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

ORAL ARGUMENT REQUESTED

MICHAEL D. COHEN,	Index No. 651377/2019
Plaintiff,	Hon. Joel M. Cohen
-against-	IAS Part 3
TRUMP ORGANIZATION LLC,	
Defendant.	Motion Seq. No. 001

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT TRUMP ORGANIZATION LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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PRELIMINARY STATEMENT[1]

Seeking to salvage this lawsuit and avoid dismissal, Plaintiff for the first time introduces new allegations—including confirming that the purported "Indemnification Agreement" with Trump Org. was an oral agreement. Yet he *still* fails to allege the essential elements of a valid contract, including adequate consideration. And while he argues that Trump Org. entered into an "unequivocal" contract with "no uncertain terms," the allegations about the purported agreement in the Complaint itself—which is the only pleading properly before the Court on this motion—are anything but certain. In reality, the alleged agreement is a moving target, consisting of vague terms that Plaintiff manipulates in an attempt to stave off dismissal. Plaintiff has not alleged a valid contract and these incurable deficiencies doom his cause of action for breach of contract.

Plaintiff also cannot escape the Statute of Frauds. His Opposition[2] argues that the "investigations" he participated in theoretically could have finished within one year. But the Complaint alleges an agreement far broader in scope than just the "investigations"—an agreement purportedly covering all *future* legal matters in any way relating to Plaintiff's work for Trump Org. and matters even unrelated to his work at Trump Org. Complaint ¶¶ 1, 60 and 72. Indeed, Plaintiff claims that the oral agreement—allegedly reached in July 2017—required Trump Org. to indemnify him forever and even extended to personal matters, such as his criminal prosecution for tax evasion. The indefinite duration and scope of this alleged indemnification obligation confirms that performance of such an agreement within one year was impossible. This is exactly why there is the Statute of Frauds and why Plaintiff's first cause of

[1] Capitalized terms not otherwise defined herein shall have the same meaning as was ascribed to them in Trump Org.'s moving brief dated April 15, 2019 (the "Moving Memorandum" or "Moving Mem.") and Affirmation of Marc L. Mukasey (the "Mukasey Aff.").

[2] References to Plaintiff's opposition to the Moving Memorandum are cited as "Opposition" followed by the applicable page number(s).

action must be dismissed.

Plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing also fails as Plaintiff has not provided a separate basis independent from his breach of contract claim to allow it to go forward. Plaintiff also cannot maintain his third cause of action for declaratory judgment as he has failed to establish that this claim is anything more than a duplicate of his breach of contract claim. Plaintiff's fourth cause of action for promissory estoppel must fail since he cannot allege the requisite elements.

Finally, Plaintiff should not be given an opportunity to amend the Complaint as any such attempt would be futile. Nor should he be entitled to take discovery in hopes of piecing together documentation evidencing an agreement when he cannot even plead the elements in the Complaint.

For all of these reasons, Trump Org. respectfully request that the Complaint be dismissed, with prejudice, as a matter of law.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT.

A. Plaintiff's New Allegations of an Oral Agreement Must Be Disregarded.

In his Opposition, Plaintiff argues, for the very first time, that that the purported "Indemnification Agreement" between himself and Trump Org. was an oral agreement and that the consideration was his participation in the subject investigations, together with his prior work for Trump Org. Cohen Aff. ¶ 11; Opposition 7-10. Plaintiff, however, cannot base his argument on facts or evidence not alleged in the Complaint. Indeed, such new allegations are an improper attempt to amend his pleading which should be dismissed out of hand.

A motion to dismiss is judged by the sufficiency of the pleading itself, something which

Plaintiff's counsel controls, and not by "facts" or "information" outside of the pleading. *See, e.g., African Diaspora Maritime Corp. v. Golden Gate Yacht Club,* 109 A.D.3d 204, 211 (1st Dep't 2013) ("The sole criterion for deciding a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), 'is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail"') (citations omitted). *See also 511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 151-52 (2002) ("In the posture of defendants' CPLR § 3211 motion to dismiss, the Court's task is to determine whether plaintiffs' pleadings state a cause of action.").

