

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION**

<p>QUINN EMANUEL URQUHART &amp; SULLIVAN, LLP; FRESHFIELDS BRUCKHAUS DERINGER US LLP; and KOBRE &amp; KIM, LLP,</p> <p style="text-align: center;">Plaintiffs,</p> <p>-against-</p> <p>MIMEDX GROUP, INC.,</p> <p style="text-align: center;">Defendant.</p>
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Index No. \_\_\_\_\_

**SUMMONS**

Plaintiffs designate New York  
County as the place of trial.

**TO THE ABOVE NAMED DEFENDANT:**

**YOU ARE HEREBY SUMMONED** to answer the Complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on Plaintiffs’ attorney within 20 days after the service of this summons, exclusive of the date of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York).

**TAKE NOTICE THAT** should you fail to answer, a judgment will be taken against you by default for the relief demanded in the Complaint and any additional interest the Court deems applicable.

Plaintiffs designate the Supreme Court of the State of New York in and for New York County as the place of trial. Venue is proper because Plaintiffs’ offices are located in this County, and some or all of the acts giving rise to Plaintiffs’ claims occurred in this County and State.

DATED: New York, New York  
April 15, 2021

QUINN EMANUEL URQUHART &  
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By:



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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION**

QUINN EMANUEL URQUHART &  
SULLIVAN, LLP; FRESHFIELDS  
BRUCKHAUS DERINGER US LLP; and  
KOBRE & KIM, LLP,

Plaintiffs,

-against-

MIMEDX GROUP, INC.,

Defendant.

Index No. \_\_\_\_\_/2021

**COMPLAINT**

Plaintiffs designate New York County as the  
place of trial.

**COMPLAINT**

Plaintiffs Quinn Emanuel Urquhart & Sullivan LLP (“QEU&S”), Freshfields Bruckhaus Deringer US LLP (“Freshfields”), and Kobre & Kim, LLP (“K&K”) (together “Plaintiffs”) bring this action against Defendant MiMedx Group, Inc. (“MiMedx,” or the “Company”) for damages arising from breach of contract in connection with Plaintiffs’ provision of legal services to the Company’s former executives.

**NATURE OF THE ACTION**

1. This is an action to enforce MiMedx’s agreement to pay legal fees and expenses owed to Plaintiffs for their legal representation of MiMedx’s former Chief Executive Officer, Parker H. “Pete” Petit, and former Chief Operating Officer, William C. Taylor (together, the “Officers”).

2. From 2018 to the present, the Officers have been involved in a variety of internal investigations, civil lawsuits, and government enforcement actions related to their service as MiMedx officers and directors (the “MiMedx Legal Actions”). Pursuant to indemnification agreements entered into between MiMedx and the Officers, as well as MiMedx’s own Articles of

Incorporation and Bylaws, MiMedx was obligated to indemnify the Officers and advance their legal expenses related to legal proceedings arising from their corporate status, including the MiMedx Legal Actions.<sup>1</sup>

3. As detailed below, the Officers retained Plaintiffs to represent them in certain of the MiMedx Legal Actions, and MiMedx agreed to pay Plaintiffs' monthly invoices directly, within the 30 days contemplated by applicable indemnification agreements, thus assuring Plaintiffs that they would be paid for the work they performed.<sup>2</sup> Plaintiffs relied on MiMedx's promises to make prompt, direct payment of their invoices in agreeing to represent the Officers.

4. But MiMedx repeatedly violated its promise to make prompt payment to Plaintiffs. Beginning in 2018, MiMedx was often more than 30, 90, and at times even 180 days late in paying invoices that it had promised to pay upon receipt. Plaintiffs continued zealously representing the Officers, even as they were forced to send the Company numerous letters and other

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<sup>1</sup> “[A]dvancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings.” *Ficus Invs., Inc. v. Priv. Cap. Mgmt., LLC*, 61 A.D.3d 1, 9 (1st Dep’t 2009); *see also Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 170 (Del. Ch. 2003) (“It is well recognized that the rights to indemnification and advancement ‘encourage well-qualified persons to serve as directors and officers of . . . corporations and, in that capacity, to be willing to commit their corporations, after the exercise of good faith and care, to risky transactions that promise a lucrative economic return.’”).

<sup>2</sup> Since 2018, QEU&S has represented Mr. Petit and Mr. Taylor in connection with several civil cases filed in various state and federal courts, as well as in connection with investigations conducted by MiMedx's Audit Committee, the Securities and Exchange Commission (“SEC”), and the Department of Justice. QEU&S has also represented Mr. Taylor in (i) an SEC civil enforcement action and (ii) a criminal action, both filed against him in the United States District Court for the Southern District of New York (“S.D.N.Y.”). Freshfields has represented Mr. Petit in connection with the same SEC and criminal actions filed in S.D.N.Y., where Mr. Petit and Mr. Taylor are co-defendants, as well as in two civil cases filed in the District Court for the Northern District of Georgia. K&K also represented Mr. Petit in the S.D.N.Y. criminal action, serving as co-counsel with Freshfields at trial in that matter. In addition, since 2018, K&K worked alongside QEU&S as local counsel for Mr. Petit and/or Mr. Taylor in three civil cases filed in Florida state court.

communications demanding that it pay as promised in the indemnification agreements and otherwise.

