INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

International Arbitral Tribunal

In the Matter of the Arbitration between Lion's Property Development Group LLC, Claimant, v. New York Proton Regional Center, LLC, NCM USA Bronx LLC f/k/a NCM USA LLC, Big Apple Capital Lenders LLC, Yitzchak Tessler, and Ari Herrmann, Respondents/Counterclaimants.	Case No. 01-21-0002-1146

FINAL AWARD

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FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement between the Parties contained in a certain agreement dated August 14, 2012 as more fully described below, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, issue this FINAL AWARD, as follows:

I. Introduction

The central issues in this arbitration are (1) whether an obligation to pay a bonus was added to two separate but related agreements after they had already been signed by the parties thereto without the prior written approval and consent of the parties against whom enforcement of the purported bonus obligation is sought and, if so, whether such obligation is enforceable; (2) whether a guaranty, guaranteeing payment of the bonus, was fraudulently created without the approval of the purported guarantors and their signatures forged thereon and, if so, whether such guaranty is enforceable; and (3) whether the recipient of an account stated with respect to amounts of the bonus due and payable is entitled to the return of proceeds remitted in satisfaction of the account stated.

II. The Parties, their Representatives and the Tribunal

Claimant is Lion's Property Development Group LLC ("Claimant" or "Lion's Property"), a New York limited liability company, with its principal place of business in the State of New York, New York County. JX C-4 at ¶ 21.[1] Lion's Property is represented in these proceedings by Howard M. Rubin, Esq. and Sean R. Flanagan, Esq. of Goetz Fitzpatrick LLP. Mr. Chaim Katzap is the sole proprietor and managing member of Lion's Property. Katzap Tr. 3:24-4:4.[2]

Respondents/Counterclaimants are (1) New York Proton Regional Center, LLC, a New York limited liability company, with its principal place of business in the State of New York ("NY Proton"), (2) NCM USA Bronx LLC f/k/a NCM USA LLC, a New York limited liability company, with its principal place of business in the State of New York ("NCM"), (3) Big Apple Capital Lenders LLC, a Delaware limited liability company, with offices in the State of New York ("Big Apple Capital", and, together with NY Proton and NCM collectively referred to herein as the "Corporate Respondents"); (4) Yitzchak Tessler, an individual and the principal of

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[1] Lion's Property's exhibits agreed to by the Parties and cited in this Final Award are referred to as "JX C-__". Respondents'/Counterclaimants' exhibits agreed to by the Parties and cited in this Final Award are referred to as "JX RCC-__". Lion's Property's separate exhibits are referred to as "CX-__"; Respondents'/Counterclaimants' separate exhibits are referred to as "RCC-__".

[2] Transcript of Proceedings, May 23, 2022, transcribing testimony of Chaim Katzap ("Katzap Tr. [page]: [line-line]").

each of the Corporate Respondents who resides in or has offices in New York, New York (individually referred to herein as "Mr. Tessler"), and (5) Ari Herrmann, an individual who resides in or has offices in New York, New York and serves as the Chief Financial Officer of each of the Corporate Respondents (individually referred to herein as "Mr. Herrmann" or, together with Mr. Tessler, "Respondents Tessler and Herrmann"). JX C-4 at ¶¶ 23-29. The Corporate Respondents, together with Respondents Tessler and Herrmann, are collectively referred to herein as "Respondents". Respondents are represented in these proceedings by David E. Ross, Esq. of Morrison Cohen LLP.

Lion's Property and Respondents are referred to collectively in this Final Award as the Parties.

On June 24, 2021, the International Centre for Dispute Resolution (the "ICDR") gave notice that it had reaffirmed the appointment of Michele S. Riley as the sole arbitrator in this matter.

III. The Arbitration Clause and Governing Law

The agreement in connection with which this arbitration has been commenced as more particularly described below in Part V provides, in full, as follows:

> This Agreement shall be governed by laws of the State of New York and it cannot be changed or modified except in writing and with both parties' prior written approval and consent. Any dispute arising out of its performance by either party shall be settled through friendly discussions and/or negotiations. In the unlikely event that any such dispute cannot be settled amicably through friendly negotiations, then such dispute shall be submitted to binding arbitration pursuant to the Commercial Rules of the American Arbitration Association with such arbitration to be located in New York.[3]

IV. Procedural History

On March 2, 2021, pursuant to R-4(a) of the American Arbitration Association's (the "AAA") Commercial Arbitration Rules and Mediation Procedures, including Procedures for Large, Complex Commercial Disputes, as amended and effective October 1, 2013 (the "AAA Commercial Rules"), as well as the mandatory arbitration provision set forth above in Part III, Lion's Property filed a Demand for Arbitration and Statement of Claim (the "Arbitration Demand"), asserting the following causes of action: (1) as against Corporate Respondents, breach of contract; (2) as against Respondents Tessler and Herrmann, breach of contract: (3) as

[3] The Exclusive Agency & Marketing Agreement as defined in fn. 15 below. JX C-1 at ¶ 11.

against Corporate Respondents, anticipatory breach of contract; (4) as against Respondents Tessler and Herrmann, anticipatory breach of contract; (5) as against all Respondents, quantum meruit; (6) as against all Respondents, unjust enrichment; (7) as against all Respondents, account stated; and (8) as against all Respondents, alter ego liability. *See* JX C-4. Lion's Property also asserts claims for attorneys' fees, statutory interest accruing at 9%, and costs. *Id.* at p. 13.

In their Response to Statement of Claim and Counterclaims filed on June 24, 2021 ("Response and Counterclaims"), Respondents do not directly admit or deny the allegations in the Arbitration Demand but assert the affirmative defense of fraud to Lion's Property's claims. *See* JX RCC-6. Respondents demand that the Arbitrator issue an award denying with prejudice Lion's Property's claims in their entirety. Respondents also assert counterclaims seeking an award to Big Apple Capital for the return of proceeds procured through Lion's Property's fraud, damages incurred by Respondents Tessler and Herrmann as a result of such fraud, and Respondents' attorneys' fees and costs, including arbitrator fees, and disbursements in connection with this arbitration and statutory interest. *Id.* at p. 6.

On July 7, 2021, in accordance with R-21 of the AAA Commercial Rules, the Arbitrator and the Parties participated in a videoconference to discuss procedural matters.[4] The Arbitrator issued the Preliminary Hearing and Scheduling Order, dated July 7, 2021 (as amended, the "Scheduling Order"), which *inter alia* fixed the procedural schedule with which the Parties and their counsel endeavored to comply.

At a status conference held on April 18, 2022, the Parties confirmed that the evidentiary hearing scheduled to commence on May 23, 2022 would be held in person at the ICDR/AAA offices located at 150 East 42d Street, New York, New York. The Parties also confirmed their agreement pursuant to paragraph 15 of the Scheduling Order to arrange for the presence of a court reporter for the purpose of providing a stenographic record of the hearing and to divide evenly between themselves the cost of the court reporter and record.[5]

On April 18, 2022, the Parties simultaneously submitted their final list of witnesses that they expected to call for direct examination at the evidentiary hearing. On May 17, 2022, the Parties simultaneously submitted their pre-hearing briefs. The Parties provided to the Arbitrator electronic copies of the exhibits prior to and/or after the hearing and hard copies at the hearing.

The evidentiary hearing took place on May 23 through 24, 2022 in person at the ICDR/ AAA offices located at 150 East 42nd Street, New York, New York (the "Hearing").

The following persons were present at the Hearing:

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[4] All pre-hearing and post-hearing conferences in these proceedings were held via videoconference on the AAA Zoom Pro platform.

[5] *See* Amendment No. 2 to Scheduling Order dated April 18, 2022.

The Tribunal:
Michele S. Riley

For Claimant:
Sean R. Flanagan, Goetz Fitzpatrick LLP
Chaim Katzap, Lion's Property

For Respondents/Counterclaimants:
David E. Ross, Morrison Cohen LLP
Yitzchak Tessler, Respondent/Counterclaimant
Ari Herrmann, Respondent/Counterclaimant
Jeffrey H. Luber, Forensic Document Examiner

Court Reporter: David Novick, U.S. Legal Support

The Parties delivered opening statements before presenting their witnesses. On Lion's Property's side, Mr. Chaim Katzap testified as a fact witness. Respondents presented two fact witnesses: Respondents Tessler and Herrmann. Respondents also called Mr. Jeffrey H. Luber as an expert witness. Each witness was cross-examined by the opposing side and asked questions by the Arbitrator.

At a post-hearing conference held on June 16, 2022, the Parties confirmed their agreement that all exhibits that were presented at the Hearing without objection would be admitted into evidence. The Parties further agreed to submit post-hearing briefs and, in connection therewith, the Arbitrator advised the Parties of specific questions, the answers to which might guide her in rendering this Final Award.[6] The Parties confirmed their understanding that the Hearing would not be closed until the receipt of the post-hearing briefs or receipt of any additional submissions (including but not limited to arbitration fees and expenses) as may be requested by the Arbitrator.[7]

On August 1, 2022, the Parties simultaneously submitted their post-hearing briefs.[8] Respondents raised the affirmative defenses of breach of fiduciary duty, collateral estoppel and *res judicata* based on the confirmation of a certain arbitral award by the New York State Supreme Court (New York County) on May 24, 2022, the last day of the Hearing. *See* Resp. PHB at pp. 42-46; RCC-19. A post-hearing conference was held on August 4, 2022 at which Lion's

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[6] The questions of the Arbitrator were also conveyed to the Parties by email dated June 20, 2022. The deadline for submission of post-hearing briefs was initially set for July 15, 2022; the deadline was subsequently extended to July 29, 2022 and then to August 1, 2022 at the request of one Party for good cause without objection from any other Party. *See* emails of the Arbitrator dated July 6 and July 21, 2022.

[7] *See* Post-Hearing Order dated June 17, 2022.

