

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

JA LEE KAO,

Plaintiff,

- v -

ONYX RENEWABLE PARTNERS L.P.,  
ORP JOINT HOLDINGS GP LLC,  
BLACK ONYX INVESTMENTS, LLC,  
BILAL KHAN, AND JONATHAN  
MAXWELL

Defendants.

Index No. 654411/2021

**CORPORATE DEFENDANTS’  
VERIFIED ANSWER AND  
AFFIRMATIVE DEFENSES AND  
AMENDED COUNTERCLAIMS**

Defendants Onyx Renewable Partners L.P. (“Onyx”), ORP Joint Holdings GP LLC (“ORP GP”), Black Onyx Investments, LLC (“Black Onyx”) (Onyx, ORP GP, and Black Onyx collectively, the “Corporate Defendants”), by and through their undersigned counsel, answer and respond to Plaintiff’s Complaint (the “Complaint”) as follows. Any allegation not expressly admitted (including any allegation in the footnotes) is denied. All responses herein are based on information known to the Corporate Defendants as of the date hereof, and the Corporate Defendants reserve the right to supplement or amend their responses based on new information.

1. The Corporate Defendants admit that Plaintiff was formerly the President and Chief Executive Officer (“CEO”) of Onyx, but deny that post-employment restrictions against “competition/solicitation and disparagement” that Plaintiff agreed to are excluded from enforcement by Section 9 of Plaintiff’s Employment Agreement and deny that Plaintiff is entitled to a declaratory judgment, an injunction, or monetary damages with respect thereto, and aver that Plaintiff is subject to post-employment restrictions pursuant to subsequent agreements

that Plaintiff signed that expressly superseded Section 9 of the Employment Agreement. The Corporate Defendants deny the allegations contained in footnote 1 to Paragraph 1; to the extent the footnote purports to characterize written documents, such documents speak for themselves and no response is required.

2. The Corporate Defendants deny that Plaintiff had Good Reason to terminate her employment, deny that she adequately perfected a resignation with Good Reason under the terms of the Employment Agreement, deny that she is entitled to a declaratory judgment with respect thereto, and deny that she is entitled to severance pursuant to any provision in the Employment Agreement or that Onyx breached Sections 8(d) or 8(e) of the Employment Agreement, and aver that when Plaintiff sent her April 23, 2021 notice of resignation (the “April 23 Notice”), she specifically stated that her resignation was “without Good Reason.” The Corporate Defendants deny the remaining allegations in Paragraph 2 as legal conclusions to which no response is required.

3. The Corporate Defendants admit only that Plaintiff purports to seek entitlement to certain legal fees and expenses in this Action but deny the remaining allegations in Paragraph 3.

4. The Corporate Defendants deny the allegations in Paragraph 4 and aver that the definition of “fair market value” Plaintiff urges was superseded by a definition that results in a valuation of zero.

5. The allegations contained in Paragraph 5 state legal conclusions to which no response is required. To the extent a response is deemed required, Corporate Defendants deny the allegations in Paragraph 5.

6. The Corporate Defendants admit the allegations in Paragraph 6, but aver that

Plaintiff worked remotely between March 14, 2020 and the date of her resignation, and lack knowledge or information sufficient to form a belief as to the truth of the allegations with respect to Plaintiff's residence.

7. The Corporate Defendants admit that Onyx is a limited partnership formed under the laws of Delaware, with its principal place of business at 230 Park Avenue, Suite 845, New York, NY 10169. The Onyx Renewable Partners L.P. Second Amended and Restated Limited Partnership Agreement of Onyx dated as of February 26, 2021 is a written document that speaks for itself and the Corporate Defendants refer to said agreement for a complete and accurate statement of its terms. To the extent the allegations in Paragraph 7 state legal conclusions, no response is required.

8. The Corporate Defendants admit that ORP GP is a limited liability company formed under the laws of Delaware, with its principal place of business at 345 Park Avenue, New York, NY 10154. To the extent that the allegations in Paragraph 8 state legal conclusions, no response is required. The allegations in Paragraph 8 refer to a written document, the terms of which speak for itself, and the Corporate Defendants deny any characterizations that are inconsistent with the written document. The Corporate Defendants deny the allegations contained in footnote 2 to Paragraph 8.

9. The Corporate Defendants admit only that Black Onyx is a limited liability company formed under the laws of Delaware, with its principal place of business at 345 Park Avenue, New York, NY 10154. The remaining allegations in Paragraph 9 state legal conclusions to which no response is required. To the extent those allegations are deemed factual, they are denied.

10. The allegations in Paragraph 10 are not directed towards the Corporate

Defendants and contain conclusions of law. Therefore, no response is required. To the extent a response may be deemed required, the Corporate Defendants deny the allegations in Paragraph 10, and aver that Mr. Khan is a Senior Managing Director of Blackstone; that Mr. Khan is a member of the board of Cross Pond Renewable Ventures LLC, the sole member of ORP GP. The Corporate Defendants further aver that Mr. Khan served as Chair of an advisory board to Onyx until February 26, 2021; and that Mr. Khan lives in the County, City, and State of New York.

11. The allegations in Paragraph 11 are not directed towards the Corporate Defendants and contain conclusions of law. Therefore, no response is required. To the extent a response may be deemed required, the Corporate Defendants admit that Mr. Maxwell lives in the United Kingdom but deny the remaining allegations in Paragraph 11, and aver that Mr. Maxwell is a member of the Investment Committee of SDCL Energy Efficiency Income Trust.

12. Paragraph 12 asserts legal conclusions with respect to which no response is required from the Corporate Defendants. To the extent a response may be deemed required, the Corporate Defendants deny the allegations in Paragraph 12.

13. Paragraph 13 asserts legal conclusions with respect to which no response is required from the Corporate Defendants. To the extent a response may be deemed required, the Corporate Defendants deny the allegations in Paragraph 13.

14. Paragraph 14 asserts legal conclusions with respect to which no response is required from the Corporate Defendants. To the extent a response may be deemed required, the Corporate Defendants deny the allegations in Paragraph 14 which purport to characterize a written document that speaks for itself and deny any characterizations of the Employment

Agreement that are inconsistent with its terms.

15. Paragraph 15 asserts legal conclusions with respect to which no response is required from the Corporate Defendants. To the extent a response may be deemed required, the Corporate Defendants deny the allegations set forth in Paragraph 15.

16. The Corporate Defendants deny the allegations in Paragraph 16 and aver that Onyx develops and finances commercial and industrial and small-scale utility solar energy projects in North America and that Onyx is owned by funds affiliated with Blackstone Inc. and SEEIT.

17. The Corporate Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 17, except that the Corporate Defendants admit only that Mr. Rosenblum was Onyx's first CEO.

18. The Corporate Defendants deny the allegations in Paragraph 18, except admit that Plaintiff became President of Onyx as of July 1, 2015.

19. The Corporate Defendants deny the allegations in Paragraph 19, and aver that Blackstone Solar Holdco GP L.L.C., the then-general partner of Onyx, established an advisory board to Onyx that consisted of three Blackstone employees and three Onyx employees in November 2017 and that Plaintiff served on such advisory board at that time.

20. The Corporate Defendants deny the allegations in Paragraph 20, and aver that Blackstone Solar Holdco GP L.L.C. appointed Plaintiff CEO by written resolution and consent on January 9, 2019.

21. The Corporate Defendants admit only that Section 9.3 of the Onyx Renewable Partners L.P. Second Amended and Restated Agreement of Limited Partnership, dated as of February 26, 2021, relates to "Management" and refer to said section for a complete and accurate

statement of its terms. The remaining allegations in Paragraph 21 purport to characterize a written document, which speaks for itself and thus no response is required.

