EXHIBIT A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

OEHME, VAN SWEDEN & ASSOCIATES, INC.
Vs.
ELENA PINCHUK

C.A. No. 2011 CA 009500 B

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("SCR Civ") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the Summons, the Complaint, and this Initial Order. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in SCR Civ 4(m).

(3) Within 20 days of service as described above, except as otherwise noted in SCR Civ 12, each defendant must respond to the Complaint by filing an Answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in SCR Civ 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an Initial Scheduling and Settlement Conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than six business days before the scheduling conference date. No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each Judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Lee F. Satterfield

Case Assigned to: Judge JOHN M MOTT
Date: November 30, 2011
Initial Conference: 10:00 am, Friday, March 02, 2012
Location: Courtroom 112
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www:dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 105, 515 5th Street, N.W. (enter at Police Memorial Plaza entrance). Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code § 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Clerk's Office. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Lee F. Satterfield

Superior Court of the District of Columbia
CIVIL DIVISION
500 Indiana Avenue, N.W., Suite 5000
Washington, D.C. 20001 Telephone: (202) 879-1133

Oehme, van Sweden + Associates, Inc.
Plaintiff

vs.

Case Number 0009500-11

Maypaul Trading + Services Limited
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve an Answer to the attached Complaint, either personally or through an attorney, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you are being sued as an officer or agency of the United States Government or the District of Columbia Government, you have sixty (60) days after service of this summons to serve your Answer. A copy of the Answer must be mailed to the attorney for the party plaintiff who is suing you. The attorney's name and address appear below. If plaintiff has no attorney, a copy of the Answer must be mailed to the plaintiff at the address stated on this Summons.

You are also required to file the original Answer with the Court in Suite 5000 at 500 Indiana Avenue, N.W., between 8:30 a.m. and 5:00 p.m., Mondays through Fridays or between 9:00 a.m. and 12:00 noon on Saturdays. You may file the original Answer with the Court either before you serve a copy of the Answer on the plaintiff or within five (5) days after you have served the plaintiff. If you fail to file an Answer, judgment by default may be entered against you for the relief demanded in the complaint.

PAUL S. Thaler, ESQ.
Name of Plaintiff's Attorney

1825 EYE ST. NW Suite 400
Address
Washington, DC 20006
202 - 587-4750
Telephone

Clerk of the Court

By _____
Deputy Clerk

Date 11/30/2011

如需翻译,请打电话 (202) 879-4828 Veuillez appeler au (202) 879-4828 pour une traduction Để có một bài dịch, hãy gọi (202) 879-4828
번역을 원하시면, (202) 879-4828 로 전화주십시요 የአማርኛ ትርጉም ለማግኘት (202) 879-4828 ይደውሉ

IMPORTANT: IF YOU FAIL TO FILE AN ANSWER WITHIN THE TIME STATED ABOVE, OR IF, AFTER YOU ANSWER, YOU FAIL TO APPEAR AT ANY TIME THE COURT NOTIFIES YOU TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY DAMAGES OR OTHER RELIEF DEMANDED IN THE COMPLAINT. IF THIS OCCURS, YOUR WAGES MAY BE ATTACHED OR WITHHELD OR PERSONAL PROPERTY OR REAL ESTATE YOU OWN MAY BE TAKEN AND SOLD TO PAY THE JUDGMENT. IF YOU INTEND TO OPPOSE THIS ACTION, *DO NOT FAIL TO ANSWER WITHIN THE REQUIRED TIME.*

If you wish to talk to a lawyer and feel that you cannot afford to pay a fee to a lawyer, promptly contact one of the offices of the Legal Aid Society (202-628-1161) or the Neighborhood Legal Services (202-279-5100) for help or come to Suite 5000 at 500 Indiana Avenue, N.W., for more information concerning places where you may ask for such help.

See reverse side for Spanish translation
Vea al dorso la traducción al español

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

OEHME, VAN SWEDEN & ASSOCIATES, INC.
800 G Street, SE
Washington, DC 20002

Petitioner,

v.

ELENA PINCHUK
c/o Interpipe Group
42/44 Shovkovichna STR
Kiev, 01004
Ukraine

and

MAYPAUL TRADING & SERVICES LIMITED
Arch. Makariou III, Nicosia, Cyprus
P.C. 1077, Nicosia, Cyprus

Respondents.

Civil Action No. 0009500-11

MOTION FOR CONFIRMATION OF ARBITRATION AWARD

COMES NOW Petitioner, Oehme, van Sweden & Associates, Inc. ("OvS"), by and through undersigned counsel, seeking confirmation of an arbitration award against Respondents, Elena Pinchuk and Maypaul Trading & Services Limited ("Maypaul"), and entry of judgment in conformity with the arbitration award.

Parties and Jurisdiction

1. Petitioner, OvS, is a landscape architecture and design services firm, located and incorporated in Washington, D.C.

2. Respondent Elena Pinchuk is a Ukrainian citizen. Her maiden name is Elena Franchuk.

3. Respondent Maypaul is a Cyprus corporation.

4. The arbitration award that is the subject of these proceedings for confirmation was the result of an arbitration proceeding between the parties that took place in Washington, D.C.

5. The parties entered into a February 2, 2007 agreement. *See* Agreement on Landscape Design Services (the "Agreement") attached hereto as Exhibit A. The Agreement provides, *inter alia,* that it has been "negotiated and executed in the District of Columbia, is to be performed at least in significant part in the District of Columbia, is governed by its law, and may be enforced in that jurisdiction." *Id.* ¶ 9.1.

6. The arbitration provision contained in the Agreement states that "[t]he award rendered by the arbitration shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." *Id.* ¶ 4.3.

7. This Court has jurisdiction over these proceedings pursuant to the terms of the Agreement, the location of the arbitration proceeding, and D.C. Code §§ 16-4422 and 4426.

8. Personal jurisdiction over Respondents is appropriate pursuant to the terms of the Agreement and D.C. Code §§ 13-334, 13-423 and 16-4426(b).

Facts

9. Pursuant to the Agreement and modifications thereto, OvS provided landscape design services for a property near Kiev, Ukraine for the benefit of, and as requested or authorized by, Respondent Pinchuk. Respondent Pinchuk lives or lived on the property with her family. The Agreement was executed by Respondent Maypaul.

10. Respondents failed to pay for certain of OvS' services.

11. Petitioner filed its Demand for Arbitration with the American Arbitration Association on April 13, 2010 seeking $169,933.96 plus interest, cost and expenses, and attorneys' fees against Respondents.

12. On May 2, 2010 Respondents Maypaul and Pinchuk filed an Answering Statement of Counterclaims. Respondent Maypaul asserted a counterclaim against OvS seeking $50,000 plus interest, costs and expenses, and attorneys' fees. Respondent Pinchuk contested arbitral jurisdiction over her.

13. The Agreement was negotiated and executed in the District of Columbia and performed at least in significant part in the District of Columbia.

14. Pursuant to the terms of the Agreement, the arbitration took place in Washington, D.C. and was governed by the laws of the District of Columbia.

15. Pursuant to the terms of the Agreement, the dispute shall be resolved by arbitration and the result is binding on the parties.

16. The arbitration hearing was held before an arbitrator over several days in February and March and finally concluded on March 30, 2011.

17. An arbitration award (the "Award") was rendered on October 26, 2011 and served on the parties on that date. A copy of the Award is attached hereto as Exhibit B.

18. The decision of the arbitrator found that the arbitration provision of the Agreement is binding upon Respondent Pinchuk. *See* Award attached hereto as Exhibit B, pp. 1, 26-32.

19. The Award denied Respondent Maypaul's counterclaim. *Id.* pp. 1-2, 48, 53.

20. The Award found Respondents Maypaul and Pinchuk jointly and severally liable to OvS for breach of contract and in quantum meruit. *Id.* pp. 1, 32-46.

21. Petitioner was awarded the amount of $281,710.14 in damages and pre-award interest to the date of the Award jointly and severally from Respondents Maypaul and Pinchuk. *Id.* pp. 1, 47, 52.

22. The Award found that Respondents Pinchuk and Maypaul are jointly and

severally liable for $178,985.46 in attorneys' fees and expenses incurred by OvS. *Id.* pp. 2, 48-49, 52.

23. The Award further found that Respondents Pinchuk and Maypaul are jointly and severally responsible for the administrative filing and case service fees of the arbitration as well as the arbitrator's fees and expenses. *Id.* pp. 2, 48-49, 52. Accordingly, Respondents were ordered to reimburse OvS in the amount of $26,290. *Id.* p. 52.

24. OvS was awarded post-award interest on all sums due at a rate of 3% per annum from and including the date thirty (30) days after the date of the Award to but excluding the date of full payment. *Id.* pp. 1-2, 49-53.

25. Pursuant to the Award, payment was due within thirty (30) days, or by November 25, 2011. *Id.* pp. 52-53. Respondents have not complied with the Award and have failed to pay the sum awarded to Petitioner and the amounts due.

26. Petitioner is entitled to confirmation of the Award and entry of judgment in conformity with the Award. D.C. Code §§ 16-4422 and 4425.

27. Petitioner is further entitled to seek and recover post-judgment costs and attorneys fees. D.C. Code § 16-4425.

28. Copies of all documents required by SCR-Civil-70-I(b) are annexed as exhibits.

Prayer for Relief

WHEREFORE, Petitioner, Oehme, van Sweden & Associates, Inc. seeks an order:

1) confirming the arbitration award against Respondents, jointly and severally;

2) entering judgment in favor of Petitioner Oehme, van Sweden & Associates, Inc. against Respondents Elena Pinchuk and Maypaul Trading & Services Limited, jointly and severally, as follows:

a.$281,710.14 as damages for breach of contract and in restitution plus interest at 3% per annum from November 25, 2011;

b. $178,985.46 in reimbursement of reasonable attorneys' fees and expenses of OvS plus interest at 3% per annum from November 25, 2011;

c. $26,290.00 as reimbursement for arbitrator fees and expenses and arbitration fees plus interest at 3% per annum from November 25, 2011;

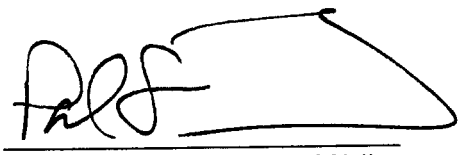
3) entering judgment against Respondent Maypaul Trading & Services Limited on its counterclaim against Petitioner Oehme, van Sweden & Associates, Inc.;

4) entering judgment against Respondents Maypaul Trading & Services Limited and Elena Pinchuk, jointly and severally, for post-award costs and legal fees pursuant to D.C. Code § 16-4425; and

5) providing Petitioner with such other and further relief as the Court deems proper.

Dated: November 30, 2011

Respectfully Submitted,



Paul S. Thaler, Esq. (416614)
Kelly S. Delaney, Esq. (975232)
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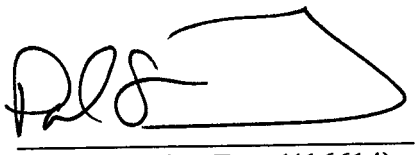
1825 Eye Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 466-4110
Fax: (202) 466-2693
Attorneys for Petitioner,
Oehme, van Sweden & Associates, Inc.

Points and Authorities

1. D.C. Code, Title 16, Chapter 44, §§ 16-4422, 4425 and 4426.
2. Super. Ct. R. Civ. P. 70-I.
3. The record herein.
4. The equitable powers of the court.

Dated: November 30, 2011

Respectfully Submitted,



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Attorneys for Petitioner,
Oehme, van Sweden & Associates, Inc.

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

OEHME, VAN SWEDEN & ASSOCIATES, INC. **Petitioner,** **v.** **ELENA PINCHUK** **and** **MAYPAUL TRADING & SERVICES LIMITED,** **Respondents.**	**Civil Action No.**

ORDER

Upon consideration of Petitioner's Motion for Confirmation of Arbitration Award, and any responses thereto filed by Respondents, it is, this ___ day of _____ 2011,

ORDERED that the motion be and hereby is GRANTED; and it is,

FURTHER ORDERED that the arbitration award is CONFIRMED; and it is

FURTHER ORDERED that judgment is hereby entered in favor of Petitioner Oehme, van Sweden & Associates, Inc. against Respondents Elena Pinchuk and Maypaul Trading & Services Limited, jointly and severally, in the following amounts:

a. $281,710.14 as damages for breach of contract and in restitution plus interest at 3% per annum from November 25, 2011;

b. $178,985.46 in reimbursement of reasonable attorneys' fees and expenses of OvS plus interest at 3% per annum from November 25, 2011;

c. $26,290.00 as reimbursement for arbitrator fees and expenses and arbitration fees plus interest at 3% per annum from November 25, 2011;

and it is,

FURTHER ORDERED that judgment is hereby entered against Respondent Maypaul Trading & Services Limited on its counterclaim against Petitioner Oehme, van Sweden & Associates, Inc.; and it is,

FURTHER ORDERED that Respondents Elena Pinchuk and Maypaul Trading & Services Limited, jointly and severally, pay to Petitioner Oehme, van Sweden & Associates, Inc. costs of suit and legal fees in the amount of $_____.

_____
Judge

OJECT FILE SIGNED

OEHME, VAN SWEDEN & ASSOCIATES, INC.

AGREEMENT
ON LANDSCAPE DESIGN SERVICES

2 February 2007

This Agreement on landscape design services (hereinafter referred to as the "Agreement") is entered into by and between

Maypaul Trading & Services Limited, a legal entity duly organized and operating under the laws of Cyprus, with its registered office at: Arch. Makariou III, Nicosia, Cyprus, P.C. 1077, Nicosia, Cyprus, represented by Marina Konstantinidou (hereinafter referred to as the "Owner")

and

OEHME, van SWEDEN & ASSOCIATES, Inc.(hereafter called L.A), legal entity duly organized and operating under the laws of Washington D.C, USA, having its registered office at 800G Street, SE, Washington, D.C. 20003, represented by Ms. Lisa E. Delplace.

The Parties hereby agreed as follows.

1. RESPONSIBILITIES OF L. A.

1.1 The L.A. agrees to provide professional services outlined in this Agreement and the Description of Landscape Design Services attached hereto as Addendum I (hereinafter referred to as the "Description of Services").

1.2 Additional services may be performed if requested, subject to an agreed upon revision in the scope of services and authorized fee(s).

2. OWNER'S RESPONSIBILITIES

2.1 The Owner shall furnish a legal description and a certified land survey of the site and the services of soil engineers or other consultants when such services are deemed necessary by the L.A. The services, information, surveys and reports required by this paragraph shall be furnished at the Owner's expense, and the L.A. shall be entitled to rely upon the accuracy and completeness thereof.

