

**21-637**

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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DEVIN G. NUNES,

*Plaintiff-Appellant,*

– v. –

CABLE NEWS NETWORK, INC.,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**OPENING BRIEF OF APPELLANT**

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## **JURISDICTIONAL STATEMENT**<sup>1</sup>

The basis of the District Court’s subject matter jurisdiction is 28 U.S.C. § 1332 (diversity jurisdiction). The parties are citizens of different States and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs. [*JA*, p. 22].

The basis for the Court of Appeals’ jurisdiction is 28 U.S.C. § 1291 (final decision of the District Court). On February 19, 2021, the District Court entered an Order, which is a final decision in this matter. [*Id.*, pp. 123-141].

On March 19, 2021, Plaintiff-Appellant, Devin G. Nunes (“Nunes”), timely filed notice of appeal to the United States Court of Appeals for the Second Circuit pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure (“FRAP”). Nunes appeals the District Court’s Order granting Defendant-Appellee, Cable News Network, Inc.’s (“CNN”), motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and dismissing the case with prejudice. [*Id.*, pp. 142-145].

This Appeal is from a final order or judgment that disposes of all parties’ claims.

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<sup>1</sup> This Brief will refer to the Joint Appendix as “*JA*” and will cite to the specific page numbers of the Joint Appendix. *e.g.*, “*JA*, p. 1”.

## STATEMENT OF THE ISSUES

Nunes presents the following issues for review:

1. Is § 48a of the California Civil Code a “procedural” statute, such that it does not apply under Virginia choice of law rules? *Tanges v. Heidelberg North America, Inc.*, 93 N.Y.2d 48, 687 N.Y.S.2d 604, 710 N.E.2d 250, 252-253 (1999); *see Kipper v. NYT Holdings, Inc.*, 2007 WL 1439075, at \* 2 (N.Y. Sup. 2007) (“Section is inapplicable here, however, because, contrary to defendant’s argument, section 48a is not a conduct-regulating law, but rather, one that provides a post-event mechanism for reparation ... Here, California has no interest in protecting a New York newspaper from defending against a defamation claim in New York or in limiting the recoverable damages, if the newspaper were found liable. Accordingly, New York defamation and damages law applies.”), *rev’d on other grounds*, 47 A.D.3d 597, 852 N.Y.S.2d 56 (2008); *O’Hara v. Storer Communications, Inc.*, 231 Cal.App.3d 1101, 282 Cal.Rptr. 712, 732 (4<sup>th</sup> Dist. 1991) (“Section 48a has not changed the nature of the tort of defamation from a personal injury into a property injury, but rather has placed a limit on the type of damages that can be recovered if the plaintiff does not properly seek a retraction.”).

2. In this defamation case, would the Virginia Supreme Court apply the substantive law of California, where (a) the false and defamatory statements were first published in New York, (b) CNN exclusively controlled the means and

methods of publication and chose to publish and republish in New York, (c) Nunes works in the District of Columbia, (d) Nunes was in the District of Columbia at the time of the publications, (e) Nunes primarily suffered injury to his reputation in the District of Columbia and Virginia, where he performs his intelligence community oversight duties, and (f) CNN's agents were physically present in New York and authored the statements at issue in New York, published and broadcast the statements from CNN's facilities in New York, republished the statements via social media accounts operated in New York, and the statements were about events that CNN falsely claimed occurred in Vienna, Austria, and in the District of Columbia?

3. Can the choice of law issue in this case be decided without evidence? Should the case be remanded so the District Court can hear evidence to determine what State's law applies? *See Rudin v. Dow Jones & Co.*, 510 F.Supp. 210, 216-217 (S.D.N.Y. 1981) ("where [as here] the plaintiff has a significant relationship to a state other than the state of his domicile, other factors must be considered in determining which law to apply ... Like the court in *Palmisano*, we find that these issues cannot be sufficiently considered on a motion to dismiss addressed to the face of the complaint. Accordingly, the motion to dismiss on the basis of California law is denied without prejudice to its renewal on a sufficient record.")

(citing and quoting *Palmisano v. News Syndicate Company, Inc.*, 130 F.Supp. 17, 19-20 fn. 2 (S.D.N.Y. 1955)).

4. Should the District Court have granted leave to amend so Nunes could specify the special damages under Rule 9(g)?

5. Did Nunes plead facts sufficient to allege a conspiracy to defame?

### **STATEMENT OF THE CASE**

This case presents a shocking example of fake news published by CNN. The story is a complete fabrication that was fed to CNN by a source known to be wholly unreliable. The sole source of CNN's statements is a known "fraudster", "hustler", a "radioactive wolf in sheep's clothing", a man indicted by the United States Government, charged with multiple Federal crimes, who faces years in a Federal penitentiary – Lev Parnas ("Parnas"). CNN's Chief Washington Correspondent Jake Tapper ("Tapper") admitted on national television that **"We can't ignore – Parnas has a serious credibility problem. He's under indictment for campaign finance charges. The foreign minister of Ukraine told CNN's Christine Amanpour that he doesn't trust a word Parnas is saying."** [<https://www.cnn.com/videos/politics/2020/01/16/jake-tapper-lev-parнас-credibility-roosevelt-vpx.cnn>]. It was obvious that Parnas' lies were part of a thinly-veiled attempt to obstruct justice and to trick either the United States Attorney or the House Intelligence Committee Chairman, Adam Schiff ("Schiff"),

into offering “immunity” or favorable treatment in return for scandalous “information” about Nunes – a prominent United States Congressman and Ranking Member of the House Intelligence Committee. In spite of the fact that CNN’s sole source was a known liar, a fraudster and an indicted criminal defendant, and in spite of its serious doubts as to the veracity and credibility of its sole source, CNN spread the fabricated statements about Nunes indiscriminately to millions online and via social media with a reckless, heedless and palpable indifference as to the consequences. [*JA*, pp. 12-60].

On February 7, 2020, Nunes filed a two-count amended complaint against CNN in the United States District Court for the Eastern District of Virginia, alleging claims of defamation and civil conspiracy. Nunes’ claims arise out of statements published by CNN on November 22, 2019 in an online article, entitled **“Exclusive: Giuliani associate willing to tell Congress Nunes met with ex-Ukrainian to get dirt on Biden”**, and broadcast by CNN to the subscribers and viewers of CNN’s *Cuomo Prime Time*. [*Id.*, pp. 28-37]. CNN responded to Nunes’ amended complaint by filing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In its motion, CNN claimed that California law applied, and because Nunes had not requested a retraction in accordance with California law, he was limited to recovering special damages, and because he had not alleged special damages, his claim of defamation failed. [*Id.*, pp. 64-65]. CNN

also filed a motion to transfer venue to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404. [*Id.*, pp. 102-103].