22. The Corporate Defendants deny the allegations in Paragraph 22, including footnote 3, except admit that, following a rigorous auction sale process in which Plaintiff was actively involved, Blackstone Solar Holdco L.P., as “Seller”, Blackstone Solar Holdco GP L.L.C., as “Current Onyx GP”, and SEEIT Hemisphere I LLC, as “Purchaser,” and SEEIT Hemisphere II LLC, “Purchaser YieldCo”, entered into a Purchase and Sale Agreement dated as of December 23, 2020, and refer to said Purchase and Sale Agreement for a complete and accurate statement of its terms.

23. The Corporate Defendants deny the allegations set forth in Paragraph 23, and aver that Plaintiff was actively involved in the negotiations surrounding the Hemisphere Transaction, including negotiation regarding Onyx’s reporting obligations, and that Plaintiff thus was fully aware of and agreed to such reporting requirements imposed in connection with the Hemisphere Transaction.

24. The Corporate Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24.

25. The Corporate Defendants deny the allegations in Paragraph 25, except the Corporate Defendants admit that Plaintiff continued in her role as CEO of Onyx between the date the Purchase and Sale Agreement was signed and the date the Hemisphere Transaction closed.

26. The Corporate Defendants admit that Section 3(a) of the Employment Agreement relates to Plaintiff’s “Position, Duties, and Responsibilities” and refer to said section for a complete and accurate statement of its terms.

27. The Corporate Defendants deny the allegations in Paragraph 27, except the Corporate Defendants admit that Section 8 of the Employment Agreement relates to “Termination of Employment” and Appendix A contains definitions, including the definition of “Good Reason” and refer to said section and Appendix A for a complete and accurate statement of their terms.

28. The Corporate Defendants deny the allegations in Paragraph 28, except the Corporate Defendants admit that before the date the Hemisphere Transaction was closed, Plaintiff continued in her role as CEO of Onyx.

29. The Corporate Defendants deny the allegations in Paragraph 29.

30. The Corporate Defendants deny the allegations in Paragraph 30.

31. The Corporate Defendants admit only that Plaintiff gave notice of her resignation on April 23, 2021. To the extent the allegations in Paragraph 31 purport to characterize a written document, the document speaks for itself and no response is required.

32. The Corporate Defendants admit Plaintiff gave notice of her resignation on April 23, 2021, and refer to the April 23 Notice for a complete and accurate statement of its contents but deny the allegations in the April 23 Notice.

33. The Corporate Defendants deny the allegations in Paragraph 33.

34. The Corporate Defendants deny the allegations in Paragraph 34.

35. The Corporate Defendants deny the allegations in Paragraph 35 and aver that there is no documentary support for the term Plaintiff alleges.

36. The Corporate Defendants deny the allegations in Paragraph 36.

37. The Corporate Defendants admit that Section 22 of the Employment Agreement relates to “Litigation; Legal Fees” and refer to said section for a complete and accurate statement

of its terms.

38. The Corporate Defendants deny the allegations in Paragraph 38.

39. The Corporate Defendants deny the allegations in Paragraph 39, including footnote 7, and aver that Mr. Khan's May 21, 2021 email (the "May 21 Email") relates in part to legal fees Plaintiff allegedly incurred and refer to said email for a complete and accurate statement of its contents. The Corporate Defendants deny any characterizations of the May 21 Email inconsistent with its terms.

40. Paragraph 40 contains conclusions of law. Therefore, no response is required. To the extent a response may be deemed required, the Corporate Defendants deny the allegations in Paragraph 40.

41. The Corporate Defendants deny the allegations in Paragraph 41.

42. The Corporate Defendants deny the allegations in Paragraph 42, but the Corporate Defendants admit only that Plaintiff was offered a Proposed Transition and Separation Agreement after her resignation. The terms of the Proposed Transition and Separation Agreement speak for themselves, and the Corporate Defendants deny any characterization inconsistent with its terms.

43. The Corporate Defendants deny the allegations in Paragraph 43. The allegations in Paragraph 43 purport to characterize a written document, the terms of which speak for itself, and thus no response is required. The Corporate Defendants deny any characterization of the Employment Agreement that is inconsistent with its terms.

44. The Corporate Defendants admit that Section 9 of the Employment Agreement relates to "No Additional Restrictions" and refer to said section for a complete and accurate statement of its terms.

45. The Corporate Defendants admit that Section 11.2 of the Third Amended and Restated Limited Liability Company Agreement of Black Onyx dated as of December 20, 2019, relates to “Restrictive Covenants” and includes provisions regarding “Non-Competition,” “Non-Interference,” and “Non-Disparagement” and refer to said section for a complete and accurate statement of its terms.

46. The Corporate Defendants deny the allegations in Paragraph 46.

47. The Corporate Defendants deny the allegations in Paragraph 47.

48. The Corporate Defendants deny the allegations in Paragraph 48.

49. The Corporate Defendants deny the allegations in Paragraph 49.

50. The Corporate Defendants deny the allegations in Paragraph 50.

51. The Corporate Defendants deny the allegations in Paragraph 51.

52. The Corporate Defendants deny the allegations in Paragraph 52.

53. The Corporate Defendants deny the allegations in Paragraph 53.

54. The Corporate Defendants deny the allegations in Paragraph 54.

55. The Corporate Defendants deny the allegations in Paragraph 55.

56. The Corporate Defendants deny the allegations in Paragraph 56, except they admit only that Mr. Maxwell said “Happy International Women’s Day” to the male and female videoconference attendees.

57. The Corporate Defendants deny the allegations in Paragraph 57 and aver that Plaintiff was not the only female videoconference attendee.

58. The Corporate Defendants deny the allegations in Paragraph 58.

59. The allegations in Paragraph 59 state legal conclusions to which no response is required. To the extent they are deemed factual, the Corporate Defendants admit only that

Plaintiff was afforded at least 21 days to consider the Proposed Transition Agreement.

60. The Corporate Defendants admit that Plaintiff responded to the Proposed Transition and Separation Agreement offered to her by emailing Mr. Khan on May 17, 2021, and refer to that email for a complete and accurate statement of its language, but deny the allegations contained in her response.

61. The Corporate Defendants deny the allegations in Paragraph 61, and aver that the Corporate Defendants have repeatedly shared their view that Plaintiff's contractual positions are unsupportable. To the extent Paragraph 61 purports to characterize a written document, the document speaks for itself.

62. The allegations in Paragraph 62 purport to characterize a written document, which speaks for itself and to which no response is required.

63. The Corporate Defendants deny the allegations in Paragraph 63.

64. The Corporate Defendants deny the allegations in Paragraph 64, except the Corporate Defendants admit only that, consistent with company policy, the Interim Co-CEOs were provided access to certain information after Plaintiff's resignation to ensure all ongoing business obligations were fulfilled.

65. The Corporate Defendants deny the allegations in Paragraph 65.

66. The Corporate Defendants deny the allegations in Paragraph 66, but admit only that when Plaintiff insisted on a June 2 separation date, she was relieved of any further responsibilities.

67. The Corporate Defendants deny the allegations in Paragraph 67.

68. The Corporate Defendants deny the allegations in Paragraph 68, except that the Corporate Defendants admit only that when Plaintiff insisted on a June 2 separation date, she

was relieved of any further responsibilities, and the outside vendor that is responsible for managing Onyx's website was directed to remove any reference to Plaintiff.

69. The Corporate Defendants admit that Plaintiff was granted Series A Fixed Allocation Units and Series B Fixed Allocation Units in Black Onyx, in each case representing a profits interest in Onyx Renewable Partners L.P, pursuant to the terms of the Third Amended and Restated Limited Liability Company Agreement.

70. The Corporate Defendants admit only that Plaintiff was not the only employee who received profits interests in Black Onyx. The Corporate Defendants deny the remaining allegations in Paragraph 70.