5. On three separate occasions, Plaintiffs threatened to sue the Company if it did not abide by the terms of its obligations. Each time, MiMedx persuaded Plaintiffs to forego filing a lawsuit by promising to pay Plaintiffs' overdue invoices and by renewing its agreement to make prompt payment of future invoices. On each of these occasions, MiMedx did pay many (although not all) outstanding invoices, but it failed to honor its renewed promises to pay future invoices promptly.

6. The problem reached a crisis point in spring 2020, when the Officers were expected to begin a six-week trial on criminal securities fraud charges within a matter of months in the United States District Court for the Southern District of New York. Plaintiffs had several oral and written communications with MiMedx's General Counsel, Butch Hulse, in which Plaintiffs explained that they were unwilling to bear the financial risk that MiMedx would fail to pay their invoices promptly (or at all) for the considerable time, effort, and expense associated with a criminal trial of complex financial charges—a trial made all the more complicated by the COVID-19 pandemic. Plaintiffs requested that MiMedx provide a retainer, line of credit, or other form of payment guarantee in light of the Company's history of violating payment agreements. Plaintiffs stated that absent such a guarantee, they would be compelled to file a lawsuit to force MiMedx to pay all outstanding invoices and to make prompt payment of all future invoices in keeping with the terms of its payment agreements. Mr. Hulse asked Plaintiffs not to file a lawsuit and promised on the Company's behalf that it would pay Plaintiffs' outstanding and future invoices, including their invoices for preparation and trial of the criminal case, which Mr. Hulse acknowledged were likely to be considerable. In reliance on that promise, Plaintiffs did not file a lawsuit and proceeded

to prepare and try the criminal case, winning partial victories for both Officers, but only after investing considerable time, effort, and expense.<sup>3</sup>

7. Once again, however, MiMedx has violated its agreements to pay Plaintiffs' invoices. Despite Plaintiffs' agreements to forego filing a lawsuit and to continue to defend the Officers on MiMedx's behalf, MiMedx has not paid any portion of Plaintiffs' invoices arising from the preparation and trial of the criminal case, which ended nearly five months ago. MiMedx has also violated its agreements to pay Plaintiffs for work in civil matters where MiMedx is required to indemnify and advance fees and expenses to defend the Officers. Those outstanding invoices are substantial: MiMedx owes each Plaintiff millions of dollars in legal fees and costs incurred in preparing and trying the criminal case, as well as fees and costs incurred in other MiMedx Legal Actions. Plaintiffs seek relief from this Court to hold MiMedx accountable for its breaches.

#### **THE PARTIES**

8. Plaintiff QEU&S is a California limited liability partnership engaged in the practice of law. QEU&S is authorized to do business in New York with offices located at 51 Madison Avenue, New York, New York 10010.

9. Plaintiff Freshfields is a New York limited liability partnership engaged in the practice of law. Freshfields is authorized to do business in New York with offices located at 601 Lexington Avenue, New York, New York 10022.

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<sup>3</sup> As the presiding judge remarked near the end of the trial, the advocacy on behalf of the Officers was exceptional: "I thought this was really one of the best tried cases I've seen in a long while, and I'm very grateful to everyone." Trial Tr. at 2446:14–16, *United States v. Parker H. Petit and William Taylor*, Case No. 19-cr-00850-JSR (S.D.N.Y).

10. Plaintiff K&K is a New York limited liability partnership engaged in the practice of law. K&K is authorized to do business in New York with offices located at 800 Third Avenue, New York, New York 10022.

11. Defendant MiMedx is a Florida corporation with its principal place of business at 1775 West Oak Commons Ct. NE, Marietta, Georgia.

12. Non-Party Parker H. “Pete” Petit (“**Petit**”) resides in Georgia. From 2009 until his June 2018, he was MiMedx’s Chief Executive Officer (“CEO”), and from 2009 until September 2018, he was a member of the Company’s Board of Directors.

13. Non-Party William C. Taylor (“**Taylor**”) resides in Georgia. From 2009 until July 2018, he was MiMedx’s Chief Executive Officer (“COO”), and from 2009 until September 2018, he was a member of the Company’s Board of Directors.

**JURISDICTION, VENUE AND GOVERNING LAW**

14. This Court has jurisdiction pursuant to CPLR §§ 301 and 302.

15. This Court has personal jurisdiction over Defendant under CPLR § 302(a) because Defendant purposefully availed itself of this forum by entering agreements with Plaintiffs for legal services to be performed in New York, and by committing a breach of contract which harmed Plaintiffs in New York. Further, Defendant regularly transacts business within New York.

