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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

POINT I

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

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

1. SDNY Criminal Investigation And Convictions

Plaintiff, seeking to end-run the Court's prior law-of-the-case ruling, contended that the ruling does not preclude indemnification for fees incurred in connection with the search warrants. Defendant, however, showed that Plaintiff admitted, on at least ten occasions in this case, NYSCEF 158 at 5-7, that the investigation, which culminated in his conviction, included the search warrants. In opposition, Plaintiff fails to controvert Defendant's showing, thereby conceding the point. Madeline D'Anthony Enterprises, Inc. v. Sokolowsky, 101 A.D.3d 606, 609 (1st Dep't 2012). Accordingly, the Court should adhere to its prior ruling, clarifying that the ruling includes fees incurred in connection with the search warrants.

2. Mueller Investigation

a. Plaintiff Did Not Become Involved "By Reason Of The Fact That He Was An Employee"

Plaintiff does not contend that the language of the Operating Agreement is ambiguous. Therefore, the construction of that language presents a question of law for the Court. 1550 Fifth Avenue Bay Shore, LLC v. 1550 Fifth Avenue, LLC, 297 A.D.2d 781, 783 (2d Dep't 2002).

Defendant showed that the definition, and fundamental purpose, of indemnification is to hold employees harmless from the expenses of defending proceedings to protect corporate interests, not the expenses of going on the offensive to advance personal interests. BCL §722 Official Commentary ("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"); 2 White, New York Business Entities ¶ B722.01 (2020) (statutes provide "indemnification . . . against . . . expenses . . . incurred as a result of being made a party to [an] action . . . . [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 . . . was a director or officer of the corporation and not in connection with an action against him" in his "individual capacity"); NYSCEF 158 at 10 (citing additional authorities).

Here, the undisputed record shows that Plaintiff did not become "involved" in the Mueller Investigation "by reason of the fact that" he was an employee. That record, rather,

[redacted] Accordingly, Defendant has no duty to indemnify Plaintiff for fees incurred in the Mueller Investigation.

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In opposition, Plaintiff ignores Defendant's showings, ignores the cited authorities, and -- most tellingly -- ignores his deposition testimony, thereby conceding these showings. Plaintiff does contend, broadly, that his "motivation in complying with these inquiries and investigations at any point in time is irrelevant to the 'by reason of the fact' determination." NYSCEF 161 at 19. The sentence, however, stands at war with itself. A "[r]eason[]" is a "motive, or ground for action[,]" and a "[m]otive" is a "reason that moves the will and induces action." Black's Law Dictionary (6th ed. 1990). Plainly, the contractual "by-reason-of" inquiry asks why Cohen acted

as and when he did, which necessarily involves his motive or motivation for acting as and when he did.

Plaintiff also contends that the Operating Agreement does not provide that he "forfeits his rights if he cooperates . . . 'voluntarily[.]'" NYSCEF 161 at 14. As shown above, however, the exclusion of indemnification for expenses incurred in voluntary, self-interested activity enters the analysis via the contractual "by-reason-of-the-fact" language.

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Cohen next attempts to dispute the timeline of events. Cohen, however, admits that his "initial communications and first in-person meeting with the Special Counsel occurred" on August 7, 2018, just two weeks before the US Attorney charged him. NYSCEF 161 at 15. This admission proves Defendant's point. Cohen learned that he was about to be indicted, whereupon he began voluntarily to cooperate, seeking to mitigate his sentence. The timeline therefore remains undisputed.

Cohen also contends that the Special Counsel "sought Cohen's testimony and documents in 2017, over a year before the FBI raid[] . . . and over 18 months before he was charged with any crime." NYSCEF 161 at 19; id. at 15 ("McDermott[] . . . was coordinating with the Special Counsel[] . . . in 2017.") The point, however, is legally immaterial.

First, Cohen asserts no claim here for indemnification in connection with McDermott's work in 2017. [redacted]

Second, Cohen's contention does not change the timeline regarding the claim that Cohen does assert here, for work by Petrillo and Monico in 2018 and 2019. It remains undisputed that

Cohen, in 2018, knowing that he was about to be charged, began voluntarily to cooperate with the Special Counsel.

