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

DONALD J. TRUMP FOR PRESIDENT, INC., a Virginia corporation, Plaintiff, v. THE NEW YORK TIMES COMPANY d/b/a *The New York Times*, a New York corporation, Defendant.	Index No. 152099/2020

OPPOSITION TO DEFENDANT THE NEW YORK TIMES COMPANY D/B/A *THE NEW YORK TIMES*' MOTION TO DISMISS

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I. INTRODUCTION

The motion of Defendant, the *New York Times* (the "*Times*"), asks this Court to adjudicate, at the pleadings stage and before any discovery is taken, that a story it published (the "Defamatory Article") alleging a "*quid pro quo*" and "deal" between the Russian Federation and Plaintiff Donald Trump for President, Inc. (the "Campaign"), in fact did not actually allege any sort of *quid pro quo* or deal. This is patently absurd.

The Defamatory Article clearly states a fact, not an opinion. The terms "*quid pro quo*" and "deal" can only refer to a supposed transaction between the Campaign and the Russian government—a transaction that never happened. The *Times* published these statements despite the fact that Special Counsel Robert Mueller, no friend of the Campaign, conducted an extensive investigation into the allegations and found there was insufficient evidence to establish any such "deal" took place. The *Times* knew this, and published the Defamatory Article anyway, because it wanted to harm the Campaign.

While the *Times* attempts to wrap itself in the First Amendment, as every defamation defendant does, there is no categorical exception to the defamation laws for speech regarding a political issue. Rather, the Campaign is required to plead (and eventually prove) actual malice—an obligation it has not shirked from and which its Complaint pleads in more than sufficient detail.

The *Times*' argument that the Defamatory Article was not "of and concerning" the Campaign should be rejected. The *Times* specifically referred to the "Trump campaign" in the Defamatory Article, and yet argues to this Court that it did not actually mean to refer to the Campaign. That argument is wholly without merit.

Finally, the *Times* has shown no proper basis for monetary sanctions here. Just the opposite is true, the Complaint adequately pleads a cause of action for defamation, and the

motion to dismiss (and request for sanctions) should be denied.

II. STATEMENT OF FACTS

On a motion to dismiss, the statements in the Complaint are taken as true. *Gorelik v. Mount Sinai Hospital Center*, 19 A.D.3d 319, 319 (1st Dep't 2005). The facts, as pled in the Complaint, are these:

The Campaign operated the presidential election campaign of Donald J. Trump commencing in 2015, and has operated his reelection campaign since the President's election. *Complaint* ¶ 5.

On or about March 27, 2019, the *Times* published an article by Max Frankel entitled "The Real Trump-Russia Quid Pro Quo", which claims, among other things:

> "There was no need for detailed electoral collusion between the **Trump campaign** and Vladimir Putin's oligarchy because **they had an overarching deal**: 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.* ¶ 9. (Emphasis added.)

The Defamatory Article does not allege or refer to any *proof* of its claims of a "*quid pro quo*" or "deal" between the Campaign and Russia. Rather, the Defamatory Article selectively refers to previously-reported contacts between a Russian lawyer and persons connected with the Campaign. The Defamatory Article, however, claims that these contacts must have resulted in a *quid pro quo* or a deal, and does not acknowledge that, in fact, there had been extensive reporting, including in the *Times*, that the meetings and contacts that the Defamatory Article refers to did **not** result in any *quid pro quo* or deal between the Campaign and Russia, or anyone connected with either of them. *Id.* ¶ 10.

The *Times*' story is false. The falsity of the story has been confirmed by Special Counsel Robert Mueller's Report on the Investigation into Russian Interference in the 2016 Presidential Election released on or about April 18, 2019 (the "Mueller Report"), and many other published sources, which concluded that there was no conspiracy between the Campaign and Russia in connection with the 2016 United States Presidential Election, or otherwise. Among other things, there was no "deal," and no "*quid pro quo*," between the Campaign or anyone affiliated with it, and Vladimir Putin or the Russian government. *Id.* ¶ 11.

