

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

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JA LEE KAO,

Index No.: 654411/2021

Plaintiff,

MOTION SEQUENCE NO. 5

-against-

ONYX RENEWABLE PARTNERS L.P., ORP
JOINT HOLDINGS GP LLC, BLACK ONYX
INVESTMENTS, LLC, BILAL KHAN, AND
JONATHAN MAXWELL,

Defendants.

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**MEMORANDUM OF LAW OF ONYX RENEWABLE PARTNERS L.P. IN
OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE**

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February 25, 2022

TABLE OF CONTENTS

	Page
I. PRELIMINARY STATEMENT	1
II. STATEMENT OF FACTS	3
III. LEGAL STANDARD.....	6
IV. PLAINTIFF HAS NOT MET THE HIGH STANDARD FOR A PRELIMINARY INJUNCTION.....	7
A. Plaintiff Has Not Demonstrated Likelihood Of Success On The Merits	7
i. Plaintiff’s Employment Agreement Does Not Provide For Payment Of Attorney’s Fees During The Pendency Of This Action.....	7
ii. Onyx’s Obligation To Pay Plaintiff’s Attorney’s Fees Is Limited By The Plain Language Of Her Employment Agreement	8
iii. Onyx’s Obligation To Pay Attorney’s Fees Is Cabined By The Covenant Of Good Faith And Fair Dealing	12
iv. Onyx Is Not Obligated To Pay Plaintiff’s Attorney’s Fees To Seek Attorney’s Fees	13
v. Onyx Has Not Waived Any Rights Under The Employment Agreement	14
vi. Plaintiff Fails To Provide Evidence To Support Her Request For Fees	16
B. Plaintiff Fails To Demonstrate Irreparable Harm	19
C. The Balance Of The Equities Favor Onyx.....	20
V. PLAINTIFF’S REQUEST FOR PERMANENT INJUNCTIVE RELIEF THROUGH AN ORDER TO SHOW CAUSE IS IMPROPER	21
VI. CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u><i>Armbruster v. Gipp,</i></u> <u>103 A.D.2d 1014 (4th Dep't 1984)</u>	22
<u><i>Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr. for Heyman,</i></u> <u>2020 WL 6582958 (Del. Super. Ct. Nov. 10, 2020)</u>	11
<u><i>Bantum v. New Castle Cnty. Vo-Tech Educ. Ass'n,</i></u> <u>21 A.3d 44 (Del. 2011)</u>	14
<u><i>Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC,</i></u> <u>2009 WL 1124451 (Del. Ch. Apr. 20, 2009)</u>	12
<u><i>Bergin v. McCloskey,</i></u> <u>2008 WL 4662378 (Del. Ct. Com. Pl. Oct. 22, 2008)</u>	13
<u><i>Berman v. TRG Waterfront Lender, LLC,</i></u> <u>181 A.D.3d 783 (2d Dep't 2020)</u>	19
<u><i>Clean Harbors, Inc. v. Union Pac. Corp.,</i></u> <u>2017 WL 5606953 (Del. Super. Ct. Nov. 15, 2017)</u>	10
<u><i>Danenberg v. Fittracks, Inc.,</i></u> <u>58 A.3d 991 (Del. Ch. 2012)</u>	17
<u><i>DeLucca v. KKAT Mgmt., L.L.C.,</i></u> <u>2006 WL 224058 (Del. Ch. Jan. 23, 2006)</u>	8
<u><i>Fasciana v. Elec. Data Sys. Corp.,</i></u> <u>829 A.2d 178 (Del. Ch. 2003)</u>	13, 14
<u><i>Fasciana v. Elec. Data Sys. Corp.,</i></u> <u>829 A.2d 160 (Del. Ch. 2003)</u>	18
<u><i>Ficus Invs., Inc. v. Priv. Cap. Mgmt., LLC,</i></u> <u>61 A.D.3d 1 (1st Dep't 2009)</u>	6
<u><i>Flynn v. CIBC World Mkts. Corp.,</i></u> <u>2005 WL 1538337 (Del. Ch. June 21, 2005)</u>	7
<u><i>Kaloyeros v. Fort Schuyler Management Corporation,</i></u> <u>157 A.D.3d 1152 (3d Dep't 2018)</u>	6, 20
<u><i>Kleinberg v. Radian Group, Inc.,</i></u> <u>2003 WL 22420501 (S.D.N.Y. Oct. 24, 2003)</u>	9

L Series, L.L.C. v. Holt,
571 S.W.3d 864 (Tex. App. 2019) 8

Lau v. Lai,
43 Misc. 3d 1220(A) (Sup. Ct., Kings County 2014)..... 16

Lennox Indus., Inc. v. All. Compressors LLC,
2021 WL 4958254 (Del. Super. Ct. Oct. 25, 2021)..... 14, 15, 16

Lillis v. AT & T Corp.,
904 A.2d 325 (Del. Ch. 2006)..... 10, 12

Majkowski v. Am. Imaging Mgmt. Servs., LLC,
913 A.2d 572 (Del. Ch. 2006)..... 7

Metro Commc’n Corp. BVI v. Advanced Mobilecomm Techs. Inc.,
854 A.2d 121 (Del. Ch. 2004)..... 12

Rosa Hair Stylists, Inc. v. Jaber Food Corp.,
218 A.D.2d 793 (2d Dep’t 1995)..... 6, 7

SportsChannel Am. Assocs. v. Nat’l Hockey League,
186 A.D.2d 417 (1st Dep’t 1992)..... 21

Onyx Renewable Partners L.P. (“Onyx”) submits this Memorandum of Law in Opposition to Plaintiff Ja Lee Kao’s (“Plaintiff”) Motion For Reimbursement And Advancement Of Legal Fees And Expenses (the “Motion”).

