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.
>
> (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 <u>this</u> 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 ***<u>date certain</u>***, 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

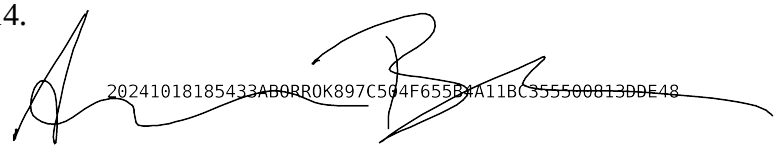
ORDERED and ADJUDGED that BMLP is entitled to judgment on its breach of contract claim; and it is further

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 _____)**