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

----------X
GIT, INC.

Plaintiff, Index No. /2022

- against -

QUINN EMANUEL URQUHART &
SULLIVAN, LLP,

Defendants.. **SUMMONS**

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Plaintiff designates New York County as place of trial. The basis of venue is: defendant has a place of business in New York County

Plaintiff's address:
1700 Sinton Road
Santa Maria, California 93458

To the Above-Named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve your notice of appearance on the plaintiffs' attorneys within 20 days after the service of this summons exclusive of the date of service, or within 30 days after service is complete if this summons is not personally delivered to you within the State of New York; and in case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
August 10, 2022

Berry Law PLLC

By: /s/ Eric W. Berry
Eric W. Berry
Attorneys for plaintiff GIT, Inc.
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Defendant's address: 51 Madison Avenue, 22nd Floor
New York, New York 10010

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

----------X
GIT, INC.

Plaintiff, Index No. /2022

- against -

QUINN EMANUEL URQUHART &
SULLIVAN, LLP, **COMPLAINT**

Defendants.
----------X

Plaintiff GIT, Inc., by its undersigned counsel, for its complaint, alleges as follows:

A. PARTIES

1. Plaintiff GIT, Inc. has a principal place of business in Santa Barbara County California, and is a corporation formed under the laws of the state of Colorado.

2. Defendant Quinn Emanuel Urquhart & Sullivan, LLP is a professional limited liability partnership formed under the laws of the State of California. It is a law firm with offices throughout the world, including a principal place of business in New York, New York.

B. JURISDICTION AND VENUE

3. *In personam* jurisdiction exists over Quinn Emanuel since it has a principal place of business within the State of New York.

4. Venue properly lies in New York County, since Quinn Emanuel has a principal place of business here, and because a portion of the events at issue occurred here.

C. NATURE OF THE ACTION

5. In this action, GIT alleges that Quinn Emanuel committed several instances of malpractice. Quinn Emanuel's malpractice is a proximate cause of judgments totaling

$136,967,650.10 entered against GIT, then known as Greka Integrated, Inc. and in favor of UBS AG, London Branch in the U.S. District Court for the Southern District of New York. *UBS AG, London Branch v. Greka Integrated, Inc*., 19 Civ. 10786 (LLS) (hereinafter, "the *UBS* action"). The $136,967,650.10 in judgments are based on UBS' successful enforcement in that action of GIT's guaranties ("Guaranties") of obligations of two of GIT's subsidiaries, Rincon Island, L.P. and HVI Cat Canyon, Inc. ("HVICC," and, together with Rincon, "the Subsidiaries"). Quinn Emanuel appeared for GIT and defended UBS' claim in that action. Four Claims in this case assert that Quinn Emanuel committed several acts of negligence in defending the *UBS* action. Another Claim asserts that Quinn Emanuel breached a contractual obligation to undertake reasonable efforts to document an agreement that GIT negotiated with UBS that could have avoided the judgment debt. The final claim is a challenge under the California Business and Professions Code and CPLR 7511 to an advisory arbitration award that GIT is liable for fees claimed by Quinn Emanuel. In particular:

6. The First Claim alleges that in the *UBS* action Quinn Emanuel neglected to raise a meritorious defense that the Credit Agreements were not enforceable against GIT's Subsidiaries for lack of consideration, and that therefore the Guaranties were not enforceable against GIT.

7. The Second Claim alleges that in the *UBS* action Quinn Emanuel neglected to raise a meritorious defense that GIT did not receive any separate consideration for the Guaranties.

8. The Third Claim alleges that in the *UBS* action Quinn Emanuel neglected to competently pursue meritorious fraud allegations against UBS that would have supported a "fraud in the inducement" defense to UBS' suit to enforce the Guaranties and several meritorious counterclaims that GIT had against UBS.

9. The Fourth Claim alleges that Quinn Emanuel breached its contractual obligation to GIT to use reasonable efforts to document an agreement for a pre-arranged bankruptcy plan in advance of a bankruptcy filing by GIT's subsidiary, HVICC.

10. The Fifth Claim alleges that in the *UBS* action Quinn Emanuel neglected to make meritorious arguments before the District Court and thus did not preserve them for appeal.

11. The Sixth Claim objects to, and seeks to vacate, an advisory award for fees in the principal amount of $812,161.28 issued by Los Angeles County Bar Association Attorney Client Mediation and Arbitration Services, an arbitration tribunal.

D. <u>BACKGROUND</u>

12. For many years, GIT, then known as Greka Integrated, Inc., was the parent of two oil and gas production companies, Rincon and HVICC ("the Subsidiaries," as defined above).

13. In 2007, UBS, on one side, and Rincon and HVICC, on the other, entered into a series of agreements referred to by the parties as Volumetric Production Payment Documents and herein as the "VPP Documents." Under the VPP Documents, UBS provided $161.5 million to Rincon/HVICC in exchange for proceeds from Rincon's and HVICC's sale of specified amounts of oil and gas. From 2007 forward, Rincon and HVICC paid UBS approximately $185 million under the VPP Documents, more than the amount of funding provided by UBS.

14. Nevertheless, UBS alleged that Rincon and HVICC owed it substantially more money, and initiated non-judicial proceedings to seize assets that Rincon and HVICC pledged to secure their obligations under the VPP Documents. UBS' attempt to assume control of this collateral threatened to force Rincon and HVICC out of business.

15. on May 20, 2016, Rincon and HVICC agreed with UBS to replace the VPP

Documents with so-called "First Lien" and "Second Lien" "Credit Agreements." The two Credit Agreements each provided that Rincon and HVICC would jointly owe UBS the principal amount of $50 million (for a total of $100 million), which was a stipulated liquidation of the parties' competing claims over the amounts due under the VPP Documents. UBS did not provide *any* new or additional funding in connection with these Credit Agreements. The two Credit Agreements are essentially identical to each other.

16. As part of the same transaction, GIT issued two separate Guaranties, one for each Credit Agreements ("the Guaranties") thereby assuming conditional liability for the entire $100 million debt to UBS. The two Guaranties are essentially identical to each other.

17. While the Credit Agreements and Guaranties were being negotiated, UBS insisted on obtaining solvency certificates from Rincon and HVICC. UBS proposed solvency certificates that stated that "the fair value of the assets of each Company individually and on a consolidated basis with its Subsidiaries exceeds its debts and liabilities, subordinated, contingent or otherwise. . . [.]"

18. As UBS knew well from the Subsidiaries' disclosures over the years, under generally accepted accounting principals (GAAP), the Subsidiaries were insolvent. Instead, the liabilities on their combined balance sheet outstripped the assets on their balance sheet, and the Subsidiaries were not paying their bills on a current basis. For that reason, the Subsidiaries refused to execute solvency certificates in the form requested by UBS.

19. Instead of walking away from the deal, UBS invited Rincon and HVICC to propose an alternative solvency certificate.

20. Rincon and HVICC then proposed a revised solvency certificate that specifically

included the "PV-10 Value" of Rincon's and HVICC's reserves as among their assets. PV-10 value – an off-balance, non-GAAP asset – is the present value of estimated future oil and gas revenues, net of anticipated direct expenses, discounted at an annual rate of ten percent. The revised solvency certificates proposed by Rincon and HVICC stated, *inter alia*, "(a) the fair value of the assets including the value of the PV-10 Value of the Companies (on a consolidated basis) exceeds its debts and liabilities, subordinated, contingent or otherwise; . . [.]"

21. UBS accepted the solvency certificates as revised by Rincon and HVICC, and the inclusion of PV-10 values. The definition of solvency used in the agreed upon Solvency Certificates was incorporated throughout the Credit Agreements. On May 20, 2016, HVICC executed identical twin solvency certificates, one for each Credit Agreement, and the Credit Agreements and Guaranties closed. UBS thus received Solvency Certificates, as it was insisting on receiving, only because it agreed that PV-10 values of Rincon's and HVICC's reserves would be included as part of the contractual definition of their assets. The off-balance PV10 values exceeded $250 million.