Since they are not in the Complaint, this Court should not consider or otherwise rely upon Plaintiff's new "facts," allegations and claims. Instead, the Court should limit its review to Plaintiff's Complaint.

B. Plaintiff Fails to Allege the Required Elements of a Valid Contract.

Even if Plaintiff had alleged in the Compliant that the purported "Indemnification Agreement" was oral, the required elements for a valid contract would still not be stated. As explained in the Moving Memorandum, formation of a valid contract requires offer, acceptance, consideration, mutual assent and an intent to be bound. *Id.* at 5; *see also* 22 N.Y. Jur. 2d, Contracts § 9. Failure "to allege the essential terms" requires dismissal. *Sheridan v. Trustees of Columbia Univ. in City of N.Y.,* 296 A.D.2d 314, 315 (1st Dep't 2002); *see also Rosenbaum v. Premier Sydell, Ltd.,* 240 A.D.2d 556, 557 (2d Dep't 1997) (same).

In his Opposition, Plaintiff cites a series of cases which survived dismissal only because essential terms were alleged in each instance. *See, e.g., Cobble Hill Nursing Home v. Henry & Warren Corp.,* 74 N.Y.2d 475, 485 (1989) (where the intent of the agreement was clear that price

term would be set by third-party, a binding contract was formed); *Savasta v. 470 Newport Assoc.,* 82 N.Y.2d 763 (1993) (contract formed even though time for performance not specified because the law implies a reasonable time); *Stein v. Anderson,* 123 A.D.3d 1322, 1323 (3d Dep't 2014) (lack of fixed time to pay not fatal to contract formation as effect of omission was that loan was payable on demand); *Katz v. Travelers,* 241 F. Supp. 3d 397 (E.D.N.Y 2017) (valid agreement created where Plaintiff was hired to conduct medical exams and defendant would pay him); *Guggenheimer v. Bernstein Litowitz Berger & Grossman LLP,* 11 Misc.3d 926, 927-832 (Sup. Ct. N.Y. County 2006) (omission of bonus amount did not defeat a breach of contract claim where plaintiff had adequately plead elements of a contract).

Here, the *lack* of essential terms is evident making it virtually impossible to determine if a valid agreement between Trump Org. and Plaintiff was ever formed. CPLR 3013; *see also Colleran v. Rockman*, 232 A.D.2d 322, 323 (1st Dep't 1996) (claims alleged must be sufficiently particular to give the notice of the transactions intended to be proven and the material elements of the causes of action asserted); *Warner v. Levinson*, 188 A.D.2d 268, 268 (1st Dep't 1992) (affirming dismissal of pleadings that, inter alia, "failed to particularize the transactions and occurrences and the material elements of the causes of action").

C. The Alleged "Indemnification Agreement" Between Trump Org. and Plaintiff is Still Barred by the Statute of Frauds.

Plaintiff argues that his alleged oral agreement with Trump Org. "could have been completed within one year" because the "congressional investigations could have ended in a matter of weeks or months." Opposition at 12. Fatal to Plaintiff's argument, however, is that the so-called "Indemnification Agreement" is far broader than just "congressional investigations." Instead, Plaintiff alleges that the alleged "Indemnification Agreement" requires Trump Org. to indemnify him in perpetuity—for all legal matters he faced at the time of the alleged agreement,

and any legal matters he may face in the future. Complaint ¶ 61. As demonstrated in the Moving Memorandum, however, an obligation that has no temporal limit is, by definition, an obligation that could never be performed within one year and is thus barred by the Statute of Frauds. *Id.* at 8-9; *D & N Boening, Inc. v. Kirsch Beverage,* 63 N.Y.2d 449, 456 (1984); *see, e.g., Sabharwal v. Eminax, LLC,* 305 A.D.2d 336, 336 (1st Dep't 2003); *McCoy v. Edison Price,* 186 A.D.2d 442, 443 (1st Dep't 1992); *see also Grayson v. Ressler & Ressler,* 271 F. Supp. 3d 501 (S.D.N.Y. 2017); *Komlossy v. Faruqi & Faruqi, LLP,* 714 Fed. Appx. 11, 13 (2d Cir. 2017).