I. PRELIMINARY STATEMENT

Plaintiff seeks a sweeping emergency order from this Court through the unwarranted expedience of an order to show cause that Onyx is obligated to pay her attorney’s fees for any claims or defenses in this Action or any other action even tangentially related to her six-year employment at Onyx. In addition to disregarding the parameters of the applicable contractual provision regarding the payment of her fees, Plaintiff does not envision either this Court or Onyx (or anyone, for that matter) having any role in reviewing whether such fees are reasonable. Rather, she proposes a “blank check” procedure in which Onyx is obligated to make final payment for all of Plaintiff’s attorney’s fees within ten days of receiving an invoice from Plaintiff that provides no description whatsoever of the services provided and, instead, contains only the total hours worked and her counsel’s purported hourly rate.

Despite seeking such extraordinary relief, Plaintiff does not inform the Court of the amount of attorney’s fees she has incurred to date (except to say they are “substantial”), and then vaguely foreshadows that she expects her two-law-firm and four-lawyer team to incur an additional “several million” dollars of fees that Onyx allegedly is responsible for paying before the conclusion of this Action and without regard to the claims to which they pertain.

Moreover, Plaintiff filed for this extraordinary relief in an “emergency” order to show cause, despite waiting four months to send an invoice or otherwise seek reimbursement of her fees. She also sought this emergency relief despite the same issue (the limitations on Onyx’s obligation to pay Plaintiff’s attorney’s fees) being squarely addressed by Plaintiff’s claim for

declaratory judgment in this Action and Onyx's Counterclaims regarding the same issue. [Dkt. Nos. 1, 51](#). Indeed, the parties were in the middle of briefing Plaintiff's Motion to Dismiss Onyx's Counterclaims regarding limitations on Onyx's obligations to pay Plaintiff's attorney's fees when Plaintiff decided to file this *second* Motion regarding the same issue. [Dkt. Nos. 70, 76, 91](#). Even more problematic, Plaintiff seeks this emergency relief based on a clear dispute between the parties regarding the fees provision, while simultaneously and duplicitously representing to the Court in her Reply in support of her pending Motion to Dismiss that any dispute over the scope of potential reimbursement is premature as there is no "justiciable controversy." [Dkt. No. 91 at 8-9](#).

While Plaintiff seeks extraordinary interim relief, she has not and cannot meet the high standard necessary for such relief. *First*, Plaintiff has not established a likelihood of ultimate success on the merits because her requested relief is contrary to the plain language of her Employment Agreement. She is not entitled to advancement of any fees because the Employment Agreement does not contain any affirmative language entitling Plaintiff to advancement. Moreover, the relevant contractual provision only requires Onyx to pay reasonable attorney's fees related to a dispute of the three enumerated contracts. Contrary to Plaintiff's distorted and unreasonable reading, the Employment Agreement does not require that Onyx pay Plaintiff's fees for any conceivable claim against anyone that is alleged to have occurred *during* her employment. Nor does the Employment Agreement require Onyx to pay the fees for the defense of fiduciary duty breach claims that arise wholly apart from a dispute about contractual terms of the relevant agreements.

Further, Plaintiff's Motion does not seriously contest that Onyx's obligation to pay certain attorney's fees is cabined by the covenant of good faith and fair dealing, which applies to

every contract governed by Delaware law, including Plaintiff's Employment Agreement. Yet, she proposes a "blank check" procedure for reimbursement where Onyx would pay her attorney's fees – which have been expressly disputed – without an opportunity for either Onyx or this Court to evaluate the good faith and reasonableness of those fees based on a detailed invoice from Plaintiff's counsel. Plaintiff's proposed approach is contrary to the covenant of good faith and fair dealing and is thus unlikely to succeed on the merits.

Second, even if Plaintiff could adequately establish a likelihood of success on the merits, which she cannot, the Court should deny the present Motion because Plaintiff cannot establish irreparable injury, given that any claimed right to reimbursement of fees can be recovered as money damages. That Plaintiff waited over four months to submit an invoice for reimbursement alone forecloses her irreparable harm argument.

Third, and independently, a balancing of the equities does not favor Plaintiff: She has flatly refused to provide any required details regarding the claimed fees, while at the same time asking this Court for extraordinary emergency relief on issues she simultaneously claims are not in controversy and already briefed on other motions, needlessly requiring the parties to submit duplicative briefing.

For these reasons, and those more fully articulated below, Onyx respectfully submits that preliminary relief is not warranted and the Motion should be denied.

II. STATEMENT OF FACTS

On July 1, 2015, Plaintiff and Onyx entered into an Employment Agreement (the "Employment Agreement"). [Dkt. No. 81](#). The Employment Agreement was the bespoke product of negotiations between two sophisticated parties – Plaintiff and Onyx. Plaintiff has been an attorney admitted in the state of New York since 2002 and was an experienced

investment banker at the time she was negotiating the Employment Agreement. [Kao Aff. ¶¶ 3,](#)

[5.](#) Plaintiff specifically negotiated a provision in Section 22 of her Employment Agreement

which reads:

The parties acknowledge and agree that in connection with any dispute [sic] any of this Agreement, the Partnership Agreement or the MLP LLC Agreement, the Company shall pay all costs and expenses of the parties to this Agreement, including, without limitation, all legal fees and expenses of the Executive.

[Dkt. No. 81;](#) [Kao Aff. ¶ 12.](#)

Section 22 was a limited piece of Plaintiff's comprehensive Employment Agreement, which set out Plaintiff's duties and responsibilities as President of Onyx and her compensation which included a base salary of \$425,000. [Dkt. No. 81.](#)

Plaintiff became President and CEO of Onyx in January 2019, and her annual salary was increased to \$600,000. Wang Decl. ¶ 3. In addition to her salary, Plaintiff was granted substantial equity interests in Black Onyx (a profits interest vehicle in Onyx) which yielded her in excess of \$2 million in distributions in 2021. Wang Decl. ¶¶ 4-6. These distributions were a result of the sale of, among other assets, a fifty percent interest in Onyx and a project development pipeline to entities managed by Sustainable Development Capital LLP in February 2021. Wang Decl. ¶¶ 5-6.