Extensive information, including stories in the *Times* published before the Defamatory Article, had put the *Times* and the world on notice that there was no conspiracy between the Campaign and the Russian government, and there was no "*quid pro quo*" or "deal" between them. Moreover, extensive information, including stories in the *Times* published before the Defamatory Article, established that, at most, there had been isolated contact between individual Russians and some persons associated with the Campaign, which did **not** result in anything remotely similar to a "deal" or "*quid pro quo*." These prior statements in the *Times* included, among others:

a. On July 9, 2017, the *Times* published an article which confirmed that, in fact, Russian lawyer Natalya Veselnitskaya, who has been alleged to have met with individuals connected with the Campaign in 2016, had no meaningful information about Hillary Clinton to provide to attendees of the meeting. The *Times* further reported Ms. Veselnitskaya's statement that she never worked on behalf of the Russian government.

b. On July 11, 2017, the *Times* reported in an article that Ms. Veselnitskaya's statements at the meeting were described by attendees as "vague, ambiguous, and mak[ing] no sense," "generic" and "inane nonsense."

c. On September 7, 2017, the *Times* reported Donald Trump, Jr.'s statement that the

meeting "provided no meaningful information" and that he was "adamant" that he did not collude with the Russian government.

d. On May 16, 2018, the *Times* reported that Ms. Veselnitskaya was disappointed that her meeting with associates of the Campaign did not result in a commitment to relax sanctions against Russia. The *Times* also reported that a second meeting with Ms. Veselnitskaya did not take place. *Id.* ¶ 13.

III. PROCEDURAL HISTORY

On February 26, 2020, the Campaign filed this lawsuit against the *Times*, alleging a single claim of defamation. On July 9, 2020, the *Times* filed a motion to dismiss the Complaint.

IV. THE MOTION SHOULD BE DENIED

A. Legal Standard on a Motion to Dismiss

"[A] motion to dismiss under CPLR 3211(a)(1) obliges the court to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory.... Dismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff's factual allegations..., and conclusively establishes a defense to the asserted claims as a matter of law." *Amsterdam Hospitality Group v. Marshall-Alan Assocs.*, 120 A.D.3d 431, 433 (1st Dep't 2014) (citations omitted).

B. The Campaign Has Stated a Claim for Defamation

"The elements [of a defamation claim] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard[1], and, it must either cause special harm or constitute defamation per se." *Dillon v. City*

[1] The Campaign does not contest that it must satisfy the heightened "actual malice" standard.

of New York, 261 A.D.2d 34, 38 (1st Dep't 1999). "In evaluating whether a cause of action for defamation is successfully pleaded, [t]he words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader...." *Id.*

1. The Defamatory Statements Are Not Protected Opinion.

Under New York law, the opinion rule has been summarized as follows:

> "The key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact. In making this inquiry, courts cannot stop at literalism. The literal words of challenged statements do not entitle a media defendant to 'opinion' immunity or a libel plaintiff to go forward with its action. In determining whether speech is actionable, courts must additionally consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person."

Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270, 1273-74 (N.Y. 1991).

Under this definition, the statements are not opinion. The Complaint centers around a factual claim—that there was a "deal", a *quid pro quo*, between the Campaign and the Russian government, in the 2016 election. *Merriam-Webster's Dictionary*, defines *quid pro quo* as "something given or received for something else[;] *also* : a deal arranging *a quid pro quo*") at https://www.merriam-webster.com/dictionary/quid%20pro%20quo. The statements at issue in the Defamatory Article were not an opinion. Whether such a "deal" or "*quid pro quo*" took place is a matter of historical fact: either it happened, or it did not happen. A reasonable person reading the Defamatory Article would conclude that Frankel was making the factual claim that it did happen. But in reality, the statement was false—it did not happen.