2.3 Owner shall supply written authorization to proceed with approved work on a timely basis so as not to delay or increase the costs of the L.A.'s work. The Owner shall be given ten (10) working days for approvals of the documents and reasonable time to prepare required descriptions or surveys, so as not to influence completion dates indicated in Description of Services.

LANDSCAPE ARCHITECTURE
URBAN DESIGN
MASTER PLANNING
HORTICULTURE
LANDSCAPE MANAGEMENT

800 G STREET, SE, WASHINGTON, D.C. 20003
202-546-7575 FAX 202-546-1035
EMAIL ovs@ovsla.com WEB www.ovsla.com

EXHIBIT A

3. OWNERSHIP AND USE OF DOCUMENTS

3.1 All Plans, Design Documents, Drawings and Specifications are made for the execution of this Project only and shall not be used on other projects except by agreement in writing and with appropriate compensation to the L.A. The Owner shall be permitted to retain copies, including reproducible copies, for information and reference in connection with the use and occupancy of the project, for submission or distribution to meet official regulatory requirements, or for other purposes in connection with the Project.

3.2 The L.A. shall be considered the author of all Plans, Design Documents, Drawings and Specifications for purposes of copyright and shall have the right to register the copyright in the name of the L.A.

4. ARBITRATION

4.1 All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration in the District of Columbia in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree in writing otherwise. This Agreement to arbitrate and any agreement to arbitrate with an additional person or persons duly consented to by the parties to this Agreement shall be specifically enforceable under the prevailing arbitration law. Arbitration fees may be assessed.

4.2 In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

4.3 The award rendered by the arbitration shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

5. TERMINATION OF AGREEMENT

5.1 This Agreement may be terminated by either party upon seven days' written notice should the other party fail substantially to perform in accordance with its terms.

5.2 This Agreement may be anytime terminated by the Owner upon at least seven days' prior written notice to the L.A. In such case L.A. will invoice the Owner for all the services rendered and all reimbursable expenses made as of the date of termination notice. No damages, future lost profits or other costs shall be reimbursed by the Owner.

6. LIABILITY OF THE PARTIES

6.1 The parties shall be fully liable for the due performance of their obligations hereunder unless otherwise expressly provided in the body of the Agreement.

6.2 If any payment due under this Agreement is not received within thirty days from the date of the respective invoice, a service charge of 1.5 percent per month will be added to the unpaid balance.

6.3 L.A. shall be liable for the timely performance of its obligations. In the event of delay Owner may impose penalties on L.A. in amount of 0.05 % of the value of delayed services for each day of delay.

6.4 The L.A shall not be liable for approvals or construction delays outside of their scope of work. Access to the site without the hindrance of construction is required. Any delays will be documented in advance and approved by both parties.

7. FEES COMPUTATION

7.1 The fee for professional services shall not exceed US $447,600 (four hundred forty seven thousand six hundred US dollars) (hereinafter referred to as the "Fee for Professional Services"). Structure of the Fee for Professional Services is specified in the Description of Services.

7.2 The Owner is entitled to reduce the scope of L.A.'s services by sending L.A. a respective written notice. The Fee for Professional Services shall be then revised by the parties subject to the actual scope of services, provided, however, that the Owner shall compensate L.A. for all the services rendered and all reimbursable expenses made as of the date of such notice. No damages, future lost profits or other costs shall be reimbursed by the Owner.

7.3 Fee for Professional Services shall be paid in 20 monthly installments, each amounting to US $22,380 (twenty two thousand three hundred eighty US dollars).

7.4 Payments are due upon receipt of invoice to be issues by L.A. between the first and the tens day of reporting months.

7.5 The Owner is not obliged to any payments that are not specified in Description of Services unless negotiated in advance and authorized in writing.

8. ADDITIONAL SERVICES

8.1 L.A. shall provide only those services specified in this Agreement and the attached Description of Services. Any services not otherwise included in this Agreement or not customarily furnished in accordance with generally accepted L.A. practice, if required, shall be provided under separate agreement.

9. MISCELLANEOUS PROVISIONS

9.1 This Agreement is deemed to be negotiated and executed in the District of Columbia, is to be performed at least in significant part in the District of Columbia, is governed by its law, and may be enforced in that jurisdiction.

9.2 This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors, permitted assigns, legal or personal representative, or partners. Neither the Owner nor the L.A. shall assign, sublet or transfer any interest in this Agreement without the written consent of the other.

9.3 This Agreement with its Addendum I represent the entire and integrated agreement between the Owner and the L.A. and supersedes all prior negotiations, representations or agreement, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and L.A.

9.4 Addendum I to this Agreement shall be its integral part binding for both parties.

SIGNATURES

For OEHME, van SWEDEN & ASSOCIATES, Inc
Lisa E. Delplace, Principal

Lisa E. Delplace

For Maypaul Trading & Services Limited
Marina Konstantinidou, Director

9.2 This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors, permitted assigns, legal or personal representatives. The parties hereto shall not assign, sublet or transfer any interest in this Agreement without the written consent of the other.

9.3 This Agreement, with its Addendum, represent the entire and integrated agreement between the Owner and the L.A. and supersedes all prior negotiations, representations or agreements either written or oral. This Agreement may be amended only by written instrument signed by both Owner and L.A.

9.4 Addendum I to this Agreement shall be an integral part binding for both parties.

SIGNATURES

For DEHMEN VON SWEDEN & ASSOCIATES, Inc
Lisa E. Delplace, Principal

For Maypaul Trading & Services Limited
Kostas Konstantinidou, Director

OEHME, VAN SWEDEN & ASSOCIATES, INC.

Addendum 1
to the Agreement on Landscape Design
Services (the "Main Agreement")

DESCRIPTION OF LANDSCAPE DESIGN SERVICES

1. GENERAL CONDITIONS

1.1 L.A. shall provide all required specialty design services and construction expertise to furnish landscaping services under this Addendum I.

1.2 L.A. shall provide all necessary materials, reproduction, supplies, travel and incidentals as required to prepare the Design, detailed Construction Documents and to furnish construction observation services as detailed within this Addendum, clause 6.3.1.

1.3 Entire project area is split into two (2) parts (hereinafter referred to as "Phase I" and "Phase II") and delineated in Addendum II and described as follows:

1.3.1 Phase I consists of the scope of landscaping services that are performed approximately 20 meters beyond the house façade. Total Phase I area is approximately 31,855 square meters. The outside boundaries of Phase I area are as follows:

- Northern border is 70 meters away from the house façade
- Southern border is 67 meters away from the house façade
- Western border is 62 meters away from the house façade
- Eastern border is 121 meters away from the house façade

1.3.2 Phase II consists of the scope of landscaping services that are performed within the twenty meters space from the house façade. Total Phase II area is approximately 7,484 square meters, including the interior courtyard.

1.4 L.A. shall provide the required and timely coordination with local estimators for preparation of preliminary construction estimated for the project.

1.5 L.A. shall perform two working sessions with local staff on the care and maintenance of planting (i.e., overgrowths control measures, etc.)

LANDSCAPE ARCHITECTURE
URBAN DESIGN
MASTER PLANNING
HORTICULTURE
LANDSCAPE MANAGEMENT

800 G STREET, SE, WASHINGTON, D.C. 20003
202-546-7575 FAX 202-546-1035
EMAIL ovs@ovsla.com WEB www.ovsla.com

2. DESIGN DEVELOPMENT DOCUMENTS

2.1 L.A. shall develop landscaping design for entire project that shall include, but not be limited to, the following (hereinafter referred to as the "Design Development Documents"):

a) Site Plan with identification of main zones (e.g., main entrance zone, garden zone, zone for recreation, service zone, etc.) providing a breakdown of elements for each zone;
b) Site Plans with identification of the existing buildings and structures as well as proposed landscaping and architectural features (e.g., houses, roads, walkways, retaining walls, terraces, fountains, pools, service buildings, etc.);
c) Site Plan with proposed elevations
d) Site Plans of woodland clearing areas in support of the proposed landscaping features;
e) Site Plans of woodland restoration;
f) Planting Plans showing type, general shape and size of proposed plants;
g) Plant schedule indicating quantities and sizes;
h) 3D views for proposed landscaping features;

2.2 All recommendations by L.A. shall be recorded with photographs, sketch drawings, perspectives and working notes.

2.3 L.A. shall submit finalized Design Development Documents for review and approval by the Owner.

3. CONSTRUCTION DOCUMENTS

3.1 Upon the approved Design Development Documents the L.A. will develop Construction Documents according to Project Schedule defined in Clause 5 of this Addendum.

3.2 Construction Documents shall provide the required detailed information for all items outlined in Clause 2.1 and shall also include, but not be limited to, the following:

a) Grading plans;
b) Drainage system plans depicting piping, slope directions, written descriptions for local engineering review;
c) Irrigation system plans depicting valves, piping, controllers, point of connection and written descriptions for local engineering review;
d) Lighting system plans depicting electrical schematic diagrams, cable routes, and written descriptions for local engineering review;
e) Planting Plans;
f) Water pond plans, details and equipment and written descriptions for local engineering review;
g) Aquatic planting diagram.

3.3 L.A. is responsible to ensure that level of detail of Construction Document is self sufficient to allow the Client to obtain comprehensive price quotes for anticipated construction work from the qualified construction companies.

4. CONSTRUCTION OBSERVATION AND RECOMMENDATIONS

4.1 Construction Observation shall be performed in Phases.

4.2 L.A. shall provide on-site construction observation to monitor work performance and to assure that it is progressing in accordance with the approved plans and schedule. Such monitoring shall also assure that the selection, layout and installation of all plant materials are in conformance with approved planting plans.

4.3 L.A. shall coordinate with local project staff.

4.4 L.A. is responsible to issue required recommendations on the appropriate changes and/or improvements to the work during the course of the project.

5. PROJECT SCHEDULE

5.1 L.A. shall perform the required work in accordance with the following project schedule:

Service Description	Start Date	Completion Date
Design Development Documents	01 October 2006	28 February 2007
• Client Review and Approval	28 February 2007	14 March 2007
• Phase I Planting Design, Irrigation Design (entire site), Phase I low wall and paths	15 March 2007	01 May 2007
• Client Review and Approval	01 May 2007	15 May 2007
Construction Documents	15 May 2007	01 August 2007
• Client Review and Approval	01 August 2007	15 August 2007
Construction Observation, Phase I	16 May 2007	01 October 2007
Construction Observation, Phase II	01 May 2008*	01 July 2008*

Note: * - weather permitting

5.2 L.A. will coordinate activities with principal site project manager and other project team members in a timely manner to ensure adherence to the project schedule.

6. COMPENSATION

6.1 Compensation for the professional work described in the Description of Services will be calculated hourly in accordance with the rate schedule shown below, not to exceed the estimated fees shown in Clause 7.1 of the Main Agreement:

Service Description	Cost, US Dollars
Design Development Documents	117 000.00
Construction Documents, Phase I	91 000.00
Construction Documents, Phase II	128 000.00
Construction Observation, Phase I	61 600.00
Construction Observation, Phase II	50 000.00

6.2 The fees include participation by one senior staff person in up to twelve one-person visits for site work and review meetings in Kiev. Participation in additional meetings, if required, will be provided on a time and materials basis upon request.

6.3 Current schedule of hourly fees for L.A. is $325 for Founding Principal, $235 for Principal-in-Charge, $155 for Senior Associate, $125 for Associate, $105 for Landscape Design Staff I, $95 for Landscape Design Staff II, and $75 for Administrative Staff. This fee schedule is subject to change upon notice.

6.3.1 The hourly fees do not include incidental direct expenditures made in the interest of the project such as drawing reproduction, photographic services, postage, and transportation expenses. These expenses will be invoiced for reimbursement at 1.1 times actual cost. Transportation expenses will include Business Class airfare.

6.4 The monthly amount of reimbursable expenses shall not exceed 40% of the monthly invoice amount indicated in Clause 7.3. of the Main Agreement without prior written approval. Any expenses in the excess of the above 40% limit will be reimbursed only if made upon a separate approval of the Owner.

7. PROJECT REPORTING

7.1 L.A. shall prepare and submit monthly Progress Reports to the Owner's Representative for Owner's review detailing the work completed for the previous month.

7.2 Reports shall be submitted monthly thereafter, each within seven (7) working days after the last day of the period to which it relates. Failure to provide the report in due time may be a cause for delay of payments.

8. PROJECT TEAM

8.1 Ms. Lisa E. Delplace shall provide overall supervision of the work and participate in key meetings and presentations.

