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

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SINA DRUG CORP. d/b/a ONCOMED PHARMACEUTICAL SERVICES and KAVESH ASKARI,

Plaintiffs,

-against-

MOHAMMAD ALI MOHYUDDIN and SORKIN'S RX LTD.,

Defendants.

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Index No: 651710/2013

(Hon. Shirley Werner Kornreich)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Defendant's Mohammad Ali Mohyuddin and Sorkin's RX LTD., by their undersigned attorneys, respectfully submit this Memorandum of Points and Authorities in support of their cross-motion for an order pursuant to CPLR § 3212 (b), granting them summary judgment against the plaintiffs and dismissing the claims of plaintiffs for a declaration that defendants have breached the Indemnity Agreement and that they are entitle to one million ($1,000,000.00) dollars in damages plus attorney fees. It is also respectfully requested that, to the extent plaintiffs Complaint is not dismissed, their request to dismiss the defendants affirmative defenses be denied.

PRELIMINARY STATEMENT

The Court must look at the intent and purpose of the Indemnifying Agreement in determining its application to the present action. In so doing, it is evident that plaintiffs improper and perhaps illegal conduct in issuing the K-1 Statements, which in and of itself is a breach of the Indemnity Agreement, cannot be used as a predicate for plaintiffs current claim of breach of contract.

Plaintiff's breach of the Indemnity Agreement claim is premised on their misconstruing the Settlement Agreement in the first instance. The Settlement Agreement quite simply settled "all claims herein, including any claim by Mohyuddin to share in Oncomed". Despite the decision of Justice Warshawsky, there was never any transfer of the 18% interest in Oncomed to Mohyuddin to warrant Askari's issuance of the K-1 statements, which is the linchpin of plaintiffs indemnity claim. The claims advanced by both parties were settled, pursuant to the Settlement Agreement (defendants' Exhibit "D")[1] prior to the transfer of any ownership in Oncomed to Mohyuddin. However, by issuing the K-1 Statement and forcing Mohyuddin to incur tax liabilities, the plaintiffs breached the very RDI which they incredibly seek to enforce against the defendants. A party who itself is at fault

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[1] All exhibits referred to as "defendants Exhibit "_", are annexed to defendants' Affirmation in Support of Cross-Motion and in Opposition to Plaintiffs' Motion for Summary Judgment.

cannot use their own breach as the basis for an indemnity claim.

Plaintiffs also claim the letter sent to Askari in response to his demand for attorney fees by the defendants pursuant to the RDI constituted an anticipatory breach of contract. Plaintiffs application of the doctrine of anticipatory repudiation is misplaced, as there has never been a "positive and unequivocal refusal to indemnify" by the defendants who advised Askari that they would honor the agreement to indemnify if so determined buy the Court. As such, defendants have not advanced an "untenable position" so as to find a breach. Moreover, the subject Indemnity Agreement is a unilateral contract, as is therefore not subject to this doctrine.

Finally, the one million ($1,000,000.00) dollars damage provision in the contract is in reality an unenforceable penalty, as it has no relation to damages, but was inserted strictly to threaten, coerce and to dictate conduct.

STATEMENT OF FACTS

A. The First Action

In 2006, the plaintiffs, SINA DRUG CORP. d/b/a ONCOMED PHARMACEUTICAL SERVICES and KAVESH ASKARI (hereinafter collectively referred to as "Oncomed") commenced suit against the defendants herein, MOHAMMED ALI MOHYUDDIN (hereinafter referred to as "Mohyuddin") and SORKIN'S RX LTD. ("Sorkins")(Pharmacy of Mohammad Ali Mohyuddin) in addition to several employee's of Sorkins for conspiracy, defamation, conversion, misappropriation of trade secrets, tortious interference with contractual relations, tortious interference with prospective contractual relations and breach of duty of fidelity to employer (see, defendants Exhibit "A").

