SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY: COMMERCIAL DIVISION
--x

ARIEL X. BURT, individually and derivatively on behalf of FORSYTHE LTD.,

Plaintiff,

-against-

LLUIS TORRENT JEREZ,

Defendant.

--x

Index No.: 910717-23
Hon. Richard M. Platkin
Motion Seq. No. 001

SUPPLEMENTAL AFFIRMATION OF ARIEL X. BURT IN FURTHER SUPPORT OF HER MOTION FOR A PRELIMINARY INJUNCTION

I, ARIEL X. BURT, plaintiff in the above-captioned action, affirm under penalty of perjury pursuant to CPLR 2106 the truth of the following:

1. I am the Plaintiff in the above-captioned action. I submit this Affirmation as a supplement to my Affirmation of June 13, 2024 (Doc. No. 22), in further support of my motion for a preliminary injunction pursuant to CPLR § 6301, and in response to the opposition papers filed by Defendant Lluis Torrent Jerez on June 28, 2024.

2. Defendant's opposition papers are replete with falsehoods. Though I am not going to address every single one of these falsehoods here, particularly if such falsehoods do not directly relate to the underlying basis for the preliminary injunction sought in my motion, I address herein several of the more glaring falsehoods that directly relate to the pending motion.

Defendant's False Claim that the MITA Was "Void"

3. Defendant asserts that he and I had a phone conversation on September 7, 2020, three days after we executed the MITA on September 4, 2020, but before the MITA's Closing date on September 10, 2020, wherein I purportedly told him that I was not "in a position to invest any

funds into Atlas, and so could not go through with the closing." He claims that, during this call, we "agreed and understood that, at least for the time being, the MITA, and the transfer contemplated therein, was void." (Doc. No. 58, ¶¶ 46-7; Doc. No. 87 at 11.)

4. This assertion is completely and utterly false. This alleged phone conversation never occurred. Defendant has invented it out of whole cloth.

5. As an initial matter, the conversation Defendant describes makes no sense. Nothing in the MITA required me to make an investment into Atlas at that time in order for the MITA to go into effect. (Doc. No. 24.) And the Cooperation Agreement (which reflects my investment of $250,000.00 into our joint business as of that date (Doc. No. 23, at ¶ 4)) already contemplated that Defendant would be investing a greater proportion of funds into our joint business than I would. (Id., at ¶ 5: "One of the partners of Forsythe, LT [Lluis Torrent] has committed to invest USD 1M or more at his discretion…")

6. There would have accordingly been no reason for me to abruptly "change my mind" between September 4, 2020 and September 7, 2020 and agree to void the MITA because I did not want to invest funds that I was not required or expected to invest.

7. Regardless, contemporaneous emails between Defendant and me document the outrageous falsity of Defendant's wholly invented phone call.

8. Annexed hereto as **Exhibit HH** is a true and correct copy of an email that Defendant sent me on October 20, 2020, to which he annexed his executed copy of the MITA. The executed copy of the MITA Defendant attached to Exhibit HH is annexed hereto as **Exhibit II**.

9. Defendant wrote to me on October 20, 2020, well over a month after he now claims that we purportedly agreed that the MITA was "void," and over a month after the MITA's Closing date, to provide me with the MITA he had executed on September 4, 2020 and to tell me that he

had reached out to six different notaries in an effort to have his signature on the MITA notarized, but that he ultimately decided to drop the notarization requirement because obtaining a notarization for his September 4, 2020 signature would cost him $350. (Exhibit HH.) He then asked me to send him back the version of the MITA with my signature. (Id.)

10. Notably, Defendant said nothing in this email to suggest that the MITA was somehow not effective, nor did he complain that he did not receive the $1,000 purchase price on the MITA's Closing date.

11. I sent him back the fully executed MITA with my signature the very next day, October 21, 2020. A true and correct copy of that email is annexed hereto as **Exhibit JJ**.

