UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VISION ENTERTAINMENT WORLDWIDE, LLC,

Plaintiff,

-against-

MARY JANE PRODUCTIONS, INC. and MARY JANE BLIGE,

Defendants.

13 Civ. 4215 (AT)

MEMORANDUM, ORDER AND JUDGMENT

ANALISA TORRES, District Judge:

In this diversity action, Plaintiff, Vision Entertainment Worldwide, LLC ("VEW"), alleges claims of unjust enrichment and breach of contract against Defendants, Mary Jane Productions, Inc. ("MJP") and Mary Jane Blige ("Blige"). MJP asserts a counterclaim for breach of contract. Defendants move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. MJP also seeks attorney's fees and costs. For the reasons stated below, the motion is GRANTED.

BACKGROUND

Blige is a recording artist and entertainer. Def. 56.1 ¶ 1; Pl. 56.1 ¶ 1. This lawsuit concerns a contractual dispute between two entities, VEW, an event promoter, and MJP, a company that furnishes Blige's entertainment services. Pursuant to an amended Live Performance Agreement (the "Agreement") dated as of October 1, 2012, Blige was to perform at a concert on December 9, 2012 at the American Airlines Center in Dallas, Texas. *See* Def. 56.1 ¶¶ 2, 3; Pl. 56.1 ¶¶ 2, 3; Def. 56.1 Ex. A. The Agreement required VEW to provide at its sole cost and expense first-class air and ground transportation and first-class hotel accommodations for Blige and her entourage before the concert. *See* Def. 56.1 Ex. A at ¶ 2(b). The Agreement also required VEW to furnish all facilities, equipment, personnel, and services in connection with Blige's performance. *Id.* On December 6, 2012, First In Service ("FIS"), MJP's travel agent,

received three money wires totaling $19,800 from VEW. Def. 56.1 ¶¶ 20, 21; Pl 56.1 ¶¶ 20, 21. Ryan Burke, VEW's owner and president, *see* Def. 56.1 ¶ 4; Pl. 56.1 ¶ 4, knew that the total cost of travel exceeded $19,800. Def. 56.1 ¶ 22, 23; Pl. 56.1 ¶¶ 22, 23.

On December 6, 2012, Christine DiMeglio, an FIS employee, e-mailed Burke shortly after 8:00 p.m. stating, "Please let me know at your earliest convenience if you intend to wire the balance due so we can move forward with the travel arrangements." Def. 56.1 ¶ 26; Pl. 56.1 ¶ 26. About fifteen minutes after DiMeglio sent her e-mail, Jaha Johnson, an assistant to Kendu Issacs, Blige's husband and manager, *see* Rosenblatt Decl. Ex. 4 at 89, 90, e-mailed Burke stating, "This date is cancelled. Nothing to discuss." Def. 56.1 Ex. G. Burke responded by asking: "You sure boss?" *Id.* Johnson replied about two hours later: "You didn't send all the money, 20k even with 10k from Pooh, you are still 30k short. And you didn't send escrow proof that you have the funds for the back end." *Id.* The next day, on December 7, 2012, at 1:50 p.m., Grace Kim, MJP's attorney, e-mailed Burke, stating, "Our client is ready, willing and able to perform her obligations pursuant to the agreement, but obviously needs VEW to fulfill their [sic] obligations in order for this to happen. Please advise ASAP when the travel agency and our client can expect to receive the respective funds." Def. 56.1 Ex. H.

Nearly *two hours after* Kim informed VEW that MJP was ready, willing, and able to perform at the concert, VEW advised the American Airlines Center by e-mail that the concert was cancelled. Davis Reply Decl. Exs. C, D at ¶ 1(g). VEW and the American Airlines Center then immediately took steps to cancel the concert, including ceasing ticket sales, proceeding with automatic refunds, notifying radio stations of the concert cancellation, and suspending all advertisements, marketing, and promotional campaigns. Davis Reply Decl. Ex. C. VEW did not wire the balance of the funds to FIS, *see* Def. 56.1 ¶ 34; Pl. 56.1 ¶ 34, and Blige did not perform

at the American Airlines Center on December 9, 2012.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only if the court concludes that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). A dispute is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Material facts are those which may affect the outcome of a case. *Id.*

The moving party initially bears the burden of informing the court of the absence of a genuine dispute of material fact by citing to particulars in the record. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322-25; *Koch v. Town of Brattleboro*, 287 F.3d 162, 165 (2d Cir. 2002). The movant may satisfy its burden by "showing that the materials cited do not establish the . . . presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1)(B). If the non-moving party has the burden of proof on specific issues, the movant may also satisfy its own initial burden by demonstrating that the adverse party cannot produce admissible evidence to support an issue of fact. *Celotex*, 477 U.S. at 322-23; *PepsiCo Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002). In deciding the motion, the court views the record in the light most favorable to the non-moving party. *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61 (2d Cir. 2002).

If the moving party meets its initial burden, the burden then shifts to the opposing party to establish a genuine issue of fact. *Beard v. Banks*, 548 U.S. 521, 529 (2006); *Santos v. Murdock*, 243 F.3d 681, 683 (2d Cir. 2001). The opposing party may not avoid summary judgment by relying solely on conclusory allegations or denials that are unsupported by factual

data. *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 91 (2d Cir. 2002). Instead, the opposing party must set forth "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotation marks omitted).

II. Unjust Enrichment Claim and Demand for Punitive Damages

Defendants argue that because VEW's unjust enrichment claim arises out of a written contract, it is barred as a matter of law. They also contend that VEW is not entitled to punitive damages as a matter of law. In its opposition, VEW states that it "hereby drops the claims for unjust enrichment and punitive damages." Pl. Mem. 28. Accordingly, Defendants' motion for summary judgment dismissing those claims is GRANTED.