Just two months after the closing of the sale, on April 23, 2021, Plaintiff voluntarily submitted her resignation from Onyx. Wang Decl. Ex. 2 (April 23, 2021 Resignation Letter).

On July 16, 2021, Plaintiff filed the present Action bringing claims for declaratory judgment (including that Onyx is responsible for paying her legal fees in this Action), breach of contract, discrimination under state and local law, and retaliation. [Dkt. No. 1.](#) Plaintiff did not seek any interim relief in her complaint. Between July 16, 2021 and November 23, 2021, the parties were not actively engaged in litigation, but were exploring whether an amicable

resolution was possible. Wang Decl. ¶ 8. On September 24, 2021, because the parties were in the midst of actively seeking a potential amicable resolution, Onyx paid Plaintiff's legal fees for services rendered through September 9, 2021 without waiver of any of Onyx's rights. [Hubell Aff. ¶¶ 9-10](#).¹

On November 24, 2021, Onyx filed its Answer with Counterclaims. [Dkt. No. 21](#). These Counterclaims, as amended on January 3, 2022, include claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and declaratory judgment that (a) the implied covenant of good faith and fair dealing applies to Plaintiff's incurrence of attorney's fees and (b) Onyx is not obligated to pay attorney's fees related to either Plaintiff's claims for discrimination and retaliation or Onyx's Counterclaims. [Dkt. No. 51](#).

On January 13, 2022, approximately four months after Plaintiff's counsel last submitted an invoice to Onyx, Plaintiff's counsel sent an invoice to Onyx for \$337,341.50 for unspecified legal services from September 10, 2021 to November 30, 2021. Wang Decl. Ex. 3. This invoice contained a simple five-line chart titled as a "Fee Summary" that identified only the total hours worked by two timekeepers per month and the purported hourly rate per timekeeper. *Id.*

On January 25, 2022, Onyx's General Counsel wrote to Plaintiff's counsel requesting "an itemized statement of attorney time entries for each month reflecting, at a minimum, the date on which each timekeeper billed time, a description of the work performed by each timekeeper and the time spent on that work for each task performed." [Dkt. No. 86](#). Plaintiff's only communication in response to this reasonable request for more detail came in a January 26, 2022

¹ If the Court holds that communications surrounding the parties' mediation and discussions in aid of settlement are not privileged and/or confidential, which we respectfully believe it should not, Onyx requests the opportunity to present confidential evidence to the Court *in camera* that will provide a complete and accurate picture of the parties' interactions in the settlement discussions that preceded mediation, the mediation itself, and the continuing settlement discussions that followed as facilitated by the mediator.

email in which her attorneys “rejected” Defendants’ request to meet and confer on discovery matters because of Onyx’s purported “declination to pay outstanding legal fees” of Plaintiff.

[Dkt. No. 75](#). On February 3, 2022, Plaintiff filed the instant Motion.

III. LEGAL STANDARD

The Motion seeks preliminary relief in the form of an order requiring that during the pendency of this Action, Onyx blindly pay all purported legal fees that Plaintiff already has incurred and on a going forward basis “advance” all fees and expenses to Plaintiff within ten business days of receiving a summary invoice from Plaintiff. [Dkt. No. 77](#). In contrast to an advancement action, Plaintiff’s Motion and the relief she seeks do not suggest that she would have any obligation to re-pay any attorney’s fees if it was subsequently determined that she was not entitled to those attorney’s fees.² Therefore, in effect, Plaintiff seeks a final determination of her right to attorney’s fees – and an expedited end-run around an issue clearly disputed before this Court – before the conclusion of this Action and without the benefit of any discovery or fact-finding as to Onyx’s obligations to pay her attorney’s fees or the reasonableness of those fees.

Where, as here, a party seeks the final disposition of a contested issue through a motion for preliminary relief, such relief “should not be granted, absent extraordinary circumstances[.]” [Rosa Hair Stylists, Inc. v. Jaber Food Corp.](#), 218 A.D.2d 793, 794 (2d Dep’t 1995). Under this high standard, Plaintiff must demonstrate she has a “clear right” to a preliminary injunction which has three elements: “(1) a likelihood of ultimate success on the merits, (2) irreparable

² Given that Plaintiff is not seeking advancement, the standard that governs advancement actions articulated in *Kaloyeros v. Fort Schuyler Management Corporation* does not apply to this Motion. [157 A.D.3d 1152, 1153 \(3d Dep’t 2018\)](#). “Under Delaware law, a clear distinction is drawn between the two provisions: whether an officer is entitled to advancement is determined in a summary proceeding, while the right to indemnification is delayed until the conclusion of the matter.” [Ficus Invs., Inc. v. Priv. Cap. Mgmt., LLC](#), 61 A.D.3d 1, 9 (1st Dep’t 2009).

injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor." [Rosa Hair Stylists, Inc. 218 A.D.2d at 794.](#)

IV. PLAINTIFF HAS NOT MET THE HIGH STANDARD FOR A PRELIMINARY INJUNCTION

A. Plaintiff Has Not Demonstrated Likelihood Of Success On The Merits

As outlined below, Plaintiff fails to show she is likely to succeed on the merits of her claim for attorney's fees.

i. Plaintiff's Employment Agreement Does Not Provide For Payment Of Attorney's Fees During The Pendency Of This Action

Plaintiff is not entitled to the payment of her attorney's fees as they are incurred or any advancement of attorney's fees based on the clear language of the Employment Agreement, which does not provide for advancement. Whether a party is entitled to advancement turns solely on whether the contract at issue provides for advancement. [Majkowski v. Am. Imaging Mgmt. Servs., LLC, 913 A.2d 572, 593 \(Del. Ch. 2006\)](#) (“[C]ompany will only be obligated to advance litigation expenses to an officer when its LLC agreement expressly states the company's intention to mandate advancement.”); [Flynn v. CIBC World Mkts. Corp., 2005 WL 1538337, at *2 \(Del. Ch. June 21, 2005\)](#) (In determining whether to award advancement, “[t]he court will look to the plain meaning of the advancement provision of the [governing] agreement in determining whether to award advancement.”) (citation and quotation omitted).

