

**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. 004

ORAL ARGUMENT REQUESTED

**MEMORANDUM OF LAW IN OPPOSITION TO TRUMP ORGANIZATION LLC'S
MOTION FOR SUMMARY JUDGMENT**

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Michael D. Cohen (“Cohen”), by and through undersigned counsel and pursuant to Civil Practice Law and Rules 3212, respectfully submits his Memorandum of Law, together with the Affirmation of Daniel I. Wolf (“Wolf Aff.”), and the exhibits annexed thereto, in opposition to the Trump Organization LLC’s (the “Trump Organization” or the “Organization”) Motion for Summary Judgment ([NYSCEF Doc. No. 158](#)) (the “Motion”).

STANDARD OF REVIEW

I. THE TRUMP ORGANIZATION BEARS A HEAVY BURDEN ON ITS MOTION

On a motion for summary judgment, the moving party bears the burden of establishing its right to judgment as a matter of law and must tender sufficient admissible evidence “to demonstrate the absence of any material issues of fact.” See *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014) (citation omitted). This burden is “heavy,” *Deleon v. N.Y.C. Sanitation Dep’t*, 25 N.Y.3d 1102, 1106 (2015), and the Court must view the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in favor of the non-moving party. See *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012).

If the moving party meets its burden, the non-moving party need only identify the existence of triable issues of fact to defeat the motion. *Id.* Once it is determined that such issues of fact exist, summary judgment must be denied. See *Greater N.Y. Mut. Ins. Co. v. ERE LLP*, 125 A.D.3d 417, 418 (1st Dep’t 2015); see also *Schumacher v. Pucciarelli*, 161 A.D.3d 1205, 1205 (2d Dep’t 2018) (“The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist.” (citation omitted)).

Summary judgment is a “drastic remedy” that should only be granted when there is no doubt whatsoever as to the absence of a triable issue. *Gale v. Kessler*, 93 A.D.2d 744, 745 (1st Dep’t 1983).

FACTUAL AND PROCEDURAL BACKGROUND

Cohen filed his Amended Complaint for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory judgment, and promissory estoppel against the Trump Organization on September 11, 2020. [NYSCEF Doc. No. 111](#). The Amended Complaint alleges that the Organization was obligated to indemnify Cohen for the following matters.

Matter	Case Number	Description
House Permanent Select Committee on Intelligence	N/A	Subpoena by House Permanent Select Committee on Intelligence re connections between the Trump Organization and Russia.
Senate Select Committee on Intelligence	N/A	Testimony before the Senate Select Committee on Intelligence re connections between the Trump Organization and Russia.
Senate Committee on the Judiciary	N/A	Preparation for potential testimony; response to document requests re connections between the Trump Organization and Russia.
House Committee on Oversight and Reform	N/A	Preparation for testimony re connections between the Trump Organization and Russia.
<i>Stephanie Clifford v. Donald J. Trump, et al.</i>	2:2018-cv-02217	Stormy Daniels lawsuit against Cohen re defamation in connection with his payment of Ms. Daniels on President Trump's behalf.
In the Matter of Search Warrants Executed on April 9, 2018	1:2018-mj-03161	Motion for temporary restraining order to prevent USAO-SDNY from reviewing evidence obtained by FBI during raid of Cohen's home and office.

Matter	Case Number	Description
<i>Stephanie Clifford v. Keith Davidson</i>	No. SC129384 (L.A. Super. Ct.) <i>as removed</i> , No. 2:2018-cv-05052 (C.D. Cal.)	Stormy Daniels lawsuit against her former attorney, Keith Davidson, and Cohen re collusion arising from Cohen's payment to Ms. Daniels.
<i>Underwood v. Trump</i>	451130/2018 (N.Y. Sup. Ct., N.Y. Cnty.)	Subpoena issued on 8/22/2018 by N.Y. Attorney General in case against the Donald J. Trump Charitable Foundation, (the "Trump Foundation"), Mr. Trump, and others re violation of state charity laws.
Special Counsel Robert S. Mueller III's Investigation	N/A	Meetings with Special Counsel Robert S. Mueller III's team re Mr. Trump/the Trump Organization's Russia ties and potential collusion.

Id. ¶ 70.

In light of the Court's August 28, 2019 ruling on the Trump Organization's Motion to Dismiss, Cohen's Amended Complaint did not seek recoupment of any attorneys' fees or expenses incurred in the two criminal cases commenced against him in 2018 (*United States v. Cohen*, Case Nos. 1:2018-cr-00602 and 1:2018-cr-00850). *Id.* ¶¶ 69–72; *see also* Wolf Aff. Ex. A. Nor is Cohen seeking recovery of any fees or costs incurred in sentencing and other post-conviction proceedings in those cases. [NYSCEF Doc. No. 111](#) ¶¶ 69–72; Wolf Aff. Ex. A.

