SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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SUMMER ZERVOS,

Plaintiff,

DONALD J. TRUMP,

Defendant.
---x

Index No.: 150522/2017

Hon. Jennifer G. Schecter

Motion Seq. No. 005

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S FIRST MOTION TO COMPEL

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PRELIMINARY STATEMENT

Evidence concerning Defendant's treatment of and statements about his other accusers is not being sought, and will not be offered, to demonstrate his propensity to commit sexual assault. Rather, the evidence at issue is directly relevant and therefore discoverable for at least three reasons that have nothing to do with propensity.

First, evidence concerning Defendant's other accusers is probative of his intent. Defendant's intent is directly at issue because he claims that Plaintiff is a "limited public figure" – and thereby has imposed upon her the burden of proving that he intentionally lied about her or at least consciously disregarded the truth – and also because Plaintiff seeks punitive damages. As shown below, the "intent" exception under the *Molineux* doctrine is much broader than the distinct "common scheme or plan" exception, and courts routinely invoke it, including where, as here, the defendant's intent at issue.

Second, Plaintiff is entitled to discovery that will refute any defense by Defendant that his statements, even if false in some respects, are substantially true. Several of the defamatory statements at issue refer to a group of women. Plaintiff is entitled to discover information necessary to show that Defendant's statements about all of the women in the group are false, lest Defendant attempt to escape liability by arguing that even if the portion of the pleaded statements about Plaintiff are false, those statements are substantially true as a whole because they are true about the other women. And Plaintiff is also entitled to discover whether Defendant lied when he bolstered his false statement about her by saying "That is not who I am as a person, and it is not how I have conducted my life."

Finally, the evidence is reasonably likely to lead to the discovery of admissible evidence concerning Defendant's credibility – a core issue in this case.

Defendant cites to decisions concerning former President Clinton (Def. MOL at 25), but fails to note that the trial court in *Clinton v. Jones* granted plaintiff's motion to compel him to provide discovery about other women he had propositioned or had sex with. *Infra* at 14-15.

This is discovery, not trial. The standard for disclosure is "liberal," *Forman v. Henkin*, 30 N.Y.3d 656, 661 (2018), and its scope "extends not only to admissible proof but also to testimony or documents *which may lead* to the disclosure of admissible proof." *Polygram Holding, Inc. v. Cafaro*, 42 A.D.3d 339, 341 (1st Dep't 2007) (emphasis added). Under this standard, Plaintiff is entitled to the information she seeks about Defendant's similar interactions with other women and his false statements attacking them and denying their claims.

ARGUMENT

I. Information About Other Accusers Is Relevant to Defendant's Intent

Defendant's intent is directly at issue for two reasons: (a) because his assertion of a "limited public figure" defense, if deemed valid, would require Plaintiff to show that he acted with "actual malice"; and (b) because Plaintiff must show that Defendant acted with common-law malice on order to be entitled to punitive damages. *See* Opening MOL at 10-13.

Defendant claims that Plaintiff is, for purposes of this case, a public figure. Affirmation of Mariann Meier Wang, dated August 21, 2018 ("Wang Opening Aff.") (Dkt. No. 173), Ex. 13 (Def. Mem. in Support of Motion to Dismiss) at 21; Ex. 10 (Answer) ¶ 93. By doing so, Defendant imposes upon Plaintiff the burden of proving "with convincing clarity" that defendant knew that his statements were false when he made them. *See Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 474 (1993). This is a subjective standard. *See St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968) (rejecting objective standard and requiring proof that defendant engaged in deliberate falsification or acted with conscious disregard of the truth).

Because Defendant's subjective intent is relevant, the law recognizes that "proof of intent is often unobtainable except by evidence of successive repetitions of the act." Prince, *Richardson on Evidence* § 4-504 (11th ed. 1995) (citing *People v. Schwartzman*, 24 N.Y.2d 241, 248 (1969)). Plaintiff needs discovery to obtain such evidence.

