



AMERICAN ARBITRATION ASSOCIATION®

BNP Development LLC
Claimant

v.

01-24-0008-2505

JDS Principal 9DKB LLC and
JDS Principal Parent et al
Respondents

AAA Case Administrator: Lyn Pagliarini

PARTIAL FINAL AWARD

This partial final award adjudicates ONLY those matters expressly decided in the Award/Dispositive section of this Award. Any issue not expressly decided in the Award/Dispositive section of this award remains before the Tribunal for adjudication, and the Tribunal retains jurisdiction to decide all matters not disposed of in this Partial Final Award.

I, THE UNDERSIGNED ARBITRATOR, having been appointed in accordance with the arbitration agreement entered into between the parties identified and described below, having been duly sworn, having received, reviewed and considered the written documents submitted to me, and having heard the oral arguments of counsel, do hereby make this Partial Final Award as follows:

INTRODUCTION

This matter comes before this Tribunal on the demand for arbitration of BNP Development LLC (“BNP”) against Respondents JDS Principal 9DKB LLC (“JDS”) and JDS Principal 9DKB Parent LLC (“JDS Parent”). Claimant shall be referred to as “BNP.” JDS and JDS Parent will collectively be referred to as “Respondents.” BNP and Respondents will be collectively referred to as the “Parties.”

By this arbitration, BNP seeks to compel Respondents to provide access to the books and records of the Brooklyn Tower project (the “Project”, more fully described below) pursuant to Delaware statute and pursuant to the terms of the JDS Principal LLC agreement.¹ Respondents have provided access to some Project books and records, and but have refused access to many of the books and records BNP seeks. This Partial Final Award addresses the Parties’ rights under Delaware law and the JDS Agreement with respect to BNP’s books and records requests.

THE PARTIES, THE PROJECT, And Relevant Persons

1. BNP and Respondents are all Delaware limited liability companies.
2. BNP is a limited member of JDS. JDS Parent is the managing member of JDS. BNP and JDS Parent are the only two members of JDS.
3. BNP is represented in this matter by the law firm Blank Rome LLP, 1271 Avenue of the Americas, New York, NY 10020 and the following attorneys: Andrew Hambelton, Craig Flanders, Andrew M. Kaufman, and Matthew Treiber.
4. Respondents are represented in this matter by the law firm Kasowitz Benson Torres LLP, 1633 Broadway, 21st Floor, New York, NY 10019 and the following attorneys: David Szeker, Robert M. Novick, and Ann M. St. Peter-Griffith.
5. The Project is a 74-story, 1,067-foot high mixed-use property comprising retail space, rental units, and residential condominiums. It is located at 9 DeKalb Street, Brooklyn, New York.
6. In addition to being an investor in the Project via JDS, BNP invested in the Project as a limited member of Ackerman 9 DeKalb Partner LLC (“Ackerman”). Ackerman is a company **not** a party to this arbitration.
7. Certain of the books and records review rights claimed by BNP are set forth in The Amended and Restated Limited Liability Company Operating Agreement of Ackerman 9 DeKalb Partner LLC (the “Ackerman Agreement”).

¹ Amended and Restated Limited Liability Company Agreement of JDS Principal 9DKB LLC (hereinafter, the “JDS Agreement”).

8. Michael Stern (“Stern”) is the natural person who controls JDS, JDS Principal, and Ackerman². Stern is **not** a party to this arbitration in his personal capacity.

BACKGROUND TO THE DISPUTE

9. BNP and JDS are investors in the Project.

10. BNP, through JDS and Ackerman, invested more than \$66 million in the Project.

11. On June 10, 2024, 9 Dekalb Holdings 1 LLC, a Delaware Limited Liability Company (“Dekalb Holdings”), by Michael Stern, “effect[ed] an assignment-in-lieu of foreclosure”³ that “assigned all of the membership interests of the [Project’s] fee owner and mortgage debtor”⁴ to SCP JV1 Lender LLC (“Lender”)⁵. Substantially all of the assets of JDS and Ackerman were transferred to Lender pursuant to the Assignment-in-Lieu.

12. As a result of the Assignment-in-Lieu, 100% of BNP’s \$66+ million investment in the Project was lost.

13. As a result of the Assignment-in-Lieu, Respondents claim that Ackerman was dissolved “automatically,” thus extinguishing BNP’s books and records review rights set forth in the Ackerman Agreement and referenced in the JDS Agreement.

ARBITRATION CLAUSE | APPOINTMENT | APPLICABLE LAW

14. The Parties agree that the following is the arbitration clause (“Arbitration Agreement”) governing these proceedings⁶:

24. Arbitration of Disputes. Any dispute among the Members shall, in each case, be resolved and finally determined by arbitration pursuant to an Expedited Arbitration Proceeding, which shall be the sole

² The JDS Agreement and Ackerman Agreement are signed by Michael Stern, as an “authorized signatory.” The JDS Agreement identifies its managing member as JDS Parent. Mr. Stern’s signature appears in the JDS Agreement’s signature block under the designation “Managing Member, JDS Principal 9DKB Parent LLC.” The Ackerman Agreement defines the “Managing Member” as Ackerman/JDS. That agreement is signed “Ackerman JDS by Michael Stern, authorized signatory.”

³ Assignment, Lien Release and Termination Agreement (“Assignment-in-Lieu”), par. C, p.1

⁴ Respondents’ Brief In Opposition To Demand For Inspection Of Documents (“JDS Brief #1”), p. 4;.

⁵ Assignment-in-Lieu, Section II.

⁶ Procedural Order #1 (“PO#1”), par. 1.

and exclusive mechanism for resolving disputes arising out of or relating to this Agreement. As used herein, an "Expedited Arbitration Proceeding" means a binding arbitration proceeding conducted in the City and County of New York under the Commercial Arbitration Rules of the American Arbitration Association (or its successor) (the "Rules") and administered pursuant to the expedited procedures provisions thereof; provided, however, that with respect to any such arbitration, (A) the list of arbitrators referred to in Section E-4(B) of the Rules shall be returned within seven (7) days from the date of mailing; (B) the parties shall notify the American Arbitration Association (or its successor) by telephone, within five (5) days of receipt of notice of the appointed arbitrator, of any objections to the arbitrator appointed and, subject to clause (G) below, shall have no right to object if the arbitrator so appointed was on the list submitted by the American Arbitration Association (or its successor) and was not objected to in accordance with Section E-4(B) of the Rules as modified by clause (A) above; (C) the notification of the hearing referred to in Section E-7 of the Rules shall be five (5) days in advance of the hearing; (D) the hearing shall be held within ten (10) days after the appointment of the arbitrator; (e) the arbitrator shall have no right to award damages or vary, modify or waive any provision of this Agreement; (F) the decision of the arbitrator shall be final and binding on the parties, and any party may seek to have the decision confirmed by way of a court order; and (G) the arbitrator shall not have been employed by either party (or any of their respective Affiliates) during the three (3) year period immediately prior to the date of the Expedited Arbitration Proceeding. All fees and expenses of the arbitrator and all other expenses of the arbitration shall be borne initially by the Members equally (i.e., 50% for each Member), but ultimately shall be borne by the non-prevailing party in the arbitration.

