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. 004

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MUKASEY FRENCHMAN LLP

2 Grand Central Tower
140 East 45th Street, 17th Floor
New York, New York 10017
(212) 466-6400

ken.caruso@mfsllp.com
marc.mukasey@mfsllp.com
elyssa.brezel@mfsllp.com
Attorneys for Defendant

REDACTED

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Defendant, Trump Organization LLC ("Defendant" or the "Trump Organization"), respectfully submits this Memorandum of Law in support of its motion, under CPLR Rule 3212, for summary judgment against Michael Cohen ("Plaintiff" or "Cohen").

STATEMENT OF UNDISPUTED FACTS

In 2007, "Cohen joined the Trump Organization" as an employee. Amended Complaint, NYSCEF 111 ¶ 17. On January 20, 2017, Donald J. Trump was inaugurated as President of the United States, and Cohen resigned from the Trump Organization. Id. ¶ 24.

"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 into the 2016 Election." Id. ¶ 35. On August 28, 2017, Cohen submitted a false statement, in writing, to the House and Senate Intelligence Committees. Affirmation of Kenneth A. Caruso Exhibit ("KACEx.") A ¶¶ 3-4,

On April 9, 2018, special agents of the Federal Bureau of Investigation (the "FBI") executed search warrants at Cohen's office, residence and hotel room. Amended Complaint, NYSCEF 111 ¶ 49. On August 21, 2018, the United States Attorney for the Southern District of New York (the "US Attorney") filed an Information, charging Cohen with five counts of personal income tax evasion, one count of making a false statement to a bank and two counts of unlawful campaign contributions. Cohen pleaded guilty to those charges. KACEx. B.

On November 29, 2018, the Special Counsel filed an Information, charging Cohen with one count of making a false statement to the Senate Intelligence Committee. KACEx. A ¶ 9. Cohen pleaded guilty to that charge. KACEx. C.

On December 12, 2018, the United States District Court for the Southern District of New York, Hon. William H. Pauley, United States District Judge, sentenced Cohen principally to a

term of 36 months in prison. Judge Pauley then entered final judgments of conviction. KACEx. D, E, F.

After his sentencing, Plaintiff testified before, or otherwise cooperated with, the House Oversight Committee, the House Judiciary Committee and the Senate Judiciary Committee. Plaintiff also continued to cooperate with the New York State Office of the Attorney General ("NYAG").

Plaintiff later made a motion asking Judge Pauley to reduce his sentence based on Plaintiff's post-conviction cooperation. Judge Pauley denied that motion.

Meanwhile, on March 7, 2019, Plaintiff commenced this action, seeking indemnification for legal fees and expenses incurred in what he has described as "a litany of congressional investigations, litigations, and other potential matters[,]" NYSCEF 71 ¶ 13, including those identified above. Plaintiff's Amended Complaint, filed on September 11, 2020, alleges a single cause of action for breach of a written contract and of three alleged oral contracts. The Amended Complaint also alleges causes of action for breach of the implied obligation of good faith and fair dealing, for promissory estoppel and for a declaratory judgment. [redacted] Plaintiff now seeks indemnification in the amount of approximately [redacted], which he [redacted].

ARGUMENT

POINT I

PLAINTIFF HAS NO CAUSE
OF ACTION FOR BREACH OF THE
WRITTEN OPERATING AGREEMENT

As this Court held earlier in this action, "a breach of contract claim requires: (1) the existence of a contract; (2) plaintiff's performance under the contract; (3) defendant's breach of the contract; and (4) resulting damages." NYSCEF 29 at 8, citing Noise in the Attic Productions v. London Records, 10 A.D.3d 303, 307 (1st Dep't 2004). Here, Plaintiff admits the first element of this cause of action, the existence of a contract. See Amended Complaint, NYSCEF 111 ¶ 29 ("The Operating Agreement . . . was in effect for the entirety of the time [Plaintiff] was employed by [Defendant] and . . . at all times relevant to [Plaintiff's] claims for indemnification."); id. ¶ 3 ("This provision constitutes a binding contractual obligation").

