21-637

In the United States Court of Appeals for the Second Circuit

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 (THE HONORABLE LAURA TAYLOR SWAIN, C.J.)

BRIEF OF APPELLEE

KEVIN T. BAINE
STEPHEN J. FUZESI
NICHOLAS G. GAMSE
MATTHEW J. GREER
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

CORPORATE DISCLOSURE STATEMENT

Cable News Network Inc. ("CNN"), a Delaware corporation, is ultimately a wholly owned subsidiary of Warner Media, LLC. Warner Media, LLC is a direct, wholly owned subsidiary of AT&T Inc., a publicly traded corporation. AT&T Inc. has no parent company, and no publicly held company owns ten percent or more of AT&T's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

Cases—continued:

Page

Cases—continued:

Page

Cases—continued:

STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1332 because plaintiff-appellant Devin G. Nunes is a citizen of California; defendant-appellee Cable News Network Inc. is a Delaware corporation with a principal place of business in Georgia; and the amount in controversy exceeds $75,000. The district court entered final judgment dismissing Rep. Nunes's claims on February 19, 2021. J.A. 141. Rep. Nunes filed a timely notice of appeal on March 19, 2021. J.A. 142. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that California law applies to defamation and common law conspiracy claims brought by a California congressman.

2. Whether the district court correctly dismissed the congressman's claims because, under California law, his admitted failure to request a retraction before filing this lawsuit limited his recovery to special damages, which he did not adequately plead.

STATEMENT OF THE CASE

California Congressman Devin G. Nunes brought this libel and "conspiracy" lawsuit arising out of coverage by Cable News Network Inc. ("CNN") of

the first impeachment of President Trump. CNN accurately reported what a witness's lawyer stated—on the record—that his client would testify to under oath in response to a Congressional subpoena. The lawyer explained that his client, Lev Parnas, would testify that Rep. Nunes had met with a former Ukrainian prosecutor to discuss Joe Biden. Rather than respond to multiple attempts by CNN to seek comment prior to publication, Rep. Nunes filed suit, purporting to seek more than $435 million in damages and labeling CNN "the mother of fake news." J.A. 12.

In his rush to sue CNN, however, Rep. Nunes failed to first seek a retraction as required by the law of his home state, California. He admits here that he never did so. Br. 19. As a result, he was limited to seeking "special damages." Cal. Civ. Code § 48a. But his Complaint failed to plead special damages in compliance with Federal Rule of Civil Procedure 9(g), and so CNN moved to dismiss. Fully on notice of CNN's arguments, Rep. Nunes then filed an Amended Complaint, which did not add any allegations of special damages. Indeed, Rep. Nunes does not contest on appeal that his Amended Complaint failed to adequately plead such damages.

The district court applied California law and granted CNN's motion to dismiss the Amended Complaint. In keeping with the prevailing authority

addressing how to apply Virginia's *lex loci delicti* choice-of-law rule in a multistate defamation case—where the statements at issue were published to audiences in fifty states at once—the district court held that the law of Rep. Nunes's primary place of injury, his domicile California, controls here. J.A. 132. That ruling comports with how the "vast majority" of courts applying the *lex loci* rule have resolved the question, including the well-reasoned decision of the other district court to have considered the issue in this Circuit, as well as the most authoritative federal decision in Virginia. *See* J.A. 131-32 (quoting *Hatfill v. Foster*, 415 F. Supp. 2d 353, 364 (S.D.N.Y. 2006)); *Gilmore v. Jones*, 370 F. Supp. 3d 630, 666 (W.D. Va. 2019). Even on appeal, Rep. Nunes has no real answer to these cases, which he continues to ignore. This Court should affirm the district court's dismissal of the Amended Complaint.

A. Congressman Nunes

Rep. Nunes was born and raised in California. J.A. 16. He has represented California in the House of Representatives since 2003 and currently represents "California's 22nd Congressional District, which is located in the San Joaquin Valley and includes portions of Tulare and Fresno Counties." J.A. 16. Rep. Nunes is, by his own account, a "prominent" Republican congressman, serving as the Ranking Member on the House Intelligence

Committee. J.A. 16. He previously chaired the House Intelligence Committee during the 114th and 115th Congresses. J.A. 17.

Rep. Nunes is also a prolific defamation plaintiff. Over the past several years, he has filed at least nine defamation suits against multiple reporters and news organizations, among others.[1]

B. The First Impeachment Proceedings

The reports at issue here were part of CNN's coverage of the House of Representatives' first impeachment inquiry into President Trump. That inquiry considered, among other questions, whether President Trump had improperly sought assistance from Ukraine to benefit his reelection efforts.

---

[1] Although his cases have spanned jurisdictions, they have been repeatedly dismissed. *See, e.g.*, *Nunes v. Lizza*, 476 F. Supp. 3d 824, 862 (N.D. Iowa 2020) (dismissing defamation claim), *appeal docketed*, No. 20-2710 (8th Cir. Aug. 17, 2020); *Nunes v. WP Company LLC,* --- F. Supp. 3d ----, No. 20-cv-1403, 2020 WL 7668900, at *1 (D.D.C. Dec. 24, 2020) (same), *appeal docketed*, No. 20-7121 (D.C. Cir. Dec. 30, 2020); *Nunes v. WP Company LLC*, No. 21-cv-506 (D.D.C. filed Nov. 17, 2020) (motion to dismiss pending); *see also Nunes v. Fusion GPS*, No. 19-cv-1148, 2020 WL 8225339 (E.D. Va. Feb. 21, 2020) (dismissing case involving conspiracy claim); *Nunes v. Twitter, Inc.*, 105 Va. Cir. 230 (June 24, 2020) (dismissing claims against Twitter). The merits of his lawsuits notwithstanding, Rep. Nunes has capitalized on his litigation campaign to raise money for reelection—and has run advertising asking for donations in conjunction with this very case. *See* Jake Bernstein, *The Fundraising Pulpit*, N.Y. Review of Books (Apr. 23, 2020) ("Nunes turned his lawsuit against CNN into a Facebook ad campaign to collect donors."), https://tinyurl.com/3advabs2.

The House investigation began in earnest in September 2019, led primarily by the House Intelligence Committee.[2] As Ranking Member of that Committee, Rep. Nunes had substantial involvement in the proceedings; the Amended Complaint asserts that he "spearheaded Republican efforts to investigate and defend the truth during the impeachment inquiry." J.A. 58.

