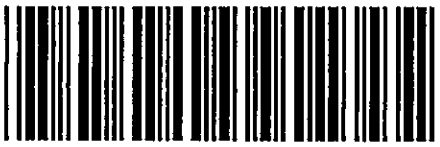

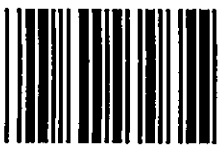

Appellate...: **A**

Case No.....: **006141**

Year.....: **08**

Type.....: **BRIEF**

Volume.....: **011**

A 6141-08T3

DONALD J. TRUMP, Plaintiff/Appellant, v. TIMOTHY L. O'BRIEN; TIME WARNER BOOK GROUP, INC.; and WARNER BOOKS, INC., Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-6141-08T3 ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION - CAMDEN COUNTY SAT BELOW HONORABLE MICHELE M. FOX, J.S.C.

APPENDIX TO BRIEF OF PLAINTIFF/APPELLANT DONALD J. TRUMP
Volume VI
Pa1800-Pa2160

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A Professional Corporation
Attorneys for Plaintiff/Appellant
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(609) 392-2100

Of Counsel
Joel H. Sterns

On the Brief
Karen A. Confoy
Erica S. Helms

TABLE OF CONTENTS

Defendants argue that "offers or proposals to purchase or sell properties have potential relevance to the valuation of those properties." Plaintiff does not disagree. However, defendants have not limited their request to the who, when, and how much of any offers and proposals. Not only do defendants demand the date and specific terms of each offer or proposal, defendants demand that plaintiff identify every person involved in negotiations or communications relating to the offer or proposal, identify all communications relating to any such offer or proposal, and identify and attach all documents relevant thereto. Trump appropriately objected to the overbreadth of these interrogatories, and defendants refuse to narrow the scope of these interrogatories in any way.

For the foregoing reasons, defendants' cross-motion should be denied.

CONCLUSION

For the reasons set forth above, it is respectfully requested that plaintiff's motion to compel be granted and defendants' cross-motion to compel be denied.

Respectfully submitted,

BROWN & CONNERY LLP

By: _____
William M. Tambussi

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

By: /s/ Mark P. Ressler
Mark P. Ressler

Attorneys for Plaintiff
Donald J. Trump

Dated: December 3, 2007

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
Marc E. Kasowitz, Esquire
Daniel R. Benson, Esquire
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1633 Broadway
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William M. Tambussi, Esquire
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360 Haddon Avenue
Westmont, New Jersey 08108
(856) 854-8900

DONALD J. TRUMP, Plaintiff, vs. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART CAMDEN COUNTY Docket No. L-545-06 CERTIFICATION OF SCOTT WALTER **Returnable:** December 7, 2007

Scott Walter, being of full age, certifies as follows:

1. I am a computer forensic analyst with the firm of Miles Computer Technologies, a firm whose headquarters are located in Moorestown, New Jersey. Our firm works in civil and criminal cases with expertise in electronic discovery, computer forensics, data recovery, court testimony, corporate internal investigations and preventative services. These services deal with sensitive information stored on digital media, including hard drives, cell phones, digital cameras, personal desk assistants, CDs, DVDs, flash cards, or tapes.

2. I have extensive experience in the area of computer forensics. At Miles Technologies, I serve as the Forensic Division Case Manager. I have several years of experience working on a wide range of forensics investigations and forensic analysis.

3. It is my understanding that this matter involves an issue with respect to the discoverability of stored data on an individual's personal computer(s). It is my understanding that this individual may have accessed email accounts on such personal computer(s) and deleted emails therefrom. It is also my understanding that this individual may have viewed, accessed, modified, or removed Microsoft Word files that were once stored and/or accessed on such a personal computer and then transferred to a different computer.

4. A forensic evaluation of a personal computer is performed through professional methods that result in a "forensically sound bit for bit image" of the hard drive of the personal computer being made. Once this forensic image is made, a search of the forensic image can reveal a wide range of information about emails, documents, or files once stored on the computer. In other words, this forensic image results in the recovery of files or fragments of files that are not currently seen by the operating system because of deletion or other means. The forensic image can also reveal what is known as "metadata," or data about data. Such metadata includes important information about when a document was accessed, document revisions, the authors computer name and hidden text.

5. It is my professional opinion that a forensic evaluation of the personal computer(s) at issue in this case will determine the existence of deleted emails, fragments

of files, or other information that would not otherwise be found by a mere search of the visible domain of an operating system.

6. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Scott Walter

DATED: December 3, 2007

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
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Daniel R. Benson, Esquire
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(856) 854-8900

DONALD J. TRUMP, Plaintiff, vs. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART CAMDEN COUNTY Docket No. L-545-06 **REPLY CERTIFICATION OF COUNSEL IN FURTHER SUPPORT OF PLAINTIFF'S MOTION TO COMPEL** Returnable: **December 7, 2007**

William M. Tambussi, being of full age, certifies as follows:

1. I am a partner of the firm of Brown & Connery, LLP, co-counsel for the plaintiff, Donald J. Trump ("Trump"), in the above-captioned matter. I make this certification pursuant to R. 1:5-3. I have personal knowledge of the facts contained in this certification in accordance with R. 1:6-6.

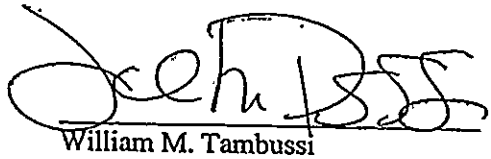
2. Attached as Exhibit P-1 is a true and correct copy of an email correspondence between O'Brien and Arthur Sulzberger, September 6, 2005.

3. Attached as Exhibit P-2 is a true and correct copy of an email correspondence between Andrew Blauner, Rick Wolff, Emi Battaglia, and O'Brien, July 13-14, 2005.

4. Attached as Exhibit P-3 is a true and correct copy of an email correspondence between Wolff and O'Brien, October 31, 2005.

5. Plaintiff is not in default of any discovery obligations.

6. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



William M. Tambussi

DATED: December 3, 2007

EXHIBIT 1

From: Arthur Sulzberger JR./CORPHQ/NYTIMES <aosjr@nytimes.com>
Sent: Tuesday, September 6, 2005 4:26 PM
To: Tim O'Brien <tob@nytimes.com>
Subject: RE: The Donald

Tim,

Now THAT's a great story.

Arthur

"Tim O'Brien"
<tob@nytimes.com>

09/06/2005 04:25 PM

To: "Arthur Sulzberger JR./CORPHQ/NYTIMES" <aosjr@nytimes.com>

cc:

Subject: RE: The Donald

Arthur—

No feedback at all from Donald yet. I think parts of it will make him go ballistic (particularly the stuff about the casinos and his net worth) while other parts he'll sort of relish (like raising hell in Palm Beach, the Apprentice stuff, and his marketing mojo). Overall, I think he'll be tickled.

He did see the cover art about 6 months ago and called me to tell me: "I loooovvve this. I look like some kind of superhero. Like a Marvel superhero. I looooyvee it." He keeps a copy of the cover art on his desk and said the only thing he didn't like about it was that my name was above his....

Tim

EXHIBIT
132

TOB-EF-00000387

-----Original Message-----
From: Arthur Sulzberger JR./CORPHQ/NYTIMES [mailto:aosjr@nytimes.com]
Sent: Tuesday, September 06, 2005 3:44 PM
To: Tim O'Brien
Subject: RE: The Donald

Tim,

Great story.

And yes, great trek. Machu Picchu is all one could hope for.

Arthur

PS: Donald must have seen your book by now. Any feedback?

"Tim O'Brien" <tob@nytimes.com>
09/06/2005 10:36 AM

To: "Arthur Sulzberger JR./CORPHQ/NYTIMES" <aosjr@nytimes.com>
cc:
Subject: RE: The Donald

Arthur--

What a surprise -- and what a kind note. I didn't even know Warner Books sent you a galley. They dropped them on a random assortment here (so Keller got one, but not Geddes; Jill got one, but not Gretchen).

Anyway, thanks for taking the time to write. Donald is easy to lampoon, but harder to portray accurately (and deep down inside he's really sort of likeable -- in the way that endearing but out-of-control 8-year-olds are likeable).

Bennett's favorite Sinatra story: When Tony's mother was dying in Astoria, Queens in the 1970s it took her a few days to go. During the last couple of days, Sinatra showed up by Mrs. Bennett's bedside and kept her company around the clock – holding and stroking her hand and singing to her softly.
Sinatra just showed up. Tony never asked him to come, he just showed up.

Hope you loved the Inca Trail. I was a volunteer worker in Peru a couple of decades ago after college and I lived in a small Quechuan village in the Andean foothills. I trekked the Amazon outside of Iquitos and did part of the Inca Trail between Cuzco and Machu Picchu. I've lived all over the world
and I still think Machu Picchu is one of the most magical and spiritual places I've visited.

Thanks again for the generous note.

All best,

Tim

—Original Message—
From: Arthur Sulzberger JR./CORPHQ/NYTIMES [mailto:aosjr@nytimes.com]
Sent: Monday, September 05, 2005 4:46 PM
To: tob@nytimes.com
Subject: The Donald

Tim,

I hope I have your correct e-mail address.

Just finished reading your book (while trekking the Inca Trail, no less) and wanted you to know how much I enjoyed it.

Congrats. And what, exactly, was Bennett's favorite Sinatra story?

Arthur

EXHIBIT 2

From: emi.battaglia@twbg.com
Sent: Thursday, July 14, 2005 11:52 AM
To: tob@nytimes.com; rick.wolff@twbg.com; BLAUNER@aol.com
Cc: jennifer.romanello@twbg.com; rob.nissen@twbg.com
Subject: RE: confidential / TRUMP

Just wanted to add here that we are asking the outlets to sign non disclosure agreements...we don't want a big chunk of the book out there with no books in the stores.

-----Original Message-----
From: Tim O'Brien [mailto:tob@nytimes.com]
Sent: Wednesday, July 13, 2005 4:08 PM
To: Wolff, Richard - TWBG -Editorial <rick.wolff@twbg.com>; BLAUNER@aol.com; Battaglia, Emi - TWBG -Advertising and Promotion <emi.battaglia@twbg.com>

Subject: RE: confidential / TRUMP

great by me....

thanks!

-----Original Message-----
From: rick.wolff@twbg.com [mailto:rick.wolff@twbg.com]
Sent: Wednesday, July 13, 2005 3:59 PM
To: BLAUNER@aol.com; emi.battaglia@twbg.com
Cc: tob@nytimes.com
Subject: RE: confidential / TRUMP

Andrew - it was decided not to embargo the book because we want it to generate some excitement and buzz before it pubs. Clearly if Mr. Trump takes exception to Tim's work and starts making noise about the book before pub time, that will only help to excite the masses - and that's a good thing. Or at least that's the game plan. Rick

-----Original Message-----
From: BLAUNER@aol.com [mailto:BLAUNER@aol.com]
Sent: Wednesday, July 13, 2005 3:39 PM
To: Wolff, Richard - TWBG -Editorial <rick.wolff@twbg.com>; Battaglia, Emi - TWBG - Advertising and Promotion <emi.battaglia@twbg.com>

Subject: confidential / TRUMP

Hi. Just checking in to confirm something about Tim's Trump book. I understand now that bound galleys will be available starting within about two weeks.

Are we going with an embargo, here, per se, or not? I was just consulting with Tim, I wasn't sure, and/but he's concerned that as soon as Donald sees the book in it's entirety, he will go ballistic, and he raises the question of whether we want to save that particular PR pop for the fall?

Not sure how to do a galley mailing without running some decent risk that a copy would find its way to Donald, right? One of the flip-sides of it all, of course, is that if nobody can see the book until it pubs, we lose all kinds of opportunities with all kinds of reviewers, media, etc who need long leads.

So.....please advise. Thanks.

AB

Andrew Blauner
Blauner Books Literary Agency
263 Cumberland Street, #4
Brooklyn, NY 11205
(718) 858-2416
Blauner@aol.com

EXHIBIT 3

From: Wolff, Richard - TWBG -Editorial <rick.wolff@twbg.com> [rick.wolff@twbg.com] on behalf of rick.wolff@twbg.com
Sent: Monday, October 31, 2005 11:27 AM
To: tob@nytimes.com
Subject: RE: CNBC, etc.

At some point we're going to reach a tipping point on this book...and Trump is going to either do something or say something that will add jet fuel to this book. Just keep up all of the good work you've done so far...and keep battling! Also -- please let Rob Nissen know about the Post story so he can follow up elsewhere.

-----Original Message-----
From: Tim O'Brien [mailto:tob@nytimes.com]
Sent: Monday, October 31, 2005 11:19 AM
To: Wolff, Richard - TWBG -Editorial <rick.wolff@twbg.com>
Subject: RE: CNBC, etc.

thanks for going the extra mile Rick. the Post story is going to run very large and be right up front in the paper....it may even be the front page, but pls keep that detail under your hat for now.

-----Original Message-----
From: Wolff, Richard - TWBG -Editorial <rick.wolff@twbg.com> [mailto:rick.wolff@twbg.com]
Sent: Monday, October 31, 2005 11:12 AM
To: tob@nytimes.com; rob.nissen@twbg.com
Subject: RE: CNBC, etc.

Rob - this is just the kind of Trump feedback we've been waiting for! Please try very hard today to get Tim onto the more upscale major TV and radio shows (especially FOX, CNN, ABC, CBS, NPR) - -even the local NYC affiliates if we can....I spoke with Imus' booker this AM - please send a book overnight to Julie Kanter at WFAN (34-12 36th Street, Astoria NY 11106) with a note that the book is coming from me (a WFAN colleague). Finally, I just spoke with Jamie Raab and she's also eager to make sure we strike while the iron is hot. Many thanks! Rick

-----Original Message-----
From: Tim O'Brien [mailto:tob@nytimes.com]
Sent: Monday, October 31, 2005 10:55 AM
To: Wolff, Richard - TWBG -Editorial <rick.wolff@twbg.com>; Nissen, Rob - TWBG -Advertising and Promotion <rob.nissen@twbg.com>
Subject: RE: CNBC, etc.

Rob -

He knew I'd be on because CNBC was advertising the appearance late last week and over the weekend. And CNBC is owned by NBC, and NBC airs The Apprentice. He lobbied the show not to have me on all weekend and this morning.

All of this will be elements of the stories that will run tomorrow...

We should get this in front of as many radio and TV people as possible (the CNBC stuff, organized crime ties, etc.): I don't think we want this stuck in the

EXHIBIT
135
HCN 10/16/07

Inside Edition/Exxtra trough, though -- these new developments take the story in a different direction.

Thanks,

Tim

-----Original Message-----
From: Nissen, Rob - TWBG -Advertising and Promotion <rob.nissen@twbg.com> [mailto:rob.nissen@twbg.com]
Sent: Monday, October 31, 2005 10:43 AM
To: tob@nytimes.com
Subject: RE: CNBC, etc.

Tim:

Sounds great. I am trying to confirm you for On the Money tonight at 7:30pm. As soon as I hear, I'll let you know. How did Trump try to kill the appearance? How did he know you'd be on? That could be a story in itself.

Rob

-----Original Message-----
From: Tim O'Brien [mailto:tob@nytimes.com]
Sent: Monday, October 31, 2005 10:22 AM
To: Wolff, Richard - TWBG -Editorial <rick.wolff@twbg.com>; Nissen, Rob - TWBG -Advertising and Promotion <rob.nissen@twbg.com>
Cc: Andrew Blauner
Subject: CNBC, etc.

Gents --

Am getting lots of calls from people off of the CNBC gig this morning. Trump tried to get the appearance killed. On the show, I spoke about how he openly acknowledges in the book that he suspected that his early casino partners in AC had organized crime ties. I also said that the book is the story of how a "cartoon character became the most famous businessman in the U.S." and said he was more like "Baby Huey" than "Jack Welch."

He's now phining reporters all over town saying something to the effect of "I am not a mobster. I am not Baby Huey." The NY Post is planning a big story for tomorrow...I'll let you know as I hear from others. The London Sunday Telegraph ran a big piece yesterday.

Let me know what you want to do proactively off of the CNBC appearance.

Thanks,

Tim

Tim O'Brien
The New York Times
229 W.43rd Street
New York, NY 10036

212-556-7131

TOB-EF-00000258

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
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BROWN & CONNERY LLP
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Westmont, New Jersey 08108
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DONALD J. TRUMP,

Plaintiff,

vs.

TIMOTHY O'BRIEN, TIME WARNER BOOK GROUP INC., AND WARNER BOOKS INC.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
CAMDEN COUNTY

Docket No. L-545-06

CERTIFICATE OF SERVICE

William F. Cook, being of full age, certifies as follows:

1. I am an associate of the firm of Brown & Connery, LLP, co-counsel for the plaintiff in the above matter. I make this certification pursuant to R. 1:5-3. I have personal knowledge of the facts contained in this certification in accordance with R. 1:6-6.

2. I caused one copy of plaintiff's brief in further support of motion to compel discovery, certificate of service, reply certification of counsel and certification of Scott Walter to be served this day upon the following in the manner indicated:

Honorable Michael Kassel, J.S.C.
Camden County Hall of Justice
101 South 5th Street
Camden, New Jersey 08103-4001
Via Hand Delivery

Andrew M. Levine, Esq.
Debevoise & Plimpton, LLP
919 Third Avenue
New York, NY 10022
by electronic mail and regular mail

Mark S. Melodia, Esq.
Reed Smith LLP
Princeton Forrestal Village
136 Main Street – Suite 250
Princeton, NJ 08540-7839
by electronic mail and regular mail

James F. Dial, Esq.
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Kellie A. Lavery, Esq.
Reed Smith LLP
136 Main Street, Suite 250
Princeton Forrestal Village
Princeton, NJ 08540
by electronic mail and regular mail

3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

W F Cook /mmb
William F. Cook

DATED: December 3, 2007

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

1633 BROADWAY

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FACSIMILE: 212-506-1800

MARK P. RESSLER
212-506-1752

ATLANTA
HOUSTON
NEWARK
SAN FRANCISCO

July 20, 2007

BY E-MAIL AND U.S. MAIL

Andrew J. Ceresney, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022

Re: *Trump v. O'Brien, et al.*

Dear Andrew:

Pursuant to the Court's order of July 6, 2007, plaintiff Donald J. Trump hereby supplements his responses to Defendants' First Set of Interrogatories as follows:

INTERROGATORY NO. 4

Set forth the complete factual basis for the claim contained in paragraph 3 of the Complaint that "the value of Trump's brand name alone is huge, amounting in itself to hundreds of millions, if not billions, of dollars of value," specify any alternative valuations and responses thereto, and identify and attach all documents relevant thereto, including but not limited to any financial statements (audited, unaudited, or compilations) or other documents that assign a particular value to the Trump brand name.

RESPONSE TO INTERROGATORY NO. 4

Trump objects to this interrogatory on the ground that it is overly broad and unduly burdensome. Trump further objects to this interrogatory on the ground that it is premature, as "the value of Trump's brand name" will be the subject of expert testimony at trial, and the expert phase of discovery has neither begun nor been scheduled. Trump further objects to this interrogatory on the ground that it seeks information protected by the attorney-client privilege and the work-product doctrine. Trump further objects to this interrogatory on the ground that the term "any alternative valuations" is vague and ambiguous. Subject to and without waiving any of the foregoing objections, Trump responds as follows:

The factual bases for the allegation contained in paragraph 3 of the Complaint that "the value of Trump's brand name alone is huge, amounting in itself to hundreds of millions, if not billions, of dollars of value" include, among other things, the fact that (i) Trump has entered into licensing agreements, and has been asked to enter into licensing agreements, for the use of the

"Trump" brand name in connection with real estate, merchandise and other ventures, for millions of dollars; (ii) the "Trump" brand name is one of the most recognizable brand names in the world; and (iii) the "Trump" brand name has been used in connection with some of the country's most well-known and admired buildings, golf courses and casinos, best-selling books and one of the most popular television programs.

Trump has never conducted a valuation of the "Trump" brand name, and is not aware of any "alternative valuations" of the "Trump" brand name. Trump intends to have an expert conduct a valuation of the "Trump" brand name for presentation at trial. At the appropriate time during the expert discovery phase, Trump will disclose such information and make expert disclosures as required by the Court's rules.

INTERROGATORY NO. 10

Identify all communications between Michelle Scarbrough and any individuals relating to O'Brien or any of the other Defendants, and identify and attach all relevant documents thereto.

RESPONSE TO INTERROGATORY NO. 10

Trump objects to this interrogatory on the ground that it is overly broad. Trump further objects to this interrogatory on the ground that it is unduly burdensome in that this information has already been produced to, or is otherwise already within the possession of, defendants. Trump further objects to this interrogatory on the ground that it seeks information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Trump further objects to this interrogatory on the ground that the phrase "any individuals relating to O'Brien or any of the other Defendants" is vague, ambiguous, and confusing. Subject to and without waiving any of the foregoing objections, Trump responds as follows:

Trump has no knowledge of any communications that Michelle Scarbrough might have had about O'Brien or any of the other defendants.

INTERROGATORY NO. 17

Set forth the complete factual basis for the allegation contained in paragraph 36 of the Complaint that: (a) O'Brien "resorted to unprofessional and unethical tactics, including physical and verbal harassment, to intimidate sources into providing information"; and (b) "Trump received complaints from business associates, employees and former employees that O'Brien was using harassment and threats to try to pressure them into making false, defamatory and misleading statements about Trump." Identify all individuals that O'Brien allegedly harassed, intimidated, or threatened, as well as those individuals reporting such allegations. In addition, identify and attach all documents relevant thereto.

RESPONSE TO INTERROGATORY NO. 17

Trump objects to this interrogatory on the ground that it is unduly burdensome and oppressive in that defendant O'Brien is in possession of the information called for by subpart (a). Subject to and without waiving any of the foregoing objections, Trump responds as follows:

(a) The factual bases for the allegation contained in paragraph 36 of the Complaint that O'Brien "resorted to unprofessional and unethical tactics, including physical and verbal harassment, to intimidate sources into providing information" are: reports from Michelle Scarbrough and Allen Weisselberg; a letter dated August 26, 2004 from Lawrence S. Rosen to David E. McCraw, which already has been produced to defendants; an article entitled "Source Turns on Times Reporter" published in the *New York Post* on January 17, 2000; an article entitled "Poisoned at the Source" published in *New York Magazine* on March 6, 2000; and articles publicly reported on the Internet at www.russianlaw.org.

(b) The factual bases for the allegation contained in paragraph 36 of the Complaint that "Trump received complaints from business associates, employees and former employees that O'Brien was using harassment and threats to try to pressure them into making false, defamatory and misleading statements about Trump" are reports from Michelle Scarbrough and Allen Weisselberg that O'Brien harassed them; and a letter dated August 26, 2004 from Lawrence S. Rosen to David E. McCraw, which already has been produced to defendants.

INTERROGATORY NO. 20

To the present, set forth the nature and amount of, and facts and data supporting each and every claim of damages in this action, including a description of: (a) the method used to calculate the total amount of such damages; (b) the source of all facts and data supporting such damages; (c) all persons involved in making such calculations of damages; and (d) all persons with knowledge of such damages or any data used to calculate such damages. Identify and attach hereto copies of all documents on which you relied in calculating such damages.

RESPONSE TO INTERROGATORY NO. 20

Trump objects to this interrogatory on the ground that it is premature, as Trump's damages, in part, will be the subject of expert testimony at trial, and the expert phase of discovery has neither begun nor been scheduled. Subject to and without waiving any of the foregoing objections, Trump responds as follows:

The nature of Trump's damages include, but are not limited to, the following:

(1) Trump's loss of business opportunities as a result of defendants' defamatory statements about Trump in October 2005. Trump has already identified these lost business opportunities to defendants. Trump is providing additional information relating to these lost

business opportunities on Monday, July 23, 2007 in response to Defendants' Second Set of Interrogatories Directed to Plaintiff.

(2) The injury to Trump's reputation sustained as a result of defendants' defamatory statements. Trump is not required to present evidence that assigns an actual dollar value to the injury to his reputation.

INTERROGATORY NO. 26

If you have been involved in any lawsuit, other than this litigation, set forth for each lawsuit: (a) your role in the case; (b) the nature of the case; (c) your attorneys in the matter; (d) the other parties to the case and their attorneys; (e) the court and docket number; and (f) the disposition of the case.

RESPONSE TO INTERROGATORY NO. 26

Trump objects to this interrogatory on the ground that it is overly broad, unduly burdensome, oppressive and intended solely for the purposes of harassment. Trump further objects to this interrogatory on the ground that the information it seeks is equally available to defendants through any of the readily accessible databases that contain such information. Trump's counsel advised you previously that because of Trump's numerous business ventures and activities, he has been involved in numerous lawsuits, which have no bearing whatsoever on any issue in this case, involving claims ranging from contract disputes to personal injury claims stemming from accidents occurring on the premises of Trump's real estate holdings. Indeed, a simple docket search conducted by Trump's counsel on a publicly available database identified more than 100 records in New York County alone in which Mr. Trump has been a party. Trump further objects to this interrogatory on the ground that the phrase "involved in any lawsuit" is vague and ambiguous. Trump further objects to this interrogatory on the ground that it seeks information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing, Trump responds as follows:

Trump does not maintain a list of the lawsuits to which he has been a party.

Two of Trump's recent lawsuits were:

(1) (a) Trump is a plaintiff in *Donald J. Trump, individually, and derivatively on behalf of Hudson Waterfront Associates, L.P., Hudson Waterfront Associates, L.P., Hudson Waterfront Associates, I. L.P., Hudson Waterfront Associates, II., L.P., Hudson Waterfront Associates, III, L.P., Hudson Waterfront Associates, IV, L.P., Hudson Waterfront Associates, V, L.P. v. Henry Cheng, Vincent Lo, Charles Yeung, Edward Wong, and David Chiu, Hudson Waterfront Corp., Hudson Waterfront II Corp., Hudson Waterfront III Corp., Hudson Waterfront IV Corp., Hudson Waterfront V Corp., Hudson Waterfront Assoc., L.P., Hudson Waterfront Assoc. I, L.P., Hudson Waterfront Assoc. II, L.P., Hudson Waterfront Assoc. III, L.P., Hudson Waterfront Assoc. IV,*

L.P., Hudson Waterfront Assoc. V, L.P., Hudson Westside Assoc., L.P., Hudson Westside Assoc. I, L.P., Hudson Westside Assoc. II, L.P., Hudson Westside Assoc. III, L.P., Hudson Westside Assoc. IV, L.P., Hudson Westside Assoc. V, L.P., John Doe I and John Doe II.

(b) In this case, Trump brought an action against defendants, including the general partners in a real estate partnership, for breach of their fiduciary and contractual duties to Trump, a limited partner, by selling, at a grossly inadequate price, and without considering several substantially higher offers, one of the most valuable residential properties in New York City. Compounding their breach, rather than distributing the proceeds from that sale, as required under the applicable agreements, defendants reinvested the proceeds in a different set of properties, consisting of certain office buildings in New York and San Francisco. Trump seeks more than $1 billion in compensatory damages, as well as punitive damages.

(c) Trump is represented by Jay Goldberg, P.C., 250 Park Avenue - 14th Floor, New York, New York 10177 and Law Offices of John Nicholas Iannuzzi, 74 Trinity Place, New York, New York 10006.

(d) The Individual Defendants (Henry Cheng, Vincent Lo, Charles Yeung, Edward Wong and David Chiu) and Hudson Westside Associates Entities (Hudson Westside Assoc., L.P., Hudson Westside Assoc. I – V, L.P.) are represented by Richard Schaeffer, Esq., Dornbush Schaeffer Strongin & Weinstein, LLP, 747 Third Avenue, 11th Floor, New York, New York 10017. The Hudson Waterfront Entities (Hudson Waterfront Corp., Hudson Waterfront II Corp. – V Corp.) are represented by Sullivan & Cromwell LLP, 125 Broad St., New York, New York 10004 and Jonathan J. Lerner, Esq. and Michael H. Gruenglas, Esq. of Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, New York 10036-6522. The Hudson Waterfront Associates Entities (Hudson Waterfront Assoc., L.P., Hudson Waterfront Assoc. I – V, L.P.) are represented by Herbert Teitelbaum, Esq. and Mark Sugarman, Esq. of Bryan Cave, LLP, 1290 Avenue of the Americas, New York, New York 10104.

(e) Supreme Court of the State of New York, County of New York, Index No. 05/602877 (Lowe, J.).

(f) Notice of Appeal from orders of the court dismissing certain causes of action have been filed. All parties have moved for summary judgment, which is pending.

(2) (a) Trump was a defendant in a suit brought by Barbara Corcoran, Carrie Chiang, and Susan Cara-Madden.

(b) The plaintiffs alleged breach of contract, claiming that Trump owed them a brokerage commission. Trump argued that the like-kind exchange of property was not a sale that triggered the commission obligation.

(c) Trump was represented by Rosen Weinhaus LP.

(d) The plaintiffs were represented by Kaye Scholer LLP.

(e) Supreme Court of the State of New York, County of New York, Index No. 05/604347

(f) Summary judgment was granted in favor of Trump, and the case was dismissed.

INTERROGATORY NO. 35

Set forth the details relating to every instance from 1975 to the present in which: (a) you or anyone on your behalf (including your attorneys or other representatives) threatened any individual or entity with a lawsuit claiming defamation (libel or slander) and/or filed such a lawsuit; or (b) you or any Trump-related entity were threatened with or actually were sued for defamation (libel or slander). Identify and attach all documents relevant thereto, including related communications and any pleadings. If a lawsuit was filed, state: (a) the court and docket number; (b) all parties to the lawsuit and their attorneys; and (c) the disposition.

RESPONSE TO INTERROGATORY NO. 35

Trump objects to this interrogatory on the ground that it is overly broad, unduly burdensome and oppressive. Trump further objects to this interrogatory on the ground that it seeks information neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving any of the foregoing objections, Trump responds as follows:

(a) Trump has previously advised, directly or indirectly, the following persons or entities that he would initiate, or consider, a defamation lawsuit against them because they wrote, published or uttered, or threatened to write, publish or utter, maliciously false, defamatory and libelous statements about him: (i) *The New York Times*; and (ii) Rosie O'Donnell and the producers of *The View* television program. Other than this litigation, Trump has not filed a defamation lawsuit.

(b) To the best of his knowledge, Trump does not recall having been threatened with a defamation suit, and has not been sued for defamation.

INTERROGATORY NO. 38

Identify all communications that you made about O'Brien or the Book, and identify and attach all documents relevant thereto.

RESPONSE TO INTERROGATORY NO. 38

Trump objects to this interrogatory on the grounds that it is overly broad, unduly burdensome, and oppressive. Trump further objects to this interrogatory on the ground that it seeks information neither relevant nor reasonably calculated to lead to the discovery of

admissible evidence. Subject to and without waiving any of the foregoing objections, Trump responds as follows:

Trump refers defendants to the documents already produced in this litigation. As for oral communications, Trump communicated with employees, business associates, members of the media, family members, and friends concerning the defamatory, malicious and egregiously false statements made by Timothy O'Brien and the Warner Defendants in the Book and in connection with their efforts to promote and market the Book.

* * * * *

Trump reserves the right to supplement these interrogatory responses.

As always, please feel free to contact me with any questions.

Sincerely,

Mark P. Ressler

cc: Mark Melodia (by e-mail)
William M. Tambussi (by e-mail)

THE WALL STREET JOURNAL.
The Wall Street Journal

March 10, 2009 Tuesday

SECTION: Pg. C3

LENGTH: 602 words

HEADLINE: Crisis On Wall Street: Economic Tumult Besets Trump Property Projects

BYLINE: By Alex Frangos

BODY:

With the economy bearing down, Donald Trump's real-estate business has hit new snags that imperil several big projects that bear his name.

The latest troubles -- following a bankruptcy filing by the casino company he founded and a dispute with lenders at a Chicago condo project -- come in Las Vegas. Three-fourths of the buyers of condo-hotel rooms at the Trump International Hotel & Tower Las Vegas have failed to close contracts, according to public records and people familiar with the project.

Consequently, the gold-glass skyscraper, a joint-venture between Mr. Trump and casino magnate Phil Ruffin, is more than $200 million short of paying off the project's construction loan, which comes due in July, the two men said. But Mr. Trump said that the project will turn out fine and that he is in talks with the lender, Hypo Real Estate Holding AG, to extend and restructure the project's $537 million construction loan and operate the tower as a hotel. Hypo didn't return calls requesting comment.

Meanwhile, in the Mexican state of Baja California, hundreds of buyers of hotel-condo rooms at another Trump-branded project have been told they will lose substantial deposits -- many more than $150,000 apiece -- on units they bought there -- on units they bought there. Local developer PB Impulsores, which paid Mr. Trump a licensing fee to use his name, failed to get the project off the ground and informed buyers recently there was no money left to return deposits. Timothy Hughes, a lawyer representing PB Impulsores, confirmed the facts of the deal but otherwise declined to comment.

Bart Ring, a Woodland Hills, Calif., attorney who is representing more than 80 buyers at the Trump Baja says that Mr. Trump played a development role and therefore has legal liability regarding the deposits.

Mr. Trump says he wasn't that project's developer, but merely licensed his name. He blames the local developer and points to disclosures that were sent to the buyers detailing his role as a licensor. Mr. Trump said he is looking into the lost deposits, but said the buyers probably would have lost their money even if the project went ahead, given strains in credit markets. "The same people would be trying to get financing to close and they would have lost their deposit that way," he said.

Neither project is large in the context of his overall operation, Mr. Trump said. Mr. Trump is in better shape than he was during the recession of the early 1990s, when he was forced to renegotiate hundreds of millions of dollars of debt that he signed for personally. He pointed to successful developments he built in recent years, such as condos on Fifth Avenue and near the United Nations.

During the recent condo boom, Mr. Trump didn't take on personal-recourse debt -- other than limited construction completion guarantees -- that would let individual project lenders go after his other assets. He also expanded his brand by making dozens of licensing deals.

As the economy soured, several of those licensing deals, including ones in Tampa, Fla., and Dubai, never got started. Others, such as two in the Miami area, are now in trouble for the local developers because buyers can't get mortgages to close units as they deliver, according to people familiar with the projects.

As for the Vegas project, Mr. Trump said it isn't in trouble. "We are doing very nicely considering that Las Vegas is in a massive depression," he said. He blamed the failed closings on the lack of mortgage financing, and said he hopes more people will eventually make good on the sales contracts.

NOTES:
PUBLISHER: Dow Jones & Company, Inc.

LOAD-DATE: March 10, 2009

11Alive.com

Atlanta Trump Towers On Hold; Deposits Not Lost

POSTED BY: BILL LISS

ATLANTA -- In typical Donald Trump style -- it was a first class unveiling, but that was April of 2007. Two giant Trump Towers with the best in luxury living -- in the heart of Midtown Atlanta.

"Its one of the fastest growing cities in the country--in the world--and we're just happy to be here and we also feel we have the best site within Atlanta," Donald Trump said on the night the project was unveiled.

But with the current reality of frozen credit, strict and often unyielding financing terms and big time buyers hard to find, the Atlanta Trump Towers is a parking lot and a billboard on West Peachtree Street at 15th, and insiders say it will remain that way until money is freed up for construction. Eventually one Tower with 220 units may rise on the site. Right now, 40 units are under contract.

But is the deposit money protected?

"If it's a $150,000 or less Unit, the entire earnest money must go into an escrow account. If its above $150,000,and the contract allows, the money has to go into an escrow account but the developer can then withdraw everything over 1 percent of the purchase price and use that for construction," said real estate attorney Seth Weissman, who also represents the Georgia Association of Realtors.

Bottom line, read every line of the contract carefully.

(11Alive News has learned that no deposit is more than $150,000 for the reserved Units. Insiders say no deposit monies will be used for construction and that all deposits will be returned if the Trump Towers project goes "belly up.")

LexisNexis

March 6, 2009 Friday

SECTION: BUSINESS NEWS

LENGTH: 1082 words

HEADLINE: Trump venture folds, leaving buyers strapped

BYLINE: By ELLIOT SPAGAT, Associated Press Writer

DATELINE: SAN DIEGO

BODY:

Stephen and Linda Drake cast aside concerns about owning property in Mexico because they believed in Donald Trump.

The Southern California couple paid $250,000 down payment on a 19th-floor oceanfront condo in Trump Ocean Resort Baja in 2006 before the first construction crew arrived.

But admiration for the celebrity developer and star of "The Apprentice" has now turned into anger and disbelief as Trump's luxury hotel-condo plan collapsed, leaving little more than a hole in the ground and investors out of their deposits, which totaled $32.2 million.

"I can't even stand to see Trump's face on TV," says Linda Drake, a psychologist, whose husband is a commercial airline pilot and financial adviser.

Investors were told last month their money was spent and they won't get a penny back. A single mother in suburban Los Angeles lost $200,000 and won't be able to send her sons to private universities. A Los Angeles-area businessman lost a deposit of more than $1 million on four Trump units, including two penthouses.

The project's collapse comes at a delicate time for Trump, whose casino company, Trump Entertainment Resorts Inc., filed for bankruptcy protection last month. He also is embroiled in a lawsuit to avoid paying debt on the struggling Trump International Hotel & Tower in Chicago.

Trump and his children heavily promoted the northern tip of Mexico's Baja California coast. He sold 188 units for $122 million the first day they went on a sale at a lavish event in a downtown San Diego hotel in December 2006.

"I went out and saw this site, and I was blown away by it," Ivanka Trump told The Associated Press in June 2007. "From the minute I saw it, it was a deal I had to do."

The location was a contrast to more expensive Mexican coastal markets such as Puerto Vallarta, Los Cabos and Cancun, she said.

The Trumps remained buoyant even as the U.S. housing market began to crumble. Ivanka assured buyers in an October 2007 newsletter that all Trump projects were immune to a slowdown.

"In characteristic Trump fashion, Trump Ocean Resort Baja will be the best of the best, and consequently always in demand," she wrote.

All that remains of Trump Baja is a highway billboard with a large photo of Donald Trump that advertises condos for sale. It hovers over a closed sales center and showroom, a paved parking lot, a big hole that cuts a wide swath, drainage pipes and construction equipment.

The failure of Trump Baja is a big blow to a real estate market just south of the border from San Diego that was booming two years ago with U.S. buyers looking for second homes and easy profits but is now similarly swooning. The market has been hammered by Mexico's drug-fueled violence and the global economic crisis.

Other developers completed big projects nearby in recent years and the area remains home to thousands of Americans, but the cliff-lined coast is pocked with partially built towers. The steel frame of one oceanfront high-rise is rusting, with air ducts hanging from one floor and an idled crane out front. A wind-tattered sales sign hangs outside twin towers nearby, one that appears almost complete and the other a much shorter steel skeleton.

Trump Baja demanded about 30 percent down for units that sold from less than $300,000 to $3 million, buyers said.

Deposits on abandoned projects are also at risk in the U.S., even in states like California that prohibit developers from spending the money on construction, lawyers say. The risk may be higher in Mexico because consumer protection laws are generally weak.

"The bottom line in Mexico is caveat emptor, buyer beware," said Art Spaulding, an Irvine, Calif., real estate attorney who does business south of the border.

Trump's condos went on sale when Southern California home prices were near their peak, offering a lower-cost alternative in the Mexican border city of Tijuana. The Trump Organization teamed up with Los Angeles developer Irongate Capital Partners LLC, the partnership behind Trump International Hotel & Tower Waikiki in Honolulu.

Guadalupe Mendoza, 47, paid a $200,000 deposit at the first-day sale in San Diego, refinancing her Downey home and getting a loan from a sister. She watched a giant screen show units getting snapped up.

After signing papers, buyers were ushered to a buffet of sirloin tip and fish tacos. Cheers erupted in the hotel ballroom for each new owner.

"I did it in less than a minute," said Mendoza, an administrator in the Los Angeles County Office of Education. "I remember my head was hurting and thinking, 'My God, what was that?' I was thinking maybe I should have asked questions. It was like a roller-coaster ride."

Buyers pressed for updates as construction fell behind schedule. They got a bombshell letter in December that said negotiations for a construction loan from German bank WestLB AG collapsed and Trump Baja had only $556,000 left. It quoted a contract clause that gave the developer a right to spend their deposits.

Another letter came in January that said Trump was removing his name.

A Feb. 16 letter from a Mexican entity, PB Impulsores, said the project was scrapped "given the extreme

dislocation of the financial markets." It said there was no money left to refund deposits.

The December letter says Trump was not an investor, but buyers said they were sold on his imprimatur.

"We thought of Donald Trump," says Linda Drake. "If Donald Trump was behind it, it was going to work ... I am embarrassed to tell people we got caught up in this."

Ivanka Trump told the AP in 2007 that her father "is the boss" when asked about his role in the project.

"He is involved in every capacity," she said.

In response to a request to interview Donald and Ivanka Trump, the Trump Organization issued a statement that said its partner violated an agreement to license the Trump name, missing deadlines to obtain financing and begin construction.

Timothy Hughes, an attorney for Irongate, said the project "will not be going forward" but declined to answer questions.

One buyer sued Trump and Irongate in Los Angeles Superior Court last month and more litigation is expected.

"They put their trust in this project and feel betrayed," said Bart Ring, a Woodland Hills attorney who says he represents about 75 buyers who haven't sued.

Homeowners and brokers in Baja welcomed the publicity and higher prices that Trump brought. Now they wish he never came.

"It was a two-edged sword that's cutting the wrong way," said broker Brian Flock. "Everybody is shellshocked. I call it post-Trump syndrome."

LOAD-DATE: March 7, 2009

BusinessWeek

THE ASSOCIATED PRESS February 17, 2009, 6:10PM ET

Lawyer: Trump high-rise in New Orleans on hold

By BECKY BOHRER

NEW ORLEANS

A proposed $400 million New Orleans high-rise involving real estate mogul Donald Trump is on hold until national credit markets start recover from the recession, an attorney for developers said Tuesday.

Stephen Dwyer, who represents Poydras LLC, said developers have not secured all their funding but still hope to move ahead with the high-end condominium and hotel project by the end of the year. He said it's not a matter of whether the project will go forward but how big it will be when it does.

"Everything's there except the credit markets," said Dwyer, noting that developers had secured the needed zoning and land downtown. "The credit markets aren't back in a way to allow the financing to move forward."

City planners who vetted the project in 2007 said it would be the city's tallest building, rising 716 feet with a 126-foot spire.

Plans called for about retail and parking space, 435 guest rooms and suites, and roughly 290 residential units, including studios and larger units and a handful of five-bedroom penthouses.

Promotional material for the Trump International Hotel & Tower New Orleans quotes Donald Trump calling the building the "most incredible" the city had ever seen.

Dwyer, who declined to specify Trump's level of involvement in the project, said there's no way to know for sure how large or expensive it will be until the economy stabilizes. But he said the developers were "absolutely committed" to building here.

More than 100 reservations and other expressions of interest have been made so far, he said. A Web site touting the property cited a starting price for a studio at $387,000.

The project was proposed before Hurricane Katrina damaged much of New Orleans' housing stock. A city of renters before the August 2005 storm, the city is seen as lacking affordable housing.

Patrick Egan, head of the commercial division for real estate company Latter & Blum, questions the feasibility of many still-proposed condo projects in the city given the state of the national economy.

Crain's New York Business

December 15, 2008

SECTION: NEWS; Pg. 1

LENGTH: 800 words

HEADLINE: TRUMP'S towering troubles;
Fabled brand looks damaged, dated

BYLINE: Theresa Agovino

BODY:

Donald Trump has had a rough few weeks.

He went to court in an effort to avoid paying off a $640 million construction loan on his struggling condo/hotel project in Chicago, and was countersued by his lender. Meanwhile, rating agencies downgraded Trump Entertainment Resorts Holdings' bonds after the casino company said it would miss a $53 million interest payment. Over the past year, a number of other developments bearing the Trump name have been halted, named in lawsuits, or both.

Mr. Trump insists that this string of events isn't a replay of his travails in the early 1990s, when the collapse of the real estate market nearly drove him into bankruptcy. He has learned his lessons, he says, and is much more financially conservative. Many of his deals are licensing arrangements, under which he is paid simply for the use of his name.

"I have a lot of cash," says Mr. Trump. "I am not in trouble."

Financially, maybe not. But the Trump brand--a major source of his earnings--has seen better days. His woes may tarnish his all-important image as a business genius. In addition, his brand is looking decidedly dated, standing as it does for over-the-top luxury at a time when the recession is driving conspicuous consumption out of style.

"Donald Trump is kind of like Hugh Hefner," says Brenda Smith, managing partner at Brenda Smith + Associates, a branding agency. "He has this anachronistic feel."

The shift in Mr. Trump's stature comes after more than two decades in which his brand had been golden. The developer has reaped revenues from Trump-branded condominium towers and casinos, from ties, shirts and cuff links, and even from vodka.

His aura led Tampa builder SimDag/RoBEL to fork over a $2 million licensing fee and 50% of its proposed luxury condo's net sales profits for the right to use the Trump name, according to a lawsuit.

However, given the crumbling Florida real estate market, the project was never built, and Mr. Trump sued

SimDag/RoBEL to force it to hand over unpaid fees. Adding to the mess, the buyer of one of the units in the planned Tampa project sued Mr. Trump, alleging that buyers were led to believe that Mr. Trump was part of the management team rather than involved only through a licensing deal.

meanwhile, Michael Mikelic says he is considering suing Mr. Trump to get back a deposit he made on a stalled condo project in Mexico that bears the famous name but has yet to be built. Mr. Mikelic, president of real estate company King Penguin Properties, says he has made money buying and reselling condos in other Trump projects. But he now doubts that he would ever buy another, because he has lost confidence in the name.

Mr. Trump says the overall strength of his reputation overrides any negative press generated by soured deals. He adds that the problematic licensing deals don't affect his bottom line because he doesn't commit any of his own cash.

The developer adds that 2008 has brought many triumphs, including the sale of his home in Florida for nearly $100 million and the purchase of a posh New Jersey country club out of foreclosure at a bargain-basement price.

Those successes may be dwarfed by the problems with his 92-story Chicago project, Trump International Hotel & Tower, which bears his name and uses his money. About 30% of the units are still unsold, sources say. Meanwhile the legal battle with his lenders is just beginning, leaving Mr. Trump's money and his brand on the hook.

The lawsuit he filed in November against his Deutsche Bank-led lenders, cites numerous reasons why he should not be required to repay the loan immediately. These include a breach of fiduciary responsibility on the part of the bank, which then countersued.

All in the same boat

given the dire state of real estate markets everywhere, it isn't surprising that some Trump projects are struggling, developer Dean Geibel says.

"Everyone is having trouble," says Mr. Geibel, who licensed the Trump name for a residential building in Jersey City.

Nonetheless, he estimates that the Trump name added 20% to the prices of his apartments.

In Atlantic City, though, the Trump magic has faded in recent years along with rest of the gambling industry. Mr. Trump says that he is unhappy that his name is on Trump Entertainment, the floundering casino company--though he quickly adds that he doesn't have anything to do with the firm's management. He also notes that his 26% stake represents just 1% of his net worth.

Nonetheless, Mr. Trump says he is considering either taking his name off the company or stepping in to help manage its plush holdings.

The financial fallout from the casino operation may prove to be small. The big question is whether the Trump brand can withstand the multiple blows at a time when the developer's rococo image is at odds with the current climate.

GRAPHIC: Art Credit: That topplin' town: Some 30% of units in Trump International in Chicago remain unsold.

LOAD-DATE: December 18, 2008

THE WALL STREET JOURNAL.
The Wall Street Journal

March 4, 2009 Wednesday

SECTION: THE PROPERTY REPORT; Pg. C8

LENGTH: 400 words

HEADLINE: Trump, Lenders Suspend Legal Row

BYLINE: By Alex Frangos

BODY:

Developer Donald Trump and his lenders came to an agreement to temporarily suspend litigation on the struggling Trump International Hotel & Tower project in Chicago.

The agreement with the project's lenders, a group led by Deutsche Bank AG, gives the parties at least 90 days to negotiate a settlement over the 92-story development, where sales have fallen short of what is required to pay back a $640 million first mortgage construction loan. It also gives Mr. Trump breathing room to finish construction without imminent fear of foreclosure.

It isn't clear what role Mr. Trump will play in the tower once it's completed, given that the project's sales are behind what is needed to pay back the lenders.

Sales of 339 hotel rooms and 486 condominium units have come in below original estimates and the project's current projected revenue remains short by nearly $100 million needed to pay off the senior first mortgage loan, according to court documents and people familiar with the project.

The development also owes $360 million on a so-called mezzanine loan that was originated by Fortress Investment Group LLC. Mr. Trump put $77 million of his own equity into the tower, according to court documents.

The "standstill agreement" removes for now the cloud of litigation hanging over the project at a time when Mr. Trump is aggressively trying to close condo units with buyers who signed contracts several years ago.

The building opened in early 2008 and units are being delivered from bottom to top. Final touches on the tower are expected to be completed by June, according to a person familiar with the matter.

"I see this as very positive development," Mr. Trump said in a statement. A Deutsche Bank spokesman confirmed the agreement but otherwise declined to comment.

In litigation started last November, Mr. Trump demanded that Deutsche Bank extend the construction loan claiming the overall economic financial crisis triggered the "force majeure" clause in his loan. Force majeure provisions are common in contracts and usually applies to unforeseen circumstances such as war or natural disasters.

Deutsche Bank countersued demanding Mr. Trump make good on a $40 million personal guarantee he made to complete the building. The agreement gives Mr. Trump enough time to finish the project, likely meaning the completion guarantee would be fulfilled.

Donald Trump

NOTES:
PUBLISHER: Dow Jones & Company, Inc.

LOAD-DATE: March 4, 2009

The New York Times

March 6, 2009

In Las Vegas, a Break in the Real Estate Action

By STEVE FRIESS

BY now, a forest of high-rise condominiums was supposed to be crowding the skyline of the Las Vegas Strip, inhabited by celebrities, millionaires and those who wanted to bask in their reflected glory. Wealthy people the world over would find Las Vegas Boulevard an enviable second-home address akin to Park Avenue or South Beach, and major corporations would view owning a condo there as an amenity much like a skybox at a sports arena.

And, indeed, it started out that way five years ago when one celebrity-branded high-rise after another made splashy announcements. There was to be George Clooney's Las Ramblas, Ivana Trump's Ivana, a hotel-condo by the celebrity chef Charlie Palmer. Web sites and entire real estate agencies sprang up around the notion that the market for luxury living on the Strip was limitless.

It hasn't quite worked out. Each of those projects was canceled before even a shovelful of dirt was displaced. The St. Regis Residences, wedged between the Venetian and Palazzo resorts, stands as a truncated shell, construction having been unceremoniously halted in November by the financially troubled developer Las Vegas Sands.

Donald Trump built the hotel-condo Trump International Tower and saw reservations sell out, but a year on has managed to close on just 23 percent of the 1,286 units. His second tower has been postponed indefinitely. One completed condominium tower, Allure, has had such trouble closing on units that the developer has taken the unusual step of marketing the building to gay men and lesbians on the promise that a gay-themed hotel-casino may someday be built next door.

Whether the desire to own a residence or live on the Strip was overestimated or whether the nation's real estate and economic collapse dashed these visions of glamour and profit, the Las Vegas second-home market is clearly different today from what it was giddily anticipated to be earlier this decade.

The buildings at CityCenter, the $8.6 billion six-structure development just south of the

Bellagio Hotel and Casino, embody the uncertainty in the condominium market. The developer, MGM Mirage, holds deposits on 434 of the 670 units at the twin-tower Veer condominiums and 210 of the 227 at the residences atop the 400-room Mandarin Oriental Hotel. But there is no telling how many will close when the buildings open in December. The company also canceled 210 units in another building, the Harmon, when construction problems there forced the company to build 21 fewer floors than intended. The Harmon is now planned solely as a hotel and is due to open in late 2010, a year late.

"We have written very few new contracts in 2008, and the beginnings of '09 are not any better," said Tony Dennis, MGM Mirage executive vice president for residential sales. Even so, the company, which raised prices in February 2008, does not plan to discount them. "We have a philosophy that the real estate is finite, that CityCenter is exceptional and that lowering prices in the short term offends the buyers who come before and undermines the philosophy," Mr. Dennis said.

Mr. Trump also isn't lowering prices, saying he has reduced the $535 million mortgage to "a very low number" partly through 20 percent nonrefundable deposits and by, for the time being, renting out as hotel rooms those units that don't close. He said he was astonished at the stalling of the St. Regis, which is visible from his tower across the street. "They have an empty building right in the front entrance that stopped construction," Mr. Trump said. "I don't know whose idea that was. They have a concrete frame standing there; you talk about a mess."

When second-home seekers do buy on or near the Strip, real estate agents say, most pay cash. That's what Harry Bienenfeld, 54, of Old Brookville, N.Y., did last year when he bought a 3,200-square-foot, three-bedroom, three-bathroom unit with two terraces for $1.055 million at Turnberry Place, a four-building high-rise complex just off the Strip that was completed in 2005 and is seen as the most successful of such projects.

Mr. Bienenfeld bought the property for an especially Vegas-y reason: he was tired of having to gamble a certain amount to earn free rooms and amenities at resorts on the Strip.

"When you stay in these hotels, you always feel the pressure to meet your minimums," said Mr. Bienenfeld, a retired commodities trader who said the last straw was a visit to the Bellagio when he was charged more than $1,000 a night for his room upon checkout because he hadn't played enough. "This way I own my own place and play as much or as little as I like."

Mr. Bienenfeld admits he wishes he had waited — he bought in February 2008 and the

property would probably be significantly less now — but he said he was confident about Las Vegas in the long term.

"I think Turnberry Place, because it's mostly third or fourth homes for most people, will continue to hold their value," Mr. Bienenfeld said. "For those who can afford to hold on, Las Vegas isn't going anywhere. It'll be back."

Some second-home browsers in Las Vegas put off by what they see as unreasonably high prices on the Strip have found themselves considering properties in unexpected parts of town.

Such was the case of Richard Thum, a frequent visitor from San Antonio, who joined a recent bus tour of foreclosed properties aimed at second-home buyers and led by Jennifer Martin, a real estate agent. Ms. Martin's tour began first at a trio of single-family houses in the suburbs, which mildly irritated Mr. Thum, who was focusing on condominiums on the Strip.

"This isn't what I planned to look at," muttered Mr. Thum, who had stayed an extra day and skipped Valentine's Day evening with his wife to take the tour.

By the time the bus arrived at a pair of units at Turnberry Place, though, Mr. Thum had made a mental shift that startled even him. The third house in the suburbs was a 2,300-square-foot, three-bedroom single-family home with a kidney-shaped pool that was listed for $194,500. It had last sold for $395,000 in April 2006 before Wells Fargo foreclosed on the owners in January.

Mr. Thum was charmed by the place and unimpressed by what he found at Turnberry. He was shocked that a 2,195-square-foot two-bedroom, three-bathroom unit on the 14th floor was listed at $454,900 even though the deck, which provided a spectacular southward Strip view when it was completed in 2004, now faced a mammoth parking structure for the soon-to-open Fontainebleau Hotel and Casino. The unit, foreclosed upon in December, last sold for $850,000 in March 2005.

"My impression when we first started was that I wanted a condo, but I also was expecting to see blighted neighborhoods of houses with rows of foreclosed signs, and that's not it at all," said Mr. Thum, a 53-year-old commercial real estate agent who visits Las Vegas at least three times a year. "And look at the prices. There's no way I would spend $500,000 to look at a parking lot when I can pay a third of that for a house, a pool and no association fees."

Real estate agents say his is a common reaction these days. Nevada has the nation's highest foreclosure rate — one in 76 homes is owned by a bank — so real estate agents are aggressively pushing the prospect of astonishing deals. The city enjoyed its best January ever this year in terms of single-family home sales, although more than 80 percent of those units were foreclosures.

"I hear from a lot of people who are only familiar with the Strip, who think they want to live a few blocks off the Strip," said Robin Camacho, a real estate agent who writes the House Advantage blog for the Las Vegas Advisor, a Web site aimed at visitors. Ms. Camacho, whose 27 sales in 2008 put her among the top sellers in the region, said all were foreclosed properties. "You've got to have an awful lot of money to not think twice to put down $1 million on a condo near the Strip," she said, "and it also might not be worth it."

ONE of Ms. Camacho's clients was Darlene Robidoux of Winnipeg, Manitoba, who came to town with her husband, Paul, in October with one rule for their search for a second home: it had to be at least 20 minutes away from the Strip. "When I go there, I want to not initially think, 'Oh, I'm in Vegas,' " Ms. Robidoux said. "I want to be able to go and think this is my second home and relax there."

The couple drove in for their annual 10-day visit with a blank check in hand, capable of spending as much as $90,000 for a condominium unit. They found precisely what they sought, a 980-square-foot, two-bedroom, two-bathroom apartment in the northwest community of Summerlin, for much less. The unit, which last sold for $165,990 in 2005 before being foreclosed upon last year, had been listed for $84,900 but — in a stroke of Vegas-sized luck — fell to $58,400 the day the Robidouxes chose to take a look, and their $61,100 topped an existing bid.

"When we left, we were just in shock," said Mrs. Robidoux, 43, a dispatcher at the hospital where Mr. Robidoux is a systems analyst. "In the car, we'd say to each other, 'Did we just buy a condo?' All the way back home, we were like that."

Mr. Thum, who is debating whether to bid on the house with the pool, is wondering if in fact the Las Vegas market has hit its bottom yet. He said he was confident, though, that even if it has not and he buys now, values will rise again sooner or later.

"This is the only city in the world that has billion-dollar hotels — not one or two, but a whole line of them, one after the other — and none of those hotels are going to go out of business," he said. "Las Vegas is not going to dry up and go away. You give it 10 or 20 years, you'll do just fine here."

This article has been revised to reflect the following correction:

Correction: March 13, 2009
An article last Friday about the real estate market in Las Vegas misstated the age of Harry Bienenfeld, a retired commodities trader from Old Brookville, N.Y., who bought a second home in a high-rise complex just off the Strip. He is 54, not 64.

TRUMP LICENSE FEES, AS OF JUNE 30, 2005

Trump Island Villas, Cancuan Island**
Fees

After Co-Broke:	
9,810,000	3% commisssion to TRUMP after co-broke to Altman
2,500,000	Minimum Guaranteed Payment of $125k quarterly for 5 years (as advance on bonus commissions)
12,310,000	Payable at closings over the next 10 to 15 years
(791,666)	Less: payments received to date
11,518,334	

[**Currently, 14 villas in reservation, need to be converted to hard contracts, closings will occur in approx 2 years]

Trump Tower Tampa

2,000,000	License Fees (two payments of $125k + $65k/mo for 26 mos)
[illegible]	License Fee - based on $484/sf avg @ $245mm sellout, 507,500 sf total
12,657,500	Total - payable in approx 2007 - 2008
(510,000)	Less: payments received to date
12,147,500	future receipts

Trump Las Olas Beach Resort, Ft. Lauderdale

960,000	Initial Fee Payment as Class A Member Compensation (payable as $15k/mo for 24 mos, then $25k/mo for 24 mos)
795,000	1.5% of hard and soft costs - $53mm
250,000	License Fee Initial Payment
[illegible]	License Fee - Based on $1350/sf avg @ $105mm sellout, 85,000 sf total
950,000	Hotel Management Agreement (10 year term based on $1k per unit for 95 units)
9,885,000	Total - (License fees payable in approx 2007-2008; Management fees payable upon hotel opening in 2008)
(460,000)	Less: payments received to date
9,426,000	future receipts

Trump International Hotel & Tower, Ft. Lauderdale

950,000	Initial Fee Payment as Class B Member Compensation (payable as $210k + $15k/mo for 10 mos + $25k/mo for 12 mos)
1,280,775	1.5% of hard and soft costs - $85,385,000
250,000	License Fee Initial Payment
[illegible]	License Fee - Based on $1200/sf avg @ $275mm sellout, 229,000 sf total
903,000	Hotel Management Agreement (3 year term based on $1k per unit for 301 units)
17,948,275	Total (License fees payable in approx 2007- 2008; Management fees payable upon hotel opening in 2008)
(430,000)	Less: payments received to date
17,518,275	future receipts

Trump Towers I, II & III, Sunny Isles, FL

100,000	Advance payment
4,065,000	813 units @ $5k per unit
4,165,000	Total - payable in approx 2008

DJT fs 2005.xls

EXHIBIT
Defendants' 43
11/14/07 CC

10/31/2005

18433a

CONFIDENTIAL WEI 000001943

TRUMP LICENSE FEES, AS OF JUNE 30, 2005

Trump International Hotel & Tower, Toronto (*contract in dispute and being renegotiated)

	Construction Management Fee/Development Management Services (CAN $75k + $25k)
837,342	Construction Management Fee (US $25,374/mo for 33 months starting 10/15/2003) - *IN DISPUTE*
$———	License Fee - 10% of net profit
$———	Hotel Management Agreement (CAN $1750/unit/year)
$———	Residential Management Agreement (CAN $1000/unit/year)

Trump International Hotel & Residences, Phoenix *(project in planning stages, sales & construction info not yet available)*

250,000	License Fee (paid)
$———	1.5% of hard and soft costs - NOT YET AVAIL
$———	License Fee - minimum 5% of gross sales - NOT YET AVAIL
1,560,000	Development and Services Agreement Fee ($15k/mo for 24 mos + $50k/mo for succeeding 24 mos)
1,810,000	
(505,000)	Less: payments received to date
1,305,000	future receipts

Trump Grande Ocean Resort & Residences, Sunny Isles, FL
?????

PENDING Residential and Hotel Condominium Projects, as of June 30, 2005:
Trump Plaza Jersey City, NJ
Trump Tower Hawaii
Trump India (5 cities)
Trump Tower Tel Aviv, Israel
Trump International Hotel & Tower, Dubai, UAE
Trump International Hotel & Tower, Cabo San Lucas, Mexico
Trump Tower Philadelphia
Trump International Hotel & Tower, New Orleans

The New York Post

May 4, 2006 Thursday

SECTION: All Editions; Pg. 48

LENGTH: 1255 words

HEADLINE: GIMME SHELTER

BYLINE: Braden Keil

BODY:

JEWELRY COLLECTION

Apparently 7,000 square feet isn't enough space for jewelry designer David Yurman, who's just added another apartment to his collection in a Greenwich Street building.

City records show that Yurman and his wife, Sybil, have paid $3.125 million for a second-floor apartment. The unit offers two bedrooms, three baths and a total of just more than 2,000 square feet of living space in a six-story building between Spring and Canal streets.

That's in addition to the spacious triplex loft that they bought in 2004 for $6.27 million. That unit has four bedrooms and 4 1/2 bathrooms, with wood-burning fireplaces, views of the Hudson River (unlike the new unit, which has no views) and a 4,000-square-foot roof terrace.

Maybe they purchased the smaller unit for their son Evan, or perhaps their Maltese dog, Sushi.

And just so Sushi doesn't feel cooped up, the Yurmans also have a weekend retreat in Bedford, N.Y., which was the former home of former Vogue editrix Grace Mirabella.

O, what a home

One of Jackie Kennedy Onassis' childhood summer haunts (one of her many, we should point out) is on the market for $25 million. The sprawling former home of her paternal grandparents, known as "Lasata," is on 6.4 acres on Further Lane in East Hampton.

The 8,500-square-foot, two-story residence, built in 1917, includes six main bedrooms and 5 1/2 baths, with grand public rooms that have several fireplaces. The property has a large pool and formal gardens.

In the book "Jacqueline Bouvier Kennedy Onassis: a Life," author Donald Spoto referred to the estate. "At Lasata, grandma Bouvier often took Jackie around the gardens, pointing out this flower and that plant and spicing her instruction with legends and folklore about each species."

It is being listed by James Makrianes at Brown Harris Stevens.

A man from Canada

The second-most expensive home in Nantucket has recently been purchased by a Canadian businessman who wants to publish American newspapers.

Gerald Schwartz, the chairman and CEO of Toronto-based Onex Corp., paid $18.25 million for a vintage ocean-front property, according to the island's public records.

The estate, know as Sandhill, includes a circa 1860s, eight-bedroom home, comprising more than 10,000 square feet, with two grass tennis courts, a pool and two guesthouses.

Sandhill's sale is second only in price to a 65-acre property that sold in 2000 for just less than $20 million.

Schwartz, who had previously rented on the charming island, topped last year's mega-sale price of $16.7 million to Google CEO Eric Schmidt.

He and his Canadian-based group of investors, which inclues Black Press (no connection to beleaguered Canadian newspaper mogul Conrad Black) are in the running to buy The Philadelphia Inquirer and Philadelphia Daily News.

Other suitors who are reportedly submitting bids for the Philadelphia newspapers include publishing wannabes Mort Zuckerman and Ron Burkle.

Schwartz and his wife, Heather Reisman, who is CEO of Indigo Books & Music, also have homes in Toronto, Bel-Air, Calif., and Palm Beach.

Patriot Act at the Plaza

New England Patriots owner Robert Kraft is the latest mogul who will be checking in to The Plaza hotel, once its residences are completed next year.

Kraft joins a growing list of boldface names to buy into the pricey landmark building. Others include Bear Stearns Chairman James Cayne and Formula One magnate and Naomi Campbell survivor Flavio Briatore.

Last year, Kraft presented Russian President Vladimir Putin with his diamond-encrusted 2005 Super Bowl ring during a meeting with U.S. business executives, so the fomer KGB head might be a frequent visitor (wink, wink) on Fifth Avenue. Actually, an official in Moscow told The Associated Press that Putin had given the ring to the Kremlin library, where other foreign gifts are kept.

This just in...

A new luxury hotel condominium and retail complex will soon be rising on Fifth Avenue.

We've learned that a major international developer based in Italy has just bought the property at 400 Fifth Ave. from Lehman Brothers to construct a 56-story building at the northwest corner of Fifth Avenue and 36th Street.

The buyers, Bi & Di Real Estate SpA, outbid many of the city's top developers, with an offer of approximately $200 million.

Lehman had already commissioned plans created for the project by Gwathmey Siegel, before they opted to put it on the market.

Current plans for the complex, which will comprise 520,858 square feet, calls for over 145,000 square feet of hotel space and 323,000 square feet of residential property that will occupy floors 18 to 56. The group has already developed many resorts, offices and other such projects around the world. And this will be its first venture in the U.S.

"We're now in the process of selecting a luxury hotel group that will complement the upscale residences," says real-estate mogul Howard Lorber. The chairman of Prudential Douglas Elliman and super-broker Dolly Lenz represented the buyers in the acquisition and will be exclusively marketing the property.

Chopping it up

The former Westchester estate of Dr. Herman Tarnower, the Scarsdale Diet founder, has been sliced up - unlike Tarnower, who was actually shot there by jilted boarding-school headmistress Jean Harris.

Local developer Joe Simone has begun construction on two large homes on the 7-acre property in Purchase, N.Y., after demolishing the Tarnower home.

The custom spec homes, priced in the $6 million range, will comprise 12,000 square feet, with seven bedrooms and 10 bathrooms in each. Amenites will include elevators, wine cellars and swimming pools.

Pssst! We hear that...

Now that she's produced an heir for her glossy magazine-publishing husband, Jason Binn, Haley Lieberman Binn is back in the business of selling residential real estate.

And she's already making her move - to the Corcoran Group from Stribling, where she previously hung her shingle.

It's a fresh start," says Binn. "I've got a new baby [Penny], new office and new title [vice president]."

* Phone-flinging catwalker Naomi Campbell certainly gives new meaning to domestic abuse. But the malevolent model is at least taking some steps to cut down on chance enounters with her household help.

According to brokers, Campbell has been combing the Upper East Side specifically for townhouses that have separate, self-contained maid's quarters and separate service entrances. One such place she was perusing a few days ago is a smaller single-family home with an $8 million asking price.

"It's got separate everything," chuckled one broker familiar with the property. "Her help would be out of phone-shot."

Certainly a point of concern.

In 2000, Campbell pleaded guilty to assault in Toronto, after her maid complained the model had struck her head with a cell-phone and tossed her against a wall in a hotel room.

In 2001, London police were called to ex-boyfriend Flavio Briatore's Chelsea apartment at dawn, after Campbell allegedly threw a glass bowl at another maid.

Police were again called to calm a situation in Campbell's apartment at 480 Park Ave. in 2004, after a scuffle ensued between Naomi and maid Millicent Burton. After some rolling around on the floor, Burton needed hospitalization. At the time, Campbell told police it was she who had been attacked.

Most recently, Campbell was charged with second-degree assault last March after allegedly bashing her new housekeeper in the head with a phone at the same apartment, police said.

