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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 3

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MICHAEL D. COHEN,

PLAINTIFF,

-against-

Index No:  
651377/2019

TRUMP ORGANIZATION LLC,

DEFENDANT.

-----X

Via Skype Proceedings  
August 20, 2020

B E F O R E:

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J U S T I C E

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VANESSA MILLER  
Senior Court Reporter

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1 THE COURT: Okay. Counsel, can we start with  
2 entering your appearances starting with the plaintiff?

3 MR. WINSTEAD: Yes, your Honor.

4 Hunter Winstead of Gilbert LLP on behalf of  
5 plaintiff, Michael Cohen.

6 THE COURT: Good afternoon.

7 MS. HANDELSMAN: And also Lauren Handelsman,  
8 Binder & Schwartz, also on behalf of Mr. Cohen.

9 THE COURT: Good afternoon.

10 MR. WOLF: Daniel Wolf for Mr. Cohen from Gilbert  
11 LLP as well.

12 MR. MUKASEY: Good afternoon, Judge.

13 This is Marc Mukasey. I believe my partner, Jeff  
14 Sklaroff, is on the line as well, and we represent the  
15 defendant, Trump Organization.

16 THE COURT: Okay. So I would ask that when you're  
17 not speaking, that you go on mute because that will help  
18 avoid peopling cutting in and out for the court reporter;  
19 okay? All right. Thanks.

20 Here's how I'd like to organize this just to keep  
21 things straight in my head: I'd like to start with the  
22 claims with respect to criminal proceedings and then have  
23 the back and forth on that and then move onto the  
24 non-criminal proceedings. And I think I'm going to do this  
25 mostly leading with the motion for summary judgment. And I

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1 think that will cover most of what will feed into the motion  
2 to amend the complaint. I think that's just a more  
3 efficient way to do it.

4 So I'm going to start with either Ms. Handelsman or  
5 Mr. Mukasey on the motion for summary judgment with respect  
6 to criminal proceedings.

7 MR. WINSTEAD: Your Honor, this is Hunter Winstead  
8 on behalf of Michael Cohen.

9 The motion for summary judgment is really the Trump  
10 Organization's motion. So --

11 THE COURT: I'm sorry. I did want to start with  
12 you anyway.

13 MR. WINSTEAD: Okay.

14 THE COURT: So I have the right name, the wrong  
15 party.

16 So, obviously, there's law to the effect that you  
17 can't be indemnified for criminal conduct, and that's true  
18 both under the operating agreement, and more importantly,  
19 under New York law. So what is the argument for seeking  
20 legal fees in connection with the criminal proceeding that  
21 indisputably led to a conviction?

22 MR. WINSTEAD: Thank you, your Honor.

23 So I start at the outset by maybe reminding us a  
24 little bit of where we've been in this case and sort of  
25 where we are: So when we filed our initial complaint, we

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1 were seeking indemnification from the Trump Organization for  
2 11 separately enumerated matters, and those are listed  
3 specifically in both our original complaint and now our  
4 amended complaint. Of those 11 matters, two of them are  
5 criminal proceedings. The others are all -- the other nine  
6 are investigations, civil proceedings, congressional  
7 inquiries, subpoena from the New York Attorney General. So  
8 I start with the notion that we're only talking about two of  
9 the 11 matters for which Mr. Cohen is seeking  
10 indemnification.

11 Based on the Court's initial ruling on the statute  
12 of frauds issue, because in August of last year, the two  
13 criminal matters were effectively taken out of our  
14 litigation and have not been sort of the subject of active  
15 ongoing discovery in any sense. But, if you're asking for  
16 how you get to those two particular matters being quote "in  
17 the case", which I think is how we thought about this prior  
18 to this point, I would point out the following: There's a  
19 couple of -- the two sources of information that people are  
20 pointing to in terms of whether these matters are in or out,  
21 and what that means for the case more broadly, are Section  
22 420 of the New York limited liability statutory regime, and  
23 then the particular indemnification provision, Section 7.2  
24 of the operating agreement for the Trump Organization.

25 Specifically, the statute which is referenced in

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1 the parties' pleadings precludes indemnification by an LLC  
2 if you've got a judgment or final adjudication that's  
3 adverse and establishes that the acts were committed in bad  
4 faith or were the results of active or deliberate dishonesty  
5 and were material to the causes of action so adjudicated;  
6 or, B, "the individual seeking indemnification personally  
7 gained, in fact, a financial profit or other advantage to  
8 which he or she was not legally entitled"; that particular  
9 statutory provision does not speak in terms of criminality  
10 or criminal action, unlike the LLC agreement, which we'll  
11 look at in a minute. It does speak in terms of bad faith,  
12 deliberate dishonesty and then improper profiting or  
13 advantage. Although we haven't done discovery on this  
14 because these particular two matters haven't been part of  
15 our case to date, I don't think that there's really any  
16 question that Mr. Cohen profited personally from the two  
17 criminal aspects of the criminal count against him that  
18 involved or relate to the Trump Organization.

19 The things that he pled guilty to doing that relate  
20 to the company, as distinct from himself, you know, so  
21 distinct from the tax evasion charges and distinct from the  
22 making of false statements to a bank on a home equity, like,  
23 you know, the two things that he pled to were two counts of  
24 improper campaign finances contributions in connection with  
25 payments he made to women in connection with confidential

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1 settlements to buy their stories about alleged affairs with  
2 the head of the Trump Organization; and then a separate  
3 individual count for making false statements to Congress in  
4 connection with his 2017 testimony regarding the Trump Tower  
5 Russia project. There is nowhere that I can plausibly see  
6 how, by facilitating payments to these individuals or  
7 through his testimony and that one particular congressional  
8 hearing, he improperly profited or gained any sort of  
9 advantage that would implicate Section 420.

10 There are --

11 THE COURT: Hang on.

12 420 talks about "acts that were committed in bad  
13 faith or were the result of active and deliberate  
14 dishonesty", that sounds pretty close to what he was  
15 convicted of.

16 MR. WINSTEAD: Well --

17 THE COURT: Exactly what he was convicted of.

18 MR. WINSTEAD: Well, your Honor, I,  
19 respectfully -- let's parse that because I think we need to  
20 look at closely what exactly he was convicted of. Again,  
21 putting the tax evasion charges and the statement to the  
22 bank issue to the side, which is personal to him, but, you  
23 know, the bad-faith aspect of this statute is applied and  
24 discussed in some of the case law is really with respect to  
25 whether you're acting in good faith to the organization as

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1           opposed to in your own interest. In other words, this is  
2           not a situation where Mr. Cohen was looting the company or  
3           stealing from it; this is not a case where he was imparting  
4           upon some self-motivated conduct that would benefit himself  
5           to the detriment of the company.

6                       We see some of the cases cited in the papers, like  
7           the Biondi case and the Kaufman case. In Biondi, there was  
8           an individual who was engaging in racial discrimination in  
9           an apartment co-op complex to the detriment of the co-op.  
10          The finding there was you couldn't be acting in good faith  
11          to the co-op as an individual if you're engaging in racial  
12          discrimination that hurts the co-op --

13                      THE COURT:   Isn't this also partly to avoid having  
14          a company assess the fund or facilitate criminal behavior by  
15          its employees?