8.2 Other qualified staff members shall be assigned for support as required.

SIGNATURES

1. For OEHME, van SWEDEN & ASSOCIATES, Inc
Lisa E. Delplace

Lisa E. Delplace

_____

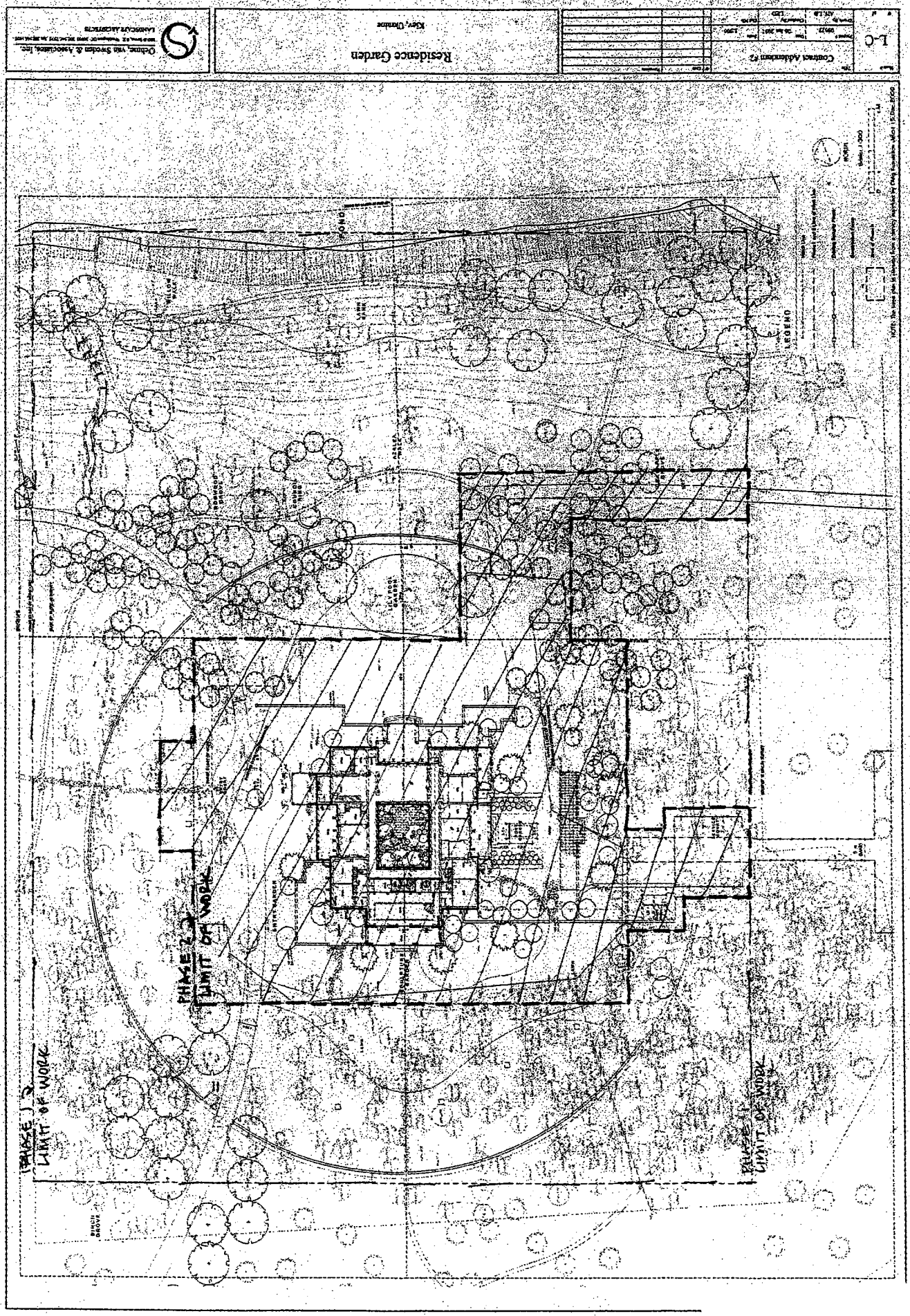
2. For Maypaul Trading & Services Limited
Marina Konstantinidou

_____

5. SIGNATURES

1. For OEHMP van SWEDEN & ASSOCIATES, Inc
Lisa B. Deplace

2. For Maypaul Trading & Services Limited
Marina Konstantinidou


Residence Garden
PHASE 2
LIMIT OF WORK
PHASE 3
LIMIT OF WORK
PHASE 1
LIMIT OF WORK

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

International Arbitration Tribunal

In the Matter of the Arbitration:

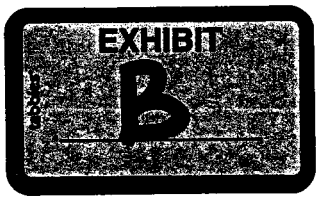
Oehme, van Sweden & Associates, Inc.
v.
Elena Franchuk (now Pinchuk)
and
Maypaul Trading & Services Limited

ICDR No. 50 527 T 00288 10

AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement dated February 2, 2007, and having been duly sworn, and having duly heard the proofs and allegations of the parties hereto, do hereby AWARD as follows:

For the reasons set out below more fully, I hold that (a) I have arbitral jurisdiction over Ms. Elena Franchuk, now known as Ms. Elena Pinchuk ("Ms. Pinchuk"), a Ukrainian national, in this arbitration; (b) Ms. Pinchuk and Maypaul Trading & Services Limited ("Maypaul"), a Cypriot corporation, are jointly and severally liable to Oehme, van Sweden & Associates, Inc. ("OvS"), a District of Columbia corporation, for breach of contract and in quantum meruit; (c) Ms. Pinchuk and Maypaul are jointly and severally liable for US $281,710.14 in damages and pre-award interest to the date of this Award, together with interest thereon accruing from and after the date of this Award until paid in full at the rate of 3% per annum, (d) Maypaul's



counterclaim is denied, and (e) Ms. Pinchuk and Maypaul are jointly and severally liable for fees, costs, and expenses in this matter, including US $178,985.46 in attorneys' fees and expenses incurred by OvS, together with interest thereon accruing from and after the date of this Award until paid in full at the rate of 3% per annum.

I. Procedural History

On April 13, 2010 OvS filed its Demand for Arbitration in this matter under the Construction Industry Arbitration Rules (the "Rules") of the American Arbitration Association ("AAA") against Ms. Pinchuk (denominated Elena Franchuk in the Demand) and Maypaul seeking US $169,933.96, plus interest, costs and expenses, for breach of an Agreement on Landscape Design Services, dated 2 February 2007, with Addenda (the "Contract") and restitution in quantum meruit. OvS asserts that Ms. Pinchuk, although not a signatory to the Contract, is subject to arbitral jurisdiction on a variety of legal theories and jointly and severally liable with Maypaul for such damages and restitution. Maypaul responded in an Answering Statement of Counterclaims on May 2, 2010, denying OvS's claims and asserting a counterclaim for US $50,000 for recovery of pre-paid professional fees on account of "construction observation" under the Contract, together with pre-award interest, costs and expenses.

Ms. Pinchuk joined that Statement to contest arbitral jurisdiction. In a Joint Stipulation of Uncontested Facts dated February 17, 2011, the parties stipulated that "Elena Franchuk's married name is Elena Pinchuk." Throughout this Award references to Ms. Pinchuk and Ms. Franchuk refer to the same person. This Award is binding on that person without regard to the name currently being used by her.

In addition to their respective claims, both OvS and Maypaul seek an order recovering fees, costs and expenses in the arbitration, including attorneys' fees and expenses.

The Contract, as noted above, was signed solely by OvS and Maypaul. The Contract contained the following arbitration clause, calling for the use of the AAA Construction Industry Arbitration Rules and specifying the District of Columbia as the situs for the arbitration.

> All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration in the District of Columbia in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree in writing otherwise. This Agreement to arbitrate and any agreement to arbitrate with an additional person or persons duly consented to by the parties to this Agreement shall be specifically enforceable under the prevailing arbitration law. Arbitration fees may be assessed.

Under Article 9.1 of the Contract, the rights and obligations of the parties to the Contract are governed by the law of the District of Columbia.

> This Agreement is deemed to be negotiated and executed in the District of Columbia, is to be performed at least in significant part in the District of Columbia, is governed by its law, and may be enforced in that jurisdiction.

It is common ground between the parties in this arbitration, as well as my own understanding, that under District of Columbia law if there is no precedent from the District of Columbia courts to resolve an issue of District of Columbia law, then a District of Columbia court will look to the jurisprudence of the State of Maryland for assistance. See, e.g., *Napolean v. Heard*, 455 A.2d 901, 903 (D.C. 1983).

Following the ICDR's Notice of Preliminary Hearing dated September 23, 2010, I held a preliminary hearing by conference call on October 1, 2010 to organize the proceedings. Counsel for OvS and Maypaul participated. Ms. Pinchuk appeared specially through the same counsel as

Maypaul to contest arbitral jurisdiction. At the preliminary hearing, Ms. Pinchuk sought dismissal of the proceedings against her.

After discussion with counsel, I ordered in Procedural Order No. 1, dated October 17, 2010, an expedited briefing and hearing schedule on the issue of arbitral jurisdiction over Pinchuk. In addition, the parties agreed to a general timetable for the arbitration, also as set forth in Procedural Order No. 1 (later modified as described in an email dated November 18, 2010 from counsel for OvS). The parties further reconfirmed at the preliminary hearing that they had no objection to my continued service as arbitrator. See Procedural Order No. 1, ¶ 6.

In that preliminary hearing, the parties also agreed that the AAA Construction Industry Arbitration Rules and the ICDR's May 2008 Guidelines Concerning the Exchange of Information in International Arbitration were applicable to these proceedings. See Procedural Order No. 1, ¶ 1. In light of the international character of this dispute, the international arm of the AAA, the International Centre for Dispute Resolution (the "ICDR") administered this arbitration.

In accordance with Procedural Order No. 1, the parties submitted briefs and evidence on the issue of arbitral jurisdiction over Ms. Pinchuk. On December 26, 2010, I ordered in Order No. 2 that the issue of arbitral jurisdiction over Ms. Pinchuk be joined with the merits and resolved after completion of the full hearings. I further ordered that Ms. Pinchuk participate in discovery.

> To Counsel,
>
> Paragraph 2(b) of Procedural Order No. 1, dated October 17, 2010, established a procedure for determining whether a sufficient showing had been made as to arbitral jurisdiction over Ms. Elena Pinchuk ("Pinchuk") to permit discovery from and by Pinchuk and that the question of arbitral jurisdiction over Pinchuk be determined in connection with the hearings, or alternatively, that she should be dismissed from the case for lack of arbitral

jurisdiction. Terms used in Procedural Order No. 1 and used herein shall have their respective defined meetings when used in this Order No. 2.

In this connection, I have reviewed OvS' Memorandum dated December 3, 2010, in Support of Prima Facie Showing of Jurisdiction Over Respondent Elena Franchuk, and accompanying materials, and Maypaul's Memorandum, dated December 22, 2010, in Opposition to a Prima Facie Showing of Jurisdiction over Respondent Elena Pinchuk and accompanying materials, and such other information as I have considered appropriate in the circumstances.

Based on that review, I have concluded that a sufficient showing has been made as to arbitral jurisdiction over Pinchuk to permit discovery from and by Pinchuk and that the question of arbitral jurisdiction over Pinchuk should be determined in connection with the hearings in this matter. Accordingly, the Parties shall conduct such discovery in accordance with Procedural Order No. 1, as modified in accordance with the mutual agreement of the Parties set out in the email dated November 18, 2010 from Kelly S. Delaney to, *inter alia*, the undersigned Arbitrator.

This Order No. 2 is without prejudice to final determination of the issue of arbitral jurisdiction over Pinchuk following the hearings as part of the final award in this matter.

In light of the timetable for this matter, I have further concluded to reserve my statement of reasons for this Order No. 2. Instead, I will address the matters I have considered for purposes of this Order No. 2 as part of that final award, once a more complete record is available for resolving the issue of arbitral jurisdiction over Pinchuk.

I thank counsel and the Parties for their cooperation.

Best Wishes for the New Year.

Mark Kantor
Arbitrator

Thereafter, document production proceeded. The parties submitted witness statements from Ms. Lisa Delplace, Chief Executive Officer and principal of OvS, Ms. Vernae Jones-Seals, Chief Financial Officer of OvS, Ms. Aurika Dmitrieva, formerly of a company known as Service Park, and Mr. Alexandr Chernyavskiy of Svit Shylahiv Transport and Forwarding Co., LLC ("Svit Shylahiv"). Oral hearings, including testimony by teleconference and video conference,

were originally scheduled for February 9-10, 2011. Due to complications over the availability of documents and difficulties with technology and schedules, the hearings were not completed until March 30, 2011. I nevertheless held the record open at that time for submission of evidence on certain outstanding matters.

At the end of the oral hearings, I inquired, consistent with Rule R-32(a) of the AAA Construction Industry Arbitration Rules and subject to the open items, whether any party had any reason to believe they had not been treated with equality, had not had a right to be heard, or had not been given a fair opportunity to present their case. Both counsel stated that their requirements had been satisfied. Transcript, pps. 682-683, lines 13-25, 1-19

Thereafter, the evidence on outstanding matters was provided. The parties submitted their post-hearing briefs on May 3, 2011, along with lists of the issues presented for decision in the case. The parties also made costs submissions on May 3, 2011.

In response to an inquiry by me on May 4, counsel for Maypaul and Pinchuk confirmed by email dated May 5, 2011 to me and to the ICDR that "The parties have consulted and determined that neither Claimant nor Respondents have any additional offers of proof or witnesses to be heard." See also Transcript, pps. 681-682, lines 17-25, 1-12. I closed the hearing on May 5, 2011 in accordance with Rule R-37(a) of the AAA Construction Industry Arbitration Rules. During the Preliminary Hearing, the Parties waived the 30-day time period for awards in Rule R-43 of the AAA Construction Industry Arbitration Rules. See Procedural Order No. 1, ¶ 3.

II. Facts

I set out the following non-exhaustive summary of facts for the convenience of the parties. I have carefully reviewed all of the submissions and evidence presented to me by the parties in these proceedings, even if a particular filing or exhibit is not specifically mentioned in this Award. This dispute revolves around a claim by OvS against Maypaul and Ms. Pinchuk relating to architectural and landscape design services in connection with the Contract with respect to a property in Kiev, Ukraine. OvS asserts that it should be compensated for services rendered either under the Contract, as modified, or in quantum meruit pursuant to a relationship covered by the arbitration agreement in the Contract.

The property at issue was owned by Svit Shylahiv, a company owned by Ms. Pinchuk and her husband Mr. Victor Pinchuk. OvS claims all the work was done upon direction from Ms. Pinchuk and her representatives and for her benefit in developing a residence for the Pinchuks on the property. OvS further claims that Ms. Pinchuk is bound to the arbitration clause in the Contract by operation of principles of agency, conduct constituting consent, and contract law.

Maypaul and Ms. Pinchuk respond that Maypaul has fully complied with its payment obligations under the Contract. They assert that the services provided by OvS were covered by the Contract and compensated for in accordance with the payment provisions of the Contract - a maximum price, fixed-duration contract. Maypaul and Ms. Pinchuk further argue that no modifications to the Contract were ever effected, as negotiations for an Addendum extending and modifying the Contract were unsuccessful. Maypaul seeks US $50,000, plus interest, for payments to OvS on account of "construction observation" services that were never provided under the contract.

Additionally, Ms. Pinchuk asserts that she never submitted to arbitral jurisdiction and is not bound to the arbitration clause in the Contract, whether by agency, conduct, contract laws or other principles.

The facts in this dispute are not simple. The principal persons and companies involved include the following. OvS, the claimant in this matter, is an architectural and landscape design company based in Washington, D.C. OvS provides services worldwide. In 2004, OvS was introduced to Victor and Elena Pinchuk and then began to provide architectural and landscape design services to the Pinchuks for the grounds surrounding a residence in Kiev, Ukraine to be occupied by the Pinchuks (the "Residence"). At that time, no written agreement covering those services existed. Instead, OvS issued invoices to the Pinchuks, which were paid in accordance with their terms. Ms. Lisa Delplace, Chief Executive Officer and a principal of OvS, was in charge of the project for landscape services at the Residence at all relevant times. There do not appear to have been any disputes with respect to those services or invoices. Those invoices did not contain an arbitration clause.