III. Breach of Contract

To prevail on a breach of contract claim under New York law, a plaintiff must prove: (1) the existence of a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages attributable to the breach. *See Beautiful Jewellers Private Ltd. v. Tiffany & Co.*, 438 Fed. App'x 20, 21-22 (2d Cir. 2011).

A. Breach of Contract Claim Against Blige

Blige seeks summary judgment on VEW's breach of contract claim because no privity of contract exists between VEW and Blige. VEW does not oppose the motion. *See* Pl. Mem. 20. Accordingly, Blige's motion for summary judgment dismissing VEW's breach of contract claim is GRANTED.

B. Breach of Contract Claim Against MJP

1. Anticipatory Repudiation

Under New York law, a repudiation is "'a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for

damages for total breach.'" *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463 (1998) (citation omitted). A repudiation has occurred when "the announcement of an intention not to perform was positive and unequivocal." *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 150 (1978); *see also DeLorenzo v. Bac Agency, Inc.*, 256 A.D.2d 906, 908 (3rd Dep't 1998) (repudiation occurs where "the repudiating party has indicated an unqualified and clear refusal to perform"); *Rachmani Corp. v. 9 E. 96th St. Apt. Corp.*, 211 A.D.2d 262, 267 (1st Dep't 1995) (explaining that repudiation occurs when there is "a definite and final communication of the intention to forego performance"). Whether an anticipatory repudiation has occurred is generally an issue of fact for the jury. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 112 (2d Cir. 2010). An exception to that general rule applies, however, where, as here, the purported repudiation is in writing. *See id.* In such circumstances, the issue may be decided as a matter of law so long as there is no ambiguity as to the writing's meaning. *See id.*

Here, Johnson's e-mail that stated, "This date is cancelled, nothing to discuss," to Burke, was an anticipatory repudiation. Def. 56.1 Ex. G. "This date" referred to the concert, and Johnson was clearly declaring MJP's intention not to perform its future obligations under the Agreement. Because the communication is unambiguous and in writing, the Court finds as a matter of law that Johnson's e-mail amounted to an anticipatory repudiation.

2. Johnson's Authority to Repudiate the Agreement

MJP states: "Mr. Isaacs, who is Ms. Blige's manager and husband, owns a management company separate and apart from MJP. Although Mr. Johnson is employed by and assists Mr. Isaacs, there is no evidence that Mr. Johnson worked for MJP or had authority to cancel the December 9 [c]oncert." Def. Mem. 9 n.4 (citation omitted). VEW argues that it reasonably relied on Johnson's apparent authority to repudiate the contract. To repudiate a contract on

behalf of a principal, a putative agent must be vested with actual or apparent authority. *See USHA Holdings, LLC v. Franchise India Holdings Ltd.*, No. 12 Civ. 3492, 2014 WL 1310345, at *15 (E.D.N.Y. Mar. 27, 2014). "'[A]ctual authority is created by direct manifestations from the principal to the agent.'" *Aleph Towers, LLC v. Ambit Tex., LLC,* No. 12 Civ. 3488, 2013 WL 4517278, at *6 n.10 (E.D.N.Y. Aug. 23, 2013) (quoting *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082, 1088 (2d Cir. 1997)). Apparent authority is created by "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority." *Hallock v. New York*, 64 N.Y.2d 224, 231 (1984); *see also Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472-73 (1973) (citations omitted) ("An agent's power to bind his principal is coextensive with the principal's grant of authority. One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority . . . . [T]he existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal – not the agent."). Although "the existence of apparent authority is normally a question of fact," *Green Door Realty Corp. v. TIG Ins. Co.*, 329 F.3d 282, 289 (2d Cir. 2003) (citation and internal quotation marks omitted), where insufficient evidence of apparent authority is provided, the issue can be decided as a matter of law. *See 150 Beach 120th St., Inc. v. Washington Brooklyn Ltd. P'ship*, 39 A.D.3d 722, 723 (2nd Dep't 2007) ("Here, there is no evidence of words or conduct of the Partnership, communicated to the respondents, which gave rise to the appearance and reasonable belief that BUFNY possessed authority to enter into the subject transactions."); *Rose v. Associated Univs., Inc.*, No. 93 Civ. 5872, 1994 WL 167974, at *7 (S.D.N.Y. Apr. 29, 1994) (Where no rational juror could find on the facts advanced, viewed

in the light most favorable to the non-moving party, that the putative agent had apparent authority to render the transaction, the court may decide the issue of apparent authority on summary judgment.).

According to Isaacs, Johnson lacked the authority to cancel concert dates. *See* Rosenblatt Decl. Ex. 4 at 90:22-24. VEW argues that it reasonably believed that Johnson had the apparent authority to cancel the concert because he had "been copied on emails related to the concert between [VEW] and Mr. Isaacs." Pl. Mem. 6. VEW points to a "November 14 at 8 PM" e-mail from Isaacs to Burke, Def. 56.1 Ex. D at 214, which VEW's counsel referred to during his direct examination of Burke at his deposition. Although the Court has not been provided with a copy of the e-mail, Burke testified that in his reply e-mail to Isaacs Burke asked if it was possible to push the concert date back to November 23, November 25, or December 8. *Id.* at 216. Isaacs responded with a question: "Is it possible?" *Id.* Apparently, Johnson was copied on Isaacs' response and the question was directed to him, because Johnson responded: "Not sure if everyone in the band and crew are available the day after Thanksgiving, the 23rd, Black Friday, or the 25th, the Sunday. Mary isn't available the 8th, Huggy. I assume you would have to check with everyone." *Id.* at 217:2-7. This e-mail trail is the only evidence VEW has submitted to the Court to support its claim that VEW reasonably believed that Johnson had the apparent authority to cancel the concert.