I. MCDERMOTT WILL & EMERY REPRESENTS COHEN IN THE INVESTIGATIONS OF VARIOUS CONGRESSIONAL COMMITTEES AND THE SPECIAL COUNSEL COMMENCED IN 2017

Beginning in May 2017, Cohen received requests from various congressional committees to provide documents and testimony in investigations into Russian interference in the 2016 presidential election. Wolf Aff. Exs. B–C. After consulting with President Trump and his counsel and initially refusing to cooperate, Cohen received a subpoena to provide documents to the House Permanent Select Committee on Intelligence ("HPSCI") on May 31, 2017 regarding,

among other things, connections between the Trump Organization and Russia. *Id.* Ex. D. Prior to receiving this subpoena, Cohen met with President Trump on May 18, 2017, to discuss the congressional investigations into connections between the Trump Organization and Russia and alleged interference in the 2016 presidential election. *Id.* Ex. E at 139; *id.* Ex. F at 103:13–106:6; 106:17–108:14; 128:4–22. President Trump instructed Cohen to cooperate with the congressional investigations. *Id.* Ex. E at 139. Cohen heeded President Trump’s instruction and committed to cooperate with the then-pending investigations. *Id.* Ex. F at 249:5-18. At this time (May 2017), Cohen had not been charged or even threatened with the possibility of a criminal charge. *See, e.g.*, Ex. E at 145.

McDermott Will & Emery (“McDermott”) was engaged by Cohen on June 12, 2017, at the suggestion of the Organization and its executives. Wolf Aff. Ex. G. McDermott’s engagement included representation of Cohen “in connection with an investigation being conducted by the HPSCI and other Senate, House or Special Counsel inquiries as may subsequently occur.” *Id.* at 1. The Organization paid, in part, for McDermott’s fees and costs in representing Cohen in these matters. *See, e.g., id.* Ex. H at 29:17–24. The invoices produced in this case demonstrate that McDermott initially provided legal services to Cohen in connection with (a) the subpoena and investigation of the HPSCI regarding connections between the Trump Organization and Russia; (b) testimony before the Senate Select Committee on Intelligence (“SSCI”) regarding connections between the Trump Organization and Russia; (c) a request for documents and investigation from the Senate Judiciary Committee regarding connections between the Organization and Russia; and (d) Special Counsel Robert S. Mueller III’s investigation of collusion between the Trump Campaign, the Organization, and Russia in influencing the 2016 presidential election. *See id.* Exs. T–U.

In conjunction with his cooperation with the investigations pending in 2017, Cohen prepared a written statement regarding, among other things, a proposed Trump Tower Moscow project that was under discussion in 2016. *See id.* Ex. E at 140–42. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Cohen submitted this two-page written statement to the HPSCI and to the SSCI on August 28, 2017. *Id.* Ex. I ¶ 3. Cohen subsequently testified before the SSCI on October 25, 2017 regarding, among other things, the content of his written statement. *Id.* ¶ 6.

II. MCDERMOTT ALSO REPRESENTS COHEN IN THE EARLY STAGES OF THE MUELLER INVESTIGATION

On May 17, 2017, the United States Attorney General appointed Robert S. Mueller III as Special Counsel, and charged him with the task of investigating “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald J. Trump” and “the Russian government’s efforts to interfere in the 2016 presidential election.” Wolf Aff. Ex. J. In the summer of 2017, the Special Counsel sought information and testimony from Cohen regarding these matters based upon his prior work for the Organization. *Id.* Ex. V. McDermott began coordinating with the Special Counsel’s investigators and laying the groundwork for Cohen’s ultimate cooperation with the Special Counsel during its

representation of Cohen in 2017 and 2018. *Id.* Ex. T. McDermott’s work in this regard commenced prior to the April 9, 2018 FBI raids, the charging of Cohen with any crimes, or his 2018 guilty plea.

III. COHEN DEFENDS LITIGATION BROUGHT BY STEPHANIE CLIFFORD

Beginning in March 2018, Cohen was also named as a defendant in two litigations involving Stephanie Clifford (also known as Stormy Daniels), with whom Cohen negotiated a non-disclosure agreement and payment to avoid publicity surrounding Ms. Clifford’s prior sexual relationship with President Trump. In consultation with the Organization and its counsel, Cohen retained the Blakely Law Group (“Blakely”) to represent him in those actions. [NYSCEF Doc. No. 71](#) ¶ 7. The actions concluded in 2018 and Cohen owed the Blakely firm \$299,275.38 for its services, none of which was paid prior to the commencement of this case. In June 2020, counsel for the Trump Organization contacted Blakely and negotiated an agreement to resolve the firm’s outstanding invoices in exchange for a payment of \$150,000.00. [NYSCEF Doc. No. 82](#).