Mr. Victor Pinchuk is a prominent Ukrainian businessman. Mr. and Ms. Pinchuk are sole owners of EastOne Group Ltd., a Ukrainian group of companies. Through Pantoho, Ltd., they own Svit Shylahiv. Svit Shylahiv owns the property (the "Kiev Property") of which the Residence forms a part. The Kiev Property is apparently zoned as a health and rehabilitation center and includes several residential properties. Whatever the function of other parts of the Kiev Property, it is clear from the factual record that OvS's architectural and landscape design services were for residential property intended to be occupied by the Pinchuks as their residence. In correspondence, the Residence was regularly referred to as "Villa Elena", "Elena's project",

the "Pinchuk Residence" or "the Residence Garden Project." Also, Sec. 1.3 of Addendum I to the Contract repeatedly refers to the "house façade."

The landscape design work for the Residence was put on hold for a time. When work resumed in 2006, OvS sought to put the arrangement with the Pinchuks on a contractual basis. Starting in late 2006, OvS proposed drafts of an agreement based upon their standard form contract. Ms. Aurika Dmitrieva and Mr. Konstantin Ussar, among others, provided comments on the document. Ms. Dmitrieva described herself in her Witness Statement and in testimony as Ms. Pinchuk's personal representative and regularly relayed comments "from Elena." She testified that she would not have made requests of OvS without the approval of Ms. Pinchuk. Dmitrieva Transcript 638:17-22. Ms. Dmitrieva first held a position as the Managing Director of Non-Business Activities at Interpipe Group ("Interpipe"), which is controlled by the Pinchuks. Later, she served as Director of Service Park, an affiliate that shared office space with Interpipe. No further information is available on this record about the correct corporate name or location of Service Park. Regardless of her corporate titles, it is clear from the factual record that Ms. Dmitrieva acted as business assistant to and representative of Ms. Pinchuk in her dealings with respect to the Contract and the Residence.

Mr. Ussar was Interpipe's project manager for development of the Kiev Property, including the Residence. Mr. Ussar regularly sought approvals and relayed instructions from Ms. Pinchuk.

According to Ms. Dmitrieva and others, Mr. Andrey Shapovalov was Ms. Pinchuk's personal assistant. Ms. Shapovalov was also involved in meetings and correspondence with respect to the Contract and the Residence.

Numerous exhibits in the record, as well as witness statements and testimony from Ms. Dmitrieva and Mr. Alexandr Chernyavskiy, show that Ms. Pinchuk was providing detailed instructions regarding the proposed Contract to Ms. Dmitrieva, Mr. Ussar and Mr. Chernyavskiy, among others, for presentation to OvS. Ms Pinchuk attended a number of meetings personally with OvS, participated in telephone calls and made requests and decisions regarding a variety of issues in the period leading up to execution of the Contract, as illustrated by the following incidents.

On October 23, 2006, Mr. Shapovalov sent an email entitled "Villa Elena" as part of an email chain with Lisa Bowes, an OvS employee in which he wrote "you should send drawings to me and billing information to Aurika." OvS Exhibit 23. A few days later, Mr. Shapovalov confirmed receipt of the drawings and stated "Elena had been having a very hard schedule and I hadn't possibility to show those to her." OvS Exhibit 24 (October 27, 2006)

On the same day, Mr. Oleg Kuznetsov, another employee of Interpipe who had regular dealings with OvS, wrote to Ms. Bowes of OvS, stating "I'd like to inform you, that we have received your contract and Elena together with Aurika is studying it now. I hope that next week we will give you our decision. Maypaul's witness Mr. Chernyavskiy, a Svit Shylahiv employee, testified that he though Mr. Kuznetsov was a personal assistant to either Ms. Dmitrieva or Ms. Pinchuk.

The draft Contract and the landscape design were thereafter revised by OvS. On December 21, 2006, Mr. Ussar wrote to Ms. Delplace stating "we will have to present the contract terms and updated landscape plan together with Aurika to the Client." OvS Exhibit 30. As explained more fully below, references throughout these communications to the "client' or

the "customer" were references to Ms. Pinchuk. On January 8, 2007, Ms. Delplace emailed Mr. Ussar, with a copy to Ms. Dmitrieva, inquiring "Has there been any approval?" OvS Exhibit 31.

On January 15, 2007, in anticipation of a meeting between OvS and Ms. Pinchuk, Mr. Ussar forwarded a number of comments and requests from Ms. Pinchuk about the concept design. OvS Exhibit 32. On the same day, Mr. Ussar forwarded more detailed comments on the proposed contract in Track Changes format. OvS Exhibit 33. In a further exchange about the work timetable in the draft contract, Mr. Ussar wrote "it is important to make sure we both have a clear understanding of the scope and deliverables of the contract as well as to ensure timely completion of required by OvS client services." OvS Exhibit 35.

Throughout this period, the identity of the counterparty who would sign the Contract with OvS remained blank. On February 1, 2007, Ms. Delplace wrote Mr. Ussar saying "The contract and addendum are ready but I will need to know who is signing for the Addendum I and a name, address and signor for the Agreement. Please let me know and I will finalize the documents." OvS Exhibit 36. The next day, Mr. Ussar responding, specifying that Maypaul, represented by Ms. Marina Konstantinidou, would be the signatory. Id. Mr. Ussar also provided Maypaul's bank account details in Cyprus. This was the first time Maypaul's name was introduced into the discussion.

The Contract, dated February 2, 2007, was executed by OvS with this information inserted, and then sent to Ukraine. In particular, Maypaul was designated in the introductory paragraph of the Contract as the "Owner" (see OvS Exhibit 37, p. 1), as well as signatory to the Contract and Addendum I. Thus, Maypaul had the rights and responsibility of the "Owner" under the Contract, including providing a legal description and survey (Art. 2.1), providing written

authorization to proceed (Art. 2.2), termination (Art. 5.2), imposition of delay penalties (Art. 6.3) the right to reduce the scope of services unless agreed in writing in advance (Art. 7.5) and the authority to agree to amendments and modifications (Arts. 1.2, 6.4, 7.5 and 9.3 of the Contract and Sec. 6.4 of Addendum I). As one of "the parties" to the Contract, Maypaul was also bound by the arbitration clause in Art. 4.1 of the Contract.

Notwithstanding the designation of Maypaul as "Owner" in the Contract and as signatory, the only time Maypaul ever appeared thereafter during performance of the Contract (until commencement of this arbitration) was as initiator of wire transfers making payment out of Maypaul bank accounts. There is no evidence in the record showing which employee or representative of Maypaul authorized those wire transfers. Apparently, no Maypaul employee or representative, including Ms. Konstantinidou, ever sent any communication to OvS, appeared at any meeting, or executed any documents other than the Contract (and presumably the wire transfer instructions to the initiating banks). There is no record that any Maypaul employee or representative reviewed performance by OvS under the Contract, reports presented by OvS or invoices submitted by OvS.

Several provisions of the Contract are relevant to this dispute. First, as noted above, Maypaul is designated as the "Owner" and "party" to the Contract.

> This Agreement on landscape design services (hereinafter referred to as the "Agreement") is entered into by and between
>
> Maypaul Trading & Services Limited, a legal entity duly organized and operating under the laws of Cyprus, with its registered office at: Arch. Makariuo III, Nicosia, Cyprus, P.C. 1077, Nicosia, Cyprus, represented by Marina Konstantinidou (hereinafter referred to as the "Owner")
>
> And

> OEHME, van SWEDEN & ASSOCIATES, Inc. (hereafter called L.A.), legal entity duly organized and operating under the laws of Washington D.C. USA, having its registered office at 800 G Street, SE, Washington, D.C. 20003, represented by Ms. Lisa Delplace.
>
> The Parties hereby agreed as follows.

OvS agreed in Article 1 to perform the services described in Addendum I to the Contract and additional services" if requested, subject to an agreed upon revision in the scope of services and authorized fee(s)."

> 1. RESPONSIBILITIES OF L.A.
>
> 1.1 The L.A. agrees to provide professional services outlined in this Agreement and the Description of Landscape Design Services attached hereto as Addendum I (hereinafter referred to as the "Description of Services")
>
> 1.2 Additional services may be performed if requested, subject to an agreed upon revision in the scope of services and authorized fee(s).

A plan appended to the Contract identified the area of the Residence as the object of the Contract. Article 8.1 of the Contract specified that services not otherwise included in the Contract "or not customarily furnished in accordance with generally accepted L.A. [landscape architect] practice if required, shall be provided under separate agreement.

> 8.1 L.A. shall provide only those services specified in this agreement and the attached Description of Services. Any services not otherwise included in this Agreement or not customarily furnished in accordance with generally accepted L.A. practice, if required, shall be provided under separate agreement.

Article 6.4 of the Contract addressed construction delays, and stated that "Any delays will be documented in advance and approved by both parties."

Article 7 of the Contract specified that professional fees will not exceed US$447,600. That sum was to be paid in 20 equal monthly installments. Article 7.5 further provided that "The

Owner is not obligated to make payments outside the Description of Services unless negotiated in advance and authorized in writing."

7. FEES COMPUTATION

7.1 The fee for professional services shall not exceed US $447,600 (four hundred forty seven thousand six hundred US dollars) (hereinafter referred to as the "Fee for Professional Services"). Structure of the Fee for Professional Services is specified in the Description of Services.

7.2 Fee for Professional Services shall be paid in 20 monthly installments, each amounting US $22,380 (twenty two thousand three hundred eighty US dollars.

7.5 The Owner is not obliged to any payments that are not specified in Description of Services unless negotiated in advance and authorized in writing.

Section 6 of Addendum I to the Contract provided additional detail on compensation for services and reimbursement of expenses. Section 6.1 specified that compensation would be calculated on the basis of hourly rates, but "not to exceed the estimate fees shown in Clause 7.1 of the Main Contract."

6. COMPENSATION

6.1 Compensation for the professional work described in the Description of Services will be calculated hourly in accordance with the rate schedule shown below, not to exceed the estimate fees shown in Clause 7.1 of the Main Agreement.

Service Description	Cost, US Dollars
Design Development Documents	117 000.00
Construction Documents, Phase I	91 000.00
Construction Documents, Phase II	128 000.00
Construction Observation, Phase I	61 600.00
Construction Observation, Phase II	50 000.00

6.2 The fees include participation by one senior staff person in up to twelve one-person visits for site work and review meetings in Kiev. Participation in additional meetings, if required, will be provided on a time and materials basis upon request.

6.3 Current schedule of hourly fees for L.A. is $325 for Founding Principal, $235 for Principal-in-Charge, $155 for Senior Associate, $125 for Associate, $105 for Landscape Design Staff I, $95 for Landscape Design Staff II, and $75 for Administrative Staff. This fee schedule is subject to change upon notice.

6.3.1 The hourly fees do not include incidental direct expenditures made in the interest of the project such as drawing reproduction, photographic services, postage, and transportation expenses. These expenses will be invoiced for reimbursement at 1.1 times actual cost. Transportation expenses will include Business Class airfare.

6.4 The monthly amount of reimbursable expenses shall not exceed 40% of the monthly invoice amount indicated in Clause 7.3. of the Main Agreement without prior written approval. Any expenses in the excess of the above 40% limit will be reimbursed only if made upon a separate approval of the Owner.

Section 6.2 specified that 12 one-person site visits were covered by these fees. Additional meetings would be on a "time and materials basis upon request." I note that, during performance of the Contract, OvS sent several OvS staff on site visits to the Residence numerous times, at the request or with the acquiescence of Ms. Pinchuk and Maypaul.

Section 6.3.1 and 6.4 of Addendum 1 addressed expense reimbursements. Incidental direct expenditures were to be reimbursed under Section 6.3.1 at 1.1 times actual cost. Section 6.4 provided that the monthly amount of reimbursable expenses would not exceed the monthly invoice amounts without prior written approval. Expenses in excess of the 40% limit would be reimbursed "only if made upon a separate approval of the Owner." On numerous occasions, however, monthly invoiced expenses noticeably exceeded 40% of monthly invoiced fees. In fact, expenses exceeded 40% of the invoiced fees in 8 out of the 17 monthly invoices sent covering work done prior to July 1, 2008. See OvS Exhibit 121. Maypaul paid those invoices without

objection. There is no evidence in the record that "a separate approval of the Owner" for those expenses was ever sought or issued.

Under Article 6.2 of the Contract, a service change of 1.5% per month (18% per annum) would be added to any sums unpaid under the Contract for at least 30 days.

Finally, the Contract contained a "successors and assigns" clause in Art. 9.2 and an "integration" clause in Art. 9.3. The "successors and assigns" clause prohibited transfers of interest in the Contract without prior written consent. The "integration" clause provided that the Contract supersedes all prior arrangements. The last sentence of Art. 9.3 provided that the Contract could only be amended by a written instrument signed by both Owner and Landscape Architect.

> 9.2 This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors, permitted assigns, legal or personal representative, or partners. Neither the Owner nor the L.A. shall assign, sublet or transfer any interest in this Agreement without the written consent of the other.
>
> 9.3 This Agreement with its Addendum I represent the entire and integrated agreement between the Owner and the L.A. and supersedes all prior negotiations, representations or agreement, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and L.A.

Under the Description of Services appended to the Contract as Addendum I, services were to be completed by July 1, 2008. While the parties have referred to the Contract during this arbitration as "terminating" on that date, I do not see such a termination provision in the Contract or Addendum I, merely the final completion date set out in the Addendum.

Maypaul and Ms. Pinchuk rely on these express provisions to show that (a) as a non-signatory, Ms. Pinchuk never consented to arbitrate disputes with OvS, and (b) any services

rendered by OvS were either within the Description of Services in Addendum I and thus fully compensated by the maximum US $447,600 professional services fee or (ii) outside the Contract and never agreed in writing as called for by the Contract.

However, following the pattern established starting in 2004, the parties began ignoring these provisions immediately upon execution of the Contract. The Contract designated Maypaul as "Owner," yet Maypaul did not own the Kiev Property or the Residence. The Kiev Property was owned by Svit Shylahiv. See Maypaul Exhibit 6. Svit Shylahiv's sole shareholder was Pantoho Ltd., which in turn was controlled by EastOne Group. According to the Joint Stipulation of Uncontested Facts dated February 17, 2011, Mr. and Ms. Pinchuk are the sole owners of EastOne Group. According to Maypaul and Ms. Pinchuk, Svit Shylahiv contracted with a company named Transport Investments, LLC ("TI") to handle landscape design for the Kiev Property. That agreement is not, however, in the record. TI, in turn, entered into an Agency Agreement dated 10 January 2007 (Maypaul Exhibit 7) with Maypaul, thereby entitling Maypaul to enter into the Contract with OvS on behalf of TI. That agency relationship, and the existence of TI, did not become disclosed until this arbitration.