[8] *See* Lion's Property Development Group LLC's Post-Hearing Brief dated August 1, 2022 ("Cl. PHB"); Respondents'/Counterclaimants' Post-Hearing Brief dated August 1, 2022 ("Resp. PHB").

Property was invited and agreed to submit a post-hearing reply brief by August 12, 2022, limited in scope to rebuttal of Respondents' arguments relating to the aforesaid affirmative defenses.[9] Lion's Property submitted its reply brief on August 12, 2022.[10]

On August 10, 2022, the Arbitrator requested that Respondents submit a supplemental brief by August 19, 2022 setting forth their arguments in support of their demand that all claims asserted by Lion's Property be denied with prejudice, limited in scope to "the claims for breach of contract, anticipatory repudiation, quantum merit and unjust enrichment."[11] Respondents submitted their supplemental brief on August 19, 2022.[12]

In response to the Arbitrator's query made on August 24, 2022 regarding Lion's Property's claims for anticipatory breach of contract against all Respondents, by emails dated August 26, 2022, Lion's Property withdrew those claims.[13]

The Hearing was closed as of August 31, 2022.

V. Summary of Facts

Background

The United States and Immigration Services (the "USCIS") runs the U.S. Immigrant Investment Pilot Program number 5 (the "USCIS EB-5 Program"). The purpose of the USCIS EB-5 Program is to provide an avenue for certain employment-based immigration designed to stimulate the U.S. economy through job creation and capital investment by foreign investors.

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[9] *See* Post-Hearing Order No. 2 dated August 4, 2022.

[10] *See* Lion's Property Development Group LLC's Post-Hearing Reply Brief dated August 12, 2022.

[11] *See* email of the Arbitrator dated August 10, 2022.

[12] *See* Respondents'/Counterclaimants' Tribunal Ordered Supplemental Post-Hearing Brief dated August 19, 2022 ("Resp. Supp. Brief"). Respondents exceeded the limited scope of the supplemental brief by raising for the first time a new theory — the "faithless servant" doctrine — as a defense against Lion's Property's claims. Because that is a defense that exceeds the limited scope of the Arbitrator's directive in her email of August 10, 2022 and could have been asserted well before the Hearing, the Arbitrator will not consider the doctrine in determining the disposition of any claims or counterclaims in this arbitration.

[13] *See* emails of the Arbitrator dated August 24 and 26, 2022, and emails of counsel for Lion's Property dated August 26, 2022 ("Cl. August 26th Emails"). The claims withdrawn by Lion's Property are its claims for anticipatory breach of contract as against the Corporate Respondents and as against Respondents Tessler and Herrmann, respectively, the Third Cause of Action and the Fourth Cause of Action in the Arbitration Demand. JX C-4 at ¶¶ 57-67, ¶¶ 68-74; *See* fn. 29 below for a more detailed explanation of the basis for that withdrawal.

Katzap Tr. 6:11-7:3; Tessler Tr. 14:10-17;[14] JX C-1 at p. 1. Under the USCIS EB-5 Program, foreign investors may qualify for EB-5 classification by investing, through an investment vehicle, in a company that has designed a project which will stimulate the economy by creating a certain number of jobs in a certain geographic region of the United States in which it has authority to act. *Id.*

In or about 2012, the Corporate Respondents designed and sponsored an investment project under the USCIS EB-5 Program (the "EB-5 Project"). In order to meet the capital investment requirements to qualify for EB-5 classification as set and modified from time to time by the USCIS (Katzap Tr. 9:19-24; JX C-1 at p. 1), under the terms of the EB-5 Project, foreign investors would be required to invest, in the form of a loan, at least $500,000 each in the investment vehicle, Big Apple Capital. Katzap Tr. 16:6-14; Tessler Tr. 13:2-17; JX C-1 at ¶ 6. Big Apple Capital would then loan the funds it raised to NY Proton and NCM. Tessler Tr. 47:6-11; RCC-18. NY Proton and NCM would use the proceeds of the loan to run the EB-5 Project and provide jobs in the New York region. RCC-18 at CKatzapRev_0001566.0001, pp. 5-6.

In return for their investment in the EB-5 Project, the foreign investor would receive a visa to travel to, and potentially a permanent visa to enter, the United States. Additionally, the investor would receive interest on their loan that would "accrue at an estimated rate of 1.5% per annum on a non-compounded basis." RCC-18 at CKatzapRev_0001566.0001, p. 13, § 2.1.

Lion's Property is an entity specializing in matching foreign investors with qualified EB-5 projects, as well as facilitating all pre-investment negotiations and due diligence required. Katzap Tr. 5:10-24.

The Marketing Agreement

On August 14, 2012, the Corporate Respondents entered into an Exclusive Agency and Marketing Agreement with Lion's Property related to the EB-5 Project (the "Marketing Agreement").[15] Katzap Tr. 17:8-23; 31:21-32:2; Tessler Tr. 57:7-17; JX C-1.

Under the terms of the Marketing Agreement, the Corporate Respondents contracted with Lion's Property on an exclusive basis to identify and procure foreign investors to participate in

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[14] Transcript of Proceedings, May 24, 2022, transcribing testimony of Yitzchak Tessler ("Tessler Tr. [page]:[line-line]").

[15] The Marketing Agreement is more specifically described as the Exclusive Agency & Marketing Agreement between NY Proton, NCM and Big Apple Capital collectively referred to thereunder as "NCM-USA EB-5", and Lion's Property Development Group Beijing Representative Office, People's Republic of China and Lion's Marketing Group Limited - a Hong Kong Company collectively referred to thereunder as "Lion's" dated August 14, 2012. (JX C-1 at p. 1). NCM-USA EB-5 is comprised of the Corporate Respondents. Lion's Property is the parent company of Lion's. JX C-4 at ¶ 22.

the EB-5 Project. JX C-1 at ¶ 1. Lion's Property was also required to conduct all negotiations (subject to final approval by the Corporate Respondents), and provide and procure all services incidental to investments in the EB-5 Project, such as the preparation of closing materials and schedules, and the due diligence required to ensure that all such investments are compliant with USCIS rules and regulations. *Id.* at ¶ 7.

In exchange for Lion's Property's exclusive services, the Marketing Agreement provided that Lion's Property was to receive a fee of US $45,000 (the "Project Fee") for each qualified foreign investor ("EB-5 Investor"). *Id.* The Project Fee was to be paid to Lion's Property from the EB-5 Investor's payment of a service fee over and above their $500,000 investment. *Id.* at ¶¶ 7-8. The Project Fee was largely used to cover the marketing and costs of related services incurred in procuring the EB-5 Investors. Katzap Tr. 11:3-14:10; JX C-1 at ¶ 3 and Ex. B.

The Marketing Agreement also provided that it "may be terminated for justifiable cause upon written notice by either party if the other party fails to perform its obligations hereunder." JX C-1 at ¶ 1.

On August 14, 2012, at a meeting held at the office of Mr. Herrmann at NCM (the "August 2012 Meeting"), the Marketing Agreement was signed by Mr. Tessler on behalf of the Corporate Respondents and by Mr. Katzap on behalf of Lion's Property. Katzap Tr. 25:14-26:9; Tessler Tr. 57:7-17; JX C-1 at p. 5. There were two signed originals of the Marketing Agreement, one for Lion's Property and the other for the Corporate Respondents.[16] Katzap Tr. 153:14-16.

Pursuant to the terms of the Marketing Agreement, the Corporate Respondents paid Lion's Property the Project Fee of US $45,000 per EB-5 Investor for a total of US $540,000 (in the aggregate, the "Project Fees") for having identified and procured twelve EB-5 Investors for the EB-5 Project resulting in a total investment amount of US $6,000,000. Tessler Tr. 65:13-20. Eight of the EB-5 Investors made their investments in 2013 and the remaining four in 2014, 2015

[16] "Signed original" as used in this Final Award refers to a document bearing "wet-inked signatures", using the terminology of Mr. Luber. *See, e.g.*, letter from Jeffrey H. Luber dated February 19, 2022 (the "Luber Report") at pp. 2, 3.

and 2016. *See* CX-18; Katzap Tr. 61:15-17. The loans of all twelve EB-5 Investors have matured.[17]

The Bonus Provision

Lion's Property claims that the Corporate Respondents are obligated to pay not only the Project Fees but also a bonus that they contractually bound themselves to pay in connection with the EB-5 Project. This purported obligation to pay a bonus can be found in two documents: (i) a separate one-page document referred to therein as the "Side Agreement" (the "Side Agreement") (JX C-3); and (ii) the Marketing Agreement by way of a handwritten provision on the signature page. JX C-4, Ex. A at p. 5.

Turning first to the Side Agreement, the sole operative provision set forth in the version produced by Respondents is the right of the Corporate Respondents "to cancel the [Marketing] agreement attached hereto and made a part hereof at any time and at will, in which event Lion's will not be obligated to refund any expenses advanced to it by [the Corporate Respondents] prior to such termination." JX C-2. The Side Agreement is dated August 14, 2012 and signed by Mr. Tessler on behalf of the Corporate Respondents, and by Mr. Katzap on behalf of Lion's Property. *Id.*

After signing the Marketing Agreement at the August 2012 Meeting, Mr. Katzap testified that he was for the first time presented with the Side Agreement. Katzap Tr. 28:2-10; JX C-2. He signed the Side Agreement and then, after considering the ramifications of the right of the Corporate Respondents to cancel the Marketing Agreement at any time and at will, objected to the change in terms and requested Mr. Herrmann to put into writing the Parties' prior agreement providing Lion's Property with a $15,000 bonus per year per EB-5 Investor (the "Bonus"). Katzap Tr. 28:11-29:16.