As a matter of law, however, Plaintiff cannot establish the second element or the third element of this cause of action. The Court should therefore grant summary judgment in favor of Defendant on this cause of action.

A. Plaintiff Has No Claim For Indemnification In Connection With Criminal Investigations And Convictions

Plaintiff seeks indemnification for fees incurred in connection with the SDNY criminal investigation and in connection with the investigation conducted by the Special Counsel (the "Mueller Investigation"). For the following reasons, however, Plaintiff's claim fails as a matter of law.

1. The SDNY Criminal Investigation And Conviction

On August 20, 2020, in open court, the Court granted summary judgment in favor of Defendant on Plaintiff's claims for indemnification in connection with the SDNY criminal investigation and the resulting conviction. That ruling is law of the case; it precludes the indemnification that Plaintiff now seeks.

Law of the case is "a kind of intra-action res judicata." People v. Evans, 94 N.Y.2d 499, 502 (2000) (internal citation omitted). Specifically, the doctrine "addresses the potentially

preclusive effect of judicial determinations made in the course of a single litigation before final judgment." Id. The doctrine is discretionary, id. at 503, but a court should adhere to its prior rulings except in "extraordinary circumstances[.]" Andrea v. E.I. Du Pont De Nemours & Co., 289 A.D.2d 1039, 1041 (4th Dep't 2001) (internal citation omitted). "Once a point is decided within a case, the doctrine of the law of the case makes it binding not only on the parties, but on the court as well." Siegel, New York Practice § 448 (2020).

Here, the Court previously ruled: "[S]ummary judgment is granted with respect to claims for attorney's fees incurred in connection with the Southern District of New York criminal investigation and the resulting conviction, to the extent there are any unpaid fees with respect to that." NYSCEF 110 at 38:8-12. The Court continued: "[I]t's undisputed that [Plaintiff] admitted violating the law and admitted knowing that it was unlawful when he committed the acts." Id. at 38:22-24. "The law does not permit a company to hold its employees harmless for criminal activity[.]" Id. at 38:15-16. "Those claims are[,]" therefore, "barred both by the terms of the Operating Agreement and also by New York law restricting the scope of indemnification by [an] LLC[,]" id. 38:12-14, a reference to section 420 of the Limited Liability Company ("LLC") Law.

The Court's ruling, recounted above, is law of the case. The Court should follow it here.

Cohen now concedes that the Court's prior ruling precludes indemnification for fees incurred in connection with his conviction but contends that the ruling does not preclude indemnification for fees incurred in connection with the search warrants. Cohen thus seeks [redacted] in connection with what Cohen calls the "FBI raid."

For the reasons set forth below, however, Plaintiff's contention is meritless. The Court's law-of-the-case ruling extends by its terms to both the SDNY "criminal investigation and the resulting conviction[;]" and here, the "investigation" indisputably included the search warrants.

Plaintiff has, in fact, repeatedly admitted that the investigation in this case included the search warrants. Those admissions, some of which Defendants recount below, warrant summary judgment. Thus:

In the Amended Complaint, NYSCEF 111 ¶ 49, Plaintiff admitted: "On April 9, 2018, in connection with a federal investigation of Mr. Cohen's business dealings (the 'FBI Investigation'), the FBI raided" Cohen's office, residence and hotel room. That statement "constitute[s] [a] formal judicial admission[,]" which is "conclusive" within this action. Kimso Apartments LLC v. Gandhi, 24 N.Y.3d 403, 412 (2014).

Plaintiff also made informal judicial admissions, which establish an undisputed record warranting summary judgment on this claim. See Matter of Liquidation of Union Indem. Ins. Co., 89 N.Y.2d 94, 103 (1996) (statements in depositions, affidavits and briefs are informal judicial admissions); U-Trend New York Investment L.P. v. US Suite LLC, 186 A.D.3d 438, 441 (1st Dep't (2020) (same; affidavit). Thus:

In an Affidavit, Plaintiff admitted that the law firm of McDermott Will & Emery ("McDermott") represented "me in connection with . . . the United States Attorney for the Southern District of New York's criminal investigation of me that arose from . . . the April 9, 2018 FBI raids . . . that ultimately culminated in my plea agreement." NYSCEF 71 ¶ 3. Cohen further admitted that the charges to which he pleaded guilty "were the culmination of the April 9 subpoenas [sic, should be search warrants] and SDNY investigation[.]" Id. ¶ 10.

