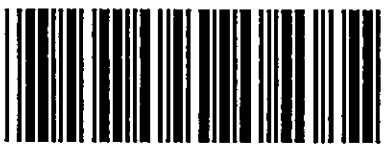

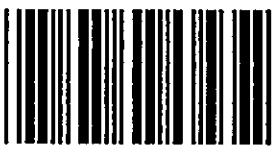

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A-6141-08T3

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

REPLY BRIEF OF PLAINTIFF/APPELLANT DONALD J. TRUMP IN SUPPORT OF APPEAL

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Plaintiff Donald J. Trump ("Trump") submits this Reply Brief in further support of his appeal of the Trial Court's Order entering summary judgment ("the Order") in favor of defendants Timothy L. O'Brien ("O'Brien"), Time Warner Book Group, Inc. and Warner Books, Inc. (the "Warner Defendants") (collectively "Defendants"), the author and publishers of TRUMPNATION, THE ART OF BEING THE DONALD ("the Book" or "*TrumpNation*").

INTRODUCTION

This case raises important questions about the limits of a media defendant's liability with respect to defamation claims asserted by public figures, and the proper balance to be struck between a public figure's right to protect his good name against fabricated lies, and the preservation of a media defendant's right to rely upon a confidential source, without disclosing the source's identity. This appeal is not, as Defendants suggest, a legal challenge to Defendants' right not to disclose confidential sources. Rather, the issue is whether facts and circumstances exist in this case which permit an inference that the alleged source information is fictitious, and ergo, that Defendants published statements regarding Trump's net worth with reckless disregard that they were false. Here, because the facts do support such an inference, Trump has the right to present those facts to a jury.

Defendants published false statements about Trump's net worth purportedly based upon information O'Brien obtained from three confidential informants - - the only sources O'Brien can identify to support his inclusion of the low net worth estimates in the Book. The confidential source information is corroborated only by the other confidential source information. All other information which O'Brien obtained places Trump's net worth in the billions of dollars. By denying Trump the right to have a jury decide his case, despite all of the evidence he offered which supports a finding that Defendants published the low net worth estimates in utter disregard of whether they were false, the Trial Court ignored Trump's rights, simply determined O'Brien was credible and deferred to Defendants' right under the Shield Law not to disclose O'Brien's sources.

The Trial Court's Order essentially gives a media defendant free license to say anything about a public figure at any time, without recourse and without regard to the existence of extrinsic evidence to the contrary, so long as the defendant claims he relied upon confidential informants as the source of his information. To paraphrase Defendants (Db at 3), no matter what evidence is offered against him, the newsperson's word

should be taken as gospel. That is not, and cannot be, the result envisioned by the Maressa Court[1].

REPLY TO COUNTERSTATEMENT OF FACTS

Throughout their Brief, Defendants misstate and mischaracterize the evidence, but in each instance, the record makes it clear that when inferences are drawn in Trump's favor, which they must be on summary judgment, the evidence is sufficient to support a verdict for Trump:

- Defendants write that there is "vast uncertainty and exaggeration surrounding Trump's holdings and debt…" Pb at 1. This statement ignores all of the evidence of the detailed financial information and real estate records provided to and obtained by O'Brien, as well as the unprecedented access O'Brien was given to Trump and individuals within the Trump organization. See discussion at Pb at 9-12. O'Brien cannot credibly deny that he knew Trump's net worth was not the low number as that reported by his sources.

- Defendants ignore, among other things, the records provided to and discussed at length with O'Brien that proved Trump's 30%, debt-free ownership interest in the West Side Yards, a riverfront property on the West Side of Manhattan, which spans 59th Street to 72nd Street, for which Trump's interest was valued at $450 - $500 million. Pa2291-Pa2394; Pa3765 at 259:6-261:25. O'Brien cannot credibly deny the fact that the value of Trump's interest in the West Side Yards alone is more than 50% higher than the overall net worth reported by O'Brien's alleged sources.

- O'Brien's conclusion that 40 Wall Street had no value (see Db at 38) was contradicted by records O'Brien had showing that Trump purchased the property for $1 million and that it was valued in excess of $400 million in 2005. Pa833 at 241:22-Pa834 at 242:13.

[1] Maressa v. New Jersey Monthly, 89 N.J. 176, cert. denied, 459 U.S. 907 (1982).

The significant, material inconsistency between the evidence that unequivocally established the value of this property and O'Brien's report gives rise to a jury question.

