SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

SINA DRUG CORP. d/b/a ONCOMED PHARMACEUTICAL SERVICES and KAVESH ASKARI Plaintiffs, - against - MOHAMMAD ALI MOHYUDDIN and SORKIN'S RX LTD., Defendants.	Index No.: 651710/2013 (Hon. Shirley Kornreich) Mot. Seq. 001

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Sina Drug Corp. d/b/a Oncomed Pharmaceutical Services ("Oncomed") and Kaveh Askari (collectively, Plaintiffs or the "Oncomed Parties"), by their undersigned counsel, respectfully submit this memorandum in support of their motion for an order pursuant to CPLR 3212(b), granting them summary judgment on their claims against Defendants Mohammad Ali Mohyuddin and Sorkin's RX Ltd. ("Sorkin's") (collectively, Defendants or the "Mohyuddin Parties"), and dismissing all of Defendants' affirmative defenses pursuant to CPLR 3211(b).

PRELIMINARY STATEMENT

This action presents straightforward questions of law regarding the interpretation of express and unambiguous terms of an indemnity agreement that the parties signed when settling a prior action. To bring closure to that dispute, and to avoid any later related litigation, Plaintiffs insisted, and Defendants agreed, that Defendants would indemnify Plaintiffs from all liability and costs, including defense costs, that Plaintiffs incurred in connection with claims concerning the parties' prior relationship. The indemnity expressly covers claims "arising out of and/or otherwise relating to" the subject of the prior litigation, Oncomed, and the settlement documents, including any such claims Defendants themselves might assert against Plaintiffs in the future.

Plaintiffs' concerns proved prescient, as a year later Defendant Mohyuddin sued Plaintiffs Oncomed and Askari to avoid the federal income tax liability arising from the judicial determination in the prior action that Mohyuddin was an 18% owner of Oncomed – which relief Mohyuddin sought and obtained in that prior action – and resulting settlement agreement. Mohyuddin's new suit is ongoing and Plaintiffs have incurred significant costs in defending it.

Defendants, however, have failed to honor Plaintiffs' written demands for indemnification, including the payment of defense fees and costs incurred in the second action, as Defendants had expressly agreed in the written settlement. Defendants have, instead,

conditioned their performance "upon a determination by a court of competent jurisdiction that [Mohyuddin's action] is in fact covered by the provisions of the Indemnity Agreement." But there is no such precondition in the parties' indemnity agreement, the imposition of which, in effect, defeats a main purpose of the indemnity: protection against litigation expense. Defendants' seeking to impose a condition before they perform is nothing more than a repudiation of the indemnity provision and a refusal to honor their written obligations.

The parties further agreed there would be a consequence for Defendants' failure to honor their indemnity obligation, which arose out of Plaintiffs' justified concern that Defendants would not respect the settlement documents. Plaintiffs insisted and Defendants expressly agreed that if Plaintiffs were forced to go to court to enforce their indemnity rights, Defendants must pay Plaintiffs $1 million for that breach.

Plaintiffs' Motion, therefore, seeks judgment declaring that Defendants must honor their indemnity obligations as written and establishing liability for Defendants' breach of contract arising from their refusal to provide indemnity. Because the resolution of Plaintiffs' Motion turns on contract interpretation issues that are a matter of law for this Court and the material facts are not in dispute, the Court should grant summary judgment to in Plaintiffs. Finally, for the same reasons the Court should dismiss Defendants' affirmative defenses.

STATEMENT OF UNDISPUTED FACTS[1]

A. The Settlement of the First Action: the Terms of the RDI and Its Indemnity Provision

From May 2006 to May 2011, Oncomed, Askari, Mohyuddin, Sorkin's, and others were embroiled in litigation over Mohyuddin's and Sorkin's alleged misappropriation of Plaintiff's property and Mohyuddin's alleged 18% share ownership in Oncomed (the "First Action"). (Askari Aff. ¶¶ 3-5, Exs. A & B.) The court entered a Decision and Order ruling that Mohyuddin was an 18% owner of Oncomed. (Askari Aff. Ex. B.) In particular, the court held:

- "Mohyuddin is an 18% shareholder of Sina Drug Corp. and Plaintiff Askari is directed to issue a certificate in the name of Mohammad Ali Mohyuddin representing 18% of the outstanding shares."
- "To the extent that an accounting may reveal that there have been profits, dividends or other distributions to shareholders, to the exclusion of Mohyuddin, Plaintiffs are directed to redistribute the funds so as to reflect the entitlement of Mohyuddin as a holder of 18% of the shares of Sina Drug Corp."

