UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

JAMES STUCKEY,

Plaintiff,

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Defendant.

x

No. 15 Civ. 6639 (CM)

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

McMahon, J.:

This action arises from an insurance company's alleged failure to (1) advance defense costs to an insured for claims covered under the policy, and (2) authorize comprehensive settlement among the insureds and the plaintiff in litigation giving rise to the covered claim.

Now before the court is Plaintiff James Stuckey's motion for a preliminary injunction enjoining Defendant National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") to (1) reimburse his past defense costs and advance ongoing defense costs, and (2) authorize and indemnify settlement between Stuckey and the plaintiff in the underlying litigation.

For the reasons set forth below, Stuckey's motion for a preliminary injunction is denied. He is, however, entitled to a quick trial on the merits, and that trial will be held on December 7, 2015.

BACKGROUND

From 2009 to September 2011, Stuckey was the Dean of the Shack Institute of Real Estate at New York University ("NYU"). (Compl., ¶ 11.) On the night of September 23, 2011, Plaintiff

allegedly sexually harassed one of his subordinates. (*Id.*) Plaintiff left his employment at NYU a week later. (*Id.*)

In January 2012, Plaintiff's subordinate brought claims in state court against both Plaintiff – for sexual harassment and assault and battery – and NYU ("the Underlying Action"). (*Id.*)

At the time of both the alleged incident and the initiation of the Underlying Action, NYU maintained a Manuscript NFP Individual and Organization Insurance Policy, policy number 02-250-55-41 (the "Policy"), issued by National Union. (*Id.* at ¶ 17.)

In March 2012, pursuant to the Policy, NYU tendered notice of the claim to National Union. (*Id.* at ¶ 12.) Neither NYU nor National Union told Plaintiff about the existence of the Policy or the fact that he might be covered by it. (*Id.*) However, National Union responded to NYU with a preliminary analysis, which stated, *inter alia*, that "coverage is potentially afforded to New York University and James Stuckey subject to our continuing analysis and reservations contained herein." (Compl., Ex. A.) One of the aforementioned reservations stated that Plaintiff was *not* covered under the Policy for the assault and battery claim, because Policy Exclusion 4(h) excludes coverage for claims:

> alleging, arising out of, based upon or attributable to in any way directly or indirectly, bodily injury, sickness, disease, or death of any person, or damage to or destruction of any tangible property, including the loss of use thereof . . . .

(Compl., Ex. A; Compl., Ex. F, Policy § 4(h).) The Exclusion does, however, carve out an exception for the other claim – the sexual harassment claim – against Plaintiff:

> this exclusion shall not apply to that portion of a Claim which constitutes:
>
> (i) An Employment Practices Claim.

(*Id.*)

The Policy defines an "Employment Practices Claim" as one that alleges an "Employment Practices Violation." Policy § 2(f). An "Employment Practices Violation" includes alleged or

actual "harassment (including sexual harassment whether 'quid pro quo', hostile work environment or otherwise." (Compl., Ex. F, Policy § 2(g)(2).)

National Union also stated, in the initial letter to NYU, that Endorsement #5 might be applicable. (Compl., Ex. A.) That endorsement excludes coverage if there is a final adjudication of intentional discrimination. (Compl., Ex. F, Policy, Endorsement #5.)

Because Plaintiff was not aware of the Policy or the possibility that he might be covered under it, he retained his own defense counsel and paid the cost of litigation out of his own pocket. (Compl., ¶ 14.) Then, after more than three years of litigation – during which Plaintiff had paid hundreds of thousands of dollars in attorneys' fees – his lawyer received an email from National Union on April 24, 2015. (*Id.* at ¶ 15.) It read, in full:

> John - on behalf of the insurance carrier, I have been assigned to handle the claim brought by Stephanie Bonadio against your client James Stuckey. Please provide me with a current status update for the case including any upcoming dates. Please also let me know what defense costs to date are (billed and unbilled) and have copies of your firm's invoices forwarded to me. Thank you.
>
> Mike

(Compl., Ex. A.)

The written record does not reveal why National Union did not advise Plaintiff about the existence of the policy for over three years of litigation. At oral argument, National Union indicated that it believed NYU intended to indemnify Plaintiff for defense costs within its $500,000 retention (see below, page 5). By the same token, Plaintiff's counsel had no good reason for failing to explore the possibility that his client was insured.

A. The Policy

The Policy provides coverage for both NYU and "Individual Insured(s)," which it defines as "a past, present or future duly elected or appointed director, officer, trustee, trustee emeritus, executive director, *department head*, committee member (of a duly constituted committee of the

Organization), *staff or faculty member (salaried or non-salaried)*, Employee or volunteer of the Organization." (Compl., Ex. F, Policy § 2(i) (emphases added).) There is no dispute that Plaintiff qualifies as an Individual Insured under the Policy.

Coverage A of the Policy, titled "Individual Insured Insurance," provides that:

> This policy shall pay on behalf of each and every Individual Insured Loss arising from a Claim first made against such Individual Insured during the Policy Period or the Discovery Period (if applicable) and reported to the Insurer pursuant to the terms of this policy for any actual or alleged Wrongful Act in his/her respective capacities as an Individual Insured of the Organization, *except when and to the extent that the Organization has indemnified the Individual Insured*. The Insurer shall, in accordance with and subject to Clause 8, advance Defense Costs of such Claim prior to its final disposition.

(Compl., Ex. F, Policy § 1 (emphasis added).)

Coverage B of the Policy, titled "Organization Indemnification Reimbursement Insurance," provides that:

> This policy shall pay on the behalf of the Organization Loss arising from a Claim first made against an Individual Insured during the Policy Period or the Discovery Period (if applicable) and reported to the Insurer pursuant to the terms of this policy for any actual or alleged Wrongful Act in his/her respective capacities as an Individual Insured of the Organization, *but only when and to the extent that the Organization has indemnified such Individual Insured for such Loss pursuant to law, common or statutory, or contract, or the Charter or By-laws of the Organization duly effective under such Law which determines and defines such rights of indemnity*. The Insurer shall, in accordance with and subject to Clause 8, advance Defense Costs of such Claim prior to its final disposition.

