To be Argued by:
MARC E. KASOWITZ

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New York Supreme Court

Appellate Division—First Department

SUMMER ZERVOS,

Plaintiff-Respondent,

– against –

DONALD J. TRUMP,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

KASOWITZ BENSON TORRES LLP
Attorneys for Defendant-Appellant
1633 Broadway
New York, New York 10019
(212) 506-1700
mkasowitz@kasowitz.com

#252128

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Defendant-appellant President Donald J. Trump respectfully submits this reply in further support of, and in response to plaintiff-respondent's brief in opposition ("Opposition" or "Opp. Br.") to, his appeal.[1]

PRELIMINARY STATEMENT

The fundamental flaw in plaintiff-respondent's opposition is that she (like amicus) completely ignores the dispositive difference between the Separation of Powers doctrine -- the doctrine at issue in *Clinton v. Jones*, 520 U.S. 681 (1997), a case in federal court -- and the Supremacy Clause -- the Constitutional provision at issue here, a case in state court. (*See* Br. 9-16.)

Thus, in her Opposition, plaintiff-respondent states that in *Clinton v. Jones*:

> [T]he logic of the [U.S. Supreme] Court's analysis was aimed at judicial power generally, not at any unique characteristics of federal judicial power.

(Opp. Br. 14.)

This is the opposite of the truth. In *Clinton v. Jones*, the Supreme Court focused virtually exclusively -- and the decision turned precisely -- on the "unique characteristics of federal judicial power" under the Constitution and the Separation of Powers doctrine -- with one exception. That exception was footnote 13 in the

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[1] Capitalized terms used but not otherwise defined herein shall have the meaning given to them in President Trump's opening brief ('Opening Br." or "Br"). Defendant-appellant also responds herein to the proposed amicus brief ("Am. Br.") submitted by the Protect Democracy Project.

decision, and its accompanying text, where the Supreme Court expressly noted that it was not deciding whether, under the Supremacy Clause, state courts could hear cases against a sitting President -- an issue, the Court stated, that may very well "present a more compelling case for immunity." 520 U.S. at 691 & n.13.

In *Clinton v. Jones*, the U.S. Supreme Court held only that, under the Separation of Powers doctrine, the federal judiciary, as a co-equal branch of the federal government, is authorized under the U.S. Constitution to hear private civil damages actions against the President. In *Clinton v. Jones*, the Court recognized that the President is uniquely vested "with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties," *id.* at 697, but concluded that, after weighing the powers and duties of the federal Executive Branch and those of the co-equal federal Judicial Branch, federal courts are empowered to hear such actions against the President so long as they give due regard to the President's duties and schedule.

Under the Constitution and, in particular, the Supremacy Clause, however, state courts are, of course, *not* a co-equal branch to the federal Executive Branch and therefore do *not* have "judicial power" to exercise jurisdiction over, and hear cases against, a sitting President. Because the exercise of jurisdiction is "fundamentally about a court's control over the person of the defendant," *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 340 (2012) -- and because, under the

Constitution, the supreme law of the land, the President in principle must always be personally "in session" (Br. 12-13) -- any exercise by a state court of jurisdiction over a sitting President is Constitutionally impermissible. Accordingly, this action should be dismissed or stayed during President Trump's presidency.[2]

Moreover, plaintiff-respondent's defamation claim fails to state a cause of action. While plaintiff-respondent correctly notes that "[w]ords matter" (Opp. Br. 3), their context matters as well and is dispositive here. Even if, as plaintiff-respondent claims (Opp. Br. 24), the Statements were "factual" and "precise" -- and plainly they were not -- there is no question that the Statements, in context, were political campaign statements protected by the First Amendment and otherwise not actionable.

Plaintiff-respondent's attempt to distinguish the most relevant precedent, *Jacobus v. Trump*, 156 A.D.3d 452 (1st Dep't 2017), only highlights the similarities between the cases. In *Jacobus*, as here, plaintiff, sued a presidential candidate for statements he made in political forums in response to public attacks. Plaintiff-respondent makes much of the fact that the *Jacobus* plaintiff was a frequent media commentator. (Opp. Br. 39-40.) Even assuming *arguendo* that

[2] Because the "immunity" is only temporary, the claim (Opp. Br. 2) that it would render the President "above the law" is completely off the mark (Br. 16.)

were relevant, plaintiff-respondent and her then attorney, Gloria Allred, had, when the Statements were made, ready access, to say the least, to all the media they could want. And Ms. Allred, who herself made the accusations to which President Trump responded, has undoubtedly appeared as a media political commentator at least as often as the *Jacobus* plaintiff -- and, indeed, is much more well known. As in *Jacobus*, a reasonable audience here would understand that denials of attacks, in the midst of a heated political campaign, on a candidate's qualifications for office -- a debate she and her attorney instigated here for explicitly political purposes -- amount to non-actionable opinion. (Br. 26-27.)