(*Id.* at 5-6.)

In May 2011, during appeal the parties entered into a settlement agreement (the "Settlement Agreement") to end the First Action. (Askari Aff. Ex. C.) As part of the settlement, Mohyuddin was paid $ 3.8 million in exchange for Defendants' relinquishing all of their right title and interest in Oncomed, and any further claims thereto. (Askari Aff. ¶ 10.) Along with the Settlement Agreement, the Oncomed Parties and the Mohyuddin Parties entered into a Release, Disclaimer and Indemnity (the "RDI" or "Indemnity Agreement"). (Askari Aff. ¶ 8, Ex. D.)

[1] Counsel for the parties attempted, but were unable, to agree to a stipulated set of facts, coming so close that defense counsel signed a stipulated statement for submission to the Court, but ultimately would not authorize its submission. *See* Affirmation of James W. Perkins, dated July 19, 2013, ¶ 20 ("Perkins Aff."). The material facts, therefore, are set forth in the Affidavit of Kevin Askari, sworn to on July 19, 2013 ("Askari Aff.") and the Affirmation of James W. Perkins, to which the Court is respectfully referred.

The RDI is paramount to this action for it contains the Mohyuddin Parties' express agreement to indemnify the Oncomed Parties against expenses or liability from related claims or suits "arising out of and/or otherwise relating to" the First Action, its settlement or Oncomed. In the RDI, the Mohyuddin Parties granted a broad release in which they

> unconditionally and irrevocably release[d] . . . the Oncomed Parties from or on any and all claims, actions, causes of action, suits, debts, dues, sums of money, accounts reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages (including, without limitation, compensatory, consequential, and punitive damages), judgments, extents, executions, demands, fees and liabilities of any kind whatsoever in law and equity (collectively, "Claims" and each individually a "Claim") whether known or unknown, which each of the Mohyuddin Parties ever had, now has or can, shall or may have against the Oncomed Parties . . . in connection with, arising out of and/or otherwise relating to Oncomed [or] claims that were or could have been asserted in the Action . . . ., the Settlement Agreement dated May __, 2011 or the Action.

(Askari Aff. Ex. D at § 1(B), emphasis added.)

Defendants further agreed in the RDI to indemnify the Oncomed Parties from all costs "arising . . . from or in connection with the assertion by or on behalf of any of the Mohyuddin Parties . . . of any Claim, including those Claims pending in the Action or other matter released pursuant to this Release." (*Id.* at § 6.) The indemnity provision, Section 6, reads in full:

> Without in any way limiting any of the rights and remedies otherwise available to the Oncomed Parties under this Release, the Mohyuddin Parties shall indemnify and hold harmless each of the Oncomed Parties from and against all loss, liability, claim, damage (including incidental and consequential damages) or expense (including costs of investigation and defense and reasonable attorney's fees), whether or not involving third party claims, arising directly or indirectly from or in connection with the assertion by or on behalf of any of the Mohyuddin Parties or any of their respective heirs, executors, administrators, shareholders, directors, officers, members, partners, agents, representatives, affiliates, parent companies, subsidiaries, related business entities, successors and/or assigns of any Claim, including those Claims pending in the Action or other matter released pursuant to this Release.

(*Id.*, emphases added.) By encompassing any "Claim . . . or other matter released pursuant to

this Release," the indemnity provision is intentionally broad. Thus, the indemnity covers all Claims "arising out of and/or otherwise relating to" the First Action, the Settlement Agreement or Oncomed.