It is doubtful that Isaacs' mere inquiry to Johnson about the availability of MJP to perform on certain dates, without more, cloaked Johnson with the apparent authority to cancel the concert. However, even if Isaacs' e-mail creates an issue of fact regarding whether VEW reasonably relied on Johnson's alleged apparent authority to repudiate the Agreement, MJP would still be entitled to summary judgment, as discussed below.

3. VEW's Options After Repudiation

Under New York law, an anticipatory repudiation gives the non-repudiating party two mutually exclusive options:

> He may (a) elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract, thereby terminating the contractual relation between the parties, or (b) he may continue to treat the contract as valid and await the designated time for performance before bringing suit.
>
> The non-repudiating party must, however, make an affirmative election. He cannot at the same time treat the contract as broken and subsisting, for one course of action excludes the other. Indeed, the law simply does not permit a party to exercise two alternative or inconsistent remedies. Once a party has elected a remedy for a particular breach, his choice is binding with respect to that breach and cannot be changed.
>
> In determining which election the non-repudiating party has made, the operative factor is whether the non-breaching party has taken an action (or failed to take an action) that indicated to the breaching party that he had made an election. There is no specific time limit within which to make this election and generally, an election need not be made until the time comes when the party making the election must render some performance under the terms of the contract. At this point, either performing or failing to perform will indicate an election.

Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 258-59 (2d Cir. 2002) (alterations, citations, and internal quotation marks omitted). Thus, a repudiation by one party *may* constitute a breach of the contract, excusing the non-repudiating party from further performance and entitling it to claim damages for total breach; but, a repudiation constitutes a breach only if the non-repudiating party elects to treat it as such. *Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002) (citation and internal quotation marks omitted) ("[A] repudiation ripens into a breach prior to the time for performance only if the promisee elects to treat it as such."). "If [the non-repudiating party] elects to terminate the contract and sue for breach, he is excused from tendering his own performance; he need only show that [he] was ready, willing and able to perform." *In re Randall's Island Family Golf Ctrs., Inc.*, 261 B.R. 96, 101 (Bankr. S.D.N.Y.

2001), *aff'd*, 272 B.R. 521 (S.D.N.Y. 2002). The non-repudiating party may refuse, for a time, to acquiesce in the repudiation, and, without waiving any rights, urge the repudiator to perform. *S.D. Hicks & Son Co. v. J.T. Baker Chem. Co.*, 307 F.2d 750, 752 (2d Cir. 1962); *Mindel v. Image Point Prods., Inc.*, 725 F. Supp. 189, 194 (S.D.N.Y. 1989).

In a situation where the non-repudiating party continues to insist on performance, the repudiating party is given "an opportunity to repent and to resume the contract" during this period of insistence. *Deforest Radio Tel. & Tel. Co. v. Triangle Radio Supply Co.*, 243 N.Y. 283, 293 (1926). "The repudiator may retract his repudiation until the other party has elected to terminate the contract or has materially changed his position in reliance on the repudiation." *In re Randall's Island*, 261 B.R. at 102. If the repudiating party retracts its repudiation, the non-repudiating party once again becomes obligated to perform its obligations under the contract. *See Deforest*, 243 N.Y. at 292. "However, in order for a retraction to negate a prior repudiation, the retraction must take the form of a statement by the repudiating party that it will perform." *Argonaut P'ship v. Sidek*, No. 96 Civ. 1967, 1996 WL 617335, at *6 (S.D.N.Y. Oct. 25, 1996), *aff'd sub nom.*, 141 F.3d 1151 (2d Cir. 1998). In *Argonaut P'ship*, the court reasoned by analogy to the U.C.C., which governs the sale of goods, and noted that one commentator has stated that "[t]he retraction must be unconditional . . . . Ambiguous language that may or may not indicate that the repudiation is being withdrawn amounts to a retraction only if it would clearly be so understood by a reasonable man . . . in the position of the aggrieved party." *Id.* (quoting William D. Hawkland, *Uniform Commercial Code Series*, § 2-611:01 (1984)); *see also Vahabzadeh v. Mooney*, 399 S.E.2d 803, 805 (Va. 1991) (holding that to be effective, a retraction must meet the same standard as repudiation and, therefore, "must be clear, definite, absolute, and unequivocal in evincing the repudiator's intention to honor his obligations under the contract").

Although the issue of whether a retraction has occurred, like the issue of whether a repudiation has occurred, is ordinarily a question of fact for the jury, *see Johnson v. Benson*, 725 P.2d 21, 25 (Colo. App. 1986), courts may decide the issue of retraction as a matter of law when the retraction is definite and unambiguous. *See Silverman Perlstein & Acampora, LLP v. Reckson Operating P'ship, L.P.*, 303 A.D.2d 576, 577 (2nd Dep't 2003) (affirming the decision of the trial court, which found on a summary judgment motion that "the plaintiffs failed to raise a triable issue of fact that they either terminated the lease or materially changed their position in reliance on the defendants' anticipatory repudiation of the same before the repudiation was retracted"); *Kinesoft Dev. Corp. v. Softbank Holdings Inc.*, 139 F. Supp. 2d 869, 901 (N.D. Ill. 2001) (finding that the issue of retraction could be decided as a matter of law if the writing was sufficiently clear such that no reasonable jury could find that it did not constitute a retraction).[1]

Here, VEW initially did not elect to treat the anticipatory repudiation as a breach of the Agreement. Instead, Burke responded to the repudiation with an e-mail stating, "You sure boss?" Def. 56.1 Ex. G. VEW characterizes this response not as an acquiescence to MJP's

