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

PROSKAUER ROSE LLP, ALAN P. PARNES, RICHARD H. ROWE, PETER G. SAMUELS, and STEVEN O. WEISE,

Plaintiffs,

- against -

JAMES EDELSON and MYLES ITKIN,

Defendants.

Index No. _____

**COMPLAINT**

Plaintiffs Proskauer Rose LLP ("Proskauer"), Alan P. Parnes, Richard H. Rowe, Peter G. Samuels, and Steven O. Weise (collectively, "Plaintiffs"), by their undersigned attorneys, as and for their Complaint against defendants James Edelson and Myles Itkin (together, "Defendants"), hereby allege as follows:

## NATURE OF THE ACTION

1. This is an action by the Proskauer law firm and four of its partners seeking, *inter alia*, to hold the senior executives of a long-time client, Overseas Shipholding Group, Inc. ("OSG" or the "Company"), responsible for tortious and fraudulent conduct that has caused significant harm both to Plaintiffs and to OSG.

2. As described herein, those senior executives, OSG General Counsel James Edelson and OSG Chief Financial Officer Myles Itkin, solicited legal advice from Proskauer based on Edelson's and Itkin's materially false and misleading representations, then purported to use that advice to claim that OSG had not incurred tax liability as a result of a faulty credit agreement in which Proskauer was not involved.

3. Adding insult to injury, OSG's management then caused OSG to commence a baseless malpractice and breach of duty lawsuit against *Proskauer* in an attempt to recover OSG's extensive tax liabilities—despite the fact that Proskauer's allegedly negligent advice was premised on Edelson's and Itkin's own false and misleading representations and despite the fact that OSG's alleged damages in that lawsuit were caused by a 2006 credit agreement regarding which OSG was advised *not* by Proskauer, but by another law firm, Clifford Chance LLP ("Clifford Chance"), and Defendant Edelson himself.

4. This Complaint states claims for fraud, constructive fraud, and negligent misrepresentation against Defendants for deceiving and misleading Proskauer into providing legal advice based on Defendants' false representations, creating significant legal fees for Proskauer and damaging the professional reputations of each Plaintiff.

5. This Complaint also states claims for contribution under Article 14 of the New York Civil Practice Law and Rules ("CPLR") against Defendants for their failure to exercise due care in the performance of their fiduciary duties as senior officers of OSG and against Edelson for the malpractice he committed. Defendants were responsible for ensuring that Proskauer rendered advice on the basis of complete and accurate factual information that was solely within the knowledge and control of OSG. They failed to do so and, to the extent Proskauer is found liable in a separate action for any damages allegedly sustained by OSG, all of those damages are attributable to Defendants' conduct in failing to adequately perform their duties.

## THE PARTIES

6. Plaintiff Proskauer is a New York limited liability partnership. It has its principal place of business at 11 Times Square, New York, New York 10036.

7. Plaintiff Alan P. Parnes is a partner in Proskauer's New York, New York office and a resident of New York.

8. Plaintiff Richard H. Rowe is a retired partner formerly of Proskauer's Washington, D.C. office and a resident of Washington, D.C.

9. Plaintiff Peter G. Samuels is a partner in Proskauer's New York, New York office and a resident of New York.

10. Plaintiff Steven O. Weise is a partner in Proskauer's Los Angeles, California office and a resident of California.

11. Defendant James Edelson is General Counsel and a Senior Vice President of OSG. Upon information and belief, Edelson resides in New York.

12. Defendant Myles Itkin is the former Chief Financial Officer ("CFO"), Treasurer, and Executive Vice President of OSG. Upon information and belief, Itkin resides in New York.

## JURISDICTION AND VENUE

13. This Court has personal jurisdiction over Defendants pursuant to CPLR § 301 because, upon information and belief, they are residents of New York.

14. This Court also has personal jurisdiction over Defendants pursuant to CPLR § 302 because they have committed tortious acts within New York state and caused injury within New York state.

15. Venue is proper pursuant to CPLR § 503.

## FACTUAL ALLEGATIONS

16. For many years, OSG has been a New York-based multi-national energy transportation company, shipping crude oil and other energy products around the world. The Company has operations based both in the United States and abroad. Its wholly owned subsidiaries OSG Bulk Ships, Inc. ("OBS" or "OSG Bulk") and OSG International, Inc. ("OIN") conduct its domestic and its international operations, respectively.