In other words, where a party's state of mind is relevant, as it is here, evidence of his prior acts that bears on his intent or knowledge is admissible. *Id.* ("Evidence of intent is relevant when the crime charged requires assessment of the subjective intent of the accused.") (citing *People v. Roe*, 74 N.Y.2d 20, 24 (1989)). The truth or falsity of Defendant's statements about his other accusers plainly is probative of whether he intentionally made false statements about Plaintiff, because if Defendant consciously lied more than a dozen times when he spoke about other accusers, a jury could reasonably conclude that he intentionally lied when, during the same time period, he falsely denigrated Plaintiff and denied assaulting her.

Separately, to the extent that Defendant may attempt to argue that he did not intentionally lie about Plaintiff because he has no specific memory of meeting her at the Beverly Hills Hotel or the encounter at his office, evidence that Defendant knew that he routinely and frequently arranged secret meetings with other women alone at this hotel or his office and/or subjected many other women to inappropriate touching (and even paid other women to stay quiet about such reports) would show that he acted with conscious disregard of the truth when he affirmatively denied assaulting Plaintiff.

This logic is inescapably correct, and Defendant makes no effort to refute it.

Defendant's reliance on *Matter of Brandon*, 55 N.Y.2d 206 (1982), is peculiar because that case is a classic application of the well-established intent exception and squarely refutes his argument. *Brandon* held that the "much higher" standard and "more stringent requirements" that

apply when considering whether evidence shows a "common scheme or plan" do not apply when considering whether prior similar acts evidence is admissible to show a defendant's intent. *Id*. at 212-13. In *Brandon*, the defendant had allegedly taken in a wealthy, terminally ill widow and induced the widow to gift most of her money to the defendant before the widow died, and the question was whether it was appropriate to admit evidence that the defendant had done something similar to two other elderly people in the recent past. The Court of Appeals upheld the admission of the prior similar acts evidence because it was probative of intent. As the Court held, "[w]here guilty knowledge or an unlawful intent is in issue, evidence of other similar acts is admissible to negate the existence of an innocent state of mind." *Id*. at 211. Relying on Wigmore, the Court explained that "the successive repetition of similar unlawful acts tends to reduce the likelihood of the actor's innocent intent on the particular occasion in question." *Id*. at 212. The Court held that "[f]or purposes of the intent exception, there was a sufficient degree of similarity" between the case at issue and the prior acts to permit the introduction of the prior acts evidence "in order to negate [the defendant's] innocent state of mind," even though the much more stringent "common scheme or plan" test was not satisfied.[1] *Id*. at 214. Because Defendant's intent is squarely at issue here, *Brandon* compels the conclusion that evidence of the falsity of his statements about his other accusers is admissible and, *a fortiori*, discoverable.

Defendant nevertheless insists that evidence of his intent is not admissible (and not even discoverable) because he denies that his statements about Plaintiff were false. Def. MOL at 19. Defendant's odd attempt to bootstrap – he essentially contends, "I did not make false statements, so it does not matter if I meant to" – misses the mark. He cites *People v. Bagarozy*, 132 A.D. 2d

[1] Plaintiff does not concede that the common scheme or plan (or any other) exception to *Molineux* will not otherwise apply, but notes only that we are in the early stages of discovery and that it is premature to identify, before the evidence is known, which *Molineaux* exceptions may ultimately apply, including at trial.

225 (1st Dep't 1987), a case involving the sexual abuse of children, but his reliance on that case is misplaced. It is true that in a child sexual abuse case – where there is no possibility of an innocent state of mind excuse because all sex with children is unlawful, and thus the only issue is whether the defendant actually did the act he is accused of doing – the intent exception does not apply. *Id*. at 236. But that is not this case. Here, Defendant is arguing not only that the statements he made were true, but also that if they were false, they were not maliciously false. Defendant injected his state of mind into the case by invoking the "limited public figure" defense. That defense requires Plaintiff to show that Defendant subjectively intended to make false statements about her. Having imposed that burden, Defendant cannot deny Plaintiff the opportunity to discover evidence that bears on Defendant's knowledge and intent at the time he made the statements, including evidence that could show that even if Defendant convinces a jury that he did not specifically remember his encounters with Plaintiff, he nonetheless acted with reckless disregard for the truth by insisting she lied when she reported that he had assaulted her. Defendant's malice was not at issue in *Bagarozy*. It is here.[2]

