To be Argued by:
MARIANN MEIER WANG

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New York Supreme Court

Appellate Division – First Department

SUMMER ZERVOS,

Plaintiff-Respondent,

– against –

DONALD J. TRUMP,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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Plaintiff-Respondent Summer Zervos respectfully submits this brief in opposition to the appeal by Defendant-Appellant Donald J. Trump of the March 20, 2018 Decision and Order ("Decision").

PRELIMINARY STATEMENT

Over the course of nine days in October 2016, Appellant Donald J. Trump made 18 statements that deliberately and falsely denigrated Summer Zervos for her detailed report that Appellant had sexually groped her against her will. R170-74 (Compl. ¶¶ 55-74). Ms. Zervos reported those details only after Appellant publicly lied about his behavior with women in a coordinated effort to explain away his admissions caught on the *Access Hollywood* tape. R169-70 (Compl. ¶¶ 47-50). Repeatedly attacking Ms. Zervos's credibility after she came forward, Appellant asserted from his unique position of knowledge that she "lied," that she "fabricated" and "made up" these "phony" stories, and that she did so in order to garner fame or at the behest of his opponent. *E.g.*, R171-74 (Compl. ¶¶ 60, 63-64, 69, 74).

Appellant carefully calculated his defamatory attacks. His false statements about Ms. Zervos were published through his campaign website, at rallies as he spoke to tens of thousands of his own supporters, and through his personal Twitter feed, which had over twelve million followers. *See* R170-74 (Compl. ¶¶ 55-74); *infra* n.18. Appellant's attacks were defamatory because his statements were factual, provably false, and fundamentally debased Ms. Zervos's reputation. His

brutalizing of her a second time – this time falsely condemning her to the world as a liar for having the temerity to reveal his earlier unwanted sexual groping of her body – directly caused serious injury. Ms. Zervos and her business were repeatedly threatened with violence. R620 (Zervos Aff.) ¶¶ 10-12. People told her they would destroy her and her business, shouting "lying c—t" and "lying b—ch. " *Id.* ¶ 11. The threats increased each time Appellant publicly attacked her. *Id.* ¶ 12.

Appellant seeks pre-answer dismissal of this action because he claims this Court has no power over him or, alternatively, that Ms. Zervos fails even to state a defamation claim. His contentions are meritless.

Appellant attempts in vain to sidestep the Supreme Court's unanimous decision in *Clinton v. Jones*, 520 U.S. 681 (1997), that a President can be subjected to litigation concerning his unofficial conduct without interfering with his ability to effectively perform his duties. Appellant's status as a sitting President does not place him above the law. As the Decision cogently explains, the Supremacy Clause does not prevent a state court from adjudicating a civil claim arising from Appellant's unofficial conduct, and there is no basis to be concerned that New York courts will act in a manner that interferes with Appellant's official functions or the operation of the federal government. A years-long stay is unnecessary and would be unfair. Ms. Zervos is entitled to her day in court, and this litigation will be managed in a manner that accommodates Appellant's schedule and respects the importance of his office.

The lower court also correctly held that Ms. Zervos's defamation claim is adequately pled. Contrary to Appellant's spin, this case is not about robust political debate. Ms. Zervos came forward to report the details of Appellant's unwanted sexual battery only after he repeatedly lied publicly about his behavior, and, far from merely denying her report, Appellant then used his international bully pulpit affirmatively to attack her in a variety of fora. *E.g.*, R171-74 (Compl. ¶¶ 60, 63, 64, 69, 74). No case stands for the proposition that politicians have a free pass to defame citizens who criticize them.

Appellant insists that his statements were merely "expressions of opinion," Brief for Defendant-Appellant ("App. Br.") at 4, but the Court of Appeals has made clear that a defendant's false statements that a plaintiff lied about reports of sexual assault or abuse are defamatory, *Davis v. Boeheim,* 24 N.Y.3d 262, 270-73 (2014), and his efforts to distinguish this case from *Davis* are unavailing.

Appellant's other arguments likewise are baseless: (1) his statements plainly were about Ms. Zervos because he repeatedly named her explicitly, and she was one of 13 women who reported his abuse, all of whom he branded liars; (2) he augmented other people's defamatory statements when he re-tweeted them to tens of millions of readers with additional commentary; and (3) California's procedural rules do not apply in New York courts.

Words matter. The law has long recognized that there are lines that must not be crossed because "[n]either the intentional lie nor the careless error materially

advances society's interest in uninhibited, robust and wide-open debate on public issues." *Chalpin v. Amordian Press*, 128 A.D.2d 81, 85 (1st Dep't 1987) (citation omitted). As the Supreme Court has recognized: "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966). The law affords Ms. Zervos the right to vindicate her reputation.

FACTS

A. Ms. Zervos's Claim

Ms. Zervos is one of a number of women[1] who were subjected to sexual attacks by Appellant. R160 (Compl. ¶ 1). By his own account, Appellant regularly engaged in such behavior, telling Billy Bush in an unguarded moment that he can "just start kissing [women]. . . Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything. Grab them by the pu—y. You can do anything." *Id*.

Ms. Zervos was ambushed and assaulted by Appellant on multiple occasions, including attacks at both his office and in a hotel room. R160-61 (Compl. ¶¶ 2-3). Appellant suddenly, and without Ms. Zervos's consent, kissed her on her mouth, touched her breast, and pressed his genitals up against her. *Id.*

[1] Twelve other women came forward during the campaign to report Appellant's unwanted sexual touching. R629-37 (Wang Aff., Ex. 2) (thirteen women total as of October 23, 2016).

Ms. Zervos never consented to any of this. *Id.* She told him repeatedly to stop his inappropriate sexual behavior, including by shoving him away from her forcefully. *Id.* Appellant kept touching her sexually anyway. *Id.*

Ms. Zervos confided in family and friends when these assaults first occurred in 2007. R161, 165, 167 (Compl. ¶¶ 3, 26, 35). She also confronted Appellant about it. R668-69 (Wang Aff., Ex. 18 at 3-4); R619 (Zervos Aff. ¶ 6). But like so many women who have suffered this kind of abuse, Ms. Zervos felt conflicted and confused about the incidents. R161 (Compl. ¶ 3). She decided that Appellant's behavior had been an isolated set of incidents, and perhaps that he had even regretted the behavior. *Id.* She continued to admire his success as a businessman and spoke highly of him. *Id.*

In October 2016, that changed. *Id.* (Compl. ¶ 4). On October 7, 2016, when Appellant's own crude and vulgar comments on the *Access Hollywood* tapes (which were recorded in 2005) were broadcast, it became clear that Appellant's sexually inappropriate behavior towards Ms. Zervos in 2007 was consistent with his belief that he had the right to sexually assault women, and even to boast about it. *Id.* Then, during the October 9, 2016 presidential debate, Appellant lied by stating that he had not done any of the things that he had bragged about to Billy Bush. *Id.* Ms. Zervos no longer could rationalize Appellant's behavior by telling herself that it had been a mistake or an isolated incident for which he might be ashamed. R161 (Compl. ¶ 5). His casual recounting of his sexual assaults made

clear his behavior was intentional. R162. She felt a responsibility to inform the public of the true facts. R162 (Compl. ¶ 6). She therefore came forward, as at least a dozen other victims did, R629-637, to inform the public of the facts. R162 (Compl. ¶ 6); *see also* R666-70 (statement of Ms. Zervos, dated Oct. 14, 2016).

In response, Appellant lied again, attacking Ms. Zervos ruthlessly with false statements about both her and her reasons for speaking out. *See* R169-70 (Compl. ¶¶ 47-50). Appellant stated falsely that he "never met [Ms. Zervos] at a hotel or greeted her inappropriately." R170 (Compl. ¶ 55). He went further, describing Respondent's experience, along with those of others, as "made up events THAT NEVER HAPPENED"; "100% fabricated and made-up charges"; "totally false"; "totally phoney [sic] stories, 100% made up by women (many already proven false)"; "made up stories and lies"; "[t]otally made up nonsense." R162, 171-74 (Compl. ¶¶ 8, 66, 60, 73, 68, 70, 63). He falsely stated: "Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened." R174 (Compl. ¶ 74). He said, "it's not hard to find a small handful of people willing to make false smears for personal fame . . . maybe for financial reasons, political purposes." R171 (Compl. ¶ 59). During the last presidential debate, he falsely stated that the women who described his disgusting behavior were either being put forward by the Clinton campaign, or were motivated to come forward by the desire for "ten minutes of fame." R174 (Compl. ¶ 73).

Appellant spoke in a manner that clearly evinced his unique knowledge of

the events, stating that he *did* recall Ms. Zervos, but that the encounters she described never happened. R170 (Compl. ¶ 55). He made sure that one statement defaming Ms. Zervos – posted at his direction on his campaign's website and ascribed to her cousin, John Barry, R171 (Compl. ¶ 56) – was posted just above a copy of an e-mail that only Appellant or his personal secretary could have accessed, showing that Ms. Zervos had reached out to him in a friendly way in April 2016 to imply her lack of credibility. R638 (Wang Aff., Ex. 3); R102 (Kasowitz Aff., Ex. 2). He purposely distorted the public record by keeping secret a different e-mail that would have corroborated Ms. Zervos, in which she had told him she was deeply hurt by what he had done to her. R619 (Zervos Aff. ¶¶ 7-9).

Appellant exploited his unparalleled access to the media. He knew that his false, disparaging statements would be heard and read by tens of millions of people around the world, and that his accusers, including Ms. Zervos, would be subjected to threats of violence, economic harm, and reputational damage. *See* R163, 174-75 (Compl. ¶¶ 11, 76-78). And that is exactly what happened.