17. To finance its capital expenditures and other aspects of its operations, OSG has routinely entered into multi-million dollar credit agreements with groups of lenders for itself, OBS, and OIN. Such agreements are an important part of OSG's business, and, upon information and belief, the mechanics and intricacies of those agreements were at all relevant times well known to OSG's senior officers.

### The 2006 Credit Agreement

18. In or about late 2005, OSG retained outside legal counsel from Clifford Chance to assist OSG's in-house counsel—led by Defendant Edelson, who had been named OSG's General Counsel that year—in negotiating and documenting a $1.8 billion unsecured revolving credit agreement (the "2006 Credit Agreement"). Both tax and finance lawyers from Clifford Chance had reviewed the terms of the transaction, which were arranged with oversight from Defendant Itkin, OSG's CFO.

19. The 2006 Credit Agreement was executed on February 9, 2006. The final negotiated terms of that agreement provided that OSG, OBS, and OIN were each able to draw down on the credit facility. The drawn-down funds, however, were to be provided "to the Borrowers on a joint and several basis." In connection with the transaction, OSG

terminated all of its existing unsecured revolving credit facilities, leaving the facility under the 2006 Credit Agreement as the only such source of funds for OSG's operations until that agreement expired in 2013.

**Proskauer's Discovery of the Section 956 Tax Issue**

20. In or about late 2010, OSG retained Proskauer to negotiate a new credit agreement. That agreement (the "Forward Start Agreement") would provide OSG, OBS, and OIN with a $900 million line of credit upon the expiration of the 2006 Credit Agreement.

21. On April 27, 2011, a draft of the Forward Start Agreement prepared by the lenders under that agreement was provided to Plaintiff Parnes, a partner in Proskauer's tax department. Parnes immediately identified a potential issue concerning the draft's provision that the revolving loans would be made "to the Borrowers on a joint and several basis," the same language that had been utilized in the 2006 Credit Agreement.

22. The potential tax issue that Parnes identified arose under Section 956 of Title 26, the Internal Revenue Code, and is well known to members of the global shipping industry. Since 2005, the general rule regarding taxation of a foreign subsidiary of a U.S. corporation (known as a "controlled foreign corporation" or "CFC") has been that the subsidiary's foreign shipping income was not taxable as income to its U.S. parent unless distributed or deemed distributed to the parent. Section 956(d), in turn, provides that a CFC's income will be deemed distributed to a U.S. corporation to the extent the CFC is a "pledgor or guarantor" of the U.S. corporation's obligations. Thus, if the "joint and several" language in the credit agreements meant that OSG and OIN were co-obligors of any amounts borrowed under the credit facilities, OIN would have effectively guaranteed

OSG's debts. Accordingly, the income of OIN—which is a CFC of OSG—would potentially be taxable to the Company to the extent of OSG's borrowings, and OSG could be facing hundreds of millions of dollars of unpaid tax liability from its drawdowns under the 2006 Credit Agreement.

23. Having identified the Section 956 issue, Parnes called Plaintiff Samuels, a partner in Proskauer's corporate department and Proskauer's main contact with OSG. Parnes also immediately called Defendant Edelson and informed him of the issue.

24. Samuels reached out to Plaintiff Weise, another partner in Proskauer's corporate department and an expert in corporate finance matters. Parnes, Samuels, Weise, and others at Proskauer began analyzing the Section 956 issue. As part of that work, Weise and others began to research the meaning of the phrase "joint and several" and determined that there was ample support for the argument that the phrase was ambiguous and therefore susceptible to multiple interpretations. Weise concluded that OSG's Section 956 liability, therefore, would depend substantially on whether or not the parties to the 2006 Credit Agreement had intended the "joint and several" language to create a guarantee by OIN of OSG's obligations under the 2006 Credit Agreement.

25. In order to evaluate this intent-based argument, Proskauer began searching its own files relating to the credit agreements it had last worked on for OSG—in 2000 and 2001—to determine if those files contained any evidence regarding the parties' historical intent in using the phrase "joint and several." Although those 2000 and 2001 agreements differed dramatically from the 2006 Credit Agreement and had been entered into prior to a change in the law regarding taxation of CFC income, they did employ a "joint and several" structure and may have shed light on the intent behind the language.

26. Following Proskauer's identification of the Section 956 issue, Parnes and Samuels held telephone calls with both Defendants Edelson and Itkin. During those calls, Parnes and Samuels stated that OSG might have a viable commercial law argument against the imposition of Section 956 tax liability if the evidence established that the parties did not intend "joint and several" to mean "guarantee."