16                      MR. WINSTEAD:   I think that there is an element of  
17          that, certainly, your Honor. But I think here, you know,  
18          what was undertaken by Mr. Cohen was an effort to further an  
19          advantage of the Trump Organization, both due to his  
20          congressional testimony and with respect to the payments to  
21          these individuals to buy their stories. It was undertaken  
22          not to benefit himself, but to benefit the company, and,  
23          actually, the gravamen of the case law --

24                      THE COURT:   Well, let me understand your argument.  
25                      So if the company is engaged in criminal behavior

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1 and one of its employees is part of that criminal behavior,  
2 the company can indemnify him for that behavior; is that the  
3 way you read it?

4 MR. WINSTEAD: No, no. Certainly, your Honor.

5 I would say that when an individual, who's  
6 potentially indemnifiable, undertakes acts for the benefit  
7 of the company as distinct from himself, or herself --

8 THE COURT: The benefit of the company in  
9 connection with a crime.

10 MR. WINSTEAD: Well, an act that, yeah, that's  
11 subsequently determined to be criminal. In that context  
12 where the individual acts in good faith and for the benefit  
13 and in the interest of the company, there are cases out  
14 there that say the good-faith aspect of it, notwithstanding  
15 a criminal conviction, can be satisfied and is not  
16 implicating.

17 THE COURT: Okay. Why don't you move onto the  
18 operating agreement?

19 MR. WINSTEAD: Okay. The operating agreement is a  
20 bit different in terms of the language. And I would point  
21 you to the authorities we cite in our briefing where there  
22 are criminal convictions and nonetheless the individual can  
23 be indemnified. And it's particularly acute in a case where  
24 the individual, really, sort of bears the consequences but  
25 there's no co-defendant status for the parent company or for

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1 the entity. And the Trump Organization was not, you know,  
2 brought into any of the matters as a co-defendant for Mr.  
3 Cohen --

4 THE COURT: Are we still on the statute or are you  
5 back under the operating agreement?

6 MR. WINSTEAD: I'm on the statute. I'll move to  
7 the operating agreement right now, sir, per your  
8 instruction.

9 THE COURT: In the last form.

10 MR. WINSTEAD: So there's a similar but slightly  
11 different standard under the operating agreement. The  
12 operating agreement provides that, "the individual can be  
13 indemnified if the indemnified person acted in good  
14 faith" -- so that's similar to the statute -- "and in a  
15 manner he, she or it reasonably believed to be in or not  
16 opposed to the best interest of the company." I think that's  
17 a similar standard to what we've seen in the statute. And  
18 then it gets into, "with respect to any criminal acts or  
19 proceeding, had no reasonable cause to believe his, her or  
20 its conduct was unlawful", and then it goes onto describe --  
21 "the indemnity's conduct as not being gross negligence or  
22 willful or wanton misconduct."

23 The indemnification provision, Section 7.2, goes  
24 onto provide that, "the determination of any action, suit or  
25 proceeding by judgment, order, settlement, conviction or

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1 upon a plea of nolo contendere, or its equivalent, should  
2 not, in and of itself, create the presumption that the  
3 indemnified person did not act in good faith and in a manner  
4 which he, she or it reasonably believed to be in or not  
5 opposed to the best interest of the company or with respect  
6 to any criminal action or proceeding if the indemnified  
7 person had reasonable cause to believe that his, her or its  
8 conduct was unlawful."

9 THE COURT: Well, we have more than a nolo  
10 contendere. We have a fairly extended allocution and a list  
11 of answers to questions admitting to guilt, admitting to all  
12 sorts of things. So while a presumption, that may be fine  
13 if you're convicted despite maintaining your innocence, but  
14 you've got a lot more than that here.

15 MR. WINSTEAD: I would say, yeah. The allocution  
16 that you've obviously read, your Honor, speaks for itself,  
17 but I think that the purpose of this language, which is  
18 enforceable and has been upheld and is, indeed, part of the  
19 statutory regime in many jurisdictions is, I think, a  
20 recognition that individuals plead guilty to offenses for a  
21 variety of reasons; to mitigate their risk. It's not  
22 necessarily definitively an establishment of everything they  
23 did or didn't do in connection with what's alleged, it's a  
24 resolution of the matter. And, ultimately, you know, the  
25 onus is on the company here, separate and apart from that

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1 proceeding, to establish that there's no entitlement to  
2 indemnification. The allocution and the plea is not  
3 sufficient.

4 THE COURT: So your understanding is that an  
5 in-court admission to specific facts is not binding; is  
6 that right?

7 MR. WINSTEAD: I wouldn't say that it's not  
8 binding, but I would say that it's not determinative and not  
9 the entirety of the story.

10 THE COURT: Okay. Mr. Mukasey, you want to start  
11 on the criminal part and then we'll -- I recognize, at least  
12 I thought there was still potentially some fees that you're  
13 seeking under the original complaint. But let's just say  
14 either on the original complaint or the proposed amended  
15 complaint, since we're going to be dealing with that anyway.

16 So, Mr. Mukasey, over to you as to whether they  
17 have any possible claim with respect to criminal  
18 proceedings.

19 MR. MUKASEY: So, Judge, the distinction that I  
20 draw here is not really between the criminal proceedings  
21 claims or the civil proceedings claims. The issue here is  
22 this: The question is obviously one of indemnification.  
23 And I think your Honor is leaning in the right direction, or  
24 putting your fingers on the right issues, the criminal  
25 guilty plea blocks Michael Cohen, forecloses Michael Cohen

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1 for indemnification under the operating agreement in New  
2 York State law for all his claims, for everything. Not  
3 civil or criminal, but for everything. And let me explain  
4 why:

5 Michael Cohen's guilty plea, both to what he admits  
6 were personal crimes, bank fraud, tax evasion, false  
7 statements to Congress, and those that he claims he  
8 performed for the benefit of, or at the behest of the Trump  
9 Organization, were all knowing and willful. They all fall  
10 under Section 420 of New York's Limited Liability Company  
11 Law, that is 420(a), his or her acts were committed in bad  
12 fact as a result of active and deliberate dishonesty, et  
13 cetera. His guilty plea to all nine counts was knowing and  
14 willful. It's on the record. It's under oath.

15 Now, we are not relying on the presumption, or, I  
16 should say, the anti-presumption clause of the operating  
17 agreements. Under Court of Appeals, I think it's Judge  
18 Kaye's opinion, in Bansbach versus Zinn, 420 of the LLCL sub  
19 A, the guilty plea to knowing and willful conduct bars  
20 indemnification, it forecloses indemnification, period, end  
21 of sentence. If the guilty plea, standing alone, the  
22 allocution, standing alone that your Honor mentioned were  
23 not enough, well, you have the Court's -- Judge Pauley's  
24 observations that the crimes were committed for personal  
25 greed and ambition, and you have the US Attorney's office

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1 sentencing memo to the same effect.