As to California's anti-SLAPP statute, which bars her claim (Br. 40-47), plaintiff-respondent's cites to *Davis v. Scottish Re Group, Ltd.*, 30 N.Y.3d 247, 252 (2017) ("*Scottish Re*") for the proposition that the burden-shifting and attorneys' fees provisions of California's anti-SLAPP statute are procedural. But that case in no way contradicts the numerous cases (Br. 41-42) holding that those provisions are substantive. *Scottish Re* merely found that the Cayman Island rule at issue -- which provided a gate-keeping mechanism for derivative actions brought in the Cayman Islands -- was not intended to apply extraterritorially, which is not true for -- and cannot be inferred form the vary broad language of and policy underlying -- California's anti-SLAPP statute. And, numerous courts have confirmed that the

statute is substantive in pertinent part and therefore it controls in cases in other states in which, as here, California law applies.

ARGUMENT

I. THE SUPREMACY CLAUSE BARS STATE COURTS FROM EXERCISING JURISDICTION AGAINST A SITTING U.S. PRESIDENT.

Neither plaintiff-respondent nor amicus cites a single state or federal case holding that a state court has jurisdiction to hear a case against a sitting President arising out of his or her unofficial conduct. They do try, unsuccessfully, to argue that it is irrelevant that the Supreme Court in *Clinton v. Jones* -- the only case to address the specific issue -- took pains to note that actions in state court may very well present a "more compelling case for immunity" than an action in federal court. 520 U.S. at 691. They argue that the Supreme Court, in that statement and its other statements in footnote 13 and accompanying text, meant to refer only to state cases involving the President's official conduct (Opp. Br. 14-16; Am. Br. 8-10).

But that argument makes no sense. First, words matter, and the Supreme Court did not say that. Indeed, if that argument were correct, the Supreme Court would have had no reason at all to include those statements in its decision in the case before it -- a federal case involving the President's unofficial conduct. Moreover, that state courts may not hear cases involving the President's official

conduct was (and is) not only well-understood and long-established, but it was not at all pertinent to the point the Supreme Court was making in footnote 13 -- namely, that the fact that it was decided that federal courts may hear cases involving unofficial actions did *not* mean that, *under* the *Supremacy Clause*, state courts could. Plainly, the cases the Court cites in footnote 13 were intended to illustrate the operation of the Supremacy Clause and were no way intended to imply that the Supremacy Clause was not applicable to state cases involving the President's unofficial conduct -- an issue that had never before been decided.

Accordingly, the Supreme Court's Supremacy Clause concerns in *Clinton v. Jones* cannot, to say the least, be so easily (and incorrectly) brushed aside. *See Winslow v. F.E.R.C.*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."); *In re McDonald*, 205 F.3d 606, 612-13 (3d Cir. 2000) ("[W]e should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket.").

Plaintiff-respondent also ignores the basis for the Supreme Court's holding in *Clinton v. Jones* -- namely, that federal, but not state, courts are authorized to burden or control the Executive Branch. The Court's analysis of what it characterized as President Clinton's "strongest argument" -- that the structure of

the Constitution requires "postponement of the judicial proceedings that will determine whether he violated any law" -- began with the Court acknowledging that there is little distinction between the Presidency, the office, and the President, the person. *Clinton*, 520 U.S. at 697-99. (Br. 11-13.) Citing to numerous practical and legal examples, the Court stated that it had "no dispute" with the premise that the President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties." *Id.* at 698 (citations omitted).

The Court nevertheless found that "[i]t does not follow . . . that *separation-of-powers* principles" -- which are "concerned with the allocation of official power among the three co-equal branches of our Government" -- would be violated, *id.* (emphasis added), because the federal Judicial Branch is constitutionally permitted to exercise "*partial agency* in, or *countroul* [*sic*] over" the Executive Branch, or to "severely burden" it, *id.* at 699-705 (quoting The Federalist No. 47, pp. 325-26 (J. Cooke ed. 1961)) (emphasis in original).

Unlike the federal Judicial Branch, however, under the Supremacy Clause, a state court is *not* co-equal to the Executive Branch and *may not* control or burden it at all. (Br. 12-14.)[3] *Matter of Armand Schmoll, Inc. v. Federal Reserve Bank of*

[3] *See, e.g., In re Tarble*, 80 U.S. 397, 403-04 (1871) ("It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by . . . tribunals of another [state]

NY, 286 N.Y. 503, 509 (1941) (assumption by a state court of the power to control a federal agency would "hamper orderly government and ignore the division of fields of government of state and nation created by the Constitution"), *cert denied*, 315 U.S. 818 (1942).[4]

And, inasmuch as these principles apply generally with respect to the Executive Branch, they apply with even more force to the President. (Br. 10-14.)[5]

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sovereignty."); *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819) ("the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws").