15. The Parties further agreed, as set forth below⁷:

The contiguous number of Parts C, D and "c" of the [Arbitration Agreement] are ambiguous and contain scrivener errors not consistent with the Parties intent and agreement. Part "c" shall hereinafter be referred to as Part E. With respect to the instant arbitration only, Parts C and D are replaced with the time periods set forth below. . .⁸

⁷ PO #1, par. 2

⁸ PO #1, par. 2 sets forth a series of dates which the Parties either complied with or agreed to be extended. All date extensions were expressly agreed to by the Parties, not their counsel.

Par. 3 of PO#1 (an agreed term of PO #1) states: "Counsel for the Parties have been expressly authorized by their respective clients to agree to par. 2 of this Procedural Order #1, and the Parties expressly agree to par. 2 of this Procedural Order." The language of Par. 3 of PO#1 is set forth in all procedural orders memorializing all Parties' agreements extending any date applicable to this arbitration.

16. The Parties agreed that the Tribunal was properly appointed.⁹
17. No Party objected to any proceeding conducted as part of this arbitration as being contrary to, or inconsistent with, an Expedited Arbitration Proceeding (as that term is defined in the Arbitration Agreement) or any other term or provision of the Arbitration Agreement.
18. The Parties agreed that the substantive law governing the dispute is the law of Delaware, the procedural law governing the dispute is the law of New York, and the seat and place of the hearing is New York City, New York.¹⁰
19. The Parties further agreed as follows¹¹:
- a. AAA Commercial Rules effective September 1, 2022 (“AAA Rule/s”) apply.
 - b. The IBA Rules on the Taking of Evidence in International Arbitration (May 29, 2010) may guide the Tribunal in making rulings regarding evidence (“IBA Rules”).
 - c. The language for all documents and all hearings is English.
 - d. An arbitration hold is in effect and commenced on October 17, 2024.¹²

PROCEDURAL HISTORY

20. BNP commenced the instant arbitration by filing its Demand for Arbitration on October 16, 2024 seeking “access to books and records under the JDS Principal 9DKB LLC Agreement.” The Demand for Arbitration checked the boxes for claims for attorneys fees, interest and arbitration costs.¹³
21. The following day, on October 17, 2024, BNP filed its one count Statement of Claim, and its prayer for the following relief:
- a. An Order compelling the [JDS], [JDS Parent], their managing members, officers, directors, employees, and/or agents to immediately permit [BNP], its counsel and/or agents to inspect and make copies of all bank account statements wherever held for 340 Flatbush Partners LLC,

⁹ PO #1, par. 5

¹⁰ PO #1, pars. 6, 7, 8 and 10.

¹¹ PO #1, pars. 9, 11, and 13.

¹² PO #1 states the date of the commencement of the arbitration hold as October 17, 2024 notwithstanding the Demand for Arbitration being dated October 16, 2024.

¹³ Demand for Arbitration.

including, but not limited to, all monthly account statements, year-end statements, and other documents evidencing the nature of each payment made from each bank account of 340 Flatbush Partners LLC, the names of each payer into any accounts and payees out of the accounts.

- b. An Order compelling the [JDS], [JDS Parent], their managing members, officers, directors, employees, and/or agents to immediately permit [BNP], its counsel and/or agents to inspect and make copies of the books and records of the JDS and its Subsidiaries, as that term is defined in the LLCA, that were identified in the various demands;
- c. An Order requiring the JDS to pay [BNP] costs and expenses, including reasonable attorneys' fees, incurred in the prosecution of this action; and
- d. d) Awarding such other and further relief to which [BNP] may be entitled and which this Court shall deem to be just and equitable.

22. On November 5, 2024, within the time period agreed to by the Parties, Respondents filed their Response to Demand, their response being in the form of a letter signed by counsel for Respondents, Robert Novick.

23. The Parties, within the time periods agreed to by the Parties, filed briefs and supplemental briefs setting forth their positions. Specifically,

- a. On February 13, 2025, BNP filed its Claimant's Brief in Support of Demand for Production of Documents which brief included exhibits A – Y ("BNP Brief"). Concurrent with filing of it's the BNP Brief, BNP provided the Tribunal with copies of all cases cited in the BNP Brief.
- b. On February 24, 2025, Respondents Filed Their Respondents' Brief In Opposition To Demand For Inspection Of Documents ("Respondents' Brief") which included Exhibits 1 - 4. Concurrent with filing of Respondents' Brief, Respondents provided the Tribunal with copies of all cases cited in the Respondents' Brief.
- c. On March 11, 2025, BNP filed its Claimant's Supplemental Brief In Support Of Demand For Production Of Documents which brief included exhibits A – G ("BNP Supplemental Brief"). Concurrent with filing of the BNP Supplemental Brief, BNP provided the Tribunal with copies of all cases cited in the BNP Supplemental Brief.
- d. On March 18, 2025, Respondents Filed Their Respondents' Brief In Opposition To Claimant's Supplemental Brief ("Respondents' Supplemental Brief") which included Exhibits A - F. Concurrent with filing of Respondents' Supplemental Brief, Respondents provided the Tribunal with copies of all cases cited in the Respondents' Supplemental Brief.

- e. On March 21, 2025, BNP filed their Claimant's Supplemental Reply Brief In Further Support Of Demand For Production Of Documents (BNP Supplemental Reply Brief"). Concurrent with filing of Respondents' Supplemental Reply Brief, Respondents provided the Tribunal with copies of all cases cited in the Respondents' Supplemental Reply Brief.

24. Pursuant to the agreement of the Parties, an oral argument hearing was held in person in the offices of BNP's counsel on Thursday, February 27, 2025 ("Oral Argument Hearing"). BNP's counsel Craig Flanders and Matthew Treiber appeared in person and argued on behalf of BNP during the Oral Argument Hearing. Respondents' counsel Robert Novick and Katherine C. Gauthier appeared in person, and Ann M. St. Peter-Griffith appeared remotely during the Oral Argument Hearing.

25. The Oral Argument Hearing comprised three plus hours of argument by all Parties. During the Oral Argument Hearing, the Tribunal asked Respondents regarding the status of Ackerman. Respondents, following a break in the hearing during which they communicated with their clients, reported that the Delaware Secretary of State had cancelled Ackerman's registration on January 10, 2025. This was the first time that Respondents reported such event to BNP or the Tribunal.

