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

DONALD J. TRUMP FOR PRESIDENT, INC.,

Plaintiff,

-against-

THE NEW YORK TIMES COMPANY d/b/a *The New York Times*,

Defendant.

Index No. 152099/2020

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT AND FOR AN ORDER IMPOSING SANCTIONS ON PLAINTIFF**

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## PRELIMINARY STATEMENT

While this motion was pending, Robert Mueller, the former Special Counsel, said in an Op-Ed in the Washington Post: "We did not establish that members of the Trump campaign conspired with the Russian government in its activities. The investigation did, however, establish that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome. It also established that the campaign expected it would benefit electorally from information stolen and released through Russian efforts."[1] That point was at the heart of Max Frankel's Commentary. He offered his opinion that because both sides knew what the other wanted, and what the other could provide, there was no need for actual collusion or some sort of transaction. The Commentary did not contradict or disregard any fact that was in Attorney General Barr's just-released summary of the Mueller Report. To the contrary, in its first sentence, the Commentary acknowledged the investigation's conclusion—there was not enough evidence to charge anyone with collusion—and then went on to comment upon why that conclusion should not be reassuring to those concerned about foreign influence in the election.

The Commentary was precisely the sort of thing that First Amendment protects: the right of a citizen to offer an opinion on the news of the day. Yet the President and his allies plow forward with this frivolous suit because their interest is not in getting at the truth, but in inflicting punishment on independent news organizations that have dared to take a hard look at the current administration, as they have done, and will continue to do, with every administration.

Campaign Corp.'s memorandum of law does not, and cannot, bring legal merit to a Complaint that has none. The memo misrepresents what the Commentary said, miscasts the

[1] Robert S. Mueller III, *Roger Stone remains a convicted felon, and rightly so*, Wash. Post (July 11, 2020), https://www.washingtonpost.com/opinions/2020/07/11/mueller-stone-oped/.

opinion analysis required under New York law, and builds its case on the fabrication that Mr. Mueller exonerated Mr. Trump's campaign. [2] More than 50 years ago, the Supreme Court in *New York Times v. Sullivan* warned about the misuse of libel suits brought by powerful interests intent on silencing those who seek to hold them accountable. 376 U.S. 254, 279 (1964). The *Sullivan* court spoke forcefully to the need for the courts to counter such abusive litigation. As this lawsuit lays bare, that judicial vigilance is still needed today.

## ARGUMENT

### A. Campaign Corp.'s Own Analysis Makes Clear that the Commentary Is Protected Opinion

Campaign Corp. doubles down on its theory that the Commentary is not a statement of opinion but instead a factual assertion that a formal "transaction" occurred between the Russians and Trump campaign aides. (Dkt. 9 ("Opp. Br.") at 1.) It arrives at that conclusion by doing precisely what it acknowledges New York law says *not* to do: removing words from their context and reading them with numb literalism. *See Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 156 (1993) (courts are not to engage in "'hypertechnical parsing' of written and spoken words for the purpose of identifying 'possible facts' that might form the basis of a sustainable libel action") (quoting *Immuno, AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 256 (1991) (alterations omitted)). Yes, the Commentary used the words "deal" and "quid pro quo." But in doing so it is no

[2] Notably, while Campaign Corp. vehemently protests the idea that the Russians and Trump campaign associates worked in tandem, just last week, a Republican-controlled Senate committee announced that its investigation into the 2016 election unearthed evidence of "more direct links between Trump associates and Russian intelligence" and found that Mr. Trump's associates were "eager to exploit assistance from the Kremlin." Greg Miller, Karoun Demirjian and Ellen Nakashima, *Senate report details security risk posed by 2016 Trump campaign's Russia contacts*, Wash. Post (Aug. 18, 2020), https://www.washingtonpost.com/national-security/senate-intelligence-trump-russia-report/2020/08/18/62a7573e-e093-11ea-b69b-64f7b0477ed4_story.html

different from the publications in the multiple court decisions cited in The Times's moving brief that involved words like "blackmail," "stalked," "harassed," "extort," and "directed the violence"—all of which possess defined factual meanings but were found, in the specific context in which they were used, to be protected statements of opinion. (Dkt. 5 ("NYT Br.") at 11-12.) As a federal district court recently concluded, even the word "literally," when uttered on cable talk show, can mean exactly the opposite of "actually." *Herring Networks, Inc. v. Maddow*, 2020 U.S. Dist. LEXIS 90658, at *16 (S.D. Cal. May 22, 2020).