Under Delaware law, a contract does not provide for advancement unless the right is “granted in specific language clearly suggesting such rights.” [Majkowski, 913 A.2d at 589-90.](#) As the “terms advancement and indemnification are not synonymous . . . [r]easonable lawyers drafting indemnification and advancement provisions understand that they are dealing with two distinct types of rights. As a result, they typically create separate provisions to address the two different topics.” *Id.* Here, the Employment Agreement does not contain any language

indicating that Plaintiff has a right to the advancement of her attorney's fees before the conclusion of this suit. [Dkt. No. 81](#).

Indeed, the language in the Employment Agreement stands in sharp contrast to the language in the cases relied upon by Plaintiff in which the right to advancement was expressly and unambiguously provided for in the underlying contracts at issue. *See, e.g., L Series, L.L.C. v. Holt*, 571 S.W.3d 864, 873 (Tex. App. 2019) (Contract provided that “[t]he right to indemnification . . . shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred . . . [1] *in advance of the final disposition of the Proceeding* and [2] *without any determination as to the Person's ultimate entitlement to indemnification.*”); [DeLucca v. KKAT Mgmt., L.L.C.](#), 2006 WL 224058, at *7 (Del. Ch. Jan. 23, 2006) (“In the event that any Indemnified Person becomes involved in any capacity in any action, proceeding or investigation in connection with any matter that may result in the indemnification contemplated above, the Company will *periodically advance to* or reimburse such Indemnified Person for its legal and other expenses[.]”) (emphasis added).

Moreover, this is not a case where the Court should strain to find a right to advancement where none exists in the contract based on any asserted equities. Plaintiff, an attorney and a sophisticated businesswoman, represented herself in a bespoke negotiation of her Employment Agreement. [J. Kao Aff. ¶¶ 3, 5, 11-12](#). In this negotiation, she did not bargain for any right to advancement under her Employment Agreement and, respectfully, that should end the Court's inquiry.

ii. Onyx's Obligation To Pay Plaintiff's Attorney's Fees Is Limited By The Plain Language Of Her Employment Agreement

Onyx's obligation to pay Plaintiff's attorney's fees is limited to fees incurred in a dispute of the three enumerated contracts between Onyx and Plaintiff. Section 22 of Plaintiff's

Employment Agreement reads: “in connection with any dispute [sic] any of *this Agreement, the Partnership Agreement or the MLP LLC Agreement*, the Company shall pay all costs and expenses of the parties to this Agreement, including, without limitation, all legal fees and expenses of the Executive.” [Dkt. No. 81](#) (emphasis added). The phrase “in connection with any dispute [sic] of th[ese]” three agreements indicates that “any dispute” must be “of” the terms of the enumerated agreements. To the extent that “in connection with” is considered a broad phrase, it is expressly limited by the modifying language “any dispute [sic] of th[ese]” agreements. Indeed, Plaintiff’s argument that the provision covers fees incurred “‘in connection with any dispute’ *related to*” the agreements, [Motion at 6](#), reads language into the provision that does not exist and ignores the difference in the meaning of “related to” and “of.” “Of” expresses the relationship between a part and a whole, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10TH ED. 1996), and in this case any dispute (the part) is in reference to “of this Agreement” (the whole).

The language in Plaintiff’s Employment Agreement is similar to that at issue in *Kleinberg v. Radian Group, Inc.*, which read that “[t]he Company shall pay all reasonable attorney’s fees and expenses incurred by the Executive in connection with, but not limited to, a *bona fide dispute* regarding the application of any and all the provisions *under this Agreement*.” [2003 WL 22420501, at *3 \(S.D.N.Y. Oct. 24, 2003\)](#), *report and recommendation adopted*, [2003 WL 22723014 \(S.D.N.Y. Nov. 18, 2003\)](#) (emphasis added). There, the Court determined that the plaintiff was not entitled to payment of attorney’s fees as his claims that the agreement at issue had been altered by parol evidence and to enforce a different agreement “stray[ed] far afield from the provisions, rights or benefits set forth in the Agreement.” [Id. at *5](#). While *Kleinburg* was decided under New York law, which strictly construes attorney’s fees provisions (in contrast

to Delaware law), the Court in *Lillis v. AT & T Corp.* (relied upon by Plaintiff) found that the language in *Kleinberg* was “significantly narrower” than the contractual language in *Lillis*. [904 A.2d 325, 334 n.35 \(Del. Ch. 2006\)](#). Moreover, *Lillis* stands for the proposition that the phrase “in connection with” a contract encompasses claims brought to enforce rights granted under that contract. [Id. at 332-33](#).³

Interpreting the attorney’s fees provision as limited to disputes of the three enumerated agreements is further bolstered by the inclusion of the phrase “the Company shall pay all costs and expenses of the parties to this Agreement, including, without limitation, all legal fees and expenses of the Executive.” [Dkt. No. 81](#) (emphasis added). By identifying the “parties to this Agreement” as those who will have their fees paid, it is clear that the Employment Agreement’s fee provision was only intended to cover disputes between the parties to the Employment Agreement (Onyx and Plaintiff) over the terms of the three agreements. [Clean Harbors, Inc. v. Union Pac. Corp., 2017 WL 5606953, at *7 \(Del. Super. Ct. Nov. 15, 2017\), aff’d, 201 A.3d 1161 \(Del. 2019\)](#) (“Though the [agreement] contains broad ‘any and all’ language . . . [it] contains an agreement . . . that attorneys’ fees may only be recovered in a particular type of action, which does not include the one at issue here.”).