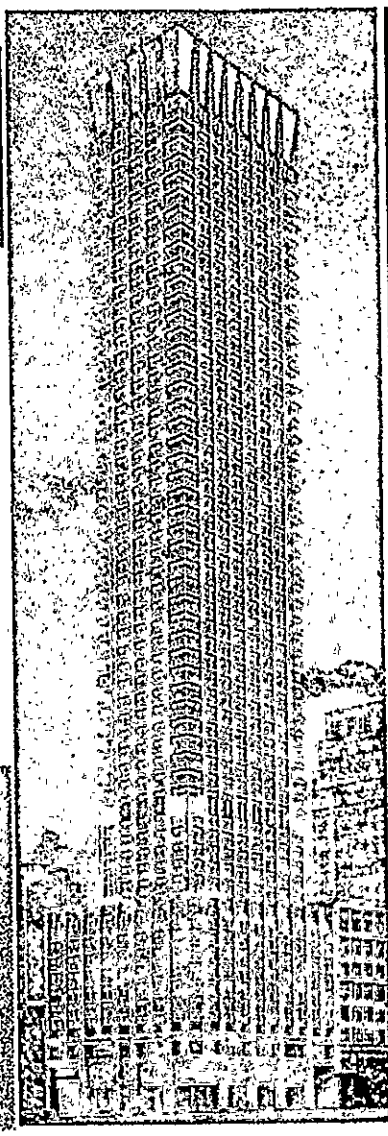
GRAPHIC: - Herman Tarnower lived here. - Bob Kraft is the latest mogul to buy a place at the Plaza. (Rex Dittman) - Campbell's looking on the Upper East Side. (Wireimage) - David Yurman now owns two units on Greenwich St. (N.Y. Post/ Jim Alcorn) - Herman Tarnower lived here. - Bob Kraft is the latest mogul to buy a place at the Plaza. (Rex Dittman) - Campbell's looking on the Upper East Side. (Wireimage)

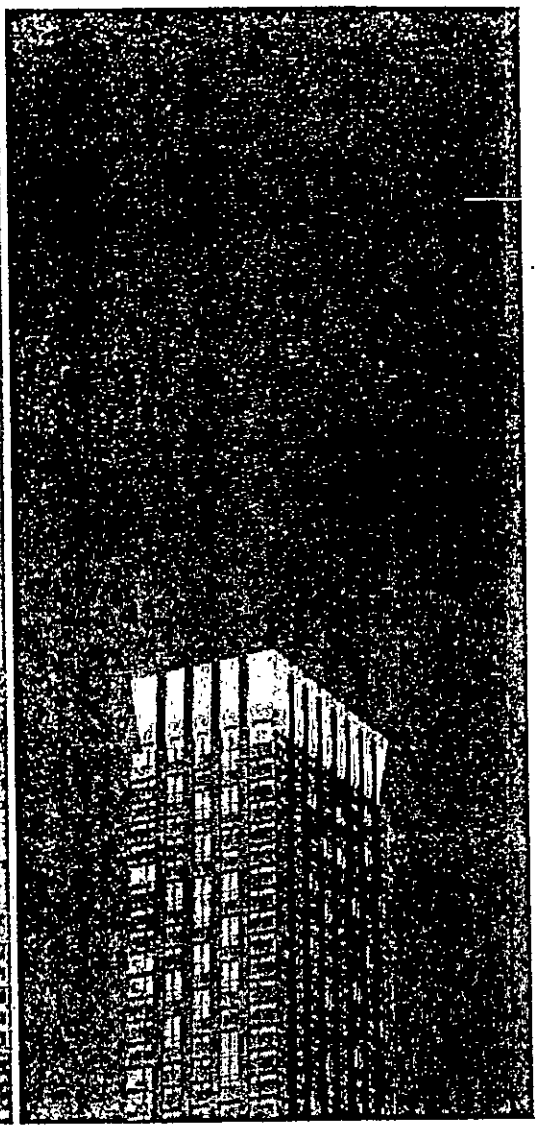
LOAD-DATE: May 4, 2006

400 FIFTH AVENUE
Hotel and Residential Condominiums
NEW YORK, NEW YORK

400 Fifth Avenue is a 57-story hotel and condominium tower containing 191 hotel rooms and 324 residences located on Fifth Avenue. The project's expressed podium establishes a sympathetic response to its immediate context of three designated landmark structures in terms of scale, rhythm, and materiality. Public functions include ground floor retail, a second floor restaurant and a third floor lounge overlooking Fifth Avenue.

back to previous page
continue





GWATHMEY SIEGEL & ASSOCIATES ARCHITECTS LLC
[illegible]
[illegible]
[illegible]

* * * C O N F I D E N T I A L * * *

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: CAMDEN COUNTY

DONALD J. TRUMP,)

)

Plaintiff,)

)

vs.) No. CAM-L-545-06

)

TIMOTHY L. O'BRIEN, TIME)

WARNER BOOK GROUP INC.,)

and WARNER BOOKS INC.,)

)

Defendants.)

November 14, 2007

9:31 a.m.

Continued deposition of GERALD J. ROSENBLUM, held at the offices of Wilson Elser Moskowitz Edelman & Dicker, 150 East 42nd Street, New York, New York, before Laurie A. Collins, a Registered Professional Reporter and Notary Public of the State of New York.

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MARTIN J. BURNS, ESQ.

ALSO PRESENT:
KEVIN GALLAGHER, Videographer

(Defendants' Exhibit 30, 2005 personal tax return, marked for identification, as of this date.)

THE VIDEOGRAPHER: Good morning. This is the continued videotaped deposition of Gerry Rosenblum taken in the Donald Trump versus Timothy L. O'Brien, et al., case. Today's date is November 14, 2007, and the time on the record is 9:31 a.m.

GERALD J. ROSENBLUM,
resumed as a witness, having been previously sworn by the notary public, was examined and testified further as follows:

EXAMINATION CONTINUED BY
MR. CERESNEY:

Q. Good mortgage, Mr. Rosenblum.

A. Good morning.

Q. I just remind you you are still under oath, and the same instructions that we talked about yesterday morning at the beginning apply today.

A. Okay.

Q. I want to start today, if we could -- I'm going to get back to the statement of

financial condition in a bit, but I thought we would start today with the returns. I've put in front of you what has been marked as Defendants' Exhibit 30. But before we look at this -- which is the 2005 tax return, personal tax return, for Mr. Trump -- let me just ask you some questions generally about tax returns.

Did Weiser LLP assist in Mr. Trump in preparing his tax returns?

A. Yes.

Q. Over what period of time has Weiser LLP assisted Mr. Trump with his tax returns?

A. Perhaps since he's born. I'm really not certain. You know, either Weiser or predecessor firm. Certainly since he was a very young boy.

Q. Have you personally participated this the preparation of his personal tax returns?

A. In some years I have reviewed the return, not -- I'm not certain that "review" is a proper word. I have considered the work done by others. I have read the tax return. I'm familiar with the tax returns. In recent years, no, I have not had any participation with regard to them.

projects?
A. One moment.
(Pause.)
A. I see next to the items enumerated on Defendants' Exhibit 45 -- certain references to per Jill. The items listed on Defendants' Exhibit 43 -- and I haven't verified it -- do seem to be the ones that are listed as per Jill.
Q. Okay. So in other words, Defendants' Exhibit 43 appears to articulate the basis for the values that are assigned to those various projects in Defendants' Exhibit 45?
A. To the extent that they are referenced per Jill.
Q. Yes.
A. In other words, my assumption would be that Jill prepared Defendants' Exhibit 43.
Then there are four other values which I would ascribe to information presented within -- oh, the four -- no, there's Dezer 1, the first item, 14,100,000. That would seem to be what is referenced on the bottom of Exhibit 45.
Q. Okay. So let me ask you a couple of questions. First, do you see here how in

Defendants' Exhibit 45 next to Trump Island Villas, which is valued at $11.5 million, you have something in your handwriting? Do you see that?
A. Yes.
Q. What did you write there?
A. Will take years to get.
Q. What did you mean by that?
A. If we look back at the schedule which I said is per Jill --
Q. Defendants' Exhibit 43.
A. Forty-three, payable at closings over the next 10 to 15 years.
Q. What does that mean?
A. That it may take 10 to 15 years to receive the total amount shown here.
Q. And was there any provision or any accounting for the fact in determining the value of this project that it would take 10 to 15 years to get the money?
(Witness and counsel confer.)
A. I'm sorry, could you repeat the question?
Q. Does this value account for the fact that these funds --

A. I do not see --
Q. Hold on. Let me finish the question. Does this value account for the fact that these funds will potentially be received over the next 10 to 15 years?
A. It does not seem to.
Q. Would standard valuation techniques require that you account for that in determining net present value?
MR. MANISERO: Objection.
You may answer.
A. Yes. If we can --
Q. I'm just asking you standard valuation techniques. Would they require you to account for that in determining net present value?
A. I am not --
Q. If you know.
A. I'm not sure what standard valuation techniques are.
Q. Okay.
A. This is the first time I've heard that usage.
Q. Fair enough. Let me rephrase. In order to do a valuation of this property, would it

be proper to account for the fact that the payments that are at issue here would likely be received over 10 to 15 years?
(Pause.)
MR. MANISERO: I don't want to interrupt you, Gerry, but the question was simply would that be something that should have been accounted for. Whether it has been or it isn't -- stay with his question, please.
A. Hmm, should have been? I would think so.
Q. Okay.
Now, looking at this schedule, Defendants' Exhibit 43, I want to focus for a moment on Phoenix just for a second, the second page.
Before we get to that, I just want to ask you, there's a date in the right-hand of this schedule, October 31st, 2005. Do you see that?
A. Yes, I do.
Q. What do you understand that to indicate about the amounts -- well, there's that date, and then there's Trump license fees as of June 30th, 2005, which is at the top of page 1. Can you tell

me what those two dates indicate here about these projects?

A. Assuming this came from a file within my records and based on the way in which I normally construct those files, the date in the lower right-hand corner would be the date that this particular printing (indicating) of the item took place. It may have been received months before or yesterday. I don't know.

Q. You could have received it earlier but printed it out on October 31st?

A. Printed it out on October 31st.

Q. Looking to Phoenix, do you see there's an indication there Trump International Hotel and Residences, Phoenix, open parens, project in planning stages sales and products information, not yet available.

Do you see that?

A. Uh-huh.

MR. MANISERO: Yes.

A. Yes.

Q. Do you also see how there's a blank — or a — there's no number neck to the 1.5 percent of hard and soft costs. There's a notation not

yet available. And the license fees that Mr. Trump may receive under this project, which it says is a minimum 5 percent of gross sales, it says not yet available.

What do those notations indicate?

A. They would seem to me -- again, this is not a schedule that I prepared. They would seem to me that a contract or at least partial agreement had been reached with regard to a property in Phoenix that $250,000 had already been paid to Mr. Trump with regard to that contract, that a million 560 was a development and services agreement which had been pretty well firmly negotiated and that those two numbers, when added together, are a million 810, which represents the negotiated portions of that arrangement to be derived from Trump International Hotel and Residences. Indeed, 505,000 of that had already been received and so was not included in the June 30th, 2005 report or numbers.

And so the future receipts -- the future receipts from the elements of the contract which had been negotiated and upon which approximately one-third -- no, a little less than

one-third of which had been paid already, the future receipts from just those elements of the contract were a million 305.

But in addition to that, Mr. Trump is to receive 1.5 percent of hard and soft costs, but nobody had as yet calculated what the hard and soft costs might be. So that was still not yet available.

He's also to receive a license fee, which would be a minimum of 5 percent of gross sales. But nobody had yet estimated the gross sales number, so that amount could not be estimated by Jill, who prepared the schedule.

So she only inserted the kind of sure numbers or negotiated and settled numbers, and she, correctly, I believe, reduced that by the amount of payments already received because those would not be received after this date.

So that is what that portion of the schedule represents to me.

Q. The hard and soft cost and the licensing numbers, were those numbers too speculative to include in this valuation at this time?

A. Or they had not yet been available to Jill.

Q. And therefore were not included?

A. Were not included, or she has not included them.

Q. And she is a representative of the Trump organization?

A. Yeah, that's Jill Kramer.

Q. Jill who?

A. More likely than not, that's Jill Kramer.

Q. And what is her position?

A. I'm not sure she's still there. I really don't know.

Q. Was she —

A. She was involved with development projects, projects under development.

Q. It was your understanding that those numbers were not included because as of that date —

A. They were uncertain.

Q. -- they were not certain. They were too speculative?

A. They were probably in the agreement as

1.5 percent of hard and soft costs incurred or to be incurred, but they were -- but the hardened soft costs were probably not known to me as yet.

Q. And therefore she couldn't estimate what Mr. Trump's return would be on that percentage?

A. That's correct. That's my reading.

Q. Let me ask you to look back to Defendants' Exhibit 45, and in particular do you see a reference there to Toronto?

A. Toronto, zero.

Q. Yes. Do you know what Toronto was?

MR. MANISERO: It's a town in Canada.

MR. CERESNEY: Yes, other than being a town in Canada. Thank you, Tom.

Q. Do you know what it's a reference to in this schedule?

A. Yes.

Q. Okay. What is it referencing?

A. Mr. Trump had been negotiating -- Mr. Trump had been negotiating with Canadian landowners and/or developers -- I'm not sure who they were -- but he had been negotiating with them about the construction of a property in Toronto,

Canada.

And the development of that property had not -- I believe that the zero indicates that the development of that property had not risen to the level of a signed deal or may have been a signed deal but whether the property was going to continue in development or not may have been unknown.

So Toronto was put into the schedule, Defendants' 45, with an unknown number. And since it was unknown, it was reported as zero.

Q. And take a look at Defendants' Exhibit 43, page 2. It looks like there's a reference to Toronto on page 2 of that schedule from Jill.

A. Yes.

Q. Do you see there where it says at the top: contract in dispute and being renegotiated?

A. Yes.

Q. And there's a reference to a construction management fee that's in dispute, and then the further numbers are all blank?

A. Yes.

Q. Is that consistent generally with your understanding of what was going on at the time?

A. The first words there, contract in dispute and being renegotiated, probably is very consistent with what I just said.

Q. Going back to Defendants' Exhibit 45, which is the overall schedule from which you derived the final number, is there any indication in that schedule of a discount to the value on the basis of the potential risk that the properties will not sell for the anticipated prices?

A. No.

Q. Now let me ask you to put aside 43, 44, and 45.

MR. MANISERO: Gladly.

MR. CERESNEY: Okay.

Q. Just a few questions about fees. Do you know, Mr. Rosenblum, who is paying Weiser's counsel fees in connection with costs incurred in this litigation?

A. No, I do not.

Q. Do you know if Mr. Trump is paying those fees?

A. I do not know that.

Q. Do you have any understanding of whether Weiser has any right to indemnification as

a result of fees incurred as a result of this litigation?

A. No, I do not know that.

Q. Would Mr. Bender be aware of that?

A. He may very well be, or may not be. I don't know.

Q. Do you know if you're being compensated by Mr. Trump for your time in testifying today?

A. I do not know that. I know I am reporting my time, but I do not know if I'm going to be compensated.

Q. Do you know whether Weiser is going to be billed for that time?

A. I do not know whether Weiser is going to bill for that time.

Q. What about time in preparing for today's deposition -- well, actually let me ask you this question: Did you, in anticipation of this deposition, do anything to prepare for the deposition?

A. I did meet with Mr. Burns before yesterday.

Q. How many times did you meet with Mr. Burns?

HOnly the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Chancery Division.
CORTLAND ASSOCIATES, LP, Plaintiff,
v.
CORTLAND NEIGHBORHOOD CONDOMINIUM ASSOCIATION, et al., Defendants.
No. SOM-C-12003-04.

Sept. 23, 2005.

Carole Lynn Nowicki and Richard L. Plotkin (Pitney Hardin LLP) for Plaintiff.

Cynthia A. Satter (The Law Offices of Stephen E. Gertler, PC) for Defendants.

Motion for Partial Summary Judgment and Cross Motion to Bar Testimony of Roy I. Mosicant

WILLIAMS, J.

I. *Background*

*1 The present matter arises out of a contractual dispute between Plaintiff Cortland Associates, LP ("Plaintiff" or "Cortland") and Defendants Cortland Neighborhood Condominium Association, David Sargent, individually and as President of the Cortland Neighborhood Condominium Association, James Garrambone, individually and as Vice President of the Cortland Neighborhood Condominium Association, Andrew Beck, individually and as Secretary of the Cortland Neighborhood Condominium Association, Regina Rossi, individually and as Trustee of the Cortland Neighborhood Condominium Association, Susan Radom, individually and as Board Attorney for the Cortland Neighborhood Condominium Association, and Executive Property Management Hills Village North Master Association ("Defendants" or "Association").

In January of 2003, Plaintiff became the non-resident owner of forty-eight condominiums in the Cortland Neighborhood at the Hills condominium development. ("Rental Units"). Plaintiff leases Rental Units to low and moderate income families. The Cortland Neighborhood Condominium Association, Inc.'s Certificate of Incorporation requires the Association to improve, repair, restore and maintain the Common Elements of the Buildings in addition to many other duties. Pursuant to Article IX, Section 2(b) of Association's By-Laws, the Board is required to establish a maintenance fund into which it must deposit all monies paid to the Association and from which disbursements may only be made to maintain and operate the Common Elements.

The Condominium's roofs leaked over the course of a number of years prior to their replacement in August, 2004. In 1997, as a result of a class action, Defendants received $38,496.00 on behalf of the Association's members. The monies were intended in part to compensate the unit owners for the potential roof failures due to defective plywood. However, the roofs were replaced nearly seven years after the Association received the settlement funds. On September 24, 2004, this court granted summary judgment as to liability because Defendants violated the New Jersey Condominium Act by failing to replace the roofs for such a substantial period after they received the settlement funds. Accordingly, this court ordered the parties to retain mold experts and structural engineers to inspect the buildings and remediate problems found in the common elements with the costs to be shared among the parties.

On or about February 25, 2005, Cynthia A. Satter and the Law Offices of Stephen Gertler notified Pitney Hardin of the need to withdraw as counsel for one or more Defendants because of ethical reasons. At that time, Ms. Satter did not disclose which Defendants were involved. On April 25, 2005, the Gertler firm filed a notice of motion for on Order to withdraw as counsel for Mr. Beck based on the assertion that Mr. Beck engaged in conduct for which disclosure is mandated under RPC 1.6(b)(2), RPC 3.3(a)(5) and RPC 8.4(d). In connection with this motion, the Gertler firm attempted to file a certification under seal disclosing Mr. Beck's conduct to which the firm based its motion.

*2 However, the Gertler firm failed to follow the proper court procedure for filing a certification under seal and this court converted the matter into a motion for a protective order. On May 4, 2005, Pitney Hardin filed a cross-motion to compel the Gertler firm to serve Cortland Associates with a copy of Satter's sealed certification. In the interim, William J. Martin of the law offices of Martin, Gunn & Martin was substituted as Mr. Beck's attorney. On June 2, 2005 the Martin firm filed a letter brief in opposition of Pitney Hardin's motion to Compel. This court heard oral argument in this matter on June 10, 2005. This court issued an opinion on June 10, 2005 denying Ms. Satter's motion for a protective Order and permitting Pitney Hardin to explore though deposition the issues raised by Ms. Satter's certification.

On or about June 21, 2005, the Gertler firm forwarded to Pitney Hardin a copy of Satter's sealed certification, which states that Steven Caparulo of defendant EPM disclosed to the Gertler firm that Mr. Beck had intentionally reviewed "privileged communications" between Cortland Associates and Pitney Hardin and that Mr. Beck confirmed this with the Gertler firm. On July 13, 2005, Pitney Hardin took the deposition of Mr. Beck. In the deposition, Mr. Beck asserted his Fifth Amendment right against self-incrimination when asked question regarding his review of privileged information. On July 13, 2005, Pitney Hardin also took the deposition of Mr. Caparulo. In the deposition, Mr. Caparulo testified that Mr. Beck informed him that he had intentionally obtained an email communication between Pitney Hardin and Cortland Associates regarding the present litigation.

Plaintiff now moves for an Order for Partial Summary Judgment on liability as to Paragraph A of its claim for relief in the Complaint. It asks this court to direct Defendants to immediately maintain and repair the Common Elements of Buildings 78 and 79 and the affected units of Cortland Neighborhood through the immediate inspection and remediation of mold infestations and structural damage, including water-related damage caused by mold. Plaintiff requests Oral Argument. Defendants oppose the motion.

II. *Plaintiff's-Movant's Position*

Plaintiff contends that it is entitled to summary judgment because there are no genuine issues of material fact regarding the existence of hazardous conditions in the Common Elements and that the defendants are required by law to remediate. *SeeR.* 4:46-2(c); *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 74, 110 A.2d 24 (1954). Under the New Jersey Condominium Act as stated by this court in the September 24, 2004 Opinion the responsibility to maintain and repair the Common Elements for the protection of the health, safety and general welfare of the residents of Cortland Neighborhood rests solely on the Defendants. However, Defendants will not remediate the mold without an injunction. Plaintiff's mold expert, Roy I. Mosicant, lab-tested extracted mold from the Rental Units and classified many of the samples as "toxigenic fungi" which could cause adverse health conditions. Accordingly, Plaintiff seeks an injunction directing the Defendants to remedy the damage to the Common Elements and the affected units. Furthermore, the Defendants should pay for the entire cost of testing, remediation and the costs of relocating Cortland Associate's tenants and their belongings during the inspections and relocation work. Finally, if this court grants partial summary judgment the remaining legal claims for damages should be bifurcated and sent to the Law Division.

III. *Cortland Neighborhood Condominium Association-Defendants'-Opponents' Position*

*3 Plaintiff relies on lab-test results from Aerotech, which specifically state in relevant part:

> The results are not a concentration to determine the relative risk of exposure. They should not be used alone to assess the conditions that exist throughout a room or building where the samples were collected. Additional information such as the total area covered by mold within the rooms in question and sampling using different sampling protocols are needed to make that determination.

Furthermore, the certification by plaintiff's expert does not say that the mold he allegedly found is a direct and proximate result of the water leaks through the roofs. Plaintiff seeks by this motion to have the Court determine Plaintiff's damages without the necessity for Plaintiff to establish that those damages are the result of the leakage and not the results of the actions of Plaintiff's tenants. Plaintiff also seeks to set aside the terms of the September 2004 Order direct-

ing the parties to share equally in the cost of inspection for environmental contamination and structural defects. Therefore, Plaintiff should have filed a motion for relief from an Order pursuant to *R.* 4:50. Defendant cites *Crowe v. DeGioia,* 90 N.J. 126, 447 A.2d 173 (1982) in arguing that a preliminary injunction is improper because Plaintiffs failed to show irreparable harm. In addition, Plaintiff failed to show that the mold found in the attic is harmful to anyone necessitating its removal. For the aforementioned reasons, Plaintiffs motion for partial summary judgment should be denied. In a separate motion, Defendant also claims that Roy I. Mosicant's testimony should be barred as a violation of *R.* 4: 24.

IV. *Andrew Beck's-Defendant's-Opponent's Position*

Defendant Andrew Beck resigned his position from the Cortland Association Board in or about January 2005. Currently, he is merely a tenant of Cortland Neighborhood. Furthermore, Cortland Neighborhood has the exclusive obligation for maintenance and repair of the Rental Units under the Condominium Act. *See* N.J.S.A. 46:8B-14)(j). Therefore, if this court grants Plaintiff's motion for partial summary judgment, the injunction should restrain Cortland Neighborhood and not all Defendants, especially Mr. Beck, who is only a former board member.

V. *Discussion*

At the outset, this court wants to be clear that it views Summary Judgment as to the cleanup of the Common Elements of the Condominium separately from Summary Judgment as to the interiors of the Rental Units.

The New Jersey Condominium Act N.J.S.A. 46:8B-14(a) states in relevant part:

> The association, acting through its officers or governing board, shall be responsible for the performance of the following duties, the costs of which shall be common expenses: (a) The maintenance, repair, replacement, cleaning and sanitation of the common elements. (emphasis added)

Therefore, the Condominium Act requires the Association to maintain, repair, replace, clean and sanitize the common elements, but not the interiors of the rental units. Plaintiff will have to use a legal theory other than the above mentioned section of the Condominium Act to seek recovery for the damage done to the interior of the rental units.

*4 Plaintiff's complaint mentions a negligence theory for recovery. Of course, "a cause of action founded upon negligence involves a breach of a duty of care that causes injury." *Weinberg v. Dinger,* 106 N.J. 469, 484, 524 A.2d 366 (1987). This court cannot grant summary judgment for remediation as to the interiors of the rental units as there remains a legal issue of material fact over whether the mold in the interiors of the individual units was caused by Defendants failure to fix the leaky roof for seven years which may constitute negligence by owners or by some negligence on the part of the tenants. Therefore, Plaintiffs have not proven the necessary element of causation and their claim of remediation for the interiors of the Rental Units must be resolved by the Law Division in a negligence action.

In this opinion, this court will also consider Defendants' motion to bar Roy I. Mosicant's testimony for violating *R.* 4: 24 in this decision. Plaintiff's motion for sanctions will be addressed in a separate opinion. This court now addresses the issue of remediation as to the Common Elements of the Condominium in this motion for Summary Judgment.

Summary Judgment as to the Common Elements

The Summary Judgment standard requires the moving party to establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *R.* 4:46-2; *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 N.J. 73, 75 (1954); *Brill v. Guardian Life Ins. Co. of America,* 142 N.J. 520, 666 A.2d 146 (1995). It is then the opposing party's burden to submit proof that the facts are not as the moving party asserts. *Spiotta v. Wm. H. Wilson, Inc.,* 72 N.J.Super. 572, 581, 179 A.2d 49 (App.Div.), *certif. denied,* 37 N.J. 229, 181 A.2d 12 (1962).

In considering the evidential materials presented, this Court's function is to determine whether there is a genuine issue for trial. *Id.,* citing *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If there exists a single, unavoidable resolution of the alleged disputed issue of fact,

that issue should be considered insufficient to constitute a genuine issue of material fact for purposes of Rule 4:46-2. *Id.* Moreover, when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant Summary Judgment.*Id.*

However, Summary Judgment is a stringent remedy and should not be granted unless the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law. *Shanley & Fisher, P.C. v. Sisselman,* 215 N.J.Super. 200, 211, 521 A.2d 872 (App.Div.1987). All inferences of doubt are drawn against the moving party and in favor of the opponent of the motion. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 N.J. at 74-75, 110 A.2d 24. If there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied. *Shanley & Fisher, P.C. v. Sisselman,* 215 *N.J.Super.* at 211, 521 A.2d 872.

*5 This is not the first time this court has reviewed a motion for summary judgment in this matter. In the September 24, 2004 Opinion this court held the following:

> Therefore, because the Defendants had knowledge of the defect, received compensation to replace the roofs and damages, and did not do so until 7 years after receipt of the settlement funds, the court finds they have violated the New Jersey Condominium Act, namely *N.J.S.A.* 46:8B-14(j) which requires every condominium association to "exercise its powers and discharge its functions in a manner that protects and furthers or is not inconsistent with the health, safety and general welfare of the residents of the community."

Therefore, this court has already determined that the Defendants violated the New Jersey Condominium Act by failing to remedy damage caused by leaky roofs. Under *N.J.S.A.* 46:8B-1, Common Elements are defined as follows:

> (i) the land described in the master deed; (ii) as to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, excluding any specifically reserved or limited to a particular unit or group of units; (iii) yards, gardens, walkways, parking areas and driveways, excluding any specifically reserved or limited to a particular unit or group of units; (iv) portions of the land or any improvement or appurtenance reserved exclusively for the management, operation or maintenance of the common elements or of the condominium property; (v) installations of all central services and utilities; (vi) all apparatus and installations existing or intended for common use; (vii) all other elements of any improvement necessary or convenient to the existence, management, operation, maintenance and safety of the condominium property or normally in common use; and (viii) such other elements and facilities as are designated in the master deed as common elements. (emphasis added)

Defendants claim that Plaintiffs failed to prove that the mold found in the Common Elements was caused by the roof leakage. Defendants submitted a certification of David A. Hardaker, which contends that Mr. Entin said in a meeting that some of the infiltration issues were not related to roof leaks and that runoffs from air conditioners and interior unit plumbing and/or maintenance by the individual occupiers could be creating mold problems. Mr. Hardaker's certification of what Mr. Entin told him in a meeting is clearly inadmissible hearsay under *N.J.R.E.* 801(c) as the Defendants are trying to offer it to prove that the mold is caused at least partially by other means besides the roof leakage. It is well established in New Jersey law that hearsay alone is insufficient to defeat a motion for summary judgment. *See Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 76, 110 A.2d 24 (1954). Furthermore, "denial of a motion for summary judgment is not required where something more than hearsay opposition might well have been developed through additional affidavits or the taking of depositions, thereby engendering a genuine factual dispute."*Id.* Accordingly, Defendants have not shown any non-hearsay evidence indicating that the mold in the Common Elements comes from anywhere but the roof leakage.

*6 However, Plaintiff has the burden of showing that the Defendants are obligated to clean up the mold that mold expert Roy I. Mosicant lab-tested found in the Common Areas. The New Jersey Condominium

Act N.J.S.A. 46:8B-14(a) states in relevant part:

> The association, acting through its officers or governing board, shall be responsible for the performance of the following duties, the costs of which shall be common expenses: (a) The maintenance, repair, replacement, cleaning and sanitation of the common elements.

Defendants do not dispute that mold exists in the Common Elements of the Condominium. They merely argue that the mold may have been caused by other means without providing any non-hearsay evidence supporting their claims. Under N.J.S.A. 46:8B-14(a), the Defendants must clean and sanitize the Common Elements. Defendants claim that that Roy I. Mosicant's report is insufficient to prove that the mold is harmful to the tenants. Mosicant's certification clearly demonstrates that he found mold in the Condominiums and the certification is accompanied by pictures of the discovered mold. (*See* Mosicant Cert. paragraph 5 and Exhibit C). In addition, Mosicant's certification cites the American Conference of Governmental Industrial Hygienists. Paragraph fifteen of Mosicant's report says the following:

> Both the Environmental Protection Agency and the Occupation Safety and Health Administration state that exposure to molds can cause health effects such as allergic reactions and exacerbation of asthma symptoms. Molds can produce allergens, toxins and/or irritants. The types of severity of health effects associated with exposure to mold, depend, in part, on the type of mold present, and the extent of the occupants' exposure and existing sensitivities or allergies.

Therefore, Mr. Mosicant's certification warns of the potential health risks mold could cause to the tenants of the Condominium. Under the Condominium Act, Defendants must protect the health, safety and general welfare of the residents of the community. N.J.S.A. 46:8B-14(j) states in relevant part:

> An association shall exercise its powers and discharge its functions in a manner that protects and furthers or is not inconsistent with the health, safety and general welfare of the residents of the community.

The health risks cited in Mosicant's certification are serious enough to necessitate the removal of the mold in the Common Elements. However, even without an expert it can be judicially noted that no one should be forced to live with mold which has the potential to be toxic and at a minimum is aesthetically displeasing. Therefore, it is fair to say that living with mold is not in the best interests of the general welfare of the residents. Therefore, to allow the mold to stay in the Common Elements would be inconsistent with the health, safety and general welfare of the residents of the community in violation of N.J.S.A. 46:8B-14(a) and N.J.S.A. 46:8B-14(j).

*7 Defendants contend that this court cannot grant Summary Judgment because Plaintiff's have not proven that the roof leakage was the direct and proximate causation of the mold. However, under N.J.S.A . 46:8B-14(a) the Association is required to maintain and sanitize the Common Elements regardless if the leakage caused the mold formations and Summary Judgment must be granted.

Cross-Motion to Bar Testimony of Roy I. Mosicant as to Summary Judgment to Remediate the Common Elements

In a separate motion, Defendants contend that Mosicant's testimony and report should be barred because Defendants first received notice of Plaintiff's expert approximately one month prior to the scheduled trial. Of course, any testimony Mosicant would offer in this matter would be heard by the Law Division in any bifurcated claims. Therefore, the Law Division should ultimately decide whether to bar Mosicant's testimony. However, this court must decide whether to consider Mosicant's certification in this motion for summary judgment as to the Common Elements.

Defendant cites *R.* 4: 24-1(c) as authority to bar Mosicant's testimony arguing that Plaintiff's waited too long to notify Defendants of Mosicant's inspections and testimony. *R.* 4: 24-1(c) states in relevant part that "(a)bsent exceptional circumstances, no extension of the discovery period may be permitted after an arbitration or trial date is fixed."Here, the trial date is fixed for September 26, 2005. However, *R.* 4:24-1(c) was amended to restrict discovery under the Best Practices Initiative. *See* Rivers v. LSC P'ship, 378 N.J.Super. 68, 874 A.2d 597 (App.Div.2005). The court opined the following:

The Best Practices initiative arose in great part to address the evident delay in trying cases caused by litigants' failures to complete discovery in a timely fashion. *Id.* at 130, 874 A.2d 597. A new rule, Rule 4:5A, required most civil actions filed in the Superior Court to be assigned to one of four tracks and *Rule* 4:24-1 was amended to provide discovery periods for each track, which were expanded substantially. *Vitti v. Brown*, 359 *N.J.Super.* 40, 44, 818 A.2d 384 (Law Div.2003). After the adoption of Best Practices, "applications to extend the time for discovery should be the exception and not the rule." *Id.* at 45, 818 A.2d 384. In this context, *Rule* 4:24-1(c) was amended, providing that "absent exceptional circumstances, no extension of the discovery period may be permitted after an arbitration or trial date is fixed."(emphasis added)

The Law Division handles discovery matters using discovery tracks adopted by the Best Practices Initiative under *R.* 4: 24-1. However, the Best Practices Initiative's restrictions are not binding on this General Equity court, which handles discovery matters in case management conferences pursuant to *R.* 4:5B-2, which states in relevant part:

In all actions in general equity, except summary actions pursuant to R. 4:67 and foreclosure actions, an initial case management conference shall be held within 30 days following the filing of the answers of all defendants initially joined, and the court may hold such additional case management conferences as it deems appropriate.

*8 This court's April 8, 2005 Order for Summary Trial Setting Dates for Mandatory Submissions set a deadline for submitting copies of expert reports "no later than 14 days prior to (the September 26, 2005) trial date."Therefore, this court's deadline for submitting expert reports in this matter was September 12, 2005. Here, Defendants admit that they received notice that Plaintiff retained Mosicant in August well before the September 12, 2005 deadline.

In its pre-trial submissions, Plaintiff shows good cause as to why Mosicant's testimony should be allowed. According to Plaintiff, this court appointed Environ as mold experts in this matter; however, Environ's work was put on hold in February 2005 due in part to alleged ethical concerns involving Defendant Andrew Beck, which were not resolved until June 10, 2005. Accordingly, Plaintiff did not realize it had a need to retain its own expert until it took the depositions of Andrew Beck and Steven Caparulo on July 13, 2005. Plaintiff's expert Roy I. Mosicant certified that he inspected the Condominium on August 22, 2005. This is less than a month after Plaintiff deposed Mr. Beck and Mr. Caparulo and discovered the need to hire its own expert instead of relying solely on the court-appointed expert, Environ. Clearly, this is sufficient good cause to admit Mosicant's testimony under these circumstances. Furthermore, Defendants are not prejudiced by the Plaintiff's retention of Mosicant as an expert as this court had already addressed the need for mold experts in this matter in the September 24, 2004 opinion. In addition, Defendants had over a month before the trial date to depose Mosicant. Accordingly, this court will deny Defendants cross motion to bar the testimony of Mosicant in this motion.

However, even if this court completely barred Mr. Mosicant's testimony and report, common sense dictates that large concentrations of clearly visible mold spores in the Common Elements pose a potential health risk to tenants and no one should have to live in a residence infested by mold of an unknown nature. Under the Condominium Act, the Association must sanitize the Common Elements. Large mold deposits are inherently unsanitary. Therefore, the Association must remove the mold in the Common Elements, in order to comply with the health, safety and general welfare standards of *N.J.S.A.* 46:8B-14(a) and *N.J.S.A.* 46:8B-14(j). To remove the mold, Defendants shall proceed with Environ or other another professionally qualified specialist to inspect and evaluate the Buildings to ascertain to presence of mold in the Common Elements and then invite bids from contractors for the remediation of the mold. Defendants shall submit to Plaintiff the names of three (3) qualified specialists within seven (7) days upon receipt of this Order. Then Plaintiff will have the right to object to this specialist. If Plaintiff does not object then Defendant shall choose the expert to inspect and remediate the Common Elements from that list. In addition, the Association must correct any structural instability present in the Common Elements from the water leakage and invite bids for structural remediation. Given the length of time this action has already been delayed the Defendants must complete the inspections and evaluations within thirty (30) days and proceed with remediation immediately thereafter. Failure to do so may result in fines.

Summary Judgment as to remediation costs

*9 Plaintiffs contend that Defendants should pay the costs of remediation. N.J.S.A. 46:8B-14(a) states in relevant part:

> The association, acting through its officers or governing board, shall be responsible for the performance of the following duties, the costs of which shall be common expenses: (a) The maintenance, repair, replacement, cleaning and sanitation of the common elements. (emphasis added)

This court agrees with Defendant Mr. Beck that under N.J.S.A. 46:8B-14(a) the costs of remediation in the Common Elements must be borne by Defendant, Cortland Neighborhood Condominium Association, as common expenses. Therefore, this court must grant Plaintiff's Summary Judgment as to allocating the costs of remediation; however, only Defendant Cortland Neighborhood Condominium Association will bear these costs.

Plaintiff also argues that Defendants should be ordered to bear the costs of relocating Cortland Associates' tenants during the inspections and remediation work. Plaintiff's brief does not give sufficient detail as to why the tenants must be evacuated while remediation work is done exclusively on the Common Elements and not inside individual rental units. Therefore, it is unclear from the briefs submitted if the tenants will need to be evacuated from the Condominium during the remediation work of the Common Elements and it cannot be ordered at this juncture. However, as discussed at oral argument, the court will consider the instruction of the specialist as to whether it is necessary for the tenants to be housed in hotels during the process.

Summary Judgment as to the Interior of the Rental Units

As discussed earlier in this opinion, this court cannot grant Summary Judgment as to the Interior of the Rental Units at this juncture because Plaintiffs have not submitted sufficient proof of causation to the underlying negligence claim or another theory. Accordingly, this court cannot issue a permanent injunction compelling Defendants to remediate the Interiors of the Rental Units. In order to grant a preliminary injunction, Plaintiff would have to satisfy the test set forth in *Crowe v. DeGioia*, 90 N.J. 126, 447 A.2d 173 (1982).

The first principle and, the sine qua non for the granting of temporary restraints, is that a preliminary injunction should not issue except when necessary to prevent irreparable harm. *Id.,citing Citizens Coach Co. v. Camden Horse R.R. Co.*, 29 N.J.Eq. 299, 303 (E. & A. 1878). Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. *Crowe v. De Gioia*, 90 N.J. at 132-133, 447 A.2d 173,*citing Hodge v. Giese*, 43 N.J.Eq. 342, 350, 11 A. 484 (Ch. 1887).

Here, there is insufficient proof that the tenants or owners will be irreparably harmed if Defendants fail to remediate the Interiors of the Rental Units because nothing prevents the tenants or owners from cleaning up mold located within their own property inside the Interior of the Rental Units. Furthermore, if Plaintiff succeeds in its negligence claim then the tenants or owners will compensated for clean up costs with interest. Accordingly, the tenants or owners will not be irreparably harmed as they will still have a claim for money damages against Defendants for any remediation done inside the Interiors of the Rental Units. Therefore, the first part of the *Crowe v. DeGioia* test favors Defendants.

*10 Furthermore, a preliminary injunction should not issue where all material facts are controverted. *Crowe v. De Gioia*, 90 N.J. at 133, 447 A.2d 173,*citing Citizens Coach Co. v. Camden Horse R.R. Co.*, supra, 29 N.J.Eq. at 305-06. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. *Crowe v. De Gioia*, 90 N.J. at 133, 447 A.2d 173,*citing Ideal Laundry Co. v. Gugliemone*, 107 N.J.Eq. 108, 115-16, 151 A. 617 (E. & A.1930). Here, this court cannot determine Plaintiff's likelihood to succeed on the merits in its negligence claim as they have failed to adequately prove causation. Therefore, this part of the *Crowe v. DeGioia* test also favors Defendants.

The final test in considering the granting of a pre-

liminary injunction is the relative hardship to the parties in granting or denying relief. *Id.citing Isolantite Inc. v. United Elect. Radio & Mach. Workers,* 130 N.J.Eq. 506, 515, 22 A.2d 796 (Ch.1941). Here, whichever party that removes the mold in the Interiors of the Rental Units will suffer a hardship. While it may be easier for Defendants' to bear the cost of the mold's removal, the tenants or owners will be reimbursed for any removal costs with interest if Plaintiff succeeds on its negligence claim. Therefore, this part of the *Crowe v. DeGioia* test slightly favors Defendants. The court notes that this matter has been pending for a significant matter of time. Failure to prove the elements necessary to grant an injunction may not be the result of any delay on Defendants part nonetheless it must fail.

Accordingly, under *Crowe v. DeGioia,* it would be inappropriate for this court to grant a preliminary or permanent injunction compelling Defendants to remediate the mold in the Interior of the Rental Units because Plaintiff has not yet proven its underlying negligence claim or that it would suffer irreparable harm if denied a preliminary injunction.

Bifurcation of remaining legal claims to Law Division

Plaintiff argues that the remaining legal claims in this matter should be transferred to the Law Division. This court agrees. New Jersey law recognizes that "the decision to retain or to transfer a claim properly cognizable in the Law Division still rests in the sound discretion of the Chancery judge." *May Stores Shopping Centers, Inc. v. Hartz Mountain-Free Zone Center,* 162 *N.J.Super.* 130, 135, 392 A.2d 251 (*Ch. Div.* 1978). Furthermore, "the Chancery Division must not become clogged down or burdened with the weight of actions properly cognizable in the Law Division."*Id.* The request for an injunction for remediation of the interior of the individual Rental Units can be decided by the Law Division after discovery proceeds in the negligence action. If the units' owners proceed to repair the units which are subsequently found to have been damaged by roof leaks they will be compensated for the costs with interest.

*11 Therefore, Plaintiff's remaining claims for negligence, breach of contract, breach of fiduciary duty and damages for remediation of the Interiors of the Rental Units will be for monetary damages. *R.* 4: 3-1 outlines the jurisdiction of the General Equity court as "actions in which plaintiff's primary right or the principal relief sought is equitable in nature."After this Summary Judgment motion is granted, Plaintiff's remaining claims will be primarily for money damages and are therefore rooted in law, not equity. Accordingly, this court grants Plaintiff's motion for Summary Judgment for bifurcation and all remaining claims will be transferred to the Law Division for further adjudication, while this court will retain jurisdiction over the equitable relief granted in this Order.

V. *Decision*

Accordingly, Plaintiff's motion for Partial Summary Judgment for remediation of the Common Elements including roof damage is hereby Granted. Plaintiff's motion for Partial Summary Judgment as remediation of the Interiors of the Individual Units is hereby Denied without prejudice and transferred to the Law Division for further adjudication. Defendants' cross motion to bar the testimony of Roy I. Mosicant is hereby Denied without prejudice for purposes of this Summary Judgment motion, but Defendants may refile their motion to bar Mosicant's testimony with the Law Division. The costs of remediation of the Common Elements will be paid by Defendant Cortland Neighborhood Condominium Association. To remove the mold, Defendants shall submit to Plaintiff the names of three (3) qualified specialists within seven (7) days upon receipt of this Order. Then Plaintiff may veto a specialist for good cause (3) days upon receipt of the names from Defendant. Defendant may choose which specialist from the ones Plaintiff agreed upon shall be offered a contract to inspect and remediate the Common Elements. Defendants shall proceed with Environ or another professionally-qualified specialist agreed to by Plaintiff to inspect and evaluate the Buildings to ascertain to presence of mold in the Common Elements within thirty (30) days of this Order and then immediately invite bids from contractors for the remediation of the mold. In addition, the Association must correct any structural instability present in the Common Elements from the water leakage and invite bids for structural remediation within thirty (30) days. Defendants may use any qualified structural engineer they choose for this task. Failure to comply with these timelines may result in monetary penalties. All remaining claims for negligence, breach of contract, breach of fiduciary duty and damages for remediation

of the Interiors of the Rental Units will be transferred to the Law Division for further adjudication. This court will retain jurisdiction over the equitable relief granted in this Order as well as any claims for damages if the tenants or owners must be relocated during the remediation of the Common Elements. Plaintiff is not barred from seeking contribution from additional parties. Defendants are not barred from seeking contribution from additional parties or from the Plaintiff in this matter or in the actions transferred to the Law Division.

N.J.Super.Ch.,2005.
Cortland Associates, LP v. Cortland Neighborhood Condominium Ass'n
Not Reported in A.2d, 2005 WL 2334364 (N.J.Super.Ch.)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
FREEMOTION FITNESS FINANCING SERVICES, Plaintiff-Respondent,
v.
TOTAL HEALTH & FITNESS, L.L.C. a/k/a Hopewell Valley's Health & Fitness Center a/k/a Back to Wellness, L.L.C., Defendant-Appellant.
Submitted July 28, 2008.
Decided Aug. 25, 2008.

West KeySummary
Judgment 228 ⇐185.1(4)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of
228k185.1(4) k. Matters of Fact or Conclusions. Most Cited Cases
Fitness center's bare conclusions that its employee was not authorized to purchase any fitness equipment nor enter into any financing agreement without the consent of the fitness center were insufficient to defeat the financial company's motion for summary judgment in an action brought by the financial company against the fitness center alleging that the fitness center owed the sum of $70,055 for the sale and delivery of fitness equipment. Although the fitness center certified that the employee who had entered into the contract for fitness equipment on behalf of the company did not have authority to enter into such a contract, it was undisputed that the employee was the fitness center's former employee and manager who listed himself on the fitness center's financing application as a vice president and 25 percent owner of the fitness center. Moreover, the fitness equipment was delivered, received, and accepted by the fitness center and the fitness center made payments to the financial company after it received the equipment.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2128-06.
Emery Z. Toth, attorney for appellant.

Schachter Portnoy, L.L.C., attorneys for respondent (Susan G. Steinman, of counsel and on the brief).

Before Judges GRAVES and YANNOTTI.

PER CURIAM.

*1 Defendant Total Health & Fitness, L.L.C. a/k/a Hopewell Valley's Health & Fitness Center a/k/a Back to Wellness, L.L.C. (Total Health) appeals from an order dated July 24, 2007, which denied its motion for reconsideration of a summary judgment order entered in favor of plaintiff Freemotion Fitness Financing Services (Freemotion) on June 8, 2007. We affirm.

On August 16, 2006, plaintiff filed a complaint alleging defendant owed "the sum of $70,055.00 on a certain book account."Plaintiff further alleged it "sold and delivered goods" (namely, fitness equipment) to defendant based upon its promise "to pay the agreed amount." In its answer filed November 27, 2006, defendant denied it owed any money to plaintiff, and it asserted a counterclaim for damages "[a]s a result of the breach or purported breach of contract by the plaintiff."In its answer to defendant's counterclaim, plaintiff denied it breached the contract and it alleged defendant's counterclaim was frivolous.

In a motion for summary judgment filed on February 12, 2007, plaintiff alleged (1) "[d]efendant executed a Financing Application to obtain ... equipment from [p]laintiff"; (2) "[d]efendant accepted

and signed for the delivered goods and merchandise," as evidenced by bills of lading documenting delivery of the equipment and acceptance by defendant on December 17, 2003; and (3) "[d]efendant [was] not entitled to any additional credits or set-offs and there now remains due and owing the sum of $70,055.00."

On March 16, 2007, summary judgment was entered in favor of plaintiff in the amount of $70,055. However, in a letter to the court dated March 19, 2007, defendant's attorney explained that plaintiff's motion was unopposed because of "some personal and staff problems" that he was experiencing, and he submitted a consent order that vacated the summary judgment order. After the consent order was signed by the court, plaintiff resubmitted its motion for summary judgment, and defendant responded by filing a brief as well as a certification by Carol Gronczewski, "a principal for the defendant." Gronczewski certified that "[a]t this juncture there has been no meaningful discovery."Moreover, according to Gronczewski, defendant's employee David Giordano "had absolutely no authority to bind the defendant company and enter into a contract for the goods and/or merchandise of the plaintiff."

On June 8, 2007, the trial court issued an oral decision granting plaintiff's motion for summary judgment. Its decision included the following:

> This matter arises from the plaintiff's claim that the plaintiff is owed $70,055 from the defendant for goods sold and delivered and of services rendered by the plaintiff to the defendant.... Discovery end date in this matter has already passed. It [ended] April of 2007.
>
> ....
>
> Plaintiff now requests that the [c]ourt grant the motion for summary judgment and dismiss the counterclaim. In opposition, defendant's counsel states that no interrogatories have been propounded on either party. There's been no demand for the production of documents and no oral depositions have occurred.
>
> *2 ....
>
> With regard to the defendant's argument that discovery has not taken place, that is really on the defendant. The [c]ourt has already stated that the discovery period has already ended in this matter. The parties did not avail themselves of discovery during the discovery period. That is the fault of the parties. It is not justification for denial of the motion for summary judgment.
>
> Here, it's quite clear ... there is a contract for the goods that were delivered by the plaintiff to the defendant, and that the defendant did not pay for the goods. The only allegation of the certification is that Giordano was not authorized to enter into the contract, but there [are] no other facts in support of that position.
>
> With regard to the defective nature of the equipment, there is no specification about how the equipment was defective. Certainly bare conclusions without factual support cannot defeat summary judgment. Instead, evidence submitted must be admissible, competent, non-hearsay evidence[.] *Brae Asset Fund, LP v. Newman*, 327 *N.J.Super.* 129, 742 A.2d 986 (App.Div.1999).

On June 27, 2007, defendant filed a motion for reconsideration. In a supporting certification, Robert Peterson, who described himself as "the defendant in the within matter," acknowledged that although Giordano was "an employee" and "our former manager," "[h]e never had any percentage of the business nor was he ever a vice president. At best, he was a manager personal trainer, who was not authorized to purchase any equipment nor enter into any financing agreement without the consent of [Total Health]." Peterson also alleged "Giordano may have received a 'kickback,' compensation or other personal benefit from the plaintiff as an inducement to enter into, on our behalf, a contract for equipment that was not needed," and he stated: "we

believe that we were overcharged and paid too much for the equipment."Finally, Peterson contended that "[a]s far as the defective nature of the equipment it has come to my attention that the monitors on the gym equipment and other electronics attached thereto 'blew out' or have otherwise failed."On the other hand, Peterson admitted "we have been making payments on this contract," but he claimed "the value of the equipment, because of the inflated price, [was] no where near $70,000.00 but probably closer to $30,000.00."

In an oral decision on July 24, 2007, the trial court denied defendant's motion for reconsideration:

> [*Rule* 4:49-2] lists three elements in order for a motion for reconsideration to be successful, (1) it must be made within 20 days of entry of the order of judgment, (2) the motion must state the basis for reconsideration, and (3) the motion must specify which cases or facts the [c]ourt erred in regards to or [overlooked]....
>
> ....
>
> The defendant argues that the [c]ourt erred in [its] belief that the defendant was making [its] conclusions regarding the defective nature of the equipment. The defendant argues that it need not prove the defective nature of the equipment through pleadings alone. Defendant states it has recently learned that the equipment has been malfunctioning and there are no replacement parts available.
>
> *3 Defendant further argues that the motion should be granted since Giordano ... misrepresented his status and ownership percentage in the company....
>
> ....
>
> The plaintiff argues that the defendant has stated that Giordano lacks the authority to enter into the contract, but does not explain why he lacks that authority. Plaintiff states that the possibility of an illegal kickback is insignificant in light of plaintiff's evidence of delivery, receipt and acceptance and defendant's failure to include evidence that a material issue of fact exists.
>
> ....
>
> The [c]ourt finds that defendant has failed to provide any legal basis to overturn the [c]ourt's June 8th decision. Defendant makes the same arguments ... that were made in opposition to the motion for summary judgment and is claiming that formerly available evidence was unavailable at the time of the earlier motion and should now be considered.
>
> Under all the circumstances the [c]ourt agrees with the plaintiff, and the [c]ourt denies the motion for reconsideration.

Defendant raises the following issue on appeal:

POINT I

WHERE DISCOVERY IS NOT COMPLETE AND NO FACTS HAVE YET BEEN ADDUCED REGARDING THE VALIDITY OF THE CONTRACT, THE CASE IS NOT RIPE FOR SUMMARY JUDGMENT.

Having reviewed the record in light of the applicable law and the parties' arguments on appeal, we affirm substantially for the reasons set forth in Judge Innes's oral decisions on June 8 and July 24, 2007. We add only the following comments.

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."*R.* 4:46-2(c). In determining whether summary judgment is precluded by the existence of a "genuine issue" of material fact, a motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to per-

mit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540, 666 A.2d 146 (1995)." 'The papers supporting the [summary judgment] motion are closely scrutinized and the opposing papers indulgently treated.' " *Lopez v. Swyer*, 115 *N.J.Super.* 237, 241, 279 A.2d 116 (App.Div.1971) (quoting *Judson v. Peoples Bank & Trust Co.*, 17 *N.J.* 67, 75, 110 A.2d 24 (1954)), *aff'd*, 62 *N.J.* 267, 300 A.2d 563 (1973). A meritorious motion for summary judgment will not, however, be defeated by "bare conclusions" unsupported by a factual basis. *U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n*, 67 *N.J.Super.* 384, 399-400, 170 A.2d 505 (App.Div.1961).

In the present matter, we agree defendant's "bare conclusions" were insufficient to defeat plaintiff's motion for summary judgment. Although both Gronczewski and Peterson certified Giordano did not have authority to enter into a contract on behalf of defendant, it is undisputed that (1) Giordano was defendant's former employee and manager who listed himself on plaintiff's Financing Application as a vice president and twenty-five percent owner of the company, (2) the fitness equipment was delivered, received and accepted by defendant on December 17, 2003, and (3) defendant made payments to plaintiff after it received the equipment. Moreover, defendant's claim that Giordano "may" have received "kickbacks" for entering into a contract on defendant's behalf, and that the equipment delivered by plaintiff was "defective," are based on hearsay and speculation unfounded on facts in the record.

*4 Finally, defendant argues that "[a]lthough summary judgment may be granted at any time after the expiration of 20 days from service of the moving party's pleadings" the "better practice" is to wait until the party's have been afforded "ample opportunity" for discovery. In the present appeal, discovery ended on April 26, 2007, and plaintiff's motion for summary judgment was granted on June 8, 2007. Defendant admits it pursued "no discovery whatsoever" in the intervening eight months between being served with plaintiff's complaint on August 31, 2006, and the expiration of the discovery period on April 26, 2007. Moreover, defendant has not demonstrated it filed "a certification of good cause with its first pleading" challenging the track assignment for discovery purposes, *see* 4:5A-2(b), or that it made a motion seeking extension of the discovery period, *see* 4:24-1(c). Thus, this is not a case where summary judgment was improvidently granted prior to the completion of discovery. *Cf. Laidlow v. Hariton Mach. Co., Inc.*, 170 *N.J.* 602, 619, 790 A.2d 884 (2002); *Wilson v. Amerada Hess Corp.*, 168 *N.J.* 236, 253, 773 A.2d 1121 (2001); *Davila v. Continental Can Co.*, 205 *N.J.Super.* 205, 207-08, 500 A.2d 721 (App.Div.1985). Furthermore, because the trial court did not err in granting plaintiff's motion for summary judgment, it did not err in denying defendant's motion for reconsideration.

Affirmed.

N.J.Super.A.D.,2008.
Freemotion Fitness Financing Services v. Total Health & Fitness, L.L.C.
Not Reported in A.2d, 2008 WL 3890444 (N.J.Super.A.D.)

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C(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Westchester County, New York.
Michael JALIMAN, Plaintiff,
v.
Janine SELENDY, Peter Adler, Cathy Adler, and Michael Morey, Defendants.
No. 12820/04.

March 17, 2005.

Mr. Michael Jaliman, Brewster, plaintiff pro se.

Beth Bird Pocker, Esq., Pound Ridge, attorney for defendants Janine Selendy, Cathy Adler and Michael Morey.

Morian Niblack, Esq., Benjamin Ostrer & Associates, P.C., Chester, attorneys for defendant Peter Adler.

MARK C. DILLON, J.

*1 This action arises out of alleged defamatory statements against the plaintiff, Michael Jaliman ("Jaliman"), uttered by defendant Peter Adler ("Adler") at a meeting of the Beekman Democratic Committee on July 13, 2004. Jaliman was a candidate for the United States House of Representatives, 19th Congressional District, which comprises Westchester, Rockland, Putnam, Dutchess and Orange Counties or portions thereof. Adler was President of the Dutchess County Democratic Club and a member of the Dutchess County Democratic Party's Executive Committee. Defendant Janine Selendy ("Selendy") was also a candidate for the same House seat, and Jaliman and Selendy faced each other in a Democratic primary election held September 14, 2004. Defendants Michael Morey ("Morey") and Cathy Adler were the manager and deputy manager, respectively, of the Selendy campaign. Peter and Cathy Adler are husband and wife.

FACTS

In the Spring of 2004, Adler, in his capacity as a member of his party's County Executive Committee, interviewed the plaintiff in connection with his interest in running for Congress. The conversation addressed a variety of issues. According to Adler, Jaliman stated during the meeting that he had espoused communist or socialist principles during his youth. Jaliman denies any affiliation with the Communist Party or with espionage activities. *See, Plaintiff's Affidavit in Opposition,* para 85. Adler formed an opinion as a result of this meeting that Jaliman lacked core convictions, would agree with a speaker on anything said, and did not fully appreciate the boundaries between federal and local issues. Adler encouraged Jaliman to consider running, instead, for the State Assembly and suggested that he [Jaliman] should gain more familiarity with local democratic politics.

Adler claims that on July 11, 2004, he found on his doorstep an envelope left by an anonymous source containing handwritten notes, photographs and information that purportedly involved Jaliman. A portion of the information suggested a possible connection between Jaliman, Rafidian Partners, L.P. and one of its partners, Mr. Chalabi. There were similarities between the information and the well-known figure, Ahmad Chalabi of the Rafidian Bank, who has been charged with the embezzlement of three million ($3,000,000) dollars of bank funds and who, more recently, has been accused of forwarding intelligence secrets to Iranian authorities.

On July 13, 2004, the Beekman Democratic Committee conducted, *inter alia,* a closed session of its membership. It included discussion of the party's candidates for the 19th District House seat occupied then, and now, by Republican Representative Sue Kelly. During that meeting, Adler summarized his views of the plaintiff and his preference for the Congressional candidacy of Selendy. In particular, Adler stated that Jaliman lacked knowledge of certain issues; molded viewpoints to suit the audience; had espoused communist or socialist principles in his youth; and according to documents anonymously-received, was possibly connected with Rafidian Partners, L.P. and someone named Chalabi. Adler conveyed conflicted information as to whether Jaliman was Buddhist, Muslim or Jewish. Adler maintains that all of his comments were qualified as his impressions or were derived from documents, the accuracy

of which were not confirmed.

*2 Jaliman learned of Adler's comments through a third person present at the meeting of the Beekman Democratic Committee. The plaintiff's amended complaint alleges that the disputed utterances were never subject to qualifiers.

On August 8, 2004, the plaintiff issued the first of various press releases addressing what had transpired the previous month at the Beekman Democratic Committee meeting. The plaintiff's own press releases brought issues regarding his religion, background, affiliations, citizenship and political leanings to the broader public's attention. These press stories, which consisted of a challenge to ballot petitions in Supreme Court, Putnam County under Index No. 1140/04 (Rooney, A.J.S.C.), a federal law suit over redistricted boundaries (*Jaliman v. Pataki,* Docket No. 04 Civ. 7977 (S.D.NY 2004) (Robinson, J.)), the plaintiff's failure to timely file financial disclosures required by the Federal Election Commission ("FEC"), and the commencement of the instant litigation, all rendered the plaintiff's congressional campaign unusually controversial.

This action was commenced by the filing of a summons with notice and complaint on August 20, 2004 and an amended complaint dated September 15, 2004. By his complaint and amended complaint, the plaintiff alleges that he was defamed by Adler stating that he [Jaliman] was a communist, an affiliate of the notorious Ahmad Chalabi, an Iranian, and that he presented himself to different audiences as Orthodox Jew, Buddhist and Muslim. It is further alleged that the statements were uttered "at the direction, and/or behest, of the Janine Selendy campaign," presumably defendants Selendy, Cathy Adler and Morey.

The defendants deny liability in their answers and amended answers, and interposed counterclaims against the plaintiff for libel and malicious prosecution.

By Order To Show Cause filed August 20, 2004, the plaintiff sought an injunction against the defendants from reiterating the alleged defamatory statements. A Temporary Restraining Order ("TRO") was denied by the assigned Justice (Smith, J.), who thereafter conducted a six (6)-hour evidentiary hearing on September 8, 2004 on the requested preliminary injunction. Justice Smith found, at the conclusion of the hearing, that the plaintiff had failed to make the necessary showing of irreparable harm, likelihood of success on the merits, and a tipping of equities in his favor, and consequently, a preliminary injunction was denied. Sanctions were requested by the defendants, which Justice Smith denied without prejudice pending the outcome of the action.

Jaliman defeated Selendy in the Democratic Party primary conducted September 14, 2004 by an approximate margin of sixty (60%) percent to forty (40%) percent. Jaliman was thereafter defeated by incumbent Congresswoman Sue Kelly in the general election conducted November 2, 2004, by a wide margin.

By notice motion, defendant Adler seeks an Order pursuant to CPLR Rule 3212 granting Summary Judgment and awarding sanctions and/or counsel fees. Defendants Cathy Adler and Morey support the application. Defendant Selendy seeks the same relief but also cross-moves for Summary Judgment on her counterclaim. The plaintiff opposes all of the applications. The bases for Summary Judgment involve the plaintiff's alleged failure to exhaust administrative remedies under 9 N.Y.C.R.R. § 6201.3, qualified privilege, the absence of evidence of actual malice, and the lack of special damages. By cross-motion untimely filed (CPLR § 2214), the plaintiff seeks an Order awarding Summary Judgment dismissing the defendants' counterclaims and awarding legal fees, which shall be addressed on the merits given the plaintiff's *pro se* status.

CONCLUSIONS OF LAW

*3 Summary Judgment is designed to expedite all civil cases by eliminating claims which can properly be resolved as a matter of law. *Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 (1974). It is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues. *Kolivas v. Kirchoff,* 14 A.D.3d 493, 787 N.Y.S.2d 392, 2005 N.Y. Slip. Op. 00132, 2004 WL 3087868 (2nd Dept.2005). The parties seeking Summary Judgment have the burden of tendering evidentiary proof in a form admissible at trial to show that they are entitled to Summary Judgment as a matter of law. *Friends of Animals v. Association of Fur Manufacturers,* 46 N.Y.2d 1065, 416 N.Y.S.2d 790,

390 N.E.2d 298 (1979); *Khagahn v. Rye Town Park Commission*, 8 A.D.3d 447, 778 N.Y.S.2d 313 (2nd Dept.2004). Upon establishing a *prima facie* entitlement to Summary Judgment, the burden then shifts to the opposing party to demonstrate by evidentiary facts that genuine issues of fact exist to preclude Summary Judgment. *Alvarez v. Prospect Hospital, et. al.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980); *Indig v. Finkelstein*, 23 N.Y.2d 728, 296 N.Y.S.2d 370, 244 N.E.2d 61 (1968); *Burns v. City of Poughkeepsie*, 293 A.D.2d 435, 739 N.Y.S.2d 458 (2nd Dept.2002). In assessing the record "all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party." *Demarco v. Bansal*, 826 F.Supp. 785 (S.D.N.Y., 1993) (applying New York law), *quoting Brady v. Town of Colchester*, 863 F.2d 205, 210 (2nd Cir.1988).

Notwithstanding the general proposition that the ultimate resolution of actions is best left to the trier of fact, mere conclusory and unsubstantiated assertions not supported by competent evidence are insufficient to defeat a motion for Summary Judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980); *Bullard v. Bender*, 251 A.D.2d 526, 673 N.Y.S.2d 921 (2nd Dept.1998). Thus, a party opposing a Summary Judgment motion must assemble and lay bare affirmative proof to demonstrate that genuine triable issues of fact exist. *Hoot Group, Inc. v. Caplan, 9 A.D.3d 448, 779 N.Y.S.2d 922 (2nd Dept.2004); Nel Taxi Corp. v. Eppinger, 203 A.D.2d 438, 610 N.Y.S.2d 323 (2nd Dept.1994)*. The issue must be shown to be real, not feigned, since sham or frivolous issues will not preclude Summary Judgment. *Sprung v. Jaffe*, 3 N.Y.2d 539, 169 N.Y.S.2d 456, 147 N.E.2d 6 (1957).

Exhaustion of Administrative Remedies

Defendants argue that Summary Judgment should be granted and the plaintiff's complaint dismissed as Jaliman failed to exhaust administrative remedies required of him under Election Law §§ 3-103 and 3-106 and 9 N.Y.C.R.R. § 6201.1, *et. seq.*

Election Law § 3-103 vests authority in the state's Board of Elections.Section 3-106(1) directs the Board of Elections to adopt a "fair campaign code" setting forth ethical standards of conduct for persons, political parties and committees engaged in elections. The fair campaign code is embodied at 9 N.Y.C.R.R. § 6201.1. The Board of Elections, at its own initiative or upon complaint, may investigate alleged violations of the code (Election Law § 3-106(3)), and upon finding that a violation occurred, impose civil penalties not exceeding one thousand ($1,000) dollars. Election Law § 3-106(4).

*4 Defendants maintain that the plaintiff failed to exhaust these available remedies in that no written complaint was filed with the Board of Elections, and that the Court therefore lacks subject matter jurisdiction to hear the action. Jaliman maintains that he spoke on August 17, 2004 with Stanley Zalen of the Board of Elections, who dissuaded him from pursuing further complaint with the Board.

The plaintiff's failure to file a written complaint with the Board of Elections in pursuit of administrative remedies under the fair campaign code is not fatal to his cause of action for defamation. *Seltzer v. Orlando*, 225 A.D.2d 456, 457, 656 N.Y.S.2d 1 (1st Dept.1996), *lv. to app. den.*, 88 N.Y.2d 813, 649 N.Y.S.2d 380, 672 N.E.2d 606 (1996), *app. den.*, 88 N.Y.2d 919, 646 N.Y.S.2d 986, 670 N.E.2d 227 (1996). While administrative remedies must first be exhausted in certain areas of electioneering, such as from the dissemination of fraudulent campaign literature (*Austin v. Delligatti*, 137 Misc.2d 530, 520 N.Y.S.2d 994 (Sup.Ct., Nassau Co.1987)), there is no legal authority that the right to sue for an independent tort, such as defamation, is subsumed by the Election Law. *Accord, Giannelli v. St. Vincent's Hospital and Medical Center of New York*, 160 A.D.2d 227, 230, 553 N.Y.S.2d 677 (1st Dept.1990) (common law right to damages for defamation not abridged by administrative remedies available to physicians by the Public Health Council under the Public Health Law).

Whether The Alleged Statements Are Slander Per Se

The defendants argue that Summary Judgment is warranted in their favor as the plaintiff won the Democratic Party primary held September 14, 2004, and that the plaintiff is therefore unable to prove the necessary element of special damages. The plaintiff

maintains that the alleged defamatory utterances constitute slander *per se* so that special damages need not be proven.

The plaintiff's complaint and amended complaint describe damage to his "good name, reputation and credit" in an "amount to be determined at trial."No pecuniary damages are set forth as would meet the specific pleading requirements for defamation claims under CPLR Rule 3016(a). Thus, if the alleged utterances are slanderous *per se,* the plaintiff's pleading is sufficient; if the alleged utterances are not slanderous *per se,* special damages must be specifically alleged and ultimately proven. *Ruder & Finn Incorporated v. Seaboard Surety Company,* 52 N.Y.2d 663, 669, 439 N.Y.S.2d 858, 422 N.E.2d 518 (1981); *Drug Research Corporation v. Curtis Publishing Company,* 7 N.Y.2d 435, 440, 199 N.Y.S.2d 33, 166 N.E.2d 319 (1960); *Chiavarelli v. Williams,* 256 A.D.2d 111, 113, 681 N.Y.S.2d 276 (1st Dept.1998).

Slander *per se,* for which special damages need not be pleaded or proven, is limited to four categories of statements; namely, 1) that the plaintiff committed a crime, 2) that the statement tends to injure the plaintiff's business, trade or profession, 3) loathsome disease, or 4) unchastity imputed to a woman. *Matherson v. Marchello,* 100 A.D.2d 233, 236, 473 N.Y.S.2d 998 (2nd Dept.1984). The plaintiff argues that the first two categories have been made relevant here. The Court disagrees.

*5 Assuming that all statements were uttered by Adler as alleged and without qualifiers, it is not a crime to be a member of the communist party. Courts have held that accusations of communist affiliations do not constitute slander *per se* as injurious to a business, trade or profession. *See, Nadrowski v. Wazeter,* 23 N.Y.2d 899, 900, 298 N.Y.S.2d 305, 246 N.E.2d 159 (1969); *Gurther v. Union Parts Manufacturing Co.,* 285 A.D. 643, 648, 140 N.Y.S.2d 254 (1st Dept.1955), *aff'd.,* 1 N.Y.2d 5, 150 N.Y.S.2d 4, 132 N.E.2d 889 (1956). The plaintiff's candidacy for Congress is not even a business, trade, or profession, but instead represents a mere time-limited avocation and *potential* career as a public servant. The plaintiff's actual business, trade and profession is in the field of organizational consulting for which any communist affiliation is not incompatible with the proper conduct of such a business. *Golub v. Enquirer/Star Group, Inc.,* 89 N.Y.2d 1074, 1076, 659 N.Y.S.2d 836, 681 N.E.2d 1282 (1997).

Nor is it slanderous *per se* to accuse an individual of being a business partner of Ahmed Chalabi or affiliated with a Rafidian Bank entity. Such a partnership would not be a crime and is not specific to or injurious of the plaintiff's business, trade or profession as an MBA-trained organizational consultant.

The plaintiff alleges in his pleadings that he was described by Adler as a "complete fraud, a Moslem representing himself as a Jew, and ... an Iranian national."*See,* plaintiff's complaint, para 3 and amended complaint, para. 5. Certainly, there is no crime in being Moslem, or Jewish, or of Iranian heritage. It does not harm one's business, trade or profession as an organizational consultant to allegedly belong to either religion or to be of Iranian background.

The essence of the alleged religious-based statements, stemming from confusion over the plaintiff's religious and ethnic background, is in the nature of Adler's *opinion* that Jaliman was a "fraud." Whether particular words are defamatory presents a legal question to be resolved by the Court in the first instance. *Golub v. Enquirer/Star Group, Inc., supra,* at 1076, 659 N.Y.S.2d 836, 681 N.E.2d 1282; *Weiner v. Doubleday & Company, Inc.,* 74 N.Y.2d 586, 592, 550 N.Y.S.2d 251, 549 N.E.2d 453 (1990). Expressions of opinion, even if false or inaccurate, are constitutionally protected and not subject to private action for defamation. *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 286, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986). Adler's comment that the plaintiff is a fraud by presenting himself differently to different groups is mere opinion expressed in normal parlance and is not actionable, even if the opinion is unfounded. *Id.*

The plaintiff has not alleged, and he does not argue in his submissions, that he incurred pecuniary damages in the form of his loss in the general election.

No other defamatory statements are specifically attributed to Adler in the complaint and amended complaint. Since none of the allegations against Adler rise to the level of slander *per se,* and since special damages are not plead, the plaintiff's pleadings as to Adler are deficient and must be dismissed. *Liberman v. Gelstein,* 80 N.Y.2d 429, 434-35, 590 N.Y.S.2d 857, 605 N.E.2d 344 (1992); *Aronson v. Wiersma,* 65 N.Y.2d 592, 594, 493 N.Y.S.2d 1006, 483 N.E.2d

1138 (1985). The Court is not inclined to permit the plaintiff leave to further amend his complaint (CPLR § 3025) as the arguments in his papers make clear that he has incurred no pecuniary damages, and in fact, handily won his party's nomination despite several well-publicized controversies. Any potential further amendment to the complaint would therefore lack sufficient merit. *Sunrise Plaza Associates, L.P. v. International Summit Equities Corp.*, 228 A.D.2d 300 (2nd Dept.2001); *Intagliata v. Peele Company*, 227 A.D.2d 450, 642 N.Y.S.2d 914 (2nd Dept.1996). To the extent the plaintiff could conceivably argue that the alleged defamatory statements caused his defeat in the general election, such an assertion would constitute nothing more than impermissible speculation, guess or surmise insufficient to defeat an otherwise meritorious motion and cross-motion for Summary Judgment. *Ramsay v. Mary Imogene Bassett Hospital*, 158 A.D.2d 754, 755-56, 551 N.Y.S.2d 342 (3rd Dept.1990), *app. den.*, 76 N.Y.2d 702, 558 N.Y.S.2d 891, 557 N.E.2d 1187 (1990); *SRW Associates v. Bellport Beach Property Owners*, 129 A.D.2d 328, 332, 517 N.Y.S.2d 741 (2nd Dept.1987).