Mohyuddin interposed an Answer with Counter-Claims to the First Action (see, defendants Exhibit "B"). Pursuant to the First Counter-Claim of Mohyuddin, it was alleged that at the time of

Mohyuddin's hiring, in addition to a weekly salary, Askari (sole shareholder of Oncomed) promised Mohyuddin an 18% ownership interest in Oncomed (see, defendants Exhibit "B"). On May 2, 2005, Mohyuddin's employment with Oncomed terminated. Following motion practice, all of the causes of action that Oncomed or Askari raised were dismissed. With respect to the Counter-Claims of Mohyuddin, the Court determined as follows (see, defendants Exhibit "C"):

> It is clear that plaintiffs have breached their fiduciary obligations to a minority shareholder, and, to the extent they have retained or diverted dividends or profits due to the minority shareholder, they have been unjustly enriched at Defendant's expense. This matter is hereby referred to Frank Schellace Esq., a Court Referee, for the purpose of calculating the amount of dividends, profits, or other distribution to which Mohyuddin, as an owner of 18% of the shares of Sina Drug Corp., d/b/a Oncomed Pharmaceutical Services, is entitled for the period April, 2002 through May 3, 2005.

B. The Settlement

Following the aforementioned decision of Justice Warshawsky, Oncomed and Askari filed a Notice of Appeal contesting the decision of Justice Warshawsky that granted Mohyuddin an 18% ownership interest in Oncomed. The Oncomed parties thereafter filed with the Court, a Share Certificate which was made in lieu of an undertaking for the appeal. Pending the appeal, the parties agreed to settle "all claims herein, including any claim by Mohyuddin to share ownership of Oncomed" (see defendants Exhibit "D" at ¶ 1). Mohyuddin received three million eight hundred thousand ($3,800,000.00) dollars from Oncomed for the settlement of any "claims". The Share Certificate filed with the court in lieu of undertaking, was never exchanged to Mohyuddin but instead voided upon the execution of a Settlement Agreement (see, defendants Exhibit "D"). Pending the finalization of the Settlement Agreement, the Oncomed parties prepared a second Share Certificate,

"the "Pledged Shares", which were placed in escrow with Oncomed's attorney only to be released to Mohyuddin if there was a default in the payment of the "settlement amount" by the plaintiffs (see, defendants Exhibit "D" at ¶ 6). The settlement amount was timely paid to Mohyuddin in May, 2011 and pursuant to the Agreement the "Pledged Shares" being held in escrow were returned to Askari's attorneys for destruction (see, defendants Exhibit "I").

C. The K-1 Statements

On July 15, 2011, immediately following final payment of the settlement, Askari amended the tax returns of Oncomed for the years 2007, 2008, 2009 and 2010 and issued Mohyuddin K-1 Statements claiming Mohyuddin received "ordinary income" in those years in the following amounts:

2007: $37, 638.00

2008: $390,727.00;

2009: $443,108.00;

2010: $ 396,325.

Mohyuddin never received any such payments. There was never any profits or distributions made to Moyhuddin as stated in the K-1 statements, and more significantly, the issuance of the K-1 Statements was improper as the Settlement was not a purchase back of the Oncomed shares, but was simply a resolution of "any and all claims" either party had, or may of had against the other (see, defendants Exhibit "D"). Furthermore, following the settlement payment, Mohyuddin paid $567,075.00 in capital gains taxes to the IRS for the settlement of the claims.

D. The Federal Action

Following the issuance of the K-1 Statements, defendants herein, commenced an action in Supreme Court, Nassau County alleging that the K-1 Statements were wrongfully issued (see, defendants Exhibit "E"). Plaintiffs herein, removed the action to the United States District Court, Eastern District. Following the submission of letter briefs by the parties, Magistrate Boyle issued a recommendation to remand the matter back to State Court. Plaintiffs filed objections and the matter is sub judice.

After allegedly incurring approximately one hundred thousand ($100,000.00) dollars in legal fees, in defending the Federal action, Askari sent a letter to Mohyuddin requesting he be indemnified for the legal fees he incurred in defending said action (see, defendants Exhibit "G"). Contrary to plaintiffs' accusation that the Mohyuddin Parties "refused to indemnify the Oncomed Parties", Mohyuddin, by counsel, responded that "there has never been a refusal of Mohammed Ali Mohyuddin to comply with the terms and conditions of the Release, Disclaimer and Indemnity Agreement executed between the parties. We remain ready willing and able to abide by the terms thereof upon a determination by a court of competent jurisdiction that the aforementioned action referred to above is in fact covered by the provisions of the Indemnity Agreement. Should there be such a determination our client will certainly honor its obligations thereunder" (see, defendants Exhibits "H"). As set forth in defendants Exhibit "H", there has never been a refusal to indemnify, as made clear by the defendants responsive letter stating that they are "ready willing and able" to abide by the indemnity agreement.

