SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SUMMER ZERVOS,

Plaintiff,

v.

DONALD J. TRUMP,

Defendant.

Index No.: 150522/2017

Hon. Jennifer G. Schecter

Motion Seq. No. 3

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT DONALD J. TRUMP'S MOTION TO DISMISS AND TO STRIKE, OR IN THE ALTERNATIVE, FOR A STAY

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Plaintiff Summer Zervos submits this memorandum of law in opposition to the motion filed by Defendant Donald J. Trump seeking the dismissal of this action or an indefinite stay.

PRELIMINARY STATEMENT

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

Defendant carefully calculated his repeated denigration of Ms. Zervos. His false statements about her 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 id.* ¶¶ 55-74; *infra* n.15. Defendant'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 and destruction. Affidavit of Summer Zervos, dated September 17, 2017 ("Zervos Aff.") ¶¶ 10-12. People called saying they would destroy her and her business, shouting "lying c—t" and "lying b—ch. " *Id.* ¶ 11. The attacks increased each time Defendant publicly denigrated her. *Id.* ¶ 12.

Defendant 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 baseless.

Defendant asserts that state courts may not constitutionally assert jurisdiction against federal officers, but controlling authority squarely refutes his claim. And although *Clinton v. Jones*, 520 U.S. 681 (1997), did not consider or decide whether a state court may adjudicate private claims against a sitting President, the fact that the Supreme Court held unanimously that a federal court may, and the manner in which the Court analyzed that question, makes clear that Defendant's requests for dismissal or a stay are meritless.

Defendant insists that Ms. Zervos's statements about his unwanted sexual groping of her were false statements of fact, yet also contends that his statements – which derided Ms. Zervos's statements as lies – merely "reflect opinions and rhetoric." Memorandum of Law in Support of Defendant's Motion (Docket No. 44) ("Def. Br.") at 9. Again, Defendant is wrong. The Court of Appeals has made clear that a defendant's 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).

Defendant'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 statements with new defamatory commentary when he re-tweeted them, and he ensured that the underlying statements were broadcast to tens of millions of readers, thus making him liable; and (3) California's procedural rules do not apply in this New York action.

Contrary to Defendant's spin, this case is not about robust political debate. Ms. Zervos was not a political opponent, nor was she a political commentator routinely engaged in criticizing candidates like the plaintiff in *Jacobus v. Trump*, 51 N.Y.S.3d 330, 344 (Sup. Ct. N.Y.

Cnty. 2017). She came forward to report the details of Defendant's unwanted sexual battery only after he repeatedly lied publicly about his behavior. Defendant then used his international bully pulpit to violate her for a second time.

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, 515 N.Y.S.2d 434 (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). Ms. Zervos, a woman and private citizen who had the fortitude to speak the truth, has the right to vindicate her reputation.

Defendant is not above the law.

FACTS

A. Plaintiff's Claim

Plaintiff is one of a number of women who were subjected to unwanted sexual groping by Defendant. Compl. ¶ 1 (attached as Exhibit 1 to the Affirmation of Mariann Wang, dated September 19, 2017 ("Wang Aff.")). By his own account, Defendant 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 by Mr. Trump on more than one occasion. *Id*. ¶ 2. Mr. Trump suddenly, and without her consent, kissed her on her mouth repeatedly; he touched her breast; and he pressed his genitals up against her. *Id.* 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.* Mr. Trump kept touching her anyway. *Id.*

Ms. Zervos confided in family and friends when these assaults first occurred in 2007. *Id.* ¶¶ 3, 26, 35. She also confronted Mr. Trump about it. Wang Aff., Ex. 18 at 3-4; Zervos Aff. ¶ 6. But like so many women who have suffered this kind of abuse, Ms. Zervos felt conflicted and confused about the incidents. Compl. ¶ 3. Ms. Zervos decided that Mr. Trump'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.* ¶ 4. On October 7, 2016, when Mr. Trump's own recorded, crude, and vulgar comments on the *Access Hollywood* tapes, recorded in 2005, were broadcast, it became clear that Mr. Trump'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, at the October 9, 2016 presidential debate, Defendant lied by stating that he had not done any of the things that he had bragged about to Billy Bush. *Id.*

For the first time, Summer Zervos saw Mr. Trump's behavior towards her for what it was: that of a sexual predator who had preyed on her and other women. *Id.* ¶ 5. Ms. Zervos could no longer rationalize Defendant's behavior by telling herself that it had been a mistake or an isolated incident for which he might be ashamed. *Id.* Mr. Trump had no shame. *Id.* His casual recounting of his sexual assaults made clear his behavior was intentional. *Id.*

Ms. Zervos knew that Donald Trump had lied – to the country and to the world – and knew that the statements he made to Billy Bush were not just "locker room" talk, but evidenced his pattern of misconduct towards women. *Id.* ¶ 6. Ms. Zervos felt a responsibility to inform the public of the true facts. *Id.* She came forward, as at least a dozen other victims did,[1] to inform the public of the facts she knew were true, and to make clear that Donald Trump had kissed and

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

sexually grabbed her without her consent, repeatedly. *Id.*

In response, Defendant lied again and debased, denigrated, and attacked Ms. Zervos with false statements about both her and her reasons for speaking up. *Id.* ¶¶ 47-50. Mr. Trump stated falsely that he "never met [Ms. Zervos] at a hotel or greeted her inappropriately." *Id.* ¶ 55. He went further, describing Ms. Zervos'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." *Id.* ¶ 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." *Id.* ¶ 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." *Id.* ¶ 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 getting "ten minutes of fame," and nothing more. *Id.* ¶ 73.

Defendant spoke in a manner that clearly evinced his unique knowledge of the events, stating that he *did* recall Ms. Zervos, but that the specific encounters she described never happened. 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, Compl. ¶ 56 – was posted just above a copy of an email that only Defendant 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. Wang Aff., Ex. 3; Affirmation of Marc E. Kasowitz, dated July 7, 2017 (Doc. No. 44) ("Kasowitz Aff."), Ex. 2. He purposely distorted the public record by keeping secret a different email that would have corroborated Ms. Zervos, in which she had told him she was deeply hurt by what he had done to her. Zervos Aff. ¶¶ 7-9.

Defendant was lying when he falsely denied assaulting Plaintiff and when he derided her for perpetrating a "hoax" and making up a "phony" story to get attention. Compl. ¶ 9. In doing so, he exploited his access to the media to make false factual statements to denigrate Ms. Zervos and the other women who publicly reported his sexual assaults. *Id.* ¶ 11. Defendant knew that his false, disparaging statements would be heard and read by people around the world, and that these women, including Summer Zervos, would be subjected to threats of violence, economic harm, and reputational damage. *Id.* And that is exactly what happened.

B. The Harm

Defendant 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. Compl. ¶ 81. In fact, as a direct result of Defendant's widespread attacks on Ms. Zervos, she suffered repeated threats of violence from various individuals who accompanied their threats with statements that she is a "lying c—t," a "lying b—tch," and otherwise threatened to harm her or her business. Zervos Aff. ¶ 11. These disturbing threats increased each time Defendant attacked her as a liar. *Id.* ¶ 12. Because Ms. Zervos herself is a Republican and lives among many of Defendant's supporters, she suffered significantly each time Defendant attacked her. *Id.*

Defendant's motion papers continue to disparage Ms. Zervos. Def. Br. at 1. Indeed, Defendant describes Ms. Zervos's account of his unwanted sexual touching as "false" throughout his brief. *Infra* n.10. Defendant himself threatened to sue Ms. Zervos and others for defamation at the time she reported his misconduct – effectively conceding that statements about his conduct are statements of *fact* that, if false, would support a defamation claim. Compl. ¶ 74; *see also* Wang Aff., Ex. 4 (Defendant's attorney threatening the *New York Times* for publishing an article about the allegations 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 Defendant kept flagrantly lying about his treatment of women. Compl. ¶¶ 45-50. She did not publicly report Defendant's behavior in order to seek fame or at the request of any political actor. *Id*. ¶¶ 51-52. And of course she is not and has never been a political candidate, and had no political motivations for making her report or for filing this lawsuit. Zervos Aff. ¶¶ 2-5. Nor is she seeking anything other than what the law provides. Despite Defendant's efforts to cast Ms. Zervos or her counsel as political actors, they are not.[2] And contrary to his baseless claims, the only discovery sought so far has been narrowly tailored to Ms. Zervos's claims: a standard document subpoena addressed to Defendant's campaign that Plaintiff offered to adjourn in exchange for assurances that relevant documents be preserved. *See* Wang Aff., Exs. 6-8.