[4] Amicus argues that because the Constitution did not create lower federal courts, the state courts must have jurisdiction or there would have been no avenue for judicial relief. (Am. Br. 14-17.) However, there is an avenue for judicial relief as the President's immunity exists only during his or her term of office. In any event, the argument proves too much. If it were true, state courts would be empowered to hear cases involving official conduct as well -- which as shown, they plainly are not. Indeed, the New York Court of Appeals has explicitly rejected amicus's argument, holding that "[i]t does not help respondents to point out that . . . the Supreme Court had remarked . . . that Congress need not have set up . . . any other inferior Federal court, but could have left suitors 'to the remedies afforded by state courts'. The courts of this State have never afforded, and do not now afford, any such remedies, whatever the result may be as to preventing suitors from reviewing the acts of Federal officers or agencies." *Wasservogel v. Meyerowitz*, 300 N.Y. 125, 134 (1949). Similarly, in *Fox v. 34 Hillside Realty Corp.*, 87 N.Y.S.2d 351 (Sup. Ct. N.Y. Cty. 1949), *aff'd*, 276 A.D. 994 (1st Dep't 1950), the court held that it lacked jurisdiction to review the actions of a federal area rent control director even though a federal court had dismissed the case for not meeting the jurisdictional amount. Thus, the lack of a remedy in federal court does not imply a right to a remedy in state court.

[5] That state courts may entertain certain civil damages suits against lower federal officials (Am. Br. 15-16), has no bearing on whether they can constitutionally entertain suits against the President, who is subject to different considerations and have more far-reaching immunities, including immunity from suits arising out of conduct within the "outer perimeter" of his or her official responsibilities, no matter the court. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 385 (2004) ("respondents' reliance on cases that do not involve senior members of the Executive Branch is altogether misplaced") (citations omitted); *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

Plaintiff-respondent, while acknowledging that a state court cannot interfere with a President's official responsibilities, claims that state courts are as equipped as federal courts to minimize such interference by managing the burdens necessarily imposed by litigation on the President. (Opp. Br. 11; Am. Br. 14-15.) However, federal courts are constitutionally permitted to manage the burdens on the President, not because they are better equipped to do so than state courts but because they are permitted, as a co-equal branch, to "severely burden the Executive Branch" in the first place, *Clinton*, 520 U.S. at 705 -- which state courts may not do.

Plaintiff-respondent claims the Supremacy Clause would not be violated by a state court exercising jurisdiction over the President or entering discovery orders, but only by ordering the President to appear at a particular time or place. (Opp. Br. 18-19 & n.4; Am. Br. 10-11.) However, as the New York Court of Appeals has confirmed, the very exercise of "jurisdiction is fundamentally about a court's control over the person of the defendant." *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 340 (2012). (Br. 12.) Indeed, state courts' exercise of jurisdiction over the President would be futile if they did not have the ultimate power to direct the President to "appear at a particular time or place." Absent such power -- which plaintiff-respondent concedes state courts do not have -- a President could, if he or she so chose, ignore any state court order, with no

consequence. *See Clinton v. Jones*, 520 U.S. at 691-92 (raising "the question [of] whether a court may compel the attendance of the President at any specific time or place," entirely separate from the question of "whether a comparable claim might succeed in a state tribunal.")

It is not true that, as plaintiff-respondent claims, congressional action is necessary to insulate the President from suit (Opp. Br. 17), or that, as amicus claims, the Supremacy Clause itself *does not* "confer[] supreme status on federal officials." (Am. Br. 11, 22-23.) The "Constitution," not just laws enacted by Congress, is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. As such, with or without Congressional action, the Constitution bars states from interfering with the exercise of the Constitutional powers and duties uniquely vested in the President. *See, e.g.*, *Hancock*, 426 U.S. at 178-79 (Supremacy Clause requires that federal functions "'be left free' of [state] regulation," *particularly* "where . . . the rights and privileges of the Federal Government at stake . . . find their origin in the Constitution"); *Feldman v. United States*, 322 U.S. 487, 491 (1944) ("[T]he sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced

by landmarks and monuments visible to the eye."); *McCulloch*, 17 U.S. at 330; *Tarble*, 80 U.S. at 408, 411.[6]

The Supremacy Clause bar on subjecting the President to state judicial process is also well grounded in prudential concerns, as the *Clinton* Court noted. 520 U.S. at 691. Exposing the President to lawsuits, which could be potentially politically-motivated like this one, in thousands of state and local courts across the country as opposed to federal courts (whose number is much more limited and which are more amenable to central review and control) is likely to create intolerable burdens on the President.

Amicus argues (irrelevantly) that the President has more protections in New York state courts than in federal court because New York allows interlocutory appeals (Am. Br. 18 n.5). But this overlooks that as a matter of constitutional law, in federal court, "[s]pecial considerations applicable to the President . . . suggest that the courts should be sensitive to requests . . . for interlocutory appeals," *Cheney*, 542 U.S. at 390-92. And while in federal court an interlocutory appeal would automatically divest the lower court of jurisdiction and stay the case pending appeal, *Griggs v. Provident Consumer Discount*, 459 U.S. 56, 58 (1982),

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[6] In fact, the Supreme Court has recognized that the President's amenability to suit is a matter of Constitutional, not Congressional, law and questioned whether Congress could constitutionally create damages liability for the President where he would otherwise be immune. *Fitzgerald.* 457 U.S. at 748 n.27. Clearly, no Congressional action is necessary to *remove* liability.

state courts might very well allow cases against the President to proceed while he or she seeks vindication on appeal -- as occurred here. (Br. 14-15.)