(Policy § 1 (emphasis added).)

NYU has not indemnified Plaintiff for any of the costs he has incurred defending the Underlying Action. (Compl., ¶ 18.) When Plaintiff first inquired about indemnification, NYU told him that "any potential indemnification of Mr. Stuckey is not ripe at this time since questions of indemnification are routinely, and appropriately, determinable upon conclusion of an action." (Compl., Ex. T.) At the time he filed this suit, Plaintiff submitted a declaration stating that "NYU has indicated that it will not indemnify [him]." (Declaration of James Stuckey, ¶ 11 (Docket #3).)

The Policy defines "Claim" and "Loss" broadly. It defines a "Claim" to include, among others things, "a civil . . . proceeding for monetary or non-monetary relief which is commenced by: (i) service of a complaint or similar pleading." (Compl., Ex. F, Policy § 2(b)(2)(i).) It defines "Loss" to include "damages, (including back pay and front pay), judgments, settlements, pre- and post-judgment interest, the multiple or liquidated damages awards under the Age Discrimination in Employment Act and the Equal Pay Act and Defense Costs," and excluding certain categories not relevant here. (Compl., Ex. F, Policy § 2(k).)

Although National Union does not have a duty to defend the insured, the Policy provides that it "shall advance Defense Costs (excess of the Retention amount) of such Claim prior to its final disposition." (Compl., Ex. F, Policy § 1.) It further provides that "when the Insurer has not assumed the defense of the Claim pursuant to Clause 8, the Insurer shall advance nevertheless, at the written request of the Insured, Defense Costs prior to the final disposition of a Claim." (Compl., Ex. F, Policy § 8.) "Defense Costs" are in turn defined as "reasonable and necessary fees, costs and expenses consented to by the Insurer . . . resulting solely from the investigation, adjustment, defense and appeal of a Claim against the Insureds, but excluding salaries of Individual Insureds." (Compl., Ex. F, Policy § 2(d).)

The Policy's "Retention Clause" – which is referenced in the Policy's description of Defense Costs – states that:

> The Insurer shall only be liable for the amount of Loss arising from a Claim which is in excess of the Retention amount stated in Item 5(B) of the Declarations, such Retention amount to be borne by the Organization and shall remain uninsured, with regard to all Loss for which the Organization has indemnified or is permitted or required to indemnify the Individual Insureds ("Indemnifiable Loss") and Loss under Coverage C. A single retention amount shall apply to Loss arising from all Claims alleging the same Wrongful Conduct or Related Wrongful Acts.

(Policy § 6.) The Policy declaration lists the relevant retention amount as $500,000. (Policy Declarations, Item 5.) By its terms, the Retention Clause applies to Loss NYU suffers when

indemnifying individual insureds under Coverage B, above, or incurs under Coverage C (which is irrelevant to this litigation); it does not apply to Loss, including Defense Costs, incurred by Individual Insureds.

Finally, the Policy outlines the responsibilities and obligations of the parties with respect to settlement. The Policy provides that the "Insured shall not admit or assume any liability or incur any Defense Costs without the prior written consent of the Insurer." (Compl., Ex. F, Policy § 8.) It further provides that, "in all events the Insurer may withhold consent to any settlement, stipulated judgement or Defense Costs, or any portion thereof, to the extent such Loss is not covered under the terms of this policy." (*Id.*) And National Union is permitted to "effectively associate with the insureds in the defense of any Claim . . . including but not limited to negotiating a settlement. (*Id.*)

B. Correspondence

In early May, the parties engaged in a series of preliminary discussions. On May 4, 2015, Plaintiff's counsel responded to Hayward's April 24 email and requested a copy of the Policy, which he had not seen before. (Compl., Ex. B.) On May 7, Plaintiff's counsel also provided the invoices that Hayward requested, which detailed the costs incurred in Plaintiff's defense of the Underlying Action. (Compl., ¶ 33.) On May 12, Hayward informed Plaintiff's counsel that the invoices would be reviewed by National Union. (Compl., Ex. H.)

The subsequent correspondence between Plaintiff's counsel and Hayward related to two main issues: (1) payment for defense costs under the Policy, and (2) authorization to engage in settlement negotiations – primarily for NYU, but also for Plaintiff.

1. Defense Costs

After the initial correspondence, Plaintiff's counsel and Hayward discussed which type of coverage applied to Plaintiff's claims, and whether that coverage required any type of retention amount or deduction that Plaintiff would have to front before National Union would reimburse

him. Plaintiff argued that he was covered under Coverage A, which applies when the Organization (here, NYU) has not indemnified the employee. Despite the fact that NYU had not indemnified Plaintiff, Hayward expressed his belief that Coverage B, which applies when NYU does indemnify the employee, was the operative provision. (*See, e.g.*, Compl., Ex. K.) Plaintiff told Hayward multiple times that, despite Plaintiff's request, "New York University has refused to indemnify Mr. Stuckey for this claim." (*See, e.g.*, Compl., Ex. R.) The matter is critical, because Coverage B contains a "self-insured retention" requiring the insured's expenditure of hundreds of thousands of dollars before National Union's monetary obligations kick in; the provision functions much like a deductible for health insurance.

Plaintiff's counsel tried in vain to decipher the analysis that led National Union to its stance on the coverage and retention questions; the company simply stopped responding to inquiries on the issue. (*See, e.g.*, Compl., Ex. P.)