Mr. Katzap explained that, during the negotiations of the Marketing Agreement, the Parties had discussed and agreed upon the payment of the Bonus. Yet the draft that had been prepared and sent to Mr. Herrmann by Mr. Katzap on August 8, 2012, just four days before the August 2012 Meeting, did not set forth any obligation on the part of the Corporate Respondents

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[17] The EB-5 Loan Agreement between Big Apple Capital (the investment vehicle for the EB-5 Investors), as lender, and NCM, as borrower, provided that the loan from the first eight EB-5 Investors would mature in December 2019 and that the second loan from the remaining four investors would mature in November 2023 (the "EB-5 Loan Agreement"). *See* Katzap Tr. 60:23-61:17. However, when the Corporate Respondents failed to re-pay the first eight EB-5 Investors upon maturity of the first loan, all twelve EB-5 Investors sued the Corporate Respondents for the return of their investments plus the interest owed under the EB-5 Loan Agreement. After the dispute was moved to arbitration (the "Investor Action"), the arbitrator ruled that the loans of both the first eight EB-5 Investors and the remaining four EB-5 Investors had matured and ordered the Corporate Respondents to re-pay all twelve EB-5 Investors their loans, plus the interest owed thereon. The New York State Supreme Court (New York County) confirmed that award on May 24, 2022. RCC-19. *See* Cl. August 26th Emails.

to pay to Lion's Property the Bonus or make any other payment over and above the Project Fee. *Id.*. at 210:12-22.

Nevertheless, Lion's Property relies on the intent of the Corporate Respondents to pay the EB-5 Investors interest on their investments that would "accrue at an estimated rate of 1.5% per annum on a non-compounded basis." RCC-18 at CKatzapRev_0001566.0001 at p. 13, § 2.1. Their intention was expressed in marketing materials distributed to the EB-5 Investors, including the Confidential Information Memorandum, approved and edited by NCM (the "PPM"). Katzap Tr. 29:5-31:10; RCC-18, CKatzapRev_0001566.0001.

The EB-5 Loan Agreement, however, stipulated that interest on the investments of the EB-5 Investors will "accrue at an estimated rate of 4.5% per annum on a non-compounded basis". RCC-18 at CKatzapRev_0001462.0002, p. 3, § 2.1. Mr. Katzap opined that this provision, when coupled with the intent of the Corporate Respondents to pay interest at the rate of 1.5% per year to the EB-5 Investors, evidences the commitment of the Corporate Respondents to pay Lion's Property interest at the rate of 3% per year per EB-5 Investor. Katzap Tr. 29:5-31:10. In other words, according to Mr. Katzap, the Corporate Respondents agreed to pay Big Apple Capital, the investment vehicle for the EB-5 Investors, an additional 3% in interest per year per EB-5 Investor over and above what was promised to the EB-5 Investors in order to cover the Bonus that was to be paid to Lion's Property as allegedly agreed to by the Corporate Respondents and Mr. Tessler. *Id.*[18] Notably, Lion's Property is not a party to the EB-5 Loan Agreement and nowhere therein does it reference any payment of interest or a bonus to Lion's Property. *See* RCC-18 at CKatzapRev_0001462.0002.

After reminding Mr. Herrmann of the Parties' prior agreement regarding the Bonus, Mr. Katzap testified that Mr. Herrmann indicated that they could put the Bonus provision in the Side Agreement. Katzap Tr. 31:11-20.

Mr. Katzap offered two alternative and conflicting scenarios as to what happened next: One scenario is that after he signed two copies of the Side Agreement and expressed his concerns, Mr. Herrmann then proceeded to add to one copy of the Side Agreement that had already been signed by Mr. Katzap the following provision next to the signature line of Mr. Tessler before taking it to Mr. Tessler sitting in the adjacent office for his signature:

> Lion's Bonus: $15,000 per year per EB5 Investor due and payable at EB5 loan maturity at the same time as repayment of EB5 investors' capital and their 1.5% annual interest.

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[18] While the rate of interest is not specified in the Bonus provision, the amount of the Bonus specified therein — $15,000 per year per EB-5 Investor — equates to 3% per year per EB-5 Investor, based on a $500,000 investment. See JX C-3; CX-18.

See id. at 31:17-34:23; JX C-3 (the "Side Agreement with Bonus"). As in the case of the Marketing Agreement, there are two signed originals of the Side Agreement, one for Lion's Property and one for the Corporate Respondents. See Katzap Tr. 146:9-23; Cl. PHB at p. 16. But the version produced by Lion's Property contains the Bonus provision while the version produced by Respondents does not. *Compare,* JX C-2, *with* JX C-3.

This scenario strains credulity for several reasons: First, Respondents' expert witness, Mr. Luber, opined that the Side Agreement with Bonus "is a composite document consisting of two entirely different print processes", explaining that an inkjet print process was used to produce the Bonus provision, while "a toner print process was used to create the remaining printed (font) entries", that is, the entirety of the Side Agreement without the Bonus provision. *See* the Luber Report at p. 9; Luber Tr. 105:8-19[19]; JX C-3.

Secondly, it would have made little sense to preserve the Side Agreement that had just been signed by Mr. Katzap and add the Bonus provision off to the right hand side next to the signature line for Mr. Tesssler when it would have been far easier to add the Bonus provision in the same paragraph format as the other operative provision (right of cancellation) in the Side Agreement and then print it for Mr. Katzap's signature. *See* JX C-3.

Perhaps recognizing that the implausibility of the first scenario, Mr. Katzap offered another scenario: after adding the Bonus provision, Mr. Herrmann printed a copy of the Side Agreement with Bonus which was then "signed fresh" by Mr. Katzap. *See* Katzap Tr. 221:10-12; JX C-3. But this scenario is subject to the same infirmities as the first scenario: inexplicably, an ink jet printer was used to print the Bonus provision, whereas a toner printer was used to print the entirety of the Side Agreement without the Bonus provision. Luber Report at p. 9; Luber Tr. 105:8-19; JX C-3. And, insofar as Mr. Katzap would be signing "freshly" on the newly printed Side Agreement, there would have been even less of a reason to place the Bonus provision off to the right hand side next to the signature line for Mr. Tessler when it could have been added far more easily in the same paragraph format as the other operative provision (right of cancellation) in the Side Agreement. JX C-3.

While Mr. Luber declined to opine as to when the Bonus provision was added (Luber Tr. 106:8-10), the use of two different printers to print two different sections — the cancellation right and the Bonus provision — of the same one-page document and the unusual formatting of the Bonus provision strongly suggest that the Bonus provision was added sometime after the Side Agreement was signed by both Mr. Katzap and Mr. Tessler. Respondents' possession of a signed original of the Side Agreement without the Bonus provision also supports this finding. *See* JX RCC-8.

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[19] Transcript of Proceedings, May 23, 2022, transcribing testimony of Jeffrey H. Luber ("Luber Tr. [page]: [line-line]").

Notably, Mr. Katzap could not explain why a different printer was used to print the Bonus provision. *See* Katzap Tr. 147:14-148:8. Nor could he explain why the signed original of the Side Agreement produced by Respondents does not contain the Bonus provision. *Id.* at 146:24-147:4.

The implausibility of the mechanics in having the Side Agreement with Bonus signed by the Parties in either scenario put forth by Mr. Katzap bolsters Respondents' position that they did not agree to the payment of the Bonus or any funds over and above the Project Fees to Lion's Property in connection with the EB-5 Project. Rather, they maintain that when the Parties signed the Side Agreement, there was no Bonus provision included therein and that Mr. Katzap fraudulently added that provision at a later time. Tessler Tr. 97:13-23; *see* JX C-2; JX C-3. Moreover, both Respondents Tessler and Herrmann testified that Mr. Tessler would never have signed a document providing for the payment of a bonus to Mr. Katzap. *See* Tessler Tr. 33:8-15; Herrmann Tr. 84:22-85:7; 87:21-88:10.[20]

In further support of their position, Respondents contend that the Side Agreement with Bonus, because it did not exist, was never sent to them or produced by Mr. Katzap until September 2021, three months after Respondents filed their Response and Counterclaims. *See* Herrmann Tr. 90:6-22. Lion's Property had several occasions to provide Respondents with the Side Agreement with Bonus if it existed. For example, on November 9, 2015, when Mr. Katzap sent an email query to Respondents Tessler and Herrmann relating to payment of certain invoices in respect of the EB-5 Investors, he attached to his email the Marketing Agreement but not the Side Agreement with Bonus. RCC-15. Mr. Katzap offered no explanation for this omission. Katzap Tr. 135:14-136:11.

Similarly, on August 15, 2016, when Mr. Katzap sent to Mr. Herrmann an email referencing his entitlement to the Bonus, he attached the Marketing Agreement but not the Side Agreement with Bonus. JX C-5. Another time when it would have been opportune to send the Side Agreement with Bonus was on June 8, 2018. Again, Mr. Katzap attached the Marketing Agreement but not the Side Agreement with Bonus to his email that day responding to Mr. Herrmann's query of June 7, 2018 regarding the payment of the "balance of EB-5 loan's interest of 3% …". JX C-6.

But curiously, the Marketing Agreement that was attached to each of the August 2016 and June 2018 emails had handwritten on the signature page that had been signed by both Mr. Tessler and Mr. Katzap the following language:

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[20] Transcript of Proceedings, May 24, 2022, transcribing testimony of Ari Herrmann ("Herrmann Tr. [page]:[line-line]"). Mr. Herrmann testified that given his knowledge of Mr. Tessler's frugality gained from 24 years of experience in working with him, Mr. Tessler would not have signed the Side Agreement with Bonus. Herrmann Tr. 55:13-22.

> Bonus: US $15,000 per annum/investor payable at loan (EB-5) maturity at the same time as repayment of Investors' capital w/ 1.5% p/a interest.

JX C-5, attachment at p. 5; JX C-6, attachment at p. 5.