IV. MCDERMOTT EXECUTES A SEPARATE ENGAGEMENT LETTER TO REPRESENT COHEN IN ADDRESSING THE FALLOUT FROM THE APRIL 9, 2018 FBI RAIDS

On April 9, 2018, FBI agents executed search warrants for Cohen’s residence, hotel room, office, safety deposit boxes, and electronic devices. *See id.* Ex. E at 145. Given Cohen’s prior employment as a lawyer with the Organization and his work as personal counsel to Mr. Donald J. Trump, the documents and information seized in these raids generated questions of privilege and other confidentiality concerns for millions of pages of material. *Id.* Ex. F at 148:22–153:5. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

McDermott executed a separate engagement letter for this work on behalf of Cohen and incurred millions of dollars in additional fees in dealing with the fallout from the raids (but not in connection with Cohen's criminal prosecution, which would not arise until several months later, after McDermott's withdrawal from its representation of Cohen). *Id.* Ex. K.

Due to the Organization's repeated delays in paying McDermott's invoices, McDermott ultimately withdrew from its representation of Cohen in June 2018. *Id.* Ex. L. A portion, but not all, of the outstanding McDermott invoices were allegedly paid by either the Trump Organization, the Trump Presidential Campaign, or by President Trump. *Id.* Ex. H at 29:17–30:3. On August 6, 2018, McDermott issued its final invoice for its work on behalf of Cohen for \$1,037,868.87. *Id.* Ex. M. Although the \$1,037,868.87 was never paid, as of February 2021, McDermott indicated that it will no longer seek payment of this outstanding receivable.

KACEx. Q.

V. COHEN ENGAGES REPLACEMENT COUNSEL FOLLOWING MCDERMOTT'S WITHDRAWAL

McDermott threatened to resign on multiple occasions throughout its representation of Cohen in 2017 and 2018 due to the Organization's failure to timely pay McDermott's bills in full. *Id.* Ex. H at 148:14–149:2, 168:8–25, 190:15–22. In anticipation of McDermott's resignation, which was finalized in June 2018, Cohen retained new counsel to assist him with the matters previously handled by McDermott. [NYSCEF Doc. No. 71 ¶ 4](#). On April 22, 2018, Cohen engaged Petrillo Klein & Boxer LLP ("Petrillo"). Wolf Aff. Ex. W. Petrillo represented Cohen in, among other things, the aforementioned congressional investigations, meetings with

the Special Counsel, the fallout from the April 9, 2018 FBI raids, and the New York Attorney General's Investigation of the Trump charitable foundation. *Id.* Ex. A.

In July 2018, prior to being charged with any crime, Cohen also engaged the Davis Goldberg & Galper PLLC firm ("Davis") to assist with his responses to the then-pending congressional and Special Counsel investigations. *Id.* Ex. X. Davis assisted Cohen in preparing for and attended his February 27, 2019 testimony before the House Committee on Oversight and Reform, described below. [NYSCEF Doc. No. 71 ¶ 6](#).

On August 7, 2018, weeks before Cohen would be charged with any crime, Cohen met with the Special Counsel's team to provide information in response to its inquiries. *Id.* ¶ 9. Between August and November 2018, Cohen provided more than 70 hours of testimony to the Special Counsel regarding ties between the Organization, its executives, the 2016 Trump Presidential Campaign, and the Russian government. *Id.* McDermott withdrew from representing Cohen before his first meeting with the Special Counsel's team and Cohen was prepared and represented in these meetings by Petrillo and Davis. Wolf Aff. Ex. A.

VI. COHEN PLEADS GUILTY

On August 21, 2018, Cohen pled guilty to eight criminal charges, including two counts of campaign finance violations, five counts of tax evasion (on his personal taxes), and making a false statement to a bank. [NYSCEF Doc. No. 71 ¶ 10](#). The counts for tax evasion and making a false statement to a bank did not relate to Cohen's employment with the Organization. *Id.* ¶ 11. The campaign finance charges arose from payments Cohen facilitated to women to buy their silence regarding their prior sexual relationships with President Trump and were made at the direction of President Trump. *Id.* ¶ 12.

On November 29, 2018, Cohen pled guilty to the additional charge of making false statements to Congress in his August 28, 2017 written submission to the HPSCI and SSCI and related testimony. *Id.* ¶ 13.

As reflected in the allocation summary previously provided to the Organization, Cohen does not seek recoupment in this case of any attorneys' fees for responding to his criminal cases, guilty plea, sentencing hearings, or Rule 35 petition seeking a sentencing reduction. Wolf Aff. Ex. A.

VII. COHEN ENGAGES NEW COUNSEL TO ASSIST WITH HIS RESPONSE TO THE INVESTIGATIONS

Due to the Organization's failure to pay Cohen's legal fees pursuant to its indemnification obligation, Cohen was unable to pay Petrillo in full for its services, including its representation of Cohen in responding to the Special Counsel's investigation. *Id.* Ex. F at 45:11–46:20. Petrillo ceased to represent Cohen in January 2019 and subsequently commenced an arbitration against Cohen seeking to collect its unpaid fees, which was settled in consideration of a commitment by Cohen to pay Petrillo \$350,000 following his release from prison. *Id.*

Cohen engaged Monico & Spevack ("Monico") in January 2019 to replace Petrillo and represent Cohen in connection with "Matters before the Southern District of New York, the House of Representatives and Senate Committees, the Office of Special Counsel and the New York Attorney General regarding their pending investigations." *Id.* Ex. N. None of the amounts for which indemnification is sought include any attorneys' fees or costs Monico incurred in dealing with Cohen's criminal cases. *Id.* Ex. A.