[2] Defendant's *ad hominem* attack on one of Ms. Zervos's attorneys, Gloria Allred, is both legally and factually baseless. First, the Appellate Division has repeatedly admonished counsel not to engage in improper attacks on opposing counsel, reversing verdicts for such behavior. *Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 53, 558 N.Y.S.2d 511 (1st Dep't 1990) (reversal of judgment "mandate[d]" due to "reprehensible conduct of plaintiffs' counsel" in attacking "credibility and competence of defendants' . . . attorneys" in attempt "to discredit" them); *Escobar v. Seatrain Lines, Inc.*, 175 A.D.2d 741, 743-44, 573 N.Y.S.2d 498 (1st Dep't 1991) (same). Second, Defendant cites to numerous inadmissible exhibits – not documents that provide immediate context for the statements at issue in this case (which may be admissible), but news articles and other items about Ms. Allred generally and in unrelated contexts, including one from 1999. *See TOA Const. Co., Inc. v. Tsitsires*, 54 A.D.3d 109, 115, 861 N.Y.S.2d 335, 339 (1st Dep't 2008) (reversing lower court for relying on news report on disputed issue). These items are likewise inadmissible because they involve statements by Ms. Allred that were plainly made outside of the scope of her representation of Ms. Zervos, even years prior to that representation. And Defendant often misstates the contents of articles he cites. For example, he claims that Plaintiff's counsel has sought *The Apprentice* tapes in this lawsuit and that she said the lawsuit will ensure Defendant is too distracted to run the country. In fact, the exhibits show that Ms. Allred's discussion of *The Apprentice* tapes had nothing to do with this lawsuit, *compare* Kasowitz Aff., Ex. 32 *with* Wang Aff., Ex. 5 (providing complete transcript), and that Ms. Allred was pointing out that Defendant's and his wife's own threats to *initiate* lawsuits would come with a cost, Kasowitz Aff., Ex. 33.

ARGUMENT

I. DEFENDANT'S SUPREMACY CLAUSE ARGUMENT HAS NO MERIT

A. The Constitution Permits This Court To Exercise Its Jurisdiction

Defendant contends that it would violate the Supremacy Clause for this Court to exercise jurisdiction over Plaintiff's claim while he is in office. Defendant has cited no case, and we are aware of no case, in which any court – state or federal – has 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. This Court should decline Defendant's invitation to be the first court to do so.

Defendant's argument rests on a false premise: that "longstanding precedent" supposedly "establishes that a state court may not exercise jurisdiction over a federal official without violating the Supremacy Clause of the Constitution." Def. Br. at 12. That is not the law. The Court of Appeals and the Supreme Court both considered and squarely rejected that proposition in the same case more than a century ago. *See Teal v. Felton*, 1 N.Y. 537, 543-547 (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 postal official seeking damages for the loss of property). As the 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 existence of the federal officer removal statute, 28 U.S.C. § 1442(a), further confirms that Defendant's premise is false. That statute entitles a federal officer who has been sued in state court for his or her official acts to remove the case to federal court even if there otherwise would be no federal court jurisdiction. *See Jefferson County, Ala. v. Acker*, 527 U.S. 423, 430-

31 (1999) (describing this statutory right as "exceptional"); *Willingham v. Morgan*, 395 U.S. 402, 406 (1969) (explaining this statutory right and describing it as "absolute"). Congress plainly would not have enacted such a statute, and the Supreme Court would not have repeatedly opined on its scope, if it were unconstitutional to sue a federal officer in a state court in the first place.

Defendant is of course correct that his office is singularly important, which is why he enjoys absolute immunity for his official acts. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982). But this case involves his *unofficial* conduct in which he engaged *prior to taking office*, and it is beyond dispute that Defendant enjoys no immunity at all – not even qualified immunity – for his unofficial private conduct. *See Clinton v. Jones*, 520 U.S. 681, 692-94 (1997) ("[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").

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"). The Court observed that Congress is free to enact legislation insulating the President from the obligation to participate in civil litigation regarding

his unofficial conduct, and the Court held that absent such legislation, requiring him to participate in such litigation is not unconstitutional. *Id*. at 709-10.

As noted, the Court in *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 its management of this case will prevent Defendant from doing his job.[3]

Moreover, Defendant expressly concedes that the reason the Supreme Court gave for observing that state court jurisdiction over a President might be different than federal court jurisdiction – "possible local prejudice" in state courts, 520 U.S. at 691-92 – is absent here. Def. Br. at 16 n.23 ("To be clear, President Trump does not suggests [sic] that such issues are present here . . . ."). Defendant's argument is not that this Court might be prejudiced against him, but rather that proceeding might "open the door for such prejudice" in a *future* case. *Id*. Given that *Jones* is so close to on point, and that the Supreme Court's curiosity about the possibility of "local prejudice" concededly is absent here, Defendant's abstract concern about *future* litigation in *other* courts provides no basis for the unprecedented dismissal he seeks.

It would be particularly inappropriate to dismiss this action based upon the theoretical possibility of "local prejudice" of a state court because Defendant likely could have removed this case to federal court if he preferred a federal forum. Although Defendant could not have removed based on the federal officer removal statute, which applies only where the claim arises

[3] Defendant relies on oral argument in *Jones*. *See*, *e.g.*, Def. Br. at 11 n.16; *id*. at 16. But "it is well-established that the Justices' questions and commentary at oral argument have no legal effect." *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 17 (D.D.C. 2015) (internal quotation omitted). Judges often play "devil's advocate" at argument. Whatever an individual Justice may have asked, the Court did not "consider or decide" any issue regarding a state court's power to adjudicate a claim against a sitting President. *Jones*, 520 U.S. at 691.

from official conduct, he likely could have removed this case to federal court based on diversity of citizenship pursuant to 28 U.S.C. § 1441(b) if he did so before served with process. Courts in the Southern District of New York "almost uniformly have read [§ 1441(b)] to allow removal where an in-state defendant has not been served by the time the removal petition is filed." *In re Fosamax Prod. Liab. Litig.*, MDL No. 1789, 2008 WL 2940560, at *2 & n.2 (S.D.N.Y. July 29, 2008) (collecting cases); *Stan Winston Creatures, Inc. v. Toys "R" Us, Inc.*, 314 F. Supp. 2d 177, 180–81 (S.D.N.Y. 2003). But removing this case to federal court would have brought it squarely within *Jones*, something Defendant evidently wished to avoid. Given Defendant's voluntary (and seemingly tactical) choice not to attempt to avail himself of a federal forum, his professed concerns about litigating in this Court ring hollow.