To understand that this is a factual claim, it is useful to contrast it with statements that would constitute opinions. For instance, had Frankel opined that the Campaign was "too close to Russia", or that administration policy was "insufficiently tough on Russia," or that the Russian government "wanted" President Trump elected, any of those things would constitute opinions. All of them are too vague to constitute a factual claim for purposes of defamation liability: What is "too close"? What is "insufficiently tough"? What does it mean that a "government" "wants" an election result?

Importantly, notwithstanding all of the rhetoric in the *Times* motion, nobody is contending that the *Times* is not permitted to publish pieces expressing negative opinions about the President of the United States or his Campaign. But the Defamatory Article does not merely do that. It makes a *factual* contention. It says there *was* a deal. It says there *was* a *quid pro quo*. It says there *was* an exchange. That is not a matter of opinion. These are statements of fact, and as such, the opinion rule does not apply to protect the statements from a defamation claim.

The *Times*' argument, in response, is to point the Court to everything *else* Frankel wrote in the Defamatory Article, as well as the label of "opinion" that was placed on the piece. However, while the *Times* is correct that statements in a libel case must be read in context, that does not mean that so long as a publication contains *other* material that constitutes opinion, the writer gets a free pass to write whatever false factual statements he wishes to. That is not the law.

In *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235 (1991), the Court of Appeals rejected the *Times*' key claim, stating that "speech earns no greater protection simply because it is labeled 'opinion'". *Id.* at 243. "We emphasize that an article's appearance in the sections of a newspaper that are usually dedicated to opinion does not automatically insulate the author from liability for defamation. Despite our firm commitment to encouraging the robust exchange of

ideas through these and similar media, **we have never suggested that an editorial page or a newspaper column confers a license to make false factual accusations** and thereby unjustly destroy individuals' reputations." *Brian v. Richardson*, 87 N.Y.2d 46, 52 (1995) (emphasis added).

Instead, the *Moor-Jankowski* decision says that to determine whether something is fact or opinion, courts should rely on the test set out in *Steinhilber v. Alphonse*, 68 N.Y.2d 283 (1986). *See Moor-Jankowski*, 77 N.Y.2d at 252 ("[T]he standard articulated and applied in *Steinhilber* furnishes the operative standard in this State for separating actionable fact from protected opinion.").

The *Steinhilber* standard is a four-part test: "The four factors are: (1) an assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; (2) a determination of whether the statement is capable of being objectively characterized as true or false; (3) an examination of the full context of the communication in which the statement appears; and (4) a consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." 68 N.Y.2d at 292 (internal quotation omitted).

Under the *Steinhilber* standard, the Campaign has pleaded a sufficient defamatory factual statement and is entitled to proceed to discovery. First, whether or not there was a deal, a *quid pro quo*, an exchange, has a precise meaning that is readily understood by readers. It is not in any way vague. It is entirely distinguishable from, for instance, a situation where Russia allegedly took unilateral actions to intervene in the election but there was no agreement between Russia and the Campaign (which is what the Mueller Report claimed to have occurred).

Second, whether there was such a transaction between the Campaign and the Russian

government is an issue that is capable of being objectively characterized as true or false. Either the two purported parties entered into such a transaction, or they did not.

This is confirmed in the case law. In *Martin v. Daily News L.P.*, 121 A.D.3d 90, 100 (1st Dep't 2014), the court held that a newspaper opinion column, headlined "Corruption" and accusing a judge of being corrupt and taking payoffs to decide cases, made factual claims and was not protected by the opinion rule.