The on-going nature of Trump Org.'s obligation is best illustrated by the matters for which Plaintiff seeks indemnification. For example, although Plaintiff alleges that the "Indemnification Agreement" was entered into in July 2017 for matters relating to his work at Trump Org., he posits that it also includes the criminal case that began in August 2018 related to his personal tax evasion having no relation to his work for Trump Org. *See* Complaint ¶ 50. The vague reference to "other matters" further demonstrates the open-ended obligation. *See* Opposition at 3 ("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."); Cohen Aff. ¶ 2 (Trump Org. "agreed to indemnify me and, separately, to pay for all of my attorneys' fees and costs … in connection with my representation and defense in the Investigations … and *other matters* arising from my work with and on behalf of the Organization and its principles, directors, and officers") (emphasis added).

Plaintiff's reliance on *Cron v. Hargro Fabrics,* 91 N.Y.2d 362 (1998) and *Kroshnyi v. U.S. Pack Courier Services, Inc.,* 771 F.3d 93 (2d. Cir. 2014) is misplaced. Both *Cron* and

Kroshnyi involved oral at-will employment agreements which may be terminated by either party, for no reason, at any time. Under such contracts, performance is always possible within one year. *Kroshnyi,* 771 F.3d at 110. Here, the purported "Indemnification Agreement" allegedly continues *ad infinitum*, with no opportunity for termination at any point in time. If, like an at-will employment agreement, Trump Org. could have terminated the alleged "Indemnification Agreement" at any time, Plaintiff would have no cause of action for breach because Trump Org. could have simply ended the agreement instead.

Plaintiff's attempt to distinguish *D&N Boening* also falls flat. There, the parties orally entered into an exclusive franchise agreement which lasted in perpetuity and could only be terminated by the distributor's failure to satisfactorily distribute the product—i.e., a breach of the agreement. *Id.* at 452. Here, in contrast, the alleged oral agreement had no time limit and no termination mechanism, and therefore, could continue in perpetuity.

In short, Plaintiff cannot have his cake and eat it too. He cannot allege that Trump Org. entered into a broad oral agreement to indemnify him now and forever for any and all conduct related to his former employment, yet avoid the Statute of Frauds by arguing that one of the many matters covered by the agreement could have concluded within a year. Plaintiff's breach of contract claim is therefore barred by the Statute of Frauds and any attempt to amend, at this point, would be futile.

D. Plaintiff Has No Right to Discovery.

Plaintiff's request to take discovery is equally meritless. It is well-settled that motions to dismiss are routinely granted where, as here, the opposition is nothing more than plaintiff's speculation and belief that discovery may lead to evidence sufficient to salvage their causes of action. *See Milosevic v. O'Donnell,* 89 A.D.3d 628 (1st Dep't 2011) ("[d]ismissal of the claims

cannot be avoided by speculation as to what discovery might reveal"). As Plaintiff's claims are not legally viable, there is no reason for discovery in this case. *See Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 448 (1st Dep't 2009) ("[t]he mere hope that discovery might provide some factual support for a cause of action is insufficient to avoid dismissal of a patently defective cause of action" (citations omitted)). *Leonard v. Gateway II, LLC*, 68 A.D.3d 408, 410 (1st Dep't 2009) ("Plaintiff's assertion that discovery is necessary in order to oppose defendants' motion is based on nothing more than unsubstantiated hope of discovering something relevant to her claims, and is an insufficient reason to deny the motion.").