B. The Harm

Appellant seeks to trivialize Ms. Zervos's claim, but it matters deeply to her. She seeks more than out-of-pocket damages, which have been pleaded only in the event that special damages are deemed to be required. R175 (Compl. ¶ 81); *contrast* App. Br. at 2 (incorrectly stating that Ms. Zervos is "asserting under $3,000 in damages"). In fact, as a direct result of Appellant's widespread attacks,

Respondent suffered repeated threats of violence from various individuals who called her a "lying c—t," a "lying b—tch" and threatened to harm her and/or her business. R620 (Zervos Aff. ¶ 11). These disturbing threats increased each time Appellant attacked her. *Id.* (Zervos Aff. ¶ 12). Because Ms. Zervos is a Republican and lives among many of Appellant's supporters, she suffered significantly each time Appellant attacked her. *Id.*

Appellant's papers, both below and now before this Court, continue to disparage Respondent. He describes her account of his unwanted sexual touching as "false," App. Br. at 1, 6, 7, 8; *see also* R40-79, 1177-1202, and threatened to sue for defamation at the time she and others reported his misconduct, effectively conceding that statements about his conduct are statements of fact that, if false, would support a defamation claim. R174 (Compl. ¶ 74); *see also* R639 (Appellant's attorney threatening the *New York Times* for publishing an article about the reports of unwanted sexual touching that he claimed was "reckless, defamatory, and constitute[d] libel *per se*").

Ms. Zervos came forward only after much consideration, and because Appellant kept flagrantly lying about his treatment of women. R169-70 (Compl. ¶¶ 45-50). She did not publicly report Appellant's behavior in order to seek fame or at the request of any political actor. R170 (¶¶ 51-52). She is not and has never been a political candidate and had no political motivations for speaking out or for filing this lawsuit. R618-19. She seeks only what the law provides.

C. Procedural History

Ms. Zervos filed this action on January 17, 2017, and service was effectuated by consent on February 2, 2017. R158-77, R724. The parties stipulated that Appellant had until April 3, 2017 to respond. *See* R737. Appellant missed that deadline and then rushed in with an Order to Show Cause seeking leave to file two *seriatim* motions to dismiss, R725-27, which Respondent opposed. R728-49. On April 28, 2017, the Court so-ordered a stipulation by which Appellant withdrew his motion and was given until July 7, 2017 to respond to the Complaint. R750-51.

On July 7, 2017, Appellant moved to dismiss the Complaint on the same grounds presented here. R26-565. Respondent opposed, R566-749, and an *amicus* brief was submitted by law professors in support of Respondent, R897-920. On March 20, 2018, the Court denied Appellant's motion to dismiss or stay the action. R16-17. The Decision held that "[t]here is no reason . . . that state courts like their federal counterparts will be 'either unable to accommodate the President's needs or unfaithful to the tradition . . . of giving the utmost deference to Presidential responsibilities.'" R19-20 (quoting *Jones*, 520 U.S. at 709). The Court added that state courts "can manage lawsuits against the President based on private unofficial conduct just as well as federal courts and can be just as mindful of the 'unique position in the constitutional scheme' that the office occupies." R20 (quoting *Jones*, 520 U.S. at 698).

On May 17, 2018, this Court denied Appellant's motion for a stay pending appeal. On May 23, 2018, the Court of Appeals denied Appellant's emergency stay application.

At a preliminary conference before Justice Schecter on June 5, 2018, Appellant's counsel argued that despite the denial by this Court and the Court of Appeals of his motion for a stay, and even though he had affirmatively noticed Respondent's deposition, no scheduling order should be set until the United States Supreme Court issues a ruling on the motion to dismiss. *See* Transcript of Preliminary Conference, Docket No. 170, at 5-6, 8 (available on New York State Courts Electronic Filing System ("NYSCEF")). The Court denied Appellants' request and set a reasonable (indeed, lengthy) schedule for discovery, emphasizing that in due course it would address any motions to adjourn deadlines to accommodate Appellant's official duties. *Id.* at 16.

On June 14, 2018, the Court of Appeals dismissed Appellant's motion for leave to appeal the stay denial for lack of jurisdiction.

QUESTION PRESENTED

Whether the lower court erred in rejecting Appellant's unprecedented immunity argument and concluding that Respondent's defamation claim is adequately pled.

ARGUMENT

I. THE SUPREMACY CLAUSE DOES NOT RENDER APPELLANT IMMUNE FROM SUIT IN THIS COURT

Appellant contends that the Supremacy Clause bars state courts from exercising jurisdiction over a sitting President – even where the claim involves only his unofficial conduct prior to taking office, and even where it has been conceded that the state court is not prejudiced again him – because a state court's supervision of litigation inevitably would require the exercise of "direct control" over him. App. Br. at 13. But a sitting President is not sovereign. He is a person subject to law. Because there is no evidence or likelihood that the trial court will take any action that would interfere with Appellant's official responsibilities, he is not entitled to the extraordinary and unprecedented relief he seeks.

We are aware of no case – and Appellant has not cited any case, either below or before this Court – in which any court, state or federal, has ever dismissed a civil damages case against a sitting President (or any other federal officer) arising out of his *unofficial* conduct on the ground that the exercise of jurisdiction would be unconstitutional. To be sure, there is a well-established doctrine known as "Supremacy Clause immunity," which is "a seldom-litigated corner of the constitutional law of federalism" that "governs the extent to which states may impose civil or criminal liability on federal officials" for conduct "*committed in the course of their federal duties*." *Wyoming v. Livingston*, 443 F.3d

1211, 1213 (10th Cir. 2006) (emphasis added), *cert. denied*, 549 U.S. 1019 (2006). Notably, Appellant does not cite any of these cases because they plainly do not apply. *See*, *e.g.*, *Johnson v. Maryland*, 254 U.S. 51, 55 (1920) (Maryland barred from prosecuting federal mail truck driver for driving in Maryland without a Maryland driver's license because the state cannot "interrupt the acts of the general government itself"); *Ohio v. Thomas*, 173 U.S. 276, 283 (1899) (federal official who oversaw Congressionally created home for disabled soldiers was immune from prosecution for violating state food labeling laws because he was "discharging duties under federal authority pursuant to and by virtue of valid federal laws"); *In re Neagle*, 135 U.S. 1 (1890) (United States marshal immune from suit based on actions he took in his official capacity, on the direct order of the Attorney General, to protect a Supreme Court Justice while traveling). Every Supremacy Clause immunity case holding that a state court could not assert jurisdiction over a federal officer involved the federal officer's performance of his *official* duties. This case does not implicate the Supremacy Clause immunity doctrine because this case involves Appellant's unofficial conduct in which he engaged before he became a federal official.[2]

[2] In his motion to dismiss below, Appellant asserted that "longstanding precedent establishes that a state court may not exercise jurisdiction over a federal official without violating the Supremacy Clause of the Constitution." R51. Appellant has wisely distanced himself from that assertion, which the New York Court of Appeals and the U.S. Supreme Court considered and squarely rejected more than a century ago. *See Teal v. Felton*, 1 N.Y. 537, 543-47 (1848), *aff'd*, 53 U.S. 284, 292-93 (1851) (rejecting the argument that it would be unconstitutional for a New York court to exercise its jurisdiction to adjudicate a common law claim against a federal

Appellant's reliance on *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), is misplaced for the same reason. *Nixon* recognizes that the President enjoys absolute immunity for his *official* acts. *See id*. at 749. But this case involves Appellant's unofficial conduct in which he engaged prior to taking office, and it is beyond dispute that Appellant enjoys no immunity at all, not even qualified immunity, for his unofficial private conduct. *See Jones*, 520 U.S. at 692-94 ("[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity."); *id*. at 696 (reaffirming that the President is "subject to the laws for his purely private acts"); *see also* R17 (Decision at 10) ("Significantly, when unofficial conduct is at issue, there is no risk that a state will improperly encroach on powers given to the federal government by interfering with the manner in which the President performs federal functions. There is no possibility that a state court will compel the President to take any official action or that it will compel the President to refrain from taking any official action.").

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postal official seeking damages for the loss of property). As a leading federal procedure treatise confirms, the law is "settled" that "state courts may entertain actions against federal officers for damages." 17A Wright & Miller, Fed. Prac. & Proc. § 4213 (3d ed.); *see also* Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 Yale L.J. 1385, 1394 (1964) ("The cases in which federal officials have been sued for damages in state courts are legion; the jurisdiction does not even appear to have been questioned since . . . the Supreme Court unanimously upheld it in *Teal v. Felton*.") (collecting cases).

Although *Jones* is not dispositive because it addressed federal, not state, court jurisdiction over the President, it is the case closest on point, and it provides powerful persuasive authority. The Court unanimously rejected the argument that requiring the President to defend a civil damages claim arising from unofficial conduct would unconstitutionally impede his ability to do his job, holding that "[t]he litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power." *Id*. at 701; *see also id.* (rejecting the argument that "burdens will be placed on the President that will hamper the performance of his official duties"); *id*. at 702 (rejecting the argument that litigation regarding the President's unofficial acts would "impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office").

Appellant is correct that *Jones* did not decide whether a different rule might apply in state court. *Id*. at 691-92 & n.13. But the logic of the Court's analysis was aimed at judicial power generally, not at any unique characteristics of federal judicial power. Just as there was no basis to be concerned that the federal district court would manage the *Jones* case in a way that would hamper the President's ability to do his job, there is no basis for this Court to be concerned that Justice Schecter's management of this case will prevent Appellant from doing his job. *See* R20 (Decision at 13) ("State courts can manage lawsuits against the President

based on private unofficial conduct just as well as federal courts and can be just as mindful of the 'unique position in the constitutional scheme' that the office occupies.'").

