

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

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DLA PIPER LLP (US),	:	Index No. 650374/2012
	:	
Plaintiff,	:	IAS Part 63
	:	
- against -	:	Hon. Ellen Coin
	:	
ADAM VICTOR,	:	<u>SUPPORTING AFFIDAVIT</u>
	:	
Defendant.	:	
	:	
-----X		
STATE OF NEW YORK)		
) ss.:		
COUNTY OF NEW YORK)		

LARRY HUTCHER, being duly sworn, deposes and says:

1. I am a member of Davidoff Hutcher & Citron, counsel for the defendant/counterclaim plaintiff Adam Victor ("Victor") herein, and as such, am fully familiar with the facts and circumstances of this matter. I submit this affidavit in support of the instant application seeking leave to file and serve an amended pleading asserting new causes of action against plaintiff/counterclaim defendant DLA Piper LLP (US) ("DLA Piper").

2. As will be more fully set forth hereafter, Victor's application should be granted since, among other reasons, it is based on newly discovered evidence which demonstrates shockingly egregious conduct by DLA Piper warranting the new counterclaims.

"Churn that bill, baby!"

3. It is hard to imagine that sophisticated lawyers associated with a reputable firm would use the cynical and unethical phrase "Churn that bill, baby!" as a rallying cry, but this is the exact mantra that the lawyers at DLA Piper adopted when it came to performing services for Victor and his company, Project Orange Associates, LLC ("POA"). Their conduct

knows no shame or boundaries.

4. While many disheartened and aggrieved clients, as well as a large portion of the general public, have long suspected that attorneys in general churn time, inflate bills, create unneeded work, or expend time performing useless tasks, that claim has always been difficult, if not impossible to prove. That is no longer the case!

5. Until now, there probably has never been a written admission where members of a law firm have flatly acknowledged they have engaged in such reprehensible and damning conduct. As described herein, the written admissions by DLA Piper attorneys concerning churning perhaps reflect the most egregious conduct by a law firm in any fee matter. These admissions provide a window into a culture of avarice and ruthlessness that casts a pall not only on DLA Piper, but on the entire legal profession.

6. It would be one thing for such a preeminent law firm to have acted in this manner, and then voluntarily address it by reducing its fees or apologizing. Not only did that not occur, DLA Piper's wrongful conduct was compounded by their continuing to seek recovery for fees that were the direct result of churning and unnecessary work. This makes DLA Piper's conduct even more reprehensible.

7. Because of this newly discovered evidence, Victor seeks leave to amend his counterclaims in the proposed form annexed as Exhibit 1 hereto.

8. The amended counterclaims contain three new causes of action - for fraud, for violation of New York Judiciary Law § 487, and for violation of New York General Business Law § 349(h), as well as a request for punitive damages in the amount of \$22.47 million, which represents 1% of DLA Piper's reported revenue for 2012 based on the written proof of DLA Piper's serious misdeeds.

Statement of Facts

9. DLA Piper instituted this action seeking to recover \$678,762.69 in unpaid legal fees by summons and complaint dated February 9, 2012 (the “Complaint” or “Cpl” ¶¶ 17-19. A copy of the Complaint is annexed as Exhibit 2 hereto.

10. In his original counterclaims (the “Counterclaims”), Victor set forth what he believed to be a pattern of DLA Piper inflating bills to him and then being coerced into paying them personally on a regular basis. Counterclaims (at Ex. 3), ¶¶ 18-30.

11. In discovery, DLA Piper has produced no less than 246,019 pages of documents including numerous internal emails among DLA Piper partners. Based on the recently discovered evidence, Victor can now show conclusively that DLA Piper had knowledge of intentional fraudulent overbilling.

* * * *

12. Without any hyperbole, the emails produced by DLA Piper shock the conscience.

13. In an email sent on May 20, 2010 by Erich Eisenegger to Christopher Thomson and Jeremy Johnson (all DLA Piper attorneys working on POA), Eisenegger writes “**I hear we are already 200k over our estimate-that’s Team DLA Piper!**” (emphasis added). A copy of this email is annexed as Exhibit 4 hereto.

14. Christopher Thomson replied to this email later that evening on May 20, 2010, writing to Messrs. Eisenegger and Johnson:

What was our estimate? But Tim [Walsh] brought Vince [Roldan] [two other DLA Piper attorneys working on POA] in to work on the objection for whatever reason, and now Vince has random people working full time on random research projects in **standard “churn that bill, baby!” mode. That bill shall know no limits.**

(emphasis added). Exhibit 5 hereto.

15. Rather than be horrified by this blatant admission of fraudulent overbilling, or even admonish their colleague for his utter disregard of their professional duties, Messrs. Eisenegger, Thomson, and Johnson continued the email thread, with each joking about how many attorneys were over-staffed on the POA file and how little work those attorneys actually accomplished. Exs. 6, 7 & 8.

16. To wit, Mr. Johnson wrote “Didn’t you use 3 associates to prepare for a first day hearing where you filed 3 documents?” Ex. 6.

17. Mr. Thomson responded, “And it took all of them 4 days to write those motions while I did cash collateral and talked to the client and learned the facts. Perhaps if we paid more money we’d have more skilled associates.” *Id.* Ex. 7.

18. Meanwhile, Mr. Johnson joked that “It’s a Thomson project, he goes full time on whatever debtor case he has running. Full time, 2 days a week.” *Id.* Ex. 8.¹

19. I first reviewed the egregious admissions discussed herein on March 5, 2013. As the Rules of Professional Conduct dictate, as soon as I learned of DLA Piper’s offending conduct, I notified both Victor and DLA Piper’s counsel the very next day.

20. These abominable admissions cast a pall not only on DLA Piper, but the entire legal profession.

21. Given the brazen misconduct by DLA Piper, it is unlikely that the conduct complained of herein is limited to Victor’s case, but is instead part and parcel of a larger corrupt culture of ruthlessness and avarice within the firm where this type of conduct is not even

¹ To the best of our knowledge, we are not aware of DLA Piper adjusting any bill as a result of this activity.

addressed, but rather a cause for celebration.

* * * *

22. Separately, as this Court recalls, Victor unsuccessfully moved to dismiss the Complaint, since he never agreed to retain DLA Piper to represent him personally. This Court denied that motion from the bench on June 13, 2012, finding it an issue of fact as to who DLA Piper actually performed services for - POA or Victor. *See* NYSCEF Doc ID ## 3-15.

23. DLA Piper alleges that it represented POA in its bankruptcy pursuant to an engagement letter between DLA Piper and POA dated April 22, 2010. Cpl ¶ 3.

24. The bankruptcy court issued an order dated June 23, 2010 disqualifying DLA Piper from representing POA, since DLA Piper simultaneously represented one of POA's major creditors, General Electric. *In re Project Orange Assocs.*, 431 BR 363, 374 [Bankr SD NY 2010] (denying DLA Piper's employment application as "DLA Piper's representation of GE creates a conflict of interest with the Debtor.")

25. DLA Piper alleges that after being disqualified from representing POA, Victor verbally asked DLA Piper to represent him individually. Cpl. ¶ 5.

26. Victor vehemently rejects the claim that it was his idea to personally retain DLA Piper. However, Victor ultimately personally paid DLA Piper a total of \$776,000 for work that DLA Piper primarily performed for POA as "ghost" counsel after DLA Piper was disqualified from representing POA. Victor seeks to recover those payments through the original Counterclaims. Counterclaims (Ex. 3), ¶¶ 31-48.

27. Documentary evidence demonstrates that it was not Victor's request to have DLA Piper represent him personally after DLA Piper was disqualified from representing POA, but it was always part of DLA Piper's scheme which they called "Plan B."

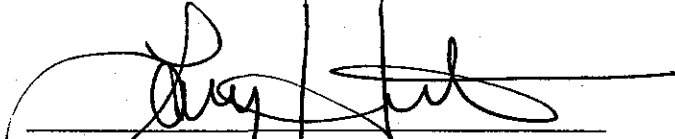
28. To wit, on June 23, 2010, after receiving the Bankruptcy Court order disqualifying DLA Piper from representing POA, Christopher Thomson wrote to Erich Eisenegger, Jed Freedlander, Vince Roldan, Jeremy Johnson and Jason Karaffa - all DLA Piper attorneys at the time - saying “Well, the Judge just fired us from POA. Drinks anyone?” Mr. Eisenegger responded to all, saying “Wow--But [Tim] Walsh [the partner in charge] has ‘Plan B’ right?” Mr. Roldan then suggested in a reply all, “get retained as special counsel?” Then Mr. Eisenegger responded to all with “Represent Adam Victor personally” (emphasis added). A copy of this email correspondence is annexed as Exhibit 9 hereto.

29. Thus, Victor’s contention that DLA Piper coerced him to permit DLA Piper to continue churning and billing for outrageous amounts of work on the POA bankruptcy, despite the Bankruptcy Court’s disqualification order, is accurate based on DLA Piper’s own admissions.

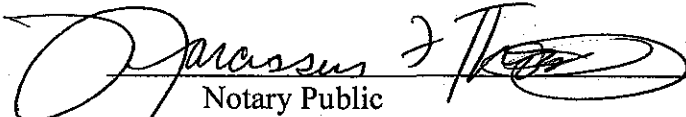
30. As such, Victor seeks leave to amend his Counterclaims to include claims for fraud, for violation of New York Judiciary Law § 487, for violation of New York General Business Law § 349(h), as well as a claim for punitive damages. A memorandum of law demonstrating the propriety of such amendment is submitted herewith.

31. There has been no previous application made to this or any other Court for the relief requested herein.

WHEREFORE, I respectfully request that the motion be granted in its entirety.


LARRY HUTCHER

Sworn to before me this
20th day of March, 2013


Notary Public

NARCISSUS F. THOMAS
Commissioner of Deeds
City of New York, No. 2-2366
Certificate Filed in Kings County
Commission Expires Nov. 1, 2013

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

-----X		
DLA PIPER LLP (US),	:	Index No. 650374/2012
	:	
Plaintiff,	:	IAS Part 63
	:	
- against -	:	Hon. Ellen Coin
	:	
ADAM VICTOR,	:	
	:	ANSWER, AFFIRMATIVE
Defendant.	:	DEFENSES, AND
	:	<u>AMENDED COUNTERCLAIMS</u>
-----X		

Defendant Adam Victor ("Victor" or "Defendant") by his attorneys, Davidoff Hutcher & Citron LLP, submit this Answer, Affirmative Defenses and Counterclaims in response to the complaint (the "Complaint") of plaintiff DLA Piper LLP (US) ("DLA Piper" or "Plaintiff") as follows:

Parties

1. Victor admits the allegations contained in paragraphs 1 and 2 of the Complaint.

Statement of Facts Common to All Claims

2. Victor admits the allegations contained in paragraph 3 of the Complaint, and states that the Engagement Letter was between Project Orange Associates, LLC ("POA") and DLA Piper. Victor was not a party to the Engagement Letter.
3. Victor admits the allegations contained in paragraph 4 of the Complaint.
4. Victor denies the allegations contained in paragraph 5 of the Complaint, except admits that there was a conflict between POA and another client of DLA Piper, and the Bankruptcy Court issued an order disqualifying DLA Piper from representing POA in the POA bankruptcy action. Victor states that while DLA Piper formally withdrew as counsel of record

for POA, DLA Piper continued to act as POA's attorneys in the POA bankruptcy behind the scenes.

5. Victor denies the allegations contained in paragraph 6 of the Complaint.

6. With respect to the allegations contained in paragraph 7 of the Complaint, Victor admits that DLA Piper sent certain invoices to Victor in his capacity as president of POA, and denies that DLA Piper sent any invoices to Victor in his individual capacity.

7. Victor denies the allegations contained in paragraph 8 of the Complaint, except admits that on or about June 25, 2010, Victor paid DLA Piper \$250,000 from his personal account for monies DLA Piper billed to POA.

8. Victor denies the allegations contained in paragraph 9 of the Complaint, except admits that on or about October 13, 2010, Victor paid DLA Piper \$150,000 from his personal account for monies DLA Piper billed to POA.

9. Victor denies the allegations contained in paragraph 10 of the Complaint.

10. Victor denies the allegations contained in paragraph 11 of the Complaint, except admits that Victor signed the affidavit annexed as Exhibit D to the Complaint.

11. Victor denies the allegations contained in paragraph 12 of the Complaint, except admits that on or about December 31, 2012, Gas Orange Development, Inc. paid DLA Piper \$150,000 for monies DLA Piper billed to POA.

12. Victor admits the allegations contained in paragraph 13 of the Complaint and states that Victor does not owe any monies on the "Outstanding Victor Invoices," since Victor was never personally liable for any of DLA Piper's invoices.

13. Victor denies the allegations contained in paragraph 14 of the Complaint.

14. Victor admits the allegations contained in paragraph 15 of the Complaints, except denies that Invoice # 2369074 was sent to Victor in his individual capacity, and states that such invoice was sent to Victor in his capacity as president of POA.