In his deposition testimony, Cohen admitted [redacted].

In his Response to Defendant's Statement of Undisputed Facts, Cohen did not dispute, and therefore admitted: "On April 9, 2018, the [FBI], working in conjunction with the [US Attorney], executed search warrants . . . as part of an investigation[,]" which Cohen defined as the "SDNY Investigation[.] . . . At or about the same time, Plaintiff retained [McDermott] to represent him in the SDNY Investigation." NYSCEF 85 at 5.

In a memorandum of law, Cohen admitted that he made a "[m]otion for a temporary restraining order to prevent [the] USAO-SDNY from reviewing evidence obtained by [the] FBI during [the] raid of Mr. Cohen's home and office in connection with criminal cases referenced below[,]" which references the two criminal cases in which Cohen pleaded guilty. NYSCEF 69 at 6-7.

In that same memorandum of law, Cohen further admitted the he "pled guilty to eight charges arising from the SDNY Investigation, April 9, 2018 FBI raids, and subsequent criminal prosecutions . . . . These charges were the culmination of the April 9 subpoenas [sic] and SDNY Investigation[.]" Id. at 12.

In a pre-litigation demand letter, Cohen [redacted].

On April 20, 2018, just days after the searches, Cohen [redacted].

Two days later, Cohen [redacted].

2. The Mueller Investigation

Plaintiff next seeks indemnification for fees incurred in connection with the Mueller Investigation, and owed to [redacted]. For the following reasons, however, this claim fails as a matter of law.

[redacted].

a. [redacted]

[redacted].

"[W]hen parties set down their agreements in a clear, complete document, their writing should . . . be enforced according to its terms[.]" 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353, 358 (2019) (internal quotation marks omitted). A court, furthermore, will read contract language objectively. "Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract[.]" Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569-70 (2002). The court will "read the document as a whole[,]" South Road Associates, LLC v. Int'l Bus. Machines Corp., 4 N.Y.3d 272, 277 (2005), and will "look solely to the language used by the parties to discern the contract's meaning." Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004).

The Court "must . . . neutrally apply the rules of contract interpretation[.]" Greenfield, 98 N.Y.2d at 573. In this case, four such rules apply:

First, a court will give a contract for indemnification -- such as the Operating Agreement -- a strict construction. It must be "unmistakably clear" that the contract "contemplated" the performance and the recovery sought by the plaintiff. 546-552 West 146th Street LLC v. Arfa, 99 A.D.3d 117, 122 (1st Dep't 2012). Thus:

"Indemnification statutes are strictly construed[.]" Id. at 121. The statute applicable here, LLC Law § 420, "is permissive and does not per se create a legal duty to indemnify." Id. Rather, the statute merely "empowers" an LLC, subject to the statutory limitations, "to tailor an indemnity clause in accordance with its own 'standards and restrictions[.]'" Id. And because, under section 420, the LLC "is under no legal duty to indemnify, a contract assuming that obligation [to indemnify,]" such as the Operating Agreement, "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed[.]" Hooper Associates Ltd. v. AGS Computers Inc., 74 N.Y.2d 487, 491 (1989).

Second, as part of the court's strict construction, the court will construe the language of the contract consistently with the definition, and the fundamental purpose, of indemnification, which is to hold current and former employees harmless from the expenses of defending proceedings to protect corporate interests, not the expenses of going on the offensive to advance personal interests. Thus:

The standard reference work, in force in 1994, when the Legislature enacted the LLC Law, defined "Indemnification" as follows: "In corporate law, the practice by which corporations pay expenses of officers or directors who are named in litigation as defendants in litigation relating to corporate affairs." Black's Law Dictionary (6th ed. 1990). And the Official Commentary to Business Corporation Law ("BCL") § 722, which established the "by-reason-of-the-fact-that" clause incorporated in the Operating Agreement, states: "The purpose of this section is to codify the common law principle that directors or officers are reimbursable by the corporation for expenses incurred and amounts paid in the defense of actions or proceedings other than derivative actions."