- Defendants falsely state that "Trump admitted to O'Brien that the 2004 article about his net worth, which cited the confidential sources, had no impact on him…", and they selectively quote from the audio tape to make it appear that Trump's statement somehow supports Defendants' position. Db at 5, n.2. The omitted language from this quote makes clear, however, that is not the case. Pa1764.

- Defendants say that "Trump did not take issue with the sources' information or analysis…." Db at 8. To the contrary, in addition to Trump's quote which follows that statement, the Book states: "Donald dismissed this as nay saying." Book at 154.

- Defendants falsely claim that "The Book ultimately did not endorse any particular estimate of Trump's worth…." Db at 8. Notwithstanding their claim, the record evidence demonstrates that O'Brien made repeated statements to the contrary, referring, for example, to Trump's "verbal billions," his "ability to magically add zeroes to his bank account" (Book at 149, 152-53, 173-74), and to the "personal OZ [Trump] created out of smoke and mirrors." (Book jacket). In marketing the Book, O'Brien said "Donald isn't a billionaire either," and called Trump a "faux billionaire" and "not a real billionaire." Pa2457; Pa3300. At a minimum, these statements demonstrate O'Brien's ill will and motive in writing the Book.

- Defendants argue that "it is undisputed that Trump's own net worth estimates varied substantially over the time O'Brien reported on him." Db at 25. However, O'Brien admits that Trump's estimates were always within a range of billions of dollars-never in the millions. See Db at 6-7. O'Brien's admission goes directly to the issues of whether he purposefully avoided the truth about his alleged sources' information, or had obvious reason to doubt the sources' veracity.

- Repeating a statement made to the Trial Court, Defendants state that, "Trump never provided O'Brien with verified information on his liabilities." Db at 27. The record reflects, however, that O'Brien was given significant information about Trump's liabilities. See Pa3660-Pa3684. O'Brien's denial goes not only to the issue of whether he acted in reckless disregard, but to his overall credibility as well.

- Defendants misquote and take out of context the deposition testimony of Trump and Allen Weisselberg, the Chief Financial Officer of the Trump Organization, who has been with Trump for over 30 years, suggesting that Trump never provided O'Brien with documents relating to his net worth. Db at 33. That was not the testimony. See Pa3756 at 166:6-169:11.

- O'Brien denies ever seeing Trump's Statement of Financial Condition. Db at 25. His denial is specifically contradicted by Trump and Weisselberg, who testified that O'Brien was given the Statement on at least three separate occasions. Pa2092 at 39:19-25; Pa2064 at 172:2-6; Pa2067 at 201:16-25; Pa2097 at 44:10-Pa2098 at 45:1-21; Pa2093 at 40:21-Pa2074 at 41:16; Pa829 at 175:9-25. O'Brien's denial (Pa2158 at 251:4-13) goes not only to the issue of whether he acted in reckless disregard because that Statement gave O'Brien information about Trump's assets and liabilities, but also to his overall credibility.

- Defendants deny that O'Brien made an admission to Michelle Lokey about the value of the West Side Yards. Db at 35. Because the admission goes to a material fact, the dispute goes directly to whether O'Brien acted in reckless disregard, as well as to his overall credibility. See Pa2237 at 187:22-Pa2238 at 188:14.

If these disputes, and all others in the record, are resolved in favor of Trump, the evidence supports a jury finding in Trump's favor. Therefore, the summary judgment order should be reversed and Trump permitted to have his case decided by a jury.

LEGAL ARGUMENT

POINT I

TRUMP IS ENTITLED TO MAINTAIN HIS CAUSE OF ACTION BECAUSE THE FACTS AND CIRCUMSTANCES SURROUNDING PUBLICATION, TAKEN TOGETHER, SUPPORT AN INFERENCE THAT DEFENDANTS ACTED WITH RECKLESS DISREGARD OF THE TRUTH OR FALSITY OF THE STATEMENTS IN ISSUE

A. Although The Shield Law Protects The Identities Of Defendants' Sources From Disclosure, It Does Not Preclude Trump From Presenting Evidence To A Jury That Proves Defendants Published Statements Without Regard To Whether They Were False