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Plaintiff contends that Tilden of New Jersey, Inc. v. Regency Leasing Systems, Inc., 237 A.D.2d 431, 431 (2d Dep't 1997), and Bensen v. American Ultramar Ltd., 1996 WL 435039 (S.D.N.Y Aug. 2, 1996), "have no bearing" because those cases involved, respectively, a "personal financial matter" and "an employment dispute[.]" NYSCEF 161 at 19-20. Here, by supposed contrast, "Cohen's testimony and documents were sought by government investigators inquiring about the Organization and its executives -- not Cohen." Id. at 20.

This contention, however, is far too superficial. Tilden and Bensen denied indemnification for fees incurred in defending claims, brought against employees (by a third-party in Tilden; by the corporation/employer in Ultramar) involving the employees' personal conduct (making a guarantee in Tilden; fraud in Ultramar). The courts denied indemnification because the applicable statute "affords indemnification . . . only for activity . . . undertaken for the benefit of the corporation[,]" not for personal activity, "even if the alleged conduct occurs while the [would-be indemnitee] is a director or officer[.]" Ultramar, 1996 WL 435039 at *2.

The same rule applies here. In connection with the Mueller Investigation, Cohen incurred fees in activity undertaken not for the benefit of Defendant, but for Cohen's personal benefit (cooperation to minimize his criminal exposure). Indeed, the rule of Tilden and Bensen applies a fortiori where, as here, the employee, Cohen, incurred fees not defending but taking the offensive.

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The Court will strictly construe an indemnification contract, such as the Operating Agreement, eschewing an expansive, but-for construction of its language. NYSCEF 158 at 8-10. In opposition, Plaintiff ignores, and therefore concedes, these legal rules.

Plaintiff nevertheless contends that "he became involved" in the investigations, including the Mueller Investigation, "[b]y virtue of his position with the [Trump] Organization." NYSCEF 161 at 12. The "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[.]" Id. at 14. Plaintiff further contends that his "voluntary cooperation . . . in 2017" and his "continued cooperation . . . after his guilty plea" must "be afforded" the same "treatment under the indemnification clause[.]" Id. at 15. In other words, Cohen's admission of criminal conduct makes no difference to the legal analysis, because "[t]he wheels for Cohen's cooperation . . . were put in motion in consultation with" Defendant "long before Cohen was ever charged with a crime or threatened with that possibility." Id.

These contentions, however, ignore the applicable rule of strict construction. They invoke, furthermore, precisely the kind of expansive, but-for-causation test rejected in Baker v. Health Management Systems, Inc., 98 N.Y.2d 80, 85 (2002). According to Plaintiff, all his activities and expenses relate back to, and flow from, his employment, no matter the intervening events, such as his decision to cooperate voluntarily to mitigate his sentence, and his guilty plea. The Court should reject this proposed construction of the contract because it has no principled stopping point. As Prosser famously warned: "[T]he consequences of an event go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. . . . [A]ny attempt to impose responsibility upon such a basis would result in infinite liability for all

wrongful acts and would set society on edge and fill the courts with endless litigation." Torts § 41 at 264 (1984) (internal quotation marks omitted). It is by no means "unmistakably clear" that the contract "contemplated" the perpetual performance and recovery sought by Plaintiff. 546-552 W. 146th St. LLC v. Arfa, 99 A.D.3d 117, 122 (1st Dep't 2012).

Plaintiff, finally, proposes his own test for causation, relying on non-binding Delaware law, Homestore, Inc. v. Tafeen, 888 A.2d 204, 214 (Del. 2005): "[T]he line between actions taken in a personal vis-à-vis corporate capacity is . . . drawn according to . . . 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.'" NYSCEF 161 at 18. Reliance on Homestore, however, is, misplaced.