16. Venue is proper because Plaintiffs’ offices are located in this County, and some or all of the acts giving rise to Plaintiffs’ claims occurred in this County and State.

17. The amount at issue is in excess of the \$500,000 monetary threshold required for jurisdiction in the Commercial Division of New York County.

**FACTS**

**I. MiMedx’s Indemnification and Advancement Agreements with the Officers**

**A. Articles of Incorporation and Bylaws**

18. MiMedx first adopted Articles of Incorporation on or about February 28, 2008. From that time until at least the present, the Articles of Incorporation have required MiMedx to indemnify officers and directors, such as the Officers, for expenses, including attorneys' fees, in legal proceedings arising from their corporate status.

19. More specifically, Article 8 of MiMedx's Articles of Incorporation, entitled "Indemnification," states in part:

Each person who is or was a Director or Officer of [MiMedx] shall be indemnified by [MiMedx] against those expenses (including attorneys' fees) . . . which are allowed to be paid or reimbursed by [MiMedx] . . . and which are actually and reasonably incurred in connection with any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, in which such person may be involved by reason of his being or having been a Director or Officer of [MiMedx].

20. MiMedx first adopted Bylaws on or about February 29, 2008. From that time until the present, the Bylaws likewise have required MiMedx to indemnify officers and directors for expenses, including legal fees, in legal proceedings arising from their corporate status.

21. More specifically, Article VIII, Section 9, of MiMedx's Bylaws, entitled "Indemnification of Directors and Officers," states in part:

Each person who is or was a director or officer of [MiMedx]... shall be indemnified by [MiMedx] against those expenses (including attorneys' fees) . . . which are allowed to be paid or reimbursed to the Corporation . . . and which are actually and reasonably incurred in connection with any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, in which such person may be involved by reason of his being or having been a director or officer of [MiMedx].

The indemnification provided herein shall not be deemed to limit the right of [MiMedx] to indemnify any other person for any liability, including obligations to pay a judgment, a settlement, penalty, fine (including an[y] excise tax assessed with respect to any employee benefit plan), and expenses actually and reasonably incurred (including attorneys' fees), to the

fullest extent permitted by law, both as to action in such person's official capacity and as to action in another capacity while holding such office.

22. Article VIII, Section 9, of MiMedx's Bylaws also states that the Company may enter into additional "indemnification agreements" with its officers or directors that "provide for further or expanded indemnification rights or otherwise modify the rights provided under this Section 9."

### **B. The 2009 & 2013 Indemnification Agreements**

23. In 2009, MiMedx entered into identical written indemnification agreements with the Officers (the "2009 Indemnification Agreements"), each of whom is referred to in his indemnification agreement as "Indemnitee."

24. In 2013, MiMedx entered into substantively identical indemnification agreements with the officers (the "2013 Indemnification Agreements"), each of whom is again referred to in his indemnification agreement as "Indemnitee."<sup>4</sup>

25. Section 1 of the 2013 Indemnification Agreements requires MiMedx "to hold harmless and indemnify Indemnitee to the fullest extent permitted by law."

26. Section 5 of the 2013 Indemnification Agreements requires MiMedx to "advance all Expenses incurred by or on behalf of Indemnitee in connection with any Proceeding by reason of Indemnitee's Corporate Status within thirty (30) days after the receipt by the Company of a statement or statements from Indemnitee requesting such advance or advances from time to time, whether prior to or after final disposition of such Proceeding." It requires MiMedx to do so "[n]otwithstanding any other provision of this Agreement."

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<sup>4</sup> True and correct copies of the 2013 Indemnification Agreements are attached hereto as Exhibit A (Petit) and Exhibit B (Taylor).

27. Section 14 of the 2013 Indemnification Agreements defines the terms “Expenses,” “Proceeding,” and “Corporate Status” as follows:

“**Expenses**” means all fees, costs, and expenses of every kind incurred in connection with any Proceeding, including, but not limited to, all reasonable attorneys’ fees, retainers, accountants’ fees, private investigators’ fees, court costs, transcript costs, fees of experts, witness fees, travel expenses, duplicating costs, printing and binding costs, telephone charges, postage, delivery service fees and all other disbursements or expenses of the types customarily incurred in connection with prosecuting, defending, preparing to prosecute or defend, investigating, participating, or being or preparing to be a witness in a Proceeding. Expenses also shall include Expenses incurred in connection with any appeal resulting from any Proceeding, including without limitation the premium, security for, and other costs relating to any cost bond, supersede as bond, or other appeal bond or its equivalent.

“**Proceeding**” means any threatened, pending or completed action, claim, suit, arbitration, alternate dispute resolution mechanism, investigation, administrative hearing or any other proceeding whether civil, criminal, administrative or investigative, including any appeal therefrom, but excluding one initiated by Indemnitee pursuant to Section 7 of this Agreement to enforce his rights under this Agreement.