15. Victor admits the allegations contained in paragraph 16, except denies that DLA Piper is only permitted to reveal confidential attorney-client communications if it is suing POA – its actual client. DLA Piper may not reveal attorney-client confidences when trying to collect a fee from Victor, with whom DLA Piper had no attorney-client relationship with.

16. With respect to the allegations contained in paragraph 17 of the Complaint, Victor admits that DLA Piper claims it is owed \$678,762.69, and denies that DLA Piper is entitled to payment from Victor.

17. Victor admits the allegations contained in paragraph 18 of the Complaint, and denies that Victor has any liability for any invoices sent to him by DLA Piper.

18. Victor denies the allegations contained in paragraph 19 of the Complaint, except Victor admits that he has refused to pay DLA Piper money that Victor is not liable for.

19. Victor denies the allegations contained in paragraph 20 to the extent that DLA Piper expected to be paid by Victor personally, as opposed to POA, and Victor otherwise denies knowledge or information sufficient to admit or deny the balance of the allegations contained in paragraph 20 of the Complaint.

20. Victor denies the allegations contained in paragraph 21 of the Complaint, and states that DLA Piper only represented Victor personally with respect to one small collection matter, and as such, could never have billed Victor more than \$50,000.

First Cause of Action (Account Stated)

21. In response to the allegation contained in paragraph 22 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

22. Victor denies the allegations contained in paragraphs 23, 24 and 25 of the Complaint.

Second Cause of Action (Breach of Contract)

23. In response to the allegation contained in paragraph 26 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

24. Victor denies the allegations contained in paragraphs 27, 28, 29, and 30 of the Complaint.

Third Cause of Action (Breach of Implied Covenant of Good Faith)

25. In response to the allegation contained in paragraph 31 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

26. Victor admits the allegations contained in paragraph 32 of the Complaint, and states that the third cause of action is entirely duplicative of the first cause of action in that it fails to articulate any facts distinct from the breach of contract alleged.

27. Victor denies the allegations contained in paragraph 33 of the Complaint.

Fourth Cause of Action (Unjust Enrichment – Quantum Meruit)

28. In response to the allegation contained in paragraph 34 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

29. Victor denies the allegations contained in paragraphs 35, 36, 37, 38, 39 and 40 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

30. The Complaint fails, in whole or in part, to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

31. The Complaint is barred, in whole or in part, by the doctrines of estoppel, waiver, ratification, laches and/or Plaintiffs' unclean hands.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

32. The relief requested in the Complaint is unavailable as a result of Plaintiff's consent or acquiescence to solely hold POA responsible for the outstanding legal invoices.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

33. The Complaint is barred, in whole or in part, by Plaintiff's breach of the Engagement Letter between Plaintiff and POA.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

34. Victor has at all times acted in good faith and with reasonable grounds for believing that his conduct was entirely lawful. Plaintiff is precluded by its own misconduct, acts and omissions from maintaining this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

35. The actions of Defendants were not wrongful.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

36. The losses and damages complained of in the Complaint were caused by Plaintiff's acts of misconduct and omissions.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

37. The Complaint is barred by documentary evidence.

38. The Engagement Letter conclusively establishes that DLA Piper's sole client was POA

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

39. The Complaint is barred in whole or in part by RPC 1.5 and 22 NYCRR 1215.1 which require a written retainer between an attorney and client in order to recover on a claim for breach of contract.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

40. The cause of action for breach of the duty of good faith is barred as being duplicative of the cause of action for breach of contract.

PRESERVATION OF DEFENSES

41. Victor reserves the right to raise additional and other affirmative defenses that may subsequently become or may appear to be applicable to the Complaint.

COUNTERCLAIMS

1. These counterclaims seek the return of \$776,000 paid by Victor to DLA Piper for services rendered for POA, in addition to punitive damages in an amount no less than \$22.47 million (1% of DLA Piper's revenues in 2012) resulting from what is perhaps the most egregious example of wrongdoing in a fee matter ever. To wit, DLA Piper's internal emails demonstrate a culture where overbilling, or as one DLA Piper attorney wrote "churn that bill, baby!", is encouraged and laughed about. This atmosphere of avarice and ruthlessness contaminates the entire legal profession.

2. As background, Victor was the owner of the equity of the now-defunct POA. When POA filed for bankruptcy protection, it retained its long-time attorneys at DLA Piper to represent it as debtor's counsel in that proceeding. DLA Piper racked up massive legal fees representing POA in the initial phases of its bankruptcy, which DLA Piper's internal emails make light of, stating at one point that "I hear we are already 200k over our estimate-that's team DLA Piper!"

3. As a result of a conflict of interest, the Bankruptcy Court disqualified DLA Piper from representing POA. Despite being disqualified, DLA Piper did not want to lose this lucrative client that it viewed internally as a cash cow to bill at will, stating "That bill shall know no limits."

4. Nevertheless, As such, after being disqualified, DLA Piper insisted to Victor that it remain POA's counsel. Since the Court Order disqualified DLA Piper from its representation, DLA Piper insisted that it would remain behind-the-scenes, and act as "ghost" counsel for POA.

3-5. In fact, in internal emails, DLA Piper attorneys lamented being "fired" by the bankruptcy judge, but openly admitted that their "Plan B" was to "[r]epresent Adam Victor personally" so that DLA Piper could continue its massive overbilling.

4. — Even though DLA Piper acted as shadow counsel for POA, it knew it could not get paid by POA since the Bankruptcy Court explicitly ruled that DLA Piper could not represent POA. As such, DLA Piper applied unrelenting pressure on Victor to pay for the legal services rendered to POA.

6. —

5-7. Victor succumbed to DLA Piper's demands and paid DLA Piper \$776,000 of his own personal funds for services largely rendered to POA.

8. — Victor paid those bills without having the benefit of receiving monthly invoices to determine whether the charges to POA were reasonable. Victor only received itemized bills after they were paid. After reviewing the detailed legal invoices, it is readily apparent that DLA Piper engaged in a systematic and sweeping practice of over-billing, by billing for services that were unnecessary, duplicative, or wasteful. DLA Piper's internal emails demonstrate conclusively that DLA Piper was in fact overbilling on a massive scale, and even joking about it - in one instance, writing "Didn't you use 3 associates to prepare for a first day hearing where you filed 3 documents?" In response, another DLA Piper attorney wrote "And it took all of them 4 days to write those motions while I did cash collateral and talked to the client and learned the facts. Perhaps if we paid more money we'd have more skilled associates."

9. — Such overbilling and billing for services that were unnecessary, duplicative or wasteful which was shockingly and specifically admitted in horrific emails is beyond the pale.

Without any hyperbole, DLA Piper's practice evidenced in this case tarnishes the entire legal profession.

6. _____

10. Through this action, Victor seeks the return of the money he was pressured to pay DLA Piper to continue a representation DLA Piper was barred from undertaking, and punitive damages in an amount no less than \$22.47 million given the severity of DLA Piper's intentional wrongdoing.

7. _____

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Parties

8.11. Counterclaim Plaintiff is Victor and Counterclaim Defendant is DLA Piper.

Jurisdiction

9.12. The court has personal jurisdiction over DLA Piper pursuant to CPLR § 301 since DLA Piper conducts business in the State of New York.

10.13. Venue is proper in New York County as DLA Piper brought the instant lawsuit in New York County and DLA Piper maintains a place of business in New York County.

Statement of Facts

11.14. POA owned and operated a steam-electric cogeneration plant in Syracuse, New York that supplied steam to Syracuse University and electricity to initially Niagara Mohawk Power Corporation, and later to the New York State Independent System Operator.

12.15. Victor was initially a minority owner of POA, and eventually became the 100% owner.

~~13-16.~~ DLA Piper had been the long-time attorneys for POA and other entities controlled by Victor. Victor's companies paid DLA Piper millions of dollars over the past 10 years in legal fees on a variety of matters.

~~14-17.~~ In 2008, after 16 years of successful operations, POA was forced to shut down the cogeneration plant, which was a result of the economic consequences of the State of New York's de-regulation and restructuring of the electric utility industry.

~~15-18.~~ POA ultimately filed for bankruptcy on April 29, 2010. POA retained its long-time attorneys at DLA Piper to serve as its bankruptcy counsel.

~~16-19.~~ POA executed an engagement letter (the "Engagement Letter") with DLA Piper one week prior to POA's bankruptcy filing, a copy of which is annexed as Exhibit A to the Complaint.

~~17-20.~~ In a decision and order dated June 23, 2010, the Bankruptcy Court held that DLA Piper could not act as counsel for POA as a result of a conflict of interest. The Bankruptcy Court's decision is reported at In re Project Orange Associates, LLC, 431 BR 363 [Bankr SD NY 2010].

21. Project Orange Associates then retained new bankruptcy counsel. Yet because DLA Piper had institutional knowledge, and did not want to lose such a lucrative client, DLA Piper insisted that it should continue to provide legal services behind the scenes to POA.

22. DLA Piper's nefarious scheme is blatantly admitted in an email produced in discovery in this matter. To wit, on June 23, 2010, after receiving the Bankruptcy Court order barring DLA Piper from representing POA, Christopher Thomson wrote to Erich Eisenegger, Jed Freedlander, Vince Roldan, Jeremy Johnson and Jason Karaffa - all DLA Piper attorneys at the time - saying "Well, the Judge just fired us from POA. Drinks anyone?"

23. Mr. Eisenegger responded to all, saying "Wow--But [Tim] Walsh [the partner in charge] has 'Plan B' right?" Mr. Roldan then suggested in a reply all, "get retained as special counsel?" Then Mr. Eisenegger responded to all with "**Represent Adam Victor personally**" (emphasis added).

18-24. POA heeded its counsel's advice. While POA hired separate counsel to officially represent its interests in the bankruptcy, DLA Piper acted as "ghost" counsel for POA and performed the bulk of the legal work required.

19-25. While POA's actual bankruptcy counsel was required to submit its fee applications to the bankruptcy court for review and approval by the court and the US Trustee, DLA Piper was not subject to such scrutiny since it was not official bankruptcy counsel.

20-26. DLA Piper would regularly bill POA/Victor for several months at a time, in invoices delivered several months after such services were purportedly rendered.

24-27. POA could not pay DLA Piper since its assets were all subject to the jurisdiction of the Bankruptcy Court. Accordingly, DLA Piper applied unrelenting pressure to Victor to pay for work done for POA from Victor's personal account.

22-28. Victor, being unaware of the impropriety of DLA Piper's actions, complied with DLA Piper's repeated demands and threats for money. At DLA Piper's demand, Victor regularly paid money to DLA Piper in advance, without the opportunity to see any detailed invoices.

23-29. To wit, Victor paid DLA Piper from his own personal funds on four occasions. On or about April 26, 2010, Victor wired \$200,000 to DLA Piper. On or about June 25, 2010, Victor wired \$250,000 to DLA Piper. On or about September 22, 2010, Victor issued check number 115 to DLA Piper in the amount of \$176,000. On or about October 13, 2010, Victor issued check number 120 to DLA Piper in the amount of \$150,000.

24-30. All told, Victor paid DLA Piper \$776,000.

25-31. These payments were all made in advance of receiving detailed legal invoices from DLA Piper. To wit, DLA Piper delivered invoice number 2513808 to POA seeking \$597,325.25, dated November 22, 2010, for services rendered from April 30, 2010 to August 3, 2010. On the cover page of the invoice, DLA Piper notes that the invoice was already paid in full in advance.

26-32. DLA Piper delivered invoice number 2526761 to POA seeking \$200,000, dated December 31, 2010, for services rendered from May 3, 2010 to October 22, 2010.

27-33. Finally, DLA Piper delivered invoice number 2639074 to POA seeking \$685,681.20 for services rendered from October 22, 2010 to December 8, 2011.

28-34. All told, DLA Piper billed POA \$1,433,006.45, and was paid \$776,000 by Victor, leaving a balance of \$657,006.45 owed by POA to DLA Piper according to DLA Piper's own belated invoicing.

29-35. The three invoices detailed above – invoice numbers 2513808, 2526761, and 2639074 all demonstrate massive over-billing, and billing for work that was unnecessary, duplicative or wasteful.

36. DLA Piper never represented Victor individually, except with respect to one minor collection matter. DLA Piper represented Victor in his individual capacity in an action captioned Fix Spindelman Brovitz & Goldman PC v. Victor, Index No. 8041/2010 [Sup Ct Monroe Co]. The plaintiff in that action sued Victor for approximately \$77,000 for unpaid legal bills. DLA Piper did some minor work on this matter for Victor, and Victor ended up settling that action a few months after it was commenced for \$17,500 in a conversation directly with the plaintiff therein.

37. As discovery progressed in this matter, DLA Piper has produced emails demonstrating its knowledge of the massive fraudulent overbilling that occurred.

38. To wit, in an email sent on May 20, 2010 by Erich Eisenegger to Christopher Thomson and Jeremy Johnson (all DLA Piper attorneys working on POA), Eisenegger writes “I hear we are already 200k over our estimate-that’s Team DLA Piper!”

