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

MICHAEL D. COHEN, Plaintiff, v. TRUMP ORGANIZATION LLC, Defendant.	Index No. 651377/2019 Hon. Joel M. Cohen IAS Part 3 Motion Seq. No. 001 **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND 2

STANDARD OF REVIEW 6

ARGUMENT 6

I. THE COMPLAINT STATES A CLAIM FOR BREACH OF CONTRACT 6

A. Mr. Cohen Adequately Alleges the Existence of a Valid Contract 6

B. Mr. Cohen's Breach of Contract Claim Is Not Barred by the Statute of Frauds .. 10

1. The Indemnification Agreement Was Capable of Full Performance Within One Year 10

2. Plaintiff, at a Minimum, Is Entitled to Discovery to Demonstrate that the Indemnification Agreement Is Not Barred Under the Statute of Frauds. 14

II. THE COMPLAINT STATES A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING 16

III. THE COMPLAINT STATES A CLAIM FOR DECLARATORY JUDGMENT 17

IV. THE COMPLAINT STATES A CLAIM FOR PROMISSORY ESTOPPEL 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Abrams Realty Corp. v. Elo,
279 A.D.2d 261 (1st Dep't 2001) 7

Ackerman v. Landes,
112 A.D.2d 1081 (2d Dep't 1985) 20

Al-Bawaba.com, Inc. v. Nstein Techs. Corp.,
19 Misc. 3d 1125(A), 862 N.Y.S.2d 812, 2008 WL 1869751 (Sup. Ct. Kings Cnty. Apr. 25, 2008) 15

Arfa v. Zamir,
55 A.D.3d 508 (1st Dep't 2008) 18

Baron v. Suissa,
167 A.D.3d 685 (2d Dep't 2018) 6

Canstar v. J.A. Jones Constr. Co.,
212 A.D.2d 452 (1st Dep't 1995) 16

Castellotti v. Free,
165 A.D.3d 535 (1st Dep't 2018) 20

Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.,
74 N.Y.2d 475 (1989) 6

Cowen & Co., LLC v. Fiserv, Inc.,
141 A.D.3d 18 (1st Dep't 2016) 8

Cron v. Hargro Fabrics, Inc.,
91 N.Y.2d 362 (1998) 11

D & N Boening, Inc. v. Kirsch Beverages, Inc.,
63 N.Y.2d 449 (1984) 11, 13, 14

Dalton v. Educ. Testing Serv.,
87 N.Y.2d 384 (1995) 16

Dee v. Rakower,
112 A.D.3d 204 (2d Dep't 2013) 7

Dweck v. Friedlander Grp., Inc.,
43 A.D.3d 854 (2d Dep't 2007) 10

Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.,
837 F. Supp. 2d 162 (S.D.N.Y. 2011).....16

Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.,
804 F.2d 787 (2d Cir. 1986).....18

Fin. Guar. Ins. Co. v. Morgan Stanley ABS Capital I Inc.,
54 Misc. 3d 1215(A), 54 N.Y.S.3d 610, 2017 WL 593142 (Sup. Ct. N.Y. Cnty. Jan. 19, 2017).....6, 17

Freedman v. Chem. Constr. Corp.,
43 N.Y.2d 260 (1977).....13

Grad v. Roberts,
14 N.Y.2d 70 (1964).....16, 17

Griffin Bros. v. Yatto,
68 A.D.2d 1009 (3d Dep't 1979).....6

Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP,
11 Misc. 3d 926 (Sup. Ct. N.Y. Cnty. 2006).....7, 19

Gural v. Drasner,
114 A.D.3d 25 (1st Dep't 2013).....11, 13

Matter of Hennel,
29 N.Y.3d 487 (2017).....20

Hoya Saxa, Inc. v. Gowan,
149 Misc. 2d 191, 571 N.Y.S.2d 179 (1st Dep't 1991).....3

Int'l Trading & Sales v. Philipp Bros.,
99 A.D.2d 983 (1st Dep't 1984).....15

Karaszek v. Blonsky,
No. 2660-07, 2008 WL 2490068 (Sup. Ct. Nassau Cnty. May 30, 2008).....18

Katz v. Travelers,
241 F. Supp. 3d 397 (E.D.N.Y. 2017), *reconsideration denied by* 2017 WL 4180012 (E.D.N.Y. Sept. 20, 2017).....9

Keefe v. New York Law Sch.,
71 A.D.3d 569 (1st Dep't 2010).....16

Kroshnyi v. U.S. Pack Courier Servs., Inc.,
771 F.3d 93 (2d Cir. 2014).....11

Lapkin v. Lapkin,
224 A.D.2d 199 (1st Dep't 1996) 8, 10

Leon v. Martinez,
84 N.Y.2d 83 (1994), *aff'd by* 164 A.D.3d 1126 (1st Dep't 2018).....6

Lidz v. Reliance Plastic Corp.,
23 Misc. 2d 1075 (Sup. Ct. Nassau Cnty. 1960) 15

Long Island Pen Corp. v. Shatsky Metal Stamping Co.,
94 A.D.2d 788 (2d Dep't 1983).....21, 22

Melwani v. Jain,
281 A.D.2d 276 (1st Dep't 2001) 21, 22

Old Salem Dev. Group, Ltd. v. Town of Fishkill,
301 A.D.2d 639 (2d Dep't 2003).....19

Piven v. Wolf Haldenstein Adler Freeman & Herz L.L.P.,
No. 08 Civ. 10578(RJS), 2010 WL 1257326 (S.D.N.Y. Mar. 12, 2010) 19

Randall's Island Aquatic Leisure, LLC v. City of New York,
92 A.D.3d 463 (1st Dep't 2012) 18

Rogers v. Town of Islip,
230 A.D.2d 727 (2d Dep't 1996).....20

Savasta v. 470 Newport Assocs.,
82 N.Y.2d 763 (1993) 7

People ex rel. Schneiderman v. Bank of N.Y. Mellon Corp.,
977 N.Y.S.2d 668, 2013 WL 4516209 (Sup. Ct. N.Y. Cnty. Aug. 5, 2013) 3