26. Attached to Respondents' Supplemental Brief is Exhibit 5, being a copy of a Delaware Secretary of State Certificate authenticated on March 17, 2025 (the "Certificate of Termination"). The Certificate of Termination states:

I do hereby further certify that [Ackerman] is no longer in existence and good standing under the laws of the state of Delaware having filed a certificate of cancellation on the 10th day of January, 2025 at 3:04 o'clock p.m.

27. Following the revelation that Ackerman's existence was terminated on January 10, 2025 during the pendency of these proceedings and notwithstanding the arbitration hold in effect, the Oral Argument Hearing was adjourned so that all counsel could study the legal effect of the termination and present further argument in support of their respective positions.

28. The following Tuesday, March 3, 2025, five (5) days later, a status hearing was held during which the Parties agreed to a supplemental briefing schedule and set a date for the resumption of the adjourned Oral Argument Hearing. Procedural Order #6 memorialized the Parties' agreement regarding the briefing schedule and the date/time for the resumption of the Oral

Argument Hearing. The resumption of the Oral Argument Hearing was subsequently continued to April 10, 2025, without objection by any Party.

29. On April 10, 2025, the adjourned Oral Argument Hearing reconvened in the offices of counsel for Respondents. Craig Flanders and Matthew Treiber appeared in person and argued on behalf of BNP during the reconvened Oral Argument Hearing. Robert Novick appeared in person, and Ann M. St. Peter-Griffith appeared remotely during the reconvened Oral Argument Hearing. Mr. Novick argued on behalf of Respondents.

30. During the Oral Argument Hearing, all Parties had an opportunity to fully present and argue their positions. The Tribunal heard argument, asked questions of the Parties, and received responses.

31. During the re-convened Oral Argument Hearing session, all Parties had an opportunity to fully present and argue their positions, including (without limitation) any argument not fully presented during the initial Oral Argument Hearing session.

32. During the re-convened Oral Argument Hearing session, in response to questions of the Tribunal regarding Respondents' assertion of confidentiality regarding the Final Term Sheet relating to the Assignment-in-Lieu ("Term Sheet"), Respondents offered to produce the confidentiality provision of the Term Sheet provided that such production would not be deemed a waiver. The Tribunal thereupon ordered the production, orally ordered that there would be no waiver as a consequence of the production, and subsequently memorialized its oral order in Procedural Order #7, as follows:

JDS shall produce an extract of the Term Sheet evidencing the confidentiality terms of the parties to the Term Sheet. Such production and disclosure shall not be deemed to be, or be used as evidence of, a waiver by JDS of its right to assert claims of confidentiality to any other term or provision of the Term Sheet, nor its right to object to the disclosure of any term or provision of the Term Sheet not set forth in the extract produced.¹⁴

EVIDENCE

Facts *Not* In Dispute

33. No evidentiary hearing was held in this matter, and no sworn statements of fact or verified documents were presented. However, documents and uncontested statements of fact were

¹⁴ Procedural Order #7, par. 1.

presented to the Tribunal and reviewed and considered by the Tribunal. The Tribunal finds such documents and statements to be evidence properly considered by the Tribunal in making the findings and determinations set forth in this Partial Final Award.

34. The Tribunal finds that each document and fact described in pars. 38 through 42, below, is evidence properly considered by the Tribunal. In support of this finding, the Tribunal has looked to the IBA Rules, which the Parties agreed the Tribunal may use to guide its decisions.¹⁵ Specifically, the Tribunal notes IBA Rule Article 4, par. 2, which reads: “Any person may present evidence as a witness, including a Party or a Party’s officer, employee or other representative.”

35. The Tribunal finds that documents presented by the Parties’ counsel without objection regarding the presented documents’ completeness or veracity are evidence.

36. The Tribunal further finds that oral statements of fact presented by counsel for the Parties, which statements were not objected to with respect to the statements’ completeness or veracity, are evidence.

37. The findings set forth in pars. 35 and 36 are supported by IBA Rule Article 4, par. 2, in addition to IBA Rule Article 9, par. 1 (which grants the Tribunal the power to “determine the admissibility, relevance, materiality and weight of evidence,”), and IBA Rule Article 1, par. 5 (which provides: “Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence”).

38. The Parties do not dispute the completeness, veracity, or authenticity of the agreements which underpin their respective positions and arguments, copies of which they attached to their respective briefs. Specifically, the Parties do not dispute the completeness, veracity, or authenticity of the following documents:

- a. The JDS Agreement¹⁶.
- b. The Ackerman Agreement.¹⁷

¹⁵ PO #1, par. 10.

¹⁶ Exhibit 3 of Respondents’ Brief; Exhibit B of the BNP Brief.

¹⁷ Exhibit 4 of Respondents’ Brief; Exhibit D of the BNP Brief.

- c. The Assignment in Lieu.¹⁸
 - d. The 9 DeKalb Avenue organizational chart, attached to BNP's Brief as Exhibit A (the "Organizational Chart").
 - e. The Certificate of Termination.
 - f. The 2023 financial statement attached to BNP's Supplemental Brief as Exhibit E (the "2023 9 DeKalb FS").
 - g. The 2024 Capitalization Table attached to BNP's Supplemental Brief as Exhibit F ("2023 Cap. Table").
 - h. The documents, letters and email correspondence attached to BNP's demand for arbitration and Statement of Claim, being Exhibits F – M of BNP's Brief.
39. The terms of the Assignment-in-Lieu were not finalized prior to the execution and effectuation of the Assignment-in-Lieu.¹⁹
40. As of the date of the reconvened Oral Argument (April 10, 2025), the terms of the Assignment-in-Lieu were not finalized, were in dispute, and were being negotiated²⁰.
41. No company identified in the Organizational Chart has been canceled *except* Ackerman.²¹
42. Companies other than Ackerman identified in the Organizational Chart *may* have been dissolved as a consequence of the Assignment-in-Lieu and *may* be in the process of having their affairs "wrapped up"²².

¹⁸ Exhibit 1 of Respondents' Brief

¹⁹ Respondents' Supplemental Brief states "[T]he Term Sheet is an interim document intended to serve as the basis for a formal agreement. To date, negotiation and documentation of the formal agreement has not reached conclusion." Respondents' Supplemental Brief, p. 5. Further, during the reconvened Oral Argument hearing, responding to questions by the Tribunal, counsel for Respondents confirmed its statement in its brief. BNP did not object to, or challenge, the veracity of the Respondents' Supplemental Brief's statement or Respondents' counsel's oral argument statement.

²⁰ Statement of counsel for Respondents during the reconvened Oral Argument. BNP did not object to, or challenge, the veracity of this oral argument statement.

²¹ *Id.*

²² During the reconvened Oral Argument, Counsel for Respondents stated that he *believed* that other companies in the Organizational Chart were dissolved, but not cancelled. BNP did not object to, or challenge, the veracity of this oral argument statement.