Early in the investigation—long before the CNN reports at issue in this case—it was widely reported that a key area of focus for House investigators was the attempt by President Trump's personal attorney, Rudolph W. Giuliani, to press the Ukrainian government to investigate then-former Vice President Biden.[3] It was also widely reported that Mr. Giuliani had been aided in his efforts by various associates, including Florida-based businessmen Lev

[2] House Perm. Select Comm. on Intel., The Trump-Ukraine Impeachment Inquiry Report, H.R. Doc. No. 116-335, at 7 (2019), https://tinyurl.com/46v59hz3 ("House Report"). This Court may take judicial notice of publicly available government documents. *E.g.*, *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 227 n.24 (2d Cir. 2012). The Court may also take judicial notice "of the fact that press coverage . . . contained certain information." *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008) (emphasis omitted).

[3] *See, e.g.*, Letter from Adam B. Schiff, Chairman House Perm. Select Comm. on Intel., et al., to Rudolph W. L. Giuliani (Sept. 30, 2019), https://tinyurl.com/se2h6h2j; Nicholas Fandos, *House Subpoenas Giuliani, Trump's Lawyer, for Ukraine Records*, N.Y. Times (Sept. 30, 2019), https://tinyurl.com/dtt6wf8r.

Parnas and Igor Fruman. J.A. 23 (citing a 2019 Washington Post article). In October 2019, Messrs. Parnas and Fruman were indicted on campaign finance charges in the Southern District of New York. J.A. 20. Mr. Parnas has been represented in that case by, among others, attorney Joseph Bondy. J.A. 20.

Shortly after the indictment, Congress subpoenaed Mr. Parnas, seeking documents and testimony as part of the impeachment investigation.[4] Mr. Parnas's attorneys publicly stated that he was "willing to comply with a Congressional subpoena for documents and testimony as part of the impeachment inquiry in a manner that would allow him to protect his Fifth Amendment rights against self-incrimination." J.A. 69.

On November 20, 2019, The Daily Beast published an online article reporting that Mr. Parnas had "helped arrange meetings and calls in Europe for Rep. Devin Nunes in 2018." Betsy Swan, *Lev Parnas Helped Rep. Devin Nunes' Investigations*, Daily Beast (Nov. 20, 2019), https://tinyurl.com/aawcw6em. The article attributed the information to "Parnas' lawyer Ed MacMahon." *Id.* The Daily Beast's reporting gained widespread

[4] J.A. 23; *see also* Letter from Adam B. Schiff, Chairman House Perm. Select Comm. on Intel., et al., to John M. Dowd (Oct. 10, 2019), https://tinyurl.com/vnynyf6d.

attention. Rep. Eric Swalwell introduced the article during the House Intelligence Committee's impeachment hearing the day after it was published. *See* House Perm. Select Comm. on Intel. Impeachment Inquiry, Tr. 146:9-21 (Nov. 21, 2019), https://tinyurl.com/56tuey75.

C. CNN's Reports

On November 22, 2019, CNN published an online report, *Exclusive: Giuliani associate willing to tell Congress Nunes met with ex-Ukrainian official to get dirt on Biden*. J.A. 28; J.A. 67-72. The article reported that Mr. Bondy, one of Parnas's attorneys, had told CNN that Mr. Parnas was prepared to testify that Rep. Nunes had met "with a former Ukrainian prosecutor to discuss digging up dirt on Joe Biden." J.A. 68. The report extensively quoted Mr. Bondy, who spoke to CNN on the record. *See* J.A. 68.

The CNN report, authored by senior reporter Vicky Ward, cited government travel records showing that Rep. Nunes had traveled to Europe along with several aides from November 20 to December 3, 2018, when he was said to be meeting with former Ukrainian Prosecutor General Viktor Shokin. J.A. 69. The article also linked to the Daily Beast article and explained that Rep. Swalwell had discussed the Daily Beast story in the impeachment hearing on November 21, 2019. J.A. 69. The CNN report further noted that Rep.

Nunes and his staff had declined comment on multiple occasions, including after that hearing. J.A. 68-69.

Following publication of the online report, Ms. Ward appeared on CNN's evening television program *Cuomo Prime Time*, where she and anchor Chris Cuomo discussed the story. J.A. 35. Ms. Ward emphasized again that Mr. Parnas had been subpoenaed in the impeachment inquiry, and that Mr. Bondy was hoping to negotiate terms that would allow Mr. Parnas to testify freely. J.A. 73-86. Ms. Ward also described CNN's efforts to seek comment from Rep. Nunes. J.A. 82-83. At the end of the segment, Mr. Cuomo called on Rep. Nunes to respond to the allegations. J.A. 86. Subsequently, after Rep. Nunes was quoted disputing CNN's report in an article published on the Breitbart website, CNN updated its online report to include his denial. J.A. 68, 71.

D. Rep. Nunes Sues Without Requesting a Retraction

Eleven days later, on December 3, 2019, Rep. Nunes filed this lawsuit against CNN. As he expressly acknowledges, he "did not make a written demand for retraction of the [allegedly] false statements" prior to bringing suit, Br. 19, as required by California law.

California's long-standing retraction statute provides that a defamation plaintiff suing with respect to certain types of publications "shall only recover

special damages unless a correction is demanded and is not published or broadcast, as provided" by the statute. Cal. Civ. Code § 48a(a). Specifically, a plaintiff must "serve upon the publisher at the place of publication, or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that those statements be corrected." *Id.* The statute, which courts strictly enforce, allows a publisher an opportunity to determine whether to make a correction before engaging in litigation. *See, e.g.*, *Anschutz Ent. Grp. v. Snepp*, 90 Cal. Rptr. 3d 133, 163 (Ct. App. 2009). It "represents a significant change from common law libel," and was part of a broader legislative trend "to restrict perceived excessive general damage awards and protect the public interest in the free dissemination of news." *Id.* (citing cases).

E. The Litigation

1. Rep. Nunes originally filed his suit in the Eastern District of Virginia. J.A. 2-3. CNN moved to dismiss the complaint, explaining that California law applied under applicable choice-of-law principles, Rep. Nunes failed to comply with the California retraction statute, and the complaint should accordingly be dismissed for failure to adequately plead special damages. J.A. 4 (ECF Dkt. No. 15). Simultaneously, CNN moved to transfer the case to the

Southern District of New York. J.A. 102. In support of its motion to transfer, CNN noted that the case's only connection to Virginia was the location of Rep. Nunes's attorney. J.A. 4 (ECF Dkt. No. 16).