Homestore involved a claim for advancement of litigation expenses, not for indemnification of such expenses; the two "are separate and distinct[,]" and "[t]he right to advancement is not dependent on the right to indemnification[,]" as Homestore itself acknowledges. 888 A.2d at 212. Indeed, the right to advancement "is greater than the right to indemnification" because "advances must be repaid if it is ultimately determined that the corporate official is not entitled to be indemnified." Id. at 212-13. Therefore, "[t]he limited and narrow focus of an advancement proceeding precludes litigation of the merits of entitlement to indemnification for defending one[s'] self in the underlying proceedings." Id. at 214. See Ficus Invs., Inc. v. Private Cap. Mgt., LLC, 61 A.D.3d 1, 9-10 (1st Dep't 2009) (recognizing, under Delaware law, distinction between advancement and indemnification; "advancement does not depend on whether or not the officer will eventually be indemnified.")

Here, by contrast, Cohen does not seek advancement; he seeks indemnification, with no duty to repay. Accordingly, Homestore's nexus-or-causal-connection test for the greater, more liberally-granted right to advancement does not apply here.[1]

In Homestore, furthermore, the governing corporate by-law gave the employee "an unconditional mandatory right to advancement." Homestore at 212. Here, by contrast, the Operating Agreement imposes conditions to the right to indemnification, as Cohen himself acknowledged in deposition testimony. Ex. F at 161:11-13.

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

Plaintiff does not dispute that Article 7.2 of the Operating Agreement establishes a condition precedent to Defendant's duty to indemnify -- [redacted] Nor does Plaintiff dispute that he admitted bad-faith, criminal conduct in connection with the Mueller Investigation. KACEx. C at 27:18-22 ("I submitted a written statement to Congress," which "was false -- I knew at the time[;]" 12:22-23 (conviction requires proof "that the false . . . statement was made knowingly and willfully").

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); Biondi v. Beekman Hill House Apartment Corp., 94 N.Y.2d 659, 666-67 (2000) (holding prior judgment against corporate official "dispositive[]" of issue of good faith). Plaintiff therefore did not satisfy the condition precedent to Defendant's duty to indemnify.

[1] Plaintiff also cites Schlossberg v. Schwartz, 43 Misc. 3d 1224(A) (Sup. Ct. Nassau County 2014). Schlossberg, however, like Homestore, involved advancement, not indemnification.

Plaintiff would distinguish Bansbach: (1) Bansbach involved criminal charges against both the corporate official and his corporation; (2) the corporation in Bansbach, supposedly unlike Defendant here, "suffer[ed] . . . harm based on . . . the criminal counts to which [Bansbach] pled guilty." NYSCEF 161 at 18 n.1. Plaintiff, however, points to differences without a distinction. Nothing in Bansbach turned on these factors. The Court directed summary judgment against Bansbach based on his own admissions in his own guilty plea. The Court should do the same against Cohen. Biondi, 94 N.Y.2d at 667 (party seeking indemnification "cannot relitigate" issue of good faith decided in prior federal judgment).

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Plaintiff contends that his "guilty plea is not dispositive of a failure to act in good faith under the Operating Agreement[,]" NYSCEF 161 at 17, [redacted]. This contention, however, betrays a misunderstanding of the definition and effect of an evidentiary presumption.

A presumption places, upon the adverse party, the burden of producing evidence to rebut the presumption, Kilburn v. Bush, 223 A.D.2d 110, 116 (4th Dep't 1996); that is, evidence to negative the existence of the presumed fact. Prince, Richardson on Evidence § 3-104 (2008). Once the adverse party produces such evidence, the presumption "disappears[,]" id.; "'[t]he case ceases to be one for presumptions, and becomes a case for proof[.]'" Id., quoting Magna v. Hegeman Harris Co., 258 N.Y. 82, 84 (1932) (Cardozo, J).