Plaintiff-respondent now argues for the first time that the President has "waived" his Supremacy Clause immunity because he has not yet raised that defense in two other suits in New York state court. (Opp. Br. 19-21.) However, President Trump had no cause or need to raise his immunity in those matters -- commenced over a year before his Presidency -- in which his involvement was, at most, in name only, and discovery had been completed by his inauguration. In *Garcia v. Bayrock/Sapir Org., LLC*, No. 601495/2015 (Sup. Ct. Suffolk Cty.), the plaintiff, an employee of a staffing agency, sued 12 defendants alleging that she was owed gratuities from a Trump hotel based on the single day she worked there. (NYSCEF 2.) Discovery was completed prior to President Trump's inauguration (NYSCEF 55) and the defendants engaged in little to no motion practice following it (NYSCEF 88, 96) before the plaintiff voluntarily discontinued the action (NYSCEF 122).

Similarly, in *Galicia v. Trump*, No. 24973/2015E (Sup. Ct. Bronx Cty.), the plaintiffs sued 8 defendants, alleging that they were assaulted outside the Trump Organization by security personnel. Disclosure was ordered to be completed by September 8, 2016 (NYSCEF 142), and the Court entered a protective order preventing the plaintiffs from deposing Mr. Trump, writing that "[t]he Court notes

that this is an ordinary personal injury action . . . . Plaintiffs have not demonstrated a sufficient basis for the Court to compel an examination before trial of a company's Chairman under such circumstances" (NYSCEF 125).

Even if the President had voluntarily participated in those matters in any meaningful way, which he did not, such participation would in no way amount to a general waiver of immunity in this or any other case -- and waive his immunity conferred on all Presidents by the Constitution. Waiving immunity in one case in no way implies a general waiver of Constitutional immunity in all cases. *See Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009) ("granting or denial of [foreign sovereign] immunity was historically the case-by-case prerogative of the Executive Branch") (citing, *e.g.*, *Ex parte Peru*, 318 U.S. 578, 586-590 (1943)); Office of Legal Counsel, *A Sitting President's Amenability to Indictment and Criminal Prosecution* at 223, n.2 (Oct. 16, 2000) (noting that while it would be unconstitutional to indict or prosecute a sitting President, the President may have the discretion to consent to such actions).

II. PLAINTIFF-RESPONDENT'S DEFAMATION CLAIM IS NOT ACTIONABLE AS A MATTER OF LAW.

Whether a statement is actionable "presents a legal question to be resolved by the court in the first instance." *See Stepanov v. Dow Jones & Co., Inc*., 120 A.D.3d 28, 37 (1st Dep't 2014), *quoting Aronson v. Wiersma*, 65 N.Y.2d 592, 593 (1985); *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1608 (1991), *reh'g denied and*

opinion modified (Sept. 6, 1991). Where, as here, the statements are not actionable, the case should be dismissed by the court. *See, e.g.*, *Brian v. Richardson*, 87 N.Y.2d 46, 53-54 (1995) (article that purportedly falsely accused plaintiff of participation in an illegal conspiracy constituted nonactionable opinion); *Hobbs v. Imus*, 266 A.D.2d 36, 37 (1st Dep't 1999) (dismissing defamation claim at pleading stage); *Dillon v. City of New York*, 261 A.D.2d 34, 40-41 (1st Dep't 1999) (same).

A. The Statements Are Not Provably False Or Defamatory.

Plaintiff-respondent has failed to meet her burden of showing that each separate Statement contains an objective statement of fact, which is "reasonably susceptible of a defamatory connotation," *Stepanov*, 120 A.D.3d at 34 (citation and quotations omitted) -- "the predicate for a maintainable [defamation] action." *Gross v. New York Times Co*., 82 N.Y.2d 146, 154-154 (1993). *See also Kahn*, 232 Cal. App. 3d at 1608; *McGarry v. University Of San Diego*, 154 Cal. App. 4th 97 (2007) (defamation claim dismissed because each statement, evaluated separately, was not actionable).

Contrary to plaintiff-respondent's argument, the Statements, particularly when viewed in context (as they must be) do not contain objective statements of fact that can be proven true or false. The New York Court of Appeals has specifically mandated against "hypertechnical parsing" of statements "for the

purpose of identifying possible facts that might form the basis of a sustainable [defamation] action," as plaintiff-respondent attempts to do here. (Opp. Br. 24-27). *Gross*, 82 N.Y.2d at 156 (citation, quotations, and alterations omitted); *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 256 (1991) ("hypertechnical parsing of a possible 'fact' from its plain context of 'opinion' loses sight of the entire exercise, which is to assure that . . . the cherished constitutional guarantee of free speech is preserved.") (*quoting Gross*).

Moreover, Statements opining on the motive for why (unnamed) accusers spoke up for the first time during the Presidential campaign are inherently subjective and not actionable. *See, e.g.*, *Immuno*, 77 N.Y.2d at 235; *Huggins v. Povitch*, 1996 WL 515498, at *8 (Sup. Ct. N.Y. Cty. April 19, 1996) (statements concerning another's state of mind or motivations "are speculation and are generally not readily verifiable" and cannot form the foundation for a defamation claim); *GetFugu, Inc. v. Patton Boggs LLP*, 220 Cal. App. 4th 141, 156 (2013) (tweet claiming organization was run for benefit of officers and directors constituted "subjective [non-actionable] opinion with respect to corporate governance"); *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 604 (1976) (statements concerning motives constitute opinions).