On May 22, 2020, the District Court for the Eastern District of Virginia granted CNN's motion to transfer venue, and transferred the case to the United States District Court for the Southern District of New York. [*JA*, pp. 105-122].

On February 19, 2021, the District Court for the Southern District of New York granted CNN's motion to dismiss. [*Id.*, pp. 123-141].

Nunes appeals. [*Id.*, pp. 142-145].

### **Facts Relevant To The Issues Submitted For Review**

Nunes is a United States Congressman who lives in California and works in the District of Columbia. He serves as Ranking Member of the House Permanent Select Committee on Intelligence (the "House Intelligence Committee"). As a member of the House Intelligence Committee, he participates in oversight of the U.S. national security apparatus, including the intelligence-related activities of seventeen agencies, departments, and other elements of the United States Government, most of which is located in Virginia. Nunes's career as a United States Congressman is distinguished by his honor, dedication and service to his constituents and his country, his honesty, integrity, ethics, and reputation for truthfulness and veracity. On September 24, 2019, the United States House of Representatives announced an impeachment "inquiry" into U.S. President Donald

Trump. Between October 3, 2019 and October 31, 2019, the Chairman of the House Intelligence Committee, Democrat Adam Schiff (“Schiff”), conducted secretive interviews in connection with the Democrats’ impeachment inquiry. On October 31, 2019, a divided House of Representatives approved guidelines that cleared the way for nationally televised impeachment hearings in mid-November. During those impeachment hearings, Nunes was a prominent participant in the defense of President Trump. [*JA*, pp. 16-17, 23].

CNN, is a Delaware corporation, headquartered in Georgia. CNN is a division of WarnerMedia. CNN is part of WarnerMedia’s “Turner” business unit. The Turner business unit operates television networks and related properties that offer branded news and other content for consumers around the world. Turner’s digital properties include the CNN digital network, [www.cnn.com](http://www.cnn.com). According to AT&T, the CNN digital network is “the leading digital news destination, based on the number of average monthly domestic multi-platform unique visitors and videostarts for the year ended December 31, 2018.” CNN’s digital platforms deliver news 24 hours a day, seven days a week, from almost 4,000 journalists in every corner of the globe. CNN claims that it reaches more individuals on television, the web and mobile devices than any other cable television news organization in the United States. In addition to its massive television and digital footprint, CNN employs multiple social media accounts as a means to publish its

statements worldwide. As of November 22, 2019, @CNN had over 43,500,000 followers on Twitter; @CNNPolitics had over 2,900,000 followers; @cnni had over 9,200,000 followers; @CNNPhillipines had over 530,000 followers; and @cnnbrk had over 56,000,000 followers. In addition to CNN’s corporate and institutional use of Twitter, most of CNN’s reporters use Twitter to spread stories to readers, viewers and voters in Virginia and elsewhere. [See, e.g., @jaketapper (2,200,000 followers)]. [JA, pp. 18-19].

CNN is well-known as a “trumpet” of the Democratic Party. *Tah v. Global Witness Publishing, Inc.*, 2021 WL 1045205, at \* 17 (D.C. Cir. 2021) (Silberman, J., dissenting) (“Two of the three most influential papers (at least historically), *The New York Times* and *The Washington Post*, are virtually Democratic Party broadsheets. And the news section of *The Wall Street Journal* leans in the same direction. The orientation of these three papers is followed by *The Associated Press* and most large papers across the country (such as the *Los Angeles Times*, *Miami Herald*, and *Boston Globe*). Nearly all television—network and cable—is a Democratic Party trumpet. Even the government-supported National Public Radio follows along.”).

Vicky Ward (“Ward”) is a senior reporter for CNN based in New York. Ward wrote the article at issue in this action, and republished it extensively via her social media accounts: LinkedIn, Twitter and Facebook. Chris Cuomo (“Cuomo”)



anchors CNN's "*Cuomo Prime Time*", a 9:00 p.m. nightly news program, where Cuomo "tests power with newsmakers and politicians from both sides of the aisle, and reports on the latest breaking news from Washington and around the world". [<https://www.cnn.com/profiles/chris-cuomo-profile>]. Between his two accounts, **@ChrisCuomo** and **@CuomoPrimeTime**, Cuomo has over 1,500,000 followers on Twitter. [<https://twitter.com/CuomoPrimeTime>]. According to Nielsen, *Cuomo Prime Time* is CNN's most-watched program with an average of 1,000,000+/- viewers. [<https://www.adweek.com/tvnewser/october-2019-ratings-cnn-posts-significant-year-over-year-audience-growth-bolstered-by-its-democratic-debate/419277/>]. [*JA*, pp. 19-20].

Prior to November 22, 2019, CNN knew that Parnas and his attorneys or other political operatives were shopping a story to the press that made claims about Nunes, implicating him in efforts to get "dirt" on Joe Biden and his son, Hunter Biden. CNN knew that no other news outlet would touch the salacious story because *none* of the so-called "facts" provided could be verified. In spite of its actual knowledge of Parnas' pattern of fraud and false statements and in spite of serious doubts as to Parnas' credibility, veracity and the truth and accuracy of his statements, CNN published Parnas' statements as if they were true. CNN ignored known "red flags" and proceeded to publish and broadcast the fake news

sponsored by a “radioactive” wolf in sheep’s clothing to millions of advertisers, subscribers, followers, and viewers. [*JA*, p. 27].<sup>2</sup>

On November 22, 2019, CNN published the following article on its active digital network:

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<sup>2</sup> The CNN Article, in pertinent part, is based entirely on hearsay statements provided to CNN by Parnas’ attorney, Bondy. Nowhere in the Article does CNN actually state that Ward ever spoke with Parnas directly. The necessary inferences to be drawn from CNN’s publication of Bondy’s statements are: (1) prior to publication, CNN confirmed that Bondy was fully authorized to speak for his client, (2) prior to publication, CNN confirmed that Bondy accurately conveyed *in haec verba* Parnas’ statements, (3) the statements are Parnas’ statements conveyed through his agent, Bondy, and (4) Parnas has first-hand knowledge of the truth of the statements conveyed through Bondy. An agent (here, Bondy) may take actions that are binding on the principal (Parnas) in only a limited number of ways. First, the agent may act with “actual authority” – that is, where “the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act,” Restatement (Third) of Agency § 2.01 (Am. Law Inst. 2005), which may be actual or implied, *see id.* § 2.02. Second, the agent may act with “apparent authority,” which binds a principal to a third party “when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” *Id.* § 2.03. Third, an action taken by a putative agent without actual or apparent authority may nonetheless be binding on the principal if the principal subsequently ratifies the action, *see id.* § 4.01, which “retroactively creates the effects of actual authority,” *id.* § 4.02(1). In this case, publication of the CNN Article and the content of the Article itself establishes Bondy acted with Parnas’ actual or apparent authority. It is also reasonable to infer that prior to publication, CNN confirmed with Bondy that Parnas was aware Bondy was speaking with CNN and that Parnas ratified Bondy’s actions. [*JA*, p. 27].



