SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiff,

-against-

LLUIS TORRENT JEREZ,

Defendants.

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Index No.: 910717-23

Hon. Richard M. Platkin

Motion Seq. No. 001

POST-HEARING BRIEF IN FURTHER SUPPORT OF PLAINTIFF'S MOTION BY ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiff Ariel X. Burt ("Burt" or "Plaintiff"), individually on her own behalf and derivatively on behalf of Forsythe Ltd. ("Forsythe"), respectfully submits this post-hearing brief in further support of her motion brought by proposed Order to Show Cause and pursuant to CPLR § 6301 for entry of a preliminary injunction against Defendant Lluis Torrent ("Torrent" or "Defendant"). Burt and Torrent do not dispute that they together own Forsythe 50/50.

Burt has more than satisfied her burden for demonstrating her entitlement to preliminary injunctive relief, and the evidence adduced during the hearing held on September 6, 2024 and October 21, 2024 only further supports Burt's position. The documentary evidence overwhelmingly demonstrates that the MITA was effective, and that Forsythe owns Atlas. Torrent explicitly and repeatedly confirmed this fact, in writing, over the course of multiple years after the MITA was executed.

Torrent's attempts during the hearing to explain away his repeated written confirmations of Forsythe's ownership of Atlas are outrageous and unpersuasive, and he consistently doubled down on demonstrably false positions directly contradicted by documentary evidence.

Torrent repeatedly testified, for instance, that the parties intended Forsythe to merely provide "advisory services" to Atlas (October 21, 2024 Transcript, Doc. No. 103 ("Torrent Transcript") at 35:24 – 36:7), a claim directly contradicted by the Cooperation Agreement (Doc. No. 23), the Forsythe Board Meeting Minutes of August 14, 2020 (Doc. No. 97), and many other documents in the record. The Cooperation Agreement, for example, which the parties used to "put down in writing what has been agreed so far," in fact describes Forsythe as Atlas' "parent company" which "will hold 100% of all of the US companies, entities and assets," and that "it is foreseen that" Forsythe "holds 100% of the Delaware company 'Atlas Renewables'…" (Doc. No.

23 at §§ 3, 6.) The Forsythe August 14, 2020 Meeting Minutes similarly make clear that "Atlas has been incorporated . . . to act as a holding vehicle for the individual solar projects." (Doc. No. 97 at § 4.)

Torrent's repeated insistence that Forsythe was merely intended to provide "advisory services" to Atlas only demonstrates how divorced his position is from reality.

The record contains myriad additional examples of Torrent straining all credulity. When presented with an email Torrent sent Burt on March 21, 2021, six months after the MITA's execution, in which Torrent stated that "[b]eing Forsythe the entity who holds 100% membership interest, all the net losses and net profits generated by Atlas are for Forsythe" (Doc. No. 31), Torrent testified that this email somehow did not represent a statement about Forsythe's current ownership of Atlas, but rather a hope for what might be the case in the future. (Torrent Tr., 74:21 – 77:8.) This position is clearly contradicted by the simple fact that Torrent's email is written in the present tense. And Torrent's testimony that he was somehow using this email to try to encourage Burt to transfer him the $1,000 contemplated in the MITA makes no sense given that he does not mention that $1,000 payment or anything even remotely related to it in this email. (Id. at 77:9-20.)

Torrent has also demonstrated a willingness to simply invent purported facts from whole cloth. He continues to insist, for instance, that the parties agreed to put Burt on a six-month "forbearance" or "grace" period, and that Burt would be paid only a 5% discretionary "success fee," despite the fact that there is literally not a single document or email in the record supporting these claims amongst the "tens of thousands" of emails Torrent and Burt exchanged on every conceivable subject related to their joint business. (Id. 31:21 – 33:10; 59:19 – 60:11; 128:18 – 129:16.)

The facts supporting Burt's motion are, by contrast, straightforward and well-supported by the record. Torrent acknowledged that he executed the MITA on September 4, 2020, that he exchanged executed copies with Burt on October 20, 2020, and that he sent all of the emails and PowerPoints in the record thereafter expressly confirming that the MITA went into effect and that Forsythe owned Atlas. After initially denying under oath that he had done so, he also later acknowledged that, on March 23, 2021, he sent Burt an email with the subject line "Atlas transfer to Forsythe" to which he annexed a copy of the Atlas meeting minutes dated September 1, 2020 by which Atlas formally authorized its sale to Forsythe. (Ex. PP (Doc. No. 104); Torrent Tr. 55:8 – 58:6.) And Torrent admitted that, despite exchanging "tens of thousands" of emails with Burt on a wide variety of subjects related to their business together, not a single one of those emails sent prior to the summer of 2023 ever memorialized his claim that the MITA was somehow "void," or that the $1,000 never transferred. (Torrent Tr. 31:9 – 33:10; 58:4 – 60:11.)

Burt's position is supported by a literal mountain of evidence in the record. Torrent's position, by contrast, would require the Court to believe that Burt mysteriously changed her position on the MITA's effectiveness three days after signing the MITA, despite months of Burt and Torrent planning and preparing to transfer Atlas to Forsythe, all because Burt did not want to make further investments into Atlas that neither the Cooperation Agreement nor the MITA required her to make. It would require the Court to believe that Burt's change of heart was never documented by either side in any document or email ever exchanged between them. And it would require the Court to ignore all the emails, documents, meeting minutes, and PowerPoint slides exchanged between the parties over the next several years which confirm, over and over again, Forsythe's ownership of Atlas. Torrent's position is outrageous.

Burt has demonstrated a likelihood of success, irreparable harm, and that the equities favor her position. The Court should accordingly impose injunctive relief in the form of a forward-looking injunction on Torrent's ability to sell or transfer Atlas assets without Forsythe's written approval, and requiring that all moneys generated through Atlas' sale of assets since the summer of 2023 be deposited into an escrow account. The details of Burt's requested injunction are set forth herein, and would essentially return the parties to the pre-2023 status quo by which they jointly managed Atlas' operations via their shared ownership of Forsythe.