71. The Corporate Defendants admit that the Third Amended and Restated Limited Liability Company Agreement provides for the repurchase of vested Units and refer to the relevant sections for a complete and accurate statement of its terms. The Corporate Defendants deny the allegations in footnote 12 that "Onyx has not contested" her claim to entitlement to "permanent units."

72. The Corporate Defendants admit that the Third Amended and Restated Limited Liability Company Agreement provides for the repurchase of vested Units and refer to the relevant sections for a complete and accurate statement of their terms. The Corporate Defendants deny any characterization of the written document that is inconsistent with its terms.

73. The Corporate Defendants deny the allegations in Paragraph 73.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
FIRST CAUSE OF ACTION

74. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 73 as if fully set forth herein.

75. The allegations contained in Paragraph 75 state legal conclusions to which no

response is required. To the extent a response is deemed required, Corporate Defendants deny the allegations in Paragraph 75.

76. The allegations contained in Paragraph 76 state legal conclusions to which no response is required. To the extent a response is deemed required, Corporate Defendants deny the allegations in Paragraph 76.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
SECOND CAUSE OF ACTION

77. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 76 as if fully set forth herein.

78. The allegations contained in Paragraph 78 state legal conclusions to which no response is required. To the extent a response is deemed required, Corporate Defendants deny the allegations in Paragraph 78.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
THIRD CAUSE OF ACTION

79. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 78 as if fully set forth herein.

80. The allegations contained in Paragraph 80 purport to characterize a written document which speaks for itself, and to which no response is required. To the extent a response is deemed required, Corporate Defendants deny any characterization of the Employment Agreement that is inconsistent with its terms.

81. The allegations contained in Paragraph 81 purport to characterize written documents which speak for themselves, and to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny any characterization of the documents inconsistent with their terms.

82. The allegations contained in Paragraph 82 purport to characterize written documents which speak for themselves itself, and to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny any characterization of the documents inconsistent with their terms.

83. The Corporate Defendants deny the allegations in Paragraph 83.

84. The Corporate Defendants deny the allegations in Paragraph 84 and aver that there is no documentary support for the term Plaintiff alleges.

85. The allegations contained in Paragraph 85 state legal conclusions to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny the allegations in Paragraph 85.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
FOURTH CAUSE OF ACTION

86. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 85 as if fully set forth herein.

87. The Corporate Defendants admit only that Plaintiff has commenced litigation purportedly related to the Employment Agreement and other documents, and deny the remaining allegations in Paragraph 87.

88. The allegations contained in Paragraph 88 state legal conclusions to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny the allegations in Paragraph 88.

89. The Corporate Defendants deny the allegations in Paragraph 89.

90. The Corporate Defendants deny the allegations in Paragraph 90.

91. The allegations contained in Paragraph 91 state legal conclusions to which no response is required. To the extent a response is deemed required, the Corporate Defendants

deny the allegations in Paragraph 91.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
FIFTH CAUSE OF ACTION

92. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 91 as if fully set forth herein.

93. The Corporate Defendants deny the allegations in Paragraph 93.

94. The Corporate Defendants deny the allegations in Paragraph 94 and aver that there is no documentary support for the term Plaintiff alleges.

95. The Corporate Defendants deny the allegations in Paragraph 95.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
SIXTH CAUSE OF ACTION

96. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 95 as if fully set forth herein.

97. The allegations contained in Paragraph 97 state legal conclusions to which no response is required. To the extent a response is deemed required, Corporate Defendants deny the allegations in Paragraph 97.

98. The Corporate Defendants admit the allegations in Paragraph 98.

99. The allegations contained in Paragraph 99 state legal conclusions to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny the allegations in Paragraph 99.

100. The allegations contained in Paragraph 100 state legal conclusions to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny the allegations in Paragraph 100.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
SEVENTH CAUSE OF ACTION

101. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 100 as if fully set forth herein.

102. The allegations contained in Paragraph 102 purport to characterize written documents which speak for themselves and to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny any characterization of the documents inconsistent with their terms.

103. The allegations contained in Paragraph 103 purport to characterize written documents which speak for themselves itself, and to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny any characterization of the documents inconsistent with their terms.

104. The Corporate Defendants deny the allegations in Paragraph 104.

105. The allegations contained in Paragraph 105 state legal conclusions to which no response is required. To the extent a response is deemed required, the Corporate Defendants deny the allegations in Paragraph 105.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
EIGHTH CAUSE OF ACTION

106. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 105 as if fully set forth herein.

107. Paragraph 107 asserts legal conclusions with respect to which no response is required from the Corporate Defendants. To the extent a response may be deemed required, the Corporate Defendants deny the allegations set forth in Paragraph 107.

108. Paragraph 108 asserts legal conclusions with respect to which no response is required from the Corporate Defendants. To the extent a response may be deemed required, the Corporate Defendants deny the allegations set forth in Paragraph 108.

109. Paragraph 109 asserts legal conclusions with respect to which no response is required from the Corporate Defendants. To the extent a response may be deemed required, the Corporate Defendants admit the allegations in Paragraph 109.

110. Paragraph 110 asserts legal conclusions with respect to which no response is required from the Corporate Defendants. To the extent a response may be deemed required, the Corporate Defendants deny the allegations set forth in Paragraph 110.

111. The Corporate Defendants deny the allegations in Paragraph 111.

112. The Corporate Defendants deny the allegations in Paragraph 112.

113. The Corporate Defendants deny the allegations in Paragraph 113.

114. The Corporate Defendants deny the allegations in Paragraph 114.

115. The Corporate Defendants deny the allegations in Paragraph 115.

116. The Corporate Defendants deny the allegations in Paragraph 116.

AS AND FOR AN ANSWER TO PLAINTIFF'S  
NINTH CAUSE OF ACTION

117. The Corporate Defendants repeat each and every response and averment as set forth in Paragraphs 1 through 116 as if fully set forth herein.

118. The Corporate Defendants deny the allegations in Paragraph 118.

119. The Corporate Defendants deny the allegations in Paragraph 119.

120. The Corporate Defendants deny the allegations in Paragraph 120, except admit that following Plaintiff's voluntary resignation, Onyx offered Plaintiff a Proposed Transition and Separation Agreement.

121. The Corporate Defendants deny the allegations in Paragraph 121.

122. The Corporate Defendants deny the allegations in Paragraph 122.

123. The Corporate Defendants deny the allegations in Paragraph 123.

124. The Corporate Defendants deny the allegations in Paragraph 124.

The Corporate Defendants deny the allegations in subparagraphs (a) through (g) of the “WHEREFORE” clause of the Complaint. The Corporate Defendants deny that Plaintiff is entitled to any of the relief sought in subparagraphs (h) through (k) of the “WHEREFORE” clauses of the Complaint, deny that they violated any law, and further deny that Plaintiff is entitled to any relief whatsoever. The Corporate Defendants also deny that Plaintiff is entitled to a jury trial on any of the Counts asserted in the Complaint (which she has not asserted in any event).

### **AFFIRMATIVE DEFENSES**

The Corporate Defendants, by and through their undersigned counsel, assert the following Affirmative Defenses. The Corporate Defendants hereby assert and reserve unto themselves the right to assert additional separate defenses and affirmative defenses, counterclaims, cross claims, third party claims, and objections as revealed or suggested by ongoing investigation and discovery in this matter that may prove applicable herein, including in accordance with the New York Civil Practice Law and Rules § 3018, to the extent such defenses are applicable.

#### **First Affirmative Defense**

The Complaint, in one or more causes of action set forth therein, fails to state claims upon which relief can be granted, in whole or in part.

#### **Second Affirmative Defense**

Documentary evidence conclusively establishes that the Complaint, in one or more causes of action set forth therein, lacks merit, in whole or in part.