*6 The re-publication of the alleged defamation in newspapers circulated among the general public causes no different result. Press attention to the plaintiff's political, ethnic and religious background was generated by the plaintiff's issuance of several press releases in August and September of 2004, by which the plaintiff self-publicized the very statements which he now claims damaged his reputation. The plaintiff's repeated self-publications of alleged defamatory material is most curious, perhaps even bizarre. Using self-generated press accounts as evidence of damaged reputation is even less tenable. New York does not recognize a cause of action for defamatory words that are voluntarily re-published by the plaintiff himself. *Wieder v. Chemical Bank*, 202 A.D.2d 168, 170, 608 N.Y.S.2d 195 (1st Dept.1999), *lv. to app. den.*, 83 N.Y.2d 759, 615 N.Y.S.2d 876, 639 N.E.2d 417 (1994); *Weintraub v. Phillips, Nizer, Benjamin, Krim & Ballon*, 172 A.D.2d 254, 255, 568 N.Y.S.2d 84 (1st Dept.1999).

Qualified Immunity Afforded to Political Committees

The utterances alleged by the plaintiff were made at a closed-door portion of a meeting of the Beekman Democratic Committee. As a general rule, communications made on any subject matter in which the party communicating has an interest or duty is qualifiedly privileged if made to a person having a corresponding interest or duty, even if containing incriminating matter that would otherwise be defamatory. *Liberman v. Gelstein, supra*, at 439, 590 N.Y.S.2d 857, 605 N.E.2d 344 (1992). Examples of common interest communications, as identified in *Liberman v. Gelstein*, include those between co-employees (*Loughry v. Lincoln First Bank*, 67 N.Y.2d 369, 376, 502 N.Y.S.2d 965, 494 N.E.2d 70 (1986)), members of faculty tenure committees (*Stukuls v. State of New York*, 42 N.Y.2d 272, 279-80, 397 N.Y.S.2d 740, 366 N.E.2d 829 (1977)), and member physicians of a health insurance plan (*Shapiro v. Health Insurance Plan of Greater New York*, 7 N.Y.2d 56, 60, 194 N.Y.S.2d 509, 163 N.E.2d 333 (1959)). A qualified privilege, where applicable, can be pierced by a plaintiff's showing of actual malice. *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 474, 605 N.Y.S.2d 218, 626 N.E.2d 34 (1993); *Stillman v. Ford*, 22 N.Y.2d 48, 53, 290 N.Y.S.2d 893, 238 N.E.2d 304 (1968).

The various political parties typically use committees to assess and select individuals as political candidates and potential public officeholders. The functions performed by all political committees are noble and necessary. Members of such committees must feel free to speak candidly with colleagues regarding the strengths, weaknesses and suitability of potential candidates for public office. The need for candor among persons involved in the candidate selection process has given rise to the "public official rule," which protects the public interest in having a free flow of information regarding public officials. *See, Garrison v. Louisiana*, 379 U.S. 64, 77, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Persons who wish to be candidates for public office fall within the scope of the "public official rule." *McGowen v. McDermott*, 47 A.D.2d 657, 658, 364 N.Y.S.2d 188 (2nd Dept.1975), *aff'd.*, 38 N.Y.2d 953, 384 N.Y.S.2d 151, 348 N.E.2d 608 (1976).

*7 The *McGowen v. McDermott* action is instructive. A candidate for school board had represented to a nominating committee that she had voluntarily left a teaching position, and the candidate received the committee's endorsement. Thereafter, the committee's chairman reported to his colleagues that he had learned that the candidate had been asked to leave the former teaching position, resulting in the committee's

withdrawal of its endorsement. The candidate commenced a defamation action against the committee's chairman, which was later dismissed in the absence of evidence of actual malice necessary to circumvent qualified privilege. The Appellate Division described the chairman's conduct and statements as a "proper regard for the conscientious discharge of duty." *McGowan v. McDermott, supra,* at 658.

There does not appear to be any reported case specifically addressing whether a political party's candidate-screening procedure is subject to qualified immunity. The *McGowen* case, involving school board endorsements, comes the closest. This Court holds that the statements uttered during the closed-door session of the Beekman Democratic Committee, and during sessions of similarly-constituted committees of political parties, enjoy a qualified privilege from liability for defamation, absent evidence of actual malice. A recognition of qualified immunity furthers the purpose behind the "public official rule." Thus, for Summary Judgment to be defeated, there must be evidence raising at least a question of fact that the utterances were a product of actual malice.

The Plaintiff's Status as a "Public Figure"

If the plaintiff was a "public figure" at the time of the alleged defamatory statements, then anything said of him is subject to qualified privilege unless motivated by actual malice. *Sweeney v. Prinsoners' Legal Services of New York, Inc.*, 84 N.Y.2d 786, 792, 622 N.Y.S.2d 896, 647 N.E.2d 101 (1995); *Toker v. Pollack*, 44 N.Y.2d 211, 219, 405 N.Y.S.2d 1, 376 N.E.2d 163 (1978); *Stillman v. Ford*, supra, at 53, 290 N.Y.S.2d 893, 238 N.E.2d 304 (1968).

Public figures are defined as persons who have assumed roles of special prominence in the affairs of society. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The essential element is whether the publicized person has taken affirmative steps to attract public attention. *James v. Gannett Co., Inc.*, 40 N.Y.2d 415, 422, 386 N.Y.S.2d 871, 353 N.E.2d 834 (1976). Under certain circumstances, the issue of whether a particular person is a "public figure," to trigger the need for proof of actual malice, is a question of fact. *See, Maule v. NYM Corporation*, 54 N.Y.2d 880, 882, 444 N.Y.S.2d 909, 429 N.E.2d 416 (1981). Where facts of a plaintiff's status are not in dispute, the court may determine whether a plaintiff is a public figure as a matter of law. *Rosenblatt v. Baer*, 783 U.S. 75 (1966); *O'Neil v. Peekskill Faculty Association*, 120 A.D.2d 36, 43, 507 N.Y.S.2d 173 (2nd Dept.1986), *app. dism'd.*, 69 N.Y.2d 984, 516 N.Y.S.2d 1027, 509 N.E.2d 362 (1987); *Dattner v. Pokoik*, 81 A.D.2d 572, 573, 437 N.Y.S.2d 425 (2nd Dept.1981), *app. dism'd.*, 54 N.Y.2d 750, 442 N.Y.S.2d 996, 426 N.E.2d 491 (1981). Here, documentary evidence that is not in dispute establishes that Jaliman's petitions to appear on the ballot for the 19th District congressional seat were circulated and signed by voters as early as July 7, 2004. The circulation of nominating petitions on July 7, 2004 is an affirmative step by the plaintiff that transformed him, by that time, into a public figure as a matter of law, continuing when the defamation allegedly occurred on July 13, 2004. Moreover, in early August 2004, the plaintiff thrust himself into the public spotlight when he issued his own press releases. *See, Blum v. State*, 255 A.D.2d 878, 680 N.Y.S.2d 355 (4th Dept.1998), *lv. app. den.*, 93 N.Y.2d 802, 687 N.Y.S.2d 626, 710 N.E.2d 273 (1999).

Actual Malice

*8 Since statements at the Beekman meeting are subject to qualified privilege, and since the plaintiff is deemed to be a public figure, as a matter of law, all roads lead to the issue of actual malice.

Malice is defined as actual knowledge by the speaker of the statement's falsity or reckless disregard for the truth. *New York Times Company v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Actual malice turns upon the speaker's state of mind, which is often not amenable to Summary Judgment (*Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 437-438, 438 N.Y.S.2d 496, 420 N.E.2d 377 (1981); *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 350, 477 N.Y.S.2d 82, 465 N.E.2d 802 (1984); *Arrigoni v. Valella*, 110 A.D.2d 601, 604, 488 N.Y.S.2d 184 (1st Dept.1985)) and which instead is a jury question. *Hamilton v. Eno*, 81 N.Y.2d 116, 129-30 (1880); *Petrus v. Smith*, 91 A.D.2d 1190, 1191, 459 N.Y.S.2d 173 (4th Dept.1983). However, actual malice cannot be demonstrated by speculation, surmise, conjecture and suspicion (*Shapiro v. Health Insurance Plan of Greater New York, supra,* at 60, 194 N.Y.S.2d 509, 163 N.E.2d 333; *Kasachkoff v. The City of New York*, 107 A.D.2d 130, 135, 485 N.Y.S.2d 992 (1st

Dept.1985), *app. dism'd,* 65 N.Y.2d 722, 492 N.Y.S.2d 28, 481 N.E.2d 568 (1985), *app. dism'd.,* 67 N.Y.2d 645, 499 N.Y.S.2d 683, 490 N.E.2d 549 (1986), *aff'd.,* 68 N.Y.2d 654, 505 N.Y.S.2d 67, 496 N.E.2d 226 (1986)) nor by mere conclusory or unsubstantiated allegations or assertions. *Dano v. Royal Globe Insurance Company,* 59 N.Y.2d 827, 829, 464 N.Y.S.2d 741, 451 N.E.2d 488 (1983); *Kasachkoff v. The City of New York, supra,* at 60.The issue on a motion for Summary Judgment is whether the plaintiff can establish with convincing clarity that the defendant knew statements were false. *Anderson v. Liberty Lobby,* 477 U.S. 242, 255-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Goldblatt v. Seaman,* 225 A.D.2d 585, 586, 639 N.Y.S.2d 438 (2nd Dept.1996).

The mere falsity of a statement is insufficient to establish an inference of actual malice (*Kasachkoff v. The City of New York, supra,* at 135-36, 485 N.Y.S.2d 992,*citing Ashcroft v. Hammond,* 197 N.Y. 488, 496, 90 N.E. 1117 (1910)), unless the statement be so extravagant in its denunciations or so vituperative in character as to justify an inference of malice. *Id.,* at 136, 90 N.E. 1117; *Toker v. Pollack, supra,* at 219, 405 N.Y.S.2d 1, 376 N.E.2d 163.

Here, the plaintiff provides no affidavit from any person actually present at the Beekman Democratic Committee meeting. The plaintiff proffers no evidence of actual malice on the part of any defendant, and instead relies upon insufficient speculation, conjecture, surmise, suspicion, and unsubstantiated or conclusory assertions. The plaintiff's reliance upon what is "plausible" is insufficient. Further, the statements themselves are not so extravagant or vituperative as to evidence actual malice or an inference thereof, given the context and purpose of the Beekman Democratic Committee meeting at which the statements were made. Actual malice is not demonstrated, despite a six (6)-hour hearing conducted in connection with the plaintiff's earlier application for a preliminary injunction.

Defendants Selendy, Morey and Cathy Adler

The plaintiff's pleadings are very specific in attributing the "primary" defamatory utterances solely to Peter Adler. Selendy, Morey and Cathy Adler are named as defendants by the allegation that the defamation was uttered "at the direction, and/or behest, of the Selendy campaign."*See,* plaintiff's amended complaint, paras. 4 and 6. Thus, Jaliman seeks to vicariously or inferentially impute liability for Peter Adler's statements to Selendy, Morey and Cathy Adler.

*9 It is not alleged that Peter Adler was employed by the Selendy campaign. As such, vicarious liability on a theory of *respondeat superior* cannot be imputed to Selendy, Morey or Cathy Adler. *Loughry v. Lincoln First Bank, N.A.,* 67 N.Y.2d 369, 376, 502 N.Y.S.2d 965, 494 N.E.2d 70 (1986); *Sanderson v. Bellevue Maternity Hospital, Inc.,* 259 A.D.2d 888, 891-92, 686 N.Y.S.2d 535 (3rd Dept.1999); *Murray v. Watervliet City School District,* 130 A.D.2d 830, 831, 515 N.Y.S.2d 150 (3rd Dept.1987).

In the absence of vicarious liability, the plaintiff's defamation claims against Selendy, Morey and Cathy Adler depend upon the inference, drawn by the plaintiff, that the statements were coordinated by and among all defendants. The plaintiff's "evidence" consists of the marriage between Peter and Cathy Adler; Cathy Adler's role as deputy manager of the Selendy campaign; the chain of command between Cathy Adler and manager Morey; and the chain of command between the campaign's management team and Selendy.

In his submissions, Jaliman states that "opposition research" was conducted by "Adler *or* others on the Selendy campaign" (plaintiff's affidavit in opposition, para. 42) (emphasis added)), without stating precisely who conducted the research. Jaliman therefore argues that it is "plausible" that opposition research would be shared among the defendants, and further, that the defendants cannot credibly deny discussion of the alleged defamatory material with each other before Adler made his remarks to the Beekman Democratic Committee. *Id.,* at paras. 42-44.

The plaintiff confuses "plausibility" with "evidence." Defendants Selendy, Morey and Cathy Adler meet their initial burden on Summary Judgment, that they not be held liable as a matter of law for the utterances of another person. The marital relationship between Peter and Cathy Adler does not in and of itself permit an inference that one acted as the agent of the other. *Four Winds Hospital v. Keasbey,* 92 A.D.2d 478, 459 N.Y.S.2d 68, (1st Dept.1983), *aff'd. as modified,* 59 N.Y.2d 943, 466 N.Y.S.2d 300, 453 N.E.2d 529 (1983). Moreover, the plaintiff's argument that there was collusion between all defendants to defame him,

as a matter of tactic and strategy, is in the nature of civil conspiracy, which is not recognized as a compensable tort in New York. *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 N.Y.2d 968, 969, 510 N.Y.S.2d 546, 503 N.E.2d 102 (1986); *Ward v. City of New York*, ---A.D.2d ---- (2nd Dept. Feb. 7, 2005), 15 A.D.3d 392, 789 N.Y.S.2d 539, 2005 WL 301160; *Pappas v. Passias*, 271 A.D.2d 271, 272 (2nd Dept.2000). The liability of defendants Selendy, Cathy Adler and Morey stands or falls with the underlying defamation claim. *Ward v. City of New York, supra; Sokol v. Addison*, 293 A.D.2d 600, 601, 742 N.Y.S.2d 311 (2nd Dept.2002)), which cannot stand absent their uttering statements themselves.

In any event, the plaintiff fails to meet his burden, which shifts to him, of providing any *evidence* whatsoever that Adler's remarks to the Beekman Democratic Committee were coordinated among the defendants. Instead, the plaintiff speaks to what might be plausible, which is the language of impermissible speculation, conjecture, guess and surmise. *Accord, Ramsay v. Mary Imogene Bassett Hospital, supra*, at 755-56, 551 N.Y.S.2d 342; *SRW Associates v. Bellport Beach Property Owners, supra*, at 332, 517 N.Y.S.2d 741.Accordingly, Summary Judgment is awarded in favor of defendants Selendy, Morey and Cathy Adler.

***10** The plaintiff's amended complaint sets forth for the first time a grab bag of alleged defamatory statements attributed to defendants Selendy, Cathy Adler and Morey. These include allegations that Jaliman was described as "crazy," that he spread untruths, failed to vote in a prior election, was a "puppet," and had otherwise engaged in electoral fraud that became the subject matter of ballot challenges litigation in Supreme Court, Putnam County.

All of the "additional" allegations of slander contained in the plaintiff's amended complaint must be dismissed. CPLR Rule 3212(g). The amended complaint fails to set forth the particularity required by CPLR Rule 3016(a) to state a cause of action. Specifically, the amended complaint fails to state dates, times, places and the manner of any of the additional statements (*Lesesne v. Lesesne*, 294 A.D.2d 507, 508 (2nd Dept.2002); *Sirianni v. Rafaloff*, 284 A.D.2d 447, 448, 727 N.Y.S.2d 452 (2nd Dept.2001); *Grynberg v. Alexanders, Inc.*, 133 A.D.2d 667, 668, 519 N.Y.S.2d 838 (2nd Dept.1987), *app. den.*, 70 N.Y.2d 616, 526 N.Y.S.2d 436, 521 N.E.2d 444 (1988), *rearg. den.*, 71 N.Y.2d 994, 529 N.Y.S.2d 278, 524 N.E.2d 879 (1988)), or in certain instances the precise words alleged (*Varella v. Investors Insurance Holding Corp.*, 185 A.D.2d 309, 310, 586 N.Y.S.2d 272 (2nd Dept.1992), *lv. to app. granted*, 80 N.Y.2d 762, 592 N.Y.S.2d 670, 607 N.E.2d 817 (1992), *aff'd.*, 81 N.Y.2d 958, 598 N.Y.S.2d 761, 615 N.E.2d 218 (1993), *rearg. den.*, 82 N.Y.2d 706, 601 N.Y.S.2d 586, 619 N.E.2d 664 (1993); *Erlitz v. Segal, Lilling & . Erlitz*, 142 A.D.2d 710, 712, 530 N.Y.S.2d 848 (2nd Dept.1998)), the identity of the specific persons to whom the statements were uttered (*Simpson v. Cook Pony Farm Real Estate, Inc.*, 12 A.D.3d 496, 784 N.Y.S.2d 633 (2nd Dept.2004); *Gill v. Pathmark Stores, Inc.*, 237 A.D.2d 563, 655 N.Y.S.2d 623 (2nd Dept.1997); *Arsenault v. Forquer*, 197 A.D.2d 554, 556, 602 N.Y.S.2d 653 (2nd Dept.1993)), and specifies no special damages. Moreover, the "additional" slander allegations appear to constitute, in the context uttered, rhetorical, loose, figurative or hyperbolic speech that is not actionable. *Accord, Falk v. Anesthesia Associates of Jamaica*, 228 A.D.2d 326, 328, 644 N.Y.S.2d 237 (1st Dept.1996); *Chernick v. Rothstein*, 204 A.D.2d 508, 509, 612 N.Y.S.2d 77 (2nd Dept.1994); *Bryant v. Kinder*, 204 A.D.2d 377, 378, 614 N.Y.S.2d 160 (2nd Dept.1994).

The Application for Monetary Sanctions

All defendants seek an Order imposing monetary sanctions. 22 N.Y .C.R.R. § 130-1.1(a) and (c) provide that courts may sanction parties that engage in "frivolous conduct." Conduct is frivolous if, *inter alia*, it is completely without merit in law and cannot be supported by reasonable arguments for an extension, modification or reversal of existing law, or if it is undertaken primarily to harass or maliciously injure another.
22 N.Y.C.R.R. § 130-1.1(c)(1) and (c)(2).

The imposition of sanctions, if any, depends upon the facts and circumstances of the individual case. Sanctions have been imposed in defamation actions where it is determined that the existence of privilege rendered the action legally meritless (*Hirschfeld v. Daily News, L.P.*, 269 A.D.2d 248, 250, 703 N.Y.S.2d 123 (1st Dept.2000), *lv. to app. den.*, 271 A.D.2d 386, 713 N.Y.S.2d 463 (2000); *Carniol v. Carniol*, 288 A.D.2d 421, 422, 733 N.Y.S.2d 485

(2nd Dept.2001)) or where the action was undertaken for the purpose of harassment. *See, Carniol v. Carniol, supra,* at 422, 733 N.Y.S.2d 485.Conversely, sanctions will not be imposed in unsuccessful defamation actions which were arguable and not frivolous. *Gelmin v. Quicke,* 224 A.D.2d 481, 484, 638 N.Y.S.2d 132 (2nd Dept.1996); *Hammer v. Berg,* 193 A.D.2d 716, 717-18, 597 N.Y.S.2d 740 (2nd Dept.1993).

*11 The Court views the issue of sanctions differently as to defendant Peter Adler from defendants Selendy, Cathy Adler and Morey. The claim against Peter Adler, while perilously close to being frivolous, nevertheless raised sufficient questions as to qualified privilege, the plaintiff's status as a public figure, the nature and intent of statements, and actual malice. Sanctions are therefore not appropriate in favor of Peter Adler, who actually spoke the primary alleged defamatory words.

The same cannot be said, however, as to the remaining defendants. Selendy, Cathy and Morey were initially sued for alleged defamatory words that none of them ever uttered. The plaintiff's claim to damages was based upon speculation and conjecture rather than upon actual evidence. The speculation and conjecture was premised upon a *de facto* civil conspiracy amongst all the defendants for the plaintiff to be defamed, even though civil conspiracy is not itself recognized as a tort in New York. *Alexander & Alexander of New York, Inc. v. Fritzen, supra,* at 969, 510 N.Y.S.2d 546, 503 N.E.2d 102;*Ward v. City of New York, supra; Pappas v. Passias, supra,* at 272.

The plaintiff's complaint lacked, at all times, even threadbare merit as to defendants Janine Selendy, Cathy Adler and Michael Morey. Given the absence of merit, the litigation against them can only be explained as having been motivated by the desire to harass the defendants. The plaintiff has improperly used-indeed, abused-the good auspices of the court for the purpose of grinding a political axe. The prior assigned Justice warned the plaintiff on September 8, 2004, when the injunction hearing was held, that sanctions would be considered if the law suit was continued and if circumstances warranted the imposition of monetary penalties. The plaintiff failed to heed the warning of the court and has continued grinding his axe.

The plaintiff's intent to harass defendants Janine Selendy, Cathy Adler and Michael Morey is further evidenced by the manner in which he has simultaneously used the alleged statements to affirmative advantage. The plaintiff issued press releases on multiple occasions self-publicizing the utterances that he now describes as damaging to his reputation. At approximately the same time, he commenced litigation claiming general damages in an effort, early on, to obtain an injunction against the defendants from further negative utterances prior to his primary and general election.

Courts should not be used by candidates for public office as a political campaign tool. It was declared long ago that the right of free speech is not absolute, and a person falsely shouting fire in a theater, creating a panic, would not be protected by the First Amendment. *Schenck v. United States,* 249 U.S. 47, 39 (1919) (Holmes, J.). However, the right to free and open political discourse must always be jealously guarded. Efforts to muzzle any individual's right to speak, in the context of a political campaign or nominating procedure, is chilling and dangerously totalitarian, particularly if directed against persons who were initially accused of having actually said nothing as were Selendy, Cathy Adler and Morey.

*12 22 N.Y.C.R.R. § 130-1.1(a) provides that sanctions may take the form of reimbursement of another party's reasonable attorneys' fees. An award of reasonable attorneys' fees appears in this instance to be the most just measure of addressing the plaintiff's frivolous conduct while compensating the defendants for expenses they legitimately incurred in responding to this litigation.

The submissions of defense counsel do not include billing statements or other evidence on which the amount of counsel fees can be determined. In any event, the plaintiff has the right to be heard as to what amount is "reasonable." It is the intention of the Court to award defendants Selendy, Cathy Adler and Morey the *full* amount of reasonable attorneys' fees, costs and disbursements incurred during the litigation from its inception through and including the next wave of submissions on which counsel fees are determined. However, a modest downward adjustment to the full amount is appropriate to account for attorneys' fees incurred that are specific to the assertion of counterclaims.

Cross-Motion for Summary Judgment on Counterclaim

Defendants Selendy, Cathy Adler and Morey seek an Order pursuant to CPLR Rule 3212 granting Summary Judgment on their counterclaims asserted in their amended answers to the plaintiff's amended complaint, all dated October 4, 2004.

Each of these three defendants assert an almost identically-worded counterclaim. They allege that the plaintiff knowingly and willfully filed a frivolous and false defamation action with malicious and political intent. It is further alleged that the plaintiff's action impugned the defendants' reputation for honesty and integrity in their professional and political arenas. The *ad damnum* clauses each seek five hundred thousand ($500,000) dollars in general damages and an award of attorneys fees.

The submission of defendants' counsel construes the counterclaims as seeking the imposition of sanctions for frivolous conduct. Summary Judgment must be technically denied as New York does not recognize an independent cause of action for sanctions. *Osborn v. Wemer,* N.Y.L.J. Oct. 14, 2003, p. 20, col. 3 (Sup.Ct., Westchester Co.2003) (Dillon, J.), *citing, Yankee Trails, Inc. v. Jardine Insurance Brokers, Inc.,* 145 Misc.2d 282, 283, 546 N.Y.S.2d 534 (Sup.Ct., Rensselaer Co.1989) and *King Enterprises, Ltd. v. Mastro,* 2001 WL 1328712 (N.Y.City Civ.Ct.2001). In any event, an application for sanctions has been independently granted, *supra.*

To the extent that the counterclaims may be construed as alleging defamation by the plaintiff resulting in damage to the defendants' reputations, Summary Judgment must be denied as the allegations are not pleaded with the particularity required by CPLR Rule 3016(a). *Ott v. Automatic Connector, Inc.,* 193 A.D.2d 657, 598 N.Y.S.2d 10 (2nd Dept.1993), *Horowitz v. Aetna Life Insurance,* 148 A:D.2d 584, 586, 539 N.Y.S.2d 50 (2nd Dept.1989); *Monsanto v. Electronic Data Systems Corporation,* 141 A.D.2d 514, 516, 529 N.Y.S.2d 512 (2nd Dept.1988). Pursuant to CPLR Rule 3212(g), any counterclaim for defamation is dismissed.

*13 The counterclaims might alternatively be viewed under liberal notice pleading as alleging abuse of process. Decisional authorities require that any such claim be pleaded with particularity, which is lacking here. *Jaroslawicz v. Cohen,* 12 A.D.2d 160 (1st Dept 2004). In any event, the undisputed facts of this action cannot legally support a claim for abuse of process. Its elements are 1) regularly issued civil or criminal process, 2) with an intent to do harm without excuse or justification, and 3) the use of the process in a perverted manner to obtain a collateral objective. *Board of Education of Farmingdale Union Free School District v. Farmingdale Classroom Teachers Association, Inc., Local 1889, AFT-CIO,* 38 N.Y.2d 397, 403, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975). While these elements might, at first blush, appear to fit the facts as found by the Court, abuse of process pertains to the improper use of process after its issuance and does not apply where, as here, it is alleged that a party acted maliciously [or frivolously] in bringing the action in the first instance. *Curiano v. Suozzi,* 63 N.Y.2d 113, 117, 480 N.Y.S.2d 466, 469 N.E.2d 1324 (1983); *Hauser v. Bartow,* 273 N.Y. 370, 373, 7 N.E.2d 268 (1937).

Likewise, if the counterclaims are viewed as alleging the "catch-all" of *prima facie* tort, Summary Judgment is warranted as there is no allegation or proof of special damages. *Friehofer v. Hearst Corporation,* 65 N.Y.2d 135, 142-43, 490 N.Y.S.2d 735, 480 N.E.2d 349 (1985); *Vigoda v. DCA Productions Plus, Inc.,* 293 A.D.2d 265, 741 N.Y.S.2d 20 (1st Dept.2002).

The defendant's counterclaims cannot be viewed as seeking damages for malicious prosecution, as a necessary element of such a claim is the existence of an underlying criminal proceeding (*see, Hollender v. Trump Village Cooperative, Inc.,* 58 N.Y.2d 420, 425, 461 N.Y.S.2d 765, 448 N.E.2d 432 (1983); *Martin v. City of Albany,* 42 N.Y.2d 13, 16, 396 N.Y.S.2d 612, 364 N.E.2d 1304 (1977)), which is lacking here.

Accordingly, the counterclaims of defendants Selendy, Cathy Adler and Morey raise no compensable claims and are therefore dismissed.

Dismissal of Adler's Counterclaim for Libel

By cross-motion, the plaintiff seeks dismissal of all counterclaims on the ground that none state a cause of action. Many of the plaintiff's arguments as to defendants Selendy, Cathy Adler and Morey are

mooted by the Court's dismissal of their counterclaims. Plaintiff *pro se* seeks dismissal of Adler's counterclaim of libel, arguing a "litigation privilege." There is, of course, a privilege that attaches to statements uttered during court proceedings (Levy v. State of New York, 58 N.Y.2d 733, 734, 459 N.Y.S.2d 27, 445 N.E.2d 203 (1982); Toker v. Pollack, supra, at 220, 405 N.Y.S.2d 1, 376 N.E.2d 163), but here, the counterclaim is addressed to press statements and e-mails by the plaintiff prior to or outside of the judicial proceeding itself. The plaintiff's arguments fail to provide a basis for Summary Judgment against Adler's counterclaim. The plaintiff's dependent request for an award of counsel fees, despite the absence of counsel, is denied.

CPLR Rule 3212(g) authorizes a court, in resolving Summary Judgment motions, to search the record and render any Order as may aid the disposition of the action. *See generally,* Star v. Badillo, 225 A.D.2d 610, 638 N.Y.S.2d 791 (2nd Dept.1996); *Hong Kong and* Shanghai Banking Corporation Limited v. 335 Oser Avenue Associates, 223 A.D.2d 676, 637 N.Y.S.2d 201 (2nd Dept.1996). Here, defendant Peter Adler asserts two (2) counterclaims, one for malicious prosecution and one for libel. The counterclaim for malicious prosecution is dismissed *sua sponte* due to the absence of any underlying criminal proceeding.*Hollander v. Trump Village Cooperative, Inc., supra,* at 425; Martin v. City of Albany, supra, at 16, 396 N.Y.S.2d 612, 364 N.E.2d 1304.

*14 The counterclaim for libel pertains to the plaintiff's press releases and e-mails to third persons accusing Peter Adler of defaming the plaintiff to stir up "anti-Moslem prejudices" for the benefit of the Selendy campaign, thereby damaging Adler's reputation for honesty in the community. In other words, Adler alleges that he was defamed by being publically accused of defaming the plaintiff.

This counterclaim by Adler must be, and is, dismissed pursuant to CPLR Rule 3212(g). The plaintiff's press releases, made in the heat of an election campaign, must be analyzed in the context in which they were published. Brian v. Richardson, 87 N.Y.2d 46, 51, 637 N.Y.S.2d 347, 660 N.E.2d 1126 (1995); Gross v. New York Times Co., 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 623 N.E.2d 1163 (1993). The context includes the entirety of the press releases, as well as their tones and apparent purpose. Steinhilber v. Alphonse, supra, at 293, 508 N.Y.S.2d 901, 501 N.E.2d 550.None of the statements contained in the plaintiff's various press releases and e-mails rise to the level of libel *per se* and, consequently, special damages need to be pleaded and proven by Adler to sustain his libel-claim. Since the counterclaim seeks twenty-five thousand ($25,000) dollars of general damages and fails to particularize special damages, no cause of action is stated. Liberman v. Gelstein, supra, at 434-35, 590 N.Y.S.2d 857, 605 N.E.2d 344, Aronson v. Wiersma, supra, at 594, 493 N.Y.S.2d 1006, 483 N.E.2d 1138.

The Court has considered the remainder of the contentions of the parties and finds them to be without sufficient legal merit or mooted by other aspects of this Decision.

In light of the foregoing, it be and is hereby

ORDERED, that the motion of the defendant, Peter Adler, and the cross-motion of the defendants, Janine Selendy, Cathy Adler and Michael Morey, for Summary Judgment against the plaintiff's claims pursuant to CPLR Rule 3212 is granted and the plaintiff's amended complaint dismissed; and it is further

ORDERED, that the motion of the defendant, Peter Adler, for the imposition of monetary sanctions upon the plaintiff pursuant to 22 N.Y.C.R.R. § 130-1.1 is denied; and it is further

ORDERED, that the cross-motion of defendants Janine Selendy, Cathy Adler and Michael Morey for the imposition of monetary sanctions upon the plaintiff pursuant to 22 N.Y.C.R.R. § 130-1.1 is granted to the extent that the plaintiff shall reimburse said defendants for the full reasonable amount of attorneys' fees, costs and related disbursements incurred in the defense of this action from inception to conclusion, in a specific amount to be determined by a further noticed motion that is to be served on or before March 31, 2004 and returnable on submission on such date as dictated by the CPLR based on the date of service; and it is further

ORDERED, that the cross-motion of the defendants, Janine Selendy, Cathy Adler and Michael Morey, for Summary Judgment in their favor on the counterclaims asserted in their amended answers to the plaintiff's amended complaint is denied; and it is fur-

ther

ORDERED, that the cross-motion of the plaintiff, Michael Jaliman, for Summary Judgment dismissing all counterclaims are denied for the reasons argued, but granted on other grounds pursuant to CPLR Rule 3212(g) and the counterclaims dismissed; and it is further

*15 ORDERED, that the cross-motion of the plaintiff, Michael Jaliman, for an award of counsel fees pursuant to 22 N.Y.C.R.R. § 130-1.1 is denied; and it is further

ORDERED, that since the sole remaining issue in the action pertains to the assessment of counsel fees that shall be addressed by motion, no further appearance date need be scheduled at this time.

N.Y.Sup.,2005.
Jaliman v. Selendy
7 Misc.3d 1007(A), 801 N.Y.S.2d 235, 2005 WL 818447 (N.Y.Sup.), 2005 N.Y. Slip Op. 50482(U)

END OF DOCUMENT

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Betty Ann KEARNEY, Executrix of the Estate of William Kearney, deceased, and Individually, Catherine Kearney, an infant by her Guardian ad litem, Betty Ann Kearney, and William Kearney, an infant by his Guardian ad litem, Betty Ann Kearney, Plaintiffs-Appellants,
v.
BAYWAY REFINING COMPANY, Tosco Refining Company, Phillips Petroleum, Conocophillips Company, Defendants-Respondents,
and
Exxon Corp., Defendant.
Argued Dec. 12, 2007.
Decided June 13, 2008.

West KeySummary
Workers' Compensation 413 ⚿2093

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2093 k. Willful or Deliberate Act or Negligence. Most Cited Cases

Workers' Compensation 413 ⚿2149

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(B) Action by Third Person Against Employer
413XX(B)2 Action for Death by Wrongful Act
413k2149 k. Death Resulting from Willful Act or Omission or Gross Negligence. Most Cited Cases
Deceased employee's wife failed to meet the context prong of the *Millison/Laidlow* intentional wrong exception to the workers' compensation bar and thus, could not pursue a wrongful death and survivorship action instituted by her on behalf of herself, her deceased husband, and her two children, against employer, a refinery. While employed at refinery, employee had been diagnosed as suffering from adenocarcinoma of the esophagus, from which he died at the age of 49. However, deceased employee's wife failed to identify a particular substance present at the refinery that had been causally connected to esophageal cancer, that employer discouraged candid reporting of dangerous leaks, or further, that employer was noncompliant with its Department of Environmental Protection reporting requirements. N.J.S.A. 34:15-8; N.J.R.E. 802; N.J.A.C. 7:27-16.18 (c), (d), and (f).

On appeal from Superior Court of New Jersey, Law Division, Ocean County, L-365-04.
Arnold C. Lakind argued the cause for appellants (Szaferman, Lakind, Blumstein, Blader & Lehmann, P.C., attorneys; Mr. Lakind, on the brief).

Lauren E. Handler argued the cause for respondents (Porzio, Bromberg & Newman, attorneys; Ms. Handler, of counsel and on the brief with Borden R. Gillis).

Before Judges PAYNE, SAPP-PETERSON and MESSANO.

PER CURIAM.

*1 Plaintiff, Betty Ann Kearney, appeals from an order of summary judgment dismissing the wrongful death and survivorship action instituted by her on behalf of herself, her deceased husband, and her two minor children against Exxon Corporation and against ConocoPhillips and its predecessors, Phillips Petroleum, Tosco Refining Company, and Tosco's wholly-owned subsidiary, Bayway Refining Company, as failing to meet the context prong of the *Millison/Laidlow* exception to the workers' compensation bar set forth in N.J.S.A. 34:15-8. *See* *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 177-79, 501 A.2d 505 (1985) and *Laidlow v. Hariton Mach. Co.*, 170 N.J. 602, 617, 790 A.2d 884 (2002).

I.

Plaintiff's former husband, William Kearney (Kearney), was employed at the Bayway Refinery continuously from 1974 until he was diagnosed as suffering from adenocarcinoma of the esophagus in February 2001. In 1980, Kearney was promoted to management, and from 1986 to his cessation of employment, Kearney worked as a shift superintendent. In that capacity, Kearney was responsible for the operation of the entire refinery, especially during off hours; he served as incident commander for plant emergencies; and he was responsible for notifying and meeting with all state, local and federal agencies, dealing with the press, and coordinating any unit start-ups or shutdowns as the existing situation demanded. Kearney died on February 9, 2002 at the age of 49. During his employment, the Bayway refinery was first owned by Exxon, which was dismissed from this suit by order of summary judgment from which there has been no appeal. In 1993, Exxon sold the refinery to Bayway Refining, a wholly-owned subsidiary of Tosco. In April 2001, the refinery was sold to Phillips Petroleum, and in 2002, Phillips merged with Conoco to form ConocoPhillips.

ConocoPhillips has assumed the liabilities of Bayway Refining and Tosco, neither of which presently exist. However, the claims forming the basis for this appeal emanate solely from the period of ownership by Bayway Refining/Tosco. In essence, plaintiff alleges that her husband's cancer was the result of workplace exposure to volatile organic compounds (VOCs) occurring as the result of the failure by Bayway Refining/Tosco to promptly repair leaking valves at the facility.

II.

In most circumstances, the New Jersey Workers' Compensation Act, *N.J.S.A.* 43:15-1 to -128, serves as a worker's sole and exclusive remedy against an employer for a work-related injury, including an occupational disease. *Millison, supra,* 101 *N.J.* at 169, 501 A.2d 505;*N.J.S.A.* 34:15-8 (surrender of other remedies); *N.J.S.A.* 34:15-31 (occupational diseases). However, *N.J.S.A.* 34:15-8 provides a limited exception to the exclusive-remedy provisions of the Act if the plaintiff can demonstrate that the injury or death results from an "intentional wrong."

The application of the intentional wrong exception was articulated by the Supreme Court in its decisions in *Millison* and *Laidlow,* where it was established that, to avoid the workers' compensation bar, a plaintiff must demonstrate that (1) the employer knew that its acts were substantially certain to result in injury or death (the conduct prong) and (2) the resulting injury and the circumstances of its infliction on the worker were "(a) more than a fact of life of industrial employment and (b) plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize" (the context prong).*Laidlow, supra,* 170 *N.J.* 617;*see also Millison, supra,* 101 *N.J.* at 177-79, 501 A.2d 505.

*2 As the Court stated in *Laidlow:*

> In general, the same facts and circumstances will be relevant to both prongs of *Millison.* However, as a practical matter, when an employee sues an employer for an intentional tort and the employer moves for summary judgment based on the Workers' Compensation bar, the trial court must make two separate inquiries. The first is whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury. If that question is answered affirmatively, the trial court must then determine whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation bar. Resolving whether the context prong of *Millison* is met is solely a judicial function. Thus, if the substantial certainty standard presents a jury question and if the court concludes that the employee's allegations, if proved, would meet the context prong, the employer's motion for summary judgment should be denied; if not, it should be granted.
>
> [*Laidlow, supra,* 170 *N.J.* at 623, 790 A.2d 884.]

In a thoughtful written opinion granting summary judgment to defendants in this matter, the motion judge concluded that plaintiff had offered evidence sufficient to raise an issue of fact as to whether the conduct prong had been met, requiring trial on that

issue, but that because evidence sufficient to meet the context prong was absent, summary judgment was appropriate.

On appeal, plaintiff claims that (1) summary judgment should not have been granted to Tosco or Bayway Refinery because no motion was made on behalf of either; (2) summary judgment was premature because plaintiff sought further discovery; and (3) the conduct of Tosco and Bayway Refinery met both prongs of the *Millison/Laidlow* test. We disagree and affirm.

III.

We address plaintiff's first two arguments only briefly, finding them of insufficient merit to warrant extensive discussion in a written opinion. *R.* 2:11-3(e)(1)(A) and (E).

Because Kearney's illness manifested in 2001, and his employment essentially ceased at that time, as a factual matter, plaintiff cannot establish direct liability on the part of Phillips Petroleum or ConocoPhillips; liability, if any, can exist in the factual circumstances of this case (the conduct of Exxon having been excused) only as the result of the actions of Bayway Refining, operating as a subsidiary of Tosco. Although only ConocoPhillips answered plaintiff's complaint, it did so in its capacity as the successor to Bayway Refining, Tosco and Phillips, and it has acknowledged that it would be subject to vicarious successor-corporation liability should the conduct of its predecessors be found actionable. Throughout the discovery phase of the action, the parties operated with the tacit understanding that ConocoPhillips was responding not only on its own behalf but also on behalf of the predecessor entities for which it retained potential liability. Because Kearney's employment at Bayway spanned the period of the refinery's control by Bayway Refining from 1993 to 2001, as a practical matter, the discovery that was directed to ConocoPhillips, and that entity's ensuing summary judgment motion and the evidence supporting that motion focused upon that period of time. In these circumstances, we find no fault with the determination of ConocoPhillips to seek summary judgment only in its own name and to offer a statement of uncontested material facts in that capacity. It was clear to all, and most particularly to the motion judge, which entities were the focus of plaintiff's claims.

*3 We further find no abuse of discretion on the part of the motion judge when he, in effect, denied the further extension of discovery sought by plaintiff by granting summary judgment to defendants, rendering such an extension moot. At the time, factual discovery had been extended on numerous occasions,[FN1] and no discovery requests upon ConocoPhillips remained pending. ConocoPhillips had provided answers to three sets of interrogatories, produced 50,000 documents, and six of its employees had given their depositions. Although plaintiff expressed a need for additional discovery at the time of summary judgment, her attorney at the time attested in a certification in support of his firm's withdrawal from representation that she had never reviewed the 12,643 pages of documents that had been offered by ConocoPhillips in a supplemental production in January 2006. Moreover, plaintiff failed to specify to the motion judge or to us what documents or other discovery she sought or their relevance to the issue presented. Nothing in the record before us suggests that plaintiff was in any way hindered in her ability to prove her case by either the court or the parties. *Wilson v. Amerada Hess Corp.*, 168 *N.J.* 136, 252-54 (2001). We thus reject plaintiff's claims that summary judgment was granted improperly and prematurely.

FN1. Suit was filed on February 3, 2004; Exxon filed its answer on July 5, 2004; and ConocoPhillips filed an answer on July 29, 2004. Discovery was extended from October 1, 2005 to December 29, 2005. Thereafter, the parties agreed to extend discovery until the end of January 2006. On January 20, 2006, ConocoPhillips completed its document production, totaling 50,000 pages. On February 3, 2006, plaintiff moved to extend fact discovery for 180 days to allow her to review the documents that had been produced. Over ConocoPhillips' objection, fact discovery was then extended by the court to April 30, 2006, with expert discovery to follow. At the time of summary judgment, plaintiff had served the reports of her liability expert.

IV.

Plaintiff also argues on appeal that the evidence produced in opposition to summary judgment not only

satisfied the conduct prong of the *Millison/Laidlow* test, as found by the motion judge, but also its context prong. In this regard, plaintiff claims that Bayway Refining/Tosco engaged in deceptive conduct that rendered Kearney's illness more than a fact of life of industrial employment that the Legislature sought to immunize from tort liability. In particular, plaintiff notes that for purposes of the motion ConocoPhillips has conceded that oil refineries can cause esophageal cancer.[FN2] She then contends Bayway Refining/Tosco "concealed the dangers of exposure to volatile organic chemicals from its employees and deceived relevant regulatory agencies with regard to the extent of equipment leaks and the resulting exposures." In her brief, plaintiff argues:

> FN2. To establish knowledge of the risk of esophageal cancer on the part of defendants, plaintiff relied upon a 1979 article, Nancy M. Harris, et al., *Cancer Mortality in Oil Refinery Workers,* 21 *J. Occup. Med.* 167 (March 1979), which reported three times the risk for esophageal and stomach cancer among exposed Canadian employees of Imperial Oil Limited whose mortality in the period from 1964 to 1973 was studied. As a factual matter, none of defendant's witnesses admitted to knowledge of such a causal connection or association. An assessment of esophageal cancer at the Bayway Refinery performed by ExxonMobil Biomedical Sciences in 2003, at the request of ConocoPhillips, and a further National Institute of Safety and Health (NIOSH) study of esophageal cancer among Bayway employees, requested by ConocoPhillips and issued on January 3, 2005, found no evidence of a possible work-related cluster. It is nonetheless clear that employees of Bayway Refining were aware of a causal connection between fugitive emissions, particularly of benzene, and other forms of cancer.

> In four ways, it was apparent that the exposures experienced by William Kearney were not a fact of life of industrial employment, and were well beyond anything the Legislature intended the Workers' Compensation Act to immunize. First, ConocoPhillips [FN3] misled its employees about the dangers of chemical exposures. Second, Tosco discouraged, and in fact punished, candid reporting of safety concerns. Third, Defendants deceived relevant regulatory agencies about the extent of exposures from its facility. Finally, in an unrebutted report, Plaintiff's expert, Dr. David Rigle, opined as to the wanton behavior of Defendants.

> FN3. We assume plaintiff meant Bayway Refining/Tosco.

We address the evidence supporting plaintiff's contentions in turn.

A. *Bayway Refining Misled Its Employees.*

In support of her claim that Bayway Refining misled its employees about the risks of exposures, plaintiff relies on the deposition of Curt Greder, president of the refinery's Teamster's Union Local 877 from approximately 1996 to November 2005. In the course of that deposition, Greder indicated that he was unaware of any information suggesting that exposure to substances at the refinery could cause esophageal cancer, although he noted that the company had "come out with something that stated that there's no correlation"-a finding that, as we have previously noted, was set forth in studies of mortality at the facility commissioned by ConocoPhillips and conducted by ExxonMobil Biomedical Sciences in 2003 and the National Institute of Safety and Health (NIOSH) in 2005. Nonetheless, Greder was well aware, for instance, that benzene, found at the refinery, was a carcinogen and that other substances found there were "bad actors."

*4 Greder additionally testified that, during Exxon's ownership of the facility, morbidity and mortality statistics were provided to the union as part of the union contract. After Bayway Refining/Tocso purchased the refinery, but prior to Greder's presidency, the right to those statistics was "bargained away," and while Greder was union president, the union had gone to the bargaining table "at least once" to ask for the statistics under Tosco. According to Greder, "it was told to us they're not really necessary to have, you don't need them." The statistics were not provided.

However, Greder additionally testified that the subject of deaths and illnesses at the facility was actively discussed by employees. He acknowledged that material safety data sheets (MSDS) [FN4] were available to

employees, and he noted in particular that employees could access the forms on the plant's yearly safety day. Additionally, Greder testified that a fugitive emission testing program existed. He stated:

> FN4. Among other things, MSDS sheets provide detailed information and warnings regarding the toxicity of the subject substance.

> Well, the fugitive emissions-I don't know what you'd call it-project or-it's an ongoing project that's-when that was brought into existence, people were trained in the operation of fugitive emission testing equipment, Mobile Fugitive Emission Testing Equipment. And they went out to the various units and tested the-the valves for leaks.
> Greder stated that the emissions testing had initially been conducted by refinery employees, but was outsourced after Bayway Refining/Tosco assumed control.

Greder additionally testified that the facility had been equipped since 1977 with an alarm system to detect leaks, and that he was one of the employees responsible for repairs to that system. Although he was presently aware of a hydrogen sulfide alarm that had not operated properly for several months because of parts problems, that was not something that happened often. Under Exxon, Greder testified, the facility would be shut down every three or four years for a "gold-plated" turn-around when everything was fixed. Once Bayway Refining/Tosco took over, those turn-arounds ceased. Maybe, Greder speculated, "the industry has chosen not to do that anymore."However, Greder stated that individual unit shutdowns occurred.

Plaintiff additionally relies on the testimony of William Reilly, a refinery employee from 1969 to 2003. Reilly testified that the repair of fugitive leaks was governed by regulations that required an initial attempt to repair within the first five days of discovery of the leak, up to fifteen days for a second attempt, and placement of the valve on the "turn-around list" thereafter if it could not be repaired. Valves on the turn-around list were given tags that told workers that the valve was leaking, the date the leak was discovered and "any information that you needed to know."[FN5]If the leak were benzene, a substance upon which the company "put a lot of emphasis," the area was roped off and respirator use was required.

> FN5. Reilly denied that he had ever made any complaints to management regarding the issue of leaking valves and the time it was taking to repair or replace them or being at a meeting where is was stated that "business leaders were putting their employees needlessly at risk but that those complains had fallen upon deaf ears."

*5 Reilly was not aware of any connection between the substances that could have leaked from the valves and esophageal cancer until rumors started to spread a couple of years before Reilly stopped working in 2003. However, he was aware that exposure to benzene caused leukemia. Additionally, Reilly testified that it was well-known that exposure to hydrogen sulfide could "kill you right on the spot," and that there were "a lot of precautions given to that."Additionally, he acknowledged that precautions were in place for carbon monoxide, caustic soda, nitrogen, chlorine, non-asbestos insulation, asbestos, lead, and light hydrocarbons. Reilly also confirmed that MSDS sheets were available to employees. "[T]hey had the books right on every unit. The operators were familiar with it.... [T]hey were all over the place."

Plaintiff does not identify a particular substance, present at the refinery, that has been causally connected to esophageal cancer. Thus, she cannot pinpoint a process as to which additional protection was required or establish improper safety procedures implemented in connection with that process.

B. *Tosco Discouraged Candid Reporting of Dangerous Conditions*

Plaintiff relies for support of her claim that Bayway Refining/Tosco discouraged reporting of dangerous leaks upon information allegedly given to her by a refinery employee, to which plaintiff testified in her deposition. In this regard, she stated that Bayway employee Richard Jennings, whose position she did not know, had reported to her that "if these health issues were reported [by employees] to management above him, that it would reflect in their ranking and their salaries."Jennings additionally stated that an employee known as "Corkie" would use his power in ranking and that, "if you complained about any envi-

ronmental issues, that it would be reflected in your salary increases and your bonuses and your ranking, which could mean promotions."

The statements reported by plaintiff constitute hearsay, N.J.R.E. 802, that plaintiff has not demonstrated is admissible in evidence. We have held that "evidence submitted in support of a motion for summary judgment must be admissible, Jeter v. Stevenson, 284 N.J.Super. 229, 233, 664 A.2d 952 (App.Div.1995), and evidence in opposition to such a motion obviously must be admissible, as well.

C. *Tosco Deceived the Department of Environmental Protection.*

Plaintiff notes that fugitive process emissions are regulated by the New Jersey Department of Environmental Protection, which in N.J.A.C. 7:27-16.18(f) requires the owner and operator of a petroleum refinery to implement a leak detection and repair program, to repair leaks in accordance with the timetables set forth in N.J .A.C. 7:27-16.18(c) and (d), and to report on a quarterly basis information on all components detected to have a regulated leak.[FN6] An incomplete sample of such reports can be found in the record. Plaintiff has offered no competent evidence to suggest that Bayway Refining/Tosco was noncompliant with its reporting requirements, or that it was ever cited for failure to report or for failure to comply with leak detection and repair regulations.

FN6. The regulation excepts from the timetable for repair those leaks whose repair requires unit shutdown. Such leaks must be tagged and repaired "during the next process unit shutdown and prior to the next start up."N.J.A.C. 7:27-16.18(f)(6).

*6 According to plaintiff, she was told by her deceased husband, as well as by Ted Worthington and John Horvath, both of whom are deceased, that once Tosco assumed ownership of the refinery it commenced underreporting fugitive emissions, that she overheard her husband and Worthington talking about second-guessing of maintenance by upper management, and that her husband commented, nonspecifically, that "[t]hey're going to kill somebody."Plaintiff gave no details of any sort with respect to the statements of her husband and Worthington regarding underreporting.

Plaintiff testified in her deposition that, in 2003, Horvath also discussed the underreporting of fugitive emissions with her, stating:

> That everybody knows, the testing is done, basically that it's a scam, from the training that they get to the equipment they use, that sometimes the men, when it was done by the refinery's own employees, wouldn't even, it was an overtime job. They could just run their pen down the page and go find someplace to go sleep and everyone knew. Everyone encouraged them not to find it because it only meant more work for everybody, budgets would get out of line, bonus program.

Horvath also allegedly stated:

> That the refinery intentionally looks the other way. They don't want to find these leaks. They don't want to slow down production. It's common knowledge. That they went in there and told everybody there would be no more gold plated turnarounds.

Horvath did not identify who told him about the change in maintenance policy. The following colloquy also occurred regarding the source of Horvath's information.

> Q. Can you identify for me from your conversation with Mr. Horvath a particular person at Tosco who supposedly did not want to find leaks to slow down production?
>
> A. There was one of the refinery managers. I'd have to look at the list of refinery managers to be able to tell you which one.
>
> Q. Is this a name that Mr. Horvath gave you?
>
> A. A name that had came up more than once, but yes, Horvath was one of the people that said it and then somebody else said the same name.

The manager was never identified.

Later in her deposition, plaintiff retracted her statement that Horvath had told her that employees failed to conduct tests while indicating that they were performed, stating that a person named Jennings had given the statement-"I think it was Jennings"-a per-

son whose first name plaintiff did not know. But then, the following colloquy occurred:

> Q. Okay. So Mr. Horvath allegedly told you that the supervisor, whose name you don't know, knew what was happening was that the union employees were not really doing the testing but were falsifying the paperwork?
>
> A. Yes. And that it was known by the management.
>
> Q. Who in management?
>
> A. I don't know who it is. But I'm sure if you find out who supervised them, I'm sure it's an answer you can find out.

Still later, plaintiff also denied that Horvath had informed her of inadequate training and equipment to detect leaks. She also answered "no" when asked: "Did [Horvath] ever tell you that the company tested for fugitive emissions, got results and didn't report them to the government?"

*7 On appeal, plaintiff claims that all of the foregoing hearsay is admissible pursuant to N.J.R.E. 804(a)(4) as constituting statements by witnesses unavailable as the result of their death. However, N.J.R.E. 804(b)(6) only recognizes as evidential "a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy."Our review of the record satisfies us that none of the above statements would be admissible, either because they were not based upon first-hand knowledge, or because they were not trustworthy. In the latter respect, we are convinced of plaintiff's good faith in bringing her claims and of the extent of her endeavors to prove its merits. However, a fair reading of plaintiff's deposition transcript discloses not only plaintiff's bias, but also her inability to accurately convey the details of information that she had allegedly obtained in the course of her extended investigation. The summary of plaintiff's deposition testimony regarding the statements of Horvath is illustrative of this point. Further, plaintiff has not demonstrated the admissibility of the statements attributed to Jennings, which constituted inadmissible double hearsay, N.J.R.E. 805, reported by one who has not been shown to be deceased.

In addition to the statements of deceased witnesses and Jennings, plaintiff also relies in support of her contention that Bayway Refining/Tosco deceived the DEP upon the statement of Curt Greder that "gold-plated" turnarounds ceased when Exxon sold the refinery. Finally, she relies upon a discussion at the deposition of the refinery's regulatory and engineering services manager, Hank Van Handle, regarding a 2003 Mid-Atlantic Regional Management Association (MARMA) report that disclosed that in the years 1999, 1000 and 2001, the refinery had the highest emissions in the region. Van Handle testified that the number resulted from conservative estimating methods employed by the refinery in producing data for use in the report, its size in comparison to other refineries whose emissions were reported, and the inclusion of storage tanks and two storage terminals. Moreover, the authors of the MARAMA report stated:

> These variations [in emissions] are not unexpected, as no two refineries are alike. Refineries differ in both size and by the type of separation, conversion, and treatment processes used. The emissions at a particular refinery are determined by the composition of the crude oil received and the chosen slate of commodities produced (i.e., gasoline, kerosene, fuel oil, chemical feed stock, etc.).
>
> * * *
>
> In addition to the physical differences in refineries, another explanation for the variability in refinery VOC emissions is differences in emission estimation methodologies.[FN7]
>
> > FN7. Absent any expert testimony on the issue, we are unable to draw any conclusions as to whether the MARAMA Report demonstrates intentional underreporting of VOCs on the part of the defendants.

Following an "uproar" regarding the report, Van Handle testified that the refinery submitted revised data, utilizing "more sophisticated and more precise estimating tools," that brought the refinery's emissions into line with those of other refineries. Although Van Handle stated that the revised data was "pro-actively submitted to the state," nothing suggests any inaccuracy in the revised data, and no puni-

tive or penalty consequences stemmed from the submission of either report.[FN8]

> FN8. We decline to consider a 2005 consent decree between ConocoPhillips, the State of New Jersey and the United States Environmental Protection Agency that included a section requiring leak detection and repair (LDAR) program enhancements. The decree was entered four years after Kearney's cancer manifested, and it does not detail regulatory noncompliance during the period of his employment. This decree was not part of the record below, and in response to a prior motion to supplement the record, we barred its use.

D. *Report of Plaintiff's Expert, Dr. David Rigle, M.D.*

*8 In opposition to summary judgment and on appeal, plaintiff also offers the report of her expert, David Rigle, M.D., who opined that "Bayway excessively exposed Mr. Kearney knowingly" to carcinogenic chemicals, demonstrating a "reckless disregard for his life." Dr. Rigle also stated in the concluding section of his report:

> The wanton behavior displayed by Bayway Refinery is evident. For example, in 1998, of the 500 facilities in New Jersey which filed data, Bayway Refinery was the fourth highest releaser of toxic chemicals into the environment. Additionally, the EPA report on toxic releases to air, water and land from 1998 demonstrates that Bayway Refinery released 2.1 million pounds of benzene into the air, the second highest in New Jersey of 582 facilities.

Dr. Rigle gives no support for his claim of wanton behavior on the part of Bayway Refining/Tosco in his report, and he did not supplement that report after its inadequacies were recognized by plaintiff and defendants, alike.

Plaintiff concedes that Dr. Rigle's "assertion was indeed conclusory and possibly a net opinion," but she claims that, because defendants declined to take the doctor's deposition, they have waived such an objection. We disagree, finding no legal support for the argument that a defendant must explore the bases for an opposing expert's conclusory opinion before utilizing its lack of factual foundation in support of summary judgment. In this regard, we note that we are not bound by the Law Division opinion in *Ferrante v. Sciaretta*, 365 *N.J.Super.* 601, 609, 839 A.2d 993 (2003), upon which plaintiff relies to support her argument that discovery must occur before a net opinion objection can be raised. Moreover, the decision in *Ferrante* did not arise in a summary judgment context. Rather, the court's determination that defendants "ha[d] no standing" to claim that plaintiff's expert's opinion was net in nature occurred in the far different context of plaintiff's use, with ample notice and no prior objection, of an expert's opinion in a post-judgment motion to establish the negative tax consequences of her lump-sum back- and front-pay damage award in a discrimination case, and it appears to have been based on principles of estoppel that are inapplicable here. We likewise distinguish the other decision upon which plaintiff relies, *McCalla v. Harnischfeger Corp.*, 215 *N.J.Super.* 160, 171, 521 A.2d 851 (App.Div.), *certif. denied*, 108 *N.J.* 219 (1987), a case in which we reversed the determination of a trial judge to limit the testimony of defendant's expert to a rebuttal of the claims of the expert upon whom plaintiff relied, finding that determination to have been fundamentally unfair in circumstances in which the foundation of the opinion of the defense expert could be explored on cross-examination. The procedural context of the present matter in no respect resembles that of *McCalla*.[FN9]

> FN9. The other two decisions upon which plaintiff relies, *Saldana v. Michael Weinig, Inc.*, 337 *N.J.Super.* 35, 51, 766 A.2d 304 (App.Div.2001) and *Congiusti v. Ingersoll-Rand Co.*, 306 *N.J.Super.* 126, 131-32, 703 A.2d 340 (App.Div.1997) both concern circumstances in which the trial judge excluded expert testimony as beyond the scope of the expert's report. In them, we held that exclusion was improper when there was an absence of a design to mislead, surprise or undue prejudice. They are thus distinguishable, as well.

V.

Our review of the foregoing facts, offered in support of plaintiff's position, satisfies us that the motion judge was correct in determining as a matter of law that plaintiff did not meet the context prong of the *Millison/Laidlow* test. We accept, for purposes of our

analysis, plaintiff's claims that Bayway Refining/Tosco had knowledge that excess cancer-causing fugitive emissions were emanating from its facility, thereby endangering its employees. We also accept plaintiff's assertion that there was a qualitative difference between Exxon's gold-plated turn-arounds and the maintenance practices adopted by Bayway Refining/Tosco. However, we cannot meaningfully distinguish this conduct from DuPont's knowing exposure of its employees to asbestos-conduct that the *Millison* Court found insufficient to overcome the workers' compensation bar. As the Court stated there:

> *9 In the face of the legislature's awareness of occupational diseases as a fact of industrial employment, we are constrained to conclude that plaintiffs-employees' initial resulting occupational diseases must be considered the type of hazard of employment that the legislature anticipated would be compensable under the terms of the Compensation Act and not actionable in an additional civil suit.

[*Millison, supra,* 101 *N.J.* at 179, 501 A.2d 505.]

Plaintiff seeks to avoid *Millison's* holding by arguing that Bayway Refining/Tosco engaged in deceptive conduct that removes its actions from the protections of workers' compensation. In that regard, plaintiff relies on the fact that morbidity and mortality studies were not circulated after Bayway Refining/Tosco took over the facility. However, she does not refute the fact, evident from the testimony of witnesses sympathetic to her position as well as others, that workers at the refinery were well aware of the presence of cancer-causing agents on the premises and of the concomitant need for protection from their effects. She is likewise unable to refute evidence of the availability of MSDS sheets to facility employees. Without doubt, the evidence produced in this case reveals the refinery to be a dangerous place. However, we do not find from plaintiff's evidence, viewed in a light most favorable to her position, that the employees were deceived with respect to that danger. We likewise find the competent evidence insufficient to support a claim that fugitive emissions were intentionally underreported or that any other form of regulatory deception occurred.

We thus conclude that plaintiff has failed to demonstrate that the conditions to which Kearney was exposed were more than a fact of life of industrial employment and beyond anything the Legislature intended the Workers' Compensation Act to immunize. We decline to address whether plaintiff's proofs met the conduct prong of the *Millison/Laidlow* test, finding such an analysis unnecessary to the resolution of this appeal.

Affirmed.

N.J.Super.A.D.,2008.
Kearney v. Bayway Refining Co.
Not Reported in A.2d, 2008 WL 2388415 (N.J.Super.A.D.)

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Sea Crest Enterprises, L.L.C. v. City of Elizabeth
N.J.Super.A.D.,2006.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,Appellate Division.
SEA CREST ENTERPRISES, L.L.C., Plaintiff-Appellant,
v.
The CITY OF ELIZABETH, Defendant-Respondent,
andThe Mayor and City Council of the City of Elizabeth, Defendants.
Sea Crest Enterprises, L.L.C., Plaintiff-Respondent,
v.
The City of Elizabeth, Defendant-Appellant,
andThe Mayor and City Council of the City of Elizabeth, Defendants.
Argued Oct. 17, 2005.
Decided Aug. 8, 2006.

Background: Designated redeveloper of a downtown redevelopment plan brought a breach of contract claim against city, and city counterclaimed. Following a bench trial, the Superior Court, Law Division, Union County, found that the city breached the contract between it and the redeveloper and awarded the redeveloper damages in the amount of $1,408,302. Parties appealed.

Holdings: The Superior Court, Appellate Division, held that:
(1) redeveloper's failure to disclose to city that the two principal owners of redeveloper's parent company had been involved in criminal activities in New York did not render agreement unenforceable based on fraud or misrepresentation;
(2) such criminal activities did not bar an award of damages to redeveloper; but
(3) redeveloper was not entitled to damages for lost profits.

Affirmed.

West Headnotes

[1] Municipal Corporations 268 ⇐339(1)

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k339 Validity and Sufficiency in General
268k339(1) k. In General. Most Cited Cases

Designated redeveloper's failure to disclose to city that the two principal owners of redeveloper's parent company had been involved in criminal activities in New York did not render downtown redevelopment agreement between redeveloper and city unenforceable based on fraud or misrepresentation; criminal prosecution in New York post-dated execution of the agreement, and there was no evidence of any misbehavior in the performance of this contract.

[2] Municipal Corporations 268 ⇐374(5)

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k374 Rights and Remedies of Contractors and Sureties Against Municipality
268k374(5) k. Damages. Most Cited Cases

Fact that the two principal owners of designated redeveloper's parent company had been involved in criminal activities in New York did not bar an award of damages to redeveloper in its breach of contract action against city relating to downtown redevelopment agreement; there was no evidence that the bid process, the evaluation of the proposals, or the performance of the contract was influenced at all by the criminal activities in New York.

[3] Municipal Corporations 268 ⇐374(5)

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k374 Rights and Remedies of Contractors and Sureties Against Municipality
268k374(5) k. Damages. Most Cited Cases

Designated redeveloper was not entitled to damages for lost profits in its breach of contract action against city, based on city's termination of downtown redevelopment agreement; redeveloper was an experienced builder, the venture was redeveloper's first foray into a major redevelopment project, and the numerous contingencies that had to be satisfied made the completion of the project with the anticipated profits too uncertain to form the basis for an award of damages.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-4727-00.

Marvin J. Brauth argued the cause for appellant/respondent Sea Crest Enterprises, L.L.C. (Wilentz, Goldman & Spitzer, attorneys; Mr. Brauth, of counsel and on the brief; Jeffrey J. Brookner, on the brief).

Janyce M. Wilson argued the cause for respondent/appellant City of Elizabeth (Ascione & Wilson, attorneys; Ms. Wilson and Lisa M. Black, of counsel; Joseph A. Ascione, on the brief).

Before Judges CUFF, PARRILLO and GILROY.

PER CURIAM.

*1 This appeal and cross-appeal [FN1] arise from a breach of contract claim by the designated redeveloper of a downtown redevelopment plan in the City of Elizabeth (the City). Following a bench trial, Judge Beglin found that the City breached the contract between it and the designated redeveloper and awarded the redeveloper damages. The City argues that there was insufficient evidence to support the finding of a breach and that no damages should have been awarded due to evidence of criminal activities by the redeveloper in another state. In its cross-appeal, the redeveloper argues that the trial judge erred when he failed to specifically enforce the contract or to award lost profits. We affirm.

FN1. Defendant City of Elizabeth filed a notice of appeal from the judgment on April 4, 2004 which was docketed as A-4109-03T1. Plaintiff Sea Crest Enterprises, L.L.C. filed a notice of appeal on the same day which was docketed as A-4094-03T1. The matters were calendared back-to-back; we consolidate them at this time for purpose of the opinion.

In 1989, the City Council of the City adopted a resolution designating a sixteen-acre parcel, known as the Midtown Redevelopment Tract, as a blighted area pursuant to *N.J.S.A.* 40:55-21.1 to -21.14. The resolution was amended and another area, the Price Street Tract, was added to the project and known as the Midtown Redevelopment Plan (Plan).

During the designation process, companies submitted proposals for selection as the redeveloper for the Plan. Plaintiff [FN2] Sea Crest Enterprises, L.L.C. (Sea Crest) was eventually chosen and entered into negotiations with the City to create a Redeveloper Agreement (Agreement) in which Sea Crest was designated the exclusive developer of the Plan for six months. The parties executed the Agreement on January 27, 1995. At the time of the designation, part of the land encompassed by the Plan was owned by New Jersey Transit Corporation (NJ Transit).

FN2. Plaintiff is a limited liability company owned by Sea Crest Construction Co. Sea Crest Construction Co. is owned by brothers Joseph and Fred Scalamandre. The Scalamandre brothers own a number of construction-related companies and have prior experience with public construction projects, although never as a redeveloper.

The Agreement provided a general outline for the redevelopment of the entire Redevelopment Area. It

identified the types of projects set for construction and refurbishing, including construction of parking facilities, market and senior housing, a new train station and other commercial properties, and the refurbishment of the historic train station.

Article III of the Agreement required the City to acquire title to all properties required for the Plan by specified dates, and to pay for and implement environmental remediation of the affected properties upon approval from the New Jersey Department of Environmental Protection (DEP). Sea Crest claimed these were conditions precedent to the beginning of construction.

The Agreement also designated the parking garage as the first project for completion. The garage was important because at the time much of the Plan site was surface parking area for NJ Transit use, and NJ Transit was hesitant to relinquish title to its property without confirmation that a new facility would be constructed to accommodate its passengers.

Financing for the Garage

The Agreement allocated the burden of financing the parking garage to both parties. Sea Crest was to obtain a mortgage and the City was to provide a loan. The City anticipated that the $3,300,000 loan would be obtained by an assignment of the City's Urban Enterprise Zone (UEZ) funds. Shortly after the Agreement was finalized, the City informed Sea Crest that the UEZ funds would not be available. Sea Crest claims that the City knew this was going to occur, but continued to represent that the funds were available. The City claims that even with the funds, Sea Crest could not complete the parking garage without further tax-exempt financing.

*2 Over two years later, the Elizabeth Development Company of New Jersey (EDC), a not-for-profit corporation, agreed to undertake Sea Crest's obligation to own and operate the parking facility during the financing period to secure the tax-exempt loans. This agreement was secured through efforts by both parties, including Hugh DeFazio, a consultant to Sea Crest.

A feasibility study for the construction of the garage was delivered eight months after the Agreement was signed. Although not required under the Agreement, the City had requested the study. Stanley I. Pilshaw, Sea Crest's manager for the Plan, testified that Sea Crest was busy in the post-agreement period while the parties were attempting to secure financing. Specifically, he stated that Sea Crest assembled a team to work on the Plan; negotiated with Amtrak to discuss the effects the new garage would have on the Amtrak Right-of-Way; and obtained preliminary and final site plan approval for construction of the garage.

The Agreement was amended after the change in financing was finalized. Most importantly, EDC became the owner of the garage, Sea Crest could no longer reserve parking spots for tenants, the City entered into a deficiency agreement directly with the EDC, and the City had to make the deficiency agreement a general obligation of the City.

Sea Crest obtained final site plan approval for the parking garage on October 11, 1996. The transaction financing closed in May 1997 and construction commenced in the summer of 1997. In the early stages of construction, Sea Crest notified the City that a forty-eight-inch water main that supplied water to the City of Newark was located under the garage and as a result redesign of the foundational support for the structure was required. Workers also encountered unsuitable soil and debris that affected the bearing capacity of elements of the foundation. In addition, in late 1997, inspections conducted by Sea Crest revealed cracks in structural concrete elements. Construction was forced to stop while these issues were addressed. As a result of the problems and subsequent integrity tests, Sea Crest learned that there was a severe structural defect which required further redesign and new components to construct the garage. In light of these structural problems, Sea Crest discharged its architectural and engineering firm.