Although Trump's high burden of proof was made more difficult because he could not directly challenge the existence of, or the information allegedly provided by, Defendants' confidential sources, he nonetheless met his burden. Trump opposed Defendants' motion for summary judgment with extrinsic, inferential evidence sufficient to support a jury finding that Defendants published false statements regarding Trump's net worth without regard to whether they were false. It was not necessary, as Defendants suggest, that Trump prove with direct evidence that O'Brien actually knew that the statements in issue were false at the time they were published. See e.g., Costello v. Ocean County Observer, 136 N.J. 594, 615 (1994) ("Rarely will direct evidence exist" to prove actual malice.); Celle v. Filipino, 209 F.3d 163, 183 (2d Cir. 2000) (quotation

omitted)("Actual malice can be established '[t]hrough the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story [among] other circumstantial evidence[.]'"); St. Amant v. Thompson, 390 U.S. 727, 732 (1968) ("recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports"); Curtis Publishing Co. v. Butts, 388 U.S. 130, 161 n. 23 (1967) (actual malice may be proven where "apparently reliable information contradicted" the published statements).

When a media defendant relies on the Shield Law[2] and refuses to produce discovery of otherwise material evidence, there is a significant risk that the defendant could be concealing fabricated, malicious lies. As a result, the New Jersey Supreme Court cautioned that the Shield Law should not be applied in a manner that forecloses a plaintiff from pursuing a cause of action. Maressa, 89 N.J. at 198-199. In this regard, a plaintiff is permitted to prove actual malice through extrinsic evidence, real or circumstantial, that supports an inference that a media defendant published defamatory statements with reckless disregard of whether those statements were false:

> An absolute Shield Law privilege gives newspersons less than absolute immunity from

[2] N.J.S.A. 2A:84A-21 et seq.; New York Shield Law (N.Y. Civ. Rights Law §79-h (2006).

> suit. In some circumstances, public figures will be able to establish by inferential evidence the recklessness necessary to sustain a libel judgment. When a plaintiff can show that a defamatory report was published, and the author claims reliance solely on confidential sources, the trial court should consider whether the circumstances surrounding the publication warrant submission of the question of actual malice to the jury. The defendant in such cases, although under no legal duty to reveal its sources, may decide to do so to rebut an inferential showing of actual malice.

Id. at 198-199. Such is the case here.

Trump has offered sufficient evidence for a jury to decide either that O'Brien's sources do not exist or that Defendants published the information attributed to those sources without regard to whether it was false. By denying Trump the right to have his evidence considered by a jury, the Trial Court improperly and prematurely foreclosed Trump's ability to maintain his cause of action against Defendants. This is precisely the result that the Court in Maressa sought to prevent.

Moreover, Defendants' argument that they are somehow immune from liability based upon their good faith reliance on the alleged confidential sources has been rejected by the courts, and does not otherwise change the analysis. "[A] publisher cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or

falsity of defamatory statements." Gertz v. Robert Welch, Inc., 680 F.2d 527, 538 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983). Accordingly, a media defendant cannot:

> [A]utomatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, ... when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. (quoting St. Amant, 390 U.S. at 732) (emphasis supplied).

B. The Trial Court Failed to Consider The Cumulative Effect Of The Evidence, Which Taken Together, Is Clear And Convincing Evidence That Could Support A Jury Verdict That Defendants Published In Utter Disregard Of The Truth

The Trial Court erred by failing to analyze whether the cumulative effect of Trump's evidence could support a jury finding that Defendants published statements about Trump's net worth in utter disregard as to the falsity of those statements. Indeed, it is well established that "evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness of his knowledge of falsity." Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970)(citation omitted); see Tavoulareas v. Piro, 817 F.2d 762,789 (D.C. Cir.), cert. denied, 484 U.S.

870 (1987)("[A] plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well through direct evidence."); Schiavone Construction Co. v. Time, Inc., 847 F.2d 1069, 1090 n. 35 (3d Cir. 1988) (quotation omitted) (a court may infer actual malice from "an accumulation of the evidence and appropriate inferences"); Moore v. Vislosky, 2007 WL 1182021 * 8 (3d Cir. 2007) (quotation omitted) (same); Fiber Systems Intern. Inc. v. Roehrs, 470 F.3d 1150, 1170 (5th Cir. 2006) (quotations omitted) (same).