On June 16, 2015, Hayward provided the results of National Union's invoice review. (Compl., Ex. J.) In that review, National Union disputed several categories of fees submitted by Plaintiff's counsel. In particular, it contended that the following fees were disallowed and would not be reimbursed, for the reasons listed:

Description	Amount
Rate Variance Above $300/$300/$125	$133,408.82
Pre-Tender Billing	$34,784.13
Administrative	$3,043.50
Block Billing	$15,524.20
Duplication of effort	$975.00
Excessive	$582.50
Non-billable	$4,195.00
Paralegal level activity	$2,020.00
Redacted	$540.00
Vague Description	$10,557.00
Expenses: Non-billable	$11,932.59
Expenses: Unsupported	$7,484.60

(*Id.*)

National Union declared that the remainder – $201,635.32 – was "undisputed." (*Id.*) But, at the time of the invoice review, National Union took the position that Plaintiff was an indemnified person within the meaning of Coverage B, and so was not entitled to immediate reimbursement of defense costs. (Compl., Ex. Q.) It took the filing of the present action to force National Union to pay Plaintiff this "undisputed" amount. The payment confirmation included with Defendant's opposition brief is dated September 3, 2015 – the day before National Union filed its brief. (*See* Declaration of Alexander S. Lorenzo In Support Of Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction, Ex. A (Docket #12).)

National Union (1) has now reimbursed Plaintiff for a portion of what he has expended in defense costs, (2) does not dispute Plaintiff's right to advancement of reasonable defense costs, and (3) represents that it will continue to advance reasonable defense costs going forward. (*See* Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction at 6 (Docket #11).) This court understands, from National Union's brief, that it now believes Plaintiff is entitled to reimbursement under Coverage A and that Plaintiff is not required to expend any of his personal money before being entitled to advancement of defense costs.

The dispute that remains over defense costs is not whether they must be reimbursed, but whether the amounts for which Plaintiff seeks reimbursement are "reasonable." Of particular moment is whether National Union's maximum billing rate is "reasonable," particularly in these unusual circumstances, where Plaintiff was unaware of his insurance coverage when he retained counsel.

The parties have had some correspondence on this issue. On May 12, before National Union's billing review was completed, Plaintiff's counsel asked Hayward where the insurer

derived the $300/hour maximum billing rate it was willing to reimburse. (Compl., Ex. K.) Hayward responded that the maximum rates were listed on something called the Exception Firm Approval Form. The Policy describes this as a form that insureds were to submit to National Union in connection with the retention of counsel in class action suits if they decided to retain a lawyer not recommended by National Union ("panel counsel"). (Compl., Ex. F, Policy § 9.) Of course, Plaintiff did not know about the Policy, so he did not submit an Exception Firm Approval Form when he retained counsel. Nor would he have done so if he had known about the Policy, as the Form applies only when selecting non-panel counsel in class action cases – which the Underlying Action is not.

Plaintiff's counsel continued to press Hayward on the point. He asked whether it was National Union's position that the insurer could unilaterally determine the reasonableness of counsel fees, and why Hayward was referring him to a form that applied only to class actions (Plaintiff's Exhibit 7.) Hayward replied that he would answer later in more detail (apparently he never did), but added, "In the interim, I would recommend that your client retain for his defense going forward one of the 30 below New York panel counsel law firms so that the insurer can reimburse 100% of the hourly rates billed." (*Id.*) Plaintiff's counsel objected that it was "far too late for the insurance carrier to suggest that Mr. Stuckey hire a different law firm, given that we have been representing him for over two years in intensive litigation of this case, and this is the first time you have ever suggested that he should hire some other law firm." (*Id.*)

Plaintiff's counsel never agreed that National Union's hourly maximums set the ceiling on "reasonable" fees, especially as Plaintiff was unaware of the Policy and its limits when he hired counsel. Nonetheless, on multiple occasions, Plaintiff's counsel demanded that National Union at

least pay any "undisputed" amounts (*e.g.*, Compl., Ex. M.) – which, as noted above, National Union has now done.

2. Settlement Authority

Plaintiff also sought Hayward's assistance in settling the case.

Actually, it was Hayward who first broached the topic in May 2015, when he wrote to Plaintiff's counsel:

> Would it be possible to schedule the case for mediation, attempt to settle for a reasonable amount, and then that way the insurer can make payments, resolving the outstanding indemnification, etc. issues?

(Compl., Ex. S.) Plaintiff's counsel was more than willing to discuss settlement, but told Hayward that the plaintiff in the Underlying Action would only engage in global settlement talks, and NYU claimed that it could not come to the table because National Union had failed to authorize any settlement. (*Id.*)

Hayward asked if Stuckey could "mediate just the claims against Mr. Stuckey without NYU or attempt informal settlement negotiation to resolve the claims against Mr. Stuckey?" (*Id.*) He also asked what Plaintiff's counsel believed "a fair and reasonable settlement value is with respect to the claims against Mr. Stuckey[.]" (*Id.*)

Plaintiff's counsel said he would respond more fully later, but he implored Hayward to intercede with National Union to facilitate a comprehensive settlement with NYU. A few days later, Hayward replied,

> I'm only handling the claims against Mr. Stuckey. If defense counsel reaches out to the insurance contact for the claims against NYU I'd be very surprised if they opposed pursing mediation. Maybe defense counsel for NYU can follow-up on that and we can try to get a mediation scheduled for early July.

(*Id.*)

On June 15, 2015, Plaintiff's counsel responded to Hayward's question about what a reasonable settlement amount might be. He also told Hayward he believed that, "National Union's ongoing refusal to permit and facilitate a mediation including NYU has materially harmed the prospects for settlement of this case." (Compl., Ex. I.) Plaintiff's counsel continued to ask Hayward to speak with his colleague who was handling the claim against NYU so as to bring about the kind of global settlement discussions that the plaintiff in the Underlying Action demanded. (*Id.*) He received no response.

At the end of June, Plaintiff's counsel sent Hayward an adverse appellate decision in the Underlying Action, which allowed the plaintiff in that case to depose others who contended that Stuckey had sexually harassed or abused them. Counsel "implore[d] [Hayward] to get National Union to stop wasting time and help the parties settle the case." (Compl., Ex. N.) Apparently, there was no response.