Campaign Corp. dismisses the decisions discussed in The Times's brief by dully marching through the facts of each and concluding that the context in which those factual terms were used rendered them opinions. (Opp. Br. at 10-11.) That is precisely the point. "Deal" and "quid pro quo" may in some other context be factual statements. But no reasonable reader could come away from the Commentary and conclude that Max Frankel was saying there was an actual bargained-for, agreed-to, and legally cognizable transaction between the Russians and the Trump aides.

The Commentary, written in reaction to the Attorney General's summary of the Mueller Report, leaves no doubt that it is an opinion piece. The headline refers to the "*real* quid pro quo." (Dkt. 6 ("McCraw Aff.") Ex. B (emphasis added).) The word "real" flags for readers that the quid pro quo that Mr. Frankel wanted to talk about was not the sort of legal quid pro quo that had occupied Mr. Mueller's attention and prompted Mr. Frankel to write in the first place.[3] To the

[3] For this reason alone, Campaign Corp.'s reliance on *Kaelin v. Globe Communs. Corp.*, 162 F.3d 1036, 1037 (9th Cir. 1998), for the unremarkable point that headlines can be defamatory is entirely misguided and irrelevant.

contrary, through its headline, the Commentary transparently holds itself out as an interpretive counterpoint to Mr. Barr's summary of Mr. Mueller's report.[4]

In its first two sentences, the Commentary immediately concedes that there was no collusion (read: no transaction): "Collusion — or a lack of it — turns out to have been the rhetorical trap that ensnared President Trump's pursuers. There was no need for detailed electoral collusion between the Trump campaign and Vladimir Putin's oligarchy." (McCraw Aff. Ex. B.) That disclaimer not only kills Campaign Corp.'s theory of the case all by itself; it also sets up the opinion that Mr. Frankel wants to convey: that readers should not take the lack of collusion to mean that Russian interference played no role in the 2016 election. Mr. Frankel saw instead a tacit understanding between the Trump campaigners and the Russians: "the quid of help in the campaign against Hillary Clinton for the quo of a new pro-Russian foreign policy, starting with relief from the Obama administration's burdensome economic sanctions. The Trumpites knew about the quid and held out the prospect of the quo." (*Id.*)

That is not the language a person would use to describe a legally bargained-for "transaction." No reference to any agreement. No reference to any negotiation. No reference to the when or where of any deal that was struck by the two sides. Instead, Mr. Frankel was theorizing just the opposite: no formal agreement is needed when two sides know what each wants and what each is willing to do, and each can benefit from the other. The Commentary offered Mr. Frankel's interpretation of what was going in the minds of the Trump aides (they

[4] Indeed, people understand that "real" can sometimes mean exactly the opposite of real. When, for instance, Donald Trump refers to a Democratic politician as a "real genius"—as in "The Mayor of Baltimore said she wanted to give the rioters 'space to destroy' - another real genius!"—no reasonable reader could miss that he was not complimenting her intelligence. Donald J. Trump (@realDonaldTrump), Twitter (Apr. 28, 2015, 6:14 AM), https://twitter.com/realdonaldtrump/status/592995408219152384.

"knew about the quid") and in the minds of the Russians (a possible Trump administration "held out the prospect of the quo"). And over the next seven paragraphs, Mr. Frankel elaborated on how he came to that interpretation, laying out the facts he considered and making his case with colorful language, pointed asides, and an ironic reference to Mr. Trump's most famous book, The Art of the Deal. (NYT Br. at 12-13.)

Unable to counter the obvious, Campaign Corp. tries to take refuge in the dictionary, noting that "quid pro quo" has only one meaning. (Opp. Br. at 5.) But exactly the same thing could be said about countless statements found to be opinion by New York courts, where words with an accepted factual meaning (like "blackmail," "stalked," and "harassed") are found to mean something else in context. Campaign Corp. knows that from its own litigation experience in this Court. (NYT Br. at 11-12.) The word "begged" has a fixed factual meaning. Whether someone was "turned down" for a job is, on its face, a "matter of historical fact." (Opp. Br. at 5.) Yet this Court had no trouble finding that when candidate Donald Trump tweeted that consultant Cheryl Jacobus had "begged" for a job and was "turned down," he was stating opinions and not facts. *Jacobus v. Trump*, 55 Misc. 3d 470, 482 (Sup. Ct. N.Y. Cnty. 2017*), aff'd*, 156 A.D.3d 452 (1st Dep't 2017). And it hardly bears repeating that the word "deal" is used in multiple ways to refer to policies and events that have nothing transactional about them at all (real deal, big deal, raw deal, the New Deal, what's the deal?).