#### **Third Affirmative Defense**

Plaintiff's claims for relief are barred, in whole or in part, to the extent they were not filed within the applicable statute of limitations and/or filing period(s).

**Fourth Affirmative Defense**

Plaintiff's claims for relief are barred, if and to the extent Plaintiff failed to comply with the administrative, procedural, and jurisdictional requirements of the New York State Executive Code and the New York City Administrative Code.

**Fifth Affirmative Defense**

Plaintiff's claims for relief are barred, in whole or in part, to the extent that they are barred by the equitable doctrines of laches, waiver, estoppel, and/or unclean hands.

**Sixth Affirmative Defense**

At all relevant times the Corporate Defendants complied with all contractual obligations applicable to Plaintiff.

**Seventh Affirmative Defense**

At all relevant times the Corporate Defendants complied with all applicable federal, state, and local laws, rules, regulations, codes and standards.

**Eighth Affirmative Defense**

Plaintiff cannot make out a prima facie case of discrimination or retaliation under the New York City Human Rights Law or the New York State Human Rights Law.

**Ninth Affirmative Defense**

At all relevant times, including prior to the allegations that form the basis of Plaintiff's claims, the Corporate Defendants aver that they exercised reasonable care to prevent and promptly correct any discriminatory or retaliatory behavior. The Corporate Defendants further aver that Plaintiff unreasonably failed to take advantage of the preventative and/or corrective opportunities

provided by the Corporate Defendants to avoid harm otherwise. The first time Plaintiff made any suggestion or claim, either implicitly or explicitly, of discriminatory or retaliatory behavior by the Corporate Defendants was on May 17, 2021, after her voluntary resignation, after she had already announced her departure as CEO to the entire staff of Onyx, and after she received the proposed Transition and Separation Agreement.

#### **Tenth Affirmative Defense**

At all relevant times, including prior to the allegedly discriminatory or retaliatory acts referred to in the Complaint, the Corporate Defendants aver that they maintained and complied with their policies, programs, and procedures for the prevention and detection of unlawful discriminatory and/or retaliatory practices by their employees and agents.

#### **Eleventh Affirmative Defense**

Corporate Defendants' liability and penalties, if any, should be mitigated by virtue of the factors set forth in in Section 8-107(13)(d) of the Administrative Code.

#### **Twelfth Affirmative Defense**

If and to the extent any action taken with respect to Plaintiff was motivated by an impermissible consideration, which the Corporate Defendants expressly deny, the Corporate Defendants aver that, in compliance with applicable law, they would have taken the same action for non-discriminatory and/or non-retaliatory reasons.

#### **Thirteenth Affirmative Defense**

Plaintiff lacks a good faith basis for her claims in whole or in part, thereby entitling the Corporate Defendants to an award of attorneys' fees, costs, and expenses incurred in defending this action, including under Section 8-502(g) of the Administrative Code.

#### **Fourteenth Affirmative Defense**

The Corporate Defendants affirmatively plead the defense of good faith and affirmatively aver that at all times the Corporate Defendants acted in good faith, and without any discriminatory, retaliatory, wrongful or malicious intent and without reckless indifference to legal requirements with respect to all employment actions concerning Plaintiff. The Corporate Defendants further aver that they did not breach any obligations or duties owed to Plaintiff, to the extent any existed under applicable laws and regulations, and that any actions taken towards Plaintiff were for legitimate, non-discriminatory, non-retaliatory business reasons, including the Corporate Defendants' desire to convince Plaintiff to continue in her role as CEO, and failing that, to reach an amicable resolution regarding Plaintiff's departure from Onyx.

#### **Fifteenth Affirmative Defense**

The Complaint fails to state a claim against the Corporate Defendants upon which declaratory or injunctive relieve or an award of incidental, consequential, compensatory and/or punitive damages can be granted.

#### **Sixteenth Affirmative Defense**

The Corporate Defendants affirmatively deny that Plaintiff sustained any damages as a result of any alleged discriminatory/retaliatory action or breach of any obligations or duties owed to Plaintiff by the Corporate Defendants and/or any of their employees or agents and affirmatively aver that Plaintiff is not entitled to any legal, equitable, declaratory, or monetary relief, including, but not limited to, compensatory damages, punitive damages, pre-judgment interest, attorneys' fees or any other lost benefits.

#### **Seventeenth Affirmative Defense**

The Corporate Defendants affirmatively deny that Plaintiff sustained any damages as a

result of any fault or wrongdoing on the part of any of the Corporate Defendants.

#### **Eighteenth Affirmative Defense**

The Corporate Defendants assert the right to rely upon any after-acquired evidence of misconduct by Plaintiff to mitigate any alleged damages.

#### **Nineteenth Affirmative Defense**

Even if Plaintiff sustained damages as the result of the conclusion of her employment, which is specifically denied, the Corporate Defendants aver that Plaintiff failed to make reasonable efforts to mitigate her alleged damages.

#### **Twentieth Affirmative Defense**

Plaintiff's claim for emotional injury and/or mental anguish damages is barred, in whole or in part, because the Corporate Defendants' alleged conduct did not rise to the level of culpability to justify an award of such damages and/or because the Corporate Defendants did not cause such damages.

Pursuant to Section 17 of Plaintiff's Employment Agreement, the Corporate Defendants do not consent to the trial by jury of any issue, including, but not limited to any determination of equitable remedies.

### **AMENDED COUNTERCLAIMS AGAINST PLAINTIFF**

The Corporate Defendants, by and through their undersigned counsel, as and for their counterclaims against Plaintiff, Ja Lee Kao, state as follows:

#### **PRELIMINARY STATEMENT**

1. This matter arises from Counterclaim-Defendant Ja Lee Kao's ("J. Kao") abrupt resignation from her position as the President and Chief Executive Officer ("CEO") of Counterclaim-Plaintiff, Onyx on April 23, 2021. That voluntary resignation, in which J. Kao

expressly stated she was resigning “*without* Good Reason under the terms of [her] Employment Agreement” (emphasis added), blindsided Onyx and came just eight weeks after a new investor acquired a fifty-percent stake in Onyx’s business—a transaction that, upon closing resulted in J. Kao personally receiving a distribution in excess of \$2 million. J. Kao helped negotiate that deal, knowing full well that it necessarily would result in some changes in Onyx management’s reporting obligations. Significantly, and as J. Kao admits in the Complaint, at no point before she collected that outsized distribution—indeed, neither before her surprise resignation nor in her April 23, 2021 Resignation Notice (the “April 23 Notice”)—did she raise any claims or issues related to alleged discrimination, retaliation or other mistreatment because of her gender or otherwise.

2. In the days following receipt of the April 23 Notice, Onyx tried to convince J. Kao to remain as CEO, but she made clear that she would not change her mind because she was “burnt out” and “need[ed] a break.” While disappointed, Onyx respected J. Kao’s decision and proposed a Transition and Separation Agreement on April 30, 2021, consistent with the desire that J. Kao expressed in her April 23 Notice for “as amicable a separation as possible.”

3. But instead of engaging in good faith discussions about the terms of the proposed Transition and Separation Agreement, J. Kao responded with baseless accusations against Defendants—merely because they had proposed wholly customary terms in the Proposed Transition and Separation Agreement—of “threaten[ing] her,” “planning to sue [her] for resigning,” and “spitting in her face.” Going even further, for the very first time, and without any basis whatsoever, J. Kao accused Defendants of having engaged in “racial and gender discrimination.” J. Kao predicated this incendiary charge on the fact that Onyx had proposed a Transition and Separation Agreement, and that other alleged “behavior” following the closing of

the Hemisphere Transaction was discriminatory, such as an alleged comment by Jonathan Maxwell at the start of a videoconference, wishing a “Happy International Women’s Day” to the men and women in attendance on the date that was, in fact, International Women’s Day. These new, baseless allegations of discrimination and retaliation are flatly denied by Defendants.