22. The Credit Agreements not only attached, cited and incorporated by reference the negotiated May 20, 2016 Solvency Certificates, but also expressly adopted the PV-10 method as the basis for resolving future valuation issues. Section 3.17 of the Credit Agreements defines "Solvency" as based upon PV-10 values and repeats the substance of the Solvency Certificates. The Credit Agreement's terms relating to the value and solvency of Rincon and HVICC refer both to PV-10 Values and the sort of PV-10 based reserve reports that UBS had previously received. The definition of "PV-10 Value" in the Credit Agreements likewise referenced those prior reserve reports. Netherland, Sewell & Associates, Inc., the independent firm that prepared

those prior reports, was designated an "Approved Petroleum Engineer" under the Credit Agreements.

23. As a condition to the closing of the Credit Agreements, UBS insisted that GIT provide Rincon and HVICC with $7.5 million in working capital, and GIT did so. The only new cash extended to Rincon and HVICC came from GIT, rather than UBS. Thus, not only did GIT not receive any direct financial consideration for guaranteeing the Rincon/HVICC $100 million debt, it also incurred an immediate, direct and non-contingent $7.5 million cash obligation to the entity that funded GIT's provision of working capital to the Subsidiaries.

24. The Credit Agreements provided that the Subsidiaries' $100 million payment obligation to UBS was due on June 30, 2021. Each Credit Agreement also imposed pre-maturity installment obligations on the Subsidiaries, including monthly interest payments, quarterly loan amortization payments, annual administrative agent fees, monthly payments for deferred closing costs, and quarterly performance payments. (In fact, the closing costs were deferred since the Subsidiaries did not have sufficient liquidity to pay them at the closing.) Shortly after the Credit Agreements were concluded, the Subsidiaries were unable to meet important short-term obligations. On August 8, 2016, less than three months after the Credit and Agreements were signed and the Guaranties issued, Rincon filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code. *In re Rincon Island, L.P.*, Case No. 16-bk-33174 (Bankr., N.D. Tex.)

E. <u>GIT'S ENGAGEMENT OF QUINN EMANUEL</u>

25. Aa Chapter 11 Trustee was appointed for Rincon, and Rincon's Chapter 11 Trustee incurred an additional indebtedness to UBS. UBS then asserted in a May 19, 2019 default notice that HVICC was now responsible for not only all the Subsidiaries' unpaid obligations under the

Credit Agreements, but also the additional indebtedness that Rincon's Chapter 11 Trustee had incurred.

26. GIT determined that it needed to retain counsel that was highly qualified in commercial litigation, debtor and creditor rights and bankruptcy litigation and strategy given: (a) Rincon's bankruptcy; (b) the possibility of an HVICC bankruptcy filing in light of HVICC's inability to meet UBS' financial demands; (c) the enumeration of a bankruptcy filing by either Subsidiaries as a default under the Credit Agreements (Credit Agreements, §7.01(g) & §7.01(h)); and (d) the looming action by UBS to enforce the Guaranties against GIT based on allegations that the Subsidiaries had defaulted under the Credit Agreements.

27. Quinn Emanuel held itself out as precisely the highly qualified counsel that GIT needed. On its website, Quinn Emanuel identifies itself as "the largest law firm in the world devoted solely to business litigation and arbitration." The first page of the website identifies Quinn Emanuel as the "Law Firm Most Feared Globally by Large Business" and "A Global Force in Business Litigation." Under "Banking and Financial Institution Litigation," the website states:

> We have an experienced U.S. practice litigating against major investment and commercial banks on behalf of other financial institutions, insurers and hedge funds. We have tried virtually every type of banking dispute, including lender-liability actions, suits by loan participants, actions arising out of letters of credit and other forms of commercial paper, commercial and residential foreclosure actions and loan fraud matters. In the last three years, we achieved two separate settlements of lawsuits against financial institutions that each exceeded $2 billion.

Under "Energy Sector Disputes," the website proclaims: "[O]ur partners have been involved in the largest and most complex energy disputes in recent history, both internationally and in the United States." Under "Bankruptcy and Restructuring," the Quinn Emanuel website announces:

"Like the rest of the firm we do try cases – a lot of them. However, we try to look for a business solution first. When we do negotiate, there is no doubt that our reputation for winning trials is a huge asset."

28. The Quinn Emanuel web page for Peter Calamari, whom GIT hired as its lead counsel, quoted Chambers USA as describing Calamari as "probably the most feared name among bank defendants" and "a real strategic leader in the space." The web page for Patty Tomasco, who provided strategic advice and appeared on behalf of GIT in the bankruptcy case that HVICC eventually filed, states that: "Patty was selected as Best Business Bankruptcy Lawyer by the Austin Business Journal."

29. On June 28, 2019, Quinn Emanuel and GIT executed an engagement letter, which Calamari signed on behalf of the law firm. The engagement expressly provided that Quinn Emanuel would act as counsel for GIT in connection with an anticipated Chapter 11 filing by HVICC. Later, the engagement was expanded to include the defense of UBS' claim against GIT to enforce the Guaranties.

30. The hourly rates Quinn Emanuel charged were extraordinary, even for lawyers of with the experience, skills and accomplishments that Quinn Emanuel's website claimed for them: $1550 for Calamari; $1150 for Tomasco; $860 for a mid-level associate; and $330 for paralegals. **F. <u>THE *HVICC* BANKRUPTCY CASE</u>**

31. The HVICC Chapter 11 case, *In re HVI Cat Canyon, Inc.*, Case No. 19-bk-12417 (Bankr., S.D.N.Y.), was filed on July 25, 2019, and later transferred to the Bankruptcy Court for the Central District of California, *In re HVI Cat Canyon, Inc.*, Case No. 19-bk-11573 (Bankr., C.D. Cal.).) Quinn Emanuel appeared for GIT as a creditor of HVICC in the *HVICC*

bankruptcy case.

32. In the *HVICC* bankruptcy case, UBS disavowed its agreement that the PV-10 value of HVICC's reserves would be considered in subsequent proceedings concerning those assets.

33. Before the HVICC bankruptcy estate could market and sell HVICC's assets at fair value, UBS successfully contended that the PV-10 method was conceptually flawed, and the value of HVICC's reserves only in the range of $50 million to $75 million, *i.e.*, less 20 percent of the Solvency Certificates and approximately half the amount claimed by UBS. By disavowing its prior contractual agreement regarding the manner in which HVICC's assets should be valued, UBS was able to obtain the appointment of a Chapter 11 Trustee and control the cash collateral. UBS then coerced the HVICC Trustee to enter into a new post-petition credit agreement with UBS, which was dated November 8, 2019. In fact, UBS' post-petition credit agreement with the HVICC Trustee contains a waiver of the Trustee's statutory right to propose a Chapter 11 plan of reorganization without UBS' consent. Trustee Credit Agreement, §7.01(g)(i)(F) (denominating, as an event of default, "without the prior written consent of the Lender, filing a Chapter 11 plan for Borrower or any modification thereto").

34. Eventually, UBS directed the HVICC Trustee to accept a bargain-basement offer. As a result, HVICC's assets were abandoned or liquidated for pennies on the dollar compared to their actual value, leaving GIT exposed to a large deficiency judgment.

G. <u>UBS' SUIT TO ENFORCE GIT'S GUARANTIES</u>

35. On October 21, 2019, UBS filed an action to enforce the Guaranties against GIT in this Court under CPLR 3213, the accelerated judgment procedure known as "summary judgment in lieu of complaint." (This case is defined above, as "the *UBS* action.") The CPLR 3213

procedure is designed for straight-forward, simple instruments for the payment of money only, and permits a court to rule based solely on the facial content of the instrument and proof of non-payment. Among other advantages to the plaintiff, a CPLR 3213 motion for summary judgment can be made without first affording the defendant an opportunity to obtain discovery in support of its defenses.