[1] Indeed, courts routinely find as a matter of law that some language or conduct does *not* amount to a retraction. *See Pavone v. Kirke*, 807 N.W.2d 828, 835 (Iowa 2011) ("Therefore, we agree with the district court that there is no genuine issue of material fact as to whether Wild Rose retracted the repudiation."); *Ratliff v. Hardison*, 199 P.3d 696, 701 (Ariz. Ct. App. 2008) ("As a matter of law, this is not a positive and unequivocal statement of his desire to once again abide by the contract, nor is it a retraction at all."); *Whitehall Packing Co. v. Schoeneweis*, 282 N.W.2d 638, at *2 (Wis. Ct. App. 1979) ("Whitehall's attempted retraction of its repudiation was insufficient as a matter of law."). However, when the alleged retraction is not so clear as to be definite and unambiguous, but not so equivocal as to not constitute a retraction as a matter of law, courts submit the issue to the jury. *See Cary Oil Co. v. MG Ref. and Mktg., Inc.*, 90 F. Supp. 2d 401, 414 n.62 (S.D.N.Y. 2000) (stating "the letters at least raise an issue of fact as to whether defendants retracted their anticipatory repudiation"); *Bykowsky v. Eskenazi*, 2 A.D.3d 115, 115 (1st Dep't 2003) (agreeing with the trial court that "whether the June 5 letter constituted a bona fide retraction is an issue of fact for trial"). Although examples of courts finding that a party affirmatively retracted its repudiation as a matter of law are scarce, there is no reason why a court should submit the issue to the jury if it determines that no reasonable juror could find that a statement was not a retraction. And, logic dictates that the same exception that applies to evaluating repudiations as a matter of law (when they are in writing and unambiguous) should apply to retractions as a matter of law. *See Vahabzadeh*, 399 S.E.2d at 805 ("Although the matter is one of first impression, we think that logic and reason compel the application of the same standard to the retraction of a repudiation that is applied in determining whether a contract has been repudiated.").

repudiation of the contract but as an attempt to persuade MJP to perform. Pl. Mem. 14 ("Mr. Burke in an effort to convince MJP to move forward with the concert emailed, '***You sure boss***?'") (emphasis in original). Because VEW insisted on performance, MJP was given "an opportunity to repent and to resume the contract." *See Deforest*, 243 N.Y. at 293; *see also S.D. Hicks & Son Co.*, 307 F.2d at 752. Johnson's reply e-mail, which stated, "You didn't send all the money, 20k even with 10k from Pooh, you are still 30k short. And you didn't send escrow proof that you have the funds for the back end," does not amount to a retraction of the repudiation. Although it does indicate some willingness on the part of MJP to perform, it conditions that willingness on VEW's providing proof that VEW would be able to pay the $105,000 balance due to MJP if it were to perform – proof not required by the terms of the Agreement.[2] For a retraction to negate a prior repudiation, it "must be clear and unequivocal; it may not impose new conditions not in accord with the original contract." *See Gilmore v. Duderstadt*, 125 N.M. 330, 336 (N.M. Ct. App. 1998).[3]

Nevertheless, the Court finds that, as a matter of law, the e-mail Kim sent to Burke the next day, on December 7, 2012 at 1:50 p.m., retracted Johnson's repudiation of the contract.

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[2] The Agreement only requires that the "remaining balance of such fee (i.e. the $105,000) (the "Balance Payment") [be paid] upon [Blige]'s arrival in [Dallas, Texas] for such [concert] (but in no event later than one (1) hour before the [concert] on the [December 9, 2012])." Def. 56.1 Ex. A at ¶ 6.

[3] Defendants seem to argue that Johnson's e-mails should not be considered repudiations because they came about only because of VEW's inability to furnish the necessary funds to cover the travel expenses. This argument is plausible. A repudiation occurs "if one promisor manifests to the other that he cannot or will not substantially perform his promise, or that, though able to do so, he doubts whether he will substantially perform it, and the statement is not conditional on the existence of facts that would justify a failure to perform, and there are no such facts." Restatement (First) of Contracts § 280 (1932). Although Johnson's first e-mail does not condition the repudiation on anything, if it is read conjunctively with his second e-mail, his initial repudiation appears to be conditioned on the existence of facts that would justify MJP's failure to perform (*i.e.*, VEW's inability to furnish the funds for the travel expenses). However, because MJP timely retracted Johnson's repudiation, as discussed below, this issue is immaterial.

Kim's e-mail was a clear, definite, and unambiguous statement that MJP would fulfill its obligations under the Agreement: "Our client is ready, willing and able to perform her obligations pursuant to the agreement." Def. 56.1 Ex. H. Indeed, Kim's e-mail was so clear in declaring MJP's willingness to perform that no reasonable juror could find that Kim's statement did not constitute a retraction. *See Kinesoft Dev. Corp.*, 139 F. Supp. 2d at 901. Thus, the only question is whether VEW "elected to terminate the contract or ha[d] materially changed [its] position in reliance on [Johnson's] repudiation" before receiving Kim's 1:50 p.m. e-mail. *See In re Randall's Island*, 261 B.R. at 102. If VEW did neither, then it became obligated to perform its obligations under the contract. *See Deforest*, 243 N.Y. at 292.

i. Did VEW Elect to Terminate the Contract?