2. Rather than respond to CNN's motion to dismiss, Rep. Nunes filed an Amended Complaint. J.A. 5; J.A. 12-63. The Amended Complaint did not add any allegations relating to special damages. Aside from a single reference to "special damages" in each count, it did not allege any special damages or claim that Rep. Nunes suffered any specific pecuniary loss. J.A. 60, 61. CNN again moved to dismiss on the same grounds. J.A. 64.

3. On May 22, 2020, the district court in the Eastern District of Virginia (Hon. Robert E. Payne) granted CNN's motion to transfer and ordered the case moved to the Southern District of New York. J.A. 122. The court held that the subject matter of this suit "has nothing to do with Virginia" and noted that Rep. Nunes "is a citizen of California." J.A. 113, 118. The court expressed "significant concerns about forum shopping" and emphasized that "[a]s the Court has explained to Plaintiff's counsel on numerous occasions," the Eastern District of Virginia "cannot stand as a willing repository for cases which have no real nexus to [that] district." J.A. 120 (quoting *Phillips v. Uber Technologies, Inc.*, No. 15-cv-544, 2016 WL 165024, at *3 (E.D. Va. Jan. 13,

2016)). The court declined to resolve CNN's motion to dismiss, noting that it was "best resolved by the transferee court." J.A. 121.[5]

4. Upon transfer, the parties filed supplemental briefs at the request of the magistrate judge, further addressing which state's law should apply. J.A. 9 (ECF Dkt. No. 43) (Nunes); J.A. 10 (ECF Dkt. No. 44) (CNN). CNN maintained that California law applies. ECF Dkt. No. 44, at 7. Rep. Nunes, despite having previously argued that Virginia, D.C., or New York law applies, ECF Dkt. No. 25, at 8, 10, appeared to settle on New York in his supplemental brief, ECF Dkt. No. 43, at 5. Discovery was stayed pending resolution of CNN's motion to dismiss. J.A. 9 (ECF Dkt. No. 40).

5. On February 19, 2021, the district court (Hon. Laura Taylor Swain) granted CNN's motion to dismiss in an 18-page decision. J.A. 123-40; *Nunes v. Cable News Network, Inc.*, --- F. Supp. 3d ----, No. 20-cv-03976, 2021 WL 665003 (S.D.N.Y. Feb. 19, 2021).

[5] The court further noted its dismay that Rep. Nunes' Amended Complaint contained "*ad homine[m]* attacks against [CNN and others]." J.A. 108-09 (quoting *Steele v. Goodman*, No. 17-cv-601, 2019 WL 3367983, at *3 (E.D. Va. July 25, 2019)). The court reminded Rep. Nunes's counsel of his obligation to conduct himself "with dignity and propriety" and warned that he may be subject to sanctions "for engaging in conduct unbefitting of this Court." J.A. 109.

The district court first held that California law applied. J.A. 132. Because Rep. Nunes originally filed the case in Virginia, the court applied Virginia choice-of-law rules and, in particular, its *lex loci delicti* doctrine. J.A. 126. The court recognized that the "Virginia Supreme Court has not addressed how to determine the 'place of the wrong'" where, as here, a case involves "the instantaneous, multistate publication and broadcasting that the Internet, social media, and other forms of mass communication facilitate." J.A. 127. Joining the other court in this Circuit to have considered the issue, as well as the most recent federal court opinion from Virginia, the district court held that "the Virginia Supreme Court would likely 'follow the lead of other lex loci jurisdictions and pinpoint the place of greatest harm in this multistate libel case in the district where the plaintiff was domiciled, absent strong countervailing circumstances,'" which are not present here. J.A. 132 (quoting *Hatfill*, 415 F. Supp. 2d at 365). That conclusion is dictated, the district court explained, by "persuasive authority and the legal and practical considerations underpinning Virginia's application of the *lex loci* doctrine." J.A. 132.

The district court examined and rejected Rep. Nunes's arguments against the application of California law, concluding that looking to the plaintiff's domicile "is consistent with the sound approach followed by most *lex loci*

jurisdictions, as well as with the goals of 'uniformity, predictability, and ease of application' that underpin the doctrine." J.A. 131 (quoting *Gilmore*, 370 F. Supp. 3d at 665).

Applying California law, the district court then held that Rep. Nunes did not request a retraction, so he was limited to "special damages." J.A. 133. The court again examined and rejected Rep. Nunes's arguments with respect to the application of the statute. *See* J.A. 133-35.[6]

Because the Amended Complaint contains only a single invocation of the term "special damages" in each count, with "no further indication of the basis or quantum of any special, or economic, element of his damages claim," the district court held that the Amended Complaint failed to meet the requirements of Rule 9(g). J.A. 137-38. Accordingly, the district court dismissed Rep. Nunes's defamation claim with prejudice. The district court also dismissed Rep. Nunes's conspiracy claim because without a viable defamation claim, "there is no underlying tort to support a viable claim for conspiracy" and because the conspiracy claim was deficient in its own right. J.A. 139.

[6] These included arguments—abandoned on appeal—as to the applicability of the statute to the specific publications at issue here and with respect to claims of defamation "*per se*" that were contradicted by the statute's text and California case law. *See* J.A. 134-35.

On March 19, 2021, Rep. Nunes filed a timely notice of appeal.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a defendant's motion to dismiss for failure to state a claim. *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 242 (2d Cir. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do," nor will "naked assertion[s] devoid of further factual enhancement." *Id.* (internal quotation marks omitted). There must be "well-pleaded factual allegations." *Id.* at 679. In addition, if a complaint claims special damages, they "must be specifically stated." Fed. R. Civ. P. 9(g).

SUMMARY OF ARGUMENT

Rep. Nunes acknowledges that he failed to seek a retraction, as required under California law. Cal. Civ. Code § 48a. And he does not contest that the Amended Complaint failed to plead special damages—the category of damages to which he is restricted under California law in light of his failure to make a retraction demand. *See id.* The only question on this appeal, then, is whether

the district court correctly applied California law to a defamation claim brought by this California congressman arising from statements that were published simultaneously in multiple jurisdictions. It did. Adopting the prevailing view, the district court rightly applied the law of Rep. Nunes's domicile—in keeping with decisions from courts both in this Circuit and across the nation applying the *lex loci delicti* choice-of-law principle. *See, e.g.*, *Hatfill v. Foster*, 415 F. Supp. 2d 353, 365 (S.D.N.Y. 2006); *Gilmore v. Jones*, 370 F. Supp. 3d 630, 645 (W.D. Va. 2019).