39. Christopher Thomson replied to this email later that evening on May 20, 2010, writing to Messrs. Eisenegger and Johnson:

What was our estimate? But Tim [Walsh] brought Vince [Roldan] [two other DLA Piper attorneys working on POA] in to work on the objection for whatever reason, and now Vince has random people working full time on random research projects in standard “churn that bill, baby!” mode. That bill shall know no limits.

(emphasis added).

40. Rather than be horrified by this blatant admission of fraudulent overbilling, Messrs. Eisenegger, Thomson, and Johnson continued the email thread, with each joking about how many associates were staffed on the case and how little work they actually accomplished.

41. To wit, Mr. Johnson wrote “Didn’t you use 3 associates to prepare for a first day hearing where you filed 3 documents?” Mr. Thomson responded, “And it took all of them 4 days to write those motions while I did cash collateral and talked to the client and learned the facts. Perhaps if we paid more money we’d have more skilled associates.”

30-42. Even Nicolai Sarad, the relationship partner, and Tim Walsh, the partner in charge of the POA bankruptcy, knew massive overbilling was occurring. In an email from Mr. Sarad to Mr. Walsh on June 23, 2010, Mr. Sarad writes, with respect to the POA bill, “you will need to look at this to tell me where there is fat (I see one day of 14.5 hrs for Julia for example, and a lot of time for Baum; 45K for Vince, etc.”

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**AS AND FOR A FIRST COUNTERCLAIM
(BREACH OF FIDUCIARY DUTY)**

~~31-43.~~ Victor repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth in full herein.

~~32-44.~~ As the president and owner of POA, DLA Piper's client, and as the person who DLA Piper billed for legal services and who paid for DLA Piper's legal services from his own personal account. DLA Piper owed fiduciary duties to Victor, including the duty of good faith, loyalty, and candor. As a result, DLA Piper was at all times obligated to act in Victor's best interest and not to overbill Victor or to bill Victor for legal services that were unnecessary, duplicative or wasteful.

~~33-45.~~ DLA Piper breached its fiduciary duties to Victor, based on the pressure it bore on Victor to pay for legal services rendered to POA, and for advising Victor that it was permitted to continue to act as "ghost" counsel for POA, even though the Bankruptcy Court ruled that DLA Piper could not act as counsel for POA.

~~34-46.~~ DLA Piper further breached its fiduciary duties by billing Victor for legal services that were unnecessary, duplicative, or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.

~~35-47.~~ DLA Piper took these actions intentionally and with malicious disregard for its fiduciary duties owed to Victor.

~~36-48.~~ As a direct and proximate result of DLA Piper's breach of its fiduciary duties, Victor suffered damages in the amount of \$776,000, the amount Victor paid to DLA Piper from his personal account.

~~49.~~ In addition, punitive damages should be imposed on DLA Piper to punish it for its intentional and fraudulent actions, and to ensure that DLA Piper and others likewise situated will

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refrain from the commission of like outrageous public wrongs. DLA Piper's actions were malicious, wanton, willful, morally reprehensible, in reckless disregard of Victor's rights, and therefore warrant an award of punitive damages.

37-50. According to the American Lawyer magazine, DLA Piper's revenues in 2012 were approximately \$2.247 billion. As such, a punitive damage award in an amount not less than \$22.47 million, or 1% of DLA Piper's revenue for one year, is appropriate. By virtue of the foregoing, Victor is entitled to a judgment in an amount not to exceed \$776,000, in addition to interest accrued and accruing.

**AS AND FOR A SECOND COUNTERCLAIM
(UNJUST ENRICHMENT)**

38-51. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

39-52. In the alternative to the first counterclaim, DLA Piper was unjustly enriched by and benefited from the \$776,000 paid to DLA Piper by Victor personally for services rendered for POA.

40-53. DLA Piper's actions in pressuring Victor to pay for services rendered to POA and then accepting those payments were wrongful.

41-54. DLA Piper was also unjustly enriched by and benefited from the \$776,000 paid to it by Victor for legal services that were unnecessary, duplicative, or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.

42-55. Circumstances are such that equity and good conscience require DLA Piper to make restitution to Victor in an amount to be determined at trial, but no greater than \$776,000.

**AS AND FOR A THIRD COUNTERCLAIM
(BREACH OF CONTRACT)**

43-56. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

44-57. DLA Piper alleges in its complaint that it had an oral agreement with Victor where Victor agreed to be personally liable for services rendered by DLA Piper. Victor denies that he ever agreed to be personally liable to DLA Piper for services rendered. However, to the extent this Court finds that such an oral agreement did exist, then also in the alternative to the first cause of action, Victor asserts a counterclaim for breach of contract.

45-58. There is no written contract between Victor and DLA Piper.

46-59. However, to the extent this Court finds that there was an oral contract between Victor and DLA Piper, which Victor denies, such contract would be valid and binding.

47-60. To the extent an oral contract existed, which Victor denies, DLA Piper breached that contract by failing to provide invoices in a timely fashion, and engaging in a systematic and sustained practice of overbilling by charging Victor for services that were unnecessary, duplicative or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.-

61. As a direct and proximate result of these breaches of contract, Victor has suffered damages in an amount to be determined at trial, but no more than the \$776,000 that Victor paid to DLA Piper, in addition to pre-judgment interest.

**AS AND FOR A FOURTH COUNTERCLAIM
(BREACH OF NY JUDICIARY LAW § 487)**

62. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

63. DLA Piper engaged in deceitful conduct and its attorneys colluded amongst themselves with intent to deceive Victor.

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64. Such conduct included DLA Piper submitting bills to Victor for legal services that were unnecessary, duplicative or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.

65. DLA Piper also deceived the Bankruptcy Court by continuing to perform services for POA even after it was disqualified as counsel, by billing such services to Victor personally.

66. DLA Piper acted with a chronic extreme pattern of legal delinquency.

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67. As a direct and proximate result of DLA Piper's conduct, Victor has suffered damages in an amount to be determined at trial, but no more than the \$776,000 that Victor paid to DLA Piper, in addition to pre-judgment interest, which money DLA Piper was not entitled to.

68. Plaintiff is entitled to treble damages pursuant to Judiciary Law § 487.

AS AND FOR A FIFTH COUNTERCLAIM
(FRAUD)

69. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

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70. DLA Piper made false representations to Victor, for the purpose of inducing Victor to pay legal bills for services that were unnecessary, duplicative or wasteful, which was shockingly admitted by DLA Piper attorneys in heinous emails produced in discovery.

71. DLA Piper also committed fraud by omission when it submitted legal bills to Victor without disclosing that those bills contained time entries for services that were unnecessary, duplicative or wasteful.

72. DLA Piper deliberately billed Victor for services that were unnecessary, duplicative or wasteful.

73. Based upon the false representations made by DLA Piper, Victor paid DLA Piper \$776,000 for legal fees that were unnecessary, duplicative or wasteful.

74. If Victor knew the truth behind the inflated legal bills submitted to him by DLA Piper, he would not have paid \$776,000 to DLA Piper for services that were unnecessary, duplicative or wasteful.

75. By reason of the foregoing, Victor is entitled to compensatory damages in the amount of \$776,000, together with expenses and attorneys' fees incurred in the bringing of this action as well as exemplary and punitive damages.

76. In particular, punitive damages should be imposed on DLA Piper to punish it for its intentional and fraudulent actions, and to ensure that DLA Piper and others likewise situated will refrain from the commission of like outrageous public wrongs. DLA Piper's actions were malicious, wanton, willful, morally reprehensible, in reckless disregard of Victor's rights, and therefore warrant an award of punitive damages in an amount not less than \$22.47 million, or 1% of DLA Piper's revenue for 2012.

AS AND FOR A SIXTH COUNTERCLAIM
(VIOLATION OF NY GENERAL BUSINESS LAW § 349[h])

77. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

78. DLA Piper is a law firm that promotes its services to high end consumers.

79. The actions described herein, including overbilling and billing for services that were unnecessary, duplicative, or wasteful, and deceiving the Bankruptcy Court and Victor by billing Victor for services rendered on behalf of POA after DLA Piper was disqualified by the Bankruptcy Court from representing POA constitute deceptive or materially misleading acts or practices.

80. By reason of the foregoing, Victor is was damaged in the amount of \$776,000, the amount of money Victor paid to DLA Piper from his personal accounts.

81. In addition, pursuant to NY General Business Law § 349[h], this Court is granted the authority to award Victor the reasonable attorneys' fees expended in prosecuting this action.

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48. —

WHEREFORE, Victor respectfully requests that a Judgment be entered herein:

- (a) Dismissing the complaint with prejudice,
- (b) On the first counterclaim, or in the alternative on the second counterclaim, or in the alternative on the third counterclaim, or in the alternative on the fourth counterclaim, or in the alternative on the fifth counterclaim, or in the alternative on the sixth counterclaim, granting Victor a money judgment in an amount to be determined at trial, but no more than \$776,000 in addition to pre-judgment interest;
- (b)(c) On the fourth counterclaim, granting treble damages to Victor pursuant to Judiciary Law § 487;
- (d) On the first counterclaim, or in the alternative on the fifth counterclaim, for an award of punitive damages in an amount not less than \$22,470,000;
- (e) On the sixth counterclaim, for a hearing to determine the amount of reasonable attorneys' fees to be awarded to Victor and against DLA Piper;
- (f) Granting Victor an award for the costs and disbursements of this action; and
- (g) Granting such other and further relief as this Court deems just and proper
- (e) —

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(d) ~~Granting such other and further relief as this Court deems just and proper.~~

Dated: New York, New York

~~July 3, 2012~~ March , 2013

DAVIDOFF HUTCHER & CITRON LLP

By: /s/ Joshua Krakowsky

Larry Hutcher

Joshua Krakowsky

605 Third Avenue

New York, New York 10158

(212) 557-7200

Attorneys for Defendant/Counterclaim Plaintiff

Adam Victor

TO: Kevin Arthur, Esq.

Kramon & Graham, P.A.

One South Street, Suite 2600

Baltimore, Maryland 21202-3201

(410) 347-7432

Counsel for Plaintiff/Counterclaim Defendant

and

Jeffrey Schreiber, Esq.

Meister Seelig & Fein LLP

2 Grand Central Tower

140 East 45th Street,

19th Floor

New York, New York 10017

(212) 655-3500

Local Counsel for Plaintiff/Counterclaim Defendant

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

DLA PIPER LLP (US)

Plaintiff,

-against-

ADAM H. VICTOR

Defendant.

X
: Index No. 650374 -2012
: Date Purchased: 2/9/2012
:
: Plaintiff designates NEW YORK
: COUNTY as the place of trial.

SUMMONS

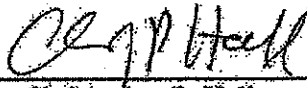
To the above-named defendant:

YOU ARE HEREBY SUMMONED and required to serve upon plaintiff's attorneys an answer to the complaint in this action within twenty (20) days after service of this summons, exclusive of the day of service (or within thirty (30) days after service is complete if this summons is not personally delivered to you within the State of New York). In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue designated is plaintiff's place of business at 1251 Avenue of the Americas, New York, NY 10020.

Dated: New York, New York
February 9, 2012

DLA PIPER LLP (US)

By: 
Christopher P. Hall
Spencer Stiefel

DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, New York 10020-1104
212-335-4500 (telephone)
212-884-8588 (facsimile)

Attorneys for Plaintiff

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

DLA PIPER LLP (US)

Plaintiff,

-against-

ADAM H. VICTOR

Defendant.

Index No.

650374/2012

COMPLAINT

Plaintiff, DLA Piper LLP (US) ("Plaintiff" or "DLA Piper"), complains and alleges as follows:

Parties

1. DLA Piper is, and, at all relevant times hereinafter mentioned was, a limited liability partnership organized and existing under the laws of the State of Maryland, and is authorized to do business in the State of New York, with an address of 1251 Avenue of the Americas, New York, New York 10020.

2. Upon information and belief, Adam H. Victor ("Defendant" or "Victor") is, and at all relevant times hereinafter mentioned was, an individual who lives in the State of New York, having his residence at 630 First Avenue, Suite 30E, New York, New York 10018.

Statement of Facts Common to All Claims

3. On April 22, 2010, DLA Piper provided to Victor a written letter of engagement ("Engagement Letter") that provided: (1) an explanation of the scope of the legal services to be provided; and (2) an explanation of attorney's fees to be charged, expenses and billing practices. A true and correct copy of the Engagement Letter is attached hereto as Exhibit A. As provided in the Engagement Letter, DLA Piper was to provide legal services related to "the refinancing

and restructuring options (the 'Restructuring') of Project Orange Associates, LLC ('POA')". See Engagement Letter at 1.

4. Victor signed the Engagement Letter on behalf of POA and dated it April 22, 2010. Thereafter, DLA Piper entered an appearance as counsel for POA in POA's bankruptcy case in the Bankruptcy Court of the Southern District of New York.