Likewise, merely because a speaker has or purports to have knowledge about the allegedly defamatory statements does not make them actionable, as

plaintiff-respondent claims. (Opp. Br. 28.) In *Jacobus,* statements made with purported knowledge about whether Jacobus begged for a job and was turned down were found not actionable. *Jacobus v. Trump*, 55 Misc. 3d 470, 473, 482 (Sup. Ct. N.Y. Cty. 2017), *aff'd,* 156 A.D.3d 452 (1st Dep't 2017). Similarly, in *Galasso v. Saltzman*, 42 A.D.3d 310, 310-11 (1st Dep't 2007), the defendant's statements, in the context of a "heated property dispute," that the plaintiff was "connected" -- even though defendant implied that he had unique knowledge because he had "had [plaintiff] checked out" -- were held not actionable. *See also Indep. Living Aids, Inc. v. Maxi-Aids, Inc*., 981 F. Supp. 124, 128 (E.D.N.Y. 1997) (denials of allegations that business was engaged in improper practices and calling competitor's executive a "liar" were not actionable).

Plaintiff-respondent nonetheless argues that the Statements were actionable because they were "mixed opinion." (Opp. Br. at 29 n.11.) "Mixed opinion" statements are those that insinuate that they are "based on facts which justify the opinion but are unknown" to the audience. *Davis v. Boeheim*, 24 N.Y.3d 262, 269 (2014). But here President Trump never insinuate that he had access to facts justifying his opinion which were undisclosed to the public.

Moreover, even assuming the Statements could be interpreted as calling plaintiff-respondent a liar, as plaintiff-respondent claims (Opp. Br. 24-27), they are not actionable because they were made in the context of a heated dispute where a

reasonable audience understands the statements to be opinions. *Galasso*, 42 A.D.3d at 310-311; *Indep. Living Aids, Inc.*, 981 F. Supp. at 127-128; *Ram v. Moritt*, 205 A.D.2d 516 (2d Dep't 1994); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995) ("[T]he term 'lying' applies to a spectrum of untruths including 'white lies,' 'partial truths,' 'misinterpretation,' and 'deception.' . . . [The term] is no more than nonactionable rhetorical hyperbole.") (citation and quotations omitted); *Carver v. Bonds*, 135 Cal. App. 4th 328, 347 (2005).[7]

[7] The cases cited by plaintiff-respondent are inapposite. (Opp. Br. 30-32.) *First*, in *Dickinson v. Cosby*, 17 Cal. App. 5th 655, 691 (2017), *petition for certiorari filed*, (Jul. 12, 2018) (No. 18-70), the defendant, outside of the political arena, referred to plaintiff specifically, accusing her of fabricating a rape allegation, rather than, as here, merely defending his candidacy for office and stating that he did not act inappropriately or meet her at a hotel. *See also Giuffre v. Maxwell*, 165 F. Supp. 3d 147, 150 (S.D.N.Y. 2016) (defendant, outside the political realm, asserted that plaintiff's claims were "shown to be untrue" indicating that "some verifiable investigation [had] occurred and come to a definitive conclusion proving that fact"); *compare Gregory*, 17 Cal. 3d at 604 (1976) (finding statements not actionable in defamation because they did not make specific allegations that plaintiffs engaged in crimes or dishonest conduct). *Second*, many of the cases cited by plaintiff-respondent involve specific allegations of criminal activity, a key fact not present here. *See Gross*, 82 N.Y.2d at 154; *McNamee v. Clemens*, 762 F. Supp. 2d 584, 601 (E.D.N.Y. 2011). *Third*, other cases involve allegations of professional dishonesty directly affecting the plaintiff's business, or are far more specific than the ambiguous term "liar." *See Brach v. Congregation Yetev Lev D'Satmar, Inc.*, 265 A.D.2d 360, 360 (2d Dep't 1999); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 185-86 (2d Cir. 2000); *Divet v. Reinisch*, 169 A.D.2d 416 (1st Dep't 1991); *Mase v. Reilly*, 206 A.D. 434, 435 (1st Dep't 1923); *Cappellino v. Rite-Aid of N.Y., Inc*., 152 A.D.2d 934 (4th Dep't 1989); *Curry v. Roman*, 217 A.D.2d 314, 317 (4th Dep't 1995). *Fourth*, other cases plaintiff-respondent cites simply do not support her argument, and either dismiss the defamation claim as based on non-actionable opinion or are too sparse of an opinion. *See Petrus v. Smith*, 91 A.D.2d 1190, 1191 (4th Dep't 1983) (granting summary judgment where malice was not properly alleged and defendant established qualified privilege); *Kaminester v. Weintraub*, 131 A.D.2d 440, 440 (2d Dep't 1987) (offering no detail as to the nature of the defamatory statement).