**Edelson's and Itkin's False Representations**

27. During the course of the calls, Itkin and Edelson repeatedly and emphatically stated that neither OSG nor the lenders under the 2006 Credit Agreement had intended the "joint and several" language to make OIN a guarantor of OSG's obligations. Samuels asked that OSG search its files for documents relevant to the issue of the parties' intent, and Edelson agreed to undertake that search.

28. During those calls, OSG asked Proskauer to look further into commercial law arguments that—based on OSG's representations that the parties (the Company and the lenders) did not intend to make OIN a guarantor of OSG's obligations—the "joint and several" language had not created an upstream guarantee by OIN of OSG's obligations. Proskauer was to draft a memorandum (the "Memorandum") laying out its analysis. The Memorandum is attached hereto as Exhibit A.

29. As work began on the Memorandum, Proskauer continued searching its files for any document that would aid in the analysis of the parties' intent, which was a central underpinning of the Memorandum. Samuels reported on more than one occasion to Edelson the progress of that review and that Proskauer was not locating any relevant documents.

30. Edelson, likewise, reported to Samuels that OSG was searching its own files but was also unable to locate anything of relevance. Upon information and belief, OSG was in fact not conducting a search of its documents and Edelson knowingly misrepresented otherwise to Samuels. Edelson knew, and intended, that Proskauer would rely on his false representations.

31. At the conclusion of Proskauer's search, despite thoroughly combing through volumes of its files, Proskauer was unable to locate any documents that provided any insight into the parties' intended meaning of "joint and several" at the time of the 2000 and 2001 agreements. The only items of possible interest that Proskauer had located were time entries from its bills in 2000 that indicated that the potential issue with the "joint and several" language had been raised with OSG contemporaneously with the documentation of the 2000 agreement, but those entries did not illuminate the issue of the parties' intent.

32. On May 9, 2011, Proskauer provided Edelson and Itkin with a first draft of the Memorandum, which explored potential arguments in favor of eliminating or mitigating any tax liability arising from the "joint and several" language in the 2006 Credit Agreement. Having determined that the agreements were sufficiently ambiguous as to the meaning of "joint and several," the Memorandum then went on to analyze the parties' intended meaning of that language. Based on Edelson's representations that OSG had searched for documents bearing on that question but was unable to find any, and on Edelson's and Itkin's representations that the parties to the credit agreements never intended to create a guarantee, the Memorandum argued that the available parol evidence weighed in favor of concluding that the parties had not intended to make OIN a guarantor of OSG.

33. Thereafter, Parnes and Samuels conducted a conference call with Defendant Edelson, as well as OSG's then-Chief Risk Officer Janice Smith and then-Controller Jerry Miller. On that call, Smith requested additional detail on Proskauer's review of documents related to the 2000 and 2001 agreements, and Samuels walked through the efforts Proskauer had undertaken. Smith then asked Edelson what searches OSG had conducted. Edelson replied that, although he had done a complete review of OSG's files dating back to 2000, there was nothing of relevance in the records. Upon information and belief, Edelson knowingly misrepresented that OSG had searched its files and been unable to find any relevant documents. Edelson knew, and intended, that Proskauer would rely on his false representations.

34. In an effort to further Proskauer's ability to analyze the intent of the parties, Parnes and Samuels asked for OSG's permission to speak with individuals who had been involved in the documentation of the credit agreements, including a former finance executive at OSG and a former Proskauer partner. OSG declined to give Parnes and Samuels that permission.

35. In a separate conversation with Defendant Itkin, Parnes and Samuels asked Itkin if he would be willing to raise the Section 956 issue with the lenders under the Forward Start Agreement, a number of whom had been involved in the earlier credit agreements. Itkin declined to raise the issue with the lenders and instructed Proskauer not to approach them about it.

36. In their call with Parnes and Samuels, Edelson, Miller, and Smith also provided detailed comments on the draft of the Memorandum and asked detailed questions about its contents. Their comments did not alter the fundamental premises on

which the legal arguments in the Memorandum were based, including OSG's representation that the parties to the credit agreements had not intended to create a guarantee. There was, however, significant discussion of those premises. Edelson never revealed that those premises were false.

37. Proskauer provided Edelson, Smith, and Miller with a second draft of the Memorandum on May 23, 2011. Among other changes, that draft added footnotes that made clear that the only documentary evidence of which Proskauer was aware other than the agreements themselves were Proskauer's billing records from 2000 about a now-expired credit agreement and the 2006 revolving note, neither of which revealed the parties' intent. The Memorandum's central premises that there was no documentary evidence of the parties' intent—as repeatedly confirmed by Edelson—and that the parties did not intend that OIN guarantee OSG's obligations—as repeatedly confirmed by both Edelson and Itkin—were unchanged.

