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

DONALD J. TRUMP,

Plaintiff,

-against-

MARY L. TRUMP, THE NEW YORK TIMES COMPANY d/b/a *The New York Times*, SUSANNE CRAIG, DAVID BARSTOW, RUSSELL BUETTNER, JOHN DOES 1 THROUGH 10, and ABC CORPORATIONS 1 THROUGH 10,

Defendants.

Index No. 453299/2021

Oral Argument Requested

Preference Requested Pursuant to CPLR 3211(g)

DEFENDANTS THE NEW YORK TIMES COMPANY, SUSANNE CRAIG, DAVID BARSTOW, AND RUSSELL BUETTNER'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO CPLR 3211(a)(1), (a)(7), and (g)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Defendants The New York Times Company ("The Times"), Susanne Craig, David Barstow, and Russell Buettner (collectively, "The Times Defendants") respectfully submit this Memorandum of Law in support of their Motion to Dismiss the Complaint pursuant to CPLR 3211(a)(1), (a)(7), and (g) (the "Motion"). For the reasons set forth below, the Court should grant the Motion with prejudice and, based on New York's newly amended anti-SLAPP law, order Plaintiff Donald Trump to pay The Times Defendants' fees and costs spent defending against Trump's frivolous claims.

PRELIMINARY STATEMENT

In this lawsuit, former president Donald Trump seeks to punish The New York Times and its journalists for reporting truthful but unflattering information about him. The First Amendment and New York law prohibit this blatant misuse of the judicial system to chill constitutionally protected speech about matters of undisputed public concern. All of Trump's claims fail as a matter of law.

Trump's overarching narrative is that a Times reporter caused his niece, Mary Trump, to take 20-year-old tax and financial documents held by her lawyer and disclose them in violation of a 2001 settlement agreement (the "Settlement Agreement"). The Times then used those documents to publish a 40-page "scathing report" (the "Article") that found Trump had "participated in dubious tax schemes during the 1990s, including instances of outright fraud." Compl. ¶¶ 68-70. None of Trump's claims dispute the truth of any statements made in the Article. Instead, Trump alleges that The Times Defendants' interaction with Mary renders them liable for direct and indirect tortious interference with contract, unjust enrichment, and negligent supervision. He demands $100 million in damages, but fails to identify any harm that he actually incurred.

As a factual matter, the sources incorporated by reference into the Complaint contradict this narrative. Most significantly, the plain language of the Settlement Agreement did not bar

Mary from providing documents for a story about Trump's finances. The Complaint also selectively quotes from Mary's book but omits key facts, including that she owned the documents she gave to The Times and had received permission to take a copy of them.

Trump's claims against The Times Defendants also fail as a matter of law. Courts have long recognized that reporters are entitled to engage in legal and ordinary newsgathering activities without fear of tort liability. That is all that the Times reporters did here by speaking to sources, seeking information, and gathering relevant documents. These actions are at the very core of protected First Amendment activity, as the First Department recently made clear when it dismissed a similar tortious interference claim against reporters who were accused by a hedge fund of inducing the breach of a non-disclosure agreement. *Highland Cap. Mgmt., L.P. v. Dow Jones & Co.*, 178 A.D.3d 572, 574 (1st Dep't 2019) (holding that conduct "incidental to the lawful and constitutionally protected process of news gathering and reporting" is protected by the First Amendment (citing *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001))).

While Trump's claims fail under any standard for the reasons set forth below, dismissal is especially warranted because this is a Strategic Lawsuit Against Public Participation ("SLAPP") that challenges The Times Defendants' right to publish articles on a matter of public concern. In November 2020—expressly motivated by Trump's prior use of frivolous litigation to attempt to silence criticism—the New York State legislature enacted new legislation to discourage SLAPP suits like this one. Under this newly expanded anti-SLAPP law, a plaintiff that files litigation to chill free speech must prove that their claims have "a substantial basis in law" or a "substantial argument" to change existing law—a standard that Trump cannot possibly meet—and pay defendants' attorneys' fees and costs if they fail to do so. *See* CPLR 3211(g); N.Y. Civ. Rights Law § 70-a. Such cases are also entitled to a calendar preference to ensure they are disposed of

expeditiously. CPLR 3211(g). Accordingly, this case should be promptly dismissed, and Trump should be ordered to pay The Times Defendants' costs and attorneys' fees.

STATEMENT OF FACTS[1]

Donald Trump is the former President of the United States. Compl. ¶ 4. Mary Trump is his niece. *Id.* ¶ 2.

A. Mary Trump Objects to the Probate of Her Grandparents' Estates.

In June 1999, Frederick C. Trump—Donald Trump's father and Mary Trump's grandfather—passed away. Compl. ¶ 15. Frederick's wife, Mary Anne Trump, died the following year. *Id.* ¶ 19.

Disputes soon arose between various members of the Trump family regarding Frederick and Mary Anne's estates (the "Estate Disputes"). *Id.* ¶¶ 15-21. Mary Trump, joined by her brother (Fred Trump III, individually and on behalf of his son, William Trump), his wife, and their mother (collectively, the "Objectors"), filed objections to the probate of both estates against co-executors Donald Trump, Robert Trump, and Maryanne Trump Barry (collectively, the "Proponents"). *Id.* ¶ 17; Ex. A. The Objectors also filed litigation seeking to reinstate the health insurance that the Proponents cut off in retaliation for their objections to the probate proceedings. Compl. ¶ 18.