Authorities applying such "by-reason-of-the-fact-that" language clearly recognize this distinction between (on the one hand) expenses incurred on the defensive, protecting corporate interests and (on the other hand) expenses incurred on the offensive, advancing personal interests. See 2 White, New York Business Entities ¶ B722.01 (2020) ("White") (stating that BCL § 722 and related BCL sections "provide for indemnification in certain circumstances of corporate directors and officers against . . . reasonable expenses including attorney's fees, actually and necessarily incurred as a result of being made a party to a legal action or proceeding. . . . [T]he items of expense must have been incurred in connection with an action . . . brought against a person by reason of the fact that he or she . . . was a director or officer of the

corporation and not in connection with an action against him or her in his or her individual capacity"); 14A N.Y. Jur. 2d, Business Relationships § 807 (2020) ("Under the . . . indemnification statutes, the corporation is chargeable with expenses of litigation only if the person seeking reimbursement was made a party defendant . . . by reason of his or her present or former status as a corporate director or officer."); Tilden of New Jersey, Inc. v. Regency Leasing Systems, Inc., 237 A.D.2d 431, 431 (2d Dep't 1997) (holding that action against corporate official "based on a personal guaranty . . . is not brought against him 'by reason of the fact that he . . . was a director of officer of the corporation[;]'" citing prior edition of White, quoted above); Bensen v. American Ultramar Ltd., 1996 WL 435039 at *2-3 (S.D.N.Y Aug. 2, 1996) (holding indemnification unavailable where corporate employee defended claim challenging "conduct he undertook not for the corporation's benefit, but for his personal benefit").

Third, as part of the court's strict construction, the court will eschew an expansive, but-for construction of the language of a contract for indemnification. Thus:

In Baker v. Health Management Systems, Inc., 98 N.Y.2d 80 (2002), the plaintiff sought indemnification for fees incurred in the successful defense of several securities-fraud actions. The plaintiff, however, also sought recovery, under BCL § 722(a), of the fees "incurred in attempting to secure indemnification[,]" 98 N.Y.2d at 83, so-called "fees on fees." Id. The plaintiff urged a "'but for' test . . . . argu[ing] that but for the underlying action, he would not have incurred the litigation costs for which he sought indemnification." Id. at 85. The Court of Appeals rejected that "expansive 'but-for' test[,]" id., which would have extended the statutory right to indemnification "to fees and expenses having the most attenuated link to the underlying action." Id.

Fourth, a court will not construe a contract so as to place one party "at the mercy of the other[.]" Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 201 (2001).

Here, applying the foregoing rules, the Operating Agreement gives Plaintiff no claim for indemnification for fees incurred in the Mueller Investigation.

The language of the Operating Agreement makes no promise, much less the requisite unmistakably clear promise, to indemnify a former employee, such as Plaintiff, for fees incurred in matters voluntarily undertaken -- matters in which the former employee goes on the offensive, advancing personal interests. On the contrary, such a promise would run counter to the very definition and purpose of indemnification.

Here, the undisputed record shows that Plaintiff did not become involved in the Mueller Investigation by reason of the fact that he was a former employee. That record shows, rather, that Plaintiff became involved in the Mueller Investigation by reason of the fact that he was about to be indicted, whereupon, for his personal benefit, in an effort to reduce his criminal exposure, he voluntarily cooperated with the Mueller Investigation. Thus:

Cohen admitted, [redacted].

Plaintiff's reading of the Operating Agreement, furthermore, "would . . . extend[] the [contractual] right to indemnification . . . to fees and expenses having the most attenuated link" to Plaintiff's former employment by Defendant. Baker, 98 N.Y.2d at 85. Plaintiff cooperated with the Mueller Investigation in an effort to mitigate his personal criminal exposure. Plaintiff therefore cannot articulate a sufficient connection between fees incurred in that effort and Plaintiff's former employment; a mere but-for connection, along a chain of events, does not suffice.