It is notable that although Appellant relies almost exclusively on footnote 13 in *Jones*, he makes no mention of the cases the Court cited in that footnote to illustrate the nature of any potential concern about a state court exercising "direct control" over the President: *Hancock v. Train*, 426 U.S. 167 (1976), and *Mayo v. United States*, 319 U.S. 441 (1943). Neither of those cases remotely supports Appellant's immunity argument. In *Hancock*, Congress had made federal facilities subject to both federal and local clean air standards, 426 U.S. at 172-74, but the state still lacked power to condition the operation of a federal facility on obtaining a state permit because "the activities of the Federal Government are free from regulation by any state." 426 U.S. at 178. In *Mayo*, a federal law authorized the federal government to distribute fertilizer to farmers participating in a national soil conservation program, but a Florida law required the payment of an inspection fee for fertilizer being distributed in the state, 319 U.S. at 442-43, and the Court held that Florida could not impose this fee on fertilizer shipped under the federal program because the Supremacy Clause prohibited a state from subjecting the "instrumentalities or property" of the United States to such direct regulation. 319 U.S. at 442-48. The concern raised in both cases is a state imposing its laws on the federal government as a condition to the federal government carrying out a federal

program or operating a federal facility. As Justice Schecter correctly held, that simply has nothing to do with this case. *See* R18-19 (Decision at 11-12) (holding that the *Jones* Court's concern about "unlawful state intrusion into federal government operations . . . are nonexistent when only unofficial conduct is in question").[3]

Appellant admits, moreover, that the only other concern about state court jurisdiction that the *Jones* Court noted – "possible local prejudice," 520 U.S. at 691 – is absent here. Appellant, who was born, raised, and built his business in New York, conceded below that the New York state courts are *not* prejudiced against him. R55, n.23 ("To be clear, President Trump does not suggests [sic] that such issues are present here . . . ."). Appellant's argument is thus limited to his ostensible concern that adjudicating Respondent's claim might "open the door for such prejudice" in a *future* case. *Id*. Given his concession that "local prejudice" is absent here, Appellant's abstract concern about future litigation in other courts provides no basis for the unprecedented immunity he seeks.

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[3] *Hancock* and *Mayo* both relied on *McCulloch v. Maryland*, 17 U.S. 316 (1819), which Appellant cites for the proposition that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws." App. Br. at 12 (citing *McCulloch*, 17 U.S. at 436). But *McCulloch* had nothing to do with a state court's exercise of jurisdiction, nor did it even involve encroachment on the Executive. Rather, *McCulloch* held that because "the power to tax involves the power to destroy," the Supremacy Clause invalidated a tax Maryland imposed on bonds issued by a national bank created by Congress. *McCulloch*, 17 U.S. at 431-37.

When the Court alluded to "possible local prejudice" in *Jones*, it cited the federal officer removal statute, 28 U.S.C. § 1442, *see* 520 U.S. at 691, which entitles a federal officer who has been sued in state court for his or her official acts to remove the case to federal court if the officer has a colorable federal defense. *See Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 430-31 (1999); *Mesa v. California*, 489 U.S. 121, 129-34 (1989). The existence of this statute further belies Appellant's assertion that New York courts cannot adjudicate this action. After all, Congress would not have enacted the federal officer removal statute if it were unconstitutional to sue a federal officer in a state court in the first place.

As the Court observed in *Jones*, and as the court recognized below, Congress is and remains free to enact legislation insulating the President from the obligation to participate in civil litigation regarding his unofficial conduct, and absent such legislation, requiring him to participate in such litigation is not unconstitutional. *See* 520 U.S. at 709-10; R20-21 (Decision at 13-14) ("Congress, moreover, has enacted legislation deferring civil litigation under circumstances it felt appropriate [but] [e]ven after *Clinton v Jones*, decided more than 20 years ago, Congress has not suspended proceedings against the President of the United States . . . .").

Appellant's argument boils down to his unsupported insistence that merely participating in litigation in state court necessarily would prevent him from performing his federal duties. But that is precisely the factual claim that President

Clinton made in *Jones* – that participating in pending litigation would so consume his time and distract his attention that it would materially impede his ability to perform his duties as President – and the Supreme Court unanimously rejected it. *See id*. at 701-02 (rejecting President Clinton's claim "that – as a byproduct of an otherwise traditional exercise of judicial power – burdens will be placed on the President that will hamper the performance of his official duties."); *id*. at 702 (holding that a sexual harassment and defamation action "if properly managed by the District Court . . . appears to us highly unlikely to occupy any substantial amount of [the President's] time").

That the lower court has set a discovery schedule plainly doesn't amount to "direct control" of the President. Discovery will be handled primarily, if not exclusively, by Appellant's capable lawyers and is unlikely to require much of Appellant's time. There is no reason to doubt that discovery will be managed in a manner that is sensitive to the demands of Appellant's office. *Id.* at 709 ("Although scheduling problems may arise, there is no reason to assume [that a court will be] unable to accommodate the President's needs."); R19-20 (Decision at 12-13) (noting that the court is fully capable of "accommodat[ing] the President's needs," giving "the utmost deference to Presidential responsibilities," and being "mindful of the 'unique position in the constitutional scheme' that the office occupies," and that, "of course, important federal responsibilities will take

precedence" (citing *Jones*, 520 U.S. at 698); *see also* Transcript of Preliminary Conference, Docket No. 170 (available on NYSCEF), at 16.[4]

This Court should ignore Appellant's references to the oral argument in *Jones* and articles in which various commentators criticize its holding. App Br. at 12 n.6; *id.* at 15 & n.12. Questions asked by Justices during oral argument "have no legal effect," *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 17 (D.D.C. 2015), and even if they did, the oral argument in *Jones* does as much to hurt Appellant as to help him. *See*, *e.g.*, R372 (comments by Justice Scalia that "we see Presidents . . . playing golf and so forth and so on" such that "the notion that he doesn't have a minute to spare is – is just not – not credible"). And prominent academics have argued not only that *Jones* was correctly decided, but that its rationale requires rejection of Appellant's position. R897-920. In any event, what matters is whether there is any controlling *case law* that supports Appellant's position. There plainly is none.

Finally, to the extent that this Court might be tempted to become the first court ever to hold that the President is categorically immune from being sued in

[4] To the extent Appellant contends that it would be unconstitutional for this Court to order him to appear at a particular time and place, there is no reason to reach that issue now because no such order has been or is likely to be made. *See Jones*, 520 U.S. at 691-92 ("[O]ur decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place. We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so.")

state court while in office for his prior unofficial conduct, Appellant has waived any such defense. Appellant cites various lawsuits that he represents were "filed against [him] since taking office." App. Br. at 15 n.10. Leaving aside that this representation is incorrect,[5] his failure to claim "immunity" in those cases fatally undermines his attempt to do so here. For example, in *Galicia v. Trump*, No. 24973/2015E (Sup. Ct., Bronx Cnty.), Appellant moved for summary judgment on June 12, 2017 – well after he took office, and more than four months after he was served with process in this action – submitting multiple affidavits and 22 exhibits in support of his motion, and never asserting Supremacy Clause immunity. *See* Mot. Seq. No. 6, Dkt. Nos. 145-70 (available on NYSCEF). Appellant also continued actively to defend *Garcia v. Bayrock/Sapir Org., LLC*, No. 601495/2015 (Sup. Ct., Suffolk Cnty.), long after he took office, once again without asserting Supremacy Clause immunity. *See* Mot. Seq. No. 2, Dkt. No. 88; Mot. Seq. No. 3, Dkt. No. 94) (available on NYSCEF). Defending these actions while serving as President did not prevent Appellant from doing his job. Appellant has also repeatedly threatened to bring civil actions in his personal capacity while he is in office, apparently unconcerned that suing other citizens for damages would distract

[5] Appellant is not a party to *Cockrum v. Donald J. Trump for President*, No. 17 Civ. 1370 (D.D.C.). In *Mendoza v. Trump*, 708 F. App'x 958 (10th Cir. 2018), a *pro se* plaintiff named over 150 defendants (including "All US Federal Courts" and "United States House of Representatives"), and the case was dismissed by both the District Court and the Tenth Circuit before any defendant filed an appearance or was even served.

him from his official duties.[6] Appellant wants this Court to dismiss this action not from some noble desire to protect the office he holds for the benefit of future Presidents and the good of our nation, but because he does not want to allow Respondent the opportunity to prove that he sexually assaulted her and then defamed her by attacking her for reporting the truth.

II. NEW YORK LAW APPLIES TO RESPONDENT'S CLAIM

Appellant cites no case, and we have found no case, in which any New York state court has applied another state's law in a defamation case. The threshold question is "whether there is an actual conflict of laws." *Test Masters Educ. Servs., Inc. v. NYP Holdings, Inc.*, No. 06-11407, 2007 WL 4820968, at *3 (S.D.N.Y. Sep. 18, 2007). Absent such conflict, the choice of law inquiry ends. *See Matter of Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 223-25 (1993); *Elson v. Defren*, 283 A.D.2d 109, 114-15 (1st Dep't 2001). It is Appellant's burden to show such a conflict, *see K.T. v. Dash*, 37 A.D.3d 107, 112 (1st Dep't 2006), as his brief admits. App. Br. at 40-41. As the trial court held, because Appellant "has not

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[6] Appellant expressly threatened to bring defamation actions both against the *New York Times* for reporting that two women described his inappropriate sexual touching, R639, and against each of the women who have publicly accused him of sexual assault, promising that "[a]ll of these liars will be sued after the election is over," R174 (Compl. ¶74); R153. More recently, while in office, Appellant sent his former aide a cease and desist letter threatening to sue for defamation and issued a press release threatening "imminent" legal action. *Trump threatens to sue Bannon over Wolf book*, CNN, Jan. 4, 2018 https://edition.cnn.com/2018/01/04/politics/trump-bannon-letter-legal-action/index.html (last accessed Aug. 6, 2018).

established that there is a conflict between substantive New York and California defamation law," New York law applies." R21.[7]

III. THE COMPLAINT STATES A CAUSE OF ACTION FOR DEFAMATION

Under New York law, "[m]aking a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation. Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue." *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584 (2012) (citations omitted).[8]

In distinguishing statements of fact from expressions of opinion, courts must consider: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact." *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153 (1993)

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[7] Indeed, Appellant himself easily cites to both California and New York cases for the same propositions and analysis of the defamation claim. App. Br. at 19-40. Appellant's argument that California's anti-SLAPP procedure applies is dealt with in Point III.C.3. below.