On April 10, 2001, the various Trump parties executed the Settlement Agreement to resolve the Estate Disputes.[2] Ex. A. The Settlement Agreement purported to resolve the two probate proceedings and the related insurance litigation. *Id.* at 5. It also contained limited confidentiality provisions. *Id.* at 5-9. As relevant to the claims against The Times Defendants, that provision

[1] The facts set forth herein are taken from the Complaint, the documents incorporated therein, and judicially noticeable sources.

[2] The Settlement Agreement is currently the subject of separate litigation in which Mary Trump alleged that it was procured by fraud. *See Trump v. Trump*, No. 654698/2020 (Sup. Ct., N.Y. Cty. filed Sept. 24, 2020).

stated that the Objectors and their counsel may not "assist or provide information" for any article "concerning their litigation or relationship with the 'Proponents/Defendants' or their litigation involving the Estate of FRED C. TRUMP and the Estate of MARY ANNE TRUMP." *Id.* ¶ 2. The Settlement Agreement did not otherwise bar the disclosure of documents from the Estate Disputes, nor did it require that any documents remain confidential other than the Settlement Agreement itself.

B. The New York Times Publishes a 2018 Article About Trump's Tax Evasion.

Donald Trump's financial and tax dealings have long been the subject of intense media coverage, including by The Times. Compl. ¶ 36; *see also, e.g., Cruz, Rubio Challenge Trump on Taxes, Release Summaries of Recent Filings*, Fox News (Nov. 30, 2016), https://www.foxnews.com/politics/cruz-rubio-challenge-trump-on-taxes-release-summaries-of-recent-filings. While running for President, Trump repeatedly promised to disclose his tax returns.[3] His failure to do so—even after his election—fueled speculation that the tax returns would contradict his public statements about his finances. *Id.*

Susanne Craig, David Barstow, and Russell Buettner (the "Reporter Defendants") were Times reporters who covered Trump's financial affairs for several years.[4] Compl. ¶¶ 7-9. In 2017,

[3] *See, e.g.*, Today, *Donald Trump on New Hampshire Win (Full Interview)*, YouTube, at 3:45-51 (Feb. 10, 2016), https://youtu.be/vQal9FMbkcw (Q: "Real quickly. When are you going to release your tax returns?" Trump: "Probably over the next few months. They're being worked on right now."); *Meet the Press*, NBC News (Jan. 24, 2016), https://www.nbcnews.com/meet-the-press/meet-press-january-24-2016-n503241 (Q: "Will you release any of your tax returns for the public to scrutinize?" Trump: "Well, we're working on that now. I have very big returns, as you know, and I have everything all approved and very beautiful and we'll be working that over in the next period of time, Chuck. Absolutely."); Virgin Media Television, *Colette Fitzpatrick Meets Donald Trump!*, YouTube, at 1:29-1:45 (May 20, 2014), https://www.youtube.com/watch?v=Hg-5KEt1Abg ("If I decide to run for office, I'll produce my tax returns, absolutely. And I would love to do that.").

[4] David Barstow is a former Times reporter who was employed by The Times when the events in the Complaint occurred.

Craig approached Mary Trump to seek information for "a very important story about [the Trump] family finances." *Id.* ¶ 39. Mary initially declined to speak with Craig. *Id.* ¶ 40. Craig also sent Mary the letter quoted in paragraph 43 of the Complaint, stating that she believed Mary had documents that "could help 'rewrite the history of the President of the United States.'" *Id.* ¶ 43; Ex. B, at 186.

Sometime after the visit from Craig, Mary decided to call Craig because, in her words, she became disturbed while watching "our democracy disintegrating and people's lives unraveling because of [her] uncle's policies." Ex. B, at 186. Mary and Craig discussed documents from the Estate Disputes that might remain in Mary's client file at the offices of her attorneys, the Farrell Fritz law firm. *Id.* To make sure Mary's identity and communications about potential wrongdoing by the president stayed private and secure, Mary and Craig used anonymous cell phones. Compl. ¶¶ 46-47; Ex. B, at 187. Mary initially considered the possibility that she might have to "smuggle" these documents out of her attorney's office, but instead received permission from her attorneys to take an extra copy of them. Ex. B, at 187. The Complaint does not make any allegations about interactions between Mary and either of the other two Times reporters, defendants Barstow and Buettner.

On October 2, 2018, The Times published the Article.[5] Ex. C. It was written by the Reporter Defendants and titled, "Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father." *Id.*; Compl. ¶ 67. The Article's subject matter was described immediately below the headline: "The president has long sold himself as a self-made billionaire, but a Times

[5] Although the Complaint mentions a 2016 article about Trump's tax returns, that article does not appear to form the basis of any claims—nor could it, as any such claims would be time-barred. *See* CPLR § 214.

investigation found that he received at least $413 million in today's dollars from his father's real estate empire, much of it through tax dodges in the 1990s." Ex. C, at 2.