The district court then correctly dismissed the Amended Complaint with prejudice. Rep. Nunes did not seek leave to file yet a further amended complaint. And even now, he fails to identify on appeal what additional facts he could plead to satisfy his obligation to plead special damages with specificity.

Finally, conspiracy is not an independent tort under California law. *See, e.g.*, *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 457 (Cal. 1994) (In Bank). For that reason, the district court properly dismissed Rep. Nunes's conspiracy claim. And the conclusory allegations of conspiracy fail to state a claim in any event. *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. California Law Applies to Rep. Nunes's Claims.

Even though this case "has nothing to do with Virginia," J.A. 113, Virginia choice-of-law principles govern which state's law applies, because Rep. Nunes filed his complaint in the Eastern District of Virginia. *Van Dusen v. Barrack*, 376 U.S. 612, 633-34 (1964); *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 154 (2d Cir. 2019) (upon transfer under 28 U.S.C. § 1404(a), transferee court conducts same choice-of-law analysis that transferor court would have). The district court correctly held that California law applies under Virginia's choice-of-law principles.

A. The District Court Correctly Followed the Majority *Lex Loci Delicti* Rule.

There is no dispute that Virginia follows the *lex loci delecti* doctrine in tort cases. *McMillan v. McMillan*, 253 S.E.2d 662, 663 (Va. 1979); Br. 27. Nor is there any dispute that under *lex loci*, "the place of the wrong . . . determines which State's substantive law applies." *Quillen v. Int'l Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986); Br. 27. The place of the wrong is, generally speaking, "the place where the last event necessary to make an act liable for an alleged tort takes place," *Quillen*, 789 F.2d at 1044, which in defamation cases is "where the defamatory statement is communicated" to a third party,

Restatement (First) of Conflict of Laws § 377 n.5 (Am. L. Inst. 1934). That is, it is traditionally understood to be where the allegedly defamatory statement is "seen or heard by non-parties." *Wells v. Liddy*, 186 F.3d 505, 521-22 (4th Cir. 1999). For example, courts have held that "[w]ith respect to defamation claims involving email, the place of publication is deemed to be the place where the email was received (i.e., opened and read)." *Galustian v. Peter*, 561 F. Supp. 2d 559, 565 (E.D. Va. 2008), *rev'd in part on other grounds*, 591 F.3d 724 (4th Cir. 2010).

Here, the Amended Complaint alleges that the CNN coverage at issue was seen and heard by viewers and readers in all fifty states—and even "around the World." *See* J.A. 19, 37. It is thus no answer to assert, as Rep. Nunes does, that the court should apply the law of the state "where the publication first occurred." Br. 29. This was, as the district court recognized, an "instantaneous, multistate publication." J.A. 127.

The Virginia Supreme Court has not addressed how to apply *lex loci* in a defamation case where the statements are simultaneously published in multiple jurisdictions. *Gilmore*, 370 F. Supp. 3d at 664. But other courts have, and the prevailing view is that the Virginia Supreme Court would apply the law of the state of the plaintiff's greatest injury, which is presumptively the

plaintiff's state of domicile. *See, e.g.*, *Hatfill*, 415 F. Supp. 2d at 365; J.A. 132. The district court here properly followed the majority rule.

1. In this Circuit, the two district courts to have considered this question, including the district court in this case, have reached the same conclusion: in a multistate defamation suit, Virginia's *lex loci* rule dictates that the plaintiff's domicile is usually "the place of the wrong." J.A. 129, 132; *Hatfill*, 415 F. Supp. 2d at 365. For example, in a case involving a nationwide magazine publication, the district court in *Hatfill* concluded that Virginia would apply the law of the state "where the plaintiff suffered the greatest injury," which is "where the plaintiff was domiciled, absent strong countervailing circumstances." 415 F. Supp. 2d at 364-65. The district court here concluded the same. J.A. 132.

Similarly, in the most recent and authoritative federal Virginia multistate Internet defamation case, *Gilmore*, the court concluded that the Virginia Supreme Court would apply the law of "the state where the plaintiff is primarily injured as a result of the allegedly tortious online content." *Gilmore*, 370 F. Supp. 3d at 666. Thus, while the publication at issue was available worldwide through the Internet, the court held that the "state where the

plaintiff [was] primarily injured" was Virginia, where he lived and worked. *Id.* at 664-65.

2. Those decisions accord with the "vast majority" of jurisdictions that apply *lex loci*. *Hatfill*, 415 F. Supp. 2d at 364-65. In fact, "lex loci jurisdictions have shown remarkable consistency in how to resolve the question." *Id.* at 364; *see also, e.g.*, *Swinney v. Frontier Airlines, Inc.*, No. 19-cv-808, 2020 WL 3868831, at *3 (M.D.N.C. July 9, 2020) ("this Court concludes that the North Carolina Supreme Court, consistent with the First Restatement of Conflict of Laws and the principle of lex loci, would likely treat [plaintiffs'] state of residency as the state where their reputational injury occurred"); *Adventure Outdoors, Inc. v. Bloomberg*, No. 06-cv-2897, 2007 WL 9735875, at *3 (N.D. Ga. Dec. 18, 2007) (same, applying the *lex loci* rule of Georgia); *Ascend Health Corp. v. Wells*, No. 12-cv-83, 2013 WL 1010589, at *2 (E.D.N.C. Mar. 14, 2013); *Hudson Assocs. Consulting, Inc. v. Weidner*, No. 06-cv-2461, 2010 WL 1980291, at *6 (D. Kan. May 18, 2010); *Lawrence-Leiter & Co. v. Paulson*, 963 F. Supp. 1061, 1065 (D. Kan. 1997).

As in the district court, Rep. Nunes continues to ignore this prevailing authority. Of all of these cases, Rep. Nunes mentions only *Gilmore*, and he does so only in passing. Br. 32. He continues to overlook altogether the prior

precedent from the Southern District, which decisively answered the question presented, holding that, consistent with the "vast majority" of *lex loci* jurisdictions, Virginia "would follow the lead of other lex loci jurisdictions and pinpoint the place of greatest harm in this multistate libel case in the district where the plaintiff was domiciled." *Hatfill*, 415 F. Supp. 2d at 364-65.

