commitments to achieve a *reduced* scale of work in the "presence of the three entities' [*i.e.*, BML, CCAB, and CEXIM] senior most representatives," and at a time when the Project was "very close" to completion (tr. 303:1-304:6). The entire point of this was to induce reliance.

129. And in reliance on these assurances, BMLP directed BML to announce a public opening date, and spend millions of dollars hiring and training a staff, marketing, stocking the casino, among many other expenses necessary to ready the Project to receive guests (tr. 148:14-21; 152:12-153:1; 311:5-312:3). On January 27, 2015, BML sent out contractually required 60-day notices to third-party retailers (JX 598; tr. 312:6-313:15).

130. BMLP made a further $15 million equity contribution in the Spring of 2015 in reliance on CCAB and the CSCECB Board Member's promises made in the November Meeting Minutes and Bahamas Meeting Minutes (tr. 155:8-156:13).

131. The Defendants argument that reliance was not reasonable based on the Hyatt refusing to accept reservations prior to June 1, 2015 (JX 527) or based on certain other third party vendors concern over the March opening date rang hallow at trial. No one from these companies came and testified as to what or why they were concerned about the March opening date or what quantum of information they had or did not have when they expressed concern. The Defendants introduced really no credible evidence that cast doubt as the reasonableness of reliance given their active concealment of critical information, failure to provide appropriate loaded CPM schedules and simply false assurances to the contrary in

response to specific questions asked by BML and its representatives. As such, BML provided that its reliance was entirely reasonable at trial beyond any doubt.

132. Trial revealed that BML did not have sufficient information to be on notice of problems in meeting the March 27th deadline. By way of example, when they asked about TCO signoffs, they were told everything was on track even when critical dates were missed. It was CCAB's responsibility to track progress on the Project and it was incumbent on the CSCECB Board Member to warn BMLP if deadlines were in danger of not being met (tr. 318:13-17, 331:24-332:1, 478:9-22, 531:20-532:13, 533:6-12, 1447:8-13, 1480:2-6, 1485:4-10; JX 649). This is what the Best Interests Obligation required, and this is what BML was entitled to rely on such that when they were not provided this information or a fully loaded CPM schedule, their reliance on the assurances that completion was on track was not only reasonable but also the only reasonable conclusion that they could come to under the circumstances.[17]

133. Thus, BMLP reasonably relied on CCAB's fraudulent misrepresentations.

VIII. The Breaches and Fraud Caused the Loss of BMLP's Entire $845 Million Investment

A. The Effects of Missing the Date Certain

134. BMLP proved that by clear and convincing evidence that the Defendants' multiple acts of fraud and breaches of the Best Interests Obligation, caused to the Project to miss the date

[17] For the avoidance of doubt, Mr. Collins credibly testified that MACE's presence on the property was insufficient to put BML on notice (tr. 500:25-501:20) and the Defendants' own expert on the subject of construction management, David Patillo, admitted that achieving the TCO and monitoring the work leading up to the TCO inspections was CCAB's responsibility (tr. 1602:17-1603:3). Thus, the facts about the Project's progress were "peculiarly within the knowledge of" CCAB and could not have been discovered merely through the "exercise of ordinary intelligence" (*Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]).

certain and the March 27, 2015 opening that the CSCECB Board Member authroized and BMLP's subsequent loss of its entire investment.

135. The CSCECB Board Member's breach of the Best Interests Obligation and CCAB and the CSCECB's fraud caused BMLP to miss the March 27, 2015 partial opening date. Mr. Collins testified that the absence of comprehensive, manpower-loaded schedule "caused the March 27th deadline to be missed" (tr. 476:9-20, 529:22-530:14, 531:1-13). He found the diversion of Mr. Manabat's efforts and the lack of updates and accurate tracking of the work to be a "vital" cause of the missed March opening (tr. 491:25-492:7). Mr. Kwasnowski, BML's Project Manager, testified that the primary cause of the missed deadline was "manpower" (DX 1059, at 114:14-20).

136. The Project could not be opened without the TCO. As discussed above, the work on the fire and life safety systems and acquiring the TCO were CCAB's responsibility, and REISS denied the TCO on March 24, 2015, because "the contractor" (*i.e.*, CCAB), failed to achieve "a number of typical project steps that ensure acceptable reduction of hazards" in relation to the fire and life safety systems (JX 736, at 1).

137. Mr. Izmirlian credibly testified that if he had known the Project would not open on March 27, 2015, BML would have conserved its cash and would not have entered into the liquidity crisis that ultimately led to its liquidation and the loss of BMLP's investment (tr. 171:17-172:13). In fact, and as discussed above, trial revealed that if the CSCECB Board Member

and CCAB had not committed to the March 27, 2015 opening, BML would not have agreed to the release of $54 million.

138. For completeness the Court notes, that at trial, the Defendants argued that BML's filing for Chapter 11 and Mr. Izmirlian's refusal to make a $175 million guarantee requested by CEXIM as a precondition to its lending more money to the Project were intervening acts that cut this chain of causation. The argument failed. As discussed above, the liquidity crisis was caused entirely by the Defendants. In addition, the credible evidence indicated that Mr. Izmirlian acted honorably and commercially reasonably and willing to work out a deal as long as the Defendants committed to a substantial completion date (as they had fraudulently done in November 2014). This they refused to do and again only tried to shakedown Mr. Izmirlian for more money before they would even discuss completion. Having done this, the failure of Mr. Izmirlian to sign an additional guaranty (beyond the $25 million letter of credit that he was additionally prepared to give) cannot be said to have been a missed opportunity to mitigate damages (tr. 431:11-19).

B. After the Deadline was Missed, the Defendants Actively Worked to Push BMLP Out of the Project

139. The CSCECB Board Member and CCAB effectively halted work after the March 27, 2015, deadline was missed, and the evidence showed that the Defendants refused to commit to a new, later opening date unless BMLP met its demands for payment, again purportedly so CCAB could pay its subcontractors, many of whom had stopped work (JX 757; JX 857; tr. 160:25-161:9, 170:20-171:1, 341:25-342:11, 1207:17-1209:6). But, as Mr. Wu admitted, had CCAB had an additional $54 million (*i.e.*, had it not diverted this sum to buy a

competing project), it could have paid these subcontractors and would not have felt the need to press BML for additional cash (JX 857; tr. 1204:9-14). In addition, and as discussed above (in breach of the Best Interests Obligation) Mr. Wu acknowledged in front of Bahamian Government officials that he as the CSCECB Board Member had CCAB purposefully delay the work (JX777; tr. 159:23-160:20).

140. During this time, BML continued to spend money on the Project, without any of the income expected from the partial opening (tr. 167:18-23, 847:1-6, 1207:17-1208:5; JX 757; JX 838).

141. BMLP informed the CSCECB Board Member of BML's liquidity problems (tr. 170:6-171:1; JX 842; JX 861). The CSCECB Board Member and CCAB, however, refused to work with Mr. Izmirlian on agreeing to a new date (tr. 170:20-171:1). As discussed above, the CSCECB Board Member and CCAB was aware that BML was spending millions of dollars in reliance on its (fraudulent) assurances.

142. The Defendants in fact preferred that BML be put into liquidation. In a set of meeting minutes documenting a September 28, 2015 meeting between CCAB and CEXIM, the two parties agreed that "complete liquidation is a fundamental solution to the project's problems" (JX 919, at 3). The minutes continue, "[t]he two parties agreed on the criteria for finding new strategic investors," including giving priority to Chinese companies (*id*.).

143. The Defendants actively worked to curry favor with the Bahamian Government and behind the back of BML.[18] Through the end of 2014 to the beginning of 2016, the CSCECB Board Member had CCAB pay the consulting company (**NOTARC**) belonging to Leslie Bethel, son of Sir Baltron Bethel (a senior advisor to the Bahamian Prime Minister) approximately $2.3 million, purportedly for consulting services related to business opportunities in Panama (JX 983, at 48; JX 897; PX 1054, at 87:23-88:16).

144. The record evidence establishes, at the very least, that (i) the Defendants relied on their business relationship with Leslie Bethel to gain access to Sir Baltron Bethel and by extension the Bahamian Government, and (ii) Sir Baltron Bethel and the Bahamian Government coordinated with the Defendants during the 4-way negotiations between BMLP, the Defendants, the Bahamian Government, and CEXIM, which ensued after deadline failure.

145. For example, while CCAB was in negotiations with the Bahamian Government over a Head Of Agreement in relation to the Hilton development, Mr. Liu forwarded an email communication from Sir Baltron Bethel so his son, Leslie Bethel (JX 808). Mr. Liu confirmed in his deposition testimony that he did so because he was "looking for help" from Leslie Bethel, and wanted Leslie Bethel to speak with his father, Sir Baltron Bethel, about proposed edits made by Sir Baltron Bethel to the Heads of Agreement (JX 1054, at 230:10-232:15). Leslie Bethel reassured Mr. Liu that "Sir B is one of CCA's biggest supporters" and promised to provide further help with the Defendants' interactions with the

[18] This too was a breach of the Best Interests Obligation.

Bahamian Government (JX 808). Mr. Liu reciprocated the sentiment, saying "I am sure about Sir Baltron and yourself as our best friend" (*id*.).

146. Later on, after the March 27, 2015 deadline had been missed and in advance of a planned negotiation meeting with BML, Sir Baltron Bethel asked Mr. Liu for advise as to the "[m]anner in which you would wish negotiations to proceed" (JX 875; JX 877). Later, in a July 22, 2015 email (apparently inadvertently copying representatives of BMLP) Sir Baltron Bethel proposed "[o]ne way of making up the equity shortfall of Baha Mar would be for the Bank to advance the idea of an additional equity partner with hotel and casino experience being brought in within say 90 days" (JX 892). He was careful to add that "[s]uch a suggestion should preferably come from Bank and not Gov ***to prevent Baha Mar taking the position Gov is trying to push Izmirlian out***" (*id*. [emphasis added]).

147. Mr. Liu, in an email to Messrs Wang, Wu, and Yuan, celebrated an article describing BML's Chapter 11 filing, and recommended that the Defendants "take advantage of the Bahamas government. If the government, the Export-Import Bank of China and CCA join forces, that can turn passive into active!" (JX 870). He added, "reclaiming the land and not recognizing the US Chapter 11 were fatal blows to Baha Mar" (*id*.). This email chain also references apparently bilateral meetings between the Defendants and the "Prime Minister's Senior Advisor" (*id*.). This email chain is a clear endorsement of the strategy of pushing BMLP and BML out of the Project, and contemplates having the Bahamian Government's assistance in doing so.

148. After the U.S. bankruptcy case was dismissed in favor of a liquidation proceeding filed by the Bahamian Government (JX 930; tr. 174:15-18), BMLP offered to "match the price" of any other offer to buy the Project's assets out of liquidation, but did not receive a response (tr. 176:12-17).

149. The Project was sold out of liquidation to Perfect Luck, Ltd., a subsidiary of CEXIM, and then subsequently bought by another Chinese entity, Chow Tai Fook (JX 947).

150. Thus, the failure to get the Project back on track after the March 27, 2015 deadline was missed was due to the Defendants' conduct.

151. The Defendants also argued that BML's actions caused the Project to miss the March 27, 2015 date, in particular alleging that (i) BML caused delays in providing design drawings because BML changed its architect in mid-2012, (ii) BML failed to complete parts of the Project within its scope of work, (iii) BML failed to get a Certificate of Suitability necessary to operate a casino, and (iv) BML caused the failure of the critical TCO inspection in March 2015 because the Bahamas Ministry of Public Works rejected BML's fire watch plan.

152. These arguments fail. First, CCAB's fraudulent misrepresentations in the November Meeting Minutes and afterward already took into account any delays allegedly caused by BML's design drawings.

153. Second, Mr. Dunlap explained in unrebutted testimony that the various items on his exceptions list, *e.g.*, the spa and nightclub, were not necessary to attain the TCO, and that some of the items on this list were usable by guests at least in part by March 27, 2015, and that some of the works mentioned on this list related to work to be done for *total* completion of the Project, as opposed to that work needed for the March 27, 2015 partial opening (JX 771; tr. 341:2-20). In any case, it was CCAB's responsibility as Construction Manager to identify barriers to completion of the Project (tr. 318:13-17, 331:24-332:1, 478:9-22, 1106:16-17, 1447:8-13, 1467:21-1468:1 1480:2-6, 1485:4-10, 1499:9-15; JX 649; JX 418).

154. Third, the Defendants did not establish that the Certificate of Suitability was needed prior to opening the casino to paying guests. As noted above, BML had acquired one of only two gaming licenses on the island of New Providence. The June 2015 letter from the Bahamian Government to Mr. Izmirlian notifying him that the Government required additional information from him before issuing the Certificate of Suitability states only that "[a]ll licences issued under this Act are contingent on the ongoing suitability for licensing of the persons to whom or to which they are issued" (JX 835). While this seems to indicate a Certificate of Suitability would eventually be required, the letter does not state the Bahamian Government would not allow gambling at Baha Mar prior to its issuance, *i.e.*, with the gaming license alone. Put another way, the Defendants' attempt to dispute causation by distinguishing between a partial opening and a *successful* partial opening is disingenuous and speculative.

155. Finally, BML suggested a fire watch *if* the required tests for the fire safety and smoke control systems (works that were CCAB's responsibility to complete) were not completed, and it was the decision of REISS, the Bahamian Government's contractor for TCO inspections, that decided not to permit a fire watch (JX 739, at 2; tr. 1479:19-1480:20). REISS denied the TCO because "the contractor" had not met the Bahamian Government's requirements for the fire control and life safety systems for the Project (JX 736).

156. Thus, BMLP proved by more than clear and convincing evidence that the CSCECB Board Members and CCAB's acts of fraud and the CSCECB Board Member's multiple material breaches of the Investors Agreement were the direct and proximate cause of the loss of BMLP's investment in BML. To wit, but for the Defendants' conduct, there would not have been a liquidity crises, a reasonable achievable date certain for opening would have been agreed upon with an appropriate plan in place to achieve that date, there would not have been massive misappropriation of funds, the Defendants would have maintained adequate work force for the Project and not slowed down the work or otherwise diverted critical project personnel and resources such that BML would not have lost its entire $845 million investment.

157. BML's filing for Chapter 11 bankruptcy in June of 2015 was a foreseeable and natural consequence of the Defendants' actions (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296 [1st Dept 2011]). And, as set forth above prior to and after the Chapter 11 filing, the Defendants refused to work BMLP to set a new date and actively worked to push BMLP out of the Project. Thus, the failure to get the Project back on track after the

March 27, 2015 deadline was missed was due to the Defendants' conduct, and did not break the chain of causation (*Hain v Jamison*, 28 NY3d 524, 529 [2016]).

IX. BMLP Was Damaged in the Amount of $845 Million, Plus Pre-Judgment Interest Running from May 2014

158. As discussed above, the parties and CEXIM agreed that BMLP's initial investment was $830 million and that subsequently BMLP made a $15 million investment such that its entire investment was $845 million. Indeed, CEXIM continued to permit draw downs on the Credit Facility into March 2015, still relying on the value of BMLP's equity contribution and not withstanding the debt-equity requirement (tr. 800:24-801:11; 802:10-13; JX 4; JX 25; JX 26).[19]

159. The loss of BMLP's investment was the natural and probable consequence of CSCECB's breach of the Investors Agreement and thus are not consequential damages (*GSCP VI Edgemarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC*, 2023 WL 6805946, at *5 [Sup Ct , NY County 2023]).

160. As discussed above, the CSCECB Board Member first breached the Investors Agreement in May of 2014. Accordingly, BMLP is entitled to pre-judgment interest from the date of that appointment (CPLR 5001, 5004).

[19] Thus, the argument that BML lacked equity in the project fails. Mr. Soward's testimony as to subsequent 2016 valuations is thus dated and irrelevant.

161. The loss of BMLP's investment of $845 million is also appropriate fraud damages, because this is what BMLP lost "because of the fraud" and an award in this amount, plus pre-judgment interest, is necessary to "restore the plaintiff to the position it occupied before the commission of the fraud" (*NMR E-Tailing LLC v Oak Inv. Partners*, 216 AD3d 572, 573 [1st Dept 2023]; CPLR 5001, 5004).

X. Piercing The Corporate Veil Is Appropriate, and BMLP May Enforce its Judgment Against all Defendants

A. New York Law Applies

162. New York law applies to the question of whether piercing the corporate veil is appropriate. When a party requesting that the Court take judicial notice of foreign law fails to provide the Court with "sufficient information" of the content of that foreign law, that party has effectively consented to the application of forum law (CPLR 4511[b]; *see, e.g.*, *N.B. v F.W.*, 62 Misc 3d 1012, 1018 [Sup Ct 2019]; *Paulicopter-Cia. v. Bank of Am., N.A.*, 182 A.D.3d 458, 460 [1st Dept 2020]; *MBI Int'l Holdings Inc. v. Barclays Bank PLC*, 151 AD3d 108, 116, [1st Dept 2017]; *Warin v. Wildenstein & Co.*, 297 AD2d 214, 215 [1st Dept 2002]).

163. CPLR 4511 requires that notice of intent to rely on foreign law be given "in the pleadings or prior to the presentation of any evidence at the trial." The Defendants provided information on the content of Bahamian law by affidavit only after the conclusion of trial (NYSCEF Doc. No. 748). This is insufficient, and the Defendants have thus consented to application of New York to the question of veil piercing (*Bank of New York v Nickel*, 14 AD3d 140, 148 [1st Dept 2004]).

B. Piercing the Corporate Veil is Appropriate Under New York Law

164. In order to pierce the corporate veil, a plaintiff must show that (i) the owners exercised complete domination of the corporation in respect to the transaction at issue, and (ii) such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]).

165. Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity (*Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st Dept 2009]; *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]).

166. At trial, BMLP adduced sufficient evidence to demonstrate that piercing the corporate veil between the three Defendants is appropriate.

167. At the relevant time, the three Defendant entities were all subsidiaries of one parent company, CSCEC Holding Company, Inc.

168. There was substantial overlap between the officers and directors of the three Defendant entities. Mr. Yuan was the President of CCA, Inc., the Chairman of CCAB, a Director of CSCECB, and the Chairman and President of CSCEC Holding Company, Inc. (tr. 894:8-14; tr. 883:20-884:4). He also signed documents as both the Chairman and President of CCAB and CSCECB (JX 66). Mr. Yuan testified that there was no officer senior to him of any of the Defendant entities (or of other CCA subsidiaries) in the entire hemisphere (tr. 886:10-14). He testified further that, as to each Defendant entity, Mr. Wu, Mr. Wang, and Mr. Liu all reported to him (tr. 885:13-17). Requests from CCAB to the parent company CSCEC Ltd. had to go through Mr. Yuan (tr. 948:6-9). Mr. Wu was an Executive Vice President of both CCA, Inc., and CCAB. Mr. Wang was a Vice President of both CCA, Inc., and CCAB. Mr. Liu was a Senior Vice President of both CCA, Inc., and CCAB. Mr. Wu testified that the decision to appoint him as the CSCECB Board Member of BML was Mr. Yuan's alone (tr. 1383:12-22).

169. The Defendants consistently held themselves out as working on behalf of CCA, Inc. or otherwise conflated and blurred beyond independent recognition their purportedly separate corporate existences.

170. Although CCAB was the Project Manager and General Contractor for the Project, the Defendants often used CCA, Inc. letterhead, emails, and signatures for Project related documents and communications (JX 597; JX 581; JX 624; JX 704; JX 718; JX 742; JX 559; JX 456). In one notable example, when BMLP asked CSCECB to contribute $15 million to cure an equity shortfall (and when it made its equity contribution), Mr. Wu

responded "on behalf of [CCA, Inc.] and in my capacity as the current representative of [CSCECB] to the Board of [BML]," and used CCA, Inc. letterhead (JX 688, JX 704). And, in that letter, Mr. Wu defends the conduct of CCAB and requests that BML make an additional $140 million payment to CCAB (JX 704). This obviously breached the Bests Interests Obligation but it also highlighted the manner in which Mr. Wu and others slipped from entity to entity as it suited their needs – regardless of whether the entity that they responded or made the request on behalf of was the right one or not.

171. Mr. Wu also testified that CCAB's decision to purchase the Hilton was not made by CCAB, but by the parent company, CSCEC Ltd., as an "investment from the parent company" (tr. 1164:22-1165:4). In addition, CCA, Inc. marketed the Hilton as a project of CCA, Inc.'s, not CCAB's (JX627.5; tr. 935:4-17; 936:15-21; 941:5-9). But CCA, Inc. did not buy it. CCAB did.

172. Mr. Yuan testified that, in effect, if Mr. Izmirlian needed any assistance from any of the three Defendants, he could speak with Mr. Yuan and Mr. Yuan would provide that assistance (tr. 965:9-15).

173. The Defendant entities also comingled their financial obligations. Most notably, in the Investors Agreement, CSCECB's $150 million investment in the Project took the form of a net off of future payments due to CCAB as Construction Manager (JX 25). The Defendants failed to show support for their counterargument that this $150 million net off was in fact an owner's contingency; never during the trial did the Defendants demonstrate that the $90

million cash portion of this $150 million purported investment by CSCECB was actually made.

174. For the entire time Mr. Wu worked on the Project, his salary was paid not by CCAB, but by yet another related entity, China Construction American of South Carolina (tr. 1146:3-1148:1).

175. Although CCAB retained Notarc (purportedly to do "consulting work" as to its Panama exploration, although it was completely unclear the connection Notarc had to anything other than Notarc's principal's father – Sir Baltron Bethel), Notarc was paid by yet another related entity, CCA Panama (JX 391; JX 933).

176. Thus, as set forth above, BMLP demonstrated that (i) the Defendants shared ownership, officers, and directors; (ii) the Defendants shared offices and addresses; (iii) CCA, Inc., acting through Mr. Yuan, controlled CCAB and CSCECB; (iv) commingled assets; (v) paid or guaranteed obligations of one another; (vi) were not treated as separate profit centers; (vii) did not deal with one another at arm's length; and (viii) otherwise conflated their corporate identities. CCA, Inc. (through its boss Mr. Yuan), in particular, dominated the other entities and, as discussed above, used that domination and commingling of assets and corporations to perpetrate a wrong on BMLP.[20] The Defendants operated as a single economic entity, and piercing the corporate veil is appropriate (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 93 AD3d 489, 490 [1st Dept 2012]).

[20] Indeed, and as discussed above, the Defendants view was that the Best Interests Obligation could be shed and ignored merely by purporting to act on behalf of a different company or in respect of a different project.

XI. The Defendants' Counterclaims for Breach of Sections 4.7 and 4.8(l) of the Investors Agreement are Dismissed

A. CSCECB Refused to Fund a Requested $15 Million Portion of an Equity Shortfall, Made a Purported "Books and Records" Request, and Received $700 Million to Complete the Project After BML's Liquidation

177. As discussed above, on March 9, 2015, Mr. Izmirlian requested that CSCECB make an additional $15 million equity contribution, so that BML could continue to draw down on the CEXIM credit facility and complete the Project (JX 688; tr. 155:8-156:19).

178. On March 13, 2015, Mr. Wu sent a letter to Thomas Dunlap (on the letterhead of CCA, Inc.), in which Mr. Wu (i) disputed and rejected BMLP's request that CSCECB fund its $15 million portion of the equity shortfall, as BMLP did (tr. 155:8-156:9), (ii) defends the conduct of CCAB (a company which Mr. Wu was purportedly *not* writing on behalf of), (iii) blames BML for construction delays, and (iv) requested that BML make an additional $140 million payment to CCAB (on disputed claims) (JX 704).

179. Mr. Wu concluded his letter by making the follow set of demands of BML and BMLP:

> In order to bring BML and BMP in full compliance with their obligations to CSCEC we request that:
> - BML and BMP immediately provide any and all agreements and communications concerning or affecting the posting of key money by the hotel operators.
> - BML and BMP provide a complete budgetary analysis as to initial and projected budgets so that CSCEC can evaluate whether to approve BML's current operations or to call for board action to properly establish construction and financial budgets;
> - BML immediately process all outstanding change orders and change order requests to establish and finalize the construction budget;

- BML and BMP provide a thorough analysis and assurances that they have the resources committed and available to pay all outstanding obligations, including an expected $140 million remaining to be paid to the CCAB

(JX 704, at 2).

180. As set forth above, Section 4.7 of the Investors Agreement provides that the CSCECB Board Member "shall be given reasonable access to the books, records, communications and other documents of the Project and the Company's staff for the purpose of monitoring the Project Works schedule, Project Works budget and similar matters in the interest of the Company" (JX 34 § 4.7).

181. At trial, Mr. Dunlap testified that he did not understand this letter to be a books and records request pursuant to Section 4.7 (tr. 327:13-328:11). The letter does not mention Section 4.7 or "books and records" (JX 704). Indeed, the letter calls for "agreements," "communications," and a "budgetary *analysis*" (JX 704, at 2 [emphasis added]).

182. CSCECB later responded to the request to fund the equity shortfall by proposing that its $15 million portion be netted off from payments that they alleged were due to CCAB including as to certain disputed change orders (JX 861; tr. 1210:9-1211:7). This proposal was never adopted.

183. The Defendants later received a $700 million contract payment to complete the Project after BML entered liquidation (JX 947).

B. The Defendants Failed to Show Causation or Damages for their Counterclaims

184. The Defendants' failed to prove their counterclaims or that they suffered any damages. As set forth above, they committed multiple material breaches of the Investors Agreement prior to their March 13, 2015 request for books and records and BML's declaration of bankruptcy. Thus, as an initial matter, it would appear that BML's performance of these obligations is excused (*McMahan v McMahan*, 164 AD3d 1486, 1487 [2d Dept 2018]).

185. More importantly, however, the Defendants failed to adduce credible evidence that any purported breach by BML either by failing to provide information or by filing bankruptcy or by virtue of any other action or inaction caused any damages or that they were not made whole when they received $700 million after BML entered liquidation (JX 947).

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED and ADJUDGED that BMLP is entitled to judgment on its breach of contract claim; and it is further

ORDERED and ADJUDGED that BMLP is entitled to judgment on its fraud cause of action; and it is further

ORDERED and ADJUDGED that the Defendants' counterclaims are dismissed; and it is further

ORDERED and ADJUDGED that the Defendants are liable to BMLP in the amount of $845 million, with pre-judgment interest running from May 1, 2014.

ORDERED that BMLP submit judgment on notice in the amount of $845 million, with pre-judgment interest running from May 1, 2014.

20241018185433AB0RR0K897C5G4F655DAA11BC355500813DDE48

ANDREW BORROK, JSC

DATE: 10/18/2024

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify _____)**

EXHIBIT 2

Judgment dated October 31, 2024

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

----------X

BML PROPERTIES LTD.,

Plaintiff,

v.

CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., and DOES 1-10,

Defendants.

----------X

CSCEC (BAHAMAS), LTD.,

Defendant/Counterclaim-Plaintiff,

v.

BML PROPERTIES LTD.,

Plaintiff/Counterclaim-Defendant.

----------X

Index No. 657550/2017
(Andrew S. Borrok, J.S.C.)

JUDGMENT

Plaintiff BML Properties Ltd. ("Plaintiff" or "BMLP"), having commenced this action on December 26, 2017, in the Commercial Division of the Supreme Court of New York, New York County against Defendants China Construction America, Inc., now known as CCA Construction, Inc., CSCEC Bahamas, Ltd., and CCA Bahamas Ltd. (collectively "Defendants" or "CCA") by filing a Summons and Complaint ("Complaint") (NYSCEF No. 1); and CCA having filed an Answer to BMLP's Complaint on May 13, 2019 (NYSCEF No. 161).

This matter having been tried in a bench-trial over a two-week period beginning on August 1, 2024 and ending on August 15, 2024; and BMLP, having appeared by its attorneys, Susman Godfrey LLP and Dorf Nelson & Zauderer LLP, and Defendants, having appeared by their

attorneys, Debevoise & Plimpton LLP; and this Court having heard the testimony and received evidence and after due deliberation thereon, issued a Decision After Trial, dated October 18, 2024 and entered in the office of the Clerk of the Supreme Court, New York County, on October 21, 2024 (NYSCEF No. 755), ordering and adjudging that BMLP is entitled to judgment against all Defendants, jointly and severally, in the amount of $845,000,000, exclusive of interest, and attorneys' fees, costs and disbursements; and that Defendants' counterclaims are dismissed. Pursuant to CPLR 5001, 5002 and 5004, prejudgment interest at nine percent (9%) per annum simple interest shall be calculated for the following periods based on the following amounts: (1) for the period of May 1, 2014 through March 31, 2015, applied to BMLP's initial $830 million out-of-pocket investment; and (2) for the period April 1, 2015 through the date of judgment for the entire $845 million amount.

IT IS HEREBY ADJUDGED that Judgment is entered in favor of Plaintiff BML Properties, Ltd. with an address at Ocean Centre, Montagu Foreshore, East Bay Street, P. O. Box SS-19084, Nassau, New Providence, The Bahamas, and jointly and severally against Defendants CCA Construction, Inc., with an address at 445 South Street, Suite 310, Morristown, NJ 07960; CSCEC Bahamas, Ltd., with a last known address at Caves Corporate Centre, Building A Blake Road and West Bay Street, 1st Flr. P.O. Box N-3944, Nassau, Bahamas, c/o CCA Construction Inc., 445 South Street, Suite 310, Morristown, NJ 07960; and CCA Bahamas Ltd., with a last known address at Caves Corporate Centre, Building A Blake Road and West Bay Street, 1st Flr. P.O. Box N-3944, Nassau, Bahamas, c/o CCA Construction Inc., 445 South Street, Suite 310, Morristown, NJ 07960, in a sum of $845,000,000, with prejudgment interest at the rate of nine percent (9%) per annum on the sum of $830 million for the period from May 1, 2014 through March 31, 2015 in the amount of $68,560,273.97; and at the rate of nine percent (9%) per

annum on the sum of $845 million for the period from April 1, 2015 through the date hereof in the amount of $729,038,219.18, so that the amount of the judgment in favor of Plaintiff BMLP and against Defendants, jointly and severally, with interest, is for a total sum of $1,642,598,493.15, and Plaintiff BMLP shall have judgment and immediate execution on the judgment therefor.

IT IS HEREBY ADJUDGED that interest accrue as of the date of this judgment on the total sum of $1,642,598,493.15 at the rate of 9% pursuant to CPLR 5003 and 5004.

IT IS HEREBY ADJUDGED that Defendants' counterclaims against Plaintiff are dismissed in their entirety.

Plaintiff waives costs. The Clerk is directed to enter judgment accordingly.

Judgment signed this 28th day of October, 2024

Hon. Andrew Borrok, J.S.C.
HON. ANDREW BORROK
J.S.C.

FILED
Oct 31 2024
NEW YORK
COUNTY CLERK'S OFFICE

Date

Clerk

657550/2017

Judgment
Attorney for Judgment Creditor

SUSMAN GODFREY, LLP
One Manhattan West
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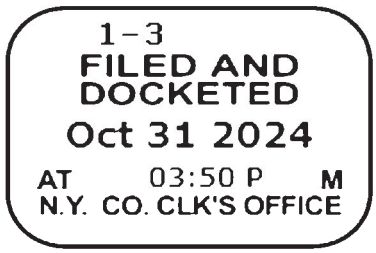

EXHIBIT 3

Motion for a Stay of Enforcement Pending Appeal

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

----------X

BML PROPERTIES LTD.,

Plaintiff-Respondent,

v.

CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., and DOES 1-10,

Defendants-Appellants.

----------X

CSCEC (BAHAMAS), LTD.,

Defendant/Counterclaim-Plaintiff-Appellant,

v.

BML PROPERTIES LTD.,

Plaintiff/Counterclaim-Defendant-Respondent.

----------X

New York County Clerk's Index No.: 657550/2017

Appellate No.: 2024-06623 ; 2024-06624

NOTICE OF MOTION FOR A STAY PENDING APPEAL

PLEASE TAKE NOTICE that upon the annexed affirmations of James McMahon, Neil Pedersen, Genguo Ju, Xin Fu, and Mark. P. Goodman sworn to on November 1st, 2024, and upon all the prior pleadings and proceedings had herein, the undersigned attorneys for Defendants-Appellants will move this Court at the Appellate Division, First Department located at 27 Madison Avenue, New York, NY 10010, at a date and time to be specified by the Court for:

(1) An order pursuant to CPLR 5519 (c) staying all lower-court proceedings, including enforcement proceedings in this matter (*BML Props. Ltd. v China Constr. Am., Inc.*, No. 657550/2017 [Sup Ct, NY County, Commercial Division]), pending the resolution of the appeal from the judgment of the Supreme Court, New York County,

Commercial Division (Hon. Andrew Borrok), entered on October 31, 2024; and

(2) An order granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 1, 2024

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

/s/ Mark P. Goodman

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Counsel to Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

BML PROPERTIES LTD.,	:	New York County Clerk's Index No.: 657550/2017
Plaintiff-Respondent,	:	
-against-	:	Appellate No.: 2024-06623; 2024-06624
CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION, INC., CCA CONSTRUCTION, INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD.,	:	**AFFIRMATION IN SUPPORT OF MOTION FOR A STAY OF ENFORCEMENT PENDING APPEAL**
Defendants-Appellants,	:	
and	:	
DOES 1 THROUGH 10,	:	
Defendants.	:	

Mark P. Goodman, an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury pursuant to CPLR 2106:

1. I am a member of Debevoise & Plimpton LLP, counsel for Defendants-Appellants CCA Construction, Inc. ("CCA"), CSCEC Bahamas, Ltd. ("CSCECB"), and CCA Bahamas Ltd. ("CCAB" and, together with CCA and CSCECB, "Defendants") in the above-captioned matter. I am fully familiar with the facts set forth herein and submit this affirmation in support of Defendants' motion pursuant to CPLR 5519(c) for a discretionary stay pending the resolution of Defendants' appeal of the judgment in the above-captioned action.

2. Following an August 2024 non-jury trial, on October 21, 2024, the New York Supreme Court, Commercial Division (Borrok, J.), entered a Post-Trial Decision and Order (Exhibit G, the "Decision"), ordering and adjudging that "Defendants are liable to [Plaintiff-Respondent] BMLP in the amount of $845 million, with pre-judgment interest running from May

1, 2014" (NYSCEF No. 755 at 74).[1] On October 29, 2024, Defendants timely noticed their appeal of the Decision to this Court (Exhibit H). On October 31, 2024, judgment (Exhibit I, the "Judgment") was entered for Plaintiff-Respondent BML Properties Ltd. ("Plaintiff"). On November 1, 2024, Defendants timely noticed their appeal of the Judgment to this Court (Exhibit J).

3. This Court has statutory authority and inherent discretion to stay "all proceedings to enforce the judgment or order appealed from pending [an] appeal" (CPLR 5519). In exercising its discretion to impose a stay pursuant to CPLR 5519 (c), the Court may consider "any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party" (Richard C. Reilly, *Practice Commentaries, McKinney's Cons Laws of NY*, CPLR C:5519:4; *see also Deutsche Bank Nat. Trust Co.*, 2016 N.Y. Slip Op. 31510(U), 2016 WL 4194195 [NY Sup Ct 2016], *4). A stay pending appeal serves to maintain the status quo (*Mintz & Gold LLP v. Zimmerman,* 17 Misc 3d 972, 976 [NY Sup Ct 2007]).

4. As explained below, all the relevant factors support the grant of a stay here as applied to each Defendant. The Decision, which saddles Defendants with a breathtaking $1.6 billion in liability, rests on numerous errors of law and fact. The Decision also erroneously treats all three Defendants as a single entity when only one (CSCECB) signed the contract alleged to be breached and another (CCA) was not involved at all in the construction project at issue.

5. Without a stay of enforcement, Defendants may never be able to exercise their rights to appeal the Decision and clear their names. Defendants have diligently sought to obtain a bond to secure an automatic stay under CPLR 5519(a) but, as Defendants are largely illiquid entities collectively worth a fraction of the Judgment, it will not surprise the Court to learn that Defendants were unable to bond this $1.6 billion judgment (*see* Affidavit of Neil Pedersen, Ex. C

[1] Unless otherwise stated, all NYSCEF references are to the trial court docket in this case.

("Pedersen Aff.")). At the same time, the Judgment's size means that if Plaintiff is allowed to commence enforcement proceedings, Defendants will be forced into insolvency.

I. Background

6. This action arises from the construction of the Baha Mar Resort in Nassau, Bahamas (the "Resort" or the "Project").[2] Plaintiff was the 100% voting shareholder and day-to-day manager of BML, the entity that owned the Resort and which is not a party to this action. BML hired CCAB as the Project's construction manager. Pursuant to a 2011 investors agreement (the "Investors Agreement"), CSCECB made a minority preferred investment of $150 million in BML, which did not come with any voting or control rights. Plaintiff, meanwhile, used its control of BML to saddle BML with $2.45 billion in debt through a loan from the Export-Import Bank of China ("CEXIM").

7. From the commencement of work in mid-2011, the Project was severely delayed because BML failed to meet its contractual obligations to timely release the Project's designs (Ex. A ¶¶ 8-9). In fall 2014, BML and CCAB jointly began developing an "Acceleration Schedule," targeting a March 31, 2015 substantial completion date—three months after the initial substantial completion date contemplated in the Master Construction Agreement. In November 2014, BML, CCAB, and CEXIM met in Beijing to resolve unpaid payment disputes and agreed to a March 27, 2015, substantial completion date (Ex. A ¶ 11).

8. By 2014, Plaintiff's mismanagement had already put BML in severe financial trouble by causing BML to overspend its budget and borrow more than it could ever hope to pay back (Ex. A ¶ 10). The unrebutted evidence at trial was that BML was out of cash by February 2015; by March 13, 2015, the Project was over budget by at least $197 million (Ex. A ¶ 24). By

[2] Unless otherwise stated, facts are drawn from Defendants' post-trial briefs (*see* NYSCEF No. 754, Ex. A; NYSCEF No. 752, Ex. B).

February 2015, BML stopped making monthly progress payments to CCAB (Ex. A ¶ 21). That was before the missed March 27, 2015 opening of the Resort that Plaintiff contends was caused by Defendant CCAB. BML's financial crisis was independent of CCAB's conduct and the missed opening; per Plaintiff's own expert, BML would have been insolvent even if the resort had opened on March 27, 2015 because BML borrowed more than it could repay even once the Resort was operational (Ex. A ¶ 29).

9. All the while, CCAB continued to work to complete the Project by March 27, 2015. It drastically increased its workforce on the Project, worked overtime and through holidays, paid its workers overtime and idle-time premiums—all at its own expense—and brought the Project to 97% completion by March 27, 2015 (Ex. A ¶ 26). Though the Project missed the March 27, 2015 opening date, CCAB continued to work, and Defendants sought to negotiate a new completion date with BML.

10. On June 29, 2015, however, Plaintiff unilaterally decided to put BML into bankruptcy in Delaware and shut down the Project (Ex. A ¶ 30). It did so without getting CSCECB's consent to the bankruptcy filing, in violation of the Investors Agreement. Plaintiff's decision was followed by a lengthy series of events, including independent decisions by courts in two countries, that ended in a 2016 order by a Bahamian court to liquidate BML. Plaintiff rejected a negotiated resolution to the bankruptcy proceedings by refusing to provide a guarantee needed to secure new bank financing to restart the Project. Plaintiff's gambit failed when the District of Delaware Bankruptcy Court then dismissed the Chapter 11 proceedings in favor of winding-up proceedings in the Bahamas, holding that proceeding in the Bahamas was in BML's "best interests." Plaintiff then tried and failed to make a proposal sufficient to regain control of BML during the Bahamian winding-up proceedings. In October 2016, the Bahamian Supreme Court

ordered that BML be liquidated, which caused both Plaintiff and CSCECB to lose their equity in BML (Ex. A ¶¶ 53-59).

11. Following BML's winding-up, CCAB was rehired to complete construction and received $700 million to cover past-due payments BML owed to CCAB and others and to complete construction, including fixing hurricane and mold damage (Ex. A ¶ 34). In April 2017 Baha Mar opened to the public (*Id.*).

12. On December 26, 2017, Plaintiff filed a complaint in this action (NYSCEF 1). On May 25, 2023, the trial court denied Defendants' motion for summary judgment in its entirety and granted Plaintiff's motion for partial summary judgment, dismissing CSCECB's counterclaims for breach of contract (NYSCEF 648; NYSCEF 649). On April 25, 2024, this Court affirmed in part and reversed in part the trial court's summary judgment decision (*BML Props. Ltd. v China Constr. America Inc.*, 226 A.D3d 582 [1st Dept 2024]). This Court reversed the trial court in numerous material respects: It dismissed Plaintiff's claims of unjust enrichment and breach of the implied covenant of good faith and fair dealing, revived CSCECB's counterclaims, and reversed the trial court's ruling that Plaintiff could seek well over a billion dollars in lost profits. In rejecting Plaintiff's lost profits claim, this Court emphasized that consequential damages are not recoverable. And on the counterclaims, this Court held that Plaintiff breached the Investors Agreement by refusing to provide CSCECB with books and records and by forcing the company into a bankruptcy that it kept secret from CSCECB, its minority investor (*id.* at 583-585). This Court's ruling meant that trial would proceed on limited bases for direct damages only.

13. A two-week non-jury trial was held in the Commercial Division from August 1 to 15, 2024. At issue during the trial were (i) BMLP's claim against CSCECB for breach of section 4.7 of the Investors Agreement; (ii) BMLP's fraud claims against all three Defendants; (iii) veil-

piercing liability for CCA and CCAB based on BMLP's claim for breach of the Investors Agreement by CSCECB; and (iv) CSCECB's counterclaims against BMLP under the IA. On October 18, 2024, the Supreme Court issued the Decision, compounding legal error on legal error to find the Defendants liable to BMLP for the extraordinary sum of $845 million, plus pre-judgment interest running from May 1, 2014 (NYSCEF No. 755). On October 31, 2024, judgment was entered for BMLP (NYSCEF No. 764).

14. Defendants immediately filed notices of appeal of the Decision (NYSCEF No. 763) and of the Judgment (NYSCEF No. 766). Defendants intend to perfect by December 30, 2024, so this Court may hear the appeals in the March Term.

II. Argument

A. Defendants Will Suffer Catastrophic and Irreparable Harm Absent a Stay.

15. Defendants are ongoing businesses facing a judgment that is several times their combined value even under the most optimistic assumptions. The judgment is far more than any Defendant could possibly satisfy [Affirmation of James McMahon, Ex. D ¶¶ 3-4 ("McMahon Aff."); Affirmation of Xin Fu, Ex. E ¶¶ 3-4 ("Fu Aff."); Affirmation of Genguo Ju, Ex. F ¶¶ 3-4 ("Ju Aff.")]. Defendant CCA is a Morristown, New Jersey-based construction company whose primary assets are the equity interests it holds in its operating subsidiaries; CCA's total value is, at most, a fraction of the amount of the judgment entered by the trial court [McMahon Aff. ¶ 3]. CSCECB is a Bahamian special purpose investment vehicle that has no meaningful assets beyond its now-dismissed counterclaims in this case [Fu Aff. ¶ 3]. Finally, CCAB is a Bahamian company whose principal assets are its ownership interests in two subsidiaries, which together own and operate two hotels in Nassau, Bahamas, and no surety firm would accept its assets as a form of collateral on a supersedeas bond [Ju Aff. ¶ 3].

16. Absent a stay of enforcement, some or all of the Defendants may be forced to file for bankruptcy in the United States or initiate liquidation proceedings in The Bahamas (*see* McMahon Aff. ¶ 7; Fu Aff. ¶ 7; Ju Aff. ¶ 7). As courts have repeatedly recognized, the threat of insolvency and bankruptcy is an irreparable harm warranting a stay (*Jack Frost Labs., Inc v Physicians & Nurses Mfg. Corp.*, 1996 WL 709574, *1 [SD NY Dec. 10, 1996, No. 92 CIV. 9264 (MGC)] [recognizing that "a judgment debtor would otherwise be in danger of being driven into bankruptcy pending appeal" and lowering bond amount because requiring bond payment in full "might push the company into bankruptcy"]; *see also Home Ins. Co. v Olympia & York Maiden Lane Co.*, 174 Misc 2d 45, 48 [Sup Ct, NY County 1997] [describing liquidation as irreparable harm]; *Port Chester Elec. Const. Corp. v HBE Corp.*, 1991 WL 258737, *2 [SD NY, Nov. 27, 1991, No. 86 CIV. 4617 (KMW)] ["[I]rreparable harm . . . is usually established upon a showing that the judgment debtor will become insolvent"]). In this case, bankruptcy or insolvency proceedings would harm not only Defendants but non-parties as well. The two hotels CCAB owns employ hundreds of people. And CCA provides shared services—including communications, accounting, information technology, and other general administration services—to non-party affiliates engaged in ongoing construction projects.

17. Defendants have diligently sought to avoid this outcome. They approached several bonding companies, but none were willing to provide a bond in any amount (*see* Pedersen Aff. ¶¶ 17-19). A discretionary stay of enforcement is the only means by which Defendants can preserve their assets while pursuing their right to appeal.

B. A Stay Would Maintain the Status Quo and Would Not Prejudice Potential Recovery for Plaintiff.

18. A stay of enforcement would not prejudice Plaintiff's potential recovery; it would merely maintain the status quo for this case, which has been pending for seven years, while

Defendants prosecute their appeal (*see Mintz & Gold LLP*, 17 Misc 3d at 976 ["[A] stay [under CPLR 5519(c)] . . . maintains the status quo"]). If anything, a stay of enforcement would be to Plaintiff's benefit because support to the ongoing businesses would continue uninterrupted, potentially increasing the value of the respective entities.

19. Defendants plan to perfect their appeal within eight weeks of filing their notice, far earlier than the six-month time frame provided for in the NYCRR, and the appeal may be resolved within several months. Plaintiff's potential recovery would be protected in the meantime. A stay would allow Defendants to continue to generate value while the appeal is pending, and post-judgment interest would continue to accrue (CPLR 5003; *Purpura v Purpura*, 261 AD2d 595, 597 [2d Dept 1999]). Defendants would not and could not dispose of or transfer their assets while this appeal is pending. And, as Defendants already disclosed to Plaintiff, the vast bulk of Defendants' value are in its ownership of two well-known hotels in The Bahamas.

C. Defendants Are Highly Likely to Succeed on the Merits of Their Appeal

20. This Court may also consider the "presumptive merits of the appeal" (*Deutsche Bank Nat. Trust Co.*, 2016 WL 4194195, *4), which overwhelmingly support a stay here. As Defendants will explain in their forthcoming appellate brief, Defendants are highly likely to succeed on the merits of their appeal of the Decision, which suffered from multiple, fatal errors of law. For example:

21. The evidence at trial was insufficient to meet Plaintiff's burden of proof on any of the elements of its claims. As to Plaintiff's fraud claim, there was no evidence that any Defendant made an actionable misrepresentation of present fact; the Supreme Court also applied the wrong legal standards for scienter and reliance and ignored the requirement that Plaintiff prove loss causation (*see* Ex. A ¶¶ 41-47; Ex. B ¶¶ 16-17). The Supreme Court also erred in holding that CSCECB, a special purpose entity created to make a $150 million investment in BML, breached

section 4.7 of the Investors Agreement. The Decision rested on a misinterpretation of that provision and ignored the relevant causation standard.

22. In addition, the damages awarded by the Supreme Court are unrecoverable as a matter of law. The damages represent the purported value of assets that Plaintiff claims to have invested in BML in 2011 (*see* NYSCEF No. 755), but between that date and the date of the supposed breach, Plaintiff caused BML to incur over $2.4 billion in debt against which it pledged those assets. BMLP only lost its equity because its own machinations landed BML in bankruptcy. More specifically, Defendants intend to argue on appeal that the damages award should be reversed because, among other reasons: (*i*) Plaintiff's damages are consequential but the Investors Agreement bars consequential damages (*BML Props. Ltd. v China Constr. Am. Inc.*, 226 AD3d 582, 584 [1st Dept 2024]; NYSCEF 710, at 7); (*ii*) Plaintiff adduced no evidence whatsoever as to the value of its equity before or after the alleged wrongdoing, as required to compute damages; (*iii*) the unrebutted evidence was that Plaintiff's own management decisions had erased the entire value of its equity in BML before the alleged wrongdoing, meaning that Defendants' actions cannot have caused Plaintiff's claimed economic loss (*see* Ex. A ¶¶ 70-71; Ex. B ¶¶ 39-42); and (*iv*) Plaintiff indisputably received consideration in exchange for its purported 2011 investment in the form of 100% of the voting shares in BML.

23. Finally, New York law does not support piercing the corporate veil of CSCECB or CCAB, Bahamian entities, to reach Defendant CCA, which is not CSCECB's or CCAB's parent, subsidiary, or sibling corporation. The Supreme Court erred as a matter of law in finding that New York, rather than Bahamian law, governed whether the corporate veil of a Bahamian entity should be pierced. Moreover, the Supreme Court's factual findings were insufficient to support veil-piercing even under New York law.

24. On November 1, 2024, I spoke with Jacob Buchdahl of Susman Godfrey LLP, counsel for Plaintiff, and advised him that Defendants are seeking a stay pursuant to CPLR 5519 (c). Mr. Buchdahl advised by email that Plaintiff does not consent to a stay.

III. Conclusion

25. For all the foregoing reasons, the Court should stay enforcement of the judgment without requiring the posting of an undertaking pending resolution of Defendants' appeals of the Decision and Judgment.

I affirm this 1st day of November, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated: November 1, 2024
New York, New York

DEBEVOISE & PLIMPTON LLP

By: /s/ *Mark P. Goodman*
Mark P. Goodman

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(212) 909-6000

Attorneys for Defendants-Appellants China Construction America, Inc., now known as CCA Construction, Inc., CCA Construction, Inc., CSCEC Bahamas, Ltd., and CCA Bahamas Ltd.

EXHIBIT 4

Opposition to Motion for a Stay Pending Appeal

FILED: APPELLATE DIVISION - 1ST DEPT 11/13/2024 04:47 PM 2024-06624
NYSCEF DOC. NO. 6 New York County Clerk's Index No. 657550/17 RECEIVED NYSCEF: 11/13/2024

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

BML PROPERTIES LTD.,

Plaintiff-Respondent,

—against—

CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., and DOES 1-10,

Defendants-Appellants.

CSCEC (BAHAMAS), LTD.,

Defendant/Counterclaim-Plaintiff-Appellant,

—against—

BML PROPERTIES LTD.,

Plaintiff/Counterclaim-Defendant-Respondent.

CASE NOS.
2024-06623
2024-06624

OPPOSITION TO MOTION FOR A STAY PENDING APPEAL

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I. INTRODUCTION

Plaintiff-Respondent BML Properties Ltd. ("BMLP") filed this lawsuit against Defendants-Appellants CCA[1] almost seven years ago. During that time, this Court heard two appeals and decided the key legal issues: Are BMLP's claims derivative? (No; they are direct claims.) Can BMLP maintain its fraud and contract claims simultaneously? (Yes.) Was BMLP's damages model proper? (Not as to lost profits.) By the time the parties got to trial, the only question left to decide was which party was telling the truth about why the Baha Mar Project failed in 2015, causing BMLP to lose its entire investment. After an eleven-day bench trial, at which the most senior executives of both parties all took the stand, the trial court has now answered that question: on October 18, 2024, the Honorable Andrew Borrok issued a thorough, 74-page decision finding that CCA breached the parties' contract and committed fraud, entitling BMLP to $845 million in damages—the value of BMLP's out-of-pocket investment, a value to which the parties *agreed in their contract*—plus interest. Ex. 1 ("Trial Op.").

[1] Defendants-Appellants CCA Construction Inc. ("CCA Inc."), CSCEC Bahamas, Ltd. ("CSCECB"), and CCA Bahamas Ltd. ("CCAB") are corporate affiliates. The trial court found "sufficient evidence" to pierce the corporate veil between these three Defendants because they "operated as a single economic entity": they "commingled their financial obligations," "conflated and blurred beyond independent recognition their purportedly separate corporate existences," and "slipped from entity to entity as it suited their needs." Ex. 1 ¶¶ 166, 169, 170,173, 176. Therefore, this brief refers to them collectively as "CCA."

Repeatedly, the Court found that CCA's testifying witnesses were not credible and that there was *clear and convincing evidence* that CCA lied constantly to BMLP, including about diverting assets. *Id.* As just a few examples, the Court found that:

- CCA engaged in an "absolute sham and shakedown" of BMLP to induce BMLP to release $54 million of Project funds so that CCA could purchase a competing hotel. Trial Op. ¶ 49; *see also id.* ¶¶ 124, 138 (finding additional unjustified "shakedown[s]" of BMLP for money).

- CCA promised completion dates to BMLP that were "just phony." *Id.* ¶ 103.

- CCA engaged in a "massive misappropriation of funds," *id.* ¶ 156, including "[u]ncontradicted evidence that Defendants' corporate officers misappropriated project funds for personal use," *id.* ¶ 111.

- CCA engaged in a "fraudulent course of dealing and disrespect for the observation of corporate formalities." *Id.* ¶ 113; *see also id.* at 5 (the defendant entities operated "without regard to corporate form" and "to further the[ir] scheme by commingling their financial and corporate obligations and rights").

- CCA engaged in "active concealment of critical information" and provided "simply false assurances" to BMLP. *Id.* ¶ 131.

- "The Defendants' witnesses' testimony … was often inconsistent with their own internal communications or otherwise confirmed their many instances of breach and fraud." *Id.* at 2; *see also id.* ¶¶ 12, 60, 73, 123 (finding CCA's witnesses not credible).

After these extensive findings of financial fraud and misappropriation, CCA now asks this Court to do something unprecedented: to grant CCA a *completely unsecured* stay of enforcement of the $845 million plus interest judgment pending appeal, because CCA purportedly cannot currently obtain a bond. NYSCEF No. 4. ("Mot."). In other words, CCA says to this Court: "***Trust us***. We can't pay the

judgment now, but don't require us to make any showing that we will do so later." But CCA deserves *no benefit of the doubt*—the trial court's findings make clear that CCA cannot be trusted to tell the truth or to act properly regarding financial matters. CCA cites *no case* where a court has granted a stay under such circumstances without requiring *any* security—let alone a case involving a judgment of this size, in which the defendants have been found liable for repeated acts of fraud and diversion of funds. The Court should exercise its discretion to deny CCA's extraordinary request.