Moreover, because the evidence weighs so overwhelmingly in Burt's favor, the Court should require Burt to post only a minimal bond. Indeed, given the evidence in the record there is little to no risk that the factfinder will later reach a different conclusion on the merits, and Torrent has offered no evidence to support the conclusion that he will suffer any legally cognizable harm should Burt's requested injunctive relief be granted.

For the reasons set forth herein, in Burt's moving papers, and during the evidentiary hearing, Burt respectfully requests that her motion for a preliminary injunction be granted in its entirety.

ARGUMENT

The Court should grant Burt's requested preliminary injunction. The evidence overwhelmingly demonstrates that (i) Burt is likely to succeed on the merits, (ii) Burt and Forsythe will be irreparably harmed if Torrent is permitted to continue his current course of conduct, and (iii) the balance of equities falls squarely in favor of Burt and Forsythe. The requested preliminary injunction will protect Burt's and Forsythe's interests in and rights to participate in Atlas' management, while maintaining the pre-2023 status quo. Further, the relief sought will impose little, if any, prejudice on Torrent.

A. Burt Has Demonstrated a Likelihood of Success on the Merits

The evidence in the record provides overwhelming support for the conclusion that the MITA was effective and that Forsythe owns Atlas. Moreover, and as argued at length in Burt's moving papers, even if the Court were to somehow conclude that there is some question as to whether the MITA went into effect, Torrent should be estopped from taking the position that the MITA was not effective given his repeated statements to the contrary and Burt's and Forsythe's reliance upon those statements to their substantial detriment. Torrent's statements confirming the MITA's effectiveness would, in that scenario, also constitute a blatant and obvious fraud designed to induce Burt's and Forsythe's reliance. (Doc. No. 18 at 20-1.)

Simply put, Torrent is caught between two potential outcomes, both of which result in Burt succeeding on the merits. Either Torrent is actively breaching the MITA, or he defrauded Forsythe and Burt by misrepresenting Forsythe's ownership of Atlas for years. Burt has accordingly demonstrated a strong likelihood of success on the merits.

1. The MITA Went Into Effect, and Torrent's Arguments to the Contrary are Baseless

As discussed above, the Cooperation Agreement and the Forsythe August 2020 Meeting Minutes both definitively demonstrate the parties' intention to transfer ownership of Atlas to Forsythe, and Exhibit PP documents Atlas formally authorizing its transfer to Forsythe. (Doc. Nos. 23 and 97, Ex. PP (Doc. No. 104).) By executing the MITA, the parties effectuated that intention. (Doc. No. 24.)

Torrent acknowledges signing the MITA on September 4, 2020. (Id.; Torrent Tr. 53:2-4.) He acknowledges that he and Burt did not exchange executed copies of the MITA until October 20, 2020, and that he contacted or visited at least six different notaries in October of 2020 in an attempt to get his signature on the MITA notarized. (Id. at 53:9-20; Doc. No. 90.) He

acknowledges that he sent Burt his executed version of the MITA on October 20, 2020, asked Burt to countersign the MITA and send her countersigned version back to him, and that she did so. (Doc. No. 90; Torrent Tr. 53:21-25.) Moreover, and as discussed in detail below and in Burt's moving papers, Torrent consistently affirmed and reaffirmed the MITA's effectiveness over the course of the next several years through his written words and actions.

Torrent offers a number of arguments for why the MITA purportedly never went into effect, but the record definitively contradicts and undermines each of his arguments.

Torrent argues that the MITA never went into effect because the $1,000 payment contemplated therein never transferred to him. But he admits that Forsythe had the $1,000 in its bank account in September of 2020 (Torrent Tr. 50:25 – 51:2), and that Burt would not have needed to invest any more money for that $1,000 to have transferred. (Id. at 51:3-7.) He admits that he had access to Forsythe's accounts at that time, and that, though distributions from Forsythe's bank account required dual approval from both him and Burt, he never asked Burt to provide her half of the dual approval to transfer $1,000 from Forsythe to him in connection with the MITA. (Id. at 47:18 – 48:23.) Torrent also acknowledges that he never sent Burt a single email at any point prior to May of 2023 in which he ever once raised the issue of the $1,000 or otherwise claimed that the MITA never went into effect because the $1,000 never transferred. (Id. at 58:22 – 59:18.)

In short, the $1,000 is a token sum that Torrent only decided to rely upon years later in a transparent attempt to retroactively invalidate the MITA. Torrent's argument is baseless.

Torrent also argues that Burt had a change of heart between signing the MITA on September 4, 2020 and the MITA going into effect on September 10, 2020 because she was purportedly unable to invest more money into Forsythe or Atlas at that time. He claims that she

conveyed this to Torrent via a telephone conversation on September 7, 2020, during which they agreed that the MITA was "void." (Id. at 48:24 – 49:24.) But Torrent acknowledges that neither the MITA nor the Cooperation Agreement require Burt to invest anything more into Forsythe or Atlas. (Id. at 50:9-16.) He acknowledges that he "wasn't expecting Ms. Burt to inject money from her pocket." (Id. at 9:22-23.) He acknowledges that no email the parties ever exchanged in 2020, 2021, or 2022 memorializes their purported agreement that the MITA was "void." (Id. at 58:4 – 59:5.) And, as discussed above, he acknowledges attempting to notarize the MITA on October 20, 2020 and exchanging fully executed copies of the MITA with Burt on that date, over a month after the purported September 7, 2020 phone call.

Torrent argues that he memorialized the purported September 7, 2020 phone conversation in a set of Atlas meeting minutes dated September 11, 2020. (Doc. No. 70.) But Torrent admits that he never once shared those purported minutes from September 11, 2020 with Burt or any other person. (Torrent Tr. 51:8 – 52:10.)

While he never shared the purported September 11, 2020 Atlas minutes, Torrent did share with Burt the Atlas minutes authorizing Atlas' transfer to Forsythe. Indeed, after initially testifying under oath that he had never sent Burt the Atlas Meeting Minutes from September 1, 2020 authorizing Atlas' transfer to Forsythe, Torrent later admitted that he had done so when presented with his email to her of March 23, 2021. (Id. at 55:8 – 58:3; Ex. PP (Doc. No. 104).) The email he sent Burt on that date – more than six months after the MITA's effective date – includes the subject line "Atlas transfer to Forsythe," which Torrent acknowledges drafting himself. (Id.)