4. Though surprised by J. Kao’s reaction, Onyx still wished to reach an amicable resolution. But while the parties were engaged in good faith efforts to reach an amicable resolution and prior to any impasse, J. Kao filed the Complaint on July 19, 2021, without notice to counsel or the parties, in a clear attempt to increase her leverage and run up the legal fees she expected Onyx to pay.

5. To make matters worse, J. Kao continues to claim that Onyx has an open-ended obligation to fund this lawsuit against themselves, notwithstanding her unreasonable and unsupportable interpretation of the terms of the Employment Agreement and other relevant documents, and despite the fact that she brings claims that are outside the scope of any alleged obligation to pay her legal fees or expenses.

6. Onyx subsequently uncovered evidence of significant prior transgressions by J. Kao while she was the CEO of Onyx. In particular, Onyx has become aware of multiple instances in which J. Kao breached her fiduciary duties to Onyx. These breaches include J. Kao using Onyx’s General Counsel, Hilary Kao (“H. Kao”)—who is also J. Kao’s husband—to directly negotiate the terms of her employment *against* the interests of Onyx. Unbeknownst to anyone else at Onyx, J. Kao instructed H. Kao to prepare a draft of a new employment agreement and to even try and figure out a way to make their new terms less conspicuous to avoid the attention of Onyx’s advisory board or General Partner. In other words, J. Kao repeatedly treated Onyx’s General Counsel as if he were her personal lawyer and adverse to Onyx, his actual and only client. More

recently, J. Kao appears to have coordinated with her husband to improperly download thousands of confidential and proprietary Onyx documents from Onyx's cloud-based data room just two days prior to his own resignation from Onyx.

7. These Counterclaims are brought to hold J. Kao responsible for these blatant breaches of corporate trust. Moreover, Onyx seeks to have this Court issue a declaratory judgment regarding J. Kao's rights under the Employment Agreement—namely, that while the Employment Agreement does purport to require the payment of J. Kao's legal fees for specific contractual claims, that obligation does not extend to J. Kao's legal fees and expenses related to her claims of discrimination, retaliation or the present Counterclaims as these claims are plainly outside the reach of Section 22 of the Employment Agreement. Even as to the contractual claims, Onyx's obligation is not absolute and unbounded; rather, in addition to the express limitations on the scope of the obligation as set forth in the contract, the obligation is cabined by the implied covenant of good faith and fair dealing inherent in every contract term, such that only fees and costs that are reasonable and incurred in good faith are reimbursable.

### **PARTIES**

8. Counterclaim-Defendant J. Kao was hired as Onyx's President in 2015 and was later appointed CEO of Onyx in 2019. Without prior warning or notice, she voluntarily tendered her resignation as President and CEO of Onyx on April 23, 2021, and that resignation was to take effect on June 22, 2021. J. Kao is a resident of the state of New York.

9. Counterclaim-Plaintiff Onyx is a clean energy provider that was created by funds affiliated with Blackstone Inc. (the "Initial Sponsors") to identify and develop North American solar projects in the commercial and industrial space. In February 2021, entities managed by Sustainable Development Capital LLP ("SDCL") acquired a fifty-percent interest in Onyx. Onyx

is a limited partnership formed under the laws of Delaware with its principal place of business at 230 Park Avenue, Suite 845, New York, NY 10169.

10. Counterclaim-Plaintiff ORP GP is the general partner of Onyx and a limited liability company formed under the laws of Delaware with its principal place of business at 345 Park Avenue, New York, NY 10154.

11. Counterclaim-Plaintiff Black Onyx is a limited partner of Onyx and is a limited liability company formed under the laws of Delaware with its principal place of business at 345 Park Avenue, New York, NY 10154.

### **FACTUAL BACKGROUND**

#### **A. J. Kao Joins Onyx, Becomes CEO, and Recommends Her Husband Be Appointed General Counsel.**

12. In 2015, Director Bilal Khan offered J. Kao the position of President of Onyx.

13. On July 1, 2015, J. Kao entered into an employment agreement to become the President of Onyx (the "Employment Agreement").

14. The Employment Agreement, which is governed by Delaware law, included, among other things, a provision regarding the payment of costs and expenses of the parties in connection with disputes about the Employment Agreement and other relevant agreements. Specifically, Section 22 of the Employment Agreement (Litigation; Legal Fees) provides as follows:

The parties acknowledge and agree that in connection with any dispute [sic] any of this Agreement, the Partnership Agreement or the MLP LLC Agreement, the Company shall pay all costs and expenses of the parties to this Agreement, including without limitation, all legal fees and expenses of the Executive.

15. Implicit in the Employment Agreement, including Section 22, is a covenant of good faith and fair dealing.

16. The implied covenant of good faith and fair dealing obligates contracting parties to act in a manner that preserves the spirit of their bargain and prohibits contracting parties from exercising any discretion under a contract in a manner that is impliedly proscribed by the contract's express terms.

17. While she was Onyx's President, J. Kao reported directly to Onyx's first CEO, who had founded the entity that became Onyx following the Initial Sponsors' initial investment.

18. In 2018, Onyx's first CEO departed and, upon the recommendation of Mr. Khan, who served on an advisory board to Onyx, J. Kao was asked to take on the role of CEO and to retain her position as President.

19. Although Mr. Khan suggested to J. Kao that they discuss an increase in her compensation at the time, J. Kao asked that they wait until bonus disbursements were discussed in the first quarter of the following year, that is 2019.

20. Following negotiations regarding J. Kao's compensation in her new position as CEO and her continuing role as President of Onyx, on April 5, 2019, by written resolution of Blackstone Solar Holdco GP L.L.C., the then-general partner of Onyx, J. Kao and Onyx agreed to increase J. Kao's base salary by approximately 40 percent, with retroactive effect to January 2019.

21. On December 9, 2019, by written resolution, J. Kao and Onyx agreed to an additional 8.3 percent increase in J. Kao's base salary, to be effective as of January 1, 2020.

22. In or around September 2017, J. Kao had recommended that her husband, H. Kao, be hired as Onyx's Interim General Counsel. Based on J. Kao's assertions that the appointment would be "temporary," and based on express assurances from J. Kao that J. Kao and H. Kao would observe all necessary boundaries to ensure that there would be no conflict as interest, H. Kao was appointed Interim General Counsel of Onyx.

23. As General Counsel of Onyx, H. Kao's sole client under the New York Rules of Professional Conduct was Onyx.

24. In his role as General Counsel of Onyx, H. Kao worked in conjunction with Onyx's outside counsel to negotiate employment agreements for senior Onyx executives.

25. Onyx did not retain or authorize H. Kao to provide personal legal advice to J. Kao in conflict with his obligations and ethical duties to Onyx.

26. H. Kao remained Onyx's General Counsel until his resignation on May 17, 2021.

**B. Blackstone Sells Fifty-Percent of Its Interest in Onyx to Entities Managed By SDCL.**

27. In February 2021, following a rigorous auction sale process, Blackstone sold fifty-percent of its interest in Onyx to entities managed by SDCL (the "Hemisphere Transaction").

28. SDCL is a UK-based alternative investment firm that manages SDCL Energy Efficiency Income Trust PLC ("SEEIT"), an investment company listed on the London stock exchange. SEEIT's investments include investments in energy efficiency and distributed energy generation assets in the UK, Continental Europe, and North America.

29. Because SEEIT is a public company investor, its acquisition of a fifty-percent interest in Onyx brought along new reporting requirements.

30. Before the Hemisphere Transaction closed, J. Kao was heavily involved in negotiating what those reporting obligations would entail. J. Kao was thus well aware that, in continuing her role as President and CEO following the Hemisphere Transaction, one of her responsibilities would be to facilitate the very reporting obligations that she negotiated.