Finally, Plaintiff's counsel sent Hayward two letters in August before filing suit. In the first letter, he restated his demand that Hayward "intercede to stop National Union's policy of not authorizing NYU to make any settlement offer whatsoever." (Compl., Ex. P.) He also advised Hayward that the Underlying Action plaintiff had made a settlement demand that very day, to which he needed to respond. Counsel asked for authority to settle the case up to a specified amount, and asserted, "National Union's continued failure to uphold its obligations is impeding efforts to settle the case." (*Id.*)

Hayward replied the next day, repeating his assertion that he was "only handling the claims brought against Mr. Stuckey and ha[d] no involvement with the claims brought against NYU" (Compl., Ex. Q.) – a statement that strikes the court as strange, since the claims against NYU arose out of and were inextricably intertwined with the claims against Stuckey, the alleged malefactor.

Hayward asked for any correspondence in which the plaintiff made her settlement demand, as well as a form case assessment so the carrier could evaluate the request for settlement authority. (*Id.*)

On August 10, Plaintiff's counsel sent a reply to Hayward's email, asserting, "National Union has breached its policy obligations by failing to permit NYU to make a settlement demand." (Compl., Ex. R.) Plaintiff's counsel also provided the case assessment Hayward asked for and requested that National Union respond to the settlement request by August 14. On September 3, after Plaintiff filed this action, Hayward contacted Plaintiff's counsel about scheduling a meeting to discuss a global resolution of the Underlying Action. (Reply Declaration of John Crossman, Ex. 5 (Docket #18).) Counsel for the carrier indicated during the hearing on the motion for a preliminary injunction that National Union is finally trying to convene global settlement talks.

DISCUSSION

Plaintiff commenced this action on August 21, 2015, seeking a preliminary injunction that would (1) force National Union to reimburse his past defense costs and pay those costs going forward, and (2) force National Union to start settlement talks with the plaintiff in the Underlying Action on behalf of all defendants, or allow Plaintiff to engage in settlement talks on his own. The Part I judge signed his Order to Show Cause, and this court heard oral argument on September 15, 2015.

I. Legal Standard

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the defendant by a *clear showing*, carries the burden of persuasion." *Sussman v. Crawford,* 488 F.3d 136, 139 (2d Cir. 2007) (emphasis in original). "To justify a preliminary injunction, [the movant] must show (i) likelihood of success on the merits; (ii) irreparable harm; (iii) that the balance of the hardships decidedly tip in [the movant's] favor; and (iv) that the public

interest would not be disserved by granting the injunction." *Lawsky v. Condor Capital Corp.*, 2015 WL 4470332, at *5 (S.D.N.Y. July 21, 2015).

"A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quotation marks and citations omitted). To adequately meet the irreparable harm requirement:

> [P]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm. Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances.

Id. at 118 (quotation marks, alterations, and citations omitted). As the Second Circuit has said, monetary loss is the quintessential form of reparable injury. *See JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990).

In addition, when a party seeks a mandatory injunction that requires the defendant to affirmatively act – as Plaintiff does here – the burden is higher. "A mandatory preliminary injunction 'should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.'" *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (citing *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010)).

Although the Second Circuit has not spoken to the issue, several of my colleagues have found that a preliminary injunction seeking defense costs is not subject to the higher standard, and that failure to advance defense costs in any amount can, in appropriate circumstances, give rise to irreparable harm. *See XL Specialty Ins. Co. v. Level Global Investors, L.P.*, 874 F. Supp. 2d 263, 272 (S.D.N.Y. 2012); *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 463 (S.D.N.Y. 2005). But in both of those cases, the issue was *whether* defense costs should be reimbursed, not *in what*

amount they should be reimbursed. In *WorldCom*, for example, the insurer claimed that it was under no obligation to advance defense costs. In such a situation, an insured might find himself devastated because he would be unable to mount an effective defense, making injunctive relief appropriate. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 469 (S.D.N.Y. 2005).

While this action began because there had been no defense cost reimbursement, that is no longer the case. National Union has (belatedly) paid what it believes to be reasonable defense costs and has agreed to continue advancing such costs on an ongoing basis. As a result, the issue confronting this court is not whether defendant is entitled to reimbursement but rather to how much reimbursement does the policy entitle him. That is a different question altogether. This court believes that the plaintiff would have to meet the heightened standard for mandatory injunctive relief in order to prevail on a claim for a preliminary injunction requiring immediate reimbursement of all his defense costs, even if my colleagues are correct that the lower standard applied in circumstances where there had been no reimbursement whatsoever – a question on which I need not and do not opine.[1]

Plaintiff also seeks an order requiring National Union to grant him authority to settle the case against Stuckey and enjoining the carrier to pay any settlement he reaches. Any such preliminary relief would undoubtedly change the status quo by requiring National Union to affirmatively act. Therefore, the part of the motion seeking such authority must be judged by the higher standard for mandatory injunctions.

Plaintiff asks this court to consolidate the preliminary injunction hearing with the trial on the merits. Under Fed. R. Civ. P. 65(a)(2), this court has discretion to order such consolidation.

[1] As will be seen below, I do not believe plaintiff has made the requisite showing even under the more lenient standard for prohibitory, as opposed to mandatory, injunctive relief.

See D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155, 158 (2d Cir. 2002). And given the issues raised by this application, such consolidation would normally be ordered, because it is unquestionably desirable. But there remain factual disputes about which discovery may be important, so the request is denied. As indicated above, I am giving the parties a short trial date.

II. Plaintiff has not shown that he is entitled to preliminary injunctive relief

A. Plaintiff is not entitled to a preliminary injunction directing Defendant to reimburse all of Plaintiff's attorneys' fees

At the time Plaintiff filed his motion for a preliminary injunction, National Union had not reimbursed him for any defense costs. But now that National Union has reimbursed Plaintiff for what it considers "reasonable" costs, and has indicated that it will continue to do so in the future, Plaintiff's remaining argument is that he needs injunctive relief to get immediate payment of the full amount he has paid and is paying his lawyers. No such injunctive relief is warranted, however, even under the lower standard for prohibitory injunctions. Not only can plaintiff be compensated in money damages for any under-reimbursement, *see JSG Trading Corp.*, *supra*, 917 F.2d at 79, but he has not yet established that he is likely to succeed on the merits.