Because the Agreement did not specify the date by which VEW was required to provide funds for the travel expenses, it is unclear whether VEW made an election to treat Johnson's repudiation as a breach by the time of Kim's 1:50 p.m. e-mail. Although Burke initially encouraged Defendants to perform after Johnson's December 6 repudiation e-mail, VEW did not waive its rights to elect at a later time to terminate the contract. *See S.D. Hicks & Son Co.*, 307 F.2d at 752; *Mindel*, 725 F. Supp. at 194. "There is no specific time limit within which to make this election and generally, an election need not be made until the time comes when the party making the election must render some performance under the terms of the contract. At this point, either performing or failing to perform will indicate an election." *Lucente*, 310 F.3d at 259 (citation and internal quotation marks omitted). "[U]nder New York law, where a contract is silent regarding the time for performance, the law will imply a duty to perform within a 'reasonable time.'" *Enzo Biochem, Inc. v. Johnson & Johnson*, No. 87 Civ. 6125, 1992 WL 309613, at *6 (S.D.N.Y. Oct. 15, 1992) (citation and internal quotation marks omitted). "The

question of what is a reasonable period of time for performance of a particular contract is a question of fact for a jury, unless the facts are undisputed, in which case the question becomes one appropriate for summary judgment." *Id.*; *see also Spagna v. Licht*, 87 A.D.2d 626, 627 (2nd Dep't 1982) ("The determination of what is a reasonable time is usually a question of fact, but when there are no disputed facts, what is a reasonable time becomes a question of law, and the case is a proper one for summary judgment."). "Some of the factors which a Court must look at to decide what is a reasonable time include: the nature and object of the contract, the presence or absence of good faith, what the parties contemplated at the time it was entered into, and the time that a person of ordinary diligence and prudence would use under the circumstances." *In re Frederes*, 108 B.R. 419, 421-22 (Bankr. W.D.N.Y. 1990); *see also Glen Cove Marina, Inc. v. Vessel Little Jennie*, 269 F. Supp. 877, 879 (E.D.N.Y. 1967). "Where . . . the parties have failed to set a specific date, it is evident that they did not regard performance at any specific point in time as essential." *Glen Cove Marina*, 269 F. Supp. at 879.

Here, the performance that VEW owed MJP was providing FIS sufficient funds to meet MJP's travel expenses for the concert. The Agreement states:

> [VEW] shall arrange for and furnish, at its sole cost and expense . . . first-class round-trip air transportation, on an airline and at flight times to be approved by [MJP] and/or [Blige] in advance to transport [Blige], [Blige]'s manager, [Blige]'s assistant, band and/or crew members, singers and other approved guests of [Blige] (collectively, the "Entourage") between [Dallas, Texas] and location(s) designated by [MJP] and/or [Blige] (which such location(s) shall be in the United States) [and] first-class hotel accommodations in [Dallas, Texas], at a first-class hotel to be approved by [MJP] and/or [Blige] in advance on dates to be selected by [MJP] and/or [Blige].

Def. 56.1 Ex. A at ¶ 2(b). The Agreement does not require VEW to furnish the funds by a date certain. Therefore, it is unclear from the terms of the Agreement when failure to provide the additional funds would constitute an election to terminate the contract. Where a contract is silent

regarding the time for performance, the law will imply a duty to perform within a reasonable time. *See Enzo Biochem, Inc.*, 1992 WL 309613, at *6. There are no material disputes of fact in this case. Indeed, VEW admitted all but two of Defendants' statements of material fact in its 56.1 response, neither of which are relevant here.[4] Because there are no material disputes of fact, the Court must decide the question of when VEW's delivery of the funds was reasonably due. *See Enzo Biochem, Inc.*, 1992 WL 309613, at *6; *Spagna v. Licht*, 87 A.D.2d at 627.

In making this determination, the Court first considers the nature and object of the contract. *See In re Frederes*, 108 B.R. at 421. The object of the contract was to hire Blige to perform in concert on December 9, 2012 in Dallas, Texas. It is unclear when the concert was slated to begin; the Agreement provides that Blige "shall commence the [p]erformance at a time on the Date to be determined by [MJP] in consolation with [VEW]." Def. 56.1 Ex. A at ¶ 2(e)(ii). However, the rider to the Agreement states that "doors open 7:00 P.M. normally." *Id.* at Tech Rider 7. Regardless of the concert's exact start time, considerable work needed to be accomplished to set up the show. The rider requires breakfast for the crew to start a half hour before "load-in," which was to begin at 7:30 a.m. on the morning of December 9, 2012. *Id.* at Tech Rider 9. Because of the early start time, the Court assumes that the crew (and perhaps Blige and other members of the entourage) needed flights arriving by and hotel accommodations for the evening of December 8, 2012. Thus, December 8, 2012, was the latest date that VEW could have performed its obligation to provide funds for the travel expenses. However, a person of ordinary diligence and prudence would not wait until the last minute. Under these circumstances, a person of ordinary diligence and prudence would provide the funds, at the very

[4] The two statements that VEW denied dealt with a characterization of Burke's deposition testimony, *see* Pl. 56.1 ¶ 25, and a conclusion of law regarding limitations on VEW's remedy if Defendants were found to be in breach of the Agreement, *see id.* ¶ 36.

latest, by the close of business the day prior to the date that flights and hotel accommodations were needed, *i.e.*, approximately 5:00 p.m. EST on December 7, 2012. Because Kim retracted Johnson's repudiation at 1:50 p.m. EST on December 7, 2012, it cannot be said that VEW's failure to provide the additional funds to cover the travel expenses constituted an election to terminate the contract before that time.

ii. Did VEW Materially Alter Its Position?