“**Corporate Status**” describes the status of a person who is or was a director, officer, employee, agent or fiduciary of the Company or of any other corporation, partnership, joint venture, trust, limited liability company, employee benefit plan or other enterprise that such person is or was serving at the request of the Company.

### C. The 2018 Prompt Payment Agreements

28. In February 2018, the Audit Committee of MiMedx’s Board of Directors began an investigation into accounting practices at the Company. In May 2018, the Officers retained QEU&S to represent them in the investigation and any related matters.

29. On May 17, 2018, MiMedx signed two written agreements with QEU&S (one for each Officer) in which it agreed to pay QEU&S’ invoices upon receipt, thus assuring QEU&S that it would be paid promptly for the work it performed (the “Prompt Payment Agreements”). Specifically, MiMedx agreed in writing that QEU&S would submit monthly invoices directly to

MiMedx and MiMedx would pay QEU&S directly upon receipt of those invoices, without the need for any action by the Officers. The Prompt Payment Agreements were signed for MiMedx by Lexi Haden, its General Counsel, who attested that she had authority to bind the Company. The identically-worded letter agreements state in relevant part that QEU&S “will send you copies of our monthly invoices” and that “[t]hese invoices are due and payable upon presentation and MiMedx agrees to be responsible for them.”<sup>5</sup>

30. MiMedx induced QEU&S to represent the Officers and to forego collecting payment from the Officers by agreeing that QEU&S would send its invoices directly to the Company and that those invoices would become due and payable by the Company upon receipt. QEU&S relied on the Prompt Payment Agreements in agreeing to represent the Officers.

## **II. MiMedx Breaches its Agreements to Indemnify the Officers and Advance Payment to Plaintiffs**

### **A. MiMedx’s Breaches in 2018-2019**

31. QEU&S began submitting invoices to MiMedx in connection with the MiMedx Legal Actions on a near-monthly basis beginning in May 2018. Almost immediately, MiMedx adopted a practice of paying those invoices up to 180 days or more late. For example:

- Invoices sent on July 23, 2018 were not paid until October 18, 2018 (i.e. 87 days later).
- Invoices sent on August 21, 2018, September 20, 2018, and October 18, 2018 were not paid until January 19, 2019 (i.e., 151 days later, 121 days later, and 91 days later, respectively).
- Invoices sent on December 20, 2018, January 11, 2019, February 21, 2019, and March 22, 2019 were not paid until June 25, 2019 (i.e., 187 days later, 165 days later, 124 days later, and 95 days later, respectively).

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<sup>5</sup> True and correct copies of the Prompt Payment Agreements are attached hereto as Exhibit C (Petit) and Exhibit D (Taylor).

- Invoices sent on September 12, 2019, and October 15, 2019 were not paid until December 30, 2019 (*i.e.*, 109 days later and 77 days later, respectively).

32. QEU&S made repeated oral and written demands to Plaintiffs for prompt payment of their invoices, generally to no avail.

33. On May 29, 2019, after QEU&S sent MiMedx a formal demand letter seeking payment and threatening litigation to enforce MiMedx's payment obligations, MiMedx agreed to pay QEU&S' outstanding invoices and renewed its agreement to pay future invoices promptly. Specifically, in exchange for QEU&S' agreement to provide MiMedx with redacted (as opposed to summary) copies of its outstanding and future invoices, MiMedx agreed to pay "80% of Quinn Emanuel's total outstanding fees and expenses" ten days after receiving the redacted invoices and the remaining 20% "[n]o later than 21 days" after receiving them. It also agreed that "MiMedx will cause Quinn Emanuel's [future] invoices to be paid within 45 calendar days of receipt."

34. No sooner did MiMedx enter into this renewed agreement than it began violating it (along with the original payment agreements) by failing to pay QEU&S' invoices within the time frames specified in the agreement. These violations prompted the need for additional oral and written demands to MiMedx for prompt payment and eventually renewed threats to take legal action.

#### **B. MiMedx's Breaches in 2020**

35. On November 25, 2019, the Officers were charged with securities fraud in the United States District Court for the Southern District of New York (the "SDNY Criminal Action"). *See United States v. Parker H. Petit and William Taylor*, Case No. 19-cr-00850-JSR (S.D.N.Y.). Because of the general prohibition against representing codefendants in criminal cases, Mr. Petit

retained Freshfields and K&K to represent him in the SDNY Criminal Action.<sup>6</sup> To be efficient, both firms kept their teams small. Freshfields assigned only one partner and a senior associate to lead their trial team, and K&K assigned only two lawyers to work on Mr. Petit's case, a partner and an associate. QEU&S continued to represent Mr. Taylor.

36. In addition to its retention letter with Mr. Petit, on April 21, 2020, K&K also sent a retention letter directly to MiMedx (both its in-house counsel and its outside counsel at Sidley Austin LLP), detailing the scope of its representation, the range of its fees, and addressing MiMedx's agreement that invoices submitted to it would be treated as earned and due upon receipt. Not only did MiMedx not object to this arrangement, it paid some of K&K's invoices accordingly.

