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
Motion Seq. 005

ORAL ARGUMENT REQUESTED

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REIMBURSEMENT AND ADVANCEMENT OF LEGAL FEES AND EXPENSES

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Plaintiff Ja Lee Kao ("J. Kao" or "Plaintiff") submits this memorandum of law in support of her Order to Show Cause seeking reimbursement and advancement of legal fees and expenses, in accordance with Section 22 of her Employment Agreement, and the practice and procedure agreed between counsel for the parties.

I. PRELIMINARY STATEMENT

J. Kao is the former Chief Executive Officer ("CEO") and President of Defendant Onyx Renewable Partners L.P. ("Onyx"). She was President of Onyx from May 2015 to June 2, 2021, and also served as its CEO from January 2019 until June 2, 2021. The terms of her employment are governed by a 2015 written agreement (the "Employment Agreement").[1] (Hubell Aff. Exh. 1).[2]

On July 19, 2021, J. Kao filed a Complaint asserting nine causes of action arising out of her employment with Onyx. (NYSCEF Doc. No. 1). The Complaint includes, *inter alia,* claims of breach of contract, gender discrimination, and retaliation. In response, Onyx has filed four Amended Counterclaims (NYSCEF Doc. No. 51), which are the subject of a pending motion to dismiss (NYSCEF Doc No. 65).

Section 22 of the Employment Agreement provides that in connection with any dispute arising out of the Employment Agreement, the Partnership Agreement or MLP LLC Agreement, Onyx shall pay the legal fees and expenses of the Executive. This motion seeks to require Onyx to abide by its obligations under the parties' contract.

II. STATEMENT OF FACTS

[1] Although the Employment Agreement was subsequently amended and supplemented by written resolution of the General Partner of Onyx after Plaintiff assumed the role of CEO, no changes have been made to Section 22.

[2] The exhibits to this Motion are attached to the Affirmation in Support of Motion for Reimbursement and Advancement of Legal Fees and Expenses ("Hubell Aff.").

From 2008 to 2015, J. Kao was an investment banker at Blackstone Advisory Partners ("BAP"), a subsidiary of Blackstone Inc. ("Blackstone"), last holding the position of Managing Director. (Affidavit in Support of Motion for Reimbursement and Advancement of Legal Fees and Expenses ("Kao Aff.") ¶ 5). While at BAP, J. Kao was the second most senior female investment banker in BAP and the only woman promoted internally to the position of Managing Director within BAP. (*Id.*). J. Kao's specialty was tax-related transaction structuring and focused on renewable energy investments in her last several years at BAP. (*Id.*).

From 2014 to February 2021, Onyx was 100% capitalized by funds managed by Blackstone. (Kao Aff. ¶ 6). Blackstone is the largest alternative asset investment firm in the world with over $700 billion of assets under management. (*Id.*). As part of her advisory services, J. Kao worked to help launch Onyx. (Kao Aff. ¶ 7). She subsequently served as Onyx's investment banker from the time Onyx was formed in 2014 until she departed BAP in 2015 when, after a series of discussions with principals at Blackstone, J. Kao was asked and agreed to join Onyx as its President. (Kao Aff. ¶¶ 7-8). At that time, J. Kao negotiated and executed the Employment Agreement. (Kao Aff. ¶ 9).

As a condition of her employment at Onyx, J. Kao required that she not be subject to any post-employment restrictive covenants. (Kao Aff. ¶ 10). The reason for this was that she was going to be compensated substantially less at Onyx than she was at her previous position at BAP, and as a result, required the ability to speak freely, compete, and solicit after her employment ended. (*Id.*). Onyx agreed to this condition, and the language in the Employment Agreement memorialized this agreement by specifically providing that J. Kao was not subject to any post-employment restrictive covenants. (*Id.*; *see also* Hubell Aff. Exh. 1 § 9 ("No Additional Restrictions")).

Additionally, Section 22 of the Employment Agreement specifically provided that in connection with any dispute arising out of the Employment Agreement, the Partnership Agreement or the MLP LLC Agreement, Onyx would pay all of J. Kao's legal fees and expenses. (Kao Aff. ¶ 11; *see also* Hubell Aff. Exh. 1 § 22). J. Kao insisted on this provision because she knew that Blackstone, which funded Onyx, had virtually unlimited resources; any dispute that might later arise with respect to her employment, her rights under the Onyx limited partnership agreement, or the management carry equity which she was to receive as part of her employment could not be resolved on a level playing field unless Onyx agreed to pay her legal fees and expenses. (Kao Aff. ¶ 12).