ISSUES PRESENTED AND TO BE DETERMINED IN THIS PARTIAL FINAL AWARD

43. Three issues are presented for determination by this Partial Final Award:
- a. Whether BNP is entitled to examine certain books and records pursuant to the Delaware access to books and records statute, 6 Del. Code § 18-305 (“Section 305”)?
 - i. Whether BNP “relinquished Section 305 as an avenue of relief . . . with respect to the books and records of entities other than the [JDS]?”
 - ii. Whether BNP’s demand for books and records is a “reasonable demand for [a] purpose reasonably related to [BNP’s] interest as a member of the limited liability company?”
 - iii. Whether BNP has proven, “by a preponderance of the evidence” “that there is a credible basis to suspect a possibility of wrongdoing?”
 - b. Whether BNP’s contractual rights to examine the books and records of those companies identified in par. 9.1 of the Ackerman Agreement terminated upon either (i) the dissolution of Ackerman or (ii) the cancellation of Ackerman?
 - c. If the Tribunal determines that BNP is entitled to review books and records regarding the Project, the scope of its review rights and which books/records it may review?

ANALYSIS AND FINDINGS

I. BNP IS ENTITLED TO BOOKS AND RECORDS UNDER SECTION 305

A. The Delaware Books and Records Act (Section 305)

44. The Parties do not dispute that Section 305 governs BNP’s statutory claim to the books and records that it seeks.
45. Section 305 states, as applicable:
- §§ 18-305. Access to and confidentiality of information; records.
- (a) Each member of a limited liability company, in person or by attorney or other agent, has the right, subject to such reasonable standards (including standards governing what information (including books, records and other documents) is to be furnished at what time and location and at whose expense) as may be set forth in a limited liability

company agreement or otherwise established by the manager or, if there is no manager, then by the members, to obtain from the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the limited liability company:

(1) *True and full information* regarding the status of the business and financial condition of the limited liability company;

* * *

(6) Other information regarding the affairs of the limited liability company *as is just and reasonable*.

* * *

(c) The manager of a limited liability company shall have the right to keep confidential from the members, for such period of time *as the manager deems reasonable*, any information which *the manager reasonably believes to be in the nature of trade secrets or other information the disclosure of which the manager in good faith believes is not in the best interest of the limited liability company or could damage the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential*.

* * *

(e) Any demand under this section shall be in writing and shall state the purpose of such demand. . . .

* * *

(g) If a member is entitled to obtain information under this chapter or a limited liability company agreement for a purpose reasonably related to the member's interest as a member or other stated purpose, the member's right shall be to obtain such information as is necessary and essential to achieving that purpose. The rights of a member or manager to obtain or examine information as provided in this section may be expanded or restricted in an original limited liability company agreement or in any subsequent amendment approved or adopted by all of the members or in compliance with any applicable requirements of the limited liability company agreement. The provisions of this subsection shall not be construed to limit the ability to expand or restrict the rights of a member or manager to obtain or examine information by any other means permitted by law.

Italic added.

B. BNP's Demand For Books And Records Is A Proper Demand Under Section 305

46. While BNP has argued multiple proper purposes to support its Section 305 demand for books and records, its principal demand is premised upon its suspicion of wrongdoing.

47. Delaware Courts have long held that suspicion of wrongdoing is a proper purpose for a limited member's demand to inspect a limited liability company's books and records. Per the Delaware Supreme Court: "It is well established that a stockholder's desire to investigate wrongdoing or mismanagement is a "proper purpose." *Seinfeld v. Verizon Commc'ns, Inc.* 909 A.2d 117, 121 (Del. 2006)

48. While *Seinfeld* and other decisions cited by the Parties concern books and records demands by shareholders of corporations, Delaware courts have applied the same standards and reasoning to demands by members of limited liability companies.

"Delaware courts have interpreted Section 18-305 by looking to cases interpreting similar Delaware statutes concerning corporations and partnerships,' such as Section 220 of the Delaware General Corporation Law."

Riker v. Teucrium Trading, LLC, 2020 WL 2393340, p.4 (Del. Ch. May 12, 2020)

49. Delaware law holding that "a desire to investigate wrongdoing" is a proper purpose, the Tribunal finds that BNP has stated a proper purpose under Section 305.

C. Section 305's Requirements and Standard of Proof

50. Respondents argue:

"Section 305 does not allow fishing expeditions. Rather, to obtain relief under Section 305, BNP is required as a matter of law to make an evidentiary showing, with more than a preponderance of the evidence, that there has been misconduct (the alleged "proper purpose")."²³

51. Respondents further argue:

BNP must meet an additional evidentiary burden to overcome Delaware's strong presumption in favor of respecting corporate separateness by demonstrating that the Company misused the corporate form for fraudulent purposes or that the subject entities were alter-egos. However, BNP expressly elected to forgo an evidentiary hearing. . . . BNP therefore has relinquished Section 305 as an avenue of relief,

²³ Respondents' Supplemental Brief, p. 21

especially with respect as to the books and records of entities other than the Company.²⁴

52. The Tribunal finds that while Respondents accurately assert that Delaware law does not permit “fishing expeditions,” the balance of Respondent’s assertions are contrary to Delaware law. Delaware law does not require “an evidentiary showing, with more than a preponderance of the evidence, that there has been misconduct.”

53. Both Parties cite the 2024 Delaware Court of Chancery decision in the case *Penoff Holdings LLC v Nurture Live, Inc.*, 2024 WL 3964006. The Tribunal finds that *Penoff* succinctly states current Delaware law applicable to the instant dispute.

54. *Penoff* holds:

Plaintiffs . . . seek to investigate possible corporate wrongdoing. Under Delaware law, *a stockholder's desire to investigate wrongdoing is a proper purpose*. However, “[a] mere statement of a purpose to investigate possible general mismanagement, without more, will not entitle a shareholder to broad § 220 inspection relief.” [citation omitted] To establish a proper purpose of investigating wrongdoing, a stockholder “must present some evidence to suggest a credible basis from which a court can infer that . . . wrongdoing may have occurred.” [citation omitted] The credible basis standard imposes “the lowest possible burden of proof.” [citation omitted] It does not require a stockholder to prove that the wrongdoing “actually occurred.” [citation omitted] It does not require a stockholder “to show by a preponderance of the evidence that wrongdoing is probable.” [citation omitted] *It requires only that a stockholder “establish by a preponderance of the evidence that there is a credible basis to suspect a possibility of wrongdoing.”* [citation omitted]. That burden may be “satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing.” [citation omitted]²⁵

Italic added.

C. BNP Did Not Relinquished Section 305 As An Avenue Of Relief With Respect To Its Books And Records Claim

55. Respondents argue that “BNP’s burden must be satisfied with evidence, not allegations or rhetoric,” citing *Riker*.²⁶ The Tribunal agrees, relying upon *Riker*.