The more than 13,000-word article explained how Frederick Trump's vast business empire supported Donald Trump's extravagant lifestyle and numerous failed real estate investments. Ex. C. It also detailed the various methods that Donald Trump and his parents used to "dodge taxes," including "set[ting] up a sham corporation to disguise millions of dollars in gifts"; "tak[ing] improper tax deductions worth millions more"; and "formulat[ing] a strategy to undervalue his parents' real estate holdings by hundreds of millions of dollars on tax returns." *Id.* at 2; Compl. ¶¶ 68-70. This reporting relied on a variety of sources, including "interviews with Fred Trump's former employees and advisors and more than 100,000 pages of documents" that "include[d] documents culled from public sources" and "tens of thousands of pages of confidential records" that contained "more than 200 tax returns from Fred Trump his companies and various Trump partnerships and trusts." Ex. C, at 3-4.

C. Trump Sues The Times and Its Reporters.

On September 21, 2021, Trump filed this lawsuit. He brings four claims against The Times and the three Reporter Defendants: tortious interference, aiding and abetting tortious interference, unjust enrichment, and negligent supervision. Trump does not specify any pecuniary loss or identifiable harm, but nonetheless seeks at least $100 million in damages.[6]

For the reasons set forth below, the Motion should be granted, all of Trump's claims should be dismissed, and Trump should be ordered to cover The Times Defendants' legal fees and costs pursuant to N.Y. Civil Rights Law § 70-a.

[6] Trump and his businesses have filed a number of lawsuits in which he demands this exact sum—$100 million in damages—for a wide variety of legal claims dating as far back as 1973. *See, e.g.*, Counterclaim at ¶ 4, *United States v. Trump*, No. 73-c-1529 (E.D.N.Y. Dec. 12, 1973), available

LEGAL STANDARD

The New York Legislature substantially expanded the state's anti-SLAPP statute last year to impose a heightened burden on plaintiffs who file litigation designed to limit free speech. The law applies to suits, like this one, that target "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest." N.Y. Civ. Rights Law § 76-a(1)(a)(2); *see* Mem. of Law in Supp. of Def. Mary Trump's Mot. to Dismiss, No. 453299/2021, at 8-10 (Doc. No. 15) [hereinafter "Mary Trump Br."]. Once triggered, plaintiffs can avoid dismissal only if they establish that they have a "substantial basis in law" for their claims or "a substantial argument for an extension, modification or reversal of existing law." CPLR 3211(g)(1). When deciding a motion to dismiss a SLAPP suit, a court must grant preference in the hearing of the motion and may consider evidence extraneous to the complaint without contravening CPLR 3211(a)(7). CPLR 3211(g)(1)-(2) (a court deciding a CPLR 3211(g) motion "shall grant" a calendar preference and "shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based"). If a defendant prevails in securing dismissal of the case, it is entitled to seek reimbursement of its costs and attorneys' fees from the plaintiff, along with compensatory and punitive damages. N.Y. Civ. Rights Law § 70-a(1)(a).

The revised anti-SLAPP law was designed to apply to lawsuits just like this one, which Trump filed to punish The Times Defendants for reporting a true story that cast him in an

---

at https://www.clearinghouse.net/chDocs/public/FH-NY-0024-0013.pdf (bringing a defamation counterclaim against the United States for $100 million in a case challenging Trump's violations of the Fair Housing Act); Complaint at ¶ 87, *Mar-a-Lago, L.L.C. v. Palm Beach Cty.*, No. 22229762 (15th Jud. Cir., Palm Beach Cty. Jan. 6, 2015) (demanding $100 million from Palm Beach County for airplanes flying over a Trump-owned property); Complaint at ¶ 106(c), *VH Prop. Corp. v. City of Rancho Palos Verdes*, No. CV09-00298 (C.D. Cal. Jan. 14, 2009) (making $100 million demand in a California lawsuit related to a Trump golf course).

unfavorable light. *See* Mary Trump Br. at 8-10. In fact, Donald Trump's history of abusive litigation inspired the expansion of the law. After the bill was signed into law, one of its authors issued a press release stating:

> For decades, Donald Trump, his billionaire friends, large corporations and other powerful forces have abused our legal system by attempting to harass, intimidate and impoverish their critics with strategic lawsuits against public participation, or 'SLAPP' suits. This broken system has led to journalists, consumer advocates, survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them. Today, New York 'SLAPPs back' with our new legislation (S.52A/A.5991A) that expands anti-SLAPP protections, thereby strengthening First Amendment rights in New York State, the media capital of the world.

Press Release, Sen. Brad Hoylman, Legislature Passes Legislation to Crack Down on Frivolous "SLAPP" Lawsuits Used to Silences Critics (July 22, 2020), https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/trump-attacks-free-press-legislature-passes-senator-hoylman-and.[7] Unfortunately, despite the revised law, it appears Trump has continued his pattern of abusing the legal process in an attempt to silence and punish his critics.[8]

* * *

[7] *See also* Press Release, Sen. Brad Hoylman, Don't Let Jared and Ivanka Threaten Free Speech (Oct. 29, 2020), https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/senator-brad-hoylman-dont-let-jared-and-ivanka-threaten-free ("The Trump family has weaponized the threat of meritless lawsuits against those who would criticize them for decades. Strategic lawsuits against public participation—or SLAPP suits—are an abuse of our legal system that are intended to harass, intimidate, and bankrupt journalists, advocates, community organizers, and engaged citizens for exercising their constitutionally-protected right to free speech.").