Finally, Plaintiff's reading of the Operating Agreement would put the Trump Organization at Plaintiff's mercy. According to Plaintiff, the Operating Agreement entitles Plaintiff to indemnification [redacted] for fees incurred, in meetings with prosecutors and FBI agents, which Plaintiff initiates and proliferates, in his sole discretion, using numerous law firms, and running up legal tabs that Plaintiff simply submits for payment by Defendant, who stands at Plaintiff's mercy. It is by no means unmistakably clear that Defendant promised such a blank check, payable to the order of its former employees, such as Plaintiff, for voluntary activities in response to an impending indictment.

b. Plaintiff Did Not Act In Good Faith And Therefore Did Not Satisfy The Condition Precedent To Defendant's Duty To Indemnify

[redacted]. Here, however, Plaintiff did not act in good faith. Accordingly, Plaintiff did not satisfy that condition precedent to Defendant's duty to indemnify.

"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[.]" Oppenheimer & Co. v. Oppenheim, 86 N.Y.2d 685, 690 (1995) (internal quotation marks

omitted). [redacted]

Here, however, as a matter of law, Plaintiff did not act in good faith and therefore did not satisfy the condition precedent to Defendant's duty to indemnify. Specifically, in connection with the Mueller Investigation, Plaintiff admitted, under oath, in open court, that he engaged in criminal conduct, by making statements to Congress that he "knew at the time" were "false." KACEx. C at 27:22. Plaintiff further admitted that the essential elements of the crime to which he pleaded guilty include proof "that the false . . . statement was made knowingly and willfully." Id. at 12:21-25; 14:21-24. Accordingly, as a matter of law, Plaintiff's "sworn admissions leave no room for finding that . . . he acted in good faith[.]" Bansbach v. Zinn, 1 N.Y.3d 1, 13 (2003).

c. LLC Law § 420 Prohibits Indemnification

Even if the Operating Agreement did permit indemnification, the over-arching statute, LLC Law § 420, would prohibit indemnification. Thus, section 420 permits indemnification, "provided, however, that no indemnification may be made to . . . any . . . person if a judgment . . . adverse to such . . . person establishes (a) that his . . . acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated[.]"

Section 420 embodies New York's long-standing public policy against indemnification for criminal conduct. See 159 MP Corp., 33 N.Y.3d at 360 n.4 (holding that "public policy, in

th[e] context [of contract construction and enforcement] . . . mean[s] the law of the State, whether found in the Constitution, statutes or decisions of the courts") (internal quotation marks omitted); Riggs v. Palmer, 115 N.Y. 506, 511 (1889) ("No one shall be permitted . . . to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.")

Here, the criminal judgment adverse to Plaintiff establishes that his acts were committed in bad faith, were the result of active and deliberate dishonesty and were material to the crime adjudicated. Thus, Judge Pauley entered judgment adverse to Plaintiff, convicting Plaintiff on one count of violating 18 U.S.C. § 1001(a)(2). KACEx. F. Under the plain language of that statute, the essential elements of the crime include proof that the defendant "knowingly and willfully . . . ma[de] any materially false . . . statement[.]" It follows that LLC Law § 420 bars indemnification. See Pilipiak v. Keyes, 286 A.D.2d 231, 231-32 (1st Dept 2001) (holding indemnification under BCL § 722 "precluded as a matter of law," where would-be indemnitee "had been convicted . . . [and] the elements of intent under the applicable provisions of the Penal Law require a finding of deliberate dishonesty").

B. Plaintiff Has No Claim For Indemnification In Connection With Congressional Investigations

Plaintiff seeks indemnification for fees incurred in connection with five Congressional investigations. For the following reasons, however, Plaintiff's claims fail as a matter of law.

1. House and Senate Select Intelligence Committees

Plaintiff seeks indemnification for fees incurred in connection with proceedings before these two Committees, and owed [redacted]. For the following reasons, however, these claims fail as a matter of law.