36. On November 2, 2019, on behalf of GIT, Quinn Emanuel removed the *UBS* action to the U.S. District Court for the Southern District of New York, on grounds of federal subject matter jurisdiction based on diversity of citizenship. 28 U.S.C. §1332. Following removal, the case was assigned to Hon. Louis L. Stanton, U.S.D.J.

37. The Federal Rules of Civil Procedure do not include an accelerated judgment procedure analogous or similar to CPLR 3213. When a CPLR 3213 motion is removed to federal court, the federal court determines it according to Fed. R. Civ. P. 56. Unlike CPLR 3213, Fed. R. Civ. P. 56 presumes that the parties have had an opportunity to conduct discovery. Fed. R. Civ. P. 56(b) ("[A] party may file a motion for summary judgment at any time until 30 days after the close of all discovery.") Unlike a motion for summary judgment in lieu of complaint pursuant to CPLR 3213, which can be based solely on the facial content of the instrument for payment of money (and proof of non-payment), Fed. R. Civ. 56(c)(1)(A) permits the parties to submit and the Court to consider a broad range of extrinsic evidence, "including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.)

38. Following removal of a CPLR 3213 motion to federal court, if a defendant needs

discovery in support of its defenses, it must formally request it pursuant to Fed. R. Civ. P. 56(d)(2). Quinn Emanuel did not discuss with GIT's management any of the procedural consequences or options that would result from the removal to federal court. As explained below, Quinn Emanuel did not formally request discovery under Fed. R. Civ. P. 56(d)(2), even though it intended to assert the sort of fraud-based defenses to the motion (as well as fraud-based counterclaims) that would require discovery concerning UBS' scienter.

39. On December 10, 2019, GIT filed its opposition to UBS summary judgment motion.

40. On December 20, 2019, GIT filed counterclaims against UBS and on February 7, 2020, GIT filed its amended counterclaims.

41. On February 28, 2020, UBS moved to dismiss GIT's amended counterclaims.

42. On April 23, 2020, the District Court entered an Opinion and Order granting UBS' motion for summary judgment in lieu of complaint and dismissing GIT's amended counterclaims. *UBS AG, London Branch v. Greka Integrated, Inc.*, 2020 WL 1957530 (S.D.N.Y., April 23, 2020). On April 24, 2020, the District Court referred the calculation of interest, fees and costs to a magistrate judge.

43. On July 10, 2020, UBS submitted its request for interest, fees and costs (which it referred to as "damages") to Magistrate Kevin Nathaniel Fox.

44. On May 5, 2021, the Clerk entered judgment in the amount of $100 million.

45. On May 20, 2021, Magistrate Fox filed a post-judgment decision awarding UBS an additional $36,967,650.10 in performance payments, interest and consulting fees, but denying UBS' request for legal fees. A supplemental judgment in the amount of $36,967,650.10 was thereafter filed against GIT.

46. On May 28, 2021, GIT, through new counsel, noticed an appeal to the Second Circuit ("the *UBS v. Greka* appeal") from the judgment in UBS' favor. GIT's appeal was perfected on September 9, 2020, again through counsel other than Quinn Emanuel, and briefing was concluded on December 29, 2021.

47. On June 27, 2022 the Second Circuit affirmed the judgment in UBS' favor in a decision that establishes several of GIT's negligence allegations against Quinn Emanuel asserted in the instant malpractice action. *UBS AG, London Branch v. Greka Integrated, Inc.*, 2020 WL 1957530 (2d Cir., April 23, 2020).

E. CLAIMS FOR RELIEF

First Claim:

LEGAL MALPRACTICE: Negligence

Failure to Raise the Defense that the Credit Agreements Could Not Be Enforced Due to Lack of Consideration

48. Paragraphs 1 - 47 are repeated and realleged as if set forth fully herein.

49. Each Credit Agreement that UBS guarantied contained *incorrect* recitations that UBS was going to make a separate $50 million loan at the closing (one loan for each Credit Agreement, for $100 million total), *i.e.:*

> [UBS] . . . agrees . . . to make a Loan to Borrowers on the Closing Date in the principal amount equal . . . to $50,000,000, it being understood that the Loans shall be made in exchange for, and in consideration of, the VPP Termination on the Closing Date without the payment of any other amount [*sic*[1]] by any Agent or Lender to any Loan Party or other person.

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[1]The phrase "without the payment of any other amount" does not mean that the $50 million loans would not be made at the Closing. It means that no money "other than" or beyond the $50 million loans would be funded to the Subsidiaries at the Closing.

First and Second Lien Credit Agreements, §2.01(a). *See also: id.*, at p. 1 ("WHEREAS, Borrowers and UBS AG, London Branch have agreed to enter into this Agreement in respect of Loans in an aggregate principal amount of $50,000,000 and the Second Lien Credit Agreement in respect of loans in an aggregate principal amount of $50,000,000. . . [.]"); and p. 6 ("'Commitment' shall mean, with respect to each Lender, the commitment, if any, of such Lender to make a Loan hereunder on the Closing Date as expressly contemplated hereby in the amount set forth on Schedule 1.0l(d). The aggregate amount of the Lenders' Commitments is $50,000,000.")[2]

50. The recitations about UBS committing to make, and making, two $50 million loans to the Subsidiaries at the closing of the Credit Agreements were a fiction: UBS and the Subsidiaries did not actually intend that UBS would make any loans *at all* at the closing of the Credit Agreements (or thereafter); and no loans were actually made.

51. The recitation in §2.01(a) of the Credit Agreements concerning consideration – "loan[s] to Borrowers [*i.e.*, the Subsidiaries] on the Closing Date in the principal amount equal . . . to $50,000,000, it being understood that the Loans *shall be made in exchange for, and in consideration* of, the VPP Termination on the Closing Date" – is illogical and incoherent. (Emphasis added.) The $50 million in loans – had they been made – would have been consideration flowing *to the Subsidiaries*. Likewise, a VPP Termination – the *annulment of the VPP Documents* which were the basis of the Subsidiaries' existing debt – was consideration

[2]All this language came from UBS' attorneys during the drafting process.

flowing *to the Subsidiaries.*[3] Those two considerations were not, and could not have been, exchanged for each other, as §2.01(a) recites.

52. Because the consideration recited in the Credit Agreements refers to: (i) $50 million loans to be made at the closing that were not actually made or ever intended to be made, (ii) does not comport with the parties' actual agreements and (iii) describes a logically impossible exchange, parol (extrinsic) evidence was admissible in the *UBS* action to establish the economic substance of the Credit Agreements, and the consideration actually exchanged.

53. The parol evidence establishes that:

(a) In actuality, the $50 million "loans" referred to in the Credit Agreements (for $100 million total), were not new loans (or any type of actual loan) made at the closing but instead a liquidation of UBS' existing claims against the Subsidiaries under the VPP Documents in a fixed amount.

- and -

(b) That UBS' actual, bargained-for consideration, *i.e.*, the Subsidiaries' assent to the Credit Agreements, was a new promise by the Subsidiaries to pay the same (pre-existing) debt incurred under the VPP Documents.

54. The Credit Agreements were not a novation, since they did not "completely extinguish" the Subsidiaries' debt under the VPP Documents. To the contrary, the Credit Agreements *confirmed* the Subsidiaries' prior obligation to UBS under the VPP Documents and

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[3]The Credit Agreements provided that "'VPP Termination' shall mean the termination of the Volumetric Production Payment and the Volumetric Production Payment Documents and the execution and delivery of all conveyances, releases and related documents required in connection therewith including, without limitation, a special warranty deed." Credit Agreements, p. 35.

liquidated the parties competing claims about the amount of those debts at $100 million. Notwithstanding the Credit Agreements, the Subsidiaries' debt under the VPP documents survived.