B. General Denials Are Not Actionable.

Plaintiff-respondent does not dispute that, under both New York and California law, denials of accusations, without more (in that case, a perjury accusation), are not actionable, as the case she cites recognizes. *Clemens*, 762 F. Supp. 2d at 601 ("general denials of accusations aren't actionable"). (Opp. Br. 33-34.)

Indeed, this Court has long recognized that denials are not the type of statements that should be considered defamatory:

> One who makes a public attack upon another subjects his own motives to discussion. It is a contradiction in terms to say that the one attacked is privileged only to speak the truth and not to make a counterattack . . . . Of course, the counterattack must not be unrelated to the charge, but surely the motives of the one making it are pertinent.

Shenkman v. O'Malley, 2 A.D.2d 567, 574 (1st Dep't 1956) (citation omitted). This is particularly true in the political campaign context.

Further, unlike *Davis* and like *Jacobus*, plaintiff-respondent admittedly intentionally elicited defendant-appellant's response to her nationally televised charges against him -- as she alleges, "[she came forward so the public] could take both her experiences and Mr. Trump's denials into consideration." (R.170 ¶ 50 [Compl.].) She claims that *Sleepy's* and *LeBreton* (Br. 27), which held that under such circumstances, the alleged defamation is not actionable, are inapplicable simply because they involved "secret" or "pretend" shoppers or landlords sent in to

record defendants and prompt them into making damning and allegedly false statements. (Opp. Br. 34.) However, the principle underlying these cases is not limited to parties making secret recordings, but applies more broadly to "a person's intentional eliciting of a statement she expects will be defamatory." *Sleepy's LLC v. Select Comfort Wholesale Corp*., 779 F.3d 191, 199 (2d Cir. 2015). *See Handlin v. Burkhart*, 220 A.D.2d 559, 559 (2d Dep't 1995).

C. The Political Context Of the Political Statements Confirm They Are Not Actionable.

1. *Jacobus* Is Directly On Point.

Contary to plaintiff-respondent's assertion, *Jacobus*, 156 A.D.3d 452 (1st Dep't 2017) -- where this Court found that the statements defendant-appellant made on Twitter and publicly during the Republican presidential primary were protected opinion -- is not at all "dramatically different" from this case. (Opp. Br. 39-40.) Indeed, her superficial distinctions only highlight the similarities between the cases. According to her, *Jacobus*, involved a "political strategist," who had access to "media outlets" and sued the Presidential candidate for "two short tweets" made during his campaign in response to Jacobus "*directly . . . attack[ing]*" him. (Opp. Br. 40.) Similarly here, plaintiff-respondent and her well-known attorney, who continuously and readily accessed the media, sued the Presidential candidate for allegedly making Statements in political forums in response to her public attack. (Opp. Br. 40).

Thus, the trial court found that in light of the political context, "a reasonable reader would recognize defendants' statements as opinion, even if some of the statements, viewed in isolation, could be found to convey facts." *Id.* at 484. This Court affirmed that decision, finding that "[t]he immediate context in which the statements were made would signal to the reasonable reader" that they were opinion. 156 A.D.3d at 453. So, too, here, the tone and context of the political Statements made in response to plaintiff-respondent's negative commentary about his qualifications for office, would signal to readers that they were engaged in a heated back and forth.

2. Statements Made In The Context Of A National Political Campaign Are Routinely Treated As Non-Actionable.

Contrary to plaintiff-respondent's argument (Opp. Br. 34), defendant-appellant is not seeking "*carte blanche* to say what he likes." As a matter of fundamental First Amendment principles, when heated political campaign speech is involved, a reasonable audience would view it as part of a free, robust, even nasty political discourse, rather than defamatory statements of fact. *See Adelson*, 973 F. Supp. 2d at 489.[8] "[T]hough it is important to protect to a party's reputation

[8] *See also Reed v. Gallagher*, 248 Cal. App. 4th 841, 859 (2016) (the audience "naturally anticipate[s] the use of rhetorical hyperbole" "during the heat of a political campaign"); *Munoz-Feliciano v. Monroe-Woodbury Cent. Sch. Dist.*, 2015 WL 1379702, at *12 (S.D.N.Y. Mar. 25, 2015) (noting "more is fair in electoral politics than in other contexts" and "[n]umerous courts have acknowledged the unique rhetorical atmosphere of the political arena").

from defamatory statements, Courts must be 'vigilant about the potential chilling effect the threat of defamation actions can have on public debate.'" *Farber v Jefferys*, 33 Misc. 3d 1218(A), at *12 (Sup. Ct. N.Y. Cty. 2011) (citing *600 W. 115th Str. Corp.*, 80 N.Y.2d at 137).