Here, the [redacted] Accordingly, this case is not "one for presumptions," but is rather "a case for proof." Magna, 258 N.Y. at 84. And, here, Defendant submitted proof -- going behind

the conviction itself -- of Plaintiff's undisputed admissions of criminal conduct (and hence, of bad faith). That submission carried Defendant's burden to "make a prima facie showing of entitlement" to summary judgment, and shifted the burden of production to Plaintiff. Madeline, 101 A.D.3d at 607. In opposition, however, Plaintiff failed to produce evidence disputing the material facts.

In sum, "the statute makes no presumption that the judgment [itself] proves" bad faith, but "reimbursement [is] precluded as a matter of law, if [as here] the judgment or conviction necessarily includes a finding of deliberate dishonesty or bad faith[.]" Pilipiak v. Keyes, 286 A.D.2d 231, 231-32 (1st Dep't 2001); Bansbach, 1 N.Y.3d at 12-13 (examining proof behind conviction (admissions in guilty plea) and concluding that undisputed admissions established bad faith as a matter of law); Biondi, 94 N.Y.2d at 666 (looking behind judgment and examining trial evidence, verdict and ruling of trial court).

Plaintiff next contends, "Generally . . . good faith is a question of fact[.]" NYSCEF 161 at 17-18. The cited case, however, Dreni v. PrinterOn Amer. Corp., 486 F. Supp. 3d 712, 731-32 (S.D.N.Y. 2020), did not involve undisputed proof of a conviction based on a guilty plea. Such proof, which exists here, "leave[s] no room for finding . . . good faith," Bansbach, 1 N.Y.3d at 13, and warrants summary judgment.

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Plaintiff, finally, contends that denial of indemnification here "would undermine" the "policy of encouraging corporate service through protections such as indemnification." NYSCEF 161 at 21. That policy, however, embodied in BCL §722 and LLCL §420, is not unconditional. On the contrary, the "'bad faith' standard' embodied in those statutes manifests a

[countervailing] public policy limitation on indemnification[,]" as recognized in Biondi, 94 N.Y.2d at 665, which Plaintiff himself cites.

That "bad-faith standard," viewed objectively, sets a low bar, which the overwhelming majority of potential corporate talent easily surmounts, although Cohen did not. Denial of indemnification in the flagrant circumstances presented here -- "a veritable smorgasbord of fraudulent conduct[,]"[2] committed by a self-proclaimed "gangster lawyer"[3] -- will not discourage honest candidates from corporate service.

Even further afield lies Plaintiff's invocation of a "public policy of encouraging full cooperation with criminal and other government investigations." NYSCEF 161 at 21. The cited case, People v. Williams, 65 Misc. 3d 1153 (Sup. Ct. N.Y. County 2019), has nothing to do with indemnification. Williams, rather, bars cross-examination of a prosecution witness concerning the status of that witness as an illegal alien, cross-examination that might "discourage[]" witnesses "from reporting crime[.]" Id. at 1156. Nothing in Williams suggests that summary judgment here will make "knowledgeable witnesses . . . less likely to provide full cooperation[,]" NYSCEF 161 at 21, or that a court should ignore or relax the good-faith standard for indemnification.

c. LLCL §420 Prohibits Indemnification

Even if the Operating Agreement did permit indemnification, LLCL §420 would prohibit indemnification. The judgment adverse to Plaintiff establishes that his acts "were[,]" in the

[2] KACEx. D at 31:11 (Pauley, J., at sentencing).
[3] See Cohen's book, Disloyal, A Memoir, 71-72 (2020) ("I wanted to be like Bugsy Siegel and Meyer Lansky and Roy Cohn . . . . I would practice law . . . but I'd practice it like a gangster."); 138 ("I purchased two Glock pistols, an ankle holster, and a waist holster . . . . Walking the streets of Manhattan with my hidden weapons giving an extra strut to my stride, I really had become . . . a gangster lawyer[.]")

statutory language, "committed in bad faith[;] were the result of active and deliberate dishonesty and were material to the [crime] . . . adjudicated" by Judge Pauley. NYSCEF 158 at 13-14. In opposition, Plaintiff ignores, and therefore concedes, this point.