Silver v. Silver,
63 A.D.3d 903 (2d Dep't 2009).....14

Singh v. PGA Tour, Inc.,
162 A.D.3d 556 (1st Dep't 2018) 16, 17

Siwek v. Mahoney,
39 N.Y.2d 159 (1976) 3

Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd.,
383 F. Supp. 2d 428 (S.D.N.Y. 2003).....19

Stein v. Anderson,
123 A.D.3d 1322 (3d Dep't 2014).....7, 9

Matter of Sud v. Sud,
211 A.D.2d 423 (1st Dep't 1995) 8, 9

Warwick v. Cruz,
270 A.D.2d 255 (2d Dep't 2000) 6

WPP Grp. USA, Inc. v. Interpublic Grp. of Cos.,
228 A.D.2d 296 (1st Dep't 1996) 14, 15

Rules and Statutes

N.Y. C.P.L.R. 3211 20

N.Y. C.P.L.R. 3211[a] 15

N.Y. C.P.L.R. 3211(a)(5) 6

N.Y. C.P.L.R. 3211(a)(7) 6

N.Y. Gen. Oblig. Law § 5-701(a)(1) 10, 11

Other Authorities

Glen Banks, Contract Law § 2:35 (2d ed. West's N.Y. Prac. Series
July 2018 update) 7

Plaintiff Michael D. Cohen ("Mr. Cohen" or "Plaintiff"), by and through undersigned counsel, respectfully submits this memorandum of law, together with the Affidavit of Michael D. Cohen ("Cohen Affidavit" or "Cohen Aff.") and the Affirmation of Eric B. Fisher ("Fisher Aff."), and the exhibits annexed thereto, in opposition to the motion of defendant Trump Organization LLC (the "Trump Organization" or the "Organization") to dismiss all causes of action asserted in the Complaint (the "Motion").

PRELIMINARY STATEMENT

This matter is, at its core, a breach of contract action. It involves an unequivocal commitment made by an employer to fund the legal fees and expenses incurred by a former employee and executive in connection with legal proceedings directly arising from his activities at the behest of and on behalf of his employer and its directors and officers. An organization's indemnification of its employees and former employees in these circumstances is commonplace, and that is precisely the contractual commitment to Mr. Cohen undertaken here, in no uncertain terms, by the Trump Organization. The Organization's legal obligation to Mr. Cohen is adequately pled in the Complaint. The Complaint also alleges the other requisites of a breach of contract claim: that the Organization breached its obligations to Mr. Cohen and that Mr. Cohen suffered resulting damages.

The Organization attempts to divert attention from these basic facts by pointing to Mr. Cohen's criminal plea and sentence. But those facts have no bearing on Mr. Cohen's averments in the Complaint of an agreement by the Organization to pay his legal fees and expenses incurred in responding to various legal matters arising from his employment by the Organization. The facts pled in support of Mr. Cohen's contract claims are valid, accurate, specific, demonstrably supported, and more than sufficient to withstand the Motion. As described further below, this is likewise true with respect to Mr. Cohen's claims for bad faith,

declaratory judgment, and promissory estoppel, as to which the Trump Organization's Motion must also be denied.

FACTUAL BACKGROUND

Mr. Cohen worked for the Trump Organization as Executive Vice President and Special Counsel from 2006 through 2017. Compl. ¶¶ 10, 17. During his employment with the Organization, Mr. Cohen became known as Donald J. Trump's ("Mr. Trump") "fixer," often helping Mr. Trump, the Trump Organization, and other affiliated businesses with issues relating to licensing deals and real estate projects. *Id.* ¶ 11.

The Organization has become the subject of numerous congressional investigations and other legal proceedings. *See Id.* ¶¶ 20–24. On January 13, 2017, the United States Senate Select Committee on Intelligence (the "Senate Intelligence Committee") announced its investigation into alleged interference by the Russian government in the 2016 United States presidential election (the "2016 Election"), including any possible coordination with the 2016 Trump presidential campaign (the "Trump Campaign"). *Id.* ¶ 20. On January 25, 2017, the United States House Permanent Select Committee on Intelligence (the "House Intelligence Committee") announced an investigation into alleged interference by the Russian government in the 2016 Election. *Id.* ¶ 21. On or around May 17, 2017, the U.S. Department of Justice Special Counsel's Office commenced an investigation, led by Special Counsel Robert S. Mueller, III (the "Special Counsel"), into potential coordination between the Trump Campaign and the Russian government, potential obstruction of justice by Mr. Trump, and related matters (the "Mueller Investigation"). *Id.* ¶ 22; *see also generally* Special Counsel Robert S. Mueller, III, "Report On

The Investigation Into Russian Interference In The 2016 Presidential Election," (March 2019), https://www.justice.gov/storage/report.pdf (the "Mueller Report").[1]

By the end of May 2017, Mr. Cohen had emerged as a person of interest in the congressional investigations and the Mueller Investigation (together, the "Investigations"). Compl. ¶ 23. On or around May 31, 2017, the House Intelligence Committee issued a subpoena to Mr. Cohen as part of its investigation into alleged interference by the Russian government in the 2016 Election. *Id.* ¶ 24.

Mr. Cohen retained counsel, McDermott Will & Emery LLP ("McDermott"), to represent him in connection with the Investigations on the recommendation of Jay Sekulow, an attorney for Mr. Trump. *Id.* ¶ 23; Cohen Aff. ¶ 8. He did so with the support of Mr. Trump and other individuals affiliated with the Trump Organization, who encouraged him to cooperate with the Investigations. Cohen Aff. ¶ 8.