First, CCA's appeal is meritless, which is an independent reason to deny CCA's motion under CPLR 5519(c). Although CCA's motion provides only a bare-bones explanation of its forthcoming appellate arguments, it appears to mainly regurgitate the factual allegations it made at trial. Mot. ¶¶ 21-23. But those factual allegations have now been rejected as not credible and not supported by the evidence. The trial court's factual determinations will be upheld on appeal if they can be reached "under any fair interpretation of the evidence, particularly where the findings of fact rest largely on the credibility of witnesses." *O'Mahony v. Whiston*, 224 A.D.3d 609, 609 (1st Dept 2024) (citation omitted). That is the case here. Moreover, many of CCA's arguments are wrong under black-letter law and this Court's prior decisions. And CCA has been found liable under multiple, independent

legal theories. In short, there is scant likelihood of CCA obtaining reversal of the entire judgment on appeal.

Second, the equities weigh heavily against granting an ***unsecured stay*** here. *See, e.g.*, *DePaolo v. Town of Ithaca*, 181 Misc. 2d 932, 934, 696 N.Y.S.2d 392, 394 (N.Y. Sup. Ct. 1999) ("Once [a] proceeding has progressed to a final judgment … the equities have shifted dramatically. … [T]he court finds no basis for continuing to afford the petitioners the extraordinary benefit of an automatic 'free' stay, without *any* consideration of the harm that may befall the [judgment winner].").

On one hand, CCA has not shown it will be prejudiced without a stay. CCA provides the Court with *no evidence* to substantiate its claim of an inability to pay the judgment and a risk of insolvency if forced to do so. It instead provides conclusory affidavits, without *any underlying financial information*, or even the slightest suggestion about what amount CCA *could* pay in satisfaction of the judgment. This Court should not simply take adjudicated fraudster CCA's word for it. *See Jenack v. Goshen Operations LLC*, 2021 WL 5847237, at *5 (N.Y. Sup. Ct. May 11, 2021) ("Defendants' conclusory affirmations do not point to any imminent or non-speculative harm that would occur in the absence of a stay.").

Even if CCA had demonstrated its inability to pay or the likelihood of insolvency, it cites *no caselaw* supporting these harms as a basis to excuse the bond requirement and grant an unsecured stay. In fact, the analogous (federal) caselaw

(which CCA relies on) makes clear that inability to pay the judgment is grounds to *deny* an unbonded stay request—or at the very least, to condition the stay on some assurance that the loser can pay the judgment. *E.g.*, Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2905 (3d ed. 2024) ("[T]he bond requirement will not be waived solely on the basis that it will pose a severe financial hardship on the appellant unless some other form of security is offered"). Nor does CCA need a stay to protect itself: it can always seek relief under CPLR 5240 to modify any judgment enforcement steps that will lead to insolvency.

By contrast, BMLP will suffer significant harm if CCA is granted an unsecured stay. The CPLR provides a clear procedure for a party to seek a stay of enforcement of a money judgment pending appeal: pay a bond. CPLR 5519(a)(2). The purpose of that bond requirement is to *protect BMLP*, which is "entitled to have [its] victory secured so that when the stay of enforcement resulting from the appeal is vacated by affirmance, a ready fund with which to satisfy the judgment shall be available." *Schaffer v. VSB Bancorp, Inc.*, 68 Misc. 3d 827, 833, 129 N.Y.S.3d 252, 256 (N.Y. Sup. Ct. 2020) (citation omitted). CCA asks this Court to excuse the bond requirement *entirely* and instead enter a discretionary unsecured stay under CPLR 5519(c). But CCA offers *nothing* to secure the $845 million plus interest judgment pending appeal. Such a stay would defeat the entire purpose of the bond requirement and ensure that BMLP lose *any* protection from the risk of devaluation, dissipation,

or diversion of CCA's assets during its meritless appeal. Considering the trial court's extensive findings of CCA's fraud, misappropriation of funds, and abuse of the corporate form, this risk is substantial.

But if the Court were to grant a discretionary stay, any order should impose sufficient conditions to protect BMLP from prejudice. At a minimum, CCA should be required to secure the judgment to the fullest extent possible, such as through a smaller cash bond and alternative forms of security (including, for example, its two hotels in the Bahamas), and CCA should be held to its promise of perfecting its appeal promptly by December 30, 2024. At this point, however, CCA has yet to come clean about its financial condition, which would only be further obscured by a stay that would both pause post-judgment discovery and provide a window of opportunity for CCA to dissipate its assets. Because CCA has neither offered to extend these protections nor provided a record on which the Court can fashion them itself, the Court should deny the motion.

II. BACKGROUND

A. Factual Background

This case is about an all-too-successful scheme by CCA to defraud and loot assets from its former business partner, BMLP. Although CCA's motion relies on factual assertions from its own post-trial briefing, Mot. ¶ 6 n.2, those assertions have now been broadly rejected; on appeal from a bench trial judgment, "deference is

accorded the trial court's factual findings[,] particularly where they rest largely upon an assessment of credibility." *43rd St. Deli, Inc. v. Paramount Leasehold, L.P.*, 178 A.D.3d 411, 412 (1st Dept 2019) (citation omitted).[2] Relevant here, the trial court made the following factual findings and credibility determinations:

BMLP was "the parent company of Baha Mar Ltd. ('BML'), the former owner and developer of the multi-billion-dollar Baha Mar resort complex in the Bahamas." (the "Project"). Trial Op. ¶ 1. Sarkis Izmirlian, the Chairman and CEO of BMLP and BML, a "central player in the events which give rise to this case," "testified credibly" and the evidence showed that he "at all times as to the issues tried in this case acted commercially reasonably, honorably, and in the best interests of the Project." *Id.* ¶ 3; *see also id.* at 2 ("BMLP's witnesses' testimony was credible and consistent with the contemporary documents.").

CCA (including CCAB, CSCECB, and CCA Inc.), are a New Jersey-based conglomerate of "affiliated companies which invested in the Project and acted as the general contractor and construction manager for the Project." Trial Op. ¶ 2. These interrelated companies "operated as a single economic entity" that "com[m]ingled their financial obligations" and are all subsidiaries of one parent holding company working as the local arm of their Chinese parent (China State Construction

[2] For completeness of the record, BMLP also submits here its post-trial briefs. Ex. 7, 8.

Engineering). *Id.* ¶¶ 166-176. The evidence at trial "firmly established that piercing the corporate veil as against all defendants is warranted," *id.* at 1, including, for example, that there was "substantial overlap between the officers and directors of the three Defendant entities," all of which ultimately reported to and were controlled by Ning Yuan, the President of CCA Inc. and Chairman and President of the parent holding company, *id.* ¶ 168. "Yuan's testimony was not credible and was inconsistent with the contemporaneous documents adduced at trial." *Id.* ¶ 12; *see also id.* at ¶¶ 60, 73, 123 (other CCA witnesses were not credible either).

BMLP, BML, and CCA memorialized their deal for the Project in a series of agreements, including an Investors Agreement, under which "***the parties agreed*** that BMLP made an $830 million equity investment into the Project" through a combination of cash, land and other assets, and "received 100% of BML's voting shares. *Id.* ¶¶ 23, 27-37. BMLP later made a further $15 million equity contribution in cash. *Id.* ¶¶ 23, 38. CSCECB agreed to "invest $150 million … in exchange for" preferred shares in BML, *id.* ¶ 23, via "a net off of future payments due to *CCAB* as Construction Manager" under a different construction contract, *id.* ¶ 173.

Under the Investors Agreement, CSCECB had the right to appoint one member of BML's Board, who was required to "at all times act in the best interests of" BML under Section 4.7. *Id.* ¶¶ 24-25, 40. CCA breached Section 4.7 beginning on May 1, 2014, when it appointed Tiger Wu as the designated Board member, who,

in one of CCA's "only moments of true candor" at trial, admitted he was not aware of and never bothered to learn of his "best interests" obligation. *Id.* at 2-3; *Id.* ¶¶ 44, 64. CCA continued to breach the Investors Agreement by acting *against* the "best interests" of the Project, through Wu, in myriad ways:

First, the "credible evidence" demonstrates that CCA requested a $54 million payment from BML in November 2014 for a "stated purpose to pay subcontractors," but in reality, CCA "diverted" those funds "to purchase the Hilton, a competing hotel property," and lied to BMLP about it. *Id.* ¶¶ 65-75.

Second, CCA diverted Project resources—including the attention and time of key CCA Project executives and employees—"away from the Project and towards [CCA's] business opportunities in Panama." *Id.* ¶¶ 76-84. The trial court found that CCA's trial testimony to the contrary was "false" and impeached. *Id.* ¶¶ 77, 79, 80.

Third, CCA allowed hundreds of workers to return to China for the Chinese New Year without ensuring adequate appropriate replacement workers to meet the Project's agreed-upon deadline, and "concealed [this] from BML[,] telling them exactly the opposite – *i.e.*, that everything was on track." *Id.* ¶¶ 85-87.

Fourth, as "Mr. Wu himself admitted" at trial, CCA repeatedly recommended and did "purposefully delay work on the Project" to extort further payment from BMLP and for "the sole purpose of furthering [CCA's] commercial interests" at the expense of BML.'s. *Id.* ¶¶ 88-98.

The trial court also found "clear and convincing evidence" that CCA committed fraud. *Id.* ¶¶ 100-133:

First, CCA committed to a March 27, 2015 partial opening date for the Project but "had absolutely no plan as to how to" meet that deadline; instead, CCA promised to meet the deadline "to induce the release of the $54 million … so that [it] could close on the Hilton," and repeatedly "reaffirmed its commitment" to the deadline while internally acknowledging "that the dates being given to BML were just phony." *Id.* ¶¶ 100-109.

Second, the misrepresentation to induce the $54 million payment was fraud. *Id.* ¶¶ 110.

Third, the "uncontradicted evidence"—including the unrebutted testimony of a forensic accounting expert—showed that "the Defendants' corporate officers misappropriated funds for personal use." *Id.* ¶¶ 111-113.

Fourth, CCA knew it had insufficient manpower, management, and resources to achieve the promised March deadline, knew this date was in jeopardy, and hid this knowledge from BMLP. *Id.* ¶¶ 114-125.

CCA's actions were intended to induce BMLP to rely on them, and the evidence at trial showed BMLP's reliance "was entirely reasonable …beyond any doubt"; "Defendants introduced really no credible evidence that cast doubt as to the reasonableness of reliance." *Id.* ¶ 126-33.

CCA's breaches and fraud caused the loss of BMLP's entire $845 million investment in the Project. *Id.* ¶¶ 134-157. The "clear and convincing evidence" showed that CCA's actions "caused the Project to miss" the March deadline, including unrebutted expert testimony regarding CCA's failure to provide adequate Project schedules and resources, and unrebutted testimony about what BML would have done if it "had known the Project would not open" in March ("conserved its cash"). *Id.* ¶¶ 134-138. After the deadline was missed, CCA actively worked to push BMLP out of the Project. CCA stopped working and "refused to commit to a new, later opening date unless BMLP met its demands for payment," while BML was forced to "continue[] to spend money on the Project, without any of the income expected from the partial opening." *Id.* ¶¶ 139-150.

BMLP informed CCA of these liquidity problems, but CCA "refused to work with [BMLP] on agreeing to a new date," leaving BMLP with no choice but to cause BML to file for Chapter 11—a "foreseeable and natural consequence" of CCA's actions. *Id.* ¶¶ 141, 157. CCA "celebrated" this—it "preferred that BML be put into liquidation," so it "actively worked to curry favor with the Bahamian Government and behind the back of BML," pushing BMLP out of the Project and ultimately resuming construction with CCA still at the helm. *Id.* ¶¶ 142-147. BMLP lost its entire $845 million investment in the Project, while CCA received a windfall $700 million payment to complete the Project. *Id.* ¶¶ 158-59, 183, 185.

The evidence showed that "but for [CCA's] conduct, there would not have been a liquidity cris[i]s, a reasonable achievable date certain for opening would have been agreed upon with an appropriate plan in place to achieve that date, there would not have been massive misappropriation of funds, the Defendants would have maintained adequate work force for the Project and not slowed down the work or otherwise diverted critical project personnel and resources such that BML would not have lost its entire $845 million investment." *Id.* ¶ 156; *contra* Mot. ¶ 8.

B. Procedural Background

In the seven years this case has been pending, this Court has already heard two prior merits appeals from CCA as well as a last-ditch motion from CCA to stay the trial proceedings. On December 26, 2017, BMLP filed the Complaint in this case. Aff. ¶ 2.[3] CCA filed a motion to dismiss, which the trial court denied. *Id.* ¶ 3. CCA appealed, but this Court affirmed the trial court's decision in full, holding that, considering its contract claim, BMLP had also "adequately stated a claim for fraud." Ex. 2 at 3.

After the close of discovery, both BMLP and CCA filed motions for summary judgment. Aff. ¶ 4. On February 9, 2023, the trial court scheduled a bench trial in the case for August 2024. *Id.* ¶ 5. On May 25, 2023, the trial court entered a Decision

[3] All "Aff." or "Ex." citations are to the concurrently filed Affirmation of Jacob Buchdahl.

and Order that (i) denied CCA's motion for summary judgment to dismiss all BMLP's claims and (ii) granted BMLP's motion for summary judgment to dismiss CCA's remaining affirmative defenses and three of its counterclaims. *Id.* ¶ 6. CCA then waited six months and ten days to perfect its appeal to this Court. *Id.* ¶ 7. CCA later filed a motion for a stay of all trial court proceedings (including the trial) pending appeal, but this Court denied that motion. Aff. ¶ 8; Ex. 3.

This Court granted in part and denied in part CCA's summary judgment appeal, *resolving the remaining legal issues in the case*: whether BMLP's claims were derivative or direct, whether the contractual "best interests" requirement only applied when CCA's officers were acting in a certain capacity, whether BMLP had a cognizable fraud claim, and the proper damages model for BMLP's claims. Ex. 4.

This Court affirmed the trial court's denial of CCA's motion for summary judgment on BMLP's fraud and breach of contract claims, the dismissal of CCA's affirmative defenses that BMLP's claims were derivative and released, and the dismissal of one of CSCECB's counterclaims. *Id.* at 1-3. This Court held that BMLP's claims were direct, not derivative; that "[i]t does not matter that the focus of the Investors Agreement is not construction management," because the "best interests" requirement applied "at all times"; and that BMLP's fraud claims were "not duplicative" of the contract claim, leaving only "[i]ssues of fact … with respect to justifiable reliance" to be decided at trial. *Id.*

This Court reversed the trial court's denial of CCA's motion for summary judgment in three respects: it dismissed BMLP's implied covenant of good faith and fair dealing and unjust enrichment claims as duplicative of the contract claim, and dismissed BMLP's request for lost profits damages for breach of contract, finding that lost profits were "consequential in nature because they stem from collateral business arrangements – i.e., the loss of contracts with potential hotel guests" and thus were barred by the contractual consequential damages waiver. *Id.* at 3-4. Finally, this Court reversed the trial court's grant of summary judgment on two of CSCECB's counterclaims, finding issues of fact remained for both. *Id.* at 4-5.

On June 12, 2024, prior to the trial, CCA filed what it called a "motion *in limine*," but was actually an untimely motion for summary judgment to dismiss BMLP's sole remaining damages claim for $845 million in out-of-pocket damages as also consequential. Aff. ¶ 11. In that motion, CCA advanced the same meritless damages argument it now intends to raise on appeal. *Id.*; *compare* Mot. ¶ 22. BMLP opposed the motion. Ex. 5. The trial court denied the motion, holding that BMLP's out-of-pocket losses are direct and not consequential damages, and noting that "Defendants' arguments regarding causation … do not make the damages consequential and involve factual issues properly determined at trial." Ex. 6 at 2-3.

The trial court held an eleven-day bench trial from August 1-11, 2024. Aff. ¶ 13. On October 18, 2024, the trial court issued a 74-page decision finding by a

preponderance of the evidence that CCA breached Section 4.7 of the Investors Agreement no fewer than six times and by clear and convincing evidence that CCA committed at least four instances of fraud, and that as a direct and proximate consequence of such conduct, BMLP suffered damages in the amount of its entire $845 million investment. Trial Op. at 1. The trial court found evidence sufficient to pierce the corporate veil to hold all three defendants liable, *id.* ¶¶ 162-176, including finding that CCA had consented to the application of New York law, *id.* ¶¶ 162-63, and found that "Defendants utterly failed to prove their counterclaims or any damages in support of their counterclaims," *id.* at 6; *id.* ¶¶ 177-185.

III. THE COURT SHOULD DENY CCA'S REQUEST FOR A STAY OF ENFORCEMENT PENDING APPEAL

A. CCA's Forthcoming Appeal is Meritless

CCA argues that the Court should enter a discretionary stay because CCA is "highly likely to succeed on the merits" of its appeal. Mot ¶¶ 20-24. Of course, that an appeal may have some merit is alone insufficient to justify a stay. If anything, "courts often *require* that the pending appeal have merit" as *one "factor"* in deciding whether to grant a stay. *Kram Knarf, LLC v. Djonovic*, 2009 WL 10749644, at *1-2 (N.Y. Sup. Ct. May 6, 2009); *see also CDR Creances S.A. v. Euro-Am. Lodging Corp.*, 40 A.D.3d 421, 423 (1st Dept 2007) (denying stay "as there was no showing of merit to the appeal"); Siegel, N.Y. Prac. § 535 (6th ed. 2024) ("The presumptive merit of the appeal will also be an element."). CCA's own cited case *denied* a stay

because "although plaintiff's appeal [wa]s not necessarily meritless, it [wa]s not strong enough to warrant a stay pending appeal." *Deutsche Bank Nat. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 2016 WL 4194195, at *3 (N.Y. Sup. Ct. Aug. 08, 2016).

But here, CCA's appeal is meritless. CCA's motion only identifies a few issues on which it will purportedly be meritorious (by merely referring to its post-trial briefing, without any explanation), Mot. ¶¶ 21-23, and accordingly, BMLP summarizes here its responses to those arguments only.

First, CCA argues that "[t]he evidence at trial was insufficient to meet Plaintiff's burden of proof" on its claims, including on fact-bound issues like scienter, reliance, causation, and breach. Mot. ¶ 21. These challenges to the trial court's factual findings—which repeatedly rely on credibility determinations and which will be reviewed with deference by this Court—will not be successful on appeal. *43rd St. Deli, Inc.*, 178 A.D.3d at 412. CCA may disagree with the trial court's factual findings, but they are plainly "supported by a fair interpretation of the evidence." *O'Mahony*, 224 A.D.3d at 610. The court found ample evidence that CCA made actionable misrepresentations of present fact and several material omissions regarding its lack of a plan or sufficient manpower, management, and resources to achieve the March deadline, its intended use of the $54 million, and its intended use of Project funds misappropriated for personal use. *Supra* § II(A); Trial

Op. ¶ 107; Ex. 7 ¶¶ 129-131; Ex. 8 ¶ 35. The trial court applied the correct legal standards for scienter, reliance, and causation under binding New York law. Trial Op. ¶ 108, 126, 156-57; Ex. 7 ¶¶ 133, 135-38, 139-40; Ex. 8 ¶¶ 36, 42-43. CCA suggests that the court somehow erred in finding CSCEB breached the Investors Agreement and misinterpreted the provision, but fails to explain this argument. Mot. ¶ 21. CCA is wrong—the evidence of CSCECB's breach, via its appointed Board member, Tiger Wu, was overwhelming, *see supra* § II(A), and the trial court applied the correct interpretation of Section 4.7 reached by *this Court* on CCA's last appeal. *Compare* Trial Op. ¶¶ 41-42, 78 *with* Ex. 4 at 2.

Second, CCA attempts to argue that the awarded damages are "unrecoverable as a matter of law," but this argument too relies on *factual* causation arguments that the trial court considered and rejected, devoting *twenty-two paragraphs* to its causation analysis. *Compare* Mot. ¶ 22 (claiming that "Defendants' actions cannot have caused Plaintiff's claimed economic loss" and "Plaintiff caused BML to incur over $2.4 billion in debt") *with* Trial Op. ¶¶ 134-157. CCA's claim that it submitted "unrebutted evidence" that BMLP destroyed the value of its own equity is a gross misrepresentation of the record. *Compare* Mot. ¶ 22 *with* Trial Op. ¶ 100 & n.15, 156, 158 & n.19; Ex. 8 ¶¶ 44-51. The trial court's award of $845 million in damages was the proven amount of BMLP's out-of-pocket investment, including (i) BMLP's undisputed $15 million cash contribution and (ii) its $830 million equity contribution

that *the parties agreed upon in their contracts*, that was relied upon by the lender (EXIM Bank) throughout the Project, and that was supported by contemporaneous valuations. Trial Op. ¶¶ 23, 32-39, 158. CCA's only legal argument—that BMLP's damages are "consequential," Mot. ¶ 22—is wrong; the damages are direct because the loss of BMLP's investment was the "natural and probable consequence" of CCA's breach of contract, Trial Op. ¶ 159 (citing *GSCP VI Edgemarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC*, 2023 WL 6805946, at *5 (N.Y. Sup. Ct. 2023)), and "appropriate fraud damages" because it represents "what BMLP lost 'because of the fraud,'" *id.* ¶ 161 (citing *NMR E-Tailing LLC v Oak Inv. Partners*, 216 A.D.3d 572, 573 (1st Dept 2023)); *see also* Ex. 6 at 2-3; Ex. 5 at 8-17.

CCA is now improperly trying to re-use its *lost profits* damages arguments—which the First Department accepted to knock out the *bigger* damages model BMLP sought, for over $1 billion in lost profits—against BMLP's distinct *out-of-pocket* damages, which the First Department did not address because CCA never before challenged them. Ex. 4 ("The lost profits sought here are consequential in nature because they stem from collateral business arrangements."). The law does not support CCA's attempt to shoehorn BMLP's out-of-pocket damages into the lost profits category; they are distinct, and they were properly awarded by the Court.

Third, CCA argues that the trial court was wrong to pierce the corporate veil. Mot ¶ 23. CCA is wrong. CCA argues that "New York law does not support piercing

the corporate veil" where CCA Inc. is "not CSCECB's or CCAB's parent, subsidiary, or sibling corporation," but cites no authority for this argument—which it *never made below. Id.*; *compare* NYSCEF No. 4, Ex. A (CCA's FOF) ¶¶ 79-81; *id.,* Ex. B (CCA's Opp. To BMLP's Post-Trial Br.) ¶¶ 43-46. The trial court applied the correct legal standard for piercing the veil under New York law—used in CCA's own post-trial briefing—and, based on largely *unrebutted evidence*, found that CCA (through Yuan) "dominated" CCAB and CSCECB and "used that domination and commingling of assets and corporations to perpetrate a wrong on BMLP," justifying piercing the corporate veil. Trial Op. ¶¶ 164-176 (citing *Morris v New York State Dept. of Taxation and Finance*, 82 N.Y.2d 135, 141 (1993); *Fantazia Intern. Corp. v CPL Furs New York, Inc*., 67 A.D.3d 511, 512 (1st Dept 2009); *Shisgal v Brown*, 21 A.D.3d 845, 848 (1st Dept 2005)). CCA also argues (without authority) that the court erred by applying New York law rather than Bahamian law, Mot. ¶ 23, but simply ignores the trial court's correct analysis that CCA consented to application of New York law by failing to provide "sufficient information" of the content of Bahamian law prior to trial under CPLR 4511, Trial Op. ¶¶ 162-63.

B. The Equities Weigh Heavily Against Granting a Stay

The "equities have shifted dramatically" now that BMLP has obtained a "final judgment": CCA's "arguments have been reviewed and rejected by an independent judicial tribunal," and there is an "absence of any clear legislative expression" in

CPLR 5519 suggesting that CCA should receive "the extraordinary benefit of an automatic, 'free' stay, without *any* consideration of the harm that may befall [BMLP]" during appeal. *DePaolo*, 181 Misc. 2d at 934; *see also Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 98 (S.D.N.Y. 1970) ("Part of business as usual must include some recognition of the rights of this plaintiff that has acquired a judgment against Toolco."). The potential harm CCA claims is unsubstantiated by any documentary evidence, and any real, irreparable harm could be averted without prejudicing BMLP by granting a *completely unsecured* stay of all enforcement actions. During a stay, BMLP would be unable to pursue post-judgment discovery to identify and trace assets, issue restraining notices to preserve the status quo, or pursue the turnover of property. Meanwhile, CCA could further dissipate assets and hinder BMLP's efforts to satisfy the judgment, which is a likely and significant risk given the trial court's findings of fraud and asset diversion. The equities therefore weigh heavily against granting CCA its requested unsecured stay of enforcement pending appeal.

a. CCA will not suffer irreparable harm absent an unsecured stay.

In a grand total of two paragraphs, CCA baldly states it will suffer "catastrophic and irreparable harm absent a stay" because it cannot afford to satisfy the entire judgment and, absent a stay of enforcement, "some or all of the Defendants may be forced to file for bankruptcy in the United States or initiate liquidation

proceedings in The Bahamas." Mot. ¶¶ 15-16. But "irreparable harm must be imminent, not remote or speculative." *Jenack*, 2021 WL 5847237, at *5 (citation omitted). Here, CCA's purported risk of harm from a stay is unsupported by anything other than self-serving, bare-bones, conclusory affirmations from individuals employed by the three defendant companies.[4] The affirmations assert that the companies will suffer financial harm if required to pay the judgment, but provide *no details* about current value of their assets or their other liabilities, let alone attach any *underlying evidence* like financial statements or valuations—even though, apparently, CCA provided that information to the individual it hired to seek a surety bond. Mot., Ex. C (Pedersen Aff.) ¶¶ 16, 21 (received "audited financials," "internal consolidated financials," "interim financials," and "valuation reports for certain hotels and assets"). CCA's own cited case makes clear that this paucity of financial information makes it impossible to credit CCA's claim that "it is in danger of being driven into bankruptcy if it is required to post a bond in the full amount." *Jack Frost Lab'ys, Inc. v. Physicians & Nurses Mfg. Corp*., No. 92 CIV. 9264

[4] *See* Mot. Ex. D (McMahon Aff.) ¶ 6 ("Enforcement proceedings ***could*** jeopardize CCA's ability to pay its employees and fund its ongoing businesses, creating a substantial ***risk*** that CCA would be forced into bankruptcy proceedings."); Ex. E (Fu Aff.) ¶ 5 ("If enforcement of the judgment is not stayed pending appeal, CSCECB will be rendered insolvent."); Ex. F (Ju Aff.) ¶ 6 ("Enforcement proceedings would imperial CCAB's ability to continue to operate as a going concern, ***potentially*** forcing CCAB to file liquidation proceedings in The Bahamas or bankruptcy proceedings in the United States.")

(MGC), 1996 WL 709574, at *1 (S.D.N.Y. Dec. 10, 1996) (noting that the company has not been "forthcoming about the company's true financial situation" and "[t]hus it is almost impossible to get a complete picture of the financial condition"); *see also J.A. Masters Invs. v. Beltramini*, No. CV H-20-4367, 2024 WL 3873146, at *2 (S.D. Tex. July 19, 2024) (finding "bare representation that posting a bond would cause [movant] financial hardship" insufficient, and noting movant "has not produced evidence of his financial condition").[5] In short, CCA's "conclusory affirmations do not point to any imminent or non-speculative harm that would occur in the absence of a stay." *Jenack*, 2021 WL 5847237, at *5. The Court should not simply take CCA's word for it, particularly considering the trial court's overwhelming findings about CCA's fraud and financial misdeeds.

CCA also claims that bankruptcy or insolvency would harm "non-parties" like the employees of CCAB's hotels or affiliates of CCA in "ongoing construction projects," but cites *nothing* to support that assertion—not even a conclusory

[5] In fact, if CCA did file for Chapter 11, it would be required to disclose significant financial information, including creditor lists, corporate ownership statements, schedules of assets and liabilities, statements of income and financial affairs (including transfers and payments to insiders), and financial reports about their subsidiaries. *See* 11 U.S.C. § 521; Fed. R. Bankr. P. 1007, 2015.3. By providing only minimal information to support it stay application here, CCA is attempting to get the benefit of a stay without the transparency that would be required in any bankruptcy proceeding (or that would be obtained through post-judgment discovery).

affirmation. Mot. ¶ 16; *see Petersen-Dean, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, No. 19 CIV. 11299 (AKH), 2020 WL 1989493, at *4 (S.D.N.Y. Apr. 24, 2020) (noting that "there is nothing specific about" alleged other creditors "in the record" and that defendant's "plea of becoming insolvent" does not justify a stay without a bond). That speculative harm, based on a tenuous chain of causation from enforcing the judgment, to insolvency, to liquidation, to jobs and construction projects being terminated, is insufficient to justify a stay.

Even if CCA had submitted evidence sufficient to demonstrate its inability to pay the judgment or the likelihood of liquidation, it cites *no cases* finding these harms are sufficient to grant a *completely* unsecured stay. In fact, CCA's cited cases confirm that CCA's unsecured stay request should be *denied.* CCA's only New York case is not about a new stay under CPLR 5519—it denies an injunction request *despite* the threat of liquidation absent one. *Home Ins. Co. v. Olympia & York Maiden Lane Co.*, 174 Misc. 2d 45, 48, 662 N.Y.S.2d 986 (N.Y. Sup. Ct. 1997). CCA's two other cited cases are federal cases under Federal Rule of Civil Procedure 62 that too show CCA cannot obtain a stay absent posting some security: in one case, the court granted a stay of execution pending appeal "on the express condition" that the appellant *post a bond*, in an amount less than the full judgment, due to certain bankruptcy risks. *Jack Frost,* 1996 WL 709574, at *1. And in the other case, the court noted that federal courts only exercise their discretion to stay enforcement

without a bond, "or with only a partial" bond, if the party seeking a stay shows irreparable harm *and* that "such a stay would not unduly endanger the judgment creditor's interest in ultimate recovery." *Port Chester Elec. Const. Corp. v. HBE Corp*., No. 86 CIV. 4617 (KMW), 1991 WL 258737, at *1 (S.D.N.Y. Nov. 27, 1991) (citation omitted). There, because the defendant showed "that, presently, they are financially able to satisfy the judgment if it is affirmed on appeal," the court granted the stay without requiring a *full* bond, but required the defendant to "provide alternative security in excess of the judgment" in order to "protect Plaintiff's judgment." *Id.* at *3. CCA cannot make that showing here—to the contrary, it has admitted the opposite, and offers *no* security whatsoever pending its appeal. Mot. ¶ 15.

This Court can and has required judgment debtors to post security when a discretionary stay is sought under CPLR 5519(c), as it did in granting then-former President Donald J. Trump and his co-defendants' motion for a stay of enforcement of a $363.8 million plus interest judgment on the condition that the defendants post "an undertaking in the amount of $175 million dollars." Ex. 9. *See also* 8 N.Y. Prac., Civil Appellate Practice § 9:4 (3d ed. 2024) ("[T]he movant may be required to post an undertaking on terms determined by the court in the exercise of its discretion to grant a stay."); *Da Silva v. Musso,* 76 N.Y.2d 436, 443 n.4 (1990) ("the court may order that an undertaking be filed to secure the respondent against damages in the

event of an affirmance"); *Lancaster v. Kindor,* 64 N.Y.2d 1013, 1014 (1985) (granting stay "on the condition that defendant serve and file an undertaking").

So too have federal courts (the main authority CCA relies on), whose caselaw confirms that CCA's supposed inability to pay the judgment currently is grounds to *deny* its unbonded stay request—or, at a minimum, to condition any stay on CCA providing some security. *See U.S. Commodity Futures Trading Comm'n v. eFloorTrade, LLC*, No. 16 CIV. 7544 (PGG), 2020 WL 2216660, at *10 (S.D.N.Y. May 7, 2020) ("a concession of inability to pay is often determinative of the entire Rule 62 inquiry") (citation omitted);[6] *Olin Corp. v. Lamorak Ins. Co*., No. 84-CV-1968 (JSR), 2021 WL 982426, at *2 (S.D.N.Y. Mar. 15, 2021) (denying motion for unbonded stay because courts will not "waiv[e] the bond requirement because a debtor simply cannot pay") (citation omitted); *Petersen-Dean, Inc.*, 2020 WL 1989493, at *3 (explaining that courts will only excuse the bond requirement where the appellant "provides an acceptable alternative means of securing the judgment," because the goal is "ensuring a meaningful outcome for the prevailing party," not "easing the judgment burden on the losing party") (citation omitted); *Xerox Corp. v. JCTB Inc.,* No. 6:18-CV-06154-MAT, 2019 WL 6000997, at *4 (W.D.N.Y. Nov.

[6] *See also Lopez v. Zoll Servs., LLC*, No. 1:21-22433, 2024 WL 3460048, at *2 (S.D. Fla. June 28, 2024) ("the Plaintiffs' professed inability to pay the amount awarded to the Defendants is a reason *not* to grant a stay without requiring a bond"), *adopted,* 2024 WL 3456431 (S.D. Fla. July 17, 2024).

14, 2019) (denying stay because "[d]efendants have not suggested an acceptable alternative means of securing the judgment" and no discretionary factor "take[s] into account the consideration of the debtor's financial insecurity as reason alone to waive the bond); Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2905 (3d ed. 2024) (requiring that "some other form of security is offered" to waive "bond requirement").

Moreover, CCA does not need a global stay of enforcement to protect itself from any real risks of irreparable harm. If any judgment enforcement actions created such risks, CCA could seek a protective order under CPLR 5240 in the trial court. *See* CPLR 5240 ("The court may at any time … make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."). By contrast, there are many tools available to BMLP under Article 52 of the CPLR that would help ensure that it can collect what it is owed without putting CCA's continued business operations at risk, such as post-judgment discovery from CCA and third parties, service of restraining notices, and commencing proceedings for turnover of CCA's property. But these procedures would be unavailable if CCA were granted an unbonded stay of enforcement pending appeal.

Finally, CCA does not argue that it will be left without a remedy in the event its appeal is successful. Nor could they: any assets that BMLP collected in enforcing the judgment would be returned to CCA upon reversal on appeal, by restitution or

other remedies. *E.g.*, CPLR 5523. And CCA does not argue that BMLP would be unable to return those assets.

b. BMLP will suffer substantial and irreparable harm if CCA is granted an unsecured stay.

By contrast, BMLP will suffer significant and irreparable harm if CCA is granted an unsecured stay of enforcement pending appeal. CCA does not seriously argue otherwise.

CCA claims that an unbonded stay of enforcement "would merely maintain the status quo." Mot. ¶ 18. Wrong. CPLR 5519(a)(2) establishes how the Legislature intended to "preserve the status quo during the pendency of an appeal": BMLP "is entitled to have [its] victory secured" during the stay by CCA posting a bond, so that when the stay lifts, "a ready fund with which to satisfy the judgment shall be available." *Schaffer*, 68 Misc. 3d at 833 (citations omitted). But CCA refuses to post a bond or *any* other form of security, asking this Court to impose a completely unsecured, discretionary stay. Such a stay would defeat the very purpose of the bond requirement and destroy any protection BMLP may have during CCA's meritless appeal.

First, the trial court's findings establish a strong likelihood that there will be further dissipation and diversion of CCA's assets: CCA committed numerous acts of fraud, diversion and misuse of assets, financial transfers and commingling between unrelated entities, and lied repeatedly while doing it. *Supra* ¶¶ I, II(A).

During a stay of enforcement, CCA would likely transfer its remaining assets to other non-defendant entities and outside the ordinary course of business—just like it did during the Project. That would substantially harm BMLP. *See Emerita Urban Renewal, LLC v. NJ Court Services LLC*, No. 158019/2014, 2014 WL 5454667, at *2 (N.Y. Sup. Ct. Oct. 23, 2014) (finding that "[w]ithout the posting of a bond," "plaintiff would be harmed … [by] risk that defendants will dispose of their assets prior to enforcement of the judgment," and noting a court found defendants had previously "failed to tender payments to plaintiff"). CCA claims it "would not and could not dispose of or transfer their assets while this appeal is pending," Mot. ¶ 19, but tellingly does not explain this or cite any supporting authority. To the contrary, a stay would prevent BMLP from serving restraining notices to prevent dissipation, *see* CPLR 5222; from serving subpoenas to identify dissipation, *see* CPLR 5224; and from commencing turnover proceedings to recover dissipated assets, *see* CPLR 5225. Meanwhile, the statute of limitations will be running on BMLP's claims to avoid any past or future fraudulent transfers of CCA's assets.

Second, CCA claims, without evidence, that a stay would somehow "benefit" BMLP because letting CCA's businesses "continue interrupted" could "potentially increase[e] the[ir] value." Mot. ¶ 18. But CCA "must be prepared to assume some financial burden to achieve 'business as usual'" now that BMLP has acquired a judgment against it, like paying security to secure a stay. *Trans Wold Airlines*, 314

F. Supp. at 98. And, of course, the opposite is equally true: CCA's financial situation could become even more dire during appeal—particularly when CCA has provided the Court with no documentation of its assets, liabilities, and cash, and when CCA's history of fraud and misappropriation as proven at trial suggests a substantial risk that it will take steps to hinder enforcement of the judgment. *Cf. Port Chester*, 1991 WL 258737, at *3 (cited by CCA) ("Plaintiff will not be unduly harmed by the lack of a supersedeas bond, so long as Plaintiff is protected from the detriment that would result from a drastic change in Defendants' financial health.").

Put simply, an unsecured stay of enforcement exposes BMLP to all these risks and ensures irreparable harm to BMLP. A stay of all efforts to enforce the judgment would serve no purpose other than to delay, which alone counsels against granting a stay. Siegel, N.Y. Prac. § 535 (6th ed. 2024) ("The stay will be denied … if the court suspects that the appeal has a dilatory aim.")

C. No Stay Should be Granted Without Conditions to Protect BMLP

CCA has not established its entitlement to any discretionary stay of enforcement under CPLR 5519(c). If the Court is nonetheless inclined to grant some stay, it should exercise its discretion to impose conditions on that stay. *See* CPLR 5519, cmt (c) ("Since the granting of the stay is discretionary under subdivision (c), the court can impose conditions if the stay is granted.")

At a minimum, the Court should condition any stay on CCA posting a *meaningful* form and amount of security—even if not a bond—and submitting proof to this Court of the amount it *can* pay. That way, BMLP is at least somewhat protected when the judgment is affirmed on appeal. As explained above, this Court and others frequently make stays conditional on posting some security, even if in a lesser amount than the total judgment. *Supra* § III(B)(a) (collecting cases). CCA undoubtedly has assets that can be used to secure satisfaction of the judgment, at least in part, such as its two hotels in the Bahamas, *see* Mot. ¶ 19, even though it has chosen to withhold documentary evidence of its assets and liabilities in support of its motion. The Court has discretion to order CCA to impose appropriate conditions, such as executing a deed of conveyance to its real property to be held by the Court pending appeal. *See, e.g.*, *Kager v. Brenneman,* 52 A.D. 446, 447–48 (1st Dept 1900) (finding stay "too broad" and imposing this condition and bond condition), *aff'd,* 165 N.Y. 674 (1901).

The Court need not credit CCA's claims that it could not obtain a "bond in *any amount*," particularly before BMLP has taken post-judgment discovery. *See* Mot. ¶ 17 (emphasis added). CCA's sole evidence is an affirmation that gives *no* details about any bonds it sought or amounts discussed with surety companies other than $1.98 billion—the *full* judgment *plus* additional interest. Mot., Ex. C ¶ 19 ("we have been unsuccessful in our effort to obtain a bond in any amount"), ¶ 23 ("no

surety I spoke to was willing to provide any bond here"). CCA has provided this Court with *no evidence* about what amount it *could* afford—either by posting a bond or in an alternate form of security—to secure this $845 million plus interest and growing judgment pending appeal. And, if the stay were granted, CCA would then not be required to disclose that evidence in post-judgment discovery.

This Court has the discretion to order a stay without a bond in the full amount of the judgment, but it should not do so unless and until CCA provides real and complete transparency about its financial situation and posts a bond or other form of security in the largest amount possible in order to protect BMLP's interest in recovery. Because CCA chose not to provide this evidence or to offer such undertaking in its motion, it should be denied.

Courts also frequently condition stays pending appeal on timely prosecution, and here CCA should be required to promptly perfect its appeal by December 30, to put it on the March Term calendar, as a condition for any stay. CPLR 5519, cmt (c) ("The stay … can be conditioned … on the prompt prosecution of the appeal, perhaps requiring that the appeal be noticed for a particular term"); Siegel, N.Y. Prac. § 535 (6th ed. 2024) (noting this is "[o]ne of the more popular conditions" imposed). CCA claims it "plan[s] to perfect … within eight weeks," Mot. ¶ 19, but that is no guarantee—particularly when CCA took almost seven months to perfect its last appeal, Aff. ¶ 7. CCA should be held to this deadline as part of any stay.

No stay should be imposed without protecting BMLP from the prejudice that will arise from delaying enforcement of the judgment. Even if CCA had substantiated its assertions that enforcement would lead to irreparable harm, which its conclusory affirmations fail to do, a stay of enforcement would give CCA license to continue hiding its assets, to dissipate its assets, and to otherwise make it harder for BMLP to enforce the judgment once the stay is lifted. Any stay should thus be tailored to minimize both the risk of harm claimed by CCA and the prejudice to BMLP, such as by requiring CCA and its affiliates to cooperate in post-judgment discovery and refrain from dissipating assets. In the absence of a record on which the Court can craft such relief, the Motion should be denied.

IV. CONCLUSION

For all these reasons, BMLP respectfully requests that the Court deny CCA's request for a stay of enforcement of the judgment pending this appeal.

Dated: New York, New York
November 13, 2024

Respectfully submitted,

SUSMAN GODFREY L.L.P.

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Attorneys for Plaintiff/Counterclaim-Defendant BML Properties LTD

SUPREME COURT OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

BML PROPERTIES LTD., Plaintiff-Respondent, -against- CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION, INC., CCA CONSTRUCTION INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., Defendants-Appellants, DOES 1 THROUGH 10, Defendants.	Appellate No.: 2024-06623; 2024-06624 New York County Index No. 657550/2017 **AFFIRMATION OF JACOB W. BUCHDAHL IN OPPOSITION TO THE MOTION FOR A STAY OF ENFORCEMENT PENDING APPEAL**

Jacob W. Buchdahl, an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

1. I am a Partner at the law firm Susman Godfrey LLP and counsel of record for Plaintiff-Respondent BML Properties Ltd. ("BMLP") in the above-captioned matter. I submit this affirmation to provide the Court with documents and information in support of BMLP's opposition to Defendants-Appellants' ("CCA's")

motion for a stay of enforcement pending appeal. I have personal knowledge of the facts set forth herein.

2. BMLP filed the Complaint in this action on December 26, 2017. The Complaint was filed as NYSCEF No. 1 on the trial court docket.

3. CCA filed a motion to dismiss, which the trial court (the Hon. Saliann Scarpulla) denied. The trial court's decision was entered as NYSCEF No. 154 on the trial court docket. CCA appealed, but this Court affirmed the trial court's decision in full. A true and correct copy of this Court's Order is attached hereto as **Exhibit 2**, and it was filed as NYSCEF No. 164 on the trial court docket.

4. After the close of discovery, both BMLP and CCA filed motions for summary judgment in this case. The motion papers were filed as NYSCEF Nos. 479-533, 534-576, 637-645 (papers regarding Plaintiff's motion) and NYSCEF Nos 416-478, 577-631, 632-636 (papers regarding Defendants' motion) on the trial court docket.

5. On February 9, 2023, the trial court issued an Order scheduling a bench trial in this case for August 1-16, 2024. The trial court's Order is entered as NYSCEF No. 647 on the trial court docket.

6. On May 25, 2023, the trial court (the Hon. Andrew Borrok) entered a Decision and Order that (i) denied CCA's motion for summary judgment to dismiss all of BMLP's claims and (ii) granted BMLP's motion for summary judgment to

dismiss CCA's remaining affirmative defenses and three of its counterclaims. The trial court's order is entered as NYSCEF No. 648 on the trial court docket.

7. CCA filed its notice of appeal on June 23, 2023. It was filed as NYSCEF No. 658 on the trial court docket. CCA ultimately perfected its appeal on January 2, 2024—6 months and 10 days after it filed its notice of appeal, and almost 11 months after the trial court scheduled this case for an August 2024 trial.

8. On January 18, 2024, CCA filed a motion for a preference and motion for a stay pending appeal in this Court, seeking a discretionary stay of all trial proceedings, including the trial date, pending resolution of its appeal. The motion was filed on the docket as NYSCEF No. 16 in Appellate Case No. 2023-03147.

9. On February 27, 2024, this Court issued an Order denying CCA's motion for a stay and setting the perfected appeal for the April 2024 Term calendar. A true and correct copy of that Order is attached hereto as **Exhibit 3** and it is entered on the docket as NYSCEF No. 20 in Appellate Case No. 2023-03147.

10. On April 25, 2024, this Court issued a Decision and Order affirming in part and reversing in part the trial court's summary judgment order. The Court affirmed the trial court's denial of CCA's motion for summary judgment on BMLP's fraud and breach of contract claims, the dismissal of CCA's affirmative defenses that BMLP's claims were derivative and released, and the dismissal of one of CSCECB's counterclaims. The Court reversed the trial court's denial of CCA's

motion for summary judgment as to BMLP's unjust enrichment and implied covenant of good faith and fair dealing claims and request for lost profits damages, and reversed the trial court's grant of BMLP's motion for summary judgment as to two of CSCECB's counterclaims. A true and correct copy of that Decision and Order is attached hereto as **Exhibit 4** and it is entered on the docket as NYSCEF No. 25 in Appellate Case No. 2023-03147.

11. On June 12, 2024, prior to the trial in this matter, CCA filed what it called a "motion *in limine*," but which was actually an untimely motion for summary judgment to dismiss BMLP's sole remaining damages claim for $845 million in out-of-pocket damages as consequential. In that motion, CCA advanced the same damages arguments it now intends to raise on appeal. BMLP opposed CCA's motion. A true and correct copy of BMLP's opposition is attached hereto as **Exhibit 5** and it was filed as NYSCEF No. 712 on the trial court docket.

12. On July 25, 2024, the trial court denied CCA's "motion *in limine*," holding that BMLP's out-of-pocket losses are direct and not consequential damages. A true and correct copy of the trial court's Decision and Order on the motion is attached hereto as **Exhibit 6** and it was filed as NYSCEF No. 736 on the trial court docket.

13. The trial court held an eleven-day bench trial from August 1-11, 2024.

14. On September 5, 2024, BMLP filed a Post-Trial Brief containing Proposed Findings of Fact and Proposed Conclusions of Law. A true and correct copy of that brief is attached hereto as **Exhibit 7** and it was filed as NYSCEF No. 749 on the trial court docket. On September 19, 2024, BMLP filed an Opposition to Defendants' Proposed Findings of Fact and Conclusions of Law containing Additional Proposed Findings of Fact and Proposed Conclusions of Law. A true and correct copy of that brief is attached hereto as **Exhibit 8** and it was filed as NYSCEF No. 751 on the trial court docket.

15. On October 18, 2024, the trial court issued a 74-page Post-Trial Decision and Order finding that BMLP proved (i) by a preponderance of the evidence that the CSCECB Board Member breached Section 4.7 of the Investors Agreement no fewer than six times and (ii) by clear and convincing evidence that CCA committed at last four instances of fraud, and that as a direct and proximate cause of such conduct, BMLP suffered damages in the amount of its entire $845 million investment, plus pre-judgment interest. The trial court also found that piercing the corporate veil against all Defendants was warranted. The trial court also dismissed Defendants' counterclaims. A true and correct copy of the trial court's Post-Trial Decision and Order is attached hereto as **Exhibit 1** and it was filed as NYSCEF No. 755 on the trial court docket.

16. A true and correct copy of this Court's Order in *People of New York v. Trump et al.*, Appeal Nos. 2024-01134, 2024-01135 (1st Dept Mar. 25, 2024) is attached hereto as **Exhibit 9.** This Court granted the defendants-appellants' motion pursuant to CPLR 5519(c) to stay enforcement pending appeal, on the condition that, among other things, defendants-appellants post a $175 million undertaking.

Dated: New York, New York
November 13, 2024

Respectfully submitted,

SUSMAN GODFREY L.L.P.

/s/ Jacob W. Buchdahl

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EXHIBIT 1

Post-Trial Decision & Order

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** 53

Justice

----------X

BML PROPERTIES LTD.,

INDEX NO. 657550/2017

Plaintiff,

- v -

POST-TRIAL DECISION and ORDER

CHINA CONSTRUCTION AMERICA, INC.,NOW KNOW AS CCA CONSTRUCTION, INC.,CCA CONSTRUCTION, INC.,CSCECBAHAMAS, LTD., CCA BAHAMAS LTD., DOES 1 THROUGH 10,

Defendant.

----------X

This case was tried without a jury over the course of approximately 11 days (August 1, 2024 - August 15, 2024).

As discussed below, at trial BML Properties Ltd. (**BMLP**) more than met its burden in proving (i) by a preponderance of the evidence that the CSCECB Board Member (hereinafter defined) breached the Best Interests Obligation (hereinafter defined) set forth in Section 4.7 of the Investors Agreement (hereinafter defined) no fewer than six times and (ii) by clear and convincing evidence committed at least four instances of fraud, and that as a direct and proximate cause of such conduct, BMLP suffered damages in the amount of its entire $845 million investment. The evidence firmly established that the first breach occurred as of May 1, 2014. Inasmuch as the cause of action accrued as of such date, BMLP is entitled to pre-judgment interest as of May 1, 2014. The evidence adduced at trial also firmly established that piercing the corporate veil as against all Defendants is warranted such that the BMLP may

OTHER ORDER – NON-MOTION

submit judgment in the amount of $845 million with statutory interest accruing as of May 1, 2014, as against all Defendants.

As discussed below, BMLP's witnesses' testimony was credible and consistent with the contemporary documents. The Defendants' witnesses' testimony by contrast was often inconsistent with their own internal communications or otherwise confirmed their many instances of breach and fraud. Indeed, and in perhaps one of the only moments of true candor, and as discussed below, Tiger Wu testified that when he became the CSCECB Board Member he was not even aware of the Best Interests Obligation (*i.e.*, the obligation to act in the best interests of BML). He never read the Investors Agreement and Ning Yuan, his predecessor as the CSCECB Board Member, never told him about the Best Interests Obligation:

Q Now, if you look at the last part of this provision, sir, it states that the China State Board Member shall at all times act in the best interests of the company. You're aware that have provision, correct, sir?

A I was not aware of it at the time.

Q So, let me make sure I understand this. You replace Ning Yuan as the China State Board member, right?

A That is correct.

Q And that happened around May of 2014; is that right?

A I think it is around that time.

Q And when that transition occurred, you did not take the time to review this document to see what your responsibilities would be as the China State Board member, is that your testimony?

A Yes.

Q And you did not discuss with Mr. Yuan what the responsibilities would be of the China State Board member, correct?

A I didn't.

Q So you went into this job without really understanding what you could or could not do in that role; is that fair?

A I don't understand the provision at that time in this document.

Q You would agree with me, though, whether or not you knew about this provision, you would agree with me that it would be in the best interests of Baha Mar to be ready to open its doors on March 27th, 2015, when guests with reservations were due to arrive, correct?

A That's correct.

…

Q You would agree with me, sir, it would not be in the best interests of the Project to intentionally slow down the progress of the Project, right?

A Yes, I agree.[1]

(tr. 1149:5-1150:8, 1150:15-18). As discussed below, appointing a CSCECB Board Member who did not even know that he was obligated to act in the Best Interests of BML was the first breach of the Investors Agreement. This occurred in May 2014. The breach was further compounded by the fact that Mr. Wu was hopelessly conflicted in this role. As discussed further below, he was the Executive Vice President of CCAB (hereinafter defined), the construction manager and general contractor of the Project, which was also responsible for the clandestine acquisition of the competing Hilton project (tr. 1167:3-19; JX 593).

Fraud was also established beyond doubt. CCAB knowingly and falsely told BML and its representatives that substantial completion would occur by March 27, 2015, and Mr. Wu voted to authorize a BML board resolution announcing such opening date to the public without any plan

[1] Yet, as discussed below, the evidence adduced at trial showed this is exactly what Mr. Wu did, and admitted to doing.

in place to achieve it, and which the uncontroverted testimony adduced indicated was done with the knowledge that if that date was missed it would be "disastrous" (JX 581). After the Board (that he served on) authorized that announcement, and without telling the Board, Mr. Wu had Mr. Yuan (his boss) write to CSCEC Ltd, the parent company located in China, explaining that the situation was dire and that the March 27, 2015 date was in danger:

> Dear Chairman Yi of CSCEC,
>
> Under the care and guidance of the joint-stock company, the work of the large-scale island resort project in the Bahamas is actively advancing towards the established targets. At present, the project has entered the critical stage of final full-scale shock work. However, due to the failure of the professional companies participating in the construction to replenish the labor force promptly in the early stage, many of the project's scheduled construction targets were not achieved on time, and the completion time of each bidding section was delayed again and again, which directly affected the realization of the project's target of full opening on March 27, 2015.
>
> At present, ***the production situation of the project is extremely severe, and if the situation cannot be fundamentally reversed, it will cause irreparable and catastrophic losses***. Not only will the project suffer a delay fine of up to USD 250,000 per day, but it will also have an immeasurable negative impact on the entire brand of CSCEC. We hereby sincerely implore the joint-stock company to strictly order all professional companies participating in the construction ***to take urgent measures immediately***, ***quickly organize the dispatch of the additional labor force, and dispatch skilled workers and experienced management personnel*** to the site for the final shock work before the end of January, so as to ensure that the project's scheduled target of full opening on March 27, 2015 can be achieved. At present, it is imminent to increase the number of personnel in the project. We have officially sent letters to all participating units and asked them to dispatch additional labor force according to the following requirements. ***Among them, there are no less than 200 people from China State Decoration Group Co., Ltd. (CSD), no less than 100 people from First Group Decoration, no less than 100 people from China Construction Industrial & Energy Engineering Group Co., Ltd. (CCIEE), and no less than 50 people from CSCEC Electronic.*** If each unit cannot dispatch personnel as required, the completion target of the Bahamas project ***will not be achieved, and the consequences will be disastrous***. We sincerely implore the joint-stock company to strongly support it!
>
> Hereby report, please instruct.