[<https://www.cnn.com/2019/11/22/politics/nunes-vienna-trip-ukrainian-prosecutor-biden/index.html>] (the “CNN Article”). The CNN Article features a picture of Nunes during the impeachment hearings in the District of Columbia in November 2019. The CNN Article contains numerous egregiously false and defamatory statements, including that Nunes had **“meetings ... in Vienna last year with a former Ukrainian prosecutor to discuss digging up dirt on Joe Biden”**, **“Nunes met with Shokin in Vienna last December”**, and **“[Parnas] and Nunes began communicating around the time of the Vienna trip”**. [*JA*, pp. 28-34].

On November 22, 2019 at 9:00 p.m., at the same time CNN published the CNN Article on its digital network, Ward appeared on Cuomo's television program *Cuomo Prime Time*. During the broadcast, Cuomo and Ward vouched for the story as if it were fact, doubled-down, and published further defamatory statements about Plaintiff, including:

“CUOMO: All right, so next big question. How do we know that Nunes met with Shokin?”

WARD: So, it gets interesting. So, Shokin tells Lev Parnas ... And what's interesting is that Nunes comes back and tries to recruit Lev Parnas. He does recruit Lev Parnas to merge his effort, his and Rudy Giuliani's investigations, with his.”

...

CUOMO: Devin Nunes, at the hearing, saying, ‘This is crazy that the President would want Ukraine to look at the Bidens.’ The prosecutor who was the one at the center of all the controversy ... met with Nunes in Vienna—

WARD: Right.

CUOMO: --last December. So, before all this other stuff that they're saying was just about one phone call—

WARD: Way before.

CUOMO: Months before. Shokin then tells Parnas, the shady guy, at the center of all this.

WARD: Right.

CUOMO: And then Nunes' staffer meets with Parnas – Parnas?

WARD: Well so does Nunes. Nunes meets with Parnas. Nunes speaks to Parnas several—

CUOMO: About dirt on the Bidens?

WARD: [S]everal times. Yes, they're asked to merge operations, essentially. So, in other words, you know, this whole impeachment, Chris, is about a shadow foreign policy.

CUOMO: Right.

WARD: That Devin Nunes appears to have ... some involvement in.

CUOMO: So, he knew it was going on ... He knew they were looking for dirt on the Bidens.

WARD: Right. He is a drama in the – in this play himself. And ... yet, he has not told anyone about this.

...

CUOMO: What is the chance of getting to him [Shokin] on this because, obviously, he can confirm or deny also.

WARD: Well, you know, I have his phone number. So, I've texted him. I've got to him. We've reached out to him. He's not talking.

...

CUOMO: [S]houldn't he [Plaintiff] have disclosed ... that he went over to ... Vienna, Austria, to meet with Shokin?

WARD: Well what's so intriguing, for want of a better word, about his whole trip was the timing of it. And, in fact, his aide, Derek Harvey told Lev Parnas that the timing of it was very deliberate. It was done right after the Republicans lost the House in the midterms, but before the Democrats took over in January.

CUOMO: Why[?]

WARD: Because once the Democrats took over, he would have had to ... disclose the details of it. So, this is why nobody has known, until now, what Devin Nunes was doing last December."

Cuomo then paraded disgraced congresswoman Katie Hill (“Hill”) before the camera so CNN could get Hill to publish further defamatory statements about Nunes. Notwithstanding Hill’s total lack of knowledge of any facts, CNN published the following exchange between Cuomo and Hill:

CUOMO: Can you believe this? Help me understand this Vicky Ward reporting. Devin Nunes, I guess, being Chairman, you don’t have to tell people what you’re going. But putting in the record, ‘I’m going to Vienna with a couple of staffers,’ and you know you’re investigating all this Ukraine stuff and you don’t mention that you met with the guy at the center of the whole situation? ... But he had to know that we were going to find out. It’s not like these players are exactly, you know, lock-lipped, you know, that these guys that we’re dealing with. And he sat in the hearings, Katie. I don’t know how much of them you saw but ... every time they bring up ‘The President wanted Ukraine to get dirt on the Bidens,’ he was, ‘Oh man, I can’t believe!’ And he even said, ‘I can’t believe,’ you know, and in some words that you guys would think this was possible when he knew damn well that he was trying to.

HILL: He was doing it. Yes.

CUOMO: Unless Parnas’ lawyer is lying because Shokin ... hasn’t confirmed it yet. Nunes says he won’t answer any questions.

...

HILL: Look, I don’t know if he ... thought he would never get found out. But you know he’s going to deny it until the day he dies ... It’s just ... where we’re at, unfortunately, with Republicans right now, is that there’s ... zero shame in lying, just straight-up lying constantly.

[<http://transcripts.cnn.com/TRANSCRIPTS/1911/22/CPT.01.html>]. [*JA*, pp. 35-37, 74, 76-101].

CNN coordinated publication of the false and defamatory statements about Nunes across each of its platforms. CNN published the CNN Article to multiple new target audiences, including CNN’s 32,000,000+ Facebook followers and CNN’s 56,000,000+ Twitter followers around the World. CNN’s goal was to inflict maximum damage to Nunes’s reputation Worldwide and to cause him to be removed from the impeachment inquiry. At the same time CNN tweeted the CNN Article, Ward, Cuomo, Vaughn Sterling, Jake Tapper, and a whole host of other CNN employees, “analysts” and agents republished the CNN Article to their millions of Twitter followers. [JA, pp. 37-47].

The CNN Article was immediately understood to convey a defamatory meaning about Nunes – that Nunes aided the President in the commission of an impeachable offense and that Nunes engaged in grossly unethical and dishonest behavior. *See, e.g.:*