37. The indictment in the SDNY Criminal Action alleged a complex accounting fraud that centered on MiMedx's sales to four different customers in 2015, each with its own set of percipient witnesses and universe of documents. The government produced in discovery over two million pages of documents and Jencks material for 91 potential government witnesses. The parties estimated that the trial would likely last six weeks.

38. As Plaintiffs began the massive undertaking of sorting through the two million pages of documents, reaching out to witnesses, analyzing legal issues, obtaining expert advice, and doing the myriad other things needed to prepare for a complex and lengthy accounting fraud trial, MiMedx failed to pay Plaintiffs' invoices. Plaintiffs made oral and written demands for payment on a nearly weekly basis, which the Company frequently ignored.

39. For example, on January 3, 2020, a QEU&S attorney emailed Butch Hulse, MiMedx's new General Counsel, to request payment of more than \$900,000 in overdue invoices.

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<sup>6</sup> Because Freshfields represented a non-party that was potentially relevant to the action, Freshfields suggested that Mr. Petit hire K&K to handle any conflicts that could have arisen.

The attorney also requested a telephone call with Mr. Hulse to discuss “anticipated future fees,” which the attorney said he “expect[s] to escalate sharply now that a 4-6 [week] trial of the criminal charges . . . has been scheduled for July 2020.” On January 21, 2020, the QEU&S attorney followed up with another email seeking payment of outstanding legal fees, which he noted were “extremely overdue” and “growing” by the day. The attorney wrote to Mr. Hulse: “If we do not obtain payment in short order we will have little choice but to seek judicial enforcement of our client’s indemnification agreement.”

40. Plaintiffs also kept MiMedx consistently apprised of the increasing legal expenses they expected the case to impose as trial approached. For example, on February 13, 2020, an attorney from Freshfields sent a letter to Mr. Hulse regarding the staffing of attorneys on Mr. Petit’s trial team. The attorney advised Mr. Hulse, “This trial will require the full-time efforts of at least ~2-3 partners to try the case.” Mr. Hulse never responded.

41. Plaintiffs made clear to the Company that they were unwilling to bear the financial risk that MiMedx would fail to pay their invoices promptly (or at all) for the considerable time, effort, and expense associated with a criminal trial of complex financial charges. On March 4, 2020, Plaintiffs had a phone call with Mr. Hulse, in which they discussed the size and scope of the upcoming trial, and broached the idea of establishing a retainer to address the substantial costs associated with preparing and trying the case. On the call, Plaintiffs explained that the trial date had been set for July 7, 2020, and that the parties estimated trial would last four to six weeks. Mr. Hulse indicated that made sense to him. Plaintiffs advised that they had made efforts to be efficient in their trial preparation, including sharing a document vendor, and Mr. Hulse stated that he appreciated Plaintiffs’ efforts in that regard. Along those lines, Plaintiffs advised that they had jointly retained a jury consultant. Mr. Hulse responded that he understood, and that he too would

use a jury consultant if he were in Plaintiffs' situation. Plaintiffs also asked Mr. Hulse if the Company would be willing to commit to a substantial retainer for each firm (or an irrevocable line of credit), in light of the fact that Plaintiffs' work would ramp up as trial approached. Mr. Hulse responded that the request was fair, and that he understood expenses would "increase exponentially" in the months leading up to trial, but that he needed to discuss the issue with others at MiMedx before approving it.

42. A few weeks later, on March 24, 2020, Plaintiffs wrote to Mr. Hulse requesting that the Company "provide a retainer or establish an irrevocable bank line of credit in the amount of \$4,000,000 for each former employee, Mr. Petit and Mr. Taylor, as security for future fees and expenses." Plaintiffs noted that "[o]ur law firms will incur further substantial attorneys' fees and out-of-pocket expenses beginning at least one month before trial, including but not limited to travel-related costs for attorneys not based in New York, transcript costs, and the like." MiMedx still did not pay Plaintiffs as it was obligated to do, and the amounts it owed Plaintiffs on unpaid invoices continued to grow.

43. On September 8, 2020, with trial scheduled to begin in approximately six weeks, Plaintiffs sent a demand letter to Mr. Hulse attaching a copy of a draft complaint to compel timely advancement of legal fees. Plaintiffs wrote:

The need for prompt payment of our invoices has become especially urgent because the court in [the Officers'] criminal case just set a firm trial date of October 26, 2020. MiMedx currently owes . . . more than \$3 million in unpaid legal fees, and that sum is likely to increase substantially as a result of pre-trial preparations and trial. The Company's refusal to honor its advancement obligations just when our clients need advancement the most is putting their legal defense in jeopardy. These circumstances compel us to take legal action to enforce their rights.