3. Rep. Nunes also continues to ignore the multiple compelling reasons why looking to a plaintiff's domicile in a multistate defamation case is most consistent with "the underlying rationale" of the *lex loci* rule, which the Virginia Supreme Court has held to be "uniformity, predictability, and ease of application." *Gilmore*, 370 F. Supp. 3d at 665 (quoting *McMillan*, 253 S.E.2d at 665); J.A. 128. "The traditional *lex loci delicti* rule 'presumes that the defamatory statement is published (*i.e.*, communicated to third parties) in one geographic location,' but publication via the Internet results in instantaneous 'multistate (if not[ ] worldwide) publication.'" *Gilmore*, 370 F. Supp. 3d at 665 (alteration in original) (quoting *Ascend Health Corp.*, 2013 WL 1010589, at *2). The same is true, of course, for a nationwide telecast. As a result, "[d]efining the 'place of the wrong' as the place of publication in a case like this"—with reports airing online and across the nation and even frequently involving contributions from journalists in multiple jurisdictions—"would inevitably

require the cumbersome application of a patchwork of state law," which is neither uniform nor predictable. *Id.*; J.A. 128; *see also, e.g.*, *Wells*, 186 F.3d at 528. In short, it would be unreasonable to assume that the Virginia Supreme Court would adopt an interpretation that defeats what it has held to be the very purpose of the rule.

Additionally, looking to where the defendant "published" would "raise[ ] thorny questions about the nature of online publication"—and publication via national telecast—including about where the "publication" technically occurs. *Gilmore*, 370 F. Supp. 3d at 665; J.A. 128. It is "unclear whether 'publication' of online content occurs in the state where an individual uploads content, the state where the relevant media platform or publication maintains headquarters, the state where a website's servers are located, or the state where third parties actually view the content (which, absent restrictions on the geographic reach of a particular online publication, will be in all fifty states and across the world)." *Id.* Looking to the plaintiff's domicile, by contrast, avoids the impossible task of identifying a single place where such a multistate publication is published.

And, of course, even if it were possible to answer such a question, attempting to do so would require information well beyond what is normally

included in a complaint. As a result, the plaintiff would be unable to determine in advance what law applies, and courts would be unable to determine what law governs a motion to dismiss for failure to state a claim. Such an approach is hardly "uniform" and "predictable," as *lex loci* demands.

4. Rep. Nunes has no response to these arguments. Rather than addressing the numerous cases supporting the district court's ruling, he continues to cite the same inapposite cases that he cited below and that do not engage the multistate defamation question presented here. In several, the issue was not even in dispute. *See, e.g.*, *Wiest v. E-Fense, Inc.*, 356 F. Supp. 2d 604, 608 n.2 (E.D. Va. 2005) (emphasizing that both parties relied on Virginia law and "raised no question about choice of law"); *Edwards v. Schwartz*, 378 F. Supp. 3d 468, 502-03 & n.17 (W.D. Va. 2019) (no dispute that Virginia law applies); *Velocity Micro, Inc. v. J.A.Z. Mktg., Inc.*, No. 11-cv-374, 2012 WL 3017870, at *6 (E.D. Va. July 23, 2012) (no dispute that Minnesota law applies). Some have even been cited as examples of *conflicting* authority on the disfavored "place of publication" test. *See Gilmore*, 370 F. Supp. 3d at 665 & n.39 (distinguishing cases including *Velocity* and *ABLV Bank v. Ctr. for Advanced Def. Studies Inc.*, No. 14-cv-1118, 2015 WL 12517012, at *1 (E.D. Va. Apr. 21, 2015)).

Rep. Nunes argues that *Gilmore* involved "unique circumstances," because it was a "multi-defendant, multi-state internet tort case." Br. 32. But, of course, this case involves publication online and on television across all fifty states by a national news organization. And the fact that *Gilmore* involved multiple defendants is no basis to distinguish its analysis. The problems described above are endemic to multistate defamation cases generally, irrespective of the number of defendants. *See, e.g.*, *Wells*, 186 F.3d at 528 (addressing single-defendant multistate defamation case).

In addition, Rep. Nunes's argument is premised on the incorrect proposition that looking to the site of injury would run afoul of the Virginia Supreme Court's prior rejection of the Second Restatement's "most significant relationship" test for choice of law. Br. 28-29. The *Gilmore* court explained why this supposed conflict was illusory: "[t]he Court *does not* hold that the Supreme Court of Virginia would apply the Second Restatement's 'most significant relationship' test, which provides that defamation cases should be decided under the law of the state with 'the most significant relationship to the occurrence and the parties.'" 370 F. Supp. 3d at 665 n.37 (emphasis added). As *Gilmore* makes clear, the tests are different; the "most significant relationship" test looks to the "most significant relationship to *the occurrence and the parties*,"

whereas the *lex loci* injury test looks "*to the site of the plaintiff's injury*." *Id.* (emphasis added).

Indeed, multiple other jurisdictions that similarly reject the "most significant relationship" test have also applied a *lex loci* rule that looks to the site of the plaintiff's injury. *Ascend Health Corp.*, 2013 WL 1010589, at *2 (North Carolina); *Adventure Outdoors*, 2007 WL 9735875, at *3 (Georgia); *Hudson Assocs.*, 2010 WL 1980291, at *6 (Kansas). CNN has consistently cited these cases throughout this case; Rep. Nunes continues to ignore them.[7]

[7] Aside from *Gilmore*, Rep. Nunes cited below only one federal district court case that actually analyzed the choice-of-law issue in any depth, albeit not with respect to a libel claim. *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652 (E.D. Va. 2019). The district court correctly held that *Cockrum* is unpersuasive, and Rep. Nunes does not even cite it on appeal. As the district court emphasized, *Cockrum*'s "holding appears to be in tension with the vast majority of *lex loci delicti* jurisdictions." J.A. 131 (internal quotation marks omitted). And *Cockrum* was premised on the same erroneous concern regarding the application of the Second Restatement test. *See* 365 F. Supp. 3d at 669. Rep. Nunes also attempts to rely on an unpublished Virginia trial court ruling in *Depp v. Heard*, 102 Va. Cir. 324, 328-30 (Va. Cir. Ct. 2019). Yet *Depp* is distinguishable for all of the same reasons. In considering a forum non conveniens motion, the Fairfax County court acknowledged the "well-articulated" analysis in *Gilmore*, but misunderstood that it was advocating a departure from *lex loci*. *See id.* at *4-5. The result was that the court looked to the law of the place of the publisher's Internet servers—a test that is quintessentially unpredictable for most litigants. *Id.* at *5-6; *see Gilmore*, 370 F. Supp. 3d at 665.