12. There is no mention in any of these emails of Defendant's purported September 7, 2020 phone conversation, nor is there any mention that the MITA was somehow "voided," which it was not. Indeed, if Defendant and I had agreed to void the MITA on September 7, 2020, it would have made no sense for Defendant to chase down six notaries, send me his executed copy of the MITA, and to request my executed copy, over a month later on October 20, 2020.

13. There is of course also no mention of the purported September 7, 2020 conversation, nor of the "voiding" of the MITA, in any of the emails, PowerPoint presentations, excel spreadsheets, or Forsythe meeting minutes annexed to my initial moving papers, all of which document Defendant repeatedly affirming and reaffirming over the course of the next several years that the MITA had gone into effect and that Forsythe owned Atlas 100%.

14. Indeed, the only evidence Defendant points to in support of this purported September 7, 2020 phone conversation is a document entitled "Atlas Renewables LLC Minutes of Special Meeting of Members," which Defendant claims he executed on September 11, 2020 to "document" our non-existent phone conversation. (Doc. No. 70.)

15. To be clear, I have never seen this document outside of the context of this litigation. Defendant does not claim to have ever sent it to me or anyone else. It is signed only by Defendant himself. And it directly contradicts our exchange of October 20, 2020, the MITA, the Cooperation Agreement, and all of the emails, PowerPoints, excel spreadsheets, and Forsythe meeting minutes annexed to my initial moving papers. It appears to me that this document is a complete and total fabrication.

16. Notably, Defendant attempts to fault me in his Affirmation for allegedly "backdating" my signature on the MITA from October 21, 2020, the date the notary signed and stamped the MITA, to September 4, 2020, the date I signed the MITA. (Doc. No. 58, ¶49.) I did no such thing. I signed the MITA on September 4, 2020, appeared before the notary on October 21, 2020, and identified and confirmed my signature on the MITA to the notary at that time.

17. According to Defendant's October 20, 2020 email, he similarly attempted to have a notary notarize his signature of September 4, 2020 after the date he had actually signed it, but ultimately decided not to have it notarized because he did not want to spend $350. (Exhibit HH.)

18. Defendant's related claim to have granted me a six-month "forbearance" or "grace" period is similarly false. (Doc. No. 87 at 14-5.) No such period was ever discussed, and no such period ever existed. Tellingly, the only evidence Defendant points to in purported support of this claim is his own sworn affirmation. He does not cite to a single email or document evincing this claim, despite the fact that Defendant and I exchanged literally thousands of emails on every conceivable subject concerning our joint venture. And this claim is contradicted by the myriad of emails, PowerPoint presentations, excel spreadsheets, and Forsythe meeting minutes annexed to my initial moving papers wherein Defendant repeatedly confirmed that Forsythe owned Atlas 100%.

19. For example, Defendant drafted and emailed the PowerPoint annexed to my prior Affirmation as Exhibit P (which clearly documents Forsythe's 100% ownership of Atlas) on June 27, 2021, well after the expiration of Defendant's purported "forbearance" period. (Doc. No. 38.)

20. Defendant and I also attended a Forsythe board meeting on November 23, 2021, well after the expiration of Defendant's purported "forbearance" and "grace" periods, during which we voted to cause Forsythe to approve the Kruger transaction and that "Atlas be given approval to proceed with the transaction and to enter into the Agreements as presented." (Doc. No. 42.) This would have made no sense if Defendant's assertions were in any way accurate, which they are not.

21. Notably, Defendant does not deny that he attended the November 23, 2021 Forsythe board meeting or that Forsythe voted to approve Atlas' transaction with Kruger, as the meeting minutes reflect. Defendant merely claims that the minutes of this board meeting inaccurately document his location at the time, given that he attended the meeting by telephone. (Doc. No. 58, ¶83.)