The usual rule, of course, is that when money damages are available, no injunctive relief should be awarded, because injury is not irreparable. *Ford v. Reynolds*, 316 F.3d 351, 355 (2d Cir. 2003); *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). However, in recent years several of my colleagues have carved out an exception to this rule in cases brought against recalcitrant insurers who are reluctant to reimburse insureds for their ongoing defense costs. *See XL Specialty Ins. Co. v. Level Global Investors, L.P.*, 874 F. Supp. 2d 263, 272 (S.D.N.Y. 2012); *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 463 (S.D.N.Y. 2005). While the

Second Circuit has not weighed in on the propriety of their conclusions, my colleagues' reasoning has force in the particular situations confronting them.

For example, in *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455 (S.D.N.Y. 2005), a director sued several insurers for failure to advance defense costs under an excess D&O liability policy. The insurers argued that they relied on false financial statements provided by the company in its application for insurance, which rendered the policies void *ab initio*; the insurers also argued that they had effectively rescinded the policies. The insurers thus argued that they were not required to advance defense fees for the insureds *at all*. The insured, a defendant in numerous lawsuits, sought an injunction requiring the insurer to reimburse defense costs pendente lite. My colleague The Hon. Denise Cote – after finding that the defendant was likely to succeed on the merits of their claim that defense costs were reimbursable – held that in a dire situation, where the insured was receiving *no* advancement of defense costs, he suffered irreparable harm. She wrote:

> It is impossible to predict or quantify the impact on a litigant of a failure to have adequate representation at this critical stage of litigation. The ability to mount a successful defense requires competent and diligent representation. The impact of an adverse judgment will have ramifications beyond the money that will necessarily be involved. There is the damage to reputation, the stress of litigation, and the risk of financial ruin—each of which is an intangible but very real burden.

Id. Because of this, Judge Cote granted the preliminary injunction.

Similarly, in *XL Specialty Ins. Co. v. Level Global Investors, L.P.*, 874 F. Supp. 2d 263 (S.D.N.Y. 2012), the court granted a preliminary injunction requiring an insurance company to continue advancing defense costs it had stopped paying. There, insureds, an investment advisory company and several of its directors, officers, and employees, sought defense costs incurred during FBI and SEC investigations and enforcement actions. The insurer began advancing defense costs after it received notice of the investigations, but then stopped paying after an information was unsealed in which a mid-level employee of the investment advisor had pleaded guilty to securities

fraud and conspiracy to commit securities fraud. The insurer argued that the mid-level employee's plea colloquy contradicted an answer in the policy application affirming that no person proposed for insurance was "aware of any fact, circumstance or situation which might afford valid grounds for any claim such as would fall within the scope of the proposed insurance." *Id.* at 268.

The court noted three reasons why – under the particular circumstances before it – the insurer's complete cutoff of funds caused irreparable harm: (1) it occurred at a critical juncture in the criminal investigation; (2) the potential securities fraud charges were "by their nature unusually costly to defend against"; and (3) the insured could not access its excess layers of insurance without exhaustion of its lower-tiered policy – the very policy on which the insurer had stopped paying. *Id.* at 273-76. Because of these factors, the court found that the need for defense costs was "immediate and concrete, and that in the absence of the requested injunction, the Insureds would suffer irreparable harm." *Id.* at 276. After finding the other requirements for a preliminary injunction met, the court granted the motion.

Those cases are not this case, for two reasons.

First, now that Plaintiff is receiving some reimbursement, he is not within the class of plaintiffs who would fall within what is admittedly an exception to the usual rule that injunctions will not issue when only money is at stake. Here, Plaintiff has been mounting a vigorous defense to the lawsuit against him for over three years. And while he does state that the lawsuit has drained his financial resources and that he fears he may have to downsize homes yet again, (*see* Declaration of James Stuckey, ¶ 8 (Docket #3)), he is now receiving reimbursement for at least some of the costs he has incurred and will incur. Before National Union had paid anything, Plaintiff feared that, if he did not "start being reimbursed for defense costs very soon," he would "either become destitute, or [would] have to further compromise [his] defense position in the Underlying Action."

(*Id.* at ¶ 12.) But the evidence does not demonstrate that Stuckey will be financially unable to continue defending himself – at least over the short term – now that he is at least sharing the cost of his defense with National Union. National Union's reimbursement amounted to approximately half of the fees Stuckey incurred in the prior three years of litigation; presumably, that money can now be used to continue funding any portion of the attorneys' fees that National Union has not yet agreed to advance. In short, Stuckey has not brought himself within that narrow class of persons who might be able to claim an exception to the usual rule that the remedy for breach of contract is a suit for money damages, not an injunction – and certainly not a preliminary injunction.

In his Reply Brief, Plaintiff argues that National Union's partial payment does not render reparable what would otherwise be irreparable harm. (Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 5 (Docket #17).) Plaintiff decries the fact that the "promise of partial reimbursement came only *after* National Union spent months ignoring Stuckey's demands for reimbursement; *after* Stuckey was forced to commence this action to seek a preliminary injunction; and *after* National Union and Stuckey's counsel engaged in negotiations about settling this preliminary injunction action, which were ultimately unsuccessful." (*Id.* (emphases in original).) In other words, Plaintiff accuses National Union of behaving inequitably. But these arguments do not address the issue of irreparable harm. Even assuming National Union behaved inequitably, "inequitable conduct alone cannot justify the entry of a preliminary injunction. The linchpin of such interim relief is that threatened irreparable harm will be prevented by that injunction." *Buckingham Corp. v. Karp*, 762 F.2d 257, 262 (2d Cir. 1985).

Plaintiff fails to establish that he is being irreparably harmed by National Union's failure to advance the disputed portion of his defense costs. Fee disputes between attorneys and clients – or attorneys and third-party payors – are par for the course in high-stakes litigation, and the

reasonableness of attorneys' fees is a frequently-tried issue. Plaintiff has not come close to establishing that it would be difficult – let alone very difficult – to quantify his damages at a trial over the cost of his defense, and "irreparable harm exists only where there is a threatened imminent loss that will be very difficult to quantify at trial." *Tom Doherty Associates, Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995). A court sitting in equity should not resolve such disputes when money damages can fully compensate any loss. *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989).