"The repudiator may retract his repudiation until the other party has elected to terminate the contract or has materially changed his position in reliance on the repudiation." *In re Randall's Island*, 261 B.R. at 102. Because VEW did not elect to terminate the contract before Kim's retraction of the repudiation, the Court must decide whether VEW materially changed its position in reliance on Johnson's repudiation before Kim's 1:50 p.m. e-mail. VEW states that "[w]hen the Defendants unilaterally cancelled the December 9, 2012 concert, VEW had a legal obligation to mitigate its losses and advised the venue site and others that the event had been cancelled on account of the breach of MJP Defendants per the email from Mr. Johnson." Pl. Mem. 3. VEW also states that "[a]fter the cancellation MJP's attorneys recognized the breach by Mr. Johnson and made a last minute attempt to cover the wrongful behavior of Mr. Johnson and spin the events to try to make it appear for litigation purposes that VEW breached the Agreement and not their client MJP. However, by that time VEW had already notified the concert site in Dallas of the cancellation." *Id.* VEW provides no evidence to support these assertions made in its Preliminary Statement. However, later in VEW's memorandum of law, VEW claims that "[b]y [the time of Kim's 1:50 p.m. e-mail], VEW had taken steps to advise third parties of the cancellation," citing "Rosenblatt Decl., Ex. 8; Ex. 22 to Burke's Deposition." *Id.* at 7; *see also id.* at 12 ("Once VEW received word that Ms. Blige would not appear, VEW had to mitigate its

losses by not sending the balance of the travel expenses, as well as notifying the venue that the [c]oncert was cancelled as well as other mitigation" citing "Plaintiff's Response at ¶ 10; Rosenblatt Decl., Ex. 8."); *id.* at 13 ("Relying on [Johnson's e-mail], VEW notified the AA Arena [sic] and others that the concert was cancelled to mitigate their losses" citing "Defendants' Ex. H; Rosenblatt Decl., Ex. 8."); *id.* at 18 ("By midday of December 7, VEW had already taken steps to mitigate their [sic] losses relying upon [Johnson's] email canceling the concert. (Rosenblatt Decl., Ex. 8). At this point it would be impossible to reinstate the [c]oncert as this was the day before the concert.").

VEW did not provide the Court with Exhibit 22 to Burke's deposition. Indeed, the Court was not even provided with the portion of Burke's deposition where Exhibit 22 was introduced. Based on Burke's deposition index, it appears that Exhibit 22 was introduced at page 257, which no party submitted. Perhaps VEW intended to attach pages 257-261, as the sheet that included pages 253-256 was attached twice. *See* Rosenblatt Decl. Ex. C. VEW's response in paragraph 10 to Defendants' 56.1 statement addresses the Agreement's terms regarding Blige's compensation; it has nothing to do with mitigating losses or notifying the venue. *See* Pl. 56.1 ¶ 10. And, "Defendants' Ex. H" is the e-mail chain containing Kim's 1:50 p.m. e-mail. *See* Def. 56.1 Ex. H. Thus, the only evidence VEW has provided that it materially altered its position before receiving Kim's 1:50 p.m. e-mail is Rosenblatt Decl. Ex. 8. However, Rosenblatt Decl. Ex. 8 does not establish what time on December 7, 2012 VEW informed the American Airlines Center that the show was cancelled. The first page of Rosenblatt Decl. Ex. 8 is an e-mail from Ken Kuhl of the American Airlines Center dated December 10, 2012, which states "on Friday, 12/7 [the concert] was cancelled." Rosenblatt Decl. Ex. 8. The second page of the exhibit is a "Cancellation Request/Policy Release" form also completed on December 10, 2012. *Id.* It does

not identify the time of day the American Airlines Center was informed of the cancellation, although it does say the "effective date and hour of cancellation" was December 7, 2012 at 12:00 a.m. *Id.*

However, it is evident from other documents that the American Airlines Center was not informed of the cancellation until later in the day on December 7, 2012. In a 9:14 a.m. e-mail from Kuhl to Burke on December 7, 2012, Kuhl declined to wire Burke additional funds and stated that "I will need to have the funds available *just in case this show cancels at the last minute*." Davis Reply Decl. Ex. A (emphasis added). And, e-mails MJP obtained directly from the American Airlines Center demonstrate that VEW informed the venue that the concert was cancelled at 2:48 p.m. CST (3:48 p.m. EST), nearly *two hours after* Kim's 1:50 p.m. EST e-mail to VEW stating that MJP was ready, willing, and able to perform. *See id.* Exs. C, D at ¶ 1(g).

Because MJP retracted its repudiation before VEW elected to terminate the contract or materially changed its position in reliance on the repudiation, VEW was obligated to fulfill its obligations under the Agreement, starting with its duty to furnish sufficient funds to cover MJP's travel expenses. *See In re Randall's Island*, 261 B.R. at 102; *Deforest*, 243 N.Y. at 292.

4. VEW's Failure to Perform

After Kim's 1:50 p.m. e-mail retracting Johnson's repudiation, VEW failed to furnish sufficient funds to cover MJP's travel expenses. VEW admits that it knew that the expenses exceeded the $19,800 that VEW had already wired, Def. 56.1 ¶ 23; Pl. 56.1 ¶ 23, but VEW did not pay the outstanding balance. Def. 56.1 ¶¶ 24, 34; Pl. 56.1 ¶¶ 24, 34. Indeed, Kim informed VEW of its failure to perform under the Agreement. *See* Def. 56.1 Ex. H (Kim e-mail at 1:50 p.m. on December 7, 2012, stating, "[p]lease advise ASAP when the travel agency and our client can expect to receive the respective funds. Otherwise, VEW's failure would be deemed a breach

of the agreement, in which event our client has the right to terminate with no further obligation to perform."); *id.* (Kim e-mail at 7:33 p.m. on December 7, 2012, stating, "[o]ur client is ready, willing and able to perform at the [the concert] but for VEW's failure to comply with its obligations under the Agreement. Specifically, despite repeated requests to pay [Blige]'s travel agency for the travel expenses that VEW is required to pay under the Agreement for [Blige] and her entourage to perform at the [c]oncert, the travel agency has still not received sufficient funds to book such travel for [Blige] and her entourage to so perform."). To prevail on a breach of contract claim under New York law, the plaintiff must demonstrate that he performed under the contract. *See Beautiful Jewellers*, 438 Fed. App'x at 21-22. Because VEW did not perform its obligation to pay for MJP's travel expenses, it cannot maintain a suit for breach of contract against MJP.