Defendant cites *McCulloch v. Maryland*, 17 U.S. 316 (1819), for the proposition that "[r]egardless of whether a suit relates to official or unofficial conduct," this Court has no power to exercise its jurisdiction, including by issuing discovery orders or judgment against him. Def. Br. at 14. This sweeping assertion that the Supremacy Clause automatically places the President above state law is plainly wrong. *McCulloch* concerned neither the Executive branch nor a state court's exercise of jurisdiction; it held only that because "the power to tax involves the power to destroy," the Supremacy Clause invalidated a tax Maryland's legislature imposed on a national bank created by Congress. *Id*. at 431-37.[4]

Defendant also cites cases regarding a state court's power to control the conduct of a federal official, but they all involved *official* conduct governed by federal law. *In re Tarble*, 80 U.S. 397 (1871), did not address state court jurisdiction to adjudicate private damages lawsuits

[4] Selectively quoting a leading treatise, Defendant suggests that Professor Tribe believes it would "violate principles of federalism" for a state court to issue discovery orders to a sitting President. Def. Br. at 14 n.22 (quoting *American Constitutional Law* (3d ed.) at 780 n.66). The suggestion is false. The complete text of Professor Tribe's footnote refers to a hypothetical situation in which a state court compels the President to release information that he had "deemed secret and vital to the national security." *Id*. That would involve a state court directing how a federal officer was to perform his federal duties in an area of exclusive federal concern, an issue that is plainly irrelevant here.

against citizens who happen to be federal officers. *Tarble* merely sustained the unremarkable proposition that a state court may not issue a writ of *habeas corpus* compelling a federal military officer to discharge a soldier from federal military service; it holds nothing more than that the Supremacy Clause bars a state court from dictating how a federal officer should perform his federal duties. *Id*. at 406-07 & 412. In *Tennessee v. Davis*, 100 U.S. 257 (1878), a federal revenue officer was indicted in state court for murder arising from his official acts. He removed that criminal case to federal court pursuant to the federal officer removal statute. The Court held that the removal statute was constitutional, explaining that the Constitution permits the federal government to exercise jurisdiction over state criminal cases that involve a federal officer's official conduct and a question of federal law. *Id*. at 262-71. The analysis is solely about removal, not about whether the State court had jurisdiction to hear a state law criminal case. *Id*. In *McClung v. Silliman*, 19 U.S. 598 (1821), the Court held that a state court had no authority to issue a writ of mandamus compelling a federal land register to take action with respect to federal land. *Id*. at 604-05. But *McClung* states expressly that federal officers could be sued in state courts in "actions for damages." *Id*. at 605. That it would be unconstitutional for this Court to order Defendant to engage or refrain from official acts does not mean it is unconstitutional for this Court to adjudicate a state law claim against him arising from his unofficial conduct.[5]

Nor is there any basis to suppose that requiring cases against the President to be brought in federal court would ensure that they would be "managed consistently." Def. Br. at 16. A federal court in New York and a federal court in California – indeed, even two federal courts in the same district – are as likely to manage a case differently than are two different state courts.

[5] Defendant's references to "comity," Def. Br. at 2, 11, have it backwards. "Comity" typically requires the federal government to respect the vital role sovereign states play in our government. *Younger v. Harris*, 401 U.S. 37, 44 (1971); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). Comity principles support Plaintiff's position, not Defendant's, because they dictate that this Court should be trusted to balance its obligations to adjudicate Plaintiff's claim and also not interfere with Defendant's official duties.

Finally, there is no merit to Defendant's odd argument that this Court would violate its "solemn oath" by declining to dismiss this case. Def. Br. at 15. A court cannot violate its oath to uphold the Constitution by adjudicating a claim over which it has jurisdiction – especially where, as here, copious venerable authority confirms that the exercise of such jurisdiction is perfectly constitutional. The only case Defendant cites to support his "solemn oath" argument is *Cooper v. Aaron*, 358 U.S. 1 (1958), in which the Supreme Court held that the Governor of Arkansas violated his oath when he dispatched units of the Arkansas National Guard to a Little Rock high school to prevent the implementation of *Brown v. Board of Education*. Needless to say, Plaintiff is not asking this Court to ignore Supreme Court authority requiring racial desegregation. Plaintiff asks this Court to adjudicate a civil claim governed by state law over which it has jurisdiction. Doing that would not violate the Court's solemn oath.

B. Defendant Is Not Entitled to a Stay

In the alternative, Defendant asks this Court to stay this case pursuant to CPLR 2201 for the entirety of his duration in office. This request likewise is unprecedented. Plaintiff is aware of no case in which any New York court has stayed a civil action against a public official on the ground that proceeding might interfere with his or her official duties. Once again, this Court should decline Defendant's invitation to become the first court to do so.

As the leading practice commentary explains, staying an action is a "drastic remedy" because "justice delayed is justice denied." Siegel and Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:7 "Some excellent reason would have to be demonstrated before a judge is asked to bring to a halt a litigant's quest for a day in court." *Id*.

Courts grant stays under CPLR 2201 in order to "avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources." *HSBC Bank, USA v. Despot*, 130 A.D.3d 783, 784, 12 N.Y.S.3d 556 (Mem) (2d Dep't 2015) (citation omitted).

Those concerns are absent here. Defendant does not claim that it would be efficient to delay Plaintiff's day in court for maybe more than seven years; that there is any potential for inconsistent results; or that proceeding would compromise the Court's resources. Defendant simply wishes to avoid addressing Plaintiff's claim, which is not a recognized basis for granting a stay pursuant to CPLR 2201. A stay is unwarranted where it "will only promote delay, not efficiency." *Mt. McKinley Ins. Co. v. Corning Inc*., 33 A.D.3d 51, 59, 818 N.Y.S.2d 73 (1st Dep't 2006); *Ferber v. Fairfield Greenwich Group*., 28 Misc. 3d 1214(A), 958 N.Y.S.2d 60, at *3 (Sup. Ct. N.Y. Cnty. 2010); *cf. Mirisoloff v. Monroe*, 16 A.D.3d 1161, 791 N.Y.S.2d 255 (4th Dep't 2005) (denying defendant's motion to stay based on military service); *KCF v. TLSF*, 15 Misc.3d 1119(A), 839 N.Y.S.2d 433, at *6 (Sup. Ct. Kings Cnty. 2007) (same).

To repeat, Plaintiff recognizes that the office of the President is singularly important and agrees that the Court must manage this case sensitively to avoid interfering with Defendant's ability to perform his official duties. But there is no basis for Defendant's unsupported speculation that such interference will occur. Document discovery likely will be handled primarily if not exclusively by Defendant's capable lawyers and is not likely to require much of Defendant's time. And like the unanimous Supreme Court in *Jones*, "[w]e 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." 520 U.S. at 691-92. If, as Defendant predicts, he is required "[a]t a moment's notice" to "tend to exigent crises that require his undivided attention," Def. Br. at 17, Plaintiff will accommodate him.

As the Supreme Court put it in *Jones*, the blanket stay Defendant seeks "takes no account whatever of the [Plaintiff's] interest in bringing the case to trial." 520 U.S. at 707-08. Granting it would "increase[] the danger of prejudice resulting from the loss of evidence, including the

inability of witnesses to recall specific facts, or the possible death of a party." *Id*. Because Defendant's stay request is wholly unsupported by any showing that proceeding would interfere with his official duties, it is, as the Supreme Court held in *Jones*, at best "premature." *Id*.[6]

There is no truth to Defendant's unsupported assertion that Plaintiff is seeking "exceptionally broad discovery" in this case, nor do the inadmissible newspaper articles Defendant cites suggest any "overreaching" by Plaintiff's counsel. Def. Br. at 19; *see* supra n.2. The supposedly "expansive subpoena" Plaintiff served on the Trump Campaign merely sought to ensure that it would preserve documents concerning Plaintiff, her claims, and Defendant's defamatory statements about her and the other women who Defendant claims lied about being touched inappropriately. Wang Aff., Ex. 8. It is a standard document subpoena that is not overbroad, much less does it threaten to prevent Defendant from performing his official duties.

For these reasons, Defendant's motion for a stay should be denied. Discovery will be managed in a manner that is sensitive to the demands of Defendant's office. *See Jones*, 520 U.S. 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."). That Defendant is not an ordinary litigant is a reason to proceed responsibly, but not to deprive Plaintiff of her day in court.

II. NEW YORK LAW APPLIES TO PLAINTIFF'S DEFAMATION CLAIM

We have not found any case in which a New York state court has applied another state's law in a defamation case. Defendant nevertheless argues that this Court should apply California law to Plaintiff's defamation claim. Def. Br. at 20 n.35. Defendant is mistaken.

[6] Defendant's reliance on *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), is misplaced because that case had nothing to do with any request for a stay. The issue in *Nixon* was whether the President was entitled to absolute immunity from damages lawsuits arising from his *official* conduct. The Court did not remotely suggest that private lawsuits arising from *unofficial* conduct should not proceed. To the contrary, the Court made clear that it only was addressing the scope of the President's immunity for "official acts." *Id*. at 754; *see also Jones*, 520 U.S. at 692-94, 696.