[8] California law is the same. Cal. Civ. Code § 45; *Baker v. Los Angeles Herald Exam'r*, 42 Cal. 3d 254, 259-60 (1986).

(quotation marks and citations omitted); *see also Davis v. Boeheim*, 24 N.Y.3d 262, 270 (2014); *Thomas H.*, 18 N.Y.3d at 584.[9]

"The dispositive inquiry . . . is whether a reasonable [reader] *could have* concluded that [the challenged statements were] conveying facts about the plaintiff." *Gross*, 82 N.Y.2d at 152 (quotation marks and citation omitted) (emphasis added); *Baker*, 42 Cal. 3d at 261 (court "must determine whether the average reader . . . *could have* reasonably understood the alleged defamatory statement to be one of fact") (emphasis added). Courts must "'not strain' to interpret [challenged] writings 'in their mildest and most inoffensive sense to hold them nonlibelous.'" *November v. Time Inc.*, 13 N.Y.2d 175, 178 (1963) (citation omitted); *see also Selleck v. Globe Int'l, Inc.*, 166 Cal. App. 3d 1123, 1131 (1985) ("[O]ur inquiry is not to determine whether the publication *may* have an innocent meaning but rather to determine if it reasonably conveys a defamatory meaning [by looking at] what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the publication.") (citations omitted) (emphasis added).

"If, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action." *Silsdorf v. Levine*, 59 N.Y.2d 8, 12 (1983) (citation omitted). It "may well be that [the challenged statements and context] are subject to

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[9] California law is the same. "First, the language of the statement is examined," and "[n]ext, the context in which the statement was made must be considered." *Baker*, 42 Cal. 3d at 260-61.

defendants' interpretation. However, the motion to dismiss must be denied if the communication at issue, taking the words in their ordinary meaning and in context, is *also* susceptible to a defamatory connotation, in which case the issue of the statement's meaning to the average reader must go to the jury." *Sweeney v. Prisoners' Legal Servs. of N.Y., Inc.*, 146 A.D.2d 1, 4 (3d Dep't 1989) (citations omitted) (emphasis added); *see also Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 380 (1995); *Good Gov't Group of Seal Beach, Inc. v. Hogard*, 22 Cal. 3d 672, 682 (1978) (jury question raised where statement is "ambiguous" as to whether it is "a fact or an opinion").

A. Appellant's Derogatory Statements Were Factual and Precise

Appellant made a host of precise, provably false statements of fact about Ms. Zervos. His brief spends little time on the defamatory words themselves, even as he attempts to mischaracterize them as "general denials," App. Br. at 26, or "vague and imprecise and reflect[ing] subjective opinion," *id.* at 27, and even though the standard for assessing a defamation claim begins with examination of the language of the statements. *Supra* at 22; *Gross*, 82 N.Y.2d at 153; *Davis*, 24 N.Y.3d at 270; *Thomas H.*, 18 N.Y.3d at 584. The statements at issue are:

1. "To be clear, I never met her at a hotel or greeted her inappropriately a decade ago. That is not who I am as a person, and it is not how I've conducted my life." R170 (Compl. ¶ 55); R101 (Oct. 14).

2. "I think Summer wishes she could still be on reality TV, and in an effort to get that back she's saying all of these negative

things about Mr. Trump. That's not how she talked about him before. I can only imagine that Summer's actions today are nothing more than an attempt to regain the spotlight at Mr. Trump's expense . . . ." R171 (Compl. ¶ 56) (Oct. 14) (alleging that Appellant's team, acting on his behalf and at his direction drafted and issued this statement by Respondent's relative). *See also* R638 (Wang Aff., Ex. 3) (campaign also tweeted the statement); R102 (Kasowitz Aff., Ex. 2) (campaign-issued statement attaches an e-mail from Ms. Zervos to Appellant's long-time personal assistant).

3. "These allegations are 100% false . . . They are made up, they never happened . . . It's not hard to find a small handful of people willing to make false smears for personal fame, who knows maybe for financial reasons, political purposes." R171 (Compl. ¶ 59); R104-05 (Oct. 14, approximately 7:15 pm).

4. "100% fabricated and made-up charges . . . ." R171 (Compl. ¶ 60); R657 (Oct. 15, 3:51 am).

5. "the media pushing false and unsubstantiated charges, and outright lies . . . ." R172 (Compl. ¶ 61); R658 (Oct. 15, 4:45 am).

6. "The truth is a beautiful weapon," R659 (Wang Aff., Ex. 23), above his re-tweet of his own campaign's statement: "Summer's actions today are nothing more than an attempt to regain the spotlight at Mr. Trump's expense." R172 (Compl. ¶ 62) (Oct. 15, 8:52 am);

7. "Nothing ever happened with any of these women. Totally made up nonsense to steal the election." R172 (Compl. ¶ 63); R660 (Oct. 15, 11:29 am).

8. "[T]oday, the cousin of one of these people, very close to her, wrote a letter that what she said is a lie. That she was a huge fan of Donald Trump. That she invited Donald Trump to her restaurant to have dinner, which by the way I didn't go to, didn't even know who the heck we're talking about here. But these allegations have been, many of them already proven so false . . . ." Later he said: "Total lies, and you've been seeing

total lies . . . you have phony people coming up with phony allegations . . . .” R172 (Compl. ¶ 64); R115 (Oct, 15, approximately 12:30 pm).

9. “[F]alse allegations and outright lies, in an effort to elect Hillary Clinton President . . . False stories, all made-up. Lies. Lies. No witnesses, no nothing. All big lies.” R172 (Compl. ¶ 65); R123 (Oct. 15, approximately 3:30 pm).

10. “Polls close, but can you believe I lost large numbers of women voters based on made up events THAT NEVER HAPPENED.” R172 (Compl. ¶ 66); R661 (Oct. 16, at 4:36 am).

11. The Clinton campaign is “putting stories that never happened into the news!” R172-173 (Compl. ¶ 67); R662 (Oct. 16, at 5:31 am).

12. “Can’t believe these totally phoney stories, 100% made up by women (many already proven false) . . . .” R173 (Compl. ¶ 68); R663 (Oct. 17, 5:15am).

13. Appellant states “Terrible,” after he re-tweets: “This is all yet another hoax.” The tweet includes a photograph of Ms. Zervos. R173 (Compl. ¶ 69); R664 (Oct. 17 at 5:24 am).

14. Appellant tweets that media had put “women front and center with made-up stories and lies . . . .” R173 (Compl. ¶ 70); R665 (Oct. 17, at 12:31 pm).

15. “The media . . . they take a story, with absolutely nothing, that didn’t exist, and they put it [sic] front page news because they want to poison the minds of the voters.” R 134-35. Later, he said: “They want to put nice sexy headlines up, even though nothing happened. Nothing took place. Even though it’s a total fabrication.” R173 (Compl. ¶ 71); R136 (Oct. 17, approximately 6:30 pm).

16. “The press . . . rigged it from the beginning by telling totally false stories. Most recently about phony allegations . . . .” R173-174 (Compl. ¶ 72); R142 (Oct. 18, approximately 1:30 pm).

17. “[T]hose stories are all totally false, I have to say that. And I didn’t even apologize to my wife, who’s sitting right here, because I didn’t do anything. I didn’t know any of these women – I didn’t see these women. These women – the woman on the plane, the – I think they want either fame or her campaign did it . . . I believe, Chris, that she got these people to step forward. If it wasn’t, they get their 10 minutes of fame. But they were all totally – it was all fiction. It was lies, and it was fiction.” R174 (Compl. ¶ 73); R149 (Oct. 19).

18. “Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened. Never. All of these liars will be sued after the election is over.” R174 (Compl. ¶ 74); R153 (Oct. 22, approximately 11:30 am).

Any reasonable reader or listener would understand that Appellant’s statements about Ms. Zervos were factual. Each statement contains verifiable assertions of fact, including whether or not Ms. Zervos lied on October 14, 2016 when she described in detail Appellant’s repeated unwanted sexual touching, and whether or not she did so for money, fame, or at the behest or in support of Appellant’s political opponent. These facts can be proven true or false in the same ways that other facts are proven in litigation: through documents and witness testimony. *See Thomas H.*, 18 N.Y.3d at 585-86 (statement accusing plaintiff of sexual assault “can be proven true or false since plaintiff either did or did not commit the acts”). As the lower court held, Appellant’s “statements can be proven true or false, as they pertain to whether plaintiff made up allegations to pursue her own agenda.” R24 (citing *Davis*, 24 N.Y.3d at 271).