Defendant Blatantly Mischaracterizes Exhibit D to My Prior Affirmation

22. Exhibit D to my prior Affirmation consists of an email Defendant sent on February 9, 2021 to an accounting firm, to which he annexed a PowerPoint slide depicting Forsythe's 100% ownership of Atlas. (Doc. Nos. 26 and 27.)

23. Defendant tellingly ignores the annexed PowerPoint slide in his opposition papers, arguing only that any email he sent to any third party in which he represented that Forsythe owned Atlas merely reflected his "hope" that the MITA would ultimately be effectuated. (Doc. No. 87 at 23.) Of course, nothing in this PowerPoint presentation, or any of the other emails, PowerPoint presentations, excel spreadsheets, or meeting minutes indicates that any of their respective contents

– much of which was drafted by Defendant himself – merely reflect Defendant's purported "hope." Rather, they state definitively and unequivocally that Forsythe owns Atlas 100%. (See, e.g., Doc. No. 30 (Defendant on March 15, 2021: "Atlas Renewables is our operational company for all our developments in USA. Atlas Renewables is 100% controlled by an overseas entity which is 100% owned by Ariel and myself.").)

24. Regardless, Defendant focuses on an email within the email chain included in Exhibit D wherein I sent an email to accountant Richard Hawley on February 4, 2021 and explained to Mr. Hawley that a delay in communicating with him was because "we had to structure our overall company structure and we now understand exactly how we are going to run the set up for the long term." (Doc. No. 26 at 3.) Defendant argues that this somehow constitutes my admission "that the structure of the venture was still uncertain in late 2020/early 2021," which he claims "is a clear sign that the MITA signed in early September 2020 had not gone into effect." (Doc. No. 87 at 23.)

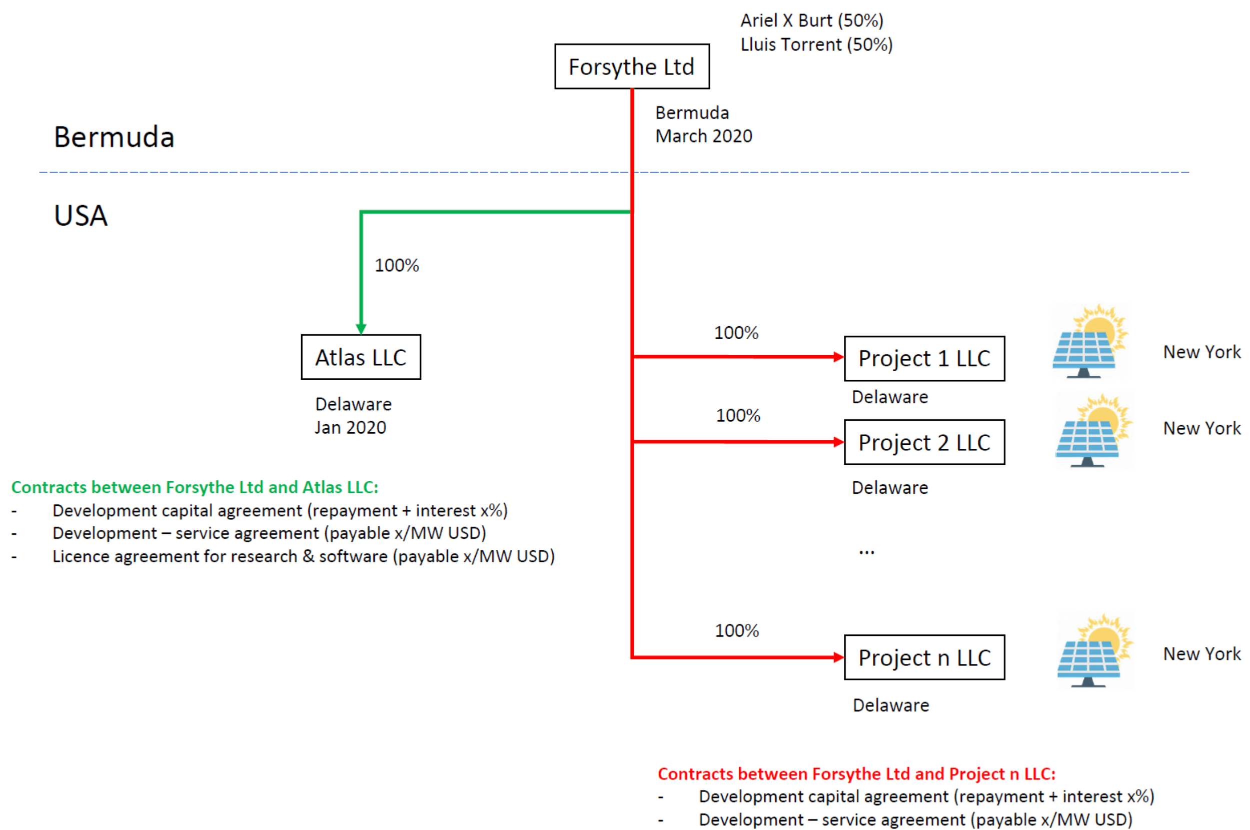
25. This claim is demonstrably false and indefensibly misleading.