44. On September 9, 2020, Mr. Hulse wrote back that "MiMedx has no intention of not paying" Plaintiffs' invoices. He acknowledged the "significant increase in time . . . as [the

lawyers] prepare for trial” and promised to approve and pay Plaintiffs’ invoices as quickly as possible. He asked Plaintiffs to “rethink the need to file suit,” and said he “[did not] believe [a suit was] necessary” given his assurances.

45. In a follow-up telephone call on September 10, 2020, Mr. Hulse again promised that MiMedx would pay Plaintiffs’ invoices. Mr. Hulse reassured Plaintiffs that he understood the amount of work that was being demanded of them, and he commended their work on the various matters stating, “You’re great lawyers.” Mr. Hulse also invoked his time as a partner at big law firm, and told the attorneys, “I get it,” alluding to Plaintiffs’ frustration with the slow rate of payments on the matter. Mr. Hulse further observed that, to date, the Company had not “pushed back on the number of attorneys” on the matter, nor the number of third party vendors engaged to assist in the representation. Mr. Hulse then stated unequivocally, “we have no intention of breaching [our] agreements” in the future. When Plaintiffs asked Mr. Hulse to reduce that promise to writing, he responded that the email he had sent to Plaintiffs on September 9, 2020, “was an attempt to do just that—[to put] something in writing [letting the law firms] know that we are going to pay you.” Mr. Hulse expressed his regret that the law firms had felt the need to draft a complaint and said that “suing us wouldn’t do much” because “you’re going to get paid anyway.”

46. On September 13, 2020, Plaintiffs sent Mr. Hulse a confirmatory email summarizing the parties’ September 10, 2020 telephone call. Plaintiffs noted “your commitment during our call, on behalf of the company, that the company will pay Mr. Petit and Mr. Taylor’s fees incurred during the course of the trial, so we can be certain that even if MiMedx falls behind on payments during the trial we will be paid in full shortly afterwards. Based on your commitment, all three firms have agreed to forego filing the draft complaint against MiMedx which we

previously sent to you, without prejudice to file it in the future if we deem it necessary and appropriate.”

47. In the weeks prior to trial, Plaintiffs continued to try to obtain a retainer from MiMedx to avoid further disputes over MiMedx’s failure to advance Plaintiffs payment for their work. On September 13, 2020, an attorney from Freshfields wrote to Mr. Hulse an email stating: “[A]ll three of our respective firms are concerned given the repeated delays in payment of the fees for the defense of our respective clients, especially in the current circumstances where we are heading into a lengthy and hotly-contested trial during which our fees will increase substantially and we will also be going out of pocket for hotels, travel, transcripts, meals, and the like.” After MiMedx ignored the request, the attorney followed up with Mr. Hulse on September 25, 2020, writing: “[T]o reiterate[,] . . . all three of our firms have held off on filing the draft complaint based on your assurance that our fees for the trial will be paid. As noted, our fees and out-of-pocket expenses are going to increase significantly as we prepare for trial and try this case, now set for October 26. We appreciate your engagement on the last call and we have all agreed that we can take you at your word that filing suit to protect our clients’ indemnification rights is not necessary.” The attorney also notified Mr. Hulse that Plaintiffs anticipated that lawyers would be billing more than 12 hours per day during preparing for trial and during trial. Again, Plaintiffs’ request was ignored by the Company.

48. Certain Plaintiffs also provided MiMedx with proposed budgets for the upcoming trial work to be performed. For example, on October 9, 2020, K&K sent MiMedx a budget for fees and expenses that detailed the necessary pre-trial and trial work to be performed, the anticipated fees and expenses that would be incurred, and invited MiMedx to respond by October 15, 2020 if it had any questions or adjustments to the work or fees outlined. K&K expressly stated

that it would proceed with the work on the assumption that the budget provided was reasonable and agreed to by MiMedx and that K&K's willingness to continue to work on the matter depended on MiMedx's agreement to pay the budgeted amounts. The Company did not suggest any adjustments or otherwise raise any objection to the budget and K&K's fees were within the budgeted amounts. The Company also paid for budgeted fees that were incurred in September 2020 but again breached its agreement to pay for fees incurred after September 30, 2020.

49. As another example, on October 16, 2020, a week before the start of the trial, Freshfields submitted a rough trial budget to Mr. Hulse. The letter stated that in addition to attorney time, "[s]ince many of our attorneys reside outside of New York City, we will also have travel, hotel, and meal expenses, in accordance with the terms of Mr. Petit's Indemnification Agreement." Mr. Hulse never responded to this letter.

50. As all parties anticipated, Plaintiffs expended considerable time and effort (and incurred considerable out-of-pocket expenses) preparing and trying the criminal case. The trial, which took place in person in the midst of the COVID-19 pandemic and wound up lasting nearly four weeks, resulted in partial victories for both Officers, each of whom was acquitted on one count and convicted on one count of the indictment. During and after the trial, Plaintiffs submitted monthly invoices to MiMedx in a timely fashion, and expected, per MiMedx's promise, that they would be paid through at least the Officers' sentencing. But MiMedx did not pay them (and still has not paid them five months later), in violation of its agreement to do so.