1. Appellant Spoke with Specificity and Unique Knowledge

Appellant argues that his statements were "vague and imprecise and reflect subjective opinion." App. Br. at 27. But he plainly sought to convey definitively to the world – from his unique vantage point of being one of the two people in the room – that Ms. Zervos lied when she described his unwanted sexual touching. Any reasonable listener or reader of Appellant's carefully chosen words would – or at the very least could – conclude that he was making factual representations. *See Davis*, 24 N.Y.3d at 271 (defendant used "specific, easily understood language" to communicate that plaintiffs lied for financial gain); *see also Selleck*, 166 Cal. App. 3d at 1131 (determining meaning by considering the words and their reasonable implication).

The fact that Appellant may have used rhetorical flourish in making these factual assertions does not transform them into protected opinion. *See Davis*, 24 N.Y.3d at 272-73 (defendant's interspersing "I know nothing" or "I believe" does not undo the defamation); *Thomas H.*, 18 N.Y.3d at 585 (qualifying language does not immunize statements); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (same); *Alianza Dominicana, Inc. v. Luna*, 229 A.D.2d 328, 329 (1st Dep't 1996) (same).[10]

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[10] California law is the same. *See Weller v. Am. Broadcasting Cos., Inc.*, 232 Cal. App. 3d 991, 1002-04 (1991) (qualifying language does not transform the impact of a statement that is overall defamatory).

Appellant admits that he knew Ms. Zervos personally (Statement 1), and he carefully cherry-picked a single e-mail from her to his personal assistant to try to support his position, while deliberately omitting another e-mail that corroborates her, R638 (Wang Aff., Ex. 3); R102 (Kasowitz Aff., Ex. 2); R619 (Zervos Aff. ¶¶ 6-9). Appellant knows whether he in fact sexually assaulted Respondent. That is, "[a] reader or listener, cognizant that defendant knows exactly what transpired, could reasonably believe what defendant's statements convey: that plaintiff is contemptible because she 'fabricated' events for personal gain." R23 (Decision at 16 (citing *Divet v. Reinisch*, 169 A.D.2d 416 (1st Dep't 1991)); *see also Davis*, 24 N.Y.3d at 273 (Appellant "appeared well placed to have information about the [sexual abuse] charges"); *Clark v. Schuyerville Cent. Sch. Dist.*, 24 A.D.3d 1162, 1164 (3d Dep't 2005) (principal is uniquely placed with knowledge to speak about teacher, so his statements denigrating her are not opinion). *See also Slaughter v. Friedman*, 32 Cal. 3d 149, 154 (1982).[11]

[11] Even if there were some opinion mixed in with factual denigrations (and there is not), Appellant's statements are nonetheless actionable as "mixed opinion." *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986) (when a "statement of opinion implies that it is based upon facts which . . . are unknown to those reading or hearing it, it . . . is actionable") (citations omitted). It is precisely under these types of circumstances – when the speaker plainly knows and makes clear to his audience that he knows the issues or parties – that courts uphold (or reinstate) defamation claims under the "mixed opinion" doctrine. *Stega v. N.Y. Downtown Hosp.*, --- N.E.3d ----, 2018 WL 3129383, at *7 (N.Y. June 27, 2018) (statement that a board was "tainted" by plaintiff's presence was actionable mixed opinion because speaker's words carried authority given his familiarity with that board); *see also Zulawski v. Taylor*, 63 A.D.3d 1552, 1553, 881 N.Y.S. 2d 244 (4th Dep't 2009); *Rossi v. Attanasio*, 48 A.D.3d 1025, 1028 (3d Dep't 2008); *Clark*, 24 A.D.3d at 1164; *Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106, 109, 773 N.Y.S. 2d 348 (1st Dep't 2004); *Gjonlekaj v. Sot*, 308 A.D.2d 471, 474, 764 N.Y.S. 2d 278 (2d Dep't 2003). Appellant also presented grossly distorted facts, by misrepresenting his e-mail communications

Appellant claims that his statements "in no way expose[d] Ms. Zervos to 'hatred, contempt or aversion,'" App. Br. at 26, but Appellant's easily understood message had precisely that impact: Ms. Zervos was threatened repeatedly, both physically and economically, by members of her community. *See* R175 (Compl. ¶¶ 80-82); R620 (Zervos Aff. ¶¶ 10-12).

2. Branding Ms. Zervos a Liar Was Not Protected Opinion

Falsely calling Ms. Zervos a liar about a matter of such significance and sensitivity is actionable because it impugned her integrity and caused her actual harm, as the Court of Appeals recently made clear. *Davis*, 24 N.Y.3d at 270-72 (saying that plaintiffs lied about sexual abuse is defamatory). Numerous other cases also support this conclusion. *See Gross v. N.Y. Times, Co.*, 82 N.Y.2d 146, 154-55 (1993) (statements that plaintiff directed the creation of misleading reports are actionable); *Brach v. Congregation Yetev Lev D'Satmar, Inc.*, 265 A.D.2d 360, 360-61 (2d Dep't 1999) (statement that the plaintiff has prevailed "by lies and deceit" is actionable); *Curry v. Roman*, 217 A.D.2d 314, 317-19 (4th Dep't 1995) (statements by owner of art gallery and its agent that auctioneer and his business were "crooks," "liars," "swindlers," and that there was "some sort of collusion somewhere along the line" were defamatory as [a] matter of law); *Divet v. Reinisch*, 169 A.D.2d 416, 417 (1st Dep't 1991) (charging plaintiff with being a

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with Ms. Zervos (revealing only one email and hiding another that corroborates her). This likewise supports actionable mixed opinion. *See* R619 (Zervos Aff. ¶¶ 6-9); *Chalpin v. Amordian Press*, 128 A.D.2d 81, 85-88 (1st Dep't 1987).

liar is actionable on its face); *Cappellino v. Rite-Aid of N.Y., Inc.*, 152 A.D.2d 934, 935, 544 N.Y.S.2d 104 (4th Dep't 1989) (public sign noting that plaintiffs' membership was revoked imputed untrustworthiness or uncreditworthiness to plaintiffs and was therefore actionable); *Kaminester v. Weintraub*, 131 A.D.2d 440, 441 (2d Dep't 1987) (statements accusing plaintiff of personal dishonesty were "not constitutionally protected expressions of opinion") (citations omitted); *Petrus v. Smith*, 91 A.D.2d 1190, 1190-91 (4th Dep't 1983) (statement that the plaintiff was "a liar and a thief" was actionable); *Mase v. Reilly*, 206 A.D. 434, 436 (1st Dep't 1923) (noting that the "charge that a man is lying . . . is such a charge as tends to hold him up to scorn, as a matter of law"); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 185-86 (2d Cir. 2000) (newspaper's statements that plaintiff made false implications about a non-party failing to pay her debts were *per se* defamatory because they "impugn[ed] plaintiff Celle's trustworthiness"); *Giuffre v. Maxwell*, 165 F. Supp. 3d 147, 152 (S.D.N.Y. 2016) (statements that claims of sexual abuse were "obvious lies" and "have been shown to be untrue" are actionable); *McNamee v. Clemens*, 762 F. Supp. 2d 584, 601 (E.D.N.Y. 2011) (Roger Clemens's statements that his former personal trainer "is constantly lying" and that McNamee's statements "are absolutely false and the very definition of

defamatory" are actionable). As one noted defamation expert has explained:

> The terms "lie" and "liar" are frequently used to characterize statements with which the speaker vehemently disagrees. If in context the word means that the Appellant disapproves, it is a protected epithet. If it literally implies that the plaintiff made a specific assertion or series of assertions knowing them to be false, it may be actionable.

Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2.4.7 at 2-48-2-49.[12]

Appellant attempts to support his meritless "opinion" argument by citing lower court cases that are either inapposite or inconsistent with more recent controlling authority. *See* App. Br. at 27-30 (citing, *e.g.*, *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *7 (Sup. Ct. N.Y. Cnty. Apr. 19, 1996) (talk show host repeatedly advised audience that it is hearing only one side of the argument and only asked questions); *Rappaport v. VV Publ'g Corp.*, 163 Misc. 2d 1, 11 (Sup. Ct. N.Y. Cnty. 1994) (underlying facts in article were undisputed); *Terry v. Davis Cmty. Church*, 131 Cal. App. 4th 1534, 1539-41 & 1553 (2005) (statement that youth counselor acted "inappropriately" was based on undisputed facts); *El-Amine v. Avon Prods., Inc.*, 293 A.D.2d 283 (1st Dep't 2002) (one-paragraph summary judgment decision in which one of two claims for defamation is sustained); *GetFugu, Inc. v. Patton Boggs LLP*, 220 Cal. App. 4th 141, 157 (2013) (tweet that litigation claims were "frivolous" and that plaintiff company "runs an

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[12] California law is the same. *See Dickinson v. Cosby*, 17 Cal. App. 5th 655, 691 (2017), *rev. denied* (Mar. 14, 2018); *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 604 (1976).

organization for the benefit of its officers and directors, not shareholders and employees" was protected opinion); *Dreamstone Entm't Ltd. v. Maysalward Inc.*, No. 14-2063, 2014 WL 4181026, at *4-*8 (C.D. Cal. Aug. 18, 2014) (in context of ongoing litigation, press release using the words "contends" and "accuses" as well as that plaintiff "maliciously absconded" not actionable)).