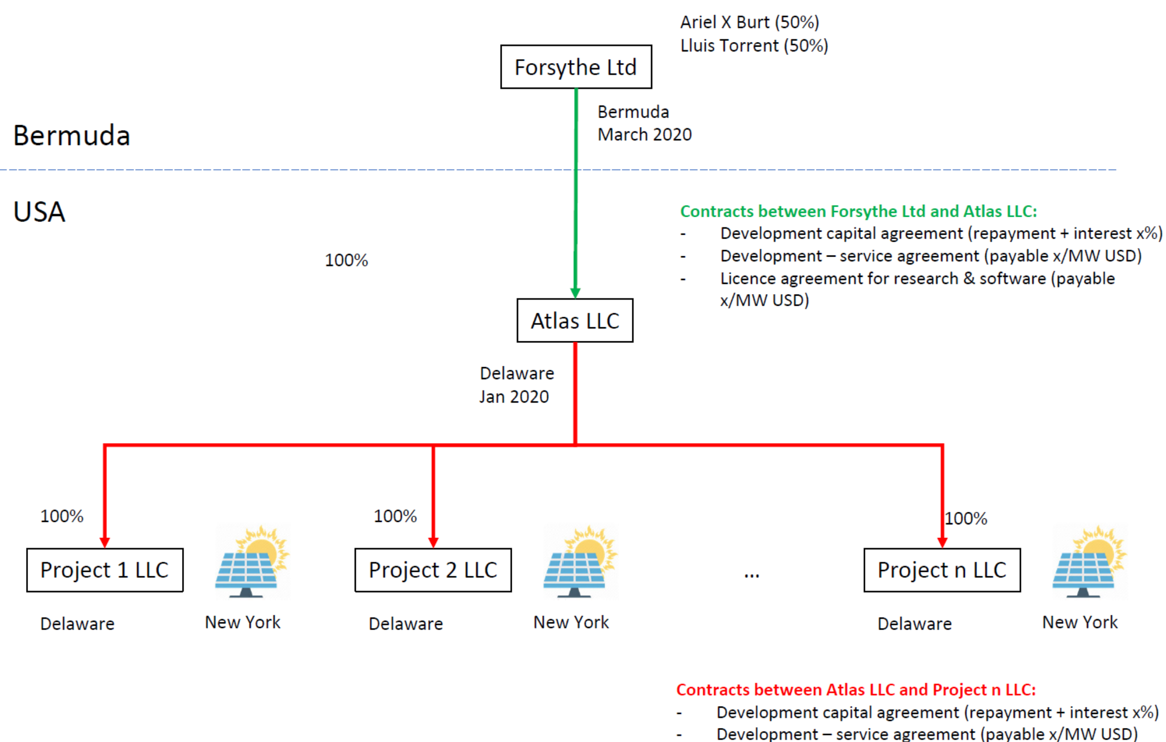
26. The questions regarding "structure" I referenced in my email to Mr. Hawley had nothing whatsoever to do with the effectiveness of the MITA or Forsythe's ownership of Atlas. Rather, they related to questions Defendant and I had been exploring around that time regarding the corporate relationship between Forsythe and the various solar project-specific LLCs we were forming to house individual solar projects.