2 Whether he committed campaign finance crimes at the  
3 Trump Organization's behest or not, which, by the way, is  
4 not in the pleadings or in the motion, the evidence attached  
5 to the motions, is a red herring. If he had not acted  
6 knowingly and willfully in bad faith, the judgment would  
7 not, could not have accepted his guilty plea. Think of it  
8 this way, Judge: If he were acting at the Trump  
9 Organization's behest and he were acting under duress or he  
10 were acting without knowing that what he was doing was  
11 wrong, or he was acting through some mistake, he could've  
12 gone to trial and been acquitted, and, frankly, Judge Pauley  
13 would not have accepted his guilty plea if that were the  
14 case, but that's not what happens. His actions, whether or  
15 not they were on behalf of the Trump Organization, whether  
16 or not the Trump Organization benefited from them -- and  
17 there's no evidence in this record that suggest they did,  
18 whether or not he has admitted under oath that he acted  
19 knowingly, willfully and in violation of the law, the guilty  
20 plea was accepted; that forecloses, Judge, that bars  
21 indemnification for every count that -- every engagement,  
22 every dollar that he is seeking, period.

23 THE COURT: So you're saying that if there is an  
24 admission to criminal liability as to Act 1, that bars  
25 indemnification in proceedings that might relate to Acts 2,

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1 3 and 4?

2 MR. MUKASEY: Well, let me back up.

3 First of all, just to address Mr. Winstead's issue  
4 about the reason people plead guilty, this was not a guilty  
5 plea to a strict liability crime. In other words, the Court  
6 did not have to find that I acted in bad faith or I acted  
7 knowingly and willfully in order to accept my plea. With a  
8 strict liability crime, that might be the case and Cohen  
9 could conceivably say, I pled guilty but I'm not really  
10 guilty, or, I did not act in bad faith, I did not have a  
11 criminal state of mind; that's not what's happening here.  
12 What's happening here is knowing and willful admissions to  
13 every crime.

14 Now, with respect to his claims in this case, he's  
15 asking for indemnification on -- and there's no  
16 correspondence, Judge. There's no relationship here between  
17 what he pled guilty to and the attorney's fees that he's  
18 seeking. There's not a one-to-one correspondence is a  
19 better way to say it. There is no one-to-one  
20 correspondence. What he's seeking indemnification for in  
21 the case before your Honor is legal fees relating to the  
22 congressional investigations related to the Southern  
23 District New York criminal investigation related to various  
24 civil proceedings, related to fallout, shall we say, from  
25 his criminal conviction.

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1           The way to look at this, in my opinion, I  
2           respectfully submit, is that the criminal conviction bars  
3           all of this. The admission that the conduct was knowing and  
4           willful bars all of it; that precludes him from being able  
5           to amend and add the operating agreement because the  
6           operating agreement, the law says if the amendment is  
7           futile, which it is here because he acted knowingly and  
8           willfully, then you can deny leave to amend.

9           Now we lead over to your question to the summary  
10          judgment issue, I think.

11          THE COURT:   Isn't that a proceeding by proceeding  
12          question? In other words, I know there were various senate  
13          proceedings, for example, and, you know, hypothetically or  
14          at least by allegation, you're called to testify as an  
15          employee and you talk about many, many things, those may be  
16          outside the ambit of what he pled guilty to. And so  
17          why -- are you saying that once somebody sort of has The  
18          Scarlet Letter of having been convicted of something, they  
19          can't seek indemnification for anything even if it had no  
20          direct connection to what they pled guilty for?

21          MR. MUKASEY:   If you plead guilty to campaign  
22          finance violations, for example -- and the short answer to  
23          your question is no, right? There can certainly be lawsuits  
24          against Michael Cohen for what he did at the Trump  
25          Organization that have zero to do with his guilty plea. I

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1 think that's the answer to your question.

2 THE COURT: Right.

3 MR. MUKASEY: I agree that that's, theoretically,  
4 possible; that's not what's on the table here. What's on  
5 the table here is what was the state of play in July 2017;  
6 right? The state of play in July 2017, under your Honor's  
7 order in response to the motion to dismiss, your Honor said  
8 before this leave to amend, your Honor said that what was on  
9 the table for July 2017 may go forward and Mr. Winstead took  
10 discovery. But what happened after July 2017 was off the  
11 table for various reasons, parole evidence issues and public  
12 policy issues. The question was what was on the table in  
13 July 2017. What was on the table in July 2017 were two  
14 congressional investigations --

15 THE COURT: Can I interrupt you?

16 Can people go on mute? Somebody is getting some  
17 outdoor noise. So if everybody can go on mute while Mr.  
18 Mukasey is talking.

19 MR. MUKASEY: See, the operating agreements and  
20 the Section 420 of the LLCL, it only really comes into play  
21 on the motion for leave to amend, because going by the  
22 original complaint, just setting aside the motion for leave  
23 to amend for a moment, only those matters, as defined by  
24 your Honor that were on the table that were existing and  
25 that were known in July of 2017, were indemnifiable, if you

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1 will, under your Honor's orders; that was as of July 2017,  
2 two congressional investigations and the Mueller Special  
3 Counsel investigation.

4 The plaintiff concedes at Paragraph 32 of this  
5 complaint, the original complaint, that the Trump  
6 Organization paid all or parts of the bills covering those  
7 matters, the matters that were pending in July of 2017. And  
8 in our submission, we prove that, we show that. We gave the  
9 McDermott, Will & Emery bills that were paid; there is no  
10 dispute about that. Now, if everything was paid, and there  
11 is no dispute about that related to what was on the table in  
12 July 2017, then his claim for legal fees for all the other  
13 matters, for all the other matters, are barred by what we  
14 say is the June 1st settlement and release.

15 THE COURT: Right. You're onto a different -- I  
16 believe I'm still trying to tie off the criminal conduct bar  
17 under the law. And so I think I get your point is that  
18 some, but probably not all -- well, some of the other  
19 claims, even if they weren't directly in connection with the  
20 Southern District of New York investigation might, you  
21 argue, still be precluded by the statute because it involves  
22 conduct that falls within the scope of the -- okay. I get  
23 it. I think there is a bit of a --

24 MR. MUKASEY: You know, plaintiff's papers make  
25 clear that all of this conduct flowed from the plaintiff's

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1 work with the Trump Organization, and I don't agree or  
2 disagree with that. My only point is that the bad faith,  
3 the knowing and willful misconduct, knocks out all the legal  
4 fees that they are seeking for all the matters they are  
5 seeking it for, not necessarily for some other unrelated, I  
6 don't know, you know, hypothetical event. It has nothing to  
7 do with senate investigations, congressional investigations,  
8 the Mueller investigation, the Southern District's  
9 investigation. But, certainly everything that he is seeking  
10 legal fees for in the case before your Honor falls under  
11 knowing and willful bad conduct and is, therefore,  
12 precluded.

13 THE COURT: Let's move onto the argument, Mr.  
14 Mukasey, that fees have been paid and that there is a  
15 settlement agreement and release that precludes claims from  
16 most, if not all, of the law firms that might have  
17 represented Mr. Cohen.