To ensure the Mohyuddin Parties would not bring further claims against Plaintiffs and honor their indemnification obligations, the RDI also provides that "[i]n the event the Mohyuddin Parties . . . refuse to indemnify the Oncomed Parties under the indemnity provisions hereof, the Mohyuddin Parties shall be liable for and shall pay to the Oncomed Parties one million dollars ($1,000,000.00)." (Askari Aff. ¶¶ 13-14, Ex. D at § 7.)

B. The Second Action Asserts Claims Arising Out of the Settlement of the First Action

On October 22, 2012, notwithstanding receipt of $3.8 million in cash for Mohyuddin's judicially-determined ownership interest and Defendants' written release and indemnity covering all claims asserted against the Oncomed Parties, Mohyuddin turned around and commenced another action against Oncomed and Askari (the "Second Action"). (Askari Aff. ¶ 15, Ex. F.) The Second Action is Mohyuddin's attempt to avoid the federal income tax liability arising from his judicially-determined ownership interest in Oncomed that he sought and obtained in the First Action. Specifically, in the Second Action, Mohyuddin challenges as "improper" Oncomed's amendments of its Schedule K-1 federal income tax filings for 2007, 2008, 2009, and 2010 that were made pursuant to the rules governing a subchapter S corporation, such as Oncomed, under the Internal Revenue Code and following the court's Decision and Order in the First Action. (Askari Aff. Ex. F at ¶¶ 28-37.) As a result of these amendments, Mohyuddin alleges that he will be required to pay federal and state taxes and that this requirement has somehow caused him harm. (*Id.* at ¶ 37.)

In setting forth his claim, Mohyuddin alleges facts that are contrary to the decision and

order of the court in the First Action that he was a shareholder of Oncomed. For example, Mohyuddin alleges that: (1) "[a]t no time . . . was he ever a shareholder of Sina Drug," (*id.* at ¶ 26); (2) "Plaintiff was never a shareholder of SINA DRUG," (*id.* at ¶¶ 38 & 41); (3) "[a]t no time . . . did Defendant permit Plaintiff to enjoy the benefits of any such shareholder interest," (*id.* at ¶ 39); and (4) "[a]t no time did Plaintiff ever receive any shareholder rights or benefits legally flowing therefrom, including, but not limited to distributions of any monthly and annual net profits enjoyed by the company during that time period," (*id.* at ¶ 40). These allegations are diametrically opposed to Defendants' allegations and the holdings of the court in the First Action that are quoted above.[2]

Given the rulings in the First Action and consequent tax reporting obligations, the Oncomed Parties have moved to dismiss the Second Action on the grounds of judicial estoppel, collateral estoppel, Mohyuddin's release in the RDI, failure to state a cause of action, and lack of standing. The motion to dismiss has been fully briefed and is *sub judice*.[3]

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[2] Mohyuddin's willingness to allege false facts in his pleading in the Second Action illustrate the lengths to which he must go to challenge the propriety of the Oncomed tax filings. In fact, the Oncomed tax filing amendments reflect the impact of Mohyuddin's judicially-determined 18% ownership of Oncomed, including his proportionate share of the company's profits during each of those years, which Oncomed was required to report in its tax filings as a subchapter S corporation. *See* 26 U.S.C. § 6037 ("Every S corporation shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowable by subtitle A," including "*each shareholder's pro rata share of each item of the corporation for the taxable year*") (emphasis added).

[3] Because the Second Action turns on substantial questions of federal law, namely the interpretation and construction of Internal Revenue Code provisions and related Internal Revenue Service regulations and doctrines of tax law, on December 7, 2012, the Oncomed Parties removed the Second Mohyuddin Action to the United States District Court for the Eastern District of New York. After the federal Magistrate *sua sponte* raised the issue of subject matter jurisdiction, and directed the parties to brief the issue, the Magistrate recommended to the District Judge that the matter be remanded to state court. Oncomed has since filed objections to the Magistrate's report with the District Judge. (Perkins Aff. ¶¶ 12-15.)