ARGUMENT

A. Plaintiffs Are Not Entitled To Indemnity As They Themselves Breached The Indemnity Agreement

(i) Contract interpretation of the RDI precludes a finding against the Mohyuddin Parties

In interpreting contractual language, a court must accord the words of the agreement a "fair and reasonable meaning", which includes consideration of "not merely literal language, but whatever may be reasonably implied therefrom" *Sutton v. E. Riv. Savs. Bank*, 55 N.Y. 2d 550, 555, 450 N.Y.S. 2d 460, 435 N.E. 2d 1075. It is a well-settled principal of contract construction that courts should not disregard common sense in interpreting a contract 22 N.Y. Jur. 2nd, Contracts §221 at 255. "A contract must be construed in accordance with the reasonable intention of the parties, arising from the language used, so as to give that construction equity to both parties, instead of a construction which will give one of them an unfair and unreasonable advantage over the other." *22 N.Y. Jur. 2nd, Contracts §218 at* 250; *Matter of Friedman*, 64 A.D. 2d 70,407 N.Y.S. 2d 999 (2nd Dept. 1978). Similarly, "an interpretation [of a contract] that produces an absurdly harsh or unreasonable result is to be avoided..."*Reape v. New York New, Inc.* 122 A.D. 2d 29, 504 N.Y.S. 2d 469(2nd Dept 1986). It is well settled that "the intention to indemnify must be reasonably clear, and such an agreement must reflect the *unmistakable* intent of the parties as to the scope of its coverage" 23 N.Y. Jur. 2d Contribution § 68 at 126-27(emphasis added). *Redding v. Gulf Oil Corp.*, 38 A.D. 2d 850 (2nd Dept 1972). As with contracts generally, the "cardinal rule [applicable to indemnity agreements] is to ascertain and give effect to the intention of the parties." 23 N.Y. Jur. 2d Contribution §70 at 129.

Here, the only reasonable construction of the RDI, so as to avoid unfair and unintended consequences, and to give effect its intended meaning, is to find that the RDI precludes the Oncomed

parties from being indemnified, as they themselves breached the very Indemnity Agreement they now seek to enforce. Plaintiff's own breach in forcing defendants to incur significant expense in tax liabilities (and forcing Mohyuddin to seek redress from the Court), and thereafter demanding indemnity for defense costs based upon that breach, is unconscionable. Because the Oncomed parties have themselves breached the RDI, the only logical construction is that they cannot now seek indemnity and damages from Mohyuddin for exercising his rights to contest those violative acts.

It is the burden of the party seeking summary judgment, in an action which turns on the construction of an unambiguous contract, to show that their construction is the only one that flows naturally from the words used (see, *Dowdle v. Richards*, 2 A.D. 2d 486,489). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v. Marshalls of MA, Inc.* 61 A.D. 3d 925, 930, 878 N.Y.S. 2d 143; see *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491-492, 549 N.Y.S. 2d 365, 548 N.E. 2d 903).

More significantly, indemnification under New York law, is not available where the party seeking indemnification was "partially at fault" or "responsible to any degree." *Monaghan v. SZS 33 Assoc., L.P.*, 73 F.3d 1276, 1284 (2nd Cir. 1996) (holding that indemnification is not available under New York law to a party who is partially at fault or is alleged to have violated the same duty to the underlying plaintiff); *Rosada v. Proctor & Schwartz, Inc.*, 66 N.Y. 2d 21, 24-25, 494 N.Y. S.2d 851, 854(1985)(holding that a party seeking indemnification may not be responsible to any degree."). In the present case, the purpose of the Settlement Agreement and resultant RDI was to forever discharge and bar any future claims or liabilities, *by either party* from the claims and counter-claims of the First Action. Despite the language of the RDI, plaintiffs intentionally issued the K-1