Plaintiff made false statements to these Congressional Committees. He then pleaded guilty to, and was convicted of, a violation of 18 U.S.C. 1001(a)(2). KACEx. C, F. Accordingly, for the reasons set forth above regarding the Mueller Investigation, see Point I(A)(2)(b)-(c) above, Plaintiff's claim for indemnification fails as a matter of law. First, Plaintiff did not satisfy the condition precedent to Defendant's duty to indemnify. Second, LLC Law § 420 prohibits indemnification.

2. House Oversight Committee

Plaintiff seeks indemnification for fees incurred in connection with his testimony before this Committee, and owed [redacted]. For the following reasons, however, this claim fails as a matter of law.

a. Statement Of Undisputed Facts Relevant To This Claim

On December 12, 2018, Judge Pauley held a sentencing proceeding, at which he concluded that the advisory U.S. Sentencing Guidelines provided for a sentence of 51-63 months in prison. KACEx. D at 5:2. Cohen's counsel, however, urged leniency, based, in part, on Cohen's cooperation with the Government. The US Attorney and the Special Counsel agreed that the court should give Cohen a modest reduction of sentence. Judge Pauley did so, sentencing Cohen principally to 36 months in prison. Id. at 36:2-9.

Federal law, however, recognizes that a convicted defendant, after sentencing, may continue to cooperate in an effort to reduce his sentence. See Rule 35(b)(1), Fed. R. Crim. P. ("Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.")

After sentencing, Cohen began an effort to provide further cooperation. On February 27, 2019, he testified before the House Oversight Committee.

Later, Cohen's counsel asked the US Attorney to make a motion under Rule 35(b)(1) for reduction of sentence based on Cohen's post-conviction cooperation. The US Attorney, however, refused to make the motion, whereupon Cohen's counsel made the motion on his own (the "Rule 35 Motion").

In support of the Rule 35 Motion, one of Cohen's counsel, Davis, submitted an Affirmation, the "primary focus" of which was "the 'substantial assistance' provided to the Congress, a Constitutional component of 'The Government' under the United States Constitution." KACEx. L ¶ 1. Davis continued: "The 'substantial assistance' provided by Michael Cohen to the Government, in its various investigations includes . . . [the] February 27, 2019[] [a]ppearance before [the] House Committee on Oversight and Reform. . . . Cohen voluntarily and publicly testified under oath before [that Committee]." Id. ¶¶ 2, 5.

Cohen himself then submitted an Affirmation, which stated that he "provided proactive cooperation to a variety of legislative branch government committees, which are fully enumerated in the [Davis] affirmation[,]" KACEx. M ¶ 9, and which included the House Oversight Committee. Id. ¶ 12.

The US Attorney opposed the Rule 35 Motion. Judge Pauley later denied it.

b. Plaintiff's Claim Fails As A Matter Of Law

[redacted] As shown in Point I(A)(2)(a) above, that language recognizes a distinction between (on the one hand) expenses incurred on the defensive,

protecting corporate interests, and (on the other hand) expenses incurred on the offensive, advancing personal interests. Here, Plaintiff's expenses fall into the latter category.

First, the Congressional testimony itself shows that Plaintiff acted voluntarily to advance his personal interests. Thus, Plaintiff began his testimony: "[T]hank you for inviting me here today." KACEx. N at 9. Plaintiff continued: "I have come here to apologize to my family, to my government, and to the American people[;]" id. at 11; "I am sorry for my lies and for lying to Congress[;]" id. at 15; "[T]oday, I get to decide the example that I set for my children, and how I attempt to change how history will remember me. . . . I can do right by the American people here today[;]" id. at 16; "I am here . . . voluntarily because it's my decision[;]" id. at 42; "I'm trying very hard. . . . to try to . . . show some redemption. . . . I am trying[;]" id. at 106.

Plaintiff later submitted this testimony to Judge Pauley in support of the Rule 35 Motion, see KACEx. L ¶ 5 -- yet another voluntary effort, taking the offensive, advancing personal interests. The law did not require Plaintiff to move to reduce his sentence; the Government did not hale Plaintiff into court for that purpose.