 **Phil Arballo**  
@PhilArballo2020

#DevinNunesGotCaught



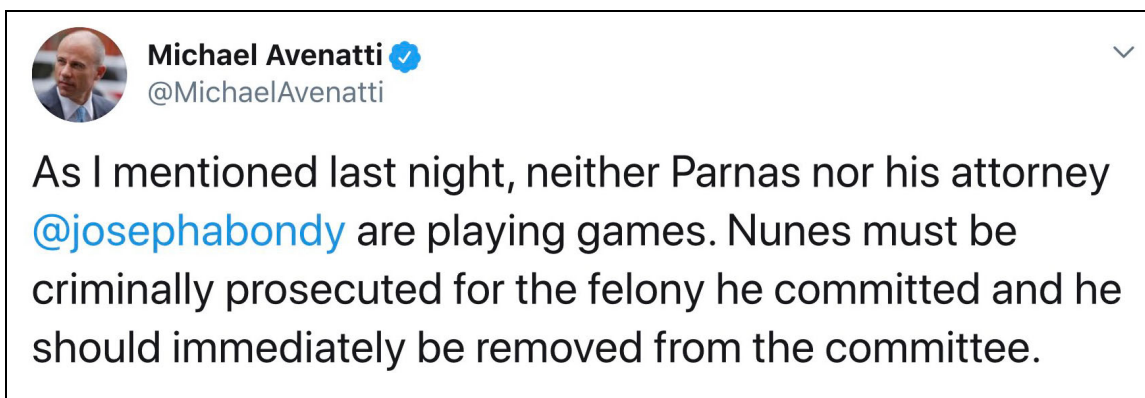
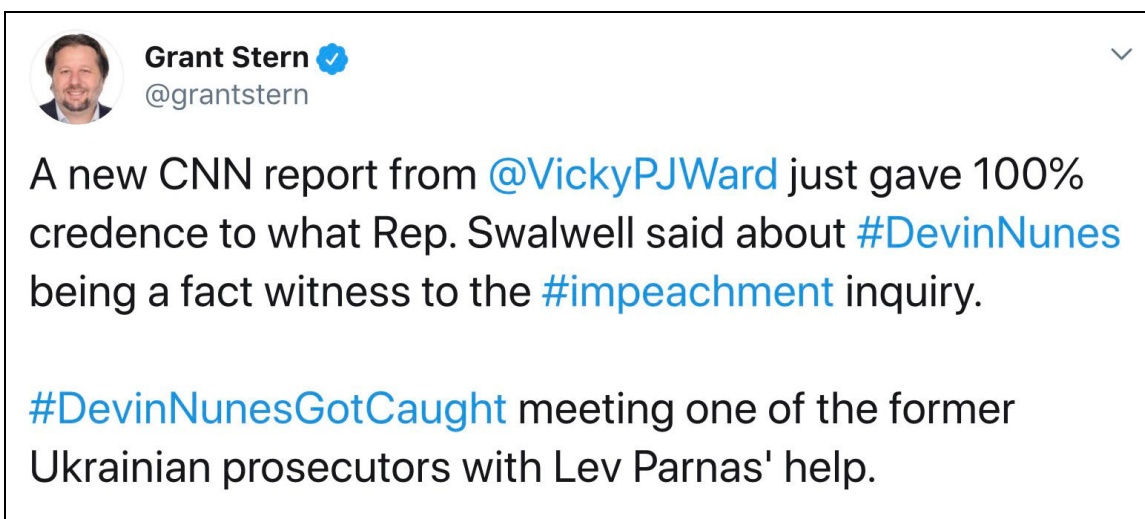
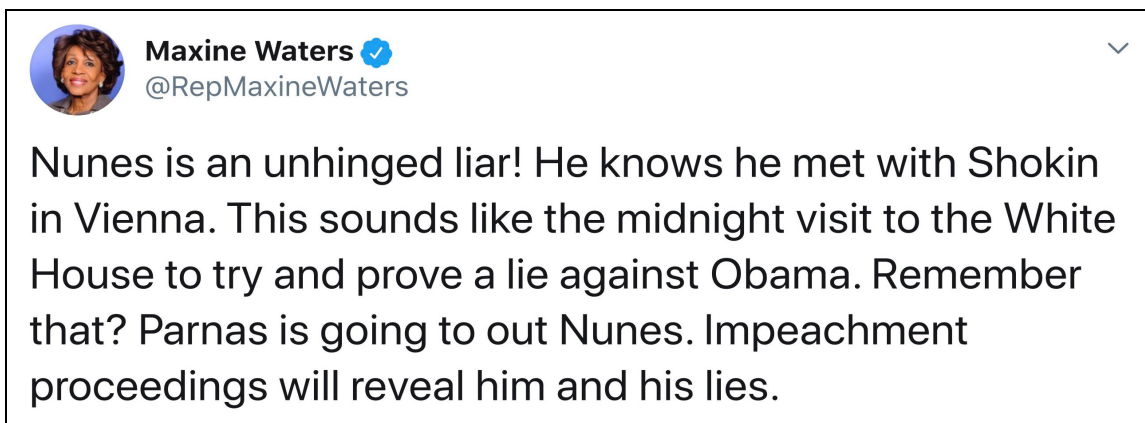
Exclusive: Giuliani associate willing to tell Congress Nunes met with ex-Ukraini...  
A lawyer for an indicted associate of Rudy Giuliani told CNN that his client is willing to tell Congress about meetings the top Republican on the House ...  
[cnn.com](https://www.cnn.com)

9:32 PM · Nov 22, 2019 · Twitter for iPhone

[\[https://secure.actblue.com/donate/arb\\_dd\\_search\\_1909\\_nunes?gclid=EAIaIQobChMIwcKpvKiV5gIVyODICh1BegNfEAAYASAAEgKHN\\_D\\_BwE](https://secure.actblue.com/donate/arb_dd_search_1909_nunes?gclid=EAIaIQobChMIwcKpvKiV5gIVyODICh1BegNfEAAYASAAEgKHN_D_BwE)

(“#DevinNunesGotCaught Devin Nunes met with Ukrainians to get dirt on Joe Biden -- *he took part in Donald Trump’s impeachable offense*”).





[JA, pp. 47-49].

On December 8, 2019, during an episode of *Reliable Sources*, CNN's Brian Stelter ("Stelter") announced on air that "CNN is standing by its reporting".

Stelter admitted and emphasized on air that the allegations in the CNN Article that Nunes met with Shokin in Vienna linked Nunes to the “pro-Trump, anti-Biden smear campaign that’s at the center of the impeachment inquiry.”

[<https://www.cnn.com/videos/business/2019/12/08/politicians-using-the-courts-to-punish-the-press.cnn/video/playlists/reliable-sources-highlights/>]. [JA, p. 49].

The CNN Article and the *Cuomo Prime Time* broadcast have now been republished hundreds of millions times, including by Nunes’s colleagues in Congress, by CNN and its agents, and by many others, e.g.:

<https://twitter.com/RepSpeier/status/1198333030496178177>

(“If Devin Nunes was using taxpayer money to do “political errands” in Vienna for his puppeteer, Donald Trump, an ethics investigation should be initiated and he should be required to reimburse the taxpayers”);

<https://twitter.com/RepTimRyan/status/1198279393514311683>

(“Uh oh”);

<https://twitter.com/AlexandraChalup/status/1198077966871416832>

(“Devin Nunes: call your office. Better yet: call your attorney”);

<https://twitter.com/ericgarland/status/1198064190835048448>

(“BREAKING BUT PREDICTABLE: Indicted Ukrainian Mobster introduced Nunes to disgraced UA prosecutor Shokin to solicit foreign attacks on U.S. democracy AGAIN in 2020”);

[https://twitter.com/fred\\_guttenberg/status/1198063646729031680](https://twitter.com/fred_guttenberg/status/1198063646729031680)

(“Wow!!! I guess this is what @RepSwalwell was talking about when he suggested @DevinNunes could be a witness. Devin, did you not think this was important?”);

<https://twitter.com/shanlonwu/status/1198204005492645888>

(“Potentially devastating blow to GOP #Trump defense - how will #DevinNunes have any credibility in attacking #Ukraine allegations when he was part of the wrongdoing?”);

<https://twitter.com/DeanObeidallah/status/1198210566973804545>

(“Guess who is now a suspect/witness in Ukraine scandal: Dum-Dum Devin ... Nunes could be possible criminal co-conspirator).