55. Quinn Emanuel therefore could have shown, on behalf of GIT in the *UBS* action, that since the Subsidiaries' obligations to UBS under the VPP Documents remained in effect, the "VPP Termination" cited in §2.01(a) of Credit Agreements did not confer any present consideration upon the Subsidiaries, and did not render the Credit Agreements enforceable. However, in the *UBS* action, Quinn Emanuel negligently failed to attempt to make that showing.

56. Also, the existing debt owed by the Subsidiaries under the VPP Documents was not valid *past* consideration for the Credit Agreements. General Obligations Law §5-1105 provides that: "A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed." (Emphasis added.) Under GOL 5-1105, to qualify as sufficient past consideration, its "expression in the writing" "must not be 'vague' or 'imprecise'" or require explication through extrinsic evidence. If the requirements of GOL §5-1105 are not met, the usual rule that "past consideration is no consideration" applies.

57. Here, §2.01(a) the Credit Agreements incorrectly describes the past consideration – the Subsidiaries' obligations to UBS under the VPP Documents – as *present* consideration, *i.e.*, "Loan[s] to Borrowers on the Closing Date in the principal amount equal . . . to $50,000,000." Since the Credit Agreements do not accurately describe the past consideration, the general rule

that "past consideration is no consideration," rather than the exception articulated in GOL 5-1105, applies. Quinn Emanuel could have shown in the *UBS* action that the Credit Agreement's mis-characterization of the existing debt under the VPP documents as present consideration in the form of new $50 million loans "committed" and to be made "on the Closing Date" defeated any argument that the past consideration rendered the Credit Agreements enforceable under the GOL. However, Quinn Emanuel negligently failed to attempt to make that showing.

58. Quinn Emanuel could have shown in the *UBS* action that the Credit Agreements were unenforceable for lack of consideration because:

(a) they did not "completely extinguish" the Subsidiaries' obligations to UBS under the VPP documents;

(b) present consideration was therefore lacking, and

(c) because the past consideration – the Subsidiaries' debt to UBS under the VPP Documents – was not accurately described in the Credit Agreements. However, Quinn Emanuel negligently failed to attempt to make that showing.

59. Since the Credit Agreements were not enforceable against the Subsidiaries for lack of consideration, the Guaranties were not enforceable against GIT.

60. A defense of lack of consideration applies even where the guaranty is absolute, unconditional and/or continuing.

61. However, Quinn Emanuel negligently failed to make any of the foregoing arguments on behalf of GIT.

62. Quinn Emanuel's failure to raise the defense that the Subsidiaries did not receive any consideration for the Credit Agreements was a proximate cause of UBS prevailing on its

motion for summary judgment on the Guaranties.

63. Had Quinn Emanuel raised the defense that the Credit Agreements were not enforceable because of a lack of consideration, the claims to enforce the Guaranties would have been dismissed, rather than reduced to judgment in UBS' favor.

64. For the foregoing reasons, Quinn Emanuel committed legal malpractice by failing to exercise the degree of care, skill and diligence commonly possessed by a member of the legal community.

65. For the foregoing reasons, GIT would have prevailed in the *UBS* action but for Quinn Emanuel's malpractice.

66. GIT has been damaged in its business and property by the foregoing legal malpractice.

67. Quinn Emanuel's malpractice was a proximate cause and a "but for" cause of GIT's injury and losses, including, without limitation, the $136,967,650.10 in judgments entered against GIT and in favor of UBS.

68. The $136,967,650.10 in judgments entered against GIT and in favor of UBS is a natural and foreseeable result of Quinn Emanuel's malpractice.

Second Claim:

LEGAL MALPRACTICE: Negligence

Failure to Raise the Defense that There Was No Separate Consideration for the Guaranties in Light of the Subsidiaries' Insolvency

73. Paragraphs 1 - 72 are repeated and realleged as if set forth fully herein.

69. The Guaranties are also unenforceable since GIT did not receive any separate

consideration in exchange for them.

70. GIT did not receive any direct benefits in consideration for the guaranties.

71. The legal presumption that a parent receives separate consideration in the form of synergistic or indirect benefits for guarantying the debt of a solvent subsidiary does not exist when the subsidiary is insolvent.

72. GIT's Subsidiaries were actually insolvent on May 20, 2016, when (and after) the Credit Agreements closed, because their balance sheet assets exceeded their balance sheet liabilities, they could not meet their financial obligations as they came due and they possessed unreasonably small capital in light of their obligations. In fact, the Subsidiaries could not even pay the closing costs, which is why they had to be deferred. "Inability to pay debts as they come due" (or "equity insolvency") and "unreasonably small capital" are distinct from the "balance sheet insolvency" test. The equity insolvency and unreasonably small capital tests are recognized under fraudulent conveyance law, and encoded in the pre-2020 version of New York's fraudulent conveyance statute at Debtor and Creditor Law §274 and §275. UBS needed a solvency certificate and accepted one based on PV-10 values because, without a solvency certificate, UBS could not defeat either (a) an action by a preexisting creditor of one of the Subsidiaries that challenged he Credit Agreements as a fraudulent conveyance[4], or (b) an action

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[4]As stated in Richard J. Sabella, "When Enough Is Too Much: Over-Collateralization as a Fraudulent Conveyance," 9 *Cardozo L. Rev.* 773 (1987):

> The best way to avoid possible fraudulent conveyance attack is to make certain that the borrower is solvent upon the closing of any loan transaction and can be expected to stay that way for some time to come. This, in fact, is the approach adopted by many institutional lenders today. It is common in major loan and acquisition transactions for the lenders to require "solvency certificates" from the borrower's management. . . [.]

by a preexisting creditor of GIT that challenged the Guaranties as fraudulent conveyance.[5]

73. The Subsidiaries' equity insolvency is evidenced, *inter alia*, by their inability to pay their short term obligations, including those imposed by the Credit Agreements. The Courts recognize that a bankruptcy shortly following the transaction at issue supports the inference that the company was actually insolvent at the time of the transaction. Rincon's bankruptcy was filed on August 8, 2016, less than three months after the closing of the Credit Agreements.

74. Given the Subsidiaries' insolvency, as evidenced by their balance sheets under GAAP, unreasonably small capital, inability to meet the pre-maturity obligations to UBS and the resulting *Rincon* bankruptcy, the presumption that a parent receives separate consideration in the form of synergistic or indirect benefits for its guaranty of its subsidiary's debt did not apply in the case of GIT's Guaranties. However, in the *UBS* action Quinn Emanuel committed malpractice by failing to allege the defense that the Subsidiaries were insolvent and that therefore GIT did not receive any synergistic or indirect benefit, or receive any separate consideration for the Guaranties.

75. If, in the *UBS* action, GIT had proffered the defense that the Subsidiaries were insolvent (and that GIT therefore did not receive consideration in the form of synergistic benefits), the Solvency Certificates would not have overcome that defense. The Subsidiaries' belief about their financial capabilities are irrelevant to the insolvency analysis in light of the

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Id. at 787 n. 59.

[5]A parent's exposure under its guaranty of a subsidiary's debt, "depends on the performance or nonperformance of [the] subsidiary[.]" Sabella, "Over-Collateralization as a Fraudulent Conveyance," *supra* note 4, *9 Cardozo L. Rev.* at 805.

Subsidiaries' balance sheets under GAAP, and immediate inability to pay debts as they come due evidencing that they had unreasonably small capital following the closing. (The Subsidiaries' PV-10 values cited in the Solvency Certificates are "off balance" sheet assets, as the Second Circuit found in the *UBS v. Greka* appeal[6], and do not equate to an ability to pay current or short term obligations or the sufficiency of the Subsidiaries' capital.[7] The PV-10 assets could not be monetized to pay short term obligations, since they were all pledged to UBS.)

76. Quinn Emanuel could have successfully demonstrated that, since the Subsidiaries were actually insolvent, GIT not only received no direct consideration for its Guaranties but also is not presumed to have received separate consideration in the form of synergistic or indirect benefits. However, Quinn Emanuel negligently failed to attempt to make that showing.