[8] Trump's history of frivolous litigation has been the subject of substantial reporting. *See, e.g.*, James D. Zirin, Plaintiff in Chief: A Portrait of Donald Trump in 3,500 Lawsuits, at xi (2019) (analyzing 3,500 lawsuits involving Trump and describing how he "sued as a means of destroying or silencing those who crossed him" and "to make headlines, for the entertainment value, and to reinforce his power over others"); *Donald Trump: Three Decades, 4,095 Lawsuits*, USA Today, https://www.usatoday.com/pages/interactives/trump-lawsuits (last accessed Dec. 1, 2021).

This case can also easily be dismissed under the traditional standards set forth in the CPLR. A claim will be dismissed under CPLR 3211(a)(1) where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) (citations omitted). "Documentary evidence" consists of documents that are "unambiguous and of undisputed authenticity, that is, it must be essentially unassailable" and generally includes evidence such as contracts and judicial records. *Bath & Twenty, LLC v. Fed. Sav. Bank*, No. 2018-01155, 2021 WL 4888749, at *1-2 (2d Dep't Oct. 20, 2021).

Dismissal is equally warranted under CPLR 3211(a)(7), because Trump has failed to state a claim even if all the well-pleaded facts are accepted as true and all inferences are drawn in his favor. *NYU Hosps. Ctr. v. Mei Rong Huang*, No. 102832-2011, 2012 N.Y. Misc. LEXIS 209, *2 (Sup. Ct., N.Y. Cty. Jan. 11, 2012) (citing *EBC I, Inc. v Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005)). When deciding a motion under CPLR 3211(a)(7), the Court can take judicial notice of the existence of court filings and documents that are considered for their existence rather than their truth. *See, e.g., Sprewell v. NYP Holdings*, 1 Misc. 3d 847, 850 (Sup. Ct., N.Y. Cty. 2013) (taking judicial notice of the widespread publication of articles in defamation case). The Court may also consider those documents incorporated by reference into the Complaint, which here include the Settlement Agreement (Compl. ¶¶ 23-33), the passage in Mary Trump's book describing her interaction with Craig (Compl. ¶¶ 38-49), and the Article (Compl. ¶¶ 67-75). *See Greenberg v. Spitzer*, 155 A.D.3d 27, 44 (2d Dep't 2017) (holding that if a complaint does not attach the content on which it relies, or quote it in full, defendants may submit the content "to aid the court in determining whether the complaint states a cause of action"); *Revici v. Conf. of Jewish Material Claims Against Ger.*, 174 N.Y.S.2d 825, 827 (Sup. Ct., N.Y. Cty. 1958) (where a complaint fails

to attach documents but the parties rely on them for a motion to dismiss, "they will be deemed to be incorporated in the complaint by reference").

ARGUMENT

I. TRUMP'S CLAIMS FAIL BECAUSE THEY ARE BASED ON CONSTITUTIONALLY PROTECTED NEWSGATHERING.

Trump urges this Court to subject a news organization to tort liability based on the publication of truthful information that was legally obtained. Such a result is flatly prohibited by the First Amendment and New York law. That is why, as explained in more detail below, New York courts routinely dismiss claims seeking to hold the press liable for allegedly inducing a source to speak in violation of a confidentiality agreement. *See Highland Cap.*, 178 A.D.3d at 574 (affirming dismissal of a tortious interference claim based on a Wall Street Journal reporter allegedly inducing current and former employees to breach their non-disclosure obligations);[9] *Huggins v. NBC*, No. 119272/95, 1996 WL 763337, at *4 (Sup. Ct., N.Y. Cty. Feb. 7, 1996) (dismissing a tortious interference claim against NBC for broadcasting statements by the plaintiff's ex-wife in violation of a confidentiality provision in the couple's divorce settlement); *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *5, 9-10 (Sup. Ct., N.Y. Cty. Apr. 19, 1996) (dismissing a tortious interference claim against Maury Povitch for inducing another breach of the same divorce settlement's confidentiality provision after being "put on notice as to the non-

[9] The facts of *Highland Capital* are set forth in more detail in the Supreme Court's decision at *Highland Cap. Mgmt., L.P. v. Dow Jones & Co.*, No. 151322/2018, 2018 N.Y. Misc. LEXIS 4255, at *1 (Sup. Ct., N.Y. Cty. Sept. 26, 2018). The case involved an article published by the Wall Street Journal that described turmoil at Highland Capital, an investment advisor. *Id.* at *1. Highland Capital alleged (among other things) that the media defendants "tortiously interfered with Highland's confidentiality agreements with current and former employees, when defendants solicited confidential information for the allegedly defamatory article, in breach of those confidentiality agreements." *Id.* at *2.

disclosure provision"). The same result is warranted here based on both federal and state law protecting the freedom of the press.

A. The First Amendment Forbids Liability for Legal Newsgathering Activities.

The principles underlying the above cases are well established. Perhaps the most basic premise of American press freedom was articulated by the Supreme Court in *Smith v. Daily Mail Publishing Co.*: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. 97, 103 (1979).