[*JA*, pp. 50-51].

On December 3, 2019, Nunes filed suit against CNN. He did not make a written demand for retraction of the false statements.

### **SUMMARY OF THE ARGUMENT**

The District Court erred when it granted CNN’s motion to dismiss. For the following reasons, the District Court’s decision should be reversed and this action remanded for a trial on the merits:

1. Section 48a of the California Civil Code is a “procedural” statute. Under Virginia’s choice of law rules, which are applicable in this transferred diversity action, § 48a does not apply.

2. Even if § 48a is a “substantive” statute – which it is not – the Virginia Supreme Court would not apply California law because (a) the false and defamatory statements were first published in New York, (b) CNN exclusively controlled the means and methods of publication and chose to publish and republish in New York, (c) Nunes works in the District of Columbia, (d) Nunes was in the District of Columbia at the time of the publications, (e) Nunes primarily

suffered injury to his reputation in the District of Columbia, and (f) CNN's agents were physically present in New York and authored the statements at issue in New York, published and broadcast the statements from CNN's facilities in New York, republished the statements via social media accounts operated in New York, and the statements were about events that CNN falsely claimed occurred in Vienna, Austria, and in the District of Columbia.

3. The choice of law issue in this case cannot be decided without evidence. The Court of Appeals should remand the case so the District Court can hear evidence to determine what State's law applies.

4. The District Court should have granted Nunes leave to amend to specify the "special damages" he claimed under Rule 9(g).

5. Nunes plead sufficient facts to plausibly allege a conspiracy to defame.

### **STANDARD OF REVIEW**

The Court of Appeals reviews *de novo* a district court's grant of a motion to dismiss, "constru[ing] the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *La Liberte v. Reid*, 966 F.3d 79, 85 (2<sup>nd</sup> Cir. 2020) (citing *Palin v. New York Times Co.*, 940 F.3d 804, 809 (2<sup>nd</sup> Cir. 2019) (quoting *Elias v. Rolling Stone, LLC*, 872 F.3d 97, 104 (2<sup>nd</sup> Cir. 2017))).

## ARGUMENT

“Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers.” *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., Concurring). The press has no “special immunity from the application of general laws”, nor does it have a “special privilege to invade the rights and liberties of others.” *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). The press has no right to “invent facts” or to “comment on the facts so invented” and, thereby, convince readers that the invented facts are true. Simply put:

“[l]iberty of the press is not license, and newspapers have no privilege to publish falsehoods or to defame under the guise of giving the news. It is held that the press occupies no better position than private persons publishing the same matter; that it is subject to the law, and if it defames it must answer for it.”

*Williams Printing Co. v. Saunders*, 113 Va. 156, 73 S.E. 472, 477 (1912) (numerous citations and quotations omitted); *Dexter v. Spear*, 7 F. Cas. 624-625 (1<sup>st</sup> Cir. 1825) (Story, J.) (“No man has a right to state of another that which is false and injurious to him. A fortiori no man has a right to give it a wider and more mischievous range by publishing it in a newspaper. The liberty of speech, or of the press, has nothing to do with this subject. They are not endangered by the punishment of libellous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation. There can be no right in printers, any more than in other persons, to do wrong.”); *Murphy v. Boston*

*Herald, Inc.*, 449 Mass. 42, 865 N.E.2d 746, 767 (Mass. 2007) (“No one would disagree with the importance of upholding the freedom of the press. Nor would anyone disagree about the media’s right (and duty) to examine the affairs of the judicial branch of government and to criticize activities of judges and other court officials that do not meet the high standards expected of judges and the courts. The press, however, is not free to publish false information about anyone (even a judge whose sentencing decisions have incurred the wrath of the local district attorney), intending that it will cause a public furor, while knowing, or in reckless disregard of, its falsity.”).

“In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White., J., Concurring). As Justice Thomas correctly observed,

statements tending to scandalize a public figure are “reputed more highly injurious than when spoken of a private man”. *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., Concurring) (quoting 3 W. Blackstone, Commentaries \* 124)). At common law, libel of a public official was deemed an offense ““most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties.”” *Id.* (quoting M. Newell, Defamation, Libel and Slander § 533 (1890) (quoting *Commonwealth v. Clap*, 4 Mass. 163, 169-170 (1808)); accord *White v. Nicholls*, 3 How. 266, 290 (1845)).

Public figures are under attack by a media that refuses to self-regulate and that seems oblivious to the impact of defamation on our system of governance. Now, more than ever, the men and women who serve our citizens across the country need protection from the malicious and injurious attacks of “news” outlets who more clearly resemble political operatives in sheep’s clothing. See *Sprouse v. Clay Communications, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (W. Va. 1975) (two weeks before gubernatorial election, newspaper foreswore its role as an impartial reporter of facts and joined with political partisans in an overall plan or scheme to discredit the character of a political candidate by publishing a series of articles that raised an implication of wrongdoing by the candidate in connection with certain real estate transactions).

The common law of libel protects the reputations of members of Congress, just as it protects the reputation of every Judge on every Court. *Rosenblatt v. Baer*, 383 U.S. 75, 92-93 (1966) (“‘Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.’ The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty ... Surely if the 1950’s taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.”). Easy lies and the pollution of information about public officials should not be tolerated by any Court, and the public cannot continue to be misinformed about public matters by publishers with an axe to grind who look to “sensationalize” the news. *Tomblin v. WCHS-TV8*, 2011 WL 1789770, at \* 5 (4<sup>th</sup> Cir. 2011) (unpublished) (“on the question of whether WCHS-TV8 deliberately or recklessly conveyed a false message to sensationalize the news and thus to provide factual support for a finding of malice, there are disputed facts”).

In November 2019, as the impeachment hearings continued, Nunes was targeted by CNN and was subjected to deliberate misreporting. Acting in concert with Parnas, CNN published a fake story about a trip to “Vienna” that never occurred and a meeting with an ex-Ukrainian prosecutor that never happened. The



goal was to create a sensational news story to implicate Plaintiff in wrongdoing, undermine the defense of President Trump, and fuel the Democrat's calls for impeachment. The District Court short-circuited the litigation. The District Court found that § 48a of the California Civil Code governed, and because Nunes did not demand a retraction within 20 days of CNN's publications, he was limited to the recovery of special damages, which he did not sufficiently allege in his amended complaint. [*JA*, pp. 123-141].