This interpretation of the Employment Agreement further comports with the default American rule that each party bears its own costs absent clear contractual language to the

³ In *Lillis*, plaintiffs brought suit to recover the attorney’s fees they incurred in vindicating their contractual rights to certain compensation. [904 A.2d at 326](#) (“This case arises from a dispute between former officers and directors of a telecommunications company and that company’s successors in interest concerning the enforcement of contracts granting stock options.”). Indeed, the causes of action underlying the request for attorney’s fees were violations of “contractual obligations” and common law negligent misrepresentation regarding the cancelation of certain options where the contract at issue protected the employee’s right to compensation in the event of a change in control transaction. [Id. at 327](#). *Lillis* stands in sharp contrast to the present case, as Plaintiff’s discrimination and retaliation claims, as well as the fiduciary duties Plaintiff is alleged to have breached, are wholly unrelated to any terms of and rights granted under the enumerated contracts.

contrary. [Ashland LLC v. Samuel J. Heyman 1981 Continuing Tr. for Heyman, 2020 WL 6582958, at *6 \(Del. Super. Ct. Nov. 10, 2020\)](#) (“Applying the law discussed above, however, the parties must have intended clearly and unequivocally to overcome the presumption against fee-shifting under the American Rule for Ashland to recover attorneys’ fees under the indemnification clauses.”).

Thus, in light of the clear intent of the parties to cover only certain attorney’s fees related to disputes of terms of specified contracts, and the presumption against expansive fee-shifting provisions in contracts, Section 22 does not extend outside of the contractual claims in this Action brought against the parties to the enumerated agreements.

In the face of this express limitation, Plaintiff asks this Court to read into Section 22 an unfettered entitlement to *undocumented and unbounded* fees incurred in pursuing or defending any and all claims that happened to occur during or are related to Plaintiff’s employment with Onyx. Such a distortion of the fees provision is not supported by the facts or the law, for example:

- Plaintiff’s assertion of discrimination and retaliation claims flows not from any dispute over a contractual term, but rather from actions she alleges violate statutory rights under the New York State Human Rights Law and the New York City Human Rights Law.⁴
- The same is true of Plaintiff’s separate discrimination and retaliation claims against Mr. Khan and Mr. Maxwell, which flow not from any dispute of a contractual term and indeed, neither Mr. Khan nor Mr. Maxwell are parties to the referenced agreements.

⁴ Plaintiff’s attempt to shoehorn Section 22 as covering these claims because, in her view, they are somehow “inextricably intertwined” with her contract claims, [Motion at 7](#), also can be readily rejected by a cursory read of her complaint, which purports to base her discrimination claims in part on a statement of “Happy International Women’s Day” made at a meeting ([Compl. ¶ 56](#))—an allegation that has absolutely nothing to do with the contract terms of the enumerated agreements in Section 22.

- Onyx's counterclaims concerning Plaintiff's breach of her fiduciary duties are not a dispute of the parties' rights and obligations under the enumerated agreements, and the law is clear that fiduciary duties are separate and distinct from a party's contractual obligations. [Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 153 \(Del. Ch. 2004\)](#).

Simply put, Plaintiff has chosen to bring claims which are outside of any contractual right to attorney's fees and against individuals not party to the underlying contractual agreements and, therefore, she brings those claims pursuant to the default rule that each party bears its own costs.

iii. Onyx's Obligation To Pay Attorney's Fees Is Cabined By The Covenant Of Good Faith And Fair Dealing

Plaintiff's Motion does not seriously contest that Onyx's obligation to pay attorney's fees is limited by the implied covenant of good faith and fair dealing, but Plaintiff asks this Court to grant relief that would violate that covenant. An attorney's fees provision "is not an invitation for the plaintiffs to abuse their contractual rights. In the end, the plaintiffs' actions are limited by the implied covenant of good faith and fair dealing, which inures to all Delaware contracts."

[Lillis, 904 A.2d at 333 n.34](#). In particular, where a party is granted discretion under one provision of an agreement, she cannot use that discretion to attempt to defeat the economic bargain reached by the parties with respect to the agreement as a whole. [Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC, 2009 WL 1124451, at *7 \(Del. Ch. Apr. 20, 2009\)](#) ("[Counterparty] could not engage in 'arbitrary or unreasonable conduct' that had the effect of preventing Bay Center from receiving the fruits of the bargain.") (citation omitted).

Plaintiff, in effect, seeks a blank check to fund any claim or litigation tactic she chooses, including those pursued in bad faith. Indeed, the docket thus far in this matter confirms her approach. For example, Plaintiff served over 300 demands for bills of particulars, [Dkt. Nos. 57-](#)

[58](#), refused to meet and confer regarding these facially unreasonable requests until ordered to do so by this Court, [Dkt. Nos. 75, 89](#), and then withdrew the requests in full. Plaintiff likewise forced Defendants to seek judicial intervention before agreeing, after many months, to return a company-issued laptop she kept in her possession following her departure from Onyx. [Dkt. No. 61](#). Further, Plaintiff has now blithely taken the unconscionable position that a private mediation between the parties was not confidential, despite the mediator's and the parties' stated understanding to the contrary.