5. Due to a conflict between POA and another client of DLA Piper, DLA Piper had to withdraw as POA's counsel in the bankruptcy case. On or about June 23, 2010, Victor informed DLA Piper that, rather than performing the services for POA, he wanted DLA Piper to represent him in his individual capacity with regard to the Restructuring (the "Representation"), and DLA Piper agreed to do so.

6. In accordance with the agreement between DLA Piper and Victor, DLA Piper provided to Victor the services necessary for the Representation.

7. DLA Piper issued invoices ("Victor Invoices") notifying Victor of the fees and disbursements due and owing to DLA Piper in connection with the Representation.

8. On June 25, 2010, Victor wired to DLA Piper \$250,000 from his personal account as payment for legal services to Victor related to the Restructuring.

9. On or about October 6, 2010, Victor sent to DLA Piper a check for \$150,000 from his personal account as payment for legal services to Victor related to the Restructuring. A true and correct copy of the October 6, 2010 check is attached hereto as Exhibit B.

10. The Bankruptcy Court of the Southern District of New York was aware that DLA Piper represented Victor, as on November 3, 2010, such information was included in a motion filed in that court. See *In re Project Orange Associates, LLC*, Case No. 10-12307 (MG), Doc.

No. 266 ("Document 266"), a true and correct copy of which is attached hereto as Exhibit C.

Document 266 filed in that court provides, in relevant part:

The DIP Lender under the Credit Agreement is Gas Alternative Systems, Inc. The DIP Lender is an entity owned and controlled by Mr. Adam Victor, the Debtor's President. The DIP Lender has retained separate counsel, DLA Piper LLP (US), which has represented Mr. Victor and the DIP Lender with respect to this Credit Agreement and the DIP financing.

Exhibit C at ¶16.

11. On November 3, 2010, Victor submitted an affidavit in support of Document 266.

A true and correct copy of Victor's affidavit is attached hereto as Exhibit D

12. On or about December 31, 2010, through Gas Orange Development, a company of which Victor is the president and sole stockholder, Victor sent to DLA Piper \$150,000 as payment for legal services to Victor related to the Restructuring.

13. Despite these payments, two Victor Invoices remain outstanding and unpaid (the "Outstanding Victor Invoices").

14. DLA Piper, in accordance with its agreement with Victor, and in the ordinary course of business, delivered to Victor Invoice # 2526761 in the amount of \$200,000 for legal fees and disbursements incurred in the Representation. DLA Piper received partial payment of this invoice, which payment has been credited to the account.

15. On November 30, 2011, DLA Piper submitted Invoice # 2369074 to Victor for \$628,762.69. Invoice # 2369074 references the fact that \$50,000 of the amount then due was for the prior outstanding balance. Invoice # 2369074 provides, *inter alia*: "INVOICE IS DUE AND PAYABLE UPON RECEIPT". This invoiced amount included a \$50,000 "Courtesy Discount". Thus, the amount of services rendered and costs incurred by DLA Piper to Victor was actually \$678,762.69.

16. Because invoices from DLA Piper may reveal information protected by the attorney-client privilege and Victor has not yet filed a pleading disputing the fees charged, invoices are not attached hereto. Consistent with Rule 1.6(b)(5)(ii) of the Rules of Professional Conduct, DLA Piper will reveal confidential information, including invoices and correspondence, if necessary to establish or collect a fee.

17. The unpaid fees and disbursements due and owing to DLA Piper under the Outstanding Victor Invoices total \$678,762.69.

18. DLA Piper has requested that Victor pay to DLA Piper all outstanding amounts due and owing under the Outstanding Victor Invoices.

19. Despite DLA Piper's good faith attempts to recover the outstanding billed amounts, Victor has failed to honor and comply with his obligations under his agreement with DLA Piper, and has failed to pay the outstanding \$678,762.69 due and owing to DLA Piper.

20. DLA Piper reasonably expected to be paid its agreed-upon hourly rates for all time billed, as well as for all disbursements expended on Victor's behalf in connection with the Representation.

21. This dispute is not covered by 22 NYCRR § 137 because the amount in dispute exceeds \$50,000.

First Cause of Action
(Account Stated)

22. DLA Piper repeats and realleges, as if set forth here in full, the allegations contained in paragraphs 1 through 21 herein.

23. DLA Piper, in accordance with its agreement with Victor, and in the ordinary course of business, delivered to Victor Invoice # 2526761 in the amount of \$200,000 for legal fees and disbursements incurred in the Representation.

24. Victor received Invoice # 2526761 without objection, and on or about December 31, 2010, through Gas Orange Development, Victor sent to DLA Piper \$150,000 as payment for legal services to Victor related to the Restructuring. Thus, leaving a balance of \$50,000, which remains unpaid.

25. By reason of the foregoing, DLA Piper has been damaged in the amount of \$50,000 with interest thereon to the fullest extent permitted by law.

Second Cause of Action
(Breach Of Contract)

26. DLA Piper repeats and realleges, as if set forth here in full, the allegations contained in paragraphs 1 through 25 herein.

27. Victor entered into a legal services contract with DLA Piper pursuant to which Victor agreed to pay DLA Piper's fees and to reimburse DLA Piper's costs, disbursements and expenses incurred in connection with the Representation.

28. In reliance on Victor's agreement to pay for DLA Piper's legal representation and services, DLA Piper expended time and resources in the Representation.

29. Victor's agreement to pay DLA Piper for legal representation and services in connection with the Representation constituted a valid, binding and enforceable contract. All services for which Victor has failed to pay are of the same general kind as previously rendered to and paid for by the client.

30. Victor's failure to pay DLA Piper for the Representation constituted a breach of contract, entitling DLA Piper to full recovery of the entire outstanding amount for the services rendered and disbursements expended totaling \$678,762.69 as well as interest and all costs and fees incurred in its good faith attempt to recover the outstanding amount from Victor.

Third Cause of Action
(Breach Of Implied Covenant Of Good Faith)

31. DLA Piper repeats and realleges, as if set forth here in full, the allegations contained in paragraphs 1 through 30 herein.

32. In New York, all contracts contain an implied covenant of good faith and fair dealing.

33. Victor's failure to pay DLA Piper under the terms of the parties' agreement constituted a breach of the implied covenant of good faith and fair dealing, entitling DLA Piper to full recovery of the agreed upon fees and disbursements of \$678,762.69.

Fourth Cause of Action
(Unjust Enrichment – Quantum Meruit)

34. DLA Piper repeats and realleges, as if set forth here in full, the allegations contained in paragraphs 1 through 33 herein.

35. In accepting and relying on DLA Piper's services in the Representation, Victor agreed to pay DLA Piper for DLA Piper's fees and to reimburse DLA Piper's costs, disbursements and expenses, and DLA Piper agreed to undertake the Representation on behalf of Victor.

36. An attorney-client relationship existed between DLA Piper and Victor for the duration of the Representation through its conclusion.

37. DLA Piper performed legal services for Victor in good faith and with the expectation that DLA Piper would receive the agreed-upon compensation.

38. In connection with the Representation, DLA Piper incurred \$678,762.69 in fees and disbursements which remain outstanding and unpaid.

39. Having received the benefit of DLA Piper's services in the Representation, Victor owes DLA Piper the reasonable value of the legal services provided and disbursements expended on Victor's behalf.

40. The reasonable value of DLA Piper's services and disbursements which remain outstanding and unpaid is \$678,762.69.

WHEREFORE, DLA Piper demands judgment against Victor, on each of the causes of action set forth in this Complaint, in the amount of \$678,762.69, together with reasonable attorney's fees, filing fees, pre- and post-judgment interest to the fullest extent permitted by law or equity, and costs of suit and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
February 9, 2012

DLA Piper LLP (US)

By: 
Christopher P. Hall
Spencer Stiefel

1251 Avenue of the Americas
New York, New York 10020
(212) 335-4500 (telephone)
(212) 335-4501 (facsimile)

Attorneys for Plaintiff

EXHIBIT A



DLA Piper US LLP
1251 Avenue of the Americas, 27th Floor
New York, New York 10020-1104
www.dlapiper.com

Nicolai J. Sarad
nicolai.sarad@dlapiper.com
T 212.335.4642
F 212.684.8542

April 22, 2010

Adam H. Victor
President
Project Orange Associates, LLC
630 First Avenue
Suite 30C
New York, New York 10016

Re: Retention of DLA Piper by Project Orange Associates, LLC

Dear Adam:

We are pleased to have the opportunity to represent you. You have asked us to assist you in assessing the refinancing and restructuring options (the "Restructuring") of Project Orange Associates, LLC ("POA").

Legal services for which you will be billed include time spent on legal research, document review and drafting, correspondence, depositions, court appearances, conferences, telephone calls, travel, negotiations, closing of transactions and other services related to transactions or litigation. Our general practice is to bill clients based on the time expended by the attorneys and legal assistants involved in the matter at each individual's then current hourly billing rate. Our current hourly rates for legal assistants and lawyers range from \$225 to \$865 per hour, depending primarily on the particular lawyer's or legal assistant's background and experience. A list of our currently effective hourly rates will be furnished to you upon request. These rates are adjusted periodically, usually at the beginning of the calendar year, and any modification of such rates is applicable to legal services performed after the new rates become effective.

We are requesting an initial retainer of \$200,000. This amount may need to be adjusted upon a change in circumstances.

The lead partner in connection with the Restructuring will be Tim Walsh, and Tim will also supervise the team involved at the firm. In addition Nick Sarad will be the overall client relationship manager with POA. As team leaders Tim and Nick may assign parts of the work to other lawyers or other personnel in the office under their supervision, and may use other firm lawyers where specialized help is needed. In their supervisory roles, however, Tim and Nick will continue to be responsible to you for the entire assignment and will be available to discuss the use of other personnel with you. It is our practice to assign tasks among lawyers, legal assistants and law clerks, document and docket clerks in such a way as to produce quality work at a reasonable cost to you given the nature of the specific project. Though the extent of our work on a specific assignment is frequently not within our control, the attorney responsible for



Adam H. Victor

April 22, 2010

Page Two

your matters is always prepared to discuss with you the scope of our assignment and changes therein.

Our performance of legal services may involve direct and indirect costs that we will incur on your behalf. These disbursements and charges include items incurred and paid by us on your behalf such as long distance telephone charges, postage, special mail or delivery charges, telex or telecopy charges, recording fees, transportation, meals, lodging and other costs necessary for out-of-town travel, photocopying, and use of other service providers such as printers or experts, if needed. In litigated matters, we include payments we must make for filing fees, court costs, process servers, court reporters, witness fees, and similar costs. These charges will be billed at cost. We also make separate charges for the use of computerized legal research systems, including "Lexis" and "Westlaw", that in our experience significantly reduce lawyer research time. We do not charge for secretarial, word processing or similar charges which are a part of our overhead.

We customarily send monthly invoices for services rendered and other charges incurred for your account during the previous month. The monthly invoice details the work performed and the types of charges incurred. Payment will be due thirty (30) days after the date of our invoice.

DLA Piper LLP (US) is a large law firm with offices in various locations throughout the United States. We may currently or in the future represent one or more other clients in matters or transactions or having other contacts with POA and/or its affiliates or subsidiaries. For example, we may represent other clients in corporate matters (including mergers and acquisitions, takeovers, and other change-in-control issues and transactions) and commercial transactions (including preparation and negotiation of agreements, licenses, leases, loans, securities offerings or underwritings), or in other matters and transactions involving POA on behalf of these or other clients where we do not represent POA on the same matter, or on legislative or policy matters, or administrative proceedings that may involve or affect POA and/or its affiliates or subsidiaries. We understand that POA consents to the firm's current and future representation of any such other clients in any of such matters without the need for any further consents from POA. We understand that no such direct conflict would exist where the representation of another client is not substantially and adversely related to the matters the firm is handling for POA, or where the firm's representation of either POA or another client would involve legislative issues, policy issues, or administrative proceedings unrelated to the representation of the other. We do not view this advance consent to permit unauthorized disclosure or use of any client confidences.

If you have questions about any aspect of our arrangements or our invoices from time to time, feel entirely free to raise those questions. It is important that we proceed on a mutually clear and satisfactory basis in our work for you.



Adam H. Victor

April 22, 2010

Page Three

The foregoing covers the essential elements necessary for the establishment of the attorney-client relationship between DLA Piper LLP (US) and POA. If you have any questions or comments about the terms of our agreement as herein outlined, please call me to discuss them.

If the scope of the services we are to render to you and terms of the engagement are satisfactorily described above, please indicate your agreement by executing the enclosed copy of this letter and returning it to us. Thereafter, unless we agree in writing to alter these arrangements, we will assume that these terms are acceptable to you for this matter and for all future matters on which you retain DLA Piper LLP (US) to serve you.

We will endeavor to provide prompt and responsive legal services at all times.

Very truly yours,

DLA Piper LLP (US)

A handwritten signature in dark ink, appearing to read 'N. Sagad'.