Finally, Torrent claims that Burt changed her mind about the MITA because Section 4.2 of the Forsythe Shareholder Agreement (Doc. No. 65) would have required her to invest equal

amounts relative to Torrent. (Torrent Tr. at 49:25 – 50:8.) But the Shareholder Agreement does not impose any such requirement. Section 4.2 provides as follows:

> There is no obligation on the Shareholders to provide any finance to the Company but, if they do so, the Shareholders shall each provide such further finance in their respective Shareholding Proportions on the same terms unless they unanimously agree in writing. In the short term, the Shareholders unanimously agree that they will be providing finance in different proportions.

The parties executed the Shareholder Agreement on or around March 9, 2020. Even assuming that the parties were contemplating additional financing in September of 2020 extending beyond the so-called "short term," a period of time that the Shareholder Agreement does not define, they had already by that point agreed unanimously, in writing, that their future financing would not be in equal proportion. Indeed, the parties agreed in the Cooperation Agreement, executed after the Shareholder Agreement but before the MITA, that Torrent would be investing "USD 1m or more at his discretion," but that Burt was not required or expected to make any further monetary investments. (Doc. No. 23 at § 5.) The Cooperation Agreement would accordingly constitute the "unanimous agree[ment] in writing" that Section 4.2 requires. Section 4.2 would have therefore given Burt no reason to abruptly change her mind, as Torrent claims without citation to any evidence whatsoever aside from his own self-serving testimony.

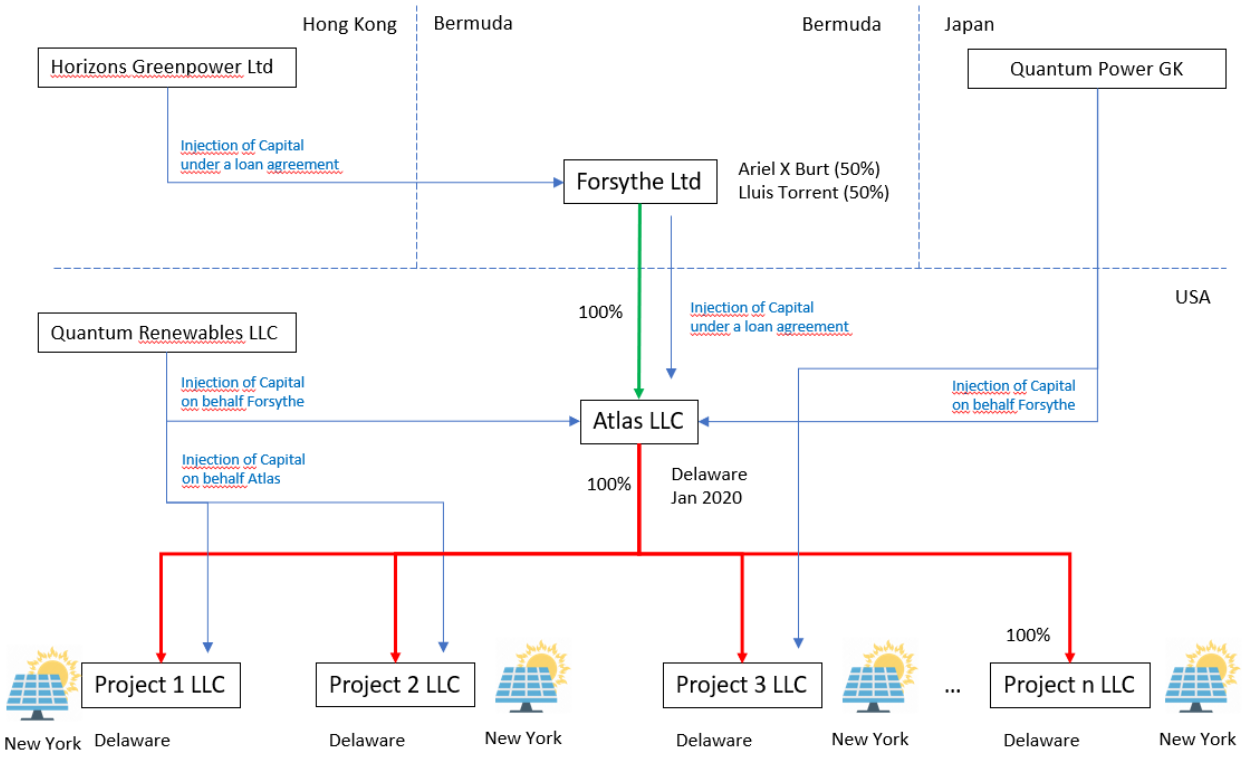
The record overwhelmingly supports the conclusion that the MITA was effective, and Torrent's arguments to the contrary are contradicted by documentary evidence.

2. Torrent Affirmed and Reaffirmed the MITA's Effectiveness Through His Words and Actions, and Torrent's Baseless Attempts to Explain Away His Behavior Make No Sense

As discussed in detail in Burt's moving papers, for several years Torrent consistently and repeatedly affirmed and reaffirmed, by his words and conduct, both in his dealings with Burt and with third parties, that the MITA was effective and that Atlas was 100% owned by Forsythe.

For example, minutes of a Forsythe board meeting attended by Burt and Torrent and held on December 3, 2020 – approximately three months after execution of the MITA – document the parties' discussions regarding strategy and budgeting for numerous Forsythe solar projects, all of which were owned 100% by Atlas. (Doc. No. 25.) Torrent admitted attending that meeting. (Doc. No. 21, Response No. 9.)

On February 9, 2021, approximately five months after the MITA's execution, Torrent emailed Forsythe's accountants a PowerPoint slide depicting Forsythe's 100% ownership of Atlas. (Doc. Nos. 26 and 27.) Torrent admitted sending this email and creating this PowerPoint slide. (Torrent Tr., 62:7 – 63:15.) Torrent's slide appears as follows:



Torrent attached to this same email a spreadsheet reflecting various accrued expenses arising from Atlas's projects, all attributed by Torrent to Forsythe. (Doc. No. 28.) This spreadsheet also documents the fact that all expenses paid on behalf of Atlas and/or Forsythe by Torrent and

his entities, Horizons and Quantum, were booked as loans by Torrent or his entities to Forsythe. (Id.) Indeed, and as another email Torrent sent to Forsythe's accountants on February 9, 2021 memorializes, Torrent and Burt expressly agreed that all such "payments are treated as a loan to Forsythe Ltd and there is no direct loan from Quantum Renewables LLC to Atlas Renewables LLC." (Ex. QQ (Doc. No. 105).)