Statements knowing it would force additional expense to Mohyuddin. The K-1 Statements were also issued outside of the time period contemplated by the Release which led to plaintiffs current claim for indemnification. Had plaintiffs not issued said K-1 statements in clear violation of the very Indemnity Agreement they now seek to enforce, defendants would never have been placed in its current position in seeking redress from the Court (the "Federal Action"). Clearly, it was not the intention of the parties to permit the plaintiffs breach of the RDI to serve as a predicate for a claim of indemnity and alleged contractual damages flowing therefrom. Had that been the intent, there would never have been reciprocal indemnity provisions contained in the Agreement (see, Exhibit "F" RDI ¶'s 6 & 8).

In *Donaldson, Lufkin & Jenerette Securities-Corp. v. Star Technologies, Inc.* 150 Misc. 126, 567 N.Y.S. 2d 1002 (Sup. N.Y. 1991) an underwriter which settled a class action suit brought pursuant to federal securities law to enforce indemnification of underwriting agreement against issuer. The underwriter brought a motion for summary judgment which was denied. A motion for re-argument was granted. Upon re-argument, Justice Lehner held that the underwriter, who was at fault for securities violations, could not enforce indemnity provision of the underwriting agreement to collect defense costs from the issuer. The court stated that, "there is no logic in permitting a wrongdoer to enforce a portion of an indemnity provision". The court found that to accept plaintiffs' position that they could recover defense costs even if they were at fault in permitting the issuance of an inaccurate prospectus, they would be recovering from the defendant over 80% of the amount paid to its shareholders in settlement of the claim for wrongdoing. This the court would not permit. See also *Globus v. Law Research Service, Inc.* 418 F. 2d 1276(2nd Cir. 1969) ("Given this state of record, we concur in Judge Mansfield's ruling that to tolerate indemnity under these circumstances would encourage flouting the policy of the common law and the Securities Act. It is well established that he cannot insure himself against his own reckless, wilful or criminal misconduct" (citations omitted).

To permit the plaintiffs herein to sue for defense costs and damages would be to condone plaintiffs own wrongful conduct in (1) breaching the indemnity agreement themselves, and/or (2) improperly issuing K-1 statements to Mohyuddin for alleged distribution of ordinary income never distributed to a non-shareholder. Either, or both actions require a denial of plaintiffs request for indemnification and damages claimed to flow therefrom. The Court simply cannot permit plaintiffs to profit from their own egregious conduct to the detriment of defendants in seeking to protect themselves from said conduct. As the court stated in *Gardiner International, Inc v. J.W. Townsend & Associates, Inc.* 13 A.D. 3d 246, 788 N.Y.S. 2d 312 (1st Dept. 2004) where the court found a question of fact as to whether there was an anticipatory repudiation where both parties claimed a breach of their agreement, "Gardiner [plaintiff] seeks by this action to un-ring a bell that Gardiner himself rang. His repudiation of the dissolution agreement is a complete bar to his recovery under it."

B. Plaintiff's Claim for damages Based Upon The Doctrine Of Anticipatory Repudiation Must Be Denied

Plaintiffs argue that they are entitled to summary judgment based upon the doctrine of anticipatory repudiation. Plaintiffs argument is misplaced for several reasons. First, there has never been a "positive and unequivocal" intention by defendants not to perform, nor are defendants urging an "untenable interpretation" of the RDI. Secondly, the doctrine of anticipatory breach may only be applied to "bilateral contracts embodying some material and interdependent conditions and obligations" *Reprosystem, B.V. v. SCM Corp.*, 630 F. Supp. 1099 (S.D.N.Y. 1986) which do not exist in an indemnity agreement. Lastly, should plaintiffs argument that there has been an anticipatory repudiation be accepted, the result would be to terminate the RDI releasing both parties from any future obligations thereunder.