Neither of the cases that Campaign Corp. uses to support its opinion argument is of any moment. (Opp. Br. at 7-8.) *Martin v. Daily News L.P.*, 121 A.D.3d 90 (1st Dep't 2014), stands for the unremarkable proposition that an accusation of "corruption" against a judge was actionable in newspaper coverage that got basic facts wrong. As is typical with this area of the law, in other decisions with different facts the accusation of corruption is treated as opinion. *See,*

*e.g.*, *First Manhattan Co. v. Sive*, 2020 N.Y. Misc. LEXIS 463, at *17 (Sup. Ct. N.Y. Cnty. Jan. 7, 2020) ("New York courts have held that assertions that a person is guilty of 'blackmail,' 'fraud,' 'bribery,' and 'corruption' could, in certain contexts, be understood as mere, nonactionable rhetorical hyperbole or vigorous epithet[s].") (quoting *Gross*, 82 N.Y.2d at 155) (internal marks omitted). Campaign Corp.'s second case, *Coliniatis v. Dimas*, 848 F. Supp. 462 (S.D.N.Y. 1994), is even more attenuated. It involved a letter from a law firm to a client containing allegations about the plaintiff. As the court found, the letter used precise language to make the accusation, the law firm indicated that its conclusions were based on a detailed review of the facts, and it arose in the context of attorney-client communication intended to render serious advice to a client, *id.* at 468-69 —in other words, it involved a host of factors that signaled the letter was meant to be read as a statement of fact.

In the end, Campaign Corp. turns to the classic four-part test for opinion and contends that the factors all break Campaign Corp.'s way. (Opp. Br. at 7-10.) That is hardly surprising, given the unreasonable way it chooses to read the Commentary. Campaign Corp. turns the blindest of eyes to what the Commentary actually said and how it said it, and then dredges up irrelevant cases holding that facts can be found in opinion columns—cases that say nothing about how this particular column was read by reasonable readers. Campaign Corp.'s legal posturing cannot convert an eight-paragraph opinion piece into a breaking news report. Contrary to what Campaign Corp. says, every factor in the traditional New York opinion analysis underscores that a reasonable reader would know that the Commentary is a work of opinion. *See Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292 (1986) (setting out the four-factor opinion analysis). The language lacks precise meaning ("real quid pro quo," "unseemly," "offensive," the "art of the deal"), and its speculation on the motives of the Russians and the Trump aides is not subject to objective

proof. Its presentation as an Op-Ed signals that is an opinion piece, and the larger context—its appearance in the midst of the wide-ranging and polarized debate over what Attorney General Barr's summary of the Mueller report meant—reinforces that point.

New York law zealously protects political opinion to ensure that New Yorkers will have a rich, varied, and vigorous marketplace of ideas. This baseless complaint is an affront to that essential body of New York law and to our most basic civic values.

**B. <u>The Commentary Says Nothing About the Corporate Entity that Is the Plaintiff Here</u>**

In its Complaint, Campaign Corp. asks the Court to read Mr. Frankel's statements about the Trump "campaign"—a loose confederation of campaign workers, Trump family members, allies of Mr. Trump, and Trump friends—as being "of and concerning" the duly incorporated business entity that brought this lawsuit. (McCraw Aff. Ex. A ¶¶ 1, 22.) It disregards the fact that nothing in the Commentary referred to or mentioned the incorporated campaign entity that is the plaintiff here, a Virginia corporation with its principal offices on Fifth Avenue in Manhattan.

Campaign Corp. challenges The Times's reliance on (among other cases) *Cohn v. Nat'l Broadcasting Co.*, 67 A.D.2d 140 (1st Dep't 1979), *aff'd*, 50 N.Y.2d 885 (1980), in which the court found that a law firm was not defamed by statements about one its lawyers. (Opp. Br. at 14.) It tries to distinguish *Cohn* and others cases away by pointing out that the entities were never mentioned in the statements at issue. That observation doesn't help Campaign Corp. for a very simple reason: Campaign Corp. is not mentioned in the column at issue here either. In reading the Commentary, no reasonable person would understand the words "Trump campaign" and Mr. Frankel's discussion of individuals associated with Mr. Trump as being, in actuality, a reference to a corporate entity created under Virginia law and subject to federal election laws. *See Three*

*Amigos SJL Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82, 87 (2016) (analyzing "of and concerning" on the basis of "context" of news broadcast). Just as criticism of a law firm's members did not add up to a viable claim for the firm itself in *Cohn*, statements about persons with some association to a corporate campaign entity do not give Campaign Corp. a claim against The Times.