On this claim, furthermore, Plaintiff fails to read the Operating Agreement as a whole, although the Court must do so. South Road, 4 N.Y.3d at 277. [redacted] the record contains no evidence that anyone ever delegated to a former employee, such as Plaintiff, the power to "sue," which is, in effect, what Plaintiff did when he made the Rule 35 Motion. See Black's Law Dictionary (6th ed. 1990) (defining "sue" as "to commence or to continue legal

proceedings for recovery of a right[]"). [redacted] contains no language suggesting, much less unmistakably promising, that Defendant must indemnify Plaintiff for fees incurred when Plaintiff voluntarily sought affirmative relief in court, as he did when he made the Rule 35 Motion.

Second, Plaintiff incorporated this Congressional testimony into, and made it a part of, the SDNY criminal proceeding. As shown in Point I(A)(1) above, however, the Court's law-of-the-case ruling precludes indemnification in connection with that proceeding.

3. House And Senate Judiciary Committees

Plaintiff seeks indemnification for fees incurred in connection with proceedings before these two Committees, and [redacted]. For the reasons set forth above regarding the House Oversight Committee, however, this claim fails as a matter of law. First, Plaintiff did not become involved in these proceedings "by reason of the fact that he . . . was . . . [an] employee[;]" rather, he involved himself voluntarily, advancing personal interests. KACEx. G at 128:7-11, 248-49; KACEx. M ¶ 13; KACEx. O ¶ 4(g); KACEx. L ¶¶ 11-12. Second, Plaintiff incorporated this activity into, and made it a part of, the SDNY criminal proceeding, as to which the Court's law-of-the-case ruling precludes indemnification.

C. Plaintiff Has No Claim For Indemnification In Connection With The New York Attorney General Investigation

Plaintiff seeks indemnification for fees incurred in connection with the NYAG investigation, and [redacted]. For the reasons set forth above regarding the House Oversight Committee, however, this claim fails as a matter of law. First, Plaintiff did not become involved in this proceeding "by reason of the fact that he . . . was . . . [an] employee[;]" rather, he involved himself voluntarily, advancing personal interests. KACEx. G at 128:7-11; KACEx. M ¶ 14; KACEx. O ¶ 4(e); KACEx. P at 2. Second, Plaintiff

incorporated this activity into, and made it a part of, the SDNY criminal proceeding, as to which the Court's law-of-the-case ruling precludes indemnification.

D. Plaintiff Cannot Recover Fees On Fees

Plaintiff seeks to recover the attorneys' fees incurred in this action, so-called fees on fees. For two reasons, however, this claim fails as a matter of law.

First, at best for Plaintiff, his claim for fees on fees derives from his claim on the merits for indemnification of fees incurred in connection with the prior matters. Because, for the reasons stated above, Plaintiff cannot recover on the merits, he cannot recover fees on fees.

Second, in the alternative, under the American Rule, Plaintiff cannot recover the fees incurred in this action unless a contract or a statute authorizes such recovery. Baker, 98 N.Y.2d at 88. Here, however, neither [redacted] nor LLC Law § 420 authorizes such recovery. Arfa, 99 A.D.3d at 121-22 (holding that § 420 does not authorize recovery of fees on fees).

POINT II

THE ALLEGED ORAL AGREEMENTS ARE UNENFORCEABLE AND IMMATERIAL

Plaintiff contends that the parties made three oral agreements, each of which entitles him to indemnification. For the following reasons, however, the alleged oral agreements, assuming they exist, are unenforceable as a matter of law, and are immaterial to Plaintiff's remaining claims.

A. The Alleged Oral Agreements Are Unenforceable

General Obligations Law § 15-301(1) provides: "A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be

changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought[.]" See also id. § 15-301(6) ("the term 'agreement' includes promise and undertaking.") An "executory agreement" is one that the parties have not fully performed. Rose v. Spa Realty Assoc., 42 N.Y.2d 338, 344 (1977).