Hence, this version of the Marketing Agreement with the handwritten Bonus provision provides Lion's Property with another source for its claimed entitlement to the payment of the Bonus. There is no dispute that Mr. Katzap hand wrote the Bonus provision on the signature page of the Marketing Agreement. Katzap Tr. 48:22-49:11. However, he offered conflicting testimony as to when that handwritten Bonus provision was added to the Marketing Agreement. At times, at the Hearing, he testified that he inserted the provision by hand during the August 2012 Meeting after reminding Mr. Herrmann of their agreement concerning the Bonus. *Id.* at 48:5-15; 126:7-11. At another time, Mr. Katzap indicated that he added the provision by hand some time after the August 2012 Meeting because he could not find the Side Agreement with Bonus.[21] *See id.* at 55:10-20; 123:9-15. It is likely that Mr. Katzap added the provision some time between (1) November 9, 2015, the day on which he sent the email referenced above to which was attached the Marketing Agreement without the handwritten Bonus provision, and (2) August 15, 2016, the day on which he sent the email referenced above to which was attached the Marketing Agreement bearing the handwritten Bonus provision. RCC-15; JX C-5; *see* Katzap Tr. 135:14-136:11. Moreover, because Mr. Herrmann, as Mr. Katzap maintains, stated at the August 2012 Meeting that "we'll put [the Bonus provision] in the [Side Agreement]" and then proceeded to do so, there would have been little reason to duplicate the Bonus provision in the Marketing Agreement at that time. *See* Katzap Tr. 31:11-20; 26:7-32:18. And, as in the case of the Side Agreement, there are two signed originals of the Marketing Agreement; the version produced by Lion's Property contains the handwritten Bonus provision while the version produced by Respondents does not. *Compare,* JX C-4, Ex. A at p. 5, *with* JX C-6, Ex. 1 at p. 5.

Although Respondents did not receive the Marketing Agreement bearing the handwritten Bonus provision until August 15, 2016, or the Side Agreement with Bonus until September 2021, Mr. Herrmann testified that he was aware before August 2016 that Mr. Katzap was requesting additional funds even though Mr. Herrmann may not have linked such funds with the word "bonus" or recognized the implication that the interest of 4.5% to be paid under the EB-5 Loan Agreement was to be apportioned between the EB-5 Investors (1.5%) and Lion's Property (3%). Herrmann Tr. 149:21-150:8. But certainly after receiving the August 15, 2016 email from Mr Katzap, Mr. Herrmann was aware that Mr. Katzap was seeking additional funds. *See id.* at 148:22-150:23. And Mr. Herrmann conceded that it was very clear from the June 7, 2018 email

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[21] Mr. Katzap testified that he did not find the signed original of the Side Agreement with Bonus until September 2021 (after Respondents had filed their Response and Counterclaims) when he thought to look for it in a "special file" in which he kept all of his signed originals of documents, *See* Katzap Tr. 122:21-123:8. Inexplicably, Mr. Katzap did not think to look for it in the "special file" at any time between the August 2012 Meeting and September 2021 including the times in November 2015, August 2016 and June 2018 when he sent to Respondents Tessler and/or Herrmann the Marketing Agreement. *See id.* at 123:4-8; JX-5; JX-6.

from Mr. Katzap, which made explicit reference to the fact that the "balance of EB-5 loan's interest of 3% p/a on non-compounded basis – is due and payable", that, in the view of Mr. Katzap, interest of 3% to be paid under the EB-5 Loan Agreement was payable to Lion's Property. *Id.* at 152:22-153:8.

Notwithstanding Mr. Herrmann's awareness by August 15, 2016 that Lion's Property was seeking additional funds from NCM and his knowledge by June 7, 2018 that Mr. Katzap believed that 3% of the 4.5% interest to be paid under the EB-5 Loan Agreement was payable to Lion's Property, Mr. Herrmann did not respond to Mr. Katzap's emails by denying that Lion's Property was entitled to any payments in connection with the EB-5 Project over and above the Project Fees. *Id.* at 150:9-23; 153:8-16. When asked why he — the CFO of NCM — did not do so, Mr. Herrmann responded "[t]hat would not be my place to do." *Id.* at 150:16-21. And upon further questioning, he offered that "it would be the place of Mr. Tessler to do so." *Id.* at 150:22-23.

When asked whether he had brought Mr. Katzap's demand for additional funds to Mr. Tessler's attention, Mr. Herrmann testified that he could not recall having any conversations with Mr. Tessler during the period of 2016 through 2018 about the Bonus. *Id.* at 60:7-13; 19-24. But thereafter, Mr. Herrmann testified, he was "pretty certain as certain as [he] can be from memory" that he brought Mr. Katzap's demand to Mr. Tessler's attention a "few times" and that he was "pretty certain" that Mr. Tessler indicated that he was "not interested in Katzap right now …". *Id.* at 151:7-24. As a result, as Mr. Herrmann further explained, because Mr. Tessler "was not interested in hearing it at all", Mr. Herrmann did not have the opportunity to discuss Mr. Katzap's demand or show Mr. Tessler any of the documents that had been forwarded to him by Mr. Katzap in connection with his demand. *Id.* at 151:20-24.[22]

In December 2019 when the loan under the EB-5 Loan Agreement made by the first eight EB-5 Investors matured, neither NCM nor Big Apple Capital returned to these EB-5 Investors their investments with interest or paid Lion's Property the Bonus.[23] As a result, Mr. Katzap met with Mr. Tessler on December 17, 2019, to discuss the Bonus. Katzap Tr. 61:15-62:24. At that time, the Bonus totaled $500,000 for the first eight investors only. *Id.* at 63:5-11. Mr. Katzap testified that at that meeting, Mr. Tessler agreed to pay Mr. Katzap: "20 percent of all monies due at the end of that year monthly -- a hundred thousand per month for five months." *Id.* at 61:18-62:24; JX C-7.

Mr. Katzap's understanding of what was agreed to with respect to the "overdue fees" at that meeting was set forth in an email sent to Respondents Tessler and Herrmann later that day.

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[22] When asked whether NCM should have expressed disagreement with Mr. Katzap's claimed entitlement to the Bonus, Mr. Herrmann agreed that it should have but he did not do so because the matter was not "under [his] purview" and that Mr. Tessler would have been unhappy if Mr. Herrmann had taken matters not within his purview "into his own hands". Herrmann Tr. 154:9-155:3.

[23] *See* fn. 17 above.

See JX C-7. Neither Mr. Tessler nor Mr. Herrmann corrected Mr. Katzap's understanding as expressed in his email. *Id.* at 63:18-64:22.

Instead, Lion's Property received the first payment of $100,000 which was made by Respondents on December 23, 2019, when Big Apple Capital Management, LLC, an affiliate of Big Apple Capital, issued a check, signed by Mr. Tessler, to Lion's Property in the amount of $100,000. CX-8; Tessler Tr. 75:2-23. In the memo section of the check, it was noted that the check was being issued for a "[f]ee pursuant to investment agreement." CX-8. Mr. Katzap, with Mr. Herrmann's permission, followed that notation by writing the phrase "equal 1st of 5 pmts". *Id.* at 65:13-66:4.

On January 20, 2020, Mr. Katzap sent Respondents Tessler and Herrmann an email thanking them for the $100,000 payment, together with an invoice for the second payment (the "January 2020 Invoice"). *Id.* at 67:11-24; JX C-9. The invoice stated:

> This invoice / letter is to confirm the subject payment #2 in the amount of $100,000 once received by us, is a second of five (5) equal payments on the account pursuant to the EB5 loan agreement and a payment toward the portion of the 4.5% percent non-compounded interest on the loan between NCM- USA and Big Apple Capital Lenders, LLC that is not earmarked for the EB5 investors' portion of said interest (namely the 1.5% per annum portion of the interest).

JX C-9 at p. 2.

Again, there was no objection from Respondents Tessler or Herrmann. Katzap Tr. 69:6-11; *see* Tessler Tr. 80:3-82:9. Instead, Respondents sent a second check to Lion's Property, this time for $25,000, dated February 7, 2020, as partial payment for the amount owed. CX-10. As with the check issued in December 2019, this check was made payable to Lion's Property and signed by Mr. Tessler. Tessler Tr. 83:6-21. Mr. Katzap wrote on the check that this was a "Partial Pmt Balance" followed by "$375,000 unpaid". Katzap Tr. 69:22-70:2; CX-10. Underneath Mr. Katzap's handwriting, Respondents again noted in the memo section that the check was issued for a "[f]ee pursuant to investment agreement." CX-10.

A few months later, on or about June 29, 2020, Respondents sent a third check to Lion's Property for $25,000. Katzap Tr. 70:23-71:5; CX-11. As with the checks issued in December 2019 and February 2020, this check was made payable to Lion's Property and signed by Mr. Tessler. Katzap Tr. 71:20- 21; CX-11. In the memo section, Respondents stated that the check was issued "[t]oward balance of Brokerage fees." CX-11.

Lastly, on or about September 23, 2020, Respondents made a wire transfer of $25,000 to Lion's Property's bank account. Tessler Tr. 87:12-18; Katzap Tr. 71:24-72:10; CX-12. After this

wire transfer, Lion's Property never received another payment towards the Bonus. Katzap Tr. 72:24-73:3. Thus, of the $500,000 demanded by Mr. Katzap, $175,000 has been paid to Lion's Property, leaving a balance of $325,000.[24]

Respondents claim that they are entitled to the return of the Remitted Proceeds, contending that they were procured through Lion's Property' fraud. JX RCC-6 at ¶¶ 25-29. Indeed, Mr. Tessler repeatedly testified that he had been defrauded into paying the Remitted Proceeds. Tessler Tr. 54:3-6; 87:23-25; 97:24-98:3: 103:4-5.

An examination of Mr. Tessler's testimony, however, leads to a different finding. When questioned as to why he authorized payments of the Remitted Proceeds, Mr. Tessler vacillated between arguing that such payments were made because he believed that Mr. Katzap and his wife needed the money and Lion's Property was owed some funds over and above the Project Fees in connection with the EB-5 Project. *Id.* at 88:1-89:10. A fair reading that would reconcile both drivers of Mr. Tessler's behavior in making payments of the Remitted Proceeds is that Mr. Tessler was moved by a charitable impulse to help Mr. Katzap as well as a belief that he was owed funds under some obligation in connection with the EB-5 Project. *See* Herrmann Tr. 94:8-23.