(the **Hidden Dire Need Letter**; JX 581 [emphasis added]).

Meanwhile, CCAB was reassuring BMLP that the Project was on track:

> Dear Tom,
> Sorry for replying late.
> I think there might be some confusion, all the overhead ceiling inspections, life safety inspections, ***TCO pre-inspections are still going well following the schedule***.

(JX 649 [emphasis added]).

Aside from never telling BML of the urgent need for more workers, as he was obligated to do as the CSCECB Board Member, these assurances by Mr. Wu and his subordinates were false and designed to induce reliance by BMLP and in Daniel Liu's words ultimately "turn passive into active" and cause a liquidity crisis pushing BMLP out of its $845 million investment. This is exactly what happened.

Additionally, the Defendants committed fraud by making the representation that they needed a $54 million payment so that they could pay subcontractors. The evidence adduced at trial established they did not need it or use it for that purpose. They wanted it and used it to buy a competing hotel development down the road (*i.e.*, the **Hilton**).

Messrs. Yuan, Wu, Daniel Liu, and David Wang also used their various different entities that they ran without regard to corporate form and to further the scheme by comingling their financial and corporate obligations and rights. By way of example, their marketing materials had CCA,

Inc. take credit for CCAB's work. When Mr. Yuan reached out to the parent company to get more people, he did not write on behalf of CCAB, he wrote on behalf of CCA, Inc. (JX 581).[2]

For the avoidance of doubt, and as discussed more completely below, the Defendants utterly failed to prove their counterclaims or any damages in support of their counterclaims stemming from BMLP's alleged breach or otherwise.

The Relevant Procedural History

On December 12, 2017, BMLP sued (NYSCEF Doc. No. 1) the Defendants, alleging that they committed fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing. Subsequently (with leave of court), BMLP supplemented its complaint with a cause of action sounding in unjust enrichment (NYSCEF Doc. No. 403). The gravamen of BMLP's complaint was that the Defendants hatched a scheme to defraud and breach its contracts with BMLP in order to delay the opening of the Project, extort extra payments from BMLP, and wrest control of the Project from BMLP. As alleged, the Defendants carried out this scheme by intentionally misleading BMLP as to the Defendants' ability to meet their obligations and open the Project when and as planned, including by, among other things, diverting resources and manpower to competing projects, concealing those diversions, and even engaging in outright sabotage of the Project.

[2] When he was asked about this at trial, he merely said that he wrote on behalf of the other company because he thought it was more respectful to use his "higher title." This was however not the only example of Mr. Yuan signing on behalf of the wrong entity improperly (tr. 964:13-17 [CCA, Inc. instead of CCAB]).

The Defendants initially moved to compel BMLP to arbitrate the dispute pursuant to a certain Amendment No. 9 to the MCC or, in the alternative, to dismiss the complaint. By Decision and Order dated January 24, 2019 (the **Prior Decision**; NYSCEF Doc. No. 154), the court (Scarpulla, J.) denied the motion because BMLP was not a party to Amendment No. 9 and held, among other things, that the fraud claims were not duplicative of the breach of contract claims because (i) the fraud claims relied on misrepresentations of then-current facts regarding the Project, and (ii) the damages sought under the fraud claims were for mitigation expenses and investment efforts based on those misrepresentations, not the contract value (NYSCEF Doc. No. 154, at 21-22). On appeal, the Appellate Division affirmed, holding that the alleged false statements concerning the Project's status and the workforce and resources available to meet deadlines were collateral to the contracts (*BML Properties Ltd. v China Constr. Am. Inc.*, 174 AD3d 419 [1st Dept 2019]). The trial court had also held that BMLP's claims are direct, not derivative claims, because BMLP alleged that CCA, the only other shareholder in BML, did not sustain a proportionate loss to that sustained by BMLP (NYSCEF Doc. No. 154, at 19). This too was affirmed on appeal.

CSCECB then served an answer with counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, and shareholder oppression under the Bahamas Companies Act (NYSCEF Doc. No. 161). BMLP moved to dismiss CSCEC's third counterclaim for shareholder oppression and strike CSCEC's demand for punitive damages. By Decision and Order dated March 17, 2020, the court (Scarpulla, J.) granted the motion (NYSCEF Doc. No. 265). Note of Issue was filed on September 19, 2022 (NYSCEF Doc. No. 410). In

advance of adjudication of the motions for summary judgment, and for the purposes of trial, the parties entered into a joint stipulation (NYSCEF Doc. No. 415) narrowing the parties' claims.

By Decision and Order dated May 25, 2023, the Court denied the Defendants' motion for summary judgment in its entirety and granted BMLP's motion to extent of dismissing (i) CSCEC's counterclaim for breach of contract as to Sections 4.7, 4.8(g), and 4.8(l) of the Investors Agreement, and (ii) several of the Defendants' affirmative defenses (NYSCEF Doc. No. 649, at 2).

On appeal, the Appellate Division modified the Court's summary judgment decision to the extent of (i) dismissing BMLP's request for lost profits damages "because the parties did not contemplate liability for lost profits at the time of contracting," (ii) dismissing BMLP's claims for unjust enrichment and breach of the implied covenant of good faith and fair dealing, and (iii) denying BMLP's motion to dismiss the Defendants' counterclaims under sections §§ 4.7 and 4.8(g), and otherwise affirmed holding, among other things that (x) BMLP's claims are direct, not derivative, and (y) BMLP's fraud claims are not duplicative of its breach of contract claims (*BML Properties Ltd. v China Constr. Am., Inc.*, 226 AD3d 582 [1st Dept 2024]):

> Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about May 25, 2023, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's motion for summary judgment dismissing the counterclaims for breach of §§ 4.7, 4.8 (g), and 4.8 (l) of the Investors Agreement and the affirmative defenses that plaintiff's claims were derivative and released, unanimously modified, on the law, to grant defendants motion as to the unjust enrichment and implied covenant of good faith and fair dealing claims and request for lost profits damages, to deny plaintiff's motion as to the counterclaims for breach of IA §§ 4.7 and 4.8 (g), and otherwise affirmed, without costs.
>
> Plaintiff's claims are not derivative because they involve the breach of a duty independent of any duty owed to the company (*see generally Abrams v Donati*, 66 NY2d 951, 953

[1985]). Plaintiff was a party to the subject Investors Agreement and there is no indication that § 4.7's "best interests" obligation was owed to the company alone. Indeed, § 4.10 of the agreement specifically authorized plaintiff to bring suit individually. "[W]here an independent duty exists, a shareholder may sue on his own behalf even for the loss of value in his investment" (*Solutia Inc. v FMC Corp.*, 385 F Supp 2d 324, 332 [SD NY 2005]; *see also Lawrence Ins. Group v KPMG Peat Marwick*, 5 AD3d 918, 919 [3d Dept 2004]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to the disproportionate loss exception to the derivative claims rule.

The motion court properly denied summary judgment dismissing plaintiff's breach of contract claim. Issues of fact exist as to whether the representatives of defendant CSCECBahamas, Ltd. (CSCECB) failed to act in the best interests of the company by diverting resources to other projects and authorizing the removal of 700 workers from the project as it was nearing its deadline, despite concerns about meeting that deadline, which they did not communicate to the company. It does not matter that the focus of the Investors Agreement is not construction management, as the CSCECB representatives were required to act "at all times" in the company's best interests (*see Falle v Metalios*, 132 AD2d 518, 520 [2d Dept 1987]).

The motion court also properly denied summary judgment dismissing plaintiff's fraud claims. This Court has already decided that the fraud claims are not duplicative of the breach of contract claim (*BML Props. Ltd. v China Constr. Am. Inc.*, 174 AD3d 419, 419 [1st Dept 2019]). Fact development has not created a basis to modify this legal determination. Issues of fact exist with respect to justifiable reliance. Evidence was presented that plaintiff, which had day-to-day responsibility for the company, relied on defendants' misrepresentations by taking reservations, preparing for opening, and refraining from seeking additional financing or labor. Evidence was also presented that, although plaintiff had some sense that defendants were not telling the truth, it lacked the ability to definitively verify their claims—especially in view of defendants' apparent concealment of information.

The breach of the implied covenant of good faith and fair dealing claim should, however, have been dismissed as duplicative of the breach of contract claim because "both claims arise from the same facts" and the conduct at issue clearly falls within the ambit of the contractual best efforts obligation (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Even if the unjust enrichment claim is not duplicative, it should also have been dismissed because plaintiff did not establish that it made the subject payments or otherwise had a legal entitlement to the funds used to make them (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; cf. *245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 606 [1st Dept 2024]).

The request for lost profits damages should also have been dismissed because the parties did not contemplate liability for lost profits at the time of contracting (*see generally Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986] [*Kenford I*]; *Awards.com v*

Kinko's, Inc., 42 AD3d 178, 183 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). It is not enough that CSCECB expected that the project would make money, as that is not the same thing as expecting to be held liable for lost profits (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-320 [1989]; *Awards.com*, 42 AD3d at 184; *Bersin Props., LLC v Nomura Credit & Capital, Inc.*, 74 Misc 3d 1209[A], 2022 NY Slip Op 50084 [U], *16 [Sup Ct, NY County 2022]). Section 11.10 of the Investors Agreement expressly waived consequential damages—notwithstanding "[a]nything herein contained, and anything at law or in equity, to the contrary" (*see Kenford I*, 67 NY2d at 262; *Awards.com*, 42 AD3d at 183-184). The lost profits sought here are consequential in nature because they stem from collateral business arrangements—i.e., the loss of contracts with potential hotel guests (*see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805-808 [2014]). Section 11.10 is not unenforceable because "the misconduct for which it would grant immunity smacks of intentional wrongdoing" as "a party can intentionally breach a contract to advance a 'legitimate economic self-interest' and still rely on the contractual limitation provision" (*Electron Trading, LLC v Morgan Stanley & Co. LLC*, 157 AD3d 579, 580-581 [1st Dept 2018]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to causation and the capability of measuring damages with reasonable certainty.

Defendants' affirmative defense that plaintiff's claims are derivative was properly dismissed for the reasons stated above. Defendants' affirmative defense that plaintiff's claims were released was properly dismissed because plaintiff was not a party to the releases, which at any rate applied to claims under a separate contract.

CSCECB's counterclaim for breach of § 4.7 of the Investors Agreement should not have been dismissed. There is evidence in the record of at least one unanswered request for books and records, in a March 13, 2015 letter, which was reiterated in March 25 and May 6, 2015 letters. Although the company was not obliged to create new documents in response to this request, it should have had some existing documentation responsive thereto. Issues of fact exist also exist as to whether the company's failure to provide this information caused CSCECB damages, as it could have taken steps to mitigate if it had evidence of financial mismanagement.

CSCECB's counterclaim for breach of § 4.8 (g) of the Investors Agreement also should not have been dismissed. It is undisputed that plaintiff breached this provision by filing for reorganization without CSCECB's consent and issues of fact exist as to whether CSCECB was damaged as a result. CSCECB's counterclaim for breach of § 4.8 (l) of the Investors Agreement was, however, properly dismissed, as there is no evidence that the subject loan damaged CSCECB in any way.

(*BML Properties Ltd.*, 226 AD3d 582 [1st Dept 2024]).

Prior to trial, the Defendants brought two motions *in limine*, seeking to exclude (i) evidence relating to BMLP's loss of its approximately $830 million initial investment in the Project, alleging such damages were consequential, not direct, and (ii) certain "parol evidence" that the Defendants claimed would vary the meaning of Section 4.7 of the Investors Agreement. By Decision and Order dated July 24, 2024 (NYSCEF Doc. No. 736), and for the reasons set forth in that Decision and Order, the Court denied both motions.

The Trial

At trial, BMLP adduced the following witnesses:

1. Sarkis Izmirlian (fact witness by live testimony)
2. Thomas Dunlap (fact witness by live testimony)
3. Patrick Murray (fact witness by deposition)
4. Allen Jude Manabat (fact witness by deposition)
5. Steven Collins (expert witness by live testimony)
6. Margaret Myers (expert witness by live testimony)
7. Daniel Liu (fact witness by deposition)
8. Paul Pocalyko (expert witness by live testimony)
9. David Bones (expert witness by live testimony)
10. Tiger Wu (fact witness by live testimony)
11. David Wang (fact witness by live testimony)
12. Ning Yuan (fact witness by live testimony)

The Defendants adduced the following witnesses at trial:

1. Jason McAnarney (fact witness by live testimony)
2. David Pattillo (expert witness by live testimony)
3. Rodney Sowards (expert witness by live testimony)
4. Douglas Ludwig (fact witness by deposition)
5. James Kwasnowski (fact witness by deposition)
6. Augustin Barrera (fact witness by deposition)
7. Gregory Djerejian (fact witness by deposition)
8. Ann Graff (fact witness by deposition)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following trial, the court makes the following findings of fact and comes to the following conclusions of law:

I. The Parties and Witnesses

1. BMLP is a company organized under the laws of the Commonwealth of the Bahamas and was the parent company of Baha Mar Ltd. (**BML**), the former owner and developer of the multi-billion-dollar Baha Mar resort complex in the Bahamas (the **Project**).

2. CCA Construction, Inc. (**CCA, Inc.**), CSCEC (Bahamas), Ltd. (**CSCECB**),[3] and CCA Bahamas, Ltd.'s (**CCAB**; CCA, Inc., CSCECB, and together with CCAB, hereinafter, collectively, the **Defendants**) are affiliated companies which invested in the Project and acted as the general contractor and construction manager for the Project.

3. Sarkis Izmirlian was the Chairman and CEO of BMLP and BML (tr. 95:21-23, 122:8-11). Mr. Izmirlian, as the principal of both BMLP and BML, was a central player in the events which give rise to this case and testified credibly as to the BMLP's investment and as to the Defendants' many acts of fraud and breach of the Investors Agreement. Trial revealed that Mr. Izmirlian at all times as to the issues tried in this case acted commercially reasonably, honorably, and in the bests interests of the Project.

[3] In the Investors Agreement, CSCECB is referred to as "China State."

4. Thomas Dunlap was the President of BMLP (tr. 281:1-3). Mr. Dunlap testified credibly to, among other things, various instances of the Defendants' conduct which frustrated progress on the Project, including turning off the lights on the Project work site over "commercial disputes" (JX 450; tr. 299:11-300:19).[4]

5. Patrick Murray was the Operations Director of Mace International (**Mace**), the Owner's Representative for the Project (PX 2 at 7:23-8:03, 10:11-10:18). Mr. Murray testified to the scope of Mace's duties as the Owner's representative on the Project.[5]

6. Allen Jude Manabat was CCAB's head scheduler for the Project (PX at 11:16-17:11). Mr. Manabat testified to the importance of scheduling to the Project and how he was repeatedly diverted to work on other CCAB or CCA, Inc. projects (e.g., the Hilton) and in Panama.

7. Steven Collins is an expert on the subject of construction management (tr. 475:19-23). Mr. Collins testified to the importance of comprehensive schedules to a construction project of this size, the inadequacy of the schedules created by CCAB, and the unique ability of the construction manager to keep track of the progress of the work.

8. Margaret Myers is an expert on the subject on China's economic policy in Latin America and the Caribbean (tr. 636:25-637:3). She testified to the practices of a "policy bank" like

[4] Trial revealed that "commercial disputes" often referred to certain disputed change orders or other demands for the release of retainage not required by the contract.
[5] As discussed below, trial revealed that the BMLP's reliance on the Defendants continued assurances that the Project would be open on March 27, 2015 and substantially completed was nonetheless reasonable under the circumstances.

the Chinese Export-Import Bank (**CEXIM**), the lender in this case, namely the goal to advance China's economic foreign policy goals and the requirements as to using Chinese-based companies.

9. Paul Pocalyko is an expert in forensic accounting and construction cost analysis (tr. 660:14-18). His testimony demonstrated that CCAB used Project money to buy the Hilton rather than pay subcontractors and described the Defendants' commingling of assets.

10. David Bones is an expert in economic loss, valuation, and damages (tr. 776:4-8). He testified to BMLP's economic loss.

11. Daniel Liu was a Senior Vice President of both CCA, Inc. and CCAB (tr. 9:12-12:19). Mr. Liu was the lead negotiator for CCAB's purchase of the Hiton (PX 2, at 43:23-44:11).

12. Mr. Yuan was, at the least, the Chairman and President of CCA, Inc., Chairman of CCAB, and a director of CSCECB (tr. 883:20-884:20, 902:22-24). In his testimony, Mr. Yuan disagreed with BMLP's contention that held himself out as both Chairman and President of CCAB and CSCECB (tr. 884:5-885:10). BMLP adduced a certain Acknowledgement Regarding Equity Investment and Advance Payment, which Mr. Yuan signed on behalf of both CCAB and CSCECB, giving his title under each signature block as "Chairman & President" (JX 66). On this point, as on others, Mr. Yuan's testimony was not credible and

was inconsistent with the contemporaneous documents adduced at trial.[6] Mr. Yuan was the first CSCECB Board Member, later replaced by Mr. Wu (tr. 897:23-898:14). Mr. Yuan was the senior-most officer for all of the Defendants (and other related entities not a part of this case) in the western hemisphere, and as discussed above was also a board member of at least some of these entities (tr. 885:13-886:14). Messrs. Wu, Liu, and Wang all reported to Mr. Yuan (tr. 885:13-17).

13. Mr. Wang was a Vice President of both CCA, Inc. and CCAB (tr. 1059:11-1060:13). Mr. Wang was one of CCAB's officers charged with working full-time at the Project (tr. 1059:15-17, 1060:17-22; JX 495, at 5).

14. Mr. Wu was the Executive Vice President of CCAB and CCA, Inc. (tr. 1146:3-12). As discussed above, Mr. Wu reported to Mr. Yuan (tr. 1148:2-5). Mr. Wu was the most senior executive at CCAB that was tasked with working full-time in the Bahamas (tr. 1148:15-17). Mr. Wu was appointed as the CSCECB Board Member in May 2014. Trial revealed the extent of Mr. Wu's conflict of interest (and its effects) between his role as the executive in charge of CCAB (the general contractor) and as the CSCECB Board Member (*i.e.*, the joint venture partner's board member). Although he did not appreciate the conflict, the potential for this type of conflict had been contractually addressed in the Investors Agreement pursuant to the Best Interests Obligation.[7]

[6] The Court notes that, to the extent there is any confusion about Mr. Yuan's roles, it is a confusion of the Defendants' own making and only underscores the degree to which the Defendants operated as a single economic entity and conflated their corporate identities.

[7] Indeed, his failure to appreciate the conflict and to otherwise understand the Best Interests Obligation led to the many breaches and fraud proved at trial.

15. Jason McAnarney was the Executive Director of CCAB's Mechanical, Electrical, and Plumbing team, which had critical responsibilities relating to achieving the Temporary Certificate of Occupancy (**TCO**) by the March 27, 2015 planned opening date (tr. 1387:14-25; tr. 1398:24-1401:4; tr. 1446:24-1447:13). Mr. McAnarney reported to Mr. Wu (tr. 1388:1-3).

16. Ann Graff was BMLP's corporate representative (tr. 1505:13-18).

17. Greg Djerejian was an executive with BML (JX 896).

18. Douglas Ludwig was BML's Chief Financial Officer (tr. 1505:21-22).

19. James Kwasnowski was the Executive Vice President for design and construction for BML (tr. 1506:8-9).

20. Augustin Berrera was the vice president of AECOM, BML's architect for the Project (tr. 1508:11-14).

21. David Pattillo is an expert in construction management and forensic schedule delay (tr. 1514:18-24).

22. Rodney Sowards is an expert in forensic accounting and economic damages (tr. 1640:13-16). As discussed below, Mr. Sowards' testimony failed to rebut the testimony of Mr. Pocalyko which demonstrated the Defendants' use of Project funds to purchase the Hilton and commingling of assets.

II. The Investors Agreement

23. On January 13, 2011, BMLP, BML and CSCECB entered into the Amended and Restated Investors Agreement (the **Investors Agreement**; JX 34), pursuant to which the parties agreed that BMLP made an $830 million equity investment into the Project and received 100% of BML's voting shares, and CSCECB agreed to invest $150 million into the development project in exchange for 150,000 shares of Series A Preferred Stock in BML; As discussed below, BMLP later made a further $15 million equity contribution.

24. Pursuant to the Investors Agreement, BMLP was responsible for BML's day-to-day management, subject to the direction of the Board of BML. BML's Board was made up of five members. Pursuant to Section 4.2 of the Investors Agreement, CSCECB was entitled to appoint one member of the Board of BML (the **CSCECB Board Member**). The remaining four Board members were appointed by BMLP. CSCECB was also entitled to appoint five representatives (the **CSCECB Representatives**) who would be seconded to the Project.

25. To avoid the effect of any potential conflict of interest between CSCECB and BMLP, the parties agreed in Section 4.7 of the Investors Agreement, that (i) the CSCECB Board Member was required to "at all times act in the best interests" of BML and that (ii) the

CSCECB Board Member was also required to report to the Board of BML as to CSCECB's findings, concerns, and recommendations. To ensure that the CSCECB Board Member could meet his obligations, the parties further agreed that the CSCECB Representatives were to have reasonable access to the books, records, communications, and other documents of the Project and BML's staff in order to monitor the Project's schedule, budget, and similar matters in the interest of BML.

III. BMLP Proved it Made an $845 Million Investment in the Project

26. At trial, Mr. Izmirlian, the Chairman and Chief Executive Officer of BMLP, testified. As indicated above, his testimony was credible and corroborated by various contemporaneous documents introduced into evidence.

27. Mr. Izmirlian testified that beginning in the early- and mid-2000s, he began to assemble a valuable collection of assets, including some 1,000 acres of land and existing structures, in the area of Cable Beach on the island of New Providence in the Bahamas, just to the west of that nation's capital city of Nassau, with the purpose of building a luxury resort on this site (tr. 97:19-98:18; 101:1-11). These efforts included moving the island's main thoroughfare and the purchase of assets from the Bahamian government, including the purchase of a police station and the Prime Minister's offices (tr. 100:13-25; 101:1-15; 103:11-18).

28. Mr. Izmirlian's efforts in acquiring this assemblage of assets were memorialized in a Heads of Agreement dated April 6, 2005, between a predecessor company of BMLP (this

predecessor defined in the agreement as Baha Mar) and the Bahamian government (JX 4; tr. 99:5-18). The Agreement described Baha Mar's efforts to date, including the purchase of several existing hotels and a casino holding one island's only two gaming licenses (JX 4 at 1-2; tr. 101:16-102:10).

29. In the Heads of Agreement, Baha Mar committed to, among other things, build a large-scale resort with a casino and other amenities and attractions, spend a minimum of $1 billion on the project, bear the expense of relocating certain government offices including the Prime Minister's, and create jobs for 3,500 Bahamians (JX 4; tr. 103:2-194:8). In return, the Bahamian government made valuable commitments to support the planned project, including waiver of property taxes and duties on materials, contributing millions of dollars to marketing, and guaranteeing no new gaming licenses would be issued in Nassau for 20 years (JX 4 at 9, 11-12, 15; tr. 104:9-20).

30. As Mr. Izmirlian testified, when the Baha Mar's original partners in the planned project dropped out around the time of the 2008 financial crisis, he sought a new lender for the project and settled on CEXIM (tr. 105:21-107:12), which agreed to lend to the Project on the condition that BMLP use a Chinese contractor for the project (CCAB; tr. 108:5-19).

31. Mr. Izmirlian also testified that the "main deal point" of BMLP's agreement with CEXIM was the debt-to-equity ratio (tr. 109:6-17). In the end, the parties agreed on a 70-30 debt-to-equity ratio for the anticipated credit facility (*id.*).

32. The value of BMLP's equity contribution was appraised by Jones Lang LaSalle Hotles (**JLL**) to be worth $1.267 billion in a May 28, 2009, report prepared at the request of BMLP and China State Construction Engineering Corporation Limited (**CSCEC Ltd**), the parent company of the Defendants (JX 19, at 4). BMLP, CSCEC Ltd, and CEXIM then commissioned BNP Paribas to review JLL's conclusions and provide comments and opinions on the value of BMLP's equity contribution. In its report, BNP Paribas appraised the value of the equity contribution to be between $725 million and $811 million (JX 20, at 8). The BNP Paribas valuation did not however include the value of the concession of the Bahamian Government memorialized in the Heads of Agreement (JX 4; JX 25; JX 26). The credible evidence adduced at trial suggested that this accounted for the disparity.

33. In any event, and significantly, BMLP, BML, CSCECB and CEXIM contractually agreed that ***the value of BMLP's initial equity contribution was $830 million*** ($745 million of asset contribution plus $85 million of cash contribution).

34. To wit, in the Investors Agreement, signed January 13, 2011, by and between BMLP and CSCECB, pursuant to which BMLP made an $830 million equity investment into the Project and received 100% of BML's voting shares, and CSCECB agreed to invest $150 million into the development project in exchange for 150,000 shares of Series A Preferred Stock in BML, CSCECB and BMLP agreed that the "Baha Mar Closing Contribution" shall have the meaning set forth in the Subscription and Contribution Agreement (JX 34, annex 1).

35. In the Subscription and Contribution Agreement by and between BMLP, BML, and CSCECB dated March 30, 2010, the parties agreed that the deemed value of BMLP's equity contribution, excluding its cash contribution of $85 million, was $745 million:

> 4.6 Value of Baha Mar Total Contribution. The Parties agree that the aggregate value of the Baha Mar Closing Contribution together with the Relevant Land Parcels identified on Part 2 of Schedule 6 to the Facility Agreement (excluding the Baha Mar Cash Contribution of $85,000,000) to be delivered, transferred, conveyed and assigned to [BML] by [BMLP] pursuant to this Agreement (or, with respect to the Relevant Land Parcels identified on Part 2 of Schedule 6 to the Facility Agreement, the Investors Agreement) is deemed to be Seven Hundred Forty-Five Million Dollars ($745,000,000).
>
> (JX 25, at 7).

36. In the Credit Facility Agreement dated March 31, 2010, by and between BML and CEXIM, pursuant to which BML and CEXIM agreed that CEXIM would provide BML with a $2.45 billion credit facility, based on a 70-30 debt-to-equity ratio (JX 26). The Credit Facility Agreement defined "Appraised Value" as "US$745,000,000" (*id*., at 3).

37. Mr. Izmirlian testified that, during the entire course of the construction of the Project, none of the Defendants ever questioned the agreed upon $745 million value of the assets contributed to the Project (tr. 119:20-24).

38. As discussed further below, when the agreed upon March 27, 2015 opening was missed, BMLP later contributed a further $15 million in equity (tr. 155:8-156:9). Thus, and as BMLP's damages expert estimated in this report and testified to at trial, BMLP's total equity investment amounted to $845 million (JX 980, at 9-10; tr. 777:10-16).

39. As such, BMLP proved that its equity contribution was $845 million.

IV. The Best Interests Obligations

40. As discussed above, pursuant to Section 4.2 of the Investors Agreement (JX 34) CSCECB had the right to appoint one member of BML's board and pursuant to Section 4.7, the CSCECB Board Member was required to "at all times act in the best interests of [BML]" (the **Best Interests Obligation**):

> 4.2 Board. The business of the Company shall be managed under the direction of the Board in accordance with applicable law and subject to the provisions of Section 4.8 relating to Material Decisions. The Board shall consist of five (5) members. Baha Mar shall be entitled to nominate and have appointed three (3) members of the Board and the Chairman of the Board (for a total of four (4) of the five (5) Board members). China State shall be entitled to nominate and have appointed one (1) member of the Board (the "CSCECB Board Member"). Baha Mar designates Sarkis D. Izmirlian as the initial Chairman of the Board. The board of directors or other governing body of each Subsidiary shall be constituted in a manner functionally equivalent to the Board.
>
> …
>
> 4.7 China State Oversight. During the period from the Closing Date until the date of Substantial Completion of the Project, the CSCECB Board Member and five (5) additional representatives of China State (the "China State Representatives") shall be seconded to the Project. The China State Representatives shall be employed by the Company in residence in The Bahamas in management positions with duties to be mutually determined between the Company and China State, including one (1) China State Representative to be elected a vice president of the Company. The China State Board Member and the China State Representatives shall be given reasonable access to the books, records, communications and other documents of the Project and the Company's staff for the purpose of monitoring the Project Works schedule, Project Works budget and similar matters in the interest of the Company. The CSCECB Board Member shall report to the Board from time to time in order to advise the Company of China State's findings and any concerns it may have with respect to the proper and efficient prosecution of the design and construction work expenditures, and any other recommendations China State may have to benefit the investment of China State and any other investors of the Company. The Company shall provide salaries, housing, benefits, office space and support facilities to the CSCECB Board Member and the China State

> Representatives in accordance with the Company's standard personnel policies. The Company shall use commercially reasonable efforts to assist the CSCECB Board Member and the China State Representatives in obtaining work permits, that are required to permit such persons to be employed in the Bahamas for a minimum of three (3) years, and pay all fees charged by any applicable Governmental Authority of the Government to obtain and maintain such work permits. China State understands that, although the CSCECB Board Member and the China State Representatives shall be appointed by China State, such individuals shall be appointed to assist the Company in furtherance of the Project and ***shall at all times act in the best interests of the Company*** (and shall have no authority to bind the Company or any of its Affiliates). China State recognizes that these personnel will need to abide by confidentiality and conflicts-of-interest requirements from time to time reasonably required by the Company.
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> (JX 34, §§ 4.2, 4.7 [emphasis added]).

41. As an initial matter, the Defendants dispute the nature of the Best Interests Obligation, arguing they are not a 24/7 commitment, and that Section 4.7 contemplates that the Defendants may wear different hats at different times such that they are not required to always act in the best interests of BML (tr. 1252:2-7; tr. 1253:24-1255:1). In particular, the Defendants pointed out that Mr. Izmirlian and others representing BML at the November 2014 Beijing Meeting and subsequent Bahamas meeting did not at those times tell Mr. Wu that he had a conflict of interest (tr. 1248:5-13; tr. 1253:2). The argument fails. They were not required to tell Mr. Wu anything. They were entitled to rely on Mr. Wu's Best Interests Obligation that they had bargained for in the Investors Agreement. The Court further notes that the Defendants concede that the Best Interest Obligation contemplated something higher than a fiduciary duty (tr. 1254:11-15). "At all times" means exactly that and Mr. Wu (who admitted he did not know understand this obligation) was not entitled to avoid it by putting on a "different hat" (*BML Properties Ltd.*, 226 AD3d 582 [1st Dept 2024]; *Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]).

42. The argument also fails because (i) the Appellate Division has already rejected the "multiple hats" argument (*see BML Properties Ltd. v China Constr. Am., Inc.,* 226 AD3d 582, 583 [1st Dept 2024]), and (ii) Section 4.2 of the Investors Agreement gives CSCECB the *right* to appoint a person to the BML board. It was CSCECB's choice (which BML had no ability to deny or contest) to appoint an obviously conflicted executive of one of its affiliated entities. And, as discussed below, this choice was but one of many made by the Defendants demonstrating that these entities operated as one, such that piercing the corporate veil is appropriate.

43. As discussed above, the initial CSCECB Board Member was Mr. Yuan (tr. 897:23-898:14). From May 2014 onward, the CSCECB Board Member was Mr. Wu.[8] At this time Mr. Wu was also an Executive Vice Present of CCAB and the senior-most executive of CCAB who worked full-time in the Bahamas (tr. 1148:15-18).

44. At trial, Mr. Wu admitted that when he was appointed as the CSCECB Board Member by Ning Yuan (Mr. Wu's predecessor CSCECB Board Member) on May 1, 2014, he had absolutely no knowledge of his Best Interest Obligation; he never discussed it with Mr. Yuan (JX 495, at 2; tr. 1149:5-1150:2) and he did not read the Investors Agreement when he was appointed to the BML board.[9] Put another way, he did not even know that he was supposed to act in BML's best interests. As discussed below, this was the first moment that

[8] As discussed above, Section 4.7 also provides CSCECB with the right to appoint the CSCECB Representatives. BMLP confirmed at trial that it withdraws any claims based on the conduct of the CSCECB Representatives, and its breach of contract claim is predicated solely on the actions of the CSCECB Board Member at the relevant times (tr. 125:4-18).

[9] The Court notes that Mr. Yuan, on the other hand, testified that he was aware of his Best Interests Obligation during his time as the CSCECB Board Member (tr. 898:11-19).

the breach of the Investors Agreement occurred. As a result of this breach and Mr. Wu's conduct, BMLP lost its entire $845 million investment.

V. The March 27, 2015 Substantial Completion Date

45. The parties initially agreed upon a December 2014 substantial completion date for the Project. This was reflected in the Master Construction Contract (**MCC**; NYSCEF Doc. Nos. 62-63; tr. 130:1-3).[10] As discussed more completely below, when it became apparent that the December 2014 date would not be achieved, the parties met in November 2014 in Beijing, China, and agreed that, by March 27, 2015, (i) the Project would be substantially completed, and (ii) the resort would be opened to guests.

46. In the Spring of 2014, however, it became clear to the parties that this date would not be achieved (JX 341; tr. 130:4-7). Certain commercial disputes also arose between the parties around this time, including contested change orders (tr. 132:17-23).

47. In order to address the need for a scheduled and firm substantial completion date and the change order disputes, representatives from BML, CCAB, and CEXIM held a series of meeting on November 17 and 18, 2014, in Beijing (the **November 2014 Beijing Meeting**; JX 462). The parties memorialized the consensus reached between them at these meetings in a set of meeting minutes signed by BML and CCAB and witnessed by CEXIM (the

[10] The MCC was executed on March 9, 2009, between Baha Mar JV Holdings Ltd., an affiliate of BMLP, and China State Construction Engineering Corp. Ltd. ("CSCEC"), an affiliate of CCA. The parties' rights and obligations under the MCC were assigned to BML and CCA, respectively.

November Meeting Minutes; JX 462).[11] Mr. Izmirlian, among others, attended on behalf of BML, and CCAB was represented by Messrs. Yuan, Wu, and Wang (*id*.).

48. At trial, BMLP established by clear and convincing evidence that the Defendants made a firm commitment to a substantial completion date of March 27, 2015. This involved substantial compromise as to what was meant by substantial completion. To wit, the parties agreed to scale back the items needed to be finished in order to open Baha Mar. It was also firmly established at trial that the promise to achieve substantial completion made in Beijing with the CSCECB Board Member (and again subsequently in the BML Board Meeting discussed below in which Mr. Wu voted to authorize the announcement of the Baha Mar opening) was made without any plan whatsoever.

49. Indeed, at trial, BML established by clear and convincing evidence that the meeting was an absolute sham and shakedown of Mr. Izmirlian designed to induce BML to release $54 million of disputed change order money for use to purchase the Hilton (rather than to pay subcontractors or to otherwise advance the Project), and that CCAB had no plan to achieve substantial completion by March 27, 2015 when it promised to do so.

50. As documented in the November Meeting Minutes, CCAB (and Mr. Wu, the CSCECB Board Member) represented that it would bring the Project to "Substantial Completion" (with the understanding that the scope of the work would be substantially reduced, to achieve only a partial opening or "operational start") by March 27, 2015, and would

[11] For the avoidance of doubt, BMLP's breach of contract claim is not predicated on the failure to meet the March 27, 2015 deadline. It is predicated based on the CSCECB Board Member's breach of his Best Interests Obligation.

produce the necessary manpower, management, and other resources necessary to do so. For its part, BML agreed to pay CCAB $54 million in partial settlement of certain commercial issues raised by CCAB, making an emergency utilization request on its credit facility with CEXIM to do so:

> A series of meetings were held among China Exim Bank ("CEXIM Bank"), Baha Mar Ltd. ("BML") and CCA Bahamas, Ltd. ("CCA") in November 17th and 18th, 2014. In order to resolve the financial and schedule disputes between CCA and BML in a timely manner and to ensure that the construction work will be completed by March 27th, 2015 substantially, these Minutes reflect the consensus reached between CCA and BML on the following matters:
>
> 1. Completion on time. CCA agrees to achieve Substantial Completion of the Project (excluding exemption list to be agreed within 7 days from the date of these Minutes) by **March 27th, 2015** on condition that CCA and BML each provides necessary assistance and cooperation and that CCA's responsibility is for Substantial Completion to achieve operational start for paying guests in hotels including amenities. The detailed Schedule Compliance and Milestones (to be agreed within 7 days from the date of these Minutes) will be agreed between CCA and BML and conducted accordingly by CCA with best efforts.
>
> 2. Improvement of work productivity. CCA agrees to ensure the achievement of Substantial Completion and operational start for paying guests in all hotels, including amenities, on time by all necessary methods, including but not limited to the maintenance of sufficient manpower, both local and international, with a minimum of 200 new Chinese workers within 30 days from the date of these Minutes and working overtime as necessary.
>
> 3. Enhancement of on-site management. CCA agrees to take necessary measures to enhance the on-site management to ensure the construction will be conducted in an orderly manner, and the works will be completed on time and in the required quality.
>
> 4. Settlement for unresolved financial disputes. BML agrees to make an emergency Utilization Request within 3 business days from the date of these Minutes for a payment of US$54,622,l 14.7 to be paid as follows: 50% of US$15,102,556 (in dispute) to be paid immediately, 70% of US$45,815,481 (under review) to be paid immediately, and US$l5,000,000 (to be paid as formerly agreed as final settlement). CCA promises that upon Jan 19th, 2015, except for the wedding chapel and elevator tower, the rest of the Convention Centre will be Substantially Complete and ready for operational start for paying guests, or BML is entitled to receive claw-back payment in an amount equal to 50% of US$15,102,556 from CCA (except in the case whereby the sole reason that the Convention Center is not Substantially Complete is because the Ministry of Works of The Bahamas has not signed the CCA-submitted generator-

> farm TCO despite CCA having completed in a timely manner all necessary works for a January 19th TCO). For the payment of US$45,815,481 to CCA which is under review, BML and CCA will mobilize sufficient resources to complete the review of all the pending financial matters within 30 calendar days from the date of these Minutes, and the final settlement amount after identified and agreed by the two parties will be adjusted accordingly. For any unresolved dispute, BML and CCA will work in an amicable manner to find mutually acceptable solutions, and any dispute unsolved after the completion of review will be brought to DRB for resolution within 45 calendar days from the date of these Minutes.
>
> CEXIM Bank, in witnessing and facilitating the discussion between BML and CCA, acts in a neutral and objective manner, and acknowledges that the related funding requests will be processed in a timely manner in accordance with, and subject to, the provisions of the Credit Facility Agreement (including, without limitation, the submission of all necessary supporting documents for such funding requests by BML in a timely manner). All three parties agree that these minutes do not waive or amend any of the executed project documents or finance documents.
>
> (JX 462 [emphasis in original]).

51. Ultimately, and as discussed further below, the $54 million was not used to advance the Project by paying subcontractors. It was used to buy the Hilton – a competing project down the road. BMLP only found out about this on or about the closing of the Hilton acquisition.

52. In addition to the commitments made in the November Meeting Minutes, BML and CCAB held a follow-up meeting in the Bahamas on November 27, 2014. The representatives from BML included Messrs. Izmirlian and Dunlap; CCAB was represented by Messrs. Wu and Wang (JX 476). At this follow-up meeting the parties discussed each paragraph of the November Meeting Minutes, reiterated their respective commitments, and again commemorated the consensus reached at this meeting in a second set of meeting minutes (the **Bahamas Meeting Minutes**; JX 476). In regard to the March 27 opening date, the parties noted in these Bahamas Meeting Minutes:

> Minutes Paragraph 1: Sarkis noted that the paragraph means that the ***resort must be open by March 27, 2015*** to paying guests other than the exception list to he reviewed in the meeting, and that BML and CCA understood what was meant by the use of Substantial Completion. CCA stated its concern that Baha Mar has an obligation to complete its own works such as the nightclub, in addition to CCA's obligation to deliver the remainder of the Project by that date, and Sarkis acknowledged that such were the respective duties of BML and CCA. He further noted that ***finding solutions to items on the exceptions list is critical***, such as through shipping and suppliers. ***David and Tiger said they would use best efforts to get this done as soon as possible***.
>
> (JX 476, at 1 [emphasis added]).

53. Mr. Dunlap's uncontradicted testimony is that nobody at the November 27, 2014, Bahamas meeting expressed disagreement as to the March 27, 2015 date (tr. 302:16-19). This accords with Mr. Izmirlian's testimony (tr. 139:7-10). Mr. Yuan testified that he understood "on time" to mean March 27, 2015 (tr. 917:11-14, 917:21-918:3).

54. Mr. Izmirlian's testimony emphasized the critical importance of the March opening date. First, it was important for the financial success of the Project that it open to paying guests before the end of the tourist season, running from November through June (tr. 130:8-16). Second, it was important that the Project open at a ***date certain***, because once BML publicly announced an opening date and opened reservations to guests, BML would have to expend significant sums in preparation, including marketing and the hiring and training of a significant staff (tr. 143:4-15;147:9-12;148:14-21).

55. During a December 5, 2014, meeting of the BML board of directors (of which Mr. Wu was at that time a member pursuant to the Investors Agreement), the directors "participated in discussions regarding the Construction report and the prospect of announcing a March 27,

2015 opening date" (JX 495, at 5). Mr. Izmirlian "***emphasized that once announced***" the opening date "***is difficult to change***" (*id*. [emphasis added]). The board (again, including Mr. Wu) then unanimously adopted a resolution once again reiterating the commitment to the March 27, 2015 opening:

> RESOLVED, that the opening date of the resort to the public, including all hotels and amenities except for the limited exceptions described, will be March 27, 2015 and that the Company would proceed to announce the date internally and open reservations to the public for March 27.
>
> (*id*., at 6).

56. Mr. Izmirlian publicly announced the March 27, 2015 opening date on December 9, 2014 (JX 500). In an email Mr. Izmirlian sent to CEXIM that same day, on which Mr. Yuan was copied, Mr. Izmirlian wrote that he was taking this step "***based on the minutes of the Beijing meeting and CCA's assurances***, and given the need for our staff, retail, restaurant and other partners to prepare to open the hotels and casino ***by a date certain***" (JX 499 [emphasis added]). Mr. Izmirlian testified that he took the step of publicly announcing this date in reliance of these repeated commitments made by the Defendants, and that up to this point the Defendants never objected to the March date or voiced reservation about their ability to meet this date (tr. 144:18-145:6, 146:15-147:16).

57. The Defendants also confirmed their understanding of the importance of these dates. In an email dated January 4, 2015, Mr. Yuan wrote to Mr. Izmirlian that "the Jan. 19th and March 27th milestones ***could not be changed***" (JX 560, at 1-2). As discussed above, in the Hidden Dire Need Letter that Mr. Wu composed for Mr. Yuan to send to Chairman Yi of

CSCEC Ltd., Mr. Wu wrote if additional labor was not sent and the March 27 opening date was missed, "it will cause irreparable and catastrophic losses," and that the "consequences will be disastrous" (JX 581). Neither the substance of the Hidden Dire Need Letter nor the Hidden Dire Need Letter itself was ever shared with BML by Mr. Wu – the CSCECB Board Member.

58. On January 27, 2015, Mr. Yuan wrote that "everyone knows that March 27 is the date when the Project is to be open to business to the general public" (JX 597, at 3).

59. At trial, however, the Defendants repeatedly insisted that in the November and Bahamas Meeting Minutes they committed only to using their "best efforts" to achieve the March 27, 2015 partial opening date and that this date was only a "target" or "goal" (tr. 914:7-8; 922:8-12; 968:10-16; 1113:9-11). Mr. Yuan insisted that the decision to publicly announce the March 27 opening was that of BML alone (tr. 965:19-966:1). Thus, the Defendants argue, BMLP did not act in reasonable reliance on these assurances.

60. The Defendants' testimony in this regard was simply not credible. Initially, the Court notes that the language of the November Meeting Minutes and the Bahamas Meeting Minutes which (particularly when read with the understanding of the state of the Project at this time and what the parties were attempting to accomplish in these meetings, including the release of $54 million as to contested money) demonstrates that the entire point of this exchange was for a firm commitment to a March 27, 2015 firm opening date – not merely a "best efforts" obligation. And in fact, in the Bahamas Meeting Minutes, which the parties put

together for the specific purpose of clarifying their mutual understanding of the November Meeting Minutes, Messrs. Wu and Wang promised to "use best efforts" to "find[] solutions to items on the exceptions list," *i.e.*, to complete the balance of the work (JX 476, at 1). To be sure, BMLP wanted as much of the Project and its various amenities and attractions open as possible, *so long as* the Project opened on March 27, 2015. Equally importantly, Mr. Yuan's assertion that the March 27, 2015 date was BML's (or even BMLP's) decision alone is disingenuous at best. Mr. Wu, as the CSCECB Board Member, voted to authorize the public announcement as to such date by adopting the Board Resolution authorizing such announcement. [12]

61. In addition, and as discussed above, even if the "best efforts" language in the minutes could be read as applying to achieving the March 27 date (which following trial it cannot), this promise nevertheless certainly became a firm commitment upon which BMLP could reasonably rely on December 5, 2014, when the BML Board, *of which Mr. Wu was then a member*, unanimously resolved to publicly announce the opening date and open reservations after Mr. Izmirlian specifically reminded the Board that, once announced, the opening date would be difficult to change. And, as set forth above, the Defendants repeatedly reaffirmed this commitment after the December board meeting in various communications with BMLP.

[12] The Defendants position that this was merely a "best efforts" obligation was not credible and inconsistent with the contemporaneous communications and facts presented at trial. The Court notes that even if it were only a "best efforts" obligation, as the Defendants strain to argue, BMLP still has proved breach as of May 2014 of the Best Interests Obligation and fraud because, among other things, of the clandestine letter sent at Mr. Wu's request by Mr. Yuan requesting substantial additional personnel on the ground in order to meet the March date while simultaneously telling the Board that everything was on track.

VI. BMLP Proved by a Preponderance of the Evidence that CSCECB Committed Multiple Material Breaches of Section 4.7 of the Investors Agreement Starting in May 2014

62. To establish its claims for breach of contract, BMLP needed to prove "(1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages" (*Alloy Advisory, LLC v 503 W. 33rd St. Assocs., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]). The parties do not dispute that the Investors Agreement was a binding contract between BMLP and CSCECB (NYSCEF Doc. No. 735 ¶ 1, footnote 2).

A. The First Breach: CSCECB Appointed Mr. Wu as the CSCECB Board Member in May of 2014 without Informing Him of His Best Interest Obligations

63. As discussed above, the initial CSCECB Board Member was Mr. Yuan (tr. 897:23-898:14). From May, 2014 onward, the CSCECB Board Member was Mr. Wu. At this time, Mr. Wu was also an Executive Vice Present of CCAB and the senior-most executive of CCAB who worked full-time in the Bahamas (tr. 1148:15-18).

64. At trial, Mr. Wu admitted that when he was appointed as the CSCECB Board Member by Ning Yuan (Mr. Wu's predecessor CSCECB Board Member) on May 1, 2014, he had absolutely no knowledge of his Best Interest Obligation; he never discussed it with Mr. Yuan (JX 495, at 2; tr. 1149:5-1150:2) and he did not read the Investors Agreement when he was appointed to the BML board. Put another way, he did not even know that he was supposed to act in BML's best interests. This was the first moment that the breach of the Investors Agreement occurred. As a result of this breach and Mr. Wu's subsequent conduct, BMLP lost its entire $845 million investment.

B. The Second and Third Breaches: CSCECB Breached the Investors Agreement by Diverting Project Resources to the Hilton Development

65. CCAB, of which Mr. Wu was Executive Vice President, diverted Project funds intended for subcontractors to purchase the Hilton, a competing hotel property.

66. Unbeknownst to BMLP, on October 21, 2014, CCAB signed a Contract of Sale to purchase the Hilton, located just some 15 minutes away from the Project (JX 419; tr. 136:17-138:4, 297:17-298:2). The Contract of Sale called for a $3 million deposit, with $54 million due at closing (*id*.). CCAB closed on the Hilton transaction on December 16, 2014, tendering the $54 million (JX 521).

67. The November Meeting Minutes (signed just some 3-4 weeks after CCAB signed the Contract of Sale for the Hilton) memorialize BML's agreement, at CCAB's urging, to place an emergency Utilization Request from BML's credit facility with CEXIM in the amount of approximately $54 million in order to pay this sum to CCAB (JX 462). BML made this utilization request on November 21, 2024 (JX 465). CCAB represented to BML that this money was urgently needed to pay subcontractors (tr. 135:7-10). The Defendants' representatives testified repeatedly at trial that this $54 million was used to pay subcontractors (tr. 990:16-20; tr. 1168:22-1169:10). During discovery, the Defendants submitted a Rule 11(f) response in lieu of testimony stating that "the entirety of the $54,622,114.70 paid to CCA Bahamas, Ltd. was used to either pay subcontractors for work done on the Project, or to reimburse CCA Bahamas, Ltd. for payments made to subcontractors for work done on the Project" (JX 970, at 8). This was false.

68. Initially the Court notes that this $54 million figure was not the result of a simple addition of unpaid claims; rather, it was a product of negotiation between the parties at the November 2014 Beijing Meeting (tr. 1168:3-21) the purpose of which trial revealed was to secure exactly that sum necessary to close on the Hilton hotel down the street.

69. More importantly, however, using CCAB's consolidated bank statements and other contemporaneous documentary evidence, BMLP's forensic accounting expert, Paul Pocalyko, credibly demonstrated that at least a significant portion of BML's $54 million payment was used to purchase the Hilton the property, because but for monies received from BML, CCAB's bank account would have had insufficient funds after CCAB closed on the Hilton (tr. 680:9-19, 680:25-681:12, 681:1-682:2; JX 481). Mr. Pocalyko also gave uncontradicted testimony that there was no evidence that CCAB used the entirety of this $54 million payment to pay subcontractors, as it had promised BMLP it would do and as it later represented it did in its Rule 11(f) response (tr. 683:12-25). In his expert report and in his testimony he also pointed to numerous examples of subcontractors requesting payment from CCAB *after* CCAB received the $54 million payment (JX 983, at 8-13; tr. 686:12-20).

70. The testimony of the Defendants' accounting expert, Rodney Sowards, was not persuasive. Mr. Sowards did not even attempt to verify the payments to subcontractors claimed by the Defendants in their Rule 11(f) response. Indeed, he conceded that he was not retained to look at that (tr. 1699:9-19).

71. Mr. Wu admitted in his testimony that, at the time he was working on the Hilton transaction, he simply "didn't think about" whether acquiring the Hilton was in the best interest of BML (tr. 1167:9-12). This too was a breach. He was both required to think about it and also to disclose the acquisition to the Board of BML. He did neither.

72. Lastly, Mr. Wu admitted that this $54 million could have otherwise been used to pay subcontractors on the Project, which would have alleviated CCAB's liquidity problem in March of 2015 (tr. 1204:9-14) and likely averted what happened – *i.e.*, BMLP would not have lost its investment.

73. Thus, the credible evidence demonstrates that CCAB requested and used the $54 million payment from BMLP in the November 2014 Beijing Meeting to purchase the Hilton, rather than for its stated purpose to pay subcontractors. Put another way, Mr. Wu's assertion that the $54 million payment request from BML and $54 million payment for the Hilton represent merely an "exact coincidence" (tr. 1169:5-10) is simply incredible.

74. CCAB diverted other Project resources to the support its acquisition of the Hilton. CCAB's head scheduler, Mr. Manabat, who served under the direction of Mr. Wang and Mr. Wu, was also diverted from his work on the Project to produce at least one schedule for the Hilton in February 2015 (JX 616; JX 585). This was also a breach of the Best Interest Obligation because the Project did not have an appropriate schedule and BML needed and was entitled to expect Mr. Manabat's attention to provide them with accurate information as to when and how substantial completion was to occur.

75. CSCECB breached the Best Interest Obligation both by diverting Project funds to purchase the competing Hilton property and by not using those funds for their intended use, *i.e.*, to pay subcontractors. Mr. Wu, in failing to pay CCAB's subcontractors and permitting the $54 million to be used to purchase the Hilton was a breach of the Best Interests Obligation to BML.

C. Fourth Breach: CSCECB Breached the Investors Agreement by Diverting Project Resources to CCAB Business Opportunities in Panama

76. At the same time BML, BMLP, and CCAB were contemplating an accelerated schedule in the lead up to the November 2014 Beijing Meeting, CCAB was exploring business opportunities in Panama. In September 2014, Mr. Liu, then the Senior Vice President of both CCA, Inc., and CCAB, wrote to Mr. Wu, ordering him to put a team together to prepare for submitting bids on a certain "Panama Metro 2" project (JX 395). Neither Messrs. Wu or Liu told BML they were involved in coordinating bids for CCA projects in Panama (PX 1054, at 135:22-136:08).

77. Mr. Wu's testimony that he was not involved in the Panama project (tr. 1156:8-10) was also false. In March of 2015, with work on the Project at a critical stage, Mr. Wu attended multiple meetings on the prospective Panama project (tr. 1156:11-1157:11; tr. 1157:24-1158:11; JX 681; JX 692). When asked if taking time away from the Project to attend meetings on Panama was in the best interests of BML, Mr. Wu avoided the question, saying only "[i]t is a different project" (tr. 1159:4-8).

78. Thus, in sum, Mr. Wu's position was that when he acted in a different role with respect to another company (*i.e.*, CCA or CCAB [which companies had a conflict of interest with BML], as the case may be), he could shed and no longer be bound by his Best Interests Obligation. Put another way, his testimony amounts to the view that the Best Interests Obligation (which he did not know about and did not consider) could be flipped on and off like a light switch by merely by saying that he was working on a different job. This is the very position this Court and the Appellate Division already rejected.