Coliniatis v. Dimas, 848 F. Supp. 462 (S.D.N.Y. 1994). In *Coliniatis*, the publication at issue (a letter that was later quoted by a periodical) alleged that an airline executive entered into a kickback transaction with respect to a contract signed on behalf of the airline. The court rejected the argument that the publication was protected opinion under New York law, and specifically rejected the claim—similar to that made by the *Times* here—that because the publication contained a call for further investigation alongside its accusation of a kick-back transaction, it was stating an opinion: "Coliniatis does not contend that he was defamed by the Dimas Defendants' opinion as to the necessity for further investigation. Rather, the complaint asserts that the Dimas Defendants implied that plaintiff was engaged in an illegal fraud and 'kick-back; scheme... As the complaint alleges that these statements were and are wholly false and defamatory..., the Court cannot dismiss the complaint on the ground that the Letter is a protected opinion." *Id.* at 469 (internal quotation omitted).

Third, the broader context of the communication does not refute that this was a factual statement. Notably, the *Times*, in arguing to the contrary, twists the meaning of its own publication. The *Times* would like this Court to believe that the Defamatory Article *did not* really allege a deal, *quid pro quo* or exchange between the Russian government and the Campaign, but rather, it merely said that the Russian government assisted the Campaign with the *hope* of favorable U.S. policies should Donald Trump be elected. However, this is the *exact*

opposite of what the Defamatory Article actual claimed. Thus, the *Times* is effectively asserting that the context of the Defamatory Article changes the entire meaning of the piece, from what it actually claimed (that there was a "real *quid pro quo*"), into the opposite (that there was in fact no agreement between the Campaign and Russia).

The context that the *Times* argues should immunize the Defamatory Article, instead just shows that the *Times* was, and still is, being dishonest, by denying that it published the very claim that it clearly published. By way of analogy: if a newspaper column claimed that someone paid an employee to commit an assault and battery, that would be a factual statement, and if false, a defamatory one. Imagine, however, if a column were headlined "Boss Paid Employee to Commit Battery". Would that statement be turned into non-defamatory opinion if the text of the piece includes the statement that the employee received compensation for his legitimate work for his boss? Of course not—paying the employee for his work is irrelevant to the issue of whether the employer also paid him to commit an assault, and to hold otherwise would authorize publishers to tell brazen lies in their headlines, as the *Times* did here, so long as they include some unrelated, more supportable claims in the text.

A classic example of this problem arose out of the famous O.J. Simpson murder case. Brian "Kato" Kaelin was Simpson's houseguest and became a minor celebrity as a result of his role as a witness in the case. In *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998), a newspaper published a piece about how Kaelin may be under investigation for giving perjured testimony to exonerate Simpson; however, the headline of the piece read "KATO KAELIN... COPS THINK HE DID IT!". The *Globe* made the same argument the *Times* makes here: that if you read the piece, and take it as a whole, it was clear that they were saying he was being investigated for perjury, not for the murders. Nonetheless, the court held that there was a *triable issue of fact* as to whether the headline made a false and defamatory statement of fact. *Id.*

1039-40.

The *Times*' action here is just a slightly more highbrow version of exactly what the *Globe* tabloid did to Kato Kaelin—a sensationalistic headline that falsely accuses the Campaign of making a deal with the Russian government, atop a piece that discusses the unrelated claim that the Russians attempted to assist the Campaign due to their own foreign policy goals.

Fourth, the broader social context does not change the fact that a column alleging a *quid pro quo* between the Russian government and the Campaign makes a factual claim rather than expressing an opinion. As the *Times* admits in its motion, the factual background of this piece was the Mueller investigation, which found that there was insufficient evidence to establish a conspiracy between the Campaign and the Russian government. In this context, a reasonable trier of fact can read the Defamatory Article as claiming: it does not matter what Mueller concludes, there really was a *quid pro quo* deal between the Campaign and the Russian government. In other words, a reasonable reader would conclude that a piece claiming that there was an "overarching deal" and a "real *quid pro quo*" was telling readers that the *Times* had the facts and could report that such a transaction took place.

The four factor test of *Steinhilber* therefore is met. The Campaign has pleaded a false statement of fact.