3. Appellant's Statements Were Not Mere "General Denials"

Appellant selectively quotes a 34-year-old nationwide survey treatise for the proposition that he "may publish anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another, including the statement that his accuser is an unmitigated liar." App. Br. at 26 (citation omitted). But as the even older case which the treatise cited for that proposition makes clear, a defendant is not immune from liability if his counterattack is excessive (a question for the jury) or if the underlying statements to which he is responding are themselves true and not defamatory. *Shenkman v. O'Malley*, 2 A.D.2d 567, 576 (1st Dep't 1956). The non-binding cases otherwise cited by Appellant alongside that treatise are all distinguishable. *Lapine v. Seinfeld*, 31 Misc. 3d 736, 752-56 (Sup. Ct. N.Y. Cnty. 2011) (no specific statement cited as defamatory); *Indep. Living Aids, Inc. v. Maxi-Aids, Inc.*, 981 F. Supp. 124, 127-28 (E.D.N.Y. 1997) (in a trademark and copyright infringement action, where one business competitor stated the other was a "liar," with no other statement and within a moment after hearing that plaintiff had accused him of

illegal business practices, the slander claim was dismissed on summary judgment); *Storek v. Fidelity & Guar. Ins. Underwriters, Inc.*, 504 F. Supp. 2d 803, 808 (N.D. Cal. 2007) (denial of wrongdoing *in a cross-complaint filed in court* did not constitute defamation, and noting that "*all* lawsuits contain allegations of wrongdoing, and these allegations are usually denied by an opposing party") (emphasis in original). Finally, Ms. Zervos neither "solicited" Appellant's defamatory attacks, R620 (Zervos Aff. ¶ 14), nor are Appellant's cases relevant for such an argument. *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 779 F.3d 191, 201 (2d Cir. 2015) ("secret" shoppers soliciting statements); *LeBreton v. Weiss*, 256 A.D.2d 47, 47 (1st Dep't 1998) ("pretend" landlords soliciting statements).

B. The Context of Appellant's Statements Confirms They Are Actionable

1. There is No Blanket Exception Allowing a Political Candidate to Defame

The trial court rejected Appellant's argument that because he was in the midst of a political campaign, the law grants him *carte blanche* to say what he likes, holding that the fact that "defendant's statements about plaintiff's veracity were made while he was campaigning to become President of the United States [] does not make them any less actionable." R24-25 (citing *Sildsorf v. Levine*, 59 N.Y.2d 8, 16 (1983)). The court was correct in holding that politicians do not enjoy blanket "immunity" from defamation claims. As the Court of Appeals has held, "[p]ublic office does not carry with it a license to defame at will, for even the

highest officers exist to serve the public, not to denigrate its members." *Clark v. McGee*, 49 N.Y.2d 613, 618 (1980). New York's highest court has upheld claims for defamation arising out of the most acrimonious political battles, even claims brought by one politician against a group of others. *Silsdorf*, 59 N.Y.2d at 16-17.[13]

2. The Context Was Not a Live Debate or Political Exchange Between Candidates

The context here is not even as extreme as in *Clark* or *Silsdorf* (which upheld defamation claims) because Ms. Zervos never was a political candidate or government official and never engaged in a direct or live debate with Appellant. She is a private citizen who spoke out on a narrow factual issue.

a. There is No Live Debate or Internet "Free Pass." Appellant's statements about Respondent were not made spontaneously during a live debate. They were carefully crafted or announced: (a) by his campaign organization through his campaign website and at his direction (Statements 1 and 2); (b) at home or in some other private setting using his Twitter account (Statements 4-7, 10-14); (c) as he alone delivered a speech to tens of thousands of his supporters (Statements 3, 8-9, 15-16, 18); or (d) in response to a moderator's question during the Presidential debate (Statement 17). These were not off-the-cuff statements made in immediate

[13] California's highest court has done the same. *Good Gov't Group of Seal Beach v. Hogard*, 22 Cal. 3d 672, 682-83 (1978). Appellant attempts to distinguish *Silsdorf* on the ground that he has not made allegations of criminal misconduct against Ms. Zervos, App. Br. 25-26, but *Silsdorf* only relied upon the allegations of criminal misconduct in finding that even clear expressions of opinion cannot be protected if they are accusations of criminal or illegal activity. *See* 59 N.Y.2d at 16.

reaction to something another speaker had just blurted out. *See 600 West 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 141 (1992) (statements during a back-and-forth with opponent or an "impromptu comment[] at a heated public debate . . . are more likely to be the product of passionate advocacy than careful, logically developed reason"). Appellant's statements, "no matter how passionately delivered, were made in pre-scheduled . . . conferences and other pre-planned public appearances. This was not a debate in which emotions might lead to exaggerated statements." *McNamee v. Clemens*, 762 F. Supp. 2d 584, 603 (E.D.N.Y. 2011) (citation omitted). That Appellant subjectively *felt* attacked does not transform this into a context of a spontaneous back-and-forth exchange. *See Guerrero v. Carva*, 10 A.D.3d 105, 114 (1st Dep't 2004) (where intensity of the controversy was likely "highly personal, and, more than likely, limited solely to the defendants[,]" statements not shielded by opinion privilege). *Cf. Davis*, 24 N.Y.3d at 272-73 (rejecting defendants' argument that the context – Boeheim's "obvious and transparent effort to defend his longtime close friend . . . against allegations of sexual abuse, as well as an effort to defend against suggestions that Boeheim knew about the alleged abuse and did nothing" – renders the statements not actionable).

Nor does the fact that a statement was carefully posted on the campaign's website or via Appellant's Twitter account immunize it. The cases cited by Appellant make clear that the same framework applies even when statements are posted on Twitter. *Jacobus v. Trump*, 55 Misc. 3d 470, 484 (Sup. Ct. N.Y. Cnty.

2017), *aff'd*, 156 A.D.3d 542 (1st Dep't 2017) (noting that artful or "small Twitter parcels" do not alone ensure that its publisher "'escape[s] liability'") (citation omitted). Moreover, in cases where Internet commentary is protected, courts often rely on the fact that anonymous users are engaged in free-for-all critiques or message boards in which users engage in vivid, actual, or close to live-stream discourse. *See Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 43-44 (1st Dep't 2011); *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001). Appellant's carefully crafted statements, including one that required the retrieval of a months-old email from Ms. Zervos, R638 (Wang Aff., Ex. 3); R102 (Kasowitz Aff., Ex. 2), issued over many days and distributed to millions of followers, were part of a coordinated campaign to send the message – repeatedly and worldwide – that Appellant had never inappropriately touched these women. They were the opposite of off-the-cuff or anonymous statements.[14]

b. Respondent is Not "Political." As noted above, the law does not give Appellant a free pass just because *he* was a political candidate at the time he attacked Ms. Zervos. *Supra*, Section III.B.1. Respondent was not a political

[14] Appellant's claim that the trial court found "that only statements made 'through op-ed pieces and letters to the editor' would not be actionable," App. Br. at 21, *see also id.* at 18-19, grossly distorts the court's actual language. The court plainly did not hold that statements made in other settings such as Internet postings, campaign literature, and debate forums could never be offered First Amendment protection. The court merely held that "*in their context*," the statements – which were made in speeches, debates, and tweets, instead of forums more quintessentially used to express opinion such as op-ed pieces or letters to the editor – "cannot be characterized simply as opinion, heated rhetoric or hyperbole." R24 (emphasis added).

candidate or commentator, nor was she motivated by politics or other politicians to report Appellant's sexual groping. *See* R170 (Compl. ¶ 52); R618-19 (Zervos Aff. ¶¶ 2-5); *see also* R666-70 (statement of Ms. Zervos, dated Oct. 14, 2016); *cf. Jacobus*, 55 Misc. 3d at 471-72 (self-described "political strategist" plaintiff criticized Appellant as "a third grader faking his way through an oral report on current affairs") (citation omitted). To conclude otherwise by drawing inferences in Appellant's favor at this stage is impermissible.

c. Appellant's Cases Are Inapposite. The cases Appellant cites are not on point. The parties in a number of cases cited by Appellant were directly opposing each other in political campaigns, and the losing plaintiff then sued for critical statements made during the campaign. *Munoz-Feliciano v. Monroe-Woodbury Cent. Sch. Dist.*, No.13-CV-4340, 2015 WL 1379702, at *12 (S.D.N.Y. Mar. 25, 2015) ("It simply cannot be that every candidate who subjects herself to the rough-and-tumble of electoral politics has an actionable . . . claim against her opponents who hold public office."), *aff'd*, 637 F. App'x 16 (2d Cir. 2016); *Reed v. Gallagher*, 248 Cal. App. 4th 841, 846-47 (2016); *Rosenaur v. Scherer*, 88 Cal. App. 4th 260 (2001). The remainder of Appellant's cases involved overtly political tracts indisputably being published or espoused by opponents, *e.g.*, *Adelson v. Harris*, 973 F. Supp. 2d 467, 472 (S.D.N.Y. 2013) (plaintiff was supporter of presidential candidates and defendants were a non-profit political organization and its officer who had issued political petitions and statements

during the campaign); *Suozzi v. Parente*, 202 A.D.2d 94, 101 (1st Dep't 1994) ("[T]he article, an obvious political tract emanating from the opposing camp, was written for a partisan publication"); *Mann v. Abel*, 10 N.Y.3d 271, 276-77 (2008) (political tract criticizing politician was on opinion page with introductory note from editor); *Matson v. Dvorak*, 40 Cal. App. 4th 539 (1995) (plaintiff was losing political candidate who had been targeted by campaign flyer published by political organization to which defendant financially contributed), an obvious opinion piece given the context, *Rudnick v. McMillan*, 25 Cal. App. 4th 1183, 1193 (1994) ("Letters to the editor are typically laden with literary license"), or U.S. Supreme Court cases generally discussing the importance of First Amendment principles in other contexts, App. Br. at 20-21.