VIII. COHEN CONTINUES TO COOPERATE IN INVESTIGATIONS RELATED TO THE TRUMP ORGANIZATION

In September 2018, Elijah E. Cummings, the Ranking Member of the House Committee on Oversight and Government Reform (the "Oversight Committee"), sent letters to the White

House and the Organization requesting documents relating to President Trump's failure to accurately report debts and payments to Cohen, his personal attorney, for silencing women who alleged extramarital affairs before the election. *Id.* Ex. O. In furtherance of this inquiry, Representative Cummings also sought information from Cohen, which Cohen agreed to provide without requiring the Oversight Committee to serve a subpoena. *Id.* Ex. F at 220:15–221:5; 249:10–18.

Among the topics identified in the “Scope and Purpose” of the Oversight Committee’s hearing were Cohen’s knowledge regarding the President’s debts and payments relating to efforts to influence the 2016 election; the President’s compliance with tax laws; the President’s business practices; the Trump International Hotel in Washington, D.C.; and potentially fraudulent or inappropriate practices by the Trump Foundation. *Id.* Ex. P. Cohen appeared before the Oversight Committee and testified regarding these matters, and others, on February 27, 2019. [NYSCEF Doc. No. 71 ¶ 6](#).

A day later, Cohen testified before the HPSCI in a closed session, where he testified regarding, among other things: (1) “[t]he extent of any links and/or coordination between the Russian government, or related foreign actors, and individuals associated with Donald Trump’s campaign, transition, administration, or business interests, in furtherance of the Russian government’s interests”; and (2) “[w]hether any foreign actor has sought to compromise or holds leverage, financial or otherwise, over Donald Trump, his family, his business, or his associates.” Wolf Aff. Ex. Q. Cohen was advised and represented by Monico and Davis in his testimony before the Oversight Committee and the HPSCI. *Id.* Ex. A.

Cohen has also cooperated in investigations of the Organization by the New York State Office of the Attorney General (“NYAG”). *Id.* Ex. Y. On August 22, 2018, Cohen received a

subpoena from the NYAG seeking information in a lawsuit alleging that the Trump Foundation, President Trump, and his children had violated state charity laws. *Id.* Ex. R. Cohen cooperated in providing information requested by the subpoena. *Id.* Ex. Y. Cohen was advised first by Petrillo, and later by Monico in responding to this subpoena. *Id.* Ex. A. Cohen has continued to cooperate in additional inquiries received from the NYAG as well as the Manhattan District Attorney's Office ("Manhattan DA") regarding the Organization, including sitting for interviews earlier this year. *Id.* Ex. Y.

IX. THE TRUMP ORGANIZATION'S OPERATING AGREEMENT REQUIRES INDEMNIFICATION OF INVESTIGATIONS INVOLVING A FORMER EMPLOYEE

Cohen's rights to receive indemnification are set forth in Article VII of the Trump Organization's Operating Agreement (the "Operating Agreement"). *Id.* Ex. S. Section 7.2, titled "Right to Indemnification," provides:

- An individual "shall be indemnified by the Company against judgments, penalties . . . fines, settlements and reasonable costs and expenses (including, without limitation, attorneys' fees) actually incurred by such Indemnified Person in connection with a Proceeding."
- A Proceeding is defined as "any threatened, pending or completed claim, action, suit, or proceeding, whether civil, criminal, administrative, arbitral or investigative . . . by reason of the fact that he [the indemnitee] is the Member or he, she or it was or is the legal representative of or a manager, director, officer, partner, venturer, proprietor, trustee, employee, agent or similar functionary of the Company or the Member."

- Indemnification extends to “any inquiry or investigation that could lead to a Proceeding.”
- An “Indemnified Person” is a person “who was or is made a party or is threatened to be made a party to or is *involved in*” a Proceeding (emphasis added).
- “[T]ermination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Indemnified Person did not act in good faith in a manner which he, she or it reasonably believed to be in or not opposed to the best interests of the Company.”
- Under Section 7.3, the above indemnification rights are “deemed contract rights” and “continue as to a person who has ceased to serve in the capacity which initially entitled such person to indemnity.”

Id. at 8–9.