The instant action between J. Kao and Defendants, including Onyx, arises out of her Employment Agreement, and as a result, J. Kao has incurred substantial legal fees and expenses. Pursuant to Section 22, Onyx initially paid J. Kao's legal fees in accordance with an agreed upon procedure between the parties and their counsel. (Hubell Aff. ¶¶ 7-9, 11; *see also* Hubell Aff. Exh. 4, 5). Specifically, on September 8, 2021, after Plaintiff's counsel raised Section 22 with Onyx's outside counsel, Onyx's counsel requested that Plaintiff's counsel provide a billing summary that included the dates, timekeepers, and associated hourly rates of services provided, and promised that payment would be made within 10 business days after Onyx received the billing summary and counsel's firm's W-9. (Hubell Aff. ¶ 8; Hubell Aff. Exh. 5). That payment—representing Plaintiff's counsel's legal fees and expenses for services rendered through September 9, 2021—was made on or about September 24, 2021, approximately 8 business days after Plaintiff's counsel provided the billing summary requested. (Hubell Aff. ¶¶ 9-10). Notably, Onyx did not require counsel to differentiate between services provided with respect to Plaintiff's discrimination and retaliation claims and Plaintiff's other claims.

Shortly after Onyx paid Plaintiff's counsel's first invoice, the parties attended a mediation at Defendants' request. (Hubell Aff. ¶¶ 11-13). In attendance at that October 1, 2021 mediation were the mediator, Plaintiff, Plaintiff's counsel, Defendants and their representatives, and numerous attorneys for Defendants. (Hubell Aff. ¶ 11). It was quickly apparent that there was little common ground between the parties, and although Plaintiff asked to end the mediation to avoid a waste of time and resources on a process that would not succeed, she nonetheless continued to participate in good faith for the rest of the session. (*Id.*). Nevertheless, Defendants repeatedly sought to continue the mediation process, and in late November, after nearly seven weeks of negotiations, numerous calls and meetings with the mediator, and multiple rounds of revisions to draft settlement agreements, Plaintiff and her counsel believed that a deal had been concluded. (Hubell Aff. ¶¶ 12-13). It was represented to Plaintiff's Counsel that all that remained was obtaining the necessary signatures, including those from parties located in other time zones. (Hubell Aff. ¶ 12). However, Defendants failed to return the signed agreement at the agreed upon time the next morning. (*Id.*). All told, Plaintiff's counsel expended a substantial number of hours on the seven-week mediation process.

After reneging on its agreement to settle this case, Onyx has also now reneged on its agreement to pay J. Kao's legal fees and expenses by refusing to pay Plaintiff's counsel's next invoice. Specifically, on January 13, 2022, Onyx's counsel was sent an invoice for legal services rendered from September 10, 2021 through November 30, 2021. (Hubell Aff. ¶ 14). This invoice represented, *inter alia*, Plaintiff's counsel's services with respect to the nearly two months of mediation and negotiations. (Hubbell Aff. ¶¶ 12-14). In accordance with the Employment Agreement, the agreement between counsel, and past practice, payment was due within 10 business days. On January 25, 2022, one day before payment was due, Onyx's interim

General Counsel emailed Plaintiff's counsel a letter ("January 25 Letter"), in which he stated that Onyx would not pay the invoice as stated and imposed onerous conditions inconsistent with the parties' prior practice. (Hubell Aff. ¶ 15; Hubell Aff. Exh. 6).

Specifically, the January 25 Letter stated that Onyx has no obligation to pay Plaintiff's "legal fees, which are incurred unreasonably or in bad faith," nor "fees related to Onyx's Counterclaims, or discrimination and retaliation claims." (Hubell Aff. Exh. 6). The January 25 Letter also demanded that Plaintiff's counsel provide an "itemized statement of attorney time entries" that provided a "description of the work performed by each timekeeper" on a line-by-line basis, as "Onyx does not accept block billing entries." (*Id.*). These demands, which appear to be made in service of Onyx's position in the Amended Counterclaims that it is responsible for only a portion of Plaintiff's legal fees, are not only unjustified given the clear language of the Employment Agreement, but also unduly burdensome and impractical. As a result of Onyx's refusal to remit timely payment, Plaintiff has been constrained to bring this motion.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE EMPLOYMENT AGREEMENT REQUIRES THAT J. KAO'S LEGAL FEES AND EXPENSES BE PAID BY ONYX

The Employment Agreement, which by its own terms is governed by the law of the State of Delaware,[3] provides:

> **Section 22. Litigation; Legal Fees.**
>
> **The parties acknowledge and agree that in connection with any dispute [sic] any of this Agreement, the Partnership Agreement or the MLP LLC**

[3] This choice of law provision is contained in Section 17 of the Employment Agreement (Hubell Aff. Exh. 1 § 17).