The authority Plaintiff relies on support this discovery limitation. *See, e.g., Al-Bawaba.com, Inc. v. Nstein Technologies Corp,* 19 Misc.3d 1125(A), 862 N.Y.S.2d 812 (Table), 2008 WL 1869751, at *2 (Sup. Ct. Kings County Apr. 25, 2008) (allowing discovery because Plaintiff showed that the Statute of Frauds may be satisfied by email correspondence signed by defendant acknowledging a contractual agreement); *WPP Grp. USA, Inc. v. Interpublic Grp. Of Cos.,* 228 A.D.2d 296, 297 (1st Dep't 1996) (discovery necessary to determine whether unsigned fax could constitute non-solicitation agreement); *Lidz v. Reliance Plastic Corp.,* 23 Misc.2d 1075, 1076 (Sup. Ct. Nassau County 1960) (discovery allowed because complaint alleged an "oral agreement confirmed in writing").

Plaintiff's only basis for speculating that writings may exist sufficient to satisfy the Statute of Frauds is correspondence between Trump Org. and an attorney at the McDermott firm, related to payment for representation in the congressional investigations. These communications, limited to one distinct matter, and devoid of any acknowledgment by Trump Org., are a far cry from evidence that Trump Org. agreed to indemnify Plaintiff indefinitely for all legal matters both related and unrelated to his former employment.

As a party to the alleged oral agreement, Plaintiff certainly knows that no writing exists memorializing the Indemnification Agreement and no amount of discovery will change that.

II. PLAINTIFF STILL CANNOT STATE A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Plaintiff essentially sidesteps the issue as to his unviable claim for breach of the implied covenant of good faith and fair dealing by arguing, in a conclusory manner, that Trump Org. somehow acted towards him in "bad faith" and "had an obligation to act in good faith so as to not frustrate the 'Indemnification Agreement.'" Opposition 16-17. Plaintiff further argues, without any justifiable basis, that they should be entitled to discovery on this claim. *Id*. at 17.

None of these arguments have any basis in law or in fact. As explained in the Moving Memorandum, there can be no breach of the covenant of good faith that is implied in every contract unless there is, first, a *contract*. *Id.* at 10-11; *see also Cusack v. Greenberg Traurig, LLP*, 109 A.D.3d 747, 748 (1st Dep't 2013); *Gaviria v. El-Tawil*, 2019 WL 103724 (Sup. Ct. N.Y. County Jan. 4, 2019). And, as previously argued by Trump Org., even if Plaintiff could show that a contract exists, which he cannot, a claim for breach of the implied covenant of good faith and fair dealing will be dismissed where it is duplicative, seeks the same damages and arises out of the same facts as a concurrent claim for breach of contract. Moving Mem. at 10-11; *see also Superior Officers Council Health & Welfare Fund v. Empire HealthChoices Ass'n, Inc.*, 85 A.D.3d 680, 682 (1st Dep't 2011); *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce,* 70 A.D.3d 423, 426 (1st Dep't 2010); *Glatt v. Mariner Farmers, Inc.*, 66 A.D.3d 440, 441 (1st Dep't 2009). Plaintiff fails to distinguish, let alone address any of these well-settled cases in the Opposition.

The cases cited by Plaintiff provide no basis to overcome dismissal of this claim. In *Keefe v. New York Law School*, 71 A.D.3d 569 (1st Dep't 2010), the First Department *upheld*