The first question is "whether there is an actual conflict of laws." *Test Masters Educational Services, Inc. v. NYP Holdings, Inc*., No. 06-11407, 2007 WL 4820968, at *3 (S.D.N.Y. Sep. 18, 2007). It is Defendant's burden to prove that there is a conflict that matters here. *See K.T. v. Dash*, 37 A.D.3d 107, 112, 827 N.Y.S.2d 112, 117 (1st Dep't 2006). Defendant has not met his burden. Where there is no actual conflict of laws, the choice of law inquiry ends. *See Allstate Ins. Co. v. Stolarz*, 81 N.Y.2d 219, 223-25 (1993); *Elson v. Defren*, 283 A.D.2d 109, 114, 726 N.Y.S.2d 407, 411 (1st Dep't 2001).

Were there a conflict of laws, it would be more appropriate to apply New York law. In tort actions, New York courts apply the law of the jurisdiction that has the most significant interest in the issue raised. *Schultz v. Boy Scouts of Am., Inc*., 65 N.Y.2d 189, 196 (1985).

In analyzing conflict issues in tort cases, New York courts assess whether the laws in conflict are "conduct-regulating" or "loss allocating." *Padula v. Lilarn Props. Corp*., 84 N.Y.2d 519, 522 (1994). Conduct-regulating rules "govern[] conduct to prevent injuries from occurring," while loss allocating rules "prohibit, assign, or limit liability after the tort occurs." *Id*. If the laws at issue are primarily conduct-regulating, "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Cooney v. Osgood Mach*., 81 N.Y.2d 66, 72 (1993).

It is settled that "[d]efamation claims invoke 'conduct regulating rules,' as opposed to 'loss allocating rules.'" *Condit v. Dunne*, 317 F. Supp. 2d 344, 353 (S.D.N.Y. 2004). New York has a strong interest "in regulating the conduct of its citizens by having its defamation rules apply when an allegedly defamatory publication is made" in New York. *Test Masters*, 2007 WL 4820968, at *4. Numerous courts have recognized that "libel is less plaintiff-centered than other torts," and, accordingly, "[s]trong policy reasons exist for deciding issues whose major impact is on the behavior of potential defendants according to the rules of the jurisdiction where the

conduct that gives rise to liability takes place." *Davis v. Costa-Gavras*, 580 F. Supp. at 1093.[7] The Court should apply New York law.

III. PLAINTIFF'S DEFAMATION CLAIM IS WELL PLED

A. The Standard on a Pre-Answer Motion to Dismiss

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford plaintiffs' allegations "liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994) (citing CPLR 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within *any* cognizable legal theory." *Id.* at 87-88 (emphasis added). Rather than assess the sufficiency of the parties' respective evidence, the court "merely examines the adequacy of the pleadings." *Davis v. Boeheim,* 24 N.Y.3d 262, 268 (2014) (citation omitted).

"[I]f, 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." *Id.* (quoting *Silsdorf v. Levine*, 59 N.Y.2d 8, 12 (1983) (emphasis added)). As the Court of Appeals recently explained: "We apply this liberal standard [in defamation cases] fully aware that permitting litigation to proceed to discovery carries the risk of potentially chilling free speech, but do so because, as we have previously stated: 'we recognize as well a plaintiff's right to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint.'" *Id.* at 268 (quoting *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 379 (1995)).[8]

[7] *Accord Cabello-Rondon v. Dow Jones & Company, Inc*., No. 16-3346, 2017 WL 3531551, at *3 (S.D.N.Y. Aug. 16, 2017); *Test Masters*, 2007 WL 4820968, at *3-*5; *Keough v. Texaco Inc*., No. 97-5981, 1999 WL 61836, at *5 (S.D.N.Y. Feb. 10, 1999); *Jewell v. NYP Holdings, Inc*., 23 F. Supp. 2d 348, 359–60 (S.D.N.Y. 1998); *Levin v. McPhee*, 917 F. Supp. 230, 235-236 (S.D.N.Y. 1996); *Zerman v. Sullivan & Cromwell*, 677 F. Supp. 1316, 1318-19 (S.D.N.Y. 1988).

[8] A court may also consider affidavits in opposition to a motion to dismiss, *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 635-36 (1976), and must "accept as true the facts alleged in . . . any submissions in

B. The Standard 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). California law is the same. Cal. Civ. Code § 45; *Baker v. Los Angeles Herald Examiner,* 42 Cal. 3d 254, 259 (1986).

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. New York Times Co.*, 82 N.Y.2d 146, 153 (1993) (citations omitted); *see also Davis,* 24 N.Y.3d at 270; *Thomas H.*, 18 N.Y.3d at 584. California law is no different: "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.

"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 (emphasis added) (internal quotation and citation omitted); *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); *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

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opposition to the dismissal motion," *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotes and citations omitted).

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.") (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*, 59 N.Y.2d at 12. It "may well be that [the challenged statements and context] are subject to 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, 538 N.Y.S.2d 370 (3d Dep't 1989) (emphasis added); *see also Armstrong*, 85 N.Y.2d at 380; *Good Gov't Group of Seal Beach, Inc. v. Superior Court,* 22 Cal. 3d 672, 682 (1978) (jury question raised where statement is "ambiguous" as to whether it is "a fact or an opinion").

C. Defendant's Derogatory Statements Are Factual, Not Opinion

Defendant made a host of precise, provably false statements of fact about Ms. Zervos. Any reasonable reader or listener would understand that Defendant's statements were factual: she "100% fabricated and made-up" her report; she was pushing "total lies" and "phony allegations"; and she was doing so simply for "ten minutes of fame" or at the behest of or in support of his opponent. Compl. ¶¶ 60, 64, 73, 65, 74. Defendant's 18 statements, made over the course of nine days from and after Ms. Zervos's report describing his behavior, are factual:

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." Compl. ¶ 55 (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 . . . ." Compl. ¶ 56 (Oct. 14)

(alleging that Defendant's team, acting on his behalf and at his direction drafted and issued this statement by Plaintiff's relative). *See also* Wang Aff., Ex. 3 (campaign also tweeted the statement); Kasowitz Aff., Ex. 2 (campaign-issued statement attaches an email from Ms. Zervos to Defendant'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." Compl. ¶ 59 (Oct. 14, approximately 7:15 pm).

4. "100% fabricated and made-up charges . . . ." Compl. ¶ 60 (Oct. 15, 3:51 am).[9]

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

6. "The truth is a beautiful weapon," (Kasowitz Aff., Ex. 6) 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." Compl. ¶ 62 (Oct. 15, 8:52 am);

7. "Nothing ever happened with any of these women. Totally made up nonsense to steal the election." Compl. ¶ 63 (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 . . . ." Compl. ¶ 64 (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." Compl. ¶ 65 (Oct. 15, at 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." Compl. ¶ 66 (Oct. 16, at 4:36 am).

11. The Clinton Campaign is "putting stories that never happened into the news!" Compl. ¶ 67 (Oct. 16, at 5:31 am).

12. "Can't believe these totally phoney stories, 100% made up by women (many already proven false) . . . ." Compl. ¶ 68 (Oct. 17, 5:15am).

[9] Statements with precise time stamps are tweets. It should be noted that the correct times of all tweets are set forth in the Complaint; the times that appear on the tweets attached to the Kasowitz Affirmation appear incorrect, generally indicating four hours ahead of the correct time, or without any time stamp. *Compare* Kasowitz Aff., Exs. 4-7, 10-14 *with* Wang Aff. ¶ 10, Exs. 9-17.

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

14. Defendant tweets that media had put "women front and center with made-up stories and lies . . . ." Compl. ¶ 70 (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." 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." Compl. ¶ 71 (Oct. 17 approximately 6:30 pm).

16. "The press . . . rigged it from the beginning by telling totally false stories. Most recently about phony allegations . . . ." Compl. ¶ 72 (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." Compl. ¶ 73 (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." Compl. ¶ 74 (Oct. 22, approximately 11:30 am).