C. The RDI Expressly Covers the Second Action

There can be no serious dispute that Mohyuddin's claim in the Second Action concerning his income tax liability resulting from his judicially-determined shareholder status and the resulting Settlement Agreement is a "Claim" within the meaning of the RDI. By the express terms of the RDI, the indemnity obligation applies to "any Claim" asserted by "any of the Mohyuddin Parties," (which include Mohyuddin) that are made "in connection with, arising out of and/or otherwise relating to Oncomed, claims that were or could have been asserted in the [First] Action, . . ., the Settlement Agreement dated May __, 2011 or the Action." (Askari Aff. Ex. D at §§ 6, 1(B).) Allegations about tax liabilities and Oncomed's preparing of tax forms relating to the Settlement Agreement plainly are "in connection with" "arise out of" or "relate to" (a) Oncomed, (b) the Action, and/or (c) the Settlement Agreement.

D. Defendants' Failure and Refusal to Indemnify Plaintiffs for Costs Incurred in the Second Action

Defendants' filing of the Second Action has caused Plaintiffs to incur significant legal expense to defend it. Indeed, Plaintiffs have incurred attorneys' fees of now well in excess of $100,000. (Perkins Aff. ¶ 17).[4] Accordingly, on March 19, 2013, Plaintiffs sent Defendants a demand for indemnity and requested that Defendants confirm in writing that they will comply with their indemnification obligations under the RDI, including payment for the fees and expenses incurred to date and going forward thereafter in defending the Second Action. (Askari Aff. ¶ 21, Ex. G.) Defendants, however, did not respond to Plaintiff's letter of March 19, 2013. (Askari Aff. ¶ 22.)

On March 27, 2013, Plaintiffs sent another demand letter to Defendants requesting

[4] By their complaint, Plaintiffs have requested that the Court sever the issue of the amount owing under the indemnity from the issue of liability on the indemnity, which is established by the mere existence of the agreement.

confirmation in writing that Defendants would honor their obligation to indemnify Plaintiffs under the RDI. (Askari Aff. ¶ 22, Ex. H.)

Defendants finally responded in a letter dated April 30, 2013, but declined to honor Plaintiffs' requests. (Askari Aff. ¶ 23, Ex. I.) In particular, Defendants failed to confirm they would honor the indemnity, much less pay Plaintiffs' costs, and stated they "remain ready, willing 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." (Askari Aff. Ex. I.) The RDI, however, does not contain any such precondition that a court first determine that a claim is covered under the indemnity provision before indemnification must be made. Meanwhile, by their prosecution of the Second Action, Defendants are continuing to cause Plaintiffs to incur attorney's fees and expenses.

On May 10, 2013, in the face of Defendants' refusal to indemnify, in order to obtain the benefits of the indemnity they bargained for, and to enforce their rights under the RDI, Plaintiffs commenced this action. (Perkins Aff. Ex. A.) On May 29, 2013, Defendants filed their Answer. (*Id.* at Ex. B.) The Answer reasserts as an affirmative defense Defendants' rejection of any obligation to indemnify Plaintiffs absent a "determin[ation] by a Court that indemnity is warranted" and further alleged that "Plaintiffs [sic] causes of action for indemnity are premature." (*Id.* at ¶¶ 30-31.) Putting the lie to Defendants' prior assertions that they have not disavowed the indemnity obligation, Defendants allege as another affirmative defense: "Plaintiffs [sic] claims are barred as they are outside the 'Indemnity Agreement.'" (*Id.* at ¶ 32.) By refusing to honor the RDI as Plaintiffs have demanded, Defendants are defeating a fundamental purpose of the indemnity: to protect against Mohyuddin's further litigation with them over his relationship with Oncomed, Mohyuddin having received $3.8 million for a

relinquishment of the Oncomed share ownership and rights established by the court in the First Action. The above facts are not in dispute.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS PROPERLY GRANTED TO PLAINTIFFS FOR CLAIMS BASED ON A CLEAR AND UNAMBIGUOUS CONTRACT