38. OSG provided additional feedback to Proskauer on the second draft of the Memorandum, in response to which Proskauer made minor changes. Upon information and belief, Edelson and Itkin reviewed the second draft of the Memorandum in detail. Neither Defendant suggested to Proskauer that the premises upon which the Memorandum was relying were false.

39. On May 26, 2011, OSG executed the Forward Start Agreement. By that time, the financial issues that ultimately led to OSG's eventual bankruptcy in November 2012 had begun to surface. Focused on ensuring its access to liquidity, OSG never sought to clarify the intent of the "joint and several" language with the bank group providing that new credit facility.

40. Proskauer sent what became the final version of the Memorandum, dated June 1, 2011, to Edelson, Smith, and Miller on June 5, 2011. This version of the Memorandum did not differ materially from the draft provided to OSG on May 23, 2011. The Memorandum expressly presumes that "the parties to the [credit agreements] could not have intended that OSG, OSG Bulk, and OIN engage in the same performance so that they would be co-obligors," based on "the statements of senior management of OSG that OSG would not have entered into the [credit agreements] . . . had senior management believed that OIN was responsible for the obligations of OSG and OSG Bulk under these agreements." That premise is reiterated in the Memorandum, which also highlights that "[s]enior management of OSG, whom [Proskauer has] advised over the years that OIN can not guarantee borrowings by OSG or any other domestic borrower, strongly state that they never intended that OIN would be responsible for the obligations of OSG or OSG Bulk under the [credit agreements]."

41. Edelson's representation that OSG had no documents that would shed light on the parties' intent in connection with the "joint and several" language and Edelson's and Itkin's representations that the Company never intended OSG's debts to be guaranteed by OIN are essential to every step of the Memorandum. Had Proskauer been provided with any documents that appeared to undermine these vital premises, Proskauer would not have arrived at the conclusions it did.

42. On June 22, 2011, Edelson told Proskauer that OSG considered the Memorandum to be final. Neither Edelson nor Itkin ever suggested to Proskauer that the premises the Memorandum relied upon were false. It was not until nearly 15 months after Proskauer had written the Memorandum—when Proskauer was asked to turn the

Memorandum into an opinion—that Edelson finally revealed that OSG had a trove of documents easily accessible in its offices that conclusively demonstrated both that the inclusion of "joint and several" in the credit agreements was intentional and that the intended meaning was "guarantor or co-obligor."

**OSG's Liquidity Troubles Worsen**

43. In late 2011, as demand for OSG's services remained depressed, OSG began preparing for refinancing negotiations with the lenders under the Forward Start Agreement because it had determined that that agreement would not provide sufficient liquidity to meet the Company's needs.

44. During those negotiations, which continued through the summer of 2012, the lenders insisted that certain of OIN's assets be pledged as collateral for any further financing, given OSG's deteriorating financial state. The ensuing discussions about avoiding liability under Section 956 drew attention to the "joint and several" language in the existing 2006 credit facility, and the bank lending group began expressing concern about OSG's potential tax liability.

45. After the banks had raised the issue with the Company, OSG began worrying that it would not be able to obtain the additional financing it was seeking from the current negotiations. Spurred by its need for liquidity, and with knowledge that its own false representations were a fundamental basis of the Memorandum, OSG drew down the funds that remained in its 2006 credit facility—approximately $340 million.

46. Following the additional drawdown, negotiations with the bank lending group broke down and OSG, unable to obtain its needed financing, became increasingly

focused on a possible bankruptcy filing. Proskauer was retained as the Company's restructuring counsel.

47. In a subsequent September 2012 meeting of OSG's board of directors, the board directed Proskauer to meet with the Company's outside auditors PricewaterhouseCoopers ("PwC") to discuss the conclusions of the Memorandum. After meeting with Proskauer in October 2012, PwC asked Proskauer to convert the Memorandum into an opinion on the "joint and several" issue.

**Proskauer Learns of a Trove of Hidden Documents**

48. At this time, Edelson began sending Proskauer *for the first time* certain documents that had been created during the negotiation of the 2006 Credit Agreement but had not previously been disclosed to Proskauer. The documents sent by Edelson to Proskauer did not include a draft term sheet (which, as discussed below, was later discovered by Proskauer in OSG's files) that made clear that both OSG and its counsel Clifford Chance intended that OIN be a guarantor of OSG's debts under the 2006 Credit Agreement as a result of the "joint and several" language.