For the reasons stated below, the Court of Appeals should reverse.

**A. SECTION 48a IS A PROCEDURAL STATUTE**

Following a transfer under § 1404(a) initiated by a defendant, the transferee court must follow the choice-of-law rules that prevailed in the transferor court. *Van Dusen v. Barrack*, 376 U.S. 612, 633-634 (1964). Accordingly, the Court applies Virginia choice of law rules.

Virginia adheres to the traditional procedural/substantive dichotomy in its choice-of-law analysis. *See, e.g., Jones v. R.S. Jones & Assoc.*, 246 Va. 3, 5, 431 S.E.2d 33 (1993) (“According to the settled rule ... the *lex fori* controls all that is connected merely with the remedy.”) (quotation omitted); *Hooper v. Mussolino*, 234 Va. 558, 566, 364 S.E.2d 207 (1988) (“Under settled choice-of-law principles, however, we will apply our own law in matters that relate to procedure”) (citations omitted); *see id. Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 fn. 10 (1984)

(“Under traditional choice of law principles, the law of the forum State governs on matters of procedure”).

Thus, the **first** choice-of-law question is whether California Civil Code § 48a is a procedural or substantive statute? If the statute is “procedural”, it will not apply because the law of the forum – New York – will apply its own laws to matters of procedure. *See Able Cycle Engines, Inc. v. Allstate Ins. Co.*, 84 A.D.2d 140, 147, 445 N.Y.S.2d 469 (1981) (“Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, are governed by the lex fori and depend upon the law of the place where the suit is brought”) (citations and quotations omitted).

California Civil Code § 48a is procedural. A statute is considered procedural if it “pertain[s] to the remedy rather than the right”. *Tanges v. Heidelberg North America, Inc.*, 93 N.Y.2d 48, 687 N.Y.S.2d 604, 710 N.E.2d 250, 253 (1999). The expiration of a statute of limitations, for instance, does not extinguish the underlying right, but merely bars the remedy. *Id.*; *see Kipper v. NYT Holdings, Inc.*, 2007 WL 1439075, at \* 2 (N.Y. Sup. 2007) (“Section 48a is inapplicable here, however, because, contrary to defendant’s argument, section 48a is not a conduct-regulating law, but rather, one that provides a post-event mechanism for reparation ... Here, California has no interest in protecting a New York newspaper from defending against a defamation claim in New York or in

limiting the recoverable damages, if the newspaper were found liable. Accordingly, New York defamation and damages law applies.”), *rev'd on other grounds*, 47 A.D.3d 597, 852 N.Y.S.2d 56 (2008); *O'Hara v. Storer Communications, Inc.*, 231 Cal.App.3d 1101, 282 Cal.Rptr. 712, 732 (4<sup>th</sup> Dist. 1991) (“Section 48a has not changed the nature of the tort of defamation from a personal injury into a property injury, but rather has placed a limit on the type of damages that can be recovered if the plaintiff does not properly seek a retraction.”).

Because § 48a is a procedural statute, the District Court erred in applying it to Plaintiff's claims in this diversity action transferred from Virginia. Under Virginia choice of law rules, New York law governs matters of procedure.

**B. NEW YORK IS THE PLACE OF THE WRONG**

If the Court of Appeals determines that § 48a is not procedural, the **second** question is what state's law governs the substantive issues in the case?<sup>3</sup>

For tort actions, such as defamation, “Virginia applies the doctrine of *lex loci delicti*, meaning the law of the place of the wrong governs all matters related to the basis of the right of action.” *Dreher v. Budget Rent-A-Car Sys., Inc.*, 272 Va. 390, 395, 634 S.E.2d 324 (2006). As the District Court noted in *Kylin v. Fidlow*, 2017 WL 2385343, at \* 3 fn. 2 (E.D. Va. 2017), the Supreme Court of Virginia has

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<sup>3</sup> This is a case of first impression, and the Court must essentially predict how the Virginia Supreme Court would rule.

never addressed how the doctrine of *lex loci delicti* applies in situations where the defamatory content is “published” in multiple jurisdictions, “such as on a national television broadcast or, as here, a website that can be accessed worldwide.” The Second Restatement of Conflict of Laws accounts for multistate defamation by applying the law of the state with the “most significant relationship” to the occurrence—typically, but not always, the state where the defamed individual was domiciled at the time of publication. *Restatement (Second) of Conflicts of Laws* § 150 (1971).<sup>4</sup> However, as the *Kylin* Court pointed out, Virginia has never adopted this provision of the Second Restatement. In fact, Virginia has expressly rejected the Second Restatement’s “most significant relationship test” for multistate tort actions generally. *See, e.g., Jones*, 246 Va. at 5, 431 S.E.2d at 34 (“In *McMillan v. McMillan*, 219 Va. 1127, 253 S.E.2d 662 (1979), we declined an invitation to adopt the so-called “most significant relationship” test, recommended by *Restatement (Second) of Conflicts of Laws* §§ 145, 146 (1971), for resolving conflicts of laws arising in multistate tort

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<sup>4</sup> In *Milton v. ITT Research Institute*, the Fourth Circuit Court of Appeals rejected the “effects test” in multistate tort cases. The Court clarified that “[t]he word ‘tort’ has a settled meaning in Virginia. A tort is any civil wrong or injury; a wrongful act.’ Thus Virginia’s choice of law rule selects the law of the state in which the wrongful act took place, *wherever the effects of that act are felt* ... Likewise, when Virginia residents are victims of out-of-state torts, the Virginia courts routinely apply the law of other states, even though the physical pain or economic impact caused by the tort injury may be experienced by the Virginia plaintiffs within the boundaries of the Commonwealth.” 138 F.3d 519, 522 (4<sup>th</sup> Cir. 1998) (quotation and citation omitted) (emphasis added).

actions. 219 Va. at 1129, 253 S.E.2d at 663. We said that we would adhere to the *lex loci delicti*, or place of the wrong, standard that had been “the settled rule in Virginia.”).