To prevail on a motion for summary judgment under CPLR 3212(b), the moving party must show that no genuine issue of material fact exists, and that it is entitled to judgment as a matter of law. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1062 (1993); *Esteva v. City of New York*, 30 A.D.3d 212, 212 (1st Dep't 2006). "[S]ummary judgment is proper in any action for a declaratory judgment if the record presents undisputed facts." *Elec. Realty Assocs., Inc. v. Lennon*, 94 Misc. 2d 249, 285 (N.Y. Sup. Ct. 1978) (granting summary judgment on declaratory judgment action). This is particularly the case when the declaratory judgment action is based on the express provisions of a written contract. *See, e.g., Cifuentes v. Penn-America Group, Inc.*, No. 111613/05, 2010 WL 1945733 (N.Y. Sup. Ct. Mar. 26, 2010) (declaring claims for declaratory relief were "proper for the court to consider" where "on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on") (internal citation omitted); *Marinas of the Future, Inc. v. City of New York*, 87 A.D.2d 270, 277 (1st Dep't 1982) ("[W]here a question of intention is determinable by written agreements, the question is one of law, appropriately decided . . . on a motion for summary judgment.") (internal quotation omitted).

That is because the proper interpretation of an unambiguous contract is a question of law for the court, and a dispute on such an issue – whether in the nature of an action for breach of contract or for declaratory relief – may be properly resolved by summary judgment. *See White v.*

Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); *Project Gamma Acquisition Corp. v. PPG Indus., Inc.*, 34 Misc. 3d 771, 779 (N.Y. Sup. Ct. 2011) (Kornreich, J.) (granting motion for partial summary judgment on breach of contract cause of action). Moreover, under well-settled New York law, "[a] contract that provides for indemnification will be enforced as long as the intent to assume such a role is 'sufficiently clear and unambiguous.'" *Bradley v. Earl B. Feiden, Inc.*, 8 N.Y.3d 265, 274 (2007) (quoting *Rodrigues v. N & S Bldg. Contractors, Inc.*, 5 N.Y.3d 427, 433 (2005)). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002) (brackets in original) (quoting *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978)). Where, as here, an agreement to indemnify "is clear, unequivocal and unambiguous," a "trial court properly grant[s] summary judgment . . . finding that [the indemnitor] is required to indemnify [the indemnitee]." *Bradley*, 8 N.Y.3d at 275.

When the moving party's burden is met, the non-movant must show through affidavits or other admissible proof that a genuine issue of material fact does exist requiring a trial on the action. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980). "[M]ere conclusions, expressions of hope, unsubstantiated allegations or assertions are insufficient." *State Bank of Albany v. Fioravonti*, 51 N.Y.2d 638, 647 (1980). The "presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment." *Am. Sav. Bank FSB v. Imperato*, 159 A.D.2d 444, 444 (1st Dep't 1990). And, the non-moving party cannot create an ambiguity by resorting to extrinsic evidence. *See Serbin v. Rodman Principal Invs., LLC*, 87 A.D.3d 870, 870 (1st Dep't 2011) (rejecting alternative interpretation of clear and unambiguous agreement).

As further discussed below, each Cause of Action, which turns on the plain meaning of the parties' indemnity agreement and the pleadings and court rulings in two cases, is ripe for adjudication in Plaintiffs' favor. Defendants cannot meet their burden to raise a triable issue, because the terms of the RDI at issue are unambiguous, creating an issue of law for the Court, and the pleadings themselves demonstrate the Second Action is within the scope of the indemnity provision in the RDI.

POINT II

THE RDI OBLIGATES DEFENDANTS TO INDEMNIFY PLAINTIFFS FOR FEES AND COSTS INCURRED IN DEFENDING THE SECOND ACTION AS A MATTER OF LAW

Pursuant to CPLR 3001, the Court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." "A declaratory judgment action thus 'requires an actual controversy between genuine disputants with a stake in the outcome,' and may not be used as 'a vehicle for an advisory opinion.'" *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 253 (1st Dep't 2006) (quoting David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3001:3). However, such an action encompasses prospective conduct: "when a party contemplates taking certain action a genuine dispute may arise before any breach or violation has occurred." *New York Pub. Interest Research Group v. Carey*, 42 N.Y.2d 527, 530 (1977). And, "where the future event is an act contemplated by one of the parties," here Defendants' future compliance with the RDI's indemnity provision, "it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct." *Id.* at 530-31.