77. For the foregoing reasons, Quinn Emanuel committed legal malpractice by failing to exercise (and departing from) the degree of care, skill and diligence commonly possessed by a member of the legal community.

78. GIT would have prevailed in the *UBS* action but for Quinn Emanuel's malpractice.

79. GIT has been damaged in its business and property by the foregoing legal malpractice.

80. Quinn Emanuel's malpractice was a proximate cause and a "but for" cause of GIT's injury and losses, including, without limitation, the $136,967,650.10 in judgments entered against GIT and in favor of UBS.

81. The $136,967,650.10 in judgments entered against GIT and in favor of UBS is a

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[6]*UBS v. Greka*, *supra*, 2022 WL 2297904, at *1.

[7]PV-10 reserve values are the present value of future net revenues.

natural and foreseeable result of Quinn Emanuel's malpractice.

Third Claim

LEGAL MALPRACTICE: Negligence

Failure to Competently Prosecute GIT's Meritorious Allegations of Fraud in the Inducement

82. Paragraphs 1 - 81 are repeated and realleged as if set forth fully herein.

83. The Subsidiaries and GIT had viable and meritorious claims based on the UBS' first agreeing to accept a solvency certificate and a definition of solvency in the Credit Agreements that was expressly based on PV-10 Values, and then disavowing that agreement and definition in the *HVICC* bankruptcy.

84. But for the malpractice of Quinn Emanuel, in the *UBS* action GIT could have successfully pleaded a viable affirmative defense of fraud in the inducement as follows:

> (a) UBS needed a solvency certificate in order to respond to (i) a future argument by GIT that, since Subsidiaries were insolvent, GIT did not receive consideration in the form of synergistic or indirect benefits for its Guaranties; and (ii) potential claims other creditors that the Credit Agreements and Guaranties were fraudulent conveyances since they rendered the Subsidiaries and GIT insolvent. The need for *some* Solvency Certificate was acute after the Subsidiaries rejected the one proposed by UBS (which did not refer to PV-10 values), since otherwise it would appear that UBS entered into the Credit Agreements despite being on notice of the Subsidiaries' insolvency.
>
> (b) The Subsidiaries and GIT, on the other hand, needed assurances that if the Subsidiaries were forced to file a bankruptcy case, UBS would cooperate by supporting a reorganization plan based on future earnings from its reserves. Both sides got what it wanted: UBS obtained a solvency certificate and GIT and the Subsidiaries obtained UBS' recognition in the Credit Agreements of PV-10 values as a component of the Subsidiaries' assets in future valuation proceedings, such as a bankruptcy case. This agreement and understanding was consistent with bankruptcy law, which will consider off-balance sheet assets, such as PV-10 values, in determining whether a reorganization, rather than a liquidation, is feasible.

(c) Based on the references to PV-10 values in the Credit Agreements' definitions of solvency and their prescribed methodology for determining value, the Subsidiaries and GIT reasonably expect that, in the event of a bankruptcy filing by the Subsidiaries, UBS would not insist on a liquidation of the Subsidiary rather than a reorganization that would permit it to exploit the value of future revenues from their reserves through an orderly market sale.

(d) Based on GIT's reasonable belief, that, in the event of a bankruptcy filing by the Subsidiaries, UBS would not insist on a liquidation of the Subsidiaries rather than a reorganization that would permit the Subsidiaries to exploit the value of their reserves, GIT agreed to issue the Guaranties.

(e) In the *HVICC* bankruptcy, UBS first induced the Chapter 11 Trustees to enter into onerous new post-petition credit agreement with UBS, which did not provide fair consideration to the HVICC bankruptcy estate, and then coerced the Chapter 11 Trustee to pursue liquidation rather than reorganization plan. In fact, UBS' post-petition credit agreement with the HVICC Trustee contains a waiver of the Trustee's statutory right to propose a Chapter 11 plan of reorganization without UBS' consent.

- and -

(f) On May 20, 2016, when the Credit Agreements and Guaranties closed, UBS actually did not intend to support a reorganization rather than a liquidation of the Subsidiaries in the event of a bankruptcy filing, notwithstanding its agreement
to include PV-10 values in the valuation analysis mandated by the Credit Agreements.

85. In order to prevail on this affirmative defense, GIT would have to establish UBS' state of mind: That is, that UBS was willing to accept any solvency certificate, even one that it did not believe was valid (subparagraph (a), *supra*); and, also, that UBS actually did not intend, at the time it accepted the PV-10 definition of solvency, to support a reorganization of the Subsidiaries that would permit the PV-10 values to be realized and monetized, but actually intended to force a liquidation of the Subsidiaries (subparagraph (f), *supra*).

86. There were two ways that Quinn Emmanuel could have successfully addressed the fraudulent scienter requirement, either:

> (a) *As GIT was urgently requesting*, by seeking and obtaining discovery – as GIT was urgently requesting regarding UBS' state of mind at the time the Credit Agreements were signed and the Guaranties issued. In fact, the courts recognize that fraudulent in the inducement based defenses depend on proof of the plaintiff's state of mind, and cannot be proven without discovery.
>
> - or -
>
> (b) Second, by making adequate particularized allegations supporting the fraud in the inducement defense.

In the *UBS* action, Quinn Emanuel did neither. The Second Circuit specifically found:

> . . . [T]here is essentially *no evidence, nor non-conclusory allegations*, in the record from which the Court can infer a present intent to deceive – that is, that in 2016, UBS believed the PV-10 methodology to be inaccurate, let alone that it intended to deceive GIT by conveying a belief in PV-10's soundness.

UBS v. Greka, *supra*, 2022 WL 2297904 at *3 (emphasis added).

(a) <u>Quinn Emanuel's Failure to Properly Request Discovery</u>

87. Within the Second Circuit, a party that needs discovery in order to oppose a summary judgment motion, must strictly comply with the requirements of Fed. R. Civ. P. 56(d) which means it "must file an affidavit describing: (1) what facts are sought and how they are to be obtained; (2) how these facts are reasonably expected to raise a genuine issue of material fact; (3) what efforts the affiant has made to obtain them; and (4) why the affiant's efforts were unsuccessful." *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004).

88. However, Quinn Emmanuel did not file a request for discovery that met the requirements, instead only vaguely discussed the need for discovery in its opposition to the summary judgment motion. As the Second Circuit found in the *UBS v. Greka* appeal:

> The district court held that, notwithstanding general assertions of the need for discovery, GIT "has not attempted to make th[e] showing" required by Rule 56(d). UBS AG, 2020 WL 1957530, at *6 n.3. On appeal, GIT cites assertions in its memorandum of law opposing summary judgment, as well as certain

> paragraphs in two declarations submitted in connection with its opposition, as evidence that it requested additional discovery. Reply Br. at 23–25. But GIT conceded at oral argument that it never made a Rule 56(d) motion, and the portions of its declarations below it relies on merely assert that UBS had not provided support for its damages calculations; they do not actually request discovery on the issues raised, let alone meet the other requirements of Rule 56(d). General assertions of the need for discovery in a memorandum of law plainly do not suffice. "[T]he failure to file such an affidavit is fatal to a claim ... even if the party resisting the motion for summary judgment alluded to a claimed need for discovery in a memorandum of law." *Gurary v. Winehouse*, 190 F.3d 37, 43–44 (2d Cir. 1999).

2022 WL 2297904 at *3.

89. Quinn Emanuel's failure to follow the correct procedure for requesting discovery was legal malpractice, which includes failure to conduct adequate legal research. Even the slightest attempt at legal research would have revealed that a formal request for discovery under Fed. R. Civ. P. 56(d)(2) was required because just three years earlier the Second Circuit held in *ICBC (London) PLC v. Blacksands Pacific Group, Inc.*, 662 Fed.Appx. 19 (2d Cir. 2016) that:

> . . . Blacksands argues that the district court improperly granted summary judgment without first allowing discovery. * * *
>
> Because Blacksands had agreed to litigate disputes regarding the bridge loan guarantee pursuant to N.Y. Civil Practice Law and Rules ("CPLR") §3213's accelerated, pre-discovery procedure for summary judgment, when the case was removed to federal court, ICBC's summary judgment motion was submitted without discovery. *Although Blacksands discussed the need to conduct discovery in its opposition to ICBC's motion, it failed to submit anything that amounted to a Rule 56(d) affidavit*. "*[T]he failure to file such an affidavit is fatal to a claim ... even if the party resisting the motion for summary judgment alluded to a claimed need for discovery in a memorandum of law*." *Gurary v. Winehouse*, 190 F.3d 37, 43-44 (2d Cir. 1999) .