Nicolai Sagad

Partner

CC: Timothy Walsh

Adam H. Victor

April 22, 2010

Page Four

I have read the above letter and agree and accept the terms and conditions set forth therein.

Date:

April 22, 2010

PROJECT ORANGE ASSOCIATES, LLC

By:

[Signature]

Adam H. Victor

President

EAST42905198.2

EXHIBIT B

120

ADAM H VICTOR

11-11-2000

DATE Oct 6, 2010

**PAY
TO THE
ORDER OF**

Bob Piper

\$150,000.00

One Hundred Fifty Thousand dollars ⁰⁰/₁₀₀

[illegible]

Paul

FBI

14-00000 12011 60260 13576 150107906 11

EXHIBIT C

KLESTADT & WINTERS, LLP
292 Madison Avenue, 17th Floor
New York, NY 10017-6314
Telephone: (212) 972-3000
Facsimile: (212) 972-2245
Tracy L. Klestadt
Brendan M. Scott

Attorneys for the Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
In re:	:
	:
	: Chapter 11
PROJECT ORANGE ASSOCIATES, LLC,	:
	:
	: Case No. 10-12307 (MG)
Debtor.	:
-----X	

**AMENDED MOTION PURSUANT TO 11 U.S.C. §§ 105, 363(b) AND 364(C) AND
BANKRUPTCY RULES 4001 AND 9014 FOR ORDERS AUTHORIZING DEBTOR TO
OBTAIN ADDITIONAL INTERIM AND FINAL FINANCING AND
AUTHORIZING THE DEBTOR TO USE PROPERTY OF THE ESTATE, INCLUDING
THE PROCEEDS OF THE INTERIM AND FINAL FINANCING TO
TO FUND AND IMPLEMENT A CERTAIN SETTLEMENT AGREEMENT
BETWEEN THE DEBTOR AND SYRACUSE UNIVERSITY**

TO THE HONORABLE MARTIN GLENN:

Project Orange Associates, LLC, as debtor and debtor in possession in the above captioned chapter 11 case (the "Debtor"), by its undersigned attorneys, hereby files its motion, (the "Motion") for orders, pursuant to sections 105, 363(b) and 364(c) of title 11 of the United States Code (the "Bankruptcy Code"), and rules 4001(c) and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the Debtor to obtain additional interim financing of up to \$1,600,000 (the "Interim Third DIP Loan") and final financing of \$4.1 million (the "Third DIP Loan") pursuant to the Amended and Restated Credit Agreement, dated as of November 1, 2010 (the "Credit Agreement", a copy of which is attached hereto as **Exhibit**

"A"), between the Debtor and Gas Alternative Systems, Inc. (the "DIP Lender"), and entry of interim and final orders. In support of this Motion, the Debtor respectfully represents as follows:

PRELIMINARY STATEMENT

This Debtor seeks approval to borrow up to \$4.1 million in additional debtor in possession financing from the DIP Lender. The Third DIP Loan is being provided by the DIP Lender as secured DIP financing. The Debtor will grant to the DIP Lender a lien on its assets up to the value of the Third DIP Loan, which shall be valid lien only after Syracuse University releases its lien on the Debtor's assets. The DIP Lender's lien on the Debtor's assets will be subordinated only to the secured claim of Syracuse University and claims for fees under 28 U.S.C. § 1930(a)(6). The DIP Lender is an entity wholly owned by Adam Victor, the Debtor's equity holder.

The funds from the Third DIP Loan will provide the Debtor with the necessary liquidity to fund and implement a certain settlement agreement between the Debtor and Syracuse University (the "University") dated as of October 16, 2010 (the "Settlement Agreement"), which requires the Debtor to, among other things, (a) post two letters of credit in the total amount of \$1,600,000, (b) enter into a contract with and pay a demolition contractor to demolish the Debtor's cogeneration facility in Syracuse, New York, (c) enter into a contract with and pay an independent engineer to monitor progress of the demolition work and (d) pay real estate taxes for the tax years 2010-2011 and 2011-2012.

BACKGROUND

1. On April 29, 2010 (the "Petition Date"), the Debtor filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code.
2. The Debtor remains in possession of its assets and continues to manage its business as debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

3. No trustee, examiner, or creditors' committee has been appointed in this chapter 11 case.

4. Additional information regarding the Debtor's business, capital structure, and the circumstances leading to this chapter 11 filing is contained in the Affidavit of Adam Victor Pursuant to Local Bankruptcy Rule 1007-2 in Support of First Day Motions and Applications and is incorporated herein by reference.

5. Certain of the Debtor's assets are subject to the alleged first-priority liens of the University. However pursuant to the terms of the Settlement Agreement, the University will release all liens on the Debtor's assets upon the Debtor's compliance with the terms of the Settlement Agreement.

6. Pursuant to the Final Order Authorizing the Debtor to Obtain Post-petition Financing from Gas Alternative Systems, Inc. entered on May 13, 2010, the Court authorized the Debtor to obtain financing in the amount of \$150,000 in accordance with a Credit Agreement, dated as of May 10, 2010, between the Debtor and the DIP Lender (the "Original DIP Facility"). The Debtor has borrowed and used all available funds under the Original DIP Facility to pay its post-petition expenses and operate its business.

7. Pursuant to the Amended Final Order Authorizing Post-petition Financing entered on July 21, 2010, the Court authorized the Debtor to obtain financing in the additional amount of \$390,000 in accordance with a First Amendment to Credit Agreement, dated as of June 4, 2010, between the Debtor and the DIP Lender (the "Additional DIP Facility"). The Debtor has borrowed and used all available funds under the Additional DIP Facility to pay its post-petition expenses and operate its business.

JURISDICTION AND VENUE

8. This Court has jurisdiction of this motion pursuant to 28 U.S.C. sections 157 and 1334. Venue of this case and this Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409. The statutory predicates for the relief sought herein are Bankruptcy Code sections 105, 363(b) and 364(c) and Bankruptcy Rules 4001(c) and 9014.

RELIEF REQUESTED

9. By this Motion, the Debtor seeks entry of an interim and final order, pursuant to Bankruptcy Code sections 105, 363(b) and 364(c) and Bankruptcy Rules 4001(c) and 9014, authorizing the Debtor to (a) further amend the Credit Agreement with the DIP Lender¹ and permit additional borrowing up to \$4.1 million in secured, post-petition financing under the Credit Agreement and (b) use the proceeds of the Third DIP Loan and/or funds currently held in the Debtor In Possession Bank account in accordance with the budget annexed hereto as **Exhibit "B"**, including (i) using up to \$1,600,000 of the proceeds of the Third DIP Loan and/or funds currently held in the Debtor In Possession Bank account, to post two letters of credit as required by the Settlement Agreement (a copy of the Settlement Agreement is annexed hereto as **Exhibit "C"**, (ii) using up to \$2,500,000 of the proceeds of the Third DIP Loan and/or funds currently held in the Debtor In Possession Bank account, to enter into a contract with and pay a demolition contractor to demolish the Debtor's cogeneration facility in Syracuse, New York as required by the Settlement Agreement², (iii) using up to \$109,120 of the proceeds of the Third DIP Loan and/or funds currently held in the Debtor In Possession Bank account, to enter into a contract

¹ The DIP Lender is wholly owned and controlled by Adam Victor, the Debtor's President and sole equity holder.

² The Debtor has not yet executed an agreement with a demolition contractor, but has received a complete bid from one contractor and a partial bid from a second contractor. Additional bids are anticipated in the near future. The bid received by the Debtor estimates the cost of demolition at \$2,500,000. At this time, the Debtor continues to consider its options, but requires the ability to use up to \$2,500,000 of the proceeds of the Third DIP Loan to enter into a contract with and pay a demolition contractor.

with and pay an independent engineer to monitor progress of the demolition work as required by the Settlement Agreement.³ This Motion is supported by the Affidavit of Adam Victor, dated November 1, 2010 (the "Victor Affidavit"), a copy of which is attached hereto as **Exhibit "D"**. Mr. Victor is the Debtor's President and has been directly involved in all of the Debtor's post-petition operational and financing efforts.

BASIS FOR RELIEF

Need For Financing

10. Since the Petition Date, the Debtor had been using the University's alleged cash collateral pursuant to consensual interim cash collateral orders and amended budgets approved by this Court. Victor Affidavit, ¶4. The Debtor has generated substantial revenue from operations since the Petition Date, and as a result, the Debtor has over \$1,000,000 in cash on hand. Victor Affidavit, ¶4. The Debtor will use cash on hand to partially fund the Debtor's financial obligations under the Settlement Agreement, but the Debtor lacks sufficient liquidity to fully fund its financial obligations under the Settlement Agreement. Victor Affidavit, ¶4

11. Accordingly, the Debtor will require additional DIP financing in order to meet its obligations under the Settlement Agreement, including among other things, the demolition of the Debtor's cogeneration facility in Syracuse New York (the "Cogeneration Facility") and payment of real estate tax obligations for the tax years of 2010-2011 and 2011-2012. Victor Affidavit, ¶5.

12. It is critical to facilitate the Debtor's reorganization that it has access to sufficient post-petition funds in order to implement the Settlement Agreement. The Settlement Agreement resolves all disputes with the University including the proof of claim it filed in the amount of \$189,007,735, a portion of which the University asserts as a secured claim in an amount equal to

³ The Debtor is in the process of finalizing an agreement with the firm of O'Brien & Gere Engineers, Inc., whereby O'Brien & Gere Engineers, Inc. will serve as the independent engineer. The estimated costs of O'Brien & Gere Engineers, Inc.'s services is \$109,120.

the value of all of the Debtor's assets (the "Proof of Claim"). As a result of its compliance with the terms of the Settlement Agreement, the University will withdraw the Proof of Claim and will convey to the Debtor title to all equipment currently used in the Cogeneration Facility. The Debtor requires sufficient liquidity to fund its obligations under the Settlement Agreement, including the demolition of the Cogeneration Facility, posting of two letters of credit in the total amount of \$1,600,000, and payment of real estate tax obligations for the tax years of 2010-2011 and 2011-2012. Failure to satisfy such obligations will result in immediate harm to the Debtor's efforts to reorganize and therefore its ability to maximize the value of its assets for the benefit of its creditors. Victor Affidavit, ¶7.

13. The Debtor has determined, in the exercise of its business judgment and in consultation with its professionals, that it requires access to up to \$4.1 million. Victor Affidavit, ¶8. The Debtor believes that a financing facility at this level will enable it to meet its obligations under the Settlement Agreement and provide the Debtor with an opportunity to reorganize its business and propose confirmable plan. Victor Affidavit, ¶9.

14. To ensure stability and maintain the highest level of care, Mr. Victor is prepared to advance funding on favorable terms to the Debtor. This funding is necessary to continue provide the Debtor with an opportunity to reorganize its operations and to develop a plan of reorganization.

15. Accordingly, the Debtor respectfully requests that the Court enter the order annexed hereto as **Exhibit "E"** (the "Interim Order") approving the Credit Agreement on an interim basis and scheduling a final hearing on the Motion, and (b) enter an order substantially in the form of the annexed **Exhibit "F"** (the "Final Order"), granting final approval of the Credit Agreement.

The DIP Lender

16. The DIP Lender under the Credit Agreement is Gas Alternative Systems, Inc. The DIP Lender is an entity owned and controlled by Mr. Adam Victor, the Debtor's President. The DIP Lender has retained separate counsel, DLA Piper LLP (US), which has represented Mr. Victor and the DIP Lender with respect to this Credit Agreement and the DIP financing.

17. As discussed below, the Credit Agreement provides far superior terms for the Debtor and it is in the best interest of the Debtor, its estate, its creditors and other parties in interest to close on the proposed Credit Agreement. The Third DIP Loan contains no fees, a very low rate of interest, and no unusual defaults. In light of the Debtor's budget and financial projections, it is extremely unlikely that any commercial lenders would provide any credit, much less on the terms proposed by the current DIP Lender.

The Credit Agreement

18. The Debtor has, subject to this Court's approval, agreed to the terms of the Credit Agreement. The following is a summary of certain key provisions of the Credit Agreement⁴:

- A. Commitment and Availability. The Credit Agreement provides for post-petition financing of up to \$4.1 million.
- B. Use of Funding. The funds made available to the Debtor pursuant to the Credit Agreement shall be used solely to fund the Debtor's obligations under the Settlement Agreement.
- C. Term. One hundred and eighty (180) days, or as otherwise provided in the credit agreement.
- D. Interest Rate. Prime plus three percent (3%) per annum.
- E. Default Interest Rate. Three percent (3%).
- F. Budget. The Credit Agreement incorporates the budget attached to the Cash Collateral Order (as such budget may be amended, the "Budget").

⁴ Capitalized terms used herein but not otherwise defined herein shall have the meaning ascribed to them in the Credit Agreement.