79. Mr. Wang, a Vice President at both CCA, Inc. and CCAB, and who had promised BML that he would work full-time on the Project, testified that he was in charge of establishing CCA's business in Panama (tr. 1060:7-1061:4; tr. 1066:21-24). This too was evidence of breach. Mr. Wang took multiple trips to Panama during for this purpose between the time of the November Meeting Minutes and the March 27, 2015 substantial completion date, and helped to set up CCA's office in Panama and coordinate CCA bids on projects in Panama (tr. 1061:5-11; tr. 1070:16-24). At trial, Mr. Wang testified that he thought he told BML of his work on Panama. This testimony was false and inconsistent with his deposition testimony where he had said that he did not inform anyone at BML of his work on CCA's Panama projects because doing so would not be "necessary" (tr. 1061:12-1064:6). Mr. Wang continued to work on Panama through March 2015 (tr. 1071:23-1072:5).

80. In his deposition testimony, Mr. Liu admitted (after first denying that he worked on CCA's projects in Panama) that he had travelled to Panama several times and was involved in setting up CCA's regional office in Panama (PX 1054, at 58:18-59:24; 111:12-112:3).

81. Finally, it is undisputed that Mr. Wu ordered CCAB's head scheduler, Mr. Manabat, to divert his efforts away from the Project and to work on Panama (tr. 1162:12-17).[13] This was at a critical time period during which schedule updates and coordination were needed to keep BML informed.

82. Mr. Manabat's involvement in Panama was under the direction of Messrs. Wu and Wang (JX 585; tr. 1072:9-18). On January 14, 2015, Mr. Manabat wrote to Mr. Wang that he was travelling to Panama the next day (JX 575). Mr. Wang emailed other CCA employees, asking that they arrange for Mr. Manabat to be picked up from the airport (*id*.). On January 30, 2015, Mr. Manabat wrote an email, copying Mr. Wang, confirming that he would be travelling to Panama the following week and staying for several days (JX 601). On February 19, 2015, Mr. Manabat wrote to Mr. Wang that he was "fully engage[d] in the Panama project now" and preparing for his next trip (JX 656). On February 24, 2015 (a Tuesday), Mr. Manabat wrote to Mr. Wang that he was considering extending his stay until Sunday (JX 666). Mr. Manabat reiterated his intent to stay longer in an email sent the following day (JX 670).

83. As late as March 19, 2015, with the planned partial opening supposedly a mere eight days away and the critical TCO not yet approved, Mr. Manabat confirmed that he had not updated the TCO schedule ***since January***, writing "[n]o I haven't updated any schedule except the monthly report," which he had delegated to a subordinate, because Mr. Manabat

[13] Mr. Wang was also well aware of Mr. Manabat's involvement in Panama (JX 585, at 3; tr. 1072:9-18).

was "busy with our project in Panama" (JX 723). Mr. Manabat testified in his deposition that his work was especially important to the Project as the March 27, 2015 deadline approached (PX 1053, at 69:18-69:21).

84. Mr. Wu, as the highest CCAB executive who was full-time in the Bahamas, breached his Best Interest Obligation by diverting his own efforts and ordering or condoning the diversion of other CCAB employees' (including Mr. Manabat's) efforts away from the Project and towards CCAB's business opportunities in Panama.

D. Fifth Breach: CSCECB Allowed Hundreds of Workers to Return to China for Chinese New Year Without Ensuring Adequate Appropriate Workers to Meet the March 27, 2015 Deadline

85. As discussed above, in the November Meeting Minutes and subsequent Bahamas Meeting Minutes, CCAB and the CSCECB Board Member committed "to ensure the achievement of Substantial Completion and operational start for paying guests in all hotels, including amenities, ***on time by all necessary methods, including but not limited to the maintenance of sufficient manpower***," and that "no workers are leaving" (JX 462; JX 476 [emphasis added]). In other words, CCAB and the CCSECB Board Member made an unequivocal commitment to provide a net increase of sufficient Chinese laborers and supervisors to complete the Project on time.

86. In fact, as Mr. Wu admitted at trial, the number of Chinese workers on the Project *decreased* between November 2014 and March 2015, and that the number of Chinese workers on the Project peaked some 2-3 months *before* the November 2014 Beijing

Meeting (tr. 1177:15-18; tr. 1187:1-7). Mr. Wu approved of the departures of some 700 workers from the Project between December 2014 and February 2015, and helped arrange their travel out of the Bahamas (tr. 1187:8-13) without arranging for replacement workers so that there were sufficient workers to complete the job "on time." This was a breach of the Best Interests Obligation.

87. The Defendants argued at trial that CCAB's laborers were free to leave as they pleased, and that CCAB had a contractual obligation to arrange for their travel home (tr. 1025:11-13; tr. 1186:19-25). The argument misses the mark. The CSCECB Board Member Best Interest Obligation required ensuring sufficient manpower either by compensating workers to stay to finish the job or otherwise hiring enough of the right kinds of workers (*i.e.*, the trades and the supervisors) to complete the job on time and to have planned to do this knowing that Chinese New Year was coming. This he did not do. Worse – he knew it and he concealed from BML telling them exactly the opposite – *i.e.*, that everything was on track.

E. Sixth Breach: CSCECB Purposefully Delayed Work on the Project

88. BMLP adduced evidence of several instances in which CCAB recommended delaying or did purposefully delay work on the Project, often in connection with attempts to resolve so-called "commercial issues."

89. On November 14, 2014, just days before the November 2014 Beijing Meeting at which the parties would discuss and resolve pending disagreements about the scope of the work, the

new opening date, and commercial issues, Mr. Dunlap emailed Mr. Wang to protest CCAB's deliberately turning off the lights on the Project work site, which both stopped all work after dark and presented an immediate danger to the safety of workers, in order to pressure BML to yield on a disputed commercial issue (JX 450; tr. 299:11-300:19). Mr. Dunlap testified to his belief that a decision of this importance to the Project could only have been made by Messrs. Wang or Wu (tr. 300:22-301:9). The Defendants offered no alternative explanation at trial.

90. On February 5, 2015, CCAB ordered its workmen not to allow any FF&E (furniture, fixtures, and equipment) loading or use of elevators for such purpose pending resolution of yet another disputed commercial issue (JX 619; tr. 313:23-315:2).

91. On February 9, 2015, James Kwasnowski, BML's Executive Vice President of Design and Construction, wrote in an email (copying Mr. Wang) that an additional 200 workers had stopped work over payment concerns (JX 628). To be clear, the evidence at trial suggested that there would have been no money issues had $54 million not been diverted away from the Project to buy the Hilton.

92. On February 16, 2015, Mr. Dunlap wrote to Messrs. Wang and Wu that there were "additional stopped works today regarding inspections," *i.e.*, work critical to preparing for the TCO (JX 649). Mr. Wang wrote back, saying "TCO pre-inspections are still going well following the schedule" (*id*.). As discussed above, Mr. Wang's email made no reference to the fact that CCAB had already missed the February 15 deadline for submitting the TCO

application that its head scheduler, Mr. Manabat, had called "critical" (JX 512). Mr. Wang then admitted that CCAB had suspended room handover "because there is still a big commercial issue pending for resolution" (*id*.). Mr. Wu was copied on this email (*id*.). As discussed above, Mr. Wu told no one.

93. In a March 3, 2015, email sent by Mr. Wang and cc'ing Mr. Wu (the CSCECB Board Member and Executive Vice President of CCAB), CCAB requested that, in addition to its normal progress payment, BML also pay it (i) 70% of change orders under review, (ii) some $13 million of MEP allowance under review, and (iii) 50% of withheld retainage (JX 694). Mr. Dunlap testified that CCAB's request for release of retainage was totally improper, as the requirements for its release (substantial completion of the entire Project, as certified by the architect of record) were not yet met, and the other two items were under dispute and BML thought them inflated (tr. 321:18-323:4).

94. Despite this, rather than negotiating in good faith to resolve these disputes, Mr. Wang wrote on March 10, 2015, to express disappointment with the amount of money BML had authorized to be released and wrote "I think it is unacceptable to CCA and will cause significant impact to CCA's performance" (JX 694). After raising the issue of a possible additional equity contribution, Mr. Wang continued "[t]he project is at the critical moment, if we couldn't raise enough fund, there will be no way to timely complete the project" (*id*.).

95. Mr. Wang's tying the progress of the Project to BML's payment, in full, of disputed amounts of change orders and other funds, can only be seen as a veiled threat to slow the work and purposefully endanger the achievement of the March 27, 2015 opening date.

96. **If there were any doubt as to whether the CSCECB caused CCAB to deliberately slow its work against the interests of BML, Mr. Izmirlian gave unrebutted testimony that Mr. Wu admitted during an April 7, 2015, meeting attended by the Prime Minister of the Bahamas, Ambassador Yuan, and Mr. Izmirlian himself, that CCAB was deliberately slowing the work (JX 777; 160:11-20). Slowing down the work was a breach of the Best Interests Obligation. As discussed above, Mr. Wu himself admitted this at trial.**

97. The trial record was replete with numerous other examples of CCAB employees threatening or suggesting work stoppages. On November 10, 2014, CCAB employee Pengfei Yu suggested that CCAB should slow down the work in order to pressure BML to pay disputed change orders, because CCAB wouldn't have as much negotiating leverage after the Project was completed (JX 445; tr. 1150:19-1151:23). On December 10, 2014, Mr. McAnarney suggested stopping work on the convention center to force payment on the MEP allowance (JX 501; tr. 1445:7-9; tr. 1445:21-1446:2). These workers all reported to the CSCECB Board Member, Mr. Wu, Executive Vice President of CCAB.

98. By ordering or condoning the slowing or stopping of work on the Project at various points both before and after the November 2014 Beijing Meeting for the sole purpose of furthering CCAB's commercial interests, Mr. Wu continually breached his Best Interests Obligation.

F. BMLP Performed

99. BMLP demonstrated that it performed its obligations under the Investors Agreement, and the Defendants failed to show any material breach by BMLP, let alone any breach that occurred prior to the Defendants' multiple material breaches. Any suggestion to the contrary by counsel was simply not supported by the credible evidence at trial.[14]

VII. BMLP Proved by Clear and Convincing Evidence that CCAB Committed At Least four Instances of Fraud

A. The First Fraud: The Defendants Committed to the March 27, 2015 Partial Opening Date Without Having a Plan in Place

100. When during the November 2014 Beijing Meeting Mr. Dunlap unequivocally informed the Defendants that "we need a detailed and complete schedule" (JX 455), the Defendants gave a firm commitment to achieve Substantial Completion (albeit on a reduced scope basis) by March 27, 2015. However, as discussed above, they had absolutely no plan as to how to do it. This was fraud and designed to induce the release of the $54 million of disputed change order money so that they could close on the Hilton with this money instead of paying their sub-contractors. This (together with other Defendant conduct) caused a liquidity crises.[15]

[14] For the avoidance of doubt, the subsequent filing of bankruptcy can not be considered a default and in any event the Defendants failed to prove any damages flowing from such filing.
[15] To the extent that the Defendants argued that years earlier there had been some over budget costs, the credible evidence adduced at trial did not suggest that any of these earlier costs had anything to do with the liquidity crises that the Defendants created based on their unlawful conduct.

101. CCAB, as Construction Manager and pursuant to the MCC and General conditions of the Contract for Construction, was responsible for developing and maintaining accurate schedules for the Project using the critical path method (**CPM**) (JX 13, § 3.10; JX 15). CCAB was also responsible for achieving the TCO certification necessary to open the Project (tr. 318:13-17, 331:24-332:1, 478:9-22, 1447:8-13, 1475:1-12, 1480:2-6, 1485:4-10, 1106:16-17; DX 4 at 126:01-25; JX 649; JX 418).

102. Steven Collins, BMLP's expert witness on the subject of construction management, credibly testified to the owner's dependence on the construction manager to accurately track manpower, resources, and the Project's overall progress. As the Construction Manager on the Project, only CCAB had the relationships with contractors and sub-contractors and ability to track all work on the Project necessary to keep BMLP accurately apprised of the true progress on the Project (tr. 479:8-480:2; tr. 500:25-501:20). Yet, as Mr. Collins testified, "there was never a realistic, fully-developed, manpower-loaded schedule for the resources to achieve the March date" (tr. 476:14-16).

103. The Defendants' corporate representatives testified that they assured themselves that the March 27, 2015 was achievable by checking in with their contractors and subcontractors from Beijing, and thus their promise was not fraudulent. The evidence of their contemporary communications adduced at trial, however, demonstrated exactly the opposite -- the absence of a clear plan and an acknowledgement that the dates being given to BML were just phony.

104. **By way of example, in August 2014, when an acceleration schedule was first being contemplated for the Project, CCAB's Executive Director of MEP (Mechanical, Electrical, and Plumbing), Jason McAnarney, wrote to CCAB's head scheduler, Allen Manabat, that CCAB needed to "commit to an executable plan, not just dates but actually 'how' we are going to do it," otherwise, said Mr. McAnarney, "this will be just another empty schedule and empty promise to the Owner [BML] that we failed to deliver" (JX 377).**

105. Referencing Mr. Dunlap's email emphasizing the need for a detailed schedule so that the Project could open for business on March 27, Mr. Wang wrote to Messrs. Manabat and McAnarney on November 17, 2014 at 9:34pm that "the expected completed sates [sic] Tom wanted is unachievable" (JX 455). Instead of communicating this to BML and giving them a real completion date that could be committed to, by 2:39pm the next day, Mr. Manabat wrote to his team of schedulers that "we need to produce a schedule to comply with the 15March2015 BAHA MAR opening" because Messrs. Wang and Wu had "directed us to produce a schedule" (*id*.). This too confirms the fraud.

106. **In fact, at trial, Mr. Wang confirmed that he had agreed to the March 27, 2015 opening date *before* asking Mr. Manabat to create a compliant schedule (tr. 1089:23-1090:1). Mr. McAnarney, who led the MEP team charged with ensuring the Project received the TCO, similarly testified that CCAB did not seek his input before CCAB committed to the March 27, 2015 opening date (tr. 1451:24-1452:4).**

107. Thus, BMLP proved that the Defendants committed fraud beyond any doubt by giving a firm commitment to open the Project on March 27, 2015 without having any plan in place by which it could meet that commitment and thereby made an empty, fraudulent promise which misrepresented its present ability to perform (*Shear Enterprises, LLC v Cohen*, 189 AD3d 423, 424 [1st Dept 2020]).

108. CCAB's utter failure to verify its ability to meet the promised deadline constitutes a "reckless disregard" of the truth (*DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 303 [1st Dept 2005]), demonstrating the Defendants' opinion was "based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth" (*Curiale v Peat, Marwick, Mitchell & Co.*, 214 AD2d 16, 28 [1st Dept 1995]).

109. And, for the avoidance of doubt, the Court notes that each time CCAB reaffirmed its commitment to the March 27, 2015 date without having a plan in place—including in the November Meeting Minutes, in the Bahamas Meeting Minutes, and during the December 5, 2014 BML board meeting—constitutes a separate act of fraud.

B. The Second Fraud: CCAB Requested $54 Million from BMLP for the Purpose of Paying Subcontractors, But Used it to Purchase the Hilton Development

110. As set forth above, CCAB used the $54 million paid to it by BML to purchase the Hilton. In representing that these Project funds would be used to pay subcontractors and diverting them to purchase the Hilton, CCAB committed an act of fraud. The $54 million payment

request from BML and $54 million payment for the Hilton are not an "exact coincidence" (tr. 1169:5-10).

C. The Third Fraud: CCAB Misappropriated Project Funds for the Personal Use of its Officers

111. Mr. Pocalyko also presented uncontradicted evidence that the Defendants' corporate officers misappropriated project funds for personal use. Unquestionably, this was evidence of the extent of the fraud and course of conduct at issue here.

112. By matching up Project expenses marked as "General Condition" with the underlying receipts, Mr. Pocalyko demonstrated in his expert report and testimony that CCAB's officers and employees spent Project funds on various personal goods such as scarves, golfing equipment, and cigars (JX 983, at 19-22; JX 943; tr. 692:11-697:11).

113. While the amounts of these expenses may *de minimis* in the context of a multi-billion dollar mega-resort (although the true amount of these diversions were not calculated at trial), the Court notes that the diversions of Project funds for personal items is just as fraudulent as the diversion of $54 million to buy the Hilton. To the extent that these Project funds were not used to pay subcontractors or other legitimate expenses relating to the Project (as the Defendants represented they had been in their Rule 11[f] response), they are indicative of a fraudulent course of dealing and a disrespect for the observation of corporate formalities on behalf of the Defendants and further evidence as to why piercing the corporate veil is appropriate under the circumstances.

D. The Fourth Fraud: CCAB Knew it Had Insufficient Manpower, Management, and Resources to Achieve the March 27, 2015 Partial Opening Date, Knew the Date was in Jeopardy, and Hid this Knowledge from BMLP

114. During the November 2014 Beijing Meeting, as memorialized in the November Meeting Minutes set forth above, CCAB and the CSCECB Board Member also committed to increasing the manpower and management devoted to the project, including "a minimum of 200 new Chinese workers within 30 days" and enhancements of the "on-site management" (JX 462, at ¶¶ 2-3) specifically and generally to provide sufficient workers to be able to achieve Substantial Completion (based on the reduced scope) by March 27, 2015.

115. The commitments were further memorialized in the follow-up Bahamas Meeting Minutes, which make clear that the CCSEB Board Member and CCAB would provide "as many workers as needed," that "no workers are leaving," and that CCAB would engage in "daily and weekly tracking of workers against the construction schedule" so as to achieve Substantial Completion by March 27, 2015:

> Minutes Paragraph 2: CCA and Baha Mar agreed that 200 additional workers is the minimum, to be measured against workers in place at the time of the Beijing meeting, and that CCA ***would add as many workers as needed***. CCA acknowledged that Chairman Yi approved CCA sourcing workers from the Bahamas and anywhere in the world. ***CCA stated that no workers are leaving***, whether hired by CCA or its subcontractors, and that 30 Bahamian painters would be in place on December 1. The group discussed ***daily and weekly tracking of workers against the construction schedule***. If dates are missed, then Baha Mar will push to add workers in certain areas.
>
> Minutes Paragraph 3: Sarkis stated that Chairman Yi and China EXIM recognized that additional experienced management personnel would be necessary. CCA stated that current senior managers would remain and that CCA is bringing in 15 people at the level of manager. CCA further stated that the company is offering positions in the U.S. to certain people following the completion of the resort, and that managers will stay on, including through the summer as necessary. Sarkis directed Jim Kwasnowski to make a 30-day plan for management enhancements and to work with CCA, and to report back within 7 days of the meeting. Sarkis stated to the group that he was responsible to report

to Governor Yuan every 2 weeks starting next week, so the 7-day schedules set in this meeting are important.

(JX 476, at 1-2).

116. Indeed, in the November Meeting Minutes themselves, the parties made clear that the obligation was to provide sufficient workers were onsite for on time completion – i.e., "to ensure the achievement of Substantial Completion and operational start for paying guests in all hotels, including amenities, ***on time by all necessary methods, including but not limited to the maintenance of sufficient manpower***" (JX 462, at 2 [emphasis added].[16]

117. Trial revealed that they as of January 1, 2015, they knew the labor was insufficient and the concealed it when the CSCECB Board Member drafted the Hidden Dire Need Letter which he never shared with BML while nonetheless representing to BML that the Project was on track for March 27, 2015 opening. By hiding this information, CCAB and the CSCECB Board Member committed fraud.

118. To wit, in the January 21, 2015 Hidden Dire Need Letter drafted by Mr. Wu and sent by Mr. Yuan (notably, on the letterhead of the Defendant CCA, Inc., rather than CCAB), Mr. Yuan wrote to CSCEC Ltd's Chairman Yi to request some 450 additional laborers, including from trades critical to achieving the TCO, and warned that if the labor does not

[16] At trial, the Defendant made much of the 200 number and whether this meant 200 new workers or 200 net new workers. As an initial note, the Court notes that Mr. Izmirlian credibly testified that this meant net taking into account (tr. 140:6-16; JX 462) and Mr. Yuan confirmed in his testimony that CCAB "promised to send ***additional*** 200 Chinese laborers" (tr. 927:1-5 [emphasis added]). But as discussed above the argument misses the mark. These were minimums. The point is that the parties reached an accord that the Defendants would provide sufficient labor for on time completion.

come the March 27 opening date "will not be achieved" and "the consequences will be disastrous" (JX 581).

119. Mr. Wu confirmed that he did not tell BMLP that CCA, Inc. and CCAB were urgently requesting additional labor, or share their view that the March 27 date was in danger (tr. 1185:10-1186:14; 1367:13-19).

120. As early as December 13, 2014, Mr. Manabat identified February 15, 2015 as a "critical target date[]" by which time the application for the TCO should have been submitted (JX 512).

121. In a January 24, 2015 exchange between Mr. Manabat and Mr. McAnarney, Mr. Manabat requested "completion dates for the fire system" (*i.e.*, work necessary for the TCO) from Mr. McAnarney (JX 589). Mr. McAnarney removed BML's representatives from the email chain before responding to Mr. Manabat and cc'ing Mr. Wu, saying "we are 4 weeks behind schedule" (*id*.). Mr. Wu – the CSCECB Board Member never brought this to BML's attention. This too was fraud (and a breach of the Best Interests Obligation).

122. On February 13, 2015, Mr. Dunlap wrote to Messrs. Wang and Wu reporting that there were "additional stopped works today regarding the inspections" (JX 649, at 2). In reply, Mr. Wang confirmed that CCAB had indeed caused work stoppages, but insisted to Mr. Dunlap that all "***TCO pre-inspections are still going well following the schedule***" (*id*., at 1 [emphasis added]). Trial revealed that this was just false. They had missed their

inspections and were not on schedule and knew then that March 27, 2015 was not on track. They told no one. This was fraud.

123. In fact, Mr. Wang wrote that CCAB had suspended handing over rooms to BML, and admitted that it had done so in order to resolve a "commercial issue," because it would be "hard for CCA to revisit" the issue after the rooms were handed over and BML had changed the locks (*id*.). Contradicting his testimony at trial, Mr. Wang admitted in his deposition testimony that suspending the handover of rooms might impact the March 27, 2015 opening date (tr. 1093:9-1094:24). Mr. Wang's attempt on the stand to muddy the waters between the March 27, 2015 opening date and the later date for completion of the balance of the work on the Project was simply not credible. These communications centered on BML's concern about the March 27, 2015 opening date. Mr. Wang misled Mr. Dunlap and BML about the progress of the work while at the same CCAB time caused work stoppages that by his own admission would slow that progress, and did so in order to secure payment on disputed claims.

124. As late as March 3, 2015, Mr. Wang continued to represent to Mr. Dunlap and BML that the TCO inspections were on track, and again tried to further shakedown BML to make payments on disputed claims (JX 694; tr. 322:21-323:4).

125. The stark contrast between CCAB's reassurances given to BML and the acknowledgements in its internal communications that the work was not on track and that the TCO and March 27, 2015 deadlines were in danger permit the rational inference that CCAB's misstatements

were knowingly and intentionally false when made, designed to induce reliance, did cause reliance and damages (*Cordaro v AdvantageCare Physicians, P.C.*, 208 AD3d 1090, 1093 [1st Dept 2022]).

E. CCAB Intended to Induce BMLP's Reliance, and BMLP did Reasonably Rely on CCAB's False Assurances

126. CCAB intended to induce BMLP's reliance on its false assurances, and BMLP reasonably relied on their repeated assurances that they were on track to meet the March 27, 2015 partial opening deadline (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020]).

127. As discussed above, the Defendants' representatives at the November 2014 Beijing Meeting committed to a firm date for the partial opening on March 27, 2015. CCAB understood that this was not a mere "best efforts" commitment to meet a "target" or "goal." And, they CCAB understood that BMLP would rely on its repeated reassurances about achieving the opening date. Mr. Izmirlian specifically warned the Defendants that an opening date, once announced, would be difficult to change. Yet, up until the denial of the TCO made opening on March 27, 2015 impossible, the Defendants gave no indication to BML or BMLP that this date was in jeopardy and in fact told them the opposite – that everything was on track. The Defendants knew that BMLP would rely on its false assurances. The Defendants always intended to use the $54 million extracted from BMLP to buy the Hilton, not to pay subcontractors.

128. CCAB and the CSCEBC Board Member made these commitments to achieve a *reduced* scale of work in the "presence of the three entities' [*i.e.*, BML, CCAB, and CEXIM] senior most representatives," and at a time when the Project was "very close" to completion (tr. 303:1-304:6). The entire point of this was to induce reliance.

129. And in reliance on these assurances, BMLP directed BML to announce a public opening date, and spend millions of dollars hiring and training a staff, marketing, stocking the casino, among many other expenses necessary to ready the Project to receive guests (tr. 148:14-21; 152:12-153:1; 311:5-312:3). On January 27, 2015, BML sent out contractually required 60-day notices to third-party retailers (JX 598; tr. 312:6-313:15).

130. BMLP made a further $15 million equity contribution in the Spring of 2015 in reliance on CCAB and the CSCECB Board Member's promises made in the November Meeting Minutes and Bahamas Meeting Minutes (tr. 155:8-156:13).

131. The Defendants argument that reliance was not reasonable based on the Hyatt refusing to accept reservations prior to June 1, 2015 (JX 527) or based on certain other third party vendors concern over the March opening date rang hallow at trial. No one from these companies came and testified as to what or why they were concerned about the March opening date or what quantum of information they had or did not have when they expressed concern. The Defendants introduced really no credible evidence that cast doubt as the reasonableness of reliance given their active concealment of critical information, failure to provide appropriate loaded CPM schedules and simply false assurances to the contrary in

response to specific questions asked by BML and its representatives. As such, BML provided that its reliance was entirely reasonable at trial beyond any doubt.

132. Trial revealed that BML did not have sufficient information to be on notice of problems in meeting the March 27th deadline. By way of example, when they asked about TCO signoffs, they were told everything was on track even when critical dates were missed. It was CCAB's responsibility to track progress on the Project and it was incumbent on the CSCECB Board Member to warn BMLP if deadlines were in danger of not being met (tr. 318:13-17, 331:24-332:1, 478:9-22, 531:20-532:13, 533:6-12, 1447:8-13, 1480:2-6, 1485:4-10; JX 649). This is what the Best Interests Obligation required, and this is what BML was entitled to rely on such that when they were not provided this information or a fully loaded CPM schedule, their reliance on the assurances that completion was on track was not only reasonable but also the only reasonable conclusion that they could come to under the circumstances.[17]

133. Thus, BMLP reasonably relied on CCAB's fraudulent misrepresentations.

VIII. The Breaches and Fraud Caused the Loss of BMLP's Entire $845 Million Investment

A. The Effects of Missing the Date Certain

134. BMLP proved that by clear and convincing evidence that the Defendants' multiple acts of fraud and breaches of the Best Interests Obligation, caused to the Project to miss the date

[17] For the avoidance of doubt, Mr. Collins credibly testified that MACE's presence on the property was insufficient to put BML on notice (tr. 500:25-501:20) and the Defendants' own expert on the subject of construction management, David Patillo, admitted that achieving the TCO and monitoring the work leading up to the TCO inspections was CCAB's responsibility (tr. 1602:17-1603:3). Thus, the facts about the Project's progress were "peculiarly within the knowledge of" CCAB and could not have been discovered merely through the "exercise of ordinary intelligence" (*Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]).

certain and the March 27, 2015 opening that the CSCECB Board Member authroized and BMLP's subsequent loss of its entire investment.

135. The CSCECB Board Member's breach of the Best Interests Obligation and CCAB and the CSCECB's fraud caused BMLP to miss the March 27, 2015 partial opening date. Mr. Collins testified that the absence of comprehensive, manpower-loaded schedule "caused the March 27th deadline to be missed" (tr. 476:9-20, 529:22-530:14, 531:1-13). He found the diversion of Mr. Manabat's efforts and the lack of updates and accurate tracking of the work to be a "vital" cause of the missed March opening (tr. 491:25-492:7). Mr. Kwasnowski, BML's Project Manager, testified that the primary cause of the missed deadline was "manpower" (DX 1059, at 114:14-20).

136. The Project could not be opened without the TCO. As discussed above, the work on the fire and life safety systems and acquiring the TCO were CCAB's responsibility, and REISS denied the TCO on March 24, 2015, because "the contractor" (*i.e.*, CCAB), failed to achieve "a number of typical project steps that ensure acceptable reduction of hazards" in relation to the fire and life safety systems (JX 736, at 1).

137. Mr. Izmirlian credibly testified that if he had known the Project would not open on March 27, 2015, BML would have conserved its cash and would not have entered into the liquidity crisis that ultimately led to its liquidation and the loss of BMLP's investment (tr. 171:17-172:13). In fact, and as discussed above, trial revealed that if the CSCECB Board Member

and CCAB had not committed to the March 27, 2015 opening, BML would not have agreed to the release of $54 million.

138. For completeness the Court notes, that at trial, the Defendants argued that BML's filing for Chapter 11 and Mr. Izmirlian's refusal to make a $175 million guarantee requested by CEXIM as a precondition to its lending more money to the Project were intervening acts that cut this chain of causation. The argument failed. As discussed above, the liquidity crisis was caused entirely by the Defendants. In addition, the credible evidence indicated that Mr. Izmirlian acted honorably and commercially reasonably and willing to work out a deal as long as the Defendants committed to a substantial completion date (as they had fraudulently done in November 2014). This they refused to do and again only tried to shakedown Mr. Izmirlian for more money before they would even discuss completion. Having done this, the failure of Mr. Izmirlian to sign an additional guaranty (beyond the $25 million letter of credit that he was additionally prepared to give) cannot be said to have been a missed opportunity to mitigate damages (tr. 431:11-19).

B. After the Deadline was Missed, the Defendants Actively Worked to Push BMLP Out of the Project

139. The CSCECB Board Member and CCAB effectively halted work after the March 27, 2015, deadline was missed, and the evidence showed that the Defendants refused to commit to a new, later opening date unless BMLP met its demands for payment, again purportedly so CCAB could pay its subcontractors, many of whom had stopped work (JX 757; JX 857; tr. 160:25-161:9, 170:20-171:1, 341:25-342:11, 1207:17-1209:6). But, as Mr. Wu admitted, had CCAB had an additional $54 million (*i.e.*, had it not diverted this sum to buy a

competing project), it could have paid these subcontractors and would not have felt the need to press BML for additional cash (JX 857; tr. 1204:9-14). In addition, and as discussed above (in breach of the Best Interests Obligation) Mr. Wu acknowledged in front of Bahamian Government officials that he as the CSCECB Board Member had CCAB purposefully delay the work (JX777; tr. 159:23-160:20).

140. During this time, BML continued to spend money on the Project, without any of the income expected from the partial opening (tr. 167:18-23, 847:1-6, 1207:17-1208:5; JX 757; JX 838).

141. BMLP informed the CSCECB Board Member of BML's liquidity problems (tr. 170:6-171:1; JX 842; JX 861). The CSCECB Board Member and CCAB, however, refused to work with Mr. Izmirlian on agreeing to a new date (tr. 170:20-171:1). As discussed above, the CSCECB Board Member and CCAB was aware that BML was spending millions of dollars in reliance on its (fraudulent) assurances.

142. The Defendants in fact preferred that BML be put into liquidation. In a set of meeting minutes documenting a September 28, 2015 meeting between CCAB and CEXIM, the two parties agreed that "complete liquidation is a fundamental solution to the project's problems" (JX 919, at 3). The minutes continue, "[t]he two parties agreed on the criteria for finding new strategic investors," including giving priority to Chinese companies (*id*.).

143. The Defendants actively worked to curry favor with the Bahamian Government and behind the back of BML.[18] Through the end of 2014 to the beginning of 2016, the CSCECB Board Member had CCAB pay the consulting company (**NOTARC**) belonging to Leslie Bethel, son of Sir Baltron Bethel (a senior advisor to the Bahamian Prime Minister) approximately $2.3 million, purportedly for consulting services related to business opportunities in Panama (JX 983, at 48; JX 897; PX 1054, at 87:23-88:16).

144. The record evidence establishes, at the very least, that (i) the Defendants relied on their business relationship with Leslie Bethel to gain access to Sir Baltron Bethel and by extension the Bahamian Government, and (ii) Sir Baltron Bethel and the Bahamian Government coordinated with the Defendants during the 4-way negotiations between BMLP, the Defendants, the Bahamian Government, and CEXIM, which ensued after deadline failure.

145. For example, while CCAB was in negotiations with the Bahamian Government over a Head Of Agreement in relation to the Hilton development, Mr. Liu forwarded an email communication from Sir Baltron Bethel so his son, Leslie Bethel (JX 808). Mr. Liu confirmed in his deposition testimony that he did so because he was "looking for help" from Leslie Bethel, and wanted Leslie Bethel to speak with his father, Sir Baltron Bethel, about proposed edits made by Sir Baltron Bethel to the Heads of Agreement (JX 1054, at 230:10-232:15). Leslie Bethel reassured Mr. Liu that "Sir B is one of CCA's biggest supporters" and promised to provide further help with the Defendants' interactions with the

[18] This too was a breach of the Best Interests Obligation.

Bahamian Government (JX 808). Mr. Liu reciprocated the sentiment, saying "I am sure about Sir Baltron and yourself as our best friend" (*id*.).

146. Later on, after the March 27, 2015 deadline had been missed and in advance of a planned negotiation meeting with BML, Sir Baltron Bethel asked Mr. Liu for advise as to the "[m]anner in which you would wish negotiations to proceed" (JX 875; JX 877). Later, in a July 22, 2015 email (apparently inadvertently copying representatives of BMLP) Sir Baltron Bethel proposed "[o]ne way of making up the equity shortfall of Baha Mar would be for the Bank to advance the idea of an additional equity partner with hotel and casino experience being brought in within say 90 days" (JX 892). He was careful to add that "[s]uch a suggestion should preferably come from Bank and not Gov ***to prevent Baha Mar taking the position Gov is trying to push Izmirlian out***" (*id*. [emphasis added]).

147. Mr. Liu, in an email to Messrs Wang, Wu, and Yuan, celebrated an article describing BML's Chapter 11 filing, and recommended that the Defendants "take advantage of the Bahamas government. If the government, the Export-Import Bank of China and CCA join forces, that can turn passive into active!" (JX 870). He added, "reclaiming the land and not recognizing the US Chapter 11 were fatal blows to Baha Mar" (*id*.). This email chain also references apparently bilateral meetings between the Defendants and the "Prime Minister's Senior Advisor" (*id*.). This email chain is a clear endorsement of the strategy of pushing BMLP and BML out of the Project, and contemplates having the Bahamian Government's assistance in doing so.

148. After the U.S. bankruptcy case was dismissed in favor of a liquidation proceeding filed by the Bahamian Government (JX 930; tr. 174:15-18), BMLP offered to "match the price" of any other offer to buy the Project's assets out of liquidation, but did not receive a response (tr. 176:12-17).

149. The Project was sold out of liquidation to Perfect Luck, Ltd., a subsidiary of CEXIM, and then subsequently bought by another Chinese entity, Chow Tai Fook (JX 947).

150. Thus, the failure to get the Project back on track after the March 27, 2015 deadline was missed was due to the Defendants' conduct.

151. The Defendants also argued that BML's actions caused the Project to miss the March 27, 2015 date, in particular alleging that (i) BML caused delays in providing design drawings because BML changed its architect in mid-2012, (ii) BML failed to complete parts of the Project within its scope of work, (iii) BML failed to get a Certificate of Suitability necessary to operate a casino, and (iv) BML caused the failure of the critical TCO inspection in March 2015 because the Bahamas Ministry of Public Works rejected BML's fire watch plan.

152. These arguments fail. First, CCAB's fraudulent misrepresentations in the November Meeting Minutes and afterward already took into account any delays allegedly caused by BML's design drawings.

153. Second, Mr. Dunlap explained in unrebutted testimony that the various items on his exceptions list, *e.g.*, the spa and nightclub, were not necessary to attain the TCO, and that some of the items on this list were usable by guests at least in part by March 27, 2015, and that some of the works mentioned on this list related to work to be done for *total* completion of the Project, as opposed to that work needed for the March 27, 2015 partial opening (JX 771; tr. 341:2-20). In any case, it was CCAB's responsibility as Construction Manager to identify barriers to completion of the Project (tr. 318:13-17, 331:24-332:1, 478:9-22, 1106:16-17, 1447:8-13, 1467:21-1468:1 1480:2-6, 1485:4-10, 1499:9-15; JX 649; JX 418).

154. Third, the Defendants did not establish that the Certificate of Suitability was needed prior to opening the casino to paying guests. As noted above, BML had acquired one of only two gaming licenses on the island of New Providence. The June 2015 letter from the Bahamian Government to Mr. Izmirlian notifying him that the Government required additional information from him before issuing the Certificate of Suitability states only that "[a]ll licences issued under this Act are contingent on the ongoing suitability for licensing of the persons to whom or to which they are issued" (JX 835). While this seems to indicate a Certificate of Suitability would eventually be required, the letter does not state the Bahamian Government would not allow gambling at Baha Mar prior to its issuance, *i.e.*, with the gaming license alone. Put another way, the Defendants' attempt to dispute causation by distinguishing between a partial opening and a *successful* partial opening is disingenuous and speculative.

155. Finally, BML suggested a fire watch *if* the required tests for the fire safety and smoke control systems (works that were CCAB's responsibility to complete) were not completed, and it was the decision of REISS, the Bahamian Government's contractor for TCO inspections, that decided not to permit a fire watch (JX 739, at 2; tr. 1479:19-1480:20). REISS denied the TCO because "the contractor" had not met the Bahamian Government's requirements for the fire control and life safety systems for the Project (JX 736).

156. Thus, BMLP proved by more than clear and convincing evidence that the CSCECB Board Members and CCAB's acts of fraud and the CSCECB Board Member's multiple material breaches of the Investors Agreement were the direct and proximate cause of the loss of BMLP's investment in BML. To wit, but for the Defendants' conduct, there would not have been a liquidity crises, a reasonable achievable date certain for opening would have been agreed upon with an appropriate plan in place to achieve that date, there would not have been massive misappropriation of funds, the Defendants would have maintained adequate work force for the Project and not slowed down the work or otherwise diverted critical project personnel and resources such that BML would not have lost its entire $845 million investment.

157. BML's filing for Chapter 11 bankruptcy in June of 2015 was a foreseeable and natural consequence of the Defendants' actions (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296 [1st Dept 2011]). And, as set forth above prior to and after the Chapter 11 filing, the Defendants refused to work BMLP to set a new date and actively worked to push BMLP out of the Project. Thus, the failure to get the Project back on track after the

March 27, 2015 deadline was missed was due to the Defendants' conduct, and did not break the chain of causation (*Hain v Jamison*, 28 NY3d 524, 529 [2016]).

IX. BMLP Was Damaged in the Amount of $845 Million, Plus Pre-Judgment Interest Running from May 2014

158. As discussed above, the parties and CEXIM agreed that BMLP's initial investment was $830 million and that subsequently BMLP made a $15 million investment such that its entire investment was $845 million. Indeed, CEXIM continued to permit draw downs on the Credit Facility into March 2015, still relying on the value of BMLP's equity contribution and not withstanding the debt-equity requirement (tr. 800:24-801:11; 802:10-13; JX 4; JX 25; JX 26).[19]

159. The loss of BMLP's investment was the natural and probable consequence of CSCECB's breach of the Investors Agreement and thus are not consequential damages (*GSCP VI Edgemarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC*, 2023 WL 6805946, at *5 [Sup Ct , NY County 2023]).

160. As discussed above, the CSCECB Board Member first breached the Investors Agreement in May of 2014. Accordingly, BMLP is entitled to pre-judgment interest from the date of that appointment (CPLR 5001, 5004).

[19] Thus, the argument that BML lacked equity in the project fails. Mr. Soward's testimony as to subsequent 2016 valuations is thus dated and irrelevant.

161. The loss of BMLP's investment of $845 million is also appropriate fraud damages, because this is what BMLP lost "because of the fraud" and an award in this amount, plus pre-judgment interest, is necessary to "restore the plaintiff to the position it occupied before the commission of the fraud" (*NMR E-Tailing LLC v Oak Inv. Partners*, 216 AD3d 572, 573 [1st Dept 2023]; CPLR 5001, 5004).

X. Piercing The Corporate Veil Is Appropriate, and BMLP May Enforce its Judgment Against all Defendants

A. New York Law Applies

162. New York law applies to the question of whether piercing the corporate veil is appropriate. When a party requesting that the Court take judicial notice of foreign law fails to provide the Court with "sufficient information" of the content of that foreign law, that party has effectively consented to the application of forum law (CPLR 4511[b]; *see, e.g.*, *N.B. v F.W.*, 62 Misc 3d 1012, 1018 [Sup Ct 2019]; *Paulicopter-Cia. v. Bank of Am., N.A.*, 182 A.D.3d 458, 460 [1st Dept 2020]; *MBI Int'l Holdings Inc. v. Barclays Bank PLC*, 151 AD3d 108, 116, [1st Dept 2017]; *Warin v. Wildenstein & Co.*, 297 AD2d 214, 215 [1st Dept 2002]).

163. CPLR 4511 requires that notice of intent to rely on foreign law be given "in the pleadings or prior to the presentation of any evidence at the trial." The Defendants provided information on the content of Bahamian law by affidavit only after the conclusion of trial (NYSCEF Doc. No. 748). This is insufficient, and the Defendants have thus consented to application of New York to the question of veil piercing (*Bank of New York v Nickel*, 14 AD3d 140, 148 [1st Dept 2004]).

B. Piercing the Corporate Veil is Appropriate Under New York Law

164. In order to pierce the corporate veil, a plaintiff must show that (i) the owners exercised complete domination of the corporation in respect to the transaction at issue, and (ii) such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]).

165. Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity (*Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st Dept 2009]; *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]).

166. At trial, BMLP adduced sufficient evidence to demonstrate that piercing the corporate veil between the three Defendants is appropriate.

167. At the relevant time, the three Defendant entities were all subsidiaries of one parent company, CSCEC Holding Company, Inc.

168. There was substantial overlap between the officers and directors of the three Defendant entities. Mr. Yuan was the President of CCA, Inc., the Chairman of CCAB, a Director of CSCECB, and the Chairman and President of CSCEC Holding Company, Inc. (tr. 894:8-14; tr. 883:20-884:4). He also signed documents as both the Chairman and President of CCAB and CSCECB (JX 66). Mr. Yuan testified that there was no officer senior to him of any of the Defendant entities (or of other CCA subsidiaries) in the entire hemisphere (tr. 886:10-14). He testified further that, as to each Defendant entity, Mr. Wu, Mr. Wang, and Mr. Liu all reported to him (tr. 885:13-17). Requests from CCAB to the parent company CSCEC Ltd. had to go through Mr. Yuan (tr. 948:6-9). Mr. Wu was an Executive Vice President of both CCA, Inc., and CCAB. Mr. Wang was a Vice President of both CCA, Inc., and CCAB. Mr. Liu was a Senior Vice President of both CCA, Inc., and CCAB. Mr. Wu testified that the decision to appoint him as the CSCECB Board Member of BML was Mr. Yuan's alone (tr. 1383:12-22).

169. The Defendants consistently held themselves out as working on behalf of CCA, Inc. or otherwise conflated and blurred beyond independent recognition their purportedly separate corporate existences.

170. Although CCAB was the Project Manager and General Contractor for the Project, the Defendants often used CCA, Inc. letterhead, emails, and signatures for Project related documents and communications (JX 597; JX 581; JX 624; JX 704; JX 718; JX 742; JX 559; JX 456). In one notable example, when BMLP asked CSCECB to contribute $15 million to cure an equity shortfall (and when it made its equity contribution), Mr. Wu

responded "on behalf of [CCA, Inc.] and in my capacity as the current representative of [CSCECB] to the Board of [BML]," and used CCA, Inc. letterhead (JX 688, JX 704). And, in that letter, Mr. Wu defends the conduct of CCAB and requests that BML make an additional $140 million payment to CCAB (JX 704). This obviously breached the Bests Interests Obligation but it also highlighted the manner in which Mr. Wu and others slipped from entity to entity as it suited their needs – regardless of whether the entity that they responded or made the request on behalf of was the right one or not.

171. Mr. Wu also testified that CCAB's decision to purchase the Hilton was not made by CCAB, but by the parent company, CSCEC Ltd., as an "investment from the parent company" (tr. 1164:22-1165:4). In addition, CCA, Inc. marketed the Hilton as a project of CCA, Inc.'s, not CCAB's (JX627.5; tr. 935:4-17; 936:15-21; 941:5-9). But CCA, Inc. did not buy it. CCAB did.

172. Mr. Yuan testified that, in effect, if Mr. Izmirlian needed any assistance from any of the three Defendants, he could speak with Mr. Yuan and Mr. Yuan would provide that assistance (tr. 965:9-15).

173. The Defendant entities also comingled their financial obligations. Most notably, in the Investors Agreement, CSCECB's $150 million investment in the Project took the form of a net off of future payments due to CCAB as Construction Manager (JX 25). The Defendants failed to show support for their counterargument that this $150 million net off was in fact an owner's contingency; never during the trial did the Defendants demonstrate that the $90

million cash portion of this $150 million purported investment by CSCECB was actually made.

174. For the entire time Mr. Wu worked on the Project, his salary was paid not by CCAB, but by yet another related entity, China Construction American of South Carolina (tr. 1146:3-1148:1).

175. Although CCAB retained Notarc (purportedly to do "consulting work" as to its Panama exploration, although it was completely unclear the connection Notarc had to anything other than Notarc's principal's father – Sir Baltron Bethel), Notarc was paid by yet another related entity, CCA Panama (JX 391; JX 933).

176. Thus, as set forth above, BMLP demonstrated that (i) the Defendants shared ownership, officers, and directors; (ii) the Defendants shared offices and addresses; (iii) CCA, Inc., acting through Mr. Yuan, controlled CCAB and CSCECB; (iv) commingled assets; (v) paid or guaranteed obligations of one another; (vi) were not treated as separate profit centers; (vii) did not deal with one another at arm's length; and (viii) otherwise conflated their corporate identities. CCA, Inc. (through its boss Mr. Yuan), in particular, dominated the other entities and, as discussed above, used that domination and commingling of assets and corporations to perpetrate a wrong on BMLP.[20] The Defendants operated as a single economic entity, and piercing the corporate veil is appropriate (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 93 AD3d 489, 490 [1st Dept 2012]).

[20] Indeed, and as discussed above, the Defendants view was that the Best Interests Obligation could be shed and ignored merely by purporting to act on behalf of a different company or in respect of a different project.

XI. The Defendants' Counterclaims for Breach of Sections 4.7 and 4.8(l) of the Investors Agreement are Dismissed

A. CSCECB Refused to Fund a Requested $15 Million Portion of an Equity Shortfall, Made a Purported "Books and Records" Request, and Received $700 Million to Complete the Project After BML's Liquidation

177. As discussed above, on March 9, 2015, Mr. Izmirlian requested that CSCECB make an additional $15 million equity contribution, so that BML could continue to draw down on the CEXIM credit facility and complete the Project (JX 688; tr. 155:8-156:19).

178. On March 13, 2015, Mr. Wu sent a letter to Thomas Dunlap (on the letterhead of CCA, Inc.), in which Mr. Wu (i) disputed and rejected BMLP's request that CSCECB fund its $15 million portion of the equity shortfall, as BMLP did (tr. 155:8-156:9), (ii) defends the conduct of CCAB (a company which Mr. Wu was purportedly *not* writing on behalf of), (iii) blames BML for construction delays, and (iv) requested that BML make an additional $140 million payment to CCAB (on disputed claims) (JX 704).

179. Mr. Wu concluded his letter by making the follow set of demands of BML and BMLP:

> In order to bring BML and BMP in full compliance with their obligations to CSCEC we request that:
> - BML and BMP immediately provide any and all agreements and communications concerning or affecting the posting of key money by the hotel operators.
> - BML and BMP provide a complete budgetary analysis as to initial and projected budgets so that CSCEC can evaluate whether to approve BML's current operations or to call for board action to properly establish construction and financial budgets;
> - BML immediately process all outstanding change orders and change order requests to establish and finalize the construction budget;

- BML and BMP provide a thorough analysis and assurances that they have the resources committed and available to pay all outstanding obligations, including an expected $140 million remaining to be paid to the CCAB

(JX 704, at 2).

180. As set forth above, Section 4.7 of the Investors Agreement provides that the CSCECB Board Member "shall be given reasonable access to the books, records, communications and other documents of the Project and the Company's staff for the purpose of monitoring the Project Works schedule, Project Works budget and similar matters in the interest of the Company" (JX 34 § 4.7).

181. At trial, Mr. Dunlap testified that he did not understand this letter to be a books and records request pursuant to Section 4.7 (tr. 327:13-328:11). The letter does not mention Section 4.7 or "books and records" (JX 704). Indeed, the letter calls for "agreements," "communications," and a "budgetary *analysis*" (JX 704, at 2 [emphasis added]).

182. CSCECB later responded to the request to fund the equity shortfall by proposing that its $15 million portion be netted off from payments that they alleged were due to CCAB including as to certain disputed change orders (JX 861; tr. 1210:9-1211:7). This proposal was never adopted.

183. The Defendants later received a $700 million contract payment to complete the Project after BML entered liquidation (JX 947).

B. The Defendants Failed to Show Causation or Damages for their Counterclaims

184. The Defendants' failed to prove their counterclaims or that they suffered any damages. As set forth above, they committed multiple material breaches of the Investors Agreement prior to their March 13, 2015 request for books and records and BML's declaration of bankruptcy. Thus, as an initial matter, it would appear that BML's performance of these obligations is excused (*McMahan v McMahan*, 164 AD3d 1486, 1487 [2d Dept 2018]).

185. More importantly, however, the Defendants failed to adduce credible evidence that any purported breach by BML either by failing to provide information or by filing bankruptcy or by virtue of any other action or inaction caused any damages or that they were not made whole when they received $700 million after BML entered liquidation (JX 947).

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

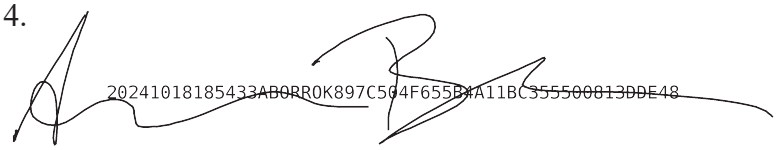
ORDERED and ADJUDGED that BMLP is entitled to judgment on its breach of contract claim; and it is further

ORDERED and ADJUDGED that BMLP is entitled to judgment on its fraud cause of action; and it is further

ORDERED and ADJUDGED that the Defendants' counterclaims are dismissed; and it is further

ORDERED and ADJUDGED that the Defendants are liable to BMLP in the amount of $845 million, with pre-judgment interest running from May 1, 2014.

ORDERED that BMLP submit judgment on notice in the amount of $845 million, with pre-judgment interest running from May 1, 2014.



DATE: 10/18/2024 **ANDREW BORROK, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify _____)**

EXHIBIT 2

First Dept. Decision on Motion to Dismiss Appeal

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

BML PROPERTIES LTD., Plaintiff, - against- CHINA CONSTRUCTION AMERICA INC., NOW KNOWN AS CCA CONSTRUCTION INC., CSCEC BAHAMAS, LTD.; CCA BAHAMAS LTD., and DOES 1-10, Defendants.	Index No. 657550/2017 **NOTICE OF ENTRY OF ORDER**

Please take notice that a Decision and Order, a copy of which is attached, was entered in the office of the Clerk of the Appellate Division First Judicial Department on July 2, 2019.

Dated: New York, N.Y.
July 2, 2019

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Richter, J.P., Tom, Gesmer, Kern, Moulton, JJ.

9800N BML Properties Ltd., Index 657550/17
Plaintiff-Respondent,

-against-

China Construction America Inc., etc., et al.,
Defendants-Appellants,

Does 1-10, et al.,
Defendants.

Squire Patton Boggs (US) LLP, New York (Mitchell R. Berger of counsel), for appellants.

Morrison Cohen LLP, New York (Malcolm I. Lewin of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about January 24, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel arbitration, or, alternatively, to dismiss the causes of action for fraud, unanimously affirmed, without costs.

The court correctly denied the branch of defendants' motion seeking to compel arbitration because plaintiff was not a party to the agreement containing the arbitration clause and the claims at issue were, by separate agreement, required to be litigated in New York (*see Matter of Cammarata v InfoExchange, Inc.*, 122 AD3d 459, 460 [1st Dept 2014]; *Oxbow Calcining USA Inc. v American*

Indus. Partners, 96 AD3d 646, 649-650 [1st Dept 2012]).

Plaintiff adequately stated a claim for fraud, by asserting justifiable reliance upon assurances, alleged to have been false when made, regarding the project's status, and the workforce and resources available to meet the deadline for completion of the project, which were collateral to, and not duplicative of plaintiff's claims for breach of contract (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 294 [1st Dept 2011]; *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2019

CLERK

EXHIBIT 3

First Dept. Decision on Motion to Stay Trial

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Present – Hon. Cynthia S. Kern, Justice Presiding,
Anil C. Singh
John R. Higgitt
Marsha D. Michael, Justices.

BML Properties Ltd., Plaintiff-Respondent,	Motion No.	**2024-00268**
	Index No.	657550/17
	Case No.	2023-03147
-against-		
China Construction America, Inc., now known as CCA Construction, Inc., CCA Construction, Inc., CSCEC Bahamas, Ltd., CCA Bahamas Ltd., Defendants-Appellants,		
Does 1 Through 10, Defendants.		

An appeal having been taken to this Court from an order of the Supreme Court, New York County, entered on or about May 25, 2023, and said appeal having been perfected,

And defendants-appellants having moved for a stay of all proceedings pending hearing and determination of the appeal, and for a calendar preference in which to hear and said appeal,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted only to the extent of directing the Clerk of this Court to maintain the perfected appeal on the calendar for the April 2024 Term of this Court; the motion is otherwise denied.

ENTERED: February 27, 2024

Susanna Molina Rojas
Clerk of the Court

EXHIBIT 4

First Dept. Decision on Motion for Summary Judgment Appeal

FILED: APPELLATE DIVISION - 1ST DEPT 04/25/2024 10:14 AM 2023-03147
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 04/25/2024

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Webber, J.P., Friedman, González, Rosado, Michael, JJ.