²⁴ *Id.*

²⁵ *Penoff*, at p. 4

²⁶ *Riker*, at p. 4

56. Respondents further argue:

“BNP expressly elected to forgo an evidentiary hearing. ...BNP therefore has relinquished Section 305 as an avenue of relief, especially with respect as to the books and records of entities other than the Company.”²⁷

57. The Tribunal does not agree, and finds that BNP’s statutory books/records demand is supported by evidence.

58. Multiple documents have been provided to the Tribunal with no objection to their completeness or veracity, and multiple facts have been asserted by all Parties in argument that have not been objected to with respect to their completeness or veracity. The Tribunal finds that such documents and facts are “evidence.”

59. Specifically, as noted in par. 34, above, the Tribunal finds that those non-contested facts and documents identified in the “Facts Not In Dispute” section of this Partial Final Award, and specifically in pars. 38 through 42, are evidence. Further, the Tribunal finds that such evidence is properly considered by the Tribunal in determining whether BNP has met its statutory burden as set forth in *Penoff*.

60. For the reasons stated below, the Tribunal finds that BNP has met its evidentiary proof obligations under Section 305.

E. BNP Established, By A Preponderance Of The Evidence, That There Is A Credible Basis To Suspect A Possibility Of Wrongdoing.

61. The Tribunal finds the following relevant and evidence of *possible* wrong-doing:

- a. On the eve of a foreclosure proceeding, the natural person with authority over Respondents’ books and records and the books and records of the Project executed a confidential assignment-in-lieu that eviscerated all of BNP’s \$66 million investment in the Project.
 - i. Respondents and Stern have refused to disclose the terms of the Assignment-in-Lieu.
 - ii. The Assignment-in-Lieu was executed and effectuated *before* all of the terms of the assignment were agreed upon.²⁸

²⁷ Respondents’ Supplemental Brief, p. 21

²⁸ “[T]he Term Sheet is an interim document intended to serve as the basis for a formal agreement. To date, negotiation and documentation of the formal agreement has not reached conclusion.” Respondents’ Supplemental Brief, p. 5.

- iii. The Assignment-in-Lieu is currently in dispute and its terms are currently being negotiated.²⁹
- b. Concurrent with the signing of the Assignment-in-Lieu, Stern and Respondents signed a release absolving Stern and Respondents from liability against themselves, including claims by BNP.³⁰
- b. Only one corporation or limited liability company investor in the Project has been terminated as a matter of law – Ackerman.
 - i. Ackerman is the entity whose operating agreement's terms are relied upon BNP to support its broad contractual claim for books and records.
 - ii. Respondents have denied BNP's demand for books and records based upon the dissolution and subsequent termination of Ackerman.
 - iii. During the pendency of these proceedings, Respondents and Stern filed with the State of Delaware the Termination Certificate.
- c. The 2023 9 DeKalb FS states "Contributions by member" as of December 31, 2023 as \$7,004,629.³¹ BNP's "equity contributions alone to the [Project] in 2023 totaled \$26.1 million."³²
 - i. Per the BNP Supplemental Brief, "all of [the \$26.1 million] should have flowed through the intermediate project entities and been reflected in the 9 DeKalb FS, which

²⁹ *Id.*

³⁰ "In consideration of the covenants, agreements and undertakings of Stern and the Affiliates under this Agreement, the Company [**JDS**], on behalf of itself, its managers, officers, representatives, agents, successors, and assigns, as applicable, **its members [BNP], each of its members' parent entities and principals**, and JDS 340 Flatbush LLC, each of its subsidiaries, and anyone claiming by or through any of the preceding (collectively, "Company Releasers"), **hereby release, waive, and forever discharge Stern and the Affiliates and each of their members, officers, representatives, agents, heirs, successors, and assigns** (collectively, "Affiliate Releasees") of and from any and all actions, causes of action, suits, losses, liabilities, rights, debts, dues, sums of money, accounts, reckonings, obligations, costs, expenses, liens, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands, of every kind and nature whatsoever, whether now known or unknown, foreseen or unforeseen, matured or unmatured, suspected or unsuspected, in law, admiralty, or equity (collectively, "Claims"), which any of such Company Releasers ever had, now have, or hereafter can, shall, or may have against any of such Affiliate Releasees for, upon, or by reason of any matter, cause, or thing whatsoever from the beginning of time through the date of this Agreement arising out of or relating in any way to the Project including any direct or indirect investments in the Project.." BNP Brief, Exhibit F, par 1(a). Bold, italic added.

A parallel provision is set forth in a separate agreement (BNP Brief, Exhibit G) wherein BNP, as a member of Ackerman, releases Stern *et. al.* BNP Brief

³¹ 2023 9 DeKalb FS, p. 6

³² 2023 Cap. Table

JDS has represented are the sole consolidated financial statements at the project level.”³³

- ii. Respondents argue that BNP’s understanding of the terms used in the financial statements is in error, but do *not* affirmatively argue that the inconsistent numbers identified by BNP are not inconsistent. Rather, Respondents state: “the two documents *are not necessarily* supposed to tie directly to each other.”³⁴

d. BNP argues in the BNP Supplemental Brief:

“Throughout 2024, after having received additional equity contributions from BNP in 2023 on the basis of representations that JDS would be refinancing the Brooklyn Tower Project and using funds from BNP to pay off project debt, JDS repeatedly refused to provide sufficient information to determine the current financial status of the project or how BNP’s capital contributions were spent. JDS and Stern then, following their failure to produce this information, . . . wiped out BNP’s entire equity contribution, the terms of which JDS refuses to disclose to the minority investors whom it dispossessed to this day. Now, in the midst of a books and records arbitration, Stern and JDS have tried to alter the state of play by terminating Ackerman. . . .”³⁵

While Respondents challenged and denied other allegations of fact in Respondents’ Supplemental Brief, Respondents did not dispute these allegations.

62. The Tribunal finds the evidence described in par. 61, above, which is undisputed, to be evidence of “a credible basis to suspect a possibility of wrongdoing,” the standard set forth in *Penoff*.

63. BNP argues, and the Tribunal agrees, that Respondents vigorous and steadfast refusal to disclose the terms of the Assignment-in-Lieu, even pursuant to a confidentiality agreement, itself is sufficient to support a “credible basis to suspect a possibility of wrongdoing.” This conclusion is strengthened by the fact that (i) the Assignment-in-Lieu was executed and BNP’s ownership interest in the Project was eliminated *before* all of the terms of the Assignment-in-Lieu were agreed upon and finalized, (ii) Respondents and Stern absolved themselves of any liability by

³³ BNP Supplemental Brief, p. 15.