18 MR. MUKASEY: Sure, Judge. And that falls under  
19 the summary judgment provision, I think, although to a  
20 certain extent the issues --

21 THE COURT: It's still very hard to hear you. I'm  
22 not sure exactly why, but go ahead.

23 MR. MUKASEY: I think my papers were covering the  
24 mic, but if that's better, I'll proceed.

25 Yeah, Judge. Our position is that the plaintiff's

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1 claims for legal fees for all the matters sought have either  
2 been paid or are barred by this settlement and release. And  
3 just for the record, I refer, when I talk about the  
4 settlement and release, to an e-mail on June 1, 2018  
5 exchanged between Steve Ryan of McDermott, Will & Emery and  
6 Jay Sekulow. And the law is pretty clear, Judge, that  
7 settlement and release is a bar to an action on a claim that  
8 is the subject of the release, and certainly the public  
9 policy around this issue is to favor settlement enforcement.

10 There is no factual issue here, your Honor. The  
11 issue of whether that e-mail is a settlement and release is  
12 one of law and is pretty clearcut.

13 THE COURT: I know your argument here. And the  
14 communications between the organization in McDermott at the  
15 time certainly related to McDermott's bills; that's the  
16 bills that they were seeking payment for and that was the  
17 back and forth. I don't have a particular issue with what  
18 your client actually paid McDermott. But your argument  
19 seems to be that the language of this e-mail, as a matter of  
20 law, not only precludes Mr. Cohen from seeking  
21 indemnification for fees from McDermott, but also  
22 constitutes an agreement never to seek fees from anyone  
23 else.

24 MR. MUKASEY: No, not necessarily --

25 THE COURT: Where do you see that in the language

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1 here?

2 MR. MUKASEY: Not exactly, Judge.

3 What we are arguing is that it was a release of the  
4 Trump Organization --

5 THE COURT: I'm sorry. That's what I mean. I  
6 meant it is -- well, first of all, I don't know. It's  
7 unclear to me who the releasor is. I know your point that  
8 you certainly are arguing that this is a release on behalf  
9 of Mr. Cohen, it certainly doesn't say that. It just talks  
10 about what McDermott will accept. The ambiguity, perhaps,  
11 is I think you're taking it as McDermott was having -- or  
12 reaching an agreement with your client that your client  
13 wouldn't have to pay McDermott or anyone else in connection  
14 with any investigations involving Mr. Cohen. And where do  
15 you get that? Where do you see this paragraph from Mr.  
16 Sekulow.

17 MR. MUKASEY: Steve Ryan --

18 THE COURT: Go ahead.

19 MR. MUKASEY: Steve Ryan was acting, not only with  
20 apparent authority, but with actual authority. And,  
21 certainly, if you look at various e-mails of extrinsic  
22 evidence in the pleadings, and I refer you specifically to  
23 Paragraph 28 of the original complaint, Paragraph 32 of the  
24 original complaint and Michael Cohen's own affidavit, he has  
25 vested Steve Ryan with authority to act on his behalf.

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1 THE COURT: Forget Mr. Ryan's bill pay. Where do  
2 you see anything that anyone said that McDermott was  
3 operating as his agent with respect to bills paid to other  
4 law firms?

5 MR. MUKASEY: By the Trump Organization.

6 THE COURT: Okay. Either way.

7 MR. MUKASEY: Steve Ryan was releasing the Trump  
8 Organization from Michael Cohen's legal fees. Those were  
9 the -- McDermott was the, then, only existing lawyer for  
10 Michael Cohen. Steve Ryan --

11 THE COURT: Okay. I think that cuts the other  
12 way.

13 MR. MUKASEY: But Steve Ryan did not relegate this  
14 or reduce this to McDermott. This is on behalf of his, this  
15 is on behalf of Michael Cohen. Michael Cohen, through Steve  
16 Ryan, was saying, You, Trump Organization, we're the  
17 original lawyers in here, we're done now, you're done paying  
18 now. If we, McDermott, or we, some other firm, runs up  
19 bills --

20 I mean, I think we're veering into the realm of  
21 speculation with respect to what Ryan was thinking. And  
22 rather than leading to discovery, rather than leading to  
23 discovery, that's irrelevant here. McDermott was the only  
24 firm at the table and the only person authorized to speak,  
25 or the only entity authorized to speak for Michael

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1 Cohen -- and he was releasing on the Trump Organization from  
2 having to pay for Michael Cohen anymore. Nobody else came  
3 close --

4 THE COURT: Where, in the one paragraph that -- by  
5 the way, was written by Mr. Sekulow, who doesn't represent  
6 either of the Trump Organization, but it was written by him,  
7 where does it say anywhere that it applies to firms other  
8 than McDermott?

9 MR. MUKASEY: It says -- it's, "my client has  
10 agreed" -- I'm sorry. And this is Sekulow's language, which  
11 Ryan agrees to -- "my client has agreed to wire McDermott in  
12 full and final payment, disbursements, whether incurred or  
13 yet to be incurred, yet to be invoiced without limitation."

14 THE COURT: And you would add the words, "yet to  
15 be invoiced by us or anyone else" after "us"?

16 MR. MUKASEY: Well, look, I think that there's  
17 acting on behalf of McDermott and there's acting on behalf  
18 of Michael Cohen. And it's very clear that with respect to  
19 the issue of legal fees -- now, remember, the contributors  
20 to the legal fees, up to this point, if I remember  
21 correctly, have been the Trump campaign, the Trump and the  
22 Trump Organization. So there's more than one contributor.  
23 And what this e-mail says, and I think this could be  
24 interpreted as a matter of law, is that the Trump  
25 Organization is no longer going to be on the hook for

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1 Michael Cohen's fees.

2 THE COURT: Okay. I understand the argument.

3 Okay. Mr. Winstead, do you want to  
4 respond -- well, I guess one other issue, or sub issue for  
5 Mr. Mukasey:

6 So sticking with, let's say, McDermott, a question  
7 has been raised, okay, you paid them, you know, \$100, or  
8 whatever it is, and they say as between themselves  
9 and -- sorry. If they come after Mr. Cohen for another  
10 \$100, your response is, Well, that's between the two of you,  
11 that has nothing to do with me. So you're basically saying  
12 that Mr. Cohen is foreclosed by this agreement even if  
13 McDermott comes after him for more, which, parenthetically,  
14 I take it they haven't. So explain that to me.

15 MR. MUKASEY: Correct. We don't have a dog in  
16 that fight. We don't have a dog in that fight. Our  
17 argument --

18 THE COURT: Look, the whole idea of the complaint  
19 is that Mr. Cohen has an agreement directly with your  
20 client, both in writing under the operating agreement and by  
21 an oral agreement. So how can that be eliminated by a law  
22 firm agreeing that, as between the law firm and your client,  
23 that somehow eliminates any obligation that your client may  
24 have to Mr. Cohen? I guess maybe it's the same argument  
25 we've been having.