ARGUMENT

I. THE TRUMP ORGANIZATION MUST INDEMNIFY COHEN FOR ALL UNREIMBURSED ATTORNEYS’ FEES AND COSTS OF PETRILLO, MONICO, AND DAVIS

A. Cohen is Entitled to Indemnification Under the Plain Language of the Operating Agreement

Cohen satisfies all of the requirements for indemnification under Article VII of the Operating Agreement. There is no question that he is an “Indemnified Person,” which includes any person who has become “involved in” a Proceeding by reason of the fact that he was an officer and employee of the Organization. Wolf Aff. Ex. S at 8. By virtue of his position with the Organization, he became involved in the proceedings detailed above. The indemnification

rights afforded to Cohen under the Operating Agreement are contractual rights that vested while he was an officer of the Organization and, under Section 7.3, continue notwithstanding his departure from the company in January 2017. *Id.* at 9. The Operating Agreement's mandate that Indemnified Persons like Cohen "shall be indemnified" establishes that the Organization's indemnification obligation is mandatory, and not discretionary. *Id.* at 8.

The matters in which Petrillo, Monico, and Davis are owed fees are all "Proceedings," as that term is broadly defined in the Operating Agreement. These matters include the congressional investigations and inquiries by the HPSCI, the SSCI, the Oversight Committee, and the Senate Judiciary Committee; the Special Counsel's investigation; and the NYAG's investigations described above. Each is an investigation (or, at a minimum, an "inquiry") and the Operating Agreement's definition of "Proceeding" encompasses any "claim, action, suit, or proceeding, whether civil, criminal, administrative, arbitral, or *investigative*" (emphasis added), as well as "any inquiry or investigation that could lead to a Proceeding." *Id.* at 8.

The breadth of this language is substantial, as it does not require the investigation to be formal or commenced by a subpoena or other initiating document. A mere "inquiry" or "investigation that could lead to a Proceeding" suffices. *Id.* And the indemnitee need not be a party to the "Proceeding" to be indemnified; indemnification extends to matters that are only "threatened" or that "could lead to a Proceeding." *Id.* Indemnification is required whether the indemnitee is "a party" or "threatened to be made a party to" or is merely "involved in" a Proceeding. *Id.*

When the aforementioned investigations sought Cohen's testimony, whether by subpoena (as in the case of the NYAG's and HPSCI's investigations) or through requests or inquiries in letters or communicated orally (as with the other congressional investigations and the Special

Counsel's investigation), these requests rendered Cohen "involved in" an investigation that constitutes a "Proceeding" or, at a minimum, in an "inquiry or investigation that could lead to a Proceeding." *Id.* The topics of the investigations make clear that these investigators sought to "involve" Cohen so they could obtain information regarding the conduct of the Organization and its executives, including President Trump, that Cohen was privy to from his time as an officer and employee of the Organization. These inquiries, investigations, and requests triggered the Organization's indemnification obligations under Article VII of the Operating Agreement.

The Operating Agreement's indemnification provision includes no limitation whereby Cohen forfeits his rights if he cooperates with a government inquiry or investigation without requiring a subpoena, or if such cooperation is "voluntary" as implied in the Motion. [Mot.](#) at 9, 11–12, 17–18. Nor is there any provision that forecloses indemnification where cooperation with an investigation by an indemnitee is later cited by the indemnitee as warranting a reduced prison sentence.

The matters for which the Petrillo, Monico, and Davis firms' fees remain at issue in this litigation were "Proceedings" for which Cohen qualified as an "Indemnified Person" entitled to indemnification from the Organization.

B. The Trump Organization's Motion is Premised Upon Inaccurate and Disputed Facts

The Organization's contentions that Cohen is not entitled to indemnification under the Operating Agreement is unsupported, disputed, or both, and precludes summary judgment.

1. *Cohen's Cooperation with Investigators Began Long Before He Was Ever Charged with Any Crime*

Contrary to the Organization's assertions, Cohen's cooperation in various government inquiries and investigations of the Organization began before his criminal charges and guilty pleas in 2018 and before any possibility he acted to mitigate his sentence. Rather, Cohen's

cooperation in various government inquiries and investigations of the Organization began in 2017, first with his submission of a written statement and documents to the HPSCI and SSCI on August 28, 2017, and then followed by testimony before the SSCI on October 25, 2017. Wolf Aff. Ex. I ¶¶ 3, 6. Cohen's initial cooperation with Congress preceded the April 2018 FBI raids of Cohen's home and office by six months and the charging of Cohen with any crime by nearly a year.

The same is true with respect to Cohen's cooperation with the investigation of the Special Counsel, which first sought information from Cohen in 2017. This is reflected in McDermott's time entries, which show that it was coordinating with the Special Counsel's Office in response to information requests directed to Cohen in 2017. *Id.* Exs. M, T. Cohen's initial communications and first in-person meeting with the Special Counsel occurred before he was ever charged with a crime (Cohen's first in-person meeting with the Special Counsel was August 7, 2018; he was not charged until August 21, 2018). The Organization's contention that Cohen's cooperation with investigations by Congress, the Special Counsel, and the NYAG was solely undertaken in a self-interested and voluntary fashion following his guilty plea in order to mitigate his prison sentence is therefore demonstrably false.