2134 BML PROPERTIES LTD.,
Plaintiff-Respondent,

Index No. 657550/17
Case No. 2023-3147

-against-

CHINA CONSTRUCTION AMERICA, INC. now known as CCA CONSTRUCTION, INC., et al.,
Defendants-Appellants,

DOES 1 THROUGH 10,
Defendants.

Debevoise & Plimpton LLP, New York (Maura Kathleen Monaghan of counsel), for appellants.

Susman Godfrey L.L.P., New York (Jacob W. Buchdahl of counsel), for respondent.

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about May 25, 2023, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's motion for summary judgment dismissing the counterclaims for breach of §§ 4.7, 4.8(g), and 4.8(l) of the Investors Agreement and the affirmative defenses that plaintiff's claims were derivative and released, unanimously modified, on the law, to grant defendants motion as to the unjust enrichment and implied covenant of good faith and fair dealing claims and request for lost profits damages, to deny plaintiff's motion as to the counterclaims for breach of IA §§ 4.7 and 4.8(g), and otherwise affirmed, without costs.

Plaintiff's claims are not derivative because they involve the breach of a duty independent of any duty owed to the company (*see generally Abrams v Donati*, 66 NY2d 951, 953 [1985]). Plaintiff was a party to the subject Investors Agreement and there is no indication that § 4.7's "best interests" obligation was owed to the company alone. Indeed, § 4.10 of the agreement specifically authorized plaintiff to bring suit individually. "[W]here an independent duty exists, a shareholder may sue on his own behalf even for the loss of value in his investment" (*Solutia Inc. v FMC Corp.*, 385 F Supp 2d 324, 332 [SD NY 2005]; *see also Lawrence Ins. Group v KPMG Peat Marwick*, 5 AD3d 918, 919 [3d Dept 2004]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to the disproportionate loss exception to the derivative claims rule.

The motion court properly denied summary judgment dismissing plaintiff's breach of contract claim. Issues of fact exist as to whether the representatives of defendant CSCEC Bahamas, Ltd. (CSCECB) failed to act in the best interests of the company by diverting resources to other projects and authorizing the removal of 700 workers from the project as it was nearing its deadline, despite concerns about meeting that deadline, which they did not communicate to the company. It does not matter that the focus of the Investors Agreement is not construction management, as the CSCECB representatives were required to act "at all times" in the company's best interests (*see Falle v Metalios*, 132 AD2d 518, 520 [2d Dept 1987]).

The motion court also properly denied summary judgment dismissing plaintiff's fraud claims. This Court has already decided that the fraud claims are not duplicative of the breach of contract claim (*BML Props. Ltd. v China Constr. Am. Inc.*, 174 AD3d 419, 419 [1st Dept 2019]). Fact development has not created a basis to modify this legal

determination. Issues of fact exist with respect to justifiable reliance. Evidence was presented that plaintiff, which had day-to-day responsibility for the company, relied on defendants' misrepresentations by taking reservations, preparing for opening, and refraining from seeking additional financing or labor. Evidence was also presented that, although plaintiff had some sense that defendants were not telling the truth, it lacked the ability to definitively verify their claims – especially in view of defendants' apparent concealment of information.

The breach of the implied covenant of good faith and fair dealing claim should, however, have been dismissed as duplicative of the breach of contract claim because "both claims arise from the same facts" and the conduct at issue clearly falls within the ambit of the contractual best efforts obligation (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Even if the unjust enrichment claim is not duplicative, it should also have been dismissed because plaintiff did not establish that it made the subject payments or otherwise had a legal entitlement to the funds used to make them (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *cf. 245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 606 [1st Dept 2024]).

The request for lost profits damages should also have been dismissed because the parties did not contemplate liability for lost profits at the time of contracting (*see generally Kenford Co. v County of Erie [Kenford I]*, 67 NY2d 257, 261 [1986]; *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). It is not enough that CSCECB expected that the project would make money, as that is not the same thing as expecting to be held liable for lost profits (*see Kenford Co. v County of Erie [Kenford II]*, 73 NY2d 312, 319-320 [1989]; *Awards.com*, 42 AD3d at

184; *Bersin Props., LLC v Nomura Credit & Capital, Inc.*, 74 Misc 3d 1209[A], 2022 NY Slip Op 50084[U], *16 [Sup Ct, NY County 2022]). Section 11.10 of the Investors Agreement expressly waived consequential damages – notwithstanding "[a]nything herein contained, and anything at law or in equity, to the contrary" (*see Kenford I*, 67 NY2d at 262; *Awards.com*, 42 AD3d at 183-184). The lost profits sought here are consequential in nature because they stem from collateral business arrangements – i.e., the loss of contracts with potential hotel guests (*see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805-808 [2014]). Section 11.10 is not unenforceable because "the misconduct for which it would grant immunity smacks of intentional wrongdoing" as "a party can intentionally breach a contract to advance a 'legitimate economic self-interest' and still rely on the contractual limitation provision" (*Electron Trading, LLC v Morgan Stanley & Co. LLC*, 157 AD3d 579, 580-581 [1st Dept 2018]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to causation and the capability of measuring damages with reasonable certainty.

Defendants' affirmative defense that plaintiff's claims are derivative was properly dismissed for the reasons stated above. Defendants' affirmative defense that plaintiff's claims were released was properly dismissed because plaintiff was not a party to the releases, which at any rate applied to claims under a separate contract.

CSCECB's counterclaim for breach of § 4.7 of the Investors Agreement should not have been dismissed. There is evidence in the record of at least one unanswered request for books and records, in a March 13, 2015 letter, which was reiterated in March 25 and May 6, 2015 letters. Although the company was not obliged to create new documents in response to this request, it should have had some existing documentation responsive

thereto. Issues of fact exist also exist as to whether the company's failure to provide this information caused CSCECB damages, as it could have taken steps to mitigate if it had evidence of financial mismanagement.

CSCECB's counterclaim for breach of § 4.8(g) of the Investors Agreement also should not have been dismissed. It is undisputed that plaintiff breached this provision by filing for reorganization without CSCECB's consent and issues of fact exist as to whether CSCECB was damaged as a result. CSCECB's counterclaim for breach of § 4.8(l) of the Investors Agreement was, however, properly dismissed, as there is no evidence that the subject loan damaged CSCECB in any way.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 25, 2024

Susanna Molina Rojas
Clerk of the Court

EXHIBIT 5

BMLP Opposition to CCA Motion in Limine

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

----------X

BML PROPERTIES LTD.,

Plaintiff,

v.

CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., and DOES 1-10,

Defendants.

----------X

CSCEC (BAHAMAS), LTD.,

Defendant/Counterclaim-Plaintiff,

v.

BML PROPERTIES LTD.,

Plaintiff/Counterclaim-Defendant.

----------X

Index No. 657550/2017

Andrew Borrok, J.S.C.
IAS Part 53

Motion Sequence No. 14

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS *IN LIMINE* TO EXCLUDE CERTAIN EVIDENCE AT TRIAL

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INTRODUCTION

Defendants CCA's[1] motions should be denied because they do not seek to preclude the admission of specific evidence from the upcoming bench trial and therefore raise issues inappropriate for motions *in limine*. NYSCEF 710 ("Mot."). Rather, they are thinly veiled motions for partial summary judgment based on new legal arguments that CCA's prior counsel could have raised at the proper time. Commercial Division Rule 27 forbids this ("Motions in limine should not be used as vehicles for summary judgment motions."), as does First Department precedent, *Downtown Art Co. v. Zimmerman*, 232 A.D.2d 270, 270 (1st Dept 1996) ("[M]otion in *limine* was an inappropriate device to obtain relief in the nature of partial summary judgment.").

CCA's Motion I's request to preclude "evidence of damages" is an attempt to bar BMLP's out-of-pocket damages model as a matter of law. Similarly, Motion II's request to preclude "parol evidence" is an untimely demand to reinterpret the contract to hold, as a matter of law, that it does not apply to anyone other than certain individuals at certain specified times. CCA could have presented these new and misguided legal theories over a year ago. The Court should deny the motions as untimely and successive summary judgment motions. *McLaughlin v. Arch Ins. Co.*, 195 A.D.3d 519, 520 (1st Dept 2021) ("Supreme Court correctly denied Arch Specialty's motion in limine . . . as an untimely dispositive motion and because Arch Specialty had failed to make those arguments in its motion for summary judgment.") (citation omitted).

In addition, CCA's motions lack merit. Motion I is premised on the false notion that, as a matter of law, BMLP is not entitled to recover the financial contributions it lost as a direct consequence of CCA's fraud and breach of contract. With respect to BMLP's fraud damages, CCA

[1] Defendants CCA Construction Inc., CSCEC Bahamas, Ltd., and CCA Bahamas Ltd. are corporate affiliates, and for reasons explained below and that will be shown at trial, this brief refers to them collectively as "CCA."

relies on cases assuming BMLP is seeking damages based on a possible benefit derived from its investment and what it might have gained absent CCA's fraud. Mot. 14-15. In fact, BMLP is seeking the return of the cash value of its "entire investment" that it "lost because of the fraud"—the standard measure of fraud damages. *NMR E-Tailing LLC v. Oak Inv. Partners*, 216 A.D.3d 572, 573 (1st Dept 2023) (citation omitted). CCA's alternative argument about costs incurred by BMLP (versus BML) is another attempt to relitigate the derivative/direct issue CCA has now lost four times.

Motion I also mischaracterizes BMLP's out-of-pocket damages model as seeking to recover the value of BMLP's *shares* in BML, and then argues, on the basis of this mischaracterization, that these losses (i) are consequential damages, and thus prohibited; and (ii) must be measured at the time of the breach. But BMLP's out-of-pocket damages comprise the return of the value of the assets BMLP contributed to the Baha Mar Project—an appraised value that the parties agreed to ***in their contract***. These are quintessential *direct*, not consequential damages: BMLP seeks the return of what it initially contributed and then lost as a direct result of CCA's breach, not lost profits or collateral business opportunities. CCA is trying to improperly re-use its *lost profits* damages arguments—which the First Department accepted—against BMLP's distinct *out-of-pocket* damages, which the First Department did not address. *See BML Properties Ltd. v. China Constr. Am., Inc.*, 226 A.D.3d 582, 584 (1st Dept 2024) ("The lost profits sought here are consequential in nature . . . ."). CCA's argument that BMLP's loss should be measured by share value after CCA had destroyed the company misses the point entirely. BMLP's damages model seeks compensation not for what it stood to gain, but for what BMLP lost: its total contribution to the Project, all of which it lost as a direct consequence of CCA's fraud and breaches.

Motion II rests on the incorrect notion that BMLP will introduce "parol evidence"—which CCA does not identify or describe anywhere in its motion—to apply the "best interests" obligation of Section 4.7 beyond Ning Yuan, CCA's Chairman, and Tiger Wu, CCA's Executive Vice President, each of whom served as Project board members. *See* Ex. 1 § 4.7. CCA is wrong, and BML will not rely on any parol evidence. But under the plain language of the agreement, the misconduct of Yuan's and Wu's CCA subordinates is certainly relevant and admissible. Yuan and Wu controlled the entire Project on the CCA side, directing and controlling the misdeeds of their Project subordinates and acting through the interrelated CCA companies to harm BML and BMLP for CCA's benefit. Given their positions, their duty to act in BML's "best interests" obviously included a duty not to direct their subordinates to harm BML, a duty to stop and/or remediate that harm, and/or a duty to at least reveal the ongoing harm. CCA's latest attempt to isolate Yuan and Wu from the conduct of CCA's other officers and employees is simply a re-packaging of CCA's failed "different hats" argument at summary judgment. NYSCEF 649 at 15. Moreover, even putting aside Yuan and Wu's "best interests" obligation as "China State Board Member[s]," CCA's secondment of Wu, David Wang, and Daniel Liu to Bahamian Project "management positions" required them to act in BML's "best interests" as "China State Representatives." Ex. 1 § 4.7. CCA's factual arguments to the contrary are best resolved at trial.

I. BACKGROUND

This case is about CCA's massive fraud and breached promises to its former partner, BMLP. CCA was the general contractor and construction manager, as well as BMLP's purported "coinvestor," for the multi-billion-dollar Baha Mar resort and casino in the Bahamas (the "Project"). BMLP was the majority shareholder and day-to-day manager of the Project. CCA promised BMLP that its representatives managing the Project would "at all times act in the best interests" of the Project. Ex. 1 § 4.7. Instead, CCA's representatives withheld material information

from and made material misrepresentations to BMLP, and acted to deliberately harm BML and BMLP in order to advantage CCA. *See generally* NYSCEF 649 at 5-6.

BMLP seeks $845 million in out-of-pocket damages from CCA, comprising: (1) $745 million in tangible and intangible assets including land, leased facilities, improvements, personal property, contracts, approvals, hotel assets, intellectual property, personal property, and casino operations and a license invested in the Project in 2010; (2) $85 million in cash invested in the Project in 2010; and (3) $15 million contributed to the Project in 2015. Ex. 2 (Bones Report) ¶ 5. Although CCA now (and for the first time) attacks BMLP's expert's calculation of these damages as "conclusory," Mot. 6, the ***parties contemporaneously agreed on the $745 million valuation*** for BMLP's non-cash contribution, which was confirmed by an appraisal and memorialized in ***numerous signed writings***. *See* Ex. 3 § 4.6; Ex. 4 § 1.1 ("Appraised Value"), § 17.13; Ex. 5; Ex. 1 § 1.1(a).

CCA's contrary factual "background," Mot. 3-6, 17-19, is largely irrelevant to its Motions. But, because it is rife with unsupported (and in some instances false) assertions not based in the record, BMLP responds to certain examples below:

- CCA asserts, without citation, that CCA America was a "remote affiliate" of CCA Bahamas and CSCECB and "not involved in the Project." Mot. 3. It similarly claims that "CCA Bahamas and CCA America are not parties to the [Investors Agreement]." *Id.* at 5; *see also id.* at 17. But as the Court will see at trial—supported by an ***unrebutted*** expert accounting opinion—these entities all operated as a unified company with no regard for the corporate form, sharing executives, employees, funds, books and records, contact information, and administrative and legal functions. Ex. 6 ¶¶ 92-106. CCA cites no evidence to the contrary.

- CCA claims that "CSCECB invested $150 million of new cash into the Project in exchange for preferred non-voting shares in BML." Mot. 3. But no CCA entity invested "new cash." The only "investment" made was through a *credit* against future payments under the construction contract. Ex. 3 at Art. 3.

- CCA suggests the "deemed value" of BMLP's $745 million contribution is somehow incorrect, for unexplained and unsupported reasons. Mot. 4 n.1. But CCA fails to tell the

Court that CCA agreed to this appraised valuation in signed writings. Ex. 3 § 4.6; Ex. 4 §1.1.

- CCA claims that by March 2015, "the Project was subject to over $1.98 billion in debt with significant capitalized interest," Mot. 4, relying only on a disputed RLB report from months earlier. *See* Ex. 6 (Pocalyko Report) ¶¶ 55-77 & Exhibit 1. But even the cited RLB report acknowledges its "uncertainty" as to its conclusions and that the debt cited could "not be[] an accurate reflection of the unexpended sums of the Credit Facility." NYSCEF 697 ¶ 1.1.5.

- CCA asserts, without any evidentiary support whatsoever in the record, that it finished the Project "at only 68 million" over budget, Mot. 5, failing to acknowledge the unrebutted evidence that CCA overbilled BMLP and was overfunded throughout the Project, Ex. 6 ¶¶ 55-73, 78-91, or that it was paid an additional $700 million to complete the Project, Ex. 13 (Wu Tr.) at 350:12-24.

- CCA misrepresents BMLP's case and the parties' prior agreement, asserting that BMLP only brings claims "based on events that occurred between November 2014 and March 2015." Mot. 5 & n.2. But BMLP never agreed to limit the timeframe of its claims, and indeed explicitly "reserve[d] the right to rely on any factual allegation in the Complaint, including those allegations in the withdrawn counts." NYSCEF No. 415 ¶ 2. BMLP has consistently pointed to conduct post-dating March 2015 as evidence of CCA's breach. *E.g.*, NYSCEF 577 at 7 ("CCA paid Notarc millions to influence the Bahamian government, including to help push BMLP out of the Project."); *id.* at 5.

II. BOTH MOTIONS "*IN LIMINE*" SHOULD BE DENIED AS UNTIMELY AND IMPROPER MOTIONS FOR SUMMARY JUDGMENT

The Court need not even reach the merits of CCA's purported motions *in limine*, and should deny them as improper, untimely summary judgment motions. The motions do not even bother to identify what evidence they seek to preclude or why that evidence would be "inadmissible, immaterial, or prejudicial." *State v. Metz*, 241 A.D.2d 192, 198 (1st Dept 1998); *see Jackson v. 84 Lumber Co.*, 2016 WL 11742055, at *2 (N.Y. Sup. Ct. Oct. 17, 2016) (finding "motion to preclude evidence of recklessness and punitive damages" was "a thinly veiled summary judgment motion on the sufficiency rather than admissibility of evidence"); *Cohen v. Fairbank Reconstruction Corp.*, 2012 WL 4472567 (N.Y. Sup. Ct. Sep. 24, 2012) ("The arguments raised are simply not

evidentiary issues. Instead, they effectively seek summary judgment."). Instead, CCA's motions seek broad rulings on legal issues that CCA could have, but failed, to raise on summary judgment.

Motion I effectively seeks summary judgment dismissing BMLP's sole remaining damages claim. *See, e.g.*, Mot. 1 ("BMLP should be precluded from presenting evidence and testimony concerning its purported 'out-of-pocket' damages"); *id.* at 2 (arguing that BMLP "cannot recover" its damages "as a matter of black-letter New York law"); *id.* ("Plaintiff has no legally cognizable basis on which to claim to have been damaged ... "). CCA's motion is an inappropriate device to obtain summary judgment as to damages. *See, e.g., Desantis v. Desantis*, 225 A.D.3d 839, 840 (2d Dept 2024) (motion seeking "in effect, to set the minimum value of the LLC at $2,450,000 and preclude any evidence of a lower value, while styled as a motion in limine, was the functional equivalent of an untimely motion for partial summary judgment determining that the value of the LLC was at least $2,450,000"); *Charter Sch. for Applied Techs. v. Bd. of Educ. for City Sch. Dist. of City of Buffalo*, 105 A.D.3d 1460, 1464 (4th Dept 2013) ("Defendant's motion to preclude plaintiffs from introducing any evidence with respect to damages was the functional equivalent of a motion for partial summary judgment.") (citation omitted); *Nelson Gerard and Buckskill Farm, LLC v. Cahill*, 2012 WL 595729 (N.Y. Sup. Ct. Feb. 03, 2012) (same, because "if the requested relief is granted, Cahill will be precluded at trial from presenting relevant evidence in defense to plaintiffs' action and in support of her counterclaims").

Motion II effectively seeks summary judgment on the legal interpretation of Section 4.7 of the Investors Agreement, arguing it should be unduly limited. Mot. 20 ("Section 4.7 is unambiguous"); *see In re Singer*, 99 A.D.3d 802, 803 (2d Dept 2012) ("the record reveals that the entire motion actually was one for summary judgment on the issues of self-dealing and appreciation damages"); *Nelson*, 2012 WL 595729 (rejecting motion *in limine* "seek[ing] a pretrial

determination that Exhibit C of the operating agreement is irrelevant to determinations as to the respective values of Gerard's and Hymans's interests").

New York practice rules require dispositive issues to be timely resolved by summary judgment motion, and not by eve-of-trial motions *in limine*, so that parties can develop their arguments and evidence as necessary in advance of trial. *See* Sadek v. Wesley, 117 A.D.3d 193, 203 (1st Dept 2014) (finding "the means by which" defendants' "dispositive" motions "were presented to the court reflects an intentional avoidance of the strictures of the CPLR's notice provisions for motions" and "something akin to an ambush"), *aff'd*, 27 N.Y.3d 982 (2016); *Arnold v. A.O. Smith Water Products Co.*, 2016 WL 7337211, at *1 (N.Y. Sup. Ct. Nov. 14, 2016) ("New York Courts limit the use of motions *in limine* when they decide dispositive issues, as if on a summary judgment, but are not accompanied by a motion for summary judgment"); Comm. Div. R. 27. New York courts consistently reject such improper devices for belated summary judgment. *Zimmerman*, 232 A.D.2d at 270; *Hefti v. The Brand Union Co., Inc.*, 2014 WL 2990389, at *1 (N.Y. Sup. Ct. July 02, 2014) ("[T]he use of a purported motion *in limine* to obtain relief in the nature of summary judgment . . . is proscribed in the First Department."). CCA does not explain why it failed to make these arguments in its summary judgment motion. *See Jones ex rel. Cline v. 636 Holding Corp.*, 73 A.D.3d 409, 409 (1st Dept 2010) ("Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification."); *Singer*, 99 A.D.3d at 803 (movant's failure "to offer any excuse for their failure to timely move for summary judgment ... warranted the denial of the motion in its entirety without consideration of the merits") (citations omitted); *Avail Shipping Inc. v. Shero Shipping, LLC*, 2015 WL 1158556, at *4 (N.Y. Sup. Ct. Mar. 12, 2015) ("When DHL moved for summary

judgment, it had received Hoffman's expert report but chose not to seek summary judgment concerning the measure of Plaintiffs' damages.").

The Court can and should deny CCA's motions "*in limine*" without reaching the merits. *See* *McLaughlin*, 195 A.D.3d at 520 (affirming denial of motion *in limine* "as an untimely dispositive motion"); *Casalini v. Alexander Wolf & Son*, 157 A.D.3d 528, 530 (1st Dept 2018) (reversing grant of motion *in limine* because it was actually "one for summary judgment" and "was untimely").

III. THE COURT SHOULD DENY MOTION I

Motion I seeks to preclude BMLP from presenting evidence regarding the vast majority—$830 million—of its out-of-pocket damages, its only remaining damages model following the First Department's recent decision. CCA offers numerous legal (rather than evidentiary) arguments that BMLP's damages are (1) consequential, (2) not measured correctly, and/or (3) irrelevant to fraud. Mot. 1-16. Putting aside their untimeliness, these arguments fail because they incorrectly assume that BMLP's requested damages are for lost profits—that is, a decline in the value of BMLP's equity in BML—rather than the return of BMLP's out-of-pocket investment in the Project. But the First Department dismissed BMLP's entirely separate lost profits model based on the decline in value of BMLP's equity; CCA's efforts to conflate the two miss the mark. CCA's remaining arguments attacking causation, consideration, and reliance highlight factual disputes which must be resolved at trial.

i. BMLP's $830 million in acknowledged, out-of-pocket costs is appropriate fraud damages.

Because CCA defrauded BMLP in 2014 and 2015, CCA now argues that BMLP's damages for fraud must be limited to costs it incurred during that time. Mot. 14-15. That is not the law. Fraud "[d]amages are calculated to compensate plaintiffs for what they lost because of the fraud."

NMR, 216 A.D.3d at 573 (citation omitted); 60A N.Y. Jur. 2d Fraud and Deceit § 176 (same). In other words, fraud damages "restore the plaintiff to the position it occupied before the commission of the fraud." *NMR*, 216 A.D.3d at 573. BMLP's out-of-pocket damages satisfy this standard: but-for CCA's fraud, BMLP would not have lost the $845 million it invested in the Project. *See id.* at 572-73 (affirming judgment entered after damages inquest where NMR "lost its entire investment when Ahmed's fraud was unearthed, causing the company to file for bankruptcy"); *Chan v. Havemeyer Holdings LLC*, 223 A.D.3d 403, 405 (1st Dept 2024) (finding sufficient allegations that Plaintiff sought "the return of their lost investment").

None of CCA's cited cases say otherwise. Instead, they stand solely for the unremarkable proposition that lost profits are unavailable for fraud. *See Kregos v. Associated Press*, 3 F.3d 656, 665 (2d Cir. 1993) ("New York law awards only 'out-of-pocket' expenses in fraud cases"); *Diamond v. Calaway*, 2019 WL 8955300, at *12 (S.D.N.Y. Oct. 25, 2019) (declining to award plaintiff consequential damages for the loss of separate investment in Nima because it represented "what he might have gained and not what he lost because of the fraud"), *adopted*, 2020 WL 1228625 (S.D.N.Y. Mar. 13, 2020). But BMLP's prior investment is not profits, and BMLP does not seek damages for "what [it] might have gained" had CCA not defrauded it. These cases are irrelevant.[2]

CCA also argues that BMLP "should not be permitted to present evidence or argument regarding the amounts that BML (***as opposed to BMLP***) spent in preparation for opening the resort on March 27, 2015." Mot. 15 (emphasis added). This argument is a veiled attempt to revive (yet

[2] CCA's "holder claims" cases, Mot. 15 n.7, are inapplicable because BMLP is "not seek[ing] recovery for the loss of the value that might have been realized in a hypothetical market exchange that never took place, but instead assert[s] an out-of-pocket loss, specifically, the loss of [its] investment." *Bullen v. CohnReznick, LLP*, 194 A.D.3d 637, 639 (1st Dept 2021) (citation omitted).

again) CCA's argument that BMLP's harm is derivative of BML's. The First Department's decision expressly foreclosed this argument. *BML Properties Ltd.*, 226 A.D.3d at 583 ("Plaintiff's claims are not derivative . . .").

In any event, BMLP is not seeking to recover BML's expenses as damages for its fraud claim, but rather is pointing to its direction of BML as evidence of ***reliance***, *see* *BML Properties Ltd.*, 226 A.D.3d at 583 ("Evidence was presented that plaintiff, which had day-to-day responsibility for the company, relied on defendants' misrepresentations by ... preparing for opening ...."), so CCA's cited cases are inapposite. *See* *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 71–72 (1st Dept 1990) ("back taxes"); *Clearview Concrete Prod. Corp. v. S. Charles Gherardi, Inc.*, 88 A.D.2d 461, 468 (2d Dept 1982) ("'out of pocket' damages have not been proven").

ii. BMLP's $830 million in acknowledged, out-of-pocket costs is relevant to contract damages.

1. BMLP's out-of-pocket costs are direct, not consequential.

CCA posits that BMLP's $830 million out-of-pocket loss represents "a loss in the value of equity," that loss is consequential, and that consequential damages are barred by the Investors Agreement. Mot. 7-12. CCA is wrong at every step.

First, BMLP is not seeking "a loss in the value of [its] equity" (i.e., its shares in BML). BMLP's shares were stripped from BMLP during the liquidation of BML, after CCA conspired to force BMLP out of the Project. *See* Ex. 7 (suggesting "Izmirlian out" but it should "come from Bank and not Gov"); Ex. 8, 9 (coordinating separate meetings with Bahamian officials); Ex. 10 (suggesting "join[ing] forces" to push out BMLP); Ex. 11 at DEFS000870592 ¶¶ 1-2 (encouraging lender to "maintain a tough attitude" with BMLP, "appoint a receiver to take over the project as soon as possible" to "pay the arrears of the project, and ***protect the interests of China***

Construction's USD $150 million preferred stock") (emphasis added). If any damages in this case were based on the value of BMLP's shares in BML, it was BMLP's now-dismissed lost profits claim. As CCA argued to the First Department, BMLP's formerly-held shares would have eventually generated profits, as profits were "generated over time by the Company and then distributed to BMLP." Ex. 12 (CCA First Dept Br.) at 48. CCA cannot now argue the same as to BMLP's out-of-pocket damages, which are not based on the lost value of its shares.

BMLP only seeks the return of its out-of-pocket investment in BML—nothing more. Courts frequently award the return of an investment for breach of contract. *See, e.g.*, *Remora Cap. S.A. v. Dukan*, 175 A.D.3d 1219, 1220 (1st Dept 2019) ("Plaintiffs adequately pleaded damages, alleging that they lost the funds they contributed . . . they have nothing to show for their capital contribution."); *GSCP VI Edgemarc Holdings, L.L.C. v. ETC Northeast Pipeline, LLC*, 2023 WL 6805946, at *5 (N.Y. Sup. Ct. Oct. 14, 2023) (denying summary judgment on argument that Plaintiff's claim for return of "its [lost] investment due to the alleged breach" was consequential); *Gerritsen v. Glob Trading, Inc.*, 2009 WL 262057, at *10 (E.D.N.Y. Feb. 4, 2009) ("BWG is entitled to recover contract damages consisting of all capital invested in GTI, plus interest") (applying New York law).[3]

Second, however they are labeled, BMLP's out-of-pocket damages are direct and not consequential. As CCA's cited authority confirms, direct damages "are the natural and probable consequence of the breach." Mot. 8, *citing* *Brooklyn Navy Yard Dev., Corp. v. TDX Const. Corp.*, 2019 WL 5595156, at *6 (N.Y. Sup. Ct. Oct. 30, 2019) (Borrok, J.) (citation omitted); *see also* 24

[3] CCA's case is inapposite because the plaintiff sought damages for "decline in the value of RCTV's assets," not an out-of-pocket loss. *See* *DirecTV Latin Am., LLC v. RCTV Int'l Corp.*, 38 Misc. 3d 1212(A), 2013 WL 203397, at *5 (N.Y. Sup. Ct. 2013), *aff'd.*, 115 A.D.3d 539 (1st Dept 2014).

Williston on Contracts § 64:16 (4th ed. 2024) (describing direct damages as "damages that would follow any breach of similar character in the usual course of events" or "'loss of bargain' damages"). Here, CCA breached the Investors Agreement by deliberately harming BML, which the contract itself acknowledges was "formed for the sole purpose of acquiring, developing, constructing, owning and operating the Project and pursuing activities related thereto." Ex. 1 at 1. When CCA breached by sabotaging the Project and BMLP's investment in it, the "natural and probable consequences" were that BMLP lost its entire investment. Particularly now that lost profits are out of the case, returning BMLP's out-of-pocket investment is the only way to put BMLP "in the same position that it would be in had [CCA] performed." *Latham Land I, LLC v. TGI Friday's, Inc.*, 96 A.D.3d 1327, 1331 (3d Dept 2012).[4] Under any formulation, BMLP's damages are direct.

CCA does not cite a single case supporting its consequential damages argument. CCA cites *ERC*, *see* Mot. 8-10, but that case supports BMLP because the First Department and the Supreme Court *upheld* a $23 million "direct damages claim" by ERC consisting of amounts "ERC itself funded" to develop a sports complex. *ERC 16W Ltd. P'ship v. Xanadu Mezz Holdings LLC*, 2015 WL 247404, at *1 (N.Y. Sup. Ct. Jan. 14, 2015) (citing *ERC 16W Ltd. Partnership v. Xanadu Mezz Holdings LLC*, 95 A.D.3d 498 (1st Dept 2012)). In the later decision cited by CCA, the court merely considered whether ERC's claim for an *additional* $1.3 billion in damages for its investment in the sports complex project—which the parties did not dispute were consequential—were recoverable against XMH, one of several lenders that had only contracted for "repayment of

[4] Alternatively, the $830 million is available as reliance damages. *St. Lawrence Factory Stores v. Ogdensburg Bridge & Port Auth.*, 13 N.Y.3d 204, 208 (2009); 24 Williston on Contracts § 64:4 (4th ed. 2024) (reliance damages include "expenditures incurred by the nonbreacher in preparing to perform or in performance").

the loan with interest," for its default on the $23 million loan obligation. *ERC*, 2015 WL 247404, at *1, *7-8. Here, the contract permits BMLP "to recover damages against China State for any losses ... resulting from" CCA's breach and "[a]ny other remedies available ... under law or equity," Ex. 1 § 4.10(b)(iv), (v),[5] and BMLP does not seek to hold any lender (let alone one of many) responsible for the loss of its equity investment. Nor are CCA's other cases about whether equity losses are direct damages for breach of ***loan agreements*** on point, given that BMLP's loss of its investment directly flowed from CCA's breach of their agreement expressly formulated to protect that investment. *See* *Five Star Dev. Resort Communities, LLC v. iStar RC Paradise Valley, LLC*, 2012 WL 13069913, at *5 (S.D.N.Y. Dec. 10, 2012) (finding "lost equity" did not directly flow from "breach of a ***loan agreement***") (emphasis added);[6] *Diamond*, 2019 WL 8955300, at *8, *11 (finding "lost investment" in separate company, sought *in addition* to direct damages for loan principal, was "too attenuated" to "be recoverable as consequential damages" for breach of loan agreement).

CCA also resorts to a facial (and unsupported) attack on BMLP's damages case as a "long causal chain" that is "obviously consequential." Mot. 10-12. This ***attack on causation*** does not support CCA's arguments about consequential damages, nor is it appropriate at the *limine* stage. *See* *GSCP*, 2023 WL 6805946, at *5 ("Defendants' arguments with respect to alternative *causes* of the damage (*e.g.,* the rain, fire, regulatory shut down, and EdgeMarc's bankruptcy) go to the

[5] For that reason, CCA's strained attempt to portray its "promised performance" under the contract as limited to "contribut[ing] $150 million to BML," Mot. 11, falls flat. CCA's "promised performance" was to protect BMLP's investment through its representatives' acting "at all times in the best interests of the Company," Ex. 1 § 4.7, and CCA expressly acknowledged it would be liable for "any losses" attributable to such a breach, *id.* § 4.10(b)(iv).

[6] The *Five Star* court also excluded plaintiff's damages evidence because, unlike here, it was not timely disclosed. 2012 WL 13069913, at *4.

question of proximate causation, not whether the damages are 'direct' versus 'special.'").[7] Causation is a highly-disputed, fact-bound issue that must be decided at trial. *Id.* ("Here, it is sharply disputed whether plaintiff lost its investment due to the alleged breach ... [or] 'supervening' factors. ... Those disputes cannot be resolved by the Court as a matter of law on summary judgment."); *Sanchez v. Finke*, 288 A.D.2d 122, 123 (1st Dept 2001) (finding "material factual issues on the issue of causation" are "inappropriate for resolution on summary judgment"); *see also Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 1992 WL 121726, at *28 (N.D.N.Y. May 23, 1992) ("Generally, whether damages are direct or consequential is an issue of fact which must be reserved for trial.") (applying New York law).

In any event, BMLP need not prove that its "damages resulted *solely* from [CCA's] breach of contract, to the exclusion of all other factors," as long as the breach "contributed in a substantial measure to its damages." *Haven Assocs. v. Donro Realty Corp.*, 121 A.D.2d 504, 508 (2d Dept 1986). There is more than enough evidence in the record to satisfy that burden: CCA caused the liquidity crisis that made bankruptcy necessary with its fraud and misconduct, and then finagled the bankruptcy into a Bahamian liquidation where BMLP lost everything. *See* NYSCEF 480 at Background § I(C), (D) and NYSCEF 577 at Background § III (collecting evidence). As this Court previously explained, Defendants "were successful" in their efforts to "remove BMLP from the Project so that they could protect their own investments" to "the detriment" of BMLP, which experienced "total loss of its investment." NYSCEF 649 at 6-7.

[7] If there were any doubt that CCA's argument is really about causation, CCA relies on a decision by this Court dismissing a fraud claim because the misrepresentation was "simply not connected to the harm alleged." *One River Run Acquisition, LLC v. Milde*, 2024 WL 420085, at *5 (N.Y. Sup. Ct. Feb. 05, 2024) (Borrok, J.). The case says nothing about consequential damages.

Finally, even if BMLP's out-of-pocket damages could somehow be construed as "consequential" (they cannot), they are not the type of consequential damages that the First Department held were waived by the Investors Agreement: "lost profits" that "stem from collateral business arrangements—i.e., the loss of contracts with potential hotel guests." *BML Properties Ltd.*, 226 A.D.3d at 584. BMLP's equity investment in not tied to any business arrangement other than the one it made with CCA to invest in BML.

2. BMLP is entitled to the return of its investment that CCA wrongfully wrested away.

CCA next argues that BMLP cannot recover its out-of-pocket investment damages because the value of BMLP's loss should be measured not by the amount BMLP actually contributed to the Project, but based on the value of BMLP's equity in the Project after CCA breached and sent the Project into bankruptcy. Mot. 12-13. That argument makes no sense. In any event, as CCA admits, its cited cases all involve claims for "the loss or diminution in value of an asset." *Id.* at 12. These cases do not apply here, because BMLP is not seeking damages for the diminution in value of its equity in BML, but rather for its total loss caused directly by CCA's malfeasance. BMLP's out-of-pocket investment—what it actually lost, and the amount the parties agreed upon in their contract—never changed.

CCA's cases are not on point. In *Schonfeld v. Hilliard*, the plaintiff sought damages based on the value of supply agreements he was induced to abandon by the defendants. 218 F.3d 164, 170-71, 175-76 (2d Cir. 2000). The court held that "the measure of [such] damages is the market value of the asset at the time of breach—not the lost profits that the asset could have produced in the future." *Id.* at 176. But unlike the fluctuating market value of those supply contracts, the value of BMLP's $845 million contribution to BML was the same at the time of CCA's breach as it is today: $845 million. If anything, *Schonfeld* supports BMLP, insofar as it supports looking to the

parties' contracts—which here state that BMLP's initial investment was $830 million, *see* Ex. 3 § 4.6; Ex. 4 §1.1—as "competent evidence of the … value[]" of damages, 218 F.3d at 180.

CCA's other cases likewise involved the inapposite question of when to measure the value of a disputed asset with a determinable value. *See Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145–46 (1971) (damages consisted of the value of shares the plaintiff never owned); *Cole v. Macklowe*, 64 A.D.3d 480, 480–81 (1st Dept 2009) (damages consisted of "the value of the distributions that plaintiff should have received … including distributions that have not yet been made"); *Cottam v. Glob. Emerging Cap. Grp., LLC*, 2021 WL 1222120, at *4–6 (S.D.N.Y. Mar. 31, 2021) (damages consisted of the market value of non-delivered stock), *aff'd*, 2022 WL 16908708 (2d Cir. Nov. 14, 2022).[8]

CCA's unsupported arguments and factual assertions about causation cannot be resolved on a motion *in limine*. *See* Mot. 13 (asserting "indisputable intervening developments that substantially reduced the value of BMLP's equity"). Nor does CCA persuade with its suggestion that BMLP's lost $830 initial investment is "irrelevant" because BMLP already "received full consideration" in the form of equity in and control of BML. Mot. 13-14. This case is about how CCA wrongfully terminated that equity and control with its fraud and egregious contract breaches, causing BMLP's total loss. If anything, CCA's cited cases support BMLP. In *Summit*, the court found that the guarantees that Summit paid the defendant were not "out-of-pocket expenses" because Summit had already "recouped the entire sum." *Summit Properties Int'l, LLC v. Ladies Pro. Golf Ass'n*, 2010 WL 4983179, at *5 (S.D.N.Y. Dec. 6, 2010). The court also declined to award Summit's additional out-of-pocket expenses because they were not "wasted"—that is

[8] CCA also cites *ERC*, Mot. 13, but fails to mention that the court in *ERC* expressly *declined* to "reach the issue of whether and to what extent the amount of ERC's ... investment is a proper measure of the value of its lost equity." 2015 WL 247404, at *9 n.2.

"rendered useless"—because of the breach, since Summit "continued to receive the benefits of its investment" in royalty payments and increased revenues. *Id.* at *6 (citations omitted). Here, by contrast, BMLP lost, and did not recoup, its entire $845 million investment—which was wasted by CCA's breach—and has been deprived of the benefits of its investment by CCA. *ADYB* is similar: after a bench trial, the court found the plaintiff failed to show its payments to the defendant were wasted by the breach, and that the defendant did not even breach. *ADYB Engineered for Life, Inc. v. EDAN Admin. Servs. (Ireland) Ltd.*, 2024 WL 2125431, at *14 (S.D.N.Y. May 10, 2024). Here, the trial has not yet occurred, and at that trial BMLP will show its total loss at CCA's hands.

IV. THE COURT SHOULD DENY MOTION II

CCA dresses up another tardy summary judgment argument disguised as its second purported motion *in limine*, asking the Court to preclude BMLP "from presenting parol evidence"—which CCA does not identify or even attempt to describe in its motion—"that would impose Section 4.7's 'best interests' obligation on anyone other than the 'China State Board Member,' as that term is defined in the IA, during their respective tenures." Mot. 19. For the following reasons, CCA's improper attempt to have a second bite at the apple on this legal (not evidentiary) issue fails.

The Court addressed CCA's breach of Section 4.7 of the Investors Agreement—finding against CCA—over a year ago at the summary judgment stage. NYSCEF 649 at 15. The First Department affirmed. *BML Properties Ltd.*, 226 A.D.3d at 583. Pursuant to the contract, CCA was "entitled to nominate and have appointed" a "member of the Board" as well as to "second[] to the Project" "five (5) additional representatives of China State" employed on the Project "in management positions." Ex. 1 §§ 4.2, 4.7. As this Court explained, CCA's board member and representatives were "required to at all times act in the 'best interests' of BML," and "were required to abide by certain confidentiality and conflicts-of-interest provisions." NYSCEF 649 at

3. This Court held that CCA's legal arguments about its lack of breach—including its attempts to slice and dice the purportedly different obligations of its different principals at different times—fail as a matter of law because "the CSCEC Representatives had an obligation to act in the best interest of BML," and "it does not matter" if they "wore different hats" because "they could not simply shed their responsibilities." *Id.* at 15. Thus, as the Court explained over a year ago, substantial record evidence that CCA was "actively pursuing [its] own interests to the detriment of BML and BMLP" is highly relevant and admissible at the upcoming trial. *Id.* at 5-6 (discussing evidence that CCA principals and managers Wu, Yuan, and Liu "sought to … protect [CCA's] investments … to the detriment of the joint venture partner … were successful a[nd] this is exactly what occurred").

CCA now asks the Court to revisit this decision, eliminating its prior consideration of relevant and admissible evidence of CCA's breach, on the claimed grounds that on appeal, "the First Department recognized that Section 4.7 imposes no requirement on any entity (including any of the Defendants), ruling that the only question at trial on BMLP's contract claim will be whether two sets of individuals—the 'China State Board Member' and the 'China State Representatives'—failed to 'act in the best interests of the company.'" Mot. 17-18 (quotation marks in original; citing *BML Properties Ltd.*, 226 A.D.3d at 583).

But the First Department said ***no such thing***, and drew no such distinction. On the contrary, the First Department affirmed the Court's decision on the breach question, which will be decided in reference to "fact[s] … as to whether the representatives of defendant CSCEC Bahamas, Ltd.

(CSCECB)[9] failed to act in the best interests of the company." *BML Properties Ltd.*, 226 A.D.3d at 583.

CCA's belated demand that the Court cast aside evidence of wrongdoing other than by board members Wu and Yuan (only at certain times) should be denied. As a threshold matter, CCA fails to identify any evidence warranting exclusion in its purported motion *in limine*, which instead raises legal issues about how to interpret the contract. *See supra* § II. Even if CCA's motion had been timely brought, it is not meritorious. Yuan and Wu—and their colleagues Liu and Wang—were plainly the four CCA principals and managers that dominated every aspect of CCA's work on the Project. As the Court already recognized in its summary judgment decision, these CCA representatives acted through the interrelated CCA companies to deliberately harm BML and BMLP. That willful breach is actionable under the plain language of the Investors Agreement and (contrary to CCA's motion) does not require any parol evidence.

First, CCA's argument to exclude any CCA activities that were not conducted personally by Wu and Yuan—undisputed Section 4.7 "best interests" designees, *see* Mot. 18 n.9—fails because the Project was dominated and controlled within CCA by Wu and Yuan. Every CCA employee on the Project, including Liu, Wang, and any number of other CCA employees whose activities CCA would like to render irrelevant, were directed by and reported to Yuan and Wu. *See* Ex. 13 (Wu Tr.) at 23:15-18 ("Q. Okay. And in terms of just the CCA team working on Baha Mar, is it fair to say that you were in charge of the CCA team? A. Yes.), 26:5-8 ("Q. … [D]id you report to anybody at CCA or were you kind of the boss? A. I would report to Mr. Yuan because he's the Chairman of CCA Bahamas."). Yuan's and Wu's direction of and failure to disclose their

[9] Because it was not raised by CCA on summary judgment, the First Department did not address the substantial evidence supporting alter ego, or veil piercing between the indistinguishable family of CCA affiliates. *See supra* § I.

subordinates' repeated sabotage of the Project—to say nothing of their failure to remediate the harm—was certainly not in BML's "best interests." *Compare, e.g.*, NYSCEF 649 at 5 (discussing evidence that "Manabat, the head scheduler for the Project could not update the schedule for the Project because he was engaged in his work on a project in Panama), *with* Ex. 14 (Manabat Tr.) at 17:18-20 ("Q. Who was your boss? A. I report directly to Tiger. Tiger Wu, our Executive Vice President."), 117:3-6 ("Q. So fair to say that Tiger Wu and David Wang decide[d] that you work on scheduling for Panama. Is that right? A. Yes.").

Second, substantial evidence supports that even putting aside the "China State Board Member" obligation, at least Wu, Wang, and Liu were "seconded to the Project" in "management positions" in "The Bahamas" as "China State Representatives," which the Investors Agreement likewise obligates to act in BML's "best interests." Ex. 1 § 4.7; *see, e.g.*, Ex. 13 (Wu Tr.) at 23:15-18 ("Q. Okay. And in terms of just the CCA team working on Baha Mar, is it fair to say that you were in charge of the CCA team? A. Yes.), *id.* at 23:19-26:3 (Wang and Liu managed "commercial issues" like "contract, cost management, change orders," and "procurement, logistics" (respectively), underneath him); Ex. 15 (Murray Tr.) at 11:3-9 (Wu and Wang were CCA "construction manager[s]" on the Project); Ex. 16 (McAnarney Tr.) at 53:18-25 (he "principally report[ed] to" Wu, Wang, and Liu). Nothing in the agreement requires anything more—and certainly not a formal appointment or any other magic incantation—for the "best interests" obligation to attach. CCA quibbles in its brief that BMLP objected to Wang's appointment as a manager on the Project and a CCA Representative, *see* Mot. 19, but BMLP's approval of the designee is not a contractual prerequisite for the obligation to act, in the capacity as CCA's principal and primary manager running the Project, in BML's "best interests." *See* Ex. 1 § 4.7.

CCA's contractual interpretation under which a limited subset of its principals were contractually obligated to act in BML's best interests (and only at certain times), but its remaining leadership and all subordinates could freely undermine and imperil the company, strains credulity. *See W. & S. Life Ins. Co. v. U.S. Bank Nat'l Ass'n*, 209 A.D.3d 6, 13 (1st Dept 2022) ("[C]ourts must construe contracts in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect.") (citation omitted).

CONCLUSION

BMLP respectfully requests that the Court deny CCA's motions *in limine*.

Dated: New York, New York
June 26, 2024

Respectfully submitted,

SUSMAN GODFREY L.L.P.

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WORD COUNT CERTIFICATION

Pursuant to Rule 17 of subdivision (g) of section 202.70 of the Uniform Rules for the Supreme Court and County Court (Rules of Practice for the Commercial Division of the Supreme Court), I hereby certify that the total number of words in this memorandum of law, excluding the caption, table of contents, table of authorities, signature block and word count certification is 6,899.

/s/ Jacob W. Buchdahl
Jacob W. Buchdahl

EXHIBIT 6

Trial Court Decision on CCA Motion in Limine

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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BML PROPERTIES LTD.,

Plaintiff,

- v -

CHINA CONSTRUCTION AMERICA, INC.,NOW KNOW AS CCA CONSTRUCTION, INC.,CCA CONSTRUCTION, INC.,CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., DOES 1 THROUGH 10,

Defendant.

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INDEX NO. 657550/2017

MOTION DATE 06/12/2024

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729

were read on this motion to/for EXAMINATION ORDER.

Upon the foregoing documents, China Construction America Inc., now known as CCA Construction, Inc. (**CCA**), CSCEC (Bahamas), Ltd. (**CSCEC**), and CCA Bahamas, Ltd.'s (**CCAB**; CCA, CSCEC, and together with CCAB, hereinafter, collectively, the **Defendants**) motions *in limine* to preclude BML Properties Ltd. (**BMLP**) from presenting at trial (i) evidence and testimony concerning BMLP's initial equity contribution in the Project and Baha Mar Ltd. (**BML**)'s expenditures made in support of the Project (**Motion 1**) as relevant to BMLP's damages, and (ii) certain "parol evidence" that the Defendants claim would vary the meaning of Section 4.7 of the Investors Agreement (the **IA**) (**Motion 2**), are DENIED.

I. Preclusion of Evidence of the initial investment is denied because it is evidence of direct not consequential damages

Relying primarily on *Five Star Dev. Resort Communities, LLC v iStar RC Paradise Val.*, LLC, 09 CIV. 2085 (LTS), 2012 WL 13069913, at *5 [SDNY Dec. 10, 2012]; *Diamond v Calaway*, 2019 WL 8955300, at *11 [SDNY Oct. 25, 2019]; *ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 46 Misc 3d 1210(A) [NY Sup 2015], *affd*, 133 AD3d 444 [1st Dept 2015], the defendants argue that initial investment damages are consequential and not direct damages and are thus barred by the waiver of consequential damages provided in Section 11.10 of the IA such that evidence as to the initial investment should be precluded from introduction at trial. They are not correct.

The project at issue was a joint venture, and the loss of initial investment in the joint venture is a direct not consequential damage of the Defendants' alleged breach of contract and fraud, if proven at trial (*see*, *e.g.*, *GSCP VI Edgemarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC*, 2023 N.Y. Slip Op. 33721[U], 9 [N.Y. Sup Ct, New York County 2023]; *Gerritsen v Glob Trading, Inc.*, 2009 WL 262057, at *10 [EDNY Feb. 4, 2009]; *NMR E-Tailing LLC v Oak Inv. Partners*, 216 AD3d 572, 573 [1st Dept 2023]). The cases relied upon by the Defendants are simply inapposite. They primarily involve lending transactions where the loan transaction was separate and apart from the investment or acquisition transaction. As such, the courts in those cases held that the lender was not responsible for the loss of initial investments. What is at issue in this case is not a separate loan transaction but the joint venture transaction itself and damages as to the investment in the joint venture transaction are not remote consequential damages not within the contemplation of the parties at the time of contract. They are direct damages. These damages thus do not run afoul on the contractually agreed upon limit on consequential damages or the Appellate Division's decision limiting the plaintiff's ability to recover lost profits.

Evidence as to lost profits, consequential damages and damages not contemplated at the time of contract are precluded (*BML Properties*, 226 AD3d at 584 ["[t]he request for lost profits damages should also have been dismissed because the parties did not contemplate liability for lost profits at the time of contracting."]). For the avoidance of doubt, the Court notes that the Defendants' arguments regarding causation (*see* NYSCEF Doc. No. 710, at 10-14) do not make the damages consequential and involve factual issues properly determined at trial.

II. Evidence of Breach is not precluded and does not alter Section 4.7 of the IA

The Defendants argument that BMLP should be precluded from presenting certain unidentified "parol evidence" is also denied. In denying the Defendants' appeal of this Court's holding that the Defendants were not entitled to summary judgment that they did not breach Section 4.7 of the IA, the Appellate Division held that "[i]ssues of fact exist as to whether the representatives of defendant CSCEC Bahamas, Ltd. (CSCECB) failed to act in the best interests of the company by diverting resources to other projects and authorizing the removal of 700 workers from the project as it was nearing its deadline, despite concerns about meeting that deadline, which they did not communicate to the company" (*BML Properties*, 226 AD3d at 583). The Appellate Division did not limit evidence of any breach of the IA solely to the "China State Board Member" and the "China State Representatives" (NYSCEF Doc. No. 710, at 17-18):

> Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about May 25, 2023, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's motion for summary judgment dismissing the counterclaims for breach of §§ 4.7, 4.8 (g), and 4.8 (l) of the Investors Agreement and the affirmative defenses that plaintiff's claims were derivative and released, unanimously modified, on the law, to grant defendants motion as to the unjust enrichment and implied covenant of good faith and fair dealing claims and request for lost profits damages, to deny plaintiff's motion as to the counterclaims for breach of IA §§ 4.7 and 4.8 (g), and otherwise affirmed, without costs.

Plaintiff's claims are not derivative because they involve the breach of a duty independent of any duty owed to the company (*see generally Abrams v Donati*, 66 NY2d 951, 953 [1985]). Plaintiff was a party to the subject Investors Agreement and there is no indication that § 4.7's "best interests" obligation was owed to the company alone. Indeed, § 4.10 of the agreement specifically authorized plaintiff to bring suit individually. "[W]here an independent duty exists, a shareholder may sue on his own behalf even for the loss of value in his investment" (*Solutia Inc. v FMC Corp.*, 385 F Supp 2d 324, 332 [SD NY 2005]; *see also Lawrence Ins. Group v KPMG Peat Marwick*, 5 AD3d 918, 919 [3d Dept 2004]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to the disproportionate loss exception to the derivative claims rule.

The motion court properly denied summary judgment dismissing plaintiff's breach of contract claim. Issues of fact exist as to whether the representatives of defendant CSCEC Bahamas, Ltd. (CSCECB) failed to act in the best interests of the company by diverting resources to other projects and authorizing the removal of 700 workers from the project as it was nearing its deadline, despite concerns about meeting that deadline, which they did not communicate to the company. It does not matter that the focus of the Investors Agreement is not construction management, as the CSCECB representatives were required to act "at all times" in the company's best interests (*see Falle v Metalios*, 132 AD2d 518, 520 [2d Dept 1987]).

The motion court also properly denied summary judgment dismissing plaintiff's fraud claims. This Court has already decided that the fraud claims are not duplicative of the breach of contract claim (*BML Props. Ltd. v China Constr. Am. Inc.*, 174 AD3d 419, 419 [1st Dept 2019]). Fact development has not created a basis to modify this legal determination. Issues of fact exist with respect to justifiable reliance. Evidence was presented that plaintiff, which had day-to-day responsibility for the company, relied on defendants' misrepresentations by taking reservations, preparing for opening, and refraining from seeking additional financing or labor. Evidence was also presented that, although plaintiff had some sense that defendants were not telling the truth, it lacked the ability to definitively verify their claims—especially in view of defendants' apparent concealment of information.

The breach of the implied covenant of good faith and fair dealing claim should, however, have been dismissed as duplicative of the breach of contract claim because "both claims arise from the same facts" and the conduct at issue clearly falls within the ambit of the contractual best efforts obligation (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Even if the unjust enrichment claim is not duplicative, it should also have been dismissed because plaintiff did not establish that it made the subject payments or otherwise had a legal entitlement to the funds used to make them (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *cf. 245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 606 [1st Dept 2024]).