Moreover, "[a] dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights." *Zwarycz v. Marnia Const., Inc.*, 102 A.D.3d 774, 776 (2d Dep't 2013). "Repudiation, among other things, means rejection, disclaimer, renunciation, or even abandonment" of an obligation. *In re S.M. Goldberg Enters.*, 130 Misc. 887, 889 (N.Y. Sup. Ct. 1927). Any notice to that effect "creat[es] a genuine dispute for which a declaration would have . . . an 'immediate and practical effect of influencing the parties' conduct.'" *Big Four LLC v. Bond Street Lofts Condominium*, 94 A.D.3d 401, 402-03 (1st Dep't 2012) (quoting *New York Pub. Interest*, 42 N.Y.2d at 531) (brackets omitted).

Plaintiffs' First Cause of Action seeks a declaration that Defendants are obligated to indemnify Plaintiffs under the RDI for all liability and expenses that they have incurred and will incur as a consequence of the Second Action. (*See* Complaint ¶ 33, Perkins Aff. Ex. A.) As discussed above, the express language of the indemnity provision of the RDI, together with the face of the pleadings themselves, clearly and unambiguously show that Defendants are obligated to indemnify Plaintiffs from and against all loss or costs incurred in connection with the Second Action. (*See* Askari Aff. Ex. D at § 16.) Moreover, there can be no dispute that the indemnity provision covers claims that Defendants themselves bring against Plaintiffs: it expressly encompasses "the assertion by or on behalf of any of the Mohyuddin Parties . . . of any Claim . . . ." (*Id.*) *Accord Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989) (requiring clear and unmistakable language in parties' indemnity agreement permitting indemnification of costs incurred in litigation between them, as opposed to with third parties); *Sagittarius Broadcasting Corp. v. Evergreen Media Corp.*, 243 A.D.2d 325, 326 (1st Dep't 1997) (finding agreement contained language clearly and unmistakably permitting indemnification of costs incurred in litigation between the parties).

Defendants have attempted to side step liability under the RDI by asserting defenses alleging this case is not ripe since Defendants are waiting for a court of competent jurisdiction to tell them they have to indemnify. But this tactic is nothing more than an effort to leave Plaintiffs in a state of limbo without a remedy. Declaratory judgment actions are ripe when a party, such as Plaintiffs do here, requests from the Court an interpretation of the parties' contract so that they may know how to conduct themselves in an ongoing relationship. *See, e.g., James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931) ("The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations."); *Allen v. Thousand Island Park Corp.*, 18 Misc.2d 1079, 1080 (N.Y. Sup. Ct. 1959) ("An action for a declaratory judgment is designed to obtain a judicial declaration of the rights of the parties for the purpose of guiding their future conduct.") (internal quotation omitted).

In the Second Action, the parties are engaged in active litigation over the tax consequences of the rulings and settlement of the First Action. Defendants have failed to honor Plaintiffs' demand for indemnity concerning the Second Action. Now, having asserted as a defense that "Plaintiffs [sic] claims are barred as they are outside the 'Indemnity Agreement,'" (Perkins Aff. Ex. B at ¶ 32), Defendants' position there is no justiciable controversy is entirely without merit. Similarly, as discussed in Point III below, Defendants' repudiation of the indemnity obligation also creates a justiciable controversy that merits declaratory relief.

With the declaratory judgment claim ripe for adjudication, Defendants are obligated as a matter of law to indemnify Plaintiffs for all liability and expenses incurred as a consequence of the Second Action. *Accord Rubinio v. Ocean Prime, LLC*, No. 100716/05, 2008 WL 835254, *5 (N.Y. Sup. Ct. Mar. 18, 2008) (Kornreich, J.) ("[A]s Nouveau agreed in the contract to

indemnify Newmark for all liabilities caused by Nouveau's negligence, including attorneys fees and costs, Newmark is entitled to conditional summary judgment of indemnification for the attorneys' fees and costs it has incurred to date."); *see also De la Rosa v. Philip Morris Mgmt. Corp.*, 303 A.D.2d 190, 193 (1st Dep't 2003) (reversing denial of summary judgment for contractual indemnification because the "relevant indemnification provisions . . . are clear and unambiguous"). Plaintiffs are expressly entitled to indemnity against the claims against them in the Second Action and seek the assistance of this Court to order Defendants to honor that obligation.