Given both that Onyx's obligation is only to pay *reasonable* attorney's fees covered by Section 22 and that Plaintiff has engaged in bad faith litigation tactics to date, Onyx, or at a minimum this Court, must have an opportunity to review Plaintiff's detailed fee invoices to determine whether such fees are reasonable and in good faith.⁵

iv. *Onyx Is Not Obligated To Pay Plaintiff's Attorney's Fees To Seek Attorney's Fees*

The Court should deny Plaintiff's requested relief seeking payment of her attorney's fees in bringing this Motion. [Motion at 11-12](#). As discussed above, all Delaware contracts are subject to "an implied reasonableness requirement." [Fasciana v. Elec. Data Sys. Corp., 829 A.2d 178, 184 \(Del. Ch. 2003\)](#). When parties seek to recover their attorney's fees in seeking attorney's fees, the reasonableness requirement is enforced by awarding attorney's fees only in proportion to a party's success in the underlying action. [Id.](#) (explaining that when an individual sought to enforce a contractual right to advancement under corporate bylaws in a § 145 proceeding, the implied reasonableness requirement limits any award of fees on fees in

⁵ [Bergin v. McCloskey, 2008 WL 4662378, at *2 \(Del. Ct. Com. Pl. Oct. 22, 2008\)](#) (Even where attorney's fees provision did not include a reasonableness requirement, Court examined and reduced requested attorney's fees as they were not reasonable.).

proportion to plaintiff's success). Indeed, as the *Fasciana* Court explained, allowing parties to recover a full fees on fees award when they were only partially successful in the underlying action would "encourage attorneys for parties seeking advancement to raise any conceivable argument that can pass Rule 11 muster knowing that any level of ultimate success would warrant a full fees on fees award." *Id.* Rather, the incentive structure for enforcing fee agreements should be a "sensible one" which "encourages parties seeking advancement or indemnification to raise only substantial claims and encourages corporations to compromise worthy claims (lest they suffer a fees on fees award) and resist less meritorious claims (knowing that success will bar a fees on fees recovery for the plaintiff)." *Id.* In the case of this Motion, as articulated herein, Plaintiff has no right to preliminary relief, thus warranting denial of any fees on fees award.

v. *Onyx Has Not Waived Any Rights Under The Employment Agreement*

Plaintiff's assertion that "the parties' prior practice," [Motion at 7](#), altered Onyx's rights under the Employment Agreement and left Plaintiff with a blank check for attorney's fees is without any merit. Under Delaware law, to waive a contractual provision requires that "(i) there is a requirement or condition capable of being waived, (ii) the waiving party knows of that requirement or condition, and (3) the waiving party intends to waive that requirement or condition." [Lennox Indus., Inc. v. All. Compressors LLC, 2021 WL 4958254, at *8 \(Del. Super. Ct. Oct. 25, 2021\)](#). As waiver is the "voluntary and intentional relinquishment of a known right," the standard to prove waiver is "quite exacting" and "[t]he facts relied upon to prove waiver must be unequivocal." [Bantum v. New Castle Cnty. Vo-Tech Educ. Ass'n, 21 A.3d 44, 50 \(Del. 2011\)](#) (citation and quotation omitted).

Plaintiff's burden to prove waiver is further heightened by the Employment Agreement's valid and enforceable non-waiver clause. In particular, the Employment Agreement states:

Any waiver, alteration, amendment, or modification of any of the terms of this Agreement shall be valid only if made in writing and signed by each of the parties hereto affected by such waiver, alteration, amendment, or modification. No waiver by any of the parties hereto of their rights hereunder shall be deemed to constitute a waiver with respect to any subsequent occurrences or transactions hereunder unless such waiver specifically states that it is to be construed as a continuing waiver.

[Dkt. No. 81.](#)

Non-waiver clauses in contracts “serve an important purpose in contract law by ensuring that a party to a contract is given an opportunity to make a thoughtful and informed decision about whether or not to enforce a particular contract right.” [Lennox Indus., 2021 WL 4958254, at *9](#) (citation and quotation omitted).

Here, Plaintiff asks the Court to find that Onyx intended to waive its rights under the Employment Agreement and thus agreed to fund boundless litigation against itself. [Motion at 4](#) (Asserting that Onyx is obligated to pay Plaintiff’s summary “invoice” of legal fees within 10 business days.). Plaintiff’s evidence of the “parties’ prior practice” falls far short of “unequivocally” proving such a stupefying waiver.

As evidence of the parties’ past practice, Plaintiff relies first on an email from Mr. Khan sent several months before Plaintiff chose to file this lawsuit which reads in relevant part:

You also mentioned that you have not hired counsel but will look to do so. Having independent legal advice from an employment lawyer may help to document the separation on mutually agreeable terms. If you do engage counsel for that purpose, we will ensure that your legal fees connected with negotiating and revising your separation agreement will be covered.

[Dkt. No 83.](#)

This email makes clear that Mr. Khan’s offer to pay for Plaintiff’s counsel to negotiate and revise her Separation Agreement was only done as part of a good faith effort to reach a mutually agreeable Separation Agreement upon her surprise resignation and months before this

litigation was initiated. *Id.* Moreover, the offer expressly was limited to paying for fees “connected with negotiating and revising [the] separation agreement.” *Id.*

Second, Plaintiff relies on the fact that Onyx paid an invoice for Plaintiff’s attorney’s fees on September 24, 2021. However, Plaintiff fails to mention to the Court that such payment was part of what Onyx hoped would be an amicable resolution of this entire matter and making one payment as a good faith gesture towards resolution in no way suggests an agreement to pay all attorney’s fees unconditionally and without limitation going forward. Wang Decl. ¶ 9.