49. On October 18, 2012, OSG's Chief Risk Officer Smith called Samuels. Distraught, Smith informed Samuels that Edelson had just told her that—contrary to his repeated prior representations to Proskauer, made throughout the drafting of the Memorandum and on which the Memorandum crucially depended—OSG's files contained numerous documents that addressed the drafting of the Company's credit agreements from 2000 forward. Smith and Samuels agreed that Proskauer needed to review immediately all of these newly disclosed files.

50. On October 19, 2012, OSG informed Proskauer that the Company would be replacing Proskauer with new restructuring counsel. Prior to a transition meeting with the new counsel that same day, Samuels reviewed some of the newly revealed documents from OSG's records. On the basis of this limited review alone, Samuels determined that there were multiple documents that would have been highly relevant to Proskauer's analysis in the Memorandum.

51. During her conversations with Samuels on October 18 and October 19, Smith told Samuels that, had she known about the documents earlier, the drafting of the Memorandum would have come to a "screeching halt" and that she "never would have allowed [Proskauer] to write the memo."

52. On or about October 23, 2012, Samuels and Smith scheduled time for Proskauer to return to OSG's offices and continue to review the Company's credit agreement files. With Smith and Edelson, Samuels and others from Proskauer pored through those records—centrally located in OSG's offices, mere feet from Edelson's office—during periods of Smith's availability from October 28 to October 30.

53. While at OSG's offices, Samuels saw for the first time numerous documents that wholly undermined Edelson's and Itkin's repeated assertions to Proskauer that the parties to the credit agreements never intended that OIN guarantee OSG's obligations. By way of example only, OSG had in its files a mark-up of a draft term sheet for the 2006 Credit Agreement (not previously disclosed by Edelson to Proskauer) that plainly indicates that both OSG and its counsel Clifford Chance understood and intended that OIN be a guarantor of OSG's debts under that agreement via the "joint and several" structure. Specifically, counsel to the lenders included a footnote on the first

page of that document that they sought to "[d]iscuss tax implications of guarantees from non US subsidiaries." Clifford Chance responded that: "*No subsidiary guarantees should be required. OSG Bulk and [OIN] . . . will be joint and several borrowers under the Credit Facility*." Thus, Clifford Chance asserted that the banks did not need an upstream guarantee because, in the context of the 2006 negotiation, it equated the joint and several liability of OBS and OIN to the liability of a guarantor. That clear assertion directly contradicted the fundamental premise of the Memorandum that had been repeatedly endorsed by Edelson and Itkin to Proskauer—i.e., that the parties never could have intended "joint and several" to mean an OIN upstream guarantee. That draft term sheet is attached hereto as Exhibit B.

**Proskauer Refuses to Provide a Formal Opinion to OSG**

54. On October 31, 2012, OSG revoked Proskauer's access to OSG's offices, ending the review and precluding Proskauer from discovering the full scope of the documentation that Edelson had earlier withheld. Even with its review prematurely cut off, Proskauer had collected multiple boxes of documents that appeared relevant to the question of the parties' intended meaning of "joint and several." Had Proskauer been aware of these documents prior to drafting the Memorandum, it would have materially altered its conclusions.

55. That same day, Samuels wrote to OSG's new restructuring counsel and informed them that the Memorandum had been based on Edelson's representation that OSG had made a complete review of its records and found no information relevant to the Section 956 issue and Edelson's and Itkin's representations that the parties to the credit agreements did not intend to make OIN a guarantor of OSG's obligations. Because these

representations were, in fact, false, Samuels indicated that Proskauer would be unable to render the previously requested opinion.

56. Meanwhile, OSG issued guidance that its financial statements for the previous three years could not be relied upon. On November 14, 2012, OSG and 180 of its affiliates, including OIN and OBS, filed for Chapter 11 relief. OSG thereafter self-reported to the IRS that it owed additional income taxes due to the "joint and several" language in its credit agreements. Since then, OSG has agreed with a notice of proposed adjustment issued by the IRS, which provides that OSG will include additional taxable income under Section 956 in respect of calendar years 2010 and 2011, due to drawdowns on the facility under the 2006 Credit Agreement. That adjustment imposed a tax liability of $225 million on OSG, nearly all of which was incurred *prior* to the drafting of the Memorandum.

**OSG's Baseless Suit Against Plaintiffs**

57. On November 18, 2013, OSG initiated an action against Plaintiffs in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), alleging claims of malpractice and breach of fiduciary duty stemming in large part from the advice Proskauer rendered in the Memorandum. The complaint in that action is attached hereto as Exhibit C. Upon information and belief, had Proskauer never issued the Memorandum, OSG would not have brought suit against Plaintiffs.