Applying this principle, the Supreme Court has routinely rejected tort lawsuits premised on the publication of information that was obtained through ordinary newsgathering activities.[10] *See id.* at 106 (rejecting civil liability for newspaper that lawfully obtained name of juvenile defendant and published it in violation of a statute); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (rejecting civil liability for newspaper that lawfully obtained and published the identity of crime victim in contravention of a statute). More recently, in *Bartnicki v. Vopper*, a radio station was sued for broadcasting an illegally recorded phone call between a school district's union officials. 532 U.S. 519. The Supreme Court reaffirmed the core principle of *Smith v. Daily Mail*,

[10] Trump cannot avoid The Times Defendants' First Amendment defense by focusing on their newsgathering activities, rather than publication of the Article itself, because First Amendment protections extend to newsgathering. *See, e.g.*, *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 279 (S.D.N.Y. 2019) ("[E]ntrenched in Supreme Court case law is the principle that the First Amendment's protections for free speech include a constitutionally protected right to gather news."); *Higginbotham v. City of N.Y.*, 105 F. Supp. 3d 369, 379 (S.D.N.Y. 2015) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978))). This protection is based on the longstanding recognition that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

holding that because the radio station had not itself illegally recorded the call and had done nothing but commit an act of journalism—receiving truthful information from a source—it had no liability under the First Amendment. *Id.* at 525-28. These cases foreclose all of Donald Trump's claims against The Times Defendants.

Craig's actions as alleged in the Complaint amount to nothing more than routine newsgathering techniques: identifying a possible source, seeking out that source, asking her for assistance, and persuading her to voluntarily come forward and provide documents. Compl. ¶¶ 38-44; *see Daily Mail*, 443 U.S. at 103-04 (holding that reporters were protected by the Constitution for unlawfully publishing the name of a suspect when they "relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant," such as interviewing witnesses); *Fla. Star*, 491 U.S. at 538-39 (holding that the First Amendment precluded liability for unlawfully publishing the name of a victim identified in a press release because reliance on a press release "is a paradigmatically routine newspaper reporting techniqu[e]"). Craig sought to speak to Mary Trump for an important story about the Trump family's finances by knocking on her door and sending a letter. Compl. ¶¶ 39-43; Ex. B, at 185-86. Mary initially refused, but ultimately agreed to provide documents from her own client file held by her own attorney.[11] Compl. ¶¶ 41-45; Ex. B, at 186-87. The First Amendment simply does not permit civil liability for this type of ordinary newsgathering. *See Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 519-20 (Ct. App. 1986) ("asking persons questions, including those with confidential or restricted information" is a "routine reporting technique[]" that is protected by the First Amendment (alteration omitted)).

[11] A client's legal files belong to the client, not her attorney. *See Bronx Jewish Boys v. Uniglobe, Inc.*, 633 N.Y.S.2d 711 (Sup. Ct., N.Y. Cty. 1995) ("[A]ttorneys have no possessory rights in the client files other than to protect their fee. In other words, the file belongs to the client.").

B. New York Law Forbids Liability for Legal Newsgathering Activities.

The Times Defendants' conduct is independently protected by New York law, which is exceedingly protective of free speech rights. *See Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249-50 (1991). In particular, New York courts have consistently rejected efforts to impose tort liability on the press based on allegations that a reporter induced a source to breach a non-disclosure agreement.

Most recently, in *Highland Capital*, the First Department affirmed dismissal of an investment adviser's claim that a Wall Street Journal reporter engaged in tortious conduct by obtaining information from employees bound by non-disclosure agreements. 178 A.D.3d at 574; *see* note 9, *supra*. In doing so, the court relied on the *Bartnicki* rule that the press may publish lawfully obtained information, and held that dismissal was appropriate because "Defendants' conduct as alleged in the complaint was incidental to the lawful and constitutionally protected process of news gathering and reporting." *Highland Cap.*, 178 A.D.3d at 574 (citing *Bartnicki*, 532 U.S. at 534). The other New York decisions dismissing tortious interference claims against the press are in accord. *See, e.g.*, *Huggins v. NBC*, 1996 WL 763337, at *4 (dismissing tortious interference claims against NBC because "[a]ny interference that occurred was merely incidental to defendants' exercise of their constitutional right to broadcast newsworthy information"); *Povitch*, 1996 WL 515498, at *9-10 (same).

Those results are consistent with the strong protections that the New York State Constitution provides for newsgathering. N.Y. Const. art. I, § 8 ("Every citizen may freely speak, write and publish his or her sentiments on all subjects."). New York has "its own exceptional history and rich tradition," rooted in its Constitution, of protecting the freedom of the press. *See Immuno AG*, 77 N.Y.2d at 249-50 (explaining that state courts should be especially vigilant "in safeguarding the free press against undue interference"). This tradition extends to "the sensitive

role of gathering and disseminating news of public events," which receives "the broadest possible protection" under state law. *Id.* (citation omitted). Thus, "[t]he protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment," including where a case could impact "[t]he ability of the press freely to collect and edit news." *O'Neill v. Oakgrove Constr., Inc*., 71 N.Y.2d 521, 526, 528 n.3 (1988).

Given the binding precedent of *Highland Capital* and the New York Constitution's strong protection for newsgathering, Trump's attempt to impose civil liability on The Times Defendants for legally gathering and publishing truthful information lacks "a substantial basis in law" (CPLR 3211(g))—and in fact has ***no*** basis in law, and is contrary to the core principles that underlie the First Amendment and the New York State Constitution.

The claims against The Times Defendants must be dismissed in their entirety.