The request for lost profits damages should also have been dismissed because the parties did not contemplate liability for lost profits at the time of contracting (*see generally Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986] [*Kenford I*]; *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). It is not enough that CSCECB expected that the project would make money, as that is not the same thing as expecting to be held liable for lost profits (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-320 [1989]; *Awards.com*, 42 AD3d at 184; *Bersin Props., LLC v Nomura Credit & Capital, Inc.*, 74 Misc 3d 1209[A], 2022 NY Slip Op 50084 [U], *16 [Sup Ct, NY County 2022]). Section 11.10 of the Investors Agreement expressly waived consequential damages—notwithstanding "[a]nything herein contained, and anything at law or in equity, to the contrary" (*see Kenford I*, 67 NY2d at 262; *Awards.com*, 42 AD3d at 183-184). The lost profits sought here are consequential in nature because they stem from collateral business arrangements—i.e., the loss of contracts with potential hotel guests (*see generally Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805-808 [2014]). Section 11.10 is not unenforceable because "the misconduct for which it would grant immunity smacks of intentional wrongdoing" as "a party can intentionally breach a contract to advance a 'legitimate economic self-interest' and still rely on the contractual limitation provision" (*Electron Trading, LLC v Morgan Stanley & Co. LLC*, 157 AD3d 579, 580-581 [1st Dept 2018]). In view of our disposition of this issue, we need not reach the parties' arguments with respect to causation and the capability of measuring damages with reasonable certainty.

Defendants' affirmative defense that plaintiff's claims are derivative was properly dismissed for the reasons stated above. Defendants' affirmative defense that plaintiff's claims were released was properly dismissed because plaintiff was not a party to the releases, which at any rate applied to claims under a separate contract.

CSCECB's counterclaim for breach of § 4.7 of the Investors Agreement should not have been dismissed. There is evidence in the record of at least one unanswered request for books and records, in a March 13, 2015 letter, which was reiterated in March 25 and May 6, 2015 letters. Although the company was not obliged to create new documents in response to this request, it should have had some existing documentation responsive thereto. Issues of fact exist also exist as to whether the company's failure to provide this information caused CSCECB damages, as it could have taken steps to mitigate if it had evidence of financial mismanagement.

CSCECB's counterclaim for breach of § 4.8 (g) of the Investors Agreement also should not have been dismissed. It is undisputed that plaintiff breached this provision by filing for reorganization without CSCECB's consent and issues of fact exist as to whether CSCECB was damaged as a result. CSCECB's counterclaim for breach of § 4.8 (l) of the Investors Agreement was, however, properly dismissed, as there is no evidence that the subject loan damaged CSCECB in any way.

(*BML Properties Ltd.*, 226 AD3d at 582-85). As discussed above, direct and circumstantial evidence of breach is thus relevant and does not serve to alter the terms of the IA.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the Defendants' motions *in limine* are DENIED.

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7/24/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
		GRANTED	[X] **DENIED**		**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**

EXHIBIT 7

BMLP's Post-Trial Brief

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

----------X

BML PROPERTIES LTD.,

Plaintiff,

Index No. 657550/2017
(Andrew S. Borrok, J.S.C.)

v.

CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., and DOES 1-10,

Defendants.

----------X

CSCEC (BAHAMAS), LTD.,

Defendant/Counterclaim-Plaintiff,

v.

BML PROPERTIES LTD.,

Plaintiff/Counterclaim-Defendant.

----------X

PLAINTIFF'S POST-TRIAL BRIEF

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I. Preliminary Statement

Two decades after Sarkis Izmirlian conceived of Baha Mar, BMLP got its day in court. The evidence overwhelmingly confirmed that CCA defrauded BMLP, breached their Investors Agreement by acting against "the best interests" of the "Project," and caused BMLP to lose its entire $845M investment.

CCA's top executives took the stand but neither rebutted BMLP's veil-piercing case nor explained their interference with EXIM Bank ("EXIM") or improper payments to the son of a Bahamian government official. Their testimony boiled down to the incredible claim that the March 27, 2015 deadline was not "firm," and that CCA tried its best—notwithstanding work stoppages, diversion of resources, and obfuscation.

On this record, there is only one just result: the Court should enter judgment against all Defendants for $845,000,000 plus interest to compensate BMLP for its loss. BMLP respectfully submits these proposed findings of fact and conclusions of law.

II. Proposed Findings of Fact

A. The contracts & Project financing

1. Izmirlian became "interested in developing" the Project in "the early 2000s."[1]

2. Izmirlian's companies purchased "land from various owners," including "hotels and [a] casino" and its license, and "negotiate[d] with [the] government" of the Bahamas to buy properties and move them and the highway, memorializing this in a "Heads of Agreement" that provided one of "only two" local casino licenses and "hundreds of millions" in benefits.[2]

[1] Tr. 97:17-98:18 (Izmirlian).
[2] JX4; Tr. 98:22-99:11, 100:22-101:15; 101:25-105:14 (Izmirlian); 790:1-21 (Bones).

3. Izmirlian was introduced to EXIM, a "policy bank of the Chinese government," through Yuan and "China State Construction," which "bid" on the Project. EXIM "agreed to finance" the Project, but required "a Chinese contractor," specifically "China State Construction."[3]

4. EXIM required 70% debt to 30% equity. BMLP contributed a "thousand acre assemblage" and cash.[4]

5. "JLL" appraised BMLP's "non-cash" contribution at ~$1.267 billion.[5] EXIM, "Baha Mar and CSCEC" ("the parent company"[6]) retained BNP Paribas to conduct a valuation which, excluding the "Heads of Agreement," ranged from $725 million to $811 million.[7]

6. In March 2015, BMLP "made an additional $15 million equity contribution" after "the bank took the view that there'd been an equity shortfall." BMLP would not have made this contribution "in the absence of China State's promises about the opening date." China State did not make its sponsor payment.[8]

7. Everyone (including Yuan (for "China State") and "EXIM") "agreed to a value" of $745M for the non-cash contribution.[9] BMLP's cash contribution was agreed at $85M of otherwise reimbursable expenses.[10]

[3] Tr. 107:13-108:19 (Izmirlian); JX26.
[4] Tr. 109:10-25 (Izmirlian); JX26.
[5] JX19; *see also* Tr. 786:18-24 (Bones).
[6] Tr. 110:1-111:15 (Izmirlian); JX 19; JX20.
[7] JX20; Tr. 786:25-787:4; 795:16-22 (Bones) ("JLL incorporated the Heads of Agreement into its appraisal and BNP did not."); *see also* JX26; JX551; Tr. 798:20-23 ("[T]his is the accounting firm [KPMG] coming in … and adjusting the financial records at this point in time to reflect the agreed upon value of these assets at $745 million."); 801:1-11 (Bones) ("[T]here was never a write down or an indication that the value of those contributed as[sets] has been reduced from the lender's perspective.").
[8] JX688; Tr. 155:8-156:19 (Izmirlian).
[9] Tr. 113:14-25 (Izmirlian); 783:19-21 (Bones) ("This is from the lender's perspective assessing its collateral and its protection, if you will, in the project."); JX25.10 § 4.6, JX26.6.
[10] JX25.7 § 4.2(j); JX26.12.

8. Investors Agreement §4.7 provides: "[T]he China State Board Member … shall be appointed to assist the Company in furtherance of the Project and shall at all times act in the best interests of the Company."[11]

9. Yuan understood his obligations as "Board Member" when signing.[12]

10. On May 1, 2014, Wu replaced Yuan as Board Member at Yuan's direction.[13] Wu did not "review th[e] document to see what [his] responsibilities" were, did not discuss with Yuan, and was "not aware" of his obligation to act in the Project's best interests.[14]

11. Subscription and Contribution Agreement, Article 3 provides (per "China State" and Yuan)[15] CSCECB would contribute $150,000,000 to the Project.[16]

B. Defendants operated as CCA.

1. Defendants are financially indistinguishable

12. Expert Pocalyko opined Defendants "operated as a unitary financial entity and commingled" assets.[17]

13. Defendants kept no separate accounting records.[18]

14. CCAB's finances and banking ran through CCA.[19]

15. CCAB signed a contract with Notarc, but invoiced CCA Panama; CCA controlled payment.[20]

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[11] JX34.14.
[12] Tr. 898:7-19 (Yuan); *see also* 902:10-904:9 (Yuan) (refusing to answer a simple question about how he resolved conflicts).
[13] JX495.2 (referencing May 1, 2014 minutes); Tr. 1149:10-14, 1383:12-22 (Wu).
[14] Tr. 1149:5-1150:2; 1383:12-22 (Wu); *see also* Tr. 1163:22-1164:4, 1167:9-12, 1188:1-3 (Wu).
[15] Tr. 120:4-121:5 (Izmirlian).
[16] JX25; Tr. 904:15-905:8 (Yuan).
[17] Tr. 704:16-705:16 (Pocalyko); *see also* Tr. 661:9-19, 705:18-706:12 (Pocalyko).
[18] Tr. 708-7-16 (Pocalyko); *see also* Tr. 1146:3-1148:1 (Wu) (Wu's salary while working on the Project was paid by yet another CCA entity, "China Construction America of South Carolina").
[19] Tr. 706:15-23 (Pocalyko); Manabat Tr. 155:18-22 ("I believe H.R. head office -- New Jersey is the one giving us money in the Bahamas."); JX526; JX481; JX708; Tr. 1582:5-1583:10 (Pattillo) (CCA's construction expert billed CCA, Inc. for the $500,000-$1 million worth of work he did on the Baha Mar Project in 2014-2015).
[20] Tr. 710:3-711:20 (Pocalyko); Liu Tr. 142:24-143:16; JX391; JX933.

16. CSCEB contributed $150 million as a setoff against money owed to CCAB.[21]

17. CCAB "General Conditions" payments were sent to affiliates.[22]

18. CSCEC guaranteed CCAB's completion.[23]

19. CCAB used CSCEC's logo on reports.[24]

20. When CSCEC was requested to contribute $15 million to cure a shortfall,[25] CCA responded.[26] Wu proposed to contribute "a deduction from what [CCAB] believed it was owed."[27]

21. Yuan claimed the Hilton was a CCAB project.[28] But CSCEC controlled it through CCA employees.[29] CCAB transferred its ownership to affiliates; Yuan signed the documents.[30] CCA marketed it as a *CCA* (not CCAB) project.[31] CCAB's acquisition was "a decision made by the parent company."[32]

22. CCA holds itself (not CCAB or CSCECB) out as contractor *and* equity partner on the Project.[33]

23. Pocalyko opined: "[t]hese are the worst cost records" he has seen, and he has "never seen this level of diversion" or "manipulation in the financial records."[34]

2. Yuan controlled

24. Yuan was President and Chairman of CCA , CCAB, and CSCECB.[35]

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[21] Tr. 905:16-906:5, 907:16-908:4; 908:24-909:2, 910:23-911:12, 911:20-23 (Yuan); Tr. 739:6-13, 743:15-23, 747:7-13, 768:3-770:9 (Pocalyko); JX25.5; JX548; Pocalyko RDX-1 (citing JX401.4).
[22] JX1024.29-30 ($6,127,568.48 to Neworld Development, Inc.); Tr. 707:5-20 (Pocalyko).
[23] JX15.436-50; Tr. 707:21-708:6 (Pocalyko).
[24] JX787; Tr. 706:24-707:4 (Pocalyko)
[25] JX688.
[26] JX704.
[27] Tr. 1210:9-1211:7 (Wu); JX861.3.
[28] Tr. 932:13-15 (Yuan).
[29] Tr. 708:17-709:19; JX818.
[30] Pocalyko DX-23 (citing JX983.5); Tr. 690:8-692:10, 708:17-22; 709:20-710:2 (Pocalyko); JX490; JX534; JX537.
[31] JX627.5; Tr. 935:4-17; 936:15-21; 941:5-9 (Yuan).
[32] Tr. 1164:22-1165:3 (Wu).
[33] Tr. 712:9-16 (Pocalyko).
[34] Tr .712:23-713:9 (Pocalyko).
[35] Tr. 883:20-884:4, 884:10-885:4, 886:5-9 (Yuan); JX66.

25. New Jersey-based CSCEC Holding Co. holds all Defendants—Yuan is Chairman and President.[36]

26. CCA's organizational chart is inaccurate.[37]

27. Wu, Liu, and Wang reported to Yuan.[38]

28. Requests to CSCEC must go through Yuan/CCA.[39]

29. CSCEB and CCAB formed with directors Yuan and Gao (CCA's CFO).[40] Asset ownership transferred without records between affiliates.[41]

30. Notices for the Investors Agreement are c/o President of CCA in New Jersey (Yuan).[42]

3. Defendants held themselves out as CCA

31. "CCA" and its executives Wu and Wang had day-to-day responsibility on the Project.[43]

32. Defendants used CCA letterhead, email, and signatures for Project communications.[44]

33. Defendants conflated entities for commercial issues.[45]

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[36] Tr. 894:8-14, 895:3-10 (Yuan).
[37] JX908; Tr. 888:4-24, 889:6-15, 894:4-7, 938:23-939:25 (Yuan).
[38] Tr. 885:13-17, 885:21-22, 886:1-4, 886:10-14 (Yuan).
[39] Tr. 948:6-9 (Yuan).
[40] JX17; Tr. 889:24-890:6, 892:13-893:3 (Yuan); JX18.
[41] Tr. 890:19-22, 893:7--894:3 (Yuan); JX17; JX908.
[42] JX34.38-9 § 11.8; Tr. 895:19-23, 896:9-23, 897:18-22 (Yuan).
[43] Tr. 1059:15-17 (Wang) (agreeing his "job responsibilities" at "China Construction America, Inc. was the Baha Mar Project"); Tr. 285:23-286:8, 329:6-14 (Dunlap); Kwasnowski Tr. 126:17-127:04; Barrera Tr. 14:17-19, 113:21-114:02 (AECOM considered "China Construction America" not CCAB to be construction manager).
[44] *See, e.g.*, JX597; JX581; JX624; JX704; JX718; JX742; JX559; JX456 (@CHINACONSTRUCTION.US email).
[45] JX694 (March 10, 2015 email from D. Wang to Dunlap: "Before CCA is able to take any action in respect of equity shortfall contribution, we have to have the detailed information in respect of fund use made by BML other than the payment made to CCA."); JX704 (March 13, 2015 letter from Wu to Dunlap "on behalf of CCA and in my capacity as the current representative of … CSCEC to the Board of Baha Mar," regarding Izmirlian's request to Ning Yuan regarding CSCEC equity shortfall contribution, JX688, noting that at least $140 million will "need to be paid to CCAB.").

34. Yuan wrote to Izmirlian about the missed deadline as President of CCA.[46] Yuan's explanation (they knew "each other so well"; Yuan had "hats") was nonsensical.[47]

C. CCA represented it would meet the deadline, but had no plan.

1. CCA committed to having the Project open to guests by March 27

35. BMLP realized the original opening (December 2014) "wasn't going to be possible," but needed to "get cash in the door" for part of "tourism season."[48]

36. In November 2014, EXIM, BMLP, and China State[49] memorialized agreements on scheduling and commercial issues in Meeting Minutes.[50]

37. "Most importantly,"[51] Paragraph 1 states: "CCA agrees to achieve Substantial Completion of the Project ... by March 27, 2015." "CCA's responsibility" was "for Substantial Completion to achieve operational start for paying guests in hotels including amenities."[52]

38. Yuan understood "on time" meant March 27, 2015.[53]

39. At a November 27 meeting, no one "express[ed] disagreement"[54] or that it "was … impossible..."[55]

40. Statements that "Chairman Yi" (China State) approved "CCA sourcing workers from … anywhere in the world" and "no workers are leaving" "gave [BMLP] a lot of comfort that they were going to do whatever was necessary."[56]

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[46] Tr. 964:7-17 (Yuan); JX 742.
[47] Tr. 965:6-18 (Yuan).
[48] Tr. 130:1-16 (Izmirlian).
[49] Tr. 914:13-21; 915:10-17 (Yuan).
[50] JX462.
[51] Tr. 131:3-32:5 (Izmirlian).
[52] JX462 ¶ 1; Tr. 915:18-23 (Yuan).
[53] Tr. 917:11-14, 917:21-918:3 (Yuan).
[54] Tr. 302:16-19 (Dunlap); JX476.
[55] Tr. 139:7-10 (Izmirlian).
[56] Tr. 139:13-140:23 (Izmirlian).

41. At the December 5 Board meeting, Wu and Wang falsely represented they were working "full-time" with Baha Mar and "fully committed." In reliance, the Board, including Wu, voted, and the Project "announce[d] the date."[57]

42. Izmirlian explained, "Once you announce the opening…. [y]ou start hiring staff, you start taking reservations, you start marketing, you start spending a lot of money... [O]nce you open that floodgate it's very difficult to stop it."[58] Yuan understood this, and never said "this is not a firm date."[59]

43. On January 3, Izmirlian asked Yuan for his "view on progress to completion."[60] Yuan stated: "I told [subcontractors] the January 19th and March 27th milestones *could not be changed.*"[61]

44. In January, CCA represented it would complete the Project by March 27 in a Beijing meeting with the Bahamian Prime Minister.[62]

45. On January 26, CCA' s Monthly Report stated: "on target to deliver the agreed portions of the resort in time for an opening to paying guests on March 27, 2015."[63]

46. On January 27, Yuan wrote to CSCEC (from CCA): "everyone knows that March 27 is the date when the Project is to be open to business to the general public."[64]

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[57] JX495; JX500; Tr. 1066:22-67:1; 1068:22-69:3 (Wang); 1180:15-81:7 (Wu); Tr. 143:16-44:5 (Izmirlian "felt better" about concerns "that the China State senior management were diverting their efforts" after these representations), 144:6-45:6 (Izmirlian); *see also* Tr. 148:19-21 (Izmirlian) ("And we asked Mr. Wu point-blank, at that board meeting, Should we make this decision now to open March 27th? He said, Yes.").
[58] Tr. 143:12-15 (Izmirlian).
[59] Tr. 920:17-19, 922:13-16, 923:25-924:7, 924:8-15, 926:7-9 (Yuan); JX499; JX559; JX560; Tr. 149:20-23 (Izmirlian).
[60] JX559.
[61] *Id.*; Tr. 944:18-22, 926:10-928:2 (Yuan). CCA missed the January 19th date to complete the convention center. Yuan's explanation?: "nobody is perfect." Tr. 944:23-945:4.
[62] Tr. 151:3-52:11 (Izmirlian) ("And in those meetings in front of the press, in front of the world, they were confirming that March 27th was a hard date.").
[63] JX755.4.
[64] JX597.3; Tr. 1045:4-19 (Yuan).

47. Incredibly, Yuan testified that March 27 was just a "target date."[65]

2. CCA never had a plan

48. Expert Collins concluded CCA never had "a realistic, fully-developed manpower-loaded schedule for the resources to achieve the March date."[66] CCA's expert (Pattillo) agreed.[67]

49. CCA was required to vet the March 27, 2015 date with a detailed—Critical Path Method, Manpower Loaded—plan.[68] That was important given the "significant amount of work" and short time.[69]

50. CCA's responsibilities to obtain TCO included MEP/FP work, tracking testing and commissioning, and coordinating work and inspections,[70] including work outside CCA's scope.[71]

51. CCA had no basis to represent it could achieve Substantial Completion by March 27 because CCA lacked a realistic schedule.

52. MEP/FP Director McAnarney warned that a schedule that is not "realistic" is an "empty promise to" BMLP.[72]

53. On October 22, 2014—*after* McAnarney told CCA that for fire safety inspection, "the end of February … could probably not be met"—Wu and Wang told BML they would start fire safety inspection by January 15.[73]

[65] Tr. 913:17-914:8, 929:7-11 (Yuan).
[66] Tr. 476:9-20 (Collins).
[67] Tr. 1588:3-5 (Pattillo).
[68] Tr. 479:8-22, 480:6-12, 481:6-21, 503:8-504:1 (Collins); Tr. 1602:17-1603:3 (Pattillo); JX13 § 3.10; JX15.
[69] Tr. 483:12-484:10 (Collins).
[70] Tr. 478:9-22 (Collins); JX649; Tr. 318:13-17, 331:24-332:1 (Dunlap); Tr. 1447:8-13, 1480:2-6, 1485:4-10 (McAnarney); *see also* Tr. 1106:16-17 (Wang); Kwasnowski 126:01-25; JX418.
[71] Tr. 1602:17-1603:3 (Pattillo); 479:23-480:2 (Collins).
[72] JX377; Tr. 1449:9-23 (McAnarney).
[73] JX421; Tr. 1450:1-1451:4 (McAnarney).

54. Neither CCA's head scheduler, Manabat, nor McAnarney recalled being asked if that date was achievable,[74] nor whether the March 27 deadline was achievable before CCA agreed to it.[75]

55. Wang said he "would never agree to an opening date without having evaluated the achievability carefully," but only directed Manabat to produce a schedule *after* CCA agreed to March 27. Internally, Graeme Moran of CCA suggested it was not realistic.[76]

56. Collins opined: "if there were ever going to be a [time for a] proper detailed schedule" it was "within this four-month period and it just didn't happen."[77] Mace's Murray could not identify a good faith reason to withhold schedules.[78]

57. CCA claims as "schedules" three tools that did not demonstrate a realistic plan.[79] Collins, Murray, and contemporaneous records confirm these tools were inadequate, and also inaccurate.[80]

58. CCA's claim that the parties ***agreed*** to forgo schedules[81] is refuted by extensive evidence showing BMLP begging for schedules, and CCA recognizing the need for and lack of a realistic schedule.[82]

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[74] Tr. 1451:5-11 (McAnarney); Manabat Tr. 80:3-9.
[75] Tr. 1451:24-1452:4 (McAnarney); Manabat Tr. 85:16-86:3.
[76] Tr. 1087:15-18; 1089:1-4, 1089:23-90:1 (Wang); Tr. 1454:1-1456:18 (McAnarney); JX456.
[77] Tr. 533:13-22, 482:9-13, 484:11-15 (Collins); JX455 (Dunlap: "This is why we need detailed and complete schedule with adequate manpower and management that shows ALL areas done in advance to allow inspection and usage.").
[78] Murray Tr. 27:23-28:07; 131:06-18 (only reason Manabat would not provide updated schedules was that "he had been told not to provide the information,"); JX308.17 (Manabat warning CCA's Wang "Reporting at all levels and no lies!"); JX417 ("truth, planning and scheduling" on the Project are different from Manabat's usual).
[79] Tr. 484:16-485:14 (Collins); Tr. 486:1-15, 20-23 (Version 7); JX509 (Version 7 schedule); Tr. 487:9-488:17; JX518 (TCO Schedule Dec. 16); JX436.10 (PBS 3.2 schedule excerpt); Tr. 496:3-15 (PBS 3.2 excerpt).
[80] Tr. 500:7-24 (Collins); Murray Tr. 71:12-25; JX766.26; Tr. 494:19-495:3, 501:21-502:1, 581:7-14 (Collins); Tr. 486:24-487:5 (no update of Version 7 after December 9, 2014); Tr. 488:18-490:5 (Collins) (No update of "TCO schedule" after January 28, 2015); Collins DX-15 (citing JX985.22); Tr. 495:25-496:2; 629:6-8, 496:18-21, 496:22-499:22 (Collins) (no complete Primavera version or updated PBS 3.2 despite identified problems); JX669 at 2; JX295; *accord* Tr. 1604:13-25 (Pattillo).
[81] Tr. 1605:15-23 (Pattillo).
[82] JX506; JX608 at 4; Tr. 492:18-493:21 (Collins); JX766.26; Tr. 493:22-495:3; Murray Tr. 43:14-22; 3; Tr. 500:7-24 (Collins) (Project not "close to being ready to start abandoning schedules" in November 2014); Tr. 583:2-584:10.

59. Instead of providing a means to track progress, CCA misled BMLP.

60. On December 10, 2014, CCA was informed that CCA's testing schedule must be reliable and the tests successful. CCA represented that all spaces would be ready.[83]

61. Internally, Manabat and McAnarney raised concerns, McAnarney observing: "The contractor has just guessed" about a schedule.[84]

62. On January 7, BMLP noted "[t]he progress needs to be tracked or the schedule is basically a useless document."[85] CCA assured that McAnarney would "own the occupancy certificate process."[86]

63. Manabat internally identified three "critical target dates" to obtain TCO: apply for TCO (February 15); receive TCO (March 1); and open (March 27).[87] This would allow time to fix issues.[88]

64. BMLP asked whether CCA was on track.[89] Internally, CCA acknowledged *no plan* and that the date "has passed, it's clearly just fantasy." But CCA reassured that "significant work has been carried out."[90]

65. Despite claiming transparency,[91] on January 23, McAnarney informed Wu and Manabat—removing BML—that CCA was "four weeks behind" for fire systems.[92]

[83] JX502; Tr. 1458:15-1459:11 (McAnarney).
[84] JX512 (Manabat noting that "If we will provide a schedule that later on [the Ministry of Works] will find out we are not ready, we will surely have difficulty in getting TCO inspection."); Tr. 1461:13-20 (McAnarney).
[85] JX568.
[86] *Id.*; Tr. 1475:1-12 (McAnarney).
[87] JX512; JX295; JX405; Tr. 1461:9-12 (McAnarney); Tr. 1074:7-10 (Wang).
[88] Tr. 1462:25-1463:6 (McAnarney); *see also* Tr. 1463:7-17 (fire safety inspections); Tr. 1603:4-11 (Pattillo)
[89] JX564; JX586; Tr. 1463:19-1464:22 (McAnarney).
[90] JX563; JX564; Tr. 1465:18-1466:7 (McAnarney).
[91] Tr. 1428:24-1429:2 (McAnarney).
[92] JX589; Tr. 1466:8-1467:11 (McAnarney).

66. On January 26, JBB (for BML) requested an MEP schedule.[93] CCA had not completed a list of required inspections.[94]

67. On February 27, BML wrote Wu: "There is no explanation of the status of testing required to support these dates, the extent of outstanding critical activities or any strategy to engage with MOWT."[95]

68. CCA was obligated to notify BML if BML was impacting critical path. CCA never sent anything after November 2014 showing delay due to BML.[96]

69. Between December 5, 2014 and March 27, 2015, neither Wang nor Wu disclosed that challenges were going to prevent opening.[97]

70. CCA stopped updating the "TCO Schedule" because Manabat was re-assigned to Panama, a "vital" part of the Project's failure.[98]

D. CCA did not use "all necessary methods."

71. CCA agreed to achieve the March date "***by all necessary methods,*** including ... sufficient manpower, both local and international, with a *minimum* of 200 new Chinese workers within 30 days...."[99]

72. CCA represented "no workers are leaving," confirming "200 additional workers is the minimum, to be measured against workers in place at the time of the Beijing meeting, and that CCA would add as many workers as needed."[100]

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[93] JX595; Tr. 1476:24-1477:11 (McAnarney).
[94] Tr. 1476:11-22 (McAnarney); JX595.
[95] JX669.2.
[96] Tr. 1467:21-1468:1, 1499:9-15 (McAnarney); Tr. 1595:1-7 (Pattillo).
[97] Tr. 451:16-19 (Dunlap); 1175:11 (Wu) ("I never told them they wouldn't get a TCO on time.").
[98] Tr. 491:1-24; JX723 ("No, I haven't updated any schedule . . . coz am busy with our project in Panama"); Tr. 1620:14-1626:12 (Pattillo); Tr. 491:25-492:7 (Collins).
[99] JX462 ¶ 2.
[100] JX476.1; Tr. 592:11-593:9 (Collins); Tr. 927:1-5, 986:2-986:19, 1026:22-1028:13 (Yuan); JX529 at 5; Tr. 522:20-523:7 (Collins).

73. CCA did not add 200 new Chinese workers or "as many workers as needed," and authorized hundreds of workers to *leave*.[101]

74. No one "s[at Izmirlian] down and explain[ed] just how many workers were going to be leaving for the Chinese New Year" without replacement.[102] Wu concealed manpower numbers.[103]

75. Contrary to testimony that CCA did not need more manpower,[104] on January 21, Wu drafted a letter for Yuan to send on CCA letterhead, stating "it is imminent to increase the number of personnel in the project," requesting 450 workers (including for MEP) and recognizing "If each unit cannot dispatch personnel ... the completion target of the Bahamas Project will not be achieved and the consequences will be disastrous."[105]

76. Yuan knew without additional manpower, the deadline would be "very challenging."[106]

77. Seventeen days later, Yuan, on CCA letterhead,[107] arranged, and Wu approved, hundreds of workers leaving.[108] Nobody told BML.[109]

78. Izmirlian confronted Yuan by email; Yuan did not respond.[110]

79. On February 16, Wang stated "false[ly]" statement that CCA had added "almost 600 Chinese workers and managing staff" while demanding more money from BML. Wang's letter

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[101] Tr. 502:2-15; Tr. 507:14-508:2, 508:17-25; Tr. 511:19-23; Tr. 510:22-25; *compare* JX436 at 44 (Nov. Report) *with* JX484 at 43 (Dec. Report); Tr. 516:20-517:4; Kwasnowski 78:25-79:08; 80:4-20; Collins DX-25, 30 (citing JX985.36, JX756.73); Tr. 505:12-508:22; Tr. 620:5-10; *compare* JX467 (Nov. 21, 2014 report) *with* JX531 (Dec. 19, 2014 report) *and* JX752 (March 27, 2015 report).
[102] Tr. 150:19-51:2 (Izmirlian).
[103] JX801; JX260; Tr. 511:24-513:5; Tr. 293:3-11 (Dunlap).
[104]Tr. 1453:12-23 (McAnarney); Tr. 1567:24-1568:11 (Pattillo).
[105] JX581; Tr. 1184:15-17 (Wu); *compare* Tr. 520:23-521:3, 519:9-520:22; Collins DX-31 (citing JX756.73) (CCA's manpower at time Wu sent this letter).
[106] Tr. 945:9-19; Tr. 947:3-10. Tr. 949:1-9; JX594.
[107] Tr. 950:8-22.
[108] JX624; Tr. 951:15-24, 952:25-953:12 (Yuan); *see also* 1187:8-22 (Wu) .
[109] Tr. 953:13-16.
[110] JX645; Tr. 952:14-24; 954:5-955:6 (Yuan).

did not mention CCA blowing the February 15 inspection deadline or diverting managers to Panama.[111]

80. Despite promising "to enhance the on-site management,"[112] and that Wu and Wang were "full-time," [113] CCA decreased management,[114] diverted managers, and lied about it.[115]

81. Wu and Wang, managers "in charge of the day-to-day construction," claimed at trial "100 percent of [my] work was focused on Baha Mar" (Wang) and "I didn't" "spend any time on this Panama Project" (Wu). In fact, Wu, Wang, and Liu were focused on competing projects—Panama and the Hilton.[116]

82. Wu, a BML Board Member, approved Manabat and Rick Caillier (CCA TCO representative) working on Panama and Hilton during early 2015.[117]

83. Manabat was too busy to schedule fire systems—the key TCO failure, per CCA. CCA never told BML they were "four weeks behind[.]"[118]

E. CCA tried to extort BMLP.

84. CCA threatened stoppages for commercial ends. In November 2014, Wu discussed "slowing down the progress" to remedy a "disadvantageous [commercial] position."[119] On November 14, Dunlap was "appalled" to learn that CCA had put safety at risk by "shut[ting] off all lights and power to the buildings."[120]

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[111] JX649; Tr. 319:10-320:8 (Dunlap); JX658; JX648; Tr. 1095:25-98:25 (Wang).
[112] JX462 ¶ 3; JX476.2; JX493; Tr. 524:11-17, 525:15-526:10 (Collins).
[113] JX495.
[114] Tr. 452:20-453:2, 454:22-25 (Dunlap); JX648; Tr. 526:11-527:23, 528:12-529:1 (Collins); *compare* JX467 (Nov. 21, 2014 report) *with* JX555 (Jan. 2, 2015 report); Collins DX-39-40 (citing JX985.45, JX756.73); Tr. 527:24-528:11; JX756 at 72-73 (Appendix F).
[115] Tr. 529:9-21 (Collins); JX723; JX656; JX585.
[116] Tr. 1059:8-10; 1060:17-64:8; 1072:1-20 (Wang); Tr. 1156:4-59:9 (Wu); JX390; JX395; JX681; JX692.
[117] JX656; JX585 (Panama); Tr. 1161:16-62:17 (Wu); JX616 (Hilton); Tr. 1624:10-1626:2 (Pattillo).
[118] JX589; JX723.
[119] JX445; Tr. 1150:15-53:12.
[120] JX450; Tr. 299:11-300:19 (Dunlap).

85. By February 15, CCA knew the March 27 date was in jeopardy.[121] CCA became concerned it would not be paid sufficiently.[122]

86. CCA decided to, on one hand, (falsely) assure BMLP that "life safety inspections, TCO inspections" were on track; and on the other, squeeze money from BMLP by threatening the opening. [123]

87. Wu even ghostwrote a letter to Izmirlian from EXIM, assuring that "CCA will spare no efforts to achieve the TCO."[124]

88. On February 4, Wang informed Dunlap that CCA would not allow FF&E loading—"taking rooms hostage and blocking elevators"—"to get resolution to a commercial matter, which … he wasn't entitled to."[125]

89. On February 13, Dunlap notified Wang and Wu about "additional stopped works." Wang again requested money CCA was not entitled to, including retainage.[126]

90. On March 3, Wang again claimed TCO pre-inspections were proceeding on schedule and requested unearned payments.[127]

91. On March 10—knowing CCA had blown its internal deadlines—Wang threatened, "If we can't raise enough funds there will be no way to timely complete the Project ***and successfully open to the public.***"[128]

92. On March 18, when BML rejected payment demands, Wang instructed: "[F]reez[e] all the handing over process."[129]

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[121] Tr. 1046:14-16 (Yuan); JX597.3.
[122] Tr. 955:11-24 (Yuan); Tr. 960:5-961:8 (Yuan).
[123] Tr. 316:10-17:10 (Dunlap); JX648; Tr. 321:12-23:21; JX694; Tr. 533:6-12 (Collins).
[124] JX647; Tr. 1188:4-89:25.
[125] Tr. 313:20-315:2 (Dunlap); JX619.
[126] JX649; Tr. 1093:9-94:25 (Wang).
[127] JX694; Tr. 321:13-323:4 (Dunlap).
[128] JX694 (emphasis added).
[129] JX717; JX719; JX724.

93. On March 18, CCA (Wu) drafted a report to CSCEC from Yuan: "only by taking extreme measures such as a ***complete shutdown of the work***, it is possible to bring the three parties back to the negotiating table to fully and completely solve the problems of lack of funds and payment of construction funds."[130]

94. Yuan incredibly claimed this was for the good of the "whole project."[131]

95. McAnarney admitted CCA's commercial interests were more important.[132]

96. CCA's threats were unfounded, because it was *overfunded*.[133]

F. CCA used Project money to buy the Hilton.

97. CCA represented it needed $54,622,114.70 to settle disputes and pay subcontractors.[134] In exchange, it promised Substantial Completion by March 27, 2015.[135]

98. CCA initially hid the Hilton acquisition from BMLP. When BMLP learned, the reaction was "shock."[136] CCA represented the Hilton was separate.[137]

99. But CCA used Project funds to buy the Hilton. [138] Pocalyko opined that "but for" receipt of the Project's $87.6 million, CCA would have insufficient funds for the Hilton *and* other obligations.[139]

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[130] JX718; Tr. 957:18-958:4 Tr. 958:24-959:5, Tr. 962:3-963:11 (Yuan).
[131] Tr. 958:5-16.
[132] Tr. 1445:21-1446:2 (McAnarney); JX501.
[133] Tr. 661:9-19, 689:20-690:4, 697:12-698:7, 737:10-21, 771:6-9; Tr. 748:8-22; Tr. 699:21-700:20, 771:10-13; Pocalyko DX-35 (citing JX983.16); 702:22-703:23; JX787 (CCA cost report); Pocalyko DX-38 (citing JX983.19); Tr. 704:3-15; Tr. 698:23-699:20; JX548 (AECOM cost report); Tr. 700:21-6, 702:3-7, 770:16-23; Pocalyko DX-36 (citing JX983.17); Tr. 701:7-18; JX853.21 ¶ 48 (CCA billed $343.8 million but RLB countersigned only $76.1 million).
[134] JX462.2 ¶ 4; Tr. 664:15-665:14; JX462
[135] *Id.*; Tr. 133:22-34:13 (Izmirlian) ;1168:3-69:13 (Wu).
[136] JX423; Tr. 137:18-35. (Izmirlian); Tr. 298:1-299:8 (Dunlap).
[137] JX495.
[138] Tr. 660:14-18; 31; 661:9-15, 680:20-24; JX627.3; Tr. 679:22-680:4; Tr. 680:20-24; Tr. 661:22-662:4, 663:14-19, 678:22-679:8, 757:1-10, 765:10-766:2; Pocalyko DX-15 (timeline); JX419; Tr. 662:19-663:12 (purchase agreement); JX465; JX481; Tr. 666:11-17; JX521; Tr. 679:12-21; JX522.1-2; Tr. 678:12-21; JX481; Tr. 666:11-19, 678:5-11; JX481; Tr. 678:22-679:11.
[139] Tr. 680:9-19, 681:1-682:2; Pocalyko DX-16 (citing JX481).

100. In discovery, CCA falsely claimed that "the entirety of the $54,622,114.70" was "used to either pay subcontractors for work done on the Project, or to reimburse [CCAB]."[140] In unrebutted analysis, Pocalyko could not verify 96.4% of the amounts.[141]

101. CCA's failure to pay its subcontractors "put the project at risk."[142]

102. CCA concealed diversions of Project funds for cigars, wine, scarves, golf equipment, and similar as "conference costs,"[143] "hospitality expenses,[144] and "office supply."[145]

103. Monitors RLB and AECOM observed discrepancies in CCA's general conditions uses.[146]

G. BMLP reasonably relied.

104. BMLP believed CCA's representations because "we were very close," "ownership had agreed to fund $54 million," the "reduce[d] … scale of what is [to] open," and that agreement was in the "presence of the three entities' senior most representatives."[147]

105. BMLP, as BML's day-to-day manager,[148] directed BML to act in reliance upon CCA's representations that it would meet the deadline by: opening reservations; placing ads; hiring and training employees; scheduling entertainment; bringing in $4 million+ for the casino; obtaining equipment; loading mini-bars; and directing third-party operators to prepare to open.[149]

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[140] JX970.8-9 (Topic 13).
[141] Pocalyko DX-17 (citing JX983.10); Tr. 683:12-25, 684:18-685:4, 766:12-767:1; JX954; Tr. 685:10-686:3.
[142] JX498 (December 2014, Valley Crest); JX628 (Feb. 2015 China State fit-out subcontractor).
[143] Tr. 661:9-19, 692:11-18, 695:14-17; Tr. 694:5-9; Tr. 694:16-695:1; JX15 at 29 (§ 6.1.4), 66 (Attachment 4, § 1.03), 36 (§ 7.2.3); Pocalkyo DX-28 (citing JX943); Pocalyko DX-26 (citing JX939.14); Tr. 693:12-20; Pocalyko DX-27 (citing JX939.15-16); Tr. 693:24-694:4.
[144] Pocalyko DX-29 (citing JX 943); Pocalyko DX-30 (citing JX939.30-31); Tr. 696:7-17.
[145] Pocalyko DX-31-2 (citing JX939.32); Tr. 696:23-697:11.
[146] Tr. 695:18-696:2.
[147] Tr. 303:1-304:6 (Dunlap); Tr. 146:19-47:16 (Izmirlian).
[148] Tr. 121:17-22:16; JX34 § 4.1.
[149] Graff Tr. 102:20-103:08, 104:19-25; Tr. 152:12-153:1 (Izmirlian); Tr. 311:5-313:3 (Dunlap), 313:4-15 (BMLP could not wait until the last minute).

106. CCA argued that BMLP relied unreasonably, but every witness who was asked believed that the Project could be open by March 27.[150]

107. It is customary to rely on the construction manager regarding scheduling, manpower, and life and fire safety. [151] BMLP did.[152]

108. CCA was responsible to inform BML if the deadline was in jeopardy; CCA did not.[153]

109. If BMLP had known the truth, it would have done "just about everything differently": "conserved cash"—about $500 million; not started marketing, hiring, training; removed work from CCA; and, possibly, filed suit earlier.[154]

H. CCA caused deadline failure.

110. On March 24, Izmirlian wrote: "despite the numerous promises and commitments by CCAB and CCA, we have had to call off the opening of Baha Mar."[155]

111. Collins opined (unrebutted) that "the absence of [a] plan with proper manpower applied to it" and the failure to meet CCA's November commitments "caused the March 27th deadline to be missed."[156]

[150] Tr. 340:8-11 (Dunlap); Kwasnowski 114:11-12; Tr. 1588:6-14 (Pattillo); Tr. 155:1-7, 156:20-157:2 (Izmirlian); Tr. 1416:1-5 (McAnarney); Tr. 1021:19-22 (Yuan).
[151] Tr. 531:15-532:1, 500:25-501:20, 523:10-21, Tr. 532:18-533:5 (Collins) (manpower management).
[152] Murray Tr. 28:25-30:04; (life safety); Tr. 521:25-523:7 (Collins) (manpower); Tr. 150:10-13 (Izmirlian); JX560 ("We rely on Tiger and David to advise us as to what can be achieved and David has been mostly absent since our meetings in Beijing.").
[153] Tr. 533:6-12; Tr. 531:20-532:13; Murray Tr. 72:08-25; *see supra* ¶¶ 50, 68.
[154] Tr. 171:17-72:13 (Izmirlian).
[155] JX738; Tr. 157:3-11 ("We had to contact every single person that was coming on March 27th. We had to reimburse them, not only for what they had paid us but their airfare. We had to tell the world that Baha Mar was not going to be open.").
[156] Tr. 476:9-20; Tr. 529:22-530:14, 531:1-13 (Collins); *accord* Kwasnowski 114:14-20; 132:06-11 (manpower significant factor in preventing March 27 substantial completion).

112. CCA's claim that BML was responsible is not credible. It was CCA's obligation to timely identify barriers.[157] CCA did not notify BML that anything in its scope would prevent TCO.[158]

113. Reiss (inspector) denied TCO because "the contractor" (CCA) failed to test or commission the fire safety systems.[159]

114. CCA did not try in good faith.[160]

I. CCA's failure triggered a liquidity crisis.

115. After CCA missed the deadline, it continued attempting to force BML to pay undue money, refusing to provide a completion date.[161]

116. CCA "reduc[ed] numbers and resources" and work halted.[162]

117. Wu admitted before government officials that CCA "delayed works on purpose."[163]

118. BMLP tried to secure funding; CCA demanded more money while refusing to restart construction. [164] Additional contributions from BMLP would have been "throwing money into a black hole."[165]

119. Thus, the Project continued spending money without relief from (e.g.) key money, guests, or condo sales, and plunged deeper into liquidity crisis, making bankruptcy inevitable.[166]

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[157] *See supra* ¶¶ 50, 68, 101.
[158] Tr. 331:21-23 (Dunlap); Tr. 1595:8-13 (Pattillo).
[159] JX736; Tr. 1490:7-1492:6; 31; JX410 ("communication appeared to be lacking by CCA on some of the life safety issues"); JX432 ("CCA MEP staff telling us to go jump in a lake . . . does not work for us in working toward a TCO since wea re the ones who will be signing off"); JX486 (McAnarney "admitted that he does not read our e-mails…This is totally unacceptable to us . . . [and] fosters a lack of trust.").
[160] Tr. 346:25-347:2 (Dunlap).
[161] Tr. 332:22-333:16 (Dunlap); *see also* JX746; Tr. 159:11-19 (Izmirlian); Tr. 1048:5-10 (Yuan); Tr. 336:1-16 (Dunlap); JX757
[162] Tr. 341:25-11 (Dunlap); 1208:10-23 (Wu); JX857; Murray 83:20-85:20; 160:25-161:07.
[163] JX777; Tr. 159:23-160:20 (Izmirlian).
[164] Tr. 162:1-11 (Izmirlian); JX817; JX826; JX858; Tr. 342:12-343:6 (Dunlap).
[165] Tr. 170:20-71:1 (Izmirlian).
[166] Tr. 167:18-23 (Izmirlian) ("We had staff we were still paying. We had our power bills we had to pay. You know, think about having hired thousands of people who open thousands of rooms and now we're at the end of June. So, basically three months later. Bills add up."); 847:1-6 (Bones) ("The actual world is, as Mr. Izmirlian testified, [they]

120. CCA worsened matters by making spurious complaints to EXIM about BML.[167]

121. BMLP informed Wu about (obvious) liquidity problems before filing Chapter 11.[168]

J. CCA conspired to force BMLP out.

122. Chapter 11 reorganization was a uniquely appropriate vehicle to save the Project.[169]

123. CCA secretly paid Notarc (run by a Bahamian official's son) for years, and asked Leslie Bethel to intervene with his father when Bahamian politics did not go CCA's way. The same month Sir Baltron Bethel asked CCA how it wanted negotiations to procced, CCA paid Notarc nearly $100,000.[170]

124. The U.S. bankruptcy was dismissed due to a liquidation filed by the Bahamian Government.[171]

125. BMLP still tried and Izmirlian offered to "match the price" but "never got any answers," because CCA made a "back room deal to replace the developer with another hotel and casino operator."[172] (Sir Bethel: "suggestion should preferably come from Bank and not Gov to prevent Baha Mar taking the position gov is trying to push Izmirlian out."). An EXIM subsidiary became the owner, then sold the Project to a Chinese company.[173]

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had to spend $330 million leading up to the opening, had no revenue coming in, had 2400 employees burning at a payroll of between 5 and $7 million a month with no cash flow coming in which caused the credit facility and the funds available to dry up very quickly."); 1207:17-08:5 (Wu admitting CCA refused to agree to a new opening date repeatedly before bankruptcy); JX757; JX838; Ludwig Tr. 340:22-41:12.

[167] Tr. 447:4-10 (Dunlap); JX703; JX731; Tr. 343:7-344:6 (Dunlap); JX846.

[168] Graff Tr. 160:25-161:14; Tr. 170:6-171:16 (Izmirlian); JX842; JX861.

[169] JX860; Tr. 173:1-174:14, 175:4-13 (Izmirlian).

[170] JX983.48 ($2.3 million total payments to Notarc); Liu Tr. 231:8-37:10; JX431; JX740; JX808 ("Sir B is one of CCA's biggest supporters"); JX875; JX877; JX897; JX870 (discussing "fatal blows to Baha Mar").

[171] Tr. 174:15-18 (Izmirlian); *see also* JX930.

[172] Tr. 344:15-346:24 (Dunlap); 176:12-17 (Izmirlian); JX892; JX919 (meeting between China State and EXIM agreeing to replace BML with a new, Chinese investor.).

[173] JX947.

126. CCAB remained construction manager and received another $700 million to finish —a satisfactory outcome for Yuan.[174]

III. Proposed Conclusions of Law

A. Fraud

127. Fraud requires: a material misrepresentation or omission of fact; knowledge of its falsity; intent to induce reliance; justifiable reliance; damages. *Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 310 (2017); *Rapaport v. Strategic Fin. Sols., LLC*, 140 N.Y.S.3d 508, 509 (1st Dept 2021).

128. BMLP proved that CCA committed fraud by clear and convincing evidence. The evidence is not "loose, equivocal, or contradictory." *Abrahami v. UPC Const. Co.*, 224 A.D.2d 231, 233 (1st Dept 1996).

129. **Misrepresentation or Material Omission:** CCA made misrepresentations of "existing fact" about its present ability and intent to meet the deadline, including resources to commit. *Sabo v. Delman*, 3 N.Y.2d 155, 160 (1957). CCA repeatedly represented it would open the Project by March 27, 2015—on November 17-18, on November 27, in the December 5 Board Meeting, and in reassurances from top executives through March.[175] CCA's representations were false and omitted material information:

a. CCA agreed to the deadline to extract $54 million for the Hilton.[176] CCA lied that this money was for subcontractors.[177]

[174] JX947; Tr. 1049:17-1050:7, 1051:20-1052:4 (Yuan).
[175] *Supra* ¶¶ 36-46.
[176] *Supra* ¶¶ 97-99.
[177] *Supra* ¶¶ 97, 99-101.

b. CCA had no realistic plan to open by March 27, in November 2014 or ever.[178] Its continued reassurances[179] misrepresented its present "ability to perform." *Shear Enterprises, LLC v. Cohen*, 189 A.D.3d 423, 424 (1st Dept 2020).

c. CCA promised to add as many workers as needed and that none would leave.[180] But CCA authorized hundreds of departures, and never warned BMLP of the "disastrous" consequences.[181]

d. By mid-February, CCA decided it was better off not finishing, so it tried to extort payment through threatened work stoppages.[182] CCA lied that the Project was on schedule and issues were "commercial."[183]

130. CCA's "misleading partial disclosure[s]" omitted the material fact that CCA lacked ability, and later intention, to meet the deadline. *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 135 (1st Dept 2014); *Indosuez v. Barclays Bank PLC*, 181 A.D.2d 447, 447 (1st Dept 1992) ("half-truth").

131. The facts were "peculiarly within the knowledge of" CCA, the construction manager.[184] BMLP could not have discovered them through "exercise of ordinary intelligence." *Jana L. v. W. 129th St. Realty Corp.*, 22 A.D.3d 274, 278 (1st Dept 2005); *Heineman v. S & S Mach. Corp.*, 750 F. Supp. 1179, 1185-86 (E.D.N.Y. 1990) (failure to disclose insufficient resources to complete transaction).

132. CCA's misrepresentations were material, *i.e.* "sufficiently important or relevant to influence [BMLP's] decision" to open reservations, direct BML to incur staggering expenses

[178] *Supra* ¶¶ 48, 51-58, 61, 64-67, 70.
[179] *Supra* ¶¶ 36-46, 60, 62, 64, 69, 86, 90.
[180] *Supra* ¶¶ 71-72.
[181] *Supra* ¶¶ 73-79.
[182] *Supra* ¶¶ 84-96.
[183] *Supra* ¶¶ 84-96.
[184] *Supra* ¶¶ 49-50, 57-59, 62, 64-69, 107, 108.

(including $54 million for the Hilton), and not pursue alternatives.[185] *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 448 (E.D.N.Y. 2013).

133. **Knowledge of Falsity:** Initially, CCA represented that it could open the Project by March with "reckless disregard" to whether it had the required resources, and a plan to deploy them. *DaPuzzo v. Reznick Fedder & Silverman*, 14 A.D.3d 302, 303 (1st Dept 2005); *State St. Tr. Co. v. Ernst*, 278 N.Y. 104, 112 (1938) ("a reckless misstatement," "an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth," "[a] refusal to see the obvious, [and] a failure to investigate the doubtful" all constitute fraudulent intent); 14 N.Y. Prac., New York Law of Torts § 1:71 ("blind[ing] …[oneself] to obvious data … without knowing whether or not [representation] was true"). CCA had the ability—and was contractually required—to maintain a resource-based, Critical Path schedule.[186] CCA knew its lack of any realistic plan was an "empty promise."[187] CCA represented it could meet the deadline anyway.[188] It did so for $54 million for the Hilton.[189]

134. Later, CCA realized that the consequences of its false promises would be "disastrous" for the Project.[190] Instead of telling BMLP, CCA said everything was fine and demanded money.[191] CCA knew its representations were false when made. CCA knew in November 2014 that it would use the $54 million to buy the Hilton.[192] CCA knew as of January 21 it had insufficient manpower[193] and by February that TCO was jeopardized.[194] Yet CCA hid

[185] *Supra* ¶¶ 105, 109.
[186] *Supra* ¶¶ 49, 50, 68, 111, 112.
[187] *Supra* ¶¶ 51-55, 61, 64.
[188] *Supra* ¶¶ 36-44, 55, 64.
[189] *Supra* ¶¶ 97-100.
[190] *Supra* ¶¶ 75-76.
[191] *Supra* ¶¶ 65, 77, 79, 84-91.
[192] *Supra* ¶¶ 97-100.
[193] *Supra* ¶¶ 75-76.
[194] *Supra* ¶¶ 63, 79, 85.

this.[195] CCA knew that its work stoppages jeopardized the opening and the Project's liquidity, and that its "commercial" demands were unsupported.[196]

135. The "rational inference" is that CCA's misrepresentations "were knowing and intentional" based on CCA's intent to squeeze money from the Project, and its internal acknowledgments contrary to its representations.[197] *Cordaro v. AdvantageCare Physicians, P.C.*, 208 A.D.3d 1090, 1093 (1st Dept 2022); *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 131 A.D.3d 427, 429 (1st Dept 2015).

136. **Intent to Induce Reliance:** CCA "was aware that its misrepresentations would be reasonably relied upon by" BMLP. *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 100 (1st Dept 2003); *Cohen Bros. Realty Corp. v. Mapes*, 181 A.D.3d 401, 404 (1st Dept 2020) (defendants "knew that Plaintiffs would rely"). CCA knew that BMLP would publicly announce the opening date and take reservations, and that it would then be too late to reverse course.[198]

137. **Reliance:** BMLP "was induced to act or to refrain from acting to its detriment by virtue of" CCA's misrepresentations. *Fid. Nat. Title Ins. Co. v. N.Y. Land Title Agency LLC*, 121 A.D.3d 401, 402 (1st Dept 2014). BMLP believed CCA when it represented that it would open the resort on time.[199] BMLP reasonably relied on CCA to truthfully advise BMLP.[200] As BML's day-to-day manager, BMLP directed it to open reservations and incur significant opening expenses (plus $54 million for the Hilton).[201] But for CCA's misrepresentations, BMLP would have protected its investment by conserving cash, bringing in other subcontractors, or suing.[202]

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[195] *Supra* ¶¶ 64-5, 69, 79, 86-87, 90-1.
[196] *Supra* ¶¶ 84-93, 95-96.
[197] *Supra* ¶¶ 52, 53, 58, 61, 64, 65, 75, 79, 83, 84-95.
[198] *Supra* ¶¶ 41-43, 46.
[199] *Supra* ¶ 104.
[200] *Supra* ¶¶ 104, 106-108.
[201] *Supra* ¶¶ 104, 105, 97.
[202] *Supra* ¶ 109.