In February 1999, the parking garage was issued a certificate of occupancy, twenty-one months following the availability of financing. The City alleged that the February 1999 completion date was thirty-seven weeks beyond the contracted completion date and in breach of the Agreement.

Other Aspects of the Plan

Market Housing

In 1995, plans for the Market Rate Housing Project commenced. The Agreement anticipated a minimum of 240 units. An architectural firm produced preliminary studies and designs for these units of housing. In April 1996, Sea Crest also submitted an application for financing under the Urban Homeownership Recovery Program (UHORP). In July 1996, UHORP issued Sea Crest a $1,000,000 grant and a $2,910,000 construction loan commitment. To retain UHORP financing, construction had to begin within nine months of the July 1996 approval. Sea Crest representatives testified they were informed that the City wanted to change the location of this housing project. The City testified that the housing could be constructed more quickly in a new area.

*3 Pilshaw testified that Sea Crest obtained new architectural studies to accommodate this request. He further testified that the City decided to remain at the original location after Sea Crest presented the negative consequences of relocation. Sea Crest stated that this was the cause for the delay in finalizing the market rate housing plans. Further delays occurred when plans were not approved by the City and EDC officials, a new architectural firm had to be secured, and the concept plan was changed from market rate housing to commercial use.

Once the City recognized that another round of State approval was required, the City decided to maintain the original plan. Peter Vander Schuyt, vice-president of operations for Sea Crest Construction, and Edward Kolling, an agent of EDC during the Plan, testified that by this time Sea Crest could not meet the UHORP deadline because the City had yet to obtain environmental remediation as required in the Agreement. Consequently the UHORP funding was lost.

Sea Crest's witnesses testified to similar delays, indecision, and change of focus in regard to the various other construction projects under the Plan, including the senior housing units, the Union County College Building, and the new and historic train stations. Sea Crest points to a letter sent by an employee of the City, which stated that the City would not assist Sea Crest in addressing the various funding, environmental, and structural issues at each of these sites because it had already decided to terminate its relationship with Sea Crest.

The City's witnesses testified that the numerous delays were a result of Sea Crest's ineptitude in reaching agreements with the necessary parties, such as NJ Transit, and developing feasible housing plans. The City also maintained that it was not responsible for subsidizing the short-falls in funding.

Termination of the Agreement

On November 22, 1999, the City served Sea Crest with a notice of breach. The City asserted that: Sea Crest failed to prepare marketing studies as required under the Agreement; failed to build model homes for the market housing by the 1995 deadline in the Agreement; and failed to provide monthly written reports regarding the status of governmental approvals. Sea Crest asserted that the City never complained of the alleged problems between the parties prior to the breach letter and also that the City was responsible for some of the significant delays in construction of the model homes. On August 22, 2000, the City Council adopted a resolution terminating the Agreement and withdrawing Sea Crest as the designated redeveloper for the Plan.

On October 6, 2000, Sea Crest filed an action in

lieu of prerogative writs claiming wrongful termination of the Agreement. Sea Crest also sought equitable relief, specific performance of the Agreement, and damages for breach of the Agreement. The City filed an answer in which it asserted that Sea Crest's complaint was barred by equitable estoppel and that the formation of the contract was founded on misrepresentations by Sea Crest. In its counterclaim, the City asserted that it had been injured by the failure of Sea Crest to timely perform its obligations under the Agreement, including the cost to obtain various parcels of real property, loss of tax revenues, payroll expenses and out-of-pocket expenditures for "counsel to the City in connection with the negotiation and supervision of the redevelopment project...." It also sought reimbursement of half of the cost incurred by the City for off-site improvements and the design and construction of a pedestrian plaza. In its amended counterclaim, the City asserted that the principals of Sea Crest misrepresented their character and qualifications and that the misrepresentations caused economic damage for which it sought compensation.

*4 Following a bench trial, Judge Beglin issued an oral opinion in which he entered judgment in favor of Sea Crest in the amount of $1,408,302. He also dismissed the counterclaim and amended counterclaim asserted by the City. Judge Beglin found that the Agreement imposed responsibilities on both parties. As an example, he found that Sea Crest was obliged to obtain preliminary and final site plan approvals, but the deadlines for the various site plan applications were measured from when the City completed the requisite property acquisitions, which obligation was not triggered until the concept plan was approved and the scope of environmental remediation was determined by DEP.

Judge Beglin found that Sea Crest met its initial obligation to produce marketing studies at its cost. The studies were forwarded to the City's Office of Policy and Planning. He also found that the City neither rejected nor questioned the studies, and he further found that "Sea Crest was entitled to assume the City found these initial market studies to be acceptable."Thus, he found the City's first asserted breach of the Agreement, failure to provide market studies, was without factual basis.

Judge Beglin also found that the City executed the Agreement that made construction of the parking garage a priority when it knew that the source of its subsidy, the UEZ grant, was not available. The City's search for alternative funding for its share of the garage was protracted and caused the alteration of the garage construction schedule. When alternative financing was procured, it required a substantial revision of the Agreement. Sea Crest produced an economic feasibility study of the garage to assist the new financing scheme, despite its belief that it was not obliged to do so.

Judge Beglin found that further delays were encountered after the financing was secured due to scheduling difficulties with Amtrak's overhead wire work, soil bearing capacity problems, debris and a forty-eight inch water main in the construction field, all of which required structural redesign. Cracks in pre-cast concrete elements of the garage delayed the project for another four to five months. Judge Beglin also found that in February 1999, when the garage was ready for occupancy, neither party sought to allocate fault or to revise or renegotiate the Agreement. Significantly, he found that many of the delays were caused by or exacerbated by the City. He found that the City lacked understanding of the enormity of the project and the impact its indecision or inaction had on Sea Crest. The judge found that "it would have been unreasonable for the City to expect [Sea Crest] to implement other Phases of the project until the key cornerstone of the initial plan was in place."Nevertheless, Sea Crest pursued other elements of the Plan, such as a concept plan for market rate housing and two office buildings. The judge found that Sea Crest applied for and obtained a construction loan commitment and a grant for subsidized market rate housing. He ascribed the delay in construction to the City which sought to relocate projects, decided to emphasize

commercial over residential development, and ultimately decided to return to the original concept. By that time, the funding obtained by Sea Crest was lost.

*5 Judge Beglin concluded that the City also breached its obligation to assist Sea Crest to secure financing and subsidies for the housing. The City's referral of Sea Crest to the local housing authority was an inadequate effort.

Judge Beglin also found that the insistence by NJ Transit to allow for a fifth track, or sleeve, in conjunction with the commercial development referred to as the Home Plate Building caused delays and that the City did not use its best efforts to dissuade NJ Transit of the scheme or to impress on the agency the negative impact on the Plan in general and the Home Plate project in particular. Without the City's assistance, Sea Crest could not market the building. The judge cited this dispute as a further example of the City's lack of understanding of its obligations under the Agreement. This lack of understanding hindered the cooperation between the City and Sea Crest that was required for the success of the Plan.

The judge also found that Article 7.01 of the Agreement allowed a sixty-day right to cure upon notice of a breach. Judge Beglin found that there was no factual basis for the first alleged breach, the absence of market studies. As to the second alleged breach, the failure to construct model homes, Judge Beglin found that the City's actions, including requests to relocate the site of the housing and rejection of the concept design for the housing, excused Sea Crest's performance of this obligation. Judge Beglin also found that failure to provide written monthly reports was without factual basis. He cited the large number of status meetings, written communications, and written agendas of meetings to support his finding.

Ultimately, Judge Beglin concluded that "the City lacked a basis to claim Sea Crest had breached the Redevelopment Agreement."Accordingly, he found the August 22, 2000 resolution terminating the Agreement and withdrawing the redeveloper designation from Sea Crest was arbitrary and unreasonable because it lacked factual basis. The judge also found that the City breached the Agreement and that Sea Crest was entitled to relief.

Following termination of the Agreement, the City learned that Joseph and Fred Scalamandre, principals of Sea Crest, pled guilty to charges of tax evasion and paying members of the Luchese crime family to alleviate their obligation to pay union dues on a construction project in New York. At trial, the City argued that the Agreement was void *ab initio* because neither Scalamandre brother disclosed the charges.

As to these contentions, Judge Beglin held that the convictions occurred after Sea Crest was designated the exclusive redeveloper. Therefore, the information could not have been disclosed prior to execution of the Agreement. He agreed, however, that the moral character of a contractor was a relevant concern to a public entity, and that the convictions affected the integrity and moral responsibility of the Sea Crest principals to such an extent that Sea Crest could not obtain specific performance of the Agreement.

*6 In considering damages, Judge Beglin held that Sea Crest was not eligible for lost profits because its anticipated profits were too speculative because it was a new venture. Relying principally on a decision of this court, *Bell Atlantic v. P.M. Video Corp.*, 322 *N.J.Super.* 74, 730 A.2d 406 (App.Div.), *certif. denied*,162 *N.J.* 130, 741 A.2d 98 (1999), Judge Beglin found that the law requires reasonable certainty to recover lost profits and the evidence failed to establish that certainty. He noted that Sea Crest had never engaged in a redevelopment project before the failed Elizabeth venture. He also observed that the Agreement was multifaceted, complex and contingent on obtaining satisfactory agreements with various agencies, including NJ Transit. Many contingencies had to be fully satisfied in order for the project to succeed. Furthermore, market

conditions were untested. Thus, Judge Beglin concluded that "[i]t is not the newness, itself, in the final analysis that defeats the claim, it is the speculative and unproven aspects of the totality of the undertaking."

On the other hand, Judge Beglin held that the City was required to reimburse Sea Crest for the cost and expenses it incurred, other than for the garage, up to the point of termination. He found that Sea Crest proved that it incurred costs and expenses in the total amount of $1,408,302. In doing so, he accepted the testimony and exhibits prepared by Sea Crest's expert Paul Pocalyko.

[1][2] We address the City's appeal first. Although the City raises five arguments, the overriding contention is that Sea Crest is not entitled to damages due to the conduct of the Scalamandre brothers in New York. The City does not take issue with the various findings about its failure to perform its responsibilities and obligations under the Agreement.

The Scalamandre brothers are the principal owners (98%) of Sea Crest Construction, the parent company of Sea Crest, L.L.C. They have numerous other companies which operate throughout New York and New Jersey. While conducting business with their other companies in New York, the Scalamandre brothers were involved in criminal conduct in connection with bribes to alleviate their obligation to pay union dues. The City claims that it put Sea Crest on notice that a heightened standard of moral integrity was a material term of the contract and that not disclosing the above activities constituted misrepresentation and fraud. The City admits that no standard existed to compel the Scalamandre brothers to disclose their unrelated illegal activities in New York.

Breach of a material term of a contract allows the non-breaching party to rescind the contract and prevent the breaching party from recovering on that contract. *Medivox Prods. Inc. v. Hoffman-LaRoche, Inc.*, 107 *N.J.Super.* 47, 58-59, 73, 256 A.2d 803 (Law Div.1969). In determining whether a breach is material the following factors should be considered:

> (a) the extent to which the injured party will be deprived of the benefit which he [or she] reasonably expected;
>
> *7 (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he [or she] will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his [or her] failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
>
> [*Restatement (Second) of Contracts*, § 241 (1981).]

A material term is incorporated into a contract when it is either explicitly stated in the contract or implicitly created during formation of the contract.*Doyle v. Northrop Corp.* 455 *F.Supp.* 1318, 1335 (D.N.J.1978). The City claims that a material term regarding heightened moral integrity was implicit in its contract negotiations with Sea Crest.

The City relies on its actions prior to the acceptance of Sea Crest's proposal for redevelopment to demonstrate the creation of a heightened level of integrity as a material term of the contract. It points to the fact that it would not consider Sea Crest's proposal until DeFazio was removed as a principal of Sea Crest. Sea Crest claims that the City's refusal to deal with DeFazio did not imply a duty of disclosure.

DeFazio had previously been involved in a failed business venture, which led to litigation. To ensure consideration of their proposal, Sea Crest asked De-

Fazio to step down from his position in the company and DeFazio complied. Nevertheless, DeFazio's involvement in the Plan and execution of the Agreement did not end.

DeFazio was a constant, authorized presence during negotiations and in post-Agreement investment deals. He was an integral part of the relationship between Sea Crest and the City. The City was aware of DeFazio's involvement and conducted much of its business directly with him. Further, DeFazio met directly with the City officials after the contract to discuss strategy to entice investors to the Plan and in subsequent meetings with those potential investors. The City does not dispute that DeFazio remained as a consultant, but it still argues that its insistence on his removal from the company before considering the proposal created a material term of the contract regarding integrity. The City's behavior, however, suggests that it was interested more in form than substance. In fact, its continual involvement with DeFazio belies its present assertion that the principals of Sea Crest must be blameless.

The Agreement does not expressly state that it expected or insisted on a heightened standard of integrity. On the other hand, the City is directed by various statutes governing public contracts to deal only with responsible bidders. *See N.J.S.A.* 40A:11-1 to -51 (Local Public Contracts Law); *N.J.S.A.* 40A:12A-1 to -73 (Local Redevelopment and Housing Law). Responsibility includes moral integrity of the prospective contractor in addition to the capacity to perform the work. To that end, a public body may determine those with whom it chooses to do business and may disqualify those whose conduct is not conducive to advancing the public interest. *Trap Rock Indus. v. Kohl,* 59 *N.J.* 471, 284 A.2d 161 (1971), *cert. denied,*405 U.S. 1065, 92 *S.Ct.* 1500, 31 *L. Ed.*2d 796 (1972).

*8 Here, however, there was no information to disclose at the time Sea Crest submitted its proposal, negotiated the terms of the Agreement and executed the Agreement. The criminal prosecution in New York post-dated execution of the Agreement, and there is no evidence of any misbehavior in the performance of this contract. Furthermore, the City's insistence on the removal of DeFazio from the official roster of the company, but its continued dealings with him throughout the performance of the Agreement, suggests a post hoc rationalization to avoid its obligation under the Agreement.

The City's reliance on *Jewish Center of Sussex County v. Whale,* 86 *N.J.* 619, 432 A.2d 521 (1981) and *Jewish Center of Sussex County v. Whale,* 172 *N.J.Super.* 165, 411 A.2d 475 (App.Div.1980)(*Jewish Center II*), in support of its position that Sea Crest had an obligation to disclose its criminal conduct is misplaced.

Unlike *Jewish Center II,* in which the disqualifying charges were known to the applicant when he applied for the position, in this case, the charges postdated the execution of the Agreement. In addition, the activities in New York did not directly relate to the contract with the City. They also did not affect Sea Crest's faithful fulfillment of its obligation under the contract.

It is clear that some nexus must exist between the criminal activity and the contract currently in dispute to find fraud or misrepresentation. *Manning Eng'g, Inc. v. Hudson County Park Comm'n,* 74 *N.J.* 113, 142, 376 A.2d 1194 (1977). In *Manning,* the defendant learned that the plaintiff had been awarded the contract in question in return for its president's role as a conduit for an illegal 'kickback,' associated with an engineering project in the defendant's county. *Id.* at 117-18, 376 A.2d 1194.In addressing the need for honesty in public contracts, the Court found it " 'a matter of grave public concern that there be absolute honesty in the procuring of a public contract.' " *Id.* at 139, 376 A.2d 1194 (citing *S.T. Grand, Inc. v. City of N.Y.,* 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 *N.E.*2d 105, 108 (N.Y.Ct.App.1973) (quoting *Jered Contr. Corp. v. N.Y. City Trans. Auth.,* 22 N.Y.2d 187, 292 N.Y.S.2d 98, 239 *N.E.*2d 197, 200-01 (N.Y.Ct.App.1968)). The Court found the plaintiff

appropriately rescinded the contract because procurement of that contract was "permeated with 'corrupting influences.' " *Id.* at 140, 292 N.Y.S.2d 98, 239 N.E.2d 197.The Court further found that

> "[a] bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction. * * * How closely a bargain must be connected with an illegal purpose in order to make the bargain illegal is a question of degree. * * * The line of proximity varies somewhat according to the gravity of the evil apprehended."
>
> [*Id.* at 141, 292 N.Y.S.2d 98, 239 N.E.2d 197 (quoting 6A *Corbin on Contracts* § 1529, n. 62 (1962) (citation omitted).]

Here, there is no connection between the criminal acts in New York and the contract between plaintiff and defendant, nor does the City allege such a connection. In *Manning*, the party accepting bribes did not directly determine the award of the contract, but he used his influence to secure the contract for the plaintiff firm. *Id.* at 141, 376 A.2d 1194.Because there is not even a remote connection between the Scalamandre brothers' criminal activities and the procurement or performance of the Agreement, no obligation to disclose the Scalamandre brothers' criminal activities in New York existed, and the contract may not be deemed illegal and, therefore, unenforceable based on fraud or misrepresentation. Nor does the criminal activity of the Scalamandre Brothers bar an award of any damages to Sea Crest.

*9 The City grounds its argument that the criminal activity of Sea Crest's parent corporation's principal officers bars any recovery on two cases: *Polyvend v. Puckorious*, 77 Ill.2d 287, 32 Ill.Dec. 872, 395 *N.E.*2d 1376 (Ill.1979), *app. dism.*,444 U.S. 1062, 100 *S.Ct.* 1001, 62 *L. Ed.*2d 744 (1980) and *Brown Construction Trades, Inc. v. United States*, 23 *Cl.Ct.* 214 (1991).*Polyvend* is not apposite to this issue because it concerned the rejection of a bid on moral integrity grounds. *Polyvend, supra*, 32 Ill.Dec. 872, 395 *N.E.*2d at 1378.*Brown* is also not instructive because the contractor's claim for damages was rejected because the criminal convictions of the contractor's officers were directly related to conduct during the performance of the contract. *Brown, supra*, 23 *Cl. Cl.* at 215. That is not this case. Furthermore, the City's argument ignores the rule announced in *Manning, supra*, 74 *N.J.* at 142, 376 A.2d 1194.As previously discussed, the Court recognized that collateral or remote illegal transactions will not bar the recovery of damages for breach of contract, particularly when there is no hint that the contract at issue was the fruit of corrupting influences. *Id.* at 140-41, 376 A.2d 1194.While the Court held that Manning Engineering was barred from any recovery of damages for breach of contract because the contract was awarded in a pervasive atmosphere of trafficking in public contracts and the principal of the engineering firm was inextricably involved in that behavior, *id.* at 140-42, 376 A.2d 1194, that is not the situation in this case. Here, there is no evidence that the bid process, the evaluation of the proposals, or the performance of the contract was influenced at all by the criminal activities of the Scalamandre brothers in New York. Therefore, Sea Crest was not barred from recovering damages in this case.

We are also persuaded that the trial judge properly accepted the testimony of the Sea Crest damages expert, Paul Pocalyko, as well as the various exhibits on which he relied. Pocalyko listed twenty-nine documents, upon which he relied to form the basis of his opinion. The City claims the report is flawed because two of the documents listed were too general, and Sea Crest did not provide further identification of them or detail about them. The City finds the documents identified as "Cash Flow Summaries" and "Project Cost Worksheets" problematic. As a preliminary matter, this issue was not raised at trial and we consider any evidentiary error in accordance with the plain error standard. *R.* 2:10-2.

The City's contention is without merit. First, Judge Beglin stated that he was relying on the experts' re-

ports in this respect because of the voluminous nature of the underlying data. He stated, "part of the opinion rule in allowing expert testimony is to recognize there are areas in cases where the finder of fact is aided by what the witness is providing them."The judge used these reports, summaries or calculations, to aid him in understanding the evidence, which is an appropriate use under *N.J.R.E.* 702. All of the underlying evidence was also admitted as evidence, reviewed by the judge and made available to plaintiff during discovery. Therefore, defendant's claim that the expert testimony and report should have been excluded on this basis fails.

*10 The City also argues that it was presented with an updated report the day before plaintiff's expert was scheduled to testify, and was, therefore, prejudiced by the late submission. All of the documents referenced in the report or from which Pocalyko derived information were produced during discovery. Moreover, Sea Crest produced the late submission of the amended report at the request of the City and in response to the submission of its expert report. Further, the trial judge permitted defendant to show that the late submission caused prejudice, which it did not do. Without a showing of prejudice, the judge could properly permit the admission of the report and the testimony related to it. Therefore, exclusion on this ground would not have been appropriate.

[3] Finally, we address the argument advanced by Sea Crest that Judge Beglin erred by denying damages for lost profits. We disagree.

In *Bell Atlantic v. P.M. Video Corp., supra,* we examined the continued vitality of the new business rule. Other courts, most notably the Court of Appeals for the Third Circuit, predicted that the New Jersey Supreme Court would depart from the "new business rule" that precludes an award of profits to a new and untested business venture. *P.M. Video, supra,* 322 *N.J.Super.* at 98-99, 730 A.2d 406.This court noted that there was insufficient authority to compel the conclusion that the "new business rule" was not the governing law.*Id.* at 99-100, 730 A.2d 406.*Accord, RSB Lab. Servs., Inc. v. BSI Corp.*, 368 *N.J.Super.* 540, 560, 847 A.2d 599 (App.Div.2004). We also held that P.M. Video was involved with "new, highly innovative products whose reception by the public was doubtful, to say the least."*P.M. Video, supra,* 322 *N.J.Super.* at 101, 730 A.2d 406.We affirmed the trial court determination that the proofs were too speculative to be submitted to a jury. *Ibid.*

Here, Judge Beglin found that Sea Crest was an experienced builder. He also found that this venture was its first foray into a major redevelopment project. Moreover, the numerous contingencies that had to be satisfied made the completion of the project with the anticipated profits too uncertain to form the basis for an award of damages. There is no factual or legal basis to disturb this ruling.

Finally, the City contends that it was entitled to damages on its counterclaim and amended counterclaim. These claims asserted that Sea Crest breached the agreement and that the City was entitled to recover the expenses incurred by it during the course of the project and the lost revenue incurred due to the delays. Judge Beglin found, however, that the City, rather than Sea Crest, had breached the Agreement. This ruling is well-supported by the record and does not warrant further discussion in this opinion. *R.* 2:11-3(e)(1)(A) and (E).

We, therefore, affirm the February 17, 2004 judgment in favor of plaintiff Sea Crest Enterprises, L.L.C. in all respects.

N.J.Super.A.D.,2006.
Sea Crest Enterprises, L.L.C. v. City of Elizabeth
Not Reported in A.2d, 2006 WL 2590327 (N.J.Super.A.D.)

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NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Civil Court, City of New York,
New York County.
Gary SUSON, Plaintiff,
v.
NYP HOLDINGS, INC., News America Incorporated, Cynthia R. Fagan, Murray Weiss, Stephanie Gaskell, and John Does 1 and 2, Defendants.
No. 300605TSN2006.

March 31, 2008.

Jared M. Lefkowitz, Law Office of Jared M. Lefkowitz, New York, for Plaintiff.

Slade R. Metcalf, Jason P. Conti, Hogan & Hartson L.L.P., New York, for Defendant.

SHLOMO S. HAGLER, J.

*1 This action forces us to reflect on the unforgettable and unforgivable tragedy that will always be etched in our collective memories, "9/11." This tragedy has had a tremendous human toll for the families of the fallen victims, but it also produced champions who saved the lives of tens of thousands of people trapped in the burning towers. These heroes, who risked their health and even their lives, deserve our deepest respect, admiration and praise. Among these heroes were brave uniformed officers from the Fire Department, Police Department and the Courts. Three valiant court officers, Captain William Harry Thompson, Thomas E. Jurgens, and Mitchel S. Wallace, sadly perished in the inferno, and were assigned at some point in their careers to this very courthouse at 111 Centre Street where a plaque is dedicated to their memories.

Motion Practice

In this round of voluminous motion practice, plaintiff Gary Suson ("plaintiff" or "Suson") moves for an order pursuant to CPLR § 3212, granting him partial summary judgment as to "liability" and "precluding the defendants from offering certain testimony or evidence at trial."Defendants NYP Holdings, Inc. and News America Incorporated ("Post" or "New York Post"), Cynthia R. Fagen ("Fagen"), Murray Weiss ("Weiss") and Stephanie Gaskell ("Gaskell") separately move for an order pursuant to CPLR § 3212, granting defendants summary judgment dismissing the complaint. Plaintiff also cross-moves for an order "granting sanctions for discovery violations pursuant to CPLR § 3214 and 3126."Plaintiff and defendants oppose the respective motions and cross-motion. The motions and cross-motion are consolidated herein for disposition.

Procedural History

Complaint/Answers

Plaintiff commenced this action in Supreme Court, New York County, on March 3, 2006 by filing of a summons and verified complaint. The parties then entered into a stipulation wherein defendants' counsel accepted service of a Supplemental Summons and Amended Verified Complaint dated March 23, 2006 that contained minor revisions. (Exhibit "1" to the Defendants' Motion). The Amended Complaint alleged four libel claims (First through Fourth Causes of Action) and a claim for intentional infliction of emotional distress (Fifth Cause of Action) stemming from four articles published in the New York Post in August and September 2005 ("Post Articles"). Defendants served separate verified answers to the amended complaint on April 12, 2006. (Exhibit "2" to the Defendants' Motion). Defendants asserted affirmative defenses including that the complained-of articles published in the New York

Post are "substantially true" and plaintiff, as a "public figure," cannot prove "actual" or "constitutional" malice by clear and convincing evidence. (Answers at ¶ 97 & 101, Second and Sixth Affirmative Defenses).

Transfer from Supreme Court to Civil Court

After several preliminary conferences, Justice Richard Braun, J.S .C., by order dated October 17, 2006, transferred this action from Supreme Court to Civil Court pursuant to CPLR § 325(d). (Exhibit "4" to Defendants' Motion).

Discovery

*2 The parties have aggressively pursued discovery which is now complete. Specifically, defendants conducted the deposition of plaintiff on March 13, 2007, March 15, 2007 and March 30, 2007. (Exhibit "5" to Defendants' Motion).

Defendants also conducted the depositions of ten non-party witnesses who either served as sources for the Post Articles, or who had specific information regarding Suson and/or the Museum. Defendants took the depositions of: (1) Michael Coan, currently a Deputy Chief in the New York City Police Department (the "NYPD"), but also the former Executive Officer in the NYPD's Information Division in August/September 2005, and an alleged source for the Post Articles (Exhibit "6" to Defendants' Motion); (2) Francis X. Gribbon, the deputy commissioner for public information for the New York City Fire Department ("FDNY") and an alleged source for the Post Articles (Exhibit "7" to Defendants' Motion); (3) Michael Block, a partner with the law firm of Sullivan Papain Block McGrath & Cannavo P.C., the general counsel for the Uniformed Firefighters Association ("UFA") for more than 20 years, and an alleged source for the Post Articles ("Block EBT," Exhibit "8" to Defendants' Motion); (4) Rudy Sanfilippo, the former Manhattan Trustee of the UFA, a friend of Suson and an alleged source for the Post Articles (Exhibit "9" to the Defendants' Motion); (5) Kevin Gallagher, the former President of the UFA ("Gallagher EBT," Exhibit "10" to the Defendants' Motion); (6) Michael Bellone, a former rescue and recovery worker at Ground Zero and a friend of Suson (Exhibit "11" to Defendants' Motion); (7) Stephen Cassidy, the current President of UFA ("Cassidy EBT," Exhibit "12" to Defendants' Motion); (8) Brian Bonsignore, a retired FDNY Lieutenant and friend of Suson's (Exhibit "13" to Defendants' Motion); (9) Thomas P. Butler, President of Butler Associates, LLC, the spokesman for the UFA since approximately 1996, and an alleged source for the Post Articles (Exhibit "14" to Defendants' Motion); and (10) Peter L. Gorman, the former President of the Uniformed Fire Officers Association ("UFOA") ("Gorman EBT," Exhibit "15" to the Defendants' Motion).

Plaintiff conducted the depositions of Post reporter Fagen on April 24, 2007 and May 8, 2007; Post reporter Weiss on May 16, 2007; and former Post reporter Gaskell on September 19, 2007. In addition, on June 12, 2007, plaintiff conducted the depositions of Jesse Angelo, the Post's Metropolitan Editor, Gregg Birnbaum, the Post's Political Editor, and David Boyle, the Post's former Photo Editor.

Factual Background

Suson Begins Photographing Ground Zero

Suson is an "actor, writer and photographer." (Amended Complaint at ¶ 13). When the attacks occurred on the World Trade Center on September 11, 2001, Suson began photographing the rescue and recovery efforts at Ground Zero. A day later, Suson created a website, September Eleven.net, to publish his photos to the world. Almost immediately, Suson garnered national and international media coverage, including Fox, New York 1, CNN, CBC, NBC, Court TV, BBC and ABC (Exhibit "8" to plaintiff's Motion and Exhibits "22-24, 28, 30 and 31" to Defendants' Motion) for his "stunningly poignant photographs" that documented the rescue and recovery

efforts at Ground Zero. (Amended Complaint at ¶ 16).

The April 15, 2002 Letter

*3 During his time spent at Ground Zero, Suson became friendly with certain fire fighters and other recovery personnel. Suson befriended Rudy Sanfilippo, the Manhattan Trustee of the UFA, who had survived both tower collapses. Sanfilippo had seen the photos that Suson posted on his website and admired Suson's work. Since Sanfilippo was impressed with Suson's photos, he allegedly offered to make Suson the "Official Photographer" of the UFA at Ground Zero on three conditions: (1) Suson would not photograph any body parts, (2) no images would be released until the recovery was over or until permission was granted, and (3) proceeds from the sale or publication of the photos, if any, would be shared with the UFA's charities. (Amended Complaint at ¶ 21). Suson alleges that this oral agreement was memorialized in a letter dated April 15, 2002 (Exhibit "10" to plaintiff's Motion) that was signed by both Peter Gorman, president of UFOA and Kevin B. Gallagher, President of UFA as follows:

We are writing this letter of introduction for Gary Suson, a professional photographer who was enormously supportive of our members who were working at the World Trade Center site after September 11th.

We permitted Mr. Suson access to the site and to our members who were engaged in rescue and recovery operations. He assembled over many months an extraordinary collection of photographs of the rescue/recovery and other workers at the site.

We hope that you find these photographs are as special and moving as we do. In the event that Mr. Suson receives any proceeds for the sale or publication of these photographs, he has made arrangements to share his earnings with the Widows and Childrens Fund that we administer on behalf of families of firefighters and fire officers lost in the line of duty.

We appreciate your attention to Mr. Suson's work.

However, Gallagher, who was president from 1996 to July 2002, testified that he did not know Suson, he did not appoint him the official photographer, and the UFA has never had an official photographer. (Gallagher EBT at 14, 22, 52-53, 61-66). Gallagher also disputed that he signed the April 15, 2002 letter and the signature on the letter is an unauthorized stamp of his signature.*(Id.* at 54, 56, 58, 107). The other signatory to the letter, Gorman, testified that he told Suson that he never authorized him to be the official photographer for the UFOA and that it never had an official photographer. (Gorman EBT at 12-13, 49-50, 55-56, 72). On April 30, 2005, Block, the general counsel of the UFA, told Fagen that the UFA never had an "official photographer" and the April 15, 2002 letter did not authorize such a designation. (Block EBT at 19-20, 43-46, 81-82). On the same date, Block sent Suson a "cease and desist" letter demanding that Suson "immediately cease and desist from referring to yourself or representing yourself as the "official photographer" for the Uniformed Fighters Association in any context."(Exhibit "27" to Defendants' Motion).

*4 Suson was given "virtually unfettered access to the recovery site and access to officers on the scene [at Ground Zero]." (Complaint at ¶ 20). Suson took many stunning photos that capture the essence of the herculean rescue and recovery efforts that were often undertaken by dedicated firefighters. It vividly displays the triumphant spirit and grief of the rescue workers. (Exhibit "36" to Plaintiff's Motion).

Barnes & Noble Book Deal/CNN Licensing Agreement

As a result of his notoriety and reputation as a noted photographer of the 9/11 rescue efforts, Barnes & Noble Publishing, Inc. ("Barnes &

Noble") offered Suson a book deal. Suson agreed, *inter alia,* to provide Barnes & Noble with 225 "high-quality photographs of Ground Zero and other images related to the attack on the World Trade Center" and "4,000 words about the photographs in the book."(Exhibit "26" to Defendants' Motion). Suson received a $55,000 advance from Barnes & Noble. (Amended Complaint at ¶ 28). The Suson book, entitled "Requiem: Images of Ground Zero," was published and released in September, 2002. (Amended Complaint at ¶ 32). Suson engaged in several interviews with the media to promote his book. (Exhibit "28" to Defendants' Motion). Suson also licensed certain photographs to CNN for $6,000. (Exhibit "32" to Defendants' Motion).

Minimal Donations to UFA's Charity

On August 30, 2005, Suson provided Fagen with a "thank you" note from the UFA regarding a $100 donation "from book sales," along with 9 checks written by various individuals to the UFA's Widows and Children's Fund related to their purchase of Suson's book. Those sums added up to $525 in total donations, which seemed to Fagen to be a "nominal amount." (Affidavit of Cynthia R. Fagen in support of Defendants' Motion, sworn to on December 5, 2007 ["Fagen Affidavit"] at ¶ 24, and Exhibit "8" attached thereto). The proceeds of Suson's book did not go to 9/11 relief efforts. (*Id.,* and Exhibit "21" annexed thereto). Other than the above $525, Suson did not and has not provided proof that the $61,000, or a portion thereof, he received for his photographs at Ground Zero was donated by him to the UFA's Widows and Children's Fund. This was not meaningfully disputed by Suson and was confirmed by UFA's current president and general counsel. (Cassidy EBT at 88-90; Block EBT at 82-83).

Suson Opens Ground Zero Museum Workshop

In late August, 2005, Suson opened the Ground Zero Museum Workshop ("Museum") to the media for a preview to display his photographs, videos and remnants from Ground Zero. (Amended Complaint at ¶ 41). He also issued a press release touting the opening of his Museum. (Exhibit "1" to the Fagen Affidavit). At about that time, a Post photographer, Catherine Nunce, took photographs at the Museum which included a teddy bear, a pair of mangled eyeglasses and their case, a rag doll, a make-up case, a cellular telephone, and a Polaroid photograph depicting two individuals. (Exhibit "2" to the Fagen Affidavit). The Museum opened to the public on September 7, 2005.

The August 31, 2005 Article

*5 After reviewing the press release and the photographs from the Museum, Fagen began ground work for a potential article on Suson. Fagen believed that the "appearance of these Ground Zero items in a Museum started by a civilian raised several questions, including how Suson obtained the items, who gave him permission to obtain the items, and whether or not anyone had attempted to return them to their owners."(Fagen Affidavit at ¶ 14). Fagen next went to the Museum's website and reviewed Suson's "Introduction" section where he described the items that were displayed as follows:

Back in New York, I went to my storage facility on a Sunday afternoon to retrieve some items but before I left, something caught my eye. It was a plastic box of artifacts' from Ground Zero. Artifacts is a bit of a fancy word for what can really be deemed as junk sitting in the garbage pile' at Ground Zero during the recovery. The plastic box contained an odd assortment of items that I retrieved from a larger dumpster just on the outskirts of the Ground Zero site.... I didn't see what some would deem garbage." I saw remnants of another period; artifacts that would one day be appreciated and speak volumes to its viewers. The items did in fact hit home for me because I knew someone owned them: they meant something to someone and represented the humanity that existed up high in those beautiful towers.... I saw a muddy doll, a shattered make-up case and a woman's broken busi-

ness shoe.... I loaded up what I could in a plastic bag, informed a Chief that I had taken some garbage' (he chuckled) and brought them home.

(Exhibit "4" to the Fagen Affidavit).

Fagen also caused a search of past articles regarding Suson and other individuals charged with crimes or implicated in incidents where items were removed from Ground Zero. (Fagen Affidavit at ¶ 17, Exhibit "5" annexed thereto). She then contacted Butler, the long-time spokesperson for the UFA, who she previously relied upon as a reliable source. Butler told Fagen to contact Block, the UFA's general counsel which she did. Fagen next interviewed Suson for the article. Suson's conversation led to Fagen contacting the deputy commissioner for public information for the FDNY, Francis X. Gribbon ("Gribbon"). Gribbon informed Fagen that "No one was authorized to take artifacts whether they were personal belongings or dangling from a dumpster."("Fagen Affidavit at ¶ 27).

Fagen collaborated with Weiss, who conducted his own independent investigation for the article. Weiss contacted Michael Coan ("Coan"), who was then the Executive Officer with the Public Information Division at the NYPD, and a reliable source in the past. Coan told Weiss that Ground Zero was a crime scene and removing items from it could be illegal. (Affidavit of Murray Weiss in Support of Defendants' Motion for Summary Judgment, sworn to on December 6, 2007 ["Weiss Affidavit"] at ¶ 10). Weiss spoke to a "confidential source" in the FDNY, who he had relied upon numerous times in the past and was an accurate source of information, that informed him Suson "was not authorized or sanctioned to remove items from Ground Zero."(Weiss Affidavit at ¶ 15). Finally, Weiss relied on Kenneth Maxwell ("Maxwell"), the former head of the FBI's Counter terrorism Division in the New York Field Office, and was a an important and reliable source for Weiss' book, "The Man Who Warned America." Maxwell reiterated the collective opinion that "Ground Zero was considered the world's greatest crime scene" and, therefore, it "could be a crime to possess items removed from Ground Zero."(Weiss Affidavit at ¶ 16).

*6 Gregg Birnbaum, the Post's Political Editor, was Fagen's supervisor and assisted her throughout the investigation and editing of the first article. Fagen then wrote an article partly headlined "9/11 Cam Scam," which was published in August 31, 2005 issue of the Post (Exhibit "26" to Plaintiff's Motion).

The September 1, 2005 Article

Fagen began to obtain reaction to the first article from family members of victims of the 9/11 attacks. Fagen first spoke to Anthony Gardner ("Gardner"), a spokesperson for the Coalition of 9/11 families, who lost his brother on 9/11. Gardner told Fagan that "items removed from Ground Zero, including those Suson removed, should be returned to the Port Authority to be included in an inventory of artifacts."(Fagen Affidavit at ¶ 36). Fagen then spoke to another victim's family member, Patricia Reilly, who also reiterated Gardner's thoughts and noted that "anyone exhibiting [these items] should be sanctioned by the memorial foundation."(*Id.* at ¶ 37). Fagen also obtained Suson's reaction who told her to contact Lee Ielpi ("Ielpi"), one of the many firefighters that supported him, and who had lost his firefighter son in the 9/11 attacks. Fagen claims Ielpi told her that "should he [Suson] have turned them [the items] over, yeah probably."(*Id.* at ¶ 2). Ielpi, however, states that Fagan misrepresented the statement attributed to him which was merely a hypothetical scenario which did not apply to Suson. (Ielpi Affidavit, sworn to on December 31, 2007, at ¶¶ 4-5, Exhibit "D" to Plaintiff's Cross-Motion and in Opposition to Defendants' Motion).

On August 31, 2005, Weiss again contacted a confidential source in the FDNY, which he relied on several times in the past and was known to be accurate. The confidential source informed Weiss that the FDNY had dispatched two marshals to investigate the Museum, but they could not gain entry. The marshals planned to return to the Museum on the

next day. (Weiss Affidavit at ¶ 19).

Fagen then wrote a follow-up article headlined "2nd Hit on 9/11 Photog Grave-Rob' Museum" which was published in the September 1, 2005 issue of the Post. (Exhibit "27" to Plaintiff's Motion).

The September 2, 2005 Article

Fagen's next article focused on Mayor Bloomberg's response to the Post's first two articles about Suson. On September 1, 2005, Gaskell asked Mayor Bloomberg at a press conference the following questions regarding Suson:

Mayor-I'd like to ask this of you and the commissioner-and it's the question I asked you yesterday. This photographer that's claiming to be the official FDNY photographer. What's your reaction to this ... ?

Mayor Bloomberg answered:

It's a disgrace. I can answer for everybody. I don't know what you want-what you want us to say. It's a disgrace. You know, there are always some sick people that are trying to exploit others, other people's tragedies and I just never wanted to give them any more publicity. I think that makes it worse.

*7 (Gaskell Affidavit in support of Defendants' Motion, sworn to on December 6, 2007 ["Gaskell Affidavit"] at ¶ 13).

Gaskell attempted to contact Suson for his reaction to Mayor Bloomberg's comments. Gaskell initially was unable to do so, but then incorporated his statements in a later version of the third article. Gaskell wrote and Fagen contributed to the article headlined "Mike Rips Sept. 11 cur'ator" and later re-headlined, "9/11 cur'ator [line break] Mike rips sick' scavenger" which was published in the September 2, 2005 issue of the Post. (Exhibit "28" to Plaintiff's Motion).

The September 28, 2005 Article

On September 27, 2005, Fagen learned that Michael Bellone ("Bellone"), who had worked in the recovery effort at Ground Zero and was the founder of a 9/11 charity, Trauma Response Assistance for Children ("TRAC"), had been arrested by FDNY marshals for possession of certain FDNY items. Fagen believed that Bellone was a friend of Suson and they worked together at Ground Zero. Suson listed TRAC as one of the six charities that his Museum would support. (Fagen Affidavit at ¶ 53, Exhibit "I" annexed thereto). Fagen then wrote a fourth article regarding Bellone and his connection to Suson and his Museum headlined "9/11-charity big busted" which was published in the September 28, 2005 issue of the Post. (Exhibit "29" to Plaintiff's Motion).

Summary Judgment

Plaintiff and defendants seek summary judgment. Summary judgment is particularly favored in deciding libel cases. *Immuno AG. v. J. Moor-Jankowski,* 77 N.Y.2d 235 (1991), *cert denied,* 500 U.S. 954 (1991); *Khan v. New York Times Co., Inc.,* 269 A.D.2d 74 (1st Dept 2000).

Standard for Defamation Action

To establish a cause of action for defamation, plaintiff must demonstrate the following elements:

1)a false statement on the part of the defendants concerning the plaintiff;

2)published without privilege or authorization to a third party;

3)with the requisite level of fault on the part of the defendants; and

4)causing damage to plaintiff's reputation by special harm or defamation per se.

See *Restatement (Second) of Torts* § 558; *Dillon v.*

City of New York, 261 A.D.2d 34, 38 (1st Dept 1999).

CPLR § 3016(a) requires that the alleged false and defamatory words be specified with particularity in the complaint. The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made. (Citations omitted)."*Dillon v. City of New York,* 251 A.D.2d at 38.

Plaintiff sets forth 14 statements in the four Post Articles that he alleges are false and defamatory:

(1)Plaintiff is "scamming the public"

(2)Plaintiff is "billing himself as the official photographer for the firefighters union"

(3)Plaintiff [may have] "illegally taken artifacts from Ground Zero"

(4)Plaintiff "has not honored his pledge to donate thousands of dollars in proceeds from 9/11 artwork"

*8 (5)Plaintiff's actions constituted "grave robbing," and are "akin to stealing from a graveyard"

(6)Plaintiff is "despicable"

(7)Plaintiff is "exploiting the dead"

(8)That the Post article alludes to "two FDNY marshals who were dispatched' to the museum in order to view the artifacts and states that they could not gain entry to the building,' " but fails to mention the outcome of any eventual visit from the FDNY marshals and that plaintiff was never found or accused by any authority to have committed any wrongdoing

(9)"The photographer who is displaying personal items he took from Ground Zero at his downtown museum is a disgrace,' an angry Mayor Bloomberg said yesterday, lashing out at the sick people' who have exploited the tragedy ... There are always some sick people that are trying to exploit tragedy.' "

(10)"Bloomberg said Suson doesn't deserve attention. I've never wanted to give them any more publicity,' he said. I think that just makes it worse.' "

(11)The Post headline prints the work curator as "cur'ator," meaning that Suson is a cur, or mongrel dog'

(12)That the article was placed next to the police blotter "to further smear the plaintiff's good name ..."

(13)That plaintiff is "further portray[ed] ... as a criminal" because Plaintiff is mentioned in the same article as Michael Bellone, who was "busted" by the FDNY marshals; and

(14)The article claims plaintiff "came under criticism for allegedly removing victims' personal effects" from Ground Zero.

(Amended Complaint at ¶¶ 51-71).

Actual or Constitutional Malice

In the landmark decision of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the United States Supreme Court created a qualified constitutional privilege for public officials in defamation actions. The plaintiff who is a public official must prove by clear and convincing evidence that the defamatory publication was made with "actual malice" or constitutional malice. The U.S. Supreme Court defined "actual malice" as knowledge of falsity or reckless disregard for the truth. *Id.* at 280.

The U.S. Supreme Court further elaborated on this standard as follows:

[R]eckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his [or her] publication.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

The reckless disregard standard requires a plaintiff to prove a subjective awareness of probable falsity. *Id.* at 737;*Gertz,* 418 U.S. at 334, n. 6. The failure to properly investigate a story alone (*St Amant,* 390 U.S. at 733) or "a showing of ill-will or malice' in the ordinary sense of term" (*Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 666 [1989]) is insufficient to demonstrate constitutional malice.

*9 The United States Supreme Court provided some helpful examples to support a finding of constitutional malice where the story is:

(1)"fabricated" or the product of defendant's imagination;

(2)based solely on an "unverified anonymous telephone call" or the reporter doubts the veracity of the information; or

(3)"inherently improbable that only a reckless [person] would have put them in circulation"

St. Amant, 390 U.S. at 732.

The U.S. Supreme Court has extended this constitutional privilege to "public figures." *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967). The U.S. Supreme Court further defined public figures into two distinct classes of individuals: (1) public figures for all purposes and (2) limited purpose public figures. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974). The first designation applies to an individual who "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.* at 351.The more common limited purpose figure is an individual who "voluntarily injects himself [or herself] or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."*Id.* The court must determine as a matter of law whether the evidence shows the plaintiff to be a public official or public figure. *Rosenblatt v. Baer,* 383 U.S. 75 (1966).

Suson is a "Limited Purpose Public Figure"

Suson does not seriously dispute that he is a limited purpose public figure. Suson describes himself as a "nationally and internationally renowned photographer." (Exhibit "42" to Defendants' Motion). Suson touts his extensive press coverage which included interviews and news stories about him both nationally and internationally on all major news networks. (Amended Complaint at ¶ 16). Inasmuch as Suson has taken affirmative steps to attract extensive media attention to document his activities at Ground Zero and the opening of his Museum, this Court finds as a matter of law that he is a limited purpose public figure.

Suson Fails to Demonstrate "Actual Malice"

In order to prevail, Suson as a limited purpose public figure must demonstrate "actual" or constitutional malice. Plaintiff asserts that he has satisfied this high standard. The thrust of plaintiff's argument is that defendants had a "baseline knowledge" that the articles were false because there were prior articles (including several in the Post) that acknowledged and reported Suson's bona fides. Specifically, Suson points to many articles and interviews where he is referred as the "official photographer" of the UFA. (Exhibit "18" to plaintiff's Motion). Suson attacks the myriad of sources the defendants utilized to conclude that Ground Zero was declared a crime scene and removing items from it could be illegal. In this regard, Suson produces the sworn statement of his friend, Ielpi, to show that Fagen intentionally misquoted him in the second article. Suson also claims that defendants knew the statement that he failed to honor his "pledge to donate thousands of dollars in proceeds from his 9/11 artwork" was false because he could not have done so since the Museum had not opened *prior* to the publication of the first article. Suson takes issue with the sensational headlines, charging that they were

not a "fair index" of the related articles. Suson also generally challenges the lack of "meaningful investigation" undertaken by defendants.

*10 The very basis of plaintiff's argument that defendants had "baseline knowledge" of the falsity of the articles because of the prior publications, including several in the Post, was effectively rejected by the U.S. Supreme Court in *New York Times Co. v. Sullivan, supra.*The U.S. Supreme Court specifically held that prior stories or articles in the defendant's own files was insufficient to show actual or constitutional malice. *Id.* at 287.Plaintiff's claim that defendants improperly relied upon unreliable sources that Ground Zero was a crime scene and that taking items from it could be illegal similarly does not rise to the level of demonstrating defendants' subjective intent by clear and convincing evidence of constitutional malice. *Sweeney v. Prisoners' Legal Services of New York, Inc.*, 84 N.Y.2d 786 (1995) (defendant's reliance on a source, a convicted felon who presumably lacked credibility, did not satisfy actual malice standard); *Farrakhan v. N.Y.P. Holdings*, 238 A.D.2d 197 (1st Dept 1997) (defendant New York Post's partial reliance "on the affidavit of a confessed and convicted assassin" was insufficient to show actual malice); *Khan v. New York Times Co., Inc.*, 269 A.D.2d 74 (1st Dept 2000) (defendant's false and defamatory misstatements which resulted from a reporter's misreading of reputable news sources did not rise to the level of actual malice); *Gross v. New York Times Co.*, 281 A.D.2d 299 (1st Dept 2001) (defendant may rely on sources "who may have borne plaintiff ill-will"); *Robart v. Post-Standard*, 74 A.D.2d 963 (3d Dept 1980)*aff'd* 52 N.Y.2d 843 (1981) (defendant's reliance on false information received by telephone from the New York State barracks at Tupper Lake did not demonstrate "gross irresponsibility" because the reporter had no reason to doubt the accuracy of the information).

Substantial truth is also a defense to a libel claim. *Leibowitz v. St. Luke's-Roosevelt Hosp. Center*, 281 A.D.2d 350 (1st Dept 2001). Plaintiff seemingly argues that the statement, "Current union official ... charge [sic] Suson has not honored his pledge to donate thousands of dollars in proceeds from his 9/11 artwork" is not true. However, this statement is amply supported by the record and has not been controverted by plaintiff other than by his future promise to donate certain proceeds from his Museum. Simply stated, plaintiff has not come forward with any proof that he donated any portion of the sales of his photographs to UFA's charity from the time he obtained at least $61,000 from Barnes & Noble and CNN in or about 2002 through August 31, 2005 (the date of the first article). At the time of the first publication, it is undeniable that the plaintiff did not fulfill his pledge, even though he expressed a laudatory and yet unfulfilled intent to donate the proceeds of the Museum in the future.[FN1] In addition, the headlines, while provocative, appear to be a "fair index" of the truthful matter contained in the accompanying four articles. *Gunduz v. New York Post Co., Inc.*, 188 A.D.2d 294 (1st Dept 1992) (headline "Public Enemy No. 1" as amplified with an adjacent sub-headline "City moves to yank license of Apple's worst taxi driver"' was a "fair index" of the related article reporting that plaintiff had received more summonses and violations than any other cab driver in New York City).

> FN1. Plaintiff also has not come forward with any evidence that he donated a portion of the proceeds of his Museum which opened in September, 2005 to UFA's charity through the submission of this round of motion practice on January 29, 2008.

*11 The thread that runs through plaintiff's argument is that defendants' purported failure to investigate demonstrates actual malice. Notwithstanding this challenge, the reporters, who have a wealth of experience in journalism, meticulously documented their extensive investigation and provided a reliable source of information for each of the fourteen alleged defamatory statements. Even assuming the veracity of the challenge, a failure to investigate

does not in itself establish bad faith amounting to actual malice. *St. Amant v. Thompson,* 390 U.S. 727 (1968).

Plaintiff may take some solace that the actual malice standard enunciated by the U.S. Supreme Court was developed to protect our prized First Amendment rights to free speech and press. As the Court recognized, an "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the breathing space' that they need to survive.' " *New York Times Co. v. Sullivan,* 376 U.S. at 271-272,*citing N.A.A.C.P. v. Button,* 371 U.S. 415, 433 (1963)."The interest of the public here outweighs the interest of the [plaintiff] or any other individual."*Id.* at 271.In sum, plaintiff has not presented sufficient proof to establish by clear and convincing evidence that the complained-of statements in the four Post Articles were published with actual or constitutional malice. *Sprewell v. N.Y.P. Holdings, Inc.,* 43 AD3d 166 (1st Dept 2007) (defendant New York Post's reliance on confidential witnesses coupled with extensive investigation efforts to confirm the information in the article shielded it from liability as plaintiff failed to come forward with evidence of constitutional malice).

Intentional Infliction of Emotional Distress

Plaintiff asserted a fifth cause of action for intentional infliction of emotional distress premised on the same facts underpinning the libel claims. In order to prove such a cause of action, plaintiff must demonstrate the following elements:

(i)extreme and outrageous conduct;

(ii)intent to cause, or disregard of a substantial probability of causing severe emotional distress;

(iii)a causal connection between the conduct and injury; and

(iv)severe emotional distress.

Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 121 (1993); *Restatement (Second) of Torts* § 46.

In this case, plaintiff has not come forward with any evidence to meet the above elements. It also appears that plaintiff can not recover for intentional infliction of emotional distress caused by duplicative claims of libel alleged in the complaint. *Manno v. Hembrooke,* 120 A.D.2d 818, 820 (3d Dept 1986); *Levin v. McPhee,* 917 F Supp 230, 242 (SDNY 1996), *affd* 119 F3d 189 (2d Cir1997).

Conclusion

Based on the foregoing, plaintiff's motion for partial summary judgment and to preclude defendants from offering certain evidence at trial is denied. Defendants' motion for summary judgment dismissing the complaint is granted. Plaintiff's cross-motion to impose sanctions for purported discovery violations is denied as being moot.

*12 The clerk shall enter a judgment dismissing the complaint accordingly. Courtesy copies of this decision and order have been mailed to counsel for the parties. The foregoing constitutes the decision and order of this Court.

N.Y.City Civ.Ct.,2008.
Suson v. NYP Holdings, Inc.
19 Misc.3d 1116(A), 862 N.Y.S.2d 818, 2008 WL 927985 (N.Y.City Civ.Ct.), 36 Media L. Rep. 1776, 2008 N.Y. Slip Op. 50730(U)

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DONALD J. TRUMP, Plaintiff, vs. TIMOTHY O'BRIEN, TIME WARNER BOOK GROUP INC., WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART CAMDEN COUNTY Docket No. L-545-06

PLAINTIFF DONALD J. TRUMP'S RESPONSES TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AND PLAINTIFF'S COUNTERSTATEMENT OF MATERIAL FACTS

PLAINTIFF DONALD J. TRUMP'S RESPONSES TO DEFENDANTS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ACTUAL MALICE

***

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted that O'Brien and Plambeck claim that they conducted approximately 100 other interviews. No independent or documentary evidence has been produced by defendants to substantiate the claim that "100 other interviews" actually occurred.

15. Denied. O'Brien ignored critical documentary evidence that the Trump Organization provided. See, e.g., Lokey Dep. 126:5-24, 130:2-21, Ex. R.). Plambeck, who had only recently graduated from journalism school and had no specific education or

training in financial valuations, business, or real estate when he began working for O'Brien (Deposition of Joseph Plambeck ("Plambeck Dep.") 134:16-135:24, 149:8-17, Ex. X), described his research role much differently -- i.e., focusing on Trump's "mojo" (Plambeck Dep. 135:25-137:6, Ex. X). Plambeck stated that O'Brien never asked Plambeck to gather any information about the value of Trump's real estate holdings or net worth and that he only viewed mortgage information for the West Side Yards. (Plambeck Dep. 40:25-42:9, Ex. X.) O'Brien offers no justification for limiting Plambeck's mortgage research to the West Side Yards. Similarly, he offers no justification for ignoring other goldmines of information for the Book, including other reporters and contacts of other reporters at *The New York Times* or his own brother, a real estate lawyer who has prepared net worth valuations for individuals (see, e.g., Deposition of Patrick O'Brien 16:6-15, Ex. Y).

16. Admitted that O'Brien claims that he relied on his earlier reporting but as a consequence of O'Brien's refusal to provide information regarding the three "confidential sources", this statement can neither be admitted nor denied as stated.

17. Admitted.

18. Admitted.

19. Admitted.

20. Denied. The TrumpBroke chapter contains the most false and damaging statements in the Book, and evidences the most specious of O'Brien's reporting practices. (See Trump Dep. 502:8-16, Ex. B; O'Brien Dep. 731:11-21, Ex. E; Book at 154.) In TrumpBroke, O'Brien repeatedly states that Trump lies about his finances and refers to Trump's "*verbal* billions," his "*verbal* fortune," his "ability . . . to magically add zeroes

to his bank account," and his propensity for inflation. (Book at 149, 152, 153, 156, 173, 174 (emphasis added).) O'Brien rejects numerous valuations that have repeatedly and accurately placed Trump's net worth in the billions of dollars. (Book at 152; Ex. AB.) In October 2005, *Forbes* magazine valued Trump's net worth at $2.7 billion. Instead, O'Brien adopts the valuation of three anonymous sources to claim that Trump "was not remotely close to being a billionaire" and that his "net worth was somewhere between $150 million and $250 million" (Book at 154) -- a valuation that is orders of magnitude below the credible valuations.

21. Denied. As a consequence of O'Brien's refusal to provide information regarding the three "confidential" sources, Trump has not yet been given the opportunity to seek information reasonably likely to lead to the discovery of admissible evidence as to whether this statement is or is not uncontroverted.

22. Denied. See ¶ 21, supra.

23. Denied. See ¶ 21, supra.

24. Denied. See ¶ 21, supra.

25. Denied. See ¶ 21, supra.

26. Denied. See ¶ 21, supra.

27. Denied. See ¶ 21, supra.

28. Denied. See ¶ 21, supra.

29. Denied. See ¶ 21, supra.

30. Admitted.

31. Denied. During interviews, O'Brien made clear to Trump that he questioned Trump's ownership of properties and believed that Trump "owned nothing."

In response, Trump instructed The Trump Organization's CFO, Weisselberg, and in-house attorney Lokey to assemble documents to prove Trump's ownership of his properties. (Lokey Dep. 43:20-45:21, Ex. R; Weisselberg Dep. 166:6-25, Ex. A.) With Weisselberg's oversight, Lokey spent more than thirty hours assembling deal binders to provide O'Brien with a detailed breakdown of Trump's assets and proof of ownership of the key properties in Trump's portfolio. (See Lokey Dep. 50:17-51:2, Ex. R.) The documents filled the conference room table in the boardroom at The Trump Organization, easily surpassing the scope of information previously provided to any member of the media. (Trump Dep. 39:15-18, Ex. B.) O'Brien was invited to visit Trump Tower on April 21, 2005 to meet with Trump, Weisselberg, and Lokey, to review the documents, and to question those high-ranking members of The Trump Organization about Trump's property ownership. (Weisselberg Dep. 166:6-25, Ex. A; O'Brien Dep. 248:11-15, Ex. E.) O'Brien initially met with Weisselberg and Lokey. Weisselberg spoke generally with O'Brien about the valuation of certain assets. (Weisselberg Dep. 202:8-14, Ex. A; Lokey Dep. 100:2-100:16, Ex. R.) In the Book, O'Brien claims that he and Weisselberg went point-by-point through a list of assets totaling $5 billion, $1 billion short of Trump's purported $6 billion verbal estimate of his net worth. O'Brien quotes Weisselberg as responding, "I'm going to go to my office and find that other billion." (Book at 154.) According to Weisselberg, that never happened; O'Brien did not ask for any additional information, and Weisselberg did not retreat to his office to get it. (Weisselberg Dep. 183:8-184:6, Ex. A.) Rather, Weisselberg left the room after approximately forty minutes with the understanding that he had proved successfully Trump's property ownership. (Weisselberg Dep. 208:14-18, 217:9-20, Ex. A.) While Weisselberg was still

in the boardroom, Trump came in briefly and (for the second time) presented his Statement of Financial Condition to O'Brien. (Trump Dep. 43:3-44:11, Ex. B; Weisselberg Dep. 171:22-172:6, Ex. A.) This time, O'Brien merely glanced at the document before putting it down. (Weisselberg Dep. 201:23-202:7, Ex. A.)

32. Denied. See ¶ 31, supra.

33. Denied. See ¶ 21, supra.

34. Admitted.

35. Admitted.

36. Admitted.

37. Denied. See ¶ 21, supra. In denying defendants' motion to dismiss on August 18, 2008, the Honorable Faustino J. Fernandez-Vina, J.S.C.,

> The Court has read the publication in question, TrumpNation: The Art of Being the Donald in detail, particularly Chapter 6 entitled, "TrumpBroke." On the applicable standard of review, it can be inferred that the book does not merely recount the net worth estimates of others, including the aforementioned estimate without endorsing any estimate and only discussing Trump's assets by reporting them without question, but that the author endorses the information of individuals, providing all estimates and adapts – adopts those, while at the same time discounting the reliability and credibility of higher estimates and the individuals who provided the higher estimates.
>
> See Ex. Pl.'s Ex. BF, at 39:12-25.

38. Admitted.

39. Denied. See ¶ 21, supra.

40. Admitted.

41. Denied that this statement constitutes a material fact pursuant to R. 4:46. The paragraph is otherwise admitted.

42. Denied that this statement constitutes a material fact pursuant to R. 4:46. The paragraph is otherwise admitted.

43. Denied that this statement constitutes a material fact pursuant to R. 4:46. The paragraph is otherwise admitted.

44. Denied that this statement constitutes a material fact pursuant to R. 4:46. The paragraph is otherwise admitted.

45. Denied that this statement constitutes a material fact pursuant to R. 4:46. The paragraph is otherwise admitted.

46. Denied that this statement constitutes a material fact pursuant to R. 4:46. The paragraph is otherwise admitted.

47. Denied that this statement constitutes a material fact pursuant to R. 4:46. The paragraph is otherwise admitted.

48. Admitted.

49. Denied. See ¶ 21, supra.

50. Denied. See ¶ 21, supra.

51. Denied. See ¶ 21, supra.

52. Admitted.

53. Denied. See ¶ 31, supra.

54. Denied. O'Brien had the necessary information, but disputed ownership. Accordingly, Trump provided O'Brien with proof of ownership. See ¶ 31, supra.

55. Denied. As of October 2005, Trump's estimate was that he was at least a billionaire. (See Deposition of Allen Weisselberg ("Weisselberg Dep.") 54:16-55:2, Ex. A; Deposition of Donald J. Trump ("Trump Dep.") 658:17-18, Ex. B; TOB-PD-00000024, Ex. C.) The Trump brand (the "Trump Brand") is synonymous with luxury and enormous success. (See TOB-PD-00000024, Ex. C.)

56. Admitted.

57. Denied. See Trump Deposition, Ex. 11, at 62:25-64:19.

58. Denied. See ¶ 21, 57, supra.

59. Denied. Under the Book contract, O'Brien is retained by Warner Books as an author. See Def. Ex. 10.

60. Denied. See ¶ 59, supra.

61. Denied. See Ex. 10, at ¶ 18(e).

62. Denied. See ¶ 21, supra. As a consequence of O'Brien's refusal to provide information on this topic, Trump has not yet been given the opportunity to seek information reasonably likely to lead to the discovery of admissible evidence as to whether this statement is or is not uncontroverted.

63. Admitted.

***

PLAINTIFF'S COUNTERSTATEMENT OF MATERIAL FACTS

I. Plaintiff Donald J. Trump

1. Plaintiff Trump is an extremely successful and renowned businessman -- he is a real estate developer, entrepreneur, author, and television personality. His vast real estate holdings include extraordinarily valuable residential, commercial, casino, and golf-course properties worldwide. Trump holds interests in, and earns revenues from, an array of enormously successful business ventures in the publishing, apparel, cosmetic, consumer, education, and entertainment fields -- his television shows *The Apprentice* and *The Celebrity Apprentice* are among the most highly rated -- and he holds significant cash and personal investments. (See Deposition of Allen Weisselberg ("Weisselberg Dep.") 54:16-55:2, Ex. A; Deposition of Donald J. Trump ("Trump Dep.") 658:17-18, Ex. B; TOB-PD-00000024, Ex. C.) The Trump brand (the "Trump Brand") is synonymous with luxury and enormous success. (See TOB-PD-00000024, Ex. C.)

2. Trump's success in business hinges on the accurate recognition and appreciation by the financial community and public that Trump is a skilled, successful, and trustworthy businessman who has financial resources totaling billions of dollars. (See Trump Dep. 502:2-16, Ex. B.)

3. In the high-risk, high-reward real estate industry, Trump's ability to close deals and secure financing for his projects depends on investors trusting his reputation. (See Trump Dep. 17:17-25, Ex. B.) Trump's status as a billionaire (TR 000037598, Ex. D) enables him to marshal resources to accomplish what most in the industry would deem impossible.

4. In short, the business of the author of *Think Like a Billionaire* (among other best-selling books) is based on his billionairedom. (See Trump Dep. 506:7-17, Ex. B.)

II. Defendant Timothy L. O'Brien

5. Defendant O'Brien is a book author and veteran business reporter. He currently serves as editor of the Sunday Business Section of *The New York Times*, and previously was a reporter with the *Wall Street Journal*. (Deposition of Timothy L. O'Brien ("O'Brien Dep.") 27:2-6, 33;13-35:11, Ex. E.)

6. Although his credentials (see O'Brien Dep. 686:14-22, Ex. E) would suggest that he is credible and produces quality journalism, O'Brien has a history of using unprincipled reporting practices and demonstrating a personal bias against Trump (see TOB-EF-00005762-5765, Ex. F; TOB-PD-00000705-714, Ex. G; Trump Dep. 532:7-19, Ex. B).

III. Defendants Time Warner Book Group Inc. and Warner Books Inc.

7. The Warner Defendants contracted with O'Brien for the production, publication, and marketing of the Book (TWBG-PD-00000972-976, Ex. H), eager to participate as O'Brien "cut through all the smoke-and-mirrors of Trump's so-called empire" (TWBG-PD-00000916, Ex. I). However, under the terms of the Book contract, the Book was to be "a **frank and honest** look at the life and business dealings of real estate mogul Donald Trump[.]" (Def. Ex. 11, at ¶ 1(b) (emphasis added).)

8. The Warner Defendants provided substantive editorial oversight as O'Brien wrote the Book, and they spearheaded the marketing campaign, which, as

explained below, focused on the false, defamatory, and salacious "facts" asserted in the Book. (See TWBG-EM-00010106-10107, Ex. J.)

IV. O'Brien's Writings About Trump and "Research" for the Book

9. O'Brien began writing about Trump when he was still in school and served as a research assistant for Wayne Barrett on his book *Trump* (O'Brien Dep. 35:22-36:20, Ex. E).

10. In 1998, O'Brien wrote the book *Bad Bet: The Inside Story of the Glamour, Glitz, and Danger of America's Gambling Industry* and reported on Trump's Atlantic City casino ventures. (O'Brien Dep. 35:15-21, Ex. E.)

11. On or about March 28, 2004, O'Brien published the first in a series of negative articles questioning Trump's financial stability and business acumen. (TOB-PD-00000705-714, Ex. G.)

12. The article, titled *Is Trump Headed for a Fall?*, discussed "Trump's increasingly troubled gambling empire" and was followed soon thereafter by *The Midas Touch, With Spin on It*; and *Now, Reality for Trump Looks More Like Survivor*, among others. (Exs. K and L, respectively.) The articles collectively suggested that Trump's empire was on the brink of collapse and that to claim otherwise was a farce.

13. In a July 30, 2004 *Times* article, *Losses Increase as Cash Decreases, Straining Trump's Casinos*, O'Brien reported that Trump said he had a $34.5 million stake in Trump Hotels & Casino Resorts (Ex. M), even though Trump had, and told O'Brien that he had, a stake worth $49 million (see TOB-PD-00000016, Ex. N).

14. In an August 12, 2004 article, *Can Trump Afford Casino Stake?*, O'Brien again misrepresented Trump's finances. (See Ex. O.) In that article, O'Brien falsely

stated that Trump needed to borrow $55 million to make an investment in Trump Hotels & Casino Resorts when, in fact, Trump did not need to borrow the money. (Compare NYT0000256-258, Ex. P with TOB-PD-00000001, Ex. Q.)

15. Thus, when Trump learned that O'Brien was writing the Book, he gave O'Brien unprecedented access to himself, his staff, and his financial documents to make sure that O'Brien had correct information. (Trump Dep. 40:9-20, 245:20-246:16, 453:20-454:4, Ex. B.)

16. Trump gave O'Brien more than twenty-five interviews and took him to California, Florida, and Westchester, among other places, to view his properties; Trump's Chief Financial Officer, Allen Weisselberg, met with O'Brien on several occasions (see Weisselberg Dep. 156:25-157:6, Ex. A); and Trump's in-house attorney Michelle Lokey met with O'Brien and fielded countless phone calls from him (see Deposition of Michelle Lokey ("Lokey Dep.") 171:20-175:12, Ex. R).

A. Visit to Trump National Golf Course

17. On March 6, 2005, in response to O'Brien's request to view Trump National Golf Course, Palos Verdes, Trump took O'Brien to California. (Trump Dep. 40:21-41:3, Ex. B.)

18. During the flight, Trump presented O'Brien with his 2004 Statement of Financial Condition, which identified and quantified his assets and liabilities and estimated that his net worth, exclusive of the value of the Trump Brand, was $3.5 billion. (Weisselberg Dep. 328:17-329:12, Ex. A; see O'Brien Dep. 249:6-250:21, Ex. E.) Net worth is calculated as assets minus liabilities. (Deposition of Gerald J. Rosenblum

("Rosenblum Dep.") 40:3-7, Ex. S.) O'Brien spent an hour reviewing the document. (Trump Dep. 40:21-41:19, Ex. B.)

19. When O'Brien and Trump arrived in California, O'Brien refused to see the golf course. (Trump Dep. 41:20-42:15, Ex. B.)

20. Indeed, although the golf course at Palos Verdes is extremely valuable, O'Brien never mentions it in the Book. (Trump Dep. 41:20-42:10, Ex. B.)

21. Of the trip to California, the Book only describes an in-flight viewing of *Sunset Boulevard* and relays the anecdote that during the flight, Tony Bennett said hello to O'Brien's sister into O'Brien's tape recorder. (Book at 181-82.) (A copy of the Book was included as Exhibit 7 to the Certification of Mark S. Melodia that defendants submitted in support of their summary judgment motions.)

B. The April 21, 2005 Meeting at The Trump Organization

22. O'Brien made clear to Trump that he questioned Trump's ownership of properties and believed that Trump "owned nothing." In response, Trump instructed The Trump Organization's CFO, Weisselberg, and in-house attorney Lokey to assemble documents to prove Trump's ownership of his properties. (Lokey Dep. 43:20-45:21, Ex. R; Weisselberg Dep. 166:6-25, Ex. A.)