Each statement contains verifiable assertions of fact, including whether or not Ms. Zervos lied on October 14, 2016 when she described in detail Defendant's unwanted sexual touching, and whether or not she did so for money, fame, or in order to support Defendant's political opponent. These facts can be proven true or false in the same ways that other facts are proven in litigation: through the testimony of witnesses, through prior statements by the parties, through the fact-finder's weighing of the credibility of each witness, and by reviewing documents such as e-mails, texts, phone and travel records, etc. *Cf. Thomas H.* 18 N.Y.3d at 585-86 (defendants' statement accusing plaintiff of sexually assaulting defendants' daughter "can be proven true or false since plaintiff either did or did not commit the acts").

Defendant's motion papers repeatedly stress the alleged falsity[10] of Ms. Summer's account, yet he still argues that his denigrating statements about Plaintiff were nothing more than "fiery rhetoric" and "non-actionable opinions." Def. Br. at 23, 28. That argument has no merit. Defendant plainly sought to convey definitively to the world that Ms. Zervos lied when she described his unwanted sexual touching. That is the conclusion that any reasonable listener or reader of Defendant's carefully chosen words would draw. *See Davis v. Boeheim,* 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). Defendant's easily understood message about Ms. Zervos had precisely his intended impact. She was threatened repeatedly, both physically and economically, by members of her community who called her a "lying c—t", and "lying b—ch" as they threatened to hurt her or her business – threats that escalated in tandem with Defendant's escalating defamatory statements. *See* Zervos Aff. ¶¶ 10-12.

1. Calling Someone a Liar Is Not Opinion

Contrary to Defendant's citations to inapposite lower court cases, his statements that Ms. Zervos lied when she told the world what Defendant did to her are actionable because they impugned her integrity and caused her actual harm, as the Court of Appeals recently made clear. *Davis v. Boeheim,* 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. New York Times*, 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, 696 N.Y.S.2d 496 (2d Dep't 1999) (statement that the plaintiff has prevailed "by lies and deceit" is actionable); *Divet v. Reinisch*, 169 A.D.2d 416, 417, 564 N.Y.S.2d 142 (1st Dep't

[10] The words "false," "falsity," or "falsehood" are used over twenty times by defense counsel in Defendant's opening brief, with an entire section of the brief devoted to the point. *See* Def. Br. at 7.

1991) (charging plaintiff with being a 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, 516 N.Y.S.2d 234 (2d Dep't 1987) (statements accusing plaintiff of personal dishonesty were "not constitutionally protected expressions of opinion"); *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); *Petrus v. Smith*, 91 A.D.2d 1190, 1190-91, 459 N.Y.S.2d 173 (4th Dep't 1983) (statement that the plaintiff was "a liar and a thief" was actionable); *Mase v. Reilly*, 206 A.D. 434, 436, 201 N.Y.S. 470 (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"); *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 defendant 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.

California law likewise makes clear that statements that a plaintiff has lied or is dishonest are actionable. *See Gregory v. McDonnell Douglas Corp.,* 17 Cal. 3d 596, 604 (1976) ("accusations that an individual . . . is personally dishonest" are actionable); *Manufactured Home Communities, Inc. v. Cnty. of San Diego,* 544 F.3d 959, 963-64 (9th Cir. 2008) (defendant's statement that plaintiff lied with reference to specific circumstances is a "provably false assertion of fact"); *Pentalpha Macau Commercial Offshore Ltd. v. Reddy,* No. 03-5914, 2004 WL 2738925 at *2 (N.D. Cal. Dec. 1, 2004) (statement that plaintiff "lied and acted dishonestly on numerous occasions" was sufficient to plead a defamation claim).

In stark contrast to controlling precedent (and his own characterization of Ms. Zervos's statements in his brief), Defendant attempts to support his meritless "opinion" argument by citing lower court cases that are either inapposite or inconsistent with more recent controlling authority. *See* Def. Br. at 28-30 (citing, *e.g., Carr v. Warden,* 159 Cal. App. 3d 1166, 1170 (1984) (undisputed, fully disclosed facts form the basis for defendant's ultimate opinion and conclusion); *Behr v. Weber*, 172 A.D.2d 441, 443, 568 N.Y.S.2d 948, 950 (1st Dep't 1991) (qualified privilege defeats defamation claim); *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); *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'ing Corp.*, 163 Misc. 2d 1, 11, 618 N.Y.S.2d 746, 752 (Sup. Ct. N.Y. Cnty. 1994) (underlying facts in article were undisputed); *Terry v. Davis Cnty. 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, 739 N.Y.S.2d 564 (1st Dep't 2002) (one-paragraph

summary judgment decision, in which one of two claims for defamation is sustained); *Lapine v. Seinfeld*, 31 Misc. 3d 736, 752-56, 918 N.Y.S.2d 313, 326-29 (Sup. Ct. N.Y. Cnty. 2011) (no specific statement was cited as defamatory).[11]

2. Defendant's Statements Are More than Mere "Campaign Rhetoric"

Defendant argues that he used "heated campaign rhetoric" in expressing himself. Def. Br. at 25-26. Defendant ignores that in doing so, he *also* targeted Ms. Zervos as a liar about a specific and provable set of facts regarding his sexual assasult of her. The fact that Defendant may have used rhetorical flourish in expressing his denigration of Ms. Zervos does not transform his factual statements into protected opinion. *See Davis v. Boeheim*, 24 N.Y.3d 262, 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).[12] Defendant claims that his statements "in no way expose[d] Ms. Zervos to 'hatred, contempt or aversion,'" Def. Br. at 26, but the statements did exactly that, because she was subjected to a barrage of hateful threats. Zervos Aff. ¶¶ 10-11.

[11] *Farber v. Jeffreys* also is inapposite. The court there expressly considered that the statements at issue were "typical examples of the accusations" which dissenters and the traditional HIV/AIDS community had historically traded back and forth in the ongoing debate regarding the disease, as well as the *specific* history of communications between the parties themselves. 33 Misc. 3d 1218(A), 941 N.Y.S.2d 537, at *15 (Sup. Ct. N.Y. Cnty. Nov. 2, 2011).

[12] California law is the same. *See Weller v. Am. Broadcasting Cos., Inc.*, 232 Cal. App. 3d 991, 1002-04 (1991) (repeated qualifying language and occasional description of conjecture in a news broadcast does not transform the impact of the overall report as defamatory of the plaintiff). In cases where qualifying language supports the defendant, it is because the rest of the statement is not otherwise defamatory or factual. *Cf. Gregory*, 17 Cal. 3d at 599 & 603 (cautiously worded conclusions – using "apparent" or "apparently" repeatedly – alongside disclosure of undisputed underlying facts, is not defamatory); *Baker v. Los Angeles Herald*, 42 Cal. 3d 254, 258 (1986) (single sentence prefaced with the phrase "My impression is," in a critical review of a documentary in an editorial column not defamatory.)

D. The Context of Defendant's Statements Confirms They Are Actionable

1. There is No Privilege or Immunity for Defamation By a Political Candidate During a Campaign

Defendant essentially argues that because he was in the midst of a political campaign, the law grants him *carte blanche* to say what he likes. To the contrary, politicians do not enjoy blanket "immunity" from defamation claims. As the Court of Appeals has held, "Public 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 and California's highest courts have both upheld claims for defamation arising out of the most acrimonious political battles, even claims brought by one political actor against an opponent. *Silsdorf v. Levine*, 59 N.Y.2d 8, 16-17 (1983); *Okun v. Maple Props.*, 29 Cal. 3d 442, 460 (1981); *Good Gov't Grp. of Seal Beach v. Hogard,* 22 Cal. 3d 672, 682-83 (1978).