138. **Justifiable:** BMLP's reliance was justifiable because CCA's misrepresentations about its plans, ability, and resources "concerned facts peculiarly within [CCA's] knowledge." *Forty Cent. Park S., Inc. v. Anza*, 117 A.D.3d 523, 523-24 (1st Dept 2014). Owners customarily rely on construction managers' representations about scheduling, manpower, and management resources.[203] It was CCA's responsibility to inform BML/BMLP that the March 27 deadline was in jeopardy; it never did.[204] BMLP's reliance was reasonable based on CCA's resources and the public and formal nature of its promises.[205]

139. **Causation:** CCA's misrepresentations were the "direct and proximate cause" of BMLP's total loss. There is considerably more than a "reasonable connection." *Laub v. Faessel*, 297 A.D.2d 28, 30-31 (1st Dept 2002). It "was foreseeable" that the Project would suffer a liquidity crisis if it did not open on time, and that BMLP would lose its investment.[206] *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 296 (1st Dept 2011). Though BMLP took extraordinary efforts, CCA refused to agree to reasonable terms for a new opening date, and intentionally slowed work. [207] CCA backchanneled falsehoods to EXIM, causing a funding freeze.[208] CCA's actions were the direct and substantial cause of BML's bankruptcy, as the Project hemorrhaged money.[209] After the Chapter 11, CCA conspired with EXIM and the Bahamian government to liquidate BML and force BMLP out, causing BMLP to lose its entire investment.[210]

140. There is no "intervening act" so "independent of or far removed" from CCA's conduct to "possibly break the causal nexus." *Hain v. Jamison*, 28 N.Y.3d 524, 529 (2016). CCA's

[203] *Supra* ¶¶ 107; *see also supra* ¶ 131.
[204] *Supra* ¶¶ 108, 112, 68, 69.
[205] *Supra* ¶ 104, 107.
[206] *Supra* ¶¶ 110-111, 115-121.
[207] *Supra* ¶¶ 115-120.
[208] *Supra* ¶¶ 118-120.
[209] *Supra* ¶¶ 115-121.
[210] *Supra* ¶¶ 122-126.

fraud caused the liquidity crisis.[211] Chapter 11—the only viable option[212]—was a "normal or foreseeable consequence of the situation created by" CCA's fraud. *Id.* (citations omitted). The acts of the Bahamian government and EXIM[213] flow from CCA's fraud and were directly encouraged by CCA.

141. **Damages:** Returning BMLP's investment will "compensate [BMLP] for what [it] lost because of the fraud" and "restore [BMLP] to the position it occupied before the commission of the fraud." *NMR E-Tailing LLC v. Oak Inv. Partners*, 216 A.D.3d 572, 573 (1st Dept 2023). But-for CCA's fraud, BMLP would not have lost its $845 million investment. *See id.* at 573 (affirming judgment where NMR "lost its entire investment when Ahmed's fraud was unearthed, causing the company to file for bankruptcy").

142. BMLP suffered a loss of $845 million. BMLP initially contributed ***at least*** $830 million, and another $15 million in March 2015.[214]

143. BMLP is entitled to pre-judgment interest at 9% per annum. CPLR §§5001, 5004.

144. Defendants are ***all*** liable for the fraud orchestrated by Yuan, their President and Chairman, and executives Wu, Wang, and Liu.[215]

B. Breach of Contract

1. CSCECB breached

145. Breach requires: a contract; performance; breach; and damages. *34-06 73, LLC v. Seneca Ins. Co.*, 39 N.Y.3d 44, 52 (2022).

[211] *Supra* ¶¶ 115-120.
[212] *Supra* ¶ 122.
[213] *Supra* ¶¶ 123-126.
[214] *Supra* ¶¶ 4-7.
[215] *Supra* ¶¶ 24, 27, 31, 36-46, 69, 75-79, 84-86, 88-93, 97-100.

146. **Contract:** Investors Agreement §4.7 required the Board Member to "at all times act in the best interests of the Company," BML.[216] If the Board Member wore "different hats," "when they changed their hats, they could not simply shed their responsibilities."[217] To hold otherwise would excise the term "at all times." *See* *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004).

147. **Performance:** Defendants introduced no evidence that BMLP materially breached prior to their breach.

148. **Breach:** CSCECB breached when Wu took actions not in the best interests of BML.

149. The breach began on May 1, 2014, when Yuan directed Wu to replace him as the Board Member, and continued until April 2015.[218]

150. BMLP was stripped of its right to have a Board Member looking out for BML's best interest by the appointment of Wu, who was not aware of his obligation, and who repeatedly acted *against* BML. The breach was material, *i.e.* "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract"—here, to protect Project investments. *Smolev v. Carole Hochman Design Grp., Inc.*, 79 A.D.3d 540, 541 (1st Dept 2010). CSCECB further breached by its Board Member acting contrary to BML's interests[219] when:

151. Wu approved using BML's money to acquire the Hilton[220]: the Hilton was a competitor;[221] that money was for Project work.[222]

[216] JX34.14 (§ 4.7); NYSCEF 668 at 3 (1st Dept summary judgment decision)
[217] NYSCEF No. 648 at 15.
[218] *Supra* ¶ 10.
[219] Tr. 1150:3-8, 1150:15-18, 1153:9-12, 1187:23-25 (Wu); Liu Tr. 279:21-280:05; Manabat Tr. 128:11-21 (Panama); 134:08-13 (Hilton); 148:01-149:09 (EXIM).
[220] *Supra* ¶¶ 97-100, Tr. 1164:15-1165:3 (Wu) ("an investment from the parent company").
[221] JX627.3. Tr. 935:20-936:11 (Yuan).
[222] *Supra* ¶¶ 97, 101.

152. Wu, Wang, Liu, Manabat, and Callier were diverted to Panama when the Project desperately needed management,[223] and Manabat admitted he "must be there."[224] This diversion led to CCA's failure to meet the deadline.[225]

153. Wu authorized the departure of 700 Chinese workers,[226] but drafted a letter acknowledging an "imminent" need for hundreds more.[227] This contributed to the failure.[228]

154. Wu directed CCA to slow and stop work to extract payments.[229] These actions interfered with progress,[230] and were unjustified attempts to take Project funds.

155. Wu directed interference with Project financing. CCA communicated with EXIM to provide false complaints about BML,[231] and false reassurances to BMLP via a ghost-written letter from EXIM.[232] These efforts interfered with financing—which impeded the deadline.

156. **Causation:** CSCECB's breaches were the direct and proximate cause of the loss of BMLP's investment in BML. CCA's breaches caused the missed deadline.[233] That triggered a liquidity crisis, and—ultimately—the Bahamian liquidation in which BMLP lost everything.[234] Each event was "directly traceable" to CCA's breach. *Fed. Hous. Fin. Agency v. Morgan Stanley ABS Cap. I Inc.*, 59 Misc. 3d 754, 784 (N.Y. Sup. Ct. 2018); *see also NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 2016 WL 3098842, at *6 (S.D.N.Y. June 1, 2016) (same proximate causation test as for fraud).

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[223] *Supra* ¶¶ 70, 80, 81, 82.
[224] Manabat Tr. 69:18-21.
[225] *Supra* ¶¶ 70, 83, 111.
[226] *Supra* ¶¶ 73, 77.
[227] *Supra* ¶ 75.
[228] *Supra* ¶ 111.
[229] *Supra* ¶¶ 84-95.
[230] *Id.*
[231] *Supra* ¶ 120; JX339; Manabat Tr.135:21-140:9, 144:2-8, 147:21-148:16.
[232] *Supra* ¶ 87.
[233] *Supra* ¶¶ 110-114.
[234] *Supra* ¶¶ 115-126.

157. **Damages:** BMLP can recover the return of its investment as direct damages because the loss "ordinarily and naturally flow[s] from" CSCECB's breach. *Fruition, Inc. v. Rhoda Lee, Inc.*, 1 A.D.3d 124, 125 (1st Dept 2003); *see also Remora Cap. S.A. v. Dukan*, 175 A.D.3d 1219, 1220 (1st Dept 2019) ("they lost the funds they contributed . . . they have nothing to show for their capital contribution"); *GSCP VI Edgemarc Holdings, L.L.C. v. ETC Northeast Pipeline, LLC*, 2023 WL 6805946, at *5 (N.Y. Sup. Ct. Oct. 14, 2023) (claim for return of lost … investment due to the alleged breach" not consequential); *Gerritsen v. Glob Trading, Inc.*, 2009 WL 262057, at *10 (E.D.N.Y. Feb. 4, 2009) ("BWG is entitled to recover contract damages consisting of all capital invested in GTI, plus interest"). When Wu sabotaged the Project, BMLP's loss of its investment was a "natural and probable consequence." As the Court held, these are not consequential damages.[235]

158. Only returning BMLP's investment can come close to putting BMLP "in the same position that it would be in had [CCA] performed." *Latham Land I, LLC v. TGI Friday's, Inc.*, 96 A.D.3d 1327, 1331 (3d Dept 2012); 24 Williston on Contracts § 64:16 (4th ed. 2024) (direct damages "would follow any breach of similar character in the usual course of events").[236] BMLP incurred significant cost to assemble and contribute assets,[237] which are now part of a successful resort. BMLP does not receive—and cannot seek—any profits; returning its investment is its only recompense.

[235] NYSCEF 736 at 2.
[236] Alternatively, the $830 million is available as reliance damages. *St. Lawrence Factory Stores v. Ogdensburg Bridge & Port Auth.*, 13 N.Y.3d 204, 208 (2009); 24 Williston on Contracts § 64:4 (4th ed. 2024) ("expenditures incurred by the nonbreacher in preparing to perform or in performance").
[237] *Supra* ¶¶ 2, 4, 5, 7.

159. BMLP's damages are certain and ascertainable, "not remote, speculative, or contingent." *Fruition*, 1 A.D.3d at 125. BMLP's lost investment is readily valued at $845 million, including based on the parties' agreement.[238]

160. For breach of contract, BMLP is entitled to $845,000,000 in damages.

161. BMLP is entitled to pre-judgment interest at 9% per annum. CPLR §§5001, 5004.

2. CCA and CCAB are liable for CSCECB's breach

162. To find CCA and CCAB liable for CSCECB's breach, the Court must pierce the corporate veil. BMLP proved by a preponderance that CCA (1) "exercised complete domination of" CSCECB and CCAB "in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against [BMLP] which resulted in [BMLP's] injury." *Cobalt Partners, L.P. v. GSC Cap. Corp.*, 97 A.D.3d 35, 40 (1st Dept 2012).

163. Veil piercing is a fact-based and equitable inquiry; "there are no definitive rules[.]" *Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dept 2014).

164. Courts consider numerous non-dispositive factors, discussed below. *Fantazia Int'l Corp. v. CPL Furs New York, Inc.*, 67 A.D.3d 511, 512 (1st Dept 2009); *see also Okapi Partners, LLC v. Holtmeier*, 2019 WL 1517553, at *4 (S.D.N.Y. Apr. 8, 2019).

165. CCA exercised complete domination of CSCECB and CCAB on this Project.

166. Defendants shared ownership, officers, directors and personnel. Project executives—Wu, Wang, Liu, and Yuan—held positions at multiple Defendants.[239] Yuan was Chairman and President of all three, and the senior-most officer in the Western hemisphere.[240] All Defendants are subsidiaries of a New Jersey-based holding company, of which Yuan is Chairman

[238] *Supra* ¶¶ 5-7.
[239] *Supra* ¶¶ 24, 27, 31, 32, 33.
[240] *Supra* ¶¶ 24, 27, 28.

and President.[241] CCAB and CSCECB had the same two directors (Yuan and Gao) at incorporation.[242] *See* *Rich v. J.A. Madison, LLC*, 211 A.D.3d 652, 653 (1st Dept 2022) (veil piercing based on "companies occup[ying] the same offices" and "overlapping personnel" involved in "negotiating the contracts"); *Perez v. Long Island Concrete Inc.*, 165 N.Y.S.3d 504, 506-07 (1st Dept 2022) (veil piercing based on intermingled "paychecks," "trucks," and overlapping personnel); *People v. Leasing Expenses Co. LLC*, 159 N.Y.S.3d 1, 4-5 (1st Dept 2021) (overlap "in officers [and] ownership"); *Gutierrez v. 451 Lexington Realty LLC*, 179 A.D.3d 422, 423 (1st Dept 2020) (companies were "interchangeable" because of "overlap in ownership ... and employees"); *UBS Sec. LLC v. Highland Cap. Mgmt., L.P.*, 93 A.D.3d 489, 490 (1st Dept 2012) (company's "sole board member" was on alter ego's board); *Cherkasets v. Gordon*, 21 A.D.3d 856, 857 (1st Dept 2005) (shared officers, "president, executive vice-president").

167. CCA, through Yuan, exercised discretion over and controlled critical actions taken by CSCECB and CCAB on this Project, and provided false information.[243] *See* *Baby Phat*, 123 A.D.3d at 407 ("[D]efendant dominated and controlled the negotiations on behalf of PFLLC and actually provided the erroneous information which persuaded plaintiff"); *TIAA Glob. Invs., LLC v. One Astoria Square LLC*, 127 A.D.3d 75, 90 (1st Dept 2015) (one individual was managing member of both companies and "integral" to defendant's "decision" "to conceal from plaintiff"); *Miller v. Cohen*, 93 A.D.3d 424, 425 (1st Dept 2012) (company's "investment decisions were dependent on funding from" affiliate and it "did not have business discretion to enter into contracts, absent [its] assent"). *All* Project-related communications and every executive ran through Yuan at CCA.[244]

[241] *Supra* ¶ 25.
[242] *Supra* ¶ 29.
[243] *Supra, e.g.*, ¶¶ 14, 15, 20, 21, 22, 30, 31, 43, 44, 46, 75-78, 93.
[244] *Supra* ¶¶ 27, 28.

168. CCA, CSCECB and CCAB employees shared office space and addresses, used CCA letterhead, emails, and signatures, and interchangeable logos on Project documents[245] *See Gutierrez*, 179 A.D.3d at 423; *James*, 199 A.D.3d at 523.

169. CCA, CCAB and CSCECB disregarded corporate formalities, not maintaining separate books.[246] Defendants introduced no evidence of "the formalities and paraphernalia of corporate existence," *Simplicity Pattern Co. v. Miami Tru-Color Off-Set Serv., Inc.*, 210 A.D.2d 24, 25 (1st Dept 1994), including separate "corporate records," *CC Ming (USA) Ltd. P'ship v. Champagne Video Inc.*, 232 A.D.2d 202, 202 (1st Dept 1996), such as tax returns, board or corporate meetings, or regular elections of directors and officers, *Ventresca Realty Corp. v. Houlihan*, 41 A.D.3d 707, 709 (2d Dept 2007).

170. Pocalyko's opinion that CCA, CCAB, CSCECB "operated as a unitary financial entity and commingled" assets was ***unrebutted***[247] and supported by ample evidence, including bank accounts;[248] commingled obligations,[249] *see Baby Phat*, 123 A.D.3d at 407 (defendant "commingled funds and disregarded corporate formalities" based on receiving monies "owed to" its subsidiary); and commingled property and transactions.[250]

171. CCA paid or guaranteed obligations for CSCECB and CCAB.[251] *UBS*, 93 A.D.3d at 490 (companies "did not distinguish … debts and obligations"); *Miller*, 93 A.D.3d at 425 ("Icon group paid some of movants' personal expenses."); *Simplicity Pattern*, 210 A.D.2d at 25 ("payments of Tru-Color's debts by Miami Tru-Color").

[245] *Supra* ¶¶ 14, 19, 22, 32, 33, 34.
[246] *Supra* ¶ 13.
[247] *Supra* ¶¶ 12, 23.
[248] *Supra* ¶ 14.
[249] *Supra* ¶¶ 16, 18, 20, 30, 33.
[250] *Supra* ¶¶ 15, 17, 21, 22.
[251] *Supra* ¶ 14, 16, 18, 20.

172. CCAB and CSCECB were inadequately capitalized. CSCECB "held no assets other than" its shares in BML.[252] *Ming*, 232 A.D.2d at 202; *see also Miller*, 93 A.D.3d at 425 ("did not have an independent source of funds"). CCAB needed external funding for anything not Project-related.[253]

173. CSCECB and CCAB were not treated as independent profit centers. CSCECB was a shell solely for the Investors Agreement.[254]

174. Dealings between CCA, CSCECB, and CCAB were not at arm's length. They transferred funds, assumed one another's obligations, and commingled contractual obligations.[255]

175. CCA conflated entities including by holding *itself* out as the construction manager and co-investor.[256] Everyone on the Project understood CCA was the relevant entity.[257] *See Cherkasets*, 21 A.D.3d at 857 (director "believed HSW and Eastern were actually two arms of the same entity"); *Anderson St. Realty Corp. v. RHMB New Rochelle Leasing Corp.*, 243 A.D.2d 595, 596 (2d Dept 1997) (relying on "appellant's reference to itself as the parent company"); *Clark Rigging & Rental Corp. v. Liberty Mut. Ins. Co.*, 179 A.D.3d 1510, 1511–12 (4th Dept 2020) (defendant "made clear in certain conversations" companies "are one and the same").

176. Defendants introduced no evidence of separateness. To the extent Defendants' witnesses asserted that, it was unsupported and not credible. *Miller*, 93 A.D.3d at 425 (testimony "was evasive and non-responsive"); *Pensmore Invs., LLC v. Gruppo, Levey & Co.*, 184 A.D.3d 468, 469 (1st Dept 2020) ("This Court defers to Supreme Court's credibility determinations ... Supreme Court properly determined that veil piercing was appropriate.").

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[252] *Supra* ¶ 16
[253] *Supra* ¶ 14.
[254] Tr. 911:20-23 (Yuan); *supra* ¶ 16.
[255] *Supra* ¶¶ 12-18, 20-21, 23, 33.
[256] *Supra* ¶ 22; *see also* ¶¶ 16, 20, 33.
[257] *Supra* ¶¶ 31-34.

177. CCAB, CSCECB, and CCA operated as a "single economic entity"—CCA—on the Project. *UBS*, 93 A.D.3d at 490; *see also Cherkasets*, 21 A.D.3d at 857 (issue is whether companies "operated as a single entity"). CSCECB and CCAB were so financially intertwined with CCA, and their day-to-day operation "so dominated" by Yuan at CCA, that they primarily transacted CCA's business instead of their own, justifying disregard of the corporate form. *Austin Powder Co. v. McCullough*, 216 A.D.2d 825, 827 (3d Dept 1995).

178. CCA, through Yuan, used its domination and control of CSCECB and CCAB to perpetrate a wrong against BMLP. Yuan directed Wu to replace him on the BML Board;[258] he arranged for workers to leave;[259] he directed Wu to mislead Izmirlian via fake letter;[260] he recommended shutting down the work for payment.[261] CCA directed CCAB to acquire the Hilton, using money from its New Jersey account, and marketed the Hilton as CCA's.[262] Each action harmed BMLP.[263] *See ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 229 (2011) (corporation "abused its control of its wholly-owned subsidiary ... by causing it to engage in harmful transactions" which "expose [plaintiffs] to significant liability"); *Kostyatnikov v. HFZ Cap. Grp. LLC*, 212 A.D.3d 477, 478 (1st Dept 2023) (defendants "exercised domination and control over defendant entities ... by abusing the corporate form to deprive plaintiffs of their investment"); *BP 399 Park Ave. LLC v. Pret 399 Park, Inc.*, 150 A.D.3d 507, 508 (1st Dept 2017) ("Pret Parent's decision that Pret 399 would stop paying rent and breach the lease constitutes wrongdoing sufficient to pierce the corporate veil."); *Baby Phat*, 123 A.D.3d at 407 ("defendant, through its domination of PFLLC, misrepresented the value of the assets"); *Cobalt Partners*, 97

[258] *Supra* ¶ 10.
[259] *Supra* ¶ 77.
[260] *Supra* ¶ 87.
[261] *Supra* ¶ 93.
[262] *Supra* ¶ 21, 99, 14.
[263] *Supra* ¶¶ 156-157, 139-141.

A.D3d at 41 ("To use domination and control to cause another entity to breach a contractual obligation for personal gain is certainly misuse of the corporate form to commit a wrong."); *Simplicity Pattern*, 210 A.D.2d at 25 ("domination caused the wrong to plaintiff by … breaching"); *Anderson*, 243 A.D.2d at 596 ("appellant dominated RHMB's affairs with respect to the subject premises, which led to the wrong now complained of"); *Pae v. Chul Yoon*, 41 A.D.3d 681, 682 (2d Dept 2007) ("[A]ppellant ... dominated the corporation and was solely responsible for the wrongful failure of the corporation to pay the plaintiff.").

179. CCA and CCAB are liable for CSCECB's breach.

C. CSCECB's Counterclaims

180. Defendants introduced no evidence that BMLP breached Investors Agreement §§2.1 or 4.7.

181. Defendants introduced no evidence that BMLP breached Investors Agreement §4.8(g) before Defendants' material breach.

182. Defendants introduced no evidence of causation or damages for its counterclaims.

183. CSCECB has not proven its counterclaims.

IV. Conclusion

BMLP respectfully requests that the Court enter judgment in its favor and against all three Defendants for fraud and breach of contract, in the amount of $845,000,000 plus pre-judgment interest. *See* Exhibit A (proposed judgment).

Dated: New York, New York
September 5, 2024

Respectfully submitted,

SUSMAN GODFREY L.L.P.

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WORD COUNT CERTIFICATION

Pursuant to the Court's August 19, 2024 Order, NYSCEF No. 746, and Rule 17 of subdivision (g) of section 202.70 of the Uniform Rules for the Supreme Court and County Court (Rules of Practice for the Commercial Division of the Supreme Court), I hereby certify that the total number of words in this post-trial brief, excluding the caption, table of contents, table of authorities, signature block, citations in footnotes, and word count certification is 6992.

/s/Jacob W. Buchdahl
Jacob W. Buchdahl

EXHIBIT 8

BMLP Opp to CCA Post-Trial Brief

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

----------X

BML PROPERTIES LTD.,

Plaintiff,

Index No. 657550/2017
(Andrew Borrok, J.S.C.)

v.

CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD., and DOES 1-10,

Defendants.

----------X

CSCEC (BAHAMAS), LTD.,

Defendant/Counterclaim-Plaintiff,

v.

BML PROPERTIES LTD.,

Plaintiff/Counterclaim-Defendant.

----------X

PLAINTIFF'S OPPOSITION TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Other Authorities

I. INTRODUCTION

CCA's brief reads like its counsel attended a different trial. It presents arguments based on: (a) documents not addressed by any witness (or ***even in evidence***)[1]; (b) mischaracterizations; and (c) incredible testimony contradicted by the record. CCA makes Izmirlian the centerpiece of its causation and damages defenses, but failed to ask him about those issues. No CCA witness testified about CCA's counterclaims or purported corporate separateness. CCA attempts to salvage its veil-piercing defense with an untimely affidavit about Bahamian law, but it long ago waived that argument. CCA's legal arguments were previously rejected by this Court and the First Department. The Court should enter judgment for BMLP on all claims.

II. ADDITIONAL PROPOSED FINDINGS OF FACT

A. Defendants operated as CCA

1. *No witness* testified about CCA's incorporation.[2] Only BMLP used CCA's organizational documents.[3]

2. CCA's claim to not "direct or control" CCAB or CSCECB grossly misrepresents the record: BML wrote that CCA "plays no role in" the *equity shortfall request to CSCEC*—not "the Project," which CCA controlled.[4]

[1] CCA's brief cites ***twenty-five*** exhibits not admitted in evidence: JX0003, JX0037, JX0123, JX1027, JX1026, JX1028, JX0630, JX0920, JX0731, JX0480, JX0496, JX0511, JX0541, JX0570, JX0578, JX0588, JX0606, JX0625, JX0643, JX0674, JX0686, JX0705, JX0504, JX0528, JX0631. *See* NYSCEF 747 ("CCA Br.") n.1, 19, 44, 51, 52, 64, 72, 156, 178.
[2] *See* CCA Br. ¶¶ 5-6.
[3] Tr. 889:22-23 (JX17), 892:6-11 (JX18).
[4] *Compare* JX721.1; Tr. 329:2-8 (Dunlap) ("these matters" meant "the Equity Shortfall Agreement" and CCA had "day to day responsibility for delivering The Project") *with* CCA Br. ¶ 7; *see also* NYSCEF 749 ("BMLP Br.") ¶¶ 20-23, 28, 30, 31-34.

3. CCA does not refute that Wu and Wang worked for all Defendants and reported to Yuan.[5] Whether Wang needed Wu's "permission" is irrelevant.[6]

B. CCA had no plan

4. CCA agreed to achieve Substantial Completion by March 27.[7] *Additionally,* the parties agreed "[t]he detailed Schedule Compliance and Milestones … will be agreed between CCA and BML and conducted accordingly by CCA with best efforts."[8] CCA misleadingly inserts "including the March 27 date" in brackets.[9] There is no "best efforts" language in the second paragraph, either, which says "***on time by all necessary methods.***"[10]

5. Over time, CCA's representations became *more* concrete—the parties did not "refine"[11] or alter them.[12]

6. CCA's TCO trackers were non-compliant and inadequate.[13]

7. CCA's testimony that it had a plan to achieve the deadline was ***not credible.***[14]

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[5] BMLP Br. ¶¶ 27-28, 31-33; Tr. 1059:11-17, 1060:7-13 (Wang) (Wang was vice president of CCA and his job responsibility at CCA and CCAB was the same—the Project); Tr. 885:13-17 (Yuan) (Wu, Liu, Wang all reported to him); Tr. 1148:2-5 (Wu) (reported to Yuan).

[6] CCA Br. ¶ 6 (citing Tr. 299:1-3, 301:6-18 (Dunlap) (speculating what he "think[s]" Wang's and Wu's responsibilities were but stating that between them, "one was never unaware of what the other was doing"); Tr. 1111:3-9 (Wang) (stating only his job title and "focus"); *compare* Tr. 1107:8-11 (not disputing Wu and Yuan were his "bosses")

[7] JX462.1-2; BMLP Br. ¶¶ 35-38.

[8] JX462.1-2 ¶ 1.

[9] CCA Br. ¶ 11 ("detailed Schedule Compliance and Milestones [***including the March 27 date***] w[ould] be agreed between CCA[B] and BML and conducted accordingly by CCA[B] with best efforts.") (emphasis added).

[10] JX462.2 ¶ 2; Tr. 993:17-994:23 (Yuan).

[11] CCA Br. ¶ 14.

[12] JX476.1-2; *see also* BMLP Br. ¶¶ 39-45; Tr. 139:7-10 (Izmirlian) (neither Wu nor Wang said "this was a impossible date they couldn't meet" on November 27); Tr. 592:11-593:9 (Collins) ("You can get the rest sourced from the Bahamas or anywhere in the world but not those first 200 Chinese, which, again, was a minimum."); Tr. 927:1-5 (Yuan) ("We promised to send additional 200 Chinese laborers.").

[13] Tr. 484:11-485:12, 487:9-488:17; 559:2-7, 632:25-633:2 (Collins) (inadequate and not "acceleration" schedules); JX430.3 (March 31 deadline); Tr. 630:19-24, 631:3-15 (Collins) (no compliant schedule reflecting March 27); *contra* CCA Br. ¶ 9.; *see also* BML Br. ¶¶ 48-70.

[14] *See* CCA Br. ¶¶ 9, 13; *compare* BMLP Br. ¶¶ 48-70.

8. Yuan, who testified evasively[15] and contradicted the record,[16] said subcontractors "told me their plan," with no corroboration.[17]

9. Wu's claim there were "numerous discussions" is unsupported.[18] Wu was paid to testify[19] and evasive.[20] He claimed his negotiation of $54 million while needing $54 million for the Hilton was an "exact coincidence" and that a proposal, nine days before opening, to completely shut down the Project *was* "in the best interests of BML."[21]

10. CCA never sought McAnarney's input about whether March 27 was feasible before agreeing to it, and CCA's claimed (but undocumented) planning meetings occurred *after* CCA committed.[22] McAnarney was not credible[23]; he offered unsupported testimony on topics for which he lacked knowledge,[24] and falsely claimed that CCA bore *no* responsibility for Project delay.[25]

11. BMLP did not agree that CCA's so-called "acceleration" schedule would replace a Critical Path, Primavera-format schedule.[26]

12. In September 2014, BML rejected CCA's PBS 4.0 schedule per the contract,[27] but stated "CCA should issue a revised Version 4 schedule" that "is credible, shows a transparent

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[15] Tr. 937:2-938:3, 916:3-917:14 (Yuan); *see also* Tr. 896:24-897:3, 899:19-24, 903:14-904:5, 907:6-16, 918:7-18, 932:16-24 (Yuan).
[16] *Compare* Tr. 936:22-937:1 *with* Tr. 938:4-18, 935:13-17, 944:11-16 (Yuan); JX627; *compare* Tr. 917:11-14, 917:21-918:3 *with* Tr. 918:4-18, 919:3-5 (Yuan).
[17] Tr. 979:10-18 (Yuan) (cited by CCA).
[18] Tr. 1268:3-13 (Wu) (cited by CCA); *see also* Tr. 1269:15-20 (Wu) (cited by CCA) (claiming a "joint meeting" "discussing the schedule" that is not memorialized)
[19] Tr. 1144:16-1146:2 (Wu).
[20] *E.g.*, Tr. 1186:3-14 (Wu).
[21] Tr. 1168:15-1169:13, 1202:17-1203:11 (Wu); *see also* Tr. 1163:23-1164:5; 1167:3-12; 1188:1-3 (Wu) (never considered whether his conduct was in BML's "best interests").
[22] Tr. 1451:24-1452:4, 1452:25-1453:11 (McAnarney).
[23] Tr. 1455:1-1456:18 (McAnarney) (impeachment).
[24] *Compare* Tr. 1427:3-8 *with* Tr. 1440:13-1441:11 (subcontractor payments); *compare* Tr. 1392:18-23 *with* Tr. 1441:13-1442:9 (expense of meeting March 27); *compare* Tr. 1430:2-5, 1431:5-8 *with* Tr. 1443:1-1444:5, JX755.2 (restaurants ready on March 27); *see also* Tr. 1391:2-4, 1419:17-22, 1446:3-23, 1402:16-25 (McAnarney) (testifying he was "sure" certain things were done, without basis or corroborating evidence).
[25] *Compare* Tr. 1467:15-20 *with* Tr. 1447:8-13, 1480:2-6, 1475:1-12 (McAnarney).
[26] *Contra* CCA Br. ¶ 9; *see* BMLP Br. ¶¶ 57-58, 62, 64, 66, 67.
[27] Tr. 629:16-630:18 (Collins); JX396.1.

critical path/s" and "is capable of being monitored by all parties."[28] Wu admitted that critical path was important to BML.[29] Manabat agreed it was necessary. [30] CCA's requested inference that Manabat and Pickerill privately agreed to abandon schedules is absurd.[31]

13. Pattillo claimed incredibly that the parties agreed to forgo schedules.[32] He *knew* CCA stopped updating the schedule because Manabat was in Panama.[33] Pattillo was neither independent nor credible in his claim that CCA used best efforts.[34]

14. CCA string-cites reports and minutes—***sixteen of which are not in evidence*** and should not be considered.[35] These reports do not accurately convey progress.[36] BML did not know what only CCA could see.[37]

15. Purported design delays did not cause or excuse CCA's failure. These alleged "delays"[38] predate CCA's November commitment.[39] Any prior delays "made it all the more essential for CCA to have a plan to meet the March 27th date."[40]

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[28] JX396.6; *see also id.* at 396.5 ("The current detailed construction schedule shows no visibility in the process of testing and commissioning and its criticality.").
[29] Tr. 1362:21-23 (Wu).
[30] JX405.1 (stating: "Every section should produce their MILESTONE COMPLETION," including "plan, logistics and resources"; "MEP should have a clear CRITICAL PATH"; and "we will help produce the Schedule in Primavera and send to everyone"); *id.* (stating in follow-up email that CCA will update the Baseline 4.0, a Primavera schedule).
[31] Tr. 1364:11-17 (Wu) (BML did not waive contractually-required schedules through conversation between Manabat and Pickerill).
[32] Tr. 1605:15-23 (Pattillo); *see also* Tr. 1588:3-5 (Pattillo) (has not seen a resource-loaded plan to get to March 27).
[33] JX723 (Manabat told *Pattillo's assistant*); Tr.1620:15-1624:9 (Pattillo); BMLP Br. ¶¶ 70, 82; *see also* Tr.1624:10-1626:12 (Pattillo) (knew Manabat was working on the Hilton); JX616 (emailing Baha Mar schedule for Hilton project).
[34] Tr. 1581:25-1583:10 (Pattillo) (paid $500,000 to $1 million by CCA to work on Project in 2014-15).
[35] CCA cites the following exhibits which were not admitted into evidence: JX0480, JX0496, JX0511, JX0541, JX0570, JX0578, JX0588, JX0606, JX0625, JX0643, JX0674, JX0686, JX0705, JX0504, JX0528, JX0631. *See* CCA Br. ¶ 15 n.44, ¶ 25 n.72.
[36] BMLP Br. ¶¶ 57-69; Tr. 500:7-24, 501:21-502:1, 583:2-584:10 (Collins); JX766.26 ("this schedule was never progressed and no visibility on work done was communicated by CCA"); Tr. 494:19-495:3 (Collins).
[37] BMLP Br. ¶ 107; Tr. 500:25-501:20 (Collins); Murray Tr. 28:24-30:04; *contra* CCA Br. ¶ 42.
[38] CCA Br. ¶ 8 & n.19 (citing JX0123, which is ***not in evidence***).
[39] Tr. 556:2-17 (Collins); Tr. 1584:1-18 (Pattillo).
[40] Tr. 1584:19-22 (Pattillo).

16. CCA never said "this design change is going to affect our ability to meet substantial completion" and BML said "do it anyway."[41]

17. CCA says it "did not file a formal request for an extension for the *sake of helping BML* finish the Project."[42] Untrue: Pattillo helped prepare such a request.[43]

C. CCA did not use "all necessary methods"

18. CCA's evidence that "Wu disclosed plans to address worker departures"[44]—the December 5 Board minutes—in fact states: "CCA is pushing for **completion** for individual workers before" Chinese New Year."[45] Completion did not happen. CCA did not disclose 1500 expiring Chinese worker contracts.[46] CCA never told BML how many workers would leave without replacement.[47]

19. CCA did not add the manpower it committed to "within 30 days"[48] or even after.[49]

[41] Tr. 1595:8-13 (Pattillo); *see also* Kwasnowski Tr. 120:1-4 (no design issues as of November); JX683 ("HOLD on THESE WORKS, CHANGES! No field directives can be made to CCA wo my approval. CCA: please confirm no action to be taken ..."); Tr. 1371:2-21 (Wu).
[42] CCA Br. ¶ 8.
[43] Tr. 1583:15-25 (Pattillo). *But see* Tr. 1227:17-21 (Wu) ("We were not a big advocator of DRB, and I felt it took a lot of energy."); Tr. 975:25-976:9 (Yuan) ("If we rely on DRB or something, that will just waste our time").
[44] CCA Br. ¶ 16.
[45] JX 495.5.
[46] Tr. 1179:11-18 (Wu).
[47] BMLP Br. ¶ 74; JX529.5 ("CCA have remained silent about the scale of the likely demobilization up to and around Chinese New Year…"); Tr. 522:20-523:7 (Collins); *see also* Tr. 598:5-11 (Collins) (CCA knew about Chinese New Year when it made its promise that "no workers are leaving").
[48] BML Br. ¶¶ 71-75; Tr. 927:1-5; 986:2-19, 1026:22-1028:13 (Yuan) (promised 200 *new, Chinese* worker); JX560 ("the added worker counts you note have not been reported to us … From what we see … only about 180 Chinese workers"); JX558.1 (114 Chinese expats "related to CCA").
[49] Tr. 519:9-521:3 (Collins); Collins DX-31 (citing JX756.73 (February report)); *contra* CCA ¶ 18 n.50 (citing JX800.6, the same February report, on a page about permit applications); Tr. 1018:21-1019:3 (Yuan)).

20. CCA fixates on a January 29 PowerPoint,[50] well after BML announced opening.[51] CCA's PowerPoint did not disclose its urgent requests for more workers.[52] CCA introduced no evidence it took the PowerPoint's proposed measures.[53]

D. CCA caused deadline failure

21. CCA did not complete the necessary testing and commissioning for TCO.[54] CCA's TCO schedule was so "high level" it was "nearly worthless," "CCA issued no other means of progress reporting despite constant requests," and "[a]t weekly TCO meetings CCA … offered no explanation on how they are going to achieve the Mar 27 date" or TCO.[55]

22. CCA tries to blame BML for "redesign[ing] the smoke-management system,[56] but cite no evidence.[57] On February 16, McAnarney told BML that the system was "**ready** for smoke control testing."[58] That same day, he emailed Wu stating that CCA had not completed the smoke control duct cleaning, saying "we are out of time" and "without [duct cleaning], no TCO."[59]

23. CCA was responsible for fire and life safety testing and inspections, and BML only proposed a fire watch to save the opening if CCA could not complete its required tests.[60] McAnarney's attempt to blame BML was not credible, and contradicted Reiss's letter denying

[50] CCA Br. ¶ 19 (citing JX600); *see* JX1026; Tr. 1360:11-15 (Wu) (Izmirlian and Dunlap not listed as attendees); Tr. 222:6-12 (Izmirlian); Tr. 363:11-13 (Dunlap) (Izmirlian and Dunlap don't remember the meeting or update).
[51] BML Br. ¶¶ 41-42, 46, 105 (announcing & opening reservations).
[52] Tr. 1367:13-19 (Wu).
[53] JX600.23; *compare* Tr. 979:19-20, 981:19-982:12 (Yuan) (claimed CCA did work "on CCA's cost," but could not explain how CCA was paid under construction contract).
[54] BMLP Br. ¶¶ 50, 113; JX595.5; Tr. 1476:11-22 (McAnarney).
[55] JX766.26.
[56] CCA Br. ¶ 25.
[57] *Compare* Tr. 1412:8-15 (McAnarney) ("this is what was told to me").
[58] JX650.5; Tr. 1477:23-1478:8 (McAnarney).
[59] JX652; Tr. 1478:10-1479:18 (McAnarney).
[60] Tr. 1480:2-1481:1, 1491:25-1492:2, 1485:4-8 (McAnarney); JX502 ("the testing process needs to be driven by CCA"); BMLP Br. ¶¶ 50, 60.

TCO, which found that *CCA* failed to test or commission the fire safety systems,[61] and did not, as CCA mischaracterizes, simply "reject[] the fire watch."[62]

24. McAnarney's self-serving memo to Wu *after* CCA missed the deadline[63] contradicts Reiss and is not credible.[64] The elevator issue is undocumented[65] and was CCA's responsibility.[66] ID lighting was decorative; BML could have fixed it if timely notified by CCA (as was CCA's responsibility).[67]

25. Contrary to CCA's claim, none of the BML works that were not ready would have been a barrier to opening on March 27.[68]

26. The casino was "ready to open to paying guests on March 27."[69] BML already had a license to operate a casino.[70] CCA asked Dunlap (*but not Izmirlian*) about gaming licenses. GGAM's certificate of suitability is irrelevant because *BML* could operate the casino.[71] The gaming board's inquiries relating to *keeping* BML's license in June 2015 confirm that BML already *had* the necessary license.[72]

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[61] BMLP Br. ¶ 113 (citing JX736; Tr. 1490:7-1492:6 (McAnarney)).
[62] CCA Br. ¶ 26.
[63] CCA Br. ¶ 27 (citing JX780); Tr. 1482:15-1483:4 (McAnarney).
[64] Tr. 1483:14-17, 1484:19-1485:8 (McAnarney); *see also* Tr. 1481:3-1482:8 (McAnarney) (remembered authoring document at trial but not deposition), Tr. 1483:8-13, 1417:7-9 (McAnarney) (listed eight factors in memo but testified to only one primary cause at trial).
[65] Tr. 1484:6-14 (McAnarney).
[66] Tr. 1483:24-1484:4 (McAnarney) (checklists for inspections); JX502; Tr. 1459:19-1460:5 (McAnarney) (he oversaw elevator inspection testing).
[67] Tr. 1468:15-1470:1 (McAnarney); BML Br. ¶¶ 68, 108, 112 (CCA's responsibility to inform BML); *see also* JX672.2; Tr. 1470:20-1471:17 (McAnarney) ("wire nuts should be sufficient" and CCA's subcontractor was handling).
[68] *Compare* CCA Br. ¶ 27 *with* Tr. 341:2-11 (Dunlap); JX755.2-3. Neither the testimony nor the November 27, 2014 minutes (JX476) support CCA's claim that the parties agreed "that CCAB's ability to meet March 27 required BML to … for example, complet[e] the nightclub." CCA Br. ¶ 14. BML's agreement that the nightclub was part of BML's "respective duties" "was not necessarily in relation to March 27th." Tr. 200:18-21 (Izmirlian).
[69] Tr. 341:21-24 (Dunlap).
[70] Tr. 444:8-20 (Dunlap).
[71] *Id.*
[72] JX835.2-3 ("[I]n an endeavour to accommodate *Baha Mar* in its capacity *as a holder of a gaming licence*, the Board herewith provides you with a further opportunity to provide all outstanding information, documents, and payments by June 22, 2015[.]")

27. Certain areas (spa, restaurants) were not *complete*, but *were* available for guest use *had CCA obtained TCO*.[73]

E. CCA caused BMLP's loss

28. CCA says "BML was facing severe financial trouble" regardless of CCA's misconduct.[74] CCA's support for this counterfactual is a document,[75] not in evidence and unsupported by testimony, merely reflecting that BML continued to draw down the loan; and a "summary" Wang (who lied on the stand[76]) created, purportedly reflecting payments due to CCA as of "October 08, 2014."[77] These October 2014 commercial disputes (later resolved in Beijing) are irrelevant.

29. CCA claims without support that "BML stopped monthly progress payments" in February 2015 for "undisputed amounts."[78] The record shows BML's payments were not due, and amounts (including retainage) *were* disputed.[79] CCA was not entitled to stop work for nonpayment of disputed amounts under the MCC.[80] Dunlap's statement that "CCA began to submit inflated invoices for work" refutes CCA.[81]

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[73] Tr. 444:25-446:1 (Dunlap) (explaining JX771.3).
[74] CCA Br. ¶ 10.
[75] JX920.
[76] *See, e.g.*, Tr. 1061:12-1064:8; 1093:9-1094:25 (Wang); Kwasnowski Tr. 117:21-23 ("He might not be direct.").
[77] JX409.2.
[78] CCA Br. ¶ 21.
[79] Tr. 1201:6-1202:19 (Wu) (admitting that BML had only just "received the request for the February payment"); Tr. 246:2-9 (Izmirlian) (change orders and retainage); Tr. 322:7-20, 324:12-14, 336:8-16 (Dunlap) (retainage); JX719; *see also* BMLP Br. ¶ 96.
[80] JX13.49 § 9.7 (requiring "seven additional days' written notice" before stopping work "until payment of the *undisputed* amount owing has been received"); JX13.51 § 9.10.3 ("remaining retained percentage" not due until several criteria met); *contra* CCA Br. ¶ 21.
[81] JX853.21 ¶ 48 (cited in CCA Br. ¶ 21, n.61).

30. Absent CCA's fraud and breaches, the Project was poised to be cash-flow positive and profitable.[82] CCA's misstates that EXIM "had confirmed the cost overrun."[83] As of March 17, 2015, EXIM told CCA that their "audit" had found BML's "use of hard costs has not exceeded the budget, and the use of soft costs is basically reasonable."[84] CCA's assertion that "BML's insolvency was inevitable" is unsupported.[85]

31. CCA is wrong that Chapter 11 dismissal was "best" for BML.[86] The Bankruptcy Judge opined that Chapter 11 "would be an ideal vehicle," and would have "consider[ed] denying the Dismissal Motions" had "CCA [and] CEXIM" been willing to sit at "the bargaining table."[87]

32. CCA claims bizarrely BMLP did not contribute its investment because Izmirlian-affiliated "entities" "defaulted" on a loan and a judgment went "unpaid."[88] CCA waived cross-examining Izmirlian on this topic and cites no evidence,[89] instead relying on deposition testimony that these questions "should be directed at Sarkis."[90] The business dealings of unnamed "entities" are irrelevant; it is undisputed that BMLP owned and contributed the investment.[91]

F. Counterclaims

[82] Tr. 846:14-25 (Bones) (in the "but-for world if it opened [o]n March 27th," "it wouldn't have gone into the liquidity crisis" because "it would have had $280 million of net operating income in 2015 and 2016 which would still have been $100 million positive after debt service, plus key money …").
[83] CCA Br. ¶¶ 24.
[84] JX718.3.
[85] CCA Br.¶¶ 28-29; Tr. 162:1-11, 167:18-23 (Izmirlian); Tr. 847:1-6 (Bones); Ludwig Tr. 340:22-341:12.
[86] CCA Br. ¶ 33.
[87] JX914.20-21.
[88] CCA Br. ¶¶ 1-2.
[89] *Id.* ¶ 1 (citing JX3 and JX37, which were ***not admitted into evidence***).
[90] Ludwig Tr. 69:14-25; *see also* Ludwig Tr. 48:02-17 ("the original land assembly" was "[s]ignificantly more" than "the Scotiabank lands," which were acquired "through [other] means"), 51:02-51:08, 56:17-57:25 (Scotiabank loan "had to be repaid" to "have clearance" from EXIM, and Scotiabank was given valuable "equity" along with cash).
[91] JX25.6 (Article 4).

33. Dunlap did not understand Wu's March 13, 2015 letter on "China Construction America, Inc." letterhead, with no reference to §4.7 or "books and records," to be a books-and-records request under the IA.[92]

34. CCA failed to examine any witness about its purported damages. It relies on a bare citation to the contract.[93]

III. ADDITIONAL PROPOSED CONCLUSIONS OF LAW

A. Fraud

35. **Misrepresentation or Omission:** BMLP never argued that CCA did not intend to achieve the deadline when it committed.[94] BMLP proved that CCA extracted $54 million for the Hilton by misrepresenting its ability to meet the March 27 deadline, with reckless disregard.[95] CCA neither addresses these facts nor the relevant law.[96] *See* *Coolite Corp. v. Am. Cyanamid Co.*, 52 A.D.2d 486, 488 (1st Dept 1976) ("Cyanamid's representations, concerning the state of its research and testing and its ability to produce a perfected light stick, when made, were representations of fact and not merely promises of future action."). CCA's motion-to-dismiss cases about future intentions are inapplicable.[97]

36. **Knowledge of Falsity:** CCA cites no caselaw supporting its scienter arguments, which it barely disputes factually.[98] CCA claims it "did in fact have a plan,"[99] but the evidence—including Collins's virtually-unrebutted opinion—shows the opposite.[100] Attempts to say

[92] Tr. 327:25-328:15 (Dunlap); JX704.
[93] CCA Br. ¶ 34 (citing JX914 (a U.S. Bankruptcy Court opinion which does not divest CCA of any interest), Tr. 175:3-13 (Izmirlian testifying about the "blunt instrument" of Bahamian insolvency—in a manner CCA disagreed with—and not what happened to CCA's equity); JX34 (Investors Agreement)).
[94] *Contra* CCA Br. ¶¶ 37-38.
[95] BMLP Br. ¶¶ 129, 130, 133; *see also id.* ¶¶ 129(d), 134 (later intent to not finish to extort payment).
[96] BMLP Br. ¶¶ 129-135.
[97] *See* CCA Br. ¶¶ 37-38.
[98] CCA Br. ¶¶ 39-40; *compare* BMLP Br. ¶¶ 133-35 (scienter).
[99] CCA Br. ¶ 39.
[100] BMLP Br. ¶¶ 48-70; *supra* ¶¶ 6-14.

otherwise by Yuan, Wu, McAnarney, and Pattillo were inconsistent, unsupported, and not credible.[101]

37. CCA claims "disclosures to Plaintiff"[102] but ignores its many *material non-disclosures*.[103]

38. **Reliance:** CCA does not seriously dispute that BMLP relied.[104]

39. **Justifiable:** CCA's "not justified" arguments[105] ignore that BMLP had ***already announced opening and opened reservations*** by January 2015, and that BMLP begged for compliant schedules, more manpower, and insight into TCO progress.[106] CCA's executives dismissed these concerns[107] and misled BMLP.[108]

40. CCA attempts to evade responsibility because third parties—who had not heard CCA's promises—were suspicious of the deadline.[109] But Izmirlian asked Yuan, Wang, and Wu directly on November 27, on December 5, and in January about the date. CCA reaffirmed.[110]

41. CCA asks this Court to create a dangerous precedent[111] that BMLP did not justifiably rely because it attempted to verify. None of CCA's "sophisticated investor" cases[112] support such an outcome, especially for a construction manager in a position of "trust."[113]

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[101] *Supra* ¶¶ 7-10, 13.
[102] CCA Br. ¶ 40.
[103] BMLP Br. ¶¶ 129, 132, 134.
[104] BMLP Br. ¶¶ 104-109, 137.
[105] CCA Br. ¶¶ 41-47.
[106] BMLP Br. ¶¶ 41-42, 46, 105 (announcing opening and taking reservations); BMLP Br. ¶¶ 58, 62, 64, 66, 67 (scheduling and TCO); BMLP Br. ¶¶ 74, 78 (manpower); JX455 (Dunlap: "This is why we need detailed and complete schedule with adequate manpower and management that shows ALL areas done in advance to allow inspection and usage.")
[107] BMLP ¶ 69.
[108] BMLP ¶¶ 60, 61, 63- 66, 72, 77-83.
[109] CCA Br. ¶ 46.
[110] BMLP ¶¶ 39-41, 43, 44, 45.
[111] CCA Br. ¶¶ 41-47.
[112] CCA Br. ¶ 44.
[113] JX15.6 § 1.1 ("The Construction Manager accepts the relationship of trust and confidence established with the Owner by this Contract, and covenants with the Owner to furnish the Construction Manager's reasonable skill and judgment and to cooperate with the Architect in furthering the interests of the owner.")

42. In *UST Priv. Equity Invs. Fund, Inc. v. Salomon Smith Barney*, 288 A.D.2d 87, 88, (1st Dept 2001), defendant advised it "could not guarantee… the information set forth therein" and warned plaintiffs to "rely upon their own examination." CCA did the opposite. Izmirlian reminded Yuan: "Whenever we questioned the pace of work or brought up the lack of labor or management on site, ***you would tell me to trust you***."[114] BMLP did not *have* the ability (or obligation) to independently verify.[115]

43. *Global Mins. & Metals Corp. v Holme*, 35 A.D.3d 93, 100 (1st Dept 2006) and *LMM Cap. Partners, LLC v. Mill Point Cap., LLC*, 224 A.D.3d 504, 507 (1st Dept 2024) say that "when the party to whom a misrepresentation is made has a hint of its falsity" the party must "mak[e] further inquiry or insert appropriate language in the agreement for [BMLP's] protection." BMLP did both. BMLP involved EXIM and CSCEC in the November meetings, and CCA said in front of them, "we'll do whatever is necessary to open by March 27th"—the "by all necessary methods" language confirms it.[116] BMLP "gave them another opportunity [on November 27] to review all the information … and they reiterated they were going to make it" and again on December 5.[117]

44. **Causation:** CCA says BMLP was not damaged because BMLP "presented no evidence of any loss in its equity value."[118] Wrong. BMLP proved the ***total loss of its Project***

[114] JX738.
[115] *See* BMLP Br. ¶ 107; *supra* ¶ 14 n.37; Murray Tr. 72:08-25 (BML "relied on CCA's repeated assurances that we will be finished" but it was "in the absence of any schedule information or any tracking information or any metrics that would allow us to see anything … to the contrary" and CCA didn't "put a flag up … to say we don't think we can be ready by that date."); Tr. 296:10-18 (Dunlap) (it was important for CCA to prepare schedules because they control the manpower).
[116] Tr. 146:19-147:4 (Izmirlian); JX462.2 ¶ 2; BMLP Br. ¶¶ 36, 104.
[117] Tr. 147:5-12 (Izmirlian); JX476; BMLP Br. ¶¶ 39, 40, 41-42, 44.
[118] CCA Br. ¶ 51.

investment.[119] Contrary to CCA's claims about the "real" value, BMLP's equity did not "take[] a huge nosedive in 2015" and there was never "a write down" by the lender.[120]

45. CCA contends BMLP's loss was inevitable "regardless" of CCA's misrepresentations,[121] and that "intervening, unforeseeable events sever any causal connection."[122] These arguments lack credibility and nexus to the record.

46. First, the Project would have been "positive after debt service" in the but-for world.[123] CCA's Sowards did not rebut this with an alternative model.

47. Second, unlike CCA's authority where the "insolvency resulted from independent intervening events," *Aronoff v Ernst & Young*, 1999 WL 458779, at *4 (Sup Ct, NY Cty, Apr. 26, 1999), here, insolvency resulted directly from CCA's malfeasance.[124] When BMLP "cause[d] BML to file for bankruptcy,"[125] BML was ***already insolvent due to CCA's fraud*** and out of choices, save bankruptcy.[126] CCA, particularly Wu, were well aware.[127]

48. Third, CCA improperly conflates "Plaintiff's refusal to provide [a] guarantee" with a claimed refusal ***by Izmirlian, which CCA failed to examine him about***.[128] *BMLP* was not obligated to guarantee further Project funds in the face of CCA's repeated refusal to provide a completion date.[129] Refusal did not "cause" insolvency. Vague deposition testimony of a former employee does not say otherwise.[130]

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[119] BMLP Br. ¶¶ 139-142, 2, 5-7.
[120] Tr. 801:1-11, 802:10-13 (Bones).
[121] CCA Br. ¶ 52.
[122] CCA Br. ¶ 53.
[123] *Supra* ¶ 30.
[124] BMLP Br. ¶¶ 115-121, 139-40.
[125] CCA Br. ¶ 54.
[126] JX861.3-4; BMLP Br. ¶¶ 115-120, 140.
[127] BMLP Br. ¶¶ 115-121; *see also* JX861.2 (Wu present at Board meeting); Tr. 1321:21-25 (Wu) ("I remember Mr. Sarkis Izmirlian did mention liquidity issues").
[128] CCA Br. ¶ 56
[129] BMLP Br. ¶¶ 115-119; *see also* Tr. 170:20-171:1 (Izmirlian) (another contribution would be "throwing money into a black hole and hoping for the best").
[130] Djerejian Tr. 227:14-17 (a "proverbial hot potato").