58. On January 17, 2014, Plaintiffs simultaneously moved to dismiss that action and for the Bankruptcy Court to abstain from the action, on the grounds that it should have been brought in New York state court. On February 21, 2014, the Bankruptcy Court granted Plaintiffs' motion to abstain.

59. Upon information and belief, OSG intends to initiate a new action against Plaintiffs in another jurisdiction (together with the action before the Bankruptcy Court described above, the "OSG Action").

60. To date, Proskauer has incurred over $1 million in legal fees by defending against OSG's baseless claims. Should OSG reassert those claims against Plaintiffs, Proskauer's legal fees will continue to grow.

61. Plaintiffs have suffered tremendous reputational damage as a result of OSG's meritless malpractice and breach of fiduciary duty claims. The claims both impugn their abilities as lawyers and accuse them of having willfully misled OSG in the Memorandum. OSG has incorrectly blamed Plaintiffs for the shortcomings, failures, and deceit of Defendants Edelson and Itkin.

62. Edelson, as a senior officer of OSG, owed the Company fiduciary duties, including duties of care and honesty. Specifically, as General Counsel, Edelson was responsible for ensuring that complete and accurate information was supplied to OSG's outside legal advisors. Instead, however, Edelson either did not thoroughly review the Company's internal files when tasked to do so or, if he did, withheld the damaging documents found therein. Upon information and belief, in an attempt to disguise OSG's enormous tax problem while the Company was in the midst of a financially uncertain situation, Edelson knowingly deceived Proskauer into drafting the Memorandum, which provided OSG with cover when drawing down on the 2006 credit facility. OSG has alleged that it would not have made those drawdowns in the absence of the Memorandum. While Plaintiffs dispute that assertion, to the extent a court finds

Plaintiffs liable for the tax OSG incurred on those drawdowns, all of those damages are attributable to Edelson's tortious conduct alleged herein.

63. Itkin, as a senior officer of OSG, owed the Company fiduciary duties, including the duty of care. Specifically, as CFO, Itkin had the responsibility of ensuring that representations he made to OSG's outside legal advisors were accurate. Instead, however, Itkin made representations to Proskauer that were directly contradicted by documents generated in a transaction in which he was involved without ensuring that a thorough search for those documents had been undertaken. Had Itkin not made those misrepresentations, Proskauer would not have reached the conclusions set forth in the Memorandum. To the extent a court finds that OSG would not have drawn down additional funds but for the Memorandum and further finds Plaintiffs liable for the tax OSG incurred on those drawdowns, all of those damages are attributable to Itkin's tortious conduct alleged herein.

64. Edelson's and Itkin's failures to exercise due care and honesty in the performance of their duties as senior officers of OSG constitute breaches of their fiduciary duties to their principal, OSG. To the extent Plaintiffs are found liable for any damages to OSG, all of those damages are attributable to and resulted from Edelson's and Itkin's tortious breaches of fiduciary duty, and Edelson and Itkin would be responsible to OSG as joint tortfeasors.

## FIRST CAUSE OF ACTION
**(Fraud Against Defendant Edelson)**

65. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 64 as if fully set forth herein.

66. On multiple occasions, Edelson represented to Parnes and Samuels, as representatives of Proskauer, that he had undertaken a comprehensive search of OSG's internal files but had discovered no documents of relevance to the meaning of "joint and several" intended by the parties to the credit agreements. Upon information and belief, Edelson knew that the representation was false on each occasion he made it.

67. Edelson knew, and intended, that his misrepresentations would be a fundamental premise of the Memorandum drafted by Plaintiffs. Plaintiffs, having no reason to believe that their client would try to deceive them, accepted the truth of Edelson's misrepresentations and used them as the basis of the Memorandum. Had Edelson not misrepresented this fact to Plaintiffs, they would not have reached the conclusions set forth in the Memorandum.

68. At all times described herein, Edelson was acting as an officer of OSG and all of his conduct fell within the scope of his duties as an officer of OSG. Plaintiffs were entitled to rely on the representations he made on behalf of the Company.

69. As a direct and proximate result of the Memorandum providing advice based upon Defendant Edelson's false representations, OSG brought a meritless suit against Plaintiffs for malpractice and breach of fiduciary duty, causing Plaintiffs substantial injury—both monetary, in the form of legal fees, and reputational.