Defendant also argues that "New York cases uniformly hold that malice can only be established by examining the portions of the statements that defame plaintiff." Def. MOL at 19-20 & n.16. But the cases he cites in support of that assertion say no such thing. In *Mahoney v. Adirondack Pub. Co.*, 71 N.Y.2d 31 (1987), in which the plaintiff conceded that he was a public figure, the Court of Appeals held that merely showing that the statement at issue was false is not

[2] Defendant's reliance on *Coopersmith v. Gold*, 89 N.Y.2d 957 (1997) – another case about the *admissibility* of evidence as opposed to its *discoverability* – is similarly misplaced because that case was a common scheme or plan case, not an intent case, and the higher standard therefore applied. The jury in *Coopersmith* found that the plaintiff's psychiatrist had not in fact engaged in a sexual relationship with her, and the Court affirmed that the plaintiff was not entitled to introduce evidence that the psychiatrist had sex with other patients to show his propensity to do so. The defendant's intent was not at issue in *Coopersmith*.

itself sufficient to show the requisite malice. *Id*. at 39-40. Indeed, not only did the Court say nothing about the relevance of defamatory statements about others, the opinion in *Mahoney* supports Plaintiff's position because the Court faulted the plaintiff for failing to adduce evidence in discovery "to negate the possibility" of a non-malicious reason for the false statement. *Id*. at 40; *see also id*. at 39 (requiring "direct evidence that [the defendant] knew or suspected" that the statement was false). And in *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 286 & n.21 (S.D.N.Y. 2013), the Court merely held that in assessing the actual malice, there is a difference between relying on unnamed versus anonymous sources, and in doing so, the Court noted that the defendant reporter had not relied upon one particular unnamed source when he made the statement at issue. These cases do not remotely address whether a defamation plaintiff is entitled to explore whether the defendant acted with malice when he made a series of similar statements about a group of similarly situated people.[3]

This case is much more like *Bonadio v. New York Univ*., 129 A.D.3d 602 (1st Dep't 2015), in which the First Department held that a sexual harassment plaintiff was "entitled to information related to claims of sexual misconduct" by the defendant because the defendant claimed that he touched the plaintiff "innocently and with her consent." *Id*. at 603. The Court held that "plaintiff is entitled to disclosure of evidence" of "other similar acts" because it "bears on his intent." *Id*.; *cf. Ismail v. Cohen*, 899 F.2d 183, 188-89 (2d Cir. 1990) (affirming admission of evidence of Civilian Complaint Review Board complaint of a police officer's use of excessive force pursuant to Fed. R. Civ. P. 404(b)); *Young v. City of New York*, 2010 WL

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[3] Defendant's other cases are similarly off point. *Manzo v. Westchester Rockland Newspapers*, 106 A.D.2d 492 (2d Dep't 1984), had nothing to do with discovery into the defendant's intent. And in *Steinberg v. Newspaper Enterprises, Inc.*, 5 A.D.2d 686 (2d Dep't 1957), the defendant was not permitted to explore the truth of its statement that the plaintiff was a "disbarred lawyer" because that statement was admittedly true and had nothing to do with the case.

3938372, at *1 (S.D.N.Y. Oct. 7, 2010) ("It is now commonplace in the courts of this Circuit to require the production of CCRB and IAB files relating to both substantiated and unsubstantiated allegations of similar conduct.").

This is no fishing expedition. For example, documents that already have been produced by Defendant's campaign suggest that [redacted]. It is no stretch to suppose that Defendant [redacted], and that when Plaintiff made her allegations at around the same time, Defendant [redacted], in reckless disregard of the truth.[4] Documents shedding light on how statements by other women who reported Defendant's unwanted touching were handled therefore are likely to be relevant to whether Defendant acted with malice when he called Plaintiff a liar.[5]

Finally, it is telling that Defendant did not even attempt to distinguish the numerous cases Plaintiff cited in which courts have held that defamation plaintiffs are entitled to discovery regarding the defendant's knowledge and motivation when the statements were made. Opening MOL at 10-11. Nor has Defendant even attempted to dispute that the information at issue is

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[4] The foregoing passages are redacted in public filings of this document only because the campaign has designated every page it has produced to Plaintiff "confidential" under the Protective Order in this case. *See* Dkt. No. 168. Plaintiff does not believe such designations are appropriate, but will address that directly with the campaign and raise it with the Court as necessary.