Again according to their submission, neither TI nor Maypaul are affiliated with any of Ms. Pinchuk's companies, including Interpipe and EastOne Group. Nor is Ms. Pinchuk an officer, director or owner of TI or Maypaul.

Thus, whatever Maypaul's relationship with the Kiev Property or any Pinchuk enterprise may have been, it was surely not the "Owner" of either the Residence specifically or the Kiev Property generally.

The Contract also specified in Art. 2.3 that "Owner shall supply written authorization to proceed with approved work." Maypaul never supplied any written authorizations to proceed, nor did it ever send any work approvals. Indeed, there is no evidence in the record that any authorization to commence work was ever issued. Instead, the practice of Ms. Pinchuk providing work approvals and instructions that existed prior to execution of the Contract continued after as well.

Illustratively, just five days after the date of the Contract Mr. Ussar advised OvS about the stone-work pattern "preferred by Elena." As he stated in his email to Ms. Delplace, "The shape, size and color of the stone were approved by Elena on 06 February 2007."

Ms. Pinchuk (under the name Olena Leonidiana Franchuk) entered into a Preliminary Lease Agreement dated 1 August 2006 with **Svit** Shylahiv with respect to the Residence. Maypaul Exhibit 1. Under the Preliminary Lease Agreement, Ms. Pinchuk was entitled to the following rights.

A) To take part in choosing, ordering and performing interior works at the Object and territory improvement work;

B) To bring in reasonable critical comments and desires in respect of the Object Construction, furnishing and improvement.

The "Object" was defined in the Preliminary Lease Agreement as an "Entertainment Center (being a part of Rehabilitation and Health Centre according to the Master Plan Project)" and 10 hectares of adjacent territory, not as the residence it obviously was. Again, the existence of this Preliminary Lease Agreement did not become disclosed until after this arbitration was commenced. The record of correspondence with OvS from the commencement of work until collapse of the relationship in 2009 does not seem to even contain the word "lease."

Following execution of the Contract, Ms. Pinchuk clearly exercised far more powerful rights than just "taking part" in interior works and territory improvements and "bringing in reasonable critical comments and desires." She exercised the right of approval repeatedly to both grant and deny approval, gave instructions through Ms. Dmitrieva, Mr. Shapovalov and Mr. Ussar, among others, received for review the Monthly Progress Reports, received and approved design plans, met with OvS representatives personally at meetings wherein she gave instructions and approvals, and reviewed payment requests.

The documentary record in this arbitration contains the following examples of this course of performance.

Mr. Ussar inquired on January 31, 2007 if OvS had experience designing fences. OvS Memorandum Exhibit 27. Upon receiving a positive response from OvS, Mr. Ussar asked Ms. Delplace "Would you consider it possible to prepare a few concepts for the fence ASAP." Id.

Mr. Ussar looked to Ms. Pinchuk for the dates of an OvS trip to Ukraine. OvS Exhibit 39 (February 14, 2007). Exhibit 41 (February 15, 2007).

Mr. Ussar referred to "all the alterations to the house on the drawing I sent to you on 16.02.07." He further reported that "Elena eliminated or altered some of the terraces. The size of the house has also increased due to redesign of the swimming pool area.... Well, Elena wants the garden that you work on to "come very close" to the house for ALL altered areas." OvS Exhibit 42 (February 19, 2007).

Mr. Ussar advised Ms. Delplace that "We would like to be able to present something to Elena when she is back." OvS Exhibit 43 (February 20, 2007).

Mr. Ussar requested additional fence options for Ms. Pinchuk to consider. "I have meeting with Elena tomorrow. It would be nice to present her a few more options." OvS Exhibit 45 (February 26, 2007).

Mr. Ussar advised Ms. Delplace that "Elena asked me to consult with you on the following matter: she wants to add one more fence for the house." OvS Exhibit 52 (March 30, 2007).

Mr. Ussar advised that "there is no approval to proceed with planting direction yet. The major concern for the Client at the moment....." OvS Exhibit 55 (April 23, 2007).

Notably, each of Ms. Delplace, Ms. Dmitrieva and Mr. Chernyavskiy testified that the terms "Client" and "Customer" referred to Ms. Pinchuk. See, e.g., Delplace Transcript 111:24-25, 112:5; 297:14-23; 298:6-301.9; 302.14-22; Dmitrieva Transcript 397:19-23, 621:22-24; Chernyavskiy Transcript 491:10-492:9.

That practice was also documented by several Exhibits. In the April 23 message, for example, Mr. Ussar stated that the "meeting on 9-11 May is not confirmed with the Client yet....." thereby demonstrating that the term "Client" referred to Ms. Pinchuk. Similarly, on May 23, 2007, Mr. Ussar advised OvS that "In order to preserve the existing trees the Client decided to bend the tunnel.... The Client believe that the main driveway should be designed coming from the house they live at present. Could you please consider this and develop new design option for the Client to look at." OvS Exhibit 57 (May 23, 2007). The reference above to "the house they live in at present" again confirms that the term "Client" referred to Ms. Pinchuk.

Following Mr. Ussar's departure from the project, Ms. Dmitrieva became a principal point of contact, along with Mr. Chernyavskiy, Mr. Peter Fedosik (manager of the project), Ms.

Alina Kryvenko (landscape architect) and Ms. Volodia Ostrovshko (interpreter, assistant). On September 27, 2007, the latter three contacted Ms. Delplace to relay a request from "the customer" that OvS come to Kiev for meetings October 29-31. OvS Exhibit 64 (September 27, 2007). Again, the context makes clear that this request came from Ms. Pinchuk.

Ms. Kryvenko wrote Ms. Delplace to advise that "the customer doesn't understand clearly how will look the design of the courtyard. So….., she came back to the topic and asked about making a kind of simulation of the design in real shape on the other side." OvS Exhibit 66 (October 5, 2007). Here too, "she" (the customer) was obviously Ms. Pinchuk.

On January 18, 2008 OvS received a detailed set of questions about a number of design and planning issues from Mr. Chernyavskiy. OvS Memorandum Exhibit 30. In that message, Mr. Chernyavskiy reported "As the same proposal of design of court yard sent by your side on October 23 of 2006, December 6 of 2006 and January 8 of 2008 is not approved by Elena, please, present a new variant of the court yard…." In that same email, he also wrote "Elena requested to make the length of the lily pond the same as the central section of the building on eastern side," "Elena is waiting for proposals about design of metallic railing (fence) of the terrace, the material of coating the retaining wall, the material of terrace pavement," and "Elena is waiting for the proposal about the pavilion above the entrance to the tunnel." In light of later comments by Ms. Pinchuk's representatives about delays in finalizing the courtyard and the lily pond, and the changes made by Ms. Pinchuk to the terrace and tunnel, these requests are notable.

Mr. Alexandr Chernyavskiy informed OvS that "Elena could meet Lisa at the beginning of week 12, so it is better to come Kiev from 16 till 19 of March." OvS Exhibit 73 (February 20, 2008). On March 4, Ms. Bowes of OvS emailed Ms. Delplace to report a conversation with Mr.

Chernyavskiy about a meeting with "the client" on the 17th or 18th of March" Ms. Bowes advised that "He is going to confirm with the client and get back to us.... He also said that Aurika and he would discuss payment issues with the client as well." OvS Memorandum Exhibit 34 (March 4, 2008). On March 13, though, Mr. Chernyavskiy emailed "I have to inform you that 5 minutes ago, Mrs. Elena has cancelled your visit.... We will offer you new dates of your visit to Kiev next week." OvS Exhibit 76 (March 13, 2008). This exchange illustrates that Ms. Pinchuk determined, and unilaterally cancelled, meeting dates. The exchange also shows that Ms. Dmitrieva and Mr. Chernyavskiy looked to Ms. Pinchuk for approval to resolve payment issues.

Costs for plantings, as well as the choice of plants, also required Ms. Pinchuk's approval. Mr. Chernyavskiy requested Ms. Delplace to "please send us a list of plants and prices for the 1 fase (springtime) and 2 fase (autumn time) to have Elena's approval." OvS Exhibit 77 (March 18, 2008).

Similarly, on March 31, 2008, Mr. Fedosik wrote to Ms. Delplace stating "Also during my last meeting with Elena, she requested to present her the general list (Bruns and Lorenz together) with final estimation for her approval during the next meeting...." OvS Exhibit 80 (April 3, 2008).

The location and purpose of entrances was also subject to Ms. Pinchuk's decision. In mid-May 2008, Ms. Kryvenko wrote to OvS "the customer has approved the main entrance at the point A. At the same time point B will be used as the service entrance for the staff." OvS Exhibit 84 (May 13, 2008).

Approval of payments under the Contract was the task of Ms. Dmitrieva, who stated in her Witness Statement that she "served as Mrs. Pinchuk's representative at the Kiev Property. . ."

Ms. Dmitrieva testified that she would "compare that the work and the invoice correspondence to each other, and I would say 'okay' to the invoice." Dmitrieva Transcript 600:16-21.

Later meetings with OvS also occurred at the instance of Ms. Pinchuk. "Elena proposed you do come Kiev next time from 21 till 24 June." OvS Exhibit 87 (June 2, 2008).

OvS's Site Visit Report for meetings 22-28 June reported that "The client is leaving for vacation today and will not be available for another two months. OvS Exhibit 90.

The foregoing illustrates that: (i) There is no evidence that Maypaul or any of its officers or employees played any role in decision-making regarding the Contract, including ownership of the Kiev Property or the Residence, negotiations, review of proposals or designs, approvals and authorizations, review of invoices, compliance with the timetable, arrangement of meetings in Kiev or attendance at those meetings, requiring modifications to the design plans such as the addition of fences, compliance with performance obligations, price decisions, approval of invoices, resolution of payment issues, and similar obligations of the "Owner" under the Contract; (ii) The rights and responsibilities of the "Owner" under the Contract, other than the mechanical task of initiating wire transfers out of Maypaul's bank accounts, were undertaken by Ms. Pinchuk personally or by Mr. Ussar, Ms. Dmitrieva and others on behalf of and at the instruction of Ms. Pinchuk; and (iii) Alterations to design plans, the scope of services, authorization of expenditures, the timetable for development of the Kiev Property and the Residence, and the timetable for development and implementation of the architectural and landscape design services under the Contract were undertaken by Ms. Pinchuk and her representatives without regard to the provisions of the Contract requiring written agreements in advance by Maypaul.

101 (September 2, 2008). On September 17, 2008, Ms. Marchuk wrote on behalf of Mr. Chernyavskiy to advise OvS that important work remained to be completed under the Contract, such as the courtyard and the lily pool, and that a sum for "constructions observation" (US$50,000) had been paid but those services had not been performed - because the related construction to be observed had not yet commenced. OvS Exhibit 103 (September 17, 2008).

Ms. Marchuk further advised that the foregoing work was to be compensated out of payments already made under the Contract. Id. Accordingly, "only works/services not mentioned in the previous contract are due to payment (i.e. changes to drawings the 100% Construction Document dated 14 July, 2008 and approved by the Client under the Main Agreement or previous Addendum to the Agreement, transportation expenses and other incidental direct expenditures made in the interest of the Project." Id.

Ms. Delplace responded to Ms. Dmitrieva expressing "extreme disappointment" and postponed further travel to Kiev. Id.

Despite efforts to resolve the dispute, no agreement was reached. Ms. Delplace traveled again to Ukraine between September 24 and October 3. OvS Exhibit 117. A last meeting among Ms. Pinchuk, Ms. Delplace and a Mr. Ivanchenko of Headz Development in late November 2008 failed to resolve matters. OvS Exhibit 115 (December 3, 2008). A further telephone call between Ms. Pinchuk and Ms. Delplace in April 2009 appeared to move forward a possible solution. OvS Exhibit 120 (April 29, 2009). That too failed of its promise. This arbitration then ensued.

III. Arbitral Jurisdiction Over Ms. Pinchuk.

As previously noted, Ms. Pinchuk has consistently objected to arbitral jurisdiction over her in this dispute, on the basis that she did not sign the Contract or otherwise consent to arbitrate disputes with OvS. She argues that none of the grounds under U.S. arbitration law for binding a non-signatory to an arbitration agreement are applicable to her in the circumstances of this dispute. In Order No. 2, I reserved final decision on this question until completion of the hearings.

It is common ground among the parties that Ms. Pinchuk did not execute the Contract. Therefore, to hold under the Federal Arbitration Act or applicable District of Columbia law that Ms. Pinchuk is nevertheless bound to participate in this arbitration, it is necessary for this dispute to fall within a limited number of circumstances in which non-signatories may be compelled to respond to claims in arbitration. The well-known U.S. Second Circuit Court of Appeals case of *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773 (2d Cir. 1995) set out five theories for binding non-signatories: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. Id., at 776 See Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, 1.08 et seq., in *Multiple Parties in International Arbitration* (Oxford 2009). Here, OvS, a signatory to the Contract, seeks to join non-signatory Ms. Pinchuk as a party in this arbitration on the basis of arguments sounding in agency, veil-piercing, alter ego and estoppels.

As *Park* correctly points out, "most explanations of joinder relate to either (1) implied consent or (2) disregard of corporate personality." Id. at 1.10 Here, both types of behavior are present as a matter of fact. With respect to "disregard of corporate personality," *Park* illustrates this conduct by an example that is strikingly similar to the case at hand. In *Park's* scenario, a

principal conducts the negotiations but arranges at the last moment for the agreement to be signed by an affiliated company.

> 1.15 To illustrate, a businessman might actively negotiate a purchase agreement containing an arbitration clause, but at the last minute arrange for it to be signed by a company owned and controlled by him. An application to extend the arbitration clause to the businessman could find support in the notion that buyer and seller intended the businessman to be a party to the agreement directly and through.

The only difference between the scenario posted by *Park* and the facts in this case is that Maypaul is said to not be affiliated with the Pinchuks, even though the Contract describes Maypaul as the "Owner." Despite being designated as the "Owner," Maypaul never owned the Kiev Property or the Residence. The Kiev Property was in fact owned by a company owned and controlled by the Pinchuks, Svit Shylahiv.