31. J. Kao received in excess of \$2 million in distributions in connection with the Hemisphere Transaction, which closed on February 26, 2021.

**C. J. Kao Voluntarily Resigns as President and CEO of Onyx without Prior Notice or Warning.**

32. Just eight weeks after the Hemisphere Transaction closed, on April 23, 2021, J. Kao voluntarily tendered her resignation as President and CEO of Onyx.

33. At no point during those eight weeks after the Hemisphere Transaction closed and before her resignation, including in any regularly scheduled meetings of the Board of Directors, did J. Kao express to Mr. Khan or to Mr. Maxwell either that the new reporting obligations were different from what she understood they would be going into the Hemisphere Transaction or that she had any concerns about any purported changes to her role or responsibilities.

34. J. Kao's resignation came unexpectedly, blindsiding Onyx and its Board of Directors.

35. In the April 23 Notice, J. Kao cited Onyx's new reporting requirements as the reason for her resignation.

36. Notably, J. Kao's April 23 Notice expressly represented that she was resigning "without Good Reason under the terms of my Employment Agreement" while, at the same time, attempting to reserve her right to resign with Good Reason.

37. J. Kao did not mention any alleged unlawful discrimination or retaliation as the reason for her resignation on April 23.

38. Upon receiving J. Kao's April 23 Notice, Onyx urged J. Kao to reconsider. As one of her greatest supporters, Mr. Khan attempted to convince her to stay in her role as CEO and President. Mr. Maxwell, whose firm had just made a sizeable investment based in large part on J. Kao's continuing leadership role with Onyx, similarly desired for J. Kao to stay on in her role.

39. J. Kao rebuffed these efforts, explaining that she was "burnt out" and "need[ed] a break."

40. Although Onyx and Messrs. Khan and Maxwell were certainly disappointed by this news, they accepted J. Kao's wishes and sought to reach agreement on the terms of an amicable departure.

41. On April 30, 2021, Onyx provided J. Kao with a Proposed Transition and Separation Agreement.

42. Unhappy with the proposed terms, J. Kao responded with a series of baseless claims.

43. On May 17, 2021, J. Kao sent Mr. Khan a multiple-page email (the "May 17 Email") in which she accused Onyx of "threaten[ing] her," "planning to sue [her] for resigning," and "spitting in her face."

44. In the May 17 Email, J. Kao also raised claims for the first time that Onyx and the Individual Defendants had engaged in "racial and gender discrimination," pointing to the Proposed Transition and Separation Agreement and an instance in which Mr. Maxwell said "Happy International Women's Day" at the start of a videoconference on International Women's Day in which both men and women were present.

45. Since her resignation from Onyx, J. Kao has made repeated demands for the payment of her legal fees without any indication that she views such obligation as limited by any duty to act reasonably and in good faith or that her entitlement to legal fees is limited to her contractual rights under the specified agreements.

46. Indeed, J. Kao has engaged in conduct indicating that she is not interested in a good faith amicable resolution of the present matter.

**D. J. Kao Obtains Personal Legal Advice Against Onyx's Interest From H. Kao While He Is Serving As Onyx's General Counsel**

47. Following J. Kao and H. Kao's resignations, the Counterclaim-Plaintiffs learned of a number of breaches of J. Kao's obligations to them, in part through forensic investigation conducted following the Kaos' departures.

48. In one such prior transgression, which was unknown to Onyx prior to this dispute, J. Kao solicited and accepted the personal legal counsel of her husband, while he was serving as Onyx's General Counsel, and obtained advice in negotiating amendments to her personal benefit in her Employment Agreement with Onyx.

49. On October 25, 2019, J. Kao initially solicited H. Kao to revise her Employment Agreement attaching for his review her Employment Agreement and Onyx's standard employment agreement.

50. On October 31, 2019, H. Kao wrote back to J. Kao agreeing to revise her Employment Agreement and noting his initial observations about her Employment Agreement.

51. In a stunning act of disloyalty, on both November 14 and 26, 2019, in response to J. Kao's request, H. Kao provided written changes and comments to J. Kao's Employment Agreement in a way that advantaged J. Kao vis-a-vis Onyx.

52. H. Kao's revisions to J. Kao's Employment Agreement included a proposed \$225,000 increase in compensation, a non-discretionary annual bonus at 55% of her base compensation, reimbursed expenses for first-class travel and use of a black car to commute to and from the office from her home,<sup>1</sup> and other terms that were highly favorable to J. Kao in her individual capacity. On this last point, H. Kao expressly recognized and provided individual legal

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<sup>1</sup> H. Kao edited the Employment Agreement to state, "Executive's reasonable business expenses include existing Company procedures to reimburse Executive for first class air travel and black car service transportation to and from home for travel and to home from work events and from the office."

counsel on the impropriety of such requests and the likely negative reaction of the advisory board to such proposed benefits. H. Kao included a footnote addressed to J. Kao regarding a proposed edit: “Ja – your call on whether you want to call this out. As you have moved to the top, I would like to avoid any appearance of impropriety here. Happy to drop.”

53. H. Kao’s proposed revisions to the Employment Agreement also included a new provision that would entitle J. Kao to resign with Good Reason upon Onyx’s “reduction in non-discretionary bonus payable to Executive,” a term not previously included in J. Kao’s Employment Agreement, and not found in any employment agreements for other Onyx employees or executives.

54. H. Kao’s edits to the Employment Agreement did not reflect a negotiation between Onyx (H. Kao’s client as General Counsel) and J. Kao. Rather, without Onyx’s knowledge, J. Kao colluded with H. Kao and corrupted H. Kao’s ethical duty to Onyx in a scheme to disadvantage Onyx and improve J. Kao’s position.

55. At no time did J. Kao inform Onyx’s General Partner or its advisory board that she had enlisted H. Kao to advise or assist with her Employment Agreement. Indeed, Onyx’s General Partner and advisory board were not aware that changes to J. Kao’s Employment Agreement were under consideration, and had not authorized H. Kao to advise J. Kao or revise J. Kao’s Employment Agreement.

56. Onyx’s standard procedure for negotiating employment-related documents for executives was to have substantive changes to those agreements made by its outside counsel. For J. Kao to induce H. Kao to substantively mark-up a key executive’s Employment Agreement without input from outside counsel was outside the bounds of Onyx’s normal practice.

57. Finally, the changes J. Kao conspired with H. Kao to make to the Employment Agreement on November 14 and 26, 2019 were to benefit J. Kao and did not reflect J. Kao giving up any consideration.

58. Thereafter, and again unknown to Onyx prior to this dispute, J. Kao, acting as CEO of Onyx, reviewed H. Kao's proposed revisions to her Employment Agreement and provided handwritten notations on those proposed revisions. In her email responding to H. Kao's mark-up of the Employment Agreement, J. Kao noted that "I have layered in some comments, but the way you have marked up, makes it look like there are a ton of changes. I think it might be better to start with the original again and then see if the redline looks less onerous."

59. J. Kao's comment reflected that H. Kao's extensive revisions in her favor made it less likely that Onyx (H. Kao's client) would agree to all the revisions they were proposing and would increase the odds that the changes would be reviewed by objective counsel.

60. H. Kao then wrote back to J. Kao stating in relevant part "Most of what I changed was routine stuff not significant, but I agree it looks quite red. Perhaps those changes should be done without redline and then I could note only the few things that are commercially material. I will work on this tomorrow." In agreeing to "work on" the draft agreement at J. Kao's direction, H. Kao was colluding with J. Kao to only highlight certain terms in J. Kao's contract so as to lessen the appearance of having made such extensive changes to the Employment Agreement.

61. That same day, December 4, 2021, H. Kao wrote an email to himself titled "Ja – Onyx to dos" which stated "(1) Resolution to increase salary to higher number. (2) Splitting 50% time to be permissible for new venture. new permanent units." This General Partner resolution was purportedly to implement certain of the changes contemplated in the proposed revised Employment Agreement orchestrated by J. Kao alone.