Indeed, even if Onyx waived any rights in connection with its initial payment of Plaintiff’s attorney’s fees during the parties’ mediation efforts, and Onyx did not do so, the law is clear that such payment does not operate as a prospective waiver particularly given the non-waiver clause that exists in the Employment Agreement. [Lennox Indus., Inc. 2021 WL 4958254, at *9](#) (non-waiver clauses “provide a contracting party assurance that its failure to require the other party’s strict adherence to a contract term will not result in a complete and unintended loss of its contractual rights”); *see also* [Dkt. No. 81](#) § 15 (“No waiver by any of the parties hereto of their rights hereunder shall be deemed to constitute a waiver with respect to any subsequent occurrences or transactions hereunder unless such waiver specifically states that it is to be construed as a continuing waiver.”). In short, nothing about the parties’ prior dealings precludes Onyx from raising objection on any grounds to Plaintiff’s blanket and unsupported demand that Onyx cover her legal fees in total and in perpetuity without question.

vi. Plaintiff Fails To Provide Evidence To Support Her Request For Fees

Finally, the insurmountable gap between the scope of the relief Plaintiff has requested (a perpetual blank check) and the evidence she presents (none) alone requires rejection of the Motion. [Lau v. Lai, 43 Misc. 3d 1220\(A\) \(Sup. Ct., Kings County 2014\)](#) (Party seeking

preliminary injunction must demonstrate entitlement to that relief by “clear and convincing evidence.”).

Plaintiff refuses to inform the Court of the total fees she has incurred or provide any substantiation for her fees going forward. Rather, the only “evidence” of Plaintiff’s fees to date is the foreboding suggestion by her counsel that Plaintiff’s fees are “substantial” and that she “expects to incur hundreds of thousands (if not several millions) more dollars in legal costs and expenses.” [Hubell Emergency Aff. ¶ 5](#). Thus, even if this were a proper advancement action, which it is not, Plaintiff has failed to meet the evidentiary threshold required for the advancement of fees. [Danenberg v. Fitracks, Inc., 58 A.3d 991, 995 \(Del. Ch. 2012\)](#) (“A party making a fee application bears the burden of justifying the amounts sought.”).

Plaintiff asks the Court to excuse this failure by asserting that providing “detailed time entries” that identify the time her counsel spent on tasks potentially covered by Section 22 of the Employment Agreement is “wholly impractical.” [Motion at 8-9](#).⁶ Plaintiff also asserts that she cannot provide such time entries without divulging information covered by the attorney-client privilege. These contentions are meritless.

First, Plaintiff’s refusal to provide any detail is contrary to the law as courts routinely require counsel to produce detailed time entries to assess whether attorney’s fees should be advanced. [Danenberg, 58 A.3d at 1003](#) (Court required party seeking advancement to provide “[a] detailed invoice identifying the fees and expenses for which advancement is requested” and

⁶ Remarkably, Plaintiff uses the fact that she chose to delay sending an invoice for four months as a reason why the requested detail would be impossible for Plaintiff to provide. [Motion at 9](#) (“It would be practically impossible for Plaintiff’s counsel to allocate the services provided in connection with the mediation in accordance with Onyx’s new demands, *let alone four months after the fact...*”) (emphasis added).

ordering that “[t]he invoice shall provide for each time entry the date, timekeeper, billing rate, task description, time incurred, and amount charged.”).

Second, Plaintiff chose to bring the claims she brought in this case and if Plaintiff wishes for her fees to be paid by Onyx, her counsel must reasonably demonstrate that such work is covered by Section 22 of the Employment Agreement. In *Fasciana v. Elec. Data Sys. Corp.* (relied upon by Plaintiff), the Court rejected Plaintiff’s argument that it would be too administratively difficult to separate time spent on claims subject to advancement and those that were not subject to advancement. [829 A.2d 160, 175 \(Del. Ch. 2003\)](#) (finding that defendant did not “contract[] to provide [plaintiff] with a loan so that he could fund defense costs that do not arise out of [covered claims] and therefore could never be subject to advancement”). Rather, the Court held that “lawyers will know the time that they spend in developing facts” related to discrete claims in the case and plaintiff’s counsel “should identify those costs that relate directly to” claims subject to advancement. [Id. at 176-77](#). Although Plaintiff lacks any right to advancement, the same principles with respect to differentiating between covered attorney’s fees and attorney’s fees that are outside of the scope of the Employment Agreement should govern here.

Third, Plaintiff’s refusal to provide detail based on a claim of attorney-client privilege and/or the attorney work product privilege is a red herring. Again, given that some entries might contain the mental impressions of counsel does not mean that all do (e.g., “draft opposition to Defendant Maxwell’s motion to dismiss” is not a privileged entry), and this is no justification for failing to provide *any* time entries. Moreover, as Plaintiff acknowledges, Onyx is amenable to reasonable redactions necessary to protect the portion of time entries protected by privilege. [Motion at 11](#). To the extent that redactions are not sufficient to protect the attorney-client

privilege, limited time entries could be reviewed by a third-party master. Both Onyx and this Court have a right to review Plaintiff's counsel's time entries for reasonableness and concerns regarding privilege can be addressed while still preserving that right.