Plaintiff also argues that he might, "as a result of a sudden inability to pay legal fees, . . . lose his existing counsel in the middle of (and quite possibly at a key moment in) the Underlying Action." (Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 6 (Docket #17).) But counsel has not put in an affidavit threatening to resign, and Plaintiff offers no evidence that he will be unable to continue paying counsel if only a portion of his defense costs are reimbursed while the issue of reasonableness is litigated. Nor does he identify any realistic prospect that he will "suddenly" become unable to pay those costs. The only evidence in the record relates to Stuckey's financial condition before National Union reimbursed him any funds. Nothing in the record indicates that the sum National Union has reimbursed, and the amount it will continue to advance going forward, is so deficient that Stuckey might suddenly lose the ability to defend himself. The potential harm he identifies is too speculative, and not sufficiently actual or imminent, to justify the drastic remedy of preliminary injunctive relief. *See Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989).[2]

[2] Stuckey argues that National Union behaved unreasonably when it urged him to fire the lawyers who have been representing him for two years at a critical point in the Underlying Action and replace them with lawyers who would abide by the cap. While his argument has obvious appeal, a trier of fact would need more information about the progress in the Underlying Action to assess the potential for prejudice if new counsel had to be retained right now.

Second, unlike the plaintiffs in *WorldCom* and *XL Specialty*, Plaintiff has not yet proven that he is likely to succeed on the merits of his claim for full reimbursement of his defense costs. Stuckey does not argue that National Union's refusal to reimburse fees for administrative work, block-billed time, duplicative effort, excessive hours, or non-billable activities is either unreasonable or contrary to the terms of the Policy. He does not appear to have asked National Union for clarification of the deficiencies identified after its invoice review, and the parties do not appear to have even discussed whether some or all of the flagged deficiencies might be remediable (*e.g.*, the block-billed time) or turn out to be reimbursable (*e.g.*, the pre-NYU-tender billing).

Plaintiff's principal argument is that National Union's hourly cap is unreasonable, although the cap accounts for only $133,000 of the $225,000 in fees that National Union disallowed. From years of experience, I can say that the $300 hourly rate seems low for legal representation in New York City (though not necessarily in its immediate environs), at least absent the sort of negotiated rates that large consumers of legal services (like insurance companies) are able to obtain in exchange for providing volume business. In deciding motions for attorneys' fees, courts in this district have routinely found reasonable partner rates in the $600 to $800 per hour range and associate rates in the $300 to $500 per hour range. *See, e.g.*, *Asare v. The Change Group New York, Inc.*, 2013 WL 6144764, at *19 (S.D.N.Y. Nov. 18, 2013); *In re Nissan Radiator/Transmission Cooler Litig.*, No. 10 CV 7493(VB) (S.D.N.Y. May 30, 2013); *GAKM*

Furthermore, there is another question of reasonableness that bears on Stuckey's argument: whether Stuckey and his retained counsel behaved reasonably by not putting on a full-court press to ascertain whether NYU maintained an insurance policy that might cover members of its faculty. So far, all I know about is one abortive inquiry addressed to co-defendant NYU, to which there was no response. Counsel admitted at oral argument that a more vigorous effort to find out about insurance coverage would not have been amiss.

Resources LLC v. Jaylyn Sales, Inc., 2009 WL 2150891, at *8 (S.D.N.Y. July 20, 2009). Stuckey's attorneys charge $625 to $725 per hour for partners and $285 to $475 per hour for associates – well within the range of reasonableness as found by my colleagues, and even on occasion by myself. (Complaint, Ex. G.)

However, while Plaintiff certainly has a case that National Union's rate cap is unreasonable, he has not won that case just yet. He has not introduced evidence about the range of attorney rates for lawyers practicing in the New York City Metropolitan Area for work of the sort comprehended in the Underlying Action. Neither, for that matter, has National Union. Nor has either side adduced evidence about how that range of rates might differ for Plaintiff – an individual hiring an attorney for a one-off representation at a time when he knew of no insurance coverage – and National Union, a major consumer of legal services with a stable of lawyers readily available to it.

Additionally, there has been no factual development about the reasonableness of Plaintiff's efforts to discover whether he was covered by an insurance policy. Had Plaintiff discovered the Policy, National Union might have disputed his attorneys' hourly rates earlier. After all, the Policy provides that, "The Insureds shall not . . . incur any Defense Costs without the prior written consent of the Insurer." (Compl., Ex. F, Policy § 8.) National Union has not asserted this defense to Stuckey's claim for past reimbursement – and I do not think it would be fair to allow it to do so now – but on a fuller factual record, National Union might have grounds for asserting that Plaintiff's lackluster effort to discover the Policy contributed to his failure to understand what National Union considered reasonable. And because the Policy specifically provides that, "Only those . . . Defense Costs which have been consented to by the Insurer shall be recoverable as Loss under the terms of the policy," the reasonableness of Plaintiff's efforts may determine the

likelihood of his success on the merits. (*Id.*) I cannot make that determination absent a more fulsome factual record.

Plaintiff has unquestionably raised a sufficiently serious question going to the merits of his case that he is entitled to complete reimbursement of his legal fees on the ground that they are "reasonable." Under the old Second Circuit standard for the entry of a preliminary injunction that might have been enough – although even then the test required "sufficiently serious questions . . . *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sonesta Int'l Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973) (emphasis in original). However, it is not clear that that standard survived the Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) – I for one do not believe that it did – and there can be no question that plaintiff has met the more exacting standard of showing, with admissible evidence, that he is likely to succeed on the merits of his fee claim.