Torrent argued at the hearing that his agreement with Burt regarding expenses being booked as loans to Forsythe and not as loans to Atlas would only have been effective had the MITA gone into effect. (Torrent Tr., 103:20 – 108:13.) But his email to Forsythe's accountants says nothing of the kind, it merely instructs the accountants to book all such expenses as loans to Forsythe. (Ex. QQ (Doc. No. 105); Doc. No. 28.) Torrent's position would require the Court to believe that Torrent was advising Forsythe's accountants to book expenses and loans based on a set of circumstances that did not exist, which is, outrageously, exactly what Torrent claimed at the hearing to have been doing. (Torrent Tr., 108:6-13.)

Torrent also doubled down at the hearing on the blatantly false and misleading position he previously took in his sworn Affirmation regarding an email featured within Doc. No. 26. Torrent focuses on the email Burt sent to Forsythe's accountants on February 4, 2021, wherein she states that a delay in communicating with them 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.) Torrent claimed in his Affirmation, and again at the hearing, that Burt's email somehow demonstrated that the MITA never went into effect. (Doc. No. 58 at ¶¶ 69-70; Torrent Tr. 64:19 – 71:4.) In reality, and as the documentary evidence demonstrates, Burt was referring to advice the parties had sought from Mazars regarding two competing potential corporate structures, both of which reflected Forsythe's 100% ownership of Atlas. (Doc. Nos. 93 and 94.)

Mazars provided guidance in response to that inquiry on February 3, 2021, the day before Burt's email to Forsythe's accountants. (Doc. No. 89 at ¶30; Torrent Tr. 68:21-25.)

Torrent's position makes no sense even on its own terms. If Burt was in fact referring to the MITA never being effective, that issue would not have been resolved by February 4, 2021, and it would have made no sense for her to say on February 4, 2021 that "we now understand exactly how we are going to run the set up for the long term." Torrent's insistence on doubling down on his false and misleading position in the face of definitive documentary evidence making clear exactly what Burt's email was truly referring to only further underscores Torrent's incredulity and the pressing need for preliminary injunctive relief.

On March 15, 2021, more than six months after signing the MITA, in an email to a colleague, Torrent clarified the difference between Atlas and an entity called CAERO that is 100% owned by Burt. (Doc. No. 30.) Torrent stated in this email that he and Burt were utilizing Burt's CAERO entity to pursue projects on behalf of Atlas because of CAERO's "well-known and well perceived brand in the USA." (Id.) As Torrent explained:

> 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 [Burt] and myself.***

(Id.) (emphasis added). Torrent admits sending this email, but claims that he was just expressing his "hope" that the MITA would one day go into effect. (Torrent Tr. 71:7 -74:11.) He acknowledges, however, that nothing in this email indicates that his present tense description of Atlas' ownership was not the then-current state of affairs, or that it merely reflected his "hope." (Id.)

On March 21, 2021 – again, over six months following execution of the MITA – Torrent sent an email to Burt in which he discussed incorporation of the various project-specific LLCs in

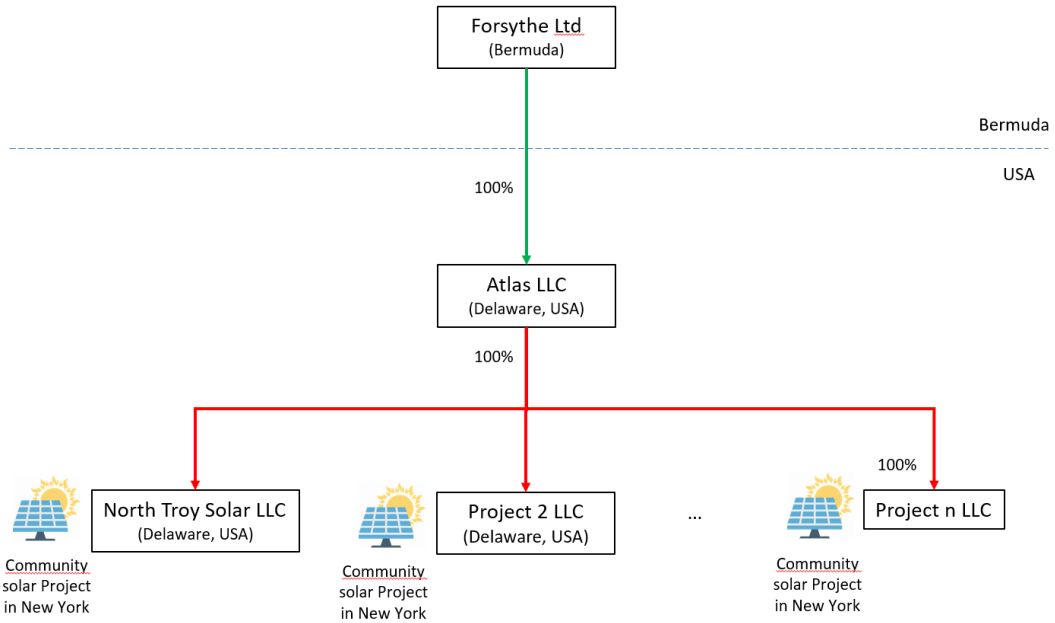
the U.S., the structure of Atlas, and a draft of Atlas' operating agreement. Regarding Atlas, Torrent stated that: "Being Forsythe the entity who holds 100% membership interest, ***all the net losses and net profits generated by Atlas are for Forsythe."*** (Doc. No. 31) (emphasis added).)