Even if the campaign entity *were* mentioned in the Commentary, allegations against campaign staff members would still not give rise to a claim of libel for Campaign Corp. In *Afftrex, Ltd. v. General Electric Co.*, 161 A.D.2d 855 (3d Dep't 1990)—a decision cited in The Times's moving memorandum of law and entirely ignored by Campaign Corp. (*see* NYT Br. at 18)— the court held that allegations against a company's president and co-owner were not "of and concerning" the company, even though the company was named in the statements at issue. As in *Afftrex*, the Commentary here "reflect[s] directly" on specific individuals, *id.* at 856, not on Campaign Corp.

### C. Campaign Corp. Fails to Make a Plausible Case for Actual Malice

As this motion was being briefed, a Senate committee led by members of Mr. Trump's own party released a report on its exhaustive three-year investigation, which found a web of connections between Trump campaign operatives and Russian agents.[5] The import of that investigation to the instant suit is this: A year and a half after the Commentary ran, investigators

[5] The committee's findings were "extraordinary": "The Russian government disrupted an American election to help Mr. Trump become president, Russian intelligence services viewed members of the Trump campaign as easily manipulated, and some of Mr. Trump's advisers were eager for the help from an American adversary." Mark Mazzetti, *G.O.P.-Led Senate Panel Details Ties Between 2016 Trump Campaign and Russia*, N.Y. Times (Aug. 18, 2020), https://www.nytimes.com/2020/08/18/us/politics/senate-intelligence-russian-interference-report.html.

were still seeking to determine the nature of the interactions between Mr. Trump's campaign team and a foreign power intent on interfering with the U.S. election.

The Senate's now-public report, like the revelations in the Mueller Report itself, belies Campaign Corp.'s breezy assurances that its Complaint has plausibly alleged actual malice. (Opp. Br. at 14-17.) Campaign Corp. accepts, as it must, its obligation to allege and show that a libel defendant who publishes a false statement knew it was false or had a "high degree of awareness of [its] probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). (*See* Opp. Br. at 4 n.1.) Campaign Corp.'s burden is straightforward and substantial: Even if the Court credits the Complaint's conclusory allegations that the Commentary asserted as a matter of fact that there was a transaction between Campaign Corp. and the Russians, Campaign Corp. must still plausibly allege that Mr. Frankel and The Times *knew* that assertion to be false, or entertained *serious doubts* about it, and published it anyway.

Campaign Corp. cleaves to the fantasy that it is a proven fact that there was no deal or transaction between the Russians and Trump campaign associates. (Opp. Br. at 15-16.) That is simply not so. Mr. Frankel was writing in response to Mr. Barr's incomplete and puzzling summary of Mr. Mueller's work, at a time when the President and people across the nation were trying to make sense of what Mr. Barr had said and what the report itself would say. (NYT Br. at 3-5.) When the Mueller Report was later released, it explicitly and emphatically stated it was not exonerating the President's allies of conspiracy: "A statement that the investigation did not establish particular facts does not mean there was no evidence of those facts." (McCraw Aff. Ex. D at 2, 9.) The Mueller team found "the numerous links between the Russian government and the Trump Campaign," and it expressly declined to decide whether those contacts could be regarded as "collusion." (*Id.* at 1-2.) And stories in The Times cited by Campaign Corp. only report the

denials of Trump associates or dead ends encountered by investigators; they do not resolve the question of what happened between the Trump aides and the Russians. (Opp. Br. at 3-4.) If the jury is still out on what happened between Russia and Mr. Trump's allies—which is the case now and was the case at the time of the Commentary—any allegation that Mr. Frankel *knew* that there was no transaction is patently implausible. A writer cannot recklessly disregard a truth when that truth itself has yet to be established.

Campaign Corp. all but concedes that point. It is finally forced in its brief to acknowledge the real state of the public record when it says not that there was no deal but that there was "no sufficient evidence" of a deal. (Opp. Br. at 15.) The actual malice analysis does not turn on the legal sufficiency of the evidence. It turns on whether the truth has been established and is known by the writer. By framing its case around how much evidence of a deal existed, Campaign Corp. in fact concedes that there was evidence of a deal and that the truth remains unresolved.

Because Campaign Corp. has not plausibly alleged actual malice, the Complaint should be dismissed on that basis as well. (*See* NYT Br. at 19-24.)