It is of no import that any one piece of evidence, in and of itself, might not support a jury finding that Trump has proven actual malice. Rather, as the courts have repeatedly emphasized, where, as here, the cumulative effect of the evidence could support a jury finding that the defendant published false statements in reckless disregard of the truth, the defendant's motion for summary judgment must be denied, and the plaintiff must be permitted to have a jury decide his case:

> That no piece of evidence in a defamation suit alone will support a verdict does not mean that together all the evidence may not be clear and convincing. Pieces to a jigsaw puzzle sometimes appear nothing more than scattered fragments, but when placed together in proper fashion they create a clear picture. . . .

Tavoulareas v. Piro, 763 F.2d 1472 (D.C. Cir. 1985), and on reh'g en banc, 817 F.2d 762 (D.C. Cir.), cert. denied, 484 U.S.

870 (1987); see also Ricciardi v. Weber, 350 N.J. Super. 453, 471-474 (App. Div. 2002), certif. denied, 175 N.J. 433 (2003) (finding that trial court should not have decided issue of actual malice because, given all of the evidence a "reasonable juror could have found that [defendant] made his statement with actual malice.").

POINT II

TRUMP OFFERED EVIDENCE MATERIAL TO THE COURT'S ACTUAL MALICE INQUIRY WHICH SHOULD HAVE SURVIVED SUMMARY JUDGMENT AND BEEN CONSIDERED BY THE JURY

The Trial Court's determination that none of Trump's evidence was material to the actual malice inquiry was erroneous as a matter of law. The Trial Court confined its inquiry to whether Trump's evidence proved Defendants had actual knowledge that the information they published about Trump's net worth was false. The inquiry, however, should also have included a determination of whether the evidence could support a finding that Defendants published information "with reckless disregard of whether it was false or not." The New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964).

It is undisputed that O'Brien had information (and was aware that he had such information) that directly contradicted his supposed confidential sources and, on that basis, a jury could find that Defendants published statements concerning Trump's net worth in reckless disregard of whether the

statements were false. Indeed, the only evidence supporting the estimates which placed Trump's net worth at between $150 and $250 million were the excerpts from O'Brien's own notes of his supposed interviews with the confidential sources. Trump disputed that evidence with the sort of direct and circumstantial evidence recognized by the courts as material in an actual malice case:

- O'Brien had "obvious reasons to doubt the veracity" of the alleged sources, as well as the accuracy and reliability of their alleged information. St. Amant 390 U.S. at 732. Pb at 9-12.

- O'Brien purposely avoided the truth. Pb at 12-15;[3] see Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.S.2d 466, 477 (1993) (quoting Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 692 (1989)) ("'[a]lthough failure to investigate will not alone support a finding of actual malice. . .the purposeful avoidance of the truth is in a different category[.]");

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[3] Defendants mischaracterize the argument Trump has made about O'Brien's investigation. Db at 33. Trump does not argue that the case should go to the jury solely on the basis of the adequacy of O'Brien's investigation, but rather that that evidence is material to the jury's determination. Moreover, although a publisher's failure to investigate prior to publication is not, by itself, sufficient to demonstrate actual malice (St. Amant, 390 U.S. at 732-33), "when an article is not in the category of 'hot news,' that is, information that must be printed immediately or it will lose its newsworthy value, 'actual malice may be inferred when the investigation for a story. . .was grossly inadequate in the circumstances.'" Hunt v. Liberty Lobby, 720 F.2d 631, 643 (11th Cir. 1983) (quoting Vandenburg v. Newsweek, Inc., 441 F.2d 378, 380 (5th Cir.), cert. denied, 404 U.S. 864 (1971)).

- Defendants "found internal inconsistencies or apparently reliable information that contradicted the story's libelous assertions but nevertheless had published the article." Costello, 136 N.J. at 615 (citing Curtis Publishing Co., 388 U.S. at 161, n.23); Pb at 9-15, 18-19.

- Defendants had information from independent sources that the published information was false. Pb at 10-12, 16; see Schiavone 847 F.2d at 1091 (concluding that a jury could find actual malice based upon the fact that "four independent sources with good bases for knowledge contradicted" the author's report).

- O'Brien exhibited ill-will and malice towards Trump. Pb at 7–9, 19-22; see Goldwater, 414 F.2d at 342 (actual malice may be adduced by cumulation of evidence and by appropriate inference).