As discussed above, Torrent again attempted in his sworn testimony to wave away this email as another example of what he merely hoped would be the case in the future. (Torrent Tr., 74:21 – 77:8.) But, again, that position makes no sense. Torrent's email is written in the present tense, and gives no indication that it does not accurately describe the present corporate structure. To the extent he was trying to avoid airing "dirty laundry" in his email to the accountants (Torrent Tr. 72:18 – 73:25), no similar justification makes sense here, since this email was only between him and Burt. And his testimony that he was somehow using this email to try to encourage Burt to transfer him the $1,000 contemplated in the MITA similarly makes no sense, since he does not mention the $1,000 payment or anything even remotely related to it in this email. (Id. at 77:9-20.)

A week later, on March 30, 2021, Torrent again reaffirmed Forsythe's ownership of Atlas in an email he sent to legal counsel requesting legal advice for Forsythe:

> As you may remember, we are developing solar projects in the State of New York under the Atlas Renewables LLC flagship. As represented in the PPTX file, ***Atlas is a 100% subsidiary of Forsythe Ltd, a Bermudian based company.*** For each of the solar projects, we are incorporating a Special Purpose Vehicle (SPV), like North Troy Solar LLC, which has all the rights related to that specific project. All the incorporated SPVs are 100% subsidiaries of Atlas Renewables LLC.

(Doc. No. 35.) The PowerPoint file Torrent attached to and referenced in that email included the following organizational chart:

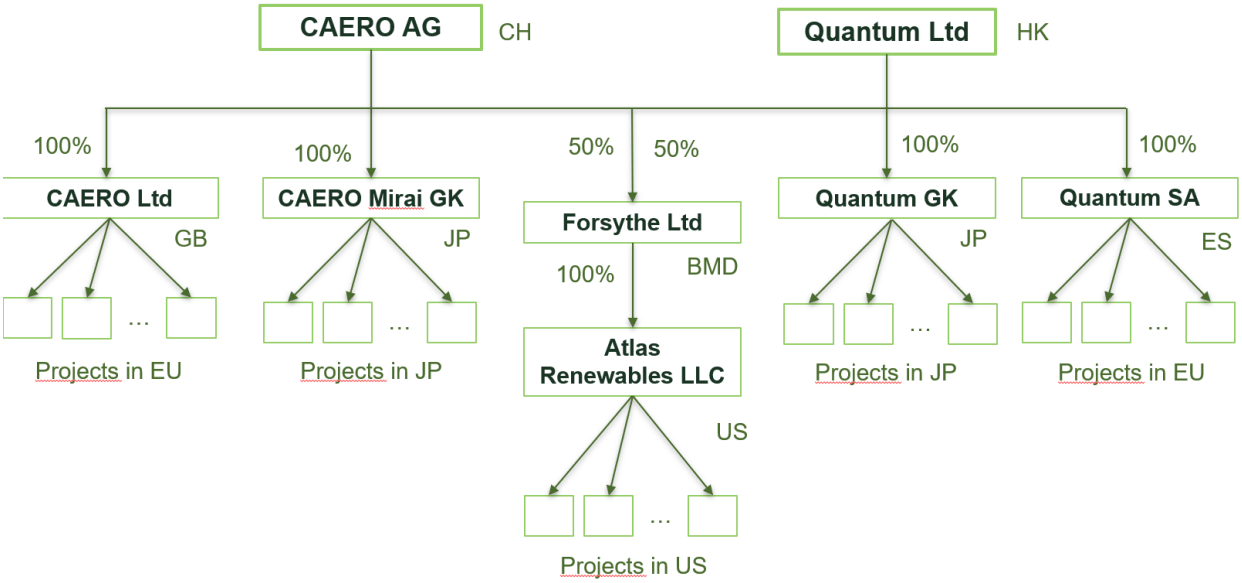


(Doc. No. 36.)

Torrent admitted under oath that he sent this email and drafted this PowerPoint. (Torrent Tr. 77:21 – 82:14.) He admitted that the email was written in the present tense. (Id.) He admitted that it says nothing to indicate that the MITA has not gone into effect, or that it did not represent the current state of affairs regarding Forsythe and Atlas. (Id.)

Torrent attempted to explain this email as him not trying to "burn" his relationship with Burt by telling these attorneys that Burt had not transferred the $1,000. (Id.) But he admitted that he would not have needed to say anything of the sort to these attorneys in order to convey that the MITA had not yet gone into effect, he simply would have needed to say that the MITA had not yet gone into effect. (Id.) He did not do so. Torrent's purported explanation would require the Court to believe, much like Torrent's attempt to explain away his email to Forsythe's accountants, that Torrent was seeking legal advice based on a state of affairs that did not exist. Torrent's position is outrageous.

On June 27, 2021, more than nine months after the MITA's Closing, Torrent sent Burt the following draft organizational chart he had created, which again clearly reflects Forsythe's 100% ownership of Atlas:



(Doc. Nos. 37 and 38.)

Torrent again admitted under oath that he created this organizational chart and shared it with Burt. (Torrent Tr. 82:15 – 86:2.)

On November 23, 2021, more than fifteen months after the MITA was executed, Torrent and Burt attended another Forsythe board meeting during which they discussed the pending sale of Atlas assets to Kruger Energy (USA) Inc. ("Kruger"). (Doc. No. 42.) As the minutes of this meeting reflect, Torrent and Burt discussed the terms of the transaction, its benefits to Atlas, and the draft agreements negotiated with Kruger. (Id.) Torrent and Burt voted to approve the transaction on behalf of Forsythe, and that "Atlas be given approval to proceed with the transaction and to enter into the Agreements as presented." (Id.) At no time during this meeting did Torrent ever assert that Atlas was not owned by Forsythe or raise any concerns regarding the effectiveness

of the MITA. (Id.) Indeed, a vote to approve the Kruger transaction during a Forsythe board meeting would make no sense if Forsythe did not own and control Atlas.

Torrent did not deny that this meeting occurred, he only testified that he could not recall attending and that he was not in Hong Kong at the time it was held. (Torrent Tr. 86:8 - 90:22.) He agreed that a vote by Forsythe to approve Atlas' sale of assets to Kruger would not make sense if Forsythe did not own Atlas. (Id.)