In or around July 2017, the Organization entered into an oral agreement with Mr. Cohen under which the Organization agreed to indemnify Mr. Cohen and, separately, to pay for his attorneys' fees and costs in connection with Mr. Cohen's representation and defense in the Investigations and other matters arising from Mr. Cohen's work with and on behalf of the Organization and its principals, directors, and officers (the "Indemnification Agreement"). Compl. ¶ 26; Cohen Aff. ¶ 2. The existence of this Indemnification Agreement is explicitly referred to by Mr. Cohen's counsel at McDermott in written communications with the Organization (specifically, the Organization's general counsel, Mr. Alan Garten), in which

[1] On a motion to dismiss, this Court may take judicial notice of public records. *See People ex rel. Schneiderman v. Bank of N.Y. Mellon Corp.*, 977 N.Y.S.2d 668 (Table), 2013 WL 4516209, at *16 n.22 (Sup. Ct. N.Y. County Aug. 5, 2013) (citing *Hoya Saxa, Inc. v. Gowan*, 149 Misc. 2d 191, 192, 571 N.Y.S.2d 179 (1st Dep't 1991)); *see also Siwek v. Mahoney*, 39 N.Y.2d 159, 163 n.2 (1976) ("Data culled from public records is, of course, a proper subject of judicial notice.").

McDermott submitted invoices to the Organization for McDermott's work on behalf of Mr. Cohen and requested payment pursuant to the company's "oral agreement" with Mr. Cohen. *See* Cohen Aff. ¶¶ 7, 9 & Ex. A.

The Organization's agreement to pay Mr. Cohen's legal fees and costs was consistent with the company's efforts to coordinate a response to the Investigations with Mr. Cohen and others pursuant to a "joint defense agreement." Cohen Aff. ¶ 6; Compl. ¶¶ 25–26; *see also* Mueller Report, Volume II at 139 ("Cohen eventually entered into a joint defense agreement (JDA) with the President and other individuals who were part of the Russia investigation.").

The existence of the oral agreement to pay Mr. Cohen's legal fees and costs arising from the Investigations and other legal proceedings is supported by a subsequent course of conduct whereby the Organization paid bills regularly submitted by McDermott to the Organization's general counsel with a demand for payment. *See* Compl. ¶¶ 28–29, 31–32; *see also* Mueller Report, Vol. II at 139–40 (noting that in the months leading up to Mr. Cohen's August 2017 congressional testimony, "Cohen's legal bills were being paid by the Trump Organization"). On October 25, 2017, the Organization paid $137,460.00 to McDermott. Compl. ¶ 29. This amount reflected half of McDermott's unpaid invoices at the time, with the Organization promising in writing at that time that the other half would be paid the following day by the Trump Campaign. *Id.*; Cohen Aff. ¶ 9 & Ex. B.

This was not a one-time payment by the Trump Organization to McDermott for its work on behalf of Mr. Cohen. Indeed, in December 2017, with multiple overdue invoices from McDermott pending, the Organization confirmed that it would continue to indemnify Mr. Cohen and pay his attorneys' fees and expenses in connection with the Investigations, including the outstanding amounts owed to McDermott. Compl. ¶ 31. The Organization's confirmation and

honoring of its agreement to pay Mr. Cohen's legal expenses followed a direct appeal to Trump Organization executives Donald Trump, Jr. and Eric Trump by Mr. Cohen regarding the Organization's repeated delays in paying his attorneys' fees and expenses. Compl. ¶ 31.

All told, the Organization paid or secured the payment by others of over $1.7 million of Mr. Cohen's attorneys' fees and costs incurred in connection with the Investigations and other matters, through direct payments, obtaining funding from the Trump Campaign, and/or securing credits from McDermott.[2] *Id.* ¶ 32.

In or around June 2018, the Organization ceased to pay McDermott's invoices, without notice or justification. *Id.* ¶ 47; Cohen Aff. ¶ 10. As a result of the Organization's wrongful refusal to pay McDermott's invoices under the Indemnification Agreement, McDermott ultimately withdrew from its representation of Mr. Cohen. Compl. ¶ 48; Cohen Aff. ¶ 10. McDermott's withdrawal prejudiced Mr. Cohen's ability to respond to the Investigations and other matters. Compl. ¶ 48. A total of $1,037,868.87 remains owed by the Organization for McDermott's services rendered to Mr. Cohen. *Id.*

In addition, following McDermott's withdrawal, and in reliance on the Organization's commitment to indemnify him, Mr. Cohen retained additional counsel in connection with the Investigations and lawsuits filed against him arising from his work on behalf of the Trump Organization and its principals, directors, and officers. Compl. ¶ 49. The other law firms retained by Mr. Cohen included Petrillo Klein & Boxer LLP; Blakely Law Group; Davis Goldberg & Galper PLLC; and Monico & Spevack. *Id.*

[2] Mr. Cohen has copies of invoices submitted directly by his counsel to the Trump Organization showing payments by the Organization to Mr. Cohen's counsel. Cohen Aff. ¶ 12. Mr. Cohen is prepared to produce these documents in discovery once appropriate confidentiality protections are established in this litigation.

STANDARD OF REVIEW

In considering a motion to dismiss pursuant to C.P.L.R. 3211(a)(7), it is well settled that "the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Fin. Guar. Ins. Co. v. Morgan Stanley ABS Capital I Inc.*, 54 Misc. 3d 1215(A), 54 N.Y.S.3d 610 (Table), 2017 WL 593142, at *3 (Sup. Ct. N.Y. Cnty. Jan. 19, 2017) (alteration in original) (internal citation omitted) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994), *aff'd by* 164 A.D.3d 1126 (1st Dep't 2018)). The same standard applies to motions pursuant to C.P.L.R. 3211(a)(5). *See Baron v. Suissa*, 167 A.D.3d 685, 687 (2d Dep't 2018). "If there is any doubt as to the availability of a defense, [the Complaint] should not be dismissed." *Warwick v. Cruz*, 270 A.D.2d 255, 255 (2d Dep't 2000).

ARGUMENT

I. THE COMPLAINT STATES A CLAIM FOR BREACH OF CONTRACT

A. Mr. Cohen Adequately Alleges the Existence of a Valid Contract

The minimal pleading requirements for a breach of contract claim have been satisfied by Mr. Cohen's Complaint. To state a breach of contract claim, a plaintiff must "plead the provisions of the contract upon which the claim is based" but is "not required to attach a copy of the contract or plead its terms verbatim." *Griffin Bros. v. Yatto*, 68 A.D.2d 1009, 1009 (3d Dep't 1979). Courts "should not be 'pedantic or meticulous' in interpreting contract expressions" as insufficiently definite, as "virtually every agreement can be said to have a degree of indefiniteness." *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989) (citations omitted).