5. Rep. Nunes's own briefing in this case only underscores why his confusing approach has been rejected by numerous courts. As the district court recognized, he argued variously in his papers below that District of Columbia, New York, and Virginia law should apply. J.A. 130-31. For example, in the district court, he argued that "that Virginia law should apply to Plaintiff's claims because the statements at issue were 'published' in Virginia." J.A. 130. Now, on appeal, he tells this Court that "[t]his case involves statements that were first published in one jurisdiction – New York," and argues for "the law of the state where the publication first occurred – here New York." Br. 32, 29. Rep. Nunes makes no attempt to resolve these contradictions in his argument, and there is no coherent explanation. Rather, his briefing exposes in stark terms the very point made by the district court below and the "vast majority" of courts before it: his test is fundamentally unpredictable, which is fatal to his argument.

In sum, CNN's argument is supported by both district courts to have considered the question in this Circuit, by the most recent and authoritative federal Virginia opinion, and by the "vast majority" of other courts to have

considered the issue. Rep. Nunes offers little more than inapposite string cites, with no analysis, to support his position.[8]

6. Once the prevailing interpretation of *lex loci* is applied, it is clear that California law governs here. As he pleads in his Amended Complaint, Rep. Nunes is a "citizen of California." J.A. 16. He is a lifelong Californian, representing Californians in Congress. J.A. 16-17. California, therefore, is presumptively the location of the greatest part of any alleged injury. *See, e.g.*, *Hatfill*, 415 F. Supp. 2d at 365 (district where plaintiff was domiciled is presumptively the place of greatest harm); *Ascend Health Corp.*, 2013 WL 1010589, at *2; *Adventure Outdoors*, 2007 WL 9735875, at *3 (the "place of greatest harm is where plaintiff domiciled"); *Lawrence-Leiter & Co.*, 963 F. Supp. at 1065 (applying law of "plaintiff's domicile").

[8] Further, this Court should not indulge Rep. Nunes's one-sentence request for certification to the Virginia Supreme Court. Br. 38. This is not a case requiring such an "exceptional" procedure. *See DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005). To the contrary, the district courts in this Circuit are in agreement, and their interpretation is consistent with the "vast majority" of other courts. This court can therefore "undertake the imprecise but necessary task of predicting on a reasonable basis how the [Virginia Supreme Court] would rule if squarely confronted with this issue," without "shifting the burdens of this Court to those whose burdens are at least as great." *Id.* at 111-12 (rejecting certification request "in light of existing authority from New York and elsewhere on this matter").

As the district court properly noted, Rep. Nunes "proffered no facts" to support any "extraordinary circumstances indicating that he suffered greater harm, i.e., that the allegedly defamatory material garnered greater third-party attention in a single jurisdiction other than his home state." J.A. 132.

Rep. Nunes asserts in a footnote in his appeal brief that harm was "concentrated in Virginia or the District of Columbia where Plaintiff works." Br. 32 n.5. The Amended Complaint, however, contains no credible factual allegations of such concentrated harm. At most, it merely alleges in one sentence that much of the "national security apparatus" is "located in Virginia," J.A. 17, and later in another sentence that CNN is subject to personal jurisdiction in Virginia because, among other things, Rep. Nunes suffered "substantial injury" in Virginia, J.A. 22. These conclusory assertions are simply no basis for overcoming the strong presumption that he suffered his most significant injury in his state of domicile. The Amended Complaint expressly acknowledges that CNN's coverage was published across the nation—and affirmatively pleads Rep. Nunes's lifelong connections to California. After all, Rep. Nunes was elected to Congress by the people of his home district in California; it is, therefore, his reputation among the constituents of his home

district that is of particular importance to his ability to continue his work in the nation's capital. *See* J.A. 132.

Finally, there is no merit to Rep. Nunes's unsupported assertion that he requires unspecified discovery, or "evidence," to show where he was harmed. Br. 33-34. First, he never requested the opportunity to offer such "evidence" below, so he has waived the argument. *See Scanscot Shipping Servs. GmbH v. Metales Tracomex LTDA*, 617 F.3d 679, 683 (2d Cir. 2010). Second, in any event, it makes no sense that a plaintiff requires discovery to properly allege where he was harmed. The fact that the Amended Complaint did not contain plausible allegations of harm anywhere suggests there is none. Third, he does not even specify what "evidence" he would require or proffer. And fourth, it would defeat the purpose of the retraction statute if a multistate defamation plaintiff were able to simply avoid application of the statute prior to discovery merely by asserting he was harmed elsewhere. That is clearly not the law.

In short, the district court reached the correct—and unsurprising—conclusion that California law applies to the libel claims brought by a California congressman.

B. The Retraction Statute Is Substantive California Law.

In a bid to avoid the application of California law, Rep. Nunes argues that the California retraction statute is merely "procedural" and that the law of the forum controls in matters of procedure. Br. 25-27. The district court correctly rejected this misguided and unsupported argument.

Every court to have considered the question of whether the retraction statute is substantive or procedural has held that it is substantive. *See, e.g.*, J.A. 136. In *Price v. Stossel*, for example, the plaintiff argued that the California retraction statute was "inapplicable because it is procedural." No. 07-11364, 2008 WL 2434137, at *6 n.12 (S.D.N.Y. June 4, 2008). The court disagreed, emphasizing that prior courts had held that the statute was substantive and applied in diversity actions. *Id.* (citing cases including *King v. ABC, Inc.*, No. 97-cv-4963, 1998 WL 665141, at *2-4 (S.D.N.Y. Sept. 28, 1998) (applying California retraction statute and dismissing case)).