Moreover, the notion that voluntary cooperation in investigations by Cohen in 2017 is to be afforded different treatment under the indemnification clause of the Operating Agreement from Cohen's continued cooperation in government investigations after his guilty plea is without basis in fact or law. The wheels for Cohen's cooperation with government investigations were put in motion in consultation with the Organization, its executives, and their counsel long before Cohen was ever charged with a crime or threatened with that possibility. *Id.* Exs. M, T. Cohen's later and continued cooperation with the Special Counsel, congressional committees (including

the Oversight Committee), and the NYAG after his guilty plea is likewise indemnifiable by the Organization under its Operating Agreement.

2. Cohen Acted in Good Faith

The Organization's sole contention in its Motion that Cohen did not act in "good faith," under the Operating Agreement, is that "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.'" [Mot.](#) at 12–13.

The remaining Matters for which Cohen is entitled to receive indemnification are separate from his criminal cases and Cohen has never been charged with committing any crimes in connection with those Matters. Cohen did not make a false statement to Congress or commit any other crime in his testimony to the Oversight Committee, the House and Senate Judiciary Committees, the Special Counsel (which functioned under the supervision of the Department of Justice, not Congress), or the NYAG. None of these Matters were criminal proceedings or matters in which Cohen committed or has been charged with committing any crime.

Moreover, the amounts that remain owed to Petrillo, Monico, and Davis in connection with Cohen's testimony given to the House and Select Intelligence Committees arose from testimony and documents Cohen provided in late 2018 and 2019 and not in connection with his prior 2017 testimony in which he made false statements to Congress. Indeed, these firms were not even engaged by Cohen at the time he made any false statements to the HPSCI or SSCI. As discussed above, Cohen's charge and guilty plea for making false statements to the HPSCI and SSCI was premised upon his August 28, 2017 written submission and October 25, 2017 testimony before the SSCI for which he was represented by McDermott. The Organization's attempt to bootstrap Cohen's guilty plea to making false statements to the HPSCI and SSCI in

2017 to infect and foreclose his claims for indemnification in other matters and in separate, subsequent testimony before those committees years later must fail.

In addition, the record in this case belies the notion that Cohen acted in bad faith to the Organization in making the 2017 false statements to Congress for which he pled guilty. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] demonstrates that

Cohen was acting in good faith and in what he believed was the best interests of the Organization in 2017. Moreover, Cohen’s guilty plea is not dispositive of a failure to act in good faith under the Operating Agreement (which expressly provides that a guilty plea does not create a presumption the indemnitee did not act in good faith).

At a minimum, this record suggests the existence of a question of fact regarding whether Cohen acted in good faith in the Matters that requires denial of the Organization’s Motion. Generally, whether a party to a contract has failed to act in good faith is a question of fact, not to be resolved by motion unless viewing the evidence most favorably to the nonmoving party, no reasonable trier of fact could find otherwise. *Dreni v. PrinterOn Am. Corp.*, 486 F. Supp. 3d 712,

731-32 (S.D.N.Y. 2020) (citing 23 Williston on Contracts § 63:22 (4th ed.)).¹ That is not the case here, and, accordingly, the Motion cannot be sustained.

C. The Trump Organization’s Motion Has No Support in the Law

1. *The Trump Organization Misstates the “By Reason of Fact” Standard*

Where indemnification rights may only extend to legal proceedings incurred “by reason of the fact” of the officer’s position *qua* officer, lawsuits resulting from activities that an officer pursues in his personal capacity, but not in his corporate capacity, do not confer indemnification or advancement rights. *Homestore Inc. v. Tafteen*, 888 A.2d 204 (Del. 2005).² But, contrary to the Organization’s contention, the line between actions taken in a personal vis-à-vis a corporate capacity is not drawn according to whether the director or officer acted detrimentally to the interest of the corporation, but instead on whether “there is a nexus or causal connection between any of the underlying proceedings . . . and one’s official corporate capacity . . . without regard to one’s motivation for engaging in that conduct.” *Id.* at 214. That requisite nexus or causal connection is present in each of the matters for which Cohen seeks indemnification.

¹ Cohen’s conduct is also distinguishable from the only case regarding “good faith” cited in the Motion, *Bansbach v. Zinn*, which involved an illegal scheme that resulted in a five-count felony indictment against both the indemnitee *and* the company. 1 N.Y.3d 1, 13 (2003). Unlike that case, the Organization did not suffer any harm based on any of the criminal counts to which Cohen pled guilty. Moreover, the Organization was not a co-defendant in Cohen’s criminal cases.