27. Defendant and I reached out to the accounting firm Mazars in September of 2020 to seek advice regarding the tax implications of two possible corporate structures. The first option was to maintain the structure Defendant and I had contemplated in the Cooperation Agreement, i.e., that Forsythe would own Atlas, and that Atlas would in turn own the various project-specific

LLCs. The second option was for Forsythe to own Atlas, but for Forsythe to directly own the individual project LLCs.

28. Defendant sent an email to Mazars on September 28, 2020, to which he annexed two PowerPoint slides laying out these two structural options. A true and correct copy of this email is annexed hereto as **Exhibit KK**. A true and correct copy of the PowerPoint slides Defendant attached to that email is annexed hereto as **Exhibit LL**. The two PowerPoint slides Defendant attached to his email, presenting these two structural options, appear as follows:





29. Under either structural option, Forsythe owned Atlas "100%." The only difference between the two options was whether Forsythe would directly own the project-specific LLCs, or would own them through its ownership of Atlas. Nothing about these two options calls into question the effectiveness of the MITA.

30. Mazars provided us with its complete analysis and recommendations regarding the tax implications of these two options on February 3, 2021. As discussed in my prior Affirmation, Defendant and I ultimately opted to retain the structure set forth in the Cooperation Agreement, wherein Forsythe owned Atlas, and Atlas owned the project-specific LLCs.

31. My reference to questions regarding "the structure of the venture" in my email to Mr. Hawley on February 4, 2021 was a reference to the advice we had sought and obtained from Mazars, for which Mazars had provided its full recommendation the day before, on February 3, 2021. It has nothing whatsoever to do with the effectiveness of the MITA, and offers no support

for Defendant's position. To the contrary, the PowerPoint slides Defendant annexed to his email to Mazars on September 28, 2020, after the MITA's Closing date, only further bolster the conclusion that the MITA was effective and that Forsythe owns Atlas.

32. For Defendant to attempt to actively distort the meaning of my email to Mr. Hawley, when Defendant was directly and intimately involved in our communications with Mazars on this subject, constitutes a blatant attempt to knowingly mislead the Court.

Defendant's False Claim that Forsythe Was Merely Created to "Advise" Atlas

33. Defendant claims that Forsythe was formed "for the purpose of providing consulting services to Atlas," or "for mere advisory services." (Doc. No. 87 at 7 and 9.)

34. This claim is demonstrably, outrageously false.

35. To the contrary, from the very beginning of our discussions regarding undertaking a joint venture in the United States, Defendant and I contemplated that we would co-own a foreign entity, which would in turn own a U.S.-based entity to house our various individual solar projects. This structure is reflected in the Cooperation Agreement and all of the various emails, PowerPoints, and Forsythe meeting minutes annexed to my prior Affirmation and this affirmation. It is the reason we executed the MITA and operated in the manner in which we did for years.

36. This was the understanding between Defendant and me from the very beginning.

37. Indeed, Defendant and I initially met in London on January 11th or 12th of 2020 to discuss our joint venture. (See **Exhibit MM** hereto.) Defendant then formed Atlas the very next day, on January 13, 2020, and immediately wrote me to tell me that he had done so. (See **Exhibit NN** hereto.) This was because Atlas was, from the very beginning, a central part of our joint business.

38. Defendant's characterization of Forsythe and its relationship to Atlas is false.

Defendant's Allegations Regarding My Forsythe Salary are False

39. Pointing to the salary I received from Forsythe, Defendant argues that I was not a partner in Atlas, but a salaried employee or service provider. (Doc. No. 87 at 14, 15, and 22.) This claim is false.