70. The misconduct of Edelson was intentional, willful, wanton, malicious, and of such egregious nature that punitive damages are appropriate in addition to any compensatory damages for harm done to Plaintiffs.

## SECOND CAUSE OF ACTION
**(Constructive Fraud Against Defendants Edelson and Itkin)**

71. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 70 as if fully set forth herein.

72. OSG's engagement of Proskauer to provide the Company with arguments regarding the import of the "joint and several" language created a confidential relationship between Proskauer and those of OSG's officers on whom Proskauer would depend for information in their capacity as representatives of OSG. Proskauer had no other source of information about what documents OSG had in its files or what OSG's intentions were with respect to the meaning of "joint and several" in the credit agreements.

73. On multiple occasions, Edelson represented to Parnes and Samuels, as representatives of Proskauer, that he had undertaken a comprehensive search of OSG's internal files but had discovered no documents of relevance to the meaning of "joint and several" intended by the parties to the credit agreements. On multiple occasions, Edelson and Itkin represented to Parnes and Samuels, as representatives of Proskauer, that the parties to the credit agreements did not intend that OIN guarantee OSG's obligations.

74. These representations are directly contradicted by documents that were stored in an easily accessible location in OSG's offices. Edelson and Itkin, as senior officers of OSG, are responsible for knowing of both the existence and contents of documents within the Company's custody and control.

75. Plaintiffs, having no reason to believe that Edelson would mischaracterize the extent and results of his search or that Edelson and Itkin would both mischaracterize their intentions with respect to agreements in which they were both involved, accepted the truth of these misrepresentations and used them as the basis of the Memorandum.

Edelson and Itkin knew, and intended, that these misrepresentations would be fundamental premises of the Memorandum drafted by Plaintiffs. Had Edelson and Itkin not misrepresented these facts to Plaintiffs, they would not have reached the conclusions set forth in the Memorandum.

76. At all times described herein, Edelson and Itkin were acting as officers of OSG and all of their conduct fell within the scope of their duties as officers of OSG. Plaintiffs were entitled to rely on the representations they made on behalf of the Company.

77. As a direct and proximate result of the Memorandum providing advice based upon Defendants' false representations, OSG brought a meritless suit against Plaintiffs for malpractice and breach of fiduciary duty, causing Plaintiffs substantial injury—both monetary, in the form of legal fees, and reputational.

**THIRD CAUSE OF ACTION**
**(Negligent Misrepresentation Against Defendants Edelson and Itkin)**

78. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 77 as if fully set forth herein.

79. OSG's engagement of Proskauer to provide the Company with arguments regarding the import of the "joint and several" language created a confidential relationship between Proskauer and those of OSG's officers on whom Proskauer would depend for information in their capacity as representatives of OSG. Proskauer had no other source of information about what documents OSG had in its files or what OSG's intentions were with respect to the meaning of "joint and several" in the credit agreements.

80. On multiple occasions, Edelson represented to Parnes and Samuels, as representatives of Proskauer, that he had undertaken a comprehensive search of OSG's

internal files but had discovered no documents of relevance to the meaning of "joint and several" intended by the parties to the credit agreements. On multiple occasions, Edelson and Itkin represented to Parnes and Samuels, as representatives of Proskauer, that the parties to the credit agreements did not intend that OIN guarantee OSG's obligations.

81. These representations are directly contradicted by documents that were stored in an easily accessible location in OSG's offices and would have been readily discovered had Defendants undertaken even a minimal search. These representations were also directly contradicted by the negotiations regarding the 2006 Credit Agreement, in which both Edelson and Itkin were involved.

82. Plaintiffs, having no reason to believe that Edelson would mischaracterize the extent and results of his search or that Edelson and Itkin would both mischaracterize their intentions with respect to agreements in which they were both involved, accepted the truth of these misrepresentations and used them as the basis of the Memorandum. Had Edelson and Itkin not misrepresented these facts to Plaintiffs, they would not have reached the conclusions set forth in the Memorandum.

83. At all times described herein, Edelson and Itkin were acting as officers of OSG and all of their conduct fell within the scope of their duties as officers of OSG. Plaintiffs were entitled to rely on the representations they made on behalf of the Company.

84. As a direct and proximate result of the Memorandum providing advice based upon Defendants' false representations, OSG brought a meritless suit against Plaintiffs for malpractice and breach of fiduciary duty, causing Plaintiffs substantial injury—both monetary, in the form of legal fees, and reputational.