49. Fourth, CCA illogically calls the "Delaware court's dismissal of the Chapter 11 case" an "intervening" cause.[131] This was not "independent": ***CCA moved for the dismissal***, which was granted because, despite BML's "preference for restructuring" and the benefits of U.S. bankruptcy law, CCA and its anti-BMLP cohort refused to consent.[132] CCA's new estoppel argument[133] strains credulity: the Bankruptcy Court never addressed the IA "best interests" clause or held that resulting future harm of BML was impossible (an absurd proposition because BML was force-liquidated out of existence).

50. Finally, CCA's argument that the results of the Bahamian winding-up proceeding—engineered by CCA after it paid ***millions to the son of a Bahamian official who then allowed CCA to direct the Bahamian negotiations***[134]—were somehow "independent" is contrary to the record.[135] CCA cites no authority showing that Izmirlian's offer to beat any potential investor's price,[136] which was ignored in favor of CCA's and EXIM's plan to "[g]ive priority to Chinese companies," breaks the chain of causation.[137]

51. **Damages:** CCA claims, on one hand, that BMLP's damages—the agreed value of its lost investment—should be recharacterized as the loss "in [BMLP's former] equity value"[138]; on the other hand, that such diminution of value damages are impermissibly "derivative."[139] These arguments are contradictory and wrong. The agreed value of BMLP'**s** lost investment is not

[131] CCA Br. ¶ 57.
[132] JX914.20-21; JX914.1 ("Before the Court are separate motions filed by CCA Bahamas, Ltd. ('CCA') and the Export-Import Bank of China ('CEXIM') to dismiss the Debtor's bankruptcy cases …").
[133] CCA Br. ¶ 57.
[134] BMLP Br. ¶¶ 123, 125.
[135] CCA Br. ¶¶ 58-59.
[136] BMLP Br. ¶¶ 125.
[137] JX919.3.
[138] CCA Br. ¶ 51.
[139] CCA Br. ¶ 61.

derivative and is permitted under the Court's *in-limine* decision and well-established law. *See* NMR E-Tailing LLC v. Oak Inv. Partners, 216 A.D.3d 572, 573 (1st Dept 2023).[140]

52. **Liable Parties:** The Court need not pierce the corporate veil to find all Defendants liable for fraud. Yuan made or caused to be made the misrepresentations, acting as Chairman and President and senior-most officer.[141] *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465 (2010) ("Corporations … act solely through the instrumentality of their officers.").

B. Breach of Contract

53. **Performance:** CCA argues BMLP did not perform because it 1) "block[ed]" a purported "CCAB books and records request" and 2) withheld benefits to CSCECB Board members.[142] These claimed "non-performances" were so immaterial that CCA did not bother to ask *any* witness about them. There is no evidence of withholding benefits.[143] And CCA's meritless[144] claim of non-performance of the books-and-records provision occurred in March 2015, over ten months *after* Wu first breached his "best interests" obligation.[145] Immaterial non-performance that long post-dates the alleged breach cannot excuse breach. *See* 14 Williston on Contracts § 43:5 (4th ed.) ("prior breach" must be "material or substantial" and not "slight or minor"); *N450JE LLC v. Priority 1 Aviation, Inc.*, 102 A.D.3d 631, 632 (1st Dept 2013) (same).

54. **Breach:** CCA wrongly says BMLP's theory of breach changed.[146] BMLP argued throughout that CCA breached because Wu did not act "in the best interests" of the Project while

[140] NYSCEF 736 at 2 (BMLP's damages are "direct"); NYSCEF 712 (BMLP's Opposition to MIL) at 8-10 (collecting cases); NYSCEF 668 (1st Dept MSJ Decision) at 3 (BMLP's claims are "not derivative").
[141] *E.g.*, BMLP Br. ¶¶ 21, 24, 27, 28, 34, 37-46, 75-78, 93.
[142] CCA Br. ¶ 64 (referring to "CCAB's books-and-records" request even though *CCAB* was not a signatory to the Investors Agreement).
[143] CCA Br. ¶ 64 n.145 (citing JX34, the Investors Agreement, and Tr. 376:20-380:1, Dunlap testifying "I don't know" and "I don't recall" about payments in a document not in evidence).
[144] *See supra* ¶ 33.
[145] BMLP Br. ¶¶ 10, 149.
[146] CCA Br. ¶ 65.

the assigned BML Board member.[147] Wu then admitted he never bothered to learn his obligations, thus breaching immediately upon appointment.[148] Wu's revelation did "not alter the theory of recovery"—at most, it changed the timing—and the Court may exercise its "discretion" to conform the pleadings to the evidence. *Mack-Cali Realty, L.P. v. Everfoam Insulation Sys., Inc.*, 129 A.D.3d 676, 678 (2d Dept 2015); CPLR 3025(c).[149] CCA was not, by its *own witness's admission*, "hindered in the preparation of [its] case or prevented from taking some measure in support of [its] position." *Perez v. Masonry Servs., Inc.*, 140 N.Y.S.3d 8, 10 (1st Dept 2020); *see also Loomis v. Civetta Corinno Const. Corp.*, 54 N.Y.2d 18, 23 (1981) ("Prejudice … is not found in the mere exposure … to greater liability.").

55. CCA argues, for the first time, that §4.7 "imposed no obligation on CSCECB" because it is only an "understanding" and not a "representation" or "obligation."[150] That reading is contrary to (a) the mandatory language of §4.7 ("shall"),[151] (b) the meaning of "understand,"[152] and (c) this Court's and the First Department's prior decisions.[153] It would render §4.7 "meaningless." *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007). CCA cites no contrary law.

56. CCA argues that "[a]ny obligation that did exist ran to ***BML*** exclusively."[154] This re-hash of CCA's "derivative" argument was rejected by the First Department.[155]

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[147] BMLP Br. ¶¶ 148-155; *see also* NYSCEF 1 (Compl.) ¶¶ 32, 33, 102, 195; NYSCEF 577 (MSJ Opp) at 6-8.
[148] BMLP Br. ¶¶ 10, 149-50.
[149] Tr. 831:6-12 ("THE COURT: "I'm going to conform the pleadings to the proof, ultimately in this case.")
[150] CCA Br. ¶ 66.
[151] JX34.14 § 4.7.
[152] Black's Law Dictionary (12th ed. 2024) (Understand: "To apprehend the meaning of; to know").
[153] NYSCEF 648 (MSJ Order) at 3 (Board Member and Representatives "were required to at all times act in the 'best interests'" of BML"); *id.* at 15 ("obligation to act in the best interest of BML"); NYSCEF 668 (1st Dept MSJ Decision) at 3 ("the CSCECB representatives were required to act 'at all times' in the company's best interests.").
[154] CCA Br. ¶ 67.
[155] NYSCEF 668 (1st Dept MSJ Decision) at 3 ("there is no indication that § 4.7's 'best interests' obligation was owed to the company alone.").

57. CCA's attempts to show CSCECB and Wu acted in BML's best interests are unsupported.[156] CCA's attacks on Pocalyko's methodology are wrong—CCAB had insufficient funds to cover the Hilton acquisition and its other obligations[157]—and do not address Pocalyko's unrebutted opinion that CCA's 11-f response *could not be verified*.[158]

58. CCA's claims that it "had no projects in Panama before March 27" and "Wu did not divert any construction resources" misrepresent the evidence.[159] Even if Wang's incredible testimony[160] said so, it is contradicted by *voluminous* evidence showing Wang, Wu, Liu, Manabat, and Callier all were working in Panama.[161]

59. CCA's remaining argument that Wu worked hard[162] does not excuse the numerous undisputed acts Wu took directly contrary to BML's "best interests" that harmed the Project.

60. **Causation:** CCA's argument that BMLP's loss was inevitable is not supported by the record.[163] CCA's authorities regarding causation[164] are utterly irrelevant.

61. **Damages:** CCA's other damages arguments fail. BMLP's loss is not its equity value, but ***the total loss of its contributed investment, which the parties agreed was initially $830 million***.[165] CCA's arguments and authorities about measuring share value[166] are inapposite.

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[156] CCA Br. ¶ 67.
[157] Tr. 680:9-19, 681:1-682:2, 680:20-24 (Pocalyko); Pocalyko DX-16 (citing JX481); *see also* Tr. 1692:10-17 (Sowards) (did not address $33 million UR in his report), 1696:9-13 (Sowards) (Pocalyko did not fail to use any available documents).
[158] JX970.8-9 (Topic 13); Pocalyko DX-17 (citing JX983.10); Tr. 683:12-25, 684:18-685:4, 766:12-767:1, 685:10-686:3, 689:20-690:7 (Pocalyko); Tr. 1688:23-1689:1 (Sowards) ("no opinions" about failure to pay subcontractors with $54 million); Tr. 1698:5-1700:22 (Sowards) ("not disputing" Pocalkyo's verification analysis and did not substantiate CCA's 11-f response, which appeared fraudulent under Sowards' own writings about badges of fraud).
[159] CCA Br. ¶ 67 (citing Tr. 1140:16-18 (Wang) (testifying that CCAB did not "perform any construction work" in Panama—not that CCA had "no projects in Panama"), Tr. 1142:3-6 (Wang) (testifying that no "*construction worker* from the Baha Mar project work[ed] on any project in Panama"—not that Wu did not divert construction "resources")).
[160] *Supra* n.76 (Wang is not credible).
[161] *Compare* CCA Br. ¶ 67 *with* BMLP Br. ¶¶ 70, 81-82, 152.
[162] CCA Br. ¶ 69.
[163] *Supra* ¶¶ 44-50.
[164] CCA Br. ¶ 69.
[165] BMLP Br. ¶¶ 1-2, 5, 7, 157-9.
[166] CCA Br. ¶¶ 69-71.

62. CCA claims its presentation regarding equity value "in 2014 or 2015" was "unrebutted."[167] This is backwards. CCA presented no evidence from the but-for world, relying instead on ***2016 reports created in the liquidation***.[168] These exercises from FTI and CBRE valued property CCA had attacked and diminished for years as part of its ongoing misconduct.[169] CCA's using its own malfeasance to limit BMLP's recovery is unsupported by fact or law. Rather, as Bones explained, because "the bankruptcy shouldn't have happened, there shouldn't have been bankruptcy appraisals in the first place," looking at "a distressed asset."[170] Moreover, the appraisals of CCA-damaged assets used inappropriately reduced "average daily rates" that were inconsistent with the "JLL" appraisal (commissioned by both CCA and BML[171]) and Bones's real-world independent research.[172] Sowards did no independent research and had not thought the FTI or CBRE valuations significant enough to mention in his report.[173]

63. CCA's attempt to equate BMLP's $830 initial investment, which was appraised and valued multiple times, including by professionals retained by CCA and a "big 4" accounting firm, and agreed-upon in writing by CCA and EXIM,[174] with a "liquidated damages" provision,[175] is absurd. There can be no dispute about the ***minimum*** value of BMLP's lost investment.

64. As this Court held, BMLP's lost "initial investment" is "evidence of direct, not consequential damages."[176] CCA recycles the same authorities and arguments[177] the Court already rejected when it ruled (correctly) that because "[w]hat is at issue in this case is not a separate loan

[167] CCA Br. ¶¶ 70-71.
[168] JX940, JX942.
[169] Tr. 1687:18-1688:1 (Sowards).
[170] Tr. 804:17-805:20 (Bones).
[171] JX19 (JLL Report).
[172] Tr. 776:17-22; 805:5-11 (Bones).
[173] Tr. 1686:21-1687:10 (Sowards).
[174] BMLP Br. ¶¶ 5, 7.
[175] CCA Br. ¶ 72.
[176] NYSCEF 736 (MIL Decision) at 1-2.
[177] CCA Br. ¶ 73.

transaction but the joint venture transaction itself and damages as to the investment … are direct damages."[178]

65. **Mitigation:** CCA's argument that *BMLP* should be limited by the "guarantee" *Izmirlian* did not make fails.[179] CCA's cited cases about reselling items and lost rent are inapposite.[180]

66. **Veil Piercing:** CCA long-ago consented to application of New York law and waived any claim that Bahamian law applies to veil-piercing. BMLP tried its veil-piercing case under New York law based on this consent (and the absence of any evidence on Bahamian law). CCA cannot now seek the protection of Bahamian law based on submissions not in the record.

67. CCA bears the burden to establish the application of foreign law. CPLR 3016(e). A court ***may not*** take judicial notice of foreign law unless the requesting party "furnishes the court sufficient information to enable it to comply with the request." Notice "shall be given in the pleadings or prior to the presentation of any evidence at the trial." CPLR 4511(b).

68. "The 'sufficient information' prong is exacting, and trial courts have frequently refused to take judicial notice of foreign laws that are not appropriately presented." *N.B. v. F.W.*, 91 N.Y.S.3d 660, 666 (N.Y. Sup. Ct. 2019) (citing cases); *see Paulicopter-Cia. v. Bank of Am., N.A.*, 182 A.D.3d 458, 460 (1st Dept 2020) (party "failed to plead or otherwise prove the substance of Brazilian law"); *MBI Int'l Holdings Inc. v. Barclays Bank PLC*, 151 A.D.3d 108, 116 (1st Dept 2017) (refusing to take judicial notice of Saudi law); *Minovici v. Belkin BV*, 109 A.D.3d 520, 525 (2d Dept 2013) ("plaintiffs failed to plead the substance of the foreign law" and "failed to provide sufficient information concerning the foreign law").

[178] NYSCEF 736 (MIL Decision) at 2.
[179] *Supra* ¶ 48.
[180] CCA Br. ¶ 74.

69. Where "parties do not provide sufficient support to prove the foreign law sought, then, 'the parties have consented that the forum law be applied to the controversy.'" *N.B.*, 91 N.Y.S.3d at 666 (quoting *Bank of NY v. Nickel*, 14 A.D.3d 140, 148–149 (1st Dept 2004)). In *Nickel*, the First Department held it was error to consider "applicability of Soviet law" at *summary judgment* where defendant never "pleaded the substance of Soviet law." 14 A.D.3d at 148–149.

70. The first time CCA raised Bahamian law was on the eve of trial, but even then, it provided no proof. Only after trial, once BMLP had proven its veil-piercing case under New York law, did CCA even attempt (through an untimely affidavit) to provide facts about Bahamian law.[181] CCA's "total failure" to plead or furnish the Court with ***any proof*** of the substance of Bahamian law prior to trial means CCA consented to New York law.

71. CCA presented no evidence to support its claim that "CSCECB and CCAB have separate corporate existences from CCA" and "followed normal corporate formalities."[182]

72. The overwhelming evidence shows that CCA completely dominated CSCECB and CCAB and used that domination to commit a fraud or wrong against BMLP.[183]

C. CSCECB's Counterclaims

73. CCA's post-trial brief says far more about its counterclaims than its witnesses did (zero). CCA did not prove its counterclaims by any evidence, much less a preponderance.

74. Both CSCECB's counterclaims fail on performance. ***CCA/CSCECB*** materially breached §4.7 in May 2014 (and repeatedly throughout 2014 and 2015).[184] Because CSCECB's *material* breach occurred ten or more months before BMLP's alleged breaches on March 13, 2015

[181] CCA Br. ¶¶ 76-78; NYSCEF 748.
[182] *Compare* CCA Br. ¶ 80 *with supra* ¶ 1-3; *see also* Tr. 1689:2-16 (Sowards) (did not rebut Pocalyko's opinion but has previously offered "quite a few" veil piercing opinions in other cases).
[183] BMLP Br. ¶¶ 165-178.
[184] BMLP Br. ¶¶ 148-155.

(§4.7) and June 29, 2015 (§4.8(g)) CSCECB cannot prevail. *See* *McMahan v. McMahan*, 164 A.D.3d 1486, 1487 (2d Dept. 2018) (contract counterclaim failed where defendant breached first).

75. CSCEB's §4.7 breach claim fails on breach. CCA's ***sole*** support is a CCA letter from Wu stating that "CCA is in receipt of an email communication from Mr. Izmirlian" and responding "on behalf of CCA and in my capacity as the current representative of [CSCEC] to the Board of Baha Mar." The letter does not reference §4.7 *or* CSCECB *or* "books and records."[185] CSCECB did not show that this letter sought access to books and records "in the interest of [BML]" as §4.7 requires.[186]

76. CCA's executives did not support its §4.7 claim. Dunlap unsurprisingly did not understand Wu's letter making improper commercial demands as a books-and-records request.[187] The letter (and CCA's arguments about it) shows that CCA did not respect corporate formalities[188]—not that CSCECB made a books-and-records records request. And BMLP did not deny the request that CSCECB never made. *See* *Barry v. Clermont York Assocs. LLC*, 2015 WL 9307944, at *11-12 (N.Y. Sup. Ct. 2015) ("books and records access" only triggered by "books and records requests").

77. Both counterclaims (§§4.7, 4.8(g)) fail on damages. CCA says[189] CSCECB lost its equity interest and potential dividends. But CCA cites no evidence of losses, causation, or amounts.

IV. CONCLUSION

BMLP respectfully requests that the Court enter judgment in its favor on all claims.

[185] JX704.
[186] JX34.14 § 4.7 ("given reasonable access … for the purpose of monitoring … *in the interest of the Company*").
[187] Tr. 327:25-328:15 (Dunlap).
[188] BMLP Br. ¶¶ 12-30, 32-34.
[189] CCA Br. ¶¶ 87-88; *see supra* ¶ 34.

Dated: September 19, 2024
New York, New York

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WORD COUNT CERTIFICATION

Pursuant to the Court's August 19, 2024 Order, NYSCEF No. 746, and Rule 17 of subdivision (g) of section 202.70 of the Uniform Rules for the Supreme Court and County Court (Rules of Practice for the Commercial Division of the Supreme Court), I hereby certify that the total number of words in this post-trial brief, excluding the caption, table of contents, table of authorities, signature block, citations in footnotes, and word count certification is 4,175.

/s/ Jacob W. Buchdahl
Jacob W. Buchdahl

EXHIBIT 9

First Dept. Order on Trump Stay Motion

Supreme Court of the State of New York
Appellate Division, First Judicial Department

PRESENT: Hon. Dianne T. Renwick, Presiding Justice,
Anil C. Singh
Lizbeth González
Bahaati E. Pitt-Burke
Kelly O'Neill Levy, Justices.

People of the State of New York, by Letitia James, Attorney General of the State of New York, Plaintiff,	Motion No.	2024-01025
	Index No.	452564/22
	Case Nos.	2024-01134
		2024-01135

-against-

Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., The Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC and Seven Springs LLC,
Defendants-Appellants,

Ivanka Trump,
Defendant.

Appeals having been taken to this Court from an order of the Supreme Court, New York County, entered on or about February 16, 2024 (Case No. 2024-01134), and from a judgment of the same Court and Justice entered on or about February 23, 2024 (Case No. 2024-1135),

And defendants-appellants having moved, pursuant to CPLR 5519 (c), to stay enforcement of the aforesaid order and ensuing judgment, pending hearing and determination of the appeals taken therefrom,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted to the extent of staying enforcement of those portions of the Judgment (1) ordering disgorgement to the Attorney General of $464,576,230.62, conditioned on defendants-appellants posting, within ten (10) days of the date of this order, an undertaking in the amount of $175 million dollars; (2) permanently barring defendants Weisselberg and McConney from serving in the financial control function of any New York corporation or similar business entity; (3) barring defendants Donald J. Trump, Weisselberg and McConney from serving as an officer or director of any New York corporation for three years; (4) barring defendant Donald J. Trump and the corporate defendants from applying for loans from New York financial institutions for three years; and (5) barring defendants Donald Trump, Jr. and Eric Trump from serving as an officer or director of any New York corporation in New York for two years. The aforesaid stay is conditioned on defendants-appellants perfecting the appeals for the September 2024 Term of this Court. The motion is otherwise denied, including to the extent it seeks a stay of enforcement of portions of the judgment (1) extending and enhancing the role of the Monitor and (2) directing the installation of an Independent Director of Compliance.

ENTERED: March 25, 2024

Susanna Molina Rojas
Clerk of the Court

FILED: APPELLATE DIVISION - 1ST DEPT 11/18/2024 09:10 AM 2024-06624
NYSCEF DOC. NO. 7 RECEIVED NYSCEF: 11/18/2024

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

BML PROPERTIES LTD.,	:	New York County Clerk's Index No.: 657550/2017
Plaintiff-Respondent,	:	
-against-	:	Appellate Nos.: 2024-06623; 2024-06624
CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION, INC., CCA CONSTRUCTION, INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD.,	:	**REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION FOR A STAY OF ENFORCEMENT PENDING APPEAL**
Defendants-Appellants,	:	
and	:	
DOES 1 THROUGH 10,	:	
Defendants.	:	

Mark P. Goodman, an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

1. I am a Member of Debevoise & Plimpton LLP ("Debevoise"), counsel for Defendants-Appellants China Construction America, Inc., now known as CCA Construction Inc. ("CCA"), CSCEC Bahamas, Ltd. ("CSCECB") and CCA Bahamas Ltd. ("CCAB") (collectively, "Defendants")[1] in the above-captioned matter. As such, I am fully familiar with the facts set forth herein and submit this reply affirmation in further support of Defendants' motion pursuant to CPLR 5519 (c) for a discretionary stay of enforcement pending the resolution of Defendants' post-trial appeal.

[1] Unless otherwise stated, all capitalized terms bear the definitions given in Defendants' initial affirmations.

2. Defendants brought this motion to maintain the status quo while this Court reviews the trial court's post-trial decision and judgment. The trial court piled error on error in awarding the real estate developer Plaintiff $1.6 billion in damages and prejudgment interest against Defendants, including one (CCA) that had no contractual relationship to or role in the construction project at issue. The trial court ignored swaths of unrebutted testimony and entire defense witnesses, mixed and matched contractual obligations without importing the attendant limitations on liability, and misapplied the same bedrock damages principles that this Court corrected the trial judge on in this same case at summary judgment less than a year ago (*see BML Props. Ltd. v China Constr. Am., Inc.*, 226 AD3d 582 [1st Dept 2024]).

3. Plaintiff miscasts Defendants' appellate arguments this time around as "fact-bound" (Opp. Br. at 16), but Defendants' principal arguments—including on damages—are purely legal. Indeed, this Court could accept the trial court's erroneous factual findings and still be compelled by New York law to reverse the judgment in its entirety or, at minimum, reduce the damages award by more than tenfold (*infra* Part A).

4. Were this an ordinary case and an ordinary judgment, Defendants would not need this Court's intervention to exercise their right to appeal without risking their ongoing businesses. They would post a bond and secure an automatic stay under CPLR 5519 (a). But because Defendants are worth collectively a fraction of the judgment, they were unable to secure a bond, despite diligent efforts. It is unsurprising, then, that if Plaintiff is allowed to begin enforcement proceedings immediately, Defendants will be forced into insolvency. Insolvency is not merely hypothetical, as Plaintiff suggests. It is effectively certain, and it will inflict its irreparable harm by the time a full panel of this Court decides Defendants' appeal.

5. Plaintiff does not dispute that courts routinely waive or reduce the appeal bond requirement where a judgment-debtor would otherwise be driven into bankruptcy pending appeal (*see* Goodman Aff. ¶ 16). Plaintiff contends instead that Defendants' "word" that they cannot pay the judgment is inadequate (Opp. Br. at 4). But Defendants detailed their financial condition in five separate affirmations made under penalty of perjury. Among the affiants are Neil Pedersen, an independent surety bond agent who has "been involved in the issuance of thousands of bonds" (Pedersen Aff. ¶ 24), and me, a member in good standing of this Bar for over 35 years.

6. In any event, as detailed below (*infra* Part C), Defendants are willing to secure a stay on the conditions Plaintiff proposes (*see* Opp. Br. at 29-32). *First*, Defendants will readily provide *in camera* or file under seal the financial information on which its affirmations—the purpose of which was to truthfully summarize that information—were based. *Second*, Defendants of course will agree to a stay condition that the appeal be perfected by December 30, 2024. After all, that was Defendants' original proposal (Goodman Aff. ¶ 14), and Defendants have every reason to ensure that the trial court's errors are corrected expeditiously, particularly given the strength of Defendants' arguments. *Third*, as security to stay enforcement of the judgment against Defendants, CCAB would be willing to pledge its shares comprising 100% ownership interest in its subsidiaries that own two hotels in Nassau, Bahamas. Those shares were carried on CCAB's books in its most recent audited financial statement at $146 million. And the hotels were recently appraised by Cushman & Wakefield Inc. and Jones Lang LaSalle Inc. at between $232.7 million and $355.1 million. This offer of security encompasses nearly all the total combined value of the three Defendants (*see* Exhibit A, Reply Affirmation of Genguo Ju ("Ju Reply Aff.") ¶ 3; *see also* McMahon Aff. ¶ 3; Fu Aff. ¶ 3).

7. Given Defendants' (i) likelihood of success on appeal, (ii) imminent insolvency absent a stay, (iii) reasonable offer of security through CCAB's pledge of its ownership interests in its subsidiaries, and (iv) commitment to perfect their appeal by December 30, 2024, Defendants reiterate their request for a stay pending appeal.

A. *The Appeal Raises Dispositive Legal Issues, and Defendants Are Highly Likely to Prevail.*

8. The post-trial arguments relevant to this motion are neither "fact-bound" nor meritless (*contra* Opp. Br. at 16). On appeal, Defendants will certainly seek to correct the trial court's factual findings (*see* Goodman Aff. ¶¶ 6-14; NYSCEF 754; NYSCEF 752). At that point, contrary to Plaintiff's assertions, the scope of this Court's review of this nonjury trial will be "as broad as that of the trial judge" (*Palmer v WSC Riverside*, 61 AD3d 589, 589 [1st Dept 2009]), and the Court will be able to "examine the record *de novo*" (*Hunts Point Term. Produce Co-op. Assn., Inc. v N.Y.C. Econ. Dev. Corp.*, 36 AD3d 234, 244 [1st Dept 2006]).

9. For purposes of this motion, however, Defendants underscore that there are multiple *purely legal* arguments on which Defendants are likely to prevail and that would either reduce damages drastically and/or release one or more defendants from liability altogether. To preview just a few of the legal errors in the decision below:

10. *No fraudulent misrepresentation*. Fraud requires the "misrepresentation of a material *existing fact*" (*GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.*, 168 AD3d 563, 564 [1st Dept 2019] [emphasis added]). The trial court held that CCAB defrauded Plaintiff by promising "BML and its representatives that substantial completion would occur by March 27, 2015" (NYSCEF 755 at 3). As an initial matter, that mischaracterizes the evidence: The March 27 opening explicitly depended on factors outside CCAB's exclusive control, and CCAB promised only to use its "best efforts" to achieve that date. But even accepting the trial court's erroneous

factual findings, the fraud claims fail as a matter of law. A "statement of future intentions," like the one the trial court purported to identify, is not fraudulent unless the speaker "never intended to honor or act on it" (*Rising Sun Constr. L.L.C. v CabGram Dev. LLC*, 202 AD3d 557, 559 [1st Dept 2022]). The trial court made no finding that CCAB believed it could not achieve substantial completion by the March 27 date. Indeed, Plaintiff's counsel expressly disclaimed that argument (Tr. 14:1-2 ["It's not that [CCAB] intentionally knew that they were not going to open on March 27th"]; Tr. 241:15-242:15 [admitting that CCAB did not "know[] that they were not going to meet that date" and that Plaintiff was not contending that CCAB "did not intend to meet that date"]). The trial court also erred in holding CSCECB and CCA liable for statements made exclusively by CCAB and by holding all three Defendants liable for another statement in post-litigation discovery responses that, besides being accurate, was made by Defendants' prior outside counsel years after the amount in question was paid (NYSCEF 752 at 7).

11. *Wrong scienter standard for fraud.* The trial court simply applied the wrong scienter standard. It held that CCAB acted with "reckless disregard" as to whether it could meet March 27 (NYSCEF 755 at 48, citing *DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 303 [1st Dept 2005]). But *DaPuzzo* involved auditors, and just this year this Court rejected its use in cases, like this one, involving promises of future performance by non-auditors (*Cimen v HQ Capital Real Estate L.P.*, 227 AD3d 587, 588-589 [1st Dept 2024] ["None of the cases in which we have cited *DaPuzzo* have extended its statement about gross negligence/recklessness to non-auditors"]). Instead, Plaintiff had to prove that the "defendants made [the allegedly fraudulent] statements with a present intention that they would not be carried out" (*Srivatsa v Rosetta Holdings LLC*, 213 AD3d 514, 516 [1st Dept 2023]). Not only did Plaintiff disclaim that argument at trial (*supra* ¶ 10), but CCAB undisputedly believed it would meet and had every intention of meeting

the March 27 date—which makes perfect sense, given that both Plaintiff and Defendants testified that the construction was 97% complete as of the March 27 date (Tr. 156:20-24, 1376:5-7).

12. *No breach from May 2014*. The trial court held that the first breach of the Investors Agreement occurred when Mr. Wu joined BML's Board on May 1, 2014 "without read[ing] the Investors Agreement" (NYSCEF 755 at 33) and that Mr. Wu's mere presence on the Board (to which BMLP appointed the other four directors) was a breach because Mr. Wu also worked for CCAB. Neither Plaintiff nor the trial court cited any authority for the absurd proposition that not reading a contract or putting a director on a board is an automatic breach of contract. There is none.

13. *No causation*. Defendants' wrongful conduct must have actually and proximately caused Plaintiff's claimed loss (*Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). Per Plaintiff's own expert, that loss occurred as of a result of the Bahamian Supreme Court's liquidation of BML in 2016, which deprived Plaintiff of its BML equity (Tr. 827:17-23, 829:13-16). But the trial court identified no causal link between that event and Defendants' purported wrongdoing in late 2014 and early 2015. At best, the trial court found (incorrectly) that Defendants' conduct caused the missed March 27 opening date, which purportedly led to BML's liquidity crisis, which Plaintiff responded to by filing BML for chapter 11 (NYSCEF 755 at 45). But even were that true (and it is not),[2] that does not prove causation. Between the chapter 11 filing and the loss of equity lay a series of events, all of which were caused by third parties and Plaintiff itself, including:

[2] As will be described further in Defendants' forthcoming brief, the trial court's finding was contrary to the evidence, which made clear that the liquidity crisis was BML's own doing. Before March 27, 2015, BML had drawn down over $2.3 billion on its loan, the lending bank notified BML it could draw down no more unless it put in $70 million additional equity, and the lending bank calculated a $200 million cost overrun. CCAB, meanwhile, was undisputably under its construction budget (NYSCEF 754 at 14).

a. the Delaware bankruptcy court's dismissal of the chapter 11 case;

b. Plaintiff's own refusal to provide the financial guarantee necessary to secure financing to restart the project, despite a contractual obligation to fund cost overruns;

c. Plaintiff's failure to make an offer for BML's assets acceptable to the Bahamian court-supervised receivers;

d. the receivers' sale of BML's assets to a third party, and

e. the Bahamian Supreme Court's liquidation order.

14. The trial court did not find that Defendants' purported fraud or breach of contract caused any of those events. Nor could the trial court have found that Defendants controlled either the U.S. bankruptcy court or the Bahamian Supreme Court, such that those courts' independent decisions can be considered to have been caused by Defendants.

15. *No actual damages*. As a matter of law, damages are measured at the time of the misconduct (*Cole v Macklowe*, 64 AD3d 480, 480 [1st Dept 2009]). Ignoring that rule, the trial court awarded damages based on the purported value of what Plaintiff paid to purchase its controlling equity in BML in 2011 (assets "deemed" worth $845 million) rather than the value of that equity at the time of the purported breaches or fraud in late 2014 and early 2015. Had the trial court correctly applied New York law, damages would have been zero. That is because the unrebutted evidence at trial was that Plaintiff's equity was worthless—well before and independent of Defendants' conduct—because of Plaintiff's overspending and decision to subordinate its equity in BML to a $2.45 billion bank loan that BML could never have repaid (JX0703.1; JX0853; Tr. 411:5-13). Even before the missed opening date, the lending bank told BML it was in default on the loan and had a $200 million funding shortfall (NYSCEF 754 at 25). And *Plaintiff's own*

expert's analysis showed that BML would have faced a five-year deficit starting in 2017, even if the Project opened on March 27, 2015 (NYSCEF 754 at 16; JX0980.70-.71; Tr. 831:23-835:11).

16. *No basis to award fraud damages*. Fraud damages are measured by the "actual pecuniary loss sustained" by the plaintiff through its detrimental reliance on the misrepresentations, which the trial court here found began in late 2014 (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). But the fraud damages awarded have nothing to do with that standard. Instead, the $845 million award (plus 10 years of pre-judgment interest) compensates for the amount Plaintiff purportedly invested in BML in 2011 (NYSCEF 755 at 66), more than three years before the allegedly fraudulent statements were made.[3] Amounts invested three years before a fraud began cannot be made in reliance on the fraud. Moreover, Plaintiff indisputably spent *no money* in reliance on the misstatements that the trial court found. At best, Plaintiff's executives testified that Plaintiff caused a *separate* company, BML, to spend money preparing for a March 27, 2015 opening. But those payments came from proceeds of a credit facility that BML never repaid (Tr. 102:23-103:1, 143:11-15, 148:14-21, 152:14-21; A. Graff Depo. 102:3-105:10 [Doc. #1-1058]). And even if they were cognizable, Plaintiff never bothered to quantify them.

17. *Contract damages were barred by agreement*. As this Court previously recognized in barring Plaintiff's requested lost profits, the Investors Agreement—the only contract at issue—explicitly waives consequential damages (*BML Props. Ltd. v China Constr. Am., Inc.*, 226 AD3d 582, 584 [1st Dept 2024]),[4] i.e., damages that "seek[] '[l]osses that do not flow directly and

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[3] The $15 million equity-shortfall payment in March 2015 also was not made in reliance on CCAB's alleged misstatements because it was contractually required by BML's lender, the China Export-Import Bank (*see* NYSCEF 752 ¶ 21).

[4] Among its five rulings reversing the trial court's summary judgment decision, this Court dismissed the lost profits claim, holding that the consequential damages bar applied despite

immediately from [the breach] but that result indirectly from the [breach]'" (*400 15th St., LLC v Promo-Pro, Ltd.*, 28 Misc 3d 1233[A], 2010 NY Slip Op 51580[U], *10 [Sup Ct, Kings County 2010] [quoting Black's Law Dictionary [8th ed 2004]). The trial court ignored the bar on consequential damages. It expressly awarded damages to compensate Plaintiff not for any harm flowing directly from Defendants' alleged breaches in 2014 and 2015, but rather for the harm that occurred almost two years later when the Bahamian Supreme Court liquidated BML (NYSCEF 754 at 18, 25-27, 33-34). Courts have held damages arising from loss of an investment as consequential, not direct, even where the causal connection was far less attenuated than it is here (*see e.g. Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192 [2008]; *DirectTV Latin Am., LLC v RCTV Intl. Corp.*, 38 Misc. 3d 1212[A], 2013 NY Slip Op 50082[U], *5-*6 [Sup Ct, NY County 2013], *aff'd DirectTV Latin Am., LLC v RCTV Intl. Corp.*, 115 AD3d 539 [1st Dept 2014]).

18. <u>*No veil-piercing*</u>. The trial court plainly erred by applying New York law to pierce the veils of two Bahamian entities (CSCECB and CCAB) and hold CCA, the New Jersey-based Defendant with no connection to the Baha Mar project, liable for fraud and breach of contract. New York courts virtually always apply the law of the jurisdiction of the entity whose veil the plaintiff seeks to pierce (*Highland Crusader Offshore Partners, L.P. v Celtic Pharma Phinco B.V.*, 205 AD3d 520, 521-522 [1st Dept 2022])—here, The Bahamas. Had the trial court correctly applied Bahamian law, it would have had to dismiss CCA altogether. To pierce the veil under Bahamian law, a defendant (CCA) must incur liability to the plaintiff before creating the allegedly

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Plaintiff's claims of "intentional wrongdoing" by Defendants (*BML Props. Ltd. v Chin Constr. Am., Inc.*, 226 AD3d 582, 584 [1st Dept 2024]). This Court also reversed the trial court's decision allowing Plaintiff to seek $700 million on an unjust enrichment claim (*id.*; *BML Props. Ltd.*, 78 Misc 3d 1242[A], *5, *8).

fraudulent shell entities (CSCECB and CCAB), and there is no dispute that CSCECB and CCAB were created well before the alleged fraud (*see Adams v Cape Industries PLC*, [1990] Ch. 433 [C.A. [544]]). The trial court circumvented this obvious result not through any substantive analysis but by finding that Defendants did not notice their intent to rely on foreign law "prior to the presentation of any evidence at the trial" (CPLR 4511 (b)). The trial court was simply wrong: Defendants expressly advised the Court in writing at the earliest pre-trial opportunity that Bahamian law should apply to veil-piercing (*see* NYSCEF 735 at 3). In any event, veil-piercing was unwarranted even under New York law: Plaintiff wholly failed to prove that CCA "exercised complete domination" over CSCECB and CCAB "in respect to the transaction attacked" or that "such domination was used to commit a fraud or wrong against[] Plaintiff" (*see Morris v N.Y.S. Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

19. <u>*Counterclaims improperly dismissed*</u>. The trial court further erred in dismissing CSCECB's counterclaims for breach of the Investors Agreement. As just one example, this Court already found that there was "evidence in the record of at least one unanswered request for books and records, in a March 13, 2015 letter" (*BML Props.*, 226 AD3d at 585). The trial court's decision squarely contradicted this Court's prior ruling, holding that the March 13 letter was not a books-and-record request (NYSCEF 755 at 71-72).

20. These arguments are by no means exhaustive of the errors in the trial court's 74-page opinion. And, of course, Defendants need not show they are certain to succeed on every one of their claims to merit a stay. Courts considering stays pending appeal look to the merits not to prejudge the appeal but because a plainly meritless appeal is likely to have been brought for improper "purposes of delay" (*see Application of Mott*, 123 NYS2d 603, 608 [Sup Ct, Oswego County 1953]; *accord Herbert v City of New York*, 126 AD2d 404, 407 [1st Dept 1987]). Any

objective reading of these likely appellate issues makes clear that the appeal is serious and meritorious.

21. Finally, although this motion's focus is the trial court's purely legal error, Defendants note that Plaintiff's brief and the trial court's decision repeatedly mischaracterized and ignored key evidence. For example:

- Plaintiff continues to describe Defendants as a singular entity (Opp. Br. at 7), even though CCA was not the construction manager on the Project, was not a party to *any* of the relevant contracts, and "play[ed] no role" in the Project (NYSCEF 754 at 7).

- The evidence was clear that the $54 million that BML paid to CCAB was a settlement for construction expenses, including amounts CCAB had *already paid* to subcontractors—and none of that money came out of Plaintiff's pocket. Nor did CCAB need that payment to purchase the British Colonial Hilton (NYSCEF 752 at 15-16).

- Moreover, CCAB continued to work on the Project even after BML stopped making required payments (NYSCEF 754 at 9-10, 12-13). It was BML that stiffed its subcontractors and lenders, incurring at least $123 million in trade debt when it filed for bankruptcy (NYSCEF 754 at 9, 16-17).

- The total number of workers onsite *increased* rather than decreased in early 2015 (*contra* Opp. Br. at 9), growing on net by over 1,000 workers (NYSCEF 754 at 13). The total increased even though approximately 700 workers with expiring contracts returned home for Chinese New Year. This was a planned departure that was repeatedly disclosed to BML at the time (NYSCEF 754 at 12).

B. ***Defendants Are Financially Unable to Bond the Full Judgment and Will Be Insolvent If the Judgment Is Enforced.***

22. Plaintiff does not dispute the principle that a stay is appropriate without a judgment debtor posting a full bond where the "judgment debtor would otherwise be in danger of being driven into bankruptcy pending appeal" (*Jack Frost Labs., Inc. v Physicians & Nurses Mfg. Corp.*, 1996 WL 709574, *1 [SD NY Dec. 10, 1996, No. 92 CIV. 9264] [reducing the bond amount where requiring defendant to pay the full amount would push it into bankruptcy]). Courts nationwide have "waived or [] reduced supersedeas bonds" where "the defendant has shown that she cannot post the full bond" (*Fed. Trade Commn. v Commerce Planet, Inc.*, 2012 WL 130150007, *8 [CD Cal, Sept. 13, 2012, No. 8:09-CV-01324] [collecting cases]). This Court did so most recently in the Trump Organization case (*see People v Trump*, No. 2024-01134; 2024-01145 [1st Dept, Mar. 25, 2024], NYSCEF 21).

23. The parties' only real dispute here, then, is whether Defendants have demonstrated their dire financial situation. They have by any standard. Defendants provided five sworn affirmations under penalty of perjury detailing Defendants' inability to pay a $1.6 billion judgment well over their combined value and the likelihood of insolvency if forced to pay it. None of the five affiants was a witness at trial, and each relied on personal knowledge to confirm Defendants' financial circumstances:

24. <u>*Pedersen Affirmation*</u>: Neil Pedersen, an independent appeal bond agent, reviewed "Defendants' year-end audited financials for 2019, 2020, and 2021," "internal consolidated financials for Defendants for years ending in 2022, 2023," and "interim financials as of June 30, 2024" (Pedersen Aff. ¶ 16). Based on these underlying financials and the fact that Defendants' most significant assets are in The Bahamas, he affirmed that "obtaining <u>*any*</u> appeal bond, let alone a bond for $1.98 billion, is impossible under the circumstances in this case" (Pedersen Aff. ¶ 19

[emphasis added]). He explained: "Surety is not written in a vacuum. Knowing that there is a billion-dollar liability with no ability to satisfy it prevents a surety company from issuing an appeal bond of any size without collateral, and indeed no surety I spoke to was willing to provide any bond here" (Pedersen Aff. ¶ 23).

25. *McMahon Affirmation*: James McMahon, who serves as Defendant CCA's General Counsel and is a member of the New York bar, detailed CCA's business activities, including its focus on "construction activities primarily in the northeastern United States, acting through its operating subsidiaries to deliver projects such as hotels, office buildings, residential buildings, hospitals, transit stations, railroad extensions, and bridges" (McMahon Aff. ¶¶ 1, 3). He affirmed that "CCA's primary assets are the equity interests it holds in [these] subsidiaries" and that "[t]he total value of CCA is, at most, a fraction of the amount of the judgment entered by the trial court" (McMahon Aff. ¶ 3).

26. *Fu Affirmation*: Xin Fu, Defendant CSCECB's President, affirmed that because CSCECB is a "Bahamian company that was set up as a special purpose vehicle to invest in" BML, it has "no meaningful assets beyond its counterclaims in this case," which the trial court dismissed in its post-trial decision (Fu Aff. ¶¶ 1, 3). Unsurprisingly, then, "[i]f enforcement of the judgment is not stayed pending appeal, CSCECB will be rendered insolvent" (Fu Aff. ¶ 5).

27. *Ju Affirmation*: Genguo Ju, Defendant CCAB's Executive Vice President, detailed CCAB's operations and affirmed that CCAB is "primarily a holding company" whose "only significant assets are its interests in two subsidiaries, which together own two hotels in Nassau, Bahamas" (Ju Aff. ¶¶ 1, 3). Mr. Ju further affirmed that "[t]he combined value of the two hotels is a mere fraction of the judgment" and that "no surety firm would offer a bond secured by CCAB's assets" (Ju Aff. ¶ 3). That is because, as Mr. Pedersen affirmed, "non-liquid forms of collateral

are not preferred types of collateral especially for a matter [] this large," and because "it is difficult [for surety companies] to enforce an indemnity agreement in" The Bahamas (Pedersen Aff. ¶¶ 21-22).

28. *Goodman Affirmation*: I am a Member of Debevoise, counsel for Defendants. Having reviewed the financial materials on which the Pedersen, McMahon, Fu, and Ju Affirmations were based, as well as the Affirmations themselves, I affirmed that "Defendants have diligently sought to obtain a bond to secure an automatic stay under CPLR 5519(a)," that because "Defendants are largely illiquid entities collectively worth a fraction of the judgment," Defendants were "unable to bond this $1.6 billion judgment," and that "the Judgment's size means that if Plaintiff is allowed to commence enforcement proceedings, Defendants will be forced into insolvency" (Goodman Aff. ¶ 5).

29. These were not "conclusory affidavits" (*contra* Opp. Br. 4). The affirmations were made under penalty of perjury by individuals with personal knowledge of the relevant materials. Messieurs McMahon, Fu, and Ju are senior executives at their respective companies, well-versed in the financial states and conditions of each company; each affirmed that judgment-enforcement would render their companies insolvent (*see e.g. Commerce Planet*, 2012 WL 13015007, *9 [granting discretionary stay without a full bond where Plaintiff "provided the Court with a sworn declaration stating that he will be forced into bankruptcy if" judgment is enforced and swore to the fact that "he does not have the financial ability to post a bond for the full amount of the judgment"]). Meanwhile, Mr. Pedersen is an independent surety bond agent who has "been involved in the issuance of thousands of bonds" (Pedersen Aff. ¶ 24).

30. On the other side of the ledger, a stay of enforcement would not prejudice Plaintiffs' potential recovery. It would merely maintain the status quo of this case, which has been pending

for seven years, while Defendants promptly prosecute their appeal (*see Mintz & Gold LLP v Zimmerman*, 17 Misc 3d 972, 976 [Sup Ct, NY County 2007] ["[A] stay [under CPLR 5519(c)] . . . maintains the status quo"]). Plaintiff's argument that a stay would "pause post-judgment discovery" (Opp. Br. at 6) is both a truism and beside the point. A stay of enforcement inevitably includes a stay of enforcement-related discovery. Plaintiff cites no case denying an otherwise meritorious stay motion on this basis.

C. *Defendants Will Consent to Plaintiff's Proposed Conditions to Secure a Stay.*

31. At the end of its brief, Plaintiff proposes several conditions that it suggests this Court "should exercise its discretion to impose" if "the Court is [] inclined to grant some stay" (Opp. Br. at 29, citing CPLR 5519, cmt [c]). Defendants would agree to accept those conditions to ensure a stay of enforcement.

32. *First*, Plaintiff asks Defendants to provide "transparency about its financial situation" (Opp. Br. at 31). As explained above, Defendants did so in five sworn affirmations. But if the Court wishes, Defendants will provide *in camera* or file under seal with the Court the financial information on which those affirmations were based, in addition to the third-party valuations of the two Bahamian hotels. Defendants are also more than willing to provide that information to Plaintiff, subject to a confidentiality agreement necessary to protect Defendants' sensitive business information, which could cause Defendants competitive harm if made public.

33. *Second*, Plaintiff asks the Court to require Defendants to "promptly perfect [their] appeal by December 30, to put it on the March Term calendar" (Opp. Br. at 31). Defendants would of course agree to perfect by December 30; Defendants, after all, first made that proposal (Goodman Aff. ¶ 14).

34. *Third*, Plaintiff asks Defendants to post "meaningful" security (Opp. Br. at 30). To secure a stay of enforcement against all three Defendants, CCAB would be willing to pledge its

shares of its only two significant assets, its ownership of two subsidiaries that own two hotels in Nassau, Bahamas: the British Colonial Hotel & Office Complex and the Margaritaville Beach Resort Complex (Ju Reply Aff. ¶ 3). Those shares were carried on CCAB's books in its most recent audited financial statement at $146 million. The hotels were recently appraised by Cushman & Wakefield Inc. and Jones Lang LaSalle Inc. as having a combined value of between $232.7 million and $355.1 million (*see* Ju Reply Aff. ¶ 4).

35. This offer of security encompasses nearly all the total combined value of the three Defendants. Given the imminent risk of insolvency without a stay, this security would make a stay here consistent with those granted in scores of cases nationwide (*see e.g. Jack Frost Labs., Inc.*, 1996 WL 706574, *1 [reducing bond where it would have been extremely difficult for the defendant to post the full bond and any such requirement might push it into bankruptcy]; *United States v Owen*, 2000 WL 1876358, *1 [ED La Dec. 26, 2000] [waiving the bond requirement where posting a full bond would have resulted in insolvency], *affd*, 263 F3d 161 [5th Cir 2001]; *Hurley v Atl. City Police Dept.*, 944 F Supp 371, 378-379 [DNJ 1996] [waiving bond requirement where there was a strong likelihood that enforcement of the judgment would push defendant into bankruptcy]; *Intl. Distrib. Ctrs, Inc. v Walsh Trucking Co., Inc.*, 62 BR 723, 732 [SD NY 1986] [allowing defendants to post bonds in the amount of $10,000 in security for a $38 million judgment, where a full bond would have been wholly impracticable]; *Miami Intl. Realty Co. v Paynter*, 807 F2d 871, 874 [10th Cir 1986] [affirming decision to not require full supersedeas bond where defendant provided evidence that he was financially unable to post a full bond and execution on the $2.1 million judgment would place him in insolvency]; *C. Albert Sauter Co., Inc. v Richard S. Sauter Co., Inc.*, 368 F Supp 501, 520 [ED Pa 1973] [allowing reduced bond where execution of the $1.45 million judgment would have placed the individual defendants in insolvency]).

D. ***Conclusion***

36. For the foregoing reasons, Appellants respectfully request that this Court enter an order pursuant to CPLR 5519 (c) for a discretionary stay of enforcement against all three Defendants subject to the terms outlined herein pending the resolution of Defendants' appeal of the judgment.

I affirm this 18th day of November, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

By: ____*/s/ Mark P. Goodman*_____
Mark P. Goodman

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New York, New York 10001
(212) 909-6000

Attorneys for Defendants-Appellants China Construction America, Inc., now known as CCA Construction, Inc., CCA Construction, Inc., CSCEC Bahamas, Ltd., and CCA Bahamas Ltd.

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

BML PROPERTIES LTD.,	:	New York County Clerk's Index No.: 657550/2017
Plaintiff-Respondent,	:	
-against-	:	Appellate Nos.: 2024-06623; 2024-06624
CHINA CONSTRUCTION AMERICA, INC., NOW KNOWN AS CCA CONSTRUCTION, INC., CCA CONSTRUCTION, INC., CSCEC BAHAMAS, LTD., CCA BAHAMAS LTD.,	:	**REPLY AFFIRMATION OF GENGUO JU IN FURTHER SUPPORT OF MOTION FOR A STAY OF ENFORCEMENT PENDING APPEAL**
Defendants-Appellants,	:	
and	:	
DOES 1 THROUGH 10,	:	
Defendants.	:	

Genguo Ju hereby affirms the following statements to be true under the penalty of perjury pursuant to CPLR 2106:

1. I am an Executive Vice President to Defendant-Appellant CCA Bahamas Ltd. ("CCAB").

2. I respectfully submit this reply affirmation in further support of Defendants' motion requesting a discretionary stay pending their appeal of the judgment entered in this case by the Supreme Court on October 31, 2024 (the "Judgment").

3. As I stated in my previous Affirmation, CCAB, a Bahamian company, is primarily a holding company whose only material assets are its interests in two Bahamian subsidiaries. These two subsidiaries together own two hotels in Nassau, Bahamas: the British Colonial Hotel & Office Complex ("British Colonial") and the Margaritaville Beach Resort Complex ("Margaritaville").

4. Earlier this year, CCAB obtained appraisals of the two hotels from Cushman & Wakefield Inc. ("Cushman") and Jones Lang LaSalle Inc. ("JLL"). Cushman and JLL appraised the collective value of the hotels as between $232.7 million and $355.1 million. CCAB would be willing to provide those valuation reports to the Court *in camera* and under seal and to make them available to Plaintiff subject to an appropriate confidentiality order.

5. As I also stated in my previous Affirmation, along with the other Defendants, CCAB retained Pedersen & Sons Surety Bond Agency ("Pedersen"), an independent surety bond firm. With Pedersen's assistance, CCAB attempted unsuccessfully to obtain supersedeas bonds to secure the judgment in this case from several different surety providers. I understand that no surety firm would accept the two hotels as a form of collateral on a supersedeas bond.

6. Nonetheless, independent of any bond, CCAB is willing to pledge its shares of its two subsidiaries as security against the Judgment. Those shares were carried on CCAB's books in its most recent audited financial statement at approximately $146 million. CCAB would be willing to provide that statement to the Court *in camera* or under seal and to make it available to Plaintiff subject to an appropriate confidentiality order.

7. CCAB intends to continue to operate the hotels in the regular course during the pendency of this appeal.

I affirm this 18th day of November, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Date: New York, New York
November 18, 2024

Genguo Ju

CCA Bahamas Ltd.
Suite 700, Park Avenue
One Bay Street
Nassau, P.O. SP-64291
The Bahamas

EXHIBIT 5

Order

Supreme Court of the State of New York
Appellate Division, First Judicial Department

PRESENT Hon. Troy K. Webber, Justice Presiding,
Lizbeth González
Julio Rodriguez III
Marsha D. Michael, Justices.

BML Properties Ltd., Plaintiff-Respondent,	Motion No.	2024-05394
	Index No.	657550/17
	Case Nos.	2024-06623
-against-		2024-06624

China Construction America, Inc., now known as CCA Construction Inc., CSCEC Bahamas, Ltd., CCA Bahamas Ltd., and Does 1-10,
Defendants-Appellants.

[And Another Action]

An appeal having been taken from an order of the Supreme Court, New York County, entered on or about October 21, 2024 (Case No. 2024-06623) and from a judgment of the same Court entered on or about October 31, 2024 (Case No. 2024-06624),

And defendants-appellants having moved for a stay of all proceedings including enforcement of the aforesaid order and judgment pending hearing and determination of the appeal taken therefrom,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied. The interim relief granted by a Justice of this Court on November 4, 2024, is hereby vacated.

ENTERED: December 19, 2024

Susanna Molina Rojas
Clerk of the Court