> **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.**

(Hubell Aff. Exh. 1 § 22).

Phrases such as "in connection with" are "paradigmatically broad" and contractual provisions using this term have "been interpreted as unquestionably broad in reach." *Lillis v. AT & T Corp.*, 904 A.2d 325, 331 (Del. Ch. 2006). Therefore, according to the terms of Section 22 of the Employment Agreement, Onyx is required to pay J. Kao's legal fees and expenses "in connection with any dispute" related to the Employment Agreement, the Onyx Partnership Agreement, or the Black Onyx LLC Agreement.[4]

Acknowledging its broad obligation under the Employment Agreement, on May 17, 2021, Defendant Khan sent J. Kao an email, which stated, in relevant part: "*If you do engage counsel for that purpose, we will ensure that your legal fees connected with negotiating and revising your separation agreement will be covered.*" (Hubell Aff. Exh. 3). Even though Plaintiff had yet to file her complaint, Onyx and Khan understood that Section 22's provision for legal fees and expenses "in connection with any dispute any [sic] of this Agreement, the Partnership Agreement or the MLP LLC Agreement" nonetheless applied to require payment for fees and expenses incurred by Plaintiff in ***negotiating*** a new and distinct separation agreement. (Hubell Aff. Exh. 1 ¶ 22). Moreover, after Plaintiff filed her complaint, Onyx's outside counsel nonetheless confirmed that Onyx would pay Plaintiff's counsel's fees in connection with this litigation, without any caveats concerning Plaintiff's discrimination and retaliation claims. (Hubell Aff. ¶ 8; Hubell Aff. Exh. 5). Consistent with this understanding, on September 24,

[4] The MLP LLC Agreement is defined to be the Black Onyx LLC Agreement. Black Onyx Investments, LLC ("Black Onyx") is one of the Defendants. Black Onyx is the profits interest management carry vehicle in which J. Kao and other select employees hold membership interests.

2021, Onyx accordingly paid Plaintiff's legal fees and expenses incurred through September 9, 2021. (Hubell Aff. ¶ 11).

The conditions newly demanded by Onyx's interim General Counsel are inconsistent with the plain terms of the contract and the parties' prior practice. As a legal matter, for the reasons stated in Plaintiff's Motion to Dismiss Amended Counterclaims, there is no basis for Onyx to refuse to pay for Plaintiff's legal fees and expenses in connection with her discrimination and retaliation claims and Onyx's Amended Counterclaims. (NYSCEF Doc. No. 72 at 17-22). Namely, two of Onyx's Amended Counterclaims relate directly to Onyx's obligations under Section 22 of the Employment Agreement; the other two Amended Counterclaims relate not only to the Employment Agreement but also to the Black Onyx LLC Agreement, which was explicitly identified in Section 22 as another agreement for which fees are owed by Onyx; and Plaintiff's discrimination and retaliation claims are inextricably intertwined with her other claims, as the conduct alleged to be discriminatory and/or retaliatory relate to her obligations under the Employment Agreement, including whether her resignation was for "Good Reason," as well as the negotiations surrounding a proposed separation agreement, which Onyx has already acknowledged are covered by Section 22, as discussed above. (*Id.*).

Furthermore, as discussed previously, Onyx has already paid one invoice that would have included services related to Plaintiff's discrimination and retaliation claims, as it encompassed the time period during which Plaintiff's counsel prepared and filed the complaint. Onyx's sudden reversal of its position—particularly in light of the lengthy and ultimately failed mediation that only occurred at Onyx's and the other Defendants' insistence, and which caused Plaintiff to incur substantial legal fees and expenses (Hubell Aff. ¶¶ 11-13)—smacks of gamesmanship.