In light of Virginia’s emphatic rejection of the Restatement’s “most significant relationship” test in multistate tort cases, it is not surprising that Virginia Courts have uniformly and overwhelmingly applied the law of the state where the publication first occurred – here **New York** – in multistate defamation cases. *See, e.g., Scott v. Moon*, 2019 WL 332415, at \* 3 fn. 5 (W.D. Va. 2019) (“Scott alleges that Moon published the statements at issue on a website that he controls from Florida. Accordingly, Florida law applies to Scott’s claims against Moon.”); *Edwards v. Schwartz*, 378 F.Supp.3d 468, 502 (W.D. Va. 2019) (“In defamation cases, Virginia courts apply the substantive law of the state where the defamatory statements were first published”); *Fluor Enterprises, Inc. v. Mitsubishi Hitachi Power Systems Americas, Inc.*, 2018 WL 3016286, at \* 3 (E.D. Va. 2018) (Texas law governed defamation case, where the statements at issue were published by a public company during a nationally broadcast earnings call that emanated from its headquarters in Texas); *Scott v. Carlson*, 2018 WL 6537145, at \* 2 fn. 3 (W.D. Va. 2018) (“Scott alleges that Carlson, a New York resident, published the statements at issue on a website that he created and on YouTube. Accordingly, New York law applies to Scott’s claims against Carlson.”); *ABLV*

*Bank v. Center for Advanced Defense Studies, Inc.*, 2015 WL 12517012, at \* 2 (E.D. Va. 2015) (“Here, it is undisputed that ABLV’s report was published from its office in Washington, D.C. It is irrelevant that the negative effects of that publication were felt in New York; any reputational damage caused by C4ADS occurred everywhere due to the nature of online publication. Thus, D.C. law shall govern the case.”); *Velocity Micro, Inc. v. J.A.Z. Marketing, Inc.*, 2012 WL 3017870, at \* 6 (E.D. Va. 2012) (“Under Virginia law, in multi-state tort actions, commercial defamation is controlled by the law of the state in which the tort occurred, that is the say, specifically where the defamatory writing was first published.”) (citing *Lapkoff v. Wilks*, 969 F.2d 78, 81 (4<sup>th</sup> Cir. 1992) (“Because the statements were made in Virginia, Virginia law applies.”)); *PBM Products, LLC v. Mead Johnson Nutrition Co.*, 678 F.Supp.2d 390, 398 (E.D. Va. 2009) (“Because Mead Johnson alleges that the defamatory Press Release was issued in Virginia, Virginia law applies”); *Wiest v. E-Fense, Inc.*, 356 F.Supp.2d 604, 608 (E.D. Va. 2005) (“Because Plaintiff alleges that ‘the website in question is controlled from Defendant E–Fense, Inc.’s corporate headquarters located in Virginia,’ and the allegedly defamatory statements were published on this website, Virginia law applies.”); *St. Clair v. Righter*, 250 F.Supp. 148, 150 (W.D. Va. 1966) (“It seems well settled that in a [multi-state] defamation action, the place of publication (the last event necessary to render the tort-feasor liable) is the place of the wrong.”);

*Depp v. Heard*, 2019 WL 8883669, at \* 5-6 (Fairfax Cir. Ct. Jul. 25, 2019) (“the place of the wrong in this case is the place where the act of publication of Ms. Heard’s Op-Ed to the internet occurred ... [T]he Op-Ed was published on *The Washington Post*’s website at Ms. Heard’s instruction ... *The Washington Post*’s online edition is ‘created on a digital platform in Virginia and routed through servers in Virginia ... Using the servers located in Springfield, Virginia, *The Washington Post* posed it to the internet”); see also *Fryfogle v. First Nat. Bank of Greencastle*, 2009 WL 700161, at \* 4 (W.D. Va. 2009) (“in actions seeking to hold the original publisher liable for republication of defamatory statements, publication occurs when the defendant first made the alleged defamatory statements, rather than when the republication occurred”) (citation omitted).

Applying the law of the state where the defendant first publishes the defamatory statements is the most uniform and predictable rule because the defendant, in this case CNN, is in exclusive control of publication and, as here, publishes in its home state where, presumably, it intends to profit most from the publication to its advertisers, subscribers, audiences, viewers and followers. As in this case, a plaintiff may live and work in different states and, therefore, suffer injury in multiple forums. Applying the law of the place of first publication ensures that the defendant is subject to the law of a state where it purposely availed itself of the privilege (and burden) of publication.

**C. NUNES WAS PRIMARILY INJURED IN D.C. AND VIRGINIA**

In *Gilmore v. Jones*, the United States District Court for the Western District of Virginia deviated from the accepted “first publication” rule in multistate defamation cases. *Gilmore* was unique. *Gilmore* involved a “multi-defendant, multi-state internet tort case”, where the publications first occurred in “multiple jurisdictions”. 370 F.Supp.3d 630, 664-665 (W.D. Va. 2019). In these unique circumstances, the District Court predicted that the Virginia Supreme Court would define the “place of the wrong” as the “state where the plaintiff is primarily injured as a result of the allegedly tortious online content”, *Gilmore*, 370 F.Supp.3d at 666, which the Court found to be Virginia.<sup>5</sup>

This case involves statements that were first published in one jurisdiction – New York – by CNN – and only CNN. This is not a “multi-defendant” case. Nunes alleges that he was primarily injured in the District of Columbia and Virginia, where he works, where he was at the time of publication, and where CNN’s falsehoods were circulated to and read by members of the intelligence community. *Compare Keeton*, 465 U.S. at 777 (“The tort of libel is generally held

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<sup>5</sup> Even if the Court were to follow the rationale in *Gilmore v. Jones*, and somehow find that this is a “multi-defendant, multi-state” defamation case, the fact is that Plaintiff’s injuries are concentrated in Virginia or the District of Columbia where Plaintiff works, has his office (Longworth House Office Building, Suite 1013, Washington, D.C. 20515) and performs his oversight of the Intelligence Community as the Ranking Member of the House Intelligence Committee.



to occur wherever the offending material is circulated. Restatement (Second) of Torts § 577A, Comment a (1977). The reputation of the libel victim may suffer harm even in a state in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished."); *see* Restatement (Second) of Conflicts of Laws § 150(2), comment e (1977) (where the plaintiff has a significant relationship to a state other than the state of his domicile, other relevant factors must be considered in determining which law to apply).

The District Court gave Nunes's allegations no weight. The District Court failed to accept Nunes's allegations as true and draw reasonable inferences in Nunes's favor. The District Court erred.

**D. THE ISSUE CANNOT BE DECIDED WITHOUT EVIDENCE**

Even if the District Court could disregard the allegations in Nunes's amended complaint – which it plainly could not – the question where Nunes was primarily injured for choice of law purposes cannot be decided without evidence. *See Rudin v. Dow Jones & Co.*, 510 F.Supp. 210, 216-217 (S.D.N.Y. 1981) (“where [as here] the plaintiff has a significant relationship to a state other than the state of his domicile, other factors must be considered in determining which law to apply ... Like the court in Palmisano, we find that these issues cannot be

sufficiently considered on a motion to dismiss addressed to the face of the complaint. Accordingly, the motion to dismiss on the basis of California law is denied without prejudice to its renewal on a sufficient record.”) (citing and quoting *Palmisano v. News Syndicate Company, Inc.*, 130 F.Supp. 17, 19-20 fn. 2 (S.D.N.Y. 1955)).