After the Kruger deal closed and Kruger paid Atlas approximately $1.6MM, Torrent and Burt conferred regarding how that money should be distributed before it was actually distributed to any individuals or entities. (Ex. SS (Doc. No. 107); Torrent Tr. 115:18 – 118:17.) Again, Torrent and Burt conferring regarding how the money Atlas received from its sale of assets to Kruger should be distributed would make no sense if Burt did not have an ownership interest in Atlas.

3. Torrent Unlawfully Cut Burt and Forsythe Out of the Onyx Deal

After years of working cooperatively to develop Atlas's projects and business strategy, in mid-2023, suddenly and without warning, and just as Atlas neared consummation of a multi-million-dollar deal with Onyx Renewable Partners L.P. ("Onyx"), Torrent launched his scheme to cut Plaintiff and Forsythe out of the equation. Around this time, Plaintiff realized that Defendant was not copying her on certain communications or including her in meetings involving Atlas projects. (Doc. No. 22, ¶¶67-68.) She further realized that Torrent was misrepresenting to Onyx that he, and not Forsythe, was Atlas's sole member. (Id., ¶69.)

The parties then had a series of discussions, and exchanged a series of emails, over the next several months, wherein Burt raised her concerns and Torrent finally revealed his scheme. By email dated July 17, 2023, for instance, Burt expressed the parties' need to accurately inform Onyx regarding Forsythe's ownership of Atlas. (Doc. No. 52.) In response, Torrent abruptly and for the

first time alleged, after years of affirming and reaffirming otherwise, that the MITA was never effectuated and that he remained the sole owner of Atlas. (Id.) The only basis for his assertion regarding the MITA was his spurious claim that he never received the $1,000 nominal payment from Forsythe, a company he owns and controls. (Id.)

In August 2023, Burt emailed Torrent again and requested that she be included on all emails regarding Atlas projects. In response, and despite Burt's years-long participation in the management and operations of Atlas, Torrent advised Burt that she had "no right to attend any of the Atlas meetings because you have no interest, direct or indirect, in Atlas." (Doc. No. 53.)

Following this sudden about-face, Torrent cut off Burt's and Forsythe's access to information regarding Atlas's business dealings, including the status of the Onyx deal. That deal ultimately closed in August of 2023. (Doc. No. 54.) Torrent did not provide Burt or Forsythe with the closing documents. (Torrent Tr. 93:22 – 94:10.) Torrent did not seek Forsythe's approval before causing Atlas to close the Onyx deal. (Id.) Torrent did not provide any of the money Atlas received from Onyx to Burt or Forsythe. (Id. at 99:25 – 100:5.)

Torrent testified during the hearing that Onyx ultimately paid Atlas approximately $2,500,000.00. (Id. at 94:13 – 96:17.) Torrent testified that he caused Atlas to distribute at least $1,370,000.00 to Quantum Renewables LLC, an entity he owns and controls, at least $210,000.00 to Horizon Greenpower Ltd., another entity he owns and controls, and $40,000 directly to himself. (Id. at 98:21 – 99:13.) Horizon is based in Hong Kong. (Id. at 100:6-7.) Torrent testified that all the money he transferred to Horizon and Quantum went to unidentified "investors" located in Singapore, Japan, and Australia. (Id. at 102:6-15.)

Torrent testified that the payments he caused Atlas to transfer to Horizon and Quantum were to pay back purported loans from those entities to Atlas. (Id. at 114:17 – 115:4.) But Torrent

and Burt had previously agreed that these expenses would be booked as loans to Forsythe, and that Forsythe would be the sole funding provider to Atlas. (Ex. QQ (Doc. No. 105).) In fact, on certain of Torrent's own private books, which he never shared with Burt until this litigation, he booked many of the same entries he had previously booked as loans from Quantum and Horizon to Forsythe (Doc. No. 28) as loans from Quantum and Horizon to Atlas. (Ex. RR (Doc. No 106); Torrent Tr. 109:16 – 115:4.) By booking or re-booking these loans as having been made to Atlas directly, without involving Forsythe, Torrent took the money from Onyx and distributed it to entities he fully owns and controls, without directing that money to Forsythe or seeking Forsythe's approval before distribution.

4. The Documents Cited By Torrent Offer Him No Support

Torrent cites in purported support of his position to attachments annexed to an email that Burt forwarded to Clarien Bank on March 16, 2021 (Exhibit 30), and to attachments sent between Atlas' counsel and Kruger's counsel as part of the Kruger closing on November 30, 2021 (Doc. Nos. 78-82). On certain pages of these attachments, the attachments identify Torrent as the sole member of Atlas. Torrent argues that Burt accordingly knew that the MITA never went into effect. Torrent's argument is baseless.

Burt consistently and truthfully testified that she did not draft or review the documents annexed to the email she sent to Clarien Bank, but that she simply forwarded documents provided to her by Torrent. (Burt Tr., Doc. No. 102, 42:7-16; 88:15 – 90:2.) She testified that she relied on Torrent to complete these documents accurately, did not review every document he prepared for accuracy, and had no reason to believe that Torrent would not accurately represent Atlas' ownership structure. (Id.) She testified that if she had noticed the inaccuracies in these documents

regarding Atlas' ownership, she would have said something to Torrent, just as she did in 2023 in connection with the Onyx materials. (Id.)

With respect to the attachments to the emails between Atlas' counsel and Kruger's counsel on November 30, 2021, Burt again testified consistently and truthfully that she did not see the inaccuracies regarding Atlas' ownership and relied on Torrent to accurately convey Atlas' ownership structure to Atlas' counsel. (Id. at 53:5 – 60:20.) She made clear that she was relying on Atlas' counsel to review these materials, and that, if she had seen any inaccuracy, she would have corrected it at the time. (Id.) Burt also pointed out that the main closing document executed between Atlas and Kruger was signed by Torrent in his capacity as Atlas' manager, not as its sole member, which he is not. (Id. at 92:15-25.)

There is simply no basis to conclude that these documents – which Burt did not draft and did not read – somehow carry the same or even a significant portion of the same weight of the many documents discussed at length above, which Torrent himself drafted over a period of years, and which state repeatedly and unambiguously that Forsythe owns Atlas.