662 Fed.Appx. at 22 (emphasis added).

90. Despite Quinn Emanuel itself citing *ICBC* holding on behalf of other clients in other

contemporaneous cases in which it had appeared[8], Quinn Emanuel committed malpractice by not following that holding in the *UBS* action.

(b) Quinn Emanuel's Failure to Make Non-Conclusory, Particularized Allegations of Fraud in Connection with the Negotiations Over the Solvency Certificate

91. In the absence of discovery, a motion for summary judgment in lieu of complaint can be defeated by properly pleading a *bona fide* defense. For a fraudulent inducement defense, that means satisfying the rule that fraud must be alleged with particularity, rather than in a conclusory fashion.

92. Even though evidence of conscious misconduct that could have been obtained in discovery was lacking, Quinn Emanuel could have adequately pleaded UBS' fraudulent scienter by alleging its motive for agreeing to a solvency definition that included PV-10 values. That could have been accomplished by alleging UBS agreed to include PV-10 values in the definition without intending to be bound by it and only (a) to avoid GIT's defense that it received no separate consideration for the Guaranties in the form of synergistic benefits (paragraphs 75 - 76, *supra*) and (b) to be able to defend future claims that Credit Agreements and Guaranties were fraudulent conveyances (paragraph 72, *supra*).

93. Quinn Emanuel did not allege UBS' motive for its deceptive conduct in connection with the solvency certificates and solvency definition. Instead, that motive was alleged only on appeal (and through new counsel, rather than Quinn Emanuel). Regarding Quinn Emanuel's failure to allege motive, Second Circuit stated:

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[8] *E.g.*, Quinn Emanuel cited the *ICBC* holding in a memorandum of law it filed on February 18, 2020 in *Red Tree Investments, LLC v. Petroìleos De Venezuela, S.A.*, 19 Civ. 2519 and 19 Civ. 2523 (S.D.N.Y.).

> GIT develops a theory on appeal that "UBS sought that solvency certificate specifically so it could rely on it in future litigation over the GIT's guaranties and, in particular, to defeat possible claims by other creditors of GIT that the Guaranties could be voided or rescinded as fraudulent conveyances." [Citation omitted.] These arguments and allegations were not made in the pleadings or briefing below, and accordingly, the Court declines to consider them on appeal.

UBS AG v. Greka, *supra*, 2022 WL 2297904 at *4 n.3.

94. Had, when the case was before the District Court, Quinn Emanuel made the motive allegations later referenced by the Second Circuit, GIT's pleadings of UBS' fraudulent' intent would have been sufficient to defeat the UBS' CPLR 3213 motion, and to permit GIT to assert-fraud based counterclaims.

95. The discovery that would have ensued had the motion for summary judgment been denied would have shown that UBS knew, as of May 20, 2016, that the Subsidiaries balance sheets showed they were insolvent, and that UBS was nevertheless interested in obtaining any solvency certificate, without regard to its accuracy or content. Discovery would also have shown that UBS knew that HVICC could not pay the installment obligations imposed by the Credit Agreements, intended to pursue aggressive liquidation strategies in the event of a bankruptcy filing, rather than cooperate in a reorganization plan that would permit the Subsidiaries to realize the PV-10 value of its reserves. With discovery, those fraud-based counterclaims would have been successful, since the rapid liquidation of HVICC increased GIT's exposure under the Guaranties.

96. For the foregoing reasons, Quinn Emanuel committed legal malpractice by failing to exercise (and departing from) the degree of care, skill and diligence commonly possessed by a member of the legal community.

97. For the foregoing reasons, GIT would have prevailed in the *UBS* action but for Quinn Emanuel's malpractice.

98. GIT has been damaged in its business and property by the foregoing legal malpractice.

99. Quinn Emanuel's malpractice was a proximate cause and a "but for" cause of GIT's injury and losses, including, without limitation, the $136,967,650.10 in judgments entered against GIT and in favor of UBS and the lost value of its meritorious fraud based counterclaims.

100. The $136,967,650.10 in judgments entered against GIT and in favor of UBS is a natural and foreseeable result of Quinn Emanuel's malpractice.

Fourth Claim

LEGAL MALPRACTICE: Breach of the Engagement Agreement

Failure to Engage in Reasonable Efforts to Negotiate an Agreement with UBS That Would Be Part of Pre-Packaged Plan

101. Paragraphs 1 - 100 are repeated and realleged as if set forth fully herein.

102. The June 28, 2019 engagement agreement required Quinn Emanuel, on behalf of GIT, "to enter into discussions with representatives of UBS (a secured creditor of HVI[CC]) with the goal of preparing an pre-arranged plan for a bankruptcy filing for HVI[CC]. . . [.]"

103. Quinn Emanuel breached the retainer agreement by failing to undertake reasonable efforts to document an agreement with UBS for a pre-arranged plan for a bankruptcy filing for HVICC.

104. Had Quinn Emanuel complied with its contractual obligation to undertake reasonable efforts to document an agreement with UBS a pre-arranged plan for a bankruptcy

filing for HVICC, and plan of reorganization could have been achieved in the HVICC bankruptcy.

105. Had Quinn Emanuel complied with its contractual obligation to undertake reasonable efforts to document with UBS a pre-arranged plan for a bankruptcy filing for HVICC, UBS would not have sued to enforce the Guaranties or, at minimum, GIT's exposure under the Guaranties would have eliminated since the plan would have recognized PV-10 values among HVICC's assets.

106. There is no legal or factual excuse for Quinn Emanuel's failure to comply with the engagement agreement.

107. GIT detrimentally relied on Quinn Emanuel's contractual promises.

108. GIT was damaged in its business and property by Quinn Emanuel's breach of contract.

109. As a result of Quinn Emanuel's breach of its obligations under the engagement agreement, judgments totaling $136,967,650.10 were entered against GIT and in favor of UBS in the *UBS* action.

110. Had Quinn Emanuel complied with its contractual obligations, the judgment debt to UBS would have been avoided, or entirely or substantially eliminated, or settled on terms favorable to GIT.

111. The $136,967,650.10 in judgments entered against GIT and in favor of UBS is a natural and foreseeable result of Quinn Emanuel's malpractice.

Fifth Claim

LEGAL MALPRACTICE: Negligence

Failure to Preserve Meritorious Arguments for Appeal

112. Paragraphs 1 - 111 are repeated and realleged as if set forth fully herein.

113. Quinn Emanuel failed to make the several arguments before the District Court. That meant they were not preserved for appeal. Accordingly, the Second Circuit was free to ignore the arguments, or consider them only it its discretion, rather than apply the *de novo* standard of review that would have governed had the arguments had they been properly preserved. The arguments that Quinn Emanuel failed to preserve included:

(a) That bankruptcy filings were not enforceable events of default, since a term defining an obligor's bankruptcy as an event of default is an "*ipso facto*" clause that, under bankruptcy law, is not enforceable before the obligor's bankruptcy case is terminated.[9]

(b) That UBS' default notices were not effective, but, instead, void *ab initio* by reason of the automatic stay under 11 U.S.C. §362 as a result of the *Rincon* bankruptcy.

(c) That the maturity date for the principal due was not until June 30, 2021, and without an actionable and ripe event of default, the loans could not yet be accelerated.

(d) That, without an actionable and ripe default by the principal obligor, a claim against a guarantor may not be enforced.