The *Times* argues that *quid pro quo* and "deal" are terms with multiple meanings, citing cases involving *other* terms that have multiple meanings. This is a curious argument: what exactly is the other meaning of *quid pro quo* besides an exchange of one thing for another. Is the *Times* arguing that "deal" instead means "no deal"?

The cases cited by the *Times* involve words that really do have multiple meanings. For instance, "blackmail", at issue in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), was clearly used by the speaker to mean hardball negotiating tactics, not the actual crime

of blackmail. *Melius v. Glacken*, 94 A.D.3d 959, 960 (2d Dep't 2012) (accusation of "extortion" did not literally accuse the plaintiff of a crime), cited by the *Times*, is distinguishable for the same reason.

McKesson v. Pirro, No. 160992/2017 (N.Y. Supr. Ct. N.Y. County Mar. 25, 2019), involved a statement by a television host that the leader of a protest which became violent "directed the violence." She was paraphrasing a legal complaint—and thus her statement was protected by the fair report privilege and the discussion of opinion was *dicta*. In any event, "directed the violence" was an opinion because it had the alternative meaning of "directing a protest where violence occurred," which Pirro opined made the plaintiff responsible for the violence. *Id.*, Slip. Op. at 20. By contrast, here, the *Times* is attempting to define "deal" as its opposite: no deal.

Egiazaryan v. Zalmayev, 880 F. Supp. 2d 494, 510 (S.D.N.Y. 2012), involved vague claims that the plaintiff was "responsible for war crimes or contributed to human rights violations." This was held to be opinion; again, this is not comparable to a definitive statement that there was a "deal", *i.e*., a transaction between the Campaign and Russia.

Springer v. Almontaser, 75 A.D.3d 539, 540–41 (2d Dep't 2010), involved a political candidate saying that she was "stalked and harassed." The court held that these terms had figurative as well as literal meanings and were vague and could not support a defamation action. Again, that situation is not comparable to changing the meaning of "deal" to mean "no deal".

Brian, 87 N.Y.2d at 53-54, held that a piece stating that a software theft scandal was a "high tech Watergate" and that the plaintiff was "linked" to the scheme did not make sufficiently specific claims to constitute fact claims rather than opinion. Again, contrast these vague descriptions to claiming there was a transaction between the Campaign and Russia, when in fact there was no transaction.

The cases that are on point are *Martin* and *Coliniatis*. An allegation that there was a transaction between two parties is a definite, factual claim, not a word or description that can have multiple meanings.

Next, the *Times* argues that the Defamatory Article merely speculates about the Campaign's motives, which is usually held to be a form of opinion, citing *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) and *Jacobus v. Trump*, 55 Misc.3d 470 (N.Y. County Supr. Ct. 2017). However, this is a mischaracterization of the Defamatory Article—the claim that there was a deal between the Campaign and Russia is *not* an issue of motive; it is a factual claim about an alleged transaction. The Defamatory Article did not merely say something on the order of "Russia wanted to help the Trump campaign" or vice-versa, either of which (though not well-founded on the facts) might be a protected opinion about an organization's motivations. The statement at issue went beyond that and claimed there *was* a transaction between the two parties.

2. The Campaign Has Adequately Pleaded that the Statements Were "Of And Concerning" the Campaign.

The *Times* claims that the Complaint does not sufficiently allege that the statements were "of and concerning" the Campaign. Most importantly, the *Times* argument is not cognizable on a motion to dismiss. "On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must *accept the facts alleged in the complaint as true*, accord the plaintiff the benefit of *every possible favorable inference*, and determine *only* whether the facts as alleged fit within any cognizable legal theory.... Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claim,' is *irrelevant* to the determination...." *Porcelli v. Key Food Stores Co-op*, 44 A.D.3d 1020, 1021 (2d Dep't 2007) (emphasis added).