II. THE TORTIOUS INTERFERENCE CLAIMS (COUNTS IV AND V) FAIL.

Even if Trump's claims did not fail as a matter of constitutional law, they fail to allege the necessary elements of tortious interference under New York common law. To state a claim for tortious interference, a plaintiff must allege "[i] the existence of a valid contract between the plaintiff and a third party, [ii] defendant's knowledge of that contract, [iii] defendant's intentional procurement of the third-party's breach of the contract without justification, [iv] actual breach of the contract, and [v] damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc*., 88 N.Y.2d 413, 424 (1996).

Trump's tortious interference claims must be dismissed because The Times Defendants' purpose in reporting on a newsworthy story constitutes justification as a matter of law, there was no underlying breach of contract, and Trump's damages allegations are merely conclusory.

A. The Times Defendants' Actions Were Legally Justified.

Trump's tortious interference claims fail as a matter of law because The Times was justified in seeking information from a source on a matter of the utmost public concern: the financial dealings of a sitting president, including tax maneuvers that may have constituted a federal crime.

Justification provides an absolute defense to a tortious interference claim. *See Povitch*, 1996 WL 515498, at *9 ("[F]or for an action for tortious interference with contract to be sustained, the defendant's actions must be improper and without reasonable justification." (citing *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82 (1978))). New York courts have consistently held that the right to engage in newsgathering activities constitutes justification as a matter of law. This issue was squarely addressed in the pair of *Huggins* cases cited above (*see* pp. 10-11, 13, *supra*), which involved tortious interference claims brought by a plaintiff against various media outlets for purportedly inducing his ex-wife to breach a confidentiality provision. In the first decision, the court dismissed a tortious interference claim against NBC, explaining that the plaintiff could not satisfy the elements of the claim because "Defendants' purpose was a legitimate one and did not involve an intent to unjustifiably interfere with the confidentiality agreement." *Huggins v. NBC*, 1996 WL 763337, at *4 (citation omitted).

The second decision expanded on this theme, adopting the defendants' argument that "the First Amendment freedom of the press to report on newsworthy subjects is an appropriate justification that will preclude a claim of tortious interference":

> The Court agrees that a broadcaster whose motive and conduct is intended to foster public awareness or debate cannot be found to have engaged in the wrongful or improper conduct required to sustain a claim for interference with contractual relations. Here the broadcaster's first amendment right to broadcast an issue of public importance, its lack of any motive to harm the plaintiff, and the obvious societal interest in encouraging freedom of the press, negate essential elements of the tort.

Povitch, 1996 WL 515498, at *9.[12]

There can be no dispute that the actions taken by The Times Defendants constitute legitimate newsgathering that increased awareness about a matter of great public concern.[13] Because that fact justifies any action that could have induced Mary Trump to breach the Settlement Agreement, Trump's tortious interference claims fail as a matter of law.

B. Providing Documents to The Times Did Not Breach the Settlement Agreement.

Trump's tortious interference claim must be dismissed for the additional and independent reason that it fails to allege an underlying breach of contract. *See Murataj v. Dream Dragon Prods., Inc.*, 72 A.D.3d 527, 527 (1st Dep't 2010) (where "there was no breach of the contract between plaintiff and his crew, plaintiff's claim of tortious interference with contract fails as a matter of law").

Even assuming that the Settlement Agreement's confidentiality provisions are enforceable, not previously breached by Trump, and still in place—assumptions that Mary Trump convincingly disputes (Mary Trump Br. at 11-21)—the Settlement Agreement's confidentiality provisions are

[12] Other jurisdictions are in accord. *See, e.g., Seminole Tribe of Fla. v. Times Publ'g Co.*, 780 So.2d 310, 317-18 (Fla. Ct. App. 2001) (dismissing a tortious interference claim against reporters for soliciting tribal employees to reveal confidential documents about the tribe's gambling operations and explaining that reporters' conduct was "routine news gathering"); *Jenni Rivera Enters., LLC v. Latin World Ent. Holdings, Inc.*, 36 Cal. App. 5th 766, 800 (Ct. App. 2019) (dismissing a tortious interference claim against a broadcaster for reporting confidential information obtained from the plaintiff's former manager in violation of a nondisclosure agreement, because the broadcaster's actions were "not sufficiently 'wrongful' or 'unlawful' to overcome the First Amendment newsgathering and broadcast privileges").

[13] Of course, there are no allegations that Barstow and Buettner took ***any*** action that could have induced Mary Trump to breach the Settlement Agreement. The sole factual allegations regarding Barstow and Buettner are that they are reporters and are listed as co-authors of the Article. Compl. ¶ 67. In the unlikely event that any of Trump's claims survive this Motion, they must be dismissed as to Barstow and Buettner.

limited in scope. As relevant here, at most they bar Mary and the other Objectors from assisting with news stories "concerning ***their*** litigation or relationship with 'Proponents/Defendants.'" Ex. A, ¶ 2 (emphasis added); p. 4, *supra*. The Objectors are not precluded from providing information or documents for news articles about other topics, including Trump's tax schemes and history of financial dealings.