23. With Weisselberg's oversight, Lokey spent more than thirty hours assembling deal binders to provide O'Brien with a detailed breakdown of Trump's assets and proof of ownership of the key properties in Trump's portfolio. (See Lokey Dep. 50:17-51:2, Ex. R.)

24. The documents filled the conference room table in the boardroom at The Trump Organization, easily surpassing the scope of information previously provided to any member of the media. (Trump Dep. 39:15-18, Ex. B.)

25. O'Brien was invited to visit Trump Tower on April 21, 2005 to meet with Trump, Weisselberg, and Lokey, to review the documents, and to question those high-ranking members of The Trump Organization about Trump's property ownership. (Weisselberg Dep. 166:6-25, Ex. A; O'Brien Dep. 248:11-15, Ex. E.)

26. O'Brien initially met with Weisselberg and Lokey. Weisselberg spoke generally with O'Brien about the valuation of certain assets. (Weisselberg Dep. 202:8-14, Ex. A; Lokey Dep. 100:2-100:16, Ex. R.)

27. In the Book, O'Brien claims that he and Weisselberg went point-by-point through a list of assets totaling $5 billion, $1 billion short of Trump's purported $6 billion verbal estimate of his net worth. O'Brien quotes Weisselberg as responding, "I'm going to go to my office and find that other billion." (Book at 154.)

28. According to Weisselberg, that never happened; O'Brien did not ask for any additional information, and Weisselberg did not retreat to his office to get it. (Weisselberg Dep. 183:8-184:6, Ex. A.)

29. Rather, Weisselberg left the room after approximately forty minutes with the understanding that he had proved successfully Trump's property ownership. (Weisselberg Dep. 208:14-18, 217:9-20, Ex. A.)

30. While Weisselberg was still in the boardroom, Trump came in briefly and (for the second time) presented his Statement of Financial Condition to O'Brien. (Trump Dep. 43:3-44:11, Ex. B; Weisselberg Dep. 171:22-172:6, Ex. A.)

31. This time, O'Brien merely glanced at the document before putting it down. (Weisselberg Dep. 201:23-202:7, Ex. A.)

32. After Weisselberg left, Lokey continued the meeting with O'Brien. (Weisselberg Dep. 183:20-25, Ex. A; Lokey Dep. 124:1-14, Ex. R.)

33. Lokey offered to review with O'Brien the ownership deeds that were assembled in the room. (Lokey Dep. 125:7-12, Ex. R.)

34. According to Lokey, O'Brien "was not terribly interested in the materials. He stayed seated the whole time"; and he confessed to Lokey that he did not need to see the materials because "the Book's already written." (Lokey Dep. 126:5-24, 130:2-21, Ex. R.)

35. From that point forward, O'Brien insisted on making the discussion with Lokey entirely personal. (Lokey Dep. 139:25-140:7, 145:3-6, Ex. R.)

36. They spoke for two hours about topics that included her law school professor, who happened to be a friend of O'Brien; his children; her son; his son's school; his marriage; his divorce; his dating; her divorce; whether she was dating; living in New York City; and social events in New York. (Lokey Dep. 136:25-139:24, Ex. R.)

37. Despite Lokey's best efforts to keep O'Brien on task, O'Brien squandered this valuable time by flirting with Lokey and engaging in "inappropriate" conversation. (Lokey Dep. 136:25-13, 139:25-140:7, 145:3-6, Ex. R.) Even after the meeting, O'Brien tried to continue a personal dialogue with Lokey, including inviting her out to dinner. (See TOB-EF-00000300-301, Ex. T.)

38. Lokey later complained to *The New York Times* that O'Brien's April 21st visit to The Trump Organization was nothing more than a "charade." (TOB-PD-00000006, Ex. U.)

39. After concluding his conversation with Lokey, O'Brien met Trump in his office and spent approximately ten minutes reviewing the Statement of Financial Condition (for the third time). (Trump Dep. 45:16-21, Ex. B.) Despite evidence that he reviewed Trump's Statement of Financial Condition three times, O'Brien claims that, before his deposition on October 15, 2007, he never saw it. (O'Brien Dep. 251:4-8, Ex. E.)

40. Detailed notes produced by O'Brien in discovery, if authentic, would suggest that O'Brien reviewed voluminous information during the April 21 meeting. (TOB-PD-00004297-4310, Ex. V.)

41. However, the authenticity of O'Brien's "notes" has been cast into serious doubt by Weisselberg's and Lokey's testimony that neither of them recalled O'Brien taking written notes at the meeting. (See Weisselberg Dep. 150:7-12, Ex. A; Lokey Dep. 134:9-22, Ex. R.)

42. Weisselberg is skeptical of the notes' authenticity: "there are a lot [of] notes for a very short meeting. It doesn't seem like all of this was written . . . [at the meeting]." (Weisselberg Dep. 215:22-216:20, 248:2-249:4, Ex. A.)

43. Indeed, the notes reflect statements that Weisselberg and Lokey testified were not made, and topics that were not covered, at the meeting. (Weisselberg Dep. 220:13-223:25, 248:2-249:4, Ex. A; Lokey Dep. 117:6-18, 132:2-8, Ex. R.)

44. One way to resolve what happened at the April 21st meeting would be to listen to O'Brien's tape recording of the meeting. Weisselberg testified that O'Brien recorded the meeting and that the tape recorder remained visible on the conference table throughout the meeting. (Weisselberg Dep. 149:12-150:6, Ex. A.)

45. And Trump testified that O'Brien -- the most sophisticated user of a tape recorder Trump had met -- recorded every interview of Trump. (Trump Dep. 71:18-72:12, Ex. B.)

46. But O'Brien claims that he did not tape the April 21st meeting. O'Brien claims that even though he had his tape recorder with him to record Tony Bennett's hello to his sister and eight conversations with Trump, he did not bring a tape recorder with him to what should have been the most important fact-finding exercise related to the Book and a highlight of his career as a business journalist -- unprecedented access to documents that showed Trump's net worth. (See O'Brien Dep. 275:24-276:25, Ex. E.) On at least one other occasion, O'Brien taped an interview with Weisselberg and then, during discovery, claimed that no tape was made. O'Brien interviewed Weisselberg in early 2005 while driving to the airport to fly with Trump to Florida. (Weisselberg Dep. 147:6-148:2, Ex. A.) After saying good morning, the very first question O'Brien asked Weisselberg was: "[W]ould you mind if I tape this meeting?" (Weisselberg Dep. 147:21-149:7, Ex. A.) Weisselberg was "shocked" to learn that O'Brien denied taping the interview. (Weisselberg Dep. 148:18-149:7, Ex. A.)

C. The June 2, 2005 Phone Call with Lokey About the West Side Yards

47. On June 2, 2005, O'Brien spoke with Lokey by phone and expressed skepticism that Trump owned the West Side Yards property. (Lokey Dep. 186:19-187:4,

Ex. R.) The West Side Yards, formally used as a railroad yard, is highly valuable riverfront property on the West Side of Manhattan that spans 59th Street to 72nd Street. (Ex. W.)

48. Lokey reminded O'Brien that the documents made available to him on April 21, 2005 proved Trump's ownership of the properties, but nevertheless explained in great detail Trump's ownership interest. (Lokey Dep. 186:19-188:4, Ex. R.)

49. By the end of the conversation, O'Brien recognized that Trump owned a thirty percent interest in the West Side Yards and admitted that Trump's stake in the West Side Yards alone was worth $450 million to $500 million. (Lokey Dep. 187:22-188:14, Ex. R.)

D. "Research" by Joseph Plambeck

50. O'Brien used Joseph Plambeck as a research assistant for the Book. O'Brien testified that he had Plambeck view publicly available mortgage information for Trump's properties and that Plambeck spent "quite a bit of time" reviewing mortgage information and interviewing brokers about property valuations. (O'Brien Dep. 690:11-691:3, 694:21-698:13, Ex. E.)

51. Plambeck, who had only recently graduated from journalism school and had no specific education or training in financial valuations, business, or real estate when he began working for O'Brien (Deposition of Joseph Plambeck ("Plambeck Dep.") 134:16-135:24, 149:8-17, Ex. X), described his research role much differently -- i.e., focusing on Trump's "mojo" (Plambeck Dep. 135:25-137:6, Ex. X).

52. Plambeck stated that O'Brien never asked Plambeck to gather any information about the value of Trump's real estate holdings or net worth and that he only

viewed mortgage information for the West Side Yards. (Plambeck Dep. 40:25-42:9, Ex. X.) O'Brien offers no justification for limiting Plambeck's mortgage research to the West Side Yards. Similarly, he offers no justification for ignoring other goldmines of information for the Book, including other reporters and contacts of other reporters at *The New York Times* or his own brother, a real estate lawyer who has prepared net worth valuations for individuals (see, e.g., Deposition of Patrick O'Brien 16:6-15, Ex. Y).

V. Defendants Are Specifically Told Before Publication That the Book Contains False Information

53. In mid-October 2005, Trump received an advance copy of the Book. He was immediately struck by the enormity of false information. Aware that *The New York Times* would soon publish an excerpt, Trump and his attorneys wrote letters to defendants and *The Times* to try to prevent further publication of false and defamatory statements. (TR000037592, Ex. Z; TOB-PD-00000006, Ex. U; Lokey Dep. 165:18-166:14, Ex. R.)

54. Trump specifically told *The Times* that O'Brien's $150 million to $250 million net worth valuation was outdated and incorrect (TR000037592, Ex. Z), and Lokey explained, for at least the third time, that despite the Book's statement otherwise, Trump owned an interest in the West Side Yards (TOB-PD-00000006, Ex. U).

55. Additionally, Trump's lawyers asked the Warner Defendants to cease and desist publishing the Book because of the false and defamatory statements therein, but the Warner Defendants refused to do so. (TOB-PD-00000013-14, Ex. AA.)

56. Trump himself sought, and was refused, a meeting with the Warner Defendants to discuss the Book's glaring factual errors. (TOB-PD-00000013, Ex. AA.)

VI. Defendants Published the Defamatory Statements Anyway

57. Despite knowing that the Book contained false and defamatory statements, defendants published an excerpt from the Book's "TrumpBroke" chapter on the front page of *The New York Times* Sunday Business Section. (TOB-PD-00004194-4214, Ex. AB.)

58. The headline of the October 23, 2005 article *What's He Really Worth?* (TOB-PD-00004194, Ex. AB), was accompanied by a large graphic of Trump surrounded by question marks (Ex. AC).

59. The TrumpBroke chapter contains the most false and damaging statements in the Book, and evidences the most specious of O'Brien's reporting practices. (See Trump Dep. 502:8-16, Ex. B; O'Brien Dep. 731:11-21, Ex. E; Book at 154.)

60. In TrumpBroke, O'Brien repeatedly states that Trump lies about his finances and refers to Trump's "*verbal* billions," his "*verbal* fortune," his "ability . . . to magically add zeroes to his bank account," and his propensity for inflation. (Book at 149, 152, 153, 156, 173, 174 (emphasis added).)

61. O'Brien rejects numerous valuations that have repeatedly and accurately placed Trump's net worth in the billions of dollars. (Book at 152; Ex. AB.) In October 2005, *Forbes* magazine valued Trump's net worth at $2.7 billion.

62. Instead, O'Brien adopts the valuation of three anonymous sources to claim that Trump "was not remotely close to being a billionaire" and that his "net worth was somewhere between $150 million and $250 million" (Book at 154) -- a valuation that is orders of magnitude below the credible valuations.

63. Every other time O'Brien referred to an anonymous source in the Book, he told the reader the date and place of the interview, but O'Brien failed to provide similar information for interviews with these three sources. O'Brien's failure to provide such information is contrary to *The New York Times*' standards for use of anonymous sources (Ex. AD), to which O'Brien claims to have adhered in writing the Book (O'Brien Dep. 41:24-42:11, Ex. E).

64. Approximately one year before publishing the Book, O'Brien published *The Midas Touch, With Spin on It*, in which he quoted three anonymous sources who estimated Trump's net worth at $200 million to $300 million, and described the sources as "people who have *had* direct knowledge of his holdings . . . ." (Ex. K (emphasis added).) The past tense suggested to the reader in 2004 that the information was not then current.

65. In the Book -- published a full year later -- O'Brien attempted to revive the outdated reporting by changing the critical language used to identify his sources: the Book identifies the same sources as "three people *with* direct knowledge of Donald's finances . . . ." (Book at 154 (emphasis added).) The present tense suggested to the reader in 2005 that the information was current in 2005. O'Brien did not think the change amounted to a "substantive difference." (O'Brien Dep. 761:6-11, Ex. E.)

66. To arrive at the $150 million to $250 million valuation in the Book, not only did O'Brien have to put full faith in the outdated information of three sources on whom he purported to rely, he had to ignore, among other things, all of the valuations that placed Trump's net worth well into the billions (including Trump's own $3.5 billion valuation, which he substantiated at the April 21, 2005 meeting, and *Forbes*' $2.7 billion

valuation); he had to ignore the value of the West Side Yards, which he conceded was worth $450 million to $500 million by itself (Lokey Dep. 187:22-188:14, Ex. R); and he had to ignore the value of the Trump Brand (KNDD0004, Ex. AG), which earlier he suggested was more valuable than the brands of The Coca-Cola Company and PepsiCo. Inc. (see TOB-M-003, Ex. AH). O'Brien also ignored an attorney who represented Trump in connection with the West Side Yards and who gave O'Brien copies of establishing documents from Trump's partners in Hudson Waterfront Associates detailing Trump's ownership interest in the property (see TR000043211-43316, Ex. AE); and an article written by a fellow *Times* journalist that identified Trump's interest in the West Side Yards (Ex. AF).

67. The Book contains other falsities relating to Trump's net worth, including the suggestion that the value of 40 Wall Street, which Trump owns, was $55 million in the hole. O'Brien based this figure on a tax assessor's valuation -- a figure never used by valuation experts (see Weisselberg Dep. 126:13-131:24, Ex. A) -- of approximately $90 million minus a mortgage of $145 million (Book at 171-72). Not only is it unlikely that a bank would have permitted Trump to keep a $145 million mortgage if the property was worth only $90 million, but the $90 million valuation is orders of magnitude below Trump's valuation of the property at $400 million and *Forbes*' valuation of it at $310 million. (See Book at 171-72.)

68. The Book also omits any reference to a rebound in the value of Trump's casino holdings.

69. In the Article, O'Brien repeated the Book's valuation of Trump's worth at between $150 million and $250 million, but the Article also contained a parenthetical that

"Donald's casino holdings have recently rebounded in value, perhaps adding as much as $135 million to these estimates." (TOB-PD-00004204, Ex. AB.)

70. The Book, which was published three days after the Article (O'Brien Dep. 380:18-24, Ex. E), neglected to mention a rebound in value that alone would have approximately doubled O'Brien's net worth valuation (see Book at 154).

71. O'Brien knowingly made other false statements in the Book, including about Trump's deceased father Fred, whom Trump holds in great esteem (see O'Brien Dep. 726:4-7, Ex. E).

72. O'Brien stated that, when building Trump Village, "Fred became overwhelmed by the project's logistics. He only managed to complete the project after securing help .... In the end Trump Village bore Fred's name and he reaped most of the profits from the site, but he didn't build it." (Book at 47.)

73. But Fred Trump did, in fact, build Trump Village, and O'Brien was told so before the Book was published. (TOB-PD-00000004, Ex. AI.)

74. In researching the Book, O'Brien saw credible information that directly contradicted the story he planned to write. (Weisselberg Dep. 166:6-167:6, Ex. A; Trump Dep. 39:15-18, Ex. B.)

VII. Defendants' Marketing of the Book Focuses on the False, Defamatory, and Salacious Statements

75. O'Brien and the Warner Defendants aggressively marketed the Book. The "plan" among "fellow soldiers for the cause" -- i.e., O'Brien and his friends -- was to "annihilate the enemy, not merely irritate him" (TOB-EF-00000381-382, Ex. AJ); to make Trump go "ballistic" to "excite the masses" (TOB-EF-00000260, Ex. AK); and

ultimately to win the "war" they were waging against Trump (Deposition of David Dillon ("Dillon Dep.") 110:9-111:4, Ex. AL).

76. David Dillon, a close friend of O'Brien who helped promote the Book, described the goal in a June 10, 2005 e-mail to O'Brien and others: "Soon [O'Brien] will discuss his new book about Trump with Larry King while the Donald remains in the fetal position in his bathroom unable to speak or keep food down as Tim explains the real business aptitude of the wizard behind the curtain . . . ." (TOB-EF-00007931, Ex. AM.)

77. O'Brien made radio appearances, attended book signings, and issued promotional pamphlets aimed at destroying Trump by calling him a fraud and a cartoon character.

78. At marketing events, O'Brien repeatedly highlighted the most salacious, damaging, and false information in the Book. O'Brien drew up talking points for promotional events (Exs. AO, AQ), which were designed to "throw some gas on the fire and then we sit back and watch the barn start to burn down -- HA!!!" (TOB-EF-00008035, Ex. AN). One set touted the Book's revelations as including:

> - When you walk into one of those flashy skyscrapers bearing Donald Trump's name, remember one thing: ***The Apprentice host owns almost none of them.*** Donald is merely a glorified landlord whose pet projects are financed with other people's money.
> - ***Donald isn't a billionaire either.*** Although he inherited a huge fortune from his wealthy father, the Trumpster almost went personally bankrupt a decade ago and was forced to make humiliating phone calls begging his irritated siblings for handouts.
>
> . . . .

(TWBG-EM-00022456, Ex. AO (emphasis and footnote added).) In other marketing materials, O'Brien called Trump a "self-described billionaire." (TWBG-PD-00002356, Ex. AP.)

79. The second set of talking points described the Book as "[t]he story of how someone who is essentially a cartoon character became the most famous businessman in America. He's not Bill Gates, Warren Buffet or Jack Welch. He's a cross between Baby Huey and PT Barnum." (TOB-EF-00007732, Ex. AQ.) During a radio appearance on KNDD that aired the week of November 17, 2005, O'Brien again made the cartoon figure comparison and also described Trump as "a guy who has had a series of car crashes in his business career," a "serial bankruptcy addict," the "court jester of the American business scene," and "just a spin-meister on steroids." (KNDD0001-5, Ex. AG.) When asked whether Trump is a good role model for aspiring entrepreneurs, O'Brien quipped, "only if their goals are to lose bales of money." (Id. at KNDD0004.)

80. The talking points also focused on Trump's alleged ties to organized crime and his sex life. (Id. at 7732-7733.)

81. That O'Brien was not interested in creating a serious piece of journalism, but rather a sensational book that would sell, is underscored by O'Brien's decision to create a VidLit, or promotional video, for the Book, which O'Brien envisioned would be introduced by circus music and feature a Trump doll. (O'Brien Dep. 609:3-611:14, Ex. E; TOB-EF-00004624, Ex. AR.)

82. The VidLit ultimately featured an audio recording of O'Brien reading one of the Book's "Trump Quizzes" (O'Brien Dep. 606:9-607:16, Ex. E), which appear at the end of each chapter and ask questions such as:

> To emerge victorious on *The Apprentice*, you should:
>
> 1) Let a leech slither up your urethra.
>
> 2) Find out before the end of the season whether Donald actually owns any of the projects to which he'll assign you if you win.
>
> . . . .

(Book at 38). The TrumpQuizzes are annexed to the Tambussi Cert. as Ex. AS.

83. On October 31, 2005, O'Brien promoted the Book on CNBC's *Squawkbox* business program (another outlet in which he hoped to use the doll (TOB-EF-00000379, Ex. AT)).

84. When the program's host questioned O'Brien's statement that Trump is worth only $150 million to $250 million, O'Brien alleged that Trump "adds zeros here and there." (Ex. AU.) During the *Squawkbox* appearance O'Brien again referred to Trump as Baby Huey, a comment that drew the ire of *The New York Times*' standards editor Allan Siegal. (TOB-EF-00000156, Ex. AV.) By e-mail to O'Brien's editor at *The Times*, Siegal chided O'Brien for the "ad hominem" attack on Trump, which violated *The Times*' standards on public appearances. (Id.)

85. On November 12, 2005, during a promotional event at Coliseum Books in New York City, O'Brien engaged in a lengthy and malicious verbal attack on Trump. (Coliseum Books Tr., Ex. AW.)

86. O'Brien falsely stated that Trump's assets and net worth were an order of magnitude lower than previously reported; that "Trump is worth anywhere from $300 to $500 million"; that Trump "doesn't have much money to invest"; that "as a businessman he is a train wreck"; that his "net worth is definitely inflated"; that "*Forbes* magazine puts his worth at $2.7 billion, but I am almost certain that is a complete work of fiction";

and that Trump "is the walking embodiment of financial pornography." (Id.) At the Coliseum Books event, O'Brien again referred to Trump as Baby Huey (Coliseum Books Tr., Ex. AW), even though *The Times* had warned him not to make ad hominem attacks on Trump.

VIII. Defendants' Publication of the Defamatory Statements Injures Trump

A. Trump Has to Take Steps to Reassure *Forbes* That Their Multi-Billion Dollar Valuation of His Net Worth Was Accurate

87. Defendants' false and defamatory statements quickly permeated the financial community. For example, *Slate* reported on the Article as follows:

> The *NYT* runs a fascinating book excerpt showing that Donald Trump's net worth is nowhere near the $5 billion to $6 billion that he claims. Nor is it even close to Forbes' estimate of $2.7 billion. According to information gleaned from auditors and former business associates, it's an order of magnitude less: about $250 million. So how does The Donald fool so many people? By claiming ownership of properties that he either doesn't own or that are larded with debt.

(TOB-EF-00000289, Ex. AX.)

88. *Forbes* then expressed concern about the accuracy of their latest valuation. (Weisselberg Dep. 370:9-371:4, Ex. A.)

89. To prove to *Forbes* that O'Brien's statements about Trump's net worth were false, Trump led a meeting with Peter Newcomb and Stephane Fitch of *Forbes*; Gerry Rosenblum and Donald Bender of Weiser LLP, Trump's accountants; and Weisselberg, Lokey, Jeff McConney, Donald Trump Jr., and Ivanka Trump of The Trump Organization. Trump provided *Forbes* with substantial documentation -- roughly

the same documents that O'Brien ignored while "researching" the Book. (Weisselberg Dep. 370:9-371:9, Ex. A; Lokey Dep. 57:22-59:5, Ex. R.)

90. When the *Forbes* representatives walked out of the nearly full-day meeting, they concluded that, at $2.7 billion, they had probably undervalued Trump's net worth. (Lokey Dep. 58:22-60:13, Ex. R; Weisselberg Dep. 373:12-17, Ex. A.)

91. On November 7, 2005, during a television appearance on the Fox News Channel business program *Your World with Neil Cavuto*, Newcomb described the meeting:

> [W]e walked into the conference room and there before us were lawyers, accountants, his CFO, his controller, and Ivanka and Don Junior. He opened up his books; there were probably about 30 books out there, we looked at the contracts, we looked at the leases and deeds. In fact, Donald does own quite a bit.

(Ex. AY.)

92. When asked about *Forbes*' $2.7 billion valuation, Newcomb said it was "conservative" and that O'Brien's $150 million to $250 million figure was patently wrong:

> [Trump's] stake in [the] casino company alone is worth practically that, and he's got 40 Wall Street, he's got stakes in all sorts of buildings. You know, one thing that's very hard to value, is kind of an intangible, is the Trump brand name, and if you look at the premium that Martha Stewart's getting for her company, you know, multiple over book value, you've got to figure Trump's got to be worth half a billion just the brand.

(Id.)

B. **Trump Takes Out Corrective Advertising and Reassures Business Partners**

93. To counter O'Brien's charges that Trump was a glorified landlord and not a billionaire (Exs. AO, AQ), Trump was forced to commission an advertisement. (See Defs.' Ex. 52 at 2; Defs.' Ex. 67.)

94. Trump created a four-page, four-color gatefold advertisement that showcased his properties and that cost more than $380,000 to run in *The New York Times, The New York Times Magazine, New York* magazine, and the *New York Post.* (TR 000092386, Ex. AZ; TR-000092387-88, Ex. BA.) The Trump Organization also had to -- and continues to have to -- spend time convincing business partners and potential business partners that Trump has the financial wherewithal to complete projects successfully.

C. **Trump Loses Business Opportunities**

95. Trump's ability to close deals that already were in progress was significantly impaired by the egregious falsities printed in the Book.

1. **The Partnership with Prudential Douglas Elliman**

96. Trump lost the opportunity to partner with preeminent real estate brokerage firm Prudential Douglas Elliman. Howard Lorber, who sits on the board of Prudential Douglas Elliman and is the Chief Executive Officer of its parent, testified that he thought of a possible merger in late 2004 to create an entity that would focus on "very high-end real estate," and he began discussing the merger with Trump in early 2005. (Deposition of Howard Lorber ("Lorber Dep.") 96:20-22, 98:22-25, Ex. BB; Trump Dep. 571:13-14, Ex. B.)

97. Trump and Lorber agreed on the nature of Trump's participation -- Trump would not have to invest capital or be involved in day-to-day operations, but he would act as a spokesman for the combined company (Lorber Dep. 111:16-21, Ex. BB) and would own a percentage of the company.

98. Trump and Lorber were actively negotiating the precise percentage -- Trump was asking for 75%, but expecting closer to 50%, and Lorber thought 25 to 33% was more realistic. (Lorber Dep. 105:24-106:19, Ex. BB.)

99. Trump and Lorber even discussed the name of the combined company -- Lorber wanted Douglas Elliman Trump (Lorber Dep. 111:11-13, Ex. BB), and Trump wanted Trump Realty (Trump Dep. 571:3-4, Ex. B).

100. While Trump and Lorber were negotiating the details of the deal, defendants published their defamatory statements. Lorber had not yet presented the deal to the Douglas Elliman board or shareholders because Lorber wanted to have all of the details ironed out beforehand. (Lorber Dep. 101:18-19, Ex. BB.)

101. After publication of the defamatory statements, Lorber felt he would not be able to obtain approval:

> I believe Prudential would have been a little bit of a sales job to sit down with them and tell them why we wanted to do it. But then just around that time is when the article in the Times appeared and then the book came out, and I knew after that that was the end of it, that there would be no way after reading that article in the Times and the book that Prudential would go along with it.

(Lorber Dep. 114:14-23, Ex. BB.)

102. In October 2005, Lorber knew that the deal would not go forward, and he told Trump so in early 2006: "I told him, Donald, I don't think I have any chance of

doing this deal, you know, ***because of the article and the book***, and I just don't think there's any chance of putting it together." (Lorber Dep. 117:6-10, Ex. BB (emphasis added).)

103. Lorber testified that he believed the deal would have been done but for publication of the defamatory statements (Lorber Dep. 122:8-10, Ex. BB) and that Trump missed a very profitable deal because of it: "I think Donald missed a good opportunity because he would have owned somewhere between probably a third of a company worth 500 million, but it didn't happen" (Lorber Dep. 120:8-16, 126:18-21, Ex. BB).

2. 400 Fifth Avenue

104. In addition to the lost opportunity to partner with Prudential Douglas Elliman, Trump lost the opportunity to complete a separate deal he was negotiating with Lorber. Lorber was working with a group of Italian investors led by Davide Bizzi of Bi & Di Realty, owners of 400 Fifth Avenue in New York City ("400 Fifth"). (Lorber Dep. 40:23-42:5, Ex. BB.)

105. Lorber considered 400 Fifth a prime location for a mixed-use retail, hotel, and condominium building. (Lorber Dep. 46:14-47:3, Ex. BB.)

106. Lorber suggested to Bizzi that he consider the Trump Brand for 400 Fifth: "[W]ith the Trump name you could expect to get higher per square foot prices, as has been proven by the market, and obtain a sellout quicker than without his name." (Lorber Dep. 54:20-56:6, Ex. BB.)

107. Lorber arranged a meeting between Trump and Bizzi at which Trump and Bizzi discussed the outline of a deal. (Lorber Dep. 58:17-59:25, 62:12-21, Ex. BB.)

108. Trump was Bizzi's and Lorber's first choice as a partner for the project. (Lorber Dep. 57:21-58:3, Ex. BB.)

109. Trump recalls discussing four elements of compensation with Bizzi: (1) developer fees, (2) licensing fees for use of the Trump name, (3) sales fees for selling the building, and (4) a 25% carry-free interest in the building. (Trump Dep. 552:25-553:5, 555:15-23, Ex. B.)

110. Lorber testified that he believed Trump would share in the premiums paid for the floor space, giving him an interest in the building beyond licensing and development fees. (Lorber Dep. 63:19-64:3, Ex. BB.)

111. Bizzi was very interested in doing the deal with Trump (Lorber Dep. 62:19, Ex. BB), and Trump believed that "it was just a deal that was going to happen." (Trump Dep. 549:20-21, Ex. B; accord id. 556:12-13).

112. Lorber and Donald Trump Jr. ultimately drew up a term sheet that gave Trump a $3-5 million fee up front, plus twenty-five percent of the sales price above a base square foot number. (Lorber Dep. 64:4-13, 65:8-22, Ex. BB; Trump Dep. 552:23-553:7, Ex. B.)

113. Bizzi was very excited about pursuing the project (Lorber Dep. 72:25-73:3, Ex. BB), and Trump felt the deal was "made in heaven" (Trump Dep. 549:3-16, Ex. B).

114. Then Bizzi began to lose interest in partnering with Trump. (Lorber Dep. 67:13-68:4, Ex. BB.)

115. Lorber testified:

> He seemed to be getting a little less interested in Trump, and I tried to find out from him. . . . Finally when I pulled it out of him, he said, well, he had heard things about the New York Times article. And I don't remember whether he mentioned the book, but I know he mentioned the article. . . . I again asked him what he thought about pursuing it, and he basically had said he had decided not to and that his lawyer had recommended [another group].

(Lorber Dep. 66:16-18, 66:21-25, 79:4-7, Ex. BB.)

116. Bizzi questioned why Lorber would want to use the Trump name when the Article suggested that Trump was a fraud. (Lorber Dep. 66:6-67:5, Ex. BB.)

117. During subsequent conversations, Bizzi expressed doubt about whether Trump was an honest businessman, telling Lorber that the Article cast Trump in a bad light. (Lorber Dep. 70:8-14, Ex. BB ("I believe that I said, Oh, are you talking about, you know, the book and the article about the book. And he said, yeah, it puts him [in] this [] bad light, you know, maybe he's not, you know, an honest guy to deal with, you know, he lies about that type of stuff.").)

118. Lorber testified that it was obvious that Bizzi no longer wanted to work with Trump because of the Book and the Article. (Lorber Dep. 72:13-73:3, Ex. BB.)

119. Lorber called Trump and explained that Bizzi was no longer interested in using Trump for the 400 Fifth project. (Trump Dep. 550:10-19, Ex. B.)

120. Trump called Bizzi to try to get the deal back on track, but Bizzi refused. (Trump Dep. 559:13-15, Ex. B.)

121. Bizzi mentioned the Article, and it became clear to Trump that the Book and Article caused a "180-degree turn" in Bizzi's interest in working with Trump on the

project. According to Trump, "It went from a deal that couldn't miss to a deal that couldn't happen." (Trump Dep. 561:4-7, Ex. B.)

3. Deals with Bayrock Group

122. Trump also lost business opportunities he was pursuing with Bayrock Group ("Bayrock"), a Manhattan-based real estate investment and development group. Trump was a "cornerstone" of Bayrock's strategy to build five-star properties, and, in scouting locations, Bayrock "looked for deals that could be a Trump deal." (Deposition of Felix Sater ("Sater Dep.") 72:2-6, Ex. BC.)

123. Trump's arrangement for each Bayrock deal was that he would put in no money and would get a carry-free ownership interest of 20-25%, plus management fees. (Trump Dep. 591:2-9, Ex. B.)

124. Trump testified that these deals failed because of publication of the Book and Article. (Trump Dep. 587:9-11, Ex. B ("[The Bayrock owner] told me that the article in the New York Times/book immediately killed those deals").)

125. At the time of publication, Trump was in talks with Bayrock to build a Trump International Hotel and Tower in Moscow. (B0207, Ex. BD.)

126. Felix Sater of Bayrock identified a property in Moscow – which he described as a "mega-financial home run" -- and asked Trump to consider developing it as a Trump Tower. (Sater Dep. 129:19-130:24, Ex. BC.)

127. On January 1, 2005, Trump executed an agreement granting Bayrock a one-year exclusive right to develop a Trump International Hotel and Tower in Moscow. (B0207, Ex. BD.)

128. Bayrock then engaged BBG, a New York-based architectural firm, to prepare plans for the mixed-use hotel and residential tower. (Sater Dep. 135:24-136:10, Ex. BC.)

129. Sater negotiated and reached a price agreement with Ilya Haikan, the owner and developer of the site. (Sater Dep. 136:14-139:10, Ex. BC.)

130. Immediately after publication of the Article and Book, the developers of the Moscow project "mysteriously went radio silent." (Sater Dep. 148:12-16, Ex. BC.)

131. Sater concluded that the lost deal was related to the Book and the Article. (Sater Dep. 151:5-21, Ex. BC.)

132. Trump also was negotiating with many foreign investors through Tevfik Arif, owner of Bayrock. The Moscow project was to be the first in a series of partnerships with Bayrock that would have placed Trump International Hotels and Towers in Turkey, Kiev, and Warsaw. (Trump Dep. 586:12-23, Ex. B.)

133. Although many of the deals in negotiation were certain to be completed, Arif told Trump that publication of the Book and Article "immediately killed" the deals in negotiation. (Trump Dep. 587:9-11, 591:16-22, Ex. B.)

134. Domestically, Trump planned to develop a high-rise building in Phoenix, Arizona in 2005. (Trump Dep. 402:2-9, Ex. B.)

135. A group of local residents who did not want the building to be constructed used the Book at a zoning meeting to try to thwart zoning approval for the building. (Trump Dep. 402:16-19, Ex. B ("We were going for zoning, and people literally held this book up during the zoning hearings, screaming 'don't approve this application'").)

136. Trump spoke with governmental decision-makers about the zoning issues, and at least one individual "said that they read the book, it was terrible, and it certainly hurt [his] chances of getting approved." (Trump Dep. 407:6-19, Ex. B.)

137. Ultimately, Trump did not get the approval. (Trump Dep. 403:24-404:9, Ex. B.)

4. **Other Lost Deals**

138. In addition to the deals Trump knows he lost because of defendants' publication of defamatory statements about him in the Book and Article, Trump testified that he may have lost other deals that he will never know about. As Trump explained:

> I'm also telling you there are deals that we lost, because of this book and because of this New York Times article excerpt from the book, where people didn't come to me specifically because they read that. I can't tell you who they are because they never came to me.

(Trump Dep. 19:13-20, Ex. B.)

***

Respectfully submitted,

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DONALD J. TRUMP, Plaintiff, v. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART CAMDEN COUNTY Docket No. L-545-06

PLAINTIFF DONALD J. TRUMP'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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Cases

Plaintiff Donald J. Trump ("Trump") respectfully submits this memorandum of law in opposition to the two motions for summary judgment brought by defendants Timothy L. O'Brien ("O'Brien"), Time Warner Book Group Inc. ("TWBG"), and Warner Books Inc. ("Warner Books"; together with "TWBG," the "Warner Defendants"): (i) Defendants' Motion for Summary Judgment on Actual Malice, and (ii) Defendants' Motion for Summary Judgment on Loss Causation and Damages.[1]

Preliminary Statement

Defendants' motions must both be denied. The evidence is overwhelming (and at a minimum creates triable issues of fact) that defendants acted with actual malice in defaming Trump and that their defamation damaged him.

Trump is the real estate mogul and celebrity who leveraged his real estate success to create a multi-billion-dollar education, publishing, entertainment, and merchandising empire and a world-renowned brand name synonymous with luxury and the pinnacle of success.

O'Brien is an author who was determined to write a sensational book that would have everyone talking and, at the same time, "annihilate" Trump, whom he considered his "enemy" (in the words of one of his closest friends). O'Brien's book, *TrumpNation: The Art of Being the Donald* (the "Book"), which the Warner Defendants published,

[1] Submitted herewith in opposition to defendants' motions for summary judgment is the Certification of William M. Tambussi dated April 24, 2009 (the "Tambussi Cert."), and the exhibits thereto. All references herein to exhibits, unless otherwise noted, are to exhibits to the Tambussi Cert. Citations herein to defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Actual Malice are in the form "Malice Mov. Br. _," and citations to the Memorandum of Law in Support of Defendants' Motion for Summary Judgment on Loss Causation and Damages are in the form "Damages Mov. Br. _."

portrays Trump as a fraud and a cartoon, "a cross between Baby Huey and P.T. Barnum." The Book, which promises to "deliver[] revelations of Trump-size proportions," falsely states that Trump -- contrary to his public image -- is not remotely close to being a billionaire, as Trump and others claim, but rather is worth only $150 million to $250 million. The evidence is clear that the Book is the product of a writer who knew what he wanted to conclude before he started "researching" and writing, and who ignored the information thrust in his face that contradicted his foregone conclusion.

O'Brien's big "revelation" -- or, more accurately, misrepresentation -- that Trump is a fraud was repeated in an excerpt of the Book that appeared in *The New York Times* (also referred to herein as "*The Times*") (the "Article"), and during marketing and promotion of the Book.

Defendants' repeated publication of false and defamatory statements about Trump and his net worth damaged Trump, whose business depends on the public's accurate perception that he is a billionaire. Defendants' statements carried weight because they bore the earmarks of credibility: O'Brien is a reporter for *The New York Times*; an excerpt of the Book appeared in *The Times*; the Book claims to be a "completely true" account by an investigative reporter; and statements in the Book show that Trump gave O'Brien unprecedented access to him, his staff, and his financial information (to ensure that O'Brien -- who had a history of writing untrue and unfavorable pieces about Trump -- reported fairly in the Book, but, ultimately, he did not).

Trump suffered general damage to his reputation and disparagement in his profession when defendants essentially called him a liar and a fraud. In addition, Trump was forced to expend time and resources to counter the defamatory statements, and he

lost several business opportunities because people believed, after defendants published the defamatory statements, that he was not an honest businessman and that he lacked the financial wherewithal to complete projects.

Trump sued O'Brien and the Warner Defendants for libel and libel per se (first cause of action) and slander and slander per se (second cause of action) to vindicate his name and reputation and to recover for the damages defendants caused.

Defendants have now filed two motions for summary judgment. One argues that Trump's claims must be dismissed because he has no proof that defendants made the defamatory statements with actual malice -- i.e., with known falsity or reckless disregard for whether they were false. The other argues that Trump's claims must be dismissed because Trump cannot establish special damages. Both motions must be denied because -- at a minimum -- there are genuine issues of material fact on both issues, and a rational fact-finder could -- and, indeed, should -- resolve the disputed issues in Trump's favor.

On actual malice, defendants essentially argue that: (i) O'Brien cannot be liable because he researched Trump's net worth, uncovered varying valuations, ultimately and reasonably relied on three anonymous sources who estimated Trump's net worth at $150 million to $250 million, and neutrally reported their and other valuations without endorsing any; and (ii) the Warner Defendants cannot be directly liable because they did not act with actual malice, and they cannot be vicariously liable because O'Brien was not their salaried employee.

Defendants' argument about O'Brien's behavior requires pretending that there is no evidence that O'Brien purposefully ignored proof that Trump is a billionaire. However, there is evidence that he did just that, because he did not want to abandon the

startling revelation that he thought would make the Book sell. Defendants' argument also depends heavily on the claimed reasonableness of O'Brien's reliance on the three anonymous "sources." But the evidence shows that O'Brien's reliance was not reasonable and that he should have doubted, and, indeed, rejected, the information from those "sources." Furthermore, as a legal matter, defendants cannot rely on the anonymous sources to establish lack of actual malice because defendants consistently have used the newsperson's privilege to thwart discovery by Trump relating to the sources. Finally, defendants' argument that the Warner Defendants cannot be held liable is not supported by the facts or applicable law. The Warner Defendants should be held vicariously liable for O'Brien's actions because, as the evidence shows, they exercised editorial control over the Book.

On damages, defendants argue that Trump cannot establish the special damages he has claimed -- mitigation damages and lost business opportunities. Defendants focus on one type of mitigation damages only -- Trump's corrective advertising -- arguing that it was belated, did not mention the Book or the defamatory statements, and was not reasonably related to an injury. Defendants' arguments about the corrective advertising are unavailing: Trump's corrective advertising was published within a reasonable time, and it need not -- and for good reason did not -- further publish the defamatory statements. Certainly there is no basis for holding as a matter of law to the contrary. Notably, defendants ignore Trump's other mitigation damages, such as the time and resources expended meeting with *Forbes* magazine to allay their concerns about their then-recent $2.7 billion valuation of Trump's net worth, the writing of letters calling for retractions, and attorneys' fees pursuing this litigation.

Defendants argue that the business opportunities Trump lost are too speculative and were not caused by the defamatory statements. Defendants ignore all evidence in the record that does not support their argument. But that evidence shows that negotiations of the deals had progressed far enough that the terms of the deals were established, and that the deals would have come to fruition but for defendants' publication of the defamatory statements. Again, this is an issue that can be decided only by the jury at trial.

Finally, defendants' damages arguments gloss over the fact that Trump's defamation per se claims do not require proof of special damages at all, and that even Trump's libel by extrinsic fact and plain slander claims -- which do require proof of special damages -- require at this stage only that Trump establish that a rational factfinder could find in his favor on any *one* of his several special damages claims.

Defendants' motions for summary judgment have no support in the facts or law and should be denied.

FACTS

I. Plaintiff Donald J. Trump

Plaintiff Trump is an extremely successful and renowned businessman -- he is a real estate developer, entrepreneur, author, and television personality. His vast real estate holdings include extraordinarily valuable residential, commercial, casino, and golf-course properties worldwide. Trump holds interests in, and earns revenues from, an array of enormously successful business ventures in the publishing, apparel, cosmetic, consumer, education, and entertainment fields -- his television shows *The Apprentice* and *The Celebrity Apprentice* are among the most highly rated -- and he holds significant cash and personal investments. (See Deposition of Allen Weisselberg ("Weisselberg Dep.")

54:16-55:2, Ex. A; Deposition of Donald J. Trump ("Trump Dep.") 658:17-18, Ex. B; TOB-PD-00000024, Ex. C.) The Trump brand (the "Trump Brand") is synonymous with luxury and enormous success. (See TOB-PD-00000024, Ex. C.)

Trump's success in business hinges on the accurate recognition and appreciation by the financial community and public that Trump is a skilled, successful, and trustworthy businessman who has financial resources totaling billions of dollars. (See Trump Dep. 502:2-16, Ex. B.) In the high-risk, high-reward real estate industry, Trump's ability to close deals and secure financing for his projects depends on investors trusting his reputation. (See Trump Dep. 17:17-25, Ex. B.) Trump's status as a billionaire (TR 000037598, Ex. D) enables him to marshal resources to accomplish what most in the industry would deem impossible. In short, the business of the author of *Think Like a Billionaire* (among other best-selling books) is based on his billionairedom. (See Trump Dep. 506:7-17, Ex. B.)

II. Defendant Timothy L. O'Brien

Defendant O'Brien is a book author and veteran business reporter. He currently serves as editor of the Sunday Business Section of *The New York Times*, and previously was a reporter with the *Wall Street Journal*. (Deposition of Timothy L. O'Brien ("O'Brien Dep.") 27:2-6, 33:13-35:11, Ex. E.) Although his credentials (see O'Brien Dep. 686:14-22, Ex. E) would suggest that he is credible and produces quality journalism, O'Brien has a history of using unprincipled reporting practices and demonstrating a personal bias against Trump (see TOB-EF-00005762-5765, Ex. F; TOB-PD-00000705-714, Ex. G; Trump Dep. 532:7-19, Ex. B).

III. Defendants Time Warner Book Group Inc. and Warner Books Inc.

The Warner Defendants contracted with O'Brien for the production, publication, and marketing of the Book (TWBG-PD-00000972-976, Ex. H), eager to participate as O'Brien "cut through all the smoke-and-mirrors of Trump's so-called empire" (TWBG-PD-00000916, Ex. I). The Warner Defendants provided substantive editorial oversight as O'Brien wrote the Book, and they spearheaded the marketing campaign, which, as explained below, focused on the false, defamatory, and salacious "facts" asserted in the Book. (See TWBG-EM-00010106-10107, Ex. J.)

IV. O'Brien's Writings About Trump and "Research" for the Book

O'Brien began writing about Trump when he was still in school and served as a research assistant for Wayne Barrett on his book *Trump* (O'Brien Dep. 35:22-36:20, Ex. E). In 1998, O'Brien wrote the book *Bad Bet: The Inside Story of the Glamour, Glitz, and Danger of America's Gambling Industry* and reported on Trump's Atlantic City casino ventures. (O'Brien Dep. 35:15-21, Ex. E.)

On or about March 28, 2004, O'Brien published the first in a series of negative articles questioning Trump's financial stability and business acumen. (TOB-PD-00000705-714, Ex. G.) The article, titled *Is Trump Headed for a Fall?*, discussed "Trump's increasingly troubled gambling empire" and was followed soon thereafter by *The Midas Touch, With Spin on It*; and *Now, Reality for Trump Looks More Like Survivor*, among others. (Exs. K and L, respectively.) The articles collectively suggested that Trump's empire was on the brink of collapse and that to claim otherwise was a farce.

In a July 30, 2004 *Times* article, *Losses Increase as Cash Decreases, Straining Trump's Casinos*, O'Brien reported that Trump said he had a $34.5 million stake in

Trump Hotels & Casino Resorts (Ex. M), even though Trump had, and told O'Brien that he had, a stake worth $49 million (see TOB-PD-00000016, Ex. N). In an August 12, 2004 article, *Can Trump Afford Casino Stake?*, O'Brien again misrepresented Trump's finances. (See Ex. O.) In that article, O'Brien falsely stated that Trump needed to borrow $55 million to make an investment in Trump Hotels & Casino Resorts when, in fact, Trump did not need to borrow the money. (Compare NYT0000256-258, Ex. P with TOB-PD-00000001, Ex. Q.)

Thus, when Trump learned that O'Brien was writing the Book, he gave O'Brien unprecedented access to himself, his staff, and his financial documents to make sure that O'Brien had correct information. (Trump Dep. 40:9-20, 245:20-246:16, 453:20-454:4, Ex. B.) Trump gave O'Brien more than twenty-five interviews and took him to California, Florida, and Westchester, among other places, to view his properties; Trump's Chief Financial Officer, Allen Weisselberg, met with O'Brien on several occasions (see Weisselberg Dep. 156:25-157:6, Ex. A); and Trump's in-house attorney Michelle Lokey met with O'Brien and fielded countless phone calls from him (see Deposition of Michelle Lokey ("Lokey Dep.") 171:20-175:12, Ex. R).

A. Visit to Trump National Golf Course

On March 6, 2005, in response to O'Brien's request to view Trump National Golf Course, Palos Verdes, Trump took O'Brien to California. (Trump Dep. 40:21-41:3, Ex. B.) During the flight, Trump presented O'Brien with his 2004 Statement of Financial Condition; which identified and quantified his assets and liabilities and estimated that his

net worth, exclusive of the value of the Trump Brand, was $3.5 billion.[2] (Weisselberg Dep. 328:17-329:12, Ex. A; see O'Brien Dep. 249:6-250:21, Ex. E.) O'Brien spent an hour reviewing the document. (Trump Dep. 40:21-41:19, Ex. B.)

When O'Brien and Trump arrived in California, O'Brien refused to see the golf course. (Trump Dep. 41:20-42:15, Ex. B.) Indeed, although the golf course at Palos Verdes is extremely valuable, O'Brien never mentions it in the Book. (Trump Dep. 41:20-42:10, Ex. B.) Of the trip to California, the Book only describes an in-flight viewing of *Sunset Boulevard* and relays the anecdote that during the flight, Tony Bennett said hello to O'Brien's sister into O'Brien's tape recorder. (Book[3] at 181-82.)

B. The April 21, 2005 Meeting at The Trump Organization

O'Brien made clear to Trump that he questioned Trump's ownership of properties and believed that Trump "owned nothing." In response, Trump instructed The Trump Organization's CFO, Weisselberg, and in-house attorney Lokey to assemble documents to prove Trump's ownership of his properties. (Lokey Dep. 43:20-45:21, Ex. R; Weisselberg Dep. 166:6-25, Ex. A.) With Weisselberg's oversight, Lokey spent more than thirty hours assembling deal binders to provide O'Brien with a detailed breakdown of Trump's assets and proof of ownership of the key properties in Trump's portfolio. (See Lokey Dep. 50:17-51:2, Ex. R.) The documents filled the conference room table in the boardroom at The Trump Organization, easily surpassing the scope of information previously provided to any member of the media. (Trump Dep. 39:15-18, Ex. B.)

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[2] Net worth is calculated as assets minus liabilities. (Deposition of Gerald J. Rosenblum ("Rosenblum Dep.") 40:3-7, Ex. S.)

[3] A copy of the Book was included as Exhibit 7 to the Certification of Mark S. Melodia that defendants submitted in support of their summary judgment motions.

O'Brien was invited to visit Trump Tower on April 21, 2005 to meet with Trump, Weisselberg, and Lokey, to review the documents, and to question those high-ranking members of The Trump Organization about Trump's property ownership. (Weisselberg Dep. 166:6-25, Ex. A; O'Brien Dep. 248:11-15, Ex. E.)

O'Brien initially met with Weisselberg and Lokey. Weisselberg spoke generally with O'Brien about the valuation of certain assets. (Weisselberg Dep. 202:8-14, Ex. A; Lokey Dep. 100:2-100:16, Ex. R.) In the Book, O'Brien claims that he and Weisselberg went point-by-point through a list of assets totaling $5 billion, $1 billion short of Trump's purported $6 billion verbal estimate of his net worth. O'Brien quotes Weisselberg as responding, "I'm going to go to my office and find that other billion." (Book at 154.) According to Weisselberg, that never happened; O'Brien did not ask for any additional information, and Weisselberg did not retreat to his office to get it. (Weisselberg Dep. 183:8-184:6, Ex. A.) Rather, Weisselberg left the room after approximately forty minutes with the understanding that he had proved successfully Trump's property ownership. (Weisselberg Dep. 208:14-18, 217:9-20, Ex. A.)

While Weisselberg was still in the boardroom, Trump came in briefly and (for the second time) presented his Statement of Financial Condition to O'Brien. (Trump Dep. 43:3-44:11, Ex. B; Weisselberg Dep. 171:22-172:6, Ex. A.) This time, O'Brien merely glanced at the document before putting it down. (Weisselberg Dep. 201:23-202:7, Ex. A.)

After Weisselberg left, Lokey continued the meeting with O'Brien. (Weisselberg Dep. 183:20-25, Ex. A; Lokey Dep. 124:1-14, Ex. R.) Lokey offered to review with O'Brien the ownership deeds that were assembled in the room. (Lokey Dep. 125:7-12,

Ex. R.) According to Lokey, O'Brien "was not terribly interested in the materials. He stayed seated the whole time"; and he confessed to Lokey that he did not need to see the materials because "the Book's already written." (Lokey Dep. 126:5-24, 130:2-21, Ex. R.)

From that point forward, O'Brien insisted on making the discussion with Lokey entirely personal. (Lokey Dep. 139:25-140:7, 145:3-6, Ex. R.) They spoke for two hours about topics that included her law school professor, who happened to be a friend of O'Brien; his children; her son; his son's school; his marriage; his divorce; his dating; her divorce; whether she was dating; living in New York City; and social events in New York. (Lokey Dep. 136:25-139:24, Ex. R.) Despite Lokey's best efforts to keep O'Brien on task, O'Brien squandered this valuable time by flirting with Lokey and engaging in "inappropriate" conversation.[4] (Lokey Dep. 136:25-13, 139:25-140:7, 145:3-6, Ex. R.) Lokey later complained to *The New York Times* that O'Brien's April 21st visit to The Trump Organization was nothing more than a "charade." (TOB-PD-00000006, Ex. U.)

After concluding his conversation with Lokey, O'Brien met Trump in his office and spent approximately ten minutes reviewing the Statement of Financial Condition (for the third time).[5] (Trump Dep. 45:16-21, Ex. B.)

Detailed notes produced by O'Brien in discovery, if authentic, would suggest that O'Brien reviewed voluminous information during the April 21 meeting. (TOB-PD-00004297-4310, Ex. V.) However, the authenticity of O'Brien's "notes" has been cast into serious doubt by Weisselberg's and Lokey's testimony that neither of them recalled

[4] Even after the meeting, O'Brien tried to continue a personal dialogue with Lokey, including inviting her out to dinner. (See TOB-EF-00000300-301, Ex. T.)

[5] Despite evidence that he reviewed Trump's Statement of Financial Condition three times, O'Brien claims that, before his deposition on October 15, 2007, he never saw it. (O'Brien Dep. 251:4-8, Ex. E.)

O'Brien taking written notes at the meeting. (See Weisselberg Dep. 150:7-12, Ex. A; Lokey Dep. 134:9-22, Ex. R.) Weisselberg is skeptical of the notes' authenticity: "there are a lot of notes for a very short meeting. It doesn't seem like all of this was written . . . [at the meeting]." (Weisselberg Dep. 215:22-216:20, 248:2-249:4, Ex. A.) Indeed, the notes reflect statements that Weisselberg and Lokey testified were not made, and topics that were not covered, at the meeting. (Weisselberg Dep. 220:13-223:25, 248:2-249:4, Ex. A; Lokey Dep. 117:6-18, 132:2-8, Ex. R.)

One way to resolve what happened at the April 21st meeting would be to listen to O'Brien's tape recording of the meeting. Weisselberg testified that O'Brien recorded the meeting and that the tape recorder remained visible on the conference table throughout the meeting. (Weisselberg Dep. 149:12-150:6, Ex. A.) And Trump testified that O'Brien -- the most sophisticated user of a tape recorder Trump had met -- recorded every interview of Trump. (Trump Dep. 71:18-72:12, Ex. B.) But O'Brien claims that he did not tape the April 21st meeting. O'Brien claims that even though he had his tape recorder with him to record Tony Bennett's hello to his sister and eight conversations with Trump, he did not bring a tape recorder with him to what should have been the most important fact-finding exercise related to the Book and a highlight of his career as a business journalist -- unprecedented access to documents that showed Trump's net worth.[6] (See O'Brien Dep. 275:24-276:25, Ex. E.)

[6] On at least one other occasion, O'Brien taped an interview with Weisselberg and then, during discovery, claimed that no tape was made. O'Brien interviewed Weisselberg in early 2005 while driving to the airport to fly with Trump to Florida. (Weisselberg Dep. 147:6-148:2, Ex. A.) After saying good morning, the very first question O'Brien asked Weisselberg was: "[W]ould you mind if I tape this meeting?" (Weisselberg Dep. 147:21-

C. The June 2, 2005 Phone Call with Lokey About the West Side Yards

On June 2, 2005, O'Brien spoke with Lokey by phone and expressed skepticism that Trump owned the West Side Yards property.[7] (Lokey Dep. 186:19-187:4, Ex. R.) Lokey reminded O'Brien that the documents made available to him on April 21, 2005 proved Trump's ownership of the properties, but nevertheless explained in great detail Trump's ownership interest. (Lokey Dep. 186:19-188:4, Ex. R.) By the end of the conversation, O'Brien recognized that Trump owned a thirty percent interest in the West Side Yards and admitted that Trump's stake in the West Side Yards alone was worth $450 million to $500 million. (Lokey Dep. 187:22-188:14, Ex. R.)

D. "Research" by Joseph Plambeck

O'Brien used Joseph Plambeck as a research assistant for the Book. O'Brien testified that he had Plambeck view publicly available mortgage information for Trump's properties and that Plambeck spent "quite a bit of time" reviewing mortgage information and interviewing brokers about property valuations. (O'Brien Dep. 690:11-691:3, 694:21-698:13, Ex. E.) Plambeck contradicted O'Brien's testimony. Plambeck, who had only recently graduated from journalism school and had no specific education or training in financial valuations, business, or real estate when he began working for O'Brien (Deposition of Joseph Plambeck ("Plambeck Dep.") 134:16-135:24, 149:8-17, Ex. X), described his research role much differently -- i.e., focusing on Trump's "mojo" (Plambeck Dep. 135:25-137:6, Ex. X). Plambeck stated that O'Brien never asked

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149:7, Ex. A.) Weisselberg was "shocked" to learn that O'Brien denied taping the interview. (Weisselberg Dep. 148:18-149:7, Ex. A.)

[7] The West Side Yards, formally used as a railroad yard, is highly valuable riverfront property on the West Side of Manhattan that spans 59th Street to 72nd Street. (Ex. W.)

Plambeck to gather any information about the value of Trump's real estate holdings or net worth and that he only viewed mortgage information for the West Side Yards.[8] (Plambeck Dep. 40:25-42:9, Ex. X.)

V. Defendants Are Specifically Told Before Publication That the Book Contains False Information

In mid-October 2005, Trump received an advance copy of the Book. He was immediately struck by the enormity of false information. (Certification of Donald J. Trump ("Trump Cert.") ¶ 2.) Aware that *The New York Times* would soon publish an excerpt, Trump and his attorneys wrote letters to defendants and *The Times* to try to prevent further publication of false and defamatory statements. (TR000037592, Ex. Z; TOB-PD-00000006, Ex. U; Lokey Dep. 165:18-166:14, Ex. R.) Trump specifically told *The Times* that O'Brien's $150 million to $250 million net worth valuation was outdated and incorrect (TR000037592, Ex. Z), and Lokey explained, for at least the third time, that despite the Book's statement otherwise, Trump owned an interest in the West Side Yards (TOB-PD-00000006, Ex. U).

Additionally, Trump's lawyers asked the Warner Defendants to cease and desist publishing the Book because of the false and defamatory statements therein, but the Warner Defendants refused to do so. (TOB-PD-00000013-14, Ex. AA.) Trump himself sought, and was refused, a meeting with the Warner Defendants to discuss the Book's glaring factual errors. (TOB-PD-00000013, Ex. AA.)

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[8] O'Brien offers no justification for limiting Plambeck's mortgage research to the West Side Yards. Similarly, he offers no justification for ignoring other goldmines of information for the Book, including other reporters and contacts of other reporters at *The New York Times* or his own brother, a real estate lawyer who has prepared net worth valuations for individuals (see, e.g., Deposition of Patrick O'Brien 16:6-15, Ex. Y).

VI. Defendants Published the Defamatory Statements Anyway

Despite knowing that the Book contained false and defamatory statements, defendants published an excerpt from the Book's "TrumpBroke" chapter on the front page of *The New York Times* Sunday Business Section. (TOB-PD-00004194-4214, Ex. AB.) The headline of the October 23, 2005 article *What's He Really Worth?* (TOB-PD-00004194, Ex. AB), was accompanied by a large graphic of Trump surrounded by question marks (Ex. AC).

The TrumpBroke chapter contains the most false and damaging statements in the Book, and evidences the most specious of O'Brien's reporting practices. (See Trump Dep. 502:8-16, Ex. B; O'Brien Dep. 731:11-21, Ex. E; Book at 154.) In TrumpBroke, O'Brien repeatedly states that Trump lies about his finances and refers to Trump's "*verbal* billions," his "*verbal* fortune," his "ability . . . to magically add zeroes to his bank account," and his propensity for inflation. (Book at 149, 152, 153, 156, 173, 174 (emphasis added).) O'Brien rejects numerous valuations that have repeatedly and accurately placed Trump's net worth in the billions of dollars.[9] (Book at 152; Ex. AB.) Instead, O'Brien adopts the valuation of three anonymous sources to claim that Trump "was not remotely close to being a billionaire" and that his "net worth was somewhere between $150 million and $250 million" (Book at 154) -- a valuation that is orders of magnitude below the credible valuations.

Although defendants have withheld from Trump key information relating to the anonymous sources, the little that is known casts serious doubt on the veracity of O'Brien's representations in the Book. First, every other time O'Brien referred to an

[9] In October 2005, *Forbes* magazine valued Trump's net worth at $2.7 billion.

anonymous source in the Book, he told the reader the date and place of the interview, but O'Brien failed to provide similar information for interviews with these three sources.[10] Second, approximately one year before publishing the Book, O'Brien published *The Midas Touch, With Spin on It*, in which he quoted three anonymous sources who estimated Trump's net worth at $200 million to $300 million, and described the sources as "people who have ***had*** direct knowledge of his holdings . . . ." (Ex. K (emphasis added).) The past tense suggested to the reader in 2004 that the information was not then current. In the Book -- published a full year later -- O'Brien attempted to revive the outdated reporting by changing the critical language used to identify his sources: the Book identifies the same sources as "three people ***with*** direct knowledge of Donald's finances . . . ." (Book at 154 (emphasis added).) The present tense suggested to the reader in 2005 that the information was current in 2005.[11]

To arrive at the $150 million to $250 million valuation in the Book, not only did O'Brien have to put full faith in the outdated information of three sources on whom he purported to rely, he had to ignore, among other things, all of the valuations that placed Trump's net worth well into the billions (including Trump's own $3.5 billion valuation, which he substantiated at the April 21, 2005 meeting, and *Forbes*' $2.7 billion valuation); he had to ignore the value of the West Side Yards, which he conceded was worth $450

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[10] O'Brien's failure to provide such information is contrary to *The New York Times*' standards for use of anonymous sources (Ex. AD), to which O'Brien claims to have adhered in writing the Book (O'Brien Dep. 41:24-42:11, Ex. E), a fact noted by Judge Snyder on December 20, 2006 (Hearing Transcript, at 35:21-44:17, Ex. BP.)

[11] O'Brien did not think the change amounted to a "substantive difference." (O'Brien Dep. 761:6-11, Ex. E.)

million to $500 million by itself[12] (Lokey Dep. 187:22-188:14, Ex. R); and he had to ignore the value of the Trump Brand (KNDD0004, Ex. AG), which earlier he suggested was more valuable than the brands of The Coca-Cola Company and PepsiCo. Inc. (see TOB-M-003, Ex. AH).

The Book contains other falsities relating to Trump's net worth, including the suggestion that the value of 40 Wall Street, which Trump owns, was $55 million in the hole. O'Brien based this figure on a tax assessor's valuation -- a figure never used by valuation experts (see Weisselberg Dep. 126:13-131:24, Ex. A) -- of approximately $90 million minus a mortgage of $145 million (Book at 171-72). Not only is it unlikely that a bank would have permitted Trump to keep a $145 million mortgage if the property was worth only $90 million, but the $90 million valuation is orders of magnitude below Trump's valuation of the property at $400 million and *Forbes*' valuation of it at $310 million. (See Book at 171-72.)

The Book also omits any reference to a rebound in the value of Trump's casino holdings. In the Article, O'Brien repeated the Book's valuation of Trump's worth at between $150 million and $250 million, but the Article also contained a parenthetical that "Donald's casino holdings have recently rebounded in value, perhaps adding as much as $135 million to these estimates." (TOB-PD-00004204, Ex. AB.) The Book, which was published three days after the Article (O'Brien Dep. 380:18-24, Ex. E), neglected to

[12] O'Brien also ignored an attorney who represented Trump in connection with the West Side Yards and who gave O'Brien copies of establishing documents from Trump's partners in Hudson Waterfront Associates detailing Trump's ownership interest in the property (see TR000043211-43316, Ex. AE); and an article written by a fellow *Times* journalist that identified Trump's interest in the West Side Yards (Ex. AF).

mention a rebound in value that alone would have approximately doubled O'Brien's net worth valuation (see Book at 154).

O'Brien knowingly made other false statements in the Book, including about Trump's deceased father Fred, whom Trump holds in great esteem (see O'Brien Dep. 726:4-7, Ex. E). For example, O'Brien stated that, when building Trump Village, "Fred became overwhelmed by the project's logistics. He only managed to complete the project after securing help . . . . In the end Trump Village bore Fred's name and he reaped most of the profits from the site, but he didn't build it." (Book at 47.) But Fred Trump did, in fact, build Trump Village, and O'Brien was told so before the Book was published. (TOB-PD-00000004, Ex. AI.)

In researching the Book, O'Brien saw credible information that directly contradicted the story he planned to write. (Weisselberg Dep. 166:6-167:6, Ex. A; Trump Dep. 39:15-18, Ex. B.) Instead of writing the story to fit the facts, O'Brien simply ignored the truth.

VII. Defendants' Marketing of the Book Focuses on the False, Defamatory, and Salacious Statements

O'Brien and the Warner Defendants aggressively marketed the Book. The "plan" among "fellow soldiers for the cause" -- i.e., O'Brien and his friends -- was to "annihilate the enemy, not merely irritate him" (TOB-EF-00000381-382, Ex. AJ); to make Trump go "ballistic" to "excite the masses" (TOB-EF-00000260, Ex. AK); and ultimately to win the "war" they were waging against Trump (Deposition of David Dillon ("Dillon Dep.") 110:9-111:4, Ex. AL). David Dillon, a close friend of O'Brien who helped promote the Book, described the goal in a June 10, 2005 e-mail to O'Brien and others: "Soon

[O'Brien] will discuss his new book about Trump with Larry King while the Donald remains in the fetal position in his bathroom unable to speak or keep food down as Tim explains the real business aptitude of the wizard behind the curtain . . . ." (TOB-EF-00007931, Ex. AM.)

O'Brien made radio appearances, attended book signings, and issued promotional pamphlets aimed at destroying Trump by calling him a fraud and a cartoon character. At marketing events, O'Brien repeatedly highlighted the most salacious, damaging, and false information in the Book. O'Brien drew up talking points for promotional events (Exs. AO, AQ), which were designed to "throw some gas on the fire and then we sit back and watch the barn start to burn down -- HA!!!" (TOB-EF-00008035, Ex. AN). One set touted the Book's revelations as including:

> - When you walk into one of those flashy skyscrapers bearing Donald Trump's name, remember one thing: ***The Apprentice host owns almost none of them.*** Donald is merely a glorified landlord whose pet projects are financed with other people's money.
> - ***Donald isn't a billionaire either.***[13] Although he inherited a huge fortune from his wealthy father, the Trumpster almost went personally bankrupt a decade ago and was forced to make humiliating phone calls begging his irritated siblings for handouts.
>
> . . . .

(TWBG-EM-00022456, Ex. AO (emphasis and footnote added).)

The second set of talking points described the Book as "[t]he story of how someone who is essentially a cartoon character became the most famous businessman in America. He's not Bill Gates, Warren Buffet or Jack Welch. He's a cross between Baby

[13] In other marketing materials, O'Brien called Trump a "self-described billionaire." (TWBG-PD-00002356, Ex. AP.)

Huey and PT Barnum."[14] (TOB-EF-00007732, Ex. AQ.) The talking points also focused on Trump's alleged ties to organized crime and his sex life. (Id. at 7732-7733.)

That O'Brien was not interested in creating a serious piece of journalism, but rather a sensational book that would sell, is underscored by O'Brien's decision to create a VidLit, or promotional video, for the Book, which O'Brien envisioned would be introduced by circus music and feature a Trump doll. (O'Brien Dep. 609:3-611:14, Ex. E; TOB-EF-00004624, Ex. AR.) The VidLit ultimately featured an audio recording of O'Brien reading one of the Book's "Trump Quizzes"[15] (O'Brien Dep. 606:9-607:16, Ex. E), which appear at the end of each chapter and ask questions such as:

> To emerge victorious on *The Apprentice*, you should:
>
> 1) Let a leech slither up your urethra.
>
> 2) Find out before the end of the season whether Donald actually owns any of the projects to which he'll assign you if you win.
>
> . . . .

(Book at 38).

On October 31, 2005, O'Brien promoted the Book on CNBC's *Squawkbox* business program (another outlet in which he hoped to use the doll (TOB-EF-00000379, Ex. AT)). When the program's host questioned O'Brien's statement that Trump is worth

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[14] During a radio appearance on KNDD that aired the week of November 17, 2005, O'Brien again made the cartoon figure comparison and also described Trump as "a guy who has had a series of car crashes in his business career," a "serial bankruptcy addict," the "court jester of the American business scene," and "just a spin-meister on steroids." (KNDD0001-5, Ex. AG.) When asked whether Trump is a good role model for aspiring entrepreneurs, O'Brien quipped, "only if their goals are to lose bales of money." (Id. at KNDD0004.)

[15] The TrumpQuizzes are annexed to the Tambussi Cert. as Ex. AS.

only $150 million to $250 million, O'Brien alleged that Trump "adds zeros here and there."[16] (Ex. AU.)

On November 12, 2005, during a promotional event at Coliseum Books in New York City, O'Brien engaged in a lengthy and malicious verbal attack on Trump. (Coliseum Books Tr., Ex. AW.) O'Brien falsely stated that Trump's assets and net worth were an order of magnitude lower than previously reported; that "Trump is worth anywhere from $300 to $500 million"; that Trump "doesn't have much money to invest"; that "as a businessman he is a train wreck"; that his "net worth is definitely inflated"; that "*Forbes* magazine puts his worth at $2.7 billion, but I am almost certain that is a complete work of fiction"; and that Trump "is the walking embodiment of financial pornography."[17] (Id.)

VIII. Defendants' Publication of the Defamatory Statements Injures Trump

A. Trump Has to Take Steps to Reassure *Forbes* That Their Multi-Billion Dollar Valuation of His Net Worth Was Accurate

Defendants' false and defamatory statements quickly permeated the financial community. For example, *Slate* reported on the Article as follows:

> The *NYT* runs a fascinating book excerpt showing that Donald Trump's net worth is nowhere near the $5 billion to $6 billion that he claims. Nor is it even close to Forbes' estimate of $2.7 billion. According to information gleaned from auditors and former business associates, it's

[16] During the *Squawkbox* appearance O'Brien again referred to Trump as Baby Huey, a comment that drew the ire of *The New York Times*' standards editor Allan Siegal. (TOB-EF-00000156, Ex. AV.) By e-mail to O'Brien's editor at *The Times*, Siegal chided O'Brien for the "ad hominem" attack on Trump, which violated *The Times*' standards on public appearances. (Id.)

[17] At the Coliseum Books event, O'Brien again referred to Trump as Baby Huey (Coliseum Books Tr., Ex. AW), even though *The Times* had warned him not to make ad hominem attacks on Trump.

> an order of magnitude less: about $250 million. So how does The Donald fool so many people? By claiming ownership of properties that he either doesn't own or that are larded with debt.

(TOB-EF-00000289, Ex. AX.) *Forbes* then expressed concern about the accuracy of their latest valuation. (Weisselberg Dep. 370:9-371:4, Ex. A.)