POINT III

BY IMPOSING NEW CONDITIONS NOT PRESENT IN THE INDEMNITY AGREEMENT, DEFENDANTS HAVE BREACHED THAT AGREEMENT AS A MATTER OF LAW

A party's "insistence on an untenable interpretation of a key contractual provision, and refusal to perform otherwise, constitute[s] an anticipatory breach of the contract" and a repudiation thereof. *IBM Credit Financing Corp. v. Mazda Motor Mfg. (USA) Corp.*, 92 N.Y.2d 989, 993 (1998). *See also Salomon v. Angsten*, 19 A.D.3d 143, 144 (1st Dep't 2005) (noting that "it was plaintiff who repudiated the parties' agreement by insisting upon an untenable interpretation of it"); *SPI Commc'ns, Inc. v. WTZA-TV Assocs. Ltd. P'ship*, 229 A.D.2d 644, 645 (3d Dep't 1996) ("An anticipatory repudiation . . . can be grounded upon a finding that the other party has attempted to avoid its obligations by advancing an 'untenable' interpretation of the contract, or has communicated its intent to perform only upon the satisfaction of extracontractual conditions."); *Higgins & Higgins Inc. v. Langenkamp*, No. 16668/08, 2009 WL 565292, *2 (N.Y. Sup. Ct. Feb. 13, 2009) (finding plaintiff's "insistence that defendants adopt this [untenable] interpretation as a condition to plaintiff's proceeding to perform constituted an

anticipatory breach of the contract"); *Aetna Cas. and Surety Co. v. Home Ins. Co.*, 882 F. Supp. 1328, 1354 (S.D.N.Y. 1995) (finding indemnitor's non-compliance with request for indemnification was anticipatory breach and repudiation).

This principle goes hand in hand with the black letter law that a contract must be enforced according to its terms and the words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties. *See W.W.W. Assocs., Inc. v. Giancontieri,* 77 N.Y.2d 157, 162 (1990); *Laba v. Carey*, 29 N.Y. 302, 308 (1971). Indeed, "it is not the function of the courts to remake the contract agreed to by the parties, but rather to enforce it as it exists." *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 69 (1978). Thus, courts cannot imply conditions or restrictions which the parties chose not to insert in the contract. *Morlee Sales Corp. v. Manufacturers Trust Co.*, 9 N.Y.2d 16, 20 (1961). *See also Raner v. Goldberg*, 244 N.Y. 438, 442 (1927) ("We may not now imply a condition which the parties chose not to insert in their contract . . . .").

Rather than honor Plaintiffs' demand for indemnity, Defendants have impermissibly injected a precondition to indemnification that appears nowhere in the RDI. In particular, Defendants have told Plaintiffs that they will indemnify only if a court first determines that the Second Action "is in fact covered by the provisions of the Indemnity Agreement." (Askari Aff. Ex. I.) Defendants cannot simply impose a new condition to their indemnity obligations – requiring Plaintiffs to incur significant time and expense to obtain a court order – and, thereby, defeat the very purpose of the covenant. It is a fundamental tenet of contract law that "[o]ne who has become a party to a contract . . . must live up to his engagement according to its spirit. He will not be permitted to wrest it from its purpose and turn it into a shallow form by taking refuge

in a disingenuous silence or in subtle and adroit evasions." *Newburger v. Lubell*, 257 N.Y. 383, 387 (1931) (Cardozo, C.J.).

Defendants' imposition of a new condition precedent to their performance is a repudiation of the RDI and, therefore, a breach. *See In re Dissolution of Princeton Info., Ltd.*, 235 A.D.2d 234, 234 (1st Dep't 1997) (rejecting argument that "a judicial determination of validity, legality or enforceability of any of the provisions" of an agreement is "a condition precedent to arbitration" where "[t]he broad arbitration clause in the . . . agreement clearly covers the subject matter of the dispute"). If the indemnitor "had reservations as to the scope of the agreement, he should have insisted on a different indemnification clause or refused to give his assent to the contract." *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 213 (1971) (enforcing indemnification agreement).[5]

By failing and refusing to indemnify, Defendants have breached the RDI's indemnity provision.