Because the accumulation of evidence offered by Trump is material and would support a finding that O'Brien decided to publish the low estimates of Trump's net worth without regard to whether they were false, the Trial Court's determination should be reversed, and the evidence should be permitted to go to the jury. See e.g., Goldwater, 414 F.2d at 342 (trial judge correctly charged the jury that although "neither negligence nor failure to investigate, on the one hand, nor ill will, bias, spite, nor prejudice, on the other, standing alone, were sufficient to establish. . .a reckless disregard of [ ] the truth or falsity of the materials used[;]. . .the court properly instructed the jurors that they should consider all the evidence concerning [defendants'] acts and conduct in publishing [the

article] in deliberating upon whether defendants published with actual malice.") (emphasis supplied).

POINT III

THE EXISTENCE OF EVIDENCE SUPPORTING TRUMP'S CLAIM THAT DEFENDANTS DISREGARDED THE TRUTH IN PUBLISHING THE LOW ESTIMATES OF TRUMP'S NET WORTH DISTINGUISHES THIS CASE FROM THOSE CITED BY DEFENDANTS IN SUPPORT OF SUMMARY JUDGMENT

The existence of the extrinsic evidence, real and circumstantial, supporting Trump's claim that Defendants acted with actual malice is critical because it is what distinguishes this case factually not only from Sprewell,[4] but the other cases cited by Defendants as well. Indeed, none of the cases granting summary judgment upon which Defendants rely (Db at 16-17), was decided on facts similar to those in this case, and therefore, none actually supports Defendants' arguments.

The court in Farrakhan v. N.Y.P. Holdings, Inc., 656 N.Y.S.2d 726 (App. Div. 1997), rendered its decision on the basis of "uncontroverted evidence." Here the record is anything but uncontroverted. Moreover, in Bement v. N.Y.P. Holdings, Inc. 760 N.Y.S.2d 133 (App. Div. 2003), the court's decision turned on the fact of "the conclusive evidence in the record that demonstrated that [defendant] reasonably believed the information reported to be true and that he had no evidence

[4] Sprewell v. NYP Holdings, Inc., 841 N.Y.S.2d 7 (App. Div. 2007).

before him that would suggest that the information reported was probably false." 760 N.Y.S. 2d at 137. Defendants here had clear and convincing evidence that the information allegedly provided by the confidential sources (even if the sources did exist) was false.

In Turf Lawnmower Repair, Inc. v. Bergen Record Corporation, 139 N.J. 392 (1995), cert. denied, 516 U.S. 1066 (1996), the court granted summary judgment even though defendant's investigation and reporting were "grossly negligent," because plaintiff did not offer affirmative evidence that could have led to a finding that defendant doubted his conclusions. Similar results were reached by the courts in Freeman v. Johnston, 84 N.Y.2d 52 (1992), cert. denied, 513 U.S. 1016 (1994) and Suson v. N.Y.P. Holdings, Inc. (unreported) 2008 WL 927985 at *11 (N.Y. Civ. Ct. March 31, 2008), both noting that a defendant's failure to fully investigate a matter or interview witnesses does not rise to the level of actual malice. Here, the evidence proves that O'Brien had information which he gained from his own investigation that proved the confidential source estimates of Trump's net worth were false. Trump offered evidence that O'Brien had in his possession (and even reported), information that a jury could rely upon to find that O'Brien acted in reckless disregard. Cf. Kipper v. N.Y.P. Holdings, Inc., 852 N.Y.S.2d 56, 57 (App. Div. 2008)(summary judgment

granted where sole piece of evidence offered by plaintiff was a newspaper editor's negligence in re-writing a story); Rocci v. Ecole Secondaire Macdonald-Cartier, 167 N.J. 149 (2000) (plaintiff failed to allege requisite harm to survive summary judgment); Millus v. Newsday, Inc. 89 N.Y.2d 840 (1966) (statement in issue constituted an opinion).

Furthermore, in DeAngelis v. Hill, 180 N.J. 1, 20 (2004), the trial court's decision to allow evidence to go to the jury was reversed because the trial court erroneously equated ill-will and motive with actual malice, and determined that such evidence, on its own, could support a finding of actual malice. While evidence of ill-will and malice in and of itself is insufficient to withstand summary judgment, Trump's case does not rely upon such evidence exclusively. The undisputed evidence of O'Brien's ill-will towards Trump is only one piece of an accumulation of evidence which a jury could infer that defendants acted with actual malice, and that evidence should go to the jury.