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1 MR. MUKASEY: Well, I would note first that there  
2 is no evidence in this record that a single law firm, of the  
3 dozen or so that have been named, is seeking a penny from  
4 Michael Cohen. Nobody's waived -- I think the plaintiff's  
5 papers make that point, nobody's waived their ability to  
6 seek payment or reimbursement. But as of right now, as far  
7 as I can tell, nobody is seeking a penny from Michael Cohen.  
8 So this would be a windfall for Michael Cohen if he were to  
9 recover anything.

10 Second of all, the engagement letter between  
11 McDermott and --

12 THE COURT: Let me just hold you there.

13 He is seeking indemnification for expenses and  
14 fees -- well, maybe we don't need to get to this, but I  
15 would've thought that any amounts received would be in  
16 respective expenses that actually are being incurred, but  
17 that's not an issue for right now.

18 MR. MUKASEY: Okay. So maybe I sweep Mr.  
19 Winstead's law firm in there.

20 THE COURT: No, no. You're making the assumption  
21 that the law firms are going to operate pro bono once Mr.  
22 Cohen gets paid. But, go ahead.

23 MR. MUKASEY: Look, we don't know what the future  
24 holds, but we don't have to predict what the future holds.  
25 We shouldn't. We don't need to, because, again, as a matter

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1 of law, he's precluded from seeking indemnification.

2 THE COURT: Understood.

3 All right. So I think I have your argument on  
4 that; that since there is a release, from your client's  
5 perspective, for everything, and your argument is that that  
6 release binds Mr. Cohen, I understand your point about why  
7 nobody can come after your client again. I get that.

8 MR. MUKASEY: The only other point I would make is  
9 that the engagement letter between McDermott and Cohen says,  
10 You're ultimately responsible for the fees. We were not a  
11 party to that.

12 THE COURT: Right.

13 Mr. Winstead, I'm going to take it as a given that  
14 you're not going to seek payment for fees that have actually  
15 been paid to your lawyers, you know. There's obviously no  
16 damages there. The only question really is whether there is  
17 a release beyond that.

18 MR. WINSTEAD: Yeah. And, your Honor, there's a  
19 \$2.3 million figure recited in our complaint, and that's net  
20 of what's already been paid to folks. So, for McDermott,  
21 you know, their piece of that is I, believe, a little bit  
22 over a million of the 2.3, but that's what's left after you  
23 take into account what McDermott's already received from the  
24 Trump Organization and the Trump campaign and from prior  
25 payments.

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1 THE COURT: Have they submitted a bill -- has  
2 McDermott submitted a bill to Mr. Cohen for that excess  
3 amount?

4 MR. WINSTEAD: There is a collection of invoices  
5 that run through the entirety of this matter, including one  
6 that we attached to our papers that was issued after this  
7 alleged agreement where the June 1st e-mail exchange  
8 supposedly terminates the obligations with respect to  
9 McDermott. Yet, in August, I believe it's August 6 of that  
10 year, two months later, there's a new billing statement  
11 issued by McDermott that shows \$1,037,000 that are owed on  
12 his account.

13 THE COURT: What you're telling me as the  
14 plaintiff is that Mr. Cohen is representing that he believes  
15 he's on the hook for that.

16 MR. WINSTEAD: It was sent to him as a bill and it  
17 hasn't been paid to anybody else --

18 THE COURT: Okay.

19 MR. WINSTEAD: -- unlike all the other prior  
20 bills.

21 And I would note just a couple of other things, and  
22 I think your Honor really honed in on it: I, unfortunately,  
23 just do not read this e-mail exchange with the clarity  
24 that --

25 THE COURT: Hang on one second. I think we've

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1 lost your opponent.

2 MR. WINSTEAD: Oh, okay.

3 THE COURT: Which we should wait for him to get  
4 back.

5 MR. WINSTEAD: Yes.

6 THE COURT: I'm sure it would make life easier if  
7 we didn't, easier for you.

8 Is any of Mr. Mukasey's colleagues on?

9 MR. MUKASEY: I'm back. Sorry.

10 The last I heard, if you don't mind, is your  
11 Honor's question about whether there are bills to Michael  
12 Cohen from McDermott.

13 THE COURT: Yeah. I asked whether Mr. Cohen is  
14 representing that he still owes something to McDermott.

15 And, Mr. Winstead, your response?

16 MR. WINSTEAD: Yeah. I mean, we collected the  
17 bills, you know. We haven't seen anything that forgives Mr.  
18 Cohen for any of the amounts that have been incurred here by  
19 any of the firms. I will say, you know, without pause, it  
20 hasn't yet come into play in discovery yet, there actually  
21 has been one of the firms we list in our complaint who has  
22 commenced an arbitration against Mr. Cohen to collect unpaid  
23 bills. None of the firms have waived, at least to Mr.  
24 Cohen, any amounts that they haven't received.

25 And as we note in our papers, notwithstanding this

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1 June 1st agreement, and I, frankly, just don't see it as  
2 that or read it that way, there is an invoice issued by  
3 McDermott two months later for Michael Cohen's account, it's  
4 attached to our papers, that shows a balance owed of  
5 \$1,037,000 and change.

6 So I would've thought that if, you know, this  
7 alleged settlement agreement was as clearcut and  
8 extinguished the obligation the way it's described, that  
9 that balance would be zero, but it's not, or I would think  
10 that if there were no further payment obligations running  
11 either from Mr. Cohen or McDermott, or from the Trump  
12 Organization to McDermott, that that invoice would say  
13 there's nothing owed, but that's not what it says.

14 THE COURT: Okay.

15 MR. WINSTEAD: I don't want to reiterate every  
16 laundry list question in our papers about that e-mail  
17 exchange, but Mr. Cohen, he's not on it. And the fact that  
18 he's on other e-mails but not on this one, where supposedly  
19 his rights to indemnification that he direly needed to  
20 defend himself in these actions are implicated, that, to me,  
21 suggests a factual question as to whether there was any  
22 actual or apparent authority. Apparent authority, which is  
23 discussed at length in the Trump Organization's last filing,  
24 is just a classic fact issue that required us to take some  
25 depositions here. We've taken none in this case and there

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1 may be some other document issues we need to clean up, you  
2 know, what the scope of this is in terms of the number of  
3 firms involved.

4 There are no other firms mentioned here, but there  
5 are certainly -- as McDermott is transitioning out of this  
6 work for Mr. Cohen because it's not getting paid anymore by  
7 the Trump Organization, other firms are getting involved  
8 prior to this point. Why are they not mentioned here?

9 There's a reference to gather the sort of  
10 collection of matters McDermott was handling in related  
11 matters, the imprecision there to me is glaring. I don't  
12 know what that encompasses, you know. Does that encompass  
13 matters related to the Stephanie Clifford litigation in  
14 California? Does that include all of the congressional  
15 inquiries? There were five of them. Does that include the  
16 New York Attorney General's subpoena to Mr. Cohen related to  
17 Trump Charitable Foundation? You know, for a settlement  
18 agreement and release -- and we're all lawyers that are  
19 working in this space, this is about as vague as a document  
20 as I've ever seen. And I just don't see the scope of the  
21 matter as described with precision as to what's being  
22 relayed.