- G. **Carve Out for Certain Fees and Expenses.** The Credit Agreement provides that the DIP Lender is granted a secured claim for the amount of the Third DIP Loan. The DIP Lender has agreed to subordinate its secured claim to quarterly fees payable to the Office of the United States Trustee pursuant to 28 U.S.C. 1930(a)(6) (the "Carve-Out Expenses") plus any interest owed thereon and the secured claim of Syracuse University.
- H. **Collateral.** The DIP Loan is secured. As security for the Obligations, the Debtor has agreed to grant to the DIP Lender a continuing security interest in and lien upon, and a right of setoff against (and the Debtor has agreed to pledge and assign to the DIP Lender), all of the assets of Borrower as collateral (the "Collateral"). The DIP Lender has acknowledge and agreed that DIP Lender's liens on the Collateral are and shall remain subordinate to the Carve-Out Expenses and the secured claim of Syracuse University, until payment in full of the Carve-Out Expenses and the release by Syracuse University of its secured claims and liens.
- I. **Fees.** The DIP Lender is not requesting any fees with respect to the DIP Loan, nor is the DIP Lender being reimbursed for legal expenses and costs.
- J. **Conditions to Closing.** The standard conditions precedent related to execution of documents and entry of Interim and Final Orders by this Court are the only conditions to closing.
- K. **Default Provisions.** The potential events of default are: (i) failure to pay the DIP Loan as required under the Credit Agreement; (ii) material misrepresentations; (iii) filing of applications to dismiss the Chapter 11 case or appoint a Chapter 11 trustee or examiner, or entry of orders with respect to same; (iv) filing of a plan that does not contemplate repayment of the Third DIP Loan; (v) modification of the Credit Agreement or the Interim or Final Orders; (vi) order of this Court granting relief from the automatic stay for assets valued in excess of \$100,000.00; and (vii) material adverse change. The majority of these defaults provide a five (5) business day cure period for the Debtor.

19. The Credit Agreement may be amended or modified prior to the hearing through negotiations with the Debtor, the DIP Lender, the Office of the United States Trustee or the University. If any such amendments or modifications are made to the Credit Agreement, the Debtor will provide the Court with a copy of the Credit Agreement, as amended or modified, in advance of the hearing.

20. The Debtor requires immediate access to \$1,600,000 to ensure sufficient liquidity to post two letters of credit totaling \$1,600,000 dollars within three (3) business days after the Debtor obtains Court approval of the Settlement Agreement. Thus it requires immediate access to the entire amount of the Interim DIP Loan.

21. The Credit Agreement does not include provisions related to cross collateralization, rollups, waivers or concessions of prepetition debt, 506(c) waivers, liens on avoidance actions, or any carve outs that treat professionals in disparate fashion.

22. The Debtor believes the terms and conditions of the Credit Agreement are reasonable under the circumstances and financing on more favorable terms is not available. See Victor Affidavit, ¶10. As set forth in the Victor Affidavit, the Credit Agreement is a fair and reasonable agreement between the Debtor and the DIP Lender. See Victor Affidavit, ¶10. For all of the foregoing reasons, the Debtor believes that the terms and conditions of the Credit Agreement serve the best interests of the Debtor, its creditors and estate and should be approved.

The Standard for Approval of the Credit Agreement

23. The Debtor believes the terms and conditions of Bankruptcy Code section 364(c) authorize this Court to allow the Debtor to obtain post-petition financing from the DIP Lender in the manner proposed in the Credit Agreement. Section 364(c) provides:

if the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt:

* * *

(3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

24. As described above, after appropriate investigation and analysis, the Debtor has concluded that the Credit Agreement is necessary to the preservation of the estate and the

payment of the Debtor's financial obligations under the Settlement Agreement. Further, the Credit Agreement is a far superior alternative when compared with the terms typically proposed by other lenders -- there are no fees or costs associated with the proposed Additional DIP Loan.

25. Bankruptcy courts routinely defer to a debtor's business judgment on most business decisions, including the decision to borrow money, unless such decision is arbitrary and capricious. *See In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that an interim loan, receivables facility, and asset based facility were approved because they "reflect[ed] sound and prudent business judgment on the part of TWA. . . . [were] reasonable under the circumstances and in the best interest of TWA and its creditors"); *cf. Group of Institutional Investors v. Chicago Mil. St. P. & Pac. Ry.*, 318 U.S. 523, 550 (1943) (decisions regarding the rejection or assumption of a lease are left to the business judgment of the debtor); *In re Simasko Prod. Co.*, 47 B.R. 444, 449 (D. Colo. 1985) ("Business judgments should be left to the board room and not to this Court."); *In re Lifeguard Indus., Inc.*, 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983) (same); *In re Curlew Valley Assocs.*, 14 B.R. 506, 513-14 (Bankr. D. Utah 1981) (holding that courts generally will not second guess a debtor-in-possession's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code"). In fact, "[m]ore exacting scrutiny would slow the administration of the Debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially[.]" *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

26. In *Crouse*, the court reasoned that the standard of review in approving DIP financing under 364(c) would be similar to that required in approving a settlement pursuant to

Bankruptcy Rule 9019. *Id.* at 550; *In Ellingsen MacLean Oil Co.*, 65 B.R. 358, 364-64 (Bankr. W.D. Mich. 1986). At most, it appears that some courts evaluate the proposed financing under Bankruptcy Code section 364(c) by application of the business judgment rule. *See In re Crouse Group, Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987).

27. Pursuant to Bankruptcy Rule 9019, the bankruptcy court should consider all facts surrounding the issue and determine whether the proposed action serves the interest of the estate. *See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 292 (2d Cir. 1992). A bankruptcy court does not, however, engage in an independent investigation into the reasonableness of the proposed conduct, but instead generally defers to the judgment of the debtor in possession provided there is a legitimate business justification for the settlement. "Where the Debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *Committee of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986).

28. Indeed, the court should not conduct a "mini-trial" on the merits of the action, but should instead "canvas the issues to see whether the settlement falls below the lowest point in the range of reasonableness." *Aetna Casualty & Surety Co. v. Jasmine, Ltd. (In re Jasmine, Ltd.)*, 258 B.R. 119, 123 (D. N.J. 2000). Accordingly, the Court does not have to engage in an independent investigation of the financing options available to the Debtor. The Court may authorize the Debtor to enter into the Credit Agreement so long as the Credit Agreement does not fall below the lowest point in the range of reasonableness.

29. The Debtor acknowledges that transactions between a debtor in possession and an

insider are subject to greater scrutiny than "arms-length" transactions. *See In re C.E.N., Inc.*, 86 B.R. 303, 306 (Bankr. D. Me. 1988). However, given the extremely favorable terms of the Credit Agreement, the Debtor believes the proposed DIP financing will survive such scrutiny.

The Debtor Should Be Authorized to Enter Into the
Credit Agreement Pursuant to the Business Judgment Rule

30. In the present case, the Debtor has reviewed various financing options, however, the financing proposed by the DIP Lender is the most beneficial to the estate because, inter alia:

- funds will be available immediately;
- there appear to be no other lenders willing to lend to the Debtor;
- the loan will be secured by a lien on the Debtors collateral, but such lien shall be subordinated to the secured claim of Syracuse University;
- the loan is subordinated to certain Carve Out Expenses;
- there are no fees of any kind, avoiding the placement, monitoring, commitment and servicing fees found in most DIP financings;
- the interest rate is reasonable; and
- there are no onerous conditions precedent to closing.

31. Under these circumstances, the Debtor respectfully submits that the Credit Agreement is beneficial and in the best interest of the estate and its creditors.

32. The Debtor has exercised sound business judgment in determining that a post-petition credit facility is appropriate and has satisfied the legal prerequisites to incur debt under the Credit Agreement.

Section 363(b) of the Bankruptcy Code Authorizing the Use of
Estate Property for Transactions other than those in the ordinary Course of Business

33. The Debtor requires the ability to use cash other than in the ordinary course of business to fund its obligations under the Settlement Agreement, including posting two letters of

credit, paying the fees of a contractor to demolish the Cogeneration Facility and paying the fees of an independent engineer as required by the terms of the Settlement Agreement.

34. Section 363(b) of the Bankruptcy Code provides that "the Trustee, after notice and a hearing, may use, sell, or other than in the ordinary course of business, property of the estate.... See 11 U.S.C. § 363(b).

The Proposed Financing Has Been Provided in Good Faith

35. The terms and conditions of the Credit Agreement are fair and reasonable and are the result of actions taken in good faith. The terms are overwhelmingly favorable for the Debtor and the Third DIP Loan will be used to fund a settlement which substantially increases the value of the Debtor's estate.

NOTICE

36. The Debtor has served notice of this Motion on (i) the Office of the United States Trustee for the Southern District of New York; (ii) the University; (iii) those creditors holding the twenty (20) largest unsecured claims against the Debtor's estate; and (iv) all parties that have filed notices of appearances in the Debtor's case. The Debtor submits that no other or further notice need be provided.

NO PRIOR REQUEST

37. No previous request for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests that the Court enter: (a) an interim order, substantially in the form attached as **Exhibit "E"** hereto, approving the Credit Agreement on an interim basis; (b) enter the Final Order approving the Credit Agreement and underlying Third DIP Loan; and (c) grant the Debtor such other and further relief as the Court deems just and proper.

Dated: November 3, 2010
New York, New York

Respectfully Submitted,

KLESTADT & WINTERS, LLP

By: /s/ Tracy L. Klestadt

Tracy L. Klestadt

Brendan M. Scott

292 Madison Avenue, 17th Floor

New York, NY 10017-6314

Telephone: (212) 972-3000

Facsimile: (212) 972-2245

Attorneys for Debtor and
Debtor in Possession

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
In re:	:
	:
PROJECT ORANGE ASSOCIATES, LLC,	:
	:
Debtor.	:
-----X	

Chapter 11
Case No. 10-12307 (MG)

**AFFIDAVIT OF ADAM VICTOR IN SUPPORT OF DEBTOR'S
MOTION PURSUANT TO 11 U.S.C. §§ 105 AND 364(c) AND
BANKRUPTCY RULES 4001 AND 9014 FOR ORDERS: (A) AUTHORIZING
DEBTOR TO OBTAIN ADDITIONAL INTERIM AND FINAL
FINANCING FROM GAS ALTERNATIVE SYSTEMS, INC.,
(B) SCHEDULING HEARINGS ON SHORTENED NOTICE**

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

Adam Victor, being duly sworn, deposes and says:

1. I am the President of the above-captioned debtor and debtor in possession (the "Debtor"). I have personal knowledge of the Debtor's business and the facts herein. With respect to financial information set forth herein, I have relied on information provided by employees of the Debtor, and with respect to pending legal matters, I have relied on the Debtor's attorneys.

2. I submit this affidavit in support of the Debtor's motion, dated November 1, 2010 (the "Motion")¹, for orders, pursuant to sections 105 and 364(c) of title 11 of the United States Code (the "Bankruptcy Code"), and rules 4001(c) and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"): (a) scheduling hearings on the Motion on shortened notice; and (b) authorizing the Debtor to obtain certain interim financing of \$1,600,000 and final financing \$4,100,000 (the "Third DIP Loan") pursuant to a Amended and Restated Credit

¹ Capitalized terms used, but not defined, herein shall have the meanings provided in the Motion.

Agreement, dated as of October 29, 2010 (the "Credit Agreement"), between the Debtor and Gas Alternative Systems, Inc. (the "DIP Lender").

DEBTOR'S NEED FOR FUNDING

3. The Debtor and the University have reached an agreement which resolves all disputes between the Debtor and the University. The Settlement Agreement requires the Debtor to, among other things, post two (2) letters of credit in the total amount of \$1,600,000 within three (3) days after the Settlement Agreement is approved by order of this Court and also requires the Debtor to pay for the demolition of the Debtor's cogeneration facility in Syracuse New York (the "Cogeneration Facility").

4. Since the Petition Date, the Debtor had been using the University's alleged cash collateral pursuant to consensual interim cash collateral orders and amended budgets approved by this Court. The Debtor has generated substantial revenue from operations since the Petition Date, and as a result, the Debtor will have over \$1,000,000 in cash on hand after payment of real estate taxes due on October 31, 2010. The Debtor will use cash on hand to partially fund the Debtor's financial obligations under the Settlement Agreement, but the Debtor lacks sufficient liquidity to fully fund its financial obligations under the Settlement Agreement.

5. The Debtor will require additional DIP financing in order to meet its obligations under the Settlement Agreement, including among other things, the demolition of the Cogeneration Facility and payment of real estate tax obligations for the tax years of 2010-2011 and 2011-2012.

6. It is critical to facilitate the Debtor's reorganization that it has access to sufficient post-petition funds in order to implement the Settlement Agreement. The Settlement Agreement resolves all disputes with the University including the proof of claim it filed in the amount of

\$189,007,735, a portion of which the University asserts as a secured claim in an amount equal to the value of all of the Debtor's assets (the "Proof of Claim"). As a result of its compliance with the terms of the Settlement Agreement, the University will withdraw the Proof of Claim and will convey to the Debtor title to all equipment currently used in the Cogeneration Facility.