What Stuckey really needs is not a preliminary injunction, but a rapid trial on the issue of the reasonableness of his reimbursement request. I am happy to give him an early trial date: December 7, 2015. Between now and November 20, the parties may engage in expedited discovery, by which I mean (1) no more than three depositions per side (including expert depositions), each to last no more than 6 hours, to be taken on five days' notice; (2) immediate production by National Union of all documents relating to when and how the rate cap structure was set (which I consider to be Rule 26 discovery); (3) immediate production by both sides of all documents that relate to (i) Stuckey's efforts to figure out whether or not he was covered under any insurance policy, and (ii) National Union's decisions, if any, regarding notice to Stuckey about the potential for coverage under the policy at issue in this lawsuit; (4) designation of a National Union Rule 30(b)(6) witness no later than September 25; and (5) designation of experts to testify

about attorney rates in the New York City Metropolitan Area and exchange of expert reports on the subject no later than November 12, 2015. If this is to be a bench trial, I will expect compliance with my rules for bench trials, with submission of a Final Pre-trial Order by November 25, 2015 and of direct testimony witness statements for witnesses under each party's control by December 2, 2015. If it is to be a jury trial, then I will need a Final Pre-trial Order, proposed voir dire, and proposed jury instructions by November 25, 2015.

B. Plaintiff is not entitled to a mandatory injunction giving him unlimited settlement authority in violation of the terms of the Policy

Plaintiff also requests a preliminary injunction "ordering National Union to authorize and fund a settlement in the Underlying Action, as required by the terms of the Policy." (Plaintiff's Memorandum of Support of Plaintiff's Motion for Preliminary Injunction at 15 (Docket #5).) In his Order to Show Cause, he describes the relief he seeks as follows:

> (1) Declar[e] that Stuckey may henceforth negotiate and consummate a settlement agreement with the plaintiff in the Underlying Action without involving National Union, and without Stuckey violating the Policy; [and]
>
> (2) Declar[e] that any settlement which may be reached between Stuckey and the plaintiff in the Underlying Action is fair and reasonable such that National Union is obligated to indemnify Stuckey for the settlement amount.

(*See* Order to Show Cause, ¶ 7-8 (Docket #16).)

Plaintiff's second request is ridiculous on its face. I cannot very well order National Union to bless as reasonable a settlement that has not yet been negotiated and so is of indeterminate amount. I will, therefore, limit discussion to Plaintiff's first request.

Plaintiff's request for an injunction authorizing him to conduct settlement talks on his own without violating the Policy fails to satisfy any of the requirements for injunctive relief.

Plaintiff has not shown that he will suffer irreparable harm in the absence of injunctive relief. The only incident that directly relates to the relief he seeks – that is, the only incident that

relates to *his* settlement authority, as opposed to NYU's settlement authority – was a purported failure by National Union to respond to Plaintiff's request for settlement authority, made just weeks before filing the instant lawsuit. Plaintiff argues that he has been irreparably injured by National Union's failure to respond to this inquiry, but the fact that the carrier has now responded would appear to render this argument moot. Stuckey obviously fears that his reputation will suffer if the court-ordered third party depositions go forward as scheduled, and I recognize that reputational injury – even if it turns out to be based on provable facts – can be found to be irreparable. *See, e.g.*, *Gennaro v. Rosenfield*, 600 F. Supp. 485, 489 (S.D.N.Y. 1984) (citing cases). However, this does not alter the fact that National Union is now moving the case toward settlement. Plaintiff has not demonstrated that the depositions will in fact proceed if the pendency of settlement discussions is made known to the judge presiding in the Underlying Action – or indeed, that the depositions are proceeding on a court-ordered schedule in the first place.[3] Plaintiff simply does not say.

However, assuming arguendo that Stuckey had demonstrated irreparable injury, he cannot obtain a preliminary injunction because he has not made out any of the other three prerequisites to the entry of a preliminary injunction.

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[3] One of the exasperating things about the motion papers in this case is that they have danced around what for Stuckey is obviously the real issue – finding a way to stop those depositions from taking place. It was not until yesterday's oral argument that I finally realized why Stuckey continues to press for an injunction allowing him to negotiate a settlement on his own behalf – even though his desire to avoid the reputational impact of those depositions is critical to any argument for irreparable injury. Just as an insurer must treat its insured's interest as equal to its own, an insured has a contractual duty not to undermine the interests of its insurer – that is why the carrier bargains for the right to participate in settlement negotiations, even though it has no obligation to assume the defense. I am particularly loathe to cut National Union out of the process in a situation where, as here, the insured carefully avoids making the very argument it needs to make; it suggests that the insured lacks any interest in protecting the assets of his insurer.

First, Plaintiff has shown no likelihood of succeeding on the merits of a claim that he be allowed to enter into any settlement he chooses with the plaintiff without involving National Union and without violating the Policy. On the contrary, Plaintiff seeks relief that expressly contradicts the terms of the Policy. Under the Policy, National Union must consent to any settlement. The Policy provides that Plaintiff "shall not admit or assume any liability or incur any Defense Costs without the prior written consent of the Insurer." (Compl., Ex. F, Policy § 8.) It also provides that, "the Insurer may withhold consent to any settlement, stipulated judgement or Defense Costs, or any portion thereof, to the extent such Loss is not covered under the terms of this policy." (*Id.*) Second, National is expressly permitted to "effectively associate with the insureds in the defense of any Claim . . . including but not limited to negotiating a settlement." (*Id.*) In short, it *would* violate the Policy for Plaintiff to settle without involving National Union; he cannot pretend otherwise.

Plaintiff hints that National Union should be estopped from relying on its rights under the Policy because of past bad faith failures to authorize settlement discussions. He points to two alleged failures by National Union. First, he argues that Hayward refused to intervene with the National Union claims handler in charge of the claims against NYU so that both defendants could be brought to the table – the preference of plaintiff in the Underlying Action. Second, he argues that National Union failed to respond to his August 2015 request for authorization – a request made two weeks before filing the present motion. Plaintiff claims that because of these failures, "repeated overtures to settlement by the plaintiff in the Underlying Action have gone unresponded [*sic*]." (Plaintiff's Memorandum of Support of Plaintiff's Motion for Preliminary Injunction at 14 (Docket #5).) This behavior, Plaintiff says, frustrated his ability to settle with the plaintiff in the Underlying Action.