23 I don't see any reference to the oral agreement  
24 that we've seen e-mails or letter exchanges between the  
25 Trump Organization's general counsel, Mr. Garten. We looked

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1 at this at the motion to dismiss, your Honor, there's a  
2 reference to an oral argument. If I was settling that, I'm  
3 pretty sure I'd say, this terminates the oral agreement. If  
4 I were settling a written indemnification obligation under  
5 an operating agreement like Section 7.2, I'd sure make some  
6 reference to that in a settlement. You know, the scope of  
7 this and what it involves really just is not clear from the  
8 document, and I think this is too thin a read to hang a  
9 summary judgment ruling on.

10 I think we need to move ahead with depositions.  
11 And it's not just the document itself, but what came later.  
12 You know, you see subsequent e-mail exchanges involving Mr.  
13 Ryan and others later in June that raise questions about  
14 whether this money was actually paid and how this played  
15 out. I don't know the answer to those questions. Why is  
16 there an invoice in August that shows Mr. Cohen owing  
17 another million dollars, \$1,037,000? If they can terminated  
18 any obligation in that respect, I don't know what the  
19 meaning of that is, it's not clear to me.

20 More recently, you know, after this litigation was  
21 filed, we received a copy of the operating agreement in  
22 March of this year, and we were all going to be together on  
23 Saint Patrick's Day in New York, which would've been a lot  
24 fun except for COVID, so our status conference was kicked  
25 until April. But we advised the Court at that conference we

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1 intended to amend to bring this into the case because this  
2 sort of false premise that underlies a lot of the arguments  
3 in the Trump Organization's papers is, well, we had this  
4 motion to dismiss ruling, it really narrowed the case just  
5 down to these three or four things McDermott was handling in  
6 June of '17 and those have been paid orally and the rest of  
7 this is just out. And --

8 THE COURT: Well, that segues to the next issue.  
9 And so I'll let you start with that and I'm sure Mr. Mukasey  
10 is going to respond to what you just said and what you're  
11 about to say. So, actually, what it's probably easiest to go  
12 to, Mr. Mukasey, the motion to amend, I know what your  
13 arguments are. Obviously, they're typically liberally  
14 granted.

15 So I guess, Mr. Mukasey, so now, as I take it, the  
16 argument is that -- first of all, I dismissed everything  
17 post July of 2017 because it was all an oral agreement.

18 MR. MUKASEY: Correct.

19 THE COURT: So now they've amended to have a  
20 written agreement and to add allegations that there were  
21 subsequent oral agreements as new investigations arose. So  
22 at least on its face, that's partly what they're saying.  
23 They've now changed the complaint from what was dismissed.  
24 And that even as to the proceedings that existed as of July  
25 2017 where the only alleged agreement was oral, now there is

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1 a written agreement. So why shouldn't they have the ability  
2 to bolster their complaint beyond all of those fronts?

3 MR. MUKASEY: Because what existed as of July 2017  
4 has been paid; there is no dispute about that. And what  
5 came into -- if there were subsequent oral agreements that  
6 affirmed, I think is the way they plead it, the operating  
7 agreement, the subsequent oral agreements are violative of  
8 the statute of frauds; right? And the --

9 THE COURT: Well, no. I mean, the idea from the  
10 last ruling was when you make the oral agreement, it can be  
11 applicable to an existing proceeding because that proceeding  
12 can end in a year.

13 MR. MUKASEY: Of course. But, there is  
14 no -- and this is not a motion to dismiss; right? This is a  
15 motion for summary judgment -- well, and a motion for leave  
16 to amend. To the extent that it's a motion to leave to  
17 amend, they're amending by trying to put in a document, or  
18 trying to rely on a document, the operating agreement, that  
19 bars them from recovering, period. And to the extent that  
20 they claim new and continuing oral agreements after July  
21 2017, there is nothing in this record at all that supports  
22 that.

23 THE COURT: That's the one that's in the motion to  
24 amend, not for summary judgment. In other words, they've  
25 made an allegation, a new allegation.

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1 MR. MUKASEY: Okay. I understand. So, arguably,  
2 one would have to take that as true; right?

3 THE COURT: Not just arguably, but actually.

4 MR. MUKASEY: Right. Legally, one would have to  
5 take that as true, but it seems to me a little fantastical  
6 that this operating agreement, all of a sudden, gave rise to  
7 some brand new oral agreements as well. And, you know, you  
8 have to take it as its pled, but the gravamen of the motion  
9 to amend is the operating agreement, and the operating  
10 agreement -- and, by the way, even if there were oral  
11 agreements, if there are new oral agreements, and we're  
12 obviously not seeing it, if there were oral agreements after  
13 July 2017, recovery under those oral agreements I'm not sure  
14 could take place in light of criminal conduct either.

15 THE COURT: Well, which makes me wonder and made  
16 me wonder whether -- so are you saying the Organization  
17 violated New York law by paying the bills it paid?

18 MR. MUKASEY: Absolutely not, absolutely not.

19 THE COURT: It would violate the law to pay them  
20 now, but it didn't violate the law to pay them then?

21 MR. MUKASEY: I'm not -- let me be clear: There  
22 is nothing in this record that suggests that the Trump  
23 Organization paid anything to McDermott or anybody else  
24 because they were required to pay or because they had an  
25 obligation or legal duty to pay. What they paid, they paid

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1 the same way -- and I think I raised this in an earlier  
2 appearance before your Honor -- they paid in the same way  
3 that I might say to somebody, Don't worry, I'll cover your  
4 dinner because you're my pal.

5 THE COURT: But the LLC law prohibits a company,  
6 in some circumstances, from doing that, whether they want to  
7 gratuitously or not; right? You're not supposed to fund  
8 your employee's criminal defense costs.

9 MR. MUKASEY: And we certainly did not, because at  
10 the time the payments were made, up through May or June of  
11 2018, it was unknown to the Trump Organization. I mean, he  
12 didn't plead guilty until, if I'm correct, mid 2019. He  
13 pled guilty -- let me just make sure I'm correct about the  
14 dates here. Yeah. He pled guilty in November of 2018 and  
15 August of 2018. We had ceased payment by then. So there's  
16 no argument that we were indemnifying criminal conduct.

17 THE COURT: Okay. Mr. Winstead?

18 MR. WINSTEAD: Yes. I would like to respond to a  
19 few things.

20 Just in terms of, you know, discussions about  
21 what's in this record regarding other oral agreements and  
22 other payments, you know, we attached, as Exhibit #9 to the  
23 affidavit of Eric Fisher that accompanied our papers, an  
24 e-mail exchange involving Mr. Brent Blakely and his firm  
25 represented Mr. Cohen in connection with a couple of actions

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1 out in California that dealt with -- I'll just say  
2 generally, issues related to the payments made to Stephanie  
3 Clifford; and those are two matters that are listed in our  
4 original and amended complaint. And in a note from Mr.  
5 Blakely to Mr. Charles Harder and then copying Mr. Garten,  
6 who is the Trump Organization's general counsel, he's  
7 talking about a reimbursement, and Mr. Blakely's  
8 representing Mr. Cohen in that proceeding, and it says,  
9 "Dear, Charles, I had spoken with Mr. Cohen regarding our  
10 discussion from yesterday. Your client instructed to Mr.  
11 Cohen to enforce the confidential settlement agreement  
12 against Daniels and represented that he would, quote, 'pay  
13 for everything.'" You know, this is another e-mail that's  
14 come out in discovery indicating, okay, a subsequent  
15 commitment by the Trump Organization and its executives to  
16 pay for Mr. Cohen's legal expenses separate from what was  
17 going on in June of '17 that we've talked about previously.