Accordingly, MJP's motion for summary judgment on VEW's breach of contract claim against MJP is GRANTED.

IV. MJP's Breach of Contract Counterclaim

To prevail on a breach of contract claim, one must prove: (1) the existence of a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages attributable to the breach. *See id.* Here, the first element is not in dispute, and MJP need not establish the second element. *See Merrill Lynch & Co. Inc., v. Allegheny Energy, Inc.*, 500 F.3d 171, 186 (2d Cir. 2007) ("Under New York law, a party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain . . . .") (citation omitted).

A. Did VEW Breach?

As discussed above, it is clear that VEW failed to perform its obligation to deliver the funds for the travel expenses; however, the Agreement provides that:

> Neither party hereto shall be deemed to be in breach of any of their respective obligations hereunder unless and until the other party shall have given written notice, describing in detail the breach, and the party in default shall have failed to cure that breach within ten (10) days after receipt of that written notice (or such other time as may be reasonable under the circumstances . . .).

Def. 56.1 Ex. A at ¶ 11(e). Although Kim's 1:50 p.m. and 7:33 p.m. e-mails to Burke provided notice of VEW's failure to deliver the balance due, Defendants acknowledge that "email [is] not a proper notice under [the Agreement] because email notices are not permitted." Def. Reply Mem. 10; *see also* Def. 56.1 Ex. A at ¶ 16 ("Notices provided for herein shall be considered effectively given when personally delivered or three (3) days after being sent by certified mail or registered mail (return receipt requested), postal prepaid, addressed as provided above."). However, MJP argues that it did not provide VEW with notice and an opportunity to cure its breach of contract because doing so would have been a futile act.

"A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.'" *Napster, LLC v. Rounder Records Corp.*, 761 F. Supp. 2d 200, 208 (S.D.N.Y. 2011) (citation omitted). If a contract explicitly states that notice and an opportunity to cure are conditions precedent to bringing or maintaining a claim, courts will enforce that agreement. *Rojas v. Don King Prods., Inc.*, No. 11 Civ. 8468, 2012 WL 760336, at *2 (S.D.N.Y. Mar. 6, 2012). Where no notice is given under the contract, there can be no breach because the counter-party has not been afforded the opportunity to cure the defect. *See I.J. Litwalk & Co., Inc. v. Gen. Signal Corp. O-Z Gedney Div.*, 293 A.D.2d 713, 715 (2nd Dep't 2002).

A party's failure to afford contractually-required notice is excusable as futile only in the limited circumstances where the other "party (1) expressly repudiates the parties' contract or (2) abandons performance thereunder." *Point Prods. A.G. v. Sony Music Entm't, Inc.*, No. 93 Civ. 4001, 2000 WL 1006236, at *4 (S.D.N.Y. July 20, 2000) (citation omitted). "Generally, a finding of an abandonment will be based upon clear, affirmative conduct by at least one of the parties that is entirely at odds with the contract." *EMF Gen. Contracting Corp. v. Bisbee*, 6 A.D.3d 45, 49-50 (1st Dep't 2004). "[W]here there is no genuine issue of fact as to whether a contract has been abandoned, summary judgment is appropriate." *Jones v. Hirschfeld*, 348 F. Supp. 2d 50, 60 (S.D.N.Y. 2004).

Here, there is no dispute that VEW unilaterally directed the American Airlines Center to cancel the concert after Kim informed VEW that MJP was ready, willing, and able to perform. *See* Davis Reply Decl. Ex. C. The Agreement requires VEW to provide the facility for the concert (*i.e.*, the American Airlines Center); thus, VEW's notifying the American Airlines Center that the concert was cancelled was entirely at odds with the object and purpose of the Agreement. *See* Def. 56.1 Ex. A at ¶ 2(b). Indeed, VEW's e-mail to the American Airlines Center cancelling the concert set in motion a chain of events that ensured that the concert would not go forward. Kuhl replied to VEW's e-mail informing him that the concert was cancelled by stating,

> With receipt of this email we will proceed with the following: Take event off sale and proceed with automatically refunding all ticket sales made thru Ticketmaster[.] Remove the event from the American Airlines Center website[.] Notify radio station that the event in [sic] cancelled and to suspend any further advertising and announce that the event has been cancelled and that ticket holders can get refunds at their original place of purchase[.]

Davis Reply Decl. Ex. C. VEW replied to Kuhl's e-mail at 3:10 p.m., informing him that "Radio has been notified and all advertisements/marketing/promotional campaigns should have ended at this time," and stating that "[VEW] asked the [p]ublicist to work on a press release." *Id.*

VEW's conduct amounted to abandonment because it was clear, affirmative, and entirely at odds with the Agreement. *See EMF Gen. Contracting*, 6 A.D.3d at 50. Accordingly, MJP's providing notice and opportunity to cure would have been a futile act.[5] Thus, VEW is liable to MJP for breach of contract.

B. Damages

The fourth element of a breach of contract claim is damages attributable to the breach. *See Beautiful Jewellers*, 438 Fed. App'x at 21-22. The Agreement requires VEW to

> pay to [MJP] the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) for the [concert] (the "Fee"), payable as follows: (i) One Hundred Forty Five Thousand Dollars ($145,000.00) of such Fee (the "Initial Payment") upon the complete execution of this Agreement (the prior receipt of which [MJP] hereby acknowledges); and (ii) the remaining balance of such Fee (i.e., $105,000.00) (the "Balance Payment") upon [Blige's] arrival in [Dallas, Texas].