To prove to *Forbes* that O'Brien's statements about Trump's net worth were false, Trump led a meeting with Peter Newcomb and Stephane Fitch of *Forbes*; Gerry Rosenblum and Donald Bender of Weiser LLP, Trump's accountants; and Weisselberg, Lokey, Jeff McConney, Donald Trump Jr., and Ivanka Trump of The Trump Organization. Trump provided *Forbes* with substantial documentation -- roughly the same documents that O'Brien ignored while "researching" the Book. (Weisselberg Dep. 370:9-371:9, Ex. A; Lokey Dep. 57:22-59:5, Ex. R.) When the *Forbes* representatives walked out of the nearly full-day meeting, they concluded that, at $2.7 billion, they had probably undervalued Trump's net worth. (Lokey Dep. 58:22-60:13, Ex. R; Weisselberg Dep. 373:12-17, Ex. A.)

On November 7, 2005, during a television appearance on the Fox News Channel business program *Your World with Neil Cavuto*, Newcomb described the meeting:

> [W]e walked into the conference room and there before us were lawyers, accountants, his CFO, his controller, and Ivanka and Don Junior. He opened up his books; there were probably about 30 books out there, we looked at the contracts, we looked at the leases and deeds. In fact, Donald does own quite a bit.

(Ex. AY.) When asked about *Forbes*' $2.7 billion valuation, Newcomb said it was "conservative" and that O'Brien's $150 million to $250 million figure was patently wrong:

> [Trump's] stake in [the] casino company alone is worth practically that, and he's got 40 Wall Street, he's got stakes in all sorts of buildings. You know, one thing that's very hard to value, is kind of an intangible, is the Trump brand name, and if you look at the premium that Martha Stewart's getting for her company, you know, multiple over book value, you've got to figure Trump's got to be worth half a billion just the brand.

(Id.)

B. Trump Takes Out Corrective Advertising and Reassures Business Partners

To counter O'Brien's charges that Trump was a glorified landlord and not a billionaire (Exs. AO, AQ), Trump was forced to commission an advertisement. (See Defs.' Ex. 52 at 2; Defs.' Ex. 67; Trump Cert. ¶ 4.) Trump created a four-page, four-color gatefold advertisement that showcased his properties and that cost hundreds of dollars to produce and more than $380,000 to run in *The New York Times, The New York Times Magazine, New York* magazine, and the *New York Post.* (TR 000092386, Ex. AZ; TR-000092387-88, Ex. BA; Certification of Rhona Graff-Riccio ¶¶ 3-4; Trump Cert. ¶¶ 4-6.)

The Trump Organization also had to -- and continues to have to -- spend time convincing business partners and potential business partners that Trump has the financial wherewithal to complete projects successfully and to field questions from investors concerning the value of the Trump Brand. (See Certification of Donald J. Trump, Jr. ¶¶ 4-7; Certification of Ivanka Trump ¶¶ 4-7.)

C. Trump Loses Business Opportunities

Trump's ability to close deals that already were in progress was significantly impaired by the egregious falsities printed in the Book.

1. The Partnership with Prudential Douglas Elliman

Trump lost the opportunity to partner with preeminent real estate brokerage firm Prudential Douglas Elliman. Howard Lorber, who sits on the board of Prudential Douglas Elliman and is the Chief Executive Officer of its parent, testified that he thought of a possible merger in late 2004 to create an entity that would focus on "very high-end real estate," and he began discussing the merger with Trump in early 2005. (Deposition of Howard Lorber ("Lorber Dep.") 96:20-22, 98:22-25, Ex. BB; Trump Dep. 571:13-14, Ex. B.)

Trump and Lorber agreed on the nature of Trump's participation -- Trump would not have to invest capital or be involved in day-to-day operations, but he would act as a spokesman for the combined company (Lorber Dep. 111:16-21, Ex. BB) and would own a percentage of the company. Trump and Lorber were actively negotiating the precise percentage -- Trump was asking for 75%, but expecting closer to 50%, and Lorber thought 25 to 33% was more realistic. (Lorber Dep. 105:24-106:19, Ex. BB.)

Trump and Lorber even discussed the name of the combined company -- Lorber wanted Douglas Elliman Trump (Lorber Dep. 111:11-13, Ex. BB), and Trump wanted Trump Realty (Trump Dep. 571:3-4, Ex. B).

While Trump and Lorber were negotiating the details of the deal, defendants published their defamatory statements. Lorber had not yet presented the deal to the Douglas Elliman board or shareholders because Lorber wanted to have all of the details ironed out beforehand. (Lorber Dep. 101:18-19, Ex. BB.) After publication of the defamatory statements, Lorber felt he would not be able to obtain approval:

> I believe Prudential would have been a little bit of a sales job to sit down with them and tell them why we wanted to do it. But then just around that time is when the article in the Times appeared and then the book came out, and I knew after that that was the end of it, that there would be no way after reading that article in the Times and the book that Prudential would go along with it.

(Lorber Dep. 114:14-23, Ex. BB.) In October 2005, Lorber knew that the deal would not go forward, and he told Trump so in early 2006: "I told him, Donald, I don't think I have any chance of doing this deal, you know, ***because of the article and the book***, and I just don't think there's any chance of putting it together." (Lorber Dep. 117:6-10, Ex. BB (emphasis added).)

Lorber testified that he believed the deal would have been done but for publication of the defamatory statements (Lorber Dep. 122:8-10, Ex. BB) and that Trump missed a very profitable deal because of it: "I think Donald missed a good opportunity because he would have owned somewhere between probably a third of a company worth [$]500 million, but it didn't happen" (Lorber Dep. 120:8-16, 126:18-21, Ex. BB).

2. 400 Fifth Avenue

In addition to the lost opportunity to partner with Prudential Douglas Elliman, Trump lost the opportunity to complete a separate deal he was negotiating with Lorber. Lorber was working with a group of Italian investors led by Davide Bizzi of Bi & Di Realty, owners of 400 Fifth Avenue in New York City ("400 Fifth"). (Lorber Dep. 40:23-42:5, Ex. BB.) Lorber considered 400 Fifth a prime location for a mixed-use retail, hotel, and condominium building. (Lorber Dep. 46:14-47:3, Ex. BB.) Lorber suggested to Bizzi that he consider the Trump Brand for 400 Fifth: "[W]ith the Trump name you

could expect to get higher per square foot prices, as has been proven by the market, and obtain a sellout quicker than without his name." (Lorber Dep. 54:20-56:6, Ex. BB.)

Lorber arranged a meeting between Trump and Bizzi at which Trump and Bizzi discussed the outline of a deal. (Lorber Dep. 58:17-59:25, 62:12-21, Ex. BB.) Trump was Bizzi's and Lorber's first choice as a partner for the project. (Lorber Dep. 57:21-58:3, Ex. BB.) Trump recalls discussing four elements of compensation with Bizzi: (1) developer fees, (2) licensing fees for use of the Trump name, (3) sales fees for selling the building, and (4) a 25% carry-free interest in the building. (Trump Dep. 552:25-553:5, 555:15-23, Ex. B.) Lorber testified that he believed Trump would share in the premiums paid for the floor space, giving him an interest in the building beyond licensing and development fees. (Lorber Dep. 63:19-64:3, Ex. BB.)

Bizzi was very interested in doing the deal with Trump (Lorber Dep. 62:19, Ex. BB), and Trump believed that "it was just a deal that was going to happen." (Trump Dep. 549:20-21, Ex. B; accord id. 556:12-13).

Lorber and Donald Trump Jr. ultimately drew up a term sheet that gave Trump a $3-5 million fee up front, plus twenty-five percent of the sales price above a base square foot number. (Lorber Dep. 64:4-13, 65:8-22, Ex. BB; Trump Dep. 552:23-553:7, Ex. B.) Bizzi was very excited about pursuing the project (Lorber Dep. 72:25-73:3, Ex. BB), and Trump felt the deal was "made in heaven" (Trump Dep. 549:3-16, Ex. B).

Then Bizzi began to lose interest in partnering with Trump. (Lorber Dep. 67:13-68:4, Ex. BB.) Lorber testified:

> He seemed to be getting a little less interested in Trump, and I tried to find out from him.... Finally when I pulled it out of him, he said, well, he had heard things about the

> New York Times article. And I don't remember whether he mentioned the book, but I know he mentioned the article. . . . I again asked him what he thought about pursuing it, and he basically had said he had decided not to and that his lawyer had recommended [another group].

(Lorber Dep. 66:16-18, 66:21-25, 79:4-7, Ex. BB.) Bizzi questioned why Lorber would want to use the Trump name when the Article suggested that Trump was a fraud. (Lorber Dep. 66:6-67:5, Ex. BB.) During subsequent conversations, Bizzi expressed doubt about whether Trump was an honest businessman, telling Lorber that the Article cast Trump in a bad light. (Lorber Dep. 70:8-14, Ex. BB ("I believe that I said, Oh, are you talking about, you know, the book and the article about the book. And he said, yeah, it puts him [in] this [] bad light, you know, maybe he's not, you know, an honest guy to deal with, you know, he lies about that type of stuff.").) Lorber testified that it was obvious that Bizzi no longer wanted to work with Trump because of the Book and the Article. (Lorber Dep. 72:13-73:3, Ex. BB.)

Lorber called Trump and explained that Bizzi was no longer interested in using Trump for the 400 Fifth project. (Trump Dep. 550:10-19, Ex. B.) Trump called Bizzi to try to get the deal back on track, but Bizzi refused. (Trump Dep. 559:13-15, Ex. B.) Bizzi mentioned the Article, and it became clear to Trump that the Book and Article caused a "180-degree turn" in Bizzi's interest in working with Trump on the project. According to Trump, "It went from a deal that couldn't miss to a deal that couldn't happen." (Trump Dep. 561:4-7, Ex. B.)

3. Deals with Bayrock Group

Trump also lost business opportunities he was pursuing with Bayrock Group ("Bayrock"), a Manhattan-based real estate investment and development group. Trump

was a "cornerstone" of Bayrock's strategy to build five-star properties, and, in scouting locations, Bayrock "looked for deals that could be a Trump deal." (Deposition of Felix Sater ("Sater Dep.") 72:2-6, Ex. BC.) Trump's arrangement for each Bayrock deal was that he would put in no money and would get a carry-free ownership interest of 20-25%, plus management fees. (Trump Dep. 591:2-9, Ex. B.) Trump testified that these deals failed because of publication of the Book and Article. (Trump Dep. 587:9-11, Ex. B ("[The Bayrock owner] told me that the article in the New York Times/book immediately killed those deals").)

At the time of publication, Trump was in talks with Bayrock to build a Trump International Hotel and Tower in Moscow. (B0207, Ex. BD.) Felix Sater of Bayrock identified a property in Moscow -- which he described as a "mega-financial home run" -- and asked Trump to consider developing it as a Trump Tower. (Sater Dep. 129:19-130:24, Ex. BC.) On January 1, 2005, Trump executed an agreement granting Bayrock a one-year exclusive right to develop a Trump International Hotel and Tower in Moscow. (B0207, Ex. BD.) Bayrock then engaged BBG, a New York-based architectural firm, to prepare plans for the mixed-use hotel and residential tower. (Sater Dep. 135:24-136:10, Ex. BC.) Sater negotiated and reached a price agreement with Ilya Haikan, the owner and developer of the site. (Sater Dep. 136:14-139:10, Ex. BC.)

Immediately after publication of the Article and Book, the developers of the Moscow project "mysteriously went radio silent." (Sater Dep. 148:12-16, Ex. BC.) Sater concluded that the lost deal was related to the Book and the Article. (Sater Dep. 151:5-21, Ex. BC.)

Trump also was negotiating with many foreign investors through Tevfik Arif, owner of Bayrock. The Moscow project was to be the first in a series of partnerships with Bayrock that would have placed Trump International Hotels and Towers in Turkey, Kiev, and Warsaw. (Trump Dep. 586:12-23, Ex. B.) Although many of the deals in negotiation were certain to be completed, Arif told Trump that publication of the Book and Article "immediately killed" the deals in negotiation. (Trump Dep. 587:9-11, 591:16-22, Ex. B.)

Domestically, Trump planned to develop a high-rise building in Phoenix, Arizona in 2005. (Trump Dep. 402:2-9, Ex. B.) A group of local residents who did not want the building to be constructed used the Book at a zoning meeting to try to thwart zoning approval for the building. (Trump Dep. 402:16-19, Ex. B ("We were going for zoning, and people literally held this book up during the zoning hearings, screaming 'don't approve this application'").) Trump spoke with governmental decision-makers about the zoning issues, and at least one individual "said that they read the book, it was terrible, and it certainly hurt [his] chances of getting approved." (Trump Dep. 407:6-19, Ex. B.) Ultimately, Trump did not get the approval. (Trump Dep. 403:24-404:9, Ex. B.)

4. **Other Lost Deals**

In addition to the deals Trump knows he lost because of defendants' publication of defamatory statements about him in the Book and Article, Trump testified that he may have lost other deals that he will never know about. As Trump explained:

> I'm also telling you there are deals that we lost, because of this book and because of this New York Times article excerpt from the book, where people didn't come to me specifically because they read that. I can't tell you who they are because they never came to me.

(Trump Dep. 19:13-20, Ex. B.)

PROCEDURAL HISTORY

I. The Complaint and Defendants' Response to It

Trump filed his complaint on January 23, 2006 to vindicate his name and reputation and to obtain redress for the damages defendants inflicted.

On May 15, 2006, defendants moved to dismiss, arguing that the complaint did not identify any statement that is susceptible of a defamatory meaning and did not adequately plead actual malice, and that the statements defendants published about Trump were protected by the fair-comment doctrine. By order dated August 30, 2006, Judge Fernandez-Vina denied defendants' motion to dismiss, holding that defendants' statements are susceptible of a defamatory meaning, that Trump adequately pleaded actual malice, and that the Book was not protected by the fair-comment doctrine. (Exs. BE, BF.)

On October 12, 2006, the Appellate Division denied defendants' motion for leave to take an interlocutory appeal from Judge Fernandez-Vina's order. (Ex. BG.)

II. Discovery and Defendants' Reliance on the Newsperson's Privilege to Shield Documents and Information from Discovery

On June 8, 2006, Trump served interrogatories and document requests on each of the defendants. (Ex. BH.) Defendants responded on September 8, 2006 and withheld entire categories of documents on the basis of the newsperson's privilege (also referred to as the shield law).[18] Defendants asserted the newsperson's privilege as a basis for

[18] Copies of the responses and objections of O'Brien and the Warner Defendants to Trump's document requests are attached to the Tambussi Cert. as Exs. BI and BJ, respectively.

refusing to produce any drafts of the Book (Response to Request No. 2) or O'Brien's calendars (Response to Request No. 57). (Exs. BI, BJ.) And, in their responses to Trump's interrogatories,[19] defendants cited the newsperson's privilege as a basis for refusing to answer interrogatories that called for:

- the identity of the three anonymous sources on which O'Brien purportedly relied (Interrogatory No. 1);
- the identity of any person to whom defendants disclosed the identity of the three anonymous sources (Interrogatory No. 2);
- communications with anonymous sources regarding Trump's finances (Interrogatory No. 3); and
- the chronology that culminated in publication of the Book (Interrogatory No. 21).

On September 27, 2006, defendants produced a log of documents that defendants produced but redacted for privilege, and a log of documents that defendants withheld on the basis of privilege. (Ex. BM.) The Court held that defendants' privilege logs were deficient and ordered defendants to produce logs that would enable Trump to assess the validity of defendants' privilege assertions. (Ex. BN.)

On October 17, 2006, defendants produced revised privilege logs. (Ex. BO.) The revised logs show that defendants primarily relied on the newsperson's privilege to shield from Trump critical information, including e-mails and notes of interviews with confidential sources, notes of interviews with non-confidential sources, drafts of the Book, communications between O'Brien and his agent regarding the Book, communications about the logistics of publishing the Book, published newspaper articles,

[19] Copies of the responses and objections of O'Brien and the Warner Defendants to Trump's interrogatories are attached to the Tambussi Cert. as Exs. BK and BL, respectively.

e-mails discussing work schedules, and even the notes and tapes of interviews that Trump gave to O'Brien. (Id.)

Defendants asserted the newsperson's privilege in refusing to produce information and documents relating to O'Brien's sources and to anything else defendants deemed part of the "newsgathering" or "editorial" processes. (See, e.g., Ex. BO (privilege log entry referencing e-mail from T. O'Brien to R. Wolff and A. Blauner dated April 4, 2005 "regarding editorial and newsgathering processes as well as draft portion of Work").) In short, defendants sought to avoid virtually all meaningful discovery by asserting that the newsperson's privilege protects more than 650 responsive documents and other information from disclosure.

Because the requested information goes to the heart of Trump's claim, Trump moved to compel production. After oral argument on December 20, 2006, the Honorable Irvin Snyder granted Trump's motion and directed defendants to produce the withheld information and documents. (Ex. BN.) Judge Snyder first conducted a conflict-of-laws analysis because he found that the newsperson's privilege under New York law differs from that under New Jersey law, and he held that New York substantive law governs because New York has the most significant relationship to the occurrence and the parties.[20] (See Ex. BP at 6-21.) Judge Snyder further held that New York's shield law did not protect defendants as the authors and publishers of *TrumpNation* and that no

[20] Trump is a New York resident; the Warner Defendants are New York entities; Trump's business is centered in New York; the tort -- publication of the Book -- occurred in New York; Trump suffered injury in New York; the Book centers on New York; O'Brien's "entire professional life" has been in New York; and O'Brien conducted most of the interviews for the Book in New York. (See Ex. BP at 6-21.)

constitutional privilege entitled defendants to withhold the information and documents they refused to produce. (Ex. BN.)

III. The Appeal on the Issue of the Newsperson's Privilege

On March 1, 2007, defendants applied to the Appellate Division for leave to take an interlocutory appeal, which the Appellate Division granted. (Ex. BQ.) On October 24, 2008, the Appellate Division did not disturb Judge Snyder's ruling on conflict of laws, but held that: (i) New York's shield law does apply to book authors and provides defendants here with absolute protection from forced disclosure of information relating to the confidential sources; and (ii) Trump did not make a showing sufficient to overcome the qualified privilege for nonconfidential news.[21] Trump v. O'Brien, 403 N.J. Super. 281, 301 (App. Div. 2008).

IV. Defendants' Voluntary Production of "Notes" of Meetings with the Sources

On November 21, 2008, after nearly three years of discovery -- during which plaintiff specifically requested them -- defendants produced approximately fifty pages of heavily redacted notes that O'Brien purportedly took during interviews with the sources.[22] (Ex. BS.)

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[21] In this brief, plaintiff relies on the substantive law of New York and New Jersey to the extent they are consistent, but to the extent they conflict, plaintiff relies on New York law because Judge Snyder's ruling that New York substantive law applies in the event of a conflict was not disturbed by the Appellate Division and remains the law of this case. See, e.g., Sisler v. Gannett Co., 222 N.J. Super. 153, 159 (App. Div. 1987) ("The law of the case doctrine requires judges to respect unreversed decisions made during the trial by the same court or a higher court regarding questions of law. . . . Prior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous.").

[22] Indeed, although the notes were responsive to no fewer than fifteen document requests (Ex. BH), defendants failed to produce them until they wanted to use them to try to support their argument (see Ex. BS).

V. The Instant Motions for Summary Judgment

On March 20, 2009, defendants filed these two meritless summary judgment motions, seeking to dismiss Trump's claims for a purported failure to adduce any evidence of actual malice or damages.

ARGUMENT

On summary judgment, defendants bear a heavy burden of establishing that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law. Defendants do not -- and cannot -- satisfy that heavy burden here. There are genuine issues of material fact regarding actual malice and damages, and defendants are not entitled to judgment as a matter of law. To the contrary, there is substantial evidence to substantiate all of the elements of all of Trump's claims, thereby precluding summary judgment here, and there is an exceptionally compelling case to present to the jury.

I. The Summary Judgment Standard

Summary judgment is appropriate only if "there is no genuine issue as to any material fact challenged in the record" and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); accord Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); Leang v. Jersey City Bd. of Educ., 399 N.J. Super. 329, 355-56 (App. Div. 2008). Determining whether there is a "'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, ***when viewed in the light most favorable to the non-moving party,*** are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Leang, 399 N.J. Super. at 355 (citing Brill, 142 N.J. at 540) (emphasis added). "Therefore, the motion must be considered on

the basis that the nonmoving parties' assertions of fact are true and the court must 'grant all the favorable inferences to the non-movant.'" Id. (quoting Brill, 142 N.J. at 536).

II. Trump Has Evidence That O'Brien Acted with Actual Malice

To succeed on his claims, Trump must, as all public figures must, adduce clear and convincing evidence that defendants made the false and defamatory statements with actual malice -- that is with known falsity or reckless disregard for whether they were false. See N.Y. Times v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 335, 94 S. Ct. 2997, 3005, 41 L. Ed. 2d 789, 803 (1974). "Summary judgment may only be granted if a reasonable factfinder could not find that plaintiff has established malice by clear and convincing evidence." Gray v. Press Commc'ns, LLC, 342 N.J. Super. 1, 11 (App. Div. 2001); accord Di Lorenzo v. N.Y. News Inc., 1981 N.Y. App. Div. LEXIS 11522, at *2 (May 6, 1981) (opponent of summary judgment "is required only to submit evidence which shows a genuine issue of material fact from 'which a reasonable jury *could find* actual malice with convincing clarity'") (emphasis in original; source omitted).

New Jersey's highest court has recognized that because actual malice is a fact-specific element, it does not lend itself to summary disposition. Maressa v. N.J. Monthly, 89 N.J. 176, 196 n.10 (1982) ("summary judgment poses a more difficult problem where the issue is whether a defendant has published a defamatory falsehood with actual malice"); cf. Gray, 342 N.J. Super. at 12 ("the issue of state of mind does not readily lend itself to summary disposition"); O'Neil v. Peekskill Faculty Ass'n, 507 N.Y.S.2d 173, 179 (App. Div. 1986) (stating same outlook by New York courts: actual malice inquiry

is entirely fact specific "and is thus not an issue that easily lends itself to summary disposition").

Numerous New Jersey decisions have denied summary judgment in defamation cases in light of the subjective nature of the actual malice requirement. See, e.g., Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 173-74 (1999) (reversing summary judgment for defendants where deposition testimony suggested defendant acted with actual malice); Hopkins v. City of Gloucester, 358 N.J. Super. 271, 279 (App. Div. 2003) (noting that "ordinarily, where a party's state of mind is critical, and there is a genuine critical issue of material fact as to the state of mind, summary judgment should be denied since the issue of state of mind does not readily lend itself to summary disposition") (quoting Gray, 342 N.J. Super. at 10 (citing Costello v. Ocean County Observer, 136 N.J. 594, 615 (1994))); Ricciardi v. Weber, 350 N.J. Super. 453, 469-475 (App. Div.), certif. denied, 175 N.J. 433 (2003) (evidence concerning actual malice precluded summary judgment). This is consistent with Judge Pressler's observation that a summary judgment motion "should ordinarily not be granted where an action or defense requires determination of a state of mind or intent." See Pressler, New Jersey Court Rules, cmt. 2.3.4 to R. 4:46-2 (citing, e.g., Fortenbaugh v. N.J. Press, Inc., 317 N.J. Super. 439 (App. Div. 1999) (reversing grant of summary judgment to defendants on defamation claim by plaintiff)).

Several other decisions note the difficulty in granting summary judgment where intent is reasonably disputed. See Binkewitz v. Allstate Ins. Co., 222 N.J. Super. 501, 514 (App. Div. 1988) (holding summary judgment inappropriate on defamation claim, in part because "[k]nowledge or disregard of falsity are mental states which are ordinarily difficult of paper proof and thus peculiarly unsuitable for resolution by summary

judgment") (citations omitted); Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 212 (App. Div. 1987) (noting that "the court should be particularly hesitant in granting summary judgment where questions dealing with subjective elements such as intent, motivation and duress are involved") (citations omitted); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 76 (1955) ("[I]n any case where the subjective elements of willfulness, intent or good faith of the moving party are material to the claim or defense of the opposing party, a conclusion from papers alone that palpably there exists no genuine issue of material fact will ordinarily be very difficult to sustain. The telltale factor of demeanor in the presence of the trier of fact often assumes such vital importance in such cases that the opposing party should generally not be denied the opportunity to have the moving party, or its officers, appear on the witness stand before the trier of fact.").

Here, Trump has evidence from which a reasonable factfinder could find actual malice with convincing clarity. First, Trump has evidence that in researching, writing, and marketing the Book, O'Brien and the Warner Defendants knowingly published false statements. Second, Trump has evidence that defendants recklessly disregarded the truth by, among other things, failing to review information necessary to draw the conclusions O'Brien reached, deliberately ignoring facts presented to them that contradicted their plan for the Book, relying instead on outdated and incorrect information, and devising and executing a marketing campaign aimed at humiliating and destroying Trump by falsely labeling him a fraud. To the extent defendants dispute Trump's evidence of their actual malice, summary judgment should be denied because there is a genuine issue of material fact.

A. **O'Brien Knowingly Published Falsities About Trump**

The evidence is clear that O'Brien deliberately published information that he knew was false about Trump, his ownership of properties, and his net worth.

For example, O'Brien published information relating to Trump's ownership of the West Side Yards that he knew was false. O'Brien knew that Trump held an extremely valuable ownership interest in the West Side Yards. First, he was shown documents at the April 21st meeting that established Trump's interest in the West Side Yards. (Weisselberg Dep. 123:6-22, Ex. A.) Second, during a June 2, 2005 telephone call, Lokey talked O'Brien through the ownership structure of the limited partnership formed to control the West Side Yards, and at the end of the conversation, O'Brien conceded that Trump owned a thirty percent interest in the West Side Yards that was worth $450 million to $500 million. (Lokey Dep. 186:19-188:14, Ex. R.) Third, O'Brien spoke with one of Trump's attorneys, who provided O'Brien with documents establishing the limited partnership formed to control the West Side Yards and demonstrating Trump's ownership interest in the property. (TR000043211-43316, Ex. AE.) Fourth, a fellow *Times* journalist wrote an article that identified Trump's interest in the West Side Yards. (Ex. AF.) Despite clearcut evidence of Trump's ownership of the West Side Yards and O'Brien's own admission to Lokey that Trump owned an interest in the property that was worth $450 million to $500 million, O'Brien falsely published in the Book that Trump "doesn't own" the West Side Yards (Book at 172) and that Trump's total net worth was $150 million to $250 million (Book at 154) -- less than half the value O'Brien knew Trump had in the West Side Yards alone.

O'Brien published other information relating to Trump's net worth that he knew was false. O'Brien knew that the Trump Brand is extraordinarily valuable[23] -- he even called it "bigger than Coke and Pepsi" (TOB-M-0003, Ex. AH). Nevertheless, in valuing Trump's total net worth at $150 million to $250 million, O'Brien did not include any amount for the Trump Brand, nor did he indicate that his valuation excluded the Trump Brand.

From this evidence that O'Brien published statements about Trump that he knew were false, including those relating to Trump's net worth, a reasonable factfinder could find that O'Brien published the defamatory statements with actual malice.

B. O'Brien Published and Marketed the Book and Article with Reckless Disregard for the Truth

In addition to evidence that O'Brien published defamatory statements about Trump that he knew were false, the evidence is clear that O'Brien acted with reckless disregard for the truth.

Reckless disregard for the truth "cannot be fully encompassed in one infallible definition. . . [I]ts outer limits will be marked out through case-by-case adjudication." St. Amant v. Thompson, 390 U.S. 727, 730-31, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968); accord Di Lorenzo, 1981 N.Y. App. Div. LEXIS, at *7 ("[A] standard of liability which encompasses innumerable subtleties of the defendant's mind set and conduct, is exceedingly difficult to apply to the varying circumstances of each case."). Reckless disregard for the truth can be demonstrated "through direct or circumstantial evidence that there were *facts* available to the defendant ***that did or should have aroused serious***

[23] Peter Newcomb of *Forbes* estimated "you've got to figure Trump's got to be worth half a billion just the brand." (Ex. AY.)

doubts as to the accuracy of the published material." First United Fund Ltd. v. Am. Banker, Inc., 485 N.Y.S.2d 489, 492 (Sup. Ct. 1985) (emphasis added). Because "[a] plaintiff is rarely successful in proving awareness of falsehood from the mouth of the defendant himself . . . [o]bjective circumstantial evidence can suffice to demonstrate actual malice." Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1089-90 (3d Cir. 1988); accord Harte-Hanks Commc'ns, Inc. v. Connoughton, 491 U.S. 657, 668, 109 S. Ct. 2678, 2686, 105 L. Ed. 2d 562, 577 (1989); Herbert v. Lando, 441 U.S. 153, 160, 99 S. Ct. 1635, 1640-41, 60 L. Ed. 2d 115, 124 (1979).

O'Brien never admitted that he entertained doubts as to the accuracy of the defamatory statements, but that does not -- as defendants would have it (see Malice Mov. Br. 16)[24] -- end the inquiry. There is ample evidence that there were facts available to O'Brien that should have aroused serious doubts as to the accuracy of the statements he made. Among other things, O'Brien thus purposefully avoided the truth; failed to research necessary information; published the Book after being alerted to glaring and egregious falsities in a prepublication version; and relied on sources whose information

[24] Relying on Lawrence v. Bauer Publishing & Printing Ltd., 89 N.J. 451, 467 (1982), and Khan v. New York Times Co., 710 N.Y.S.2d 41, 43-44 (App. Div. 2000), defendants attempt to limit the relevant analysis to O'Brien's subjective state of mind concerning the truth of his statements. The Lawrence and Khan courts, however, explicitly recognized the importance of objective circumstantial evidence. The Lawrence court, for example, found instructive the following objective examples of reckless conduct: "publication of a completely fabricated story, a publication based entirely on an unverified anonymous telephone call, or publication where there are obvious reasons to doubt the veracity of the information reported." 89 N.J. at 476 n.4. Moreover, the Khan court expressly observed that evidence that defendant "purposefully avoided the truth may support a finding of actual malice if supported by evidence that defendants' 'inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity' of the published statement." 710 N.Y.S.2d at 46. Additionally, O'Brien cannot automatically escape liability by simply swearing to his belief that the statements were true. See Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1049 (S.D.N.Y. 1975).

was suspect. In addition, Trump has evidence of O'Brien's common law malice toward Trump.

1. O'Brien Acted Recklessly by Ignoring Important Information About Trump's Net Worth

Evidence elicited during discovery makes it abundantly clear that O'Brien continued his scheme to expose Trump as a fraud even when confronted with proof that the premise was false. Such willful ignorance constitutes reckless disregard for the truth: "Where the defendant finds internal inconsistencies or apparently reliable information that contradicts its libelous assertions, but nevertheless publishes those statements anyway, the *New York Times* actual malice test can be met." Schiavone, 847 F.2d at 1091; accord Prozeralik v. Capital Cities Commc'ns, Inc., 82 N.Y.2d 466, 477 (1993) ("Although failure to investigate will not alone support a finding of actual malice . . . purposeful avoidance of the truth is in a different category.").

One of the most glaring examples of O'Brien's purposeful avoidance of the truth is his "charade" visit to The Trump Organization on April 21, 2005. The evidence shows that Trump arranged for the meeting six months before the Book was published to satisfy O'Brien's expressed concern that Trump did not own the properties he claimed to. (See Trump Dep. 40:9-20, 43:3-20, Ex. B.) In preparation, Trump's CFO and in-house counsel compiled, assembled, and gave O'Brien access to comprehensive information detailing Trump's private and public holdings -- including ownership documents, loan documents, and his Statement of Financial Condition, which placed his net worth at $3.5 billion exclusive of the Trump Brand -- and the opportunity to ask them questions. (Trump Dep. 43:13-44:11, Ex. B; Lokey Dep. 43:20-45:21, Ex. R; Weisselberg Dep. 166:6-25, Ex. A.) If O'Brien had actually reviewed the materials, he would have learned

that Trump owned the properties he claimed to and O'Brien could not have called Trump a "glorified landlord" who owns very few properties and is worth only $150 million to $250 million. Instead of reviewing the documents and questioning key Trump Organization personnel in a meaningful way -- as opposed to about their personal life -- O'Brien ignored the information because "the Book's already written" and the documents contradicted the Book. (Lokey Dep. 126:5-24, 130:2-21, Ex. R.) Thus, O'Brien merely went through the motions of accepting Trump's invitation to review documents and ask questions to create the false impression that he was doing the research a responsible journalist would do. (See Lokey Dep. 149:20-150:10, Ex. R; TOB-PD-00000006, Ex. U.)

O'Brien also purposefully avoided the information contained in Trump's Statement of Financial Condition, which he was shown three times, and which established that Trump is a multi-billionaire. O'Brien's self-serving testimony that he never saw the Statement of Financial Condition (O'Brien Dep. 251:4-8, Ex. E) is contradicted by the testimony of Trump and Weisselberg that Trump physically handed the document to O'Brien (Trump Dep. 41:10-15, 43:3-44:11, 45:16-21, Ex. B; Weisselberg Dep. 171:22-172:6, Ex. A). At a minimum, there is a genuine issue of material fact as to whether O'Brien ignored the evidence that directly contradicted the conclusion O'Brien wanted to reach.

In short, O'Brien saw documentary evidence on multiple occasions that directly contradicted his conclusions and aligned with every other professional valuation that consistently placed Trump's net worth in the billions. At the very least, such extreme inconsistencies should have raised serious concerns and caused O'Brien to conduct

further research. However, O'Brien never attempted to resolve the discrepancies, which, as a matter of law, amounts to actual malice. See Schiavone, 847 F.2d at 1091; Scacchetti v. Gannett Co., 507 N.Y.S.2d 337, 338 (App. Div. 1986).

2. O'Brien Recklessly Disregarded the Truth by Printing the Book After Being Alerted to the Falsities Therein

Trump has evidence that O'Brien acted with reckless disregard for the truth by publishing the Book after being alerted to the glaring and egregious falsities within. Upon receipt of a prepublication version of the Book, Trump and Trump's attorneys immediately wrote letters to *The New York Times*, which was planning to run an excerpt of the Book, and explained that the Book contained serious falsities. (See TR000037592, Ex. Z.) *Times*' executives, including O'Brien's editor, discussed these letters with O'Brien. (Deposition of Lawrence Ingrassia ("Ingrassia Dep.") 85:21-86:7, Ex. BT.) Nevertheless, O'Brien did nothing to correct, or even investigate, the Book's falsities, which amounts to actual malice. See Curtis Publ'g Co. v. Butts, 388 U.S. 130, 161 n.23, 87 S. Ct. 1975, 1993, 18 L. Ed. 2d 1094, 1112-13 (1967) (failing to consult additional potential sources of information when questions as to story's falsity had been raised may be evidence of malice); see also Prozeralik, 82 N.Y.2d at 477.

3. O'Brien's Reporting and Marketing of the Book Demonstrated a Clear Motive of Hate, Ill Will, and Spite Toward Trump

"Motive and intent may be adduced for the purpose of establishing by accumulation and by appropriate inference the fact of defendant's recklessness." Di Lorenzo, 1981 N.Y. App. Div. LEXIS, at *11 (quoting Goldwater v. Ginzburg, 414 F.2d

324, 342 (2d Cir. 1969)); accord Celle v. Filipino Reporter Enters. Inc., 209 F.3d 163, 183 (2d Cir. 2000); Hotchner v. Castillo-Puche, 404 F. Supp. at 1047.[25]

O'Brien's animus toward Trump was clear from his earlier writings about Trump. In the year leading up to the Book's publication, O'Brien published twenty-one articles about Trump. Each was negative,[26] and each suggested that Trump was headed for financial ruin. (Ex. BX.) Several contained false statements about Trump and his financial condition that O'Brien knew or should have known were false. (Ex. BX.) Indeed, in August 2004, Trump's lawyers warned *The New York Times* that, in his reporting about Trump, O'Brien relied on "sources who have false or incorrect information," and had been harassing current and former employees of The Trump Organization, as well as Trump's current and former business associates, "attempting to coax them into making false, deceptive and misleading statements about Mr. Trump." (NYT0000256, Ex. P.)

The Book itself takes every available avenue to injure Trump. The major premise of the Book is that Trump is a fraud. But that is not where the negativity ends. The Book takes aim at Trump's father, whom Trump holds in high regard, Trump's ex-wives, and Trump's business associates. O'Brien bragged about the Book that "parts of it will make [Trump] go ballistic." (TOB-EF-00000387, Ex. BY.)

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[25] Defendants dismiss the relevance of common law malice to constitutional malice. (See Malice Mov. Br. 23.) But, as shown directly above, New York courts routinely examine common law malice as suggestive of actual malice. And Judge Kassel already rejected this argument proffered by defendants. (Ex. BW at 16-17 ("That's evidential, whether or not you had any type of malice towards me, from which a jury could circumstantially then infer that you were recklessly indifferent about your claim . . . . The type of lay person ill will is frequently explored.").)

[26] O'Brien admitted, for example, that *The Midas Touch, With Spin* (Ex. K) was a negative article (O'Brien Dep. 158:16-22, Ex. E).

The marketing and promotion of the Book focused on the most negative aspects of the Book -- on Trump's net worth according to O'Brien -- calling Trump a "faux billionaire" and "not a real billionaire"; on purported ties to organized crime (TWBG-EM-00022456-57, Ex. AO; TOB-EF-00000257, Ex. BZ; TOB-EF-00007732-34, Ex. AQ, O'Brien Dep. 441:17-444:21, Ex. E; KNDD00001, Ex. AG); and on his failed marriages (TOB-EF-000007959, Ex. CA). Marketing was aimed at belittling Trump -- O'Brien attempted to use a "Trump doll" and circus music during his promotional appearances (O'Brien Dep. 609:3-611:14, Ex. E; TOB-EF-00004624, Ex. AR), and he repeatedly referred to Trump as Baby Huey -- a mentally impaired, obese, diaper-clad adult duckling cartoon figure[27] (O'Brien Dep. 101:2-103:25, Ex. E; TOB-EF-00007732, Ex. AQ). Indeed, O'Brien admitted that the marketing campaign devised by O'Brien and the Warner Defendants and executed by O'Brien routinely focused on "gossip" and the non-news elements of the Book. (See O'Brien Dep. 445:9-446:14.)

If O'Brien's ill will toward Trump was not clear enough from his actions -- but it is -- it was made perfectly clear by an e-mail from O'Brien's long-time friend David Dillon addressed to his "Fellow soldiers for the cause" -- i.e., O'Brien and other friends. In the e-mail, Dillon explained, "This is a war and we need to annihilate the enemy, not just irritate him." (TOB-EF-00000381, Ex. AJ.)

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[27] Following an appearance on CNBC, David Dillon, a close friend of O'Brien's helping to market the Book, circulated "just released pictures of Tim backstage getting ready for the CNBC's Squawk Box [*sic*] Interview." The pictures appear to feature O'Brien's face superimposed on Robocop's body. One picture shows O'Brien/Robocop shooting a gun and saying, "Yeah, I said 'Baby Huey.' Now . . . who's gonna try to stop me?" (TOB-EF-00008049, Ex. CB.)

4. Defendants' Arguments That O'Brien Did Not Act with Reckless Disregard Are Unpersuasive

Defendants make two principal arguments to support their assertion that O'Brien did not act with reckless disregard -- O'Brien reasonably relied on three anonymous sources for the $150 million to $250 million net worth valuation (Malice Mov. Br. 15-19), and O'Brien had reason to disbelieve Trump's estimates (Malice Mov. Br. 20-23).[28] The first argument is contrary to the facts and is precluded by law because defendants have used the newsperson's privilege to shield information about the sources from discovery. The second argument is contrary to the facts and irrelevant.

a. Defendants Cannot Use the Newsperson's Privilege as Both a Shield and a Sword

Even if O'Brien's reliance on the three anonymous sources was reasonable -- but, as shown below, it was not -- O'Brien is precluded from using that reliance here to negate actual malice. Having asserted the newsperson's privilege to shield from discovery the sources and information about them, O'Brien cannot now use any information about the sources to negate actual malice. It would be patently unfair to Trump to allow defendants to disclose that which they deem helpful to their case but refuse any disclosure that might elicit unhelpful evidence and then reap the benefits of their selective disclosures.[29]

New York courts have consistently held that while the shield law provides a journalist absolute protection from contempt and forced disclosure of confidential sources

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[28] Defendants' third argument -- that O'Brien's bias against Trump does not establish actual malice (Malice Mov. Br. 23) -- was addressed and disposed of supra Part II.B.3.

[29] Not only do defendants try to use the evidence they selectively disclosed about the sources during discovery, they seek to bolster the credibility of O'Brien's sources by identifying, for the very first time, O'Brien's purported research into the sources' backgrounds. (See Malice Mov. Br. 17.)

and information, the journalist may not then rely on those confidential sources as validation of truthful, accurate, and careful reporting. See Oak Beach Inn Corp. v. Babylon Beacon Inc., 62 N.Y.2d 158, 165-66 (1984); Greenberg v. CBS Inc., 419 N.Y.S.2d 988, 996-97 (App. Div. 1979). Rather, under New York law, the journalist must choose whether to keep the evidence confidential and forego reliance on it or, alternatively, forfeit the privilege and use the evidence to bolster his defense. Greenberg, 419 N.Y.S.2d at 996-97.[30]

In Greenberg, the defendants attempted to introduce evidence from twelve anonymous sources as proof that a segment accusing a New York doctor of improperly prescribing drugs to treat obesity was properly researched and reported. One witness agreed to waive confidentiality for the purposes of the litigation. Id. at 995. When plaintiff introduced evidence challenging the veracity of defendants' reporting concerning the one discoverable source, defendants responded that they had verified the accuracy of all published statements with the eleven confidential sources. The court found this to be an improper, offensive use of the shield law: "In short, defendants rely on undisclosed verification as 'proof' of their responsibility. Thus they have put in issue the very privilege upon which they rely. They are using the 'Shield Law' affirmatively as a sword to prevent challenge by the plaintiff." Id. The court then described its resolution of the issue:

> [T]he fair solution . . . is to allow defendants to elect the future course of their defense. At trial, ***if the defendants***

[30] The Greenberg court explained that "[s]uch exploitation of the statute vitiates the limited right to recovery that the plaintiff has as a private individual." Greenberg, 69 N.Y.S.2d at 997. Trump has an even more limited right to recover than a private individual because, as a public figure, he must prove actual malice.

> *opt to rely on their statutory privilege, they should be precluded from any use of those sources and information as proof of verification or evidence of responsibility.* On the other hand, if they choose to fully disclose their investigation, no limitation of the defense will occur.

Id. at 997 (emphasis added).[31]

In Sands v. News America Publishing, Inc., 560 N.Y.S.2d 416, 418 (App. Div. 1990), plaintiff brought suit claiming that an article published in *New York* magazine that discussed the relationship between organized crime and the operation of the local New York City government falsely implied that he was a member of the mob. Plaintiff moved to compel defendants to answer certain interrogatories, including those that asked for the identities of certain anonymous sources, and defendants opposed, citing N.Y. Civ. Rights Law § 79-h, New York's shield law. Id. at 419. The court issued a protective order preventing defendants from using the information they were shielding from disclosure: "Thus, we hold that defendants should be precluded from introducing into evidence confidential information . . . unless such information has been disclosed to plaintiff at least 10 days prior to trial." Id. at 421.

New York law is clear -- because defendants prevented Trump from taking discovery by asserting the newsperson's privilege (see supra pp. 30-33) -- they cannot use the confidential sources to negate actual malice.[32]

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[31] Five years later, in Oak Beach, New York's highest court confirmed that "the Legislature has never established an absolute right or granted journalists complete immunity from all legal consequences of refusing to disclose evidence relating to a news source." 62 N.Y.2d at 165. The Oak Beach court reiterated that a journalist cannot be held in contempt for failing to disclose confidential sources; however, that does not leave the plaintiff without remedy. After plaintiff served a show cause order demanding that defendants be compelled to disclose the name and last known address of the author of an anonymously written letter, defendants urged that the remedy was unnecessary because they "did not intend to make 'affirmative use'" of the letter. Id. at 164. The court found defendants' concession not to make use of the letter to be adequate.

b. Defendants' Reliance on Sprewell Is Misplaced

Defendants rely heavily on Sprewell v. NYP Holdings, Inc., 841 N.Y.S.2d 7 (App. Div. 2007), to argue that summary judgment is appropriate here because "[c]ourts have not hesitated to grant summary judgment when a reporter relied on confidential, undisclosed sources." (Malice Mov. Br. 15.) Defendants note that "[i]mportant to the court's decision" -- granting summary judgment to a reporter and publisher in connection with a newspaper article about a basketball player's injury that relied on confidential sources -- were:

> (1) the article cautioned that the allegedly defamatory statements were based on information from confidential sources, and noted Sprewell's denial of the accuracy of that information; (2) the record otherwise demonstrated that the reporter subjectively believed the confidential sources based on various indicia of reliability in their accounts; (3) the reporter attempted to verify or disprove the confidential sources' accounts by seeking information from other, non-confidential sources; and (4) plaintiff's explanations for the injury continuously changed over time.

(Malice Mov. Br. 15-16.)

Defendants' analogy to Sprewell fails because the key facts are dissimilar -- O'Brien did adopt the sources' valuations, O'Brien had reason to doubt the sources'

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[32] The end result is the same under New Jersey law. In Maressa, the New Jersey Supreme Court stated that where a defendant refuses to disclose confidential sources, a public figure plaintiff can establish actual malice by inference if "(1) the content of the report is such as to be defamatory as a matter of law, (2) the defendant knew or should have known of some reasonable means of verifying its accuracy, and (3) the failure to verify rises to the level of a gross violation of the standards of responsible journalism." 89 N.J. at 200. Trump satisfies Maressa's three-part test: the content of the Book is defamatory as a matter of law, and defendants do not challenge this; O'Brien knew of reasonable means of verifying the statements' accuracy -- reviewing the financial information Trump made available to him; and O'Brien's blatant failure to verify the truth of his sources' statements, after being presented with significant credible information that proved them false, is a gross violation of the standards of journalism. Thus, under Maressa, actual malice may be inferred.

credibility, and O'Brien did not seek information from non-confidential sources -- and because O'Brien cannot now point to the anonymous sources to negate actual malice when he has consistently shielded information about the sources from discovery.

i. O'Brien Adopted His Sources' Valuations

Defendants argue that "like the reporter in the Sprewell case, O'Brien did not report the sources' information as incontrovertible fact." (Malice Mov. Br. 16.) That is false. First, Judge Fernandez-Vina read the Book -- including the repeated references to Trump's "verbal billions" and "verbal fortune" -- and found that O'Brien adopted his sources' valuation:

> the book does not merely recount the networth [*sic*] estimates of others . . . without endorsing any estimate and only discussing Trump's assets by reporting them without question, but that ***the author endorses the information*** of [the anonymous sources] . . . while at the same time discounting the reliability and credibility of higher estimates and the individuals who provided the higher estimates.

(Ex. BF at 39 (emphasis added).) Second, in marketing and promoting the Book, O'Brien made clear that he did not believe Trump was a billionaire and referred to him as a "faux billionaire" and "not a real billionaire." Third, there can be no dispute that O'Brien gave an unqualified valuation during the Coliseum Books event, stating that he believed Trump was worth between $300 million and $500 million.[33] (Ex. AW at 10.)

ii. O'Brien Had Significant Reason to Doubt the Credibility of His Sources

Defendants also argue that because O'Brien subjectively believed his sources were reliable, O'Brien cannot be found to have acted with actual malice. (Malice Mov.

[33] This figure presumably accounts for a rebound by Trump's casino holdings, which O'Brien recognized in the Article. (TOB-PD-00004204, Ex. AB.)

Br. 16.) This argument is contrary to law and fact. As a matter of law, "a defendant subject to the actual malice standard 'cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.'" Schiavone, 847 F.2d at 1089-90 (quoting St. Amant, 390 U.S. at 732, 88 S. Ct. at 1326, 20 L. Ed. 2d at 267). Objective "circumstantial evidence can override defendants' protestations of good faith and honest belief that the report was true." Sprewell, 841 N.Y.S.2d at 8-9; accord Hotchner, 404, F. Supp. at 1049 ("A defendant in a defamation action cannot automatically escape liability by submitting affidavits which attest to the fact that the publication was made with a belief that the statements therein contained were true.").

As a matter of fact, the evidence shows that O'Brien had significant reasons to doubt his sources' credibility. First, the sources' valuations were orders of magnitude lower than any other valuation of Trump's net worth.[34] Trump's 2004 Statement of Financial Condition, which was prepared by Trump's accountants, listed Trump's net worth at $3.5 billion, and *Forbes* valued Trump's net worth at $2.7 billion. (Ex. AW at 10; Ex. AU at 2.) O'Brien was presented with both valuations. (Ex. AW at 10; Trump Dep. 43:3-44:11, Ex. B; Weisselberg Dep. 171:22-172:6, Ex. A.) After obtaining reliable information from independent sources that so severely contradicted his own, O'Brien should have, at the very least, considered probable falsities in his research and questioned

[34] Any debate about Trump's net worth has never been about whether he is a billionaire, but only the number of billions he is worth. Defendants cite six estimates of Trump's net worth in the billions, and two estimates that are drastically below those figures – both attributable to O'Brien. The first is O'Brien's $150 million to $250 million estimate published in the Book. The second is a *Washington Post* article, which referred to "skeptics" who place Trump's net worth near $300 million (Ex. CC), and which was written one day after O'Brien published *The Midas Touch, With Spin* in 2004 and reported that three sources estimated Trump's net worth at $200 million to $300 million (Ex. K).

the credibility of his sources. See St. Amant, 390 U.S. at 732, 88 S. Ct. at 1326, 20 L. Ed. 2d at 267 (reckless disregard may be found "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation").

Second, and contrary to defendants' argument (see Malice Mov. Br. 18), there is no question that the "sources" did not provide "reliable" information about Trump's business, including, for example, his "interest in the West Side Yards." Since O'Brien falsely printed that Trump does not own an interest in the West Side Yards, O'Brien's sources must not have provided him with credible information (or, if they did, he ignored it).[35]

Third, and contrary to defendants' argument (see Malice Mov. Br. 18), it appears that the sources did not provide O'Brien with "reliable" information about "plaintiff's interest in 40 Wall Street in New York and the level of borrowings relating to that property." O'Brien's reporting on 40 Wall suggests that the sources provided him with bad or incomplete information: O'Brien suggested in the Book that 40 Wall was worth negative $55 million (see Book at 171-72), which simply is not true and is dramatically below Trump's valuation of the property at $400 million and *Forbes*' valuation of it at $310 million.

Fourth, evidence elicited during discovery suggests that O'Brien knew his sources were providing outdated information. In the Book, O'Brien cites the same sources he used while reporting for *The Midas Touch, With Spin*, in late 2004. (O'Brien Dep. 759:7-760:5, Ex. E.) In that article, he described the three anonymous sources as "people who

[35] Defendants thwarted Trump's discovery on the issue of what the sources told O'Brien by asserting the newsperson's privilege.

have *had* direct knowledge of his holdings. . ." (Ex. K (emphasis added).) In the Book -- published more than a full year later -- O'Brien changed critical identifying language, describing the same sources as "three people *with* direct knowledge. . ." (Book at 154 (emphasis added)), to revive information he knew was outdated more than a year before the Book was published.

In the face of information that contradicted his sources, and armed with the knowledge that his sources' information was outdated, O'Brien had a duty to resolve the inconsistencies and verify the information. See Pep v. Newsweek, Inc., 553 F. Supp. 1000, 1002 (S.D.N.Y. 1983) (finding reckless disregard where reporter failed to interview critical witnesses and failed to independently corroborate information pulled from previously written stories); Scacchetti, 507 N.Y.S.2d at 339 (failure to corroborate source when there was ample time to do so will support finding of malice); Celle, 209 F.3d at 190 ("official's lack of current knowledge suggested a reasonable basis for defendants to question the accuracy and reliability of the information he provided"). O'Brien abdicated that duty.

Gray is instructive on this point. There, the defendant radio host purported to rely on confidential sources for his defamatory statement about plaintiff. The Appellate Division was "satisfied that a reasonable factfinder could conclude by clear and convincing evidence, based upon the statement of [defendant], that he acted with reckless disregard of the truth in uttering this statement. To say the least, his sources were of dubious veracity. Indeed, they are so vague that a jury could find that they were contrived after the fact." 342 N.J. Super. at 12. Accordingly, the court held that the motion judge erred in granting summary judgment. Likewise, here, where O'Brien's

sources are of dubious veracity, a factfinder could conclude that O'Brien acted recklessly (and even that the sources never existed).

iii. The Minimal Research O'Brien Conducted Does Not Establish a Lack of Actual Malice

Defendants argue that O'Brien's reporting cannot be considered reckless because he engaged in substantial efforts to gather information on Trump's net worth. (Malice Mov. Br. 19.) Evidence elicited during discovery raises serious questions about the depth and purpose of O'Brien's research.

For example, O'Brien testified that he relied heavily on Plambeck to access publicly available financial documents and interview witnesses about Trump's net worth. (O'Brien Dep. 690:11-691:3, 694:21-698:13, Ex. E.) However, Plambeck testified to having a substantially different assignment: "My job was not to get numbers; it was to find out kind of what -- how [Trump] acted at the meetings" and "to help Tim get a sense of his personality from people who have worked with him or been around him in some way." (Plambeck Dep. 25:21-26:13, 42:16-23, 137:4-6, Ex. X.) In describing interviews he conducted, Plambeck confirmed that he did not discuss Trump's holdings or net worth. (See e.g., Plambeck Dep. 42:10-16, 64:21-67:18, 70:10-19, Ex. X.)

Defendants further argue that O'Brien and Plambeck "conducted extensive documentary research." (Malice Mov. Br. 5.) But Plambeck testified that he reviewed few, if any, documents. (See Plambeck Dep. 27:5-29:3, Ex. X.) And O'Brien willfully disregarded key documentary research, including the documents presented to him on April 21, 2005 and Trump's Statement of Financial Condition. Furthermore, O'Brien identified in discovery the "documentary research" he compiled for the Book (see Ex. CD), and most of it was either outdated information about Trump's finances or second-

hand sources, such as newspaper articles. At a minimum, it is an issue of fact for a jury to resolve whether O'Brien's "documentary research" was shoddy or reasonable.

Defendants' reliance on Lynch v. New Jersey Education Assocation, 161 N.J. 152, 172-73 (1999), to argue that summary judgment is appropriate even where a reporter "could have been more careful" is misplaced. O'Brien's conduct went beyond carelessness: he did not merely fail to investigate all sources, he ignored any source that disproved his preconceived plan to portray Trump as a fraud.

c. O'Brien's "Disbelief" of Trump Was Unwarranted and Is Irrelevant

Defendants argue that O'Brien cannot be found to have acted with actual malice because O'Brien had reason to disbelieve Trump's own estimates of his net worth -- which O'Brien alleges changed over time -- particularly because Trump purportedly failed to provide O'Brien with any debt information.[36] (Malice Mov. Br. 20-23.)

This argument is a red herring. As an initial matter, as explained supra p. 51 n.34, to the extent there has been any debate over Trump's net worth, it has been over how many billions he is worth, not whether he is a billionaire, as O'Brien alone claims. But if O'Brien truly did not believe Trump's statements about his net worth, as he claims, he should have used the April 21, 2005 meeting as an opportunity to look at Trump's

[36] To the contrary, the evidence shows that Trump provided O'Brien with significant liability information for properties including, but not limited to, Mar-A-Lago; Trump National Golf Club; Briarcliff, New York; Ocean Trails; Rancho Palos Verdes, California; Lamington Farm Golf Club; and Seven Springs, LLC (see Ex. BU), including the documents reflecting every loan -- to the extent there was one -- for every project for which documents were produced on April 21st (Lokey Dep. 92:12-17, Ex. R). In addition, Trump's 2004 Statement of Financial Condition, which O'Brien viewed on three separate occasions, provided a detailed breakdown of Trump's liabilities. (Weisselberg Dep. 331:25-332:10, Ex. A; O'Brien Dep. 249:6-250:21, Ex. E; Rosenblum Dep. 108:7-15, Ex. S.).

documentation and determine whether Trump's statements were believable. Instead, O'Brien completely disregarded Trump's statements and his documents.

C. The Warner Defendants Are Liable for O'Brien's Publication of Defamatory Statements with Actual Malice

The Warner Defendants are vicariously liable for the false and defamatory statements printed in the Book and Article and made during the marketing campaign.[37]

Defendants concede that under the doctrine of respondeat superior, a principal is liable for its agent's act of publishing a statement with actual malice if the statement is made within the scope of the work for which the agent was retained. (See Malice Mov. Br. 24.) See Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 253-54, 95 S. Ct. 465, 471, 42 L. Ed. 2d 419, 427-28 (1974); Loughry v. Lincoln First Bank, 67 N.Y.2d 369, 377 (1986) ("Consonant with risk allocation theories, liability for compensatory damages is properly placed on an innocent employer for slander by its agents committed in the course of employment."). "Although the person or entity vicariously liable may not have been personally at fault, the rule of Gertz does not bar vicarious liability, provided, importantly, that the person who actually utters the defamation is personally at fault." Robert D. Sack, Sack on Defamation § 2.10 (3d ed. 2007); accord Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 545-46 (1980).

They key inquiry is whether the principal has the right to control the conduct of the agent within the scope of the work. See Mazart v. State, 441 N.Y.S.2d 600, 604-05 (Ct. Cl. 1981). The principal need not control every detail of the agent's conduct to be held vicariously liable; control can be found where the principal merely holds a right to

[37] As Trump is not arguing direct liability by the Warner Defendants, defendants' arguments against finding direct liability here (Malice Mov. Br. 25-28) are irrelevant.

make management and policy decisions affecting the agent. See id.; see also Nelson v. GLOBE Int'l, Inc., 626 F. Supp. 969, 978 (S.D.N.Y. 1986) (finding the relevant inquiry whether publisher could "control the details of [the] work").

The evidence shows that the Warner Defendants had the right and obligation to control the details of the Book. In fact, the Warner Defendants themselves have asserted in this litigation that they exercised editorial control -- they have withheld hundreds of documents and information called for in discovery on the basis of the newsperson's privilege, claiming that their documents and information represent "editorial process." For example, the Warner Defendants withheld under the "editorial process privilege" or "newsperson's privilege" documents regarding draft portions of the Book, discussions of ideas for chapters of the Book, discussions of a possible related article for publication, plans for specific chapters of the Book, newsgathering related to the golf courses, legal advice about the TrumpBroke chapter, information procured from Trump during newsgathering, their opinion of the Book, dissemination and delivery of the Book, the timing of their announcement of the Book, and the decision to grant first serial rights to *The New York Times* for publication of an excerpt. (Defendants' Redaction Log dated October 17, 2006 at entries 8, 124, 192, and 194, Ex. CE; Blauner Privilege Log dated August 24, 2007 at entries 1, 9, and 15, Ex. CF.)

Furthermore, O'Brien's agreement with the Warner Defendants gave the Warner Defendants editorial control. Section 6(c) of the agreement states, in pertinent part:

> If the Publisher determines in its good faith judgment that any or all of such delivered materials are unacceptable, the Publisher will provide written editorial comments to the Author, along with requests for revisions, and the Author shall deliver the revised work within 90 days thereafter.

> Any request by the Publisher for changes or revisions in any portion of the Work shall constitute notice to the Author that the Work is not acceptable to the Publisher.

(TWBG PD-00000976, Ex. H.) Because the Warner Defendants were required to provide editorial comments to O'Brien if they found the materials to be unacceptable, and O'Brien was, in turn, required to make the Warner Defendants' revisions, the Warner Defendants had control over the details of the Book.

The Warner Defendants actually exercised their editorial control on numerous occasions.[38] For example, the Warner Defendants changed the Book's title and subtitle, and had their lawyers scrutinize particular chapters, including the TrumpBroke chapter. (Ex. CF at entry no. 9.) The Warner Defendants exercised editorial control over the photo spread that appears in the center of the Book -- choosing which and how many photos to use, as well as taking responsibility to ensure that defendants had the correct permissions for each photograph. (TWBG-PD-00002002, Ex. CG.) The Warner Defendants were responsible for the decision to release galleys as part of the strategy to make Trump "go ballistic." (TOB-EF-00000260, Ex. CH.) Wolff explained in an e-mail to O'Brien's agent, "It was decided not to embargo the book because we wanted to generate some excitement and buzz before it pubs. Clearly, if Mr. Trump takes exception to Tim's work and starts making noise . . . that will only help to excite the masses and that's a good thing, or at least that's the game plan." (Id.)

The Warner Defendants exercised editorial control by organizing and facilitating the marketing blitz during which O'Brien continued to defame Trump. The Warner Defendants were responsible for organizing radio and television appearances, book

[38] Of course, Trump was prevented from discovering the full extent of the Warner Defendants' editorial control because they asserted the newsperson's privilege.

signings, and other promotional events. (See TOB-EF-00000463-466, Ex. CI; TOB-EF-00000256-258, Ex. BZ; TOB-EF-00000324-325, Ex. CJ.) O'Brien frequently deferred to the Warner Defendants in executing their marketing strategy, and the Warner Defendants frequently provided encouragement. (See TOB-EF-00000257, Ex. BZ; TOB-EF-00000443, Ex. CK; TOB-EF-00004544, Ex. CL.)

Defendants argue that the Warner Defendants cannot be held vicariously liable for O'Brien's defamatory statements because O'Brien was not a traditional salaried employee of the Warner Defendants. (See Malice Mov. Br. 24.) For this premise, defendants rely on Ortiz v. Valdescastilla, 478 N.Y.S.2d 895, 899 (App. Div. 1984), which held that a publisher was entitled to rely on defendant-reporter's reputation, and therefore was not directly liable for actual malice. Notably, the court did not engage in any analysis of whether the publisher could be found liable by virtue of respondeat superior. Ortiz is inapplicable here, where Trump has evidence that the Warner Defendants should be held liable through respondeat superior.

* * *

In conclusion, Trump has ample evidence that O'Brien acted with actual malice by publishing certain statements he knew were false and by publishing other statements with reckless disregard for their truth, and the Warner Defendants are vicariously liable because they had and exercised editorial control over the Book. Defendants' motion for summary judgment on actual malice should be denied.

III. Trump Has Evidence of Damages

Trump has asserted claims for libel (also referred to under New York law as "libel by extrinsic fact"), libel per se, slander (also referred to as "plain slander"), and slander

per se. Defendants do not dispute that for Trump to recover on his defamation "per se" claims, he need not prove special damages. Thus, the real focus of defendants' summary judgment motion on damages is whether Trump has evidence of special damages sufficient to support his libel by extrinsic fact and plain slander claims, which do require proof of special damages. Contrary to defendants' claims, Trump has more than sufficient evidence of special damages -- specifically, mitigation damages and lost business opportunities.

In addition, although not "special damages," Trump has evidence that he suffered damage to his reputation, and he will seek recovery at trial for that damage.

A. Defendants Are Not Entitled to Summary Judgment on Plaintiff's Libel Per Se Claim or Slander Per Se Claim Because Neither Requires Proof of Special Damages

Defendants admit that Trump does not need to prove special damages to succeed on his claims for libel per se and slander per se. (See Damages Mov. Br. 10, 35, 38.) When the defamation is per se, "the law presumes general damages to have been sustained, and it is not necessary, in order to justify a recovery on that ground, that the damages should have been specifically pleaded or proved." Segel v. Barnett, 226 N.Y.S.2d 141, 143 (Sup. Ct. 1962).

Even if Trump had no proof of special damages -- but he does -- his defamation per se claims could not be dismissed for failure to prove damages. See, e.g., Salzano v. N. Jersey Media Group, 403 N.J. Super. 403, 425 (App. Div. 2008) (noting that "[a] false assertion that a person is incompetent with regard to a chosen trade or profession is actionable without proof of damage"). He would be entitled to recover nominal damages, which would vindicate his reputation, and to recover punitive damages. See, e.g.,

Suckenik v. Levitt, 576 N.Y.S.2d 258 (Sup. Ct. 1991) (nominal damages are appropriate on defamation per se claims where plaintiff has no proof of special damages); Toomey v. Farley, 2 N.Y.2d 71, 83 (1956) (affirming judgment that included award of punitive damages in favor of plaintiff who had been awarded only nominal compensatory damages because "[p]unitive damages are allowed on the ground of public policy and not because the plaintiff has suffered any monetary damages for which he is entitled to reimbursement"); Buckley v. Littell, 539 F.2d 882, 897 (2d Cir. 1976) (applying New York law) (affirming, but reducing, punitive damages awarded to plaintiff who failed to prove special damages and, therefore, was entitled only to nominal damages).

Defendants' only argument on Trump's defamation per se claims is that the defamatory statements are not defamation per se. (See Damages Mov. Br. 35-38.) Defendants made this argument when they moved to dismiss -- that the defamatory statements do not pertain to Trump's trade, profession, or conduct of his business (see Ex. CM at 10 n.5) -- but Judge Fernandez-Vina rejected it and denied the motion. Judge Fernandez-Vina held:

> [U]nder the case law previously discussed, Ward and Printing Mart, the issue is whether the -- the derogatory statements could cause apprehension about a person's ability to conduct business and if so, they may be defamatory. Printing Mart again addresses that issue.
>
> And it does not require great financial business to recognize it in order to engage the financial enterprises -- financial backing, as well as the reputation for financial acumen are necessary. It requires no great insight for reasonable minds to determine that there are claims of one's wealth or business or financial expertise that could impair his ability to conduct business.

(Ex. BF at 40.) Judge Fernandez-Vina's ruling is the law of this case and should not be disturbed. See Sisler, 222 N.J. Super. at 159 ("The law of the case doctrine requires

judges to respect unreversed decisions made during the trial by the same court or a higher court regarding questions of law. . . . Prior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous."); State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974) ("This rule is based upon the sound policy that when an issue is once litigated and decided during the course of a particular case, that decision should be the end of the matter.").

B. Defendants Are Not Entitled to Summary Judgment on Trump's Libel or Slander Claim Because Trump Has Evidence of Special Damages

To succeed on his libel by extrinsic fact and plain slander claims, Trump must present evidence of special damages -- he must prove that the defamatory statements were a substantial factor in bringing about financial harm. Trump has done that. He has established financial harm in the form of expenses he incurred mitigating the damage caused by defendants' publication of the defamatory statements and the business opportunities that he lost, and he has established that the defamatory statements were a substantial factor in bringing about the damage. Although Trump has sufficient evidence to support each of the types of mitigation damages he claims and each of the business opportunities he lost, to defeat summary judgment, Trump only needs to establish that he has evidence to support one. As shown below, he has done that and more.[39]

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[39] Because Trump has proof of special damages, as will be shown in the following sections, the cases defendants cite to establish that summary judgment may be granted for failure to establish damages (see Damages Mov. Br. 10) are irrelevant. In McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 321 (App. Div. 2000), and Rocci v. Ecole Secondaire Macdonald-Cartier, 323 N.J. Super. 18, 25 (App. Div. 1999), plaintiffs produced no evidence of damage to reputation -- in McLaughlin plaintiff "produced no depositions or affidavits from third parties attesting to their lowered

1. Trump Incurred Expenses Mitigating the Damage Caused by Defendants' Publication of the Defamatory Statements

The general rule in defamation cases is that the "plaintiff is entitled to recover for actual expenses incurred in reasonable efforts to defend against or counter the defamatory statements." Dan B. Dobbs, Law of Remedies § 7.2(11) (2d ed. 1993). New York courts follow this rule and allow an injured party "to attempt by a reasonable and proper effort to prevent damages liable to result from the wrongful act which has been committed against him." Den Norske Ameriekalinje Actiesselskabet v. Sun Printing & Publ'g Ass'n, 226 N.Y. 1, 9 (1919) (cited with approval in Smith v. Okerson, 8 N.J. Super. 560, 566 (Ch. Div. 1950)). A successful plaintiff in a defamation suit is entitled to recover out-of-pocket expenses disbursed to clear its name. Wachs v. Winter, 569 F. Supp. 1438, 1443-44 (E.D.N.Y. 1983); see also Bolduc v. Bailey, 586 F. Supp. 896, 901-02 (D. Colo.

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opinion of him as a result of the radio commercial," and in Rocci there was "no mention in the discovery process or in the briefs submitted on appeal that any single person came forward to state that plaintiff's reputation had been besmirched by the information contained in the . . . letter." Here, by contrast, Trump has evidence that his reputation was besmirched. See infra Part III.C. In Behr v. Weber, 568 N.Y.S.2d 948 (App. Div. 1991), and Jaliman v. Selendy, 801 N.Y.S.2d 235 (Sup. Ct. 2005), unlike here, the plaintiffs relied on a defamation per se theory and did not plead special damages. In Continental Air Ticketing Agency, Inc. v. Empire International Travel, Inc., 380 N.Y.S.2d 369, 372 (App. Div. 1976), the plaintiff sought to recover damages for loss of customers, but deposition testimony established that the "lost customers" identified in the complaint were not customers (i.e., they had not signed up for the charter flight), and that plaintiff could not recall any individual who signed up for the charter flight and canceled after publication of the defamatory statements. Here, of course, Trump has detailed proof of his lost business opportunities. See infra Part III.B.2. Finally, in Loudin v. Mohawk Airlines, Inc., 297 N.Y.S.2d 630, 633 (Sup. Ct. 1968), plaintiff claimed he could not obtain employment in the airline industry for one year, but defendants submitted "affidavits of every airline plaintiff claim[ed] he applied to, all to the effect that they neither heard of publicity concerning the plaintiff nor were they ever contacted by [defendant]." By contrast, Trump has proof of his lost business opportunities, see infra Part III.B.2, and defendants do not have -- nor could they legitimately get -- affidavits from those who stopped doing business with Trump stating that they never heard of the Book or the Article (because they had).

1984) (priest defamed to head of religious order allowed to recover for international telephone and travel expenses to defend himself to the order).

New Jersey courts also permit recovery of mitigation damages in defamation actions. For example, in Stevens Institute of Technology v. Hine, No. A-3574-04T2, 2007 WL 2188200 (N.J. Super. Ct. App. Div. 2007), defendants moved for summary judgment on a defamation claim arising out of a letter suggesting that plaintiff's construction site was contaminated. The trial court granted summary judgment to defendant on the ground that plaintiff presented insufficient evidence of damages. The Appellate Division reversed on the grounds that plaintiff had presented sufficient evidence of damages in interrogatory responses referring to mitigation damages. The Appellate Division observed:

> [Plaintiff] had suffered mitigation damages, that is, its employees were forced to divert considerable time and energy at the expense of [plaintiff] in order to respond to the charges put forth by defendants. Plaintiff contended that its employees were compelled to attend meetings of the City Council and the Planning Board to address defendants' statements; to reply to a complaint defendants filed with OSHA; and to respond to the Commission's actions in refusing to accept further waste rock and ordering the placement of a two-foot earthen cover over the material already in place.