³⁴ Respondents’ Supplemental Brief, p. 3

³⁵ BNP Supplemental Brief, p. 14.

signing, on behalf of JDS and its members, a release, (iii) the terms of the Assignment-in-Lieu are currently in dispute and may be evolving, (iv) the numbers in the 2023 Project financial statement and capitalization table are not consistent, (v) the entity whose operating agreement's terms BNP relies upon for its contractual books and records rights was terminated by an overt act of Respondents' principals during the pendency of this arbitration, and (vi) the *only* Project entity to be terminated is the entity whose operating agreement's terms BNP relies upon for its contractual books and records rights.³⁶

64. For the foregoing reasons, the Tribunal finds that BNP has proven "a credible basis to suspect a possibility of wrongdoing," and possesses a Section 305 statutory right to review and inspect those books and records identified in the dispositive section of this Partial Final Award.

II. BNP'S CONTRACTUAL RIGHTS TO EXAMINE BOOKS AND RECORDS WERE NOT EXTINGUISHED BY THE TERMINATION OF ACKERMAN

A. The JDS Agreement Incorporates By Reference the Ackerman Agreement's Books and Records Language; It Does Not Make the JDS Investors' Rights the Same as Those of Ackerman's Investors.

65. Respondents argue "BNP . . . is claiming that it has the same inspection rights granted to a member of the Ackerman company under the Ackerman Agreement, as applied derivatively to BNP by the [JDS Agreement]."³⁷

66. BNP rejects the foregoing as an incorrect recitation of its position and argument. BNP does not claim "derivative" rights. Rather, it argues that it has direct, independent, rights as set forth in the JDS Agreement. BNP further argues that its direct, independent rights are unaffected by Ackerman's termination.

67. The relevant document and contract provision is par. 12 of the JDS Agreement. Par. 12 states:

12. Rights and Protections of BNP. Notwithstanding anything to the contrary herein, the Members acknowledge and agree that BNP shall have the same rights and protections afforded to BNP Development *as set forth in* Section 3.3.2, Section 3.4, Section 3.5, Section 6.3, Section 6.4, Section 9.1, Section 12.18 and Section 12.19 of the Ackerman 9 DeKalb Partner Agreement, and

³⁶ For purposes of clarity, the Tribunal makes no finding, and renders no opinion, regarding any *actual* wrongdoing by Stern, Respondents, or any other person.

³⁷ Respondents Brief, p. 11

that Managing Member shall use commercially reasonable efforts to ensure that BNP receives the benefits of such provisions *as if fully set forth herein* (to the extent same are permitted pursuant to the Ackerman JDS JV Agreement). Further, for purposes of the foregoing, any obligations and covenants of Ackerman JDS Partner under the aforementioned provisions shall be deemed the obligations and covenants of Managing Member hereunder, including, without limitation, any requirements to fund capital pursuant to Section 3.3.2 of the Ackerman 9 DeKalb Partner Agreement in order to maintain BNP's Overall Ownership Interest (as defined in the Ackerman 9 DeKalb Partner Agreement), as the same has been increased by virtue of BNP's investment under this Agreement.

Bold italic added.

68. The issue presented is whether BNP's books and records rights under the JDS Agreement are those possessed by the members of Ackerman, or independent rights which are identical to those set forth in the Ackerman Agreement.

69. Respondents assert that BNP's rights under the JDS Agreement are the same as Ackerman's investors'. Since Ackerman ceased to exist as an entity, Respondents argue that Ackerman's investors' rights ceased to exist, hence BNP's rights also ceased to exist.

70. The Tribunal acknowledges that BNP's rights, as an investor in Ackerman, may have been extinguished by the termination of Ackerman.³⁸ BNP's claims in this arbitration, however, are not as an investor in Ackerman or pursuant to the Ackerman Agreement. Rather, BNP's claims are founded on the express terms of the JDS Agreement, and as an investor in JDS.

71. The Tribunal rejects Respondent's understanding of par. 12. The Tribunal finds that par. 12 of the JDS Agreement incorporates by reference the terms of the Ackerman Agreement; it does not make JDS' investors' rights dependent upon Ackerman's investors having rights.

72. In making the foregoing finding, the Tribunal is persuaded by par. 12's language "*as if fully set forth herein.*" The Tribunal finds that this phrase means that the language of the Ackerman Agreement should be deemed to exist in, and be a part of, the JDS Agreement. As a result, the existence, or non-existence, of the Ackerman entity is irrelevant to determining BNP's

³⁸ The Tribunal expressly makes no finding, and expresses no opinion, regarding the Ackerman Agreement nor the propriety nor legal effect of the Termination Certificate, all matters relating to the Ackerman entity being beyond its jurisdiction.

books and records rights. All that matters is the applicable language, which for reasons not relevant to the determination of BNP's rights, happen to be in a document of a third party.

73. In support of this finding, in addition to par. 12's "as if fully set forth herein" language, the Tribunal finds the following to be compelling:

- a. Par. 12 repeats the "as set forth in" language:

"...Members acknowledge and agree that BNP shall have the same rights and protections afforded to BNP Development *as set forth in* . . . Section 9.1. . . of the Ackerman 9 DeKalb Partner Agreement. . ."

- b. Par. 12 imposes upon the JDS managing member the obligations of Ackerman's managing member:

"Further, for purposes of the foregoing, any obligations and covenants of [the Ackerman managing member] under the aforementioned provisions shall be deemed the obligations and covenants of Managing Member hereunder."

These are express obligations of JDS' managing member; not obligations of Ackerman's managing member or obligations to the extent that Ackerman's managing member has such obligations.

- c. Par. 12 states no applicable time period. It does not provide that BNP's books and records rights under the JDS Agreement exist for the period that Ackerman's exist. It does not provide for any termination or extinguishment of rights.

- d. The rights of BNP are not identical to all members of Ackerman. The JDS Agreement states:

"BNP shall have the same rights and protections afforded to **BNP Development** as set forth in . . .the [Ackerman Agreement]." Bold added

The identification of BNP specifically and not simply Ackerman Members supports the conclusion that BNP's rights under the JDS Agreement are distinct from those of Ackerman Agreement members.

- e. Neither par. 12, nor any other provision of the JDS Agreement, includes language stating that BNP's rights are derivative and not independent.

- f. The JDS Agreement is devoid of any language that contemplates the dissolution or termination of Ackerman. As such, the Tribunal finds no evidence within the four corners of the JDS Agreement that the intent and agreement of the Parties was that BNP's books and records rights would be extinguished upon the termination of Ackerman. Rather, the Tribunal finds that the JDS Agreement evidences a clear

intent of the Parties that BNP have the expansive books and records rights *articulated* in the Ackerman Agreement.