Just like *Park's* scenario, in this dispute Ms. Pinchuk and Ms. Dmitrieva, Mr. Shapovalov, Mr. Kuznetsov and Mr. Ussar, among others, acting on Ms. Pinchuk's behalf and pursuant to her instructions, negotiated the terms of the Contract for the provision of architectural and landscape design services. On the date of contract signing by OvS, Mr. Ussar provided the name of Maypaul, a stranger to the negotiations, as the signatory and "Owner." Apart from the use of Maypaul's bank accounts for payment, Maypaul never again played a role in contract performance, contract negotiation or contract modifications. Maypaul never exercised any rights of the "Owner" under the Contract or fulfilled any of the "Owner's" responsibilities, other than the mechanics of payments. No employee or officer of Maypaul ever corresponded with OvS about implementation of the Contract. The rights and responsibilities of the "Owner" under the Contract were exercised by individuals employed by companies owned and controlled by the Pinchuks, acting at the direction of the "Client" - Ms. Elena Pinchuk.

> "**I would expect** that each invoiced item is particularized **to give us a clear understanding** of the extent to which **the work undertaken by you conforms** to the landscaping work agreed under the Contract."
>
> "... if you could review your invoices with these issues in mind and have those **correctly reissued for our attention**."
>
> And finally, "**Having already paid you the money due** under the Contract, in the spirit of good faith **we would strongly ask that you complete the work** on the garden as soon as practicable, following which **we will consider your invoices** issued under the Contract and **in line with our understanding** set out in this letter."

Maypaul did not sign this message. Nor did Svit Shylahiv, Interpipe, Service Park or TI. Ms. Pinchuk did. In this message she admitted that the Contract was "directly and unequivocally intended to benefit" her. *Nortel Networks, Inc. v. Gold & Appel Transfer, S.A.* 298 F. Supp. 2d 81, 90 (D.D.C. 2004). She directly acknowledged the work under the Contract was for "us," and that payments were made by "us." She stated that "I would consider," "I would anticipate" and "I would expect" contractual performance from OvS. Ms. Pinchuk further acknowledged that she had a reciprocal "relationship" with OvS. If Maypaul is in fact not affiliated with the Pinchuks, as represented, then it is not commercially reasonable to interpret the terms "we," "us" and "I" in this message to refer to Maypaul.

Ms. Pinchuk was, and considered herself to be, the client and customer of OvS, just as the many communications by her representatives to OvS so described her. She clearly disregarded the corporate personality of Maypaul, the purported "Owner," by personally exercising the

approval and payment rights and responsibilities of the "Owner" under the Contract. Having conceded so directly her "relationship with [OvS] and our expectation of the respective timely performance of quality services on your side," she cannot claim the direct benefit of the Contract and disclaim the corresponding consent to arbitral jurisdiction when disputes occur. *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F. 3d 349, 353 (2d Cir. 1999).

As this recitation demonstrates, Ms. Pinchuk in this communication established a clear record that she "has consistently maintained that other provisions of the same contract should be enforced to benefit [her]." *International Paper Co. v. Schwabedissen Maschinen Anlager GMBH*, 206 F.3d 411, 418 (4th Cir. 2000). Ms. Pinchuk repeatedly adopted the purported protections of the Contract in this message. Principles of equitable estoppel bar Ms. Pinchuk from denying the binding nature of the obligation to arbitrate found in the same Contract.

The "written agreement," "integration" and "successors and assigns" provisions of the Contract do not stand as effective bars to this holding. Ms. Pinchuk and her representatives disregarded Maypaul's corporate personality and the provisions of the Contract allocating tasks to Maypaul. That conduct more than satisfies the requirements found in Federal Arbitration Act jurisprudence for binding a non-signatory to arbitration. Case law referring to the impact of integration clauses under general state contract laws does not serve as precedent to overcome Ms. Pinchuk's consent to arbitral jurisdiction through her own post-contract conduct. Maypaul and Ms. Pinchuk cannot exercise rights and responsibilities allocated to Maypaul by the Contract, but then rely on other provisions of the same contract (the integration clause, etc.) to shield Ms. Pinchuk from responsibility for her own conduct.

The same result obtains under agency principles. Ms. Dmitrieva, Mr. Ussar, Mr. Shapovalov and Mr. Chernyavskiy, among others, clearly acted under the apparent authority of Ms. Pinchuk, as demonstrated in numerous communications to OvS by those individuals passing on Ms. Pinchuk's requirements, deferring to her for approvals of work under the Contract and payment therefor, and modifying the scope and direction of that work. There is no doubt OvS reasonably relied upon that showing of authority, particularly in light of the meetings Ms. Pinchuk personally attended. See, e.g., *Green Leaves Restaurant, Inc. .v. 617 H Street Associates*, 974 A.3d 333, 230 (D.C. 2009) ("a principal places an agent in a position which causes a third party to reasonably believe the principal had consented to the exercise of authority the agent purports to hold"); *Sigal Construction Corp. v. Stansbury*, 586 A.2d 1204, 1218-1219 (D.C. 1991).

OvS was not negligent in believing these individuals acted as Ms. Pinchuk's agents, as Maypaul and she argue. To the contrary, OvS's belief was commercially reasonable in the circumstances. Nor was OvS wrong in believing that Ms. Pinchuk was the real party in interest; Ms. Pinchuk herself, and her representatives, themselves consistently and affirmatively replaced Maypaul in all aspect of contract performance with the acquiescence of Maypaul.

In light of this foregoing, I hold that on the facts of this case Ms. Pinchuk, directly and through her representatives, by conduct and in writing, has submitted herself to arbitral jurisdiction in this proceeding.

I further conclude that the scope of the arbitration clause, Article 4.1 of the Contract, is sufficiently broad to encompass a dispute about payment for post-June 2008 services. Article 4.1 provides that "all claims, disputes and other matters in question between the parties to this

Agreement, arising out of or relating to this Agreement or the breach thereof" will be settled in arbitration. OvS seeks payment of fees and reimbursement of expenses incurred pursuant to requirements of Ms. Pinchuk and her representatives with respect to the architectural and landscape design services called for under the Contract, as allegedly modified by Ms. Pinchuk's conduct and course of performance. Those claims undeniably "arise out of or relate to the Contract," as so modified, and thus are encompassed by the submission to arbitration. As explained in the next part of this Award, I conclude those modifications in fact occurred.

IV. Merits

I now turn to the merits of this dispute. OvS seeks compensation from Maypaul and Ms. Pinchuk jointly and severally in the amount of US $169,933.96, plus interest, "for the reasonable value of services rendered and expenses incurred after July 1, 2008 pursuant to quantum merit or, alternatively, breach of contract." That sum contains a reduction of US $50,000 on account of prepaid "construction observation" fees.

OvS seeks interest at the contract rate of 18% per annum for breach of contract (the 1.5% per month service charge) or, alternatively, pre-judgment interest at 6% per annum and post-judgment interest at 3% per annum pursuant to D.C. Code §28-3302 (a) and (c), or at such other rate as I deem appropriate under Rule R-45(d)(i) of the AAA Construction Industry Arbitration Rules.

Maypaul and Ms. Pinchuk object that Maypaul has fully paid all sums due under the Contract in accordance with its terms. They further argue they did not consent to any relevant modifications to the Contract. Additionally, Maypaul seeks recovery of the US $50,000 in pre-

paid "construction observation" fees, plus interest at the contract rate of 18% per annum, on the ground that those services were never provided by OvS.

The Contract provides for payment of US $447,600 in professional fees, payable in 20 equal monthly installments of US $21,350, plus reimbursement of expenditures capped at 40% of monthly fee invoices except as otherwise separately approved by the "Owner," all in exchange for work within the Description of Services in Addendum I. OvS concedes that it has received those sums and that certain portions of the work called for under the Description of Services remained unperformed, such as the courtyard and the lily pond. However, OvS assert that OvS was not responsible for timetable delays and material changes to the designs and plans. Rather, says OvS, it was conduct of others, such as Ms. Pinchuk herself and Svit Shylahiv as developer of the Kiev Property, that resulted in delays and changes to the plans.

Maypaul and Ms. Pinchuk counter that the Contract itself provided agreed procedures for modifications, including written advance agreement by the "Owner." No such written agreements ever occurred. Thus, say Maypaul and Ms. Pinchuk, OvS is bound by the original written terms of the maximum price, fixed-duration Contract.

In this regard, Maypaul and Ms. Pinchuk point to the fact that, despite months of negotiation beginning in mid-2008, the parties never agreed to a new Addendum altering the scope of work or extending the duration of work under the Contract beyond July 1, 2008. OvS contends, though, that the Contract provisions were orally modified, or modified by email exchanges, with *inter alia* Mr. Ussar, Ms. Dmitrieva, Mr. Chernyavskiy and others on behalf of Maypaul and Ms. Pinchuk.

For this purpose, OvS points out that under D.C. law "it is well settled that a written contract may be modified, rescinded or discharged by oral agreement; also that an express stipulation against oral modification is no bar to the parties' right to contract anew on the subject, since such stipulation like any other term of the contract may be rescinded." *Nickel v. Scott*, 59 A.2d 206 307 (D.C. 1948). See also the official District of Columbia Instructions to be given by judges in civil cases, 1-11 Standardized Civil Jury Instructions for the District of Columbia §11.23 (Stevens Rev Ed. 2002): "Even if the written contract itself requires that all modifications to it must be in writing, the law permits the parties to modify a written contract by a later oral agreement."

OvS also draws attention to District of Columbia law providing for restitution in quantum merit based on verbal assurances and to avoid unjust enrichment. See *In re Rich*, 337 A.2d 764 (D.C.1975), *Emerine v. Yancey*, 680 A.2d 1380 (D.C. 1996) and *Jonathan Woodner Company v. Laufer*, 531 A.2d 280 (D.C. 1987). Moreover, OvS seeks recovery of fees and expenses for work not completed by the July 1, 2008 original completion date. It is important therefore to assess whether the scope of services, fee and expenses limits or completion date for the Contract were modified, whether in writing or orally.

I note again in the regard that Ms. Pinchuk never treated Maypaul as the "Owner" with respect to Contract performance, approvals or modifications, as previously described above. To the extent Maypaul itself was even conscious of its rights and obligations under the Contract, Maypaul consistently acquiesced in a pattern of conduct under which Ms. Pinchuk and her representatives made all decisions about the Contract, including payment and performance. OvS reasonably relied upon this pattern of conduct.

The Uniform Commercial Code as adopted in the District of Columbia addresses the impact of a course of performance on a written contract. Section 1-201(3) states that the term "Agreement" means "the bargain of the parties in fact found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this subtitle ...." D.C. Code §28:1-201(3). Section 2-208(3) of the D.C. UCC makes clear that a course of performance is relevant in sales of goods transactions to show a waiver or modification of any term inconsistent with such course of performance. D.C. Code §28:2-208(3).

There is no reason to believe that the District of Columbia treats sales of services transactions in a different manner. Indeed, the official Standardized Civil Jury Instructions for the District of Columbia call for such instructions on course of performance and waiver generally in civil disputes. Thus, the instruction in §11.14 on course of performance states as follows.

> § 11.14 CONTRACT INTERPRETATION -- COURSE OF PERFORMANCE
> Instruction 11-14 Contract Interpretation: Course of Performance (D.C. Std. Civ. Jury Instr. No. 11-14)
>
> To determine the meaning of a contract, you must first look at the words and phrases actually in the contract. [There is a dispute in this case about the meaning of certain words in the contract.] To determine the meaning of the words in dispute, you may consider the conduct of the parties in relation to those disputed words in the contract. You should give great weight to how the parties acted with respect to the disputed contract provision. You should also consider other evidence presented to you about the meaning of the provisions.

The instruction on modification of contracts, §11.23, advises a jury that "Even if the written contract itself requires that all modifications to it must be in writing, the law permits the parties to modify a written contract by a later oral agreement."

§ 11.23 MODIFICATION
Instruction 11-23 Modification (D.C. Std. Civ. Jury Instr. No. 11-23)

> The law allows the parties to a contract to modify that contract later with an oral or written agreement. You must determine in this case whether the parties modified their contract. If you find that the parties entered into a later oral or written agreement with the intention of changing the terms of the original contract, you should find that the contract was modified.
>
> Even if the written contract itself requires that all modifications to it must be in writing, the law permits the parties to modify a written contract by a later oral agreement.

See also Restatement (Second) of Contracts §202(4)(1981).

In light of this legal authority, I conclude that under District of Columbia law and on the facts of this case it is proper to consider the conduct and communications of Ms. Pinchuk and her representatives to determine if the terms of the Contract were modified as contended by OvS. I conclude they were. The course of performance by OvS, Maypaul and Ms. Pinchuk shows clearly that Maypaul repeatedly acquiesced when Ms. Pinchuk and her representatives exercised the rights of the "Owner" under the Contract by giving instructions, granting approvals and authorizations, modifying the design plans and timetable and making payment decisions, all without regard to provisions in the Contract for written approvals by the "Owner." OvS reasonably relied upon that course of performance. Maypaul and Ms. Pinchuk, as well as OvS, are thus bound by this repeated conduct as a waiver or modification of the written terms of the Contract under District of Columbia law.

In this arbitration, surprisingly, there is no documentary evidence at all of communications directly among Ms. Pinchuk, Ms. Dmitrieva, Mr. Ussar, Mr. Chernyavskiy, Mr. Shapovalov, Mr. Kuznetsov or Ms. Marchuk themselves or with Maypaul representatives, except to the extent one was copied on a communication to OvS by another. Maypaul was never copied

on those communications at all. OvS sought such communications in its Request for Production of Documents, to the extent relevant and material. Maypaul and Ms. Pinchuk, through counsel, have represented that none at all exist and that all discussions among Ms. Pinchuk and her representatives occurred orally or by telephone. That representation is consistent with Mr. Dmitrieva's testimony at the hearing. It would appear that none of those individuals ever communicated within the Pinchuk group by email or in writing, regardless of where they worked or lived. Accordingly, for the contemporaneous record of personal communications I am left with only the exhibits submitted by OvS, which are largely communications sent or received by OvS.

The evidence in this proceeding shows that the parties were well aware that considerable design and planning work could not be completed by the time the Contract was scheduled to reach completion on July 1, 2008. Much of the evidence discussed above as part of my review of arbitral jurisdiction is directly relevant to this question as well, including the January 26, 2009 message from Ms. Pinchuk. I do not repeat that discussion here. I describe here some additional illustrations of the abundant evidence.

Ms. Pinchuk's approval for the main entrance and staff entrance occurred only on May 13, 2008, less than two months before scheduled project completion. OvS Exhibit 84.