The Complaint alleges that the statements made by the *Times* are of and concerning the Campaign. That allegation is certainly more than plausible—the parties to the "deal" posited by the Defamatory Article are the Campaign and the Russian government. Moreover, the *Times* essentially admits that the Defamatory Article *does* expressly refer to the "Trump campaign" as having entered into the *quid pro quo*. At the very least, the Campaign is entitled to a liberal construction that an article that expressly identifies the "Trump campaign" is, in fact, discussing the Trump campaign. This issue is more than sufficient to go to discovery.

The cases cited by the *Times* are distinguishable. For instance, *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82 (2016) ("*Three Amigos*"), is the *exact opposite* of this case. In *Three Amigos*, the Court of Appeals held that a complaint failed to allege the "of and concerning" element in a suit by employees of a company, because the defamatory statements discussed the company and did not single out individual employees. The Campaign *followed* the holding of *Three Amigos* and sued as an entity. *Lazore v. NYP Holdings, Inc.*, 61 A.D.3d 440, 440 (1st Dep't 2009), is inapplicable here for the same reason: it involved an individual plaintiff suing based on defamatory statements of and concerning an Indian tribe. This is the same as *Three Amigos*: the entity must properly sue, not the individuals. *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006), also is distinguishable for the same reason.

Schliserman v. PA Consulting Group Inc., No. 601631/04 (N.Y. County Supr. Ct. Dec. 18, 2013), an *unpublished* trial court order, involved a summary judgment motion, not a motion to dismiss, and thus its statements about what a plaintiff must "prove" on the "of and concerning" issue are of no relevance to this stage of this proceeding. This Court should allow the Campaign's case to proceed to discovery, and the *Times* can then challenge the sufficiency of the evidence in a summary judgment motion.

Carlucci v. Poughkeepsie Newspapers, 57 N.Y.2d 883, 885 (1982), arose out of an article

that "never mentioned" the entity plaintiff, only individuals. This, of course, is distinguishable: while the *Times* attempts to deflect from this fact, it concedes the Defamatory Article mentions the "Trump campaign," which is the Plaintiff herein. (The line of cases including *Cohn v. National Broadcasting Co.*, 67 A.D.2d 140, 146 (1st Dep't 1979), are distinguishable for the same reason: these cases alleged entities that were "never mentioned" in the alleged defamatory publications. No matter how many cases the *Times* cites on this point, it cannot escape the fact that its Defamatory Article *did* discuss the Trump campaign.)[2]

3. The Campaign Has Sufficiently Alleged Actual Malice

The standard for pleading the federal constitutional issue of actual malice is stated in *Biro v. Conde Nast*, 807 F.3d 541, 545 (2d Cir. 2015). In *Biro*, the court held that "a defendant in a defamation action will rarely admit that he published the relevant statements with actual malice." *Id.* Accordingly, all that is required is that the complaint allege "sufficient facts to give rise to a plausible inference of actual malice" by "alleging 'enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of' actual malice." *Id.* at 543, 546. Examples that meet this minimal standard include alleging there were obvious reasons to doubt the veracity of a source or the accuracy of that source's reports, or alleging that the statements were fabricated by the defendant if the defendant provides no source for the statements or the purported source denies the statement. *Id.* at 545; *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

Actual malice may be inferred at the pleadings stage from allegations that refer to the

[2] The *Times* falls back on the argument that because the Defamatory Article may have defamed individuals as well, it could not have been talking about the Campaign. This, of course, is a *non sequitur*.