(i) Doctrine of Anticipatory Repudiation

"An anticipatory repudiation occurs when a party disclaims a duty to perform under the contract prior to the time designated for its performance and before it has received all due consideration." *Rivera-Ramos v. Welsh*, 2006 WL 66468 at *2 (Sup Ct., Bronx County., 2006)(citing *Wester v. Casein Co. of America* , 206 N.Y. 506(1912). The repudiation "can be either a 'statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach' or 'a voluntary act which renders the obligor unable or apparently unable to perform without such a breach." *Norcon Power Partners, LP. v. Niagra Mohawk Power Corp.*, 92 N.Y. 2d 458, 682 N.Y.S. 2d 664(1998)(quotations omitted). In either case, "to support the claim of anticipatory repudiation, there must be "an unqualified and clear refusal to perform with respect to the entire contract." *O'Connor v. Sleasman*, 37 A.D. 3d 954, 830 N.Y.S. 2d 377(3rd Dept. 2007). If an anticipatory repudiation has occurred, then "the non-breaching party has two (2) mutually exclusive options. He may elect to treat the contact as terminated and exercise his remedies, or continue to treat the contract as valid." *In re Asia Global Crossing, Ltd.*, 326 B.R. 240(Bankr S.D.N.Y. 2005)(string cite omitted); see *Inter-Power of NY, Inc. v. Niagra Mohawk Power Corp.*, 259 A.D. 2d 932, 686 N.Y.S. 2d 911(3d Dept 1999)("the [non-repudiating] party must...make an election and cannot at the same time treat the contract as broken and subsisting. One course of action excludes the other").

(ii) There has never been an unequivocal statement of non-performance

As set forth above, the defendants have never repudiated or declined to perform their obligations pursuant to the RDI. It is well established that a claim for anticipatory repudiation

requires "a definite and final communication of the intention to forego performance before the anticipated breach may be subject to legal action". *Ramhmani Corp. v. 9 E. 96th St. Apartment Corp.*,211 A.D. 2d 262, 267, 629 N.Y.S. 2d 382, 385 (1st Dep't 1995); *Express Indus. & Terminal Corp. v. New York State DOT*, 252 A.D. 2d 376, 379, 676, N.Y.S. 2d 62, 66(1st Dep't 1998) *rev'd* on other grounds. 93 N.Y. 2d 584, 715 N.E. 2d 1050(1999). ("In the absence of an absolute and unequivocal refusal to perform or a clear indication of the inability to do so, petitioner cannot be said to have repudiated the [contract] and thus, to have committed an anticipatory breach")(Generally, an anticipatory breach of an obligation occurs when a party to a contract declares his intention not to perform his future obligations" (citations omitted). "*In re Randall's Island Family Golf Centers, Inc. et. al 261 B.R. 96* (U.S. Bankr. Ct 2001). In the present matter, the defendants have never indicated, in any manner, their intention not to perform. In fact, the complete opposite is true. Pursuant to the letter sent to plaintiff Askari, defendant informed him that he [Mohyuddin] would honor his commitment to indemnify, should he be required to do so. Rather then state his refusal to perform his future obligations, if any, it was stated that he was "ready, willing and able" to do so, after the court has reviewed plaintiffs entitlement to indemnity.

In *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC* 83 A.D. 3d 804, 921 N.Y.S.2d 260 (2nd Dept. 2011), investors in a private investment company brought an action against company and company manager alleging among other claims anticipatory repudiation of a contact. The company had sent a letter to its invertors that investor withdrawals were suspended, due to market conditions. The court held that the letter was not an unequivocal expression of an intent to forego its future obligations to the investors. The Court noted that to sustain a cause of action of anticipatory repudiation (separate from a breach of contract claim) "there must be [among other

things] some expressed and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him [or her] to perform" (citations omitted). See also. *124 Elmwood, LLC v. Elmwood Village Charter School* 28 Misc. 3d 1205(A), 957 N.Y.S. 2d 637 (N.Y.Sup. 2010)("for there to be an anticipatory breach, there must be an unqualified and positive refusal to perform the whole contract"). In the present matter, the letter sent to plaintiffs was absent any statement of absolute refusal or inability to perform so as to sustain a cause of action for anticipatory repudiation.