By May 19, 2008, Ms. Delplace had completed work on a "revised proposal for the additional scope of work through May 2009." OvS Exhibit 85 (May 19, 2008). That exchange demonstrates the parties were well aware of timetable delays of about one year and the need for revisions and an "additional scope of work."

The meeting agenda for the May 20, 2008 meeting "with the client" (Ms. Pinchuk) (OvS Exhibit 86), which was later postponed by Ms. Pinchuk, contained "new revisions for approval," as well as four still-unresolved construction questions and, most notably, a fundamental question about the construction schedule ("Phase I Grading and Road Work?").

OvS attended meetings with Ms. Pinchuk and her team in late June 2008 (OvS Exhibit 90), at which OvS learned "The client is leaving for vacation today and will not be available for comment for another two months." That Site Visit Report shows that "Lucia [of OvS] was instructed on June 22 to discontinue work on the grading and drainage drawings because the client wanted to review the road location and eliminate the retaining wall." Changes to a road location and elimination of a wall, just one week before the Contract work was purportedly to be completed, coupled with a coming two-month absence by Ms. Pinchuk, demonstrate the mutual understanding of the parties that the project was being extended well beyond the original completion date and the designs were being materially altered.

At that same set of meetings, on June 23, the "client" (Ms. Pinchuk) approved the electronic entry gate, but with four significant modifications. The "client" (Ms. Pinchuk) additionally approved several trees for the courtyard, as well as courtyard lighting. Ms. Pinchuk made no decision about the east lily pond, however. Id. At the meeting the next day, June 24, Mr. Fedosik expressed concern about project construction status and completion dates.

On July 14, two weeks after the originally scheduled completion date, OvS transmitted additional revised design documents to Ms. Pinchuk's representatives (OvS Exhibit 94). Another eleven days later, Ms. Marchuk inquired about the status of an offer for courtyard landscape gardening expected by Mr. Chernyavskiy. (OvS Exhibit 96, July 25, 2008).

Patently, none of this work could be completed by July 1, 2008. Equally, neither Maypaul nor Ms. Pinchuk could reasonably have expected that OvS would do this work after July 1 without compensation or reimbursement of out-of-pocket expenses.

The parties also exchanged comments on the draft contract extension (Addendum III) during this period. On August 20, 2008 OvS received a memorandum questioning what "landscape design services comprise according to Agreement III." OvS replies "Any changes, deletions and/or addition to the Construction Documents beyond the drawings submitted July 2008. This includes the two second-story terraces added during this visit, **which were not part of our original contract.**" OvS Exhibit 98, August 20, 2008, prepared during meetings in Kiev (emphasis added).

Ms. Delplace undertook trips to Kiev in late June 2008 (with Ms. Bowes), in July 2008 (alone), in August 2008 (with Ms. Bowes and Ms. Neiberline) in October 2008 (alone), and again in November 2008 (alone). Ms. Pinchuk directly and through her representatives authorized these travels. In particular, Ms. Pinchuk and her representatives authorized several trips to nurseries in Germany to select plants in August 2008, well after the original July 1 completion date.

During the post-June 2008 period, OvS prepared additional drawings and plans reflecting changes to the design of the residence and to the architectural and landscape details surrounding the Residence. Those changes included material modifications requested by Ms. Pinchuk to, *inter alia*, roads, walls, gates and entrances and plantings.

In light of the foregoing, I conclude as a matter of fact that Ms. Pinchuk and her representatives initiated and agreed to material modifications to the scope of work and duration for that work under the Contract. Those modifications are binding on Maypaul and Ms. Pinchuk.

In assessing the merits of this dispute, I first turn to the expenses incurred by OvS after June 30, 2008. The August 27, 2008 OvS Invoice No. 20231, covering the period from July 1, 2008 to July 31, 2008, identified US $27,948.60 in travel, reproduction, printing and telephone expenses. OvS Exhibit 100 (August 27, 2008). The travel and work in question was agreed with Ms. Pinchuk and her representatives.

The September 15, 2008 OvS Invoice No. 20254, covering the period from August 1 to August 31, 2008 (OvS Exhibit 102), identified another $24,417.34 in project supplies, travel for site visits, reproduction, printing and telephone charges. These expenses again encompassed requested site visits in Kiev, as well as a visit to the Lorenz von Ehren, Bruns and other nurseries in Europe. Here too, the work, travel and other expenditures were requested and for the benefit of Ms. Pinchuk.

The third invoice, No. 20285, was dated 10 October 2008 and covered the period from September 1 to September 30, 2008. The expenses encompassed by that invoice again covered travel, reproduction, printing and telephone, aggregating US $23,598.39. These expenses were again incurred in reliance on requests by Ms. Pinchuk and her representatives and for the benefit of Ms. Pinchuk.

Invoice No. 20301 (OvS Exhibit 112), dated November 5, 2008 and covering October 1 to October 31, specified US $306.16 for reproduction, printing and telephone. (OvS Exhibit 114). These costs arose out of work directly requested by Ms. Pinchuk and her representatives.

The final invoice, No. 203391, sought travel expenses of US $8,615.28 for one final trip to Kiev on November 21-22 by Ms. Delplace at the request of Ms. Pinchuk. On December 12, 2008, OvS was reimbursed this sum. Witness Statement of Vernae Jones-Seals dated February 25, 2011, at 10.

Ms. Marchuk, on behalf of Mr. Chernyavskiy, acknowledged in September 2008 that payment of transportation expenses and other incidental direct expenses incurred after June 2008 in the interest of the Project was appropriate. OvS Exhibit 103.

As discussed previously, throughout the duration of the Contract OvS was regularly reimbursed for expenditures without regard to the 40% limit found in Section 6 of Addendum I of the Contract and without approval from Maypaul. See OvS Exhibit 121, April 29, 2009.

In light of the foregoing, I conclude that under District of Columbia law Maypaul acquiesced without objection to waivers and modifications of the Contract by Ms. Pinchuk and her representatives that overrode any limit in the Contract on reimbursable expenditures or any requirement for advance written approval by the "Owner" thereof, or any requirement the expenditures be incurred before July 1, 2008. I further hold that the expenditures as a matter of fact were incurred consistent with the scope of work under the Contract, as modified by Ms. Pinchuk directly and through her representatives and acquiesced in without objection by Maypaul. Further, those expenditures were reasonably incurred in the interest of the work required by Ms. Pinchuk for the project and directly benefited her.

On this basis, I hold that Ms. Pinchuk and Maypaul are jointly and severally liable to pay OvS the sum of US $76,270.49, plus interest described below, on account of breach of contract

and as restitution in quantum merit for reimbursement of expenses in the interest of the project, as provided in Section 6 of Addendum I to the Contract as modified.

I turn now to the fees OvS seeks for professional services after June 30, 2008. Those fees are recorded in the same five invoices. The August 27, 2008 invoice (OvS Exhibit 108) specified 402 hours of services at various rates, aggregating US $48,820.00. The September 15, 2008 invoice (OvS Exhibit 102) recorded an additional 334.75 hours, totaling US $40,563.75. The October 10, 2008 invoice (OvS Exhibit 109) billed an additional 184.75 hours, for US $25,091.25 in fees. The November 5, 2008 invoice (OvS Exhibit 112), covering October 2008, sought US $27,803.75 for 215.25 additional hours. Finally, the November 24, 2008 invoice No. 20339 (OvS Exhibit 114) sought US $3,290 (less an agreed reduction of US $1,905.28) for 14 hours of work by Ms. Delplace as part of one last trip to Kiev in late November 2008 to try to salvage the relationship.

OvS also seeks interest on all unpaid sums, from their respective due dates to the award date, at the rate of 18% per annum specified in the Contract (the 1.5% per month service charge). See Witness Statement of Vernae Jones-Seals, at ¶¶ 5-16.

The sum OvS seeks to recover for profession fees is reduced by a US$50,000 credit for pre-paid "construction observation" fees. See id at ¶ 17.

I conclude that these professional fees were all incurred pursuant to requests and instructions by Ms. Pinchuk constituting modifications to the Contract under District of Columbia law. Failure to pay those fees on timely demand is thus a breach of contract.

I am not persuaded by the objections interposed by Ms. Pinchuk and Maypaul. First, their argument that the Contract cannot by its terms be modified, except in writing in accordance with

its express terms, is not consistent with District of Columbia law. As explained above, under District of Columbia law, an agreement can be modified orally or by a course of performance notwithstanding an express provision to the contrary. In this case, I conclude as a matter of fact on the record that Ms. Pinchuk and her representatives modified the Contract to extend its duration for completion while continuing to obtain services from OvS under its umbrella. Further, I conclude as a matter of fact on this record that Ms. Pinchuk and her representatives modified the maximum price nature of the Contract and expense reimbursement limits orally, by written communications and by conduct, including by authorizing additional services beyond the original services description, by repeatedly modifying plans and designs, and by delaying approvals.

Section 6 of Addendum I to the Contract specified hourly rates, subject to changes, for particular OvS staff. Section 6 further specified that participation at additional meetings will be on a "time and materials basis." I hold that those principles govern the right of OvS to be compensated for professional services, within the modified scope of the Contract, and to be reimbursed for direct expenditures made in the interest of the project such as travel, reproduction, printing and the like. See Section 6.3.1 of Addendum I.

To the extent any separate approval might have been required for reimbursement of expenses above 40% of monthly invoices, the parties disregarded the 40% limit repeatedly during the life of the Contract and thus established under District of Columbia law a course of performance waiving or modifying that limit.

Ms. Pinchuk and Maypaul object that the services provided after June 30, 2008 were covered by the monthly fees already paid under the Contract. The September 17, 2008 email

(OvS Exhibit 103) from Ms. Marchuk on behalf of Mr. Chernyavskiy refers to "some works that have not been completed yet (Courtyard, Lilly Pond, etc.)." The January 18, 2008 email from Mr. Chernyavskiy, (OvS Memorandum Exhibit 30) and, The Site Visit report for June 22-28, 2008 (OvS Exhibit 90) illustrate, however, that delays in completing those works were attributable to Ms. Pinchuk or to general construction delays outside the control of OvS.

As another illustration, on June 22, 2008, one week before the Contract work was originally expected to be completed, "Lucia was instructed by Volodia to discontinue work on the grading and drainage drawings because the client (Ms. Pinchuk) wanted to revise the road location and eliminate the retaining wall." Approval by the client (Ms. Pinchuk) of a birch tree and three amelanchiers (an arrangement of trees or shrubs) for the courtyard did not occur until June 23. So too, lighting for the courtyard was not approved by the "client" (Ms. Pinchuk) until the same day. Ms. Pinchuk also made no decision at all about the east lily pool. She did, though, inform OvS she was leaving for vacation and would not be available for comment for two months thereafter. Among the "action items" remaining at the end of the meetings on June 26 were to "coordinate fabrication of Courtyard stone fountain with local artisan" and "Client Decisions needed: ... east Lily Pool." Along with the other evidence of delays and modifications, this Site Visit Report demonstrates that Ms. Pinchuk's conduct helped create these work problems and resulted in a modification of the original maximum price, fixed-duration nature of the Contract through conduct and course of performance.

For the foregoing reasons, I hold that Ms. Pinchuk and Maypaul have breached the Contract, as modified, by non-payment to OvS of professional fees and incidental direct expenditures in the interest of the project contemplated by the Contract, as so modified.

I further hold that the same result arises by operation of principles of quantum merit. In light of the modifications to the Contract, I am not persuaded by Ms. Pinchuk and Maypaul's argument that no breach of contact occurred. Even if I were so persuaded, though, OvS would still be entitled to restitution on the basis of quantum meruit and unjust enrichment.

The court in *Emerine v. Yancey*, 680 A.2d 1380 (D.C. 1996), identified two meanings for the term "implied contract," which are often confused. As that court noted:

> There are two very distinct theories of recovery that are both frequently denominated, "implied contact," or often, "quantum meruit." The first of those theories is the "implied-in-fact" contact. As we have observed before, "an implied-in-fact contract is a true contract, containing all the necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather inferred from the conduct of the parties in the milieu in which they dealt."
>
> . . . .
>
> The second type of "implied" contract, that is a contract "implied-in-law," is not a contract at all, in the sense that the word "contract" is ordinarily understood. . . [A] contract implied-in-law, "more commonly known as a theory of unjust enrichment, . . . [is] 'a duty thrust under certain conditions upon one party to requite another in order to avoid the former's unjust enrichment. . . . To recover on a theory of unjust enrichment, also known (unhelpfully) as a "quasi-contract," the plaintiff "must show that [the defendant] was unjustly enriched at his expense and that the circumstances were such that in good conscience [the defendant] should make restitution."

Id., at 1383 (citations omitted). Under District of Columbia law, "there can be no claim for unjust enrichment when an express contract exists between the parties." *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1194 (D.C. 1992); But see *Jonathan Woodner Company v. Laufer*, 531 A.2d 280 (D.C. 1987) (arguably holding that a quantum meruit claim will exist notwithstanding an express contract).

If Maypaul and Mr. Pinchuk were correct that no modifications had been effected to the Contract by conduct and course of performance, the quantum meruit claim would nevertheless survive for services provided and expenses incurred "in the interest of the project" after June 2008.

The arbitration clause in Article 4.1 of the Contract would not expire simply because the contractual dates for performance and payment have passed under its (unmodified) terms. That arbitration agreement extends to "All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof. . . ." The scope of that submission to arbitration (which, for the reasons set forth above, is binding on Ms. Pinchuk) encompasses "all disputes . . . between the parties . . . relating to this Agreement."

Here, OvS seeks restitution on the basis of unjust enrichment for services delayed, expanded or modified with respect to the subject matter of the Contract, architectural and landscape design for the Residence. There is no doubt that demand is a "dispute . . . arising out of or relating to the Agreement." *American Recovery Corp. v. Computerized Thermal Engineering, Inc.* 96 F.3d 88 (4th Cir. 1991). Even assuming Ms. Pinchuk and Maypaul were thus correct in arguing that all payment obligations under Contract had been satisfied, OvS would still be in a position to prove in this arbitration that Ms. Pinchuk and Maypaul were unjustly enriched by the services provided by OvS after June 2008 in an effort to complete landscape design delayed through no fault of their own and at the expense of OvS and that the circumstances were such that in good conscience Ms. Pinchuk and Maypaul should make restitution.

I conclude that the evidence in this arbitration supports that result.

