UNITED STATES DISTRICT COURT DISTRICT OF NEW HAMPSHIRE

Roderick Webber, Pro Se Plaintiff, v) Case 1:18-cv-00931-LM
Donald J. Trump, Edward Deck et al.) (Chief Judge Landya McCafferty)
Defendants.) July 12, 2019

REPLY MEMORANDUM TO DEFENDANTS TRUMP COMPANIES MOTION TO DISMISS

PARTIES :

Plaintiff incorporates by reference, Reply to JPA III's Motion to Dismiss, section entitled, "Parties."

STANDARD OF REVIEW:

The Supreme Court has held that to survive a motion to dismiss under Federal Rule 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim has "facial plausibility" when the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. at 678. Wells v. West Georgia technical College, 2012 WL 3150819, (N.D. Georgia August 2, 2012). ("the complaint's factual allegations must be enough to raise the right to relief above the speculative level, *i.e.*, enough to make the claim plausible.") Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010) (quoting Twombly, 550 U.S. at 555, 570). This "plausibility" standard is "not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. at 678.

In his second amended complaint, Plaintiff has alleged specific facts supporting each element of the causes of action pled drawing a reasonable inference that the Defendants are liable for the misconduct alleged. Plaintiff's allegations are also supported by transcribed

videotapes of the incident in the appendix to the complaint as well as other research and documentation.

STATEMENT OF FACTS:

Contrary to the allegations of Defendants, Defendants Deck and Manchester Defendants did not merely remove Plaintiff from the hall and push him into a table. In fact, Defendant Deck, knowingly working at the time for Defendants Trump Companies, Trump Campaign, and Defendant Trump, purposely deceived Plaintiff into believing there was a microphone in the back of the hall to separate Plaintiff from the other journalists in the front of the hall. Then Defendants Deck Doucette, and other Trump supporters and staff surrounded or "kettled" Plaintiff and assaulted and battered him. Subsequently, Defendant Deck and Manchester Police Defendant Pittman grabbed Plaintiff and intentionally and maliciously threw Plaintiff face-first into a table and then down again when he attempted to stand, while shouting epithets at the Plaintiff. Plaintiff has meticulously alleged these facts which are supported by videotape evidence.

PERSONAL JURISDICTION

Defendant Trump Companies have sufficient contacts with the State of New Hampshire through their employment relationship with Tortfeasor Deck and through the representations of their CEO Defendant Trump for this Court to exercise Personal/ Specific/General Jurisdiction over them

Defendant Trump Companies contend that they lacked sufficient contacts with the State of New Hampshire for this Court to exercise personal jurisdiction over the Defendants. Plaintiff's Second Amended Complaint states: "based upon information and belief, The Trump Organization, Inc. or Trump Organization, LLC had been making payments to Defendant Deck

just previous to the No Labels Problem Solvers event for security." Doc. 75 at ¶5. Thus, the Plaintiff plausibly alleges an employment relationship between Trump Companies and Defendant Deck. The Pittman Affidavit (Doc 75, App 16) states, "At approximately 11:40 I was approached by a Trump Security Officer," and "The security Officer was identified as Edward Deck (11/16/1954)." A reasonable person would understand this to mean that Defendant Deck worked for Defendant Trump, or one of his Trump-named businesses, such as the Trump Companies which Trump was there to promote. Doc. 75 cites Defendant Deck's statements under oath quoting, *Galicia v. Trump*, Defendant Deck testified that he was "hired to preform [sic] security services for the Trump Organization." INDEX NO. 24973/2015E NYSCEF DOC 342, Page 20.

New Hampshire common law provides that liability passes from the servant to the master, where an employee's conduct is within the scope of his employment. Scope of employment is defined as: "(1) it is of the kind [he] is employed to perform; (2) it occurs substantially within the authorized time and space limits; and (3) it is actuated, at least in part, by a purpose to serve the employer." Porter v. City of Manchester, 151 N.H. at 40.

Accordingly, Plaintiff has properly pled that Defendant Deck was employed or an agent of Defendant Trump Companies when he committed multiple torts on the Plaintiff and, thereby, Defendant Trump Companies were specifically actors and have liability for Defendant Deck's multiple torts upon the Plaintiff at the No Labels Event, but also for any acts of Defendant Deck while employed by Defendants Trump Companies throughout the many campaign events in New Hampshire during that season. Also in attendance as security at the No Labels Event (and many campaign events) was Keith Schiller who testified in Galicia v. Trump that he was, "the Director of Security for Trump Organization since 2004." INDEX NO. 24973/2015E NYSCEF DOC 36.