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

The context here is not even as extreme as in *Clark*, *Silsdorf*, *Okun*, or *Good Gov't.* (which upheld defamation claims) because Ms. Zervos is not, and has never been, a political candidate or government official. She was not at any point engaged in a direct or live debate with Defendant. She is a private citizen who spoke out on the narrow factual issue of whether Defendant had touched her sexually without consent, only *after* Defendant boldly lied to the world to distance himself from the taped Billy Bush conversation. She simply set forth the facts.

a. There is No Live Debate or Internet "Free Pass." Defendant's statements about Plaintiff 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 reaction to something another speaker had just blurted out. *See 600 West 115th Street 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"). Defendant'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 Defendant 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, 779 N.Y.S.2d 12 (1st Dep't 2004).

Nor does the fact that a statement was carefully posted on the Internet on the campaign's website or via Defendant's personal Twitter account immunize it. The cases cited by Defendant make clear that the same framework applies even when statements are posted on Twitter. *Jacobus v. Trump,* 55 Misc. 3d 470, 484, 51 N.Y.S.3d 330 (Sup. Ct. N.Y. Cnty. 2017) (noting that artful or "small, Twitter parcels" do not alone ensure that its publisher "'escape liability'") (citation omitted); *GetFugu, Inc. v. Patton Boggs LLP,* 220 Cal. App. 4th 141, 156 (2013) (tweet that litigation claims were "frivolous" was protected opinion); *Chaker v. Mateo*, 209 Cal. App. 4th 1138, 1149-50 (2012) (finding internet posting opinion *because* the "insults are generalized in that they lack any specificity" as to detailed facts). 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 Global Telemedia Int'l v. Doe 1,* 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001) ("The statements were posted anonymously in the general cacophony of an Internet chat-room in

which about 1,000 messages a week are posted about [Plaintiff-corporation]. . ."); *Sandals Resorts Int'l Ltd. v. Google, Inc.,* 86 A.D.3d 32, 925 N.Y.S.2d 407 (1st Dep't 2011) (anonymous email criticizing a company). Defendant's carefully crafted statements (including one that required the retrieval of a months-old email, Wang Aff., Ex. 3), issued over many days and distributed to millions of followers, were part of a coordinated campaign to send the message – repeateadly and nationwide – that Defendant had never inappropriately touched these women. They were the opposite of off-the-cuff or anonymous statements.

b. Plaintiff is Not "Political." Defendant's insistence that this was a political fight and that his defamatory statements therefore were absolutely protected is simply wrong, both factually and legally. As noted above, the law does not give Defendant a free pass just because he was a political candidate at the time he attacked Ms. Zervos. *Supra,* Section III.D.1. Plaintiff was not a political candidate or commentator. Compl. ¶ 52; Zervos Aff. ¶¶ 4-5. To conclude otherwise by drawing inferences in Defendant's favor at this stage is impermissible.

c. Defendant's Cases Are Inapposite. The cases Defendant cites are not on point. The parties in a number of cases cited by Defendant were directly opposing each other in political campaigns, and the losing plaintiff then sued for critical statements made during the campaign. *Reed v. Gallagher,* 248 Cal. App. 4th 841 (2016) (losing political candidate, sued his opponent for campaign ad in which plaintiff was called a "crook" among other things)[13]; *Rosenaur v. Scherer*, 88 Cal. App. 4th 260 (2001) (plaintiff and defendant opposed each other over local initiative for land development; plaintiff lost and sued defendant over flyers and statements during the campaign); *Munoz-Feliciano v. Monroe-Woodbury Cent. Sch. Dist.,* No.13-4340, 2015 WL 1379702, at *12 (S.D.N.Y. Mar. 25, 2015) ("It simply cannot be that every candidate

[13] *Reed* is instructive in other ways as well. The defendant in that case argued that "no reasonable viewer would have thought that [defendant] was accusing [plaintiff] of criminal activity." *Id.* at 858. Of course, in this case, Defendant does the opposite: he *reiterates* his defamatory claims that Ms. Zervos is lying and spewing falsehoods. *Supra* n.10 & accompanying text.

who subjects herself to the rough and tumble of electoral politics has an actionable . . . claim against her opponents who hold office."), *aff'd,* 637 F. App'x 16 (2d Cir. 2016). The remainder of Defendant'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, 616 N.Y.S.2d 355 (1st Dep't 1994) ("[T]he article, an obvious political tract emanating from the opposing camp, was written for 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), 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 Supreme Court cases generally discussing the importance of First Amendment principles in other contexts, Def. Br. at 24-25.

Defendant also relies extensively on *Jacobus v. Trump,* 55 Misc.3d 470, 51 N.Y.S. 3d 330 (Sup. Ct. N.Y. Cnty. 2017), a defamation action brought by a political consultant and commentator against Defendant and his former campaign manager. In dismissing plaintiff's claim against Defendant based on two short tweets, however, this 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, 51 N.Y.S. 3d at 333; *see also* Wang Aff., Ex. 19 ¶ 9 (Verified 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. . . ."). Jacobus was an active political commentator with a constant presence in the political conversation throughout the campaign. Jacobus also had directly attacked Defendant in a bruising, derogatory style that arose from her political expertise. She attacked Defendant as a "'bad debater' and stated he 'comes off like a third grader faking his way through an oral report on current affairs,' and was using the Megyn Kelly dispute with FOX as an excuse for avoiding the debate." 55 Misc. 3d at 472, 51 N.Y.S.3d at 334 (quoting Verified Compl. ¶ 46). Moreover, even Ms. Jacobus did not dispute that most of what Defendant said about her (as "a real dummy," "real dumb," and a "major loser") amounted to protected opinion. 55 Misc. 3d at 482, 51 N.Y.S.3d at 341. Finally, the only fact asserted was whether Jacobus "begged" Defendant for a job and had been turned down. The parties did not dispute that she *had* met with Defendant's staff twice and expressed her salary requirements, and also that she had not been offered a job. 55 Misc. 3d at 482, 51 N.Y.S.3d at 342. The court found "begged" to be a "loose, figurative, and hyperbolic" reference to the plaintiff's state of mind. 55 Misc. 3d at 482-83, 51 N.Y.S.3d at 342.

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 about a job application phrased in loose figurative language, Ms. Zervos seeks to hold Defendant accountable for 18 extensive statements that repeatedly focus on factual assertions. *Supra* Section III.C. Nor is Ms. Zervos a "political strategist" with over a thousand appearances who had explicitly attacked Defendant for his political incompetence as a "third-grader"; Ms. Zervos instead carefully and methodically described the particular details of her interactions with Defendant, never insulting him. Wang Aff., Ex. 18. Thus, both the underlying statements and the context of *Jacobus* are inapposite. *See Jacobus*, 55 Misc. 3d at 483, 51 N.Y.S. 3d at 342 (use

of the word "begged" not provable but speculative; and "the immediate context . . . is the familiar back and forth between a political commentator and the subject of her criticism").

d. The Context Includes Defendant's Unique Position of Knowledge. Defendant's personal knowledge of Ms. Zervos and the encounters she described make clear that his statements about her are factual. Defendant admits that he knew Ms. Zervos personally (Statement 1) and he carefully cherry-picked a single email from Ms. Zervos to his personal assistant to try to support his position, while deliberately omitting another email that corroborates her, Wang Aff., Ex. 3; Kasowitz Aff., Ex. 2; Zervos Aff. ¶¶ 7-9. Defendant also knows whether he in fact sexually assaulted Plaintiff. A reasonable reader/listener would therefore conclude that Defendant was speaking factually about Ms. Zervos. *See Davis v. Boeheim,* 24 N.Y.3d 262, 273 (2014) (relevant context includes the fact that Defendant "appeared well placed to have information about the [sexual abuse] charges"); *see also Clark v. Schuyerville Cent. Sch. Dist.*, 24 A.D.3d 1162, 1164, 807 N.Y.S.2d 175 (3d Dep't 2005) (principal of high school is uniquely placed with knowledge to speak about teacher's situation, and so his statements denigrating her are not opinion); *Slaughter v. Friedman,* 32 Cal. 3d 149, 154 (1982).[14]

[14] Even if there were some opinion mixed in with factual denigrations (and there is not), Defendant'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"). It is precisely under these types of circumstances – in which 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. *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, 852 N.Y.S. 2d 465 (3d Dep't 2008); *Clark v. Schuyerville Cent. Sch. Dist.*, 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). Defendant also presented grossly distorted facts, by misrepresenting Ms. Zervos's April 2016 email communication to him (revealing only one email and hiding another that corroborates her). This likewise supports actionable mixed opinion. *See* Zervos Aff. ¶¶ 6-9; *Chalpin v. Amordian Press*, 128 A.D.2d 81, 85-88, 515 N.Y.S.2d 434 (1st Dep't 1987).