While the plaintiffs maintain that defendants request for the court to review the indemnity issue equates to an "untenable interpretation" of the contract, under the unique situation presented, such an argument is meritless. The fact is, that based upon plaintiffs own breach of the RDI, defendants are not legally required to indemnify the plaintiffs. As such, requesting guidance from this Court as to whether the plaintiffs are legally entitled to indemnification cannot be viewed as an "untenable interpretation", or added condition in the face of Askari's demanding payment of over one hundred thousand ($100,000.00) dollars in attorney fees to which he may not be entitled. An "untenable" interpretation of a contract could only give rise to a claim for anticipatory repudiation if the interpretation was a definitive and final statement of an intention not to perform under the contract (see, *Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 A.D. 2d 262, 629 N.Y.S. 2d 382 (1st Dept. 1995) (renunciation of contract must be an unqualified and positive refusal to perform, and must go to the whole of the contract). No such statement of refusal has ever been made by the defendants requiring a denial of the subject motion.

(iii) The indemnity agreement is a unilateral contract for which the Doctrine of Anticipatory Repudiation does not apply

Furthermore, the plaintiffs' motion based upon anticipatory repudiation, must be denied as the doctrine of "anticipatory breach" is not applicable to the subject agreement. As the Court stated in *Reprosystem, B.V. and N. Norman Muller v. SCM Corporation* 630 F. Supp. 1099 (S.D. N.Y. 1986), "...anticipatory breach ... may only be applied to bilateral contracts embodying some material and interdependent conditions and obligations". *Long Island Railroad Co. v. Northville Industries Corp.,* 41 N.Y.2d 455, 362 N.E. 2d 558, 564, 393 N.Y.S.2d 925, 931 (N.Y. 1977). In New York, the doctrine of anticipatory breach is only available as a defense to continued performance by the injured party and therefore is not appropriate if the party invoking the doctrine has fully performed. *Northville Industries, supra*, 362 N.E. 2d at 563-64, 393 N.Y.S. 2d at 930-31". In *Northville, supra*, the court found that the settlement agreement at issue was a unilateral contract requiring no further performance by the alleged injured party. The *Northville* court further held that the motion for anticipatory breach must be denied since the movant therein only sought the payment of money "rather then any relief from its own obligations". In the present case, the RDI is a unilateral contract, the plaintiffs having fully performed their obligations by fulfilling the monetary terms of the settlement agreement. There is no further performance required of the plaintiffs. Under New York law, the doctrine of anticipatory breach is therefore not available to the plaintiffs herein, who likewise seek the payment of money only.

Similarly, in *National Union Fire Ins. Co. Of Pittsburgh. Pa. v. Antony* 1988 WL 49040 (S.D.N.Y. 1988) plaintiff sought summary judgment based upon the defendant's anticipatory breach

of its obligations pursuant to an indemnity agreement. The Court relying on *Reprosystem, B.V. supra*, held that the doctrine of anticipatory breach is only applicable to a bilateral contract "with interdependent conditions and obligations" that do not exist for contracts seeking payment of money only. It found that plaintiff had "fully performed" its obligations under the Indemnity Agreement by providing a guaranty which was issued in consideration of defendant assuming its obligations of the indemnity agreement. In the instant matter, the payment of the settlement by plaintiffs was given in consideration of defendants assuming their obligations under the Indemnity Agreement. Although the court found plaintiff may need to commence a future suit for any allowable recovery, New York law required the motion be denied based upon the doctrine of anticipatory repudiation.

In the subject action, there is no future performance required by the plaintiffs pursuant to the Agreement. Plaintiffs fulfilled all their obligations when they made the final settlement payment to the defendants. At this juncture, plaintiffs' claim is for monetary damages only. There is no further performance required of the plaintiffs such as in the delivery or acceptance of goods or services, which is the context of when this doctrine is usually applied. Even if it can be argued that there existed obligations under the Indemnity Agreement (not to breach it), the doctrine will not apply if the parties' obligations are separate and independent, *Long Island R. Co.*, *supra*. Therefore, to the extent this Indemnity Agreement is found to be a bilateral contract, the doctrine would still not be available, as the parties have separate unilateral obligations, as contrasted with interdependent obligations. *Long Island R.*, *supra*.