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

1. House and Senate Select Intelligence Committees

For the reasons set forth above (and in Defendant's opening memorandum) regarding the Mueller Investigation, Plaintiff's claim fails as a matter of law. His guilty plea (a) proves that he did not satisfy the "good-faith" condition precedent to Defendant's duty to indemnify and (b) prohibits indemnification under LLCL §420.

Plaintiff contends that he raises a fact-question regarding good faith because he and his counsel "consulted with and sought input from [Defendant] and other participants in the joint defense group regarding his [false] written submission to [these Committees]." They supposedly did so by "circulat[ing] drafts" and "incorporat[ing] comments" from Defendant and its counsel. NYSCEF 161 at 17.

This contention fails, for two reasons.

First, Cohen does not, and cannot, point to any evidence that implicates Defendant, or any other member of the joint defense group, in criminal conduct, or imputes to them knowledge of the falsity of Cohen's Congressional statement. On the contrary, the evidence submitted by Cohen, an excerpt from the Mueller Report, keeps the onus squarely on Cohen, stating that "the substance" of Cohen's false statements was already "contained in an early draft prepared by Cohen and his counsel." Ex. E at 141 n.971.

Second, even if there were evidence implicating others, such evidence would be legally immaterial; it would not erase Cohen's bad-faith conduct. "The substantive offense[]" of

conviction, false statement under 18 U.S.C. §1001(a)(2), "do[es] not require more than one person for [its] commission; it could be[,]" and in this case was, "accomplished by a single individual[,]" Cohen himself. Pereira v. United States, 347 U.S. 1, 11 (1954). Cohen's "conviction does not turn on [any] agreement[]" with others. Id.

Cohen next contends that his "cooperation with Congress" in 2017 "preceded the April 2018 FBI raids" by six months "and the charging of Cohen" by ten months. NYSCEF 161 at 15. He contends that these Committees "sought Cohen's testimony based on his prior work for the Organization and knowledge of its dealings; not for any reason personal to Cohen." Id. at 19. Be that as it may, the contention is legally immaterial. Cohen fails the good-faith test. He therefore has no right to indemnification, even assuming that he became involved with these Committees "by reason of the fact that" he was an employee.

Plaintiff, finally, would distinguish expenses incurred in his 2019 involvement with these Committees from those incurred in 2017. NYSCEF 161 at 16-17. The only cited evidence, however, Ex. Q, is inadmissible hearsay. In any event, Ex. Q states that the 2019 activities merely continued the 2017 "inquir[ies], which "were not completed during the last Congress."

2. House Oversight Committee

Plaintiff did not become involved in this proceeding "by reason of the fact that" he was an employee. KACEx. K at 8-9. Rather, he became involved voluntarily, taking the offensive, advancing personal, not corporate, interests, as Cohen's Congressional testimony itself shows. NYSCEF 158 at 15-18. Plaintiff later submitted this testimony to Judge Pauley in support of his Rule 35 motion, KACEx. L ¶ 5, yet another voluntary effort, taking the offensive, advancing personal interests.

In opposition, Plaintiff ignores, and therefore concedes, all this. He does contend that he acted in good faith in that he "did not make a false statement to Congress or commit any other crime in his testimony to the Oversight Committee[,]" which was "separate from his criminal cases[.]" NYSCEF 161 at 16. Be that as it may, the contention is legally immaterial. Cohen fails the by-reason-of-the-fact-of-employment test. He therefore has no right to indemnification, even assuming that he acted in good faith.

Plaintiff, finally, contends that Defendant cites no "case in which a cooperating witness is denied indemnification for an investigation because he or she cites their [sic] cooperation in seeking leniency in sentencing." NYSCEF 161 at 19; id. at 14 (arguing that Operating Agreement contains no "provision that forecloses indemnification where cooperation . . . is later cited" in mitigation of sentence). The issue here, however, is not one of law but rather one of undisputed fact. By incorporating this Congressional activity into the SDNY criminal proceeding, Plaintiff made this activity part of a matter for which the Court has precluded indemnification.