Def. 56.1 Ex. A at ¶ 6. Although MJP received the initial payment of $145,000, VEW did not pay MJP the $105,000 balance. Def. 56.1 ¶¶ 18, 19; Pl. 56.1 ¶¶ 18, 19. The Agreement provides that if VEW "fails, refuses or neglects to comply with any requirements set forth herein . . . [MJP] may retain any and all portions of the Fee or any other compensation previously paid [and] [VEW] shall immediately pay to [MJP] the balance of the Fee and any other amounts due for costs and expenses in connection with the [the concert]." Def. 56.1 Ex. A at ¶ 11(c).

[5] MJP was aware of VEW's unilateral cancellation of the concert. *See* Def. 56.1 Ex. H ("It has come to our attention that you [Burke] and VEW have been making statements to third parties that [Blige] has cancelled the [c]oncert.").

MJP seeks $105,000 in damages. *See* Def. Mem. 29. VEW argues that "MJP is not entitled to recover the balance payment under its counterclaim," Pl. Mem. 7, because paragraph 11 of the Agreement is unconscionable. VEW contends that the Agreement is the "result of the uneven bargaining power of the parties" and that VEW "was forced to agree to any terms imposed by MJP no matter how overbearing, harsh, and one-sided." Pl. Mem. 27.

"[W]hen the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages and agree when they are to be paid, the remedy thus provided must be exclusively followed." *X.L.O. Concrete Corp. v. John T. Brady & Co.*, 104 A.D.2d 181, 184 (1st Dep't 1984), *aff'd*, 66 N.Y.2d 970 (1985) (citation and internal quotation marks omitted). However, stipulated damages will not be enforced if they are unconscionable or contrary to public policy. *See M. Viaggio & Sons, Inc. v. City of New York*, 114 A.D.2d 939, 939 (2nd Dep't 1985). The party contesting a stipulated damages provision bears the burden of proffering evidence that enforcement of the provision is unconscionable. *See AXA Inv. Managers UK Ltd. v. Endeavor Capital Mgmt. LLC*, 890 F. Supp. 2d 373, 388 (S.D.N.Y. 2012). "A party may meet its burden by demonstrating either that (1) the damages that would result from a breach were capable of estimation at the time at which the contract was forged, or (2) showing that the prescribed damages stand in evident disproportion to this anticipable injury." *Id.* "The enforceability of a damages clause is a question of law." *Id.*

VEW has not met its burden of demonstrating that the damages provision that allows MJP to keep the initial payment of $145,000 and requires VEW to pay the $105,000 balance in the event VEW fails to perform its obligations under the Agreement is unconscionable. Indeed, VEW has not addressed whether damages were capable of estimation at the time the Agreement

was forged or whether the prescribed damages stand in evident disproportion to an anticipable injury.

Accordingly, Defendants' motion for summary judgment on its breach of contract counterclaim is GRANTED.

C. Attorney's Fees

MJP seeks attorney's fees and costs in connection with VEW's breach. Paragraph 9(a) of the Agreement contains an indemnification provision, which provides that VEW "will indemnify . . . [MJP] . . . and [their] attorneys . . . from any liability, loss or expense (including reasonable attorney's fees) incurred by any of them in connection with any claim, suit or action against any of them arising out of or related to any breach by [VEW] of [the Agreement] or any claim, suit or action arising out of or related to any of the [the concert]." Def. 56.1 Ex. A at ¶ 9(a).

Because promises in a contract to indemnify the other party's attorney's fees and related costs "run against the grain of the accepted policy that parties are responsible for their own attorneys' fees," *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 199 (2d Cir. 2003), courts applying New York law do not infer a party's intention to indemnify such costs "unless the intention to do so is unmistakably clear from the language of the promise." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989). In *Hooper*, the New York Court of Appeals refused to read an attorney's fees provision as including claims between the parties themselves, as opposed to third-party claims, where the provision did not "exclusively or unequivocally" refer to such claims or otherwise "support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract." *Id.* Following the rule laid down in *Hooper*, courts resolve any ambiguity in favor of excluding first-party coverage. *In re Refco Sec. Litig.*, 890 F. Supp. 2d 332, 350 (S.D.N.Y. 2012) ("[A]ny ambiguity on the question . . . requires

a finding that attorney fees in suits between the contracting parties are not covered.").

Here, it is clear that paragraph 9(a)'s reference to "any claim" includes first-party claims. Def. 56.1 Ex. A at ¶ 9(a). This is because paragraph 9(b), which sets forth MJP's indemnification obligations to VEW, specifically limits indemnity to "*third party claim[s]* . . . arising out of or related to any breach by" MJP. *Id.* at ¶ 9(b) (emphasis added). Courts generally avoid interpretations that render contract terms surplusage. *See State-Wide Capital Corp. v. Superior Bank FSB*, No. 98 Civ. 817, 1999 WL 258268, at *4 (S.D.N.Y. Apr. 29, 1999). Because paragraph 9(b) specifically limits indemnification to third-party claims, it is clear that paragraph 9(a), in making no mention of third-party claims, includes indemnification for first-party claims on the contract. *See id.*

Accordingly, MJP shall submit to the Court an application for reasonable attorney's fees by **November 21, 2014**.

CONCLUSION

For the reasons stated above, Defendants' motion is GRANTED. Judgment on MJP's counterclaim for breach of contract is entered in favor of MJP in the amount of $105,000.00. The Clerk of Court is directed to terminate the motion at ECF No. 28.

SO ORDERED.

Dated: October 17, 2014
New York, New York

ANALISA TORRES
United States District Judge