nature and circumstances of the alleged defamation. *Id.* at 546. Actual malice "simply means the statement was 'made with knowledge that it was false or with reckless disregard of whether it was false or not'." *Palin v. New York Times Co.*, 940 F.3d 804, 816 (2d Cir. 2019) (quoting *Church of Scientology International v. Behar*, 238 F.3d 168, 174 (2d. Cir. 2001)). A complaint sufficiently alleges actual malice if, "given the facts alleged, the assertion that [Defendant] knew the statement was false, or acted with reckless disregard as to whether the statement was false, is plausible." *Id.* Further, the allegations must be taken as a whole. While any single fact, standing alone, might not necessarily constitute actual malice, the cumulative impact of multiple facts together certainly can. *See* Rodney A. Smolla, 1 LAW OF DEFAMATION §3:45 (2d ed. 2019) ("Actual malice may be established…through the accumulation of facts that, which individually not sufficient to establish actual malice, as a composite are sufficient to satisfy First Amendment standards"); *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 183 (2d Cir. 2000) ("Evidence of ill will *combined with* other circumstantial evidence indicating that the defendant acted with reckless disregard of the truth or falsity of a defamatory statement may also support a finding of actual malice.") (emphasis added).

Accepting all of the factual allegations as true and drawing all inferences in the Campaign's favor, the Campaign's allegations easily plead actual malice. The Campaign alleges that the Defamatory Article alleges a deal when the matter was thoroughly investigated by Special Counsel Mueller, as well as by the *Times* itself, and no sufficient evidence of such a deal was found. Thus, the *Times* acted with reckless disregard for the truth when it published the Defamatory Article which says, definitively, that there *was* such as deal between Russia and the Campaign.

The *Times* argument in response, essentially, is that there have been reports (including in the Mueller Report) of "contacts" between the Campaign and the Russian government, and also

reports of Russian intervention in the 2016 elections. However, the *Times* never explains how this bears on whether the statement that there was a *transaction* between the Russian government and the Campaign was made with actual malice. The *Times*' argument is akin to arguing that if there is evidence that a person has met an infamous criminal, a newspaper's report that the plaintiff *conspired* with the criminal could not satisfy the actual malice standard as a matter of law. This makes no sense. The two factual claims are completely different.

The gravamen of this action is precisely that the *Times* knew that there was insufficient evidence of any sort of a deal, *i.e.*, transaction between Russia and the Campaign, as opposed to a few isolated "contacts" and some unilateral actions by the Russian government. However, the *Times* went ahead and alleged a *quid pro quo* deal, notwithstanding that the *Times* was aware of the falsity of that statement, because the management of the *Times* hates the Trump campaign and wanted to injure it, and was upset at Mueller for not finding what the *Times* wanted Mueller to find: *evidence* of a deal between the Campaign and Russia.

Under these circumstances, the *Times*' defense that Mueller found that there was evidence of some "contacts" and of unilateral actions by the Russian government, but that Mueller could not substantiate a deal, far from disproving actual malice, actually establishes it. The entire point of the Defamatory Article, as pleaded by the Campaign, was to tell the readers that the alleged deal that Mueller was unable to substantiate did, in fact, occur.

The *Times* argues the straw man that evidence of ill will, alone, does not constitute actual malice, and further tries to focus the actual malice issue on the allegation in the Complaint that the *Times* did not contact the Campaign for a comment. However, the Complaint does not merely allege that the *Times* is biased or that no comment was sought out—the Complaint sets forth a factual theory that the *Times* knew that there was no *quid pro quo* deal and published a piece that claimed there was one anyway. The Campaign is entitled to all inferences in favor of

this pleading, which alleges actual malice even under the strict standard the *Times* argues for.

C. There Is No Basis for Sanctions.

The *Times* argument for sanctions borders on the frivolous. As can be seen in this memorandum, even if the Court should disagree with the Campaign's arguments, they are clearly supported by reasonable interpretations of case law and in no way come close to meeting the high threshold to support a sanctions motion.

N.Y.C.R. § 130-1.1 allows for sanctions for filing a pleading *only* when "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." (2) and (3) are not even at issue; the *Times* has adduced no evidence of delay, harassment, or any false factual statements in the pleadings. As for prong (1), the arguments in this Opposition are not "completely without merit in law". Rather, they have substantial merit.