51. On January 12, 2021, nearly two months after the jury returned its verdicts but before the Court entered judgment (given that sentencings were not scheduled to occur until February 2021), MiMedx, without any warning to Plaintiffs, filed a complaint against the Officers in Florida state court (the "Florida Complaint") seeking to terminate the Officers' indemnification

and advancement rights and to recover from the Officers all amounts MiMedx had paid Plaintiffs in connection with the MiMedx Legal Actions. *See MiMedx v. Petit and Taylor*, Case No. 2021-000718-CA-01, (Fla. 11th Cir. Ct. Jan. 12, 2021). MiMedx alleged in the Florida Complaint that it “has continued to pay, *and will continue to pay*, legal Expenses incurred by Petit and Taylor through and including November 19th, the date of the jury’s guilty verdict.” *Id.*, Complaint ¶¶ 43-44 (emphasis added). But MiMedx has not done so.

52. The Delaware Court of Chancery has frequently noted “the unfortunate fact that corporations and other entities often find broad advancement and indemnification clauses useful for enticing talented people to associate themselves with the entity, only to spurn them once the time for payment arrives.” *Costantini, v. Swiss Farm Stores Acquisition LLC*, 2013 WL 4758228, at \*3 (Del. Ch. Sept. 5, 2013); *cf. Ficus Invs.*, 61 A.D.3d at 9 (“one of the beneficial purposes behind both indemnification and advancement is to help attract capable individuals into corporate service by easing the burden of litigation-related expenses”). Regrettably, MiMedx under its current management appears to be one of those corporations.

### **CAUSES OF ACTION**

#### **COUNT I: Breach of Contract - Advancement**

53. Plaintiffs re-allege and incorporate by reference Paragraphs 1 through 52 of this Complaint as if fully set forth herein.

54. MiMedx entered into an enforceable agreement to pay Plaintiffs for their representation of the Officers in the MiMedx Legal Actions.

55. The prices, scope, length, and other terms of the agreement were documented in oral and written communications between Plaintiffs and MiMedx.

56. MiMedx accepted the terms of the agreement by promising to pay Plaintiffs’ overdue invoices and make prompt payment of future invoices.

57. MiMedx demonstrated acceptance and acquiesced to the agreement by paying some portion of Plaintiffs' invoices.

58. Plaintiffs have performed on the agreement in full by representing the Officers in the MiMedx Legal Actions.

59. Plaintiffs have submitted and MiMedx has received all of the invoices which seek payment of actual and reasonable legal expenses that the Officers incurred in connection with the MiMedx Legal Actions, but, despite the lapse of at least 30 and in some cases 180 or more days from the date of receipt, MiMedx has not paid them or paid only in part.

60. MiMedx has breached the agreement it entered into with Plaintiffs by deliberately failing to pay the invoices Plaintiffs submitted to MiMedx.

61. Plaintiffs have been damaged by MiMedx's failure to pay.

**COUNT II: Breach of Implied-in-Fact Contract**

62. Plaintiffs re-allege and incorporate by reference Paragraphs 1 through 52 of this Complaint as if fully set forth herein.

63. Plaintiffs and MiMedx had an enforceable implied-in-fact contract under which MiMedx was required to pay Plaintiffs for their representation of the Officers. The specific terms of the contract were that Plaintiffs would represent the Officers in the MiMedx Legal Actions and that MiMedx would pay Plaintiffs' invoices in connection with that representation. The prices, scope, length, and other terms of the engagement were documented in written and oral communications between MiMedx and Plaintiffs.

64. MiMedx accepted the terms of the contract through promises to pay Plaintiffs' overdue and future invoices.

65. MiMedx demonstrated acceptance and acquiesced to the agreement by paying some portion of Plaintiffs' invoices.

66. Plaintiffs have performed on the agreements in full by representing the Officers, and MiMedx received the benefit of the agreement by having their former employees, the Officers, represented in court.

67. MiMedx has breached the agreement by refusing to pay Plaintiffs' outstanding invoices.

68. Plaintiffs have been damaged by MiMedx's failure to pay.

**COUNT III: Quasi-Contract/Unjust Enrichment**

69. Plaintiffs re-allege and incorporate by reference Paragraphs 1 through 52 of this Complaint as if fully set forth herein.

70. MiMedx was unjustly enriched by Plaintiffs' representation of the Officers.

71. Plaintiffs conferred a benefit on MiMedx by representing its officers and maintaining its credibility with future officers that any officer against whom legal action is brought will be indemnified by MiMedx.

72. MiMedx had knowledge that Plaintiffs were representing the Officers and conferring a benefit on MiMedx thereby. Plaintiffs sent multiple letters and emails, spoke with MiMedx's general counsel, Mr. Hulse, and Mr. Hulse acknowledged Plaintiffs' representation of the Officers and promised to advance payment to Plaintiffs for their work on behalf of the Officers.