III. BNP'S RIGHTS TO THE BOOKS AND RECORDS OF THIRD PARTY ENTITIES DOES NOT "PIERCE THE CORPORATE VEIL"; IT IS A RIGHT EXPRESSLY GRANTED IN THE JDS AGREEMENT

A. Right to Access Subsidiaries' Books and Records

74. Respondents argue that BNP's rights to books and records, if permitted by either Section 305 or the JDS Agreement, are limited to the books and records of JDS. In support of this argument, Respondents assert Delaware's protection of corporate separateness and argue that a piercing the corporate veil standard must be met.

75. While Respondents' argument might have merit with respect to BNP's rights under Section 305, it is meritless with respect to BNP's contractual rights.

76. As held above, BNP's books and records rights under the JDS Agreement are those set forth in par. 9.1 of the Ackerman Agreement. Par. 9.1 states:

9.1 Maintenance of Books and Records. Managing Member shall maintain, or cause to be maintained, at the expense of the Company, in a manner customary and consistent with good accounting principles, practices and procedures, a comprehensive system of office records, books and accounts (which records, books and accounts shall be and remain the property of the Company) in which shall be entered fully and accurately each and every financial transaction with respect to the operations of the Company. Bills, receipts and vouchers shall be maintained on file by Managing Member. Managing Member shall maintain said books and accounts in a safe manner and separate from any records not having to do directly with the Company. Such books and records of account shall be prepared and maintained by Managing Member at the principal place of business of the Company or such other place or places as may from time-to-time be determined by Managing Member. ***BNP shall have the right to review the [Ackerman's] books and records, and [Ackerman's managing member] shall be required to cause the Subsidiaries to grant BNP access to the books and records of all Subsidiaries and reports concerning the Project.***

Bold italic added.

77. The Tribunal finds that the bold/italic language of the par. 9.1 set forth in the preceding paragraph, if appearing in the JDS Agreement, would read as follows:

BNP shall have the right to review the [JDS'] books and records, and **[JDS' managing member] shall be required to cause the Subsidiaries to grant BNP access to the books and records of all Subsidiaries and reports concerning the Project.**

78. Par. 2.7 of the Ackerman Agreement defines "Subsidiaries." Par. 2.7 reads as follows:

2.7 Subsidiaries. The Company owns, or may hereafter form, cause to be formed, or otherwise invest in subsidiary entities (a) wholly-owned either directly or indirectly by the Company (each a "Wholly Owned Subsidiary" and, collectively, the "Wholly Owned Subsidiaries"), and (b) partially owned either directly or indirectly by the Company, including, without limitation, JDS 340 Flatbush LLC, DeKalb MM LLC, 340 Flatbush Partners LLC, 340 Flatbush Partners Member LLC, 9 DeKalb Holdings 2 LLC, 9 DeKalb Holdings 1 LLC, 9 DeKalb Fee Owner LLC, and any other subsidiary formed to joint venture with a LP for the development of the Property (each a "Joint Venture Subsidiary" and, collectively, the "Joint Venture Subsidiaries" and together with any Wholly Owned Subsidiary, each a "Subsidiary" and, collectively, the "Subsidiaries"). With respect to Wholly Owned Subsidiaries, Managing Member shall perform, with no additional compensation, the same or substantially identical services for each such Wholly Owned Subsidiary as the Managing Member performs for the Company and shall have the same rights and obligations with respect to such Wholly Owned Subsidiaries as Managing Member has hereunder subject to (i) the terms of the governing documents of such Wholly Owned Subsidiary, (ii) the rights of BNP to consent to any Major Decisions and (iii) any express provisions hereof which require the consent or approval of the Members which are not otherwise Major Decisions. With respect to Joint Venture Subsidiaries, Managing Member shall act and make decisions on behalf of any Wholly Owned Subsidiary that holds a direct or indirect interest in such Joint Venture Subsidiary with no additional compensation subject to (a) the terms of the governing documents of such Joint Venture Subsidiary, (b) the rights of BNP to consent to any Major Decisions and (c) any express provisions hereof which require the consent or approval of the Members which are not otherwise Major Decisions.

79. For the foregoing reasons, the Tribunal finds that Respondents must "cause the Subsidiaries" to grant BNP access to their "books and records. . .and reports concerning the Project" (hereinafter the "Project's Books and Records").

B. Time Period of Access Right

80. While par. 9.1 of the Ackerman Agreement identifies the entities whose books and records BNP is entitled to "access," it does not state the relevant time period.

81. During the reconvened Oral Argument Hearing, Respondents argued that if the Tribunal finds that BNP has the right to access the records it seeks, the period for which access should be granted should be that period during which BNP was an investor in JDS. The Tribunal agrees, with a caveat, as described below. The Tribunal finds no evidence within the four corners of the JDS Agreement that the Parties intended BNP's books and records rights to pre-date BNP's investment in JDS.

82. The caveat: if BNP's review of the Project's Books and Records requires access to the Project's Books and Records for a period prior to July 25, 2022 (the date of the JDS Agreement) to fairly resolve BNP's suspicion of wrongdoing, upon a showing that such access is required and that BNP's continued suspicion is reasonable, the Tribunal will amend the time period for access as it finds just and necessary to prevent prejudice. The Tribunal expressly retains jurisdiction to resolve disputes regarding the time period for access.

IV. RESPONDENTS SHALL PROVIDE BNP WITH THE TERMS OF THE ASSIGNMENT-IN-LIEU

A. The Tribunal Has the Power to Order Disclosure

83. Respondents argue that the terms of the Assignment-in-Lieu are protected by a confidentiality agreement, and that they are barred by contract from disclosing the Assignment-in-Lieu's terms.

84. In support of this argument Respondents produced during the reconvened Oral Argument Hearing an extract of the Final Term Sheet for the Assignment-in-Lieu, which states as follows:

12. This Term Sheet and its terms shall be kept confidential; provided that the parties shall be permitted to disclose the terms hereof (i) as required by law or legal process, (ii) to its attorneys, accountants consultants and advisors. Further, nothing herein shall limit the Lender from advising third parties that are necessary for the continued construction and operation of the Property that it controls the Property Owner and the Property and no Sponsor Party....

85. During the reconvened Oral Argument Hearing, BNP argued that the Final Term Sheet's confidentiality clause expressly authorizes the Tribunal to decide and order disclosure. The Tribunal agrees.

86. Par. 12, as applicable, states: “the parties shall be permitted to disclose the terms hereof (i) as required by law *or legal process*” (italic added). This arbitration is a “legal process.” The Tribunal therefore finds that, per the express terms of the Final Term Sheet, it is empowered to order disclosure.

B. Disclosure is Appropriate Pursuant to BNP’s Contract Books and Records Rights

87. BNP argues that the Assignment-in-Lieu is a record of the Project to which it is entitled access pursuant to par. 9.1 of the Ackerman Agreement, incorporated into the JDS Agreement via par. 12 of the JDS Agreement. The Tribunal agrees.