3. House And Senate Judiciary Committees

For the reasons set forth above (and in Defendant's opening memorandum) regarding the House Oversight Committee, this claim fails as a matter of law. Defendant incorporates those arguments here by reference.

C. Plaintiff Has No Claim For Indemnification In Connection With The NYAG Investigation

For the reasons set forth above (and in Defendant's opening memorandum) regarding the House Oversight Committee and the House and Senate Judiciary Committees, this claim fails as a matter of law. Defendant incorporates those arguments here by reference.

Cohen, citing Ex. R, contends that the NYAG subpoenaed him. NYSCEF 161 at 10-11. Ex. R, however, a hearsay news-article, attaches no subpoena.

D. Plaintiff Cannot Recover Fees-On-Fees

Plaintiff would distinguish Baker, 98 N.Y.2d at 88; Baker construed BCL §722(a), which arguably contains language broader than that of LLCL §420. The First Department, however, has rejected this supposed distinction, holding, in precedent binding here, that §420 does not allow fees-on-fees. Arfa, 99 A.D.3d at 121.

Plaintiff contends that adjudication of this claim "would be premature." NYSCEF 161 at 24. This contention is meritless. The passage of time will increase the amount of claimed fees-on-fees but will not change the legal question now presented.

POINT II

THE ALLEGED
ORAL AGREEMENTS ARE
UNENFORCEABLE AND IMMATERIAL

A. The Alleged Oral Agreements Are Unenforceable

GOL §15-301(1) makes the alleged oral agreements unenforceable. NYSCEF 158 at 19-21. In opposition, Cohen contends that the oral agreements fall outside the reach of the statute. According to Cohen, the oral agreements "were not agreements to modify the indemnification clause in the Operating Agreement[,]" but were, rather, "stand-alone commitments" to "'take care of'" Cohen's "expenses[.]" NYSCEF 161 at 22. This contention fails as a matter of law.

On this question, the Court asks whether the oral agreement addresses an issue already covered or governed by the written agreement, and alters the written terms. If it does, then the oral agreement "change[s]" the written agreement within the meaning of the statute, and is unenforceable. If, by contrast, the oral agreement does not address such an issue, then the oral

agreement may constitute an enforceable, separate, additional agreement. Weslowski v. Zugibe, 167 A.D.3d 972, 974 (2d Dep't 2018) (where written agreement already "governed" issue of "plaintiff's entitlement to [employment] leave . . . oral promise that the plaintiff would not lose accumulated leave upon the termination of his employment was not binding"); Tierney v. Capricorn Invs., L.P., 189 A.D.2d 629, 631 (1st Dep't 1993) (oral agreement to pay "additional bonus" unenforceable where "inconsistent with the terms of" written agreement that already addresses issue of compensation); Heydt Contracting Corp. v. Tishman Const. Corp., 163 A.D.2d 196, 197 (1st Dept 1990) (oral agreement enforceable where it "relates to issues not addressed in the [written] contract").

The Court, furthermore, will "view[] the matter realistically[.]" Bakhshandeh v. American Cyanamid Co., 8 A.D.2d 35, 37 (1st Dep't 1959), aff'd, 8 N.Y.2d 981 (1960). The Court will not allow an "obvious[] . . . mere[] attempt[] to change 'orally' the written agreement" to masquerade as "a new and separate contract." Id.

Here, the oral agreements certainly address or relate to an issue already covered in, and/or governed by, the written Operating Agreement -- the duty to indemnify, including the terms of, extent of, and conditions to, that duty. And, the oral agreements certainly alter the written terms, which according to Plaintiff, morph from the detailed, conditional scheme set forth in the Operating Agreement to a general, unconditional promise to "take care of" Cohen's expenses. Indeed, even now, Cohen admits that "the oral agreements . . . were different from the indemnification clause in the Operating Agreement." NYSCEF 161 at 22. And Plaintiff's deposition testimony admitted, repeatedly, that [redacted]. NYSCEF 158 at 21 n.1. The oral agreements therefore fall within the statute's reach and are unenforceable.