18 Now, what I think even more telling, especially  
19 given the things we've just talked about, is it was about  
20 300,000, roughly, in legal fees incurred by Mr. Blakely and  
21 his firm in representing Mr. Cohen in these matters. And  
22 Mr. Cohen was seeking indemnification for those, you know,  
23 after we filed our pleadings to amend our complaint to bring  
24 in the things that were precluded by the Court by the  
25 statute of frauds ruling back in August of last year. It

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1 appears that the Trump Organization, notwithstanding its  
2 representation in its papers that all of its indemnification  
3 obligations were gone, it had no obligation to do so based  
4 on an oral commitment either, they nevertheless reached out  
5 to Mr. Blakely and negotiated payment of his fee, or at  
6 least part of it. And, you know, again, to me that casts  
7 serious doubt, or at least creates factual issues regarding  
8 what the scope of the agreement to indemnify is, what the  
9 implications are in terms of the operating agreement.

10 It's a bit inconsistent for the Trump Organization  
11 to say in this hearing and in its pleadings, Mr. Cohen's  
12 barred from everything, we don't have to pay him anything,  
13 once he pleads, indemnity is out the window, not just for a  
14 criminal claim, which I would dispute based on the language  
15 in the operating agreement, but for everything. Well, if  
16 that's the case, then why is that being paid in June of this  
17 year?

18 THE COURT: Well, you can settle claims that  
19 you're still defending.

20 MR. WINSTEAD: You can, but it sure raises some  
21 questions.

22 And, you know, we haven't taken any depositions,  
23 again, but we have sought third-party discovery from Mr.  
24 Ryan and the McDermott firm to find out what was meant by  
25 these e-mail exchanges and others, and we have done the same

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1 with Mr. Blakely and his firm regarding the payment that  
2 they received and what they were retained to do on behalf of  
3 Mr. Cohen and what the payment arrangement was. There's  
4 just a lot of factual issues here that I think require this  
5 case to go forward. And I think that trying to paint this  
6 broad brush, there's no indemnification for any matters  
7 whatsoever based upon the criminal plea, I think, is not  
8 supported by the letter of the operating agreement or the  
9 law.

10 I mean, you're effectively reading out this  
11 language that says, If you're convicted of a crime, we still  
12 don't presume that you're not entitled to indemnification.  
13 I mean, we talked a little bit about what Mr. Cohen said in  
14 his allocution, but, you know, under the letter of the Trump  
15 Organization indemnification provision, if he were convicted  
16 in every element of the offenses that he allegedly was  
17 charged with was proven, that still won't be determinative  
18 of his rights to indemnification. We're effectively  
19 reducing that to surplusage.

20 THE COURT: Okay. Look, I'm going to take 15  
21 minutes, check my notes here, see if I have any other  
22 questions, and just to reconvene. So why don't you stay  
23 logged in? You can turn your cameras and go on mute, and  
24 I'll get back on at 3:45.

25 See you then.

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1 MR. WINSTEAD: Yes, sir, your Honor.

2 (Recess taken.)

3 (Case recalled.)

4 THE COURT: Counsel, thank you very much for your  
5 argument. I'm ready to give you my decision.

6 Starting off with the motion for summary judgment  
7 and then finish up with the motion to amend the complaint,  
8 the motion for summary judgment is granted with respect to  
9 claims for attorney's fees incurred in connection with the  
10 Southern District of New York criminal investigation and the  
11 resulting conviction, to the extent there are any unpaid  
12 fees with respect to that. Those claims are barred both by  
13 the terms of the operating agreement and also by New York  
14 law restricting the scope of indemnification by LLC.

15 The law does not permit a company to hold its  
16 employees harmless for criminal activity, even if it  
17 arguably relates to his work for the company; that's  
18 consistent with common law prohibitions on indemnifying  
19 intention of torts, and it stems both from the idea that an  
20 actor in that kind of disposition is not entitled to  
21 recovery, but also to avoid agreements that might encourage  
22 employees to commit crimes. Here, it's undisputed that Mr.  
23 Cohen had admitted violating the law and admitted knowing  
24 that it was unlawful when he committed the acts. To the  
25 extent the argument is that indemnification is appropriate

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1 if the conduct somehow doesn't harm the company or benefits  
2 the company, which I doubt, on the record here, it appears  
3 that the conduct was -- the point was that it was to benefit  
4 one particular officer of the company, or perhaps his  
5 campaign, but there's no suggestion that it was somehow  
6 benefitting the company itself at this moment in time, not  
7 as far as I can tell.

8 So for all of those reasons, to the extent that  
9 there are any remaining claims either in the original  
10 complaint or with the amended complaint, you know, the  
11 proposed amended complaint, summary judgment is granted on  
12 those. And looking ahead, I will also deny the motion to  
13 amend to add any claims seeking indemnification with respect  
14 to criminal investigations.

15 Second, summary judgment is granted with respect to  
16 legal fees that have actually been paid that's conducted in  
17 receipts submitted by defendant. I don't think that's  
18 controversial and I don't think there's really much of a  
19 dispute that those actual invoices or the receipts reflect  
20 payments.

21 Third, summary judgment is denied with respect to  
22 claims for unpaid legal fees from non-criminal  
23 investigations and proceeds in existence as of July 2017.  
24 The reason I'm limiting the summary judgment portion of this  
25 to that period is because those are the only claims that

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1 survived from the original complaint. There are questions  
2 of fact whether McDermott's correspondence with Mr. Sekulow  
3 constituted a binding agreement on Cohen to forego  
4 indemnification; one, if McDermott sought additional fees  
5 from Cohen; or, two, with respect to fees owed to lawyers  
6 other than McDermott with respect to any and all  
7 proceedings, that includes questions of actual authority and  
8 the scope of apparent authority with respect to the amounts  
9 that have been paid. The language of this reasonably  
10 sparse and terse e-mail was written by Mr. Sekulow, not by  
11 McDermott, and certainly not by Cohen, and it was just a  
12 simple response saying, okay. I don't think that the scope  
13 of the agreement as proposed by the defendant is -- it may  
14 be able to prove that, but I don't think it's clear on the  
15 face of the document.

16           Again, it doesn't mean that there wasn't an  
17 agreement and it's not a definitive ruling as to what the  
18 scope of that agreement would be, but the language is  
19 unclear to me, other than with respect to McDermott, largely  
20 the agreement that it would cover their fees as between  
21 McDermott and the Trump Organization. So, in sum, I think  
22 the language of that supposed settlement and release is far  
23 from clear and certainly not enough to justify a dismissal  
24 on summary judgment.