E. Defendant's Other Arguments are Meritless

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

Each of the 18 defamatory statements either refers to Ms. Zervos explicitly, or by clear implication, as one of just thirteen women who had recently reported Defendants' unwanted sexual touching. *See supra* 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 person meant. It is not necessary that all the world should understand the libel.") (emphasis added); *Blatty v. N.Y. Times Co.*, 42 Cal. 3d 1033, 1046 (1986) (a statement is "of and concerning" a person if it "either expressly mentions him or refers to him by reasonable implication"). 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 Algarin v. Town of Wallkill*, 421 F.3d 137, 139–40 (surveying cases and noting that successful groups often involve 25 or fewer people, though can include up to 53); *see also Blatty*, 42 Cal. 3d at 1046 (a claim by a member of a group of less than 25 may succeed).

Ms. Zervos publicly reported Defendant's unwanted sexual touching on October 14, 2016. Compl. ¶ 53. On that day and the following eight days, Defendant repeatedly made derogatory statements that obviously referred to Ms. Zervos. Many of the statements referred to her explicitly or included a photo of her. *Id*. ¶¶ 62, 64, 69. Others referred to her by clear implication because Defendant interspersed them with the statements that explicitly named or depicted Ms. Zervos. *Id.* ¶¶ 59-61, 63-74. The fact that some of Defendant's statements also referred to other women who likewise had reported his inappropriate sexual touching, Compl. at ¶¶ 63, 68, 70, 73-74, does not mean the statements were not "of and concerning" Ms. Zervos. Defendant's statements were of and and concerning Ms. Zervos because they referred to a

discrete group of women that plainly included Ms. Zervos given the timing of his defamatory statements. *Supra* n.1; *see Algarin*, 421 F.3d at 139-40; *Blatty*, 42 Cal. 3d at 1046.

2. Defendant Is Liable for the John Barry Statement

The Complaint sufficiently alleges that John Barry's statement is attributable to Defendant because "Mr. Trump's campaign team drafted and issued Barry's statement at Mr. Trump's direction and with his approval." 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 Defendant's campaign website shortly after Defendant's initial statement about Ms. Zervos and within hours of Ms. Zervos's report, *see* Compl. ¶¶ 53-56, but it was tweeted by Defendant's campaign beside Defendant's picture, as if issued by him, Wang Aff., Ex. 3. Even more notably, the Barry statement is posted just above the image of a message that Ms. Zervos had sent to Defendant via his personal secretary – something that Barry could not have had access to, but Defendant did. Wang Aff., Ex. 3; Kasowitz Aff., Ex. 2. It is reasonable to infer from these facts that Defendant was directly involved with and approved the statement. *See Enigma Software Group USA, LLC,* 194 F. Supp. 3d. at 275. Regardless, Defendant certainly ratified the Barry statement by re-tweeting it the next morning from his personal twitter account, adding: "The truth is a beautiful weapon." Kasowitz Aff., Ex. 6, Wang Aff., Ex. 23. *See RLI Ins. Co. v. Athan Contracting Corp.*, 667 F. Supp. 2d 229, 235-36 (E.D.N.Y. 2009).

3. Defendant Is Liable for His Expanded Re-Tweets

Defendant 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. Compl. ¶ 62, 69, Kasowitz Aff. Exs. 6, 13. In both instances, Defendant added editorial comments from his unique perspective as a person who knows Ms. Zervos and knew whether he groped her or not. Defendant wrote: "The truth is a beautiful weapon" when he retweeted the Barry statement, Kasowitz Aff. Ex. 6, 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," Compl. ¶ 69; Kasowitz Aff., Ex. 13. Defendant 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.[15]

Defendant grasps at straws by arguing that the single publication rule or the Communications Decency Act ("CDA") protects him. The single publication rule does not bar a claim based on a "republication," where, as here, a statement is substantively augmented or circulated to a new audience. *See Lehman v. Discovery Commc'ns Inc.*, 332 F. Supp. 2d 534, 537–39 (E.D.N.Y. 2004) (clarifying that where a publication is intended to reach a new audience, it is an actionable republication); *see also Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012) (statement is republished when it is "substantively altered or added to, or the website is directed to a new audience"). And 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).

The sole case cited by Defendant for the proposition that adding language to another person's article does not remove CDA immunity only proves the point. The defendant in *Hung*

[15] The tool known as the Wayback Machine shows that, as of mid-October, 2016, Defendant's campaign Twitter handle @TeamTrump had 160,000 followers, Wang Aff., Ex. 21, while @prisonplanet had 294,000 followers, Wang Aff., Ex. 22. In stark contrast, in that same period, Defendant's own, personal Twitter handle, @realdonaldtrump had *12.5 million* followers, Wang Aff., Exs. 23, 24. *See Universal Church, Inc. v. Universal Life Church/ULC Monastery*, No. 14-5213, 2017 WL 3669625, at *3 (S.D.N.Y. Aug. 8, 2017) (accepting Wayback Machine information as reliable); *Erickson v. Nebraska Mach. Co.*, No. 15-1147, 2015 WL 4089849, at *1 n.1 (N.D. Cal. July 6, 2015) (same).

Tan Phan v. Lang Van Pham, 182 Cal. App. 4th 323 (2010), apparently had no unique, firsthand knowledge of the article he forwarded. He merely invited his audience to read about an allegation with neutral commentary that "the truth will come out in the end." *Id.* at 325-28. Here, Defendant's comments plainly affirmed the truth of the statements he forwarded, and because he was in a "position to have unique knowledge" about the contents of the posts means that when he re-tweeted them to his 12.5 million Twitter followers, "he was *adding* defamatory content beyond that asserted by the original [tweets]." *Samsel v. Desoto County Sch. Dist.*, No. 14-113, 2017 WL 1043640, at *34–35 (N.D. Miss. Mar. 17, 2017) (emphasis in original).

4. Plaintiff Did Not Consent to Being Defamed

Defendant argues that Ms. Zervos consented to the defamation. Def. Br. at 29. Ms. Zervos did not expect or seek to be called a liar who makes things up for fame or politics, just as she did not expect to be subjected to disturbing attacks as a result of Defendant's statements. Zervos Aff. ¶ 14. In any event, Defendant's cases are inapposite because they involved "secret" or "pretend" shoppers or landlords sent in to record defendants and prompt them into making damning statements. *Sleepy's LLC v. Select Comfort Wholesale Corp.,* 779 F.3d 191, 201 (2d Cir. 2015); *LeBreton v. Weiss,* 256 A.D.2d 47, 47-48, 680 N.Y.S.2d 532 (1st Dep't 1998).

5. Plaintiff Has Sufficiently Alleged Defamation *Per Se* and Alternatively Pled Special Damages

Defendant used his bully pulpit to tell the world that Ms. Zervos lied about being forcibly sexually groped by Defendant. That alone is actionable defamation *per se*. *See Divet v. Reinisch,* 169 A.D.2d 416, 417, 564 N.Y.S.2d 142 (1st Dep't 1991) (statement that someone is lying about something specific is libelous *per se*). Ms. Zervos also alleges that Defendant's statements injured her occupation or business (Compl. ¶ 79), which also makes this a claim for defamation *per se*. *Celle v. Filipino Reporter Ent., Inc.,* 209 F.3d 163, 179 (2d Cir. 2000).