40. As an initial matter, Defendant's argument does not make sense even on its own terms. The salary I received was from Forsythe in exchange for me serving as Forsythe's Chief Executive Officer. There is no dispute that Defendant and I are 50/50 owners of Forsythe. Defendant does not allege that I received a salary from Atlas. The salary I received from Forsythe has no bearing on my status as an owner of Forsythe, nor is it relevant to Forsythe's ownership of Atlas, which was effectuated by the MITA.

41. Regardless, the actual facts surrounding this issue demonstrate the falsity of Defendant's claims.

42. Defendant and I agreed in August of 2020 that it would be in Forsythe's interest for each of us to obtain work permits in Bermuda. Our agreement on this point is memorialized in Section 6 of the Meeting Minutes documenting Forsythe's board meeting of August 14, 2020. A true and correct copy of these Meeting Minutes is annexed hereto as **Exhibit OO**.

43. Bermuda law provides that employees earning a salary over a certain threshold will be automatically approved for a Bermuda work permit. All other applications for work permits are subject to the discretion of the Bermudan government. See, e.g., https://www.gov.bm/online-services/get-global-work-permit.

44. Defendant and I agreed that I would be issued a salary in connection with my role as Forsythe's CEO in order to ensure that I received automatic approval for the work permit under Bermudan law.

45. Our agreement on this point had absolutely nothing to do with Forsythe's ownership of Atlas.

46. Notably, the August 14, 2020 Meeting Minutes again make absolutely explicit the agreement that Defendant and I had reached regarding the relationship and respective roles of Forsythe and Atlas:

> Atlas has been incorporated in the United States of America to act as a holding vehicle for the individual solar projects. Atlas is currently owned by [Defendant] and the ownership needs to be transferred 100% to the Company [Forsythe]. It was RESOLVED that [Defendant] be and is hereby authorized to do such further acts and things as is necessary to transfer the ownership of Atlas to the Company [Forsythe].
>
> (Exhibit OO at § 4.)

47. Defendant's related claim that he only agreed to pay me a discretionary "success fee" (Doc. No. 87 at 16) should I substantially contribute to the sale of any Atlas asset is, again, made up out of whole cloth. Defendant tellingly does not point to any evidence supporting this claim aside from his own sworn statement, despite the fact that he and I exchanged thousands of emails related to our joint venture. And this claim is, again, contradicted by the emails, PowerPoints, excel spreadsheets, and Forsythe meeting minutes clearly and consistently documenting Forsythe's ownership of Atlas.

48. The money I was paid following the closing of Atlas' deal with Kruger was a function of my ownership interest in Atlas' parent company, Forsythe, not some non-existent discretionary "success fee" controlled by Defendant.

<u>Defendant's Claims Regarding His Purported Termination of the Cooperation Agreement are Both False and Irrelevant</u>

49. Defendant cites an email exchange and Notice document he sent me in September of 2021, and claims to have terminated the Cooperation Agreement at that time. (Doc. No. 77.)

He neglects to mention, however, that we discussed the matter thoroughly (at a then upcoming conversation referenced repeatedly in the email chain Defendant cites) and jointly decided during that call to keep the Cooperation Agreement in place and continue working together as we had before.

50. Our decision to continue working together as before is reflected in the minutes of Forsythe's November 23, 2021 board meeting, at which we voted to cause Forsythe to approve the Kruger transaction. (Doc. No. 42.)

51. Regardless, Defendant's claim to have terminated the Cooperation Agreement in September of 2021 is irrelevant to the instant dispute. Defendant's purported unilateral termination of the Cooperation Agreement, even if true, which it is not, would still have had no effect on Forsythe's ownership, Atlas' ownership, or the MITA, which was executed a full year earlier.