B. Burt and Forsythe Have Suffered and Will Continue to Suffer Irreparable Harm if Torrent is Not Enjoined

As discussed in detail in Burt's moving papers, Torrent's actions have caused her and Forsythe irreparable harm, and will continue to do so, if Torrent is not enjoined.

Such irreparable harm stems from Torrent denying Burt and Forsythe the right and opportunity to manage the affairs of their asset, Atlas. *See, e.g.*, *Wisdom v. Labatt Brewing*, 339 F.3d 101, 113-15 (2d Cir. 2003) ("Conduct that unnecessarily frustrates efforts to obtain or preserve the right to participate in the management of a company may also constitute irreparable harm."); *Oracle Real Estate v. Adrian Holdings*, 582 F.Supp.2d 616, 625 (S.D.N.Y. 2008) (issuing injunction where movant's bargained-for right to control company had intrinsic value that could

not be readily quantified); *Suchodolski v. Cardell*, No. 03-Civ.-4148, 2003 WL 22909149, *4 (S.D.N.Y. Dec. 10, 2003) ("The dilution of a party's stake in, or a party's loss of control of, a business constitutes irreparable harm."); *Spivak*, 147 A.D.3d at 651 (finding irreparable harm where, absent injunction, plaintiff would lose his "voting power and decision-making rights" with respect to subject companies); *Yemini*, 60 A.D.3d at 937 (granting preliminary injunction preventing party from taking unilateral action with respect to company in which movant held 50% interest because control and management of company at stake and money damages insufficient); *Bank of America v PSW*, 29 Misc.3d 1216(A), *10-1 (Sup. Ct. New York Co. 2010) ("[i]n appropriate circumstances, the loss of a bargained-for contractual right of control can constitute irreparable harm"); *CanWest Global v. Mirkaei*, 9 Misc. 3d 845, 860 (Sup. Ct. New York Co. 2005) (finding plaintiff had "lost the right to participate in the management of the" subject business, and that this factor and others "necessitate a finding of irreparable harm.").

Torrent has never even attempted to address, let alone refute, this body of case law or the irreparable harm he has caused Burt and Forsythe by denying their ability to manage Atlas' affairs.

The irreparable harm Torrent has caused Burt and Forsythe also stems from his diversion and dissipation of substantial funds that should have flowed from Atlas to Forsythe.

Irreparable harm justifying a preliminary injunction can arise where, absent court intervention, "a substantial amount of money may be dissipated or otherwise unavailable for recovery." *Ma v. Lien*, 198 A.D.2d 186 (1st Dept. 1993); *see also Burmax v. B & S Industries*, 135 A.D.2d 599, 600 (2nd Dept. 1987) (preliminary injunction enjoining distribution of assets appropriate where necessary to preserve the status quo).

Here, and as the evidence in the record demonstrates, Torrent completely cut Forsythe out from the $2,500,000.00 Atlas received in the Onyx deal, distributed nearly that entire amount to

himself and to entities he owns and controls, and moved nearly the entire amount oversees to his own entities or to purported unidentified "investors" in Singapore, Japan, and Australia. Should Atlas sell any further assets in the future, Torrent is overwhelmingly likely to similarly transfer any such assets to himself or to entities or individuals oversees without providing a penny to Forsythe or Burt. Injunctive relief is accordingly warranted and appropriate to remedy and prevent such unlawful diversion and dissipation of Forsythe's funds.

C. The Balance of Equities Plainly Favors Burt

The evidence in the record demonstrates that the balance of equities clearly favors Burt. Torrent has unjustifiably denied Burt's and Forsythe's right to participate in the business and management of Atlas in clear contravention of the express and unequivocal terms of their written agreements and after years of acknowledging and reaffirming Burt's and Forsythe's ownership interests in Atlas. Moreover, Burt simply seeks to maintain the pre-2023 status quo by preventing Torrent from continuing to engage in significant transactions involving Atlas's solar projects and diverting the proceeds overseas where they will be rendered unavailable in the event Burt succeeds in this litigation. Where a party seeks to maintain the status quo, and where in the absence of an injunction the non-movant may engage in conduct that will result in further irreparable harm, "the balance of equities tilt in [ ] favor" of the requested injunction. *CamWest*, 9 Misc.3d at 872.

Torrent has submitted no evidence whatsoever to even suggest, let alone demonstrate, that he will be prejudiced in any way by the requested injunction. To the contrary, the injunctive relief Burt seeks (as set forth in detail below) will merely restore the status quo that the parties worked under for years prior to the middle of 2023.

D. Burt's Proposed Injunction

Burt respectfully requests that the Court impose a preliminary injunction containing the following provisions:

i. Prohibiting Torrent from effectuating or causing Atlas to effectuate any further sales or transfers of any Atlas assets without Forsythe's written consent and approval, such consent not to be unreasonably withheld, and requiring Torrent to provide Burt and Forsythe with all documents and information they reasonably request concerning any such proposed sale or transfer;

ii. Prohibiting Torrent from making any expenditure of Atlas' funds over the amount of $250 (the "Expense Threshold") without Forsythe's written consent and approval, such consent not to be unreasonably withheld, and requiring Torrent to provide Burt and Forsythe with all documents and information they reasonably request concerning any such proposed expenditure;

iii. Prohibiting Torrent from transferring any Atlas funds to Torrent himself, or to any entities Torrent owns or controls, including but not limited to Horizons Greenpower Ltd., and Quantum Renewables LLC, pending a final determination on the merits;

iv. Requiring Torrent to provide Burt and Forsythe, on a monthly basis within five (5) days of the last day of each calendar month, with a schedule detailing all Atlas expenditures falling below the Expense Threshold (the "Expense Schedule") in that month. The Expense Schedule shall detail the recipient of the payment, the amount of the payment, and the reason for the payment.