Even if this Court were to require that special damages be pled, Plaintiff's Complaint specifically details that "her restaurant lost customers and business that it had before" because of Defendant's statements, *id.* ¶ 81, causing at least $2,914 in damages (though she believes ultimately she could prove much more). *Id.*; *see also* Zervos Aff. ¶ 13. That is sufficient at this pre-answer, pre-discovery stage. *See Sprewell v. NYP Holdings, Inc.,* 1 Misc. 3d 847, 855, 772 N.Y.S.2d 188, 196 (Sup. Ct. N.Y. Cnty. 2003) (special damages properly pleaded where plaintiff identified in his complaint "a specific, identifiable pecuniary loss and alleges a causal relationship between the articles' publication and that loss"); *Pentalpha Macau Commercial Offshore Ltd. v. Reddy,* No. 03-5914, 2004 WL 2738925 at * 2 (N.D. Cal. Dec. 1, 2004) (complaint sufficient where plaintiff alleged that he had suffered "severe emotional distress, depression, anxiety, etc. and ha[d] incurred and will continue to incur medical costs as well as pain and suffering damages in an amount of $3 million") (footnote omitted).

6. Plaintiff Has Sufficiently Alleged Actual Malice

Defendant argues that Ms. Zervos's allegation of actual malice is improperly conclusory. Def. Br. at 35. Defendant is wrong. Plaintiff specifically alleged that Defendant made "each of the above [18] statements knowing they were false and/or with reckless disregard for their truth or falsity." Compl. ¶ 78; *see also id*. ¶ 76 (Defendant knew he was lying when he made the 18 statements), and ¶ 77 (Defendant knew that Ms. Zervos was telling the truth about his unwanted sexual advances). On this pre-answer motion to dismiss, drawing all inferences in Plaintiff's favor, she has alleged more than sufficient evidence of actual malice, which as a practical matter must be proven through inferences from circumstantial evidence because defendants rarely admit their true state of mind. *See Celle,* 209 F.3d at 183. Even assuming for purposes of this motion that Ms. Zervos is a limited purpose public figure, the Complaint plainly alleges that all of Defendant's statements were made with "actual malice." *See New York Times Co. v. Sullivan*,

376 U.S. 254, 279–80 (1964) (a statement is made with "actual malice" when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not").[16]

7. California's Anti-SLAPP Statute Does Not Apply

Defendant asks this Court to grant his "motion to strike," which the CPLR does not recognize. The California Code of Civil Procedure does not apply in this case.

It is well established that all procedural issues are governed by New York law, even where the substance of the legal claim is governed by the law of another state. *See Lerner v. Prince*, 119 A.D.3d 122, 127–28, 987 N.Y.S.2d 19, 23 (1st Dep't 2014); *Marine Midland Bank v. United Mo. Bank*, 223 A.D.2d 119, 122, 643 N.Y.S.2d 528 (1st Dep't 1996).

California's anti-SLAPP statute is procedural, not substantive. It is codified, after all, 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*., contrary to the pleading standard embodied in CPLR 3211(a). It provides for an automatic discovery stay upon the filing of a special motion to strike, Cal. Code Civ. P. § 425.16(g), similar to the procedural rule set forth in CPLR 3214(b). It provides for interlocutory appeals that otherwise would not be permissible. Cal. Code Civ. P. § 425.16(i).

California courts, including the California Supreme Court, characterize its anti-SLAPP statute as "a procedural device" rather than "a substantive rule of law." *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 39 Cal. 4th 192, 202 (2006); *Bradbury v. Superior Court*, 49 Cal. App. 4th

[16] Indeed, the allegations in the Complaint support a punitive damages award because they detail a deliberate, targeted, and repeated attack by Defendant 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. Defendant's selective publication of only one email from Ms. Zervos was also a purposeful distortion of the true record of their communications, as discovery will confirm. Zervos Aff. ¶¶ 7-9. Finally, Ms. Zervos specifically requested that he retract his statements defaming her, but he has refused. Wang Aff., Ex. 20.

1108, 1117–18 (1996); *accord Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 154 (2d Cir. 2013) ("California courts have repeatedly held, as a matter of *state* law, that California's anti-SLAPP rule is 'procedural' in nature[.]") (emphasis in original). The Court of Appeals has held that California's classification of its law as procedural "should not be ignored" in applying New York's choice of law rules. *Tanges v. Heidelberg N. Am,*, 93 N.Y.2d 48, 54 (1999).

Contrary to Defendant's spin, *Adelson v. Harris*, 973 F. Supp. 2d 467 (S.D.N.Y. 2013), did not hold that the Nevada anti-SLAPP statute was substantive "under New York choice of law principles." Def. Br. at 38 n.51. Rather, *Adelson* held that the Nevada statute was substantive for purposes of the entirely distinct inquiry that federal courts sitting in diversity jurisdiction must conduct under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), about whether to apply federal or state law. *See* 973 F. Supp. 2d at 493 n.21; *see also Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (noting that U.S. Supreme Court has "reject[ed] the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflict of laws"); *Liberty Synergistics Inc.*, 718 F.3d at 157 (holding that "[s]tate rules that are 'procedural' under state choice-of-law principles may be applicable in federal diversity suits if those rules are 'substantive' within the meaning of *Erie*" and that the lower court "erred by conflating the relevant *state* choice-of-law question with the separate *federal* choice-of-law question under the *Erie* doctrine") (emphasis in original).[17]

Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003), likewise did not concern state choice of law rules, as that case was filed in California and there was no question that California law applied. *See Batzel v. Smith*, No. 00-9590, 2001 WL 1658210, at *2 (C.D. Cal. Mar. 21, 2001).

[17] *Adelson* applied Nevada's anti-SLAPP statute without any analysis of whether it was substantive or procedural for choice of law purposes (as opposed to *Erie* purposes). In any event, as *Adelson* expressly acknowledges in the footnote Defendant cites, Nevada's anti-SLAPP statute is substantive because it *creates a cause of action*, unlike California's statute, which addresses only procedural issues in defamation cases. *Adelson*, 973 F. Supp. 2d at 493 n.21.

The question was whether a federal appellate court had jurisdiction to hear an interlocutory appeal of a denial of a motion to strike. The Ninth Circuit held that it did have jurisdiction pursuant to the "collateral order doctrine" because "the district court's denial of an anti-SLAPP motion would effectively be unreviewable on appeal from a final judgment." *Batzel*, 333 F.3d at 1025. The fact that this inquiry is completely distinct from a state choice of law analysis is further demonstrated by *Liberty Synergistics Inc.*, in which the Second Circuit first held that it had jurisdiction to hear an interlocutory appeal under California's anti-SLAPP law, 718 F.3d at 149-50, and then proceeded to hold that the anti-SLAPP law was procedural for purposes of choice of law rules, *id.* at 154.

Even if California's anti-SLAPP statute applied, Defendant's special motion to strike would be untimely. The statute requires that such a motion be filed "within 60 days of the service of the complaint." Cal. Code Civ. P. § 425.16(f). Because Plaintiff effectuated service on February 2, 2017, Wang Aff., Ex. 24, Defendant had until April 3, 2017 to file an anti-SLAPP motion. Defendant did not meet that deadline, and instead rushed in at the last moment with an Order to Show Cause seeking otherwise improper procedural relief to bifurcate, which he then withdrew after Plaintiff opposed. *See generally*, Wang Aff., Ex. 25, 26, 27. Between April 3, when his time expired, and April 28, when the Court signed a stipulation permitting Defendant to file a motion to dismiss by July 7, Defendant had no permission from the Court or agreement from Plaintiff to extend *any* deadline, much less the statutorily-mandated one under California procedure. His time under the California procedure therefore expired on April 4, and the subsequent so-ordered stipulation does not cure that fatal error. *See* Wang Aff., Ex. 27; *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").[18]

CONCLUSION

Defendant's motion to dismiss pursuant to CPLR 3211, or, alternatively, for a stay pursuant to CPLR 2201 and Defendant's improper California procedural motion to strike, should all be denied.

Dated: September 19, 2017
New York, New York

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[18] Defendant's invocation of anti-SLAPP is particularly inappropriate in this case, where he plainly defamed Ms. Zervos and holds all the cards in terms of power and money. "The hallmark of a SLAPP suit is that it lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party's case will be weakened or abandoned." *Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970 (9th Cir. 1999). And even if this Court were to apply the California statute, 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) ("the plaintiff need only establish that his or her claim has minimal merit").