For example, a valid contract may exist without terms specifying the timing of performance, the amount of payment, or the mechanism for its implementation. *See Savasta v. 470 Newport Assocs.*, 82 N.Y.2d 763, 765 (1993) ("When a contract does not specify time of performance, the law implies a reasonable time."); *Stein v. Anderson*, 123 A.D.3d 1322, 1323 (3d Dep't 2014) (finding oral loan agreement enforceable even though parties did not agree on the loan's term); *Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc. 3d 926, 932 (Sup. Ct. N.Y. Cnty. 2006) ("The fact that the precise amount of the bonus to be awarded was not specified does not make the contract unenforceable."); *Abrams Realty Corp. v. Elo*, 279 A.D.2d 261, 261 (1st Dep't 2001) ("The . . . agreement was not unenforceable for its failure to specify the rate at which plaintiff's commission would be computed since it is clear that plaintiff did not agree to work without compensation and that the parties understood that plaintiff would be compensated at the prevailing, normal and accepted rates."); *Dee v. Rakower*, 112 A.D.3d 204, 212 (2d Dep't 2013) ("The failure to include the mechanism for the implementation of the parties' alleged agreement does not negate the allegations in the complaint that they entered into an agreement with regard to the rights to their assets."); *see also* Glen Banks, Contract Law § 2:35 (2d ed. West's N.Y. Prac. Series July 2018 update) ("The fact that numerous nonmaterial terms remain to be negotiated does not undermine the binding effect of an otherwise valid agreement.").

Here, as set forth in the Complaint and further detailed in the Cohen Affidavit, Plaintiff has alleged, in nonconclusory language, the essential terms of the Indemnification Agreement upon which his claim is based. Specifically, Plaintiff has alleged that the Indemnification Agreement: (1) was an oral agreement entered into around July 2017 in which the Organization, through its General Counsel, Mr. Alan Garten, agreed to pay Mr. Cohen's legal expenses and

costs incurred in connection with the Investigations and other matters arising from Mr. Cohen's work with and on behalf of the Organization and its principals, directors, and officers, including compensating his counsel at McDermott, Will & Emery for representing Mr. Cohen in various congressional hearings and legal proceedings; (2) obligated the Organization to indemnify all attorneys' fees and costs incurred by Mr. Cohen in connection with these matters for as long as such attorneys' fees and costs were incurred by Mr. Cohen; and (3) required reasonably timely payment of these fees and costs to Mr. Cohen or to his counsel on his behalf.[3] *See* Compl. ¶¶ 26, 31; Cohen Aff. ¶ 4.

The parties' agreement to these essential terms was evidenced not only by their oral statements, but also by writings discussing their agreement and by conduct consistent with their agreement, most notably the Organization's payment or efforts to cause others (including the Trump Campaign) to pay over $1.7 million from October 2017 through May 2018 to indemnify Mr. Cohen for attorneys' fees and costs he incurred in responding to matters arising from his work with and on behalf of the Trump Organization and its principals, directors, and officers. *See Cowen & Co., LLC v. Fiserv, Inc.*, 141 A.D.3d 18, 22 (1st Dep't 2016) (holding that "course of dealing . . . consistent with an intent to be bound" indicates formation of a valid contract); *Lapkin v. Lapkin*, 224 A.D.2d 199, 199 (1st Dep't 1996) (finding defendant's "long history of support" to plaintiff was evidence of oral agreement to provide child support).

Plaintiff's allegations in the Complaint more than satisfy the pleading standards set forth in *Matter of Sud v. Sud*, where the court found that the plaintiff was required to allege: (1) the

[3] In addition to this oral contract, the Organization may have obligations to indemnify Plaintiff under its corporate governance documents. Plaintiff has served document requests on the Organization regarding these documents, and others, and is entitled, at a minimum, to discovery regarding whether the Organization's indemnification commitment to Mr. Cohen is further supported by, for example, the Organization's Limited Liability Company Operating Agreement, or is reflected in other documents possessed by the Defendant. Copies of these requests are attached hereto as Exhibit A to the Fisher Aff. In response to these requests, the Organization has agreed to produce certain documents in its possession, following entry of a protective order. Fisher Aff. ¶ 3.

"specific provisions of the contract upon which liability is predicated"; (2) "whether the alleged agreement was, in fact, written or oral"; and (3) "the amount of financial support which defendant [was] required to provide or the length of time during which that support had to be provided before [its] contractual obligations concluded." 211 A.D.2d 423, 424 (1st Dep't 1995). As noted above, Plaintiff has alleged in the Complaint, as elaborated in the Cohen Affidavit, that: (1) Defendant's liability is predicated on the parties' agreement that the Organization indemnify attorneys' fees and costs incurred by Mr. Cohen in connection with various matters arising from Mr. Cohen's work with and on behalf of the Organization and its principals, directors, and officers; (2) the agreement was oral; and (3) Defendant was required to pay all attorneys' fees and costs falling within the agreement for as long as such attorneys' fees and costs were incurred by Mr. Cohen.

Plaintiff's allegations are also consistent with cases finding generalized terms in oral contracts sufficiently definite to be enforceable. *See, e.g.*, *Stein v. Anderson*, 123 A.D.3d 1322, 1322 (3d Dep't 2014) (finding oral loan agreement enforceable where plaintiff alleged that defendant acknowledged receipt of money as a loan and agreed to pay it back "as soon as [he could]") (alteration in original); *Katz v. Travelers*, 241 F. Supp. 3d 397, 409–10 (E.D.N.Y. 2017) (holding that plaintiff sufficiently pled an oral contract by alleging that he "was engaged by [defendant] to conduct [medical examinations] and to testify" and sufficiently pled breach by alleging that "fees generated for such services rendered and testimony given was $93,000[,] no part of which has been paid"), *reconsideration denied by* 2017 WL 4180012 (E.D.N.Y. Sept. 20, 2017).