[5] The discovery Plaintiff seeks is likewise relevant to Defendant's intent to subject Plaintiff to unwanted sexual touching. Defendant contends that the intent exception cannot apply to this question because he denies that the touching happened at all. Def. MOL at 19. But the intent exception applies where the "the act is either conceded *or established by other evidence*." *Brandon*, 55 N.Y.2d at 211 (1982) (emphasis added). Here, Plaintiff will prove through other evidence, including her testimony, that the unwanted groping occurred.

relevant to proving punitive damages. *Id*. at 12-13. These omissions alone are a sufficient basis for granting Plaintiff's motion.

II. Information About Defendant's Other Accusers Is Relevant to the Substantial Truth of the Defamatory Statements as a Whole

Defendant's contention that the information Plaintiff seeks is unrelated to the statements alleged in the Complaint (Def. MOL at 6-11) requires this Court to ignore what the pleaded defamatory statements actually say. In several of the pleaded statements, Defendant defamed Plaintiff by including her as one of a "particularly, specifically-defined group of individuals," Reply Affirmation of Mariann Meier Wang, dated October 3, 2018 ("Wang Reply Aff."), Ex. 1 (Decision and Order Denying Motion to Dismiss) at 16 n.3, who he told the world had falsely accused him of sexual misconduct for fiscal or political gain.[6] And in his very first defamatory statement, Defendant branded Plaintiff a liar by claiming that he had never met her in a hotel or greeted her inappropriately and supported his attack on her by declaring, "That is not who I am as a person, and it is not how I've conducted my life." Wang Opening Aff., Ex. 1 (Compl.) ¶ 55.

Given the contents of these statements, information about Defendant's other accusers is relevant to his truth defense. Under New York law, "the substantial truth" of the publication at issue may defeat a defamation claim. *Miller v. Journal-News*, 211 A.D.2d 626, 627 (2d Dep't 1995). In order to determine "whether the statements were substantially true," New York law requires that the "accuracy of the report should be assessed on the publication as a whole, not

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[6] *See, e.g.*, Wang Opening Aff., Ex. 1 (Compl.) ¶ 59 ("It's not hard to find a small handful of people willing to make false smears for personal fame, who knows maybe for financial reasons, political purposes."); *id.* ¶ 63 ("Nothing ever happened with any of these women. Totally made up nonsense to steal the election."); *id.* ¶ 64 ("Total lies, and you've been seeing total lies . . . you have phony people coming up with phony allegations . . . ."); *id.* ¶ 65 ("False stories, all made-up. Lies. Lies. No witnesses, no nothing. All big lies."); *id.* ¶ 68 ("Can't believe these totally phoney stories, 100% made up by women (many already proven false) . . . ."); *id.* ¶ 74 ("Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened. Never. All of these liars will be sued after the election is over.").

isolated portions of it." *Id.* (citing *Law Firm of Daniel P. Foster v Turner Broadcasting Sys.*, 844 F.2d 955, 959 (2d Cir. 1988)).

Defendant contends that information about his other accusers has "nothing to do with [Plaintiff's] defamation claim" and is irrelevant to the substantial truth issue because references to other accusers in the statements are "'innocuous' portions that do not defame plaintiff" – in other words, that his "truth defense is focused on whether the statements that were made *about plaintiff* were true . . . ." Def. MOL at 8-9 (emphasis in original). That is not so. This case is nothing like those cited by Defendant, in which the allegedly defamatory statements were only isolated comments made in entirely different portions of the statements at issue.[7] Here, the