Appellant also relies extensively on *Jacobus v. Trump*, 55 Misc. 3d 470 (Sup. Ct. N.Y. Cnty. 2017), *aff'd*, 156 A.D.3d 542 (1st Dep't 2017), a defamation action brought by a political consultant and commentator against Appellant and his former campaign manager. In dismissing the plaintiff's claim against Appellant based on two short tweets, however, the court made clear its extensive reliance on both a very different context and a much narrower statement. First, the plaintiff in that case was a self-described "political strategist" and "frequent commentator on television news channels and other media outlets, offering 'political opinion and analysis from the Republican perspective.'" 55 Misc. 3d at 471; *see also* R674-75 (complaint states that Jacobus made "over one thousand appearances on FOX

News/FOX Business News, and hundreds of appearances on CNN and MSNBC. She also appeared as a frequent guest on CBS.com, CNBC, FBN, HLN, C-Span and other media outlets, offering political opinion."). Ms. Jacobus also directly and bruisingly attacked Appellant on January 26 and February 2, 2016. And Ms. Jacobus did not dispute that most of what Appellant said about her in two tweets on February 2 and 5, 2016 (as "a real dummy," "really dumb," and a "major loser") amounted to protected opinion. 55 Misc. 3d at 473, 482. The only disputed fact was whether Ms. Jacobus "begged" Appellant for a job and had been turned down. The parties did not dispute that she *had* met with Appellant's campaign manager twice and expressed her salary requirements, and also that she had not been offered a job. *Id.* at 482. The court found "begged" to be a "loose, figurative, and hyperbolic reference to [the] plaintiff's state of mind." *Id.* at 482-83.

Both the statements and the relevant context here are dramatically different from *Jacobus*. Rather than just two short tweets loaded with indisputable opinion and one factual statement that is not in dispute and otherwise phrased in loose figurative language, Ms. Zervos seeks to hold Appellant accountable for 18 extensive statements that repeatedly focus on false assertions of fact. Nor is Ms. Zervos a "political strategist" with over a thousand appearances who had explicitly attacked Appellant for his political incompetence as a "third-grader." *Id.* at 472. Ms. Zervos carefully described the particular details of her interactions with Appellant without insulting him. R666-70.

C. Appellant's Other Arguments are Meritless

1. The Defamatory Statements Are "Of and Concerning" Respondent

The trial court correctly held that all of the challenged statements could reasonably be considered "of and concerning" Ms. Zervos. R23 n.3. After selectively parsing some of the statements and removing those selections from their eight-day timeframe which included Appellant's repeated, explicit reference to Ms. Zervos or her photo, *compare* App. Br. 35-36 *with* R170-74 (Compl. ¶¶ 53-74), Appellant cites, among other things, a reversed district court opinion, App. Br. 37,[15] to continue to press his frivolous argument that the statements cannot reasonably be read or heard to "refer to [Ms. Zervos] – let alone to any identifiable person or group." App. Br. 36 (citation omitted). But each of the 18 defamatory statements either referred to Ms. Zervos explicitly, or by clear implication, as one of just 13 women who had recently reported Appellant's unwanted sexual touching. *See also infra* n.1; *Dalbec v. Gentleman's Companion, Inc.*, 828 F.2d 921, 925 (2d Cir. 1987) ("The test is whether the libel designates the plaintiff in such a way as to let *those who knew* [the plaintiff] understand that [s]he was the

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[15] Appellant cites to the district court opinion in *Elias v. Rolling Stone LLC*, 192 F. Supp. 3d 383 (S.D.N.Y. 2016), which held that statements were not "of and concerning" the fraternity members. App. Br. at 37. But the Second Circuit *reversed* the district court's holding long before Appellant filed his brief in this appeal, finding the 53-member fraternity "sufficiently small that its members can plausibly claim that the [statements] defamed each individual member." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 108 (2d Cir. 2017).

person meant. It is not necessary that all the world should understand the libel.") (quotation marks and citations omitted) (emphasis added). Where a defamatory statement concerns a group, a plaintiff establishes that the statement was "of and concerning" her as long as the group is sufficiently small and its members are easily identifiable. *See Elias v. Rolling Stone LLC*, 872 F.3d 97, 108 (2d Cir. 2017); *Algarin v. Town of Wallkill*, 421 F.3d 137, 139-40 (2d Cir. 2005) (surveying cases and noting that successful groups often involve 25 or fewer people).[16] For Ms. Zervos, who lives in a small community, there is no question that Appellant's defamatory statements were understood to identify her, resulting in vicious attacks. R175 (Compl. ¶¶ 80-82); R620 (Zervos Aff. ¶¶ 10-12).

2. Appellant Is Liable for All the Statements in the Complaint

The Complaint sufficiently alleges that John Barry's statement is attributable to Appellant because "Mr. Trump's campaign team drafted and issued Barry's statement at Mr. Trump's direction and with his approval." R171 (Compl. ¶ 56). Although that allegation is made "on information and belief," drawing all inferences in favor of plaintiff on this motion to dismiss, there plainly is a "sufficient inference that some sort of agency relationship existed." *Enigma Software Group USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 274-75 (S.D.N.Y. 2016) (citation omitted). Not only was the Barry statement posted on

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[16] California law is no different. *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1046 (1986) (a claim by a member of a group of less than 25 may succeed).

Appellant's campaign website shortly after Appellant's initial statement about Ms. Zervos and within hours of Ms. Zervos's report, *see* R170-71 (Compl. ¶¶ 53-56), but it was tweeted by Appellant's campaign beside Appellant's picture, as if issued by him, R638 (Wang Aff., Ex. 3). Even more notably, the Barry statement is posted just above the image of an e-mail that Ms. Zervos had sent to Appellant via his personal secretary – something that Barry could not have had access to, but Appellant did. R638 (Wang Aff., Ex. 3); R102 (Kasowitz Aff., Ex. 2). It is reasonable to infer from these facts that Appellant was directly involved with and approved the statement. *See Enigma Software*, 194 F. Supp. 3d at 275.[17] Regardless, Appellant ratified the Barry statement by re-tweeting it the next morning from his personal twitter account, adding: "The truth is a beautiful

[17] Because the Complaint clearly alleges that Appellant was directly involved with the drafting and issuance of the statement, Appellant's argument that Ms. Zervos cannot allege actual malice on an agency theory misses the point. *See* App. Br. at 35-36. Though Respondent does not concede that it is a requirement for her to prove, the Complaint more than adequately alleges actual malice as to all of the statements, particularly given the circumstances and content of the defamation – including that Appellant knows perfectly well how he sexually groped Ms. Zervos and other women, routinely and frequently, for years. R174-75, 160, 165-66 (Compl. ¶¶ 76-78, 1, 23-30). *See Herlihy v. Metro. Museum of Art*, 214 A.D.2d 250, 259-60 (1995) ("Malice . . . may be inferred from a defendant's use of expressions beyond those necessary for the purpose. . . or from a statement that is 'so extravagant in its denunciations or so vituperative in its character as to warrant an inference of malice.'") (citations omitted). Indeed, the allegations in the Complaint support a punitive damages award because they detail a deliberate, targeted, and repeated attack by Appellant to harm Ms. Zervos (1) using multiple, specific statements; (2) announced through a variety of methods and means; (3) in a manner that reached *tens of millions* of readers and listeners directly; (4) over many days; and (5) with words chosen viciously to harm Ms. Zervos. Appellant's selective publication of only one e-mail from Ms. Zervos was also a purposeful distortion of the true record of their communications. R619 (Zervos Aff. ¶¶ 7-9); R638. Finally, Ms. Zervos specifically requested that Appellant retract his statements defaming her, but he has refused. R700 (Wang Aff., Ex. 20).

weapon." R112 (Kasowitz Aff., Ex. 6), R659 (Wang Aff., Ex. 23). *See RLI Ins. Co. v. Athan Contracting Corp.*, 667 F. Supp. 2d 229, 235-36 (E.D.N.Y. 2009).

Moreover, Appellant is liable for his re-tweets – including both his own campaign's Barry statement and his re-tweet of a post calling Ms. Zervos's report a hoax by a user named @PrisonPlanet – as well as the content he incorporated and added. R172-73 (Compl. ¶¶ 62, 69), R112 (Kasowitz Aff., Ex. 6), R659 (Wang Aff., Ex. 11), R131 (Kasowitz Aff., Ex. 13), R664 (Wang Aff., Ex.16). In both instances, Appellant put his unique imprimatur on his factual statements, writing from the perspective of one of two people who know whether he groped her. Appellant wrote: "The truth is a beautiful weapon," when he retweeted the Barry statement, R112 (Kasowitz Aff., Ex. 6), R712 (Wang Aff., Ex. 23), and wrote "Terrible" above a photo of Ms. Zervos and the link to @PrisonPlanet's statement when he retweeted that "This is all yet another hoax," R172 (Compl. ¶ 69); R131 (Kasowitz Aff., Ex. 13); R664 (Wang Aff., Ex.16). Appellant took these tweets, which had previously been circulated to a few hundred thousand followers, and republished them to his Twitter account with *12.5 million* readers.[18]

[18] The tool known as the Wayback Machine shows that, as of mid-October 2016, Appellant's campaign Twitter handle @TeamTrump had 160,000 followers, R701 (Wang Aff., Ex. 21), while @prisonplanet had 294,000 followers, R706 (Wang Aff., Ex. 22). In stark contrast, in that same period, Appellant's personal Twitter handle, @realdonaldtrump had *12.5 million* followers, R712 (Wang Aff., Ex. 23), R718 (Wang Aff., Ex. 24). *See Universal Church, Inc. v. Universal Life Church/ULC Monastery*, No. 14 Civ. 5213, 2017 WL 3669625, at *3 n.7 (S.D.N.Y. Aug. 8, 2017) (accepting Wayback Machine information as reliable).

Appellant claims that the Communications Decency Act ("CDA") protects him. But the CDA does not protect those who embellish an already disparaging post and thus contribute to its defamatory impact. *See Doe v. City of New York*, 583 F. Supp. 2d 444, 449 (S.D.N.Y. 2008); *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008).