² The test for applying a “by reason of the fact” clause in a corporate indemnification provision articulated in *Homestore, Inc. v. Tafteen* has been followed by courts in this state. As noted by the Supreme Court for Nassau County in *Schlossberg v. Schwartz*, the “Delaware case law (including as it has been interpreted by the First Department), indicates that a broad interpretation of that phrase, which would include a wide array of claims that might be asserted against a director or officer, is warranted. 43 Misc. 3d 1224(A) at *13 (Sup. Ct. Nassau Cnty. 2014). Courts have shown some latitude in interpreting this language such that if there is a nexus or causal connection between any of the underlying proceedings and one’s official corporate capacity, those proceedings are ‘by reason of the fact’ that one was an officer or director.” *Id.*

Cohen's testimony was sought in certain of the Matters before any threat of or actual criminal charge against him. Investigations regarding the ties between President Trump, the Trump Organization, and the Russian government, including the investigations of the HPSCI and SSCI and the Special Counsel, sought Cohen's testimony based on his prior work for the Organization and knowledge of its dealings; not for any reason personal to Cohen.

Moreover, Congress and the Special Counsel first sought Cohen's testimony and documents in 2017, over a year before the FBI raided his home and office and over 18 months before he was charged with any crime.

The later investigations of (a) the House Oversight Committee of the President's compliance with tax laws and business affairs, and (b) the NYAG of the Trump Foundation likewise sought information from Cohen regarding the affairs of the Organization and its executives, not information regarding Cohen's personal affairs.

Cohen's motivation in complying with these inquiries and investigations at any point in time is irrelevant to the "by reason of the fact" determination. Cohen's subsequent citation of his cooperation in these inquiries and investigations in advocating for a reduced sentence is likewise irrelevant. Indeed, the Motion does not cite a single case in which a cooperating witness is denied indemnification for an investigation because he or she cites their cooperation in seeking leniency in sentencing.

2. *The Authorities Cited by the Trump Organization Are Inapplicable*

In straining to frame Cohen's involvement in the Matters as personal to him and therefore not subject to indemnification, the Organization's Motion relies upon authorities that have no bearing on Cohen's claim. In *Bensen v. American Ultramar Ltd.*, an executive was foreclosed from indemnification for a claim where he sued a company for which he was former director for amounts he alleged he was owed under his employment agreement. No. 92 Civ. 4420

(KMW)(NRB), 1996 WL 435039, at *1 (S.D.N.Y. Aug. 2, 1996). The company counter-claimed, alleging plaintiff had fraudulently negotiated the compensation he alleged was owed to him. *Id.* Indemnification was not available to the former director under Section 722 of Business Corporation Law (“BCL”) because the dispute involved whether he was owed compensation by his company under his employment agreement; the matter involved a claim and a benefit asserted by an individual to benefit the individual personally. *Id.* at *2–3

The same was true in *Tilden of New Jersey, Inc. v. Regency Leasing Systems, Inc.*, where the plaintiff sought corporate indemnification for expenses incurred in defending litigation based upon a personal guaranty he extended. 237 A.D.2d 431 (2d Dep’t 1997). Again, the proceeding at issue involved a personal matter (a personal guaranty) and did not implicate the indemnitee’s corporate capacity. *Id.*

Cohen is not embroiled in litigation over an employment dispute or personal financial matter and the Matters are not analogous to those cases. Rather, Cohen’s testimony and documents were sought by government investigators inquiring about the Organization and its executives—not Cohen. Accordingly, the Matters are squarely within the scope of the Organization’s indemnification obligations under its Operating Agreement and Section 420 of the LLC statute.

D. The Trump Organization Seeks to Create a New and Dangerous Precedent Inconsistent with Public Policy

The result sought by the Organization would deprive Cohen of the contractual indemnification protections he is afforded by the Operating Agreement and penalize him for his cooperation with government investigators. The Organization has identified no precedent for this outcome and establishing such a precedent in this case would contravene two significant public policy concerns.

First, granting the Motion would undermine New York's well-established policy of encouraging corporate service through protections such as indemnification. A business's ability to attract competent directors and officers would be greatly inhibited if the director or officer had to personally pay to defend lawsuits and investigations arising from his corporate capacity. *See Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d 659, 665 (2000). Indemnification clauses in corporate by-laws and operating agreements, as authorized by BCL Section 722 and Section 420 of the LLC, statute are intended to protect the indemnitees and encourage corporate service. Permitting the Organization to evade its indemnification obligations would undermine this policy.

Second, granting the Organization's Motion could have a chilling effect on cooperation in government investigations by indemnified persons. New York courts have recognized and fostered a public policy of encouraging full cooperation with criminal and other government investigations. *See, e.g., People v. Williams*, 113 N.Y.S.3d 489, 490 (2019) (acknowledging public policy of encouraging witnesses to cooperate with law enforcement). Without protection from the costs of cooperating in government investigations, including costs of counsel, afforded by indemnification, knowledgeable witnesses will be less likely to provide full cooperation with government investigations.