Plaintiff-respondent's cases (Opp. Br. 35, n.13) involve inapposite circumstances in which, unlike here, there were specific, factual accusations of criminal conduct.[9] Plaintiff-respondent disingenuously now argues that she was speaking on a narrow issue (Opp. Br. 35), but, as her Complaint evidences, she and her attorney intentionally injected themselves into a public debate on matters of public interest, namely Mr. Trump's qualifications "as a candidate" – and intentionally sought and obtained massive media coverage.[10]

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[9] *See Silsdorf v. Levine*, 59 N.Y.2d 8, 12 (1983) (specific allegations of mayor's "criminal corruption"); *Good Gov't Grp. of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672, 679 (1978) (specific allegations of councilman's extortion and blackmail). Plaintiff-respondent's cases also recognize the right of a party to "to defend himself against attacks upon his character." *Clark v. McGee*, 49 N.Y.2d 613, 620 (1980) (discussing immunity, not the First Amendment)

[10] Plaintiff-respondent and her attorney continually participated in the debate, holding six press conferences, appearing at her own rally, and issuing written statements. (*See, e.g.*, R.219-220 [Allred Oct. 16, 2016 Statement]); (R.225-226 [Allred Oct. 20, 2016 Statement]); (R.227-251 [Jan. 17, 2017 Press Conf. Transcript]); (R.261-265 [Allred Jan. 17, 2017 Statement]); (R.270-272 [Jan. 20, 2017 Interview Transcript]); (279-281 [Oct. 15, 2016 Interview Transcript]); (R.285-311 [Oct. 27, 2016 Interview Transcript].) (R.170 ¶ 50 [Compl.].)

D. A Public Debate Need Not Be Live To Be Afforded Protection And Non-Actionable Opinions Are Typically Disseminated On The Internet.

Plaintiff-respondent incorrectly contends that the Statements must be "live," or spontaneous "off-the-cuff" to be offered protection. (Opp. Br. 35-36.) That is not so. Courts of course routinely protect public debates in newspaper columns, mailed campaign literature, and more -- all of which clearly are not "spontaneous" and involve "carefully crafted or announced" statements. *See Reed*, 248 Cal. App. 4th at 858 (television advertisement); *Mann v. Abel,* 10 N.Y.3d 271, 276-77 (2008) (op-ed); *see also* Br. 22 n.16. Here, the statements occurred in political forums -- on a campaign website, at political forums such as debates, on Twitter and public rallies -- where parties expected to hear expressions of opinions.[11] (Br. 21-22.) That plaintiff-respondent and her attorney repeatedly accessed the media to have a back and forth with the Presidential candidate only confirms that it was a nonactionable public debate. *600 W. 115th St. Corp.*, 80 N.Y.2d at 138–39 (discussing the importance of "self-help").

[11] Plaintiff-respondent's cases are inapposite. (Opp. Br. 36.) *Guerrero* involved a controversy between tenants and a landlord, not a political debate where "vituperative and ill-conceived comments are generally expected." *Guerrero v. Carva*, 10 A.D.3d 105 (1st Dep't 2004). *McNamee v. Clemens*, 762 F. Supp. 2d 584 (E.D.N.Y. 2011) also did not involve statements made in a political campaign. .

III. CALIFORNIA'S ANTI-SLAPP STATUTE APPLIES AS A SUBSTANTIVE LAW.

Plaintiff-respondent recognizes (Opp. Br. 45) that California's anti-SLAPP statute conflicts with New York's anti-SLAPP statute, but claims that it is only a procedural rule not applicable in New York courts. But the overwhelming precedent is to the contrary. (Br. 41-43.)[12]

Plaintiff-respondent relies heavily on *Scottish Re*, 30 N.Y.3d 247, which held that Cayman Island Rule 12A providing a mechanism for plaintiffs to obtain leave to commence a derivative action "lacks any extra-jurisdictional authority" and therefore does not apply in New York state courts. (Opp. Br. 47-78.) However, the Court of Appeals there did not rule on whether the burden-shifting or indemnification provisions of Rule 12A were procedural. Rather, the court simply examined whether Rule 12A was intended to apply extraterritorially, and found that it was not, because, among other things, it does not explicitly provide that it applies extraterritorially, unlike comparable rules in other jurisdictions, and "[b]y its terms, it does not specifically apply to actions involving *Cayman*-incorporated companies," no matter where the action is initiated, but only to actions brought by writ in the Cayman Islands. 30 N.Y.3d at 253-55. In contrast, California's anti-

[12] That certain aspects of California's anti-SLAPP (Opp. Br. 46 & n.19), such as its notice requirement to California's Judicial Counsel, may be procedural does not mean that other aspects are not substantive. *See, e.g.*, *Rotz v. Van Kampen Asset Mgmt.*, 45 Misc. 3d 1211(A), at *5-6 (Sup. Ct. Bronx Cty. 2014) (analyzing aspects of law separately).

SLAPP statute expressly states that to be construed "broadly" and applies to "any action" or "cause of action against a person arising from any act of that person in furtherance of the person's right of . . . free speech under the United States Constitution," Cal. Code Civ. P. § 425.16(a), (b)(1), (c)(1), where the statements at issue relate to a California resident. *McDaniel v. McDaniel*, 2011 WL 4940687 (Cal. Ct. App. Oct. 18, 2011). While *McDaniel* is unreported, as plaintiff-respondent notes, this Court has stated that "we need not adhere to California's Rules of Court regarding unpublished cases." *Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 123 A.D.3d 51, 67 (1st Dep't 2014), *rev'd on other grounds*, 26 N.Y.3d 659 (2016). (*See* Br. 41-42.)