Simply put, Plaintiff's extreme efforts to avoid providing any detail or substantiation for her counsel's fees justifies – if not compels – serious question about the legitimacy of such fees and whether they were incurred in relation to covered contractual claims and consistent with the covenant of good faith and fair dealing and Plaintiff's lack of evidence warrants rejection of the present Motion.⁷

B. Plaintiff Fails To Demonstrate Irreparable Harm

As Plaintiff lacks any right to advancement during the pendency of this action, her only available recovery is monetary damages at the conclusion of this action. Thus, she lacks any irreparable injury. [Berman v. TRG Waterfront Lender, LLC, 181 A.D.3d 783, 785 \(2d Dep't 2020\)](#) (“Berman failed to demonstrate irreparable injury, as the loss of a down payment is not an irreparable harm since the injured party could be made whole by a money judgment.”). Indeed, Plaintiff makes no real attempt to demonstrate the requisite irreparable harm. Plaintiff's affidavit merely states “[t]o date, I have incurred substantial legal fees and expenses as a result of the underlying dispute arising out of my Employment Agreement.” [J. Kao Aff. ¶ 13](#). The affirmation of Plaintiff's attorney, Richard Hubell, fares no better, stating “Plaintiff has been constrained to engage two law firms to represent her and needs urgent relief to be able to adequately prosecute this action.” [Hubell Emergency Aff. ¶ 5](#). These declarations do not state the amount of attorney's fees Plaintiff has incurred, do not suggest any basis to conclude Plaintiff is unable to pay such fees, or how such legal fees are constraining her ability to bring this Action.

⁷ If the Court determines that some relief is warranted, Onyx requests that both parties be provided an opportunity to submit a proposed order outlining the procedure for payment of fees.

Plaintiff's showing is particularly inadequate given that she was a highly compensated executive who recently received more than a \$2 million distribution from Black Onyx, Wang Decl. ¶ 6, and the fact that her counsel has engaged in an overtly contentious and aggressive litigation strategy rife with harassing and overbroad discovery. [Dkt. Nos. 43-48, 57-58](#); [Kaloyeros, 157 A.D.3d at 1154](#) (no irreparable harm in advancement action where "plaintiff earned over \$1 million a year for the preceding six years, indicating his ability to finance an adequate defense.").

C. The Balance Of The Equities Favor Onyx

Finally, the balance of the equities favor Onyx as Plaintiff delayed in seeking preliminary relief, failed to engage with Onyx on the requested attorney's fees, and inserted the present Motion into the parties' pending briefing on Plaintiff's Motion to Dismiss Onyx's Counterclaims regarding the same issue – the legal limitations on Onyx's obligation to pay Plaintiff's attorney's fees.

Plaintiff filed suit on July 16, 2021 and did not seek any preliminary relief. [Dkt. No. 1](#). Plaintiff then waited until January 13, 2022 to seek further payment of attorney's fees from Onyx, despite the fact that she began to incur those fees over four months ago on September 10, 2021. [Hubell Aff. ¶ 14](#). When she sought attorney's fees on January 13, 2022, Plaintiff provided a summary chart with only "total hours worked by month for each timekeeper." Wang Decl. Ex. 3. Onyx timely responded to that invoice by requesting that Plaintiff's counsel provide "the date on which each timekeeper billed time, a description of the work performed by each timekeeper and the time spent on that work for each task performed." [Dkt. No. 86](#). Onyx's request was consistent with how it requires all outside counsel and vendors to submit invoices. [Dkt. No. 86](#). Instead of further engaging with Onyx and providing the requested reasonable

details, Plaintiff refused to meet and confer on separate discovery matters and filed the present Motion on February 3, 2022.

Plaintiff filed this Motion despite the parties being in the middle of briefing Plaintiff's Motion to Dismiss the Amended Counterclaims, which squarely addresses legal limitations on Onyx's obligation to pay Plaintiff's attorney's fees. [Dkt. No. 70 at 14-22](#), [Dkt. No. 76 at 16-20](#), [Dkt. No. 91 at 8-13](#). This has caused the parties to inefficiently brief the same issues twice. Further, Plaintiff has not even bothered to ensure that the present Motion is consistent with her position in the Motion to Dismiss briefing. For example, in the present Motion, Plaintiff rejects Onyx's request that her counsel provide itemized time entries so Onyx can evaluate whether all the fees sought were incurred in good faith. [Motion at 10](#). Yet, in her Reply in support of her Motion to Dismiss filed five days *after* the present Motion on February 8, 2022, Plaintiff claimed that there was no "justiciable controversy" whether the covenant of good faith and fair dealing applies to any right she has to the payment of her legal fees. [Dkt. No. 91 at 8](#). Of course, a controversy cannot both merit emergency relief while also being so speculative as to not yet be justiciable for this Court.

Under these circumstances, the balance of the equities favor Onyx. [SportsChannel Am. Assocs. v. Nat'l Hockey League](#), 186 A.D.2d 417, 418 (1st Dep't 1992) (Delay in seeking injunctive relief "weighed against [movant] on a balancing of the equities.").

V. PLAINTIFF'S REQUEST FOR PERMANENT INJUNCTIVE RELIEF THROUGH AN ORDER TO SHOW CAUSE IS IMPROPER

Finally, the Motion should be denied because Plaintiff seeks to have this Court order permanent injunctive relief for this Action and any other proceedings based on an order to show cause and a limited factual record—both of which are plainly improper. Indeed, Plaintiff seeks an order that Onyx "on a going forward basis, 'advance' all fees and expenses to Plaintiff within

ten business days of receiving demands and invoice summaries from counsel for the Plaintiff for such payments” and that such obligation applies in this Action “or other proceedings in which a dispute arises” under the three enumerated agreements. [Dkt. No. 77](#). Such permanent equitable relief extending beyond the bounds of the current action is not appropriate on an order to show cause. [Armbruster v. Gipp, 103 A.D.2d 1014, 1014 \(4th Dep’t 1984\)](#) (“We are unaware of any authority that would permit the granting of a permanent injunction during the pendency of an action by the simple expedient of obtaining an order to show cause for such injunction[.]”).

VI. CONCLUSION

For the above reasons, Onyx respectfully submits that Plaintiff’s Motion should be denied in its entirety.

Dated: New York, New York
February 25, 2022

Respectfully submitted,

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Dated: New York, New York
February 25, 2022

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