62. The next day, December 5, 2019, H. Kao sent J. Kao a draft General Partner resolution for her review which purported to increase her salary significantly, allow her to spend 50% of her time on the launch of a new energy as a service business (i.e., entirely outside her duties as Onyx CEO), and grant her additional equity in Black Onyx (the “General Partner Resolution”).

63. On Monday December 9, 2019, H. Kao sent the General Partner Resolution to Mr. Khan for his review and approval. Neither J. Kao nor H. Kao informed Mr. Khan that J. Kao and he had secretly and together arrived at edits to J. Kao’s Employment Agreement, and, indeed, neither ever made Mr. Khan aware of their clandestine discussions regarding its “commercially material” terms.

64. On December 11, 2019, Mr. Khan – critically, without having knowledge of J. Kao’s and H. Kao’s collusion – approved the General Partner Resolution.

65. J. Kao and H. Kao thus succeeded in their surreptitious and wrongful effort to significantly increase J. Kao’s compensation and purported equity in Black Onyx without having to sacrifice any of the favorable provisions in her operative Employment Agreement.

66. By soliciting and accepting H. Kao’s legal counsel to promote her interests with regard to the terms of her Employment Agreement with Onyx, J. Kao diverted and utilized Onyx’s resources for her own personal gain and obtained personal legal counsel from a lawyer she knew was conflicted by virtue of his representation of Onyx in his role as its General Counsel.

67. Upon information and belief, J. Kao also utilized H. Kao’s legal counsel in relation to her April 23, 2021 resignation from Onyx. By accepting such counsel, J. Kao again utilized Onyx’s resources for her own personal gain and obtained personal, legal counsel from a lawyer she knew was conflicted by virtue of his representation of Onyx.

68. Further, two days before he tendered his own resignation on May 17, 2021, H. Kao downloaded a massive number of Onyx's confidential and proprietary documents from Onyx's cloud-based data room. Upon information and belief, J. Kao coordinated with H. Kao on this and/or directed this action. The downloaded documents related to numerous projects that had been developed and financed by Onyx, including confidential financial models, solar energy system designs, system performance reports, power purchase agreements with key customers, customer agreements, site control documents, tax equity financing agreements and renewable energy incentive application documentation, all of which could be used in myriad nefarious ways, including use as building blocks for J. Kao and H. Kao to compete with Onyx in the future, which would obviously pose a very serious threat to Onyx. By these actions, J. Kao again acted contrary to Onyx's interests for her own personal gain. In addition, and in further breach of her fiduciary duties, J. Kao's collaboration with and/or direction to H. Kao to download these documents potentially exposes Onyx to breach of confidentiality and other claims from Onyx's third-party clients and counterparties which have caused or will cause damage to Onyx.

**E. J. Kao Refuses to Return Property Belonging to Onyx**

69. J. Kao was issued a laptop computer by Onyx. The laptop is the property of Onyx and was provided to J. Kao for her use solely as an employee of Onyx. The laptop contains Onyx's most confidential and proprietary information, including its most sensitive and restricted information that would only be made available to its CEO, such as business plans, growth initiatives, potential strategic transactions, confidential employee information and historical legal records.

70. Onyx's employee handbook provides that upon separation an employee must return all Onyx property, including computer equipment.

71. After J. Kao's resignation, Onyx tried repeatedly to obtain the return of property belonging to Onyx beyond the documents downloaded by H. Kao prior to his departure, including J. Kao's laptop.

72. In particular, in a phone call on June 8, 2021, Onyx requested that J. Kao return all Onyx property, including Onyx's laptop computer. Again, on June 15, 2021, Onyx wrote to J. Kao through her counsel requesting that J. Kao return all Onyx property, including the Onyx laptop. Finally, on December 22, 2021, undersigned counsel for Onyx wrote to counsel for J. Kao again requesting return of all Onyx property.

73. On December 30, 2021, J. Kao's counsel replied that J. Kao would only return Onyx's laptop to a nonparty computer specialist so that she could have certain information permanently deleted from the computer before it was returned to Onyx.

74. That same day undersigned counsel reiterated that Onyx was entitled to the unconditional return of its property and requested that J. Kao confirm she would return Onyx's property, including the laptop. The following day, December 31, 2021, J. Kao's counsel suggested he would have his client deliver Onyx's laptop to his office, but has provided no date or time or confirmation that the delivery would or did happen.

75. To date, over six months after her resignation from Onyx and with no reasonable explanation, J. Kao continues to refuse to return this Company property unaltered to Onyx.<sup>2</sup>

**FIRST COUNTERCLAIM**  
**BREACH OF FIDUCIARY DUTY**

76. The Counterclaim-Plaintiffs repeat and re-allege each and every allegation contained in Paragraphs "1" through "75" herein.

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<sup>2</sup> Absent J. Kao and her counsel agreeing to return the Onyx laptop on terms acceptable to the Counterclaim-Plaintiffs, Counterclaim-Plaintiffs reserve the right to move to compel the return of the laptop and/or amend their Counterclaims to include a claim for conversion.

77. As CEO and President of Onyx, J. Kao owed the Counterclaim-Plaintiffs a fiduciary duty of loyalty, care and good faith.

78. J. Kao has breached those fiduciary duties to the Counterclaim-Plaintiffs by, among other things, (a) obtaining legal counsel with respect to her Employment Agreement from Onyx's General Counsel on behalf of herself personally and against the interests of Onyx; (b) obtaining legal counsel with respect to her resignation from Onyx's General Counsel on behalf of herself personally and against the interests of Onyx; and (c) coordinating with and/or inducing Onyx's General Counsel to download documents that she intended to use to compete with Onyx in the future and/or for other purposes against Onyx's interests.

79. As a result of the foregoing, J. Kao was a "Bad Leaver," as that term is defined in the Third Amended and Restated Limited Liability Company Agreement of Black Onyx dated as of December 20, 2019, and which includes "any material act of fraud, breach of fiduciary duty of loyalty, care or similar misconduct or gross negligence on the part of the Leaver with respect to the Partnership or any of its Affiliates."

80. Once J. Kao is determined to be a Bad Leaver, Article X (Repurchase Rights and Forfeiture of Units) of the Third Amended and Restated Limited Liability Company Agreement of Black Onyx dated as of December 20, 2019, requires Black Onyx to repurchase J. Kao's equity Units at the "Repurchase Price" of \$0, rather than at "Fair Market Value," as used in Article X, and as defined in the Onyx Renewable Partners L.P. Second Amended and Restated Agreement of Limited Partnership, dated as of February 26, 2021. In any event, J. Kao's equity Units were at the time of her resignation and are currently valued at zero even if she were a Good Leaver (which she was not).

81. As a further proximate result of J. Kao's breaches of fiduciary duty, the Counterclaim-Plaintiffs have suffered damages, including punitive and exemplary damages, in an amount to be determined at trial.

**SECOND COUNTERCLAIM**  
**AIDING AND ABETTING BREACH OF FIDUCIARY DUTY**

82. The Counterclaim-Plaintiffs repeat and re-allege each and every allegation contained in Paragraph "1" through "75" herein.

83. H. Kao was a key managerial employee as Onyx's General Counsel. He led the legal department and directly supervised five people in the department at its largest. He was a member of Onyx's executive team and participated regularly in strategy meetings with Onyx's CEO, CFO and COO.

84. H. Kao owed Onyx fiduciary duties of loyalty, care and good faith.

85. H. Kao violated those duties by providing J. Kao legal counsel with respect to her Employment Agreement in a manner that was adverse to the interest of his only client, Onyx, as a limited partnership.