In addition to alleging the essential terms of the Indemnification Agreement, Plaintiff has alleged the other requirements for a breach of contract action, including: (1) the presence of

consideration, including Mr. Cohen's participation in the Investigations as well as his prior and continued work with and/or on behalf of the Organization and its principals, directors, and officers; (2) Plaintiff's performance under the Indemnification Agreement; (3) the Organization's breach of the Indemnification Agreement by ceasing to indemnify Mr. Cohen's attorneys' fees and costs after May 2018; and (4) Plaintiff's damages resulting from Defendant's conduct. *See* Compl. ¶¶ 26–29, 47–51; Cohen Aff. ¶¶ 2–5, 9–11. Although the Organization may contest or deny Plaintiff's allegations concerning "whether the parties entered into an oral agreement and, if so, the terms of such agreement," these are, at most, disputed questions of fact not appropriate for resolving on a motion to dismiss. *Dweck v. Friedlander Grp., Inc.*, 43 A.D.3d 854, 855 (2d Dep't 2007); *see also Lapkin*, 224 A.D.2d at 199 (finding defendant's denial that it entered oral contract "serves only to raise an issue of credibility" not resolvable on a dispositive motion).

The pleading requirements for a breach of contract claim have been satisfied here and, accordingly, the Organization's Motion must be denied.

B. Mr. Cohen's Breach of Contract Claim Is Not Barred by the Statute of Frauds

1. The Indemnification Agreement Was Capable of Full Performance Within One Year

The Indemnification Agreement is not void under the Statute of Frauds because, by its terms, the agreement was capable of full performance within one year. Section 5-701(a)(1) of the General Obligations Law provides, in relevant part, that an oral agreement is void if it "[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime." Gen. Oblig. Law § 5-701(a)(1). The New York Court of Appeals has explained that this provision encompasses "only those contracts which, by their terms, 'have absolutely no possibility in fact and law of full performance within

one year.'" *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 366 (1998) (emphasis added) (quoting *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 454 (1984)).

This narrow reading of Section 5-701(a)(1) as inapplicable to an oral agreement if there is any possibility that the agreement can be performed within one year is well-established under New York law. *See, e.g.*, *Kroshnyi v. U.S. Pack Courier Servs., Inc.*, 771 F.3d 93, 110 (2d Cir. 2014) ("New York courts generally construe the statute of frauds narrowly, voiding only those oral contracts which by their very terms have absolutely no possibility in fact and law of full performance within one year.") (internal quotation marks and citation omitted); *D & N Boening*, 63 N.Y.2d at 455 ("Wherever an agreement has been found to be susceptible of fulfillment within that time, in whatever manner and however impractical, this court has held the one-year provision of the Statute to be inapplicable, a writing unnecessary, and the agreement not barred.").

The determination of whether an oral agreement can possibly be performed within one year of its making is not conducted by looking back at the actual performance; it requires analysis of what was possible, looking forward from the day the parties entered into the agreement. *Gural v. Drasner*, 114 A.D.3d 25, 28 (1st Dep't 2013). Thus, at the time the parties entered into the oral agreement, if full performance could be possible within one year, the agreement is not barred under the Statute of Frauds. *Id.* Additionally, when the amount to be paid under an oral agreement is determined based on what happens following the agreement (like the accrual of subsequent legal fees and expenses as a representation moves forward), the Statute of Frauds does not bar enforcement of the agreement even if both the determination of the amount owed and its payment takes place more than one year after the agreement. *Cron*, 91 N.Y.2d at 366.

Here, the Indemnification Agreement does not come within the Statute of Frauds because both Mr. Cohen and the Organization could have fully performed under the agreement within one year. The Indemnification Agreement obligated the Organization to indemnify all attorneys' fees and costs incurred by Mr. Cohen in connection with various matters arising from Mr. Cohen's work with and on behalf of the Organization and its principals, directors, and officers for as long as such attorneys' fees and costs were incurred by Mr. Cohen. *See* Cohen Aff. ¶¶ 2–3. At the time the parties entered into the Indemnification Agreement, in or around July 2017, Mr. Cohen had emerged as a person of interest in investigations led by the Senate Intelligence Committee, the House Intelligence Committee, and the Special Counsel, and Mr. Cohen had been subpoenaed to provide testimony and documents relating to his work for the Organization. *See* Compl. ¶¶ 20–26; *see also* Cohen Aff. ¶¶ 6, 8. Contrary to the Organization's assertions, performance under the Indemnification Agreement—that is, the Organization's indemnification of Mr. Cohen's attorneys' fees and costs in connection with the Investigations and any potential related matters—could have been completed within one year. Nothing in the terms of the Indemnification Agreement necessarily required performance outside of a one-year period.

Indeed, looking forward from the time the parties entered into the Indemnification Agreement, Mr. Cohen's involvement in congressional investigations could have ended in a matter of weeks or months, and the Organization could have met its obligations under the Indemnification Agreement well within a year.[4] The fact that the Investigations ultimately lasted longer than one year and subsequently mushroomed into additional investigations,

[4] Indeed, at the time, Mr. Cohen, Mr. Trump's personal counsel, and others apparently believed that the investigations would end within a matter of months. *See* Mueller Report, Vol. II at 140 ("Cohen recalled that the President's personal counsel told him the JDA was working well together and assured him that there was nothing there and if they stayed on message the investigations would come to an end soon. . . . Cohen was told not to worry because the investigations would be over by summer or fall of 2017.").

lawsuits, and other proceedings, does not make the Indemnification Agreement void under the one-year performance provision in the Statute of Frauds. *See Freedman v. Chem. Constr. Corp.*, 43 N.Y.2d 260, 265 (1977).

Freedman v. Chemical Construction Corp. is instructive. There, the Court of Appeals observed:

> The critical test, instead, is whether 'by its terms' the agreement is not to be performed within a year. . . . Since neither party has contended that the alleged agreement contained any provision which directly or indirectly regulated the time for performance, the agreement is not within the bar of subdivision 1.

Freedman, 43 N.Y.2d at 265 (internal citations omitted).