The standard of CPLR § 8303 is essentially similar, requiring a pleading that is either intended to delay or harass, or a legal or factual claim that not only is completely inconsistent with the law or the facts, but which is not supportable as a good faith argument to extend, modify, or reverse existing law. Again, there is no way that the arguments in this Opposition can be described in that manner.

The *Times*' sanctions gambit has been condemned in previous court opinions. For instance, in *Rakofsky v. Washington Post*, 2013 WL 1975654 at *16 (N.Y. County Supr. Ct. Apr. 29, 2013), the Court rejected the *Post*'s sanctions motion, even though it held the *Post*'s piece to be protected, non-defamatory expression, stating the following: "[T]here is a fine legal line for interpretation of alleged actionable defamatory statements of fact as opposed to non-actionable

pure opinion statements. In this regard, plaintiffs made colorable legal arguments that some of the alleged defamatory material included actionable statements of fact or 'mixed opinion' that may have been sufficient to survive the dismissal motions."

Sanctions awards are reserved for those actions that are so "completely without merit as to be frivolous." *W.J. Nolan & Co. v. Daly*, 170 A.D.2d 320, 321 (1st Dep't 1991).

The cases cited by the *Times* are distinguishable. *Morse v. Schwartz*, 179 Misc. 2d 112, 114 (Ulster County Supr. Ct. 1998), involved a plaintiff who sued a citizen for petitioning the town government regarding a zoning issue. There was no legal basis for the suit, as petitioning a local government is completely privileged. Thus, sanctions were appropriate. *Patane v. Griffin*, 164 A.D.2d 192 (3d Dep't 1990), is similar: the plaintiff sued a private citizen for defamation because the citizen attempted to petition a local government to investigate a businessman. Finally, *Rosenman Colin Freund Lewis & Cohen v. Edelman*, 165 A.D.2d 533 (1st Dep't 1991), involved a $500 sanction for repeatedly filing motions for reargument without stating the grounds for the motion. The *Times* has not identified *any* case where a sanction was awarded where there was a legitimate dispute as to whether a statement constituted one of fact versus one of opinion. The *Times* is attempting to grossly misuse the sanctions statutes, and should be admonished accordingly.

V. CONCLUSION

The Court should deny the *Times*' motion to dismiss in its entirety.

Dated: August 14, 2020

Respectfully submitted,

By: */s/ Charles J. Harder*
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AFFIRMATION OF SERVICE

Charles J. Harder, being duly sworn, deposes and says under penalty of perjury: I am over 18 years of age and am not a party to this action. I am an attorney duly authorized to practice before the courts of New York State. On the 14th day of August 2020, I served the following papers in Donald J. Trump for President, Inc. v. The New York Times Company, Index No. 152099/2020:

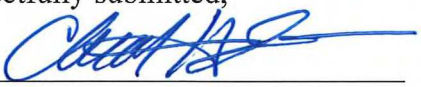
OPPOSITION TO DEFENDANT THE NEW YORK TIMES COMPANY D/B/A *THE NEW YORK TIMES*' MOTION TO DISMISS

By agreement of the parties, service was made by electronic mail on the following attorney:

David E. McCraw
The New York Times Company Legal Department
620 Eighth Avenue
New York, NY 10018
Phone: (212) 556-4031
Facsimile: (212) 556-4634
Email: mccraw@nytimes.com
Attorneys for Defendant

Dated: August 14, 2020

Respectfully submitted,

By: 
Charles J. Harder, Esq.
HARDER LLP

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

CALIFORNIA ACKNOWLEDGMENT CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of LOS ANGELES }

On AUGUST 14, 2020 before me, MARCIE LEIGH MORENO, NOTARY PUBLIC,
Date *Here Insert Name and Title of the Officer*

personally appeared CHARLES J. HARDER
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

MARCIE LEIGH MORENO
Notary Public - California
Los Angeles County
Commission # 2256448
My Comm. Expires Sep 25, 2022

Place Notary Seal and/or Stamp Above

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____
Signature of Notary Public

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