But whatever that obligation was, it was not the purported obligation to pay the Bonus. Mr. Tessler emphatically denied that the Remitted Proceeds were paid to satisfy such an obligation. Tessler Tr. 102:16-105:16. Indeed, when asked why the payments of the Remitted Proceeds were made to Lion's Property, Mr. Tessler responded: "Ma'am, I just paid [Mr. Katzap]. I didn't say I paid him because of a bonus; I never said that. I never knew it's bonus money that I'm giving him." *Id.* at 102:21-23. Again, Mr. Tessler clarified his intentions in making the payments of the Remitted Proceeds when he stated that "[t]here was no bonus. I didn't think that [Mr. Katzap] was asking for a bonus." *Id.* at 104:10-18.

Moreover, at the time he had the Remitted Proceeds paid to Lion's Property, Mr. Tessler was not aware of any obligation to pay the Bonus as he never asked to see the "papers" with the Bonus provision and never asked Mr. Herrmann about the Bonus. *Id.* at 89:11-16.[25] It was only later, when he asked to see the "papers", that Mr. Tessler realized that he had misplaced his trust in Mr. Katzap who had attempted to defraud him with false and forged paperwork. *See Id.* at 89:14-16; 100:22-101:4; 102:9-15; Resp. PHB at p. 47. Specifically, Mr. Tessler testified that he did not discover that the Remitted Proceeds were tied to or purportedly paid to satisfy the Bonus

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[24] The funds remitted to Lion's Property by checks issued in December 2019 and in February and June 2020 and by wire transfer made in September 2020 totaling $175,000 are collectively referred to herein as the "Remitted Proceeds". After the January 2020 Invoice, subsequent invoices were sent to Respondents. *See* Katzap Tr. 73:8-9; JX C-4 at ¶ 46; Cl. PHB at p. 48.

[25] Notably, none of the checks or the wire transfer transaction details referenced a "bonus". *See* CX-8; CX-10; CX-11; CX-12.

until he reviewed the Arbitration Demand in March 2021 well after he made the last payment of the Remitted Proceeds in September 2020. Tessler Tr. 100:22-101:6.

Mr. Tessler's testimony as to why he had the Remitted Proceeds paid to Lion's Property was corroborated by Mr. Herrmann. *See* Herrmann Tr. 93:7-24. For example, Mr. Herrmann testified that Mr. Tessler "absolutely" did not direct the check issued in December 2019 to be issued "pursuant to the bonus that Mr. Katzap claims he's entitled to" (*Id.* at 83:6-10) and that Mr. Tessler had no understanding that the Remitted Proceeds were being paid pursuant to the Bonus provision. *Id.* at 87:4-13. Mr. Herrmann further opined that:

> I think that Mr. Tessler gave him that money both because he thought that Mr. Katzap needed it, which is why Mr. Tessler keeps on saying he's doing it as charity, and also because Mr. Katzap kept on telling him, "You owe me the money." So Mr. Tessler thought, 'I don't know what I owe it to him for, but he needs it; we'll figure it out.That's my assumption, but it's just an assumption.

Id. at 94:8-23.

Given the totality of the circumstances surrounding the purported obligation on the part of the Corporate Respondents to pay Lion's Property the Bonus — including the findings and conclusions in the Luber Report; the conflicting and implausible testimony as to how, mechanically speaking, the Bonus provision was added to the Side Agreement; the inability of Mr. Katzap to explain the use of different printers to print separate sections of the same one-page document and the existence of a signed original of the Side Agreement without the Bonus provision; the multiple times the Marketing Agreement was sent to Respondents without the Side Agreement with Bonus; the existence of a signed original of the Marketing Agreement without the handwritten Bonus provision; and the delayed retrieval by Mr. Katzap of the signed original of the Side Agreement with Bonus — the Arbitrator finds that (1) Mr. Katzap wrote the Bonus provision by hand on the Marketing Agreement after it had been signed by Mr. Tessler and Mr. Katzap without Mr. Tessler's prior written approval and consent, and (2) the Bonus provision was added to the Side Agreement after it had been signed by Mr. Tessler and Mr. Katzap, again without Mr. Tessler's prior written approval and consent. These additions of the Bonus provision were made in contravention of the Parties' agreement that the Marketing Agreement ... "cannot be changed or modified except in writing and with both parties' prior written approval and consent." JX C-1 at ¶ 11.

The Arbitrator further finds that the evidence adduced at the Hearing demonstrates that (1) none of Respondents objected to the January 2020 Invoice pursuant to which the Remitted Proceeds were paid or any subsequent invoices for the unpaid balance of the Bonus; (2) no effort was made to ascertain whether there existed an obligation on the part of the Corporate

Respondents to Lion's Property to pay the purported Bonus; and (3) payments of the Remitted Proceeds were not made in satisfaction of the obligation to pay the purported Bonus.

The Personal Guaranty of Respondents Tessler and Herrmann

Turning next to another purported source for its claimed entitlement to payment of the Bonus allegedly owed to it in connection with the EB-5 Project, Lion's Property relies on a one-page document entitled *Confidential Addendum to the Agreement,* which provides in full:

> The undersigned Yitzchak Tessler and Ari Herrmann personally guarantee full payment of fees due to Lyon's Property Development Group, LLC % Chaim Katzap, Managing Member, as provided in the Exclusive Agency and Marketing Agreement

(The "Guaranty"). JX C-4 at p. 21.

The Guaranty bears the signatures of Respondents Tessler and Herrmann. *Id.*

At the Hearing, Mr. Katzap explained the circumstances under which the Guaranty was created and signed: During negotiations of the Marketing Agreement in 2012, Mr. Katzap expressed concern to Mr. Herrmann about whether the Corporate Respondents would pay the fees owed to Lion's Property under the Marketing Agreement. Katzap Tr. 37:16-38:21; 113:20-23. In order to provide comfort that such fees would be paid, Mr. Herrmann suggested that he and Mr. Tessler would personally guarantee payment. *Id.* at 38:24-39:6; 110:23-111:3. Shortly after the Marketing Agreement and Side Agreement with Bonus were signed at the August 2012 Meeting, Mr. Katzap brought up the topic of the guaranty to Mr. Herrmann. *Id.* at 36:16-37:3. Mr. Katzap testified that he thought that he saw Mr. Herrmann then type up the Guaranty. *Id.* at 39:7-39:9.[26] After the Guaranty was signed by both Respondents Tessler and Herrmann, Mr. Katzap testified that Mr. Herrmann kept the signed original and that Lion's Property was never provided with a signed original of the Guaranty. *Id.* at 39:14-16;133:15-22.

In contrast to Mr. Katzap's narrative, Mr. Tessler vigorously denies that he signed the Guaranty or would have signed the Guaranty had it been presented to him. Tessler Tr. 28:14-20; 30:2-7; 36:21-37:4. Similarly, Mr. Herrmann adamantly denies that he offered or agreed to personally guarantee the payment of any fees to Lion's Property in connection with the EB-5 Project, drafted or otherwise created the Guaranty at the August 2012 Meeting or any other time, or signed the Guaranty. Herrmann Tr. 49:22-50:8; 33:16-34:6; 33:14-15; 49:18-21.

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[26] This testimony was inconsistent with the testimony Mr. Katzap gave at his deposition on February 9, 2022. At that deposition, Mr. Katzap testified "I don't remember who drafted" the Guaranty. JX RCC-4 at 77:22-25. He also testified at his February deposition that he did not know if the Guaranty was signed on August 14, 2012. *Id.* at 78:11-13. He gave the same testimony later at the Hearing as to his lack of recall as to when the Guaranty was signed. Katzap Tr. 212:19-21.

In support of their denial, Respondents Tessler and Herrmann rely on the Luber Report and Mr. Luber's testimony at the Hearing. With respect to the signature of Mr. Herrmann, Mr. Luber opined that:

> 1a) [The Guaranty] is a product of a composite document manipulation (cut and paste).
>
> 1b) The Ari Herrmann signature entry depicted on [the Guaranty] is identical and proportionally superimposable with the known Ari Herrmann signature entry depicted on [the source document to which Mr. Katzap had access].
>
> 1c) The Ari Herrmann signature entry depicted on [the Guaranty] is a cut and paste manipulation from the known Ari Herrmann signature entry depicted on [the source document to which Mr. Katzap had access].

Luber Report at p. 7.

With respect to the signature of Mr. Tessler, Mr. Luber opined that the Yitzchak Tessler signature entry depicted on the Guaranty is a partial signature entry that "is most probably a cut and paste manipulation as it is missing the top portion of the signature … The source of the depicted Yitzchak Tesssler signature entry is unknown." Luber Report at p. 8.

Mr. Katzap denies that he cut and pasted the signatures of Respondents Tessler and Herrmann onto the Guaranty. Katzap Tr. 74:18-24. However, Lion's Property marshals few and insubstantial arguments in challenging Respondents' allegation. One such argument is that because the source document for Mr. Herrmann's signature is dated April 3, 2013, it could not have been cut and pasted onto the Guaranty that is dated August 14, 2012. *See* Cl. PHB at p. 42. This argument is misplaced as it assumes that the manipulation took place before April 3, 2013 when it could have taken place anytime before the Guaranty first appeared on March 2, 2021 as discussed below.

Moving beyond the forensic reasons that support a finding that the Guaranty is a forged document, Respondents showed that the Guaranty was never attached to or mentioned in any email correspondence between Lion's Property and Respondents after August 14, 2012, the date on which it was allegedly signed. Lion's Property had emailed the Marketing Agreement to Mr. Herrmann in November 2015, August 2016 and June 2018, as discussed above; the Guaranty was neither attached to any copy of the Marketing Agreement nor inserted within the body thereof. Katzap Tr. 191:9-18; 201:24-202:5. Mr. Katzap could not offer any explanation for the omission of the Guaranty from the Marketing Agreement emailed to Respondents on the occasions it was emailed after August 14, 2012 or why it was not referenced in any correspondence between the Parties. *Id.* at 109:5-110:6; 132:5-22.