Finally, Defendants misread and misapplied Sprewell (Db at 18-20. That case simply does not support their opposition to Trump's appeal. In Sprewell, the Court found that information the reporter gained from his investigation of public and other non-confidential sources supported the version of events he had been given by his confidential sources, and contradicted

Sprewell's explanation of how he was injured. Here, O'Brien admits that he attempted to verify his alleged confidential source information, but, as a result of his investigation, he could not identify even one source that placed Trump's net worth in the millions, rather than billions of dollars. In fact, the confidential source information is belied by all of the non-confidential information O'Brien obtained.

Defendants also attempt to argue that because the Sprewell Court cited Sprewell's inconsistent explanations as to how he was injured as a factor in its summary judgment decision, this Court should consider Trump's varying estimates of his net worth at different times as evidence justifying O'Brien's decision to publish. What Defendants overlook in making this argument is not only that Trump's own estimates of his worth have always been in the billions of dollars, never in the millions, but that all of the extrinsic, non-confidential information obtained by O'Brien, supports Trump's estimates. Thus, unlike Sprewell, this is not simply a case of Trump's word against that of O'Brien's confidential sources.

POINT IV

BECAUSE O'BRIEN'S CREDIBILITY IS IN ISSUE, THE JURY MUST DETERMINE WHETHER HIS TESTIMONY ABOUT HIS RELIANCE UPON CONFIDENTIAL SOURCES AND THE INFORMATION HE CLAIMS THEY PROVIDED IS FALSE

While summary judgment is considered a useful tool for disposing of frivolous defamation claims, entry of summary judgment is far from a "routine" matter (Db at 16) in actual malice cases. To the contrary, courts should be wary of disposing of cases involving actual malice through summary judgment, because state of mind is in issue, and a determination of state of mind "'does not readily lend itself to summary disposition.'" Costello, 136 N.J. at 615 (quoting Maressa, 89 N.J. at 197 n. 10); see Hutchinson v. Proxmire, 443 U.S. 111, 120 fn. 9 (1979) (same). O'Brien's sworn testimony on matters material to the determination as to whether he published in reckless disregard is directly at odds and cannot be reconciled with the testimony of other witnesses, as well as with documentary evidence:

- O'Brien's assistant Plambeck contradicted O'Brien's testimony and denied that he was ever asked to or did research the valuation of Trump's net worth. See Pa2264 at 25:21-Pa2266 at 27:13; Pa2271 at 42:21-23; Pa2280 at 137:4-6; Pa2278 at 135:25-Pa2280 at 136:23; Pa2269 at 40:25-Pa2271 at 42:9; Pa2272 at 64:21-Pa2275 at 67:18.

- O'Brien lied about taking handwritten notes of interviews. See Pa2220 at 134:9-18; Pa2060 at 150:7-12.

- O'Brien lied about tape recording interviews with Weisselberg, Lokey and Trump. See Pa2059 at 149:12-Pa2060 at 150:6.

- O'Brien lied that he did not receive Trump's 2004 Statement of Financial Condition, which included Trump's assets and liabilities, which witnesses testified he was given on at least three separate occasions. See Pa2068 at 202:3-7; Pa2096 at 43:21-44:11; Pa2063 at 171:22-Pa2064 at 172:6; Pa829 at 175:9-176:2; Pa 2093 at 40:21-Pa2094 at 41:19.

A determination as to O'Brien's credibility must be made, and that determination is one for the jury. See Ricciardi, 350 N.J. Super. at 469-70 (citation omitted)(Summary judgment should not be granted where "credibility determinations must be made."). Thus, on the issue of O'Brien's credibility alone, if a jury determines, as Trump asserts, that O'Brien was lying each time his sworn testimony was contradicted by other testimony or by information contained in documents of record, the jury could also reasonably and fairly conclude that O'Brien fabricated his sources, and lied about the information he claims they provided to him: *Falsus in uno, falsus in omnibus*. See Parks v. Rogers, 176 N.J. 491, 502 (2003)(Summary Judgment should be denied where determination of a disputed fact depends upon credibility evaluation); Gilhooley v. County of Union, 164 N.J. 533, 545-546 (2000)(A trial court should never decide on its merits a dispute in which a rational jury could go either way).

CONCLUSION

Trump opposed Defendants' Summary Judgment Motion with clear and convincing evidence, including uncontroverted, objective and public record evidence, which could support a finding that the alleged confidential sources did not exist or that Defendants published the low estimates of Trump's net worth with at least reckless disregard of whether the statements were false. Accordingly, Trump submits that the Order granting summary judgment entered in favor of Defendants should be reversed.

Respectfully submitted,

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