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[7] *Crane v. New York World Telegram Corp.*, 308 N.Y. 470 (1955), did not even involve discovery or other portions of statements that were alleged to be defamatory. The plaintiff sued for defamation based on a statement that he was "under indictment." It was undisputed that the plaintiff had not been indicted, but the defendant attempted to make a truth defense by presenting evidence that he was "'under indictment' in an alleged nonlegal sense of that term." *Id.* at 473. The court explained that "the facts alleged [by the defendant] are entirely unrelated to the truth of the charge that plaintiff had been indicted" and granted a motion to strike that defense. *Id.* at 477. In *Lopez v. Univision Commc'ns, Inc.*, 45 F. Supp. 2d 348 (S.D.N.Y. 1999), the plaintiff doctor alleged that the defendants defamed him by stating that they had been informed by Massachusetts General Hospital and Harvard Medical School that those institutions had no record of him. The court held that defendant could not prevail on a truth defense simply by proving that representatives of those institutions had told defendants that they had no file in the plaintiff's name, because "Plaintiff's reputation was harmed, if at all, by the allegation that MGH and Harvard, with which he claimed a connection, had no record of him," and "[w]hat Channel 41 was or was not told is not what stung." *Id.* at 359; *see also Fulani v. New York Times Co.*, 260 A.D.2d 215, 216 (1st Dep't 1999) (holding that the statement that the plaintiff was "of the [New Alliance Party] was not defamatory" because, even though that party had dissolved two years earlier, the statement "could not have had a different or worse effect on the mind of a reasonable reader than the truth, i.e., that plaintiff was a longtime member, ex-chair and two-time Presidential candidate of the now defunct [New Alliance Party]"); *Greene v. Aberle*, 150 Misc. 2d 306, 307, 568 N.Y.S.2d 300 (Sup. Ct., Suffolk Cnty. 1991) (information regarding plaintiff's "virginity, medical treatment, sexual history and possible spontaneous or clinical abortions" was "in no way . . . related to any of the elements plaintiff must prove with respect to the" issues to be decided regarding the defamation claim). The portion of *Greenberg v. Spitzer* cited by Defendant, Def. MOL at 9 n.6, had nothing to do with the scope of a truth defense, or with discovery, but only that a statement purely about a third party is not actionable defamation if it is not "of and concerning" the plaintiff. 155 A.D.3d 27, 51-52 (2d Dep't 2017).

entirety of Defendant's statements defamed Plaintiff because he included her among a discrete group of women he says lied about him. The "sting" of these defamatory statements, read as a whole, is that Plaintiff is one of several women who have been paid or otherwise induced falsely to accuse him of sexual misconduct. Plaintiff is entitled to discover information to rebut any argument by Defendant that this category of statements is substantially true as to the *group* of women as a whole (even if it is false as to Plaintiff). *See Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 242 (2d Dep't 1981) (Titone, J.) (falsity as to plaintiff may be "irrelevant" to truth defense if statement was substantially true about group of which plaintiff is a member).

Likewise, in order to show that the first pleaded statement was not "substantially true," Plaintiff must have access to information about how defendant has "conducted [his] life" in interacting with other women who have accused him of sexual battery or with whom he arranged to meet in hotel rooms in an attempt to engage in sexual relations. Defendant purposefully injected facts about how he "conducted [his] life" and his past interactions with women into his first false, disparaging statement about Plaintiff. Because it is basic defamation law that the pleaded statement must be read as a whole, it is hardly a surprise that a party in a defamation case is entitled to discover all information regarding the truth or falsity of the statement *as a whole*, whether or not all of it directly defames a party. *See Rivera v. NYP Holdings Inc.*, 63 A.D.3d 469 (1st Dep't 2009). Defendant contends that *Rivera* is inapposite because it involved a defamation *defendant's* request for discovery. Def. MOL at 10.[8] But nothing in *Rivera*, or in the law of discovery, suggests that a defendant's right to discovery exceeds a plaintiff's right to obtain information. Information about who Defendant "is as a person" in this regard goes

[8] Defendant also relies on a statement by the lower court, on remand, that criticizes the First Department's decision in *Rivera*. *See* Def. MOL at 10. This Court, of course, is bound by what the First Department held.

directly to the issue of whether the first statement is substantially true (as Defendant contends) or false (as Plaintiff contends). Discovery is therefore appropriate.[9]