It was not until the Arbitration Demand was filed on March 2, 2021 that Respondents learned of the existence of the Guaranty as it was embedded in the Marketing Agreement which was attached to the Arbitration Demand as Exhibit A. JX C-4 at p. 21. Tellingly, the unpaginated one page Guaranty was placed between pages 5 and 6 of the Marketing Agreement, indicating that it was not a part thereof at the time it was drafted. *See* Katzap Tr. 130:4-11; Luber Report at p. 8. The Marketing Agreement does not incorporate by reference or, outside of the one-page Guaranty itself, otherwise refer to the Guaranty. Mr. Katzap could not offer any explanation for these circumstances. *See* Katzap Tr. 130:4-11; 132:5-22; 109:5-110:6.

Moreover, Mr. Katzap fell short in explaining why Mr. Herrmann would advise Mr. Katzap to protect himself when he expressed concerns that he would not be paid his fees under the Marketing Agreement. When asked at his deposition on February 9, 2022, Mr. Katzap testified then that they had a close social relationship.[27] But by the August 2012 Meeting at which, according to Mr. Katzap, the Guaranty was signed, Mr. Herrmann and Mr. Katzap had not socialized or become close friends. When asked specifically about his social interactions with Mr. Herrmann and his family before August 2012, Mr. Katzap acknowledged that he "was not talking about before August 2012". *Id.* at 117:10-13. And when asked directly whether they were close friends in August 2012, Mr. Katzap responded: "I didn't say about August, 2012... *Id.* at 118:8-12. Thus, by his own testimony, Mr. Katzap showed that he did not have sufficiently strong social ties to Mr. Herrmann in August 2012 that would have motivated him to offer to Mr. Katzap a guarantee of payment of fees owed under the Marketing Agreement at the time of the August 2012 Meeting at which he maintains that the Guaranty was prepared and signed. *See id.* at 118:3-7.

Lastly, from a financial perspective, Mr. Herrmann had multiple reasons not to have extended the Guaranty — Mr. Herrmann had no ownership interest in any of the Corporate Respondents and therefore had no "upside" in giving such a guaranty; his net worth was a "fraction" of what Mr. Katzap was seeking to be paid by the Corporate Respondents; and if, as Mr. Katzap testified, Mr. Herrmann had suggested that Mr. Katzap needed a guaranty because Mr. Tessler "doesn't like to pay [his] bills", that belief would have given Mr. Herrmann all the more reason not to extend a guaranty to Lion's Property. Herrmann Tr. 30:5-12; 51:9-17; 50:2-12. Mr. Herrmann also testified that Mr. Tessler would never ask, and did not ask, Mr. Herrmann personally to back up the obligation of the Corporate Respondents to Lion's Property. *Id.* at 30:18-25.

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[27] Mr. Katzap described their relationship and his conversation with Mr. Herrmann in 2012 as follows: "[Mr. Herrmann] invited me to his house, he invited me to holidays, we drank together, we ate together, I went to his children's Bar Mitzvah; he became a close friend; and he was telling me that the deal I'm working on to raise money for Mr. Tessler, 'Be careful; he doesn't like to pay bills.' So I said 'How do I protect myself?' "Ask for a personal guarantee." "I said, 'Ari, but if he doesn't pay, whom can I trust?', and Ari said, 'I will put my signature to it too.'" Katzap Tr. 115:19-116:10. Mr. Herrmann denied having this conversation. Herrmann Tr. 49:18-50:8.

For the foregoing reasons, the Arbitrator finds that the evidence adduced at the Hearing compels the conclusion that the Guaranty was created without the prior knowledge or consent of Respondents Tessler and Herrmann and that their signatures depicted on the Guaranty were forged.

VI. ANALYSIS

A. Claimant's Claims

1. *Claim for Breach of Contract (as against Corporate Respondents)*[28]

In its Arbitration Demand, Lion's Property claims that Respondents breached the Marketing Agreement and the Side Agreement by failing to remit to Lion's Property the full balance of the Bonus that was purportedly due and payable in connection with the investments made by the first eight EB-5 Investors. JX C-4 at ¶¶ 31-49. The Bonus was purportedly due and payable to Lion's Property upon maturity of the first eight EB-5 Investors' investments on December 31, 2019.[29] JX C-3; JX C-4, Ex. A at p. 5.

Respondents contend (and Lion's Property agrees) that under New York law, to establish the existence of an enforceable agreement, Lion's Property must show an offer, acceptance, consideration, mutual assent, and an intent to be bound. Kowalchuk v. Stroup, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43 (1st Dep't 2009) (citing, 22 NY Jur 2d, Contracts § 9). That meeting of the minds must include agreement on all essential terms. 22 NY Jur. 2d, § 31. *See* Cl. PHB at p. 32; Resp. Supp. Brief at p. 1. Mutual assent requires an agreement as to the essential terms and conditions of the agreement, and intent to be bound requires that such assent be sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. *Joseph Martin, Jr., Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109 (1981).

Lion's Property has failed to meet its burden of proving that mutual assent existed between the Parties with respect to the payment of the Bonus, given the Arbitrator's findings

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[28] The claim for breach of contract against the Corporate Respondents is the First Cause of Action in the Arbitration Demand. JX C-4 at ¶¶ 31-49.

[29] As explained in fn. 17 above, the award in the Investor Action declared that the loans of all twelve EB-5 Investors had matured. *See* RCC-19. Lion's Property now asserts that because the Bonus is due and payable upon "EB5 loan maturity", Respondents are presently in breach of contract with respect to the Bonus due and payable on the investments of all twelve EB-5 Investors. Accordingly, Lion's Property now includes in its breach of contract claim against the Corporate Respondents the amount of the Bonus due and payable with respect to the last four EB-5 Investors' investments. This amount was previously the basis for its anticipatory breach of contract claim against the Corporate Respondents which has now been withdrawn. *See* JX C-4 at ¶¶ 57-67; Cl. August 26th Emails. Thus, the amount of damages that Lion's Property now claims for breach of contract with respect to all twelve EB-5 Investors is $1,011,766.76 through July 31, 2022. *See* Cl. August 26th Emails.

summarized above in Part V, that the Bonus provision was added to the Marketing Agreement by Mr. Katzap by his own hand and that the Bonus provision was typed onto the Side Agreement, in each case after those Agreements were signed by the Parties and without the prior written approval and consent of the Corporate Respondents as required by the Marketing Agreement. JX C-1 at ¶ 11. It is well-settled under New York law that a contract, such as "[a] deed based on forgery or obtained by false pretenses is void ab initio ..." *First Nat.l Bank of Nevada v. Williams*, 74 A.D.3d 740, 742 (2d Dep't 2010); *see also Crispino v. Greenprint Mtge. Corp.*, 304 A.D.2d 608, 609 (2d Dep't 2003) (deed and mortgage obtained under false pretenses were correctly set aside). As such, the obligation to pay the Bonus under the Marketing Agreement or the Side Agreement is void and unenforceable. Accordingly, the claim of Lion's Property against the Corporate Respondents for breach of contract with respect to the Bonus due and payable upon maturity of the loans of all twelve EB-5 Investors under the EB-5 Loan Agreement is denied.[30]

2. ***Claim for Breach of Contract (as against Respondents Tessler and Herrmann)***[31]

In its Arbitration Demand, Lion's Property claims that Respondents Tessler and Herrmann breached the Guaranty by failing to remit to Lion's Property the full balance of the Bonus that was purportedly due and payable when the investments of the first eight EB-5 Investors matured on December 31, 2019.[32] JX C-4 at ¶¶ 50-56. Lion's Property's claim against Respondents Tessler and Herrmann for breach of contract based on the Guaranty fails because Lions's Property has not met its burden of proving that Respondents Tessler and Herrmann had agreed to "personally guarantee full payment of fees due to Lyon's Property Development Group LLC % Chaim Katzap, Managing Member". JX C-4, Ex. A at p. 21. Given the Arbitrator's findings summarized above in Part V, that the Guaranty was created "out of whole cloth" and that the signatures of Respondents Tessler and Herrmann depicted on the purported Guaranty were copied and pasted from a document bearing their signatures to which Mr. Katzap had access, the Guaranty is void and unenforceable under New York law. *See First Nat.l Bank of Nevada*, 74 A.D.3d at 742; *Crispino*, at 609. Accordingly, the claim of Lion's Property against Respondents Tessler and Herrmann for breach of contract with respect to the Bonus due and

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[30] Lion's Property counters that the obligation to pay the Bonus was ratified by partial performance. Cl. PHB at pp. 37-38. For the reasons stated above in Part V, the partial payments made by the Corporate Respondents were not payments made in satisfaction of any obligation to pay a bonus and therefore could not, and did not, ratify any such obligation.

[31] The claim for breach of contract against Respondents Tessler and Herrmann is the Second Cause of Action in the Arbitration Demand. JX C-4 at ¶¶ 50-56.

[32] For the reasons stated in fn. 29 above, Lion's Property now includes in its breach of contract claim against Respondents Tessler and Herrmann the amount of the Bonus due and payable with respect to the last four EB-5 Investors' investments. This amount was previously the basis for its anticipatory breach of contract claim against Respondents Tessler and Herrmann which has now been withdrawn. *See* JX C-4 at ¶¶ 68-74; Cl. August 26th Emails. Thus, the amount of damages that Lion's Property now claims for breach of contract with respect to all twelve EB-5 Investors is $1,011,766.76 through July 31, 2022. *See* Cl. August 26th Emails.

payable upon maturity of the loans of all twelve EB-5 Investors under the EB-5 Loan Agreement is denied.[33]

3. ***Claims for Quantum Meruit and Unjust Enrichment (as against all Respondents)***[34]

Lion's Property asserts claims based on the quasi-contractual theories of quantum meruit and unjust enrichment. JX C-4 at ¶¶ 75-80, ¶¶ 81-86.