POINT IV

AS A CONSEQUENCE OF THEIR REFUSAL TO INDEMNIFY, DEFENDANTS ARE LIABLE TO PLAINTIFFS IN THE AMOUNT OF $1 MILLION

Defendants' refusal to indemnify Plaintiffs for costs incurred in defending against the Second Action has also triggered Defendants' liability under Paragraph 7 of the RDI, which provides that "[i]n the event the Mohyuddin Parties . . . refuse to indemnify the Oncomed Parties under the indemnity provisions hereof, the Mohyuddin Parties shall be liable for and shall pay to the Oncomed Parties one million dollars ($1,000,000.00)." (Askari Aff. Ex. D at § 7.)

[5] If parties were permitted to unilaterally condition their performance under a contract upon a judicial determination, the ramifications would be profound. Contracting parties would lack confidence in the performance of obligations and the courts' dockets likely would be mobbed by plaintiffs forced to commence legal proceedings to obtain court rulings demanded by their counterparties as a condition precedent to any performance.

Defendants attempt to avoid the triggering of this provision by insisting in their written response "that there has never been a refusal . . . to comply with the terms and conditions of the [RDI]," (Askari Aff. Ex. I), is not borne out by the facts or the law. Defendants' response – go tell the Court to make us indemnify – is plainly a refusal to honor their obligations. *See Princeton Info.*, 235 A.D.2d at 234 (holding that plaintiff's attempt to impose judicial determination as condition to arbitration was improper).

Defendants have at no time complied with their obligation to indemnify, and have disavowed it. This conduct constitutes a refusal to indemnify as a matter of law. *See, e.g.*, *Joseph P. Carrara & Sons, Inc. v. A.R. Mack Constr. Co., Inc.*, 89 A.D.3d 1190, 1191 (3d Dep't 2011) (holding refusal supporting an anticipatory repudiation "may take the form of an unequivocal statement of intent to perform only upon the satisfaction of extracontractual conditions") (emphasis added). If there were any doubt about Defendants' refusal, their seventh affirmative defense erases it where it alleges that the claims in the Second Action for which the Oncomed Parties seek indemnity are "outside the 'Indemnity Agreement.'" (Perkins Aff. Ex. B at ¶ 32.) That position cannot be squared with their prior statements that they have not refused to indemnify.

Accordingly, the Court should grant summary judgment on Plaintiffs' Third Cause of Action and enter judgment declaring that Defendants are liable to Plaintiffs in the amount of $1 million pursuant to Section 7 of the RDI. Indeed, it is Defendants' very refusal to honor the indemnity that triggered this lawsuit.

POINT V

DEFENDANTS' AFFIRMATIVE DEFENSES ARE PROPERLY DISMISSED

"[W]here affirmative defenses merely plead conclusions of law without any supporting

facts, the affirmative defenses should be dismissed pursuant to CPLR 3211(b)." *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 A.D.3d 746, 750 (2d Dep't 2010) (internal quotation omitted). Defendants have asserted numerous affirmative defenses, but they lack any basis in fact or law. Defendants offer no facts to support their assertions of "accord and satisfaction" (second defense) or "ratification, estoppel, waiver, acquiescence, abandonment, laches and/or unclean hands" (third defense). (Perkins Aff. Ex. B. ¶¶ 27-28.) None of these defenses are "stated" or bear any "merit" within the meaning of 3211(b).

Moreover, for the same reasons set forth above that support summary judgment in favor of Plaintiffs, the first, fourth, fifth, sixth, and seventh defenses regarding the Indemnity Agreement, (*id.* at ¶¶ 26, 29-32), are also without merit. *See Peny & Co. v. Food First Housing Dev. Fund Co., Inc.*, No. 502387/2012, 2013 WL 2382263, *5 (N.Y. Sup. Ct. May 31, 2013) ("As all of Mortgagors' defenses are without merit, plaintiff's motion to dismiss the affirmative defenses is granted.").

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment on their First, Second, and Third Causes of Action should be granted in its entirety, the Court should dismiss Defendants' affirmative defenses, and award Plaintiffs such other and further relief as it deems appropriate.

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