dismissal of a claim for breach of the implied covenant of good faith and fair dealing since no implied contract between plaintiff and defendant was found to have existed. *Id.* at 570-571. Plaintiff's reliance on *Dalton v. Educational Testing Service*, 87 N.Y.2d 384 (1995) is also misguided. In *Dalton*, the Court of Appeals analyzed the breach of the implied covenant issue *after* a bench trial in which the issue in the case concerned whether a testing service acted "arbitrary or irarationall[y] in response to denying a student's request to release his SAT scores. *Id.* at 392. In *Grad v. Roberts*, 14 N.Y.2d 70 (1964), the Court of Appeals, in a decision also involving *post-trial* proceedings, reinstated a defense verdict in which the trial court held that no breach of the implied covenant of good faith had occurred in connection with a claim arising from the breach of a related option agreement arising from the same transaction. *Id.* at 76. *Singh v. PGA Tour, Inc.*, 162 A.D.3d 556 (1st Dep't 2018) concerned the lower court's treatment of a claim of the implied covenant of good faith and fair dealing on a motion for summary judgment all of which arose from a particular incident surrounding the suspension of a professional athlete. *Id.* at 557. Lastly, in *Ellington Credit Fund, Ltd. v. Select Portfolio Services, Inc.*, 837 F. Supp. 2d 162 (S.D.N.Y. 2011), the court found that dismissal of a claim for breach of the implied covenant of good faith and fair dealing *was warranted* since the damages were "intrinsically tied" to an accompanying breach of contract claim, which is exact same circumstances as the instant case. *Id.* at 205 (internal citation omitted) (emphasis added.)

Simply put, Plaintiff has not provided a basis for a breach of implied covenant claim as he fails to allege the existence of a contract, and even if he could, the damages sought are not independent of his breach of contract claim. In addition, as argued above, speculation and belief that discovery may lead to evidence sufficient to salvage a cause of action is not enough to overcome dismissal. *See supra* at 8.

III. PLAINTIFF STILL CANNOT STATE A CLAIM FOR DECLARATORY JUDGMENT.

A claim for declaratory judgment will not survive where it is duplicative of a breach of contract claim. Moving Mem. at 11-12.

In addition to ignoring the well-grounded legal authority cited by Trump Org. in the Moving Memorandum, Plaintiff makes the conclusory argument, without any further support, that his claim for declaratory judgment "is not duplicative of his breach of contract claim." Opposition at 17. However, the cases cited by Plaintiff are unpersuasive and factually dissimilar to the claims asserted in this action. *Id.; Home Equity Mortg. Trust Series 2006-1 v. DLJ Mortg. Capital, Inc.*, No. 156016/2012, 2013 WL 5691995 (Sup. Ct. N.Y. County Oct. 9, 2013) (denying motion to dismiss a claim for declaratory judgment which was based solely on future occurrences); *Karaszek v. Blonsky*, No. 2660-07, 2008 WL 2490068 (Sup. Ct. Nassau County May 30, 2008) (denying motion to dismiss a claim for declaratory judgment which was based upon an agreement for future conduct completely independent from a claim for breach of contract of an entirely separate agreement).

Without question, Plaintiff's declaratory judgment cause of action arises from and is grounded upon his claim for breach of contract. Even when given a chance to refute Trump Org.'s well-substantiated arguments supporting dismissal on this point, Plaintiff has not and cannot provide a basis for the Court to allow this claim to proceed.

Accordingly, Plaintiff's third cause of action for declaratory judgment should be dismissed.

IV. PLAINTIFF STILL CANNOT STATE A CLAIM FOR PROMISSORY ESTOPPEL.

Lastly, Trump Org. has shown Plaintiff's failure to state a claim for promissory estoppel

by establishing he has not stated any of the requisite elements. Moving Mem. 12.

Plaintiff primarily argues, in a conclusory fashion, that his promissory estoppel claim should be allowed to proceed given that (i) he claims to have alleged a clear and unambiguous promise by Trump Org. to pay for "his attorneys' fees and costs in connection with [his] representation and defense in the Investigations and other matters arising from his work with and on behalf of [Trump Org.] and its principals, directors, and officers" (Opposition at 18 (citations omitted)); (ii) he relied on such promise to his detriment (Opposition at 19) and (iii) he would suffer "unconscionable injury" if such a claim could not proceed (Opposition at 20).

Plaintiff has not and cannot show any direct correlation between what he believes Trump Org. allegedly owes him and what Trump Org. was legally bound to provide him. To that end, the cases cited by Plaintiff on this point are of no merit. For example, in *Arfa v. Zamir*, 55 A.D.3d 508 (1st Dep't 2008), a promissory estoppel claim withstood dismissal where an express, unequivocal promise to pay for legal services was shown. *Id.* at 509. *Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co.*, 804 F.2d 787 (2d. Cir. 1986) involved a *post-trial* decision concerning a dispute over the purchase of consumer electronics components where the promise at issue was unclear.