v. Requiring Torrent to provide Burt and Forsythe, on a monthly basis within five (5) days of the last day of each calendar month, with the monthly bank account statement

for all bank accounts held by Atlas or otherwise containing Atlas' funds, so that Burt and Forsythe may confirm Torrent's compliance with the requirements of the Court's injunction;

vi. Requiring Torrent to deposit all proceeds of any future sale or transfer of Atlas assets with the Court pursuant to CPLR § 2601 or otherwise into an escrow account governed by terms on which the parties agree, to be held during the pendency of this litigation and until a final determination is made on the merits. Should Atlas' existing finances be insufficient to cover any reasonably necessary business expense, and should escrowed funds be required to cover any such expense, the parties may jointly authorize a release of necessary funds from escrow prior to a final determination being rendered on the merits;

vii. Requiring Torrent to place with the Court or into escrow on the terms set forth in Point (vi) above, or to post a bond, in the sum of no less than $950,000.00, representing the $2,500,000.00 Torrent testified that Atlas received from Onyx, less $600,000.00 in reasonable expenses associated with Atlas' sale of assets to Onyx, divided in half to reflect Burt's 50% interest in Forsythe. Though the full $2,500,000.00 should be returned to Forsythe, with the parties jointly determining the distribution of all such funds thereafter, Burt is proposing a lesser escrow amount (without waiver of any of her or Forsythe's rights) in order to honor the Court's request that the parties propose potential areas of compromise;

viii. Requiring Torrent to provide Burt and Forsythe with a full accounting of Atlas's business operations from July 2023 through the present; and

ix. Granting such other and further relief as the Court deems just and proper.

E. The Court Has the Authority to Order Burt's Proposed Injunction

CPLR § 6301 provides that:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

Under CPLR § 6301, courts have the authority to order funds placed into escrow or returned to the moving party where the money at issue consists of a specific fund that itself constitutes the subject matter of the litigation. *See Dinner Club Corp. v. Hamlet on Olde Oyster Bay Homeowners Ass'n, Inc*., 21 A.D.3d 777, 778 (1st Dep't 2005) ("Where the suit involves the plaintiff's claims to a specific fund, that fund is the 'subject of the action' and a preliminary injunction is appropriate under the express wording of CPLR 6301."); *Matter of 1650 Realty Assoc., LLC v Golden Touch Mgt., Inc*., 101 A.D.3d 1016, 1018-9 (2nd Dep't 2012) (holding that "[t]he purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual," and granting preliminary injunction directing defendants "to remit to the petitioners all funds in their possession derived from the subject properties."); *Fieldstone Capital, Inc. v Loeb Partners Realty*, 105 A.D.3d 559, 560 (1st Dep't 2013) (granting preliminary injunction and holding that, "in order to preserve the status quo, the contested accounts should be frozen and the funds held in escrow pending a determination as to the rights of the parties.")

The money Atlas received from Onyx, and any money Atlas may receive from other third parties in connection with the sale or transfer of its assets, constitute "specific funds" that are themselves the subject of this litigation, since Forsythe has a preexisting interest in those moneys.

See Dinner Club, 21 A.D.3d at 778 (a specific fund "is typically a specific res in which the plaintiff has a preexisting interest."). Ordering these specific funds placed into escrow is therefore well within the Court's authority pursuant to CPLR § 6301.

Entering the proposed injunction is necessary and appropriate here for the reasons set forth above. Absent an injunction, Torrent has demonstrated his willingness and ability to wrongfully divert Atlas funds oversees and dissipate such funds without Forsythe's knowledge, approval, or input. The requested injunction will maintain the pre-2023 status quo by returning control of Atlas' affairs to Forsythe.

F. Should The Court Require Burt to Post a Bond, Her Bond Amount Should Be Minimal

"The fixing of the amount of an undertaking is a matter within the sound discretion of the court." *Blueberries Gourmet, Inc. v. Aris Realty Corp.,* 255 A.D.2d 348, 350 (2nd Dep't 1998).

Moreover, determining the size of any required undertaking is and should be directly informed by the Court's assessment of the strength of the underlying merits and the movant's likelihood of success. *See, e.g., 180 Life Sciences Corp. v Tyche Capital LLC,* 216 A.D.3d 419 (1st Dep't., 2023) (holding that size of bond properly "based upon a careful consideration of the evidence and plaintiff's likelihood of success on its claims."); *7th Sense v Liu,* 220 A.D.2d 215, 217 (1st Dep't., 1995) (holding that court properly acted within its discretion in setting bond amount "based upon careful consideration of the evidence presented at a hearing and plaintiffs' likelihood of success at trial."); *Eastman Kodak Co. v. Collins Ink Corp.,* 821 F.Supp.2d 582, (W.D.N.Y. 2011) (in determining amount of injunction bond, "it makes sense to consider the likelihood that this Court or an appellate court will find that an injunction should not have issued in this case. The greater plaintiff's likelihood of success on the merits, the lower the probability that an injunction in plaintiff's favor will later be determined to have been issued in error, and

consequently that [non-movant] will be found to have wrongfully suffered harm."); *RLS Associates, LLC v. United Bank of Kuwait PLC,* 464 F.Supp.2d 206, 225 (S.D.N.Y. 2006) ("If objection be made that factoring the likelihood of success into the amount of a security bond constitutes improper prejudging of the merits of litigation, the answer … is that such an exercise is inherent in any fixing of security for costs by a district court.").

Here, and for the reasons discussed above, in Burt's moving papers, and during the evidentiary hearing, Burt has demonstrated an overwhelming likelihood of success on the merits. Given the strength of the evidence in Burt's favor, there is very little chance that the preliminary injunction, if imposed, will ultimately later be found to have been incorrect. Any bond required of Burt should accordingly be minimal.

Moreover, though the purpose of such an undertaking would be to protect Torrent against prejudice stemming from the injunction in the unlikely event he ultimately prevails on the merits, Torrent has not offered any evidence whatsoever to support the conclusion that he will be meaningfully prejudiced in any way in the event the injunction goes into effect. To the contrary, the proposed injunction would merely return the parties to the state of affairs that existed for years prior to mid-2023, wherein they jointly (via Forsythe) made determinations regarding Atlas' business and how moneys Atlas received should be distributed.

For these reasons, Burt respectfully proposes that, should the Court require her to post an undertaking, Burt's undertaking be set at no more than $10,000.00.

CONCLUSION

For the reasons set forth herein, in Burt's moving papers, and during the evidentiary hearing, Burt respectfully requests that the Court enter the requested preliminary injunction.

Dated: November 8, 2024

Respectfully submitted,

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