Onyx is well aware that both Plaintiff and her spouse were previously employed by Onyx and, as a result of the events underlying this litigation, are no longer employed. Moreover, Onyx's original counterclaims accused Plaintiff of breaching her fiduciary duty, impugning Plaintiff's professional reputation, and its Amended Counterclaims add similar allegations against Plaintiff's spouse. (NYSCEF Doc No. 51). As a commercial entity capitalized by the largest alternative asset investment firm in the world, Onyx enjoys an undeniable financial advantage over Plaintiff; while this litigation remains pending and those allegations against Plaintiff and her spouse remain unresolved, that financial advantage will only grow. Section 22 of the Employment Agreement was specifically designed to level the playing field should Plaintiff find herself in a dispute with Onyx. (Kao Aff. ¶ 12). This promise induced Plaintiff to enter the Employment Agreement and agree to serve Onyx as its President and then as its President and CEO, and it would be both inconsistent with the contract and contrary to public policy for Onyx to evade its obligations after the fact. *See, e.g.*, *L Series, L.L.C. v. Holt*, 571 S.W.3d 864, 877 (Tex. 2019) (interpreting contract for advancement of legal fees under Delaware law and concluding that enforcing the agreement "reinforces at least two important public policies: freedom of contract and the inducement of capable persons into corporate service while protecting their individual assets"); *see also DeLucca v. KKAT Management LLC*, 2006 WL 224058 (Del. Ch. January 23, 2006) (requiring advancement of legal fees under clear terms of the parties' contract as "it is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not").

In addition to the foregoing, the conditions newly imposed by Onyx are also unreasonable and unduly burdensome and serve no legitimate purpose in practice. First, Onyx's demand for detailed time entries, to the extent it is intended to segregate certain of Plaintiff's

claims and defenses to the Amended Counterclaims, is wholly impractical. In this case, where the legal and factual issues underlying both parties' claims are overlapping and intertwined, it is practically impossible to separate services among individual claims and counterclaims. To give just one example, the billing summary submitted by Plaintiff's counsel for the period September 10 through November 30, 2021 included services rendered in connection with the failed mediation. The negotiations conducted at that mediation covered all then-pending claims, including Plaintiff's discrimination and retaliation claims, and any settlement would have also included a general release from both parties that would have covered Onyx's counterclaims, which had not yet been filed as of the October 1, 2021 mediation. It would be practically impossible for Plaintiff's counsel to allocate the services provided in connection with the mediation in accordance with Onyx's new demands, let alone four months after the fact, and the request to do so ignores the realities of this case and how legal work is performed.

Distinguishing among claims would also be infeasible and unduly burdensome on a going-forward basis. In order for time entries to be cleanly differentiated in the manner demanded by Onyx, Plaintiff's counsel would be required to perform their work on a claim-by-claim basis, an entirely impractical suggestion inconsistent with actual legal practice. As an illustrative example, Plaintiff's counsel will no doubt be required to review a large number of documents produced by Defendants in this action. If counsel reviews a document for 5 minutes that relates to the claims Onyx agrees are covered by Section 22, then another document for 3 minutes that relates to claims whose coverage Onyx disputes, and then another document for 10 minutes that relates to all claims,[5] it appears that Onyx would require Plaintiff's counsel to enter a separate time entry for each document. Not only would this exercise substantially increase the

[5] That said, it is Plaintiff's counsel's expectation that most, if not all, documents produced will relate to all or almost all of the pleaded claims.

amount of time (and thus fees) incurred by Plaintiff's counsel, it would be a significant mental distraction and practical burden that would negatively affect the quality of legal services provided to Plaintiff. Simply put, complying with Onyx's demands would be substantively detrimental to Plaintiff's prosecution of this case.

The other purported basis for its new demand for detailed time entries is Onyx's position that it is not required to pay "unreasonable" legal fees or those incurred in "bad faith." But while a party making a fee application bears the burden of justifying the amounts sought, the request may include "a good faith estimate" of the fees and expenses. *Citadel Hldg. Corp. v. Roven,* 603 A.2d 818, 823–24 (Del. Ch. 1992); *see Fasciana v. Elec. Data Sys. Corp.,* 829 A.2d 160, 177 (Del. Ch. 2003); *Cohen v. Cohen,* 269 A.2d 205, 207 (Del. Ch. 1970) (affirming Court of Chancery's award of counsel fees for multiple matters without requiring specification by individual controversy); *Danenberg v. Fitracks, Inc.,* 58 A.3d 991, 995 (Del. Ch. 2012). Indeed, billing summaries have been accepted in other cases, including cases in which the fee provision at issue *expressly included a reasonableness limitation*. *See, e.g.*, *L Series*, 571 S.W.3d at 877 (affirming trial court order requiring the party seeking indemnification "to provide summary invoices for repayment of reasonable fees and expenses incurred"); *see also id.* at 873 ("The right to indemnification conferred in this Article VIII shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred . . . ."). Here, Onyx's obligations are clearly set forth in Section 22 of the Employment Agreement, which expressly does not contain any language that limits or otherwise conditions Onyx's obligations to pay legal fees and expenses of Plaintiff.