Rep. Nunes does not cite a single case in the more than 85 years since the statute's enactment reaching a different conclusion. He cites only one case that declined to apply the retraction statute, for any reason. Br. 26. But that New York trial court decision is irrelevant: the defendant in that case *agreed* that New York law applied. *See Kipper v. NYP Holdings, Inc.*, No. 116587/04,

2007 WL 1439075, at *3 (N.Y. Super. Ct. May 11, 2007), *rev'd on other grounds*, 47 A.D.3d 597 (N.Y. App. Div. 2008); *see also Kipper v. NYP Holdings, Inc.*, 2007 WL 6065159 (Def.'s Memo. of Law in Support of Summary Judgment) ("It is clear that New York law applies to this action . . . .").

There is no case law to support Rep. Nunes because the retraction statute is clearly substantive law. It is an integral part of California's law of defamation, designed to "restrict perceived excessive general damage awards and protect the public interest in the free dissemination of news." *Anschutz Ent. Grp. v. Snepp*, 90 Cal. Rptr. 3d 133, 163 (Ct. App. 2009). The statute functionally imposes a "condition precedent" to filing a defamation suit: a potential plaintiff must request a retraction in accordance with the statutory rules. California designed the statute that way for a reason. The state intended "to facilitate a publisher's efforts to determine if the publication contains an error," thereby allowing publishers to fix (and limit liability for) mistakes. *Id.* And under Virginia law, such a condition "is not merely a procedural requirement, but a part of the . . . substantive cause of action." *Commonwealth v. AMEC Civ., LLC*, 677 S.E.2d 633, 639 (Va. Ct. App. 2009), *rev'd in part on other grounds*, 699 S.E.2d 499 (Va. 2010) (requirement to provide written notice of

intent to file a claim was substantive) (quoting *Sabre Constr. Corp. v. County of Fairfax*, 501 S.E.2d 144, 147 (Va. 1998)).

Section 48a also limits the types of recoverable damages, which, as the district court correctly recognized, is a substantive limitation on the right of action. J.A. 136; *see, e.g.*, *Corinthian Mortg. Corp. v. ChoicePoint Precision Mktg., LLC*, No. 07-cv-832, 2009 WL 36606, at *6 n.4 (E.D. Va. Jan. 5, 2009) ("Under Virginia's conflicts rules, issues related to recovery are considered substantive law."); *Spring v. United States*, 833 F. Supp. 575, 579 (E.D. Va. 1993) (similar); *Rybolt v. Jarrett*, 112 F.2d 642, 643 (4th Cir. 1940) (*lex loci* controls "the limit of damages"); *Griffin v. Red Run Lodge, Inc.*, 610 F.2d 1198, 1205 n.7 (4th Cir. 1979) ("Availability Vel non of punitive damages is clearly a matter of substantive right to be determined by reference to state law."); *Hoilett v. Goodyear Tire & Rubber Co.*, 81 Va. Cir. 176 (2010) (holding that a Maryland statutory cap on non-economic damages for wrongful death suits is substantive as a matter of Virginia law).

To conclude otherwise would upend California's longstanding, carefully-balanced statutory scheme for addressing defamation. In multistate defamation cases, plaintiffs, including *California citizens* like Rep. Nunes, could avoid the statute and recover much greater damages simply by suing outside the

state. This Court should not bless such a perverse outcome—and Rep. Nunes provides no basis on which to do so.

II. The District Court Properly Dismissed Rep. Nunes's Defamation Claim.

Applying California law, the district court correctly dismissed Rep. Nunes's defamation claim.

There is no dispute that Rep. Nunes failed to comply with the California retraction statute. He admits that he "did not make a written demand for retraction." Br. 19. Because Rep. Nunes did not comply with the retraction statute, his possible recovery was limited to "special damages." Cal. Civ. Code § 48a(a); *Anschutz*, 90 Cal. Rptr. 3d at 163 (plaintiff "cannot recover anything beyond 'special damages.'"). But, as the district court recognized, Rep. Nunes failed to plausibly allege special damages, which is fatal to his claim. J.A. 137-39. Indeed, Rep. Nunes does not even argue on appeal that the Amended Complaint successfully pleaded special damages. *See* Br. 34-37.

In contrast with general damages, which encompass things like loss of reputation and a plaintiff's hurt feelings, "special damages are defined narrowly to encompass only economic loss." *Gomes v. Fried*, 186 Cal. Rptr. 605, 614 (Ct. App. 1982). Special damages are also subject to Rule 9's heighted pleading standard. Fed. R. Civ. P. 9(g); *see also FAA v. Cooper*, 566 U.S. 284,

295 (2012) ("'Special damages' are limited to actual pecuniary loss, which must be specially pleaded and proved.'"). Without an adequately pleaded allegation of special damages, "the complaint does not allege a legally sufficient cause of action." *King*, 1998 WL 665141, at *4 (dismissing complaint).

Here, the district court rightly concluded that the Amended Complaint's conclusory invocation of "special damages" was insufficient to state a claim. J.A. 138. The Amended Complaint's "general monetary demand stated in round numbers" and "general allegations" do not "explain what the damages comprise or how they are calculated" and do not satisfy Rule 9(g). J.A. 138-39 (collecting cases); *see also, e.g.*, *In re Cable News Network*, 106 F. Supp. 2d 1000, 1001-02 (N.D. Cal. 2000) (dismissing claims for failure to "allege[ ] special damages with adequate specificity" where plaintiffs had "not alleged a sufficient demand for retraction"); *Fellows v. Nat'l Enquirer, Inc.*, 721 P.2d 97, 101 (Cal. 1986) (In Bank) (where plaintiff's "complaint sought only general damages and did not allege that he had demanded a retraction, the [retraction] statute would have clearly barred a libel action"); *Anschutz*, 90 Cal. Rptr. 3d at 165 (granting anti-SLAPP motion based on "insufficient pleading of a special damages claim" where plaintiff "never served a legally effective retraction demand"); *Homeland Housewares, LLC v. Euro-Pro Operating LLC*, No. 14-

cv-3954, 2014 WL 6892141, at *4 (C.D. Cal. Nov. 5, 2014) ("Plaintiffs' general statements of economic loss and bare statement for relief of $3 million dollars in damages do not sufficiently identify special damages.").

Rather than take issue with the district court's conclusion that the Amended Complaint failed to adequately allege special damages, Rep. Nunes now insists that he "ought to have been granted leave to amend." Br. 34. That assertion is groundless.