Appellant's comments affirmed the truth of the statements he forwarded. Moreover, because he was in a "position to have unique knowledge" about the contents of the posts, "he was *adding* defamatory content beyond that asserted by the original [tweets]" when he re-tweeted them to the significantly expanded universe of his 12.5 million Twitter followers. *Samsel v. Desoto Cnty. Sch. Dist.*, 242 F. Supp. 3d 496, 540 (N.D. Miss. 2017) (emphasis in original).

3. California's Procedural Rules Do Not Apply Here

Appellant below sought to invoke California Code of Civil Procedure § 425.16 ("§ 425.16") to make a "special motion to strike." The CPLR does not recognize any such motion. The lower court held that § 425.16 does not apply because it is a procedural rule that does not apply here. R21 (Decision at 14 n.2). That holding is plainly correct.

The Court of Appeals recently reaffirmed that even where (unlike here) the substance of a legal claim is governed by the law of another jurisdiction, "under New York common-law principles, procedural rules are governed by the law of the forum." *Davis v. Scottish Re Group, Ltd.*, 30 N.Y.3d 247, 252 (2017) ("*Scottish*

Re") (citations omitted). In "New York, we employ our own procedural rules in the CPLR to actions in our courts." *Id*. at 257.

Section 425.16 is procedural, not substantive. It is codified in the California Code of Civil Procedure. It does not create or alter any substantive rights; rather, it expressly creates a "special motion to strike," Cal. Code Civ. P. § 425.16(b)(1), that does not exist under the CPLR. It requires a defamation plaintiff to demonstrate at the pleading stage a "probability" of prevailing, *id*., a procedural standard that differs from that codified in CPLR 3211(a). It imposes other procedural rules, such as an automatic stay of discovery, *id*. § 425.16(g), and the right to an interlocutory appeal, *id*. § 425.16(i). And it imposes a procedural requirement that any party filing or opposing a special motion to strike must send endorsed copies of the caption pages of motion papers and related notices of appeal or orders to the Judicial Council of California. *Id*. § 425.16(j).[19]

The California Supreme Court has made clear that § 425.16 is "a procedural device" rather than "a substantive rule of law." *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 39 Cal. 4th 192, 202 (2006). It "provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity." *Newport Harbor Ventures LLC v. Morris Cerullo World Evangelism*, 4 Cal. 5th 637, 642

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[19] New York has no comparable procedure. *See* R1230-31 (trial court questioning at oral argument how a New York court could possibly comply with this requirement). Appellant has not attempted to satisfy this requirement of § 425.16.

(2018) (quotation marks and emphasis omitted); *see also Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 154 (2d Cir. 2013).

The recent unanimous opinion in *Scottish Re* is directly on point. *Scottish Re* involved Rule 12A of the Cayman Island Grand Court Rules, which requires a plaintiff bringing a shareholder derivative claim to apply to the court for leave to continue the action. *See* 30 N.Y.3d at 251. The rule also sets a briefing schedule, permits interlocutory appeals, and allows for requests for indemnity. *Id*. Rejecting the argument that Rule 12A was "a substantive 'gatekeeper'" to protect Cayman companies from meritless derivative actions, *id*. at 253, the Court of Appeals noted that Rule 12A "itself neither creates a right, nor defeats it" but merely "sets forth a procedural mechanism for a threshold determination of merits and standing." *Id*. at 256-57. New York has its "own 'gatekeeping' statutes, CPLR 3211 and 3212, that effectively weed out claims which are insufficient or meritless[, which] are the procedural rules that apply when a Cayman company is sued in New York." *Id*. at 257. Because Cayman Rule 12A was procedural, it does not apply in New York courts. *Id*.

There is no meaningful distinction between Cayman Rule 12A and California Code of Civil Procedure § 425.16. Each creates a procedural mechanism for weeding out meritless claims at an early stage. Each has a peculiarly jurisdiction-specific administrative requirement unknown in New York (Rule 12A requires use of a local court form; § 425.16(j) requires papers to be filed

with the California Judicial Council). Each creates a right to interlocutory appeals. Each provides for cost-shifting (Cayman Rule 12A permits "requests for indemnity," 30 N.Y.3d at 251; § 425.16(c)(1) permits awards of attorney's fees). And each requires application of a standard of review that differs from the standard governing a CPLR 3211 motion (Cayman Rule 12A requires a "prima facie" showing, 30 N.Y.3d at 252 n.5; § 425.16(b)(1) requires showing a "probability" of success on the merits). *Scottish Re*'s holding that Rule 12A is procedural compels the conclusion that § 425.16 is procedural and inapplicable here.

Ignoring *Scottish Re*, Appellant contends that § 425.16 is "substantive [because] it was explicitly enacted to protect free speech on public issues." App. Br. at 41. But one thing has nothing to do with the other. Procedural rules often serve substantive aims. "Pleading standards, for example, often embody policy preferences about the types of claims that should succeed—as do rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence." *Shady Grove Orth. Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010). And in *Scottish Re*, the Cayman Islands enacted Rule 12A for the policy purpose of protecting corporate defendants from vexatious derivative suits, *see* 30 N.Y.3d at 251-52, but the Court of Appeals nevertheless unanimously held that Rule 12A was procedural, not substantive. *Id*. at 256-57.

The cases Appellant cites do not support his argument. *McDaniel v. McDaniel*, 2011 WL 4940687 (Cal. Ct. App. Oct. 18, 2011), is unpublished and

not citeable, and in any event describes § 425.16 as a "procedural mechanism." *Id*. at *8. The federal cases Appellant cites are irrelevant because they all involve a choice-of-law analysis under principles governing federal courts sitting in diversity announced in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *see* App. Br. at 41, 43 n.24, which is a different question than the one posed here. Whether a law is "substantive" under *Erie* (and therefore applies in a diversity suit in federal court) is a question of federal law, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726-28 (1988), and it is "immaterial" for purposes of that analysis whether the law at issue is labeled "procedural" or "substantive" under state law, *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). Indeed, a "state's 'procedural' rules under its own choice-of-law principles can be 'substantive' for purposes of *federal* diversity jurisdiction." *Liberty Synergistics*, 718 F.3d at 152 (emphasis in original).

Appellant relies heavily on *Adelson v. Harris*, 973 F. Supp. 2d 467 (S.D.N.Y. 2013), stating falsely that in that case the court "applied New York choice of law rules to determine if another state's anti-SLAPP statute applies." App. Br. 42. *Adelson* did no such thing. As a federal court sitting in New York in a diversity case, *Adelson* applied New York choice-of-law rules to determine the applicable *substantive law of defamation*. 973 F. Supp. 3d at 476. But it analyzed whether to apply Nevada's anti-SLAPP statute under the *Erie* doctrine, *not* under state choice-of-law principles. *Id*. at 493 n.21. And although *Adelson* held that Nevada's anti-SLAPP statute was substantive under *Erie*, its analysis actually

undermines Appellant's position. *Adelson* relied on the fact that several courts had held that state anti-SLAPP laws were substantive for federal *Erie* purposes. *Id*. But that was before the D.C. Circuit held in 2015 that a state anti-SLAPP statute was procedural even under *Erie*, *see Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015), and before the Second Circuit noted in 2016 that whether § 425.16 was procedural or substantive under *Erie* is an open question. *Ernst v. Carrigan*, 814 F.3d 116, 119 n.1 (2d Cir. 2016). Moreover, *Adelson* relied on the fact that Nevada's anti-SLAPP statute, unlike § 425.15, creates a separate substantive cause of action. *Adelson*, 973 F. Supp. 3d at 493 n.21. It also relied on the fact that Nevada's anti-SLAPP statute creates a substantive good-faith immunity, *id*., whereas § 425.16 "neither constitutes—nor enables courts to effect—any kind of 'immunity.'" *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 738 (2003) (citation omitted). In any event, *Adelson* was decided before the Court of Appeals issued its controlling decision in *Scottish Re*.

Finally, even if § 425.16 applied, Appellant's special motion to strike was untimely because it was not filed "within 60 days of the service of the complaint." Cal. Code Civ. P. § 425.16(f). Service was complete on February 2, 2017, R724, so Appellant's motion was due by April 3, 2017. Appellant missed the deadline, and instead rushed in with an Order to Show Cause seeking leave to file two *seriatim* motions to dismiss, which he then withdrew after Respondent opposed.

See generally, R725-27, R728-49, R750-51. Between April 3, when his time expired, and April 28, when the trial court signed a stipulation permitting Appellant to file a motion to dismiss by July 7, 2017, R750-51, Appellant had no permission from the Court or agreement from Respondent to extend *any* deadline, much less the one mandated by § 425.16. Appellant's time under the California procedure therefore expired on April 4, and the so-ordered stipulation 24 days later does not address or otherwise cure that fatal error. *See Morin v. Rosenthal*, 122 Cal. App 4th 673, 678-81 (2004) (affirming denial of anti-SLAPP motion filed six weeks after the deadline because "defendants could have but didn't bring a motion requesting the court to exercise its discretion to permit a late filing of the motion" and instead engaged in other "procedural maneuvering").[20]

[20] Even were the Court to apply the California procedure, Ms. Zervos easily satisfies the "probability of prevailing" standard, which is "minimal." *Navallier v. Sletten*, 29 Cal. 4th 82, 89 (2002) ("Only a cause of action that . . . lacks even minimal merit [] is a SLAPP, subject to being stricken under the statute."); *Grenier v. Taylor*, 234 Cal. App. 4th 471, 480 (2014) ("[T]he plaintiff need only establish that his or her claim has minimal merit[.]").

CONCLUSION

Appellant's appeal should be denied, and the Decision should be affirmed.

Dated: August 8, 2018
New York, New York

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