(e) That the Guaranties were contractually unenforceable until the collateral the

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[9]*Lehman Bros. Holdings Inc. v. BNY Corp. Tr. Servs. Ltd.*, 422 B.R. 407, 415 (Bankr., S.D.N.Y. 2010); *accord: In re Charter Comm'ns*, 419 B.R. 221, 250-251 (Bankr., S.D.N.Y. 2009) (Bankrupt Code section 365(e), 541 and 363 reflect the "overriding federal bankruptcy policy that *ipso facto* clauses are, as a general matter, unenforceable.")

Subsidiaries had pledged to secure their obligations under the Credit Agreements was first liquidated and distributed.

(f) That a statement of present intention is a statement of material fact sufficient to support a fraud action.

(g) That UBS agreement with the HVICC Trustee was overreaching, violated bankruptcy law, was made by a legal entity distinct from HVICC, intentionally impaired the value of collateral pledged by the Subsidiaries and discharged the Guaranties.

- and -

(h) That the Credit Agreements and Guaranties were coerced by excessive amounts claimed by UBS under the VPP Documents, and those amounts were fraudulently and dramatically inflated by UBS' manipulations of LIBOR interest rates. On December 21, 2018, the Attorneys General of New York and other states settled LIBOR manipulation charges with UBS. The Settlement Agreement, which was released by the New York Attorney General on December 21, 2018, showed that UBS fraudulently manipulated the LIBOR rate between 2006 and 2010. That was critical information, since the main VPP Documents were concluded in 2007. During its engagement on behalf of GIT, Quinn Emanuel did not learn about the 2018 Settlement, and therefore failed to sufficiently raise a meritorious defense in opposition to UBS' summary judgment motion that the amounts UBS claimed under VPP Documents were (i) fraudulent as a result of UBS' LIBOR manipulations, (ii) extortionate and (iii) therefore had wrongly coerced the assent to the Credit Agreements and Guaranties.

114. For the foregoing reasons, Quinn Emanuel committed legal malpractice by failing to exercise (and departing from) the degree of care, skill and diligence commonly

possessed by a member of the legal community.

115. For the foregoing reasons, GIT would have prevailed in the *UBS* action but for Quinn Emanuel's malpractice.

116. GIT has been damaged in its business and property by the foregoing legal malpractice.

117. Quinn Emanuel's malpractice was a proximate cause and a "but for" cause of GIT's injury and losses, including the $136,967,650.10 in judgments entered against GIT and in favor of UBS and the lost value of its meritorious fraud based counterclaims.

118. The $136,967,650.10 in judgments entered against GIT the loss of GIT's valuable counterclaims were the natural and foreseeable result of Quinn Emanuel's malpractice.

Sixth Claim:

For an Order and Judgment Pursuant to CPLR 7511(a) and California Business and Professions Code §§6203(a), 6204(b) and 6204(c)

119. Paragraphs 1 - 119 are repeated and realleged as if set forth fully herein.

120. On October 21, 2021, GIT requested a non-binding arbitration of Quinn Emanuel's claim for outstanding fees before the Los Angeles County Bar Association Attorney Client Mediation and Arbitration Services (hereinafter ("the Arbitration Tribunal").

121. On December 21, 2021, Quinn Emanuel filed a demand with the Arbitration Tribunal that sought an advisory award of $812,161.28 in fees together with interest.

122. On May 9, 2021, GIT filed a challenge to Quinn Emanuel's fee demand based on several legal malpractice allegations that GIT asserted against Quinn Emanuel.

123. A hearing was scheduled in the non-binding arbitration for June 29, 2022.

124. On June 27, 2022, the Second Circuit issued its decision in the *UBS v. Greka* appeal, that decision established several instances of malpractice by Quinn Emanuel, as alleged herein.

125. On June 29, 2022, in light of the Second Circuit decision, GIT filed a letter with the Arbitration Tribunal withdrawing its legal malpractice allegations against Quinn Emanuel "without prejudice to raising them in subsequent proceedings in a different forum."

126. An abbreviated hearing was conducted via a Zoom Video Conference on June 29, 2022. At the hearing, counsel for GIT reiterated that it was withdrawing its malpractice allegations against Quinn Emanuel without prejudice to raising them in subsequent proceedings in a different forum.

127. On July 11, 2022, the Arbitration Tribunal entered an advisory award (Ex. 1 hereto), in Quinn Emanuel's favor in the amount of $812,161.28 together with two years interest at nine percent per annum. The advisory award expressly noted that GIT had withdrawn its allegations against Quinn Emanuel without prejudice to its raising them in subsequent proceedings in another forum.

128. Under §6203(b) of the California Business and Professions Code ("BPC") the award becomes final and binding within 30 days unless challenged in a new or existing lawsuit between the attorney and client pursuant to BPC §6204(a) or BPC 6204(b).

129. The fee award should be confirmed and should be vacated because of Quinn Emanuel's legal malpractice, as alleged herein. "[A] negligent attorney is precluded from collecting a fee." *Genesis Reoc Co., LLC v. Poppel*, 2020 WL 5843733, *18 (Sup. Ct., New York Co. 2020, Sept. 24, 2020) (quoting *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d

38, 42, 556 N.Y.S.2d 239, 241 (1990)).

WHEREFORE, GIT demands the following relief:

(a) On the First, Second, and Fourth Claims, money damages in an amount to be determined at trial but in any event no less than $250,000,000, inclusive of the $136,967,650.10 in judgments entered in the *UBS* action (and the amount of interest accrued on the judgments); additional damages consisting of the loss of the increased value of GIT's stock in HVICC and various payments GIT would have received from HVICC had HVICC had been successfully reorganized based on the PV-10 Values of its reserves; and attorneys fees, expenses, reliance costs, reputational injury and lost opportunities;

(b) On the Third Claim, money damages in an amount to be determined at trial but in any event no less than $250,000,000, inclusive of the $136,967,650.10 in judgments entered in the *UBS* action (and the amount of interest accrued on the judgments); additional damages consisting of the loss of the increased value of GIT's stock in HVICC and various payments GIT would have received from HVICC had HVICC had been successfully reorganized based on the PV-10 Values of its reserves; and attorneys fees, expenses, reliance costs, reputational injury and lost opportunities.

(c) On the Fifth Claim, both

(i) money damages in an amount to be determined at trial but in any event no less than $250,000,000, inclusive of the $136,967,650.10 in judgments entered in the *UBS* action (and the amount of interest accrued on the judgments); additional damages consisting of the loss of the increased value of GIT's stock in HVICC and various payments GIT would have received from HVICC had

HVICC had been successfully reorganized based on the PV-10 Values of its reserves; and attorneys fees, expenses, reliance costs, reputational injury and lost opportunities; as well as an award of punitive damages to be determined at trial; and

(ii) the value of the meritorious fraud-based counterclaims that were defeated as a result of Quinn Emanuel's malpractice

- and -

(d) On the Sixth Claim, an order rejecting and vacating the advisory fee award in Quinn Emanuel's favor;

- together with -

(e) Interest, costs, disbursements and attorneys fees as allowable under law.

Dated: New York, New York
August 10, 2022

Berry Law PLLC

By: /s/ Eric W. Berry
Eric W. Berry

Attorneys for plaintiff GIT, Inc.
745 Fifth Avenue, 5th Floor
New York, New York 10151
(212) 355-0777
berrylawpllc@gmail.com

VERIFICATION

Eric W. Berry, an attorney admitted to the Bar of this Court, affirms under penalty of perjury as follows:

1. I am the attorney for the plaintiff in this action.

2. The allegations contained in the foregoing Complaint are based upon my own knowledge and are true except for those made "upon information and belief" and, as to the latter, I believe them to be true. Any allegations made upon information and belief are based on sworn evidence in other proceedings, authentic documents, public records, thorough investigation, investigation of counsel, *etc*.