Perhaps recognizing this weakness, Trump alleges that the Article "contains numerous references, depictions descriptions [sic] and/or details of the relationship(s) of the parties to the Estate Action." Compl. ¶ 71. While the Article describes the relationship between Donald Trump and his father, and the relationships between Trump and his siblings (each Proponents/Defendants in the probate proceedings), the Settlement Agreement does not—and could not—bar the Objectors from participating in media coverage about the relationships between "the parties to the Estate Action" generally. Instead, as more fully explained by Mary Trump (*see* Mary Trump Br. at 13-16), the Settlement Agreement addresses press coverage "concerning" the Objectors' collective relationships with the group of Proponents. Ex. A, ¶ 2. The Article simply does not concern that topic or the Estate Disputes, even if read in its broadest terms.[14] Ex. C.

Thus, even if the Settlement Agreement's confidentiality provisions are broadly construed and remain valid and enforceable, Mary's alleged conduct—giving information to Times reporters with an Article unrelated to the Estate Disputes or the Objectors' relationships with the Proponents—simply did not violate the plain language of that Agreement. Trump's tortious interference claims fail on this independent basis, in addition to the other reasons set forth herein.[15]

[14] Although the Article spans nearly 40 pages, Trump points to only four sentences that mention the Estate Disputes (Compl. ¶ 71)—and fails to acknowledge that each of those excerpts simply identifies the source of certain deposition testimony. Ex. C, at 6-7, 15, 20, 23.

[15] Because Trump's claim for aiding and abetting tortious interference shares the same deficiencies as his direct tortious interference claim, these claims are addressed jointly throughout this section.

C. Trump Does Not Properly Allege Injury.

Trump's sole allegation to support his claim that he was harmed by The Times Defendants' tortious interference is that he "has sustained, and will continue to sustain, significant damages in an amount to be determined at trial, but believed to be no less than One Hundred Million Dollars ($100,000,000), in actual, compensatory and incidental damages, plus interests and the costs of this action." Compl. ¶¶ 130, 137. He repeats this allegation for all of his claims except those for unjust enrichment. *See* Compl. ¶¶ 99, 106, 152.

This conclusory allegation is mere boilerplate that need not be accepted as true. *See ERE LLP v. Spanierman Gallery, LLC*, 94 A.D.3d 492, 493 (1st Dep't 2012) (a pleading containing "only boilerplate allegations of damage" is "not sufficient to sustain a complaint"); *see also Schoenbach v. Insight Venture Mgmt., LLC*, No. 651632/2018, 2019 N.Y. Misc. LEXIS 802, at *15 (Sup. Ct., N.Y. Cty. Feb. 27, 2019) (dismissing a tortious interference claim based on "vague and conclusory" allegations that failed to explain how the plaintiff "sustained damages because of this interference"). The Complaint does not identify the source of these damages, or what harm they are supposed to remedy. It is impossible to say whether they arise from harm to reputation, lost business, mental and emotional distress, or something else, because the Complaint is completely silent regarding the nature of Trump's alleged injury. And the $100 million figure is not a serious attempt to estimate actual harm; instead, it appears to be Trump's routine demand in lawsuits that range from a dispute with the government over his racially discriminatory housing practices to a claim against Palm Beach County for permitting airplanes to fly over his Florida country club. *See* note 6, *supra*.

The Complaint's complete failure to identify any injury renders it deficient as a matter of law, and provides an independent basis for the dismissal of the tortious interference claims. *See O'Neill v. Cohen*, No. 152004/2015, 2015 N.Y. Misc. LEXIS 4759, at *6-7 (Sup. Ct., N.Y. Cty.

Dec. 18, 2015) (dismissing tortious interference claim where the plaintiff "fail[ed] to specify any economic damages from the breached contract or lost business relations with the bank or other prospective lender, as is necessary to support tortious interference either with a contract or with prospective business relations").

III. THE UNJUST ENRICHMENT CLAIM (COUNT VI) FAILS.

Trump's unjust enrichment claim is fundamentally defective because it is premised on the tortious interference claim. *See* Compl. ¶ 139 (alleging that The Times Defendants engaged in "wrongful" conduct when they "intentionally, blatantly and tortiously interfered with Plaintiff's rights under the Settlement Agreement"). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon N.Y.*, 18 N.Y.3d 777, 790-91 (2012). If the Settlement Agreement is "valid and enforceable," the unjust enrichment claim is "foreclosed"—including against nonparties like The Times Defendants. *Norcast S.ar.l. v. Castle Harlan, Inc.*, 147 A.D.3d 666, 668 (1st Dep't 2017). And if it is not (*see* section II.B, *supra*), then the claim fails because The Times Defendants did not engage in "wrongful" conduct.

Even if the unjust enrichment claim was otherwise valid, "equity and good conscience" do not justify restitution here. The benefits obtained by The Times Defendants were generated by their own work in producing an important piece of investigative journalism, and did not cause any corresponding economic loss to Trump. *See Leidel v. Annicelli*, 114 A.D.3d 536, 537 (1st Dep't 2014) (affirming dismissal of an unjust enrichment claim where the complaint did not allege facts to show that "they sustained damages as a result" of defendant's actions). Moreover, Trump and The Times Defendants lack the close relationship necessary for an unjust enrichment claim. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (an unjust enrichment claim "will not be supported if the connection between the parties is too attenuated"). In fact, the

Complaint does not allege that Trump has ***any*** direct connection with The Times Defendants, which alone is sufficient to dismiss this claim. *See Schroeder v. Pinterest Inc.*, 17 N.Y.S.3d 678, 690 (1st Dep't 2015) (dismissing unjust enrichment claim because the parties had no direct contact).