(iv) Repudiation would terminate the entire Agreement or preclude plaintiff from claiming a breach

Under New York law, when faced with anticipatory repudiation the non-repudiating party has two (2) mutually exclusive options: he may (1) elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract thereby termination the contractual relation between the parties, or (2) he may continue to treat the contract as valid and await the designated time for performance before bringing suit. Regardless of which option he chooses, he must make an affirmative election of remedy; he cannot at the same time treat the contract as broken and subsisting, for one course of action excludes the other. In the present action, if plaintiffs claim of anticipatory repudiation is correct, then there will be no further Release and Indemnity Agreement between the parties. The effect will be to return the parties back to their pre-agreement status. This is certainly not the result the doctrine of anticipatory repudiation was designed to provide.

C. The Provision For One Million Dollars In Damages Is In Reality An Unenforceable Penalty

In addition to attorney's fees, the plaintiffs seek to enforce paragraph "7" of the RDI which states:

> In the event the Mohyuddin Parties challenge the enforceability of any covenant in this Release and/or refuse to indemnify the Oncomed Parties under the indemnity provisions hereof, the Moyhuddin Parties shall be liable for and shall pay to the Oncomed parties one million dollars ($1,000,000.00).

Initially, defendants did not violate ¶ 7 of the RDI in that (1) defendants have not challenged the enforce ability of any covenant in the Release and (2) as shown, *supra*, defendants have not refused to

indemnify the Oncomed Parties. However, even if there was a violation of the Agreement, the Court could not enforce the aforementioned provision because it is in reality unenforceable penalty. First, the damages allegedly allowed herein, are grossly disproportionate to the contemplated harm to the plaintiffs, and therefore, the clause constitutes a penalty. Secondly, as the Agreement obviously seeks to punish Moyhuddin for exercising his rights in a Court of law, it is a penalty that cannot be enforced. As Mr. Askari himself pointedly states in his annexed affidavit in support of motion for summary judgment, in discussing the one million ($1,000,000.00) dollar clause, "as defendants well knew, Oncomed was developing its business, and even considering a sale at the time, and any disruption in the activities as defendants had caused during the First Action by pursuing shareholder rights claims, would be detrimental to Oncomed. We, therefore, insisted that these provisions be included so as to avoid defendants' further meddling" (Askari affidavit ¶ 14). As can be seen, not only did Askari resent Mohyuddin for "pursuing [his] shareholder rights", but he confirms that the subject provision has no relation to damages, but was "insisted upon" strictly as a threat and to coerce defendants future conduct.

This clause can only be denominated a liquidated damages provision. According to Blacks Law Dictionary, the term liquidated damages is "when a specific sum of money has been expressly stipulated by the parties to a bond or contract as the amount of damages to be recovered ... for a breach of the Agreement by the other". Such a clause can only be enforced if the amount fixed as damages is a reasonable measure of the probable loss, and if the amount of the loss is difficult to determine. *Evangilista v. Ward*, 308 A.D. 2d 504 (2nd Dept 2003). The question of whether the amount of liquidated damages is appropriately proportionate to the loss is to be determined from the perspective of the situation actually before the Court and not in the abstract. *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516 (1976); *Clubb v. ANC Heating and Air Cond., Inc.* 251 A.D. 2d 956 (3d

Dept. 1998). If a contract requires (in the event of a breach), payment of a sum which is grossly disproportionate to the actual amount of damages, the provision is a penalty and is unenforceable. *Truck Rent-A-Center, Inc. v. Puritan Farms, 2d , Inc.*, 41 N.Y.2d 420 (1977.

In the present matter, the alleged damages sought are for attorneys fees allegedly incurred for having to defend the Federal Action. It is claimed in the present Complaint, that those damages "are not less than one hundred thousand ($100,00.00) dollars". However, the sum of one million ($1,000,000.00) dollars being sought is *in addition* to the attorneys fees and is thus is not even reflective of any actual damages.