3. The reason this verification is made by me rather than the plaintiff is because the plaintiff is a foreign corporation and does not have a place of business in the County in which my office is located.

Dated: New York, New York
August 10, 2021

/s/ Eric W. Berry
Eric W. Berry

EXHIBIT 1

PROOF OF SERVICE BY MAIL

I am an employee in the City and County of Los Angeles, State of California. I am over the age of eighteen (18), and I am not a party to the within action. My business address is: Los Angeles County Bar Association, 200 S. Spring Street, Los Angeles, CA 90012.

*On **July 11, 2022**, I served the **Findings and Award and Notice of Your Rights after Arbitration** for Case Number* M-195-21-JB *on the parties in this action, by causing to be placed a true copy thereof, in a sealed envelope for collection and mailing at this office, in Los Angeles, California, following our ordinary business practices, addressed to:*

GIT Inc
c/o Eric Berry
745 Fifth Avenue, 5th Floor
New York, NY 10151

John D'Amato
865 Figueroa St. 10th Floor
Los Angeles, CA 90015

by United States Postal Service first class mail and placed the envelope for collection and mailing at this office, in Los Angeles, California, following our ordinary business practices.

I am readily familiar with the practices of this office in the collection and processing of mail. On the same day that the envelope is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare, under penalty of perjury, under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on July 11, 2022.

Jesus Beltran

BEFORE THE COMMITTEE ON ARBITRATION

OF THE LOS ANGELES COUNTY BAR ASSOCIATION

ATTORNEY CLIENT MEDIATION AND ARBITRATION SERVICES

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

In the Matter of the Arbitration	)	Case No. M-031-20-JB
Between:	)	**MANDATORY FEE ARBITRATION**
GIT Inc.	)	**FINDINGS AND AWARD**
PETITIONER	)	Date of Hearing: June 29, 2022
and	)	Time of Hearing: 9:30 a.m.
John P. D'Amato and Quinn	)	Location: Zoom Video conference
Emanuel Urquhart & Sullivan	)	
RESPONDENTS	)	
	)	

A mandatory fee arbitration between Petitioner GIT Inc. (Client) and Respondents John P. D'Amato and Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel")[1] was held on June 29, 2022 at 9:30 a.m. via a Zoom video conference (the "Hearing")

[1] John D' Amato and Quinn Emanuel are colleictively referred to as "Attorneys."

before a panel of arbitrators consisting of Sandor T. Boxer, panel chair, Guy R. Bayley, attorney arbitrator, and Eric Selten, lay arbitrator. Due notice of the Hearing was given to the parties by electronic mail.

Client appeared by its counsel Eric Berry and Attorneys appeared in person and by John D'Amato and Arya Taghdiri. Attorney John P. D'Amato is the Responsible Attorney.

No party agreed to binding arbitration. Accordingly, these Arbitration Findings and Award are NON-BINDING and are subject to *Business and Professions Code § 6204,* regarding the finality of non-binding awards and the time limit on the right to a trial *de novo*.

FEES INCURRED AND AMOUNT IN DISPUTE

1. The Amount that the Client claims should have been charged: $ 818,075.88[2]
2. The Amount that the Attorney claims should have been charged: $ 1,343,256.88
3. The amount that Client has paid Attorney: $ 531,095.40.

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[2] This is the amount claimed by Client as of it's pre-hearing submission to the Panel. As noted below, as of the hearing the Client did not contest the amount due Attorneys.

4. If there was a written fee agreement, under the agreement what fees were charged: $ 1,343,256.88.

5. Amount of filing fee paid by Client: $ 5,000.00.

UNDISPUTED FACTS AND PROCEDURAL HISTORY

By letter agreement of June 28, 2019 Client entered into a written fee agreement with the New York office of Quinn Emanuel "in connection with a possible bankruptcy of HVI Cat-Canyon, Inc. . . ." HVI Cat-Canyon, Inc, ("HVI") was an affiliate of Client. The agreement was an hourly fee agreement with specified hourly rate ranges for various categories of personnel of Quinn Emanuel as well specified charges for various categories of expenses. Client paid a retainer to Quinn Emanuel of $250,000.

Quinn Emanuel thereafter provided services in two distinct areas, the bankruptcy proceedings of HVI as well as defending a suit brought by a secured creditor of HVI against Client based upon a guaranty provided by Client to the secured creditor.

Beginning on August 19, 2019 and continuing monthly thereafter Quinn Emanuel provided monthly detailed billings to Client of both time spent and expenses incurred.

In the summer of 2020, Quinn Emanuel withdrew as counsel for Client on the grounds of nonpayment of fees. At the time of its withdrawal, there were litigation and bankruptcy matters then pending in both California and New York. The suit by the guarantor resulted in a judgment against Client for an amount in excess of $136,000,000

prior to the withdrawal by Quinn Emanuel. That judgment was affirmed two days prior to the Hearing of this matter.

Given the stipulation of the Parties discussed below we forgo a detailed enumeration and discussion of the issues raised by the Parties.

While Client initially set forth in its Petition various claims against Attorneys, in the interim prior to the Hearing Client advised that the **only** claims it was asserting in these proceedings were based upon the claimed malpractice of Attorneys with respect to the defense of the suit brought against Client on a guaranty. On the morning of and prior to the Hearing, and reiterated at the Hearing, Client notified the Panel and the Parties that it withdrew "its legal malpractice defenses, *without prejudice* to its raising them in subsequent proceedings in a different forum." [Emphasis Original.]

At the hearing, the Parties stipulated that:

1. Attorney Quinn Emanuel submitted sufficient evidence to establish that it was entitled to the amount it had billed and remains unpaid, in the amount of $812,161.28; and

2. For purposes of this proceeding Attorney Quinn Emanuel is entitled to two years of interest at the New York rate of 9%.

No further evidence was produced by any party.

FINDINGS

1. Based on the foregoing stipulation, and the failure of Client to assert any defense, Attorney Quinn Emanuel Urquhart & Sullivan, LLP is entitled to recover its unpaid billing of $812,161.28 together with interest for two years, the date of the most recent unpaid billing at the rate of 9%.

2. All claims against Attorney John P. D'Amato were withdrawn.

ALLOCATION OF FILING FEE

Business & Professions Code §6203(a) permits the allocation of the filing fee paid by Client. However, the Code is silent as to when and how the arbitration filing fee should be allocated. Given the facts of this dispute, we find that Client should bear the cost of the filing fee of $5,000.

AWARD

The Arbitrators find that the total amount of fees and/or costs which should have been charged in this matter is:

Unpaid fees and costs	$ 812,161.28	
Interest	$ 146,189.03.	
For a total due of		$ 958,350.31
Of which the Client is found to have paid		$ 0

In addition, the fee arbitration filing shall be allocated:

Client	$ 5,000	
Attorney	$ 0	
For a net amount of		$ 958,350.31.

Accordingly, the following award is made:

Client GIT Inc. shall pay to Attorney Quinn Emanuel Urquhart & Sullivan, LLP $ 958,350.31 plus interest in the amount of the legal rate per annum from the 30th day after the date of service of this award.

No amount is due to or from Attorney John P. D'Amato.

Respectfully submitted,

Dated: July 7, 2022 Sandor T. Boxer

Dated: _____ Guy R. Bayley

Dated: _____ Eric Selten

Client	$ 5,000	
Attorney	$ 0	
For a net amount of		$ 958,350.31.

Accordingly, the following award is made:

Client GIT Inc. shall pay to Attorney Quinn Emanuel Urquhart & Sullivan, LLP $ 958,350.31 plus interest in the amount of the legal rate per annum from the 30th day after the date of service of this award.

No amount is due to or from Attorney John P. D'Amato.

Respectfully submitted,

Dated: _____ _____
Sandor T. Boxer

Dated: 7/6/77 _____
Guy R. Bayley

Dated: July 6, 2022 _____
Eric Selten

This is certified to be a true copy of the Decision and Award issued by the Los Angeles County Bar Association
by _____ 7/11/2022
Name Date