But these episodes do not constitute the sort of "clear showing" of bad faith failure that might warrant stripping National Union of its contractual rights.

Assuming New York law applies,[4] bad faith failure to settle requires a showing that the insurer failed to treat the insured's interests equally with its own, which "can be shown by 'a pattern of behavior evincing a conscious or knowing indifference to the probability that *an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted.*'" *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 399 (2d Cir. 2000) (emphasis added) (quoting *Pavia v. State Farm Mutual Automobile Insurance Co.*, 82 N.Y. 2d 445, 453-54 (1993)). It is not clear that a bad faith argument can proceed absent a concrete risk of personal exposure to the insured, and Plaintiff has not suggested that a potential jury award or settlement amount would exceed the Policy limits.

Furthermore, there has been no "pattern of behavior" here suggesting that National Union was indifferent to the possibility that Plaintiff would be personally liable for a judgment in excess of the policy limits. Indeed, there is every indication in the record that National Union has wanted to settle the claims against Stuckey from the minute it took on financial responsibility for his defense costs, although it has proceeded clumsily and at what I will call usual and customary carrier pace. Plaintiff himself admits National Union was more than willing to facilitate settlement between Stuckey and the plaintiff in the Underlying Action months ago. (*See* Compl., Ex. L.) Rather, it became clear at the preliminary injunction hearing that Stuckey's interest is not just in settlement, but in immediate settlement, and for reasons that are primarily reputational, not

[4] The Policy is silent about choice of law, but the parties' briefs assume that New York law applies. Such tacit consent "is sufficient to establish choice of law." *Photopaint Technologies, LLC v. Smartlens Corp.*, 335 F.3d 152, 160 n.8 (2d Cir. 2003) (quoting *Krumme v. WestPoint Stevens, Inc.*, 238 F.3d 133, 138 (2d Cir. 2000).

financial: he does not want the recently-authorized third party depositions of other individuals who contend that Stuckey sexually harassed or abused them to proceed. The testimony to be adduced at these examinations might well increase the amount needed to settle the case, as Stuckey argues, which certainly suggests that National Union ought to be moving the case toward mediation (and there is some indication that this lawsuit has lit a fire under the carrier). But that does not rise to the level of bad faith, at least in the absence of evidence tending to show that it would increase the amount needed for settlement beyond the limits of the Policy.

That leaves one incident which could plausibly form the basis for a charge of bad faith against National Union – its failure to respond to Plaintiff's August 10, 2015 request for settlement authority. Aside from the fact that one incident does not a pattern make, Plaintiff must concede that National Union's claims handler wrote on September 3, 2015, to express National Union's desire to facilitate a global resolution of the Underlying Action. (Declaration of John Crossman in Support of Plaintiff's Reply Memorandum, Ex. 5 (Docket #18).) Although this email did not address Plaintiff's specific settlement request, it does show National Union's willingness to facilitate a resolution. As much as Plaintiff would like this court to ignore such a belated overture, I cannot. Nor can I overlook the fact that counsel for National Union represented to the court during the preliminary injunction hearing that the carrier is in the process of trying to set up a settlement discussion or a mediation as early as next week.

In short, Plaintiff has not offered any evidence of bad faith, let alone enough to convince this court that it should set aside the clear terms of the policy and authorize Stuckey to negotiate in the absence of the carrier that may have to fund whatever settlement he might reach.

Second, the balance of hardships does not tip in Plaintiff's favor. After National Union agreed to advance reasonable defense costs, Plaintiff's financial hardship was lessened

considerably. Plaintiff has an interest in protecting his reputation, but allowing Plaintiff to settle the case without National Union would work an extreme hardship on National Union by contradicting the express terms of the Policy and depriving the carrier of the benefit of its bargain. The parties are in equivalent positions.

Finally, the public interest would not be served by granting Plaintiff's request. Although Plaintiff is right that the public interest is served by the enforcement of contracts, this interest cuts against him, since the relief he seeks – settling the case in the absence of the carrier – would violate National Union's rights under the policy. The Policy requires Plaintiff to obtain the consent of National Union for all settlements. (Compl., Ex. F, Policy § 8.) It permits National Union to "effectively associate with the insureds in the defense of any Claim . . . including but not limited to negotiating a settlement. (*Id.*) The only countervailing public interest in Plaintiff's obtaining a speedy response to his request for settlement authority appears to be the avoidance of whatever embarrassment might ensue if the third party depositions go forward. But that interest is personal to Stuckey; it is not at all clear to this court that the *public* interest would be served if those depositions did not take place.

Although neither party cites to any cases discussing injunctive relief in this context, I find instructive the reasoning of a district court facing a similar question. In *SW Indus., Inc. v. Aetna Cas. & Sur. Co.*, 646 F. Supp. 819 (D.R.I. 1986), The Hon. Raymond Pettine denied an insured's request for a preliminary injunction that would "enjoin each insurance company from breaching their alleged obligations to contribute to any settlement reached and from challenging the settlement amount." *Id.* at 820. In that case, the plaintiff was a corporation that owned an Ohio factory. The corporation maintained insurance policies that it argued covered the claims of a former employee who sued the corporation for intentionally exposing him to toxic chemicals.

While the corporation engaged in settlement negotiations with the plaintiff-employee, several of the corporation's insurance providers sought declaratory relief as to their respective responsibilities; the corporation also sought a preliminary injunction to ensure that it could negotiate a settlement with the plaintiff-employee that the insurers would be required to indemnify. Judge Pettine held that injunctive relief was not available because, among other deficiencies, there was no irreparable harm. *Id.* at 822-23. Any failure to indemnify a settlement authorized under the policies could be remedied by money damages "under an action for breach of contract." *Id.* at 822.

So too here.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for preliminary injunction is denied. The Clerk of the Court is directed to terminate the motion and remove it from the Court's list of pending motions.

Dated: September 17, 2015

U.S.D.J.

BY ECF TO ALL COUNSEL