The Court of Appeals has left no doubt that a court will enforce a no-oral-modifications clause. Thus, under section 15-301(1), "where a contract contains a 'no oral modifications' clause, that clause will be enforceable." Israel v. Chabra, 12 N.Y.3d 158, 163 (2009). Indeed, the statute "guarantees" the enforcement of a contractual "proscription against oral modification . . . [I]f the only proof of an alleged agreement to deviate from a written contact is the oral exchanges between the parties, the writing controls. Thus, the authenticity of any amendment is ensured[.]" Eujoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 425 (2013) (internal quotation marks omitted).

Here, Plaintiff admits that "[t]he Operating Agreement, including the Right to Indemnification provision [Article 7.2], was in effect for the entirety of the time [Plaintiff] was employed by [Defendant] and . . . at all times relevant to [Plaintiff's] claims for indemnification." Amended Complaint, NYSCEF 111 ¶ 29. That statement constitutes a formal judicial admission, binding here. Kimso, 24 N.Y.3d at 412.

[redacted]

Accordingly, the Operating Agreement cannot be changed by oral executory agreement or promise. Plaintiff, however, [redacted] [1] The alleged oral agreements are, therefore, unenforceable.

B. The Alleged Oral Agreements Are Immaterial To Plaintiff's Remaining Claims

In any event, the alleged oral agreements are immaterial to Plaintiff's remaining claims. Thus:

Two of the alleged oral agreements involve promises to indemnify Plaintiff for fees that he owed to McDermott. NYSCEF 111 ¶¶ 38, 54-56. [redacted]. It follows that Cohen has no claim under these two alleged oral agreements.

[1] [redacted]

The other alleged oral agreement involves promises to indemnify Plaintiff for fees that he owed to the lawyer who represented him in matters related to Stephanie Clifford. NYSCEF 111 ¶¶ 51-53. That lawyer, however, [redacted] It follows, again, that Cohen has no claim under this alleged oral agreement.

POINT III

PLAINTIFF'S THREE
OTHER CAUSES OF ACTION
FAIL AS A MATTER OF LAW

Plaintiff alleges three other causes of action. For the following reasons, however, each of those causes of action fails as a matter of law.

A. Plaintiff Has No Cause Of Action For Breach Of The Implied Obligation Of Good Faith And Fair Dealing

The Court previously dismissed this cause of action as "duplicative of [the breach of] contract claim[.]" NYSCEF 29 at 23. That holding is law of the case. The Court should follow it here.

B. Plaintiff Has No Cause Of Action For Promissory Estoppel

The Court previously dismissed all but "a narrow sliver of Cohen's promissory estoppel claim[.]" NYSCEF 29 at 27. That holding is law of the case. The Court should follow it here.

The Court, furthermore, should now grant summary judgment on that sliver, which the Court "limited to the assertion" that Defendant must indemnify Plaintiff "with respect to the Pending Matters [as of July 2017], and even then only if Cohen is not able to establish that there was a binding contract." Id. at 27-28. Here, however, there is a binding contract, as Cohen admits. See Amended Complaint, NYSCEF 111 ¶ 29.

C. Plaintiff Has No Cause Of Action For A Declaratory Judgment

The Court previously dismissed this cause of action as duplicative of the breach-of-contract cause of action, except "[t]o the extent [that it seeks] prospective relief[.]" NYSCEF 29 at 25. The Court should now grant summary judgment on this cause of action because Plaintiff no longer has any claims for prospective relief.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant's motion for summary judgment.

Dated: New York, New York
March 30, 2021

MUKASEY FRENCHMAN LLP

By: /s/ Kenneth A. Caruso
Kenneth A. Caruso

Of Counsel:
Kenneth A. Caruso
Marc L. Mukasey
Elyssa Brezel

140 East 45th Street, 17th Floor
New York, New York 10017
Tel: (212) 466-6400

Attorneys for Defendant

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 6,884. I further certify that this word count complies with the word count limit set forth in Rule 17 of Section 202.70(g).

Dated: North Haven, New York
March 30, 2021

/s/ Kenneth A. Caruso
Kenneth A. Caruso