Id. at *12-13. The Appellate Division noted that "the parties have not pointed us to any reported New Jersey authority which would preclude such mitigation damages in a defamation suit, and we are unable to perceive a reason in logic or policy why they should not be deemed a proper item of damage." Id. (citing Comdyne I, Inc. v. Corbin, 908 F.2d 1142, 1150 (3d Cir. 1990) (holding that New Jersey would permit mitigation damages in defamation context)). The Appellate Division concluded that "[i]f a party has

a valid claim for defamation and has expended time and effort to lessen the damage to its reputation, it should be compensated for those efforts." Stevens, 2007 WL 2188200, at *12-13; accord Restatement (Second) of Torts § 633(1)(b) cmt. k (referencing damages set forth in § 919 (the Restatement provision on mitigation damages) as recoverable in action for injurious falsehood).

Trump has evidence that he tried to mitigate the damage caused by defendants' publication of the defamatory statements, including: meeting with *Forbes* magazine to qualm fears stoked by the defamatory statements, producing corrective advertising, paying for attorneys and others to communicate with *The New York Times* to seek a retraction of the defamatory statements, and incurring attorneys' fees to pursue this litigation and seek judicial determination that defendants' statements are false.

a. Trump Expended Resources Meeting with *Forbes*

After defendants' defamatory statements were published, *Forbes* expressed concern that its $2.7 billion valuation of Trump's net worth on the Forbes 400 List might be inaccurate. (Trump Dep. 293:17-294:23, Ex. B; Weisselberg Dep. 370:15-22, Ex. A; Lokey Dep. 58:19-21, Ex. R.) The Forbes 400 List is "capitalism's Rosetta stone," and has drawn "scads of attention from the moment it was published." (TOB-PD-00004197-8, Ex. AB.) Thus, it was imperative that Trump allay *Forbes*' concerns. To that end, Trump arranged a meeting with representatives of *Forbes*, Trump's outside accountants, and five Trump Organization employees. (Trump Dep. 294:15-23, 303:8-12, Ex. B; Weisselberg Dep. 370:12-372:6, Ex. A; Lokey Dep. 58:14-17, Ex. R.) The parties met for nearly a full day. (Trump Dep. 294:15-23, 302:19-303:7, Ex: B; Weisselberg Dep. 370:23-25, 372:7-10, Ex. A; Lokey Dep. 59:19-60:13, Ex. R.) If not for defendants'

publication of the defamatory statements, the five Trump Organization employees could have been doing their regular work for the company that day. Trump is entitled to recover as special damages for the resources he was forced to expend in meeting with *Forbes*. See Wachs, 569 F. Supp. at 1448 (awarding plaintiff compensatory damages to cover income he lost while appearing before various officials to defend himself from allegations of ineptitude and dishonesty).

Notably, defendants do not even address -- let alone refute -- this claim of special damages.

b. Trump Incurred Out-of-Pocket Expenses for Corrective Advertising

Trump also incurred mitigation damages in the form of corrective advertising. Specifically, Trump incurred out-of-pocket expenses to prepare and publish, in direct response to the defendants' defamatory statements (Trump Cert. ¶¶ 4-6), a four-page, four-color gatefold advertisement that showed Trump's lavish properties.

In an oft-cited opinion, Den Norske Ameriekalinje, the New York Court of Appeals allowed a shipping company to recover money spent combating defamatory statements through advertising and established the factors to consider in determining whether corrective advertising expenses are reasonable: (1) geographic scope of the advertising, (2) timing of the advertising, (3) language and display of the advertising, and (4) whether the advertisement was calculated to reach those negatively affected by the defamation and thus minimize the injury. 226 N.Y. at 11.

When analyzed according to the four factors, it is clear that Trump's corrective advertising was reasonable. First, the geographic scope of the national advertisement was similar to the reach of the defamatory statements -- the Book and Article were published

throughout and beyond the United States. Second, the advertisement was produced within a reasonable time after the defamatory statements were published. Defendants fault the advertisement for being published one year after the Book, but defendants fail to cite any authority for the argument that taking one year to produce a glossy, fold-out advertisement with renderings of buildings from throughout the world is, as a matter of law, unreasonable. In fact, courts have approved of corrective advertising with a longer delay. See Big O Tire Dealers v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1374-75 (10th Cir. 1977) (awarding costs for prospective corrective advertising when trial had already lasted over a year). Third, the advertisement was reasonable in language and display, showing Trump's properties to demonstrate Trump's vast holdings of high-quality property (Ex. BA), a point of dispute in the Book and Article (Book at 154-56; TOB-PD-00004204, Ex. AB). The advertisement was professional in appearance and printed on glossy fold-out paper (Ex. BA), further helping to combat the defamatory statements that suggested Trump did not have much money.[40] Fourth, the advertisement was calculated to reach those in the real estate business who might be persuaded by defendants' defamatory statements and refuse to do business with Trump. (Ex. AZ.)

Defendants argue that the advertisement was not reasonably related to the injury caused by the defamatory statements because it does not refer to defendants, the Book, the defamatory statements, or Trump's net worth. (Damages Mov. Br. 31.) By dint of these failures, defendants argue, the advertisement cannot be considered reasonably related to the defamatory statements. Defendants cite no authority that establishes such a

[40] If Trump had printed a simple black-and-white statement denying defendants' statements, the low-budget appearance would cause the public to further question Trump's net worth and his ability to run a company that trades in luxury.

requirement, and it would be ridiculous to require defamed individuals to specifically reference the defamatory statements they are trying to combat. Such a requirement would force an innocent plaintiff into a Catch-22 -- either hope the defamatory effect subsides on its own or risk furthering the reach of the defamation. O'Brien's low-ball valuation of Trump's net worth was due, at least in part, to his refusal to believe that Trump owned the many properties he did and that they were valuable. (TOB-PD-00004204, Ex. AB; Book at 154-55.) Trump's best avenue to combat the defamation was to offer proof of his net worth, i.e., his expansive portfolio of luxury real estate.

Furthermore, to the extent defendants debate the reasonability of the relationship between the damage suffered and the corrective advertisement, or the reasonability of the time between publication of the defamatory statements and the advertisement, there is a genuine issue of material fact that precludes summary judgment. See Clemente Bros. v. Peterson-Ashton Fuels, Inc., 287 N.Y.S.2d 955, 959 (App. Div. 1968) ("The general denial in the answer raises an issue of fact as to the reasonableness of the costs of removal. The direction of a jury trial on the issue of damages was, therefore, proper."); Int'l Paper Co. v. Suwyn, 951 F. Supp. 445, 449 (S.D.N.Y. 1997) (validity of noncompetition agreement could not be decided on summary judgment, as determination of validity required analysis of facts "centered on reasonability"); First Interstate Credit Alliance, Inc. v. Leroy, No. 89 Civ. 3263, 1989 U.S. Dist. LEXIS 14523 (S.D.N.Y. Dec. 5, 1989) (summary judgment on damages denied because defendants challenged commercial reasonability of auction to sell repossessed equipment).

c. **Trump Spent Time and Money Attempting to Secure a Retraction**

Trump incurred other mitigation damages -- he was forced to spend time and money trying to alert *The New York Times* to the falsity of statements in and the principal premise of the Article and trying to secure a retraction. Trump's attorneys, who perform work for Trump on a fee basis, drafted the letters to *The New York Times.* (TR000092476, Ex. CN; TOB-EF-00000121-22, Ex. CO; TOB-EF-00000066-67, Ex. CP; NYT0000214-16, Ex. CQ; NYT0000256-58, Ex. P.) Additionally, numerous Trump Organization employees were taken from their work (see Defs.' Ex. 52 at 2) to aid in drafting relevant letters. Trump is entitled to compensation for his efforts to reduce the harsh effects of the defamation. See Wachs, 569 F. Supp. at 1448 (allowing plaintiff to recover not only compensation for travel expenses, but also for payments made to law clerks who aided in defense).

d. **Trump Has Incurred Out-of-Pocket Expenses Bringing This Litigation to Combat Defendants' Defamatory Statements**

Trump also is entitled to recover the attorneys' fees and costs associated with this litigation as special damages. Attorneys' fees spent in litigation alleging defamation are recoverable in New York, provided that the litigation is part of an "attempt by a reasonable and proper effort to prevent damage liable to result from the wrongful act which has been committed." Metro. Opera Ass'n v. Local 100, No. 00 Civ. 3613, 2005 U.S. Dist. LEXIS 14422, at *18-19 (S.D.N.Y. July 26, 2005); accord Dobies v. Brefka, 846 N.Y.S.2d 669 (App. Div. 2007) (counsel fees awarded as special damages); Houston v. N.Y. Post, No. 93 Civ. 4408, 1996 U.S. Dist. LEXIS 19705 (S.D.N.Y. Jan. 10, 1997)

(denying defendant newspaper's motion for summary judgment against celebrity plaintiff's claim for attorneys' fees as mitigation damages from publication of defamatory statements).

e. Defendants' Arguments That Trump Had No Injury to Mitigate Are Unavailing

Defendants make two statements from which, they appear to believe, it inextricably follows that Trump could not have been injured and, therefore, could not have had any damages to mitigate.[41] First, they argue that "[d]uring the same time period in which Trump claims that he needed to incur mitigation damages, he also was repeatedly trumpeting to the public his huge successes, including the unparalleled strength of his brand and his countless business achievements." (Damages Mov. Br. 8; accord id. 34.) Defendants ignore the possibility -- and, here, the reality -- that while Trump and the Trump Brand were and are doing well, they could be doing even better but for defendants' defamatory statements. Defendants cite no authority -- because there is none -- for the proposition that a defendant must be completely decimated by the defamation before he can recover.

Second, defendants argue that Trump cannot have been damaged by defendants' defamatory statements because he has access to the press and could counter the

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[41] Defendants cite Niagara Mohawk Power Corp. v. Ferranti-Packard Transformers, 607 N.Y.S.2d 808 (App. Div. 1994), a case that has nothing to do with defamation or disparagement. Rather, Niagara Mohawk was a products liability case in which the plaintiff sought compensatory damages for replacing undamaged transformers bought from a defendant who had sold the plaintiff other transformers that had caught fire. The court held that the injury from the damaged transformers could not be integrated to the undamaged transformers. As the plaintiff was simply being risk averse rather than mitigating damages, the mitigation claims for the undamaged transformers were denied. Here, Trump mitigated his damages in reaction to the widely published defamatory statements, not as a preemptive exercise in risk avoidance.

statements. (Damages Mov. Br. 33-34.) This argument has been rejected by courts. See Buckley v. Littell, 539 F.2d at 888-89 (in libel action brought by William F. Buckley Jr., editor of *The National Review*, host of weekly television show, and chairman and part owner of broadcasting group that owned radio and television stations and book publishing company, "despite the fact that he has spent a life in politics as a principal spokesman for a controversial political position and is eminently prominent, obviously may be the target of libel; his reputation, however capable he may be of answering false and defamatory attack with the communications resources at his command, [he] is nevertheless one that could suffer under the onus of defamation. The victims of the era of McCarthyism who had occupied positions of prominence in the radio, television and cinema fields are ample proof of that.").

2. Trump Lost Business Opportunities Because of Defendants' Publication of the Defamatory Statements

In addition to establishing mitigation damages, Trump has adduced compelling evidence that he lost business opportunities as a result of defendants' publication of the defamatory statements. He has evidence that he lost the opportunity to partner with Prudential Douglas Elliman, the opportunity to build a Trump International Hotel & Tower at 400 Fifth Avenue in New York City, and several other opportunities to build a Trump International Hotel & Tower at sites that he worked with Bayrock to develop.

Defendants try to evade Trump's wealth of evidence by sleight of hand. First, they conflate all of the damages Trump seeks for his lost business opportunities with "lost profits," a type of damages that New York's courts have recognized is inherently more speculative than other types (although lost profits clearly may be established and recovered); they then argue that all of the lost business opportunities were "new

business," which subjects the claims to an even stricter test than lost profits for established business; lastly, they argue that Trump's evidence does not satisfy the doubly heightened test.

Defendants' conflation of Trump's damages from lost business opportunities with lost profits is misleading. Indeed, Trump seeks damages for lost profits, but lost profits are not the only damages he seeks for the lost business opportunities. Among other things, he seeks to recover for the loss of income-producing assets (e.g., the management contracts that would have accompanied the Trump International Hotel & Tower developments).[42]

Ward Telecommunications & Computer Services, Inc. v. State of New York, 372 N.Y.S.2d 423 (Ct. Cl. 1975), rev'd on other grounds, is instructive in that the New York court permitted claimant to recover for the loss of new business but did not subject the claim to the lost profits test because claimant was not seeking lost profits. In Ward, a relatively new computer service company that provided payroll and other services suffered damage when the state reported to a newspaper, and the newspaper published an article that said that, an audit found that the claimant overcharged a community college for its services. The company brought an action against the state for, among other things, disseminating the libelous statements to the media. The court awarded the company

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[42] See, e.g., Schonfeld v. Hilliard, 218 F.3d 164, 176 (2d Cir. 2000) ("[L]ost profits are not the only kind of consequential damages. A defendant's breach of contract may also cause a plaintiff to lose an asset that was in its possession prior to the breach. In some instances, the asset lost is an income-producing asset, the fair market value of which may be based, in whole or in part, on a buyer's projections of what income he could derive from the asset in the future."). Furthermore, "[t]he market value of an income-producing asset is inherently less speculative than lost profits. . . . Therefore, it is appropriate to apply these proof requirements more leniently than is the case with proof of lost profits." Id. at 177.

$25,000 in damages. The damages the company established were $10,000 in unpaid bills and the loss of potential new clients. The award was based on the company's testimony that "prior to the publication of this libel their business, i.e., WTCS, had been growing and that negotiations were underway with several potential new clients. After the publication, the acquisition of new clients became nonexistent and that condition continued for many months." Id. at 343-44. Likewise, Trump seeks to recover here for the totality of damages he sustained by the loss of business opportunities, not merely lost profits.

In any case, however, Trump has met the standard for establishing the lost profits he seeks to recover -- he has established them with reasonable certainty. See, e.g., Wolf Street Supermarkets, Inc. v. McPartland, 487 N.Y.S.2d 442 (App. Div. 1985) (new grocery store owner established profits lost because of libel).

In Ashland Management Inc. v. Janien, 82 N.Y.2d 395, 403 (1993), the New York Court of Appeals described the "reasonable certainty" test and applied it -- rather than a heightened test -- to defendant's claim that it lost profits it expected to earn from a new software system designed to manage investments. Although the parties "were launching a new investment strategy, they were not entering a new or unfamiliar business," because they were in the investment business already. Id. at 406. In explaining that defendant satisfied the reasonable certainty test for establishing lost profits, the court made clear that "[t]he . . . requirement, that damages be reasonably certain, does not require absolute certainty. Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors

without undue speculation." Id. at 403. Thus, the court affirmed an award of lost profits to defendant that was based on "the parties' carefully studied professional judgments of what they believed were realistic estimates of future assets to be managed by the use of [the software]." Id. at 406.

Likewise, Trump's claims for lost profits are not based on the loss of a new or unfamiliar business. The partnership with Prudential Douglas Elliman would have given Trump a share in an existing business, and the development of 400 Fifth Avenue and the other Trump International Hotel & Tower projects would have been the same type of developments he has built in New York and other cities. Furthermore, Trump intends to rely on an expert to calculate his damages, including lost profits, and that calculation will be founded on realistic estimates of the projects.

Ashland is especially notable because the court addressed its prior decision in Kenford Co. v. County of Erie, 67 N.Y.2d 257 (1986) -- on which defendants here heavily rely -- and explained why it found that the defendant in Ashland established lost profits but the plaintiff in Kenford did not. By way of background, in Kenford, plaintiff sought lost profits for a domed stadium near Buffalo, New York that did not get built, but, at the time, only one domed stadium had ever been built before -- the Astrodome in Houston. Not only was it difficult to estimate lost profits with such little information on comparables, the court recognized that entertainment ventures, like a sports stadium, are particularly fickle. "We determined that the evidence failed to meet the requirement of reasonable certainty because it rested on a host of speculative assumptions and few known facts. Before accepting plaintiff's figures, the court was obliged to assume not only that the stadium had been completed, opened and operated successfully for 20 years,

but that it also attracted professional sporting events, concerts and conventions fully supported by the public." Id. at 405-06 (citation omitted).

The scenario presented in Kenford is markedly different than Trump's claim to lost profits for types of business ventures he has successfully developed in the past.[43]

To the extent defendants' argument depends on how Trump's damages are calculated (see, e.g., Damages Mov. Br. 12 ("Trump cannot establish the . . . amount of any lost profits . . . .")), the motion is premature. Trump has made clear in interrogatory

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[43] The other New York cases on which defendants rely to argue that Trump cannot satisfy the standard for lost profits are equally inapplicable. (See Damages Mov. Br. 11-14.) Schonfeld, 218 F.3d 164, and Zink v. Mark Goodson Productions, Inc., 689 N.Y.S.2d 87 (App. Div. 1999), both involved business opportunities in the entertainment industry, which New York courts have repeatedly emphasized is inherently uncertain. 218 F.3d at 174 ("Subject as they are to the changing whims and artistic tastes of the general public, claims for profits lost in unsuccessful entertainment ventures have received a chilly reception in the New York courts."); 689 N.Y.S.2d at 88 ("New York law . . . 'has long recognized the inherent uncertainties of predicting profits in the entertainment field in general.'"). Furthermore, in Schonfeld, the court held plaintiff to the standard for proving lost profits of a new business because the opportunity was out of line with its prior experience -- a company that ran small midwestern cable television companies sought to create an ambitious cable television corporation that was to launch a flagship channel. The business was so new to plaintiff that it had to hire new employees with other experience. And in Zink, 689 N.Y.S.2d at 87, the court applied the stricter standard for a new business venture because plaintiffs' proposed television game show had never been broadcast before and the principal plaintiff had no track record with game shows or television production. In St. Lawrence Factory Stores v. Ogdensburg Bridge & Port Auth., 810 N.Y.S.2d 532 (App. Div. 2006), and Chiu v. City of New York, 666 N.Y.S.2d 872 (S. Ct. 1997), the new business ventures were start-ups. In St. Lawrence Factory Stores, the factory outlet stores were a "startup" business for the parties. 810 N.Y.S.2d at 533. In Chiu, the Chinese restaurant that was shut down because of a fire was a new business for plaintiffs and one that they had operated for a mere seven weeks before the fire. Thus, the court held that it was too speculative for the restaurant to estimate 18 1/2 years of profits based on a mere seven weeks in business, especially given that they had no expert testimony on damages, and they did not try to compare their business to other Chinese restaurants. Finally, in Media Logic, Inc. v. Xerox Corp., 689 N.Y.S.2d 762, 765-66 (App. Div. 1999), the company suffered losses when its business had to shut down for some time after a fire caused by defendant's photocopier. Plaintiff sought lost profits, but, critically, did not explain how or why it suffered new business losses given that it experienced only a business interruption.

responses that asked him to explain his damages calculations that he intends to establish the amounts by which he was damaged through expert testimony, and expert discovery has not begun. (See, e.g., Ex. CR at 7 ("Plaintiff has not calculated the damages he sustained because the project was cancelled, but he believes that the deal would have resulted in profits of hundreds of millions of dollars, and he will offer the testimony of an expert witness at trial to estimate his damages.").) Until Trump's expert has the opportunity to prepare his report and explain his methodology, summary judgment should be denied. See, e.g., James v. Bessemer Processing Co., 155 N.J. 279, 311 (1998) (holding that summary judgment in favor of certain defendants was premature and plaintiff should be given "a reasonable time within which to conduct discovery and obtain a report from an expert regarding whether exposure to products of those defendants contributed to James's cancer, after which a renewed motion for summary judgment on behalf of the chemical defendants may be considered").

a. Trump Lost the Opportunity to Partner With Prudential Douglas Elliman

Trump has compelling evidence that, as a result of the defamatory statements in the Book and Article, he lost the opportunity to partner with preeminent real estate brokerage firm Prudential Douglas Elliman.

Defendants argue that this business opportunity was too speculative -- "It therefore would require pure speculation to determine whether Prudential or Herman ultimately would have approved such a deal, much less the existence and amount of any damages from this alleged opportunity." (Damages Mov. Br. 28.)

Defendants' argument ignores the evidence. Lorber -- the person most familiar with the deal -- testified that the deal was going to get done. (See Lorber Dep. 114:14-23,

Ex. BB.) Both Trump and Lorber were essentially in agreement about what the final outcome would be, and were merely haggling over the percentage of the combined company and the name. (Lorber Dep. 111:16-17, 105:24-106:19, 111:11-13, Ex. BB; Trump Dep. 571:3-4, Ex. B.)

As to defendants' argument that it would be speculative to estimate the amount of damages, that is not a barrier to recovery under New York law. "The rule which proscribes the recovery of uncertain and speculative damages applies where the *fact* of damages is uncertain, not where the ***amount*** is uncertain. Where the fact of damages is certain, the uncertainty of the amount will not prevent their being assessed." Matarese v. Moore-McCormack Lines, Inc., 158 F.2d 631, 647 (2d Cir. 1946) (applying New York law) (citations omitted; emphasis added); accord Miller v. Lasdon, 432 N.Y.S.2d 707, 708 (App. Div. 1980) (reversing order that granted defendants' motion for partial summary judgment and noting, "However difficult it may be for plaintiff to establish the loss of profits in a new and untried business, we think plaintiff should have the opportunity to try to establish such profits upon the trial."). Furthermore, Lorber testified that he expected Trump to own a percentage of a company worth approximately $500 million. (Lorber Dep. 120:10-13, Ex. BB.)

Defendants further argue that Trump has failed to establish causation because "Lorber's independent decision not to approach Prudential because he did not think they would approve the transaction was the reason the opportunity did not proceed any further, and Trump's alleged damages cannot be traced specifically to the allegedly defamatory statements." (Damages Mov. Br. 29.) Again, defendants' argument misses the mark. Trump has established causation through Lorber's testimony. (Lorber Dep. 114:14-23,

117:6-10, Ex. BB.) That is enough to establish that loss of the business opportunity was "the 'legal, natural and proximate, if not the necessary, consequence' of the defamation." Murphy v. Klein, 207 N.Y.S.2d 794, 796-97 (App. Div. 1960). To the extent defendants disagree, there is an issue of fact that precludes summary judgment.

Roche v. Claverack Coop. Ins. Co., No. 505669, 2009 N.Y. App. Div. LEXIS 1389 (Feb. 26, 2009), is instructive. There, the plaintiff, an attorney, represented the insurance company's insureds. Defendants wrote to plaintiff's professional liability insurance carrier about a potential claim arising out of plaintiff's alleged failures in representing defendant and attached six memoranda that plaintiff claimed were fabricated to contain false statements. New York's Appellate Division reversed the trial court, which had granted defendants summary judgment and dismissed plaintiff's defamation causes of action. On the issue of whether plaintiff had proof of special damages, the court noted: "Plaintiff sufficiently asserted special damages, including that he was required to pay a deductible under his malpractice insurance policy and pay a higher premium to a new company when Zurich declined to renew his policy due to this claim. Any dispute concerning the causal relationship between the claim and these damages is a factual question. Because questions of fact exist concerning the elements of defamation, the court improperly dismissed plaintiff's two defamation causes of action." Id. at *4-5.

Likewise, in Wolf, where plaintiff sought to recover lost profits from the libel of a grocery store, the court held that "there were several possible causes of the damage and the jury should have been instructed to differentiate between damage proximately linked to the libel as opposed to the picketing." 487 N.Y.S.2d at 449; accord Meadows v. Taft Broad. Co., 470 N.Y.S.2d 205 (App. Div. 1983) ("As to actual damages, defendants do

no more than raise a question of fact by claiming that the business losses concededly suffered by plaintiffs should be viewed as resulting from the first telecast rather than from the telecast alleged to be defamatory. In any event, the actual damage claim is sufficiently alleged and need not be further supported on this motion.").

It is clear that Trump has sufficient evidence to establish the lost opportunity to partner with Prudential Douglas Elliman. Defendants' arguments to the contrary establish the existence of genuine issues of material fact, which preclude summary judgment.

b. Trump Lost the Opportunity to Develop a Trump International Hotel & Tower at 400 Fifth Avenue

In addition to the lost opportunity to partner with Prudential Douglas Elliman, Trump has established that he lost the opportunity to complete a different deal with Lorber -- 400 Fifth.

Defendants argue that Trump should not be able to recover for the lost opportunity to develop 400 Fifth. (Damages Mov. Br. 24-26.) First, they argue that the opportunity was too speculative because "no agreement was signed, no financing received, no projections created, no government approvals obtained, no construction begun, and no apartments sold." (Damages Mov. Br. 25.) Of course with any deal that is stopped dead in tracks before completion one can make a list of what did not get done. The key, which defendants ignore, is the undisputed testimony of Trump that "it was just a deal that was going to happen" (Trump Dep. 549:20-21, 556:12-13, Ex. B), which, at a minimum, creates an issue of fact as to whether the deal otherwise would have been completed.

Second, defendants argue that Trump cannot establish causation because Trump's and Lorber's testimony recounting Bizzi's statements that Bizzi no longer wanted to do the deal with Trump and that he questioned working with Trump in light of the statements in the Book and Article are inadmissible hearsay. (Damages Mov. Br. 26.) That is not true. Testimony concerning the motivation of an individual for ceasing to deal with a business is clearly admissible under the state-of-mind exception to the hearsay rule, provided there is otherwise admissible proof that business was lost. See Celebrity Cruises Inc. v. Essef Corp., 478 F. Supp. 2d 440 (S.D.N.Y. 2007); see also Callahan v. A.E.V., Inc., 182 F.3d 237, 241 (3d Cir. 1999) ("The plaintiffs themselves can testify that the customers are in fact no longer shopping at their stores. Furthermore, although the reports of the customers' statements are hearsay, they are admissible as evidence of the customers' states of mind, i.e., their reasons for no longer shopping at the plaintiffs' stores.").[44]

Initially, there is clearly admissible evidence of the lost deal without resort to the statements made by Bizzi that he did not want to partner with Trump because of the statements in the Article and the Book. Both Trump and Lorber testified as to the negotiations and terms of the deal, and that Bizzi terminated the deal. Bizzi's termination of the deal is not hearsay, but direct and independent evidence of the loss of the deal.[45]

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[44] Although the holdings of Callahan and Celebrity are premised on Rule 803(3) of the Federal Rules of Evidence, New Jersey's Code of Evidence Rule 803(c)(3) is virtually identical, and New Jersey courts consider the holdings and analyses of federal courts when analyzing corresponding state rules. See State v. Aguiar, 322 N.J. Super. 175, 181 (App. Div. 1999) (where New Jersey rule of evidence mirrors federal counterpart, courts "look to federal decisions to interpret [New Jersey] provisions").

[45] In addition, Trump has evidence of other deals -- including the opportunity to partner with Prudential Douglas Elliman and with Bayrock. See supra Part III.B.2.

See Callahan, 182 F.3d at 253. Since Trump has independent evidence of the loss of the 400 Fifth Avenue deal, Bizzi's statements identifying his reasons for terminating the deal with Trump are admissible under the state-of-mind exception to the hearsay rule.[46]

As with the lost opportunity to partner with Prudential Douglas Elliman, it is clear that Trump has sufficient evidence to establish the lost opportunity to partner with Bizzi for the development of 400 Fifth. Defendants' arguments to the contrary establish the existence of genuine issues of material fact, which preclude summary judgment.

C. Trump Suffered Damage to His Reputation Because of Defendants' Publication of the Defamatory Statements

In addition to establishing special damages, Trump has adduced evidence of harm to his reputation, for which he will also seek recovery at trial.

Actual damages are not limited to out-of-pocket or pecuniary damages. Wolf, 487 N.Y.S.2d at 448. In fact, "the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Id. Actual harm may be established by testimony from persons in the community that the defamatory statements

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[46] Cases that, as a general principle, have found statements of motivation admissible under an exception to the hearsay rule include: State v. Long, 173 N.J. 138, 154-55 (2002) ("'It may be regarded as long since settled in this State that a person's own statements of a present existing state of mind, when made in a natural manner and under circumstances dispelling suspicion and involving no suggestion of sinister or improper motives, reflect his mental state and are competent to prove the condition of his mind--that is, his plan or design.'") (source omitted); Hunter v. New Jersey, 40 N.J.L. 495, 541-42 (Ct. of Errors 1878) ("One of the important questions at the trial was, whether the deceased had come into an agreement with the defendant to accompany him to Camden on the night of the murder. There was testimony showing the assent of Mr. Hunter to such agreement. The question for solution was as to the intention of the deceased in leaving his home, whether his motive and purpose were to assent to and execute such agreement...; and, in my opinion, this testimony, on this ground, was also admissible."); and State v. McKiver, 199 N.J. Super. 542 (App. Div. 1985) (evidence of verbal acts is admissible).

impeached plaintiff's integrity, or it may be inferred from proof of special damage. Id. at 449. It may also be established by proof "that an existing relationship has been seriously disrupted, reflecting the idea that a reputation may be valued in terms of relationships with others." Rocci, 323 N.J. Super. at 23-24 (also noting that "[t]estimony of third parties as to a diminished reputation will also suffice to prove 'actual injury'"). Here, plaintiff can establish actual harm through testimony -- of himself and third parties -- that his reputation was diminished and his integrity was impeached, as well as through proof of special damages and the disruption of existing relationships.

First, Trump testified that as a result of defendants' publication of the defamatory statements, his reputation was "seriously damaged." (Trump Dep. 531:19-24, Ex. B.) He testified that publication of the Book and Article caused people to believe that he was doing "poorly," but that, in fact, he was not:

> Well, I would say that I had some moments, some bad moments, like when this book came out. That was a very bad moment. I think I was -- I was perceived as doing poorly. I wasn't doing poorly.
>
> But I was perceived by a lot of people as doing poorly when this book came out and when the Times wrote a front page in the business section story that was one of the largest stories they've ever written where virtually every paragraph was negative.

(Trump Dep. 14:3-13, Ex. B.)

Third parties have testified to the same effect -- that defendants' publication of the defamatory statements diminished Trump's reputation and impeached his integrity. Howard Lorber testified that the Article "made Donald look like a phony." (Lorber Dep. 66:21-67:5, Ex. BB.) Lorber further testified that Bizzi pulled out of the 400 Fifth deal because of the Article: "I believe that I said, Oh, are you talking about, you know, the

book and the article about the book. And he said, yeah, it puts him [in] this [] bad light, you know, maybe he's not, you know, an honest guy to deal with, you know, he lies about that type of stuff."[47] (Lorber Dep. 70:8-14, Ex. BB.) Felix Sater also testified that the Book caused people to view Trump as a fraud. He testified that, in connection with the Trump Phoenix project, he "went to a couple of meetings and a couple of opposition, and the old ladies were showing the book up and screaming 'Trump's a fraud' and so on and so forth."[48] (Sater Dep. 117:12-16, Ex. BC.) Sater continued: "if you get the recordings, you will definitely find some instances there of people screaming and referring to the book and referring to Donald Trump in negative ways and holding the book up as an example." (Sater Dep. 122:11-16, Ex. BC.)

It cannot seriously be debated that statements that cause listeners to think that Trump was a "phony," "not . . . honest," or a "fraud" diminish Trump's reputation and impeach his integrity.

Second, actual harm may be inferred from Trump's proof of special damages (discussed supra Part III.B.1-2), from the disruption of existing relationships (discussed supra Part III.B.2), and from the evidence of other business opportunities Trump lost,

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[47] Lorber's recounting of what Bizzi said is not hearsay because, clearly, it is not being offered for the truth of the matter asserted -- that Trump is not an honest guy to deal with -- but rather to show that publication of the defamatory statements generated such discussion. Even if it were, however, being offered for the truth of the matter asserted, the evidence would be admissible under the hearsay exceptions for state of mind and verbal acts. See supra pp. 79-81.

[48] Likewise, Sater's recounting of the statements made at hearings about the Phoenix project is not hearsay because it is not being offered for the truth of the matter asserted -- that Trump is a fraud -- but to show that publication of the defamatory statements generated such discussion.

such as the Moscow and Phoenix deals, and the deals he may have lost but will never know about (see Trump Dep. 19:13-21, Ex. B).

Defendants' convoluted argument on reputation damages is that Trump has limited his claim for reputation damages to his defamation per se claims and that he has not stated a claim for defamation per se. (See Damages Mov. Br. 35.) Defendants' argument fails because, as shown supra Part III.A, Judge Fernandez-Vina has already held that Trump states a claim for defamation per se, and because Trump has not limited his claim for reputation damages to his defamation per se claims.

Defendants' purported support for their argument that Trump has limited his reputation damages to his per se claims is that Trump refused to identify any witnesses and Trump asserted in an interrogatory response that he "is not required to present evidence that assigns an actual dollar value to the injury to his reputation, as such damages are deemed to follow naturally and necessarily from the defamatory conduct itself." (Damages Mov. Br. 35.) The premises of defendants' argument are erroneous, but, even if they were true, the conclusion does not follow.

First, to be clear, Trump identified witnesses for his damage to reputation. He stated the following in the same interrogatory response that defendants quote in their brief (see Damages Mov. Br. 35):

> The witnesses on whose testimony Trump intends to rely at trial to support this claim for damages include, but are not limited to: (a) witnesses offered to establish defendants' liability; (b) witnesses who will testify to the injury to Trump's reputation caused by defendants' publication of defamatory statements about Trump; and (c) witnesses offered in support of plaintiff's other claims for damages, which include, without limitation, lost business opportunities.

(Defs.' Ex. 52 at 2.)

As for Trump's response that he is not required to present evidence that assigns an actual dollar value to the injury to his reputation, that response simply and accurately states the law. As the Court held in Wolf, awards for the more customary types of actual harm "must be supported by competent evidence concerning ***the injury***, although there need be no evidence which assigns ***an actual dollar value*** to the injury.'" 487 N.Y.S.2d at 448 (emphasis added). As described above, Trump has competent evidence of the injury, and he need not assign an actual dollar value to it.

* * *

It is clear that Trump has amassed considerable evidence that he suffered financial harm from defendants' publication of the defamatory statements -- he has established several types of mitigation damages and several lost business opportunities. Any one of those is sufficient to defeat defendants' motion for summary judgment on damages.

CONCLUSION

For the foregoing reasons, defendants' motions for summary judgment should be denied in their entirety.

Respectfully submitted,

BROWN & CONNERY LLP

By: _____
William M. Tambussi

Attorneys for Plaintiff Donald J. Trump

DATED: April 24, 2009

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DONALD J. TRUMP, Plaintiff, v. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART CAMDEN COUNTY Docket No. L-545-06

CERTIFICATION OF WILLIAM M. TAMBUSSI IN SUPPORT OF PLAINTIFF DONALD J. TRUMP'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I, William M. Tambussi, being of full age, hereby certify as follows:

1. I am Partner in the law firm of Brown & Connery, LLP, attorneys for plaintiff Donald J. Trump in the above captioned litigation.

2. I have personal knowledge of the facts set forth herein.

3. I make this certification in support of plaintiff's opposition to defendants' motions for summary judgment on actual malice and on loss causation and damages.

4. Attached as **Exhibit A** is a true and correct copy of relevant portions of the transcript of the deposition of Allen Weisselberg on January 7, 2008.

5. Attached as **Exhibit B** is a true and correct copy of relevant portions of the transcript of the deposition of Donald J. Trump on December 19 and 20, 2007.

6. Attached as **Exhibit C** is a true and correct copy of the article The Donald Machine Revs Up, by Pete Born, which appeared in WWD on February 25, 2005.

7. Attached as **Exhibit D** is true and correct copy of the article How Much is Donald Worth?, by Stephane Fitch, which appeared in Forbes on November 28, 2005.

8. Attached as **Exhibit E** is a true and correct copy of relevant portions of the transcript of the deposition of Timothy L. O'Brien on October 15 and 16, 2007.

9. Attached as **Exhibit F** is true and correct copy of a four-page document produced by defendant Timothy L. O'Brien, bearing the bates stamp TOB-EF-00005762-65.

10. Attached as **Exhibit G** is a true and correct copy of the article Is Trump Heading for a Fall?, by Timothy L. O'Brien, which appeared in The New York Times on March 28, 2004.

11. Attached as **Exhibit H** is a true and correct copy of the contract between Warner Books Inc. and Timothy L. O'Brien, dated December 6, 2004.

12. Attached as **Exhibit I** is a true and correct copy of a one page document produced by defendant Time Warner Book Group, bearing the bates stamp TWBG-PD-00000916.

13. Attached as **Exhibit J** is a true and correct copy of promotional materials for the Book prepared by Time Warner Book Group.

14. Attached as **Exhibit K** is a true and correct copy of the article The Midas Touch, With Spin on It, by Timothy L. O'Brien and Eric Dash, which appeared in The New York Times on September 8, 2004.

15. Attached as **Exhibit L** is a true and correct copy of the article Now, Reality for Trump Looks More Like 'Survivor', by Timothy L. O'Brien and Eric Dash, which appeared in The New York Times on September 24, 2004.

16. Attached as **Exhibit M** is a true and correct copy of the article Losses Increase as Cash Decreases, Straining Trump's Casinos, by Timothy L. O'Brien and Eric Dash, which appeared in The New York Times on July 30, 2004.

17. Attached as **Exhibit N** is a true and correct copy of a letter from Donald J. Trump to Erich Dash and Timothy L. O'Brien, dated August 4, 2004.

18. Attached as **Exhibit O** is a true and correct copy of the article Can Trump Afford Casino Stake?, by Timothy L. O'Brien and Eric Dash, which appeared in The New York Times on August 12, 2004

19. Attached as **Exhibit P** is a true and correct copy of a letter from Lawrence S. Rosen, Esq. to David E. McCraw, Esq., dated August 26, 2004.

20. Attached as **Exhibit Q** is a true and correct copy of a letter from Weiser LLP to David McCraw, Esq., dated September 2, 2004.

21. Attached as **Exhibit R** is a true and correct copy of relevant portions of the transcript of the deposition of Michelle Lokey on September 7, 2007.

22. Attached as **Exhibit S** is a true and correct copy of relevant portions of the transcript of the deposition of Gerald J. Rosenblum on November 13, 2007.

23. Attached as **Exhibit T** is a true and correct copy of an e-mail chain between Timothy L. O'Brien and Michelle Lokey, dated September 15, 2005.

24. Attached as **Exhibit U** is a true and correct copy of a letter from Michelle L. Scarbrough, Esq. to Larry Ingrassia, dated October 21, 2005.

25. Attached as **Exhibit V** is a true and correct copy of Timothy L. O'Brien's notes from interviews with Allen Weisselberg and Michelle Scarbrough on April 21, 2005.

26. Attached as **Exhibit W** is a true and correct copy of the article Trump Group Selling West Side Parcel For $1.8 Billion, by Charles V. Bagli, which appeared in The New York Times on June 1, 2005.

27. Attached as **Exhibit X** is a true and correct copy of relevant portions of the transcript of the deposition of Joseph Plambeck on September 25, 2007.

28. Attached as **Exhibit Y** is a true and correct copy of relevant portions of the transcript of the deposition of Patrick O'Brien on March 27, 2008.

29. Attached as **Exhibit Z** is a true and correct copy of a letter from Donald J. Trump to Larry Ingrassia, dated October 21, 2005.

30. Attached as **Exhibit AA** is a true and correct copy of a letter from Marc E. Kasowitz, Esq. to Lawrence J. Kirshbaum, dated October 27, 2005.

31. Attached as **Exhibit AB** is a true and correct copy of the article What's He Really Worth?, by Timothy L. O'Brien, which appeared in The New York Times on October 23, 2005.

32. Attached as **Exhibit AC** is a true and correct copy of the graphic that appeared along side the article What's He Really Worth?, by Timothy L. O'Brien, which appeared in The New York Times on October 23, 2005.

33. Attached as **Exhibit AD** is a true and correct copy of the Confidential News Sources Policy of The New York Times Company, available at http://www.nytco.com/company/ business_units/sources.html.

34. Attached as **Exhibit AE** is a true and correct copy of the Agreement of Limited Partnership of Hudson Waterfront Associates I, L.P. dated November 30, 1994.

35. Attached as **Exhibit AF** is a true and correct copy of the article Trump Sues Asian Partners Over Sale of West Side Site, by Charles V. Bagli, which appeared in The New York Times on July 12, 2005.

36. Attached as **Exhibit AG** is a true and correct copy of the transcript from Timothy L. O'Brien's appearance on KNDD on November 17, 2005.

37. Attached as **Exhibit AH** is a true and correct copy of Timothy L. O'Brien's interview notes from an interview with Donald J. Trump on December 20, 2004.

38. Attached as **Exhibit AI** is a true and correct copy of a letter from Jason D. Greenblatt, Esq. to Larry Ingrassia, dated October 20, 2005.

39. Attached as **Exhibit AJ** is a true and correct copy of an e-mail chain between Dave Dillon, Timothy L. O'Brien and Michael White, dated November 3, 2005.

40. Attached as **Exhibit AK** is a true and correct copy of an e-mail chain between Rick Wolff, Andrew Blauner, Emi Battaglia, and Timothy L. O'Brien, dated July 13, 2005.

41. Attached as **Exhibit AL** is a true and correct copy of relevant portions of the transcript of the deposition of David Dillon on August 13, 2008.

42. Attached as **Exhibit AM** is a true and correct copy of an e-mail chain between Dave Dillon, Timothy L. O'Brien, Michael White, and John Betterman, dated June 10, 2005.

43. Attached as **Exhibit AN** is a true and correct copy of an e-mail from Dave Dillon to Timothy L. O'Brien, dated October 31, 2005.

44. Attached as **Exhibit AO** is a true and correct copy of a two-page document produced by defendant Time Warner Book Group, bearing the bates stamp TWBG-EM-00022456-7.

45. Attached as **Exhibit AP** is a true and correct copy of a press release dated October 26, 2005.

46. Attached as **Exhibit AQ** is a true and correct copy of TrumpNation Talking Points.

47. Attached as **Exhibit AR** is a true and correct copy of an e-mail chain between Timothy L. O'Brien, Richard Wolff and Liz Dubelman, dated October 31, 2005.

48. Attached as **Exhibit AS** is a true and correct copy of the TrumpQuizzes that appear in the Book.

49. Attached as **Exhibit AT** is a true and correct copy of an e-mail chain between Timothy L. O'Brien and Lacy O'Toole, dated October 26, 2005.

50. Attached as **Exhibit AU** is a true and correct copy of the transcript of Timothy L. O'Brien's appearance on Squawk Box on October 31, 2005.

51. Attached as **Exhibit AV** is a true and correct copy of an e-mail chain between Allan M. Siegal and Larry Ingrassia, dated November 1, 2005.

52. Attached as **Exhibit AW** is a true and correct copy of the transcript from Timothy L. O'Brien's appearance at Coliseum Books in December 2005.

53. Attached as **Exhibit AX** is a true and correct copy of an e-mail chain between Timothy L. O'Brien, Renee Supriano, Rob Nissen, Richard Wolff, Lisa Dallos, and Andrew Blauner, dated October 23, 2005.

54. Attached as **Exhibit AY** is a true and correct copy of Peter Newcomb's appearance on Your World with Neil Cavuto on November 7, 2005.

55. Attached as **Exhibit AZ** is a true and correct copy of a one-page document produced by plaintiff Donald J. Trump, bearing the bates stamp TR000092386.

56. Attached as **Exhibit BA** is a true and correct copy of an advertisement that appeared on the front cover of The New York Times Magazine on October 18, 2006.

57. Attached as **Exhibit BB** is a true and correct copy of relevant portions of the transcript of the deposition of Howard M. Lorber on April 14, 2008.

58. Attached as **Exhibit BC** is a true and correct copy of relevant portions of the transcript of the deposition of Felix H. Sater on April 1, 2008.

59. Attached as **Exhibit BD** is a true and correct copy of a letter from Donald J. Trump to Tevfik Arif, dated January 1, 2005.

60. Attached as **Exhibit BE** is a true and correct copy of an order of the Honorable Faustino J. Fernandez-Vina, J.S.C., dated August 30, 2006.

61. Attached as **Exhibit BF** is a true and correct copy of the Transcript Of Motion To Dismiss before the Honorable Faustino J. Fernandez-Vina, J.S.C., dated August 18, 2006.

62. Attached as **Exhibit BG** is a true and correct copy of an order of the Honorable Dorothea O'C. Wefing, P.J.A.D., denying defendants' motion to take interlocutory appeal, dated October 12, 2006.

63. Attached as **Exhibit BH** is a true and correct copy of plaintiff's First Set of Interrogatories and Requests For The Production of Documents to defendants Timothy L. O'Brien, Time Warner Book Group Inc. and Warner Books, Inc.

64. Attached as **Exhibit BI** is a true and correct copy of Timothy L. O'Brien's Responses and Objections to plaintiff's First Request For The Production of Documents.

65. Attached as **Exhibit BJ** is a true and correct copy of Time Warner Book Group Inc.'s and Warner Book, Inc.'s Responses and Objections to plaintiff's First Request For The Production of Documents.

66. Attached as **Exhibit BK** is a true and correct copy of defendant Timothy L. O'Brien's Responses and Objections to plaintiff's First Set of Interrogatories.

67. Attached as **Exhibit BL** is a true and correct copy of defendants Time Warner Book Group Inc.'s and Warner Books, Inc.'s Responses and Objections to plaintiff's First Set of Interrogatories.

68. Attached as **Exhibit BM** is a true and correct copy of defendants' privilege log and redaction log, dated September 27, 2006.

69. Attached as **Exhibit BN** is a true and correct copy of an order of the Honorable Irvin J. Snyder, J.S.C., dated February 13, 2007.

70. Attached as **Exhibit BO** is a true and correct copy of defendants' privilege log and redaction log, dated October 17, 2006.

71. Attached as **Exhibit BP** is a true and correct copy of the Transcript Of Hearing On Motion To Compel before the Honorable Irvin J. Snyder, J.S.C., dated December 20, 2006.

72. Attached as **Exhibit BQ** is a true and correct copy of an order of the Honorable John S. Holston, Jr., J.A.D., granting defendants leave to take interlocutory appeal, dated March 14, 2007.

73. Attached as **Exhibit BR** is a true and correct copy of the decision of the Superior Court of New Jersey, Appellate Division, dated October 24, 2008.

74. Attached as **Exhibit BS** is a true and correct copy of a letter from Andrew Levine, Esq. to Maria Gorecki, Esq., dated November 21, 2008.

75. Attached as **Exhibit BT** is a true and correct copy of relevant portions of the transcript of the deposition of Lawrence Ingrassia on April 30, 2008.

76. Attached as **Exhibit BU** is a true and correct copy of a letter from Maria Gorecki, Esq. to Andrew M. Levine, Esq., dated April 5, 2007. The letter identifies materials made available to Timothy L. O'Brien on April 21, 2005 that contained debt information for Trump properties including, but not limited to, Mar-A-Lago (TR000000901-1294); Trump National Golf Club, Briarcliff, New York (TR000023397-23801); Ocean Trails Rancho Palos Verdes, California (TR00000027438-27721,

TR00000034855-35277); Lamington Farm Golf Club (TR000014956-15704); and Seven Springs, LLC (TR000022952-23375).

77. Attached as **Exhibit BV** is a true and correct copy of Defendants' Responses and Objections to Plaintiff's Requests for Admissions, dated December 8, 2008.

78. Attached as **Exhibit BW** is a true and correct copy of a Transcript of Motion Hearing before the Honorable Michael J. Kassel, J.S.C., dated December 7, 2007.

79. Attached as **Exhibit BX** is a true and correct copy of articles written by Timothy L. O'Brien from March 28, 2004 to October 22, 2004.

80. Attached as **Exhibit BY** is a true and correct copy of an e-mail from Timothy L. O'Brien to Arthur Ochs Sulzberger Jr., dated September 6, 2005.

81. Attached as **Exhibit BZ** is a true and correct copy of an e-mail chain between Timothy L. O'Brien, Richard Woff, Rob Nissen, and Andrew Blauner, dated October 31, 2005.

82. Attached as **Exhibit CA** is a true and correct copy of an e-mail chain between Timothy L. O'Brien, Michael White, John Betterman, and Dave Dillon, dated October 25, 2005.

83. Attached as **Exhibit CB** is a true and correct copy of an e-mail from Dave Dillon to Timothy L. O'Brien, Michael White, Patrick O'Brien, and Michael O'Brien, dated November 9, 2005.

84. Attached as **Exhibit CC** is a true and correct copy of the article He's the Top, by David Segal, which appeared in The Washington Post on September 9, 2004.

85. Attached as **Exhibit CD** is a true and correct copy of Timothy L. O'Brien's Supplemental Interrogatory Responses, dated August 1, 2007.

86. Attached as **Exhibit CE** is a true and correct copy of defendants' privilege log and redaction logs.

87. Attached as **Exhibit CF** is a true and correct copy of Andrew Blauner's privilege log, dated August 24, 2007.

88. Attached as **Exhibit CG** is a true and correct copy of an e-mail chain between Robert Castillo and Richard Wolff, dated July 26, 2005.

89. Attached as **Exhibit CH** is a true and correct copy of an e-mail chain between Andrew Blauner, Richard Wolff, Emi Battaglia, and Timothy L. O'Brien, dated July 13, 2005.

90. Attached as **Exhibit CI** is a true and correct copy of an e-mail chain between Rob Nissen, Timothy L. O'Brien, Richard Wolff, Andrew Blauner, and Emi Battalgia, dated September 19, 2005.

91. Attached as **Exhibit CJ** is a true and correct copy of an e-mail chain between Richard Wolff, Rob Nissen, Timothy L. O'Brien, Andrew Blauner, and Emi Battaglia, dated November 17, 2005.

92. Attached as **Exhibit CK** is a true and correct copy of an e-mail chain between Timothy L. O'Brien, Rob Nissen, Richard Wolff, Emi Battaglia, and Andrew Blauner, dated March 15, 2005.

93. Attached as **Exhibit CL** is a true and correct copy of an e-mail chain between Richard Wolff and Timothy L. O'Brien, dated March 18, 2005.

94. Attached as **Exhibit CM** is a true and correct copy of the Reply Memorandum of Law of Defendants Timothy L. O'Brien, Time Warner Book Group Inc., and Warner Books Inc. in Further Support of Defendants' Motion to Dismiss, dated July 14, 2006.

95. Attached as **Exhibit CN** is a true and correct copy of an e-mail from Michael J. Bowe, Esq. to David E. McCraw, Esq., dated October 21, 2005.

96. Attached as **Exhibit CO** is a true and correct copy of is a true and correct copy of an e-mail from Michael J. Bowe, Esq. to David E. McCraw, Esq., dated October 21, 2005.

97. Attached as **Exhibit CP** is a true and correct copy of is a true and correct copy of an e-mail from Michael J. Bowe, Esq. to David E. McCraw, Esq., dated October 21, 2005.

98. Attached as **Exhibit CQ** is a true and correct copy of a letter from Marc E. Kasowitz, Esq. to Lawrence Ingrassia, dated November 9, 2005.

99. Attached as **Exhibit CR** is a true and correct copy of a letter from Mark P. Ressler, Esq. to Andrew J. Ceresney, Esq., dated January 7, 2008.

100. Attached as **Exhibit CS** is a true and correct copy of Di Lorenzo v. New York News Inc., 1981 N.Y. App. Div. LEXIS 11522 (May 6, 1981).

101. Attached as **Exhibit CT** is a true and correct copy of First Interstate Credit Alliance, Inc. v. Leroy, No. 89 Civ. 3263, 1989 U.S. Dist. LEXIS 14523 (S.D.N.Y. Dec. 5, 1989).

102. Attached as **Exhibit CU** is a true and correct copy of Houston v. New York Post, No. 93 Civ. 4408, 1996 U.S. Dist. LEXIS 19705 (S.D.N.Y. Jan. 10, 1997).

103. Attached as **Exhibit CV** is a true and correct copy of Metropolitan Opera Association v. Local 100, No. 00 Civ. 3613, 2005 U.S. Dist. LEXIS 14422 (S.D.N.Y. July 26, 2005).

104. Attached as **Exhibit CW** is a true and correct copy of Roche v. Claverack Coop. Ins. Co., No. 505669, 2009 N.Y. App. Div. LEXIS 1389 (Feb. 26, 2009).

105. Attached as **Exhibit CX** is a true and correct copy of Stevens Institute of Technology v. Hinc, No. A-3574-04T2, 2007 WL 2188200 (App. Div. 2007).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

William M. Tambussi

Dated: April 24, 2009

* * * C O N F I D E N T I A L * * *

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: CAMDEN COUNTY

DONALD J. TRUMP, Plaintiff,	)	
vs.	)	No. CAM-L-545-06
TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants.	)	

January 7, 2008

10:02 a.m.

Deposition of ALLEN WEISSELBERG, held at the offices of Kasowitz, Benson, Torres & Friedman, 1633 Broadway, New York, New York, before Laurie A. Collins, a Registered Professional Reporter and Notary Public of the State of New York.

A. I don't know what that means.

Q. Well, how is Mr. Trump's brand doing today?

MR. RESSLER: I'll object to the form.

You can answer.

Q. You can answer.

A. How's it doing?

Q. Yeah.

A. What do you mean? As far as recognition? As far as economics? What is your specific question?

Q. Do you think that it is thriving today?

A. Absolutely.

Q. In what ways?

A. Through real estate transactions. We have 70 -- 70 deals right now that are either in the process of being finished or in the various stages of getting to completion. We have -- we're back on TV with The Apprentice. I'm sure you saw the show last week. It got great reviews. I guess the world wants us on TV.

We have a tremendous amount of products that out there: furniture lines, clothing lines. The numbers that have come in from these various

lines have been great, although I will say this: There was a point in time after this book came out and the article came out where things didn't always look so rosy. So there was a time and place where we felt this book and article was going to have an effect upon that brand.

Q. It hasn't panned out that way?

MR. RESSLER: Objection to the form of the question.

Q. Has it panned out that way?

MR. RESSLER: Objection to the form of the question.

A. Has it panned out that way? I think that -- well, you'll find out over time, but I believe there were some things that could have been better and would have been much better than they are today. This is -- this is the result of a lot of hard work on our part.

Q. What in particular are you referring to when you're saying it could have been better?

A. I think there were lots of deals we lost over time. I know -- for example, I was in Donald's office one day where he was -- during the years of our worst financial times, I never saw

information that Mr. O'Brien was provided. And you mentioned, I think, documents relating to Mr. Trump's ownership of properties; correct?

A. Correct.

Q. What, sitting here today -- and I'll get into obviously more specifics in a moment. But what, sitting here today, in Mr. O'Brien's writing was false about Mr. Trump's ownership of properties?

A. Based upon the -- again, I read his book quickly. I couldn't even bear to read most of it. He didn't believe we owned the West Side Yards, for argument's sake. He didn't believe we owned it. We had documents, deeds, all the public records to show ownership, and they were sitting on a table. He didn't show much interest to want to go through those documents.

But I believe in his book -- or I read maybe it was in the newspaper article, which was an excerpt from the book, that he claimed we didn't own the West Side Yards.

Q. The West Side Yards is one area?

A. I didn't read the book last night before this deposition, so I don't recall every

Q. Hold on. You never read the whole excerpt all the way through?

A. I may have. I may have read it quickly. I may have gone back and reread certain parts of it that were of more of interest to me than other parts. I wasn't so much concerned about things about his family. That was something that I'm sure Donald took offense to. I may have glanced over some of that stuff. I was looking more to the finances of that article that were of concern to me.

Q. What did you read in the article?

A. I read about the fact there were some sources that indicated his net worth being between I think 150 and 200 million dollars. I saw that. That upset me terribly, which I took offense to.

I recall seeing something in there about 40 Wall Street where he is trying to draw a comparison of what we say it's worth versus what an assessor of the city, to any smart writer, a business writer, located in New York City could never do.

I feel like My Cousin Vinnie here.

There's no way anybody in a million

years somebody could ever compare an assessment of a building versus its market value. That's almost a joke. And those comparisons were drawn for one reason: So the layman who is not familiar with real estate can say, sure, he's probably exaggerating. How can it be worth 410 million when the assessor says it's worth 50 million, or whatever the number was. They would say, sure, he must be lying. But what was the reason, though? He's a layman.

Q. Anything else you recall about the article or the book that you believed was incorrect?

A. I don't recall, no. If I sat down with the book for the next week or so, maybe I could go through the whole thing and find a lot of areas. But off the top of my head, no.

Q. You think you could sit down with it and find a lot of errors?

A. I think I might be able to find financial areas or statements like the one on 40 Wall Street, certainly. That I do remember very carefully, because it was almost in the bizarro world.

Q. Because you assume there are other errors in the book?

A. I assume when somebody writes about a net worth of 150 to 200 million, after having spent which -- well, we'll get to that in a moment, I guess -- but how little time he spent with me relatively speaking considering how important it was to what he was writing, and writes about 40 Wall Street, that's just irresponsible reporting.

Q. When you say he writes about 40 Wall Street and he included the assessor's amount, did he also include the amount that you told him you believed it was worth?

A. And that was the exact problem. He did.

Q. He did?

A. Yeah, and that was the problem.

Q. He included both; right?

MR. RESSLER: You can answer.

Q. He included both; correct?

A. He included both. And people that read the article -- read that portion of the book would say, Trump says X; the assessor says Y. I have to

O'Brien?

A. I couldn't tell you the exact date when his name came up.

Q. Had you heard -- go ahead.

A. I was going to say that I met him for the first time. He was going to Florida one weekend with Mr. Trump. And I go down to Florida weekends with Mr. Trump. I have a house in Florida. And he was joining us for a ride in the car, going out to the airport. He was going to spend the weekend with Mr. Trump, and I was going to my house that weekend.

Q. And so he joined you in the car with Mr. Trump --

A. Going out to the airport.

Q. -- going to the airport?

A. Going to the airport.

Q. Did you speak with Mr. O'Brien on that occasion?

A. As a matter of fact, he had a tape recorder in the car with him. We talked about just generally how long you've been with the company and how we've done over the years and his father and things of that nature, a lot of general

conversation.

That actually was very surprising, that he had a tape recorder with him in the car that they're going on a 20-minute ride to LaGuardia from midtown Manhattan. And the day we had our meeting he asked -- the first question he asked was if he had a tape recorder.

And I found out subsequently that he said he didn't have a tape recorder. I was blown away by that. I was literally blown away. He taped our conversation about nonsense in the car for 20 minutes, but yet he comes to meet with me for I don't know how many hours he wanted to meet with me, had an entire room full of documents and questions he could have asked me, and yet there was no tape recorder.

Q. Do you recall if he had a tape recorder that day?

A. He said he did. The first thing out of his mouth that day, Mr. Weisselberg -- besides good morning and the normal hellos, was: Would you mind if I tape this meeting? I said absolutely not. Go ahead. Go ahead.

And then I found out later on -- and I

told that to the Kasowitz firm. I told them that.

MR. RESSLER: You shouldn't share the substance of your communications with counsel.

A. Anyway, the bottom line is then I learned later on he said there was no tape recorder. I was totally shocked by that.

Q. Let me make sure I understand. He had a tape recorder in the car going out to the airport?

A. To the airport.

Q. Are you also saying he also had a tape recorder on the day you met with him in Trump Tower?

A. Absolutely.

Q. He taped the whole conversation?

A. He claimed he was going to.

Q. Where was the tape recorder during the conversation?

A. It was a small rectangular kind of tape recorder. I think he put it right next to him on the table. He was sitting at the end of the table. I was sitting to the right. And Michelle Lokey was in the room as well, and she was in sort of the back of the table sort of fidgeting with

the documents so that when he finished with me, he would start going through documents with her.

And there was a tape recorder sitting right to the side of where he was sitting. So I assumed the thing was being taped.

Q. Did he take notes during that meeting?

A. He may have taken some notes. I don't recall that. I do recall -- I don't typically get taped when I speak to people, because that's not my business. I have a clear recollection of him saying that to me.

Q. Let's just go back to the ride out to Florida.

A. Sure.

Q. Out to the airport to Florida. Was that the first time you met Mr. O'Brien?

A. Yeah, I think so. He may have been in the office, but I didn't know who he was. I hadn't met him. I may have seen him walk around or come to see Donald or something. But I hadn't officially been introduced to him. So I didn't know who he was. Then when I saw him in the car, I think I remembered seeing him walking around the office periodically, coming in and out of

Donald told me or maybe a secretary told me. I don't recall exactly who told me I would have a meeting with Mr. O'Brien.

Q. What were you told at that time?

A. There would be a meeting with Mr. O'Brien. The purpose of the meeting was to go over some assets, have some discussion about his net worth, and also to show him our various books to be able to finally convince him that things we claimed we owned we did own. And we --

Q. Go ahead.

A. We spent the next couple of weeks -- "we" being myself and Michelle Lokey, because she hadn't been with us all that long -- literally going through our entire office finding every binder and document we could bring to that meeting.

By the way, just so you understand -- I said this before -- we're a privately held company. We don't do this. We don't have to do this. Other reporters have been maybe frustrated by the fact we didn't do this, as you indicated to me earlier with some of the articles you showed me.

But Mr. Trump chose in this case to take him everywhere and show him everything, which he -- ask Harry Macklowe one day and see the answer you get. We took everything out, everything, and let him see everything we had.

Q. When you say "everything," what specifically, what types of documents specifically, did you ask -- well, let me back up.

Who determined which documents to pull to show to Mr. O'Brien?

A. Michelle Lokey is an attorney, and certainly an attorney can determine what it is that we have to show someone to prove ownership, whether it's through a deed or something being recorded in a county clerk's office or a binder showing evidence of ownership.

Whatever we had at our disposal, anything we had at our disposal that would show ownership we wanted to be forthcoming and give to him to be able once and for all to end the argument about ownership.

Q. Did you have discussions with Ms. Lokey about what she should pull, what documents she should pull?

A. I thought there was no need for it. If he wanted something like that, he would ask me: Show me how you arrive at that number, tell me what gives you support for that number, and I would have produced it.

Ownership is different. You can't talk ownership. You can't talk through ownership. Either you show a piece of paper evidencing ownership or you don't. Either you own something or you don't. A valuation, it's subjective. It's not a science; it's an art. There's no -- there are many methods of valuing things, as we all know.

Q. There are many ranges of valuation; correct?

A. Correct. And I think over time we've proven that our financial statements are somewhat conservative, conservative.

Q. We'll get to the financial statements.

A. That's okay.

Q. Did you pull the financial statements?

A. Which one?

Q. The statements of financial condition to show him.

A. Actually, it's funny, during the course of the meeting, Donald happened to pop in to see how things were going. And he walked in with the financial statement and showed it to Mr. O'Brien for a brief period of time.

Q. Prior to your claim that Mr. Trump came in with the statement of financial condition --

A. I did not --

Q. -- did you -- prior to the claim that you're making that Mr. Trump came in with the statement of financial condition, did you pull the statement of statement of financial condition to show to Mr. O'Brien on April 21st, 2005?

A. I did not.

Q. Why not?

A. I said I would answer his questions about valuations. We're a privately held company. I don't have to show valuations unless I have to for some reason. But ownership is something you have to show, because no one would believe it unless you show it.

Valuations are things that -- by the way, if he wanted to, he never had to meet with me. He could have gotten the values for

another, things of that nature. But I don't think I had every number in my head as far as -- I was able to tell him that sales were going well, we were selling for about 200,000 or 250 a membership, we had a strong year, we had a weaker year. That kind of conversation.

Q. Did he ask for any information at the meeting that you didn't have at your hand?

A. No.

Q. Did he ask --

A. As a matter of fact, I'm sorry, I did read a comment in the book about the fact I went back to my desk to look for a billion dollars. I'm telling you I've never said that. It was kind of funny, if you took it that way. It was kind of cute. I never said it. I never once said I'm going back to that my desk to find that billion dollars. I was like --

Q. Did you say anything as you left the room about what you were going back to your office to do?

A. No. Why would I have to tell him that? I'm going back to my work. And he was left with Michelle Lokey behind. I came back later. I

waited about an hour or so, an hour and a half, to see how things were going. They were wrapping up. And I think I may have asked him to say good-bye to Mr. Trump, and I may walked him back in there again.

Q. Any other conversations -- and I want to go through the meeting itself in a moment -- actually probably after lunch, because we'll break in a minute.

A. Oh, time's flying by. I'm having fun.

Q. Any other conversations that you recall in advance of the meeting with Mr. O'Brien?

A. Just the one trip to Florida.

Q. Any other conversations about the meeting that you recall with either Mr. Trump or anybody else in the Trump Organization?

A. No.

Q. Any other preparation for the meeting that you recall other than what you've described?

A. Not really, maybe just asking how a sale is going in a building. Nothing really.

MR. CERESNEY: Let's break for lunch, take a 45-minute break and pick up at -- let's just pick up at 1:45.

She never left.

Q. How big was the conference room?

A. Did I measure it? It's a large -- bigger than this.

Q. Where were the documents that you mentioned earlier?

A. They were on all on the conference room table, laid out, end to end.

Q. Anybody else there during the point -- during the period that you were meeting with Mr. O'Brien and Ms. Lokey? Anybody else enter the room?

A. Mr. Trump came in once to see how things were going.

Q. At what point during -- how long into your discussion with Mr. O'Brien did Mr. Trump come in?

A. I don't recall. I wasn't looking at any watch. I don't -- I have no idea.

Q. And what did he say when he entered the room?

A. How are things going. I think he actually brought a copy of his financial statement with him.

Q. You think he did?

A. Well, he walks in. He handed him a blue jacket. I know the statements are usually done in blue jackets, but "jacket" meaning the cover. And he showed it to him. He was glancing at it. He put it down.

And then Mr. Trump walked out. And then he started asking me questions about -- he mentioned an asset, let's say, the west side. And we got into a conversation about the west side. We discussed that for a few minutes. Then he would jump on to another asset. We would talk about that for a few minutes.

And I'd give him some background about the quality of the work we've done there, what we've done to the property to enhance it, the kind of money we spent, how sales were going, you know, things -- that kind of conversation.

Q. Were you already involved in a discussion with Mr. O'Brien about the assets when Mr. Trump walked in?

A. Yeah, it was a few -- not long into it, maybe 15 minutes into it, 20 minutes, maybe.

Q. You would have been discussing

A. Yeah, I guess.

Q. Tabs like this?

A. Or yellow paper like that, Post-It.

Q. So either a yellow Post-it or a tab like this?

A. Or a piece of paper or a clip, whatever she was using to indicate whatever page she wanted him to see.

Q. Did Ms. Lokey come sit next to you and Mr. O'Brien during the half hour between Mr. -- when Mr. Trump came in the first time and when he came back the second time?

A. Yes, I think she did sit down for a while, yes. I was very surprised at -- I was out of that room in 40 minutes.

Q. Forty minutes?

A. Yeah. I know it was less than an hour.

Q. Now, you talked about how you discussed with Mr. O'Brien certain assets; right?

A. The ones he raised, the ones he brought up.

Q. And you discussed these in response to Mr. O'Brien raising a particular asset?

A. Yeah, he would raise an asset, he asked

A. What I'm saying is that I don't recall what I said exactly, but I would never say we got something for nothing if I know there's a liability on the balance sheet that shows an obligation to pay Daewoo.

Daewoo is still involved to this day with us. The note payable is now down to $15 million, and they invested -- do you want to know about Daewoo?

Q. I was going to ask you about Daewoo later but --

A. It's not "Die-woo"; it's "Day-woo."

Q. Daewoo.

In terms of this meeting with Mr. O'Brien, do you remember anything else you told him about Daewoo?

A. No.

Q. Anything else about specific assets that you recall?

A. No.

Q. Let me show you what's already been marked as Defendants' Exhibit 12, which are Mr. O'Brien's notes of this meeting. Have you ever looked at these notes that Mr. -- at

Mr. O'Brien's notes?

A. I saw these for a couple of seconds at a prior meeting with our attorneys in preparation for today.

Q. Other than your meeting with your attorneys, have you ever seen these notes?

A. No. What's pretty amazing --

Q. I just asked you if you have ever seen these notes.

MR. RESSLER: Well, wait. Finish your answer, please.

Q. Go ahead.

A. I was going to say there are a lot of notes for a very short meeting. It doesn't seem like all of this was written -- not even one crossout, except for here. I mean, okay. I don't know when these were written, but I'm going to assume, because you tell me they are, they were written at that -- at the meeting on the 21st.

Q. I'm telling you these are the notes of the meeting. My question is have you seen these before.

A. Briefly, in preparation for today.

Q. Thank you. Now, let me ask you about

some specifics.

A. Sure.

Q. Did Mr. O'Brien ask you whether there were any tax returns, bank statements, audited financial statements, department of gaming enforcement filings, in the room?

A. No.

Q. Did you or Ms. Lokey tell Mr. O'Brien that there were just deal books and property records in the room?

A. Correct, we told him in the room were those things that we were going to show him to prove ownership of the properties.

By the way, that was our primary objective that day was to establish ownership, because of Mr. O'Brien's continuous comments to Donald about not owning the properties he claims he owns. So we had to leave that day that he walk out confident we did own these things.

Q. You say continuous comments that Mr. O'Brien you claim made about not owning properties. Earlier we talked about the West Side Yards and the ownership claims on that. Any other properties that you're aware that Mr. O'Brien was

A. I don't recall.

Q. Now let's go back to the meeting and in particular Mr. O'Brien's request for additional information. I'm going to ask you to look at Defendants' Exhibit 12.

A. Yes.

Q. And I'll ask you to look at the bottom of the first page. Do you see there where it says Allen? Do you see that, the last entry on that page?

A. Allen has a sheet?

Q. Yes. I'll read that to you. And I'm going to ask you if this refreshes your recollection at all.

A. Sure. Go ahead.

Q. Allen has a sheet in front of him. Are IRS forms/bank statements/audits/DGE on conference table? "No," says AW. "Just deal books and property records." Have to ask Donald for those other things.

Does this refresh your recollection that there was this interchange with Mr. O'Brien on April 21st, 2005?

MR. RESSLER: Objection to the form of

the question.

A. I don't recall that. I told him what was there before we started the conversation -- before we started the meeting. I said -- I told him what was on the table. I didn't mention that we had IRS forms. I didn't tell him about other things other than what's on the table.

So for him to ask the question after I already told him what was on the table, I don't recall that.

Q. I want to just clarify. You don't recall Mr. O'Brien asking you for -- whether IRS forms, bank statements, audits, or DGE information were on the conference table?