1. Rep. Nunes already had the opportunity to file an Amended Complaint when fully on notice of the deficiencies in his pleading. When CNN filed its original motion to dismiss, *see supra* p. 9, Rep. Nunes was put on notice of CNN's specific argument that he failed to comply with the retraction statute and failed to adequately plead special damages. Rather than respond immediately to that motion, he invoked his right under Federal Rule of Civil Procedure 15(a)(1)(B) to file an Amended Complaint. Yet he did not add a single factual allegation about special damages. J.A. 12-63.

2. Rep. Nunes never requested leave to further amend in the district court—or even argued that he could sufficiently allege special damages. He has waived the point and cannot now argue for a chance to amend yet again. Moreover, the court clearly could not have abused its discretion in failing to

"grant[ ] leave" when it was never requested. *Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249-50 (2d Cir. 2004) (the "contention that the District Court abused its discretion in not permitting an amendment that was never requested is frivolous"); *Cybercreek Ent., LLC v. U.S. Underwriters Ins. Co.*, 696 F. App'x 554, 555 (2d Cir. 2017) (plaintiff's "failure to request leave to amend alone supports the District Court's dismissal with prejudice").

3. Even now on appeal, Rep. Nunes does not describe what specific facts he could plead to satisfy the demanding standards for special damages under California law and Rule 9(g). He generically claims that he deserves "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." Br. 36. But Rep. Nunes ignores the unambiguous authority holding that vague and unquantified allegations of the loss of professional opportunities, like the ones he alludes to on appeal, are insufficient to satisfy the specific pleading requirement for special damages. *See Todd v. Lovecruft*, No. 19-cv-1751, 2020 WL 60199, at *20 (N.D. Cal. Jan. 6, 2020) (allegation of "lost professional opportunities . . . is not sufficient to meet the heightened pleading standard for special damages"); *Martin v. Wells Fargo Bank*,

No. 17-cv-3425, 2018 WL 6333688, at *2 (C.D. Cal. Jan. 18, 2018) (special damages not sufficiently pleaded where there is "no estimation of the amount of pecuniary loss suffered"); *Anschutz*, 90 Cal. Rptr. 3d at 165 (allegations that plaintiffs "suffered damage to their reputations in an amount to be proven at trial" were "insufficient to meet the specific pleading requirement"). That is particularly true for public officials who are routinely subject to public scrutiny in the press. *See Grillo v. Smith*, 193 Cal. Rptr. 414, 417 n.2 (Ct. App. 1983) ("Proof of special damages by defamed public officials is close to impossible."). He has not come close to meeting this test. His bare request plainly lacks the detail necessary to satisfy *Iqbal* plausibility requirements, much less the strict standard of Rule 9(g).

There is no basis to disturb the district court's order dismissing with prejudice the Amended Complaint. *See, e.g.*, *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 76 (2d Cir. 1998) (affirming dismissal with prejudice in light of appellant's "failure to request leave to amend and failure to show any meritorious basis upon which he could amend his complaint"); *Horoshko*, 373 F.3d at 249-50.

III. The District Court Correctly Dismissed Rep. Nunes's Conspiracy Claim.

Once the district court correctly dismissed the defamation claim, California law dictated the disposition of the conspiracy claim. "Under California law, conspiracy 'standing alone does no harm and engenders no tort liability.'" J.A. 139 (quoting *Applied Equip. Corp.*, 869 P.2d at 457 (alterations omitted)). The Amended Complaint's "failure to plead a viable defamation claim" means that "there is no underlying tort to support a viable claim for conspiracy here." J.A. 139. The district court properly dismissed it.

The retraction statute has the same effect on the conspiracy claim as it did on the defamation claim: "[w]here the complaint is based on an offensive statement that is defamatory, plaintiffs have not been allowed to circumvent the statutory limitation[s] by proceeding on a theory other than defamation." *X-Tra Art, Inc. v. Consumer Union*, 48 F.3d 1230 (table), 1995 WL 100613, at *3 (9th Cir. 1995) (citing cases) (quotation marks omitted); *see also, e.g.*, *Kalpoe v. Superior Court*, 166 Cal. Rptr. 3d 80, 81, 87-88 (Ct. App. 2013) (limiting plaintiff's recovery to special damages for all claims, including conspiracy, where plaintiff failed to request a retraction). In short, California law does not permit Rep. Nunes to plead around the retraction statute by asserting a

conspiracy based on the same statements, and Rep. Nunes does not cite any authority to the contrary.[9]

Even if Rep. Nunes had pleaded a viable defamation claim, the Amended Complaint's threadbare conspiracy allegations run headlong into *Twombly* and *Iqbal*. The district court concluded that the Amended Complaint contains no facts from which the court could "reasonably infer that CNN entered into an agreement with Joseph Bondy, Lev Parnas, and others, in order to defame and injure Nunes." J.A. 139. The absence of such facts meant that the Amended Complaint failed to allege even the first element of a civil conspiracy under California law, i.e., "an agreement to commit wrongful acts." *See Harper v. Lugbauer*, No. 11-cv-1306, 2011 WL 6329870, at *5 (N.D. Cal. Nov. 29, 2011). The closest the Amended Complaint comes to alleging an agreement is the generic allegation that CNN "combined, associated, agreed or acted in concert with Parnas and his attorneys." J.A. 60-61. But that is just parroted language from Virginia's conspiracy statute. *See* Va. Code Ann. § 18.2-499 (West) ("Any two or more persons who combine, associate, agree, mutually

[9] Rep. Nunes admits that conspiracy is not an independent tort under New York law either. Br. 37.

undertake or concert together . . . ."). Such "formulaic recitation of the elements of a cause of action" does not satisfy Rule 8. *Iqbal*, 556 U.S. at 678.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ *Stephen J. Fuzesi*
KEVIN T. BAINE
STEPHEN J. FUZESI
NICHOLAS G. GAMSE
MATTHEW J. GREER
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

July 20, 2021

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Stephen J. Fuzesi, counsel for appellee and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4), that the attached Brief of Appellee is proportionately spaced, has a typeface of 14 points or more, and contains 8,447 words.

JULY 20, 2021

/s/ *Stephen J. Fuzesi*
Stephen J. Fuzesi

CERTIFICATE OF SERVICE

I, Stephen J. Fuzesi, counsel for appellee and a member of the Bar of this Court, certify that, on July 20, 2021, a copy of the attached Brief of Appellee was filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

JULY 20, 2021

/s/ *Stephen J. Fuzesi*
Stephen J. Fuzesi