Although freedom of contract is at the core of contract law, the "freedom to contract does not embrace the freedom to punish, even by contract". *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.S.2d 354, 360, 386 N.Y.S. 2d 831, 834, 353 N.E.2d 793,796 (1976). If the clause is "intended by the parties to operate in lieu of performance, it will be deemed a liquidated damages clause and may be enforced by the courts....If such a clause is intended to operate as a means to compel performance [or non-performance], it will be deemed a penalty and will not be enforced". *Brecher v. Laikin*, 430 F.Supp. 103, 106 (S.D.N.Y. 1977). A clause setting damages much higher than the estimated actual loss does not provide fair compensation, but secures "performance by the compulsion of the very disproportion. A promisor would be compelled out of fear of economic devastation, to continue performance and his promisee in the event of a default, would reap a windfall well above the actual harm sustained." *Truck Rent -a-Center*, *Id.* at 424.

Whether a provision is an enforceable liquidated damages clause or an unenforceable penalty is a matter of law to be decided by the Court. *Vernitron Corp. v. CF 48 Associates*, 104 A.D. 2d 409,409, 478 N.Y.S.2d 933, 934 (2nd Dept. 1984). Courts have tended, in doubtful cases, "to favor

the construction which makes the sum payable for breach of contract a penalty rather than liquidated damages, even where the party has styled it liquidated damages rather than a penalty. *See C.J Carlin Construction Co., v. City of New York,* 59 A.D. 2d 847, 848, 399 N.Y.S. 2d 13, 14 (1st Dept. 1977).

In the present case, a plain reading at the clause at issue shows conclusively that it was drafted as a impermissible penalty and is thus unenforceable. Although alleged to provide damages in case of a breach, the clause itself states it was included solely to operate as punishment for any attempt to challenge the enforce ability of any covenant contained in the Agreement. The term "penalty", as used in this context, "denotes a stipulated sum inserted into the contract, not as a measure of compensation for the breach, but rather as a punishment for default, or by way of security for nonperformance, involving the concept of punishment". The essence of a penalty is the threat of monetary forfeiture intended to inject fear into the offending party, while the essence of liquidated damages is a genuine, covenanted pre-estimate of damages" *36 N.Y. Jur. 2d Damages § 162.*

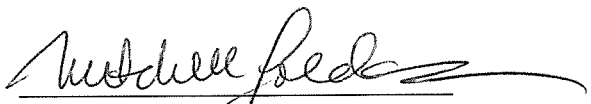
There is absolutely nothing contained in the language of this clause in remotely suggestive of damages. This is plain and simply a one million ($1,000,000.00) dollar penalty. The provision itself states it was included to estop the defendants from challenging the enforce ability of any of the covenants of the agreement, which in fact the defendants have abided by. The action commenced in Federal Court in no way challenged any covenant of the RDI. Plaintiffs cleverly set this trap by issuing the K-1 statements which Askari undoubtedly knew Mohyuddin would contest, then amassed significant legal fees and then requested indemnity for those fees, in an attempt to enforce the one million ($1,000,000.00) dollars penalty clause. This provision has no connection to any actual damages. It was inserted to inflict a punishment as confirmed by Mr. Askari himself. As this clause is an impermissible penalty, it is respectfully requested that the Court refuse to enforce it.

CONCLUSION

For the foregoing reasons, defendants respectfully request that their cross-motion be granted in its entirety dismissing all of plaintiffs causes of action, thereby denying plaintiffs motion for summary judgment, and for such other and further relief as to this Court deems just and proper.

Dated: Carle Place, New York
August 26, 2013

The Law Office of STEVEN COHN, P.C.



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Index No: 651710 **Year: 2013**

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

SINA DRUG CORP. d/b/a ONCOMED PHARMACEUTICAL SERVICES and KAVESH ASKARI ,

Plaintiffs,

-against-

MOHAMMAD ALI MOHYUDDIN and SORKIN'S RX LTD.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated: .....
Attorney(s) for

PLEASE TAKE NOTICE

___ *that the within is a (certified) true copy of a*
entered in the office of the clerk of the within named Court on *20*

___ *that an Order of which the within is a true copy will be presented for settlement to the Hon.*
one of the judges of the within named Court,

at
on *20* *, at* *M.*

Dated: