

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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DAVID M. SMITH,

Plaintiff,

Index No: 607393/2019

-against-

INTERNATIONAL INVESTIGATIVE GROUP LTD., its
agents, servants, and/or employees; DANIEL D. RIBACOFF,
Individually and as Chief Executive Officer of
INTERNATIONAL INVESTIGATIVE GROUP, LTD.;
LISA RIBACOFF, Individually and as Director and Manager
of INTERNATIONAL INVESTIGATIVE GROUP LTD.;
and LANCE RIBACOFF, Individually and as International
Operations Manager of INTERNATIONAL INVESTIGATIVE
GROUP LTD., RICHARD CUSTODIO, YANTI a/k/a MICHAEL
GREENE; SAUL B. ROTH; JAMES MARR; TYRONE DUX;
FERDINAND a/k/a FRED CARVOUSANOS; ANDREW
SPIELER and KATHLEEN HURLEY-ABITABILE,

Defendants.
-----X

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff David M. Smith ("Smith"), by his attorneys, the Law Office of Steven Cohn, P.C., submits this Memorandum of Law in support of his motion for an Order, under Civil Practice Law and Rules ("CPLR") § 3212, awarding him partial summary judgment on liability on the First and Fourth Causes of Action against defendant International Investigative Group, Ltd. ("IIG") and directing an inquest on damages.

PRELIMINARY STATEMENT

In 2016, Smith, and his matrimonial attorney Joseph DeMarco of the firm Schlissel, Ostrow and Karabatos, PLLC, (Demarco) retained IIG, a private investigative agency, to surveil Smith's then-estranged wife, Susanne Gold-Smith ("Gold-Smith") for a divorce action in which Gold-Smith sought to overturn their prenuptial agreement. Under the written retainer agreement among Smith, DeMarco and IIG ("Agreement") annexed hereto as Ex. 1, IIG was to surveil Gold-Smith and provide to Smith and DeMarco information, videos, pictures and reports for use in the divorce proceedings ("Divorce Proceedings"), including proof of physical activities by Gold-Smith (*e.g.*, photos and videos of Gold-Smith walking, shopping, dancing, exercising, etc.) inconsistent with her disability claim. As such, Smith and DeMarco were led to believe by IIG that the investigation was and needed to be covert at all times. In fact, Lance Ribacoff often told Smith and DeMarco "we need to be flies on the wall" when surveilling Gold-Smith. The Affidavits of David Smith and Joseph DeMarco are annexed hereto.

Although IIG's surveillance of Gold-Smith was supposed to capture her engaged in certain physical activities to refute her claims, it soon became difficult, if not impossible, as Smith later learned, that Gold-Smith realized early in the investigation that she was being surveilled, and made regular efforts to evade the investigators assigned to surveil her. Fearful it would lose its lucrative contract with Smith, which generated revenues averaging more than \$350,000 per month, IIG

failed to advise Smith that Gold-Smith learned who many of the investigators were, convinced Smith that additional manpower was needed to effectively surveil Gold-Smith, and allegedly assigned and charged Smith for as many as six investigators per shift to surveil Gold-Smith each day. However, the increased manpower, even when actually staffed, did little to improve the success of the investigation, and only further intimidated Gold-Smith.

After months of routine surveillance failures, several investigators began intentionally interacting with Gold-Smith, as a result of which, Gold-Smith became less evasive and more cooperative, often advising the investigators of her daily plans. With Gold-Smith's newfound compliance, IIG no longer needed to report to Smith that its Investigators were losing Gold-Smith, and certainly didn't need all the additional manpower they claimed was required to surveil Gold-Smith effectively, especially under the circumstances. IIG chose to conceal Gold-Smith's compliance with the Investigators from their clients, DeMarco and Smith. Notwithstanding, IIG charged Smith for investigators who were not on the job and for hours they never worked. With the truth concealed, Smith continued to pay for time and expenses, purportedly incurred by IIG, unaware that, what he was actually paying for, was inflated hours and expenses and, more significantly, *a sham private investigation*.

What IIG did not anticipate, though, is that Smith and Gold-Smith would eventually reconcile. With this reconciliation, Smith began to uncover the true scope and nature of the wrongs perpetrated by IIG, and the myriad of ways in which IIG breached the Agreement. Smith, as a result, commenced this action ("Action") for breach of contract, fraud, gross negligence, and breach of the implied covenant of good faith and fair dealing. During the course of discovery in this Action, forensically recovered documentary evidence was obtained, which not only corroborated the details of IIG's scheme to overcharge Smith, but also revealed that IIG engaged

in a deceptive pattern of overcharging other clients and was aware of grossly inappropriate contact taking place between its Investigators and the subject of the investigation, which Smith was funding.

The annexed affidavits of investigators, James R. Marr, sworn to March 25, 2021 (“Marr Aff.”), Saul Roth, sworn to April 21, 2021 (“Roth Aff.”), Saul Roth Affidavit 2, sworn to April 21, 2021 (authenticating as true and accurate the text messages obtained from his cell phone); Roth Affidavit 3, sworn to April 21, 2021 (authenticating the WhatsApp group chat text messages) Roth’s wife, Yolanda Roth, sworn to April 21, 2021 (“Yolanda Roth Aff.”), Daniel Ribacoff, sworn to May 11, 2018 (“Daniel Ribacoff Affidavit”) and Susanne Gold-Smith, sworn to May 24, 2021, (“Gold-Smith Aff.”) detail innumerable instances of extreme and inappropriate contact between various IIG investigators and Gold-Smith as well as the fraudulent billing practices that IIG was engaged in. As the affidavits and exhibits make clear, IIG was aware of the unprofessional and unethical behavior its investigators were involved in during the Investigation, yet turned a blind eye to it (id.). For example, the affidavits, text messages and group chats texts appended thereto – detail how IIG investigators would routinely interact with Gold-Smith at malls, dance clubs, bars, restaurants, concerts, beaches and parking lots (id.). The evidence also details some of the many times investigators were known by IIG to be interacting with Gold-Smith during overnight trips, rather than conducting legitimate surveillance (id.) The expenses for these trips, meals, concert tickets, travel, and other incidentals would be reimbursed to the investigators by IIG, and ultimately paid for by Smith, who, along with his attorney, was consistently mislead by IIG into believing that its investigators were conducting legitimate covert surveillance of Gold-Smith (id.)(DeMarco Aff., ¶ 9)(Smith Aff.¶ 17). *As it turned out, the investigation for which Smith*

was billed substantial sums of money by IIG, at least between December 2017 and January 2019, was quite obviously, nothing less than a total fraud.

This documentary evidence establishes conclusively that IIG breached the Agreement by intentionally charging Smith for “work” their investigators did not perform (which Smith paid for), with multiple investigators routinely inflating their hours at IIG’s direction and/or knowledge, each adding as many as four (4) hours per day over multiple days each week. In addition, although IIG represented to Smith that at least five and, at times, six investigators were surveilling Gold-Smith per shift each day, the evidence adduced in discovery demonstrates that fewer investigators actually worked each shift, and that IIG intentionally charged Smith for investigators who did not work as IIG claimed. Had Smith or DeMarco been made aware of the ongoing fraudulent billing practices of IIG, and/or that the investigation had been grossly compromised as a result of IIG’s investigators’ numerous inappropriate interactions with Gold-Smith, IIG would have been terminated immediately (Smith Aff., ¶¶ 33, 34; DeMarco Aff., ¶ 9).

Because the admissible evidence demonstrates there are no issues of material fact about whether IIG breached the Agreement, including its express covenant to charge Smith “based upon the time spent by its agents at hourly rates,” and its implied covenant of good faith and fair dealing, Smith now moves for partial summary judgment on liability on the First (Breach of Contract) and Fourth (Breach of Implied Covenant of Good Faith and Fair Dealing) Causes of Action. The Court should award Smith partial summary judgement and direct an inquest on damages.

STATEMENT OF FACTS

A. In Connection with Divorce Proceedings, Smith and His Counsel Retain IIG to Conduct Covert Surveillance of Smith's Then-Estranged Wife

On or about February 24, 2016, Smith and DeMarco retained IIG¹ under the Agreement to conduct surveillance of Gold-Smith ("Investigation") (Affirmation of Steven Cohn, Esq., dated May 21, 2021 ["Cohn Aff."], Ex. 1 [Verified Complaint Ex 2], ¶¶ 21, 27; (Affidavit of David M. Smith, sworn to May 21, 2021), ["Smith Aff."], (Affidavit of Joseph DeMarco, sworn to May 19, 2021) ["DeMarco Aff., Ex 5"] Ex. 1 [Agreement]). IIG interposed a Verified Answer with Cross-Claims on July 15, 2019, Ex. 3. The Agreement required IIG to obtain and furnish to Smith information, records, documentation, and reports for his use in the Divorce Proceedings (Verified Complaint, ¶ 27; (Smith Aff., ¶ 5-6), Ex. 1 [Agreement]). The Agreement states Smith would be charged for services based upon "the time spent by [IIG's] agents at hourly rates," plus other expenses incurred by IIG during the Investigation (Ex. 1 [Agreement]).

IIG controlled the manner, manpower, scheduling, and method of the Investigation, Verified Complaint, ¶ 32; Smith Aff., ¶ 14). Each day, IIG assigned multiple investigators to surveil Gold-Smith, including, among others, defendants Richard Custodio ("Custodio"), Yanti a/k/a Michael Greene ("Greene"), Saul Roth ("Roth"), James Marr ("Marr"), Tyrone Dux ("Dux"), Ferdinand a/k/a Fred Caravousanos ("Caravousanos"), Andrew Spieler ("Spieler"), and non-parties Amy Lurentzatos ("Lurentzatos"), Kathleen Hurley-Abitabile ("Abitabile"), Hiram "Ray"

¹ IIG is a family owned and operated business. Defendant Daniel D. Ribacoff ("Dan Ribacoff") – IIG's President and Chief Executive Officer ("CEO") – promotes himself on the IIG website[hello@iigpl.com] as one of the Nation's leading experts on polygraph examinations (Cohn Aff., Ex. 1a). Dan Ribacoff's daughter, defendant Lisa Ribacoff, is the Manager of IIG (Verified Complaint, ¶ 12); and Dan Ribacoff's son, defendant Lance Ribacoff, is the International Operations Manager of IIG (*id.* ¶ 11). A true and accurate print-out of the IIG web-site holding themselves out "experts" and "premier provider" of domestic investigative services and purportedly utilizes investigators who are "former law enforcement agents" or from other "operative" and "investigative" fields is annexed hereto as "Exhibit 1a".

Ramos (“Ramos”), and Thomas McNamara (“McNamara”) (each, an “Investigator,” and collectively, the “Investigators”) (Verified Complaint, ¶ 37; Smith Aff., ¶ 16).

In compliance with the Agreement, Smith remitted to IIG payment in full for IIG’s services and expenses, pursuant to IIG’s periodic requests for payment (Smith Aff., ¶11, Ex. 4 [Wire Transfers]).² Between April 2016 and January 2019, IIG requested – and Smith paid – in excess of Eight Million Eight Hundred Thousand Dollars (\$8,800,000) for the Investigation (*id.*).

B. IIG Convinces Smith that Additional Investigators Are Needed to Surveil Gold-Smith

Although IIG assured Smith and DeMarco that the Investigation was and would be conducted covertly at all times (Smith Aff., ¶17), (DeMarco Aff., ¶ 8), Gold-Smith quickly became aware of the Investigators’ presence, and in some cases, their names and which vehicles they were driving [Verified Complaint, ¶ 39]; (Smith Aff., ¶¶8, 18); [“Gold-Smith Aff. ¶ 4]. IIG was aware of the efforts Gold-Smith initially took to evade the Investigators (*id.*). Ultimately, with the Investigators routinely losing Gold-Smith (*id.*), IIG would report to Smith the embarrassing reality that, despite the multiple, purportedly “experienced” Investigators and former police officers assigned to each shift, IIG was unable to effectively surveil Gold-Smith (Smith Aff., ¶ 18).

As of result of the above outcomes, IIG advised Smith that additional Investigators and hours were required to surveil Gold-Smith effectively [Verified Complaint, ¶¶ 30, 32];(Smith Aff., ¶ 20). Indeed, IIG routinely represented to Smith that no less than five Investigators were required to surveil Gold-Smith per shift each day (Smith Aff., ¶ 20), and that each Investigator would be assigned a different “zone” near Gold-Smith’s home (*id.*). IIG often referred to this technique as

² In a further breach of the Agreement, which obligated IIG to provide Smith with “detailed billing” (Smith Aff., Ex. 1 [Agreement]), neither Smith nor his attorneys were provided the Invoices at the time they were purportedly sent. Rather, the Invoices Ex. 5 were received for the first time in discovery (Smith Aff., ¶ 12 Affidavit of Joseph DeMarco, Esq., sworn to May , 2021 [“DeMarco Aff.”], ¶ 14. The amounts owed were merely requested by IIG to Smith for payment.

“the five-man zone,” a practice they said was effectively used by law enforcement. Based on IIG’s purported experience and representations, Smith paid for additional Investigators, and, unbeknownst to him, continued funding a *bogus* Investigation (Smith Aff., ¶¶ 20, 21 & 22).

C. Gold-Smith Begins Cooperating With Investigators, but IIG Never Advises Smith and Continues Billing Smith For Five to Six Investigators Per Shift Per Day

In August 2017, after a year of routine surveillance failures, Defendant Greene suggested to Lance Ribacoff that IIG utilize one of their Investigators to “befriend” Gold-Smith “as a ruse” Affidavit of Michael Greene, sworn to April 28, 2021 [“Greene Aff.”, Ex. 6] (Affirming Gold-Smith Bates No. 000001 through Gold-Smith No. 004914, annexed in part herein, to be true and accurate copies of the Messages that were contained on the back-up of Greene’s cell phone).

Although IIG led Smith and DeMarco to believe that the investigation was covert, and their Investigators were *not* permitted to engage with the subject ever (Smith Aff., ¶8), (DeMarco Aff., ¶8), Lance Ribacoff took no steps to admonish Greene or discourage him from interacting with Gold-Smith (*id.*),³ nor did he take any action or terminate services once he learned of interaction between other investigators and Gold-Smith. Instead, IIG encouraged this “prohibited” contact, primarily to ensure that the subject of the investigation would not continue to evade the Investigators, a fact which IIG concealed from Smith and DeMarco [Ex.7- Gold Smith Bates No. 002641].

And so, on or about December 26, 2017, while serving Gold-Smith with process of legal papers, Greene improperly engaged Gold-Smith in conversation (Verified Complaint, ¶ 40; Gold-Smith Aff., ¶ 7). During this conversation, Greene persuaded Gold-Smith to stop evading the Investigators [Verified Complaint, ¶¶ 41-42]; (Gold-Smith Aff., ¶ 7), to cooperate with them and

³ In fact, the evidence demonstrates that Lance Ribacoff inquired if Greene was “volunteering” to befriend Gold-Smith (*id.*).

convinced Gold-Smith that the Investigators would be helpful to her (Ex. 8-Gold Smith Bates No. 002897) (“December Discussion”). Greene boasted to IIG and other Investigators that, based on what he accomplished with Gold-Smith, he changed the course of the Investigation “180 degrees” (id., Ex. 9, Gold Smith Bates No. 000716), and “switched [Gold-Smith’s] brain” to thinking the Investigators were actually “the good guys” [id., Ex. 8, Gold Smith Bates No. 002897]. Significantly, IIG fully supported Greene’s efforts to gain Gold-Smith’s trust and compliance, a significant fact that IIG intentionally withheld from Smith and DeMarco.

Following the December Discussion, Gold-Smith began cooperating with the Investigators (Gold-Smith Aff., ¶¶ 8,9), providing them with advance notice of her daily schedule (*id.*). IIG no longer needed to charge for any investigators, let alone five or six each day per shift, to effectively surveil Gold-Smith, as Gold-Smith stopped regularly evading them and often told the Investigators where she was going during the day (*id.*, ¶ 12).

It wasn’t long after the December Discussion that the dynamics between the Investigators and Gold-Smith markedly changed. Instead of merely “toning down” the manner in which she was being surveilled, the Investigators actually became much more “friendly” with Gold-Smith, often conversing with her on matters both related and unrelated to the investigation, including those of a personal nature. Before long, the Investigators began actively interacting with Gold-Smith, which included dining and dancing with her and her friends at various clubs and restaurants, while Smith was paying IIG to have its investigators surveil her (Gold-Smith Aff., ¶ 9).

On December 29, 2017, Defendant Lance Ribacoff was made aware that Gold-Smith informed defendant and investigator Richard Custodio of her plans that day [Id., Ex. 8, Gold-Smith Bates No. 002897].

In response to Lance Ribacoff's praise, Greene informed him that Gold-Smith enjoyed "talking to [Custodio] or seeing [Custodio] or being near [Custodio]" [Id., Ex.8, Gold-Smith Bates, 002897] from his observations.

On December 30, 2017, Greene, once again, made Lance Ribacoff aware that he was still communicating with Gold-Smith, and Ribacoff acknowledged to Greene that "it helps though" [Ex.10, Gold-Smith Bates, 002901]. Neither Lance Ribacoff nor anyone from IIG seemed concerned about these developments nor took any steps to stop the now continuous interactions occurring between its investigators and the subject, let alone inform Smith or DeMarco. Significantly, in accordance with Daniel Ribacoff's May 11, 2018 Affidavit, annexed, he advised DeMarco and Smith that he was personally overseeing and supervising his investigators, and assured them that "IIG and its employees have conducted the investigation of Ms. Gold in a lawful manner, maintaining proper and safe distances at all times" (Daniel Ribacoff Aff., ¶ 10). As established, nothing could be further from the truth.

Discovery revealed that, even prior to the December Discussion, at least one investigator, Custodio, had already been in direct and intimate physical contact with Gold-Smith. On January 5, 2018, another investigator sent IIG a video of Custodio walking out of a mall with Gold-Smith and lighting her cigarette [Exhibit 11, Gold-Smith Bates, 002942, 002943], (Marr Aff., ¶¶ 43, 44). Smith was never informed of this interaction between Custodio and Gold-Smith and never received a copy of the video IIG was made aware of. While discussing the video and the interaction, Greene wrote "but he fucking just ate lunch w her etc" and Marr, another IIG investigator assigned to the case responded "I know. I was totally shocked...Practically shared a smoke lol" [Exhibit 12, Gold-Smith Bates, 004278].

On January 9, 2018, Custodio contacted Greene from inside Gold-Smith's home, claiming that he was "fucked" and "trapped [;]" (while inside Gold-Smith's home) and asked Greene to call him for assistance in leaving Gold-Smith's home. That morning, Greene helped Custodio successfully exit the subject's home. Later that day, Custodio messaged Greene stating that his actions towards Gold-Smith were "going to get [him] in trouble" [Ex. 13, Gold-Smith Bates 003855].

During a text chat with Daniel Ribacoff, Greene reiterated that Custodio had slept inside the subject's home, with Ribacoff acknowledging "Yes. That I remember" [Ex. 14, Bates 001696]. Greene also discussed Custodio's overnight stay inside the subject's home with Lance Ribacoff [Ex. 15, Gold-Smith Bates, 003256, 003257]. Despite that fact that two different principals of IIG were aware that one of their investigators, Custodio, had, incredibly, "slept" inside the subject's home, IIG concealed this glaring fact from both Smith and DeMarco.

IIG's approval of their Investigator's interactions with Gold-Smith also extended to defendant and former NYPD police officer, Tyrone Dux. Before long, it became well known among the Investigators that defendant Dux was infatuated with Gold-Smith. During the Spring of 2018, Roth witnessed Dux engaged in inappropriate intimate physical contact with Gold-Smith while "surveilling" her at Round One Entertainment in Hicksville, New York (Roth Aff., ¶18). IIG was fully aware of Dux's many interactions with Gold-Smith and his personal interest in her. In fact, Dux's behavior escalated to the point where IIG forbade Dux from entering any establishment where Gold-Smith was located. However, not only was Smith never made aware of the ongoing inappropriate interactions between Dux and Gold-Smith, a clear breach of the Retainer Agreement, and despite said knowledge, incredibly, IIG assigned Dux to surveil Gold-Smith during her overnight trip to the Mohegan Sun Casino in Connecticut (Roth Aff., ¶20).

The inappropriate conduct of the Investigators also involved Roth himself. On or about July 7, 2018, Roth and Marr were assigned to surveil Gold-Smith at Aura, a dance club in East Meadow, New York. That evening Roth approached Gold-Smith inside Aura and engaged in unsolicited intimate physical contact with her multiple times that night. In fact, other investigators assigned that night recorded videos of Gold-Smith dancing by herself, which were then forwarded to Smith by IIG as “actual surveillance” evidence, even though Roth was physically interacting with the subject at the time (Roth Aff., ¶¶ 43, 44).

Although IIG (i) was aware of Greene’s discussion (the “December Discussion”) with Gold-Smith (Greene Aff.), [Ex. 16 Gold Smith Bates No. 002880 – 002894] (ii) was aware that Gold-Smith had all but stopped evading the Investigators, (iii) was aware Gold-Smith was providing the Investigators notice of her whereabouts [*id.*, Ex. 17, Gold-Smith Bates No. 002896-002898], and (iv) was aware that Custodio, an investigator hired to covertly surveil Gold-Smith, spent a night inside Gold-Smith’s home [*Id.*, Ex. 14], IIG never informed DeMarco or Smith of any of these developments. Rather, IIG concealed these facts and continued billing Smith for Investigators and hours that were not required to surveil Gold-Smith (Smith Aff., ¶ 20). In addition, IIG continued charging Smith for the services of five or six Investigators per shift each day (Smith Aff., ¶ 21), even though, as discussed below, text messages obtained during discovery show that, at times, fewer than five Investigators were actually surveilling Gold-Smith, and the Investigators knew when and where Gold-Smith was going in advance. Under these circumstances, for IIG to have charged Smith for even a single investigator, was a breach of the implied obligation of good faith and fair dealing, but billing for five (5) or more investigators per shift was *a complete outrage*.

D. IIG Directs Investigators to Manipulate and Inflate Their Invoices

In an effort to line its own pockets and reap financial benefits for services it was not rendering, IIG directed investigators to add time to their invoices and remit those inflated invoices to IIG for payment. For example, the evidence demonstrates unequivocally that Roth, Marr, Greene, McNamara, at the direction of IIG, routinely and repeatedly inflated their individual invoices to reflect time they never incurred. The inflated hours took various forms, as IIG (i) directed Investigators to submit hours reflecting false beginning and end times per shift (i.e., earlier start times and later end times than actually worked); (ii) directed Investigators to double bill for surveillance jobs; (iii) directed Investigators to add additional hours to those actually worked; and (iv) remitted invoices to Smith reflecting accumulated time billed by Investigators who never actually worked at all.

E. Smith Learns of IIG's Fraudulent Conduct

When Smith and Gold-Smith reconciled in January, 2019, Smith learned of the myriad of ways in which IIG breached the Agreement; concealed material information; distorted the information and reports provided to Smith and his Attorney; and allowed the Investigation to be grossly compromised (Smith Aff., ¶ 23; Gold-Smith Aff., ¶¶ 15-17).

On May 31, 2019 Smith commenced the Action, seeking damages against IIG, its principals, and certain Investigators, for breach of contract, fraud, gross negligence, and breach of the covenant of good faith and fair dealing (Smith Aff., ¶ 29; Cohn Aff., ¶ 3, [Ex. 2, Verified Complaint]).

During discovery, Smith was furnished various text messages exchanged between IIG and the Investigators documenting and confirming that IIG breached the Agreement and engaged in a systematic scheme to overbill Smith by, among other things, charging Smith for countless

Investigator hours that IIG knew were never worked and charging Smith for “agents” who did not exist (Smith Aff., ¶ 30). The evidence demonstrates that IIG explicitly and routinely directed its Investigators to “slap on” additional hours and inflate their individual invoices (Marr Aff., ¶¶ 33-36; Roth Aff., ¶¶ 53-55; Greene Aff.,) which IIG charged to Smith (Smith Aff., ¶ 30).

The attached affidavits confirm IIG’s knowledge that their Investigators were regularly interacting with Gold-Smith, which, on multiple occasions, also included inappropriate sexual contact (Gold-Smith Aff., ¶¶ 10,11). And yet, IIG continued to employ these Investigators, and even assigned them to “surveil” Gold-Smith on overnight trips. For example, during the weekend of March 23, 2018, IIG assigned Greene and Marr to surveil Gold-Smith and her friend at the time, Katuria D’Amato (“D’Amato”), on a trip to the Mohegan Sun Hotel & Casino in Uncasville, Connecticut [Verified Complaint, ¶ 100]; (Gold-Smith Aff., ¶ 11; Marr Aff., ¶¶ 47-48) (“Mohegan Sun trip”). However, Greene and Marr did not surveil Gold-Smith, instead they spent the weekend interacting, drinking, dining, engaging in physical contact, and enjoying a Rod Stewart concert with Gold-Smith and D’Amato [Verified Complaint, ¶ 100]; (Gold-Smith Aff., ¶ 11; Marr Aff., ¶¶ 47-48). IIG was aware that Marr and Greene communicated with Gold-Smith during that weekend, but never advised Smith of the interactions which occurred, or admonished the investigators for their conduct. (Marr Aff., ¶ 49).

Similarly, during the period from May 25 through May 27, 2018, Roth, Greene, and Marr were assigned to surveil Gold-Smith and D’Amato during their trip to the Montauk Yacht Club (Marr Aff., ¶ 55; Roth Aff., ¶ 27). But, like the Mohegan Sun trip, this was more of a vacation than a surveillance detail [Verified Complaint, ¶ 93]; (Marr Aff., ¶¶ 56-60; Roth Aff., ¶ 27). Roth, Greene, and Marr met Gold-Smith and D’Amato at the outdoor hotel bar where Marr, Greene and Roth all consumed alcohol while interacting with Gold-Smith (Marr Aff., ¶ 56). Marr also walked

with Gold-Smith and D'Amato through town. Roth, Marr, and Greened dined and consumed alcohol at Gold-Smith's table inside restaurants, and jointly attended a beach bon fire (Marr Aff., ¶¶ 57-58; Roth Aff., ¶ 27). Roth also joined Gold-Smith and D'Amato on a sunset catamaran cruise, where he drank and interacted with Gold-Smith (Gold-Smith ¶13, Marr Aff., ¶ 57; Roth Aff., ¶ 27, Ex. 18 [Photo]). Despite Daniel Ribacoff's awareness of these interactions, both sexual and socially, see Affidavit of Yolanda Roth, annexed hereto, confirming she personally told Daniel Ribacoff of the interactions between the investigators and Gold-Smith, (Yolanda ¶ 7) he never notified Smith or DeMarco of these developments, purportedly out of fear the investigation would be terminated.

The court should be aware that, during the same weekend in Montauk, Greene admitted to Roth that he had engaged in sexual contact with Gold-Smith, *while she was "wasted"* in the back seat of a rental vehicle he used to surveil her, an expense which, ironically, was billed by IIG and paid for by Smith (Roth Aff. 28, 29,). Despite Daniel Ribacoff's and IIG's knowledge of their Investigators' conduct in Montauk during Memorial Day weekend of 2018, these material facts were concealed from Smith and any surveillance materials forwarded to Smith's attorney from that weekend were grossly compromised (Marr Aff., ¶¶ 55-60; Roth ¶¶24-27).

The time and expenses incurred by Roth, Greene, and Marr for this weekend – including sunset cruise tickets, hotel rooms, and meals shared with Gold-Smith--were billed by IIG and paid for by Smith under the guise that the investigators conducted legitimate, covert surveillance (Smith Aff., ¶ 27). Although IIG knew its Investigators interacted with Gold-Smith on the overnight trips, and no legitimate surveillance was ever conducted (Marr Aff., ¶¶ 49, 59-60; Roth Aff., ¶ 27), IIG still charged and Smith paid for purported "surveillance" and related expenses (Smith Aff., Ex. 4 [Wire Transfers to IIG]).

Likewise, Gold-Smith and D'Amato traveled to Philadelphia during the July 4th, 2018 holiday weekend. Four (4) IIG investigators were assigned to surveil Gold-Smith over that weekend including Marr, Lurentzatos, Thomas and Spieler, who all stayed at the Ritz Carlton Hotel. While in Philadelphia Marr, Lurenzatos, Thomas and Gold-Smith all entered a dance club together (Lurenzatos fractured her shoulder that evening while dancing with Gold-Smith), (Gold-Smith Aff., 14) had meals together, shared Uber rides together, and Marr sat next to Gold-Smith while she traveled to a concert by train. Hotel rooms at the Ritz Carlton for the Investigators, their meals, concert tickets, travel expenses, and incidentals, were all paid for by Smith, despite the fact that no legitimate surveillance was ever conducted that weekend. (Gold- Smith Aff., ¶ 14; Marr Aff. ¶¶ 72-74, Complaint ¶¶ 128-132).

ARGUMENT

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Blanco Gomez v Principe*, 186 AD3d 466, 467 [2d Dept 2020], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that showing has been made, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Ayers v City of Mount Vernon*, 176 AD3d 766, 769 [2d Dept 2019], quoting *Alvarez*, 68 NY2d at 324). “[B]ald, conclusory assertions or speculation and ‘[a] shadowy semblance of an issue’ are insufficient to defeat summary judgment” (*Stonehill Capital Management, LLC v Bank of the West*, 28 NY3d 439, 448 [2016] [citation omitted]).

Smith established prima facie that IIG breached the Agreement by intentionally charging Smith for services IIG did not perform. In addition, Smith established that IIG breached the covenant of good faith and fair dealing by intentionally depriving Smith of the benefits of the Agreement and charging him for investigators who were not investigating anything, as they were interacting with Gold-Smith themselves instead of legitimately surveilling her. Because there are no material issues of fact requiring trial, the Court should award Smith partial summary judgment on liability on the First and Fourth Causes of Action.

Point I

IIG BREACHED THE EXPRESS TERMS OF THE AGREEMENT BY CHARGING SMITH FOR WORK THAT IIG KNEW THE INVESTIGATORS DID NOT PERFORM

To establish a prima facie cause of action for breach of contract, the plaintiff must show (i) the existence of a contract, (ii) the plaintiff's performance pursuant to the contract, (iii) the defendant's breach of its contractual obligations, and (iv) resulting damages (*143 Bergen Street, LLC v Ruderman*, 144 AD3d 1002, 1003 [2d Dept 2016], citing *Tudor Ins. Co. v Unithree Inv. Corp.*, 137 AD3d 1259, 1259 [2d Dept 2016]; see also *Joseph W. Ryan, Jr., P.C. v Faibish*, 136 AD3d 984, 984 [2d Dept 2016]).

There is no dispute that the Agreement is a binding, enforceable contract between Smith and IIG [Verified Complaint, ¶ 189]; (Smith Aff., ¶ 6; Cohn Aff., [IIG Verified Answer], ¶ 189 [admitting the Agreement is "binding, valid and enforceable"]). And, there is no dispute that Smith performed his obligations under the Agreement by paying the amounts demanded by IIG under the Agreement for the Investigation (Smith Aff., ¶ 9 [Ex. 4 [Wire Transfers]]). As demonstrated below in Points I (A) and (B), *infra*, Smith has established prima facie that IIG breached the Agreement, resulting in damages to Smith in an amount to be determined upon inquest.

A. IIG Breached the Agreement by Directing Investigators to Inflate Invoices to Recoup Payment for Hours Not Worked

The Agreement unambiguously obligated IIG to charge Smith “based upon the time spent by [IIG’s] agents at hourly rates” (Smith Aff., ¶9, Ex. 1 [Agreement]). This provision plainly manifests the parties’ intention to charge Smith for time the Investigators *actually worked* the Investigation – (not for inflated, contrived, or fabricated hours, manufactured *at the direction of IIG*). And yet, the record shows: (1) IIG routinely directed the Investigators to inflate their individual invoices (Marr Aff., ¶¶ 33-36; Roth Aff., ¶ 53-55; Greene Aff., Ex. 6 [Gold-Smith Bates]); (2) the Investigators did as they were directed (*id.*); (3) IIG charged Smith for these fictitious hours; and (4) Smith paid for the hours the Investigators did not actually work (Smith Aff., ¶ 11). Additionally, IIG billed Smith for an “investigation” when the subject of that investigation was fully aware she was “being surveilled,” and those hired to surveil her were actually socializing and interacting with her.

IIG’s calculated scheme to overcharge Smith generally worked as follows: utilizing the mobile messaging applications WhatsApp (“WhatsApp”) and Signal (“Signal”), IIG’s principals would initiate daily a “group chain message” among the Investigators who were assigned on a particular day to surveil Gold-Smith (Marr Aff., ¶¶ 23, 26). Within the group message chain, IIG would provide the Investigators with specific directions related to the Investigation for that day, including the time each Investigator would be discharged (*id.*, ¶¶ 27, 31-33). After dismissing each Investigator at a particular time, IIG would privately message certain Investigators – including, but not limited to Marr, Roth, Greene, McNamara and others – directing s/he to add hours to their individual invoices, even though they did not actually work the additional hours they were being directed to add (Marr Aff., ¶¶ 33-39; Roth Aff., ¶ 53-54; Greene Aff., Ex. 6 [Bates]).

This practice, done at the direction of IIG, was rampant among Investigators and spread across the entire investigation. Consider:

Investigator	Evidence Shows
Saul Roth	Inflated his individual invoices at IIG's direction to reflect hours he did not work on at least <i>twenty separate occasions</i> between February 7, 2018 and June 21, 2018 (Roth Aff., ¶ 53, Roth Aff. 2-authenticating the texts messages, Ex. 19, and Invoices Ex. 20[Texts with Lance, Invoices]). ⁴

⁴Between February 7, 2018 and June 21, 2018 Roth, at Lance Ribacoff's direction, padded his billing 21 times (Roth Aff. Lance/Roth texts, Ex. 19, text messages and invoices authenticated by Roth Affidavit 2):

On February 7, 2018, at 5:06 pm, Defendant Lance Ribacoff instructed Defendant Yanti Greene and Saul Roth to "put end time as 7pm";

On April 3, 2018 at 12:20am, Defendant Lance Ribacoff instructed Saul Roth to "slap on 2 hours for tn";

On April 5, 2018 at 8:51pm, Defendant Lance Ribacoff instructed Saul Roth to "please add extra 4 hours (\$200) for today".

On April 7, 2018 at 11:14pm, Defendant Lance Ribacoff instructed Saul Roth to "pls add 2 hours for today";

On April 9, 2018 at 9:41pm, Defendant Lance Ribacoff instructed Saul Roth to "pls add extra 2.5 hours";

On April 11, 2018 at 11:58pm, Defendant Lance Ribacoff instructed Saul Roth to "pls add extra 2.5 hours";

On April 15, 2018 at 12:35am, Defendant Lance Ribacoff instructed Saul Roth to "pls slap 2.5 hours for tn";

On May 5, 2018 at 11:01pm, Defendant Lance Ribacoff instructed Saul Roth to "pls add extra 2hours for tn";

On May 7, 2018 at 11:30pm, Defendant Lance Ribacoff instructed Saul Roth to "pls add extra 2.5 hours";

On May 10, 2018 at 11:30pm, Defendant Lance Ribacoff instructed Saul Roth to "pls add extra 2 hours for today";

On May 18, 2018 at 11:46pm, Defendant Lance Ribacoff instructed Saul Roth to "add extra 1.5 hours for tn and put start time as 530 tomorrow but start at 730";

On May 20, 2018 at 11:46pm, Defendant Lance Ribacoff instructed Saul Roth to "Pls add extra 1.5 hours";

On May 24, 2018 at 10:16pm, Defendant Lance Ribacoff instructed Saul Roth to "pls add extra 2 hours";

On June 3, 2018 at 9:59 pm, Defendant Lance Ribacoff instructed Saul Roth to "Start tomorrow at 745 and put start at 530";

On June 4, 2018 at 5:49 pm, Defendant Lance Ribacoff instructed Saul Roth "From 5pm bill at \$75 per";

On June 5, 2018 at 11:37pm, Defendant Lance Ribacoff instructed Saul Roth to "Put start time as 530am tomorrow but start 745";

James Marr	Inflated his individual invoices at IIG's direction on at least <i>ten separate occasions</i> during a two month period between March 30, 2018 and May 26, 2018, and was paid in full for each invoice (Marr Aff., ¶¶ 32, 38, 42).
Yanti Greene	Inflated his individual invoices [Ex. 22] at IIG's direction on at least <i>thirty separate occasions</i> between December 2017 and May 2018 (Green Aff., [Bates Exhibit 23] and was directed by IIG routinely to <i>fabricate extra hours to</i> his time (<i>infra</i>).
Tommy McNamara	Routinely fabricated the hours he worked pursuant to an "understanding" he had with Lance Ribacoff (Greene Aff., Ex. 6,[Chat-Greene, Tommy Mc], Ex. 21, Gold-Smith Bates No. 000999).

Marr, Roth, and Greene each submitted to IIG – at IIG's direction –inflated and materially false invoices reflecting time not spent working, for which each were paid in full (Marr Aff., ¶ 37, 38 Ex. A [Marr Invoices]; Roth Aff., ¶¶ 53-55, Ex. 20[Invoices]; Ex. 4 [Wire Transfers]). By orchestrating and encouraging this fraudulent billing, IIG breached the Agreement.

The following sets forth numerous instances in which Lance Ribacoff directed Greene to add hours to his invoices for work never performed, said hours billed to Smith: Gold-Smith Bates Nos. 002861 (fictitious end-time), 002894 (fictitious end time), 002902 (fictitious end time), 002965(fictitious end time), 002975 (fictitious end time), 002993 (fictitious end time), 002997 (fictitious end time), 003005 (fictitious end time), 003013 (fictitious end time), 003024 (fictitious end time), 003039 (fictitious end time), 003047 (fictitious end time), 003202 ("add extra 2 hours"),

On June 6, 2018 at 5:38pm Defendant Lance Ribacoff instructed Saul Roth "From 5pm bill at \$75 per";

On June 8, 2018 at 11:18pm, Defendant Lance Ribacoff instructed Saul Roth to "Start tomorrow at 8am and put 530 start";

On June 20, 2018 at 9:26pm, Defendant Lance Ribacoff instructed Saul Roth to put end as 1130";

On June 21, 2018 at 8:43am Defendant Lance Ribacoff instructed Saul Roth "Pls bill until 3pm at \$75 per" and at 3:39 Lance instructed Saul Roth to "Keep \$75 rate for the rest of the day";

On June 21, 2018 at 9:46pm Defendant Lance Ribacoff instructed Saul Roth to "Pls put end time as 11:45".

003208 (fictitious end time), 003223 (fictitious end time), 003237 (fictitious end time), 003240 (“add extra hours pls”), 00324 (“add extra 2.5 hours pls for tn”), 003268 (fictitious end time), 003276 (“slap on extra 2 hours as well pls”), 003283 (“and please slap on extra 2 hours for today”), 003310 (“pls add extra 2.5 hours”), 00311 (fictitious start time), 003312 (“pls add 3 hours for tn”), 003315 (instructing Greene to “break” at a particular time but “put end time” several hours later); 003035, 003201, 003311 (directing Greene to start shift at 9 a.m. but “put start time” at 7 a.m.) (Bates Docs. collectively Exhibit 23).

IIG’s double billing of Smith was part of a pattern and practice of IIG’s, which included directing Greene to “double bill” on other cases involving IIG clients such as “Gillian Hearst,” the granddaughter of Patricia Hearst, and the “Church of Scientology,” who allegedly retained IIG to conduct surveillance of actress Leah Remini, a former member of the Church. (Greene Aff., Gold-Smith Bates No. 003144 [“And double bill from 9 pm to midnight on that other case”], Bates No. 003153 [“Can you do city case at 4 pm again, would be solo, but bill us double ... meaning as both agents”]; No. 003165 [“Shit, can you do hearst again pls. Same as yesterday, solo at \$100 per”])(Bates 003144, 003153 and 003165 annexed hereto collectively at Ex. 24, (see also annexed texts Green Aff. [Bates, Exhibit 25]).

B. IIG Breached the Agreement by Charging Smith for Investigators Who Did Not Work As Claimed

In addition to charging Smith for inflated hours, the Invoices produced by IIG demonstrate IIG charged Smith for Investigators who did not actually work on the dates listed on the Invoices (Cohn Aff., ¶ 12 Ex. 26 [April Invoices]). For example, the invoice dated April 2, 2018 (Ex. 26) shows that IIG charged Smith \$44,100 in surveillance fees for six agents who purportedly worked a combined total of 294 hours between April 6, 2018 and April 8, 2018 (Ex.26 [Invoices]).

However, the IIG group text messages – which accurately reflect the identity and number of Investigators working the Investigation on a given day (Marr Aff., ¶ 26) – revealed that only four investigators – Roth, Marr, Spieler, and Philip Insardi (“Insardi”) – worked on April 7, 2018 and April 8, 2018 (Roth Aff., Exs. 27, 28– IIG Group Threads for 4/7/18 and 4/8/18]). These messages also show that Roth, Marr, Insardi, and Spieler worked a combined total of 111.5 hours between April 7, 2018 and April 8, 2018 – 58 hours on April 7, 2018, and 53.5 hours on April 8, 2018 (*id.*, [Exs. 27, 28]) (see Roth Affidavit 3 affirming the WhatsApp messages, annexed in part herein, to be true and accurate copies of the WhatsApp messages that were contained on the back-up of his cell phone). And so, for the April 2018 Invoice to be accurate, an additional combined 182.5 hours of work on April 6, 2018 would have been required. Even assuming six (6) Investigators actually worked on April 6, 2018, they would be tasked with the impossible feat of *each* working 30.4 hours within a single 24-hour day.

The invoice dated May 1, 2018 (“May 2018 Invoice” Ex. 29) is replete with similar material misstatements. For instance, the May 2018 Invoice states that six agents purportedly worked between May 3, 2018 and May 6, 2018, for a combined total of 294 hours (Cohn Aff., Ex.29 [May 2018 Invoice]). But the IIG group text messages demonstrate (i) only four Investigators – Spieler, Marr, Roth, and “Alex” – worked on May 5, 2018, for a combined total of 48.75 hours (Roth Aff 2., Ex. 30 [May 5 Chat])(Roth Affidavit 3), and (ii) the six investigators who purportedly worked on May 6, 2018, worked a combined total of 79 hours (*id.*, Ex. 30[May 6, 2018 Thread])(Roth Affidavit 3). And so, in order for the May 2018 IIG Invoice to be accurate, an additional combined 166.25 hours of work on May 4, 2018 would be required. Ex. 29. Even assuming six Investigators legitimately worked on May 4, 2018, they had the impossible task of working 27.7 hours each in a 24-hour period.

IIG's untrue billing did not stop there. Indeed, the evidence demonstrates that IIG charged Smith for agents who did not exist. For example, from May 25, 2018 through May 27, 2018, Smith was billed a total of \$10,078 for an "Amagansett Agent" [Invoice - Ex. 31, p. 4]). However, the IIG group chain messages confirm no "Amagansett Agent" ever worked during those three days, and that only Roth, Greene, Marr, Ramos, and Spieler worked between May 25, 2018 and May 27, 2018 (Roth Aff.2, Ex ¶¶. 32, 33)(Roth Affidavit 3).

IIG manufactured many falsehoods in their billing and, as the evidence shows, encouraged and/or directed routine padding of Investigator invoices, which it then incorporated in demands from Smith for payment. Because IIG knowingly and intentionally failed to bill Smith "based upon the time spent by [IIG's] agents at hourly rates," summary judgment on the First Cause of Action on liability is warranted.

Furthermore, once the Investigators began interacting with Gold-Smith, Smith lost any benefit under the Agreement and therefore is entitled to all monies paid since at least December, 2017, the date which Greene likely first communicated with Gold-Smith and Gold-Smith agreed to comply with the Investigators and the investigation [Gold-Smith Aff].

Point II

SMITH IS ENTITLED TO SUMMARY JUDGMENT ON THE FOURTH CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Under New York law an unexpressed promise may be implied if the promise "is implicit in the agreement viewed as a whole" (*Rowe v Great Atlantic & Pacific Tea Co., Inc.*, 46 NY2d 62, 69 [1978]). "A promise may be lacking, and yet the whole writing may be instinct with an obligation imperfectly expressed" (*id.* quoting *Wood v Duff-Gordon*, 222 N.Y. 88, 91 [1860]). Thus, "the undertaking of each promisor in a contract must include any promises which a

reasonable person in the position of the promisee would be justified in understanding were included” (*id.*). One such implied promise is a covenant of good faith and fair dealing (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]; *Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781, 784 [2d Dept 2012]),⁵ which “is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement” (*Frankini v Landmark Const. of Yonkers, Inc.*, 91 AD3d 593, 595 [2d Dept 2012]; *Ahmed Elkoulily, M.D. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 700 [2d Dept 2017]). The covenant is essentially concerned with fairness (*TVT Records v Island Def Jam Music Group*, 244 F Supp. 2d 263, 278 [SD NY 2003] [the covenant “protects a promisee not against a breach of the express terms of a contract but of the reasonable expectations and inferences otherwise derived from the agreement”]).

Here, as discussed in Points I and II, IIG intentionally deprived Smith of the benefits of the Agreement by (i) failing to disclose to Smith, Gold-Smith’s cooperation during the Investigation, (ii) failing to disclose to Smith the daily social interactions occurring between the Investigators and Gold-Smith, (iii) continuing to charge Smith for the services of between five and six Investigators per shift each day, even though fewer investigators were actually working, and in fact were not even needed, (iv) directing the Investigators to inflate their individual invoices, and billing Smith for work IIG knew the Investigators did not actually perform, (v) charging Smith for Investigators who did not actually exist, and (vi) engaging in a persistent course of conduct inconsistent with the terms of the Agreement, for the sole and improper purpose of maintaining IIG’s lucrative income stream.

⁵ The covenant of good faith and fair dealing is implied even where the contract contains a merger clause stating the contract is fully integrated (*SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004]).

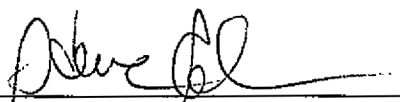
CONCLUSION

The extremely deceptive course of conduct that IIG and its principals Daniel, Lance, and Lisa Ribacoff engaged in and the clear and substantial fraud they perpetrated on their client should not go unpunished. For the reasons stated herein, the Court should grant Smith partial summary judgment on the First and Fourth Causes of Action against IIG, direct an inquest on damages, and/or award Plaintiff full restitution for the amounts paid to IIG for the period December 2017 through January 2019, including every and all expense he was charged during this period of time, and award such other and further relief as the Court deems just and proper.

Dated: Carle Place, New York
May 27, 2021

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