Defendant Misrepresents My Response to His May 8, 2023 Email to Onyx

52. Defendant cites to an email he sent to Onyx (copying me and others) on May 8, 2023 in which he represented to Onyx that he was the sole member of Atlas, and claims that I did not object. (Doc. No. 87 at 18-9.) That allegation is false.

53. I saw Defendant's May 8, 2023 email and the misstatements he made therein regarding his purported sole ownership of Atlas. Indeed, that was the first occasion on which I noticed Defendant misrepresenting himself as Atlas' sole member.

54. I was shocked by what I had read. I took several weeks to think about what it appeared Defendant had done, and to decide how best to raise my concerns with him.

55. After taking a few weeks to consider my response, I called Defendant to discuss his misrepresentation. I told him that he was misrepresenting Atlas' ownership and that we needed to

correct Onyx's understanding of Atlas' ownership. He refused to do so, and insisted during that call (without explanation) that he was Atlas' sole owner.

56. This was the beginning of our dispute.

57. After taking some additional time to consider Defendant's response and speaking with him again on this same subject, I sent Defendant the email dated July 17, 2023 that I annexed to my prior Affirmation as Exhibit DD. He responded by claiming for the first time that the MITA was never effectuated because the $1,000 had never been transferred, and that he remained the sole owner of Atlas. (Doc. No. 52.)

The November 2021 Emails on Which I Was Copied Offer Defendant No Support

58. Defendant attaches to his opposition papers a series of emails and attachments sent on November 29, 2021 and November 30, 2021 between Atlas' counsel David Brown (of Nixon Peabody LLP) and Kruger's counsel Rue Toland (of Preti Flaherty LLP) in connection with our efforts to finalize a deal between Atlas and Kruger at that time. Defendant argues that, because attachments to those emails or information in the emails themselves identify Defendant as the sole member of Atlas, and because I was copied on those emails but never objected, that Forsythe does not own Atlas.

59. Defendant's argument is without merit.

60. A significant number of emails were being sent at that time regarding the Kruger deal, and I was relying upon Atlas' counsel and Defendant to represent Atlas' (and Forsythe's) interests in connection with those negotiations.

61. I understood these emails between counsel to involve legal negotiations regarding the final language of the deal documents, and did not closely monitor these emails or their respective attachments for that reason.

62. Moreover, it was Defendant who was solely responsible for supplying information regarding Atlas' formation and ownership to Nixon Peabody in connection with the Kruger negotiations and eventual deal.

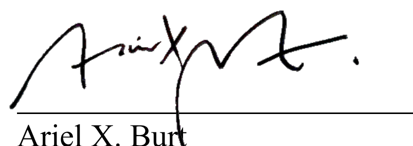
63. If I had noticed at the time that these emails referred to Defendant as the sole member of Atlas, I would have objected and sought to correct Defendant's error, as I did later when I noticed Defendant making similar misrepresentations to Onyx in 2023.

64. I later found out in the summer of 2023, when my dispute with Defendant arose, that Defendant had never provided Nixon Peabody with the MITA or the Cooperation Agreement in connection with the Kruger negotiations, and that Nixon Peabody was accordingly unaware at that time that Atlas' ownership status had changed following its initial formation in January of 2020.

65. Nixon Peabody has expressly confirmed to both me and Defendant that it was not aware of the MITA or the Cooperation Agreement prior to the instant dispute arising in the summer of 2023, and that it takes no position with respect to the ownership dispute concerning Atlas.

66. I affirm this 3rd day of July, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Dated New York, New York
July 3, 2024



Ariel X. Burt

Certification Of Word Count

In furtherance of 22 NYCRR 202.8-b(c) and Commercial Division Rule 17, it is certified that this affirmation contains 3,794 words.

Dated: July 3, 2024

Respectfully submitted,

By: ______________________________

Eric Porter
100 Park Avenue, Suite 2000
New York, New York 10017
Phone: (212) 404-0639
Email: eporter@stradley.com
Attorneys for Plaintiff Ariel X. Burt