25           There are also, in my view, fact issues as to

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1 whether non-criminal proceedings, to which Mr. Cohen is  
2 seeking indemnification, most or all of which he is not a  
3 defendant in, but is either a witness or something like  
4 that, there are fact issues with respect to any of those  
5 proceedings whether they necessarily implicate the criminal  
6 conduct to which Mr. Cohen has admitted. It might, but it's  
7 not a matter of a judgment at this stage. And further to a  
8 conversation that I had with Mr. Mukasey earlier, it does  
9 appear that the defendant made payments to at least one of  
10 the law firms well after the guilty plea. I believe the  
11 payments from the Blakely firm are from this year, which  
12 means either that they are beyond the scope of the de  
13 minimis conduct, or the payments violated the LLC law. And  
14 so at this point, there's enough up in the air about that  
15 that I'm not prepared to make a ruling as a matter of law  
16 that he's not entitled to indemnification for these  
17 non-criminal proceedings. I think there's obviously a  
18 direct overlap for the criminal proceedings, but not with  
19 respect to the rest.

20 Now, going to the motion to amend, the motion to  
21 amend is granted solely with respect to non-criminal  
22 proceedings. First, as to legal proceedings existing as of  
23 July 2017, the proposed amendment adds an additional ground  
24 for recovery based on the operating agreement. As to  
25 non-criminal proceedings initiated after July 2017, the

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1 proposed amendment adds two additional grounds for recovery;  
2 one is based on the operating agreement, which I didn't know  
3 about at the time of the earlier motion to dismiss decision,  
4 and it also alleges subsequent oral agreements that came  
5 into place as the investigations arose. And while I can't  
6 stop anybody from making a motion, but it seems to me the  
7 logic of my prior decision would indicate that at least the  
8 parole evidence rule -- I'm sorry. The statute of frauds  
9 would not necessarily preclude a subsequent oral agreement  
10 being binding with respect to new investigations.

11 So I believe that resolves all of the issues that  
12 are raised by the motions. Do the parties have anything  
13 that I forgot?

14 MR. MUKASEY: Judge, I have one question: I don't  
15 want to throw a wrench into this, but when you distinguish  
16 between criminal and non-criminal proceedings, if Michael  
17 Cohen testifies in front of Congress and commits perjury,  
18 that, in and of itself, that day of testimony is a  
19 non-criminal proceeding. He pleads guilty later six months  
20 later to lying in that proceeding, that's a criminal  
21 proceeding. So there is a real bleed from the civil to the  
22 criminal.

23 THE COURT: I don't think so. I think what I was  
24 saying is that in the criminal proceedings, it's a direct  
25 relationship. So there's not really a fact issue. With

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1 respect to the non-criminal proceedings, you may well be  
2 able to show that the conduct in those non-criminal  
3 proceedings rises to the level of preclusion under the LLC  
4 law or the operating agreement. All I'm saying is that I'm  
5 not making that decision as a matter of law today.

6 So as to all of the non-criminal proceedings, the  
7 defendant would still have an argument that indemnification  
8 is prohibited because the conduct in connection with that  
9 proceeding comes within one of those forbidden categories.  
10 You know what I mean? So there are fact issues as to  
11 whether a non-criminal proceeding involve the kind of  
12 conduct you're talking about. So I won't mention the  
13 specifics of them, but that's the point.

14 MR. MUKASEY: Okay. I think I understand that, I  
15 think.

16 THE COURT: Well, the point is I'm not making an  
17 across-the-board --

18 MR. MUKASEY: Yeah.

19 THE COURT: It's premature to make an  
20 across-the-board ruling. The details of each of these  
21 non-criminal investigations, there's not much in the record  
22 about them all, and you're asking me, essentially, to make a  
23 finding, on a relatively sparse record, that the conduct at  
24 issue in each of those proceedings necessarily protects  
25 indemnification. And as I said, you may show that, I'm just

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1 saying --

2 MR. MUKASEY: I'm just thinking about the scope of  
3 discovery. And I'm not trying to quibble or argue with your  
4 Honor's ruling, but I'm thinking about the scope of  
5 discovery. It seems to me, based on your Honor's ruling,  
6 Sekulow and Ryan have things to say based on your Honor's  
7 ruling about what was intended in that e-mail. So that, I  
8 think, seems pretty clear. But with regard to what your  
9 Honor calls other civil proceedings and whether or not they  
10 will ultimately be precluded by the criminal preclusion, if  
11 you will, I just don't see where the discovery is there.  
12 Who do you discover? I mean, that's a question of law  
13 whether this conduct in the civil case led to the guilty  
14 plea.

15 THE COURT: Yeah. Look, I'm not going to get into  
16 the details of discovery right now. I think we have to  
17 think about them. But there's just -- you know, the record  
18 is devoid of enough detail about what those proceedings were  
19 about and what the conduct that the allegation might be  
20 would be preclusive. It may be that these can be stipulated  
21 or not disputed, but that's not the record I have in front  
22 of me right now on a proceeding-by-proceeding basis.

23 So, okay. You have my decision. Do we have on the  
24 schedule a future conference to touch base on the case?

25 MR. MUKASEY: I don't think we do.

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1 THE COURT: We should set up -- there must be a  
2 compliance conference date in the preliminary conference  
3 order.

4 MR. WINSTEAD: I believe there was, your Honor.  
5 It all fell out the window with COVID.

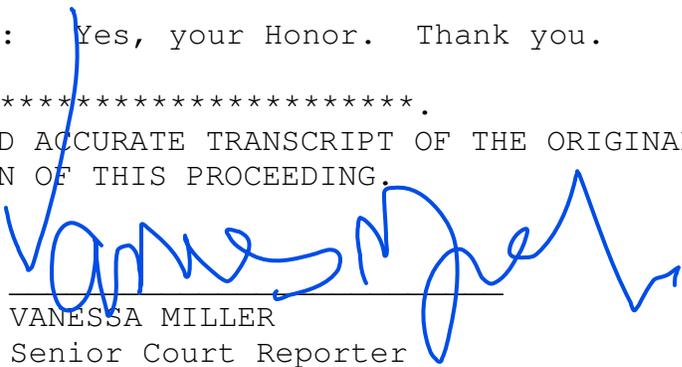
6 THE COURT: All right. Well, let's schedule  
7 another one. We had a conference before, but let's put  
8 something on the calendar to see each other again just to  
9 take the pulse of the case at a later point. I have no  
10 doubt that you may be back to me with other issues as they  
11 arise and including discovery disputes. But, for now, when  
12 I do the order deciding the motion, I'll put in a date for a  
13 subsequent conference. If the date doesn't work for folks,  
14 you can let me know, but rather than having to reach out.

15 So, anyway, I will follow this up with a written  
16 order. If you can refer back to this argument. So I would  
17 ask you to order the transcript and also settle the  
18 transcript because with Skype, it is difficult to catch  
19 everything.

20 Okay. Thanks very much. Have a good weekend.

21 MR. WINSTEAD: Yes, your Honor. Thank you.

22 \*\*\*\*\*.  
23 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL  
24 STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

25   
VANESSA MILLER  
Senior Court Reporter