Defendant also argues that a few subcategories of Plaintiff's discovery requests are beyond the scope of discovery. First, Defendant objects to Plaintiff's request for information regarding payments that Defendant made, directly or indirectly, to women who accused him of sexual misconduct, or attempts to influence those women by Defendant or his agents. Def. MOL at 10-11. But, in support of that argument, Defendant cites only cases noting the uncontroversial propositions that (1) the fact of a settlement is not necessarily evidence of liability, *Bigelow-Sanford, Inc. v. Specialized Commercial Floors of Rochester, Inc.*, 77 A.D.2d 464, 466 (4th Dep't 1980); and (2) that information concerning settlement negotiations in a lawsuit is not discoverable in that same lawsuit, *Crow-Crimmins-Wolff & Munier v. Westchester Cty.*, 126 A.D.2d 696, 697 (2d Dep't 1987) (plaintiff was not entitled to information regarding settlement negotiations between defendant and counterclaim defendant); *In re New York Cty. Data Entry Worker Prod. Liab. Litig.*, 162 Misc. 2d 263, 616 N.Y.S.2d 424 (Sup. Ct., N.Y. Cnty. 1994) (non-settling defendants were not entitled to settlement agreements of settling defendants). Plaintiff does not seek disclosure of settlement negotiations *in this case*, and does not seek to introduce settlement agreements for purposes for which they are not probative. At the discovery stage, however, Defendant has failed to show any reason why he can withhold entirely documents about any settlement, which may lead to the discovery of admissible evidence that is relevant for the reasons Plaintiff has articulated in support of this motion. Moreover, Defendant

[9] Defendant's only attempt to address the critical distinction between what is discoverable and what is ultimately admissible at trial is a suggestion that merely allowing document discovery would "improperly taint[] the jury pool." Def. MOL at 12 n.8. That is, at best, an argument that there should be a protective order allowing confidentiality designations, which there is, not an argument for depriving Plaintiff of access to the documents entirely.

does not provide any basis why other types of payments or attempts to influence Defendant's other accusers would not be discoverable. Evidence that Defendant routinely or frequently had to confront or deal with women who made similar allegations, and/or directed others to pay such women or to retaliate against them because they presented credible claims, will show that his subsequent public statements that he was never inappropriate with any of these women or with Plaintiff specifically (or at some point, that he does not remember his interactions with Plaintiff) are not credible, and much more likely to be a reflection, at a minimum, of reckless disregard for the truth.

Defendant contends that information concerning his attempts to seek information about other accusers is not discoverable because it "has no bearing on whether defendant made allegedly defamatory statements concerning her . . . ." Def. MOL at 11. But how Defendant and his agents responded to allegations of his sexual misconduct, and the process that led to Defendant's defamatory statements about Plaintiff and the other accusers, is relevant to substantial truth of Defendant's statements – including whether that is how he lives his life, and whether all of the women were liars with improper motives, as well as to his malicious intent in defaming Plaintiff.

Finally, Defendant contends that the request for information dating back to 2005 is overbroad. Def. MOL at 11. But the relevance of the requested information – both to whether Defendant's statements were true and to whether he made them with malicious intent – applies with equal force to any such responsive information, whether it regards alleged sexual misconduct in 2005 or discussions of how to respond to allegations of sexual misconduct in 2016. Although the public statements of Defendant's other accusers make clear that relevant documents may exist far earlier than 2005, *see e.g.,* Wang Opening Aff., Ex. 3 at 2 (allegation

from early 1980s of Defendant's inappropriate touching), Plaintiff has nonetheless limited her requests to 2005 to the present in order to strike a reasonable balance. Notably, Defendant has not identified any additional burden associated with producing records for that time period.[10]

III. Discovery of Information About Other Accusers Is Not Improper Under *Andon*

Defendant's reliance on *Andon v. 302-304 Mott St. Assoc*., 94 N.Y.2d 740 (2000), is misplaced. In *Andon*, the Court of Appeals pointedly emphasized "New York's policy favoring open disclosure" and that "open discovery is crucial to the search for truth." *Id*. at 745, 747. The unique discovery issue in *Andon* – whether the mother of an infant lead paint victim was required to submit to an IQ test – has nothing whatsoever to do with the discovery issue presented here, and the Court took pains to make clear, several times, that it was not answering the question itself but rather merely holding that the Appellate Division had not abused its wide discretion. *Id*. at 745-747.