73. MiMedx accepted and retained the benefit of its agreement with Plaintiffs because it allowed the Officers to continue to be represented by Plaintiffs throughout the course of the MiMedx Legal Actions.

74. It would be inequitable to allow Plaintiffs to bear the years of work and substantial cost thereby without MiMedx paying them for the work performed.

75. Plaintiffs have been damaged by MiMedx's failure to pay.

**COUNT IV: Promissory Estoppel**

76. Plaintiffs re-allege and incorporate by reference Paragraphs 1 through 52 of this Complaint as if fully set forth herein.

77. MiMedx promised to pay Plaintiffs' invoices in full. MiMedx's general counsel, Mr. Hulse, made these promises in phone calls and in writing in response to Plaintiffs' threat to bring formal legal action, which was accompanied by a draft complaint seeking damages in connection with MiMedx's failure to honor its indemnification and advancement obligations.

78. Plaintiffs did not file the draft complaint in reliance on MiMedx's promise to pay in full its unpaid invoices, as well as its promise to pay future invoices for work in the S.D.N.Y Criminal Action and otherwise.

79. MiMedx knew or should have known that its promise to pay in full Plaintiffs' unpaid and forthcoming invoices would cause Plaintiffs to forebear filing an action to enforce MiMedx's indemnification and advancement obligations.

80. Plaintiffs refrained from filing a draft complaint seeking damages from MiMedx's failure to honor its indemnification and advancement obligations.

81. Plaintiffs have been monetarily damaged because of MiMedx's failure to pay Plaintiffs for representing the Officers in the MiMedx Legal Actions.

82. Manifest injustice would result if MiMedx is not required to pay Plaintiffs.

**Count V: Equitable Estoppel**

83. Plaintiffs re-allege and incorporate by reference Paragraphs 1 through 52 of this Complaint as if fully set forth herein.

84. MiMedx represented to Plaintiffs that it would pay their outstanding and forthcoming invoices in full. MiMedx's general counsel, Mr. Hulse, made this promise in phone calls and in writing in response to the draft complaint Plaintiffs sent MiMedx.

85. Plaintiffs relied on Mr. Hulse's representation to their detriment because they did not file the complaint to enforce MiMedx's indemnification and advancement obligations. Moreover, Plaintiffs continued to represent the Officers to the exclusion of other paying work.

86. Plaintiffs have been monetarily damaged because of MiMedx's failure to pay Plaintiffs for representing the Officers in the MiMedx Legal Actions.

87. MiMedx willfully accepted the terms of Plaintiffs' representation of the Officers through its oral and written promises to pay Plaintiffs' overdue invoices and future invoices for work in the S.D.N.Y Criminal Action and otherwise.

88. MiMedx acquiesced to Plaintiffs' representation of the Officers by paying some portion of Plaintiffs' invoices, knowing Plaintiffs would continue to represent the Officers in reliance on MiMedx's promise to pay them in full.

**COUNT VI: Account Stated**

89. Plaintiffs re-allege and incorporate by reference Paragraphs 1 through 52 of this Complaint as if fully set forth herein.

90. MiMedx's agreement with Plaintiffs requires MiMedx to pay Plaintiffs for their provision of legal services to the Officers in connection with the MiMedx Legal Actions within specified time limits.

91. Plaintiffs submitted timely invoices to MiMedx for their provision of legal services to the Officers.

92. MiMedx never objected to the invoices that Plaintiffs submitted and agreed to pay the invoices in a timely fashion.

93. MiMedx failed to pay the invoices Plaintiffs submitted to MiMedx for Plaintiffs' provision of legal services to the Officers.

**PRAYER FOR RELIEF**

WHEREFORE, for these reasons, Plaintiffs pray that this Court enter judgment in favor of Plaintiffs and against Defendant as follows:

- a. an order requiring Defendant to pay forthwith all overdue invoices for Plaintiffs' provision of legal services in connection with the MiMedx Legal Actions and in litigation undertaken to enforce Plaintiffs' rights to advancement;
- b. an order requiring Defendant to advance within 30 days of receipt of an invoice Plaintiffs' provision of legal services incurred in connection with the MiMedx Legal Actions;
- c. an order requiring Defendant to advance within 30 days of receipt of an invoice Plaintiffs' provision of legal services in connection with litigation to enforce Plaintiffs' rights to advancement;
- d. actual and compensatory damages in an amount to be determined at trial for MiMedx's breaches of its promises to indemnify the Officers and advance payment to Plaintiffs;
- e. pre-judgment and post-judgment interest related to those actual and compensatory damages;
- f. all other relief to which Plaintiffs are entitled as this Court shall deem just and proper.

Dated: April 15, 2021

Respectfully submitted,

*/s/ Marc Greenwald*

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