As in *Freedman*, even if Mr. Cohen's involvement in the Investigations was unlikely to be completed within one year—and even if completion of the Investigations themselves was unlikely to occur in that time—the "critical test" is whether, by its terms, the Indemnification Agreement could have been fully performed within one year. *See id.* As no provision of the parties' agreement directly or indirectly regulated the time for performance, the Court must look to what was possible as of July 2017, when the parties entered into the Indemnification Agreement. *See Gural*, 114 A.D.3d at 28. At that time, it was possible that Mr. Cohen's involvement in the Investigations and other related matters could be completed within one year, which, in turn, would mean that the Organization could have fully performed its obligations under the Indemnification Agreement within one year.

In arguing the contrary position, the Organization misreads *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449 (1984). *D & N Boening* does not stand for the proposition that a "contract of indefinite duration is inherently incapable of performance within one year." Mot. at 8. Rather, this case stands for the unremarkable proposition that contracts "which simply are impossible of completion within [one year] by their own terms and are . . .

void if unwritten." 63 N.Y.2d at 456. In *D & N Boening*, the agreement at issue obligated the defendants to supply beverages to the plaintiff indefinitely, and only upon the plaintiff's failure to "conduct its subdistributorship satisfactorily, exerting its best efforts and acting in good faith"—i.e., plaintiff's breach—could the agreement have been terminated. *Id.* at 458. By its terms, then, the only way the contract could end within the first year was by the plaintiff's breach. *Id.* The Court of Appeals distinguished between a contract "which might be *performed* within a year" and "one which could only be *terminated* within that period by a breach of one or the other party to it." *Id.* at 457 (internal quotation marks and citations omitted). Because the contract could not have ended during its first year in any manner other than by the plaintiff's breach, the court held that the contract "was not one which by its terms could be *performed* within one year." *Id.* at 458.

Here, by contrast, because Mr. Cohen's involvement in the Investigations and other matters could have ended within one year of the date the Indemnification Agreement was made, the Organization's indemnification obligations could have been fully performed within one year. Thus, because the Indemnification Agreement was capable of full performance within one year, it is not void under the Statute of Frauds.

2. Plaintiff, at a Minimum, Is Entitled to Discovery to Demonstrate that the Indemnification Agreement Is Not Barred Under the Statute of Frauds.

When a party to a contract alleges that an oral agreement may be evidenced by writings, the party is entitled to take discovery to ascertain whether such writings exist and thus whether the agreement falls within the Statute of Frauds. *See, e.g.*, *WPP Grp. USA, Inc. v. Interpublic Grp. of Cos.*, 228 A.D.2d 296, 297 (1st Dep't 1996) ("Plaintiff is entitled to complete discovery in its quest to satisfy the Statute of Frauds by a showing that the agreement between the parties is evidenced by more than one writing, some signed and some unsigned."); *see also Silver v. Silver*,

63 A.D.3d 903, 903 (2d Dep't 2009) (holding that "the plaintiff is entitled to discovery before he is required to show that he has satisfied the statute of frauds"); *Al-Bawaba.com, Inc. v. Nstein Techs. Corp.*, 19 Misc. 3d 1125(A), 862 N.Y.S.2d 812 (Table), 2008 WL 1869751, at *2 (Sup. Ct. Kings Cnty. Apr. 25, 2008) ("Plaintiff should be entitled to complete discovery in order to defeat a motion to dismiss pursuant C.P.L.R. 3211[a], and to satisfy the Statute of Frauds by showing that the agreement is evidenced by separate writings."); *Lidz v. Reliance Plastic Corp.*, 23 Misc. 2d 1075, 1076 (Sup. Ct. Nassau Cnty. 1960) (allowing discovery "for the limited purpose of ascertaining whether a sufficient memoranda [evidencing an oral agreement] exists"). This is because "[e]ven [a defendant's] internal memoranda may be used to evidence the agreement and satisfy the statute." *WPP Grp. USA*, 228 A.D.2d at 297 (citing *Int'l Trading & Sales v. Philipp Bros.*, 99 A.D.2d 983, 984 (1st Dep't 1984)).

In his Complaint, Mr. Cohen alleged the essential terms of the Indemnification Agreement between himself and the Organization. The parties' agreement to these terms was evidenced by their oral statements, writings discussing their agreement, and conduct consistent with their agreement. *See* Compl. ¶¶ 1, 26–32; Cohen Aff. ¶¶ 5–7, 9. Mr. Cohen's Affidavit attaches correspondence with the Organization's general counsel reflecting the existence of an agreement to pay his legal fees and expenses incurred in connection with the Investigations and other matters. *See* Cohen Aff. ¶ 7, 9. And Mr. Cohen has served discovery requests on the Organization seeking, among other things, additional documents that may further demonstrate the existence of the Indemnification Agreement. Because additional writings that evidence the Indemnification Agreement likely exist, including both internal Trump Organization memoranda and communications between principals, officers, and directors of the Organization and external

parties, Plaintiff is entitled to complete discovery to demonstrate that the Indemnification Agreement is not void under the Statute of Frauds.

II. THE COMPLAINT STATES A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Mr. Cohen has sufficiently pled his claim for breach of the implied covenant of good faith and fair dealing. Although a plaintiff cannot sustain a claim alleging breach of the implied covenant of good faith and fair dealing if there is no contract, *Keefe v. New York Law Sch.*, 71 A.D.3d 569, 570 (1st Dep't 2010), a bad faith claim is viable where there is a contract. Under New York law, every valid contract contains an "implied obligation to exercise good faith not to frustrate the contract[] into which [the parties] have entered." *Grad v. Roberts*, 14 N.Y.2d 70, 75 (1964). Here, as explained above, Mr. Cohen has sufficiently alleged the existence of the Indemnification Agreement. *See* Section I.A., *supra*. It flows therefrom that the Organization had an obligation to act in good faith so as to not frustrate the Indemnification Agreement.