MR. RESSLER: Objection, asked and answered.

Q. What's the answer?

A. I already answered it. I told him what was on the table. I don't recall him asking the question.

Q. Did you, during this meeting, provide a net worth for Mr. Trump?

A. You mean a dollar amount?

Q. Yes.

A. I probably did, probably, again, as I indicated to you earlier today, probably talked about a net worth involving two components, the things that are in our statement of financial condition, those -- the net value of those assets after liabilities.

To that I probably ascribed in my mind, without talking about it, because I didn't know the real value, something for branding to add to that net worth. And I don't believe -- I don't recall what the net worth was at the time. I just don't have it in my head. But it came around 5 million or -- 5 million or something like that.

Q. Do you think you told him $6 billion?

A. I don't recall.

Q. Let's look at the notes, Defendants' Exhibit 12, and I'm going to ask you to look at the second entry on that page you're looking at, which is the second page, Bates number 4298.

A. Right.

Q. Do you see where it says, AW says DT's net is about -- I think it's A -- about 6 billion? Do you see that?

A. Is at or about?

Q. Is about -- well, there's an A with a circle around it.

A. That's "at."

Q. That's "at"? $6 billion. Do you recall that?

A. I may have said 5 to 6. I don't recall saying a specific number like 6. That's pretty exact.

Q. And let's look at page 42 -- I'm sorry, 4306 if you look at the bottom. You see there's a page there that has at the top of the page 6 billion net worth? Do you see that?

A. Yes.

Q. Does this refresh your recollection at all that you said that Mr. Trump was worth $6 billion?

MR. RESSLER: Objection to the form of the question.

A. I don't recall saying 6. I may have said some range between 5 and 6, possibly, but I don't recall saying 6 billion and hitting a specific number, because I couldn't do that because I didn't have the value of the brand in my head.

Q. Do you recall telling Mr. O'Brien that you thought that the building would sell for approximately 410 million?

A. I don't recall that. I may have, but I don't recall. I certainly don't recall the percentages that are here, 88 to 90 percent. I don't recall that. I also don't recall Donald could net. Are these Mr. O'Brien's thoughts? They're not my thoughts, what he could net on a sale.

Could certainly get 155. I don't know where that came from. It wasn't my thoughts. I'm not a broker. I have no idea what the market at that time would have given us. We estimated 410, assuming that's correct. But I never would have said 155 to him if I had 410 in my financial statement.

So where these thoughts came from could only be his own thinking of when he was writing his notes. I don't know when he wrote these notes. He may have had other notes and he took those notes and then went home and sat and thought about it and wrote his --

Q. The only question I'm asking you --

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MR. RESSLER: I'm sorry, are you finished?

A. Wrote his book.

Q. I'm only asking if you recall saying this to Mr. O'Brien that day.

A. No.

Q. Okay. Let's go on to the next one, West Side Yards.

A. Sure.

Q. Again, I'll read it and you tell me if at any point you disagree with my reading.

A. Okay.

Q. Six partnerships that own portions of the site. Seven buildings are up and five occupied. There will be 16 -- there's an abbreviation for buildings, and then there's that dash with the dot, total.

Is that accurate?

MR. RESSLER: Is your reading accurate?

Q. Is my reading accurate?

A. Your reading is accurate.

Q. Is that an accurate statement about the West Side Yards?

A. I don't recall if it was five

A. I would have to -- well, '05 wasn't prepared yet, because we met in April of '05. That statement wasn't done until around September or so. So it would be the '04 statement.

Q. Do you know whether Mr. O'Brien had previous -- had you ever -- do you have any knowledge, sitting here today, of whether Mr. O'Brien had previously seen that statement of financial condition?

A. I don't know.

Q. Has Mr. Trump ever told you any information about other occasions where Mr. O'Brien saw that statement of financial condition?

A. No.

Q. Is it fair to say that statement of financial condition provides a net worth of approximately -- again, give or take -- but approximately $3.5 billion?

A. I don't recall. The 2004 statement?

Q. Yeah, the 2004 statement.

A. I don't recall. If you show it to me, I'll be able to.

Q. Sure. Let's look at Defendants'

Exhibit 35.

A. Okay.

Q. If you look at Defendants' Exhibit 35, is this the 2004 statement of financial condition?

A. Yes, it is.

Q. And I'll ask you to look at the page that has Bates number on the bottom 124.

A. Okay.

Q. Does that appear to claim a net worth for Mr. Trump of $3.5 billion?

A. Yes, it does, without branding.

Q. Without branding.

Is it fair to say that the number that Mr. O'Brien attributed to you and Mr. Trump in terms of your -- Mr. Trump's claimed net worth in the book was $6 billion?

A. I'm not sure I understand.

MR. RESSLER: I'll object to the form of the question.

Q. Let me direct your attention to page 155 of the book again. Sorry, it's page 154.

A. Page 155?

Q. 154, actually.

Do you see on page 154 the paragraph

the question.

A. I don't think he provided it. I think he's saying that we provided it.

Q. Right. Is Mr. O'Brien, in his book, reporting that you provided a number of $6 billion?

MR. RESSLER: Objection to the form of the question.

A. Correct.

Q. And is that a higher number than the number $3.5 billion that appears in Defendants' Exhibit 35?

A. It is higher.

Q. Is that number represented to be the amount that you claimed Mr. Trump is worth?

MR. RESSLER: Objection to the form of the question.

A. Is which amount?

Q. Six billion.

A. I said 5 to 6.

Q. And that's higher, though, than the 3.5 billion in the statement of financial condition?

A. Because of branding.

Q. The statement of financial condition is

a statement of what Mr. Trump believes he's worth; correct?

MR. RESSLER: Objection to the form of the question.

A. The statement of financial condition discusses the valuation of assets and liabilities that we had as of that date without taking into consideration the value for the brand, which is mentioned in the statement.

Q. And the values that are contained in the statement of financial condition are the values attributed to those properties by Mr. Trump; correct?

MR. RESSLER: Objection to the form of the question.

A. Correct.

Q. In fact, if you look at the first page of the statement of financial condition --

A. Yep.

Q. -- and we read the accountants' compilation report, second paragraph, does it say, A compilation is limited to presenting, in the form of financial statements, information that is the representation of the individual whose

probably give you a better answer as to how many statements are prepared according to GAAP for individuals.

Q. Have you ever discussed with Weiser preparing one of those audited financial statements?

A. Never had a need to.

Q. Let me ask you some questions about a discrete area that will take ten minutes. In particular let's talk about Forbes.

Did you ever meet with Forbes magazine?

A. We did. Yes, we did.

Q. When you meet with Forbes?

A. We met with Forbes after the book came out, because they were somehow -- there was some article or something questioning their valuation for Mr. Trump. And we felt -- they called us and said, you know, we'd like to sit down with you guys and go through things and make sure that we're okay with what we're doing. We said absolutely.

We actually re-created the same room that was there for Mr. O'Brien, same documents that were there. And we sat down with them, with

the folks from Forbes, and went through assets and discussed -- whatever questions they asked of us, we gave responses, same as we did for Mr. O'Brien.

Q. Was this a single meeting?

A. Single meeting.

Q. And who was present at the meeting?

A. I think Peter Newcomb and Stephan Finch or Fitch, something like that.

Q. Who was present from the Trump Organization?

A. We had myself, and I had Jeff McConney there, who did a lot of the legwork for the statement itself; and I think Gerry Rosenblum was there and Donald Bender.

Q. What was the purpose for the Weiser people being there?

A. They didn't really do anything. They just sat there.

Q. They didn't say anything?

A. No, nothing at all. In case something came up, I didn't want to have to call them on the phone. I wanted to just take care of it one day and get it over with in the meeting. They didn't really say anything.

Q. Was it you who asked them to be there?

A. I did.

We had Mr. Trump's kids there as well, the three -- I think two kids. Eric was still in school.

Q. And you said that you provided them with documents that you had provided to Mr. O'Brien?

A. Ownership documents.

Q. Did you provide them with anything else other than the ownership documents?

A. No. We just went through a list of assets and how we arrived at various values. I had Jeff McConney there. He spoke about most of the assets, how we did. And they were fine with our methodology; they felt it worked.

Q. So just so I'm clear, where did you get the list of assets from that you spoke to them about?

A. Well, it's on Donald's statement. We just went down the list. We had it in front of us and went down the list.

Q. Did you give them the statement of financial condition?

A. I don't remember. I don't recall that at all.

Q. So you think you had it in front of you?

A. Or Jeff had it in front of him.

Q. And Mr. McConney reviewed the assets?

A. Step by -- asset by asset.

Q. Did he also review the methodologies behind the valuation of those assets?

A. We did that, yes.

Q. What was the purpose of doing that at this meeting?

A. To get Forbes comfortable that what they were doing was correct. They actually walked out saying they probably undervalued Mr. Trump's net worth.

Q. Do you recall what Mr. Trump's children said at that meeting?

A. They were talking about things they work on having to do with branding, the license deals, which we don't really value -- we value it somewhat in the statements but not a whole lot. So they spoke about the future of what our company is going to be.

C E R T I F I C A T E

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, LAURIE A. COLLINS, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That ALLEN WEISSELBERG, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 10 day of January 2008.

Laurie A. Collins

LAURIE A. COLLINS, RPR

CONFIDENTIAL

* * * C O N F I D E N T I A L * * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CAMDEN COUNTY

DONALD J. TRUMP,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CAM-L-545-06
	)	
TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC.,	)	
	)	
Defendants.	)	
----------	)	

December 19, 2007
9:32 a.m.

Deposition of DONALD J. TRUMP, held at the offices of Kasowitz, Benson, Torres & Friedman, 1633 Broadway, New York, New York, before Laurie A. Collins, a Registered Professional Reporter and Notary Public of the State of New York.

doing poorly?

A. Well, I would say that I had some moments, some bad moments, like when this book came out. That was a very bad moment. I think I was -- I was perceived as doing poorly. I wasn't doing poorly.

But I was perceived by a lot of people as doing poorly when this book came out and when the Times wrote a front page in the business section story that was one of the largest stories they've ever written where virtually ever paragraph was a negative.

I think I was perceived as doing poorly then. I wasn't doing poorly then, but I was perceived.

Q. And you were perceived as doing poorly, you think, just because of that article; correct?

MR. RESSLER: Objection to the form of the question.

Q. You can --

A. Yes, I would say that's true, yes.

Q. So it was that article that you think caused people to perceive you as doing poorly?

A. Yes, that article was very detrimental

A. Well, number one I lost deals, specific deals, and we'll get to that. We'll go over the deals. But I lost deals, number one, and that's very important. It definitely tarnished my brand.

And then there are things that happened or that didn't happen that would have happened that I don't even know about. For instance, there are many deals that I lost that I don't even know about where people wouldn't see me. So I didn't know I lost the deal, but I lost the deal. And there are many of those deals out there, and I can't name them.

Q. How do you know that there are deals out there that you didn't know about that didn't come to you because of this book?

A. Because the perception of me after that article was a very weak perception, by sophisticated people; not necessarily the man on the street because they don't read the book and they don't read The Times.

But the perception of me by business people was a very weak perception, and that's why I lost certain deals that we'll talk about. It's also why I lost certain deals that I'll never know

identified, that you believe didn't come to you with a deal as a result of this book?

A. I think I've explained it, haven't I?

Q. Can you answer my question?

A. No.

Q. Is the answer to that no?

A. I think I've explained it. The fact is that a lot of people that would have done deals with me didn't come to do deals with me. I can't tell you who those people are because they're -- I'm sure that I missed a lot of deals.

I'm giving you deals that I can explain. I'm also telling you there are deals that we lost, because of this book and because of this New York Times article excerpt from the book, where people didn't come to me specifically because they read that.

I can't tell you who they are because they never came to me. And I wouldn't have come to me either had I read that article.

Q. Can you tell me the basis for your understanding that someone other than the seven deals that you claim to have lost in this litigation didn't come to you?

MR. RESSLER: Andrew, the way it works is the witness finishes his answer in full. And then if you want to circle back and clarify any portion of the answer, you're free to do that. That's how it works.

Q. Why don't you continue.

MR. RESSLER: I'm sorry, Mr. Trump, are you finished with your answer?

THE WITNESS: No.

Q. Go ahead.

A. I then -- so I walked into the room. Now, during the course of the time -- because he was there for a long time. I don't know how long, but he was there for a long time. And we had a tremendous number of documents on the table. I remember that room had a table of this size, and it seemed every inch of it had documents on it.

And I walked in I would say two or three times. But either the first or second time I presented him with a financial statement, not to be taken out of the room and not to be photocopied, but that he could use to look at in terms of my net worth. So he had it while he was there.

Then at the end he came into my office when he was completed, and he sat in a chair and read that statement for quite a period of time. That was -- I don't know if you call that one time or two times.

The next time -- I'm not sure if it was even before or after that, because I really don't know. I can't give you the sequence. But for -- not that I believed he was going to write a good book, but I did want it to be a fair book. It should have been a good book, because I was doing appropriate things and I was doing well. But it wasn't a good book. But I thought that I should spend time.

In fact, my biggest embarrassment to myself is the fact that I devoted so much time to this guy, knowing that he is a dishonest reporter. So I just feel stupid about devoting this kind of time.

I took him on a flight to California. He wanted to look at my course, my golf course, where I made a very, very good transaction because it's got a tremendous value, in Palos Verdes, which is in Los Angeles. It's a tremendous

stretch of oceanfront property. And he wanted to look at that.

And what happened is we were on the plane, and I gave him -- I specifically brought the -- and we did an interview. And the reason I liked that is because I don't have phones ringing, I don't have a lot of things going on. We're in a plane for five hours.

And I gave him the financial statement during that flight, and he looked at it for a long time; I can't tell you, an hour, but something like an hour or maybe more. And he read it very carefully, knew it exactly, and it was a tremendous net worth. I don't know, whatever it said, it said. You have copies of it.

And he didn't dispute it. But he knew that my values were up in the billions, in the many billions, and didn't dispute it.

Then we get to California, he doesn't want to go see the course. He said he had something else to do. And I said, Yeah, but I thought we were doing -- honestly, the first -- the most important part of the trip was to spend good time with him without phones ringing where I

can convince him not to write a very negative book about me, because, again, my brand and my reputation is important to me. And I spent hours with him on the plane.

And the second part of the trip is I thought he was going to go look at the course. When he got there, he didn't want to see it. He refused to go there. And I thought that was strange.

But then now thinking about it, it wasn't strange at all. He's a total thief. So it wasn't strange at all. But I thought it was strange that he flies all the way out to California, then decides not to go see the course.

Q. Okay. Let me ask you just a couple of questions about those -- what you just said, and then I'm going to come back to this later.

The first two instances that you showed Mr. -- you claim to have showed Mr. O'Brien the statement of financial condition, that was in your office; correct?

A. Correct.

Q. That was at the time of the meeting with Mr. Weisselberg and Ms. Lokey; correct?

A. Yes, that's right.

Q. I think you said that the April 21st meeting -- was that on April 21st?

A. I don't know. Whenever they had the meeting.

Q. Okay. And you came into the room and brought the statement of financial condition in the room?

A. That is correct. I -- that was the first time he saw it.

Q. Okay.

A. And he was actually there to -- you see, he said I didn't own anything. He said I didn't own the West Side Yards, even though Vornado has now come out in public relations and said Donald Trump is a 30 percent partner. But he said I'm not a partner, I'm just a glorified landlord; in other words, I just get some fees and they use my name and stuff. So he said that.

We could not dispel him of that -- of that notion. And Vornado -- and I think now it's been dispelled. I own 30 percent of it. I told him: I own 30 percent. I must have told him that a hundred times: I own 30 percent. I couldn't

dispel him of that.

So what I did is -- Michelle Lokey, very good lawyer, was there to show him deeds and titles and actual ownership of things, not only the West Side Yards but 40 Wall Street and lots of other things. And they went over that.

And I thought it was appropriate, so I walked in with a financial statement to go along with the deeds. I walked in with a financial statement. So he had the financial statement.

Q. That was because you understood that the deeds and the ownership records couldn't give him the type of valuation information that he would need to decide or figure out what your net worth was; correct?

MR. RESSLER: I'll object to the form of the question.

Q. You can answer.

A. No, the deeds certainly went a long way, because, you see, he was saying I didn't own anything. He said I didn't own Trump Tower. He said I didn't own anything. And what I thought would be good would be for him to -- and we literally set up a war room, and the war room was

to convince him -- because I didn't want to have a book come out like this that was so negative. And I knew the The New York Times, which is a puppet for O'Brien, would write it. So -- whatever he writes.

So we literally set up a war room. And during the course of that meeting that he was there for a long period of time, I gave him -- at the beginning of it I gave him the financial statement, with the understanding that he can study it, he can review it, he can look at it, he can do whatever he wants with it, but he can't take it out of the room because I don't give away personal financial statements easily.

Then at the end he came into my office and we talked for a while, and he had the financial statement. And he actually was reading it for another ten minutes, a good ten minutes, after -- after he left what I call the title meeting.

Q. Okay.

A. And by the way, we proved that we had absolute title to the property, but he refused to write it even though he knew that and we had, you

did, because we gave him the documents.

Q. Right, later on, maybe; right?

MR. RESSLER: Objection.

A. No, I think we gave it to him very early on.

Q. Let me show you what we'll mark as Defendants' Exhibit 96.

(Defendants' Exhibit 96, notes of O'Brien's 3/22/04 interview, marked for identification, as of this date.)

Q. These are notes of Mr. O'Brien's March 22nd, 2004, interview of you, and I'll ask you to turn --

A. Excuse me, doesn't he have it on tape, because he always had a tape recorder going any time I was with him?

Q. Are you claiming that each and every time he interviewed you, either on the phone or in person, he always had a tape recorder?

A. Absolutely.

MR. RESSLER: Object to with respect to "on the phone."

A. But even on the phone I believe he had a tape recorder. Absolutely every time that I was

with him, for the entire plane flight -- not only did he have a tape recorder, he was the most sophisticated user of a tape -- I've never seen a tape recorder like it. He always had a tape recorder going.

Q. And this was even when he was reporting on you for The Times?

A. Not even; always. Whether it was the book or The Times, he always had a tape recorder going. So, I mean, I'm looking at notes here. But are these off his tape?

Q. Mr. Trump, I'll ask you the questions.

A. I'm just curious.

Q. These are the notes of the interview. I'll ask you to turn to the page which has the Bates number 4316 on the bottom. Do you see that?

A. 4316?

Q. Yes. Do you see towards the bottom there where it says, huge owner, the owner, of West Side Yards, quote, if you ask me if it's around 50 percent, I would say yes.

Do you see that? And this is from March 22nd, 2004. Do you see that?

A. Yes.

A. No, not me, he didn't ask me.

Q. Other than saying "very impressive," did he ask for any other additional financial information on your properties?

A. He didn't think I owned the property. He didn't believe the financial statements because he didn't think I owned the property. I said, Why do you say that? Now, it's since come out that I do own the property, by the way, in spades.

But he didn't say that I owned the property. He just -- he didn't believe I owned -- I mean, I don't know what was wrong with him. There's something wrong with him. There's something mentally wrong with him.

He -- regardless of anything I said, regardless of anything that the lawyers said in showing him deeds and records and partnership agreements -- and I'm telling you a table like this, and you couldn't see the table there were so many documents -- he refused to believe that I owned the property.

MO MR. CERESNEY: I move to strike as nonresponsive.

MR. RESSLER: Objection.

Q. Mr. Trump, did Mr. O'Brien, after reviewing that statement of financial condition, on the plane, ask you for any additional financial records?

A. No, no.

Q. Did he take notes on the statement of financial condition when he was reviewing it?

A. He -- as I told you, he had his tape recorder going all the time. And as far as notes are concerned, I've never seen him write anything. All of a sudden I'm seeing all these written notes. I never saw him write anything. He always had a tape recorder. When he was with me, he always had a tape recorder going.

Q. He never had a pad writing notes --

A. He would --

Q. Hold on, hold on. Let me finish my question.

Are you saying Mr. O'Brien never had a pad writing notes when he was interviewing you?

A. I never noticed it. I always noticed the tape recorder. He may have. I'm not saying he didn't. But I always noticed the tape recorder. It was always right in front of me. He

discussed it over the phone or what. But -- I'm really not sure if I met with them or not. But I did discuss occasionally the net worth with them over the phone.

Q. Do you recall a meeting -- see if this refreshes your recollection -- in October or November of 2005 with somebody named Stephane Fitch and somebody named Peter Newcomb?

A. I don't recall the meeting, but it's possible it took place. That's a long time ago.

Q. Do you recall anything related to discussions with Forbes?

A. Yes.

Q. What do you recall about those discussions?

A. One or the other of them said that -- and they said it very strongly, and I don't know if they'll remember. But they said it very strongly. They said a maniac called up who was very threatening, screaming about their estimate of my net worth. And they said they've never had anything like that happen before.

Now, I don't know which one of them said it. I don't know if it was said at a

meeting. I don't know if it was said over the phone. But I know that one or the other of them said that. I don't know which one.

Q. What other discussions do you recall with Forbes during about your net worth in the 2004-2005 time frames?

A. Is that where they did the -- I mean, you will have to help me time-wise.

Q. Sure.

A. Is that where they did the letter saying that now that they've redone the numbers they've actually found them to be conservative?

Q. Um --

A. Because what happened is after Mr. O'Brien wrote this disgraceful book and disgraceful article that followed in the The New York Times, Forbes came up to my office, and we showed them essentially the same material that we showed to him. And they brought real estate people up. They had quite a group of people up. And I think they brought somebody who was expert at real estate.

And they then, after spending quite a long period of time -- I don't know who they saw.

MR. CERESNEY: Let's take a break.

THE WITNESS: He is using the city as a source.

THE VIDEOGRAPHER: The time is 3:12 p.m., December 19th, 2007. This is the end of Tape 4 of the deposition of Donald J. Trump.

(Recess taken from 3:12 to 3:34.)

THE VIDEOGRAPHER: The time is 3:34 p.m., December 19th, 2007. This is Tape 5 of the deposition of Donald J. Trump.

Q. Good afternoon, Mr. Trump.

A. Hi.

Q. We were talking about Forbes. And do you recall, beyond what you've told me so far, anything else about discussions between you or Trump Organization personnel and Forbes regarding your net worth?

A. No. They came up to the office. As I remember, they had quite a large crew. They had a real estate expert up with them, somebody that writes or -- either that or an outside consultant on real estate. But they brought a larger than -- a pretty good crew.

And they went over documents, similar

documents; and I don't think as extensive, because I just don't think they were as extensive. But they brought a crew up. They went over documents. And then they wrote a letter that they reaffirmed and even said it was conservative or some word to that effect.

Q. Was anyone from your organization present that day when they came to the office?

A. I think perhaps Ms. Lokey, perhaps Allen Weisselberg. I think I also stopped in just for a second.

Q. How about your children, did they meet with them?

A. I don't -- I don't think so, no.

Q. How about the Weiser personnel -- Mr. Rosenblum, Mr. Bender -- did they meet with them?

A. I don't know.

Q. Was there ever any other occasion that you're aware of where the Forbes personnel, Forbes employees, met with either your kids or with the Weiser personnel?

A. I'm not sure. I just don't know.

Q. You said that the documents that were

Q. Mr. Trump, are you familiar with a company called Bayrock?

A. Yes.

Q. What is Bayrock?

A. Bayrock is a real estate company that does deal internationally and in this country.

Q. And you do deals with Bayrock, don't you?

A. Yes, some.

Q. In fact, you are involved in a project in SoHo with Bayrock; correct?

A. Yes.

Q. What is your interest in that project in SoHo?

A. I own a piece of the project.

Q. How much do you own?

A. I believe it's 18 percent.

Q. And who else owns pieces of that project?

A. The Sapir family, I believe Bayrock has, and the Sapir family.

Q. Do you do other projects with Bayrock?

A. We have a job -- let me see -- yes, we have a job in Fort Lauderdale.

Q. How about a job in Phoenix?

A. A job in Phoenix that ultimately was looked at but -- and I've just checked the records the other day because I haven't -- I didn't remember Phoenix, actually, for quite some time. A job in Phoenix that was looked at, not done, and may be will be resuscitated. But it was looked at and ultimately not done.

Q. And it wasn't done because what?

A. I think to a certain extent because of the terrible publicity I got from this book and from the The New York Times article.

Q. "To a certain extent"? What do you mean be I that?

A. To a very strong extent. We were going for zoning, and people literally held this book up during the zoning hearings, screaming "don't approve this application." And I believe that without this book you probably would have had the zoning completed.

Q. Were you present at that zoning hearing?

A. I was not, but I heard reports to the effect what happened.

Q. Who did you hear reports to that effect from?

A. People that worked for me and somebody from -- I'm not exactly sure. I'd have to find that out. But I remember specifically -- I think it was even reported. I remember specifically that people were holding the book up, screaming "don't approve this project."

Q. Who did you hear that from?

A. I told you I'd have to think about it.

Q. Do you recall who --

A. I just remember that that was said at the time.

Q. Said by whom?

MR. RESSLER: Objection, asked and answered.

A. I don't remember.

Q. Do you have any recollection?

A. I don't remember. I just remember that that was stated that that happened at the zoning hearing. And the job was -- unlike most of my jobs, that job was not approved for zoning.

Q. The zoning hearing at which what happened?

A. They were asking for a building of a certain number of stories and at a site, a very good site, in Phoenix, Arizona. The application was denied. And people were screaming and using this book -- as much like Rosie O'Donnell used the book when she went after me; she used this as her source -- used the book as a method of winning their point and denying the application.

Q. Didn't you pull out of the project prior to the zoning hearing?

MR. RESSLER: Objection to the form of the question.

A. The publicity we were getting because of the zoning was pretty bad. And at some point they owed me quite a bit of money. And at some point I pulled out, but I pulled out when it was obvious that we weren't going to get the zoning, or possibly we didn't get the zoning.

Q. You pulled out before the zoning hearing, didn't you?

A. I don't think so.

Q. Didn't you pull out once the referendum was placed on the ballot?

MR. RESSLER: Objection to the form of

Phoenix that you spoke to?

A. I don't know if you would call them officials. They were people that had to do with the vote of the referendum. I don't know who they are. It was years since I spoke to them. But I called a couple of people. And we were not met warmly, and I believe that it was to a large extent because of this book.

Q. Did any of those people that you spoke to in government about this referendum on zoning tell you that you were being opposed or that they were not going to vote for this because of the book?

MR. RESSLER: Objection to the form of the question.

A. One of the people said that they read the book, it was terrible, and it certainly hurt my chances of getting approved.

Q. Did they say they didn't vote for the zoning change because of the book?

A. They said it certainly hurt my chances. That book was terrible.

Q. I asked you did they say, in substance or in form, that they were opposing this because

C E R T I F I C A T E

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

I, LAURIE A. COLLINS, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That DONALD J. TRUMP, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of December 2007.

Laurie A. Collins

LAURIE A. COLLINS, RPR

* * * C O N F I D E N T I A L * * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CAMDEN COUNTY

DONALD J. TRUMP,)
)
Plaintiff,)
)
vs.) No. CAM-L-545-06
)
TIMOTHY L. O'BRIEN, TIME)
WARNER BOOK GROUP INC.,)
and WARNER BOOKS INC.,)
)
Defendants.)
----------)

December 20, 2007
9:30 a.m.

Continued deposition of DONALD J. TRUMP, held at the offices of Kasowitz, Benson, Torres & Friedman, 1633 Broadway, New York, New York, before Laurie A. Collins, a Registered Professional Reporter and Notary Public of the State of New York.

went there, gave him the statement, and when you took it back?

A. It's very hard to say. I would say anywhere from 30 minutes to an hour. He was there for quite a while. He was there for a long period of time. But I would say anywhere from 30 minutes to an hour.

Q. Was Mr. Weisselberg still there when you came back?

A. Yes, he was.

Q. And what were they discussing?

A. I don't know. I mean, you'd have to ask Mr. Weisselberg.

Q. What did you say when you walked in?

A. Probably how's everything going? You mean the second time or the first time?

Q. The second time.

A. Probably how's everything going? I mean, I was curious. We were working very hard to get the truth out, and he refused to write the truth.

Q. Did Mr. O'Brien ask you, when you came back in, for any further documents?

A. No. He had more documents -- he didn't

even want to see the document. He was trying to make it with Michelle Lokey. He didn't want to see documents.

MO MR. CERESNEY: Objection, move to strike, nonresponsive.

MR. RESSLER: Objection to the motion.

Q. Did you -- what did you say to Mr. O'Brien -- let me scratch that.

What was Mr. O'Brien doing when you walked in?

A. Talking to Mr. Weisselberg.

Q. What were they discussing?

A. I don't know. You would have to ask Mr. Weisselberg. I mean, I was there for seconds. He was talking to Mr. Weisselberg I think for about an hour, but again, you would have to ask Mr. Weisselberg.

Q. Where was the statement of financial condition when you walked in?

A. He had it in his hand. It was like on the table, sort of like that (indicating).

Q. So sitting right in front of him?

A. Correct.

Q. Any other documents right in front of

A. I am a billionaire. I'm not perceived. I mean, I am a billionaire. Of course, if you read Tim O'Brien's writings and what was then transposed into the The New York Times, you would certainly not think that. But I am a billionaire, many times over, on a conservative basis.

Q. And you believe that because the book, at least according to you, suggested that you were not a billionaire that damaged your reputation; correct?

A. Yes.

Q. And you think that that has hurt you in your business dealings? Is that what you've said?

A. Well, I've lost deals. I've lost specific deals because of it.

Q. And I believe yesterday we also talked about the fact that you -- strike that.

A. The fact that -- can I finish your statement?

Q. Why don't you finish my question.

A. Yeah, because I think I know what you're going to ask.

Q. Go ahead.

A. The fact that there are deals that I

Ravitch -- my father helped Dick Ravitch. Dick Ravitch had very little impact on my father.

But he made statements in the book that were negative. Unfortunately my counsel tells me that those statements are not suable statements.

What is suable is the fact he said I'm worth 150 to possibly 250 million dollars. And that was huge negative impact on me, for obvious reasons: for deal reasons, for psychological reasons.

I'm in a very big business. $150 million in my business is not very much, when we're building buildings that are worth, you know, hundreds of millions of dollars and even billions of dollars. And when somebody sees that Trump is worth $150 million, that's very damaging to me.

Q. Mr. Trump, let's look at what we'll mark as Defendants' Exhibit 116.

(Defendants' Exhibit 116, document, marked for identification, as of this date.)

MR. CERESNEY: Let's also mark, if we could, Defendants' Exhibit 117. Actually I believe -- actually the next one I'm going to show you was actually already marked as

Q. And I it impacts your reputation?

A. I think it does. It impacts my reputation.

Q. You're telling this jury as you sit here today that despite the fact there were numerous articles prior to TrumpNation that suggested that you inflate your net worth and despite the fact that there were articles that said that you cannot be believed in your claims about your net worth and about your properties and that despite some of your comments publicly that negative stories do not impact you, your reputation was damaged by TrumpNation?

MR. RESSLER: Objection to the form of the question and the summation by counsel.

You can answer.

Q. You can answer.

A. Yes, my reputation was seriously damaged. And the difference between this and other articles is that other articles, I didn't take those people into the inner confines of the company to show them financial records, to show them everything.

And then after all of that and having

him state that he did this and he spent hours and he spent all -- you know, the time, he comes out with a book that says I'm worth 150 to 250 million dollars, when I have buildings that are worth much more than that.

And he knew that. The sad part is he knew that. He knew everything that he was writing was false. These people didn't have access to the books and records that O'Brien did. He knew everything that he was writing was false.

And when you look at his e-mails, you realize what he was up to. And now we see even more than prior to filing the case. We've thought it. But now that we've been able to get his e-mails and his correspondence -- and we haven't gotten all of it; we're hopefully going to get a lot more -- we realize what he was up to was a terrible thing.

MO MR. CERESNEY: Move to strike everything after the first sentence.

MR. RESSLER: Objection to the motion.

Q. Now, Mr. Trump, you just talked about how Mr. O'Brien had all of your books and records and all of your financial records. Isn't that

A. Not that I know of.

Q. Who else at the Trump Organization was involved in discussions relating to this deal?

A. Me.

Q. Anyone other than you?

A. I don't know. I can check. But I don't know.

Q. Sitting --

A. It was primarily a me deal.

Q. Got it.

Tell us about the first conversation you had with Mr. Lorber about this project.

A. He called me. He had -- because I was looking very much at the Lord & Taylor site, which is nearby on Fifth Avenue, same side of the street. And I was looking very much at that and possibly buying it.

And he called me and he said -- and that was reported somewhere. And he called me and said, I have a better site for you. And he represented the owners of the site who had just purchased it, and they were Italian investors, without great real estate experience. And he said, I'd like to set up a meeting for you to meet

them, and he did that.

And I met the gentleman, and it looked like it was a deal made in heaven. It was -- it was just something that was going to happen. I loved the site. I thought it was -- I thought it was a better zoning package than you had at Lord & Taylor and you didn't have the landmarking problem, because people are talking about landmarking the Lord & Taylor department store, et cetera, et cetera.

I just thought it was a match made in heaven. And it was going on really well. And it was very preliminary. It was not, you know -- I don't even -- we didn't even get to the point of lawyering.

Q. You didn't get to the what, I'm sorry?

A. We didn't really get to the point of lawyering the deal yet. We were working on the concepts of the deal. And it was just a deal that was going to happen. I mean, what I do for a living is deals, and I know when they're going to happen and I know when they're not. This is a deal that was going to happen.

And then the -- I actually think they

read The Times article and then they read the book, and then they canceled the deal. I think they originally saw The Times article. The Times article was -- it really highlighted, because the book was a total failure in the sense of a book. The Times article was a killer because people would read The Times article, and then they would go and get the book.

And what happened with these Italian gentlemen, who are lovely men, they read The Times article. They then read the book. And Mr. Lorber called me and he said, They're not going to make a deal with you. I said, Why? Because they read the article in the Times and they read the book. They're not going to make a deal.

So I lost potentially a couple hundred million dollars on that deal because of this false book.

Q. Let me take you through some of what you said. What were the names of the Italian business people with whom you met at that first meeting about this proposal?

A. I don't remember. I can get them for you.

Q. And who else was present at the meeting?

A. Mr. Lorber.

Q. Where was the meeting?

A. The meeting was in my office at Trump Tower.

Q. And what was discussed at that meeting -- and this was before the book, I take it -- about this project?

A. This was a meeting that was talking about the site. I basically was telling them what I think they can do with the development itself. I told them that the building they should build is a combination hotel and residential tower, much like the building I built at One Central Park West, which is Trump International Hotel and Tower.

I said it will be a tremendous success. The market was blazing hot. And they were all excited about it. And they left my office extremely excited.

Q. What was going to be your interest in that project?

A. It would have been significant. I

would have been the developer. I would have been paid very significant fees to be the developer. I was asking for a 25 percent interest carry free, meaning you put up no money. And a deal was going to be made. It was going to be a significant deal. It was going to be a good deal.

When they read the The New York Times and the book, the deal was -- it was called Donald Trump Who? They sort of -- they got out of town.

MO MR. CERESNEY: I move to strike the latter part of the answer which was nonresponsive.

MR. RESSLER: Objection to the motion.

Q. Mr. Trump, you said you asked them for a 25 percent interest at this meeting?

A. Correct.

Q. Did they agree to it at this meeting?

A. I think conceptually they agreed to it, yes.

Q. They said, 25 percent is fine by us?

A. Yes, I think so.

Q. What specifically did they say?

A. What you just said. They said that -- because, you see, they didn't have great expertise

Q. I want to just focus on the meeting, Mr. Trump, and not the whole sequence. Can we just focus on the meeting?

A. Yeah, sure.

Q. At that meeting did you discuss a licensing interest or ownership interest by you?

A. A combination of both, which I do also.

Q. So the combination was you would have a 25 percent ownership interest?

A. Carry free.

Q. Carry free.

And you would also license them your name?

A. I also licensed the name and get a percentage for the name. And I would also be the developer and get paid development fees.

Q. So there were three aspects of this deal that were discussed: One was --

A. Actually four.

Q. Four.

A. And also I would sell the buildings and get sales fees. So I would get development fees, sales fees, I'd also have a carry-free interest, and I'd also have a licensing fee.

Q. So there are the four aspects of this deal that were discussed at this meeting?

A. Yes.

Q. All four of those aspects were discussed?

A. Yes.

Q. And what, if anything, did they say? Did they agree to all four aspects of that?

A. Pretty much. They really liked me doing the job. They really thought that the name would add a lot of cachet to the building. They very much wanted it to be -- to be a Trump building.

Pretty much, yeah, I think that deal would have gotten done in that form, pretty much in that form. I don't say there's a couple of points, obviously. But pretty much in that form the deal would have gotten done.

Q. What did they say during the meeting that led you to believe they were agreeing to those four aspects of the deal?

A. They were more excited than I was.

Q. So it was their level of excitement?

A. Yeah. Hey, I'm a deal person. You're

A. And they read the book.

Q. How did you find that out?

A. I don't know if they read it, but I was told -- I believe Mr. Lorber told me they got the book. But I think the deal was dead before they got the book. But I heard they got the book.

Q. What did Mr. Lorber tell you -- actually, strike that.

Did you have any further direct conversations with these Italian businessmen after this first meeting?

A. I believe I called them to try and get them back on track, but my call was not given very good respect.

Q. Did they return your call?

A. I spoke -- they were very nice. They were very fine people. But as I told you, I know deals. I know when they're going to be made, when they're not going to be made. This is a deal that was absolutely going to be made. After they read the article, there was nobody -- Houdini couldn't have sold them on the deal.

Q. Let's talk about that conversation that you had with the Italian businessmen. Was that

conversation before or after Mr. Lorber spoke to you about the article?

A. Oh, that conversation was after. I called them to try and save the deal.

Q. And tell me what was the discussion.

A. Well, I can go into it. I said, I hope we can do the deal. I didn't even acknowledge the story. And they said, Mr. Trump, I don't think so, I don't think so. And I said, you know, we're going to do it great, it's going to be a great building, all the things a real estate developer would tell a potential partner. And they really had no interest in going forward.

Q. Did they mention the article or the book?

A. Yes, they did.

Q. During that conversation?

A. Oh, yes. They said, That was a very poor story written about you.

Q. Did they mention that was why they didn't enter the deal?

A. They didn't say that -- maybe they did. I mean, hey, excuse me, it was so obvious. They mentioned the article. I don't think I said, Oh,

is that why -- I don't think I asked them whether or not. But they mentioned the article, and it was obvious that -- they did a 180-degree turn, almost to a point like I've never seen anything like it. It went from a deal that couldn't miss to a deal that couldn't happen.

Q. So they mentioned the article?

A. Yes.

Q. Did they mention the book too?

A. I don't remember that but -- I was told by Mr. Lorber that they actually went out and got the book after reading the article so -- I didn't go into that kind of detail. I was more interested in trying to convince them to do the deal.

Q. Did they --

A. I didn't want to hear what they were saying. I didn't want to talk about that. And I knew that when that article came out I was going to lose that deal.

I knew I was going to lose another deal with Mr. Lorber. Mr. Lorber was working actually on two deals with me. But the first deal was 400, because, you know this was -- that was the

Q. How much were you going to invest?

A. We were talking about -- well, I was actually talking about investing very little. They were going to pay me, through stock -- through a percentage of the company, for the Trump name. And it would have been a significant percentage, perhaps as much as 25 percent.

Q. Twenty-five percent of what?

A. Of the Douglas Elliman transaction.

We were working on it. We were looking at it. And it would have been that. Plus it would have been a licensing deal where every time they sold something through Trump, through the Trump brand, they would have paid me commissions. So it would have been a lot of money. It would have been a lot of cash coming in.

Q. I just want to try to understand what the deal is. Is it a separate company that's going to under the Trump name?

A. Well, we were thinking about merger, some form of merger, but it could have also been a separate deal. It wouldn't have been exceedingly complex. It could have been a separate deal where I would own a big chunk of it or it could have

called?

A. It was going to be called just Trump or Trump Realty.

Q. And would that have been a separate company from Prudential Douglas Elliman?

A. Yes, it would have been.

Q. And that Trump Realty company that was being created --

A. Right.

Q. -- who was going to -- what was the function going to be of that company?

A. It would have been very high-end real estate. It would have been on-site real estate, meaning selling buildings, not necessarily that are mine, but sales forces working in buildings, and it would have also been working together with the Douglas Elliman brokers, because many of them can go back and forth very easily.

Q. So it would have been a separate sales force from the existing Douglas Elliman?

A. Partially separate and partially unified.

Q. And how would you determine which sales were going to occur under the Prudential Douglas

I never spoke to the -- I may have, because I did speak to the people from Russia. But Mr. Arif really was involved in not only that deal but the other couple of deals that we're talking about, including Poland, Turkey, et cetera, et cetera.

Q. Are you aware of the names of the investors or other parties in Russia with whom Mr. Arif had discussions?

A. No, I'm not.

Q. So what was this proposal?

A. This was going to be a hotel in Moscow. And I really can say the same thing for all of the sites, so that you don't have to waste a lot of time. But this was going to be a hotel in Moscow, a hotel in Kiev, a hotel in Poland, et cetera, et cetera, the list you have.

Bayrock knew the people, knew the investors, and in some cases I believe they were friends of Mr. Arif. And this was going to be Trump International Hotel and Tower Moscow, Kiev, Istanbul, et cetera, Poland, Warsaw.

Q. I appreciate that. I need to go piece by piece because I'd like to just understand your

discussions with regard to each one.

A. Well, the answer is the same, though. What I'm saying to you is that these were deals that were going to be -- according to Tevfik, they were going to be done. But they really were at the same level. In other words, they were -- they were deals that Bayrock had access to; I didn't have access to. And Mr. Arif told me that the article in the The New York Times/book immediately killed those deals.

MS. WHITE: Let me just make a comment. It's not going to expedite things to try to summarize. I appreciate what you're trying to do.

THE WITNESS: Okay, yeah, because, Mary Jo, it's basically the same thing.

MS. WHITE: I understand.

THE WITNESS: Fine, if you want to go individually.

Q. Where was the hotel project in Moscow that you were discussing?

A. I have that information in my office. I don't know Moscow, so I can't really -- but I have the information in my office.

A. To be determined, probably 20 to 25 percent of the job plus management fees and various other fees.

Q. When you say "20 to 25 percent of the job" --

A. Carry-free interest.

Q. Ownership interest?

A. Ownership interest. I think that's where it was heading. Again, I hate to say it, but that's for all of these jobs.

Q. And when you say that is where it was heading, with whom did you have discussions about that interest?

A. Mr. Arif.

Q. And what did he say about what the other side's views were of that interest?

A. He thought a deal was going to happen.

Q. Did he say why he thought a deal was going to happen?

A. He's a deal man. He just thought a deal was going to happen.

Q. Why did it take six months for this deal to be discussed?

A. I didn't say. I said prior to the

responsive.

MR. RESSLER: Objection to the motion.

Q. Mr. Trump, were you involved in a letter written by Weiser LLP regarding your brand name?

A. I don't know.

Q. Let me show you what's already marked as Defendants' Exhibit 42. Take a moment to look at that document, if you could.

(Pause.)

A. Okay.

Q. Take a look at the second page. You see how it's signed by Weiser LLP?

A. I don't know, let's see, this is dated what date?

Q. October 25th, 2005.

A. And I had 117 million of cash on hand.

Q. That's one of the things that this letter claims.

A. And yet I'm worth $150 million.

Q. Mr. Trump --

MO MR. CERESNEY: Move to strike.

A. That's a tough one.

MR. CERESNEY: Move to strike,

C E R T I F I C A T E

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, LAURIE A. COLLINS, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That DONALD J. TRUMP, the witness whose continued deposition is hereinbefore set forth, was previously duly sworn and that such continued deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December 2007.

Laurie A. Collins

LAURIE A. COLLINS, RPR

The Donald Machine Revs Up

By Pete Born

NEW YORK — It started with a line of suits and a men's fragrance — and now Donald Trump can fill an entire closet, thanks to a series of licensing deals. There are so many products, in fact, that Macy's East plans on staging an entire Trump men's fashion show on March 15 in its Herald Square flagship.

Trump, the real estate tycoon, has turned into Trump, the genie search machine. He has become a walking brand laden with armloads of Trump-label merchandise. Among the latest deals: men's dress shirts with Phillips-Van Heusen Corp., men's cuff links and other furnishings with the Vendome division of K&M Associates, neckwear with Randa Corp., socks with Paul Lavitt Mills Inc., sunglasses and optical glasses with Eye Wear Designs Ltd. and watches with E. Gluck. The latest deal is for loungewear with JR United Industries Inc., according to Cathy Hoffman Glosser, Trump's vice president of licensing, who said there are also deals pending concerning luggage, top coats and even candy.

These are agreements that previously had been mentioned as possibilities, and they follow last fall's foray into men's fragrance with the Estée Lauder Cos. and men's suits with Marcrah Apparel Group. Tucked into a distant corner of Donald world there's even a board game, a talking doll (now on sale at Macy's for $13.00) and two best-selling books.

Despite a stony silence from the company, reports have been circulating that Lauder is at work expanding the initial 3.4-oz eau de toilette into an [illegible] stock-keeping units, including an after shave and a 1.7-oz. eau de toilette. In addition, Lauder executives reportedly have been "brainstorming" about other possible applications, even a Trump women's fragrance — though no decision seems to have been made.

Considering that the distribution for the fragrance initially reached only 400 doors and didn't even hit counter until mid-November, the December sales volume of somewhat less than $10 million was seen by some as a promising beginning. "We are encouraged," said one executive. "We know we have work ahead of us to build the brand."

In terms of women's apparel, Glosser added that a deal for "an all-encompassing ladies' line" is being sought as a possibility "down the road." Considering that he made his name in real estate, a Trump home collection "is in the forefront," said Glosser. "We don't have royalty in the U.S. Donald Trump is our equivalent."

Seeing Trump hold court from a department store stage and play the crowd is the stuff of vivid memory. And what drives the Donald machine is again, "The business model is self-confidence," noted one associate. His personality is an odd combination of outrageous egomania mixed with a surprisingly self-deprecating humility, all held together with tireless — almost obtrusive — charm and lit by a vaguely satanic gria.

The flamboyant megadeveloper, who loves to slap his name on skyscrapers, has no compunctions about describing himself as a brand. In fact, he even attributes his unexpected TV stardom on "The Apprentice" to his zeal for merchandising himself.

"My branding business has become a very big business, and it's been an amazing business," Trump said during a far-ranging interview. "I guess you could say the television show 'The Apprentice' has been because of branding, or I wouldn't have been the one to be in the show. Other people have tried to duplicate that show and they failed, miserably." At least one of the shows he referred to was Richard Dreyfuss's short-lived series.

The well-married Trump, who parlayed his last wedding into a publicity bonanza by landing his bride on the cover of Vogue, sees his appeal as deriving in part from his attraction to women. "My whole life has been about women," he said. "I love women. If you look at 'The Apprentice,' the biggest portion of the show is women. You can't get huge ratings if you don't have women."

When asked why a billionaire would take the time to make department store appearances to hawk $495 suits, he quickly replied, "Well, you saw the crowd that was there [referring to an appearance at Macy's in September]. We had over 2,000 people for an event that was way up high in the building. I don't know, there's some kind of something going on that's probably very complex, that maybe you can figure out better than I can. But there's something going on that has been rather amazing."

But he also can be humble and does not hesitate to make fun of himself. Although his signature "You're fired" punch line on "The Apprentice" has made Trump a national poster boy for managerial ham-fistedness, he claims to take no joy in the thumbs-down routine. "It's not easy," he said, "and sometimes making the right decision is very tough."

Then the grin returns to his face and he observes, "It's interesting that people think that I'm such a nice person now compared to my image prior to 'The Apprentice.' When you think of it, all I do is fire people — which tells you how bad my reputation must have been in the first place."

Considering his apparent relish in projecting himself into America's living rooms and turning himself into a brand, it sounds surprising to hear Trump admit that celebrity life can be "exhausting. In fact, he claims that appearing constantly in the limelight is tougher than throwing up tall buildings. "It's harder being a celebrity," he said. "It takes a lot of things, but it does take energy. You can't not be feeling well and do this. It takes a lot of drive, or it's not going to be successful.

"To be a celebrity is very unique. I know a lot of people with money but they could never transform themselves into celebrities. They would be incapable of doing it," he added, noting that "it takes a look" and "a certain personality — not always necessarily even a good personality, but a unique personality."

But despite his clear attraction to TV cameras, Trump sees himself as "somebody that knows how to build great buildings." He identified his single greatest strength as an ability "to get the right locations." Even though his real estate and casino activities have their well-publicized ups and downs, Trump doesn't seem to forget his modest beginnings as a son of a builder who managed 20- and 13-store clusters in Brooklyn and Queens — all the while sitting in his glittering office high above Fifth Avenue in Trump Tower.

He not only is a practitioner of real estate development, but he talks like one of its keenest students. Asked to single out a mall he admires, Trump points homeward.

"We have the greatest mall in the world — it's called Fifth Avenue, Madison Avenue, and the streets," he replied. "Manhattan has always been very much of a street mall. If you start putting stores up high like I did at Trump Tower, you'll have mixed results. Yet I was lucky at Trump Tower because I was able to tie the street to the third floor and even the fifth floor," referring to the rental arrangements with Avon Products and Asprey. Those deals allowed Trump to tie street locations with upper floors and charge higher rents. By consolidating blocks of space, Trump also was able to minimize the square footage normally wasted on nonretail space like hallways. "So I tied the floors to the street and I probably got the highest per-square-foot price of anybody in the nation for a mall — as much as $2,000 a foot."

He added, "Historically — as in the case of Time Warner — malls don't work very well in New York."

Looking elsewhere, he singled out David Simon, chief executive officer of Simon Property Group, as a developer who has "done a terrific job with his malls." Trump stressed the value of injecting an entertainment factor in mall designs and suggested that if consumers are bored with some malls, "maybe it's because of the merchandise. The ultimate entertainment is the merchandise."

One problem that department store anchors have to solve, however, is the competitive edge of Wal-Mart, he said. Trump described Wal-Mart as "a juggernaut" that "seems to be taking business from everyone.

"And it seems to take the business in interesting ways," he continued. "It goes into the toy business and it starts discounting toys at levels that you can't make money at and people can't compete with it. It's going to be interesting to see at what level that stops. Wal-Mart is a very frightening retailer. An amazing retailer, but a frightening one."

His real estate activities and love of the limelight sometimes coincide, like in Las Vegas, where Trump is putting up a 64-story condo. "I don't think I've ever sold apartments as quickly as I've sold there," he said. "It's an amazing phenomenon. People love the feel of Las Vegas. They love the weather, even though it's very extreme. They love the sunshine.

"It has to do with glamour," he said. "It's like Los Angeles. There's a certain glamour to Los Angeles that most other places don't have. It's all about sizzle and it seems to work.

"Las Vegas is becoming much more residential," he continued. "You're having some tremendous shopping areas built, but Las Vegas is becoming a more residential place, which is going to be a great thing for retail, ultimately."

Trump may see himself as a construction trades guy, but when talk turns to showbiz, he grows decidedly more animated. When asked how the current crop of actresses measure up against those of past eras, Trump takes off the gloves with some well-known strong opinions. "It's a much different world today," he began. "Tallulah Bankhead, when I was young, wouldn't have made it.

"The most glamorous era of all was not when I was young, but when we had the great Ingrid Bergman and all of the terrific beauties of those days. That to me was the glamour era. When I looked at Cary Grant and Clark Gable and Errol Flynn, and Ingrid Bergman and Sophia Loren, that to me [was glamour.] Where are those people today? I don't see them. They don't have the glamour, they don't have the beauty, they don't have the look, but they still make it. In the old days, great Hollywood moguls understood beauty better than they do today."

Trump's mug is plastered on a variety of products.

Donald Trump is a master of the media.

Trump's a real estate genius.

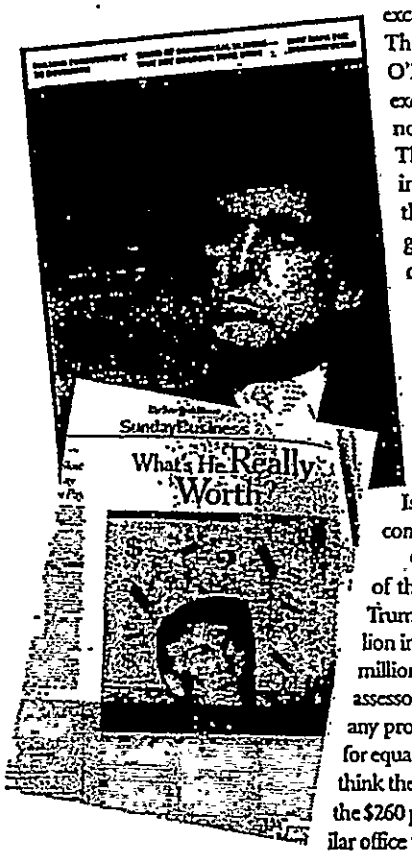
Follow-Through

OCTOBER 10, 2005

How Much Is Donald Worth?

Last month we published our annual rankings of the 400 richest people in America. Donald Trump came in 83rd with a net worth of $2.7 billion. Necessarily this number involved some guesswork about real estate values, but it was designed, as is our practice, to err on the low side. Trump protested that he is worth $3.6 billion. He has been raising similar objections to our valuations for most of the time the FORBES rich list has been around.

Close on the heels of this special issue, the *New York Times* published a book excerpt ridiculing our number as too high. The book, by *Times* reporter Timothy L. O'Brien, hit store shelves October 26. The excerpt insinuates that FORBES is naive, if not doing a quid pro quo: "Donald and The Forbes 400 were mutually reinforcing." As Donald gets more mentions in the press, O'Brien's logic goes, FORBES gets more citations as the definitive word on Trump's wealth.



After taking whacks at two decades of FORBES' net worth estimates for Trump, the *Times* article settles on vague stabs by three unnamed "people with direct knowledge" who claim they were once privy to Trump's ledger. Their guess: $250 million, tops. How can this be? Isn't Trump's stake in his public casino company worth $220 million all by itself?

One of several factoids offered in support of the lowball number is the suggestion that Trump's office tower at 40 Wall Street is $55 million in the hole. The building's mortgage is $145 million, notes the *Times*, and New York City's tax assessor values the property at $90 million. But any property broker in New York would be fired for equating tax assessments with market value. We think the building is worth $310 million, based on the $260 per square foot that a buyer paid for a similar office tower at 195 Broadway earlier this year.

Then there is the *Times*' claim that Trump "did not retain any ownership" of a residential development on Manhattan's West Side because "the owners merely promised to give him about 30% of the profits." Having a claim on profits *is* ownership. The West Side project's recent sale valued Trump's 30% interest at more than $500 million.

Is FORBES naive? The *Times* excerpt conveniently forgets to mention our 1990 cover story that broke the news of Trump's impending financial crisis, "How Much Is Donald Really Worth Now?" though it is in O'Brien's book. But O'Brien still accuses FORBES of "carrying water" for Trump. Says O'Brien, "The point is he's Mr. Elastic Man, and the media has routinely bought into it."

We've taken another look at Trump's real estate and other assets, including the brand value of his name. The $2.7 billion remains, we believe, conservative.

—*Stephane Fitch*

FLASHBACKS

85 YEARS AGO IN FORBES NOVEMBER 27, 1920

To Give Is Better

Rich men are finding today more than ever before that enormous wealth does not bring happiness and that the best way to get fun out of money is to use it freely for unselfish purposes. The possession of millions is no longer a distinction. Indeed, unless the possessor of millions uses part of them for worthy objects, his wealth excites something very different from admiration. The Vanderbilts are steadily falling into public disfavor because of the extremely selfish distribution they make of their fortunes, their rule being to keep everything in the family from generation to generation. The results have been as was expected. Only one of the younger generation of Vanderbilts amounts to shucks.

20 YEARS AGO IN FORBES JULY 1, 1985

Piece of the Apple

If there is any good news from the computer industry lately, we haven't heard it. Apple, which reached a high of 63 in 1983, has recently been trading at 17. Rumors are already around that Apple might look kindly on a big suitor, especially if the suitor took a large but minority position and left the culture intact. AT&T is the beau most often mentioned, but one can imagine a Xerox or a Wang looking twice at Apple. An Apple board member says Apple is not interested in selling out.

15 YEARS AGO IN FORBES NOVEMBER 30, 1990

Greenspan's Greenbacks

Federal Reserve Chairman Alan Greenspan and a half-dozen other top central bankers should quickly come up with steps to stem a possible financial panic. U.S. bank assets, primarily real estate, are visibly deflating and so are bank stocks. Even equities of sound institutions have seen values shrivel by more than 60%; in recent months. Doubt about the integrity of the greenback was one of the key factors triggering the 1987 worldwide stock market crash. Greenspan and his cohorts should get together and jointly announce that they are easing credit and letting interest rates come down a notch or five and that they will react swiftly to contain any financial fallout from a failed institution.

DAVID LAGA FOR FORBES; (GREETZ) PANMA ELLISON

ORIGINAL

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: CAMDEN COUNTY

---------- X

DONALD J. TRUMP,)

)

Plaintiff,)

-vs-)

TIMOTHY O'BRIEN, TIME)

WARNER BOOK GROUP INC., and)

WARNER BOOKS INC.,)

)

Defendants.)

---------- X

DEPOSITION OF TIMOTHY L. O'BRIEN

OCTOBER 15, 2007

VOLUME I

Taken at the offices of Debevoise & Plimpton, 919 Third Avenue, New York, New York, pursuant to Notice, before Hope Menaker, a Shorthand Reporter and Notary Public of the State of New York.

- TIMOTHY L. O'BRIEN -

time you met with them other than this morning?

A. Last Wednesday evening.

Q. How long was the meeting?

A. Four hours or so.

Q. And prior to that?

A. On Monday and Tuesday of last week.

Q. How long were those meetings?

A. Approximately eight hours each.

Q. And did you review certain documents during those meetings?

A. I did.

Q. What documents did you review?

MR. CERESNEY: Object, privilege.

MR. RESSLER: I think we've already dealt with this issue.

MR. CERESNEY: We have in the context of developing a foundation for asking the question, the questioning through the deposition, not at the

beginning of the deposition in questioning what he reviewed.

If you want to ask him generally what he reviewed, what types of documents, I'm not going to object on that but if you're going into the substance of the particular documents he reviewed, I'm going to ask you to lay a foundation before I let him answer.

MR. RESSLER: I'll take that up later. I don't want to waste time on that.

Q. Mr. O'Brien, did you confer with any nonlawyers at The New York Times in connection with this deposition?

A. No.

Q. Is your editor still Larry Ingrassia?

A. Ingrassia.

Q. Ingrassia?

A. Yes, he is. He's my -- he's my boss.

- TIMOTHY L. O'BRIEN -

Q. Okay. Does your boss know that you're being deposed today in Donald Trump's lawsuit against you?

A. Yes.

Q. So you did confer with him concerning the deposition?

MR. CERESNEY: Objection. Form. You can answer.

A. Okay. Only in terms of how it affected my schedule at the office.

Q. Okay. But you did communicate with your boss to the effect that you were going to be here at a deposition?

A. As it pertained to scheduling. It didn't -- it didn't pertain to substance.

Q. Okay. Anyone else at The Times?

A. Only around scheduling issues.

Q. Did you confer with Eric Dash to the effect that you'd be at a deposition today in the Trump

receive after getting your MA in U.S. history from Columbia?

A. I received a masters of science in journalism from Columbia University.

Q. Was that from the Columbia University School of Journalism?

A. Yes, it was.

Q. And that's -- that's an MS degree?

A. Yes, it is.

Q. Okay. And with respect to your MS degree from the Columbia School of Journalism, how many years was that program?

A. It was one-year.

Q. And after receiving your second advanced degree from Columbia --

A. Yes.

Q. -- you received a third one, correct?

A. That's correct.

Q. And from what school did you receive that third graduate degree?

- TIMOTHY L. O'BRIEN -

Q. Since 2006, Mr. O'Brien, you have been the editor of the Sunday business section of The New York Times newspaper; is that correct?

A. That is correct.

Q. What is the Sunday business section of the New York Times?

A. It is a weekly section that is published on Sundays that explores different facets of the business world.

Q. What are your duties and responsibilities as the editor of that business section, that Sunday business section?

A. I oversee the stories that we run on the page. I decide on, particularly on the selection of the two cover stories that run each week. I edit our cover columnist, a woman named Gretchen Morgansen.

We have a series of columns that run on the inside of the page that I have deputies who select those columns and I oversee the final stories

- TIMOTHY L. O'BRIEN -

A. It no longer exists, but it was a company that was a .com company that was dedicated to helping small businesses move their off-line operations on line.

Q. How long did you work at Whose Army?

A. I worked there for approximately a year.

Q. What was your position there?

A. Chief operating officer.

Q. Now, prior to your initial stint at The Times, you were a reporter at the Wall Street Journal; is that correct?

A. Correct.

Q. What's the Wall Street Journal, for the members of our jury?

A. It's a leading financial publication.

Q. You covered banking primarily during your years at the Journal?

A. Banking, and I also did general enterprise work.

- TIMOTHY L. O'BRIEN -

Q. You did what kind of work?

A. Enterprise reporting, project work. I actually began my career there as a small-business reporter.

Q. And how many years did you spend as a reporter for the Wall Street Journal?

A. 1992 to 1997, so five years.

Q. So you have been a journalist, whether as a reporter or an editor, from 1995 -- withdrawn.

Prior to the Journal, you also worked for a publication; is that correct?

A. Prior to the journal, I was a free-lancer.

Q. Okay. Meaning what?

A. I contributed articles on a contract basis to various publications.

Q. And, again, did you emphasize business?

A. Yes. Primarily business, I would say.

Q. Okay. So in terms of working

- TIMOTHY L. O'BRIEN -

for a newspaper or magazine, you've done that as a reporter or an editor from approximately 1995 until the present, with the one-year exception of your stint at the .com, right?

A. No, that's not correct. From 1992 to the present.

Q. Okay. And how many years is that?

A. It's about 15 years.

Q. You also have written and had published books; is that correct?

A. That is correct.

Q. You wrote a book entitled, Bad Bet: The Inside Story of the Glamour, Glitz, and Danger of America's Gambling Industry; is that correct?

A. That is correct.

Q. That book came out in 1998?

A. That's correct.

Q. And prior to that you also worked as a research assistant on a book about Donald Trump; is that correct?

- TIMOTHY L. O'BRIEN -

A. That is correct.

Q. What was the name of that book?

A. Trump.

Q. Didn't it have a longer title than just "Trump"?

A. Trump: The Deals and the Downfall.

Q. I'm sorry. What was it?

A. I believe it's Trump: The Deals and the Downfall.

Q. "The Deals and the Downfall"?

A. Yes.

Q. So it was Trump: The Deals and the Downfall?

A. That's correct.

Q. Who is the author of that book?

A. Wayne Barrett.

Q. What newspaper, magazine, or publication did or does Wayne Barrett write for?

A. The Village Voice.

Q. Have you ever taught

- TIMOTHY L. O'BRIEN -

There was -- it was -- I think that the State of New Jersey requires 18 months after you file the initial papers; so approximately a year and a half to two years.

Q. Okay. Mr. O'Brien where did you get your idea to write this book, TrumpNation: The Art of Being the Donald?

A. It came out of my reporting for The New York Times.

Q. And what was the concept you had in mind when you began to formulate the book and the book proposal?

A. I thought the Donald would be a useful person to profile as a vehicle for exploring various facets of the business world and pop culture and -- and the social scene in America.

Q. When you say "the Donald," are you referring to Mr. Trump?

A. I am.

Q. You've asserted in this litigation that the professional

- TIMOTHY L. O'BRIEN -

journalistic methods and techniques that you used to write this book were the same as the methods and techniques you used for writing stories with The New York Times; is that correct?

A. Yes, that's correct.

Q. So in writing this book, TrumpNation, you held yourself to the same standards; is that correct?

A. That is correct.

MR. RESSLER: I'd like the court reporter to mark as Exhibit 19 this document. It doesn't bear a Bates number.

(Whereupon, O'Brien Exhibit 19 was marked for identification.)

Q. Mr. O'Brien, the document that's been placed in front of you is your own certification that was filed in this case before the Judge in this case.

Do you remember seeing this document and writing this document?

A. I do.

- TIMOTHY L. O'BRIEN -

Q. Okay. So, going back to Bullet Point 1, Trump is a "cross between Baby Huey and PT Barnum."

Who is "Baby Huey," Mr. O'Brien?

A. "Baby Huey" is a cartoon figure who is an adult duckling.

Q. Okay. He's a cartoon character from about the '50s, right?

A. I believe so.

Q. He's a duck, right?

A. I believe that's correct, yes.

Q. He's profoundly oversized; is that correct?

A. He's an adult duck.

Q. He's an obese adult duck, correct?

A. He's -- he's an adult duckling.

Q. He's bigger than the other characters in the cartoon, correct, in an obese way?

A. He's an adult duckling with a

bib.

Q. Okay. And a diaper, right? He wears a diaper in the cartoon, correct?

A. I'm not sure.

Q. But you think maybe in some of the cartoons, "Baby Huey" is wearing a diaper, right?

A. Perhaps.

Q. And his voice -- he seems seemingly retarded, the "Baby Huey" cartoon character; isn't that correct?

A. No, I wouldn't describe him that way.

Q. You wouldn't?

A. No, I wouldn't.

Q. Is the voice not preposterously moronic, the voice of "Baby Huey," the cartoon character, Mr. O'Brien?

A. No, I wouldn't describe it that way.

Q. How would you describe it?

A. As an adult duckling; my

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imagination of an adult duckling. That's how I would describe it.

Q. So you don't believe that he's --

A. I would describe it as -- as a child grown old.

Q. You don't agree that "Baby Huey" in the cartoon has an outlandish-sounding voice?

A. No. That's not my first thought when I think of "Baby Huey."

Q. I'm not asking you if it's your first thought. I'm just asking you if it's -- if it's your view.

A. No, it's not my view.

Q. Okay. And would you agree that "Baby Huey" is an idiotic character in the cartoon?

MR. CERESNEY: Objection. Form.

You can answer.

A. I think "Baby Huey" is a -- is a child grown old. That's how I think of "Baby Huey."

early '90s, Donald believed he" --

A. I'm sorry. The next bullet, is that "Ever the Daddy figure..."?

Q. Oh, I'm sorry. You're right. Thank you. Am I bad.

"Ever the Daddy figure on The Apprentice, in his business dealings Donald is far more ruthless. He has used mob lawyers and mob associates to get things done and even made his first foray into Atlantic City with men known to have open ties to organized crime."

Do you see that?

A. I do.

Q. In your view, does that portray Trump in a negative light?

A. Well, I believe it to be accurate, but it is also negative.

MR. RESSLER: I move to strike the first part of the response.

MR. CERESNEY: Okay. And we'd like it to stand.

Q. The next bullet reads, "At

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yes.

Q. In fact, in promoting the book, you and Warner emphasized, among other things, that you had unique access to Trump, correct?

A. Yes, that's correct.

Q. How did your April 21st, 2005, meeting at Trump's offices come about?

A. I had repeatedly, over the course of the previous year, asked Donald to document his net worth for me and that meeting was conducted in conjunction with that.

Q. Isn't it a fact, Mr. O'Brien, that by the time of the April 21st, 2005, meeting at Trump's offices, Trump had already shown you a document titled, "2004 Statement of Financial Condition"?

A. No. That's not true.

MR. RESSLER: I'll ask the court reporter to mark as the next exhibit as 31, previously

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identified in discovery as TXT 2654.

(Whereupon, O'Brien Exhibit 31 was marked for identification.)

Q. Sir, the front of this document states, "Donald J. Trump Statement of Financial Condition June 30th, 2004." It bears the imprint or logo of Weiser LLP.

Did you come to learn in your research on Trump to the book that Weiser LLP is Trump's public accounting firm?

A. I understood that they were one of his accountants. I wasn't sure that they were the sole accountant.

Q. Let me direct your attention to Bates Number 2657.

A. Uh-huh.

Q. As you can see, Mr. O'Brien, this is a ledger or a list, if you will, referencing Trump's assets.

Do you see that?

A. I do.

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Q. And it has a total asset valuation of, rounding off, 3.9 billion.

Do you see that on the bottom?

A. I do.

Q. And then if you flip the page to 2658, you'll see a page that's titled, "Liabilities and Net Worth." The liabilities are tallied up.

Do you see it says 420 million?

A. Uh-huh.

Q. 420,200,000, to be exact.

A. I do.

Q. And then below that, there's a net worth figure of three -- rounding off, 3.5 billion.

Do you see that?

A. I do.

Q. And then, sir, if you flip the page, there are many pages of notes with respect to each asset and liability.

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Do you see that?

A. I do.

Q. Didn't Mr. Trump give you this document, sir, prior to the April 21st, 2005 --

A. No. This is the first time I've ever seen this document.

Q. -- meeting.

Is it your testimony under oath today is that Trump didn't show you this document?

A. Yes, it is.

Q. Mr. O'Brien, is it fair to say, based on your many years covering Trump both for this book and before this book, that Mr. Trump's -- that you know that Mr. Trump's net worth is a very important issue to him?

A. Yes, it is.

Q. Isn't it fair to say that Mr. Trump frequently talked to you when you were writing this book about his net worth?

A. That is true.

approximately 15 minutes?

A. No. That's not fair to say.

Q. How long is it -- how long, according to your testimony, did Mr. Weiselberg stay?

A. I would say for about two and a half hours.

Q. Mr. Weiselberg was in the conference room for two and a half hours?

A. Yes.

Q. What did you talk to Mr. Weiselberg about for two and a half hours, if anything?

A. I talked to Mr. Weiselberg about Mr. Trump's assets and liabilities.

Q. For two and a half hours?

A. Yes. In great detail, on an asset-by-asset basis.

Q. In great detail?

A. Yes.

Q. Say, where's the tape recording of this conversation,

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Mr. O'Brien?

A. There -- one doesn't exist.

Q. You didn't tape the conversation of the meeting where you're actually sitting down with Trump's CFO and he's going through a valuation of Trump assets for two and a half hours?

A. Well, when I went to the meeting, my understanding through my conversations with Donald was that I was going to be looking at documents primarily; that I wasn't going to be conducting an interview based on what Mr. Weiselberg had compiled on what appeared to me to be a legal -- a legal pad outlining Donald's documents -- Donald's net worth.

I went to the meeting anticipating a document review. And so, I hadn't gone with my tape recorder because I hadn't believed the meeting would necessitate a -- an interview drawn from handwritten notes.