88. Par. 9.1 requires the maintenance of “a comprehensive system of office records, books and accounts”. By identifying “books and accounts” separate and apart from “records,” the Tribunal finds that par. 9.1 requires more than the maintenance (and disclosure) of financial materials. It also encompasses “records.”

89. The term “records” is not defined in the JDS Agreement or the Ackerman Agreement. The Tribunal therefore looks to the Merriam-Webster dictionary for a definition. The Merriam-Webster dictionary defines “record” as:

“Something that records: such as

- a. something that recalls or relates past events;
- b. an official document that records the acts of a public body or officer;
- c. an authentic official copy of a document deposited with a legally designated officer;
- d. the official copy of the papers used in a law case.”³⁹

90. The Tribunal finds that the Assignment-in-Lieu is a record, hence subject to par 9.1.

91. The Tribunal also finds that the Assignment-in-Lieu is a record of JDS. In support of this finding, the Tribunal notes that the Assignment-in-Lieu rendered worthless the principal asset of JDS and materially impacted the operations of JDS. Thus it is a record of a financial transaction of JDS notwithstanding that JDS is not a party to the Assignment-in-Lieu. As such, BNP is entitled to access the document and its terms pursuant to the JDS Agreement’s books and records clause, par. 12.1 of the JDS Agreement.

³⁹ Merriam-Webster Dictionary, [RECORD Definition & Meaning - Merriam-Webster](#)

C. Disclosure is Appropriate Under Section 305

92. As noted in par. 63, Respondents' refusal to permit BNP to know the terms of the Assignment-in-Lieu supports BNP's suspicion of wrongdoing.

93. This conclusion is strengthened in light of the following:

- a. Respondents argue that Ackerman was dissolved and terminated because substantially all of its assets were transferred.
- b. Respondents argue that BNP's books and records rights ceased to exist because Ackerman has been dissolved and terminated.
- c. Respondents advised the Tribunal during the reconvened Oral Argument Hearing that the terms of the Assignment-in-Lieu are not final and are being negotiated.
- d. The extract of the Confidentiality Agreement states that the Lender "controls the Property and the Property Owner." It does *not* state that it *owns* the Property.
- e. The Assignment-in-Lieu states:

C. Borrower and Lender desire to (i) effectuate an assignment-in-lieu of foreclosure of 100% of Borrower's limited liability company membership interest in and to Owner (the "Assigned Interests") to Lender *or its designee* (the "Assignment-in-Lieu") and (ii) ***immediately following the consummation of such Assignment-in-Lieu***, terminate the Mezzanine Loan Agreement and the other Mezzanine Loan Documents other than the Guaranty, Guaranty of Completion and Guaranty of Interest and Carry Costs (collectively, the "Guarantees"), subject to and in accordance with their respective terms and the terms of this Agreement;

Bold, italic added.

94. If the Assignment-in-Lieu's terms are not final and still being negotiated, has the Assignment-in-Lieu "been consummated?" If not, then BNP's dissolution/termination of Ackerman is problematic. If consummated, was consummating the transaction without finality and agreement regarding the terms of the transaction "wrongful conduct?" These questions create a "credible basis."

95. Further, the language of the Confidentiality Agreement does not state that Lender is the owner of the Property. It provides that it "controls" the owner. Who is the owner? This question, too, creates a "credible bases."

96. For the foregoing reasons, the Tribunal holds that BNP is entitled to access and review all of the terms of the Assignment-in-Lieu.

PARTIAL FINAL AWARD / DISPOSITIVE


For the reasons stated above, the Tribunal Awards as follows:

- A. For the time period commencing on July 25, 2022 through the date JDS is terminated pursuant to Delaware law, Respondents shall, upon 7 days prior written notice, permit BNP, its counsel and/or agents, to inspect and make copies of JDS' books and records and reports concerning the Project.
- B. JDS Parent shall cause the Subsidiaries to, within 7 days prior written notice by BNP, grant BNP and BNP's counsel and/or agents access to the Subsidiaries' books and records and reports concerning the Project. Until further ordered by the Tribunal, the time period applicable to the Subsidiaries' books and records and reports shall be July 25, 2022 through the date JDS is terminated pursuant to Delaware law.
- C. The term "Subsidiaries" as used in pars. A and B, above, means those entities identified in par. 2.7 of the Ackerman Agreement.
- D. The term "books and records," as used in pars. A and B, above, includes, without limitation, the general ledger of the applicable entity, all contracts and binding agreements of the applicable entity, and all documents recording "each and every financial transaction with respect to the operations of the" applicable entity. With respect to the year 2022, full year or year-end reports for such year shall not be excluded by reason of such document(s) including time periods prior to July 25, 2022.
- E. Notwithstanding the generality of par. D, above, and with respect to the Assignment-in-Lieu only, Respondents shall, on or before 12 noon, ET, May 6, 2025, deliver to, or grant BNP access to and permit it to inspect and make copies of, all documents comprising the Assignment-in-Lieu (including, without limitation, the financial and other terms of the Assignment-in-Lieu and those terms of the Assignment-in-Lieu in dispute or not fully determined). If such documents are not in Respondents' possession but in the possession of a Subsidiary, JDS parent shall cause the applicable Subsidiary/ies to deliver, or permit the inspection and copying, within such time period.
- F. Until otherwise ordered by the Tribunal, BNP and its counsel and/or agents shall maintain in confidence and not disclose to persons not officers, directors, employees, or counsel of BNP any information disclosed to it by reason its access to information permitted by this Partial Final Award. Further, all persons receiving such information shall be bound by confidentiality.

- G. The Parties are ordered to meet and confer and agree upon the terms of a confidentiality agreement applicable to the documents to be disclosed pursuant to this arbitration which agreement, when executed, shall supplant and supersede par. F, above. If the Parties cannot agree upon the terms of a confidentiality agreement, each shall, on or before May 6, 2025, provide the Tribunal with a proposed draft confidentiality agreement and a statement of their objections to the language proposed by BNP/Respondents.
- H. This matter is set for status on May 7, 2025 at 3:00 p.m. ET via a Zoom hearing. A Zoom link shall be provided by the Tribunal.
- I. The Tribunal retains jurisdiction to resolve all matters that are the subject of the Parties dispute save those expressly determined in this Partial Final Award. Without limiting the generality of the foregoing, the Tribunal retains jurisdiction to resolve disputes regarding the time period for access to books and records, and to extend the time period as described in par. 82; determine the award, if any, of attorneys fees and costs; determine whether any particular document or report is the subject of this Partial Final Award, and; determine the terms of the Parties confidentiality agreement described in par. G.

I hereby certify that, for the purposes of Article I of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, this Partial Final Award was made in New York City, NY, United States of America.

Deemed signed in New York City,
NY this 29th day of April, 2025


James Reiman, sole arbitrator