V. Damages and Pre-Award Interest

As explained above, in compensation for breach of the Contract and in restitution pursuant to principles of quantum merit, OvS is entitled under District of Columbia law and under Rule R-45(a) of the AAA Construction Industry Arbitration Rules to recover unpaid professional fees and unreimbursed expenditures as set out in the five August, September, October and November 2008 invoices, minus the US $50,000 credit for pre-paid "construction observation" fees. As calculated in Ms. Vernae Jones-Seal's Witness Statement, and consistent with those invoices, Ms. Pinchuk and Maypaul are jointly and severally obligated to pay OvS (a) US $93,663.47 on account of professional fees and (b) US $76,270.49 on account of reimbursable expenditures.

OvS is further entitled to interest on those unpaid sums, from the due date thereof until the date of this Award (pre-award interest). Article 6.2 of the Contract provides for interest to accrue on overdue sums at a rate of 1.5% per month (18% per annum). Both sides have sought interest at this rate, in their claims and counterclaim respectively. Rule R-45(d)(i) of the AAA Construction Industry Arbitration Rules further authorizes me to award "interest at such rate and from such date as the arbitrator may deem appropriate."

I conclude that the rate specified in the Contract is the rate I deem appropriate for pre-award interest. Ms. Vernae Jones-Seals has calculated interest in her Witness Statement and OvS Exhibit 124 at that rate through March 2011. I have reviewed those calculations and consider them accurate. Thus, through the end of March 2011, unpaid professional fees plus interest aggregated US $155,637.36, and unreimbursed expenses plus interest aggregated US $109,504.22.

OvS is further entitled to pre-award interest at the same 18% per annum rate for the period after March 2011 until the date of this Award. I calculate that interest sum as US $16,568.56 through October 15, 2011.

Accordingly, I hold that Ms. Pinchuk and Maypaul are jointly and severally obligated to pay OvS damages of US $281,710.14, including interest accrued through October 15, 2011.

VI. Counterclaim

The sums awarded to OvS in this Award for breach of contract and restitution are already reduced to take account of the prepayment of US $50,000 for "construction observation" fees. Accordingly granting Maypaul's counterclaim for that sum would overcompensate Maypaul. Therefore, Maypaul's counterclaim is denied.

VII. Fees, Costs and Expenses

OvS seeks recovery of costs and expenses, including attorney fees and expenses in this arbitration. Ms. Pinchuk and Maypaul similarly sought recovery of attorney fees and costs. See Answering Statement and Statement of Counterclaims, May 21, 2020, at ¶¶ 67-69 and WHEREFORE clause d. Rules R-43(c), R-52, R-53 and R-54 of the AAA Construction Industry Arbitration Rules entitle the arbitrator to assess AAA fees, expenses and arbitrator compensation and to apportion them among the parties "in such amounts as the arbitrator determines is appropriate." Rule R-45(d)(ii) entitles the arbitrator to award attorneys' fees if all parties have requested such an award," which is the case here. Article 4.1 of the Contract specifies that "Arbitration fees may be assessed."

OvS has prevailed in all aspects of this case. Accordingly, I award OvS its attorneys' fees and expenses of US $178,985.46 pursuant to Rule R-45(d)(ii). As provided in the AAA Construction Industry Arbitration Rules and Art. 4.1 of the Contract, I further apportion fees and expenses of the arbitration and arbitrator compensation 100% to Ms. Pinchuk and Maypaul, jointly and severally, as set out at the end of this Award.

VIII. Post-Award Interest.

OvS seeks interest on the sums awarded from the issuance of the award until paid in full at, alternatively, the 18% per annum contract rate, 3% per annum consistent with DC Code §28-3302(a) & (c), or such other rate as I deem appropriate under Rule R-45(d)(i) of the AAA Construction Industry Arbitration Rules. Rule R-45(d)(i) provides that "The award of the arbitrator may include: (i) interest at such rate and from such date as the arbitrator may deem appropriate...." For its counterclaim, Maypaul sought only pre-award interest, but neither Maypaul nor Ms. Pinchuk has challenged an arbitrator's authority to order payment of post-award interest.

Both the Federal Arbitration Act and the District of Columbia arbitration law, D.C. Code §16-4401 et seq., are silent as to an arbitrator's authority to order post-award interest. Rule R-45(d)(i) of the AAA Construction Industry Arbitration Rules empowers arbitrators to award interest "from such date as the arbitrator may deem appropriate" and does not limit the duration of that authority. Moreover, Rule R-45(a) of the AAA Construction Arbitration Rules generally

authorizes the arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties...."

District of Columbia jurisprudence affords deference to an arbitrator's view of his authority to order interest. Thus, in *Laszlo N. Tauber, M.D. & Assocs. v. Trammell Crow Real Estate Services, Inc.*, 738 A.2d 1214 (D.C. 1999), construing an earlier D.C. arbitration statute, the District of Columbia Court of Appeals rejected the losing party's argument that "the arbitrator exceeded his powers by ... awarding interest at a rate of 8.25% from the date of the arbitration decision."

The Court of Appeals commenced its discussion by referring to District of Columbia precedent establishing a deferential standard of judicial review (citations omitted):

> ""Even if there were an ambiguity with respect to whether a matter was within the arbitrator's authority, the question must be resolved in favor of arbitration." .... Furthermore, "'an order to arbitrate the particular [dispute] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" Id., at 1218.

Tauber, seeking to vacate the award, claimed that provisions of the D.C. Code providing for judicially-ordered interest following court judgment had the effect of denying the arbitrator the authority to order accrual of interest from the date of the arbitration award itself ("the arbitrator misinterpreted the agreement as permitting him to go beyond the statutory provisions with regard to ... the proper date from which the interest is calculated.") Id. (footnotes omitted) Applying the deferential standard of judicial review set out above, the D.C. appellate court rejected that argument.

I conclude that, under the AAA Construction Industry Arbitration Rules and District of Columbia law, I have authority to order payment of interest accruing on the awarded sum after the award date. If I did not order interest to accrue on an unpaid award, then a losing party would have an incentive to delay or decline honoring the award unless and until ordered to do so by a court of law. The great majority of arbitration awards are not enforced in court action, though. Moreover, judicial enforcement can be comparatively expensive when the awarded sum is not large. Consequently, that incentive is very real. Here, ordering payment of post-award interest pursuant to Rule R-45(d)(i) is just and equitable, as contemplated by my remedial authority under Rule R-45(a).

I consider the appropriate rate to be the 3% per annum rate of interest set out in D.C. Code §28-3302(a) & (c), accruing on any unpaid amount awarded herein and commencing on the date 30 days after the date of this Award. I therefore award such post-award interest to OvS, payable jointly and severally by Ms. Pinchuk and Maypaul.

I am aware that some jurisdictions consider that post-award interest is the exclusive province of the courts and not within the authority of the arbitrator. I do not know the jurisdiction(s) in which this Award may be judicially enforced, if at all. Accordingly, to the extent such post-award interest is not permitted to be awarded in such a jurisdiction, then for purposes of that jurisdiction only the award herein of post-award interest to OvS shall be deemed severable and unenforceable without in any manner affecting any other provision of this Award or the enforcement of the joint and several obligations of Ms. Pinchuk and Maypaul to pay post-award interest as specified above in any other jurisdiction.

*****

WHEREFORE, the undersigned Arbitrator hereby AWARDS as follows:

(a) Not later than the date thirty (30) days after the date of this Award, Ms. Pinchuk and Maypaul shall jointly and severally pay to OvS the sum of Two Hundred Eighty One Thousand Seven Hundred Ten Dollars and Fourteen Cents (US$ 281,710.14) as damages for breach of contract and in restitution.

(b) Not later than the date thirty (30) days after the date of this Award, Ms. Pinchuk and Maypaul shall jointly and severally pay to OvS the sum of One Hundred Seventy Eight Thousand Nine Hundred Eighty Five Dollars and Forty Six Cents (US$ 178,985.46) for reimbursement of reasonable attorneys' fees and expenses of OvS.

(c) The administrative filing and case service fees of the International Centre for Dispute Resolution ("ICDR"), totaling US$ 5,550.00, shall be borne as follows: entirely by Ms. Pinchuk and Maypaul, jointly and severally. The fees and expenses of the arbitrator, totaling US$ 44,030.00, shall be borne as follows: entirely by Ms. Pinchuk and Maypaul, jointly and severally. Therefore, Ms. Pinchuk and Maypaul shall reimburse OvS the sum of US$ 26,290.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by OvS.

(d) Ms. Pinchuk and Maypaul shall, to the fullest extent permitted under applicable law, jointly and severally pay interest to OvS on the amount of Four Hundred Eighty Six Thousand Nine Hundred Eighty Five Dollars and Sixty Cents (US$ 486,985.60), being the sum of the amounts specified in Clauses (a), (b) and (c) above, outstanding from time to time, at a per annum rate of 3% per annum for each day from and including the date thirty (30) days after the date of this Award to but excluding the day such outstanding amount is paid in full. To the

extent such post-award interest is not permitted to be awarded in any jurisdiction, then for purposes of that jurisdiction only this Clause (d) shall be deemed severable and unenforceable without in any manner affecting any other provision of this Award or the enforcement of this Clause (d) in any other jurisdiction.

(e) Maypaul's counterclaim is denied,

(f) This Award is in full settlement of all claims submitted in this arbitration proceeding and, to the extent any such claim is not specifically mentioned herein, it is denied.

I hereby certify that, for the purposes of Article I of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Award was made in Washington, D.C.

Date

Mark Kantor

Washington, D.C. } SS:

On this 26th day of October, 2011 before me personally came and appeared Mark Kantor, to me known and known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Oct 26, 2011
Dated

Notary Public

M.R. Burness
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires April 14 2014

Superior Court of the District of Columbia

CIVIL DIVISION - CIVIL ACTIONS BRANCH

INFORMATION SHEET

Oehme, van Sweden & Associates, Inc. Case Number: _____

vs Date: _____

Elena Pinchuk and Maypaul Trading & Services Limited ☐ One of the defendants is being sued in their official capacity.

Name: (please print) Paul S. Thaler, Esq.	Relationship to Lawsuit ☑ Attorney for Plaintiff
Firm Name: Thaler Liebeler, LLP	☐ Self (Pro Se)
Telephone No.: 202-587-4750 Six digit Unified Bar No.: 416614	Other: _____

TYPE OF CASE: ☑ Non-Jury ☐ 6 Person Jury ☐ 12 Person Jury

Demand:$ exceeds 486,985.60 Other: _____

PENDING CASE(S) RELATED TO THE ACTION BEING FILED

Case No.: _____ Judge: _____ Calendar #: _____

Case No.: _____ Judge: _____ Calendar #: _____

NATURE OF SUIT: *(Check One Box Only)*

A. CONTRACTS

- ☐ 01 Breach of Contract
- ☐ 02 Breach of Warranty
- ☐ 06 Negotiable Instrument
- ☐ 15 _____
- ☐ 07 Personal Property
- ☐ 09 Real Property-Real Estate
- ☐ 12 Specific Performance

COLLECTION CASES

- ☐ 14 Under $25,000 Pltf. Grants Consent
- ☐ 16 Under $25,000 Consent Denied
- ☐ 17 OVER $25,000 Pltf. Grants Consent

B. PROPERTY TORTS

- ☐ 01 Automobile
- ☐ 02 Conversion
- ☐ 07 Shoplifting, D.C. Code § 27-102(a)
- ☐ 03 Destruction of Private Property
- ☐ 04 Property Damage
- ☐ 05 Trespass
- ☐ 06 Traffic Adjudication

C. PERSONAL TORTS

- ☐ 01 Abuse of Process
- ☐ 02 Alienation of Affection
- ☐ 03 Assault and Battery
- ☐ 04 Automobile-Personal Injury
- ☐ 05 Deceit (Misrepresentation)
- ☐ 06 False Accusation
- ☐ 07 False Arrest
- ☐ 08 Fraud
- ☐ 09 Harassment
- ☐ 10 Invasion of Privacy
- ☐ 11 Libel and Slander
- ☐ 12 Malicious Interference
- ☐ 13 Malicious Prosecution
- ☐ 14 Malpractice Legal
- ☐ 15 Malpractice Medical (Including wrongful death)
- ☐ 16 Negligence-(Not Automobile, Not Malpractice)
- ☐ 17 Personal Injury – (Not Automobile, Not Malpractice)
- ☐ 18 Wrongful Death (Not malpractice)
- ☐ 19 Wrongful Eviction
- ☐ 20 Friendly Suit
- ☐ 21 Asbestos
- ☐ 22 Toxic/Mass Torts
- ☐ 23 Tobacco
- ☐ 24 Lead Paint

SEE REVERSE SIDE AND CHECK HERE ☐ IF USED

INFORMATION SHEET, Continued

D. OTHERS I. ☐ 01 Accounting ☐ 02 Att. Before Judgment ☐ 04 Condemnation (Emin. Domain) ☐ 05 Ejectment ☐ 07 Insurance/Subrogation Under $25,000 Pltf. Grants Consent ☐ 08 Quiet Title ☐ 09 Special Writ/Warrants DC Code § 11-941	☐ 10 T.R.O./Injunction ☐ 11 Writ of Replevin ☐ 12 Enforce Mechanics Lien ☐ 16 Declaratory Judgment ☐ 17 Merit Personnel Act (OEA) (D.C. Code Title 1, Chapter 6) ☐ 18 Product Liability ☑ 24 Application to Confirm, Modify, Vacate Arbitration Award (D.C. Code § 16-4315)	☐ 25 Liens: Tax/Water Consent Granted ☐ 26 Insurance/Subrogation Under $25,000 Consent Denied ☐ 27 Insurance/Subrogation Over $25,000 ☐ 28 Motion to Confirm Arbitration Award (Collection Cases Only) ☐ 26 Merit Personnel Act (OHR) ☐ 30 Liens: Tax/Water Consent Denied
II. ☐ 03 Change of Name ☐ 06 Foreign Judgment ☐ 13 Correction of Birth Certificate ☐ 14 Correction of Marriage Certificate	☐ 15 Libel of Information ☐ 19 Enter Administrative Order as Judgment [D.C. Code § 2-1802.03(h) or 32-1519(a)] ☐ 20 Master Meter (D.C. Code § 42-3301, et seq.)	☐ 21 Petition for Subpoena [Rule 28-I (b)] ☐ 22 Release Mechanics Lien ☐ 23 Rule 27 (a)(1) (Perpetuate Testimony)

For individuals not represented by an attorney: ( ) I acknowledge receipt of the Civil Actions Pro Se Handbook.

Signature

11-30-11

Date