Each party to a contract has an implied duty "not [to] intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part." *Grad*, 14 N.Y.2d at 75. A party breaches this covenant when it acts arbitrarily or irrationally in exercising discretion or fails to exercise discretion in good faith. *See, e.g.*, *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995); *Singh v. PGA Tour, Inc.*, 162 A.D.3d 556, 557 (1st Dep't 2018). A plaintiff can maintain a claim for breach of the implied duty of good faith and fair dealing as well as a claim for breach of contract when the damages sought for breach of the implied duty are not "intrinsically tied to the damages allegedly resulting from the breach of contract." *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 205 (S.D.N.Y. 2011) (quoting *Canstar v. J.A. Jones Constr. Co.*, 212 A.D.2d 452 (1st Dep't 1995)).

As a valid contract between the parties, the Indemnification Agreement imposed on both Mr. Cohen and the Organization an implied duty of good faith and fair dealing in its performance and enforcement. *See Grad*, 14 N.Y.2d at 75. The Organization breached its obligations under the Indemnification Agreement at the same time that Mr. Cohen indicated he would cooperate in the Investigations. As alleged in the Complaint, concurrent with Mr. Cohen's public statements that he would cooperate, Mr. Trump and other individuals affiliated with the Organization spoke derisively about Mr. Cohen in various public forums and took additional steps to undermine and discredit Mr. Cohen, while depriving him of the benefits of the Indemnification Agreement. *See* Compl. ¶¶ 42–49; *see also Singh*, 162 A.D.3d at 557 (affirming denial of summary judgment of claim of breach of the implied covenant of good faith and fair dealing based on professional golf tour organizer's suspension of golfer and public statements regarding golfer's suspension).

As a result, Mr. Cohen suffered damages, including incidental, actual, consequential, and compensatory damages, in addition to the amounts of his legal fees and costs that the Organization failed to reimburse. The specific amount of extra-contractual damages resulting from the Organization's breach of the implied covenant of good faith and fair dealing may be further evidenced through discovery and ultimately determined at trial. But at this juncture, it is plain that Mr. Cohen has satisfied his pleading burden with specific and uncontroverted facts that support the elements of a bad faith claim under New York law.

III. THE COMPLAINT STATES A CLAIM FOR DECLARATORY JUDGMENT

Mr. Cohen has pled a claim for declaratory judgment that is not duplicative of his breach of contract claim. Specifically, to the extent that the breach of contract claim does not address in its entirety the parties' respective rights and obligations under the Indemnification Agreement, those rights and obligations are addressed by the declaratory judgment claim. *See Home Equity Mortg. Trust Series 2006-1 v. DLJ Mortg. Capital, Inc.*, No. 156016/2012, 2013 WL 5691995, at

*7 (Sup. Ct. N.Y. Cnty. Oct. 9, 2013); *Karaszek v. Blonsky*, No. 2660-07, 2008 WL 2490068, at *4 (Sup. Ct. Nassau Cnty. May 30, 2008).

IV. THE COMPLAINT STATES A CLAIM FOR PROMISSORY ESTOPPEL

Mr. Cohen's promissory estoppel claim is also properly pled. To state a claim for promissory estoppel, a plaintiff must plead a clear and unambiguous promise by the defendant, reasonable and foreseeable reliance by the plaintiff, and injury as a result of such reliance. *Arfa v. Zamir*, 55 A.D.3d 508, 509 (1st Dep't 2008).

Mr. Cohen pleads each of these elements. The Complaint alleges that in or about July 2017, Defendant promised to indemnify Mr. Cohen and pay for his attorneys' fees and costs in connection with Mr. Cohen's representation and defense in the Investigations and other matters arising from his work with and on behalf of the Organization and its principals, directors, and officers. Compl. ¶ 26; Cohen Aff. ¶¶ 2, 11. That promise was reaffirmed by the Organization at various points thereafter, including in December 2017, when the Organization again stated that it would continue to indemnify Mr. Cohen for amounts incurred in connection with the Investigations. Compl. ¶ 31; *see also id.* ¶ 32. An express promise to pay for services, such as the promise alleged in the Complaint, is clear and unambiguous under New York law. *See Arfa*, 55 A.D.3d at 509 (promissory estoppel claim sustained where party alleged client promise to pay for legal services); *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.*, 804 F.2d 787, 793 (2d Cir. 1986) (statements such as "[w]e will buy the parts" and "[w]e are going to buy them from you anyway" constitute clear and unambiguous promises for purposes of a claim for promissory estoppel).[5]

[5] *Randall's Island Aquatic Leisure, LLC v. City of New York*, 92 A.D.3d 463 (1st Dep't 2012), relied on by Defendant, is not on point. There, the plaintiff did not allege an express promise; instead, the plaintiff alleged only that defendant had stated that it was "possible" that the transactions were being "considered." *Id.* at 464. Here,

The Complaint also alleges that Mr. Cohen reasonably relied on the promise to his detriment. On a motion to dismiss, a plaintiff may plead reliance broadly. The reasonableness of plaintiff's reliance implicates factual issues inappropriate to resolve on a motion to dismiss. *Guggenheimer*, 11 Misc. 3d at 933. Here, in reliance on the Organization's promise to pay legal fees, Mr. Cohen engaged counsel to represent and defend him in connection with the Investigations and other matters, and incurred substantial fees, with unreimbursed fees and costs now totaling in excess of $1.9 million. Compl. ¶¶ 27, 51; *see also Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd.*, 383 F. Supp. 2d 428, 448 (S.D.N.Y. 2003) (plaintiffs sufficiently alleged injury on promissory estoppel claim where they invested $500,000 in reliance on defendant's promise). Were it not for his reliance on the Organization's promise to pay, Mr. Cohen would have had to engage counsel with lower rates and less specialized experience and would not have incurred these fees.