7. The Debtor requires sufficient liquidity to fund its obligations under the Settlement Agreement, including the demolition of the Cogeneration Facility, posting of two letters of credit in the total amount of \$1,600,000, and payment of real estate tax obligations for the tax years of 2010-2011 and 2011-2012. Failure to satisfy such obligations will result in immediate harm to the Debtor's efforts to reorganize and therefore its ability to maximize the value of its assets for the benefit of its creditors.

8. The Debtor requires the ability to borrow up to \$4.1 million in order to fund its obligations under the Settlement Agreement.

9. I believe that a financing facility at this level will enable the Debtor to meet its obligations under the Settlement Agreement and provide the Debtor with an opportunity to reorganize its business and propose a confirmable plan.

10. Based upon my review of the financing options available to the Debtor, the terms and conditions of the Credit Agreement and the DIP Loan are reasonable under the circumstances and financing on more favorable terms is not available.

11. The DIP Lender has indicated that it would not be willing to extend the Third DIP Loan under the terms set forth in the Credit Agreement unless the Debtor granted a lien on its assets up to the amount of the Third Dip Loan actually advanced to the Debtor.

12. I was solely responsible for negotiating the terms of the Credit Agreement with
the DIP Lender.

/s/ Adam Victor
Adam Victor

Sworn to before me this
__ day of November, 2010

NOTARY PUBLIC

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

-----X		
DLA PIPER LLP (US),	:	Index No. 650374/2012
	:	
	:	IAS Part 63
Plaintiff,	:	
	:	Hon. Ellen Coin
- against -	:	
	:	
ADAM VICTOR,	:	ANSWER, AFFIRMATIVE
	:	DEFENSES, AND
Defendant.	:	<u>COUNTERCLAIMS</u>
	:	
-----X		

Defendant Adam Victor ("Victor" or "Defendant") by his attorneys, Davidoff Hutcher & Citron LLP, submit this Answer, Affirmative Defenses and Counterclaims in response to the complaint (the "Complaint") of plaintiff DLA Piper LLP (US) ("DLA Piper" or "Plaintiff") as follows:

Parties

- Victor admits the allegations contained in paragraphs 1 and 2 of the Complaint.

Statement of Facts Common to All Claims

- Victor admits the allegations contained in paragraph 3 of the Complaint, and states that the Engagement Letter was between Project Orange Associates, LLC ("POA") and DLA Piper. Victor was not a party to the Engagement Letter.
- Victor admits the allegations contained in paragraph 4 of the Complaint.
- Victor denies the allegations contained in paragraph 5 of the Complaint, except admits that there was a conflict between POA and another client of DLA Piper, and the Bankruptcy Court issued an order disqualifying DLA Piper from representing POA in the POA bankruptcy action. Victor states that while DLA Piper formally withdrew as counsel of record

for POA, DLA Piper continued to act as POA's attorneys in the POA bankruptcy behind the scenes.

5. Victor denies the allegations contained in paragraph 6 of the Complaint.

6. With respect to the allegations contained in paragraph 7 of the Complaint, Victor admits that DLA Piper sent certain invoices to Victor in his capacity as president of POA, and denies that DLA Piper sent any invoices to Victor in his individual capacity.

7. Victor denies the allegations contained in paragraph 8 of the Complaint, except admits that on or about June 25, 2010, Victor paid DLA Piper \$250,000 from his personal account for monies DLA Piper billed to POA.

8. Victor denies the allegations contained in paragraph 9 of the Complaint, except admits that on or about October 13, 2010, Victor paid DLA Piper \$150,000 from his personal account for monies DLA Piper billed to POA.

9. Victor denies the allegations contained in paragraph 10 of the Complaint.

10. Victor denies the allegations contained in paragraph 11 of the Complaint, except admits that Victor signed the affidavit annexed as Exhibit D to the Complaint.

11. Victor denies the allegations contained in paragraph 12 of the Complaint, except admits that on or about December 31, 2012, Gas Orange Development, Inc. paid DLA Piper \$150,000 for monies DLA Piper billed to POA.

12. Victor admits the allegations contained in paragraph 13 of the Complaint and states that Victor does not owe any monies on the "Outstanding Victor Invoices," since Victor was never personally liable for any of DLA Piper's invoices.

13. Victor denies the allegations contained in paragraph 14 of the Complaint.

14. Victor admits the allegations contained in paragraph 15 of the Complaints, except denies that Invoice # 2369074 was sent to Victor in his individual capacity, and states that such invoice was sent to Victor in his capacity as president of POA.

15. Victor admits the allegations contained in paragraph 16, except denies that DLA Piper is only permitted to reveal confidential attorney-client communications if it is suing POA – its actual client. DLA Piper may not reveal attorney-client confidences when trying to collect a fee from Victor, with whom DLA Piper had no attorney-client relationship with.

16. With respect to the allegations contained in paragraph 17 of the Complaint, Victor admits that DLA Piper claims it is owed \$678,762.69, and denies that DLA Piper is entitled to payment from Victor.

17. Victor admits the allegations contained in paragraph 18 of the Complaint, and denies that Victor has any liability for any invoices sent to him by DLA Piper.

18. Victor denies the allegations contained in paragraph 19 of the Complaint, except Victor admits that he has refused to pay DLA Piper money that Victor is not liable for.

19. Victor denies the allegations contained in paragraph 20 to the extent that DLA Piper expected to be paid by Victor personally, as opposed to POA, and Victor otherwise denies knowledge or information sufficient to admit or deny the balance of the allegations contained in paragraph 20 of the Complaint.

20. Victor denies the allegations contained in paragraph 21 of the Complaint, and states that DLA Piper only represented Victor personally with respect to one small collection matter, and as such, could never have billed Victor more than \$50,000.

First Cause of Action (Account Stated)

21. In response to the allegation contained in paragraph 22 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

22. Victor denies the allegations contained in paragraphs 23, 24 and 25 of the Complaint.

Second Cause of Action (Breach of Contract)

23. In response to the allegation contained in paragraph 26 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

24. Victor denies the allegations contained in paragraphs 27, 28, 29, and 30 of the Complaint.

Third Cause of Action (Breach of Implied Covenant of Good Faith)

25. In response to the allegation contained in paragraph 31 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

26. Victor admits the allegations contained in paragraph 32 of the Complaint, and states that the third cause of action is entirely duplicative of the first cause of action in that it fails to articulate any facts distinct from the breach of contract alleged.

27. Victor denies the allegations contained in paragraph 33 of the Complaint.

Fourth Cause of Action (Unjust Enrichment – Quantum Meruit)

28. In response to the allegation contained in paragraph 34 of the Complaint, Victor repeats and realleges each of the foregoing paragraphs as though fully set forth herein.

29. Victor denies the allegations contained in paragraphs 35, 36, 37, 38, 39 and 40 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

30. The Complaint fails, in whole or in part, to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

31. The Complaint is barred, in whole or in part, by the doctrines of estoppel, waiver, ratification, laches and/or Plaintiffs' unclean hands.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

32. The relief requested in the Complaint is unavailable as a result of Plaintiff's consent or acquiescence to solely hold POA responsible for the outstanding legal invoices.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

33. The Complaint is barred, in whole or in part, by Plaintiff's breach of the Engagement Letter between Plaintiff and POA.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

34. Victor has at all times acted in good faith and with reasonable grounds for believing that his conduct was entirely lawful. Plaintiff is precluded by its own misconduct, acts and omissions from maintaining this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

35. The actions of Defendants were not wrongful.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

36. The losses and damages complained of in the Complaint were caused by Plaintiff's acts of misconduct and omissions.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

37. The Complaint is barred by documentary evidence.

38. The Engagement Letter conclusively establishes that DLA Piper's sole client was POA

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

39. The Complaint is barred in whole or in part by RPC 1.5 and 22 NYCRR 1215.1 which require a written retainer between an attorney and client in order to recover on a claim for breach of contract.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

40. The cause of action for breach of the duty of good faith is barred as being duplicative of the cause of action for breach of contract.

PRESERVATION OF DEFENSES

41. Victor reserves the right to raise additional and other affirmative defenses that may subsequently become or may appear to be applicable to the Complaint.

COUNTERCLAIMS

1. These counterclaims seek the return of \$776,000 paid by Victor to DLA Piper for services rendered for POA.

2. Victor was the owner of the equity of the now-defunct POA. When POA filed for bankruptcy protection, it retained its long-time attorneys at DLA Piper to represent it as debtor's counsel in that proceeding.

3. As a result of a conflict of interest, the Bankruptcy Court disqualified DLA Piper from representing POA. Nevertheless, after being disqualified, DLA Piper insisted to Victor that it remain POA's counsel. Since the Court Order disqualified DLA Piper from its representation, DLA Piper insisted that it would remain behind-the-scenes, and act as "ghost" counsel for POA.

4. Even though DLA Piper acted as shadow counsel for POA, it knew it could not get paid by POA since the Bankruptcy Court explicitly ruled that DLA Piper could not represent POA. As such, DLA Piper applied unrelenting pressure on Victor to pay for the legal services rendered to POA.

5. Victor succumbed to DLA Piper's demands and paid DLA Piper \$776,000 of his own personal funds for services largely rendered to POA.

6. Victor paid those bills without having the benefit of receiving monthly invoices to determine whether the charges to POA were reasonable. Victor only received itemized bills after they were paid. After reviewing the detailed legal invoices, it is readily apparent that DLA Piper engaged in a systematic and sweeping practice of over-billing, by billing for services that were unnecessary, duplicative, or wasteful.

7. Through this action, Victor seeks the return of the money he was pressured to pay DLA Piper to continue a representation DLA Piper was barred from undertaking.

Parties

8. Counterclaim Plaintiff is Victor and Counterclaim Defendant is DLA Piper.

Jurisdiction

9. The court has personal jurisdiction over DLA Piper pursuant to CPLR § 301 since DLA Piper conducts business in the State of New York.

10. Venue is proper in New York County as DLA Piper brought the instant lawsuit in New York County and DLA Piper maintains a place of business in New York County.

Statement of Facts

11. POA owned and operated a steam-electric cogeneration plant in Syracuse, New York that supplied steam to Syracuse University and electricity to initially Niagara Mohawk Power Corporation, and later to the New York State Independent System Operator.

12. Victor was initially a minority owner of POA, and eventually became the 100% owner.

13. DLA Piper had been the long-time attorneys for POA and other entities controlled by Victor. Victor's companies paid DLA Piper millions of dollars over the past 10 years in legal fees on a variety of matters.

14. In 2008, after 16 years of successful operations, POA was forced to shut down the cogeneration plant, which was a result of the economic consequences of the State of New York's de-regulation and restructuring of the electric utility industry.

15. POA ultimately filed for bankruptcy on April 29, 2010. POA retained its long-time attorneys at DLA Piper to serve as its bankruptcy counsel.

16. POA executed an engagement letter (the "Engagement Letter") with DLA Piper one week prior to POA's bankruptcy filing, a copy of which is annexed as Exhibit A to the Complaint.

17. In a decision and order dated June 23, 2010, the Bankruptcy Court held that DLA Piper could not act as counsel for POA as a result of a conflict of interest. The Bankruptcy Court's decision is reported at In re Project Orange Associates, LLC, 431 BR 363 [Bankr SD NY 2010].

18. Project Orange Associates then retained new bankruptcy counsel. Yet because DLA Piper had institutional knowledge, and did not want to lose such a lucrative client, DLA Piper insisted that it should continue to provide legal services behind the scenes to POA. POA heeded its counsel's advice. While POA hired separate counsel to officially represent its interests in the bankruptcy, DLA Piper acted as "ghost" counsel for POA and performed the bulk of the legal work required.

19. While POA's actual bankruptcy counsel was required to submit its fee applications to the bankruptcy court for review and approval by the court and the US Trustee, DLA Piper was not subject to such scrutiny since it was not official bankruptcy counsel.

20. DLA Piper would regularly bill POA/Victor for several months at a time, in invoices delivered several months after such services were purportedly rendered.

21. POA could not pay DLA Piper since its assets were all subject to the jurisdiction of the Bankruptcy Court. Accordingly, DLA Piper applied unrelenting pressure to Victor to pay for work done for POA from Victor's personal account.

22. Victor, being unaware of the impropriety of DLA Piper's actions, complied with DLA Piper's repeated demands and threats for money. At DLA Piper's demand, Victor regularly paid money to DLA Piper in advance, without the opportunity to see any detailed invoices.

23. To wit, Victor paid DLA Piper from his own personal funds on four occasions. On or about April 26, 2010, Victor wired \$200,000 to DLA Piper. On or about June 25, 2010, Victor wired \$250,000 to DLA Piper. On or about September 22, 2010, Victor issued check number 115 to DLA Piper in the amount of \$176,000. On or about October 13, 2010, Victor issued check number 120 to DLA Piper in the amount of \$150,000.