**D. <u>Sanctions Are Both Warranted and Necessary</u>**

This case is unprecedented: a libel suit brought by a sitting president (albeit through his proxy campaign organization).[6] It is a suit founded on a transparent lie: that an eight-paragraph freelance opinion piece decimated the reputation of the corporate entity running the Trump campaign, inflicting millions of dollars of damages on it. The equally transparent truth is that the suit was not brought to remedy any wrong. It was brought as part of a toxic, politically motivated

[6] Theodore J. Boutrous Jr., *Why Trump's frivolous libel lawsuit against the New York Times is dangerous*, Wash. Post (Feb. 29, 2020), https://www.washingtonpost.com/opinions/2020/02/29/why-trumps-frivolous-libel-lawsuit-against-new-york-times-is-dangerous/.

strategy to punish *The New York Times*, the *Washington Post*, and CNN, for doing precisely what an independent press is supposed to do in any era: hold the government and the powerful accountable. (*See* NYT Br. at 7.)

Campaign Corp.'s opposition to sanctions is telling. It pins its hopes on a libel case in which the fact/opinion divide was at issue, and a court found that the plaintiff had made a colorable claim. (Opp. Br. at 17-18.) It chides The Times for not citing a fact/opinion case where sanctions were awarded, failing to grasp that most plaintiffs in the New York courts bring cases in good faith and sanctions are rare. Sanctions are appropriate, however, when meritless litigation is brought as a form of retaliation. *See, e.g.*, *Gordon v. Marrone*, 202 A.D.2d 104 (2d Dep't 1994). In *Gordon*, the plaintiff landowner brought his suit in retaliation against a conservancy after the conservancy had successfully challenged the landowner's plan to develop his property. Following an extensive review of the law of sanctions, the court concluded that sanctions could be granted even if a claim was colorable when the litigation is brought for "an improper purpose," including "to harass or maliciously injure another." *Id*. at 110 (quoting 22 NYCRR § 130-1.1(c)(2)) (internal marks omitted).

While Campaign Corp. may entertain some slender hope that its Complaint gets over the low bar set for colorable claims, clearing that bar does not preclude sanctions. The President has spent four years denouncing *The New York Times* and other news organizations as "enemies of the people" and purveyors of fake news.[7] He has worked tirelessly to discredit Robert Mueller

[7] *See, e.g.*, John Wagner, *Trump renews attacks on media as 'the true Enemy of the People'*, Wash. Post (Oct. 29, 2018), https://www.washingtonpost.com/politics/trump-renews-attacks-on-media-as-the-true-enemy-of-the-people/2018/10/29/9ebc62ee-db60-11e8-85df-7a6b4d25cfbb_story.html.

and his team as part of a "witch hunt" run by "angry Democrats."[8] His campaign's corporate entity then brought this lawsuit, alleging it has been saddled with millions of dollars of damages, all caused by an eight-paragraph Op-Ed about the Mueller investigation. Despite being battered by those damages, Campaign Corp. waited nearly a year to bring the suit (and four more months to serve the complaint), meaning that the action was commenced just in time for the 2020 election campaign season. The suit falls squarely in the category of sanctionable litigation brought to harass and maliciously injure. *See, e.g.*, *Corsini v. Morgan*, 123 A.D.3d 525, 527 (1st Dep't 2014) (imposing sanctions on plaintiff asserting defamation and other claims where "record demonstrate[d] that [his] primary purpose in commencing the instant action, as well as two federal actions asserting the same claims, [was] the harassment of the [defendants]").

Through this lawsuit, Campaign Corp. seeks not justice, but to send a message of intimidation to the nation's independent press. We respectfully ask the Court to use its sanctions power to send a different message: that the New York courts provide no refuge for those who misuse the judicial process for their own cynical political purposes.

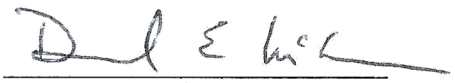
## CONCLUSION

For all the reasons set forth in its moving memorandum of law and here, Defendant respectfully requests that the Court dismiss the Complaint with prejudice, impose sanctions on Plaintiff pursuant to 22 NYCRR § 130 and CPLR 8303-a, award Defendant its costs and fees in this action, including reasonable attorneys' fees, and provide such other and further relief as the Court deems just and proper.

[8] *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (July 21, 2018, 6:40 PM), https://twitter.com/realDonaldTrump/status/1020800615226793986.

Dated: New York, NY
August 21, 2020

Respectfully submitted,



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