On the reliance issue, the cases proffered by Plaintiff are of limited worth. In *Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd.,* 383 F. Supp. 2d 428, 448 (S.D.N.Y. 2003), plaintiff in that case was able to show a clear and unambiguous promise involving an arms-length financial investment in a start-up company as well as multiple injuries directly attributed to such promise. Here, Plaintiff alleges, in a conclusory manner, that his retention of counsel in his personal legal matters was purely based on his reliance on Trump Org.'s alleged promise to him. Such allegation is wholly inadequate to maintain this cause of action.

Plaintiff relies upon *Old Salem Dev. Group, Ltd. v. Town of Fishkill*, 301 A.D.2d 639 (2d Dep't 2003) and *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) for the proposition that he can proceed on both his breach of contract and promissory claims simultaneously. However, *Old Salem* is inapplicable as it concerned multiple agreements between parties and the assumptions of those agreements by the defendant in the case from nonparties. 301 A.D.2d at 639. *Piven* is also unpersuasive as it concerned a dispute over fee sharing among attorneys which involved, among other things, "repeated assurances and encouragement" by defendant as well as an agreement terminable at will. 2010 WL 1257326, at *9 n.6.

As to the issue of unconscionability, the authority cited by Plaintiff in his Opposition miss the mark as each case involved entirely different scenarios than the instant matter. The dispute in *Castellotti v. Free*, 165 A.D.3d 535 (1st Dep't 2018) involved an alleged oral agreement between a brother and sister where they agreed that the brother (who was in the process of getting a divorce) would give his share of their late mother's estate to his sister to avoid his ex-wife from getting a hold of any part of the estate. *Ackerman v. Landes*, 112 A.D.2d 1081 (2d Dep't 1985) involved questions of unconscionability arising from a dispute over a joint venture agreement (where defendant failed to issue corporate shares in connection with the transaction) in the context of a motion for summary judgment. *Id.* at 1083-1084. Finally, *Rogers v. Town of Islip*, 230 A.D.2d 727 (2d Dep't 1996) concerned a claim for wrongful termination by a municipality's former employee where the employee clearly alleged all three elements of a promissory estoppel claim. Here, Plaintiff's claim that Trump Org. owes him certain post-employment obligations do not rise to the egregious circumstances of unconscionability found in both *Castellotti* and *Ackerman*. In addition, the decision in *Rogers* makes no reference to any of

the underlying facts in that case and is unpersuasive here.

The *Guggenheimer* case discussed herein is also inapplicable as to Plaintiff's promissory estoppel claim because Plaintiff here, unlike the plaintiff in *Guggenheimer*, cannot expressly show what was specifically promised to him. 11 Misc.3d 927-929.

Furthermore, as previously argued by Trump Org., Plaintiff still cannot establish a duty independent from his breach of contract claim as a basis for his promissory estoppel claim. Moving Memorandum at 19.

Therefore, Plaintiff's fourth cause of action for promissory estoppel should be dismissed.

CONCLUSION

For all these reasons, as well as those set forth in the Moving Memorandum and supporting papers, Trump Org. respectfully requests that the Court (1) dismiss all causes of action asserted against it the Complaint with prejudice, and (2) grant Trump Org. such other and further relief as this Court deems just and proper.

Dated: New York, New York
May 16, 2019

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WORD COUNT CERTIFICATION

Pursuant to Rule 17 of subdivision (g) of section 202.70 of the Uniform Rules of the Supreme Court and County Court (Rules of Practice for the Commercial Division of the Supreme Court), I hereby certify that the total number of words in this reply memorandum of law, excluding the caption, table of contents, table of authorities and signature block is 4,020.

Dated: New York, New York
May 16, 2019

/s/ Marc L. Mukasey
Marc L. Mukasey