Plaintiff contends that the cited deposition testimony is a "'gotcha[;]'" an attempt "to put words in Cohen's mouth[.]" NYSCEF 161 at 22. The contention, however, borders on frivolous. Defense counsel conducted an orthodox cross-examination, using leading questions, which Cohen, a sophisticated litigant -- indeed, a former lawyer [redacted] -- answered. And, of course, if this contention had any merit, Cohen would have submitted an affidavit in opposition to this motion, supplementing the answers that were "put in his mouth." Of course, Cohen did not do so.

Cohen, finally, contends that the oral agreements "were not framed as modifications" of the written agreement. NYSCEF 161 at 22. The legal question, however, is not how the parties "framed" the oral agreements but whether the oral agreements "have the effect of modifying the terms and conditions of the [O]perating [A]greement[,]" Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC, 107 A.D.3d 788, 790 (2d Dep't 2013), or "operate to modify" those terms. Gerard v. Cahill, 66 A.D.3d 957, 959 (2d Dep't 2009). Here, clearly, the oral agreements would have such effect and would so operate.

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

Cohen contends that the oral agreements remain material to his claims because those agreements extend to "all of Cohen's expenses . . . not just those of McDermott or Blakely[,]" [redacted] NYSCEF 161 at 22. The Amended Complaint, however, makes binding judicial admissions refuting this contention. NYSCEF 111 ¶¶ 38, 54-56 (alleging agreement regarding McDermott only); 51-53 (alleging agreement regarding Blakely for Daniels/Clifford work only).

POINT III

PLAINTIFF'S THREE
OTHER CAUSES OF ACTION
FAIL 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 claim as "duplicative of [the breach of] contract claim[.]" NYSCEF 29 at 23. Plaintiff does not, and cannot, explain why that holding is not law of the case.

In any event, assuming the Court revisits this issue, the claim fails as a matter of law.

This claim falls with the claim for breach of contract. A "claim for breach of the implied covenant . . . may not be used as a substitute for a non-viable contract cause of action[.]" Austin v. Gould, 137 A.D.3d 495, 496 (1st Dep't 2016).

In the alternative, this claim "cannot be maintained" where, as here, "it is premised on the same conduct that underlies the breach of contract cause of action[,] and is intrinsically tied to the damages allegedly resulting from a breach of the contract[.]" MBIA Ins. Corp. v. Merrill Lynch, 81 A.D.3d 419, 419-20 (1st Dep't 2011) (internal quotation marks omitted).

Plaintiff seeks to evade this rule, contending that he alleges "a pattern and practice of breaches by [Defendant], as well as independent tortious conduct[,]" in that Defendant repeatedly "defamed" Cohen. NYSCEF 161 at 23. This contention -- for which Plaintiff cites no authority -- is meritless. These contentions do not change the allegedly actionable conduct (failure to indemnify), and Plaintiff's claim remains tied to damages allegedly resulting from the breach (failure to pay amounts due as indemnification).

B. Plaintiff Has No Cause Of Action For Promissory Estoppel

This claim fails because the parties have a written contract. NYSCEF 158 at 22. In opposition, Plaintiff ignores, and therefore concedes, the point.

C. Plaintiff Has No Cause Of Action For Declaratory Judgment

Plaintiff's claim for a declaratory judgment merely repackages his contention that the Court should construe the Operating Agreement to give Plaintiff indemnification, [redacted], in connection with any investigation "related to" his prior employment. NYSCEF 161 at 23. As shown above, this claim fails because it invokes an overly-expansive, but-for test. This claim also ignores the rule -- which Plaintiff does not dispute, and therefore concedes -- that a court will not construe a contract so as to place one party "at the mercy of the other[.]" Reiss v. Fin. Performance Corp., 97 N.Y.2d 195, 201 (2001).

CONCLUSION

The Court should grant Defendant's motion for summary judgment.

Dated: New York, New York
May 14, 2021

MUKASEY FRENCHMAN LLP

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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 4,953. 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
May 14, 2021

/s/ Kenneth A. Caruso
Kenneth A. Caruso