24. All told, Victor paid DLA Piper \$776,000.

25. These payments were all made in advance of receiving detailed legal invoices from DLA Piper. To wit, DLA Piper delivered invoice number 2513808 to POA seeking \$597,325.25, dated November 22, 2010, for services rendered from April 30, 2010 to August 3, 2010. On the cover page of the invoice, DLA Piper notes that the invoice was already paid in full in advance.

26. DLA Piper delivered invoice number 2526761 to POA seeking \$200,000, dated December 31, 2010, for services rendered from May 3, 2010 to October 22, 2010.

27. Finally, DLA Piper delivered invoice number 2639074 to POA seeking \$685,681.20 for services rendered from October 22, 2010 to December 8, 2011.

28. All told, DLA Piper billed POA \$1,433,006.45, and was paid \$776,000 by Victor, leaving a balance of \$657,006.45 owed by POA to DLA Piper according to DLA Piper's own belated invoicing.

29. The three invoices detailed above – invoice numbers 2513808, 2526761, and 2639074 all demonstrate massive over-billing, and billing for work that was unnecessary, duplicative or wasteful.

30. DLA Piper never represented Victor individually, except with respect to one minor collection matter. DLA Piper represented Victor in his individual capacity in an action captioned Fix Spindelman Brovitz & Goldman PC v. Victor, Index No. 8041/2010 [Sup Ct Monroe Co]. The plaintiff in that action sued Victor for approximately \$77,000 for unpaid legal bills. DLA Piper did some minor work on this matter for Victor, and Victor ended up settling that action a few months after it was commenced for \$17,500 in a conversation directly with the plaintiff therein.

**AS AND FOR A FIRST COUNTERCLAIM
(BREACH OF FIDUCIARY DUTY)**

31. Victor repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth in full herein.

32. As the president and owner of POA, DLA Piper's client, DLA Piper owed fiduciary duties to Victor, including the duty of good faith, loyalty, and candor.

33. DLA Piper breached its fiduciary duties to Victor, based on the pressure it bore on Victor to pay for legal services rendered to POA, and for advising Victor that it was permitted to continue to act as "ghost" counsel for POA, even though the Bankruptcy Court ruled that DLA Piper could not act as counsel for POA.

34. DLA Piper further breached its fiduciary duties by billing Victor for legal services that were unnecessary, duplicative, or wasteful.

35. DLA Piper took these actions intentionally and with malicious disregard for its fiduciary duties owed to Victor.

36. As a direct and proximate result of DLA Piper's breach of its fiduciary duties, Victor suffered damages in the amount of \$776,000, the amount Victor paid to DLA Piper from his personal account.

37. By virtue of the foregoing, Victor is entitled to a judgment in an amount not to exceed \$776,000, in addition to interest accrued and accruing.

**AS AND FOR A SECOND COUNTERCLAIM
(UNJUST ENRICHMENT)**

38. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

39. In the alternative to the first counterclaim, DLA Piper was unjustly enriched by and benefited from the \$776,000 paid to DLA Piper by Victor personally for services rendered for POA.

40. DLA Piper's actions in pressuring Victor to pay for services rendered to POA and then accepting those payments were wrongful.

41. DLA Piper was also unjustly enriched by and benefited from the \$776,000 paid to it by Victor for legal services that were unnecessary, duplicative, or wasteful.

42. Circumstances are such that equity and good conscience require DLA Piper to make restitution to Victor in an amount to be determined at trial, but no greater than \$776,000.

**AS AND FOR A THIRD COUNTERCLAIM
(BREACH OF CONTRACT)**

43. Victor repeats and realleges each and every allegation contained in each of the foregoing paragraphs hereof as if set forth in full herein.

44. DLA Piper alleges in its complaint that it had an oral agreement with Victor where Victor agreed to be personally liable for services rendered by DLA Piper. Victor denies

that he ever agreed to be personally liable to DLA Piper for services rendered. However, to the extent this Court finds that such an oral agreement did exist, then also in the alternative to the first cause of action, Victor asserts a counterclaim for breach of contract.

45. There is no written contract between Victor and DLA Piper.

46. However, to the extent this Court finds that there was an oral contract between Victor and DLA Piper, which Victor denies, such contract would be valid and binding.

47. To the extent an oral contract existed, which Victor denies, DLA Piper breached that contract by failing to provide invoices in a timely fashion, and engaging in a systematic and sustained practice of overbilling by charging Victor for services that were unnecessary, duplicative or wasteful.

48. As a direct and proximate result of these breaches of contract, Victor has suffered damages in an amount to be determined at trial, but no more than the \$776,000 that Victor paid to DLA Piper, in addition to pre-judgment interest.

WHEREFORE, Victor respectfully requests that a Judgment be entered herein:

- (a) Dismissing the complaint with prejudice,
- (b) On the first counterclaim, or in the alternative on the second counterclaim, or in the alternative on the third counterclaim, granting Victor a money judgment in an amount to be determined at trial, but no more than \$776,000 in addition to pre-judgment interest;
- (c) Granting Victor an award for the costs and disbursements of this action; and

(d) Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 3, 2012

DAVIDOFF HUTCHER & CITRON LLP

By: /s/ Joshua Krakowsky

Larry Hutcher
Joshua Krakowsky
605 Third Avenue
New York, New York 10158
(212) 557-7200

*Attorneys for Defendant/Counterclaim Plaintiff
Adam Victor*

TO: Jeffrey Schreiber, Esq.
Meister Seelig & Fein LLP
2 Grand Central Tower
140 East 45th Street
19th Floor
New York, New York 10017
(212) 655-3500
Counsel for Plaintiff/Counterclaim Defendant

To: Thomson, Christopher[Christopher.Thomson@dlapiper.com]; Johnson, Jeremy R.[Jeremy.Johnson@dlapiper.com]
From: Eisenegger, Erich P.
Sent: Thur 5/20/2010 10:41:02 PM
Subject: Re: Project Orange

I hear we are already 200k over our estimate-that's Team DLA Piper!

From: Thomson, Christopher
To: Johnson, Jeremy R.; Eisenegger, Erich P.
Sent: Thu May 20 18:36:52 2010
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Sent: Thursday, May 20, 2010 6:29 PM
To: Walsh, Timothy W.
Cc: Adam Victor; Jonathan Flaxer; Gabriel Del Virginia; Sarad, Nicolai J.; Thomson, Christopher; Roldan, Vincent J.; Zborovsky, Gabriella
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Tim,

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Tom

On May 19, 2010, at 3:09 PM, Walsh, Timothy W. wrote:

Attached is our draft objection to Syracuse's motion. Please review and provide us with your comments as soon as possible. Thanks.

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<POA_ Objection to Syracuse Stay Relief Motion.DOC>

To: Eisenegger, Erich P.[Erich.Eisenegger@dlapiper.com]; Johnson, Jeremy R.[Jeremy.Johnson@dlapiper.com]
From: Thomson, Christopher
Sent: Thur 5/20/2010 10:42:27 PM
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What was our estimate? But Tim brought Vince in to work on the objection for whatever reason, and now Vince has random people working full time on random research projects in standard Vince "churn that bill, baby!" mode. That bill shall know no limits.

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From: Johnson, Jeremy R.
Sent: Thur 5/20/2010 10:48:58 PM
Subject: RE: Project Orange

Didn't you use 3 associates to prepare for a first day hearing where you filed 3 documents?

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To: Eisenegger, Erich P.; Johnson, Jeremy R.
Subject: RE: Project Orange

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From: Eisenegger, Erich P.
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To: Thomson, Christopher; Johnson, Jeremy R.
Subject: Re: Project Orange

400k. We are at 600k

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From: Thomson, Christopher
Sent: Thur 5/20/2010 10:50:01 PM
Subject: RE: Project Orange

And it took all of them 4 days to write those motions while I did cash collateral and talked to the client and learned the facts. Perhaps if we paid more money we'd have more skilled associates.

From: Johnson, Jeremy R.
Sent: Thursday, May 20, 2010 6:49 PM
To: Thomson, Christopher; Eisenegger, Erich P.
Subject: RE: Project Orange

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Sent: Thur 5/20/2010 10:48:27 PM
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It's a Thomson project, he goes full time on whatever debtor case he has running. Full time, 2 days a week.

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To: Roldan, Vincent J.[Vincent.Roldan@dlapiper.com]; Thomson, Christopher[Christopher.Thomson@dlapiper.com]; Freedlander, Jed[jed.freedlander@dlapiper.com]; Johnson, Jeremy R.[Jeremy.Johnson@dlapiper.com]; Karaffa, Jason[Jason.Karaffa@dlapiper.com]
From: Eisenegger, Erich P.
Sent: Wed 6/23/2010 7:32:33 PM
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Represent Adam Victor personally

From: Roldan, Vincent J.
Sent: Wednesday, June 23, 2010 3:31 PM
To: Eisenegger, Erich P.; Thomson, Christopher; Freedlander, Jed; Johnson, Jeremy R.; Karaffa, Jason
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

get retained as special counsel?

From: Eisenegger, Erich P.
Sent: Wednesday, June 23, 2010 3:30 PM
To: Thomson, Christopher; Freedlander, Jed; Roldan, Vincent J.; Johnson, Jeremy R.; Karaffa, Jason
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Wow--But Walsh has "Plan B" right?

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 3:30 PM
To: Eisenegger, Erich P.; Freedlander, Jed; Roldan, Vincent J.; Johnson, Jeremy R.; Karaffa, Jason
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Well, the Judge just fired us from POA. Drinks anyone?

From: Eisenegger, Erich P.
Sent: Wednesday, June 23, 2010 3:29 PM
To: Thomson, Christopher; Freedlander, Jed; Roldan, Vincent J.; Johnson, Jeremy R.;

Karaffa, Jason

Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Jesus, that Wimbledon match is 54-53 in the fifth set.

From: Thomson, Christopher

Sent: Wednesday, June 23, 2010 2:59 PM

To: Freedlander, Jed; Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason

Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

For those of you not familiar with those local landmark and institution:

<http://www.bohemianhall.com/en/index.html>

From: Freedlander, Jed

Sent: Wednesday, June 23, 2010 2:23 PM

To: Thomson, Christopher; Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason

Subject: Re: Saturday June 26, USA Soccer History 2:30 PM

Guys, I'm away this wknd but, if I were you, I'd make a reservation at city winery or possibly that nolita "stadium". Big screens

From: Thomson, Christopher

To: Thomson, Christopher; Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed

Sent: Wed Jun 23 13:25:28 2010

Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Any opinions from Jed or JJ (assuming Erich is watching with 4 kids in his lap on Long Island)? Firefly wouldn't be my first pick, especially since the beers are stupidly overpriced, but it's serviceable.

From: Thomson, Christopher

Sent: Wednesday, June 23, 2010 1:16 PM

To: Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

- A) My fat ass likes to sit
- B) My fat ass likes a waitress
- C) With a broken foot, my fat ass really likes to sit

From: Roldan, Vincent J.
Sent: Wednesday, June 23, 2010 1:15 PM
To: Thomson, Christopher; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

even without a table, there's plenty of bar space

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 1:14 PM
To: Roldan, Vincent J.; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

That bar was a pain in the ass to get a table, but only because I was the only one that got there at 12 and they wouldn't seat us until everyone was there. If everyone gets there on time, we'd be fine...

From: Roldan, Vincent J.
Sent: Wednesday, June 23, 2010 1:12 PM
To: Thomson, Christopher; Eisenegger, Erich P.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

hopefully not the germans

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 1:09 PM
To: Eisenegger, Erich P.; Roldan, Vincent J.; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Don't know until the 2:30 games - likely the Black Stars of Ghana.

From: Eisenegger, Erich P.
Sent: Wednesday, June 23, 2010 1:09 PM
To: Roldan, Vincent J.; Thomson, Christopher; Johnson, Jeremy R.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

Who are we playing?

From: Roldan, Vincent J.
Sent: Wednesday, June 23, 2010 1:09 PM
To: Thomson, Christopher; Johnson, Jeremy R.; Eisenegger, Erich P.; Karaffa, Jason; Freedlander, Jed
Subject: RE: Saturday June 26, USA Soccer History 2:30 PM

that bar u picked for the England match was good.
i'd go there again

From: Thomson, Christopher
Sent: Wednesday, June 23, 2010 1:06 PM
To: Johnson, Jeremy R.; Roldan, Vincent J.; Eisenegger, Erich P.; Karaffa, Jason; Freedlander, Jed
Subject: Saturday June 26, USA Soccer History 2:30 PM

Gents -

It has been brought to my attention that Team USA's next match will be this Saturday at 2:30 PM. While some of you may have 9 kids and live in suburbia, louts like myself would like to organize as large a group as possible for this history drinking and watching opportunity. As I do unfortunately live in this general area, I'm fine watching up here, but could also go downtown to watch. Due to the history nature of this clash, I'd suggest arriving by 12 to secure a table one we decide on a locale and determine who is interested. Obviously non-DLA people are welcome, as I plan to invite my friends as well and expect the size of the group will get quite large.

Chris

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