Further, plaintiff-respondent's claim that California's anti-SLAPP neither "creates a right, nor defeats it," and is therefore procedural (Opp. Br. 47), is contrary to numerous courts' holdings that it provides a "substantive immunity from suit" that "protect[s] the [speaker's] constitutional rights" to free speech by discouraging meritless actions at the outset, *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (citing Cal. Sen. Judiciary Comm. Rep. on AB 1675, at 4), and "provid[es] a defendant with the right to not proceed to trial," *Schwern v. Plunkett*, 845 F.3d 1241, 1244-45 (9th Cir. 2017). (Br. 41-42.) Thus, the California anti-SLAPP statute is substantive because it "envelop[s] both the right and remedy." *Tanges v. Heidelberg N. Am.*, 93 N.Y.2d 48, 56 (1999).

The remaining cases plaintiff-respondent cites, which make passing references to California's anti-SLAPP as procedural, are inapplicable because they are not in the choice of law context or do not apply New York's own choice of law principles. (Br. 43-45.) *See Am. Bank of Commerce v. Corondoni*, 169 Cal. App. 3d 368, 371-72 (1985) (noting California's choice-of-law analysis does not distinguish between substantive and procedural rules).[13]

Plaintiff-respondent also fails to distinguish the sole case that in fact applied an analogous out-of-state anti-SLAPP statute under New York's choice of law principles, *Adelson*, 973 F. Supp. 2d at 494 n.21. She argues only that when *Adelson* and other federal courts found California's anti-SLAPP statute to be substantive, they were applying a federal *Erie* analysis, without explaining why that distinction matters, because it does not. In fact, for *Adelson* to determine that Nevada's anti-SLAPP statute was substantive for *Erie* purposes, it first had to "determine the rules of decision that would apply if the suit were brought in state court," and thereby conclude that it was substantive under New York's choice of

[13] *Ernst v. Carrigan*, 814 F.3d 116 (2d Cir. 2016), did not state that it is an open question whether § 425.16 is substantive under *Erie* as plaintiff-respondent claims (Opp. Br. 50), but only refrained from deciding whether *Vermont's* anti-SLAPP statute was applicable in federal court, explicitly recognizing that California's anti-SLAPP *is* substantive, citing *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 973 (9th Cir. 1999). Similarly, *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015), found that D.C.'s anti-SLAPP provision did not apply for *Erie* purposes, because it conflicts with Fed. R. Civ. P. 56, taking what was referred to as a "minority view" in *Tobinick v. Novella*, 108 F. Supp. 3d 1299, 1311 (S.D. Fla. 2015), which followed the rulings of "the majority of circuit courts" to find that *California's* anti-SLAPP law is substantive.

law rules. *Adelson*, 973 F. Supp. 2d at 476 (citation omitted).[14] Further, plaintiff-respondent claims that *Adelson* found Nevada's anti-SLAPP to be substantive because it is akin to an immunity, which, plaintiff-respondent incorrectly claims, California's anti-SLAPP is not. (Opp. Br. 50.)[15] *Adelson's* discussion of immunity, however, was not in the context of whether the anti-SLAPP statute was substantive and there is no distinction between Nevada and California's anti-SLAPP in the immunity *Adelson* was describing. *See Adelson*, 973 F. Supp. 29 at 498 (Nevada's anti-SLAPP is "not an absolute bar against federal substantive claims," except for "persons who seek to abuse other citizens' rights").

Plaintiff-respondent baselessly contends that President Trump's anti-SLAPP motion, filed jointly with his motion to dismiss, is untimely (Opp. Br. 50-51): the parties stipulated in writing to extend his deadline to "answer or move with respect to the complaint." (*See* Dkt. Nos. 5, 18, 40, 97.) There is also no prejudice to plaintiff-respondent, given that, after receiving an extension to oppose the motion, she had approximately two-and-a-half months to submit evidence to support her claims. However, even if the motion was untimely -- and it was not -- the Court

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[14] *Scottish Re* also expressly affirmed that the *Erie* analysis encompasses a threshold state choice-of-law analysis in holding that deeming Rule 12A substantive would burden federal courts sitting in diversity. 30 N.Y.3d at 256. California's anti-SLAPP, which is routinely applied as a substantive law in federal courts, does not create any such issues.

[15] Notably, in characterizing California's anti-SLAPP as substantive, other courts have compared it to an immunity, *see, e.g.*, *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013).

has broad discretion to allow a late-filed anti-SLAPP motion. *See Adelson*, 973 F. Supp. 2d at 495 (permitting the filing deadline of defendant's anti-SLAPP motion to be extended); *San Diegans for Open Gov't v. Har Constr., Inc.*, 240 Cal. App. 4th 611, 624 (2015).

CONCLUSION

For the foregoing reasons, and those demonstrated in the Opening Brief, this action should be dismissed.

Dated: New York, New York
August 17, 2018

KASOWITZ BENSON TORRES LLP

By: 

Marc E. Kasowitz
Christine A. Montenegro
Paul J. Burgo
1633 Broadway
New York, New York 10019
Tel: (212) 506-1700
Fax: (212) 506-1800

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