## FOURTH CAUSE OF ACTION
**(Contribution Based on Malpractice Against Defendant Edelson)**

85. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 84 as if fully set forth herein.

86. As General Counsel of OSG, Edelson owed a duty of care to the Company, requiring him to act with that certain level of skill, prudence, and diligence required of internal legal counsel of a corporation.

87. Edelson breached that duty by failing to recognize in 2006 the Section 956 tax liability that OSG would incur as a result of the 2006 Credit Agreement's use of a "joint and several" structure to effect an upstream guarantee from OIN to OSG. Although the operation of Section 956 is well known to members of the global shipping industry, and to Edelson in particular, he failed to identify the issue when it was presented by the 2006 Credit Agreement. As a direct and proximate result of Edelson's negligence, OSG incurred significant tax liability. Edelson's breach was tortious as to OSG, and, to the extent a court finds Plaintiffs liable for OSG's tax liability, all of those damages are attributable to Edelson's conduct in failing to adequately perform his duties.

88. Edelson also breached that duty by failing to thoroughly review OSG's internal files for documents relating to the meaning of "joint and several" intended by the parties to the credit agreements. Although tasked to do so, Edelson did not search for and disclose highly relevant documents until after the Company had made hundreds of millions of dollars of drawdowns on its 2006 credit facility that would never have been made had Edelson acted with the level of care required of attorneys acting as internal counsel. Edelson's negligence was tortious as to OSG and was the predicate for the false premises underlying the Memorandum. To the extent, if any, that injury to OSG

followed from the Memorandum, any such injury would be the direct and proximate result of Edelson's breach.

89. At all times described herein, Edelson was acting as an officer of OSG and all of his conduct fell within the scope of his duties as an officer of OSG.

**FIFTH CAUSE OF ACTION**
**(Contribution Based on Breach of Fiduciary Duty Against Defendant Edelson)**

90. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 89 as if fully set forth herein.

91. As General Counsel of OSG, Edelson had the duty of a fiduciary to perform reasonably with due diligence and honesty, including by ensuring that complete and accurate information was supplied to OSG's outside legal advisors, such as the information he provided to Proskauer regarding OSG's search of its internal files and the intentions of the parties to the credit agreements.

92. Edelson breached his fiduciary duty to OSG either by not thoroughly reviewing the Company's internal files when tasked to do so or, if he did, by refusing to disclose the existence of damaging documents found therein. Edelson's breach was tortious as to OSG and was the predicate for the false premises underlying the Memorandum. To the extent, if any, that injury to OSG followed from the Memorandum, any such injury would be the direct and proximate result of Edelson's breach.

93. At all times described herein, Edelson was acting as an officer of OSG and all of his conduct fell within the scope of his duties as an officer of OSG.

## SIXTH CAUSE OF ACTION
**(Contribution Based on Breach of Fiduciary Duty Against Defendant Itkin)**

94. Plaintiffs repeat and reallege the allegations in Paragraphs 1 through 93 as if fully set forth herein.

95. As CFO of OSG, Itkin had the duty of a fiduciary to perform reasonably with due diligence, including by ensuring that representations he made to OSG's outside legal advisors were accurate, such as the representations he made to Proskauer regarding the intentions of the parties to the credit agreements.

96. Itkin breached his fiduciary duty to OSG by making representations to Proskauer that were directly contradicted by documents generated in a transaction in which he was involved without ensuring that a thorough search for those documents had been undertaken. Itkin's breach was tortious as to OSG and was the predicate for the false premises underlying the Memorandum. To the extent, if any, that injury to OSG followed from the Memorandum, any such injury would be the direct and proximate result of Itkin's breach.

97. At all times described herein, Itkin was acting as an officer of OSG and all of his conduct fell within the scope of his duties as an officer of OSG.

WHEREFORE, by reason of the foregoing, Plaintiffs respectfully request that this Court award them judgment against Defendants

a. actual damages in an amount to be proven at trial, including without limitation all costs and attorneys' fees arising out of the OSG Action, but in all events in an amount greater than $500,000;

b. consequential damages in an amount to be proven at trial, including without limitation the damages associated with the harm to Plaintiffs' reputations as a result of the OSG Action;

c. punitive damages as redress for Edelson's malicious and reckless conduct;

d. prejudgment and post-judgment interest as allowed by law;

e. reasonable attorneys' fees and costs of court; and

f. any other relief allowed by law and deemed appropriate by the Court.

Dated: New York, New York
February 23, 2014

DAVIS POLK & WARDWELL LLP

By: /s/ Paul Spagnoletti
Paul Spagnoletti

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