The Organization incorrectly asserts that Mr. Cohen's promissory estoppel claim should be dismissed "for lack of an alleged duty independent of the supposed indemnity agreement." Mot. at 13. It is well established under New York law that a plaintiff may proceed on both quasi-contract and breach of contract claims where the existence of the contract itself is disputed by the defendant. *See Old Salem Dev. Group, Ltd. v. Town of Fishkill*, 301 A.D.2d 639, 639 (2d Dep't 2003) ("[A]t this early juncture in the litigation, the plaintiffs are entitled to proceed on both quasi contract and breach of contract theories."); *see also Piven v. Wolf Haldenstein Adler Freeman & Herz L.L.P.*, No. 08 Civ. 10578(RJS), 2010 WL 1257326, at *9 n.6 (S.D.N.Y. Mar. 12, 2010) ("[W]here Defendants dispute the existence of a valid, enforceable contract, Plaintiffs are permitted to proceed on both contractual and quasi-contractual theories."). Here,

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Mr. Cohen has alleged express and unambiguous promises and assurances by Defendant that it would indemnify Mr. Cohen. *See* Compl. ¶¶ 26, 31–32.

the Organization disputes the validity of the Indemnification Agreement, *see* Mot. at 5–7, and thus this argument to dismiss the quasi-contractual claim is without merit.

Finally, the Organization claims that promissory estoppel cannot be used to obtain legal relief denied by the Statute of Frauds. *See id.* at 13. This argument presupposes that the Statute of Frauds bars the oral agreement alleged in the Complaint; but for the reasons set forth above, the Statute of Frauds does not preclude enforcement of the parties' agreement. *See supra* Section I.B.

In any event, even if the Statute of Frauds were to bar the breach of contract claims here (it does not), it cannot separately bar a claim for promissory estoppel where "enforcement of the statute of frauds would be unconscionable," and questions of whether it is "unconscionable to permit the defendant to invoke the Statute of Frauds are questions that should not be determined on the pleadings, but should await a full determination of the facts upon the trial." *Castellotti v. Free*, 165 A.D.3d 535, 536 (1st Dep't 2018) (quoting *Matter of Hennel*, 29 N.Y.3d 487, 494 (2017) and *Ackerman v. Landes*, 112 A.D.2d 1081 (2d Dep't 1985)); *see also Rogers v. Town of Islip*, 230 A.D.2d 727, 727–28 (2d Dep't 1996) ("Although the plaintiffs will be required, at trial, to prove the specific details of each of the elements [of promissory estoppel], no such detailed showing is required to survive a motion to dismiss pursuant to CPLR 3211.") (internal citation omitted).

Mr. Cohen has alleged that he incurred unconscionable injury—in the form of both significant monetary harm as well as irreversible prejudice to his legal interests and reputation—as a result of the Organization's failure to indemnify him and reimburse his legal expenses. As explained above, the Complaint alleges that as a direct result of the Organization's failure to pay Mr. Cohen's attorneys' fees, Mr. Cohen's counsel withdrew from its representation of

Mr. Cohen and prejudiced Mr. Cohen's ability to respond to the Investigations and other matters, including those that exposed Mr. Cohen to significant legal jeopardy. *See* Compl. ¶ 48. Mr. Cohen's legal representation and defense were impaired as a consequence of his counsel's withdrawal due to the Organization's failure to honor its promise to pay. These allegations sufficiently demonstrate that it would be unconscionable to apply the Statute of Frauds to bar Mr. Cohen's promissory estoppel claim.

The two cases discussed by the Organization in support of its argument are distinguishable. First, both cases involve an alleged agreement that by its explicit terms could not possibly be completed within one year, unlike the promise at issue here. *Long Island Pen Corp. v. Shatsky Metal Stamping Co.*, 94 A.D.2d 788, 789 (2d Dep't 1983) (oral agreement to purchase goods over a four-year period); *Melwani v. Jain*, 281 A.D.2d 276 (1st Dep't 2001) (oral agreement to pay royalties to plaintiff over his lifetime and then to his heirs in perpetuity). Second, neither case involved the level of significant injury at issue here. In *Long Island Pen Corp.*, there is no discussion of the extent of plaintiff's injury as a result of his reliance on the promise of defendant; the only reference to an injury is the allegation that plaintiff had to hire certain professionals to evaluate the business. *Long Island Pen Corp.*, 94 A.D. 2d at 789. And in *Melwani*, the First Department found that the plaintiff did not allege any injury at all as a result of any reliance on defendant's promise. *Melwani*, 281 A.D.2d at 277.

In contrast, Mr. Cohen alleges direct and substantial injury. His legal representation and defense were prejudiced as a result of the Organization's failure to pay his legal fees. Mr. Cohen's counsel withdrew from his representation while multiple criminal, civil, and high-profile investigations were ongoing, which, as the Complaint alleges, negatively affected Mr. Cohen's ability to respond to those investigations. And Mr. Cohen further incurred over

$1.9 million in legal fees and costs that have not been paid, an amount far greater than any monetary injury alleged in *Long Island Pen Corp.* and *Melwani*.

Accordingly, Defendant's Motion to Dismiss the cause of action for promissory estoppel should be denied.

CONCLUSION

For the reasons set forth above and in the accompanying Cohen Affidavit, Mr. Cohen respectfully requests that the Court deny the Trump Organization's Motion.

Dated: May 8, 2019
New York, NY

Respectfully submitted,

BINDER & SCHWARTZ LLP

/s/ Eric B. Fisher

Eric B. Fisher (N.Y. Bar No. 2754976)
Lauren K. Handelsman (N.Y. Bar No. 4481040)
366 Madison Avenue, 6th Floor
New York, NY 10017
Telephone: (212) 510-7008
Email: efisher@binderschwartz.com
Email: lhandelsman@binderschwartz.com

GILBERT LLP

Daniel Wolf (N.Y. Bar No. 4904892)
Scott D. Gilbert
1100 New York Avenue NW, Suite 700
Washington, DC 20005
Telephone: (202) 772-2200
Email: wolfd@gilbertlegal.com
Email: gilberts@gilbertlegal.com

Attorneys for Plaintiff Michael D. Cohen

WORD COUNT CERTIFICATION

Pursuant to Rule 17 of Section 202.70(g) of the Uniform Civil Rules for the Supreme Court and the County Court, I hereby certify that the total number of words in this memorandum of law, excluding the caption, table of contents, table of authorities and signature block, is 6,950. I further certify that this word count complies with the word count limit set forth in Rule 17 of Section 202.70(g).

Dated: May 8, 2019
New York, NY

/s/ Eric B. Fisher
Eric B. Fisher