The Parties are in agreement that in order to prevail on a claim for *quantum meruit* under New York law, a claimant must establish (1) the performance of the services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services. See *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 175 (2d Cir. 2005) (internal quotation marks omitted); *Matter of Adams*, 1 A.D.2d 259, 149 N.Y.S.2d 849 (4th Dep't 1956), *affd.* 2 N.Y.2d 796, 159 N.Y.S.2d 698 (1957); *Matter of Allen*, 53 Misc.2d 1032, 1033, 281 N.Y.S.2d 112 (Surrogate's Court, NY Cty. 1967). *See* Cl. PHB at p. 44; Resp. Supp. Brief at p. 8.

The Parties are also in agreement that in order to succeed on a claim for unjust enrichment under New York law, a plaintiff must prove that "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 55 (2d Cir. 2011) (internal quotation marks omitted); *see also Mobarak v. Mowad*, 117 A.D.3d 998, 1001, 986 N.Y.S.2d 539 (2d Dep't 2014); *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421, 334 N.Y.S.2d 388 (N.Y. 1972); *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215, 831 N.Y.S.2d 760 (N.Y. 2007). *See* Cl. PHB at pp. 46-47; Resp. Supp. Brief at p. 8.

Lion's Property's causes of action for unjust enrichment and quantum meruit are both defeated by its reliance on certain agreements between the Parties, namely, the Marketing Agreement and the Side Agreement with Bonus. This is because, under New York law, unjust enrichment and quantum meruit are quasi-contractual claims that only apply "in the absence of an actual agreement between the parties." *See generally*, *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012). Thus, "[i]t is impermissible to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the

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[33] Lion's Property's breach of contract claim based on the Guaranty is also unenforceable as a matter of law because the obligation of the Corporate Respondents under the Marketing Agreement and the Side Agreement that the Guaranty purportedly guarantees — the payment of the Bonus — is void and unenforceable.

[34] The claims for quantum meruit and unjust enrichment against all Respondents are, respectively, the Fifth Cause of Action and the Sixth Cause of Action in the Arbitration Demand. JX C-4 at ¶¶ 75-80, ¶¶ 81-86.

parties. *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987). Indeed, this bedrock principle of law was most recently affirmed by the First Department in *Garda USA, Inc. v. Sun Cap. Partners, Inc.*, 194 A.D.3d 545, 548 (1st Dep't 2021), to wit: "quasi contract claims are barred [when] there are express agreements that govern the same subject matter."; *see also*, *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790-791 (2012) ("unjust enrichment is not a catchall cause of action to be used when others fail," and is "available only in unusual situations"); *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005); *State v. Barclays Bank of N.Y.*, 76 N.Y.2d 533, 540 (1990). *Baumberger Cap. v. Canaan Partners*, 235 A.D.2d 216, 217 (1st Dep't 1997) ("[g]iven the existence of the finder's agreement ... which governs the relationship between the parties, plaintiff is precluded from seeking damages under the quasicontractual theories of quantum meruit and unjust enrichment").

Lion's Property's claimed entitlement to payment of the Bonus rests on the Marketing Agreement and the Side Agreement. Lion's Property acknowledges in its pleadings that those Agreements govern the issue at bar: "[t]his arbitration concerns the breach of an Exclusive Agency & Marketing Agreement"(CX-4 at ¶ 1); "[i]n August of 2012, Corporate Respondents contracted with Lion's on an exclusive basis" (CX-4 at ¶ 7); "Lion's fulfilled its obligations under the [Marketing] Agreement". (CX-4 at ¶ 12). The first and second Causes of Action (breach of contract) asserted by Lion's Property in its Arbitration Demand are predicated on the existence of a contract. CX-4 at ¶¶ 31-74. Indeed, Lion's Property avers that "[t]here is no dispute, [the Parties] entered into [the Marketing Agreement] and a Side-Agreement ... dated August 14, 2012 ...". Cl. Reply Brief at p. 2.

Accordingly, because the scope of the Marketing Agreement and Side Agreement clearly covers the dispute between the Parties relating to the payment of the Bonus and otherwise govern the relationship of the Parties with respect to the EB-5 Project, the claims against all Respondents based on the quasi-contractual theories of quantum meruit and unjust enrichment are denied.

4. ***Claim for Account Stated (as against all Respondents)***[35]

The January 2020 Invoice and subsequent invoices were account statements for the Bonus due and owing to Lion's Property through December 31, 2019 with respect to the first eight EB-5 Investors. *See* JX C-9 at p. 2; JX C-4 at ¶ 40. Lion's Property contends that an account has been stated through July 31, 2022, not only (1) in respect of those first eight EB-5 Investors, for $809,273.97, but also (2) in respect of the last four EB-5 Investors, for

[35] The claim for account stated against all Respondents is the Seventh Cause of Action in the Arbitration Demand. JX C-4 at ¶¶ 87-91.

$377,492.79.[36] Thus, Lion's Property contends that an account has been stated for all twelve EB-5 Investors in the amount of $1,011,766.76, after deducting the amount of the Remitted Proceeds.[37]

To establish a claim for account stated under New York law, a plaintiff must plead that: "(1) an account was presented; (2) it was accepted as correct; and (3) [the] debtor promised to pay the amount stated." *Camacho Mauro Mulholland LLP v. Ocean Risk Retention Grp.*, 2010 US Dist. LEXIS 51789 at *11 (S.D.N.Y. 2010). Recovery on a claim for account stated is permitted on the theory that "the parties have, by their conduct, evidenced an agreement upon the balance of an indebtedness." *Id.* at *12. However, it is well established that "fraud, misrepresentation or other equitable considerations" can prevent recovery under a theory of account stated." *See generally, Marchi Jaffe Cohen Crystal Rosner & Katz v. All-Star Video Corp.*, 483 N.Y.S.2d 707, 709 (1st Dept. 1985) (a claim for an "account stated" may be defeated by proof of "fraud, mistake or other equitable considerations"); *LLT Int'l Inc. v. MCI Telecomms. Corp.*, 69 F.Supp. 2d 510, 517 (S.D.N.Y. 1999) (an account stated is binding on both parties unless fraud, misrepresentation or other equitable considerations are shown).

Given the Arbitrator's findings summarized above in Part V, the account stated in respect of the purported Bonus (excluding the Remitted Proceeds) totaling $1,011,766.76 is based on a Bonus provision that was fraudulently included in the Marketing Agreement and Side Agreement. The Guaranty was fraudulently created and the signatures of Respondents Tessler and Herrmann thereon were forged. A claim for an account stated is defeated by proof of fraud. Accordingly, the claim of Lion's Property against all Respondents for account stated with respect to the unpaid balance of the purported Bonus is denied.

5. ***Declaration of Alter Ego Liability (as against all Respondents)***[38]

In its Arbitration Demand, Lion's Property alleges that Respondents Tessler and Herrmann exercised "complete and unfettered domination and control over the Corporate Respondents" and by reason of the foregoing, Lion's Property is entitled to a declaration that

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[36] *See* Cl. PHB at pp. 47-48; Cl. August 26th Emails. Until the confirmation of the award in the Investor's Action, any Bonus due and owing in respect of the last four EB-5 Investors would not have been due and payable until their investment matured which was anticipated to take place in November 2023. Although Lion's Property now contends that because such investment has matured, and therefore the Bonus with respect to the last four EB-5 Investors in the amount of $377,492.79 is due and payable, there is no evidence in the record that Lion's Property has invoiced or presented an account statement to the Respondents for that amount. But even if the full amount of the Bonus with respect to all twelve EB-5 Investors was the subject of duly submitted invoices or account statements, for the reasons stated below, Lion's Property's claim for account stated is denied.

[37] *See* Cl. August 26th Emails. The return of the Remitted Proceeds in the amount of $175,000 is the subject of Respondents' First Counterclaim addressed in Section VI.B.1 below.

[38] The claim for alter ego liability against all Respondents is the Eighth Cause of Action in the Arbitration Demand. JX C-4 at ¶¶ 92-98.

Respondents are alter egos of each other and should bear joint and several liability under the claims alleged against them. JX C-4 at ¶¶ 92-98. Because none of Respondents is liable for any of the claims asserted by Lion's Property, the Arbitrator need not address its demand for such a declaration.

B. Respondents'/Counterclaimants' Counterclaims

1. *Respondents' Counterclaim for the Return of the Remitted Proceeds*[39]

In their Response and Counterclaims, Respondents seek the return of the Remitted Proceeds because they claim that such proceeds were procured through Lion's Property's fraud. JX RCC-6 at ¶¶ 25-29; Resp. PHB at p. 50.

As noted above in Sections VI.A.1, 2 and 4, with respect to the unpaid balance of the Bonus in the amount of $1,011,766.76 for all twelve EB-5 Investors, each of Respondents' claims for breach of contract and their claim for account stated was defeated by proof of fraud.

With respect to the return of the Remitted Proceeds, however, the Arbitrator's findings summarized above in Part V do not support Respondents' claim for their return to any of the Corporate Respondents. While Mr. Tessler testified that he had been defrauded into paying the Remitted Proceeds, an examination of the record indicates otherwise. Mr. Tessler repeatedly denied that the payments of the Remitted Proceeds were made to satisfy any obligation to pay the Bonus or any bonus to Lion's Property. Rather, Mr. Tessler, motivated by a charitable impulse, made payments of the Remitted Proceeds to satisfy some yet-to-be determined payment obligation that he believed the Corporate Respondents owed to Lion's Property in connection with the EB-5 Project. Mr. Tessler emphatically testified that such payments were not made to satisfy any obligation of the Corporate Respondents to pay the Bonus to Lion's Property. Mr. Tessler further testified that he did not discover that the Remitted Proceeds were tied to or purportedly paid to satisfy the Bonus until he reviewed the Arbitration Demand in March 2021 well after he made the last payment of the Remitted Proceeds in September 2020.