86. H. Kao advised Onyx to adopt the General Partner Resolution to increase J. Kao's compensation and purported equity only after he and J. Kao determined it would not be in J. Kao's best interest to amend her Employment Agreement.

87. In doing so, H. Kao acted against the interests of Onyx and caused Onyx to suffer a loss to the benefit of J. Kao.

88. J. Kao knowingly participated in, encourage and induced H. Kao's breach of his fiduciary duty as, among other things, indicated by her remark that H. Kao should work to reduce the appearance of such significant edits to her Employment Agreement.

**THIRD COUNTERCLAIM**  
**DECLARATORY JUDGMENT THAT, UNDER THE EMPLOYMENT AGREEMENT'S**  
**IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AND COMMON**  
**LAW, SECTION 22 DOES NOT APPLY TO UNREASONABLE LEGAL FEES OR**  
**EXPENSES OR THOSE INCURRED BY J. KAO IN BAD FAITH**

89. The Counterclaim-Plaintiffs repeat and re-allege each and every allegation contained in Paragraphs "1" through "75" herein.

90. Implicit in the Employment Agreement is a covenant of good faith and fair dealing.

91. The implied covenant of good faith and fair dealing obligates contracting parties to act in a manner that preserves the spirit of their bargain and prohibits contracting parties from exercising any discretion under a contract in a manner that is impliedly proscribed by the contract's express terms.

92. In the context of contractual fee arrangements, attorneys' fees must be reasonably incurred in order to be subject to payment by the opposing party.

93. For the foregoing reasons, the Counterclaim-Plaintiffs are entitled to a summary declaratory judgment pursuant to CPLR § 3001 as to the rights and legal relations of the parties, declaring that, under the Employment Agreement's implied covenant of good faith and fair dealing and as a matter of common law, Section 22 does not apply to any legal fees or expenses incurred by J. Kao that are not reasonable or that were incurred in bad faith.

**FOURTH COUNTERCLAIM**  
**DECLARATORY JUDGMENT THAT SECTION 22 OF THE EMPLOYMENT**  
**AGREEMENT DOES NOT APPLY TO J. KAO'S CLAIMS FOR RETALIATION,**  
**DISCRIMINATION OR THE COUNTERCLAIMS ASSERTED AGAINST J. KAO**

94. The Counterclaim-Plaintiffs repeat and re-allege each and every allegation contained in Paragraphs "1" through "75" herein.

95. Section 22 of the Employment Agreement provides that "[t]he parties acknowledge and agree that in connection with any dispute [sic] any of this Agreement, the Partnership

Agreement or the MLP LLC Agreement, the Company shall pay all costs and expenses of the parties to this Agreement, including without limitation, all legal fees and expenses of the Executive.”

96. Section 22 of the Employment Agreements obligates Onyx (subject to the implied covenant of good faith and fair dealing) to pay J. Kao’s legal fees and expenses only with respect to the contractual rights and obligations of the parties to the Employment Agreement, the Partnership Agreement or the MLP LLC Agreement.

97. Onyx does not have any obligation to pay J. Kao’s legal fees and expenses relating to J. Kao’s Eighth Cause of Action “Discrimination By Onyx, ORP GP, Khan and Maxwell Against Mrs. Kao On The Basis Of Gender” as the claim does not relate to the parties’ contractual rights under the specified agreements.

98. Onyx does not have any obligation to pay J. Kao’s legal fees and expenses relating to J. Kao’s Ninth Cause of Action “Retaliation By Onyx, ORP GP, Khan and Maxwell Against Mrs. Kao For Complaint She Made To The Board of Onyx” as the claim does not relate to the parties contractual rights under the specified agreements.

99. The Counterclaims brought by the Counterclaim-Plaintiffs are not contractual claims nor do they depend on the rights and obligations of the parties under any of the specified agreements. Onyx therefore does not have any obligation to pay J. Kao’s legal fees and expenses relating to the Counterclaims.

100. For the foregoing reasons, the Counterclaim-Plaintiffs are entitled to a summary declaratory judgment pursuant to CPLR § 3001 as to the rights and legal relations of the parties, declaring that, under the Employment Agreement Onyx does not have an obligation under Section 22 to pay any legal fees or expenses incurred by J. Kao that relate to her claims of retaliation and

discrimination nor does Onyx have any obligations to pay any legal fees or expenses incurred by J. Kao related to the Counterclaims.

**WHEREFORE**, the Corporate Defendants respectfully request that judgment be entered in their favor:

- (a) Dismissing the Complaint in its entirety, with prejudice against Plaintiff and at Plaintiff's costs, entering judgment in the Corporate Defendants' favor,
- (b) On the First Counterclaim, awarding the Corporate Defendants/Counterclaim-Plaintiffs damages and declaring Black Onyx is required to repurchase J. Kao/Counterclaim Defendant's equity Units at the Repurchase Price of \$0 and/or that due to J. Kao/Counterclaim Defendant's breach of fiduciary duty she is a Bad Leaver under the terms of the Third Amended and Restated Limited Liability Company Agreement of Black Onyx dated as of December 20, 2019, and therefore the Repurchase Price of J. Kao/Counterclaim-Defendant's equity Units is \$0.
- (c) On the Second Counterclaim, awarding the Corporate Defendants/Counterclaim-Plaintiffs damages and declaring Black Onyx is required to repurchase J. Kao/Counterclaim Defendant's equity Units at the Repurchase Price of \$0 and/or that due to J. Kao/Counterclaim Defendant's breach of fiduciary duty she is a Bad Leaver under the terms of the Third Amended and Restated Limited Liability Company Agreement of Black Onyx dated as of December 20, 2019, and therefore the Repurchase Price of J. Kao/Counterclaim-Defendant's equity Units is \$0.
- (d) On the Third Counterclaim declaring that under the Employment Agreement's implied covenant of good faith and fair dealing and common law, Section 22 does not apply to any unreasonable legal fees or expenses or those incurred by Plaintiff

in bad faith.

- (e) On the Fourth Counterclaim, declaring that legal fees or expenses incurred by Plaintiff related to her claims for discrimination, retaliation and the Counterclaims are not covered under Section 22 of the Employment Agreement.
- (f) Awarding the Corporate Defendants costs, expenses, and attorneys' fees; and
- (g) Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York  
January 3, 2022

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Melissa D. Hill

Melissa D. Hill

David A. McManus

Lucas D. Hakkenberg

101 Park Avenue

New York, New York 10178

Telephone: 212.309.6000

Facsimile: 212.309.6001

[melissa.hill@morganlewis.com](mailto:melissa.hill@morganlewis.com)

[dmcmanus@morganlewis.com](mailto:dmcmanus@morganlewis.com)

[lucas.hakkenberg@morganlewis.com](mailto:lucas.hakkenberg@morganlewis.com)

*Attorneys for Defendants*

*Onyx Renewable Partners L.P.*

*ORP Joint Holdings GP LLC,*

*Black Onyx Investments, LLC*

VERIFICATION

STATE OF NEW YORK )

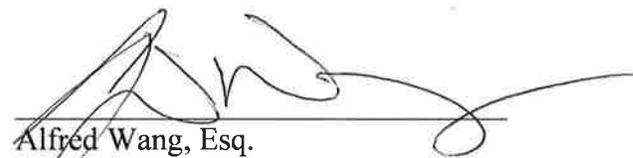
) ss.

COUNTY OF NEW YORK )

Alfred Wang, being duly sworn, deposes and states:

I am the Interim General Counsel of Corporate Defendant Onyx Renewable Partners L.P.

I have read the foregoing Verified Answer and know the contents thereof. The factual contents of the responses contained therein are true to my personal knowledge. As to the contents of the responses contained therein stated to be based on information and belief, I believe them to be true.

  
Alfred Wang, Esq.

Sworn to before me this 29<sup>th</sup> day of November, 2021.

  
NOTARY PUBLIC