IV. THE NEGLIGENT SUPERVISION CLAIM (COUNT VII) FAILS.

The negligent supervision claim fails because it is reserved only for those situations where employees commit torts outside their normal duties. *See Scollar v. New York*, 160 A.D.3d 140, 147-48 (1st Dep't 2018). Here, the Reporter Defendants engaged in newsgathering activities that were a key part of their role as Times reporters. *See Nicholson*, 177 Cal. App. 3d at 519 ("asking persons questions, including those with confidential or restricted information" is a "routine reporting technique[]") (alteration omitted). There can be no doubt that The Times approved of these actions, since it chose to feature the Reporter Defendants' work in a 13,000-word story that received "a record-breaking amount of attention." Compl. ¶¶ 68-72. Moreover, the Complaint alleges that The Times was aware of the Reporter Defendants' actions and was "acting in concert with" them. *Id.* ¶ 66. Given that the Reporter Defendants' conduct occurred within the scope of their employment, the negligent supervision claim must be dismissed.

The claim also fails because the Complaint does not adequately allege that The Times "knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence." *Ehrens v. Lutheran Church*, 385 F.3d 232, 235 (2d Cir. 2004) (citation omitted). Although the Complaint references a 2016 article about Trump's taxes (Compl. ¶¶ 148-49), it does not allege that a Reporter Defendant induced anyone to breach their confidentiality obligations in connection with the 2016 story. To the contrary, the Complaint alleges that the tax returns mentioned in the 2016 article were "sent by an unidentified, anonymous source" ***before*** "Mary Trump was approached by Craig," a person with whom Mary Trump "had

no prior relationship." *Id.* ¶¶ 35, 38-39. And the Complaint fails to explain how mere publication of the 2016 article would put The Times on notice of any reporters' propensity to engage in so-called "tortious acts."[16] *Id.* ¶ 149.

The Complaint also fails to plead "that the tort was committed on the employer's premises or with the employer's chattels." *Ehrens*, 385 F.3d at 235. The supposedly tortious conduct—inducing Mary Trump to breach the Settlement Agreement—did not occur on The Times's premises; it allegedly occurred at Mary Trump's home. Compl. ¶ 39. The negligent supervision claim must therefore be dismissed.

V. THE TIMES DEFENDANTS ARE ENTITLED TO COSTS AND ATTORNEYS' FEES.

As explained above, New York's anti-SLAPP law applies to this lawsuit because it "is an action involving public petition and participation" as defined in Section 76-a(1)(a) of the New York Civil Rights Law. Therefore, upon dismissal of the claims against The Times Defendants, they will be entitled to recover their costs and attorney's fees by showing, as they have above, that the claims lack a substantial basis in fact or law. N.Y. Civ. Rights Law § 70-a(1)(a).

CONCLUSION

For the reasons set forth above, The Times Defendants respectfully request that the Motion to Dismiss be granted with prejudice and that this Court order Plaintiff to pay The Times Defendants' legal fees and costs pursuant to N.Y. Civil Rights Law § 70-a(1)(a).

[16] Trump alleges that publication of the 2016 article demonstrates that the Reporter Defendants had a "vendetta" against him. Compl. ¶ 149. He alleges no facts that would render this allegation remotely plausible. When the 2016 article was published, Trump was a candidate for U.S. President and his business dealings and taxes were the subject of intense scrutiny. *See* p. 4 & note 3, *supra*. The publication of an article about those matters, based on documents given to the Reporter Defendants, reflects nothing more than The Times Defendants' efforts to cover an important matter of public concern.

Dated: December 2, 2021
New York, New York

THE NEW YORK TIMES COMPANY

By: /s/ Karen A. Chesley

Karen A. Chesley
David McCraw
Jessica Hui (*New York Bar admission pending*)
620 8th Avenue
New York, NY 10018
Telephone: 800-698-4637
karen.chesley@nytimes.com
david.mccraw@nytimes.com
jess.hui@nytimes.com

Attorneys for Defendants The New York Times Company, Susanne Craig, and Russell Buettner

VINSON & ELKINS LLP

By: /s/ Christopher E. Duffy

Thomas S. Leatherbury (*pro hac vice* motion forthcoming)
Texas Bar No. 12095275
Trammell Crow Center
2001 Ross Avenue, Suite 3900
Dallas, Texas 75201
214.220.7792 (Telephone)
214.999.7792 (Facsimile)
tleatherbury@velaw.com

Christopher E. Duffy
The Grace Building
1114 Avenue of the Americas
New York, New York 10036
212.237.0000 (Telephone)
212.237.0100 (Facsimile)
cduffy@velaw.com

Attorneys for Defendant David Barstow

CERTIFICATION OF COUNSEL

I hereby state, pursuant to Rule 17 of the Commercial Division Rules, that the foregoing Brief was prepared on a computer using Microsoft Word. Pursuant to the word count system in Microsoft Word, the total number of words in the Brief, excluding the caption, table of contents, table of authorities, signature block, and this certification is 6,986.

Dated: December 2, 2021
New York, New York

/s/ Karen A. Chesley
Karen A. Chesley