But even assuming *arguendo* that Onyx has the right under the Employment Agreement to challenge the reasonableness of Plaintiff's legal fees and expenses, that does not mean that

Onyx is entitled to see counsel's detailed time entries. The tasks undertaken by counsel and descriptions thereof not only reflect communications with Plaintiff that implicate the attorney-client privilege, but also are likely to reveal legal strategy and other information subject to attorney work product protection. Onyx's proviso that counsel may redact entries as necessary to maintain the attorney-client privilege (with no mention of the work product doctrine) is insufficient to protect Plaintiff's right to legal counsel in this matter, and moreover imposes yet another burdensome and time-consuming task on Plaintiff's counsel. (Hubell Aff. Exh. 6). Imposing these requirements on Plaintiff's counsel in the first instance—despite there being no credible allegation whatsoever that any of counsel's previously paid or currently invoiced time is unreasonable or incurred in bad faith—places a heavy burden on Plaintiff's counsel.

Onyx has no basis to object to the reasonableness of the fees sought, and to date has not asserted such an objection. In sum, there is no basis under the Employment Agreement or under Delaware law for Onyx's position that it need pay legal fees and expenses with respect to some but not all of the claims in this action, and its newly imposed demands for detailed time entries are contrary to the parties' Agreement and unduly burdensome on Plaintiff's counsel.

II. FEES ON FEES OBLIGATION

Delaware law is clear that a party's obligation to pay attorneys' fees includes the obligation to pay "fees on fees"—*i.e.*, fees incurred in enforcing that obligation. *See, e.g.*, *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561–62 (Del. Ch. 2002) (holding that a statutory provision for officer and director indemnification permits "fees on fees" as that (1) "gives recognition to the reality that the corporation itself is responsible for putting the director through the process of litigation" to recover those fees, (2) "prevents a corporation from using its 'deep pockets' to wear down a former director, with a valid claim to indemnification, through expensive litigation," and

(3) may be avoided by corporations through the simple expedient of excluding "fees on fees" indemnification from their bylaws "if that is a desirable goal"); *see also DeLucca*, 2006 WL 224058, at *15 (applying *Stifel*'s reasoning to indemnification provision in an LLC's operating agreement).

Given that Section 22 of the Employment Agreement is very clear in setting forth Onyx's obligations to pay, it is reasonable to apply the standards for "fees on fees" to this application and award of Plaintiff's fees associated with respect to this application.

CONCLUSION

This motion is made particularly necessary and urgent by the hyper-aggressive litigation tactics of Defendants. Until recently, Onyx was represented by not one, but two major national law firms, Milbank LLP and Morgan Lewis and Bockius LLP. These firms also represent the other two Corporate Defendants in the lawsuit. The individual Defendants are each represented by other large prestigious firms: Kirkland and Ellis LLP represents Defendant Khan and Wilson Sonsini Goodrich & Rosati represents Defendant Maxwell. It is evident that the Defendants intend to mount an extensive and expensive defense. Onyx's denial of its obligations to reimburse and advance Plaintiff's legal fees and expenses is simply the latest chapter in the Defendants' strategy to wear down Plaintiff through delay and expense.

In light of the foregoing, Plaintiff respectfully requests that the Court grant this motion in its entirety, and enter an order enforcing Onyx's obligation under Section 22 of the Employment Agreement to pay for all attorneys' fees and expenses in accordance with the parties' contract, including fees incurred in making this application, and awarding such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 3, 2022

Respectfully submitted,

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WORD-COUNT CERTIFICATION
In accordance with Rule 17 of the Commercial Division Rules

I certify that this document was prepared on a computer using Microsoft Word in 12-point, Times New Roman font; that the word count of this document, as calculated in accordance with Rule 17 of the Commercial Division Rules by the computer processing system used to prepare this document is 4,176 ; and that this document thus complies with the word-count limit in Rule 17 of the Commercial Division Rules.

February 3, 2022

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