Consequently, because there is no nexus between Lion's Property's fraudulent acts and Respondents' payments of the Remitted Proceeds, Respondents are not entitled to the return of the Remitted Proceeds on the basis of fraud. By claiming that fraud is a ground for the return of the Remitted Proceeds, Respondents implicitly acknowledge that other grounds for defending against an account stated claim should also apply to any claim for the return of payments made in satisfaction of an account stated. *See* JX RCC-6 at ¶¶ 25-29; Resp. PHB at p. 50. Such other grounds are timely objection to an account statement and due examination of the statement.

Absent fraud, misrepresentation or other equitable considerations, the standard under New York law for prevailing on a claim for an account stated is whether the party to a contract

[39] The counterclaim for return of proceeds is the First Counterclaim. JX RCC-6 at ¶¶ 25-29.

receiving invoices has objected within a reasonable time. S*ee Herrick, Feinstein LLP v. Stamm*, 297 A.D.2d 477, 746 N.Y.S.2d 712 (1st Dep't 2002). If a recipient fails to object to an account statement within a reasonable time, the recipient would be bound by it as an account stated. *Marchi Jaffe Cohen Crystal Rosner & Katz*, 483 N.Y.S.2d at 709; *see also Camacho Mauro Mulholland LLP.*, 2010 US Dist. LEXIS 51789 at *13 ("An implied account stated generally arises when a party receiving a statement of account keeps it without objecting to it within a reasonable time or if the debtor makes partial payment.")

Implicit in the requirement to object is the expectation that the recipient of an account statement will make an effort to determine whether the statement is correct. The decisions of New York courts on claims for account stated make this expectation explicit by uniformly requiring that the recipient of an account statement examine the statement to ascertain whether it is correct or not. *See, e.g.*, *Camacho Mauro Mulholland LLP*, 2010 US Dist. LEXIS 51789 at *13 (the debtor "has a duty to examine the statement to ascertain whether it is correct or not …"); *Marchi Jaffe Cohen Crystal Rosner & Katz*, 483 N.Y.S.2d at 709 ("It has long been established that 'where an account is made up and rendered, he who receives it is bound to examine the same, or to procure some one to examine it for him …'"); *LLT Int'l Inc. v. MCI Telecomms. Corp.*, 69 F.Supp. 2d at 516 ("a party cannot be bound by an account stated unless it had, or was offered the ability to obtain, full knowledge of the true facts and circumstances relating to the actual amount due.").

Thus, in order to recover the Remitted Proceeds absent fraud, it is incumbent on Respondents to establish that neither were they given the opportunity nor did they have the ability to obtain full knowledge of the true facts and circumstances relating to the Remitted Proceeds. They would also have to show that they had fulfilled their duty to examine the January 2020 Invoice and subsequent invoices to ascertain whether they were correct or not and timely objected to the January 2020 Invoice or subsequent invoices for the Bonus.

This, the Respondents cannot do. As summarized above in Part V, Respondents were willfully blind to Lion's Property's demand for payment of the Bonus or additional funds under the Marketing Agreement and the Side Agreement. Respondents had several opportunities to examine whether they had an obligation to pay the Bonus or any additional funds to Lion's Property over and above the Project Fees but declined to do so. Not only did Respondents fail to object to any invoices for the Remitted Proceeds but they also made payments of the Remitted Proceeds. The examination undertaken by Respondents as to whether the amounts stated in the January 2020 Invoice or subsequent invoices were correct or, more importantly, whether they even bore any obligation to pay those amounts, was woefully inadequate if non-existent. Thus, Respondents do not satisfy any of the grounds for defeating an account stated claim under New York law. Accordingly, Respondents' counterclaim for the return of the Remitted Proceeds is denied.

2. ***Respondents' Counterclaim for Damages Incurred by Respondents Tessler and Herrmann***[40]

In their Response and Counterclaims, Respondents assert a counterclaim seeking damages for Lion's Property's fraud in creating the Guaranty without the knowledge or consent of Respondents Tessler and Herrmann and forging their signatures. JX RCC-6 at ¶¶ 30-34. Respondents have failed to introduce any evidence to support a claim for damages. Accordingly, the Arbitrator concludes that Respondents have waived or otherwise abandoned their counterclaim for damages for fraud and denies their counterclaim for such damages.

VII. ATTORNEYS' FEES AND OTHER COSTS

Lion's Property and Respondents request that all fees and other costs incurred in this arbitration, including all fees and deposits previously advanced by one side or both sides, be assessed against the other side pursuant to the authority conferred upon the Arbitrator under R-47(c) of the AAA Commercial Rules which provides:

> In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

With respect to the award of Respondents' expert witness' fees, R-54 of the AAA Commercial Rules provides that the "expenses of witnesses for either side shall be paid by the party producing such witness."

With respect to the award of attorneys' fees, under subparagraph ii. of R-47(d) of the AAA Commercial Rules, the arbitrator's discretion is limited to cases where "all parties have requested such an award or it is authorized by law or their arbitration agreement".

Here, all Parties have requested an award of attorneys' fees and other costs in their respective prayers for relief. *See* JX C-4 at p. 13; JX RCC-6 at p. 6; *see also* CL. PHB at p. 29; Resp. PHB at pp. 46-47, 50. The Marketing Agreement is silent on the apportionment of attorneys' fees and other costs and contains no "fee-shifting" provision in favor of the prevailing party. *See* JX C-1 at ¶ 11.

Notwithstanding this silence, Respondents assert that their attorneys' fees and other costs of arbitration should be awarded to NCM where, as here, "a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *See e.g., Chambers v. Nasco, Inc.*, 501 U.S. 32,

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[40] The counterclaim for damages incurred by Respondents Tessler and Herrmann is the Second Counterclaim. JX RCC-6 at ¶¶ 25-29.

45-46 (1991) (holding that a court may assess attorney's fees as sanction for party's bad-faith conduct in course of litigation). Respondents do not tie its allegations of bad-faith conduct to the conduct of Lion's Property in this arbitration. *See* Resp. PHB at p. 50. Unlike the petitioner in the *Chambers* case, Lion's Property did not defy an order of the Arbitrator, file meritless motions and pleadings or engage in delaying tactics. Thus, the *Chambers* case is of limited value because the conduct in question was not pre-litigation conduct, but rather the conduct of the petitioner during the judicial process. *Chambers*, 501 U.S. at 48.

Lion's Property is silent as to the basis of its request for an award of attorneys' fees and other costs of arbitration. *See* Cl. PHB.

Accordingly, the Arbitrator, in exercising her discretion under R-47(c) of the AAA Commercial Rules, sees no reason to apportion fees and other costs in any manner other than to have the costs of this arbitration be borne equally by Lion's Property, on the one hand, and Respondents, on the other, and the fees and costs of their own counsel and expert witness borne by each side.

VIII. DISPOSITIVE PART OF THIS FINAL AWARD

This Final Award is based upon careful evaluation of the Hearing record, and the facts and legal authorities presented (including in post-hearing submissions). To the extent the Arbitrator's conclusions differ from any Party's position, any such difference is the result of the Arbitrator's determinations of burden of proof, relevance, weight of the evidence, credibility of the witnesses and legal authorities.

The Arbitrator further notes that she has considered all arguments and evidence put forward by the Parties in relation to the claims, counterclaims and defenses set forth in the Parties' pleadings unless expressly withdrawn, whether or not they are explicitly addressed in this Final Award. Any argument not expressly addressed in this Final Award (including, without limitation, those arguments related to the affirmative defenses of breach of fiduciary duty, collateral estoppel and *res judicata*) was found to be unavailing or unnecessary to consider, and any claim or counterclaim not expressly granted herein is denied.

For the reasons stated above, the Arbitrator awards as follows:

(1) DENIES Lion's Property's claims against the Corporate Respondents for breach of contract;

(2) DENIES Lion's Property's claims against Respondents Tessler and Herrmann for breach of contract;

(3) DENIES Lion's Property's claim against all Respondents for quantum meruit;

(4) DENIES Lion's Property's claim against all Respondents for unjust enrichment;

(5) DENIES Lion's Property's claim against all Respondents for account stated;

(6) DENIES Lion's Property's claim against all Respondents for a declaration of alter ego liability;

(7) DENIES Lion's Property's claim for attorneys' fees and other costs incurred in connection with this arbitration;

(8) DENIES Respondents' counterclaim against Lion's Property for the return of the Remitted Proceeds to Big Apple Capital or any other Corporate Respondent in the amount of $175,000.00;

(9) DENIES Respondents' counterclaim against Lion's Property for damages incurred by Respondents Tessler and Herrmann as a result of Lion's Property's fraud;

(10) DENIES Respondents' claim for attorneys' fees, witness' fees and other costs incurred in connection with this arbitration;

(11) ORDERS the Parties to bear their own attorneys' fees and other costs incurred in connection with this arbitration except where it has been otherwise agreed by the Parties or ordered by the Arbitrator that such other costs shall be borne equally between Lion's Property, on the one hand, and all Respondents, on the other hand;

(12) ORDERS that the administrative fees and expenses of the International Centre for Dispute Resolution totaling US$26,725.00 and the compensation and expenses of the Arbitrator totaling US$61,849.75 shall be borne equally between Lion's Property, on the one hand, and all Respondents, on the other hand. Therefore, Respondents jointly and severally shall reimburse Claimant the sum of US $6,812.51, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Lion's Property; and

(13) DECLARES that this Final Award is in full settlement of all claims and counterclaims submitted in this arbitration.

The undersigned Arbitrator hereby certifies that, for the purposes of Article I of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in New York, New York, U.S.A.

Dated: September 26, 2022

Michele S. Riley
Arbitrator

State of New York)
) SS:
County of New York)

I, Michele S. Riley, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Final Award.

Date: September 26, 2022

Michele S. Riley
Michele S.Riley

State of New York)
) SS:
County of New York)

On this 26 day of September, 2022, before me personally came and appeared Michele S. Riley, to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

Jackson Bloom
Notary Public, State of New York
No. 01BL6349763
Commission Expires Oct. 24, 2024