Defendant greatly exaggerates the breadth of the discovery being sought – particularly as against a Defendant who by his own lawyers' account does not actively use e-mail. Contrary to Defendant's spin, complying with the requests at issue will not impose any significant burden – or even any burden at all – on Defendant, much less an unconstitutionally excessive burden. *See* Def. MOL at 25. The issue is whether Defendant's employees, agents, and representatives must turn over emails and other documents relating to his other accusers. If this motion to compel is granted, the electronic search terms will be somewhat broader than if it is denied, and Defendant's lawyers (and those of his company and campaign) will have to review a somewhat

[10] As a practical matter, Defendant does not appear to have many documents, at least based on the fact that the first response to Plaintiff's document requests, provided on September 28, 2018, has so far resulted in a production of no documents at all from Defendant and only 19 distinct pages of documents from the Trump Organization.

broader universe of documents for responsiveness and privilege before their productions are complete. No significant burdens will be placed on Defendant himself.

Defendant presents no reason why Plaintiff should be denied the discovery at issue because of his office. *See Clinton v. Jones*, 520 U.S. 681, 701 (1997) ("The litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power."); *id*. (rejecting the argument that "burdens will be placed on the President that will hamper the performance of his official duties"); *id*. at 702 (rejecting the argument that litigation regarding the President's unofficial acts would "impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office").

Indeed, in continuing to rely upon *Clinton v. Jones*, Defendant ignores that the trial court in that case *granted* motions to compel requiring President Clinton to respond to interrogatories regarding his sexual activities with other women and allowing the plaintiff to depose non-parties about their sexual activities with President Clinton, ruling that "the issue here is one of discovery, not admissibility of evidence at trial," and that "it is difficult for the Court to make evidentiary rulings without knowing what the evidence is." Wang Reply Aff., Ex. 2, at 7-8; Ex. 3 at 2-4 (ordering President Clinton to respond to interrogatories requiring him to identify every state or federal employee, and every person contacted through a state trooper, who he propositioned or had sexual relations with during the five years before the beginning of the relevant period in that case because it was potentially relevant to "establishing a pattern of

conduct," and stating that the five-year time limitation for interrogatories would not necessarily apply to the scope of permissible questioning during his deposition).[11]

Defendant also cites *Carter Clark v. Random House, Inc*., 2002 WL 31748573 (Sup. Ct., N.Y. Cnty. Dec. 2, 2002) – another case involving former President Clinton – but there the trial court reaffirmed both that the "material and necessary" standard "is to be liberally and broadly interpreted" and that "[i]t is the settled law of this land that even a sitting United States President is subject to the commands of the Judicial Branch." *Id*. at *1, *2. The Court declined to compel former President Clinton to sit for a non-party deposition, but not because doing so would be unduly burdensome. Rather, the deposition was not allowed because the disputed issues in the case had nothing to do with him and "[n]o person should have to appear for a deposition at which he or she does not have needed information to give." *Id*. at *2.

CONCLUSION

For all of the reasons set forth above and in Plaintiff's opening papers, the Court should grant Plaintiff's motion to compel and order Defendant to respond to Interrogatories 8, 11, 12, 15, and 16 and to produce documents responsive to Document Requests 16-22 and/or future discovery requests relating to this subject matter.

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[11] This point is critical in evaluating Plaintiff's argument that information concerning his other accusers could be admissible evidence of Defendant's credibility. *See* Opening MOL at 13-14. Defendant relies on cases holding that a party may not introduce extrinsic evidence to impeach a witness's credibility. *See* Def. MOL at 21-23. But New York law is clear that a party may cross-examine a witness without extrinsic evidence about acts that bear on his credibility. *See Badr v. Hogan*, 75 N.Y.2d 629, 634 (1990) ("It is . . . the general rule that a witness may be cross-examined with respect to specific immoral, vicious or criminal acts which have a bearing on the witness's credibility."). As the trial court observed in *Clinton v. Jones*, this Court will not be able to rule on whether Plaintiff can use information at trial (including with respect to Defendant's credibility) without giving Plaintiff the opportunity to discover such evidence and show the Court what it is.

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