The Court of Appeals should reverse and remand the case, so the choice of law issues can be decided on a well-developed record.

**E. NUNES OUGHT TO HAVE BEEN GRANTED LEAVE TO AMEND**

Subdivision 4(b) of § 48a defines special damages as “all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other”. See *O’Hara*, 231 Cal.App.3d at 1112 (the “classical definition of special damage in a defamation case” is “business loss suffered by the plaintiff as a result of damage to her reputation”) (citing *Terwilliger v. Wands*, 17 N.Y. 54, 60 (1858) (“As to what constitutes special damages, Starkie mentions the loss of a marriage, loss of hospitable gratuitous entertainment, preventing a servant o[r] bailiff from getting a place, the loss of customers by a tradesman; and says that in general whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient. In *Olmstead v. Miller* ...

it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in *Williams v. Hill* ... was the fact that the plaintiff was turned away from the house of her uncle and charged not to return until she had cleared up her character. So in *Beach v. Ramey*, was the circumstance that persons, who had been in the habit of doing so, refused longer to provide fuel, clothing, &c. These instances are sufficient to illustrate the kind of special damage that must result from defamatory words not otherwise actionable to make them so; they are damages produced by, or through, impairing the reputation.”); *compare In re U.S. Office of Personnel Management Data Security Breach Litigation*, 928 F.3d 42, 66 (D.C. Cir. 2019) (“We have not yet addressed whether Rule 9(g)’s heightened pleading standard applies to Privacy Act claims, and we have no occasion to do so here. Gonzalez-Colon’s specific allegations about the time lost from work addressing the fraudulent tax return and Verizon Wireless account suffice either way.”) (citing 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1311 (4<sup>th</sup> ed 2019) (“[A]llegations of special damage will be deemed sufficient for the purpose of Rule 9(g) if they are definite enough to notify the opposing party and the court of the nature of the damages and enable the preparation of a responsive pleading.”); *Conejo v. Am. Fed’n of Gov’t Emps., AFL-CIO*, 377 F.Supp.3d 16, 32 (D. D.C. 2019) (allegations that plaintiff “suffered and continues to suffer career damage, loss of consideration for career advancement,

personal and professional embarrassment and humiliation, and emotional pain and suffering” “met the pleading standard for the purposes of overcoming a motion to dismiss.”); *see also Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 33 (5<sup>th</sup> Cir. 1973) (plaintiff’s complaint specifically alleged that he “suffered special damages of incurring pecuniary loss in terms of total hours expended in removing from the minds of certain business associates the harmful effect of the false statements”); *Fleck Bros. Co. v. Sullivan*, 385 F.2d 223, 225 (7<sup>th</sup> Cir. 1967) (plaintiff “averred that as a result of the letter plaintiff ... has expended time, money, and effort to reestablish its credit.”); D. Dobbs, *Law of Remedies* § 7.2, p. 520 (1873) (“Special damages in defamation cases mean pecuniary damages, or at least ‘material loss;’ (footnote omitted)).

Rule 15(a)(2) provides that the Court “should freely give leave when justice so requires.”

In this case, Nunes’s amended complaint alleges that Plaintiff suffered “special damages”. Having decided that § 48a applied, the District Court ought to have given Nunes an opportunity to particularize the special damages that he sought, including career damage, loss of future employment, loss of future earnings, impaired and diminished earning capacity, and impact upon his prospects for career advancement, including Senate-confirmed offices, especially since

CNN's motion to dismiss did not challenge any substantive element of Nunes's defamation claim, including whether Nunes plead actual malice. [*JA*, p. 64].

**F. NUNES'S CONSPIRACY CLAIM**

Although New York does not recognize civil conspiracy to commit a tort as an independent cause of action, "a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme." *Environmental Services, Inc. v. Recycle Green Services, Inc.*, 7 F.Supp.3d 260, 277 (E.D.N.Y. 2014) (quoting *Dickinson v. Igoni*, 76 A.D.3d 943, 945, 908 N.Y.S.2d 85 (2<sup>nd</sup> Dept. 2010) and *Litras v. Litras*, 254 A.D.2d 395, 396, 681 N.Y.S.2d 545 (2<sup>nd</sup> Dep't 1998)).

Viewing the amended complaint in the light most favorable to Nunes, there are sufficient facts alleged from which it may be inferred that CNN and Parnas (through Bondy) knowingly participated in a fraudulent scheme to defame Nunes. The amended complaint identifies (a) the purpose of the conspiracy, (b) when it was hatched, (c) who participated in the overt acts, (d) the acts of defamation published in furtherance of the joint plan, (e) the coordinated nature of the attacks, including the common theme and timing of the CNN Article, and (f) the role of each participant in accomplishing the common goal of the defamation campaign. [*JA*, pp. 60-61 (*Amended Complaint*, ¶¶ 54-55)]; compare *Steele v. Goodman*, 382

F.Supp.3d 403, 424 (E.D. Va. 2019) (“Plaintiffs adequately plead (1) the existence of an agreement between Negron and Goodman (2) to defame Plaintiffs, resulting in the production and publication of allegedly defamatory videos that (3) caused Plaintiffs damages. Negron’s participation in the production and publication of the videos constitutes an overt act to satisfy the fourth and final prong of the common law conspiracy claim”).

### **CONCLUSION AND REQUEST FOR RELIEF**

For the reasons stated above, the Court of Appeals should reverse the District Court’s Order granting CNN’s motion to dismiss, and remand the case for a trial on the merits of Nunes’ claims of defamation and common law conspiracy.

### **REQUEST FOR ORAL ARGUMENT AND CERTIFICATION**

Nunes respectfully requests oral argument. This case presents an important question of first impression, which the Court should certify to the Virginia Supreme Court: In a multistate defamation such as this case, where the defendant chooses to republish and republish in New York and the plaintiff ultimately suffers injury in all fifty (50) states, what is the law of the place of the wrong? Oral argument will give the parties an opportunity to address questions the Court may have regarding the issues raised on appeal.

DATED: July 6, 2021

Respectfully Submitted,

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**CERTIFICATE OF FILING AND COMPLIANCE**

I hereby certify that on July 6, 2021, I caused Appellant's Opening Brief to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel for the Appellee.

I further certify that on July 6, 2021, I caused the required copies of Appellant's Brief to be served on counsel for the Appellee in PDF.

In accordance with FRAP 32(a)(7)(B), I further certify that Appellant's Opening Brief complies with the type-volume limitation and that the total number of words, as measured by the word count of the word-processing system used to prepare the brief, is 8,097. Appellant used Microsoft Office Word to prepare the Brief. The Brief uses a proportionally spaced face (Times New Roman, 14-Point).

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