II. COHEN'S ADDITIONAL CLAIMS ARE VALID AND FACTUALLY SUPPORTED

A. The Oral Agreements Are Valid, Enforceable, and Material

The Organization's contentions regarding the oral agreements that Cohen pled in addition to his claims for indemnification based upon the Operating Agreement are unfounded in fact or law.

Cohen's full, unabridged testimony makes clear that the multiple oral commitments by the Organization to pay his legal fees incurred in the Matters were not agreements to modify the indemnification clause in the Operating Agreement. Rather, they were stand-alone commitments made by the Organization to Cohen that it would "take care of" his expenses for counsel in cooperating with various government investigations implicating the Organization. Wolf Aff. Ex. F at 137:14–138:25. The out-of-context, excerpted deposition testimony cited as a "gotcha" in the Motion is just that—an attempt by the Organization to put words in Cohen's mouth in order to avoid its obligations.

Cohen's complete testimony shows that (a) the oral agreements by the Organization to pay his expenses were different from the indemnification clause in the Operating Agreement and that the Operating Agreement and its terms were never mentioned, and (b) the commitment made by the Organization was to pay for Cohen's costs in the Matters and not for any particular firm's work on those Matters. The Organization orally agreed to pay all of Cohen's expenses in these Matters, not just those of McDermott or Blakely that have been resolved since the inception of this litigation. Cohen's claim for promissory estoppel likewise remains part of the case based on the same oral representations by the Organization that have been affirmed through discovery. Because the oral agreements were not framed as modifications of the indemnification clause in the Operating Agreement and were not limited to the McDermott and Blakely firms, those stand-alone agreements are valid, enforceable, and remain material in this case.

B. Cohen's Claim for Breach of the Implied Obligation of Good Faith and Fair Dealing was Properly Re-Pled in the Amended Complaint

The Organization's reliance upon aspects of the Court's August 28, 2019 ruling on its Motion to Dismiss as the "law of the case" is misplaced. In his 2020 motion seeking leave to file an amended complaint, Cohen submitted his proposed Amended Complaint that included the bad

faith claim, which was later filed after the motion for leave was granted. [NYSCEF Doc. Nos. 52, 111](#). The Amended Complaint included his re-pled Cause of Action for Breach of the Implied Obligation of Good Faith and Fair Dealing. [NYSCEF Doc. No. 111](#).

Moreover, Cohen's bad faith claim is not duplicative of his breach of contract claim, as he has alleged both a pattern and practice of breaches by the Organization, as well as independent tortious conduct by the Organization in breaching its obligations to Cohen (e.g. the Organization "repeatedly defamed and slandered Mr. Cohen's character and professional reputation"). *Id.* ¶¶ 10, 86–92. Cohen's bad faith count is part of the operative Complaint in this case and is distinct from his breach of contract claim.

C. Cohen is Entitled to Declaratory Relief with Respect to His Claims for Prospective Relief

Cohen continues to receive inquiries and requests for information from government investigators related to his prior work for the Organization that require the assistance of counsel and implicate the Organization's indemnification obligations under the Operating Agreement and pursuant to the parties' oral agreements. As stated above, earlier this year, Cohen received and responded to inquiries from the NYAG and the Manhattan DA seeking information related to his work for the Trump Organization. Wolf Aff. Ex. Y. Moreover, the possibility exists that Cohen could be recalled for additional testimony by various congressional committees, as he was in 2019 by the HPSCI and SSCI. The Organization's contention that Cohen no longer has any claims for prospective relief is therefore not correct and summary judgment should be denied on his claim for declaratory relief.

D. Summary Judgment on Cohen's Claim for Attorneys' Fees in Bringing This Action Would be Premature

Despite the Organization's contentions, neither the Operating Agreement nor Section 420 of the LLC statute forbid recovery of the fees incurred by Cohen in this action. The Court of

Appeals' decision in *Baker v. Health Management Systems, Inc.*, 98 N.Y.2d 80 (2002), is inapplicable here, as its holding solely concerned BCL Section 722(a) and did not address Section 420. Moreover, unlike BCL Section 722(a), which limits attorneys' fees to those that are "actually and necessarily incurred as a result of such action or proceeding," Section 420 states that "a limited liability company may, and shall have the power to, indemnify and hold harmless, and advance expenses to, any member, manager or other person . . . , *from and against any and all claims and demands whatsoever.*" (emphasis added).

Putting aside the substance of these arguments, which would warrant their own briefing, Cohen respectfully submits that addressing his claim for attorneys' fees at this juncture, with the merits of the case still in dispute, would be premature.

CONCLUSION

For the foregoing reasons, Cohen requests that this Court enter an order denying the Organization's Motion and awarding such other and further relief in favor of Cohen as it deems just and proper.

Dated: April 30, 2021
New York, New York

Respectfully submitted,

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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 6979. I further certify that this word count complies with the word count limit set forth in Rule 17 of Section 202.70(g).

Dated: April 30, 2020
New York, New York

/s/ Lauren K. Handelsman
Lauren K. Handelsman