Plaintiff has also pled sufficient contacts with New Hampshire by the Trump Companies in his Second Amended complaint: "Trump promoted himself at No Labels Problem Solvers," as "Chairman of The Trump Organization." *Id*. at ¶140. This paragraph references Appendix 8, in which several sources for "Trump's speech," (as labeled), are included. Consequently, Plaintiff has sufficiently pled that Trump Companies had systematic and continuous contacts with the State of New Hampshire not only as their employed security worked the events during the campaign in New Hampshire, but also specifically at the No Labels Problem Solvers Event, where their employee Defendant Edward Deck committed multiple torts on the Plaintiff. Defendant Trump Companies also had systematic and continuous contacts with New Hampshire and availed themselves of the laws and benefits of the State of New Hampshire through their CEO, Defendant Trump, as he promoted himself, his brand, and his companies, Defendants Trump Companies, at every event, including the No Labels Event. Accordingly, hailing Defendant Trump Companies into U.S. District Court in New Hampshire would be consistent with due process.

Defendants Trump Companies had actual notice of this lawsuit within the Statute of Limitations

Defendant Trump Companies claim that this action against them is barred by the Statute of Limitations because they were not properly named in the original complaint. However, Defendants' had actual notice within the Statute of Limitations period. a) As shown by the proof of service previously filed with this Court, (document 4 filed 2/19/19), The Trump Organization, Inc. was served pursuant to Rule 4 of the Federal Rules of Civil Procedure on February 14, 2019. b) Pursuant to Rule 4 of the Federal Rules of Civil Procedure, two slightly different copies of the summons and complaint (document 36 filed 3/28/19) were mailed to 725

Fifth Avenue, New York, NY, 10022. The distinction between the two documents is that one copy was for The Trump Organization, Inc. and one copy was for Trump Organization, LLC. c) On March 18, 2019, Bryan K. Gould, Counsel for Defendant Trump signed a waiver of service for Defendant Trump, as an individual named in this case. Donald J. Trump, being a principal officer and owner of both The Trump Organization, Inc. and Trump Organization, LLC, at this stage, knew or should have known that the action would have been brought against both The Trump Organization, Inc. and Trump Organization, LLC. Defendants Trump Companies had actual notice and were not prejudiced in preparation for this suit. Therefore, Plaintiff has not exceeded the statute of limitations. SEE APPENDIX FOR DETAILS RE RE-ROUTING OF MAIL

The "relation back" provision of Rule 15(c) tolls the Statute of Limitations from the time of the original pleading

Although Plaintiff may have improperly name the Defendants initially in this suit, the Statute of Limitations was tolled as provided by the "relation back" provisions of Rule 15(c) through the theories of equitable estoppel, equitable tolling,

Rule 15(c) provides for "relation back" of amendments to the filing date of the original complaint for purposes of the statute of limitations where an amendment adding a party asserts "a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading," and where "the amendment changes the party or the naming of the party against whom a claim is asserted," the party to be brought in must have, within the period provided by Rule 4(m), "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

Rule 15(c) attempts to balance the flexibility of Rule 15(a) and the adequacy of notice requirements of the statute of limitations.

Some courts have read Rule 15(c)(1)(C)(i) and (ii) together, holding that where a party received notice it will not be prejudiced because it would have been aware that it might still be added to the suit by amendment. Meredith v. United Air Lines, 41 F.R.D. 34, 39 (S.D. Cal. 1966); see also Bayerische Landesbank v. Aladdin Capital Mgmt. LLC, 289 F.R.D. 401, 406 (S.D.N.Y. 2013) (where amendment of investor's complaint added another company upon discovering that its employees were involved, "[t]here is no requirement, however, that an amendment must replace a party in order to establish a mistake warranting relation back." These courts also held that adding a party constitutes a "change" of the party within the meaning of Rule 15(c)).

Other courts have considered (i) and (ii) as separate requirements, interpreting (i) as focusing only on the narrow question of whether the information received by the party to be brought in was adequate. Under Rule 15(c)(1)(C)(i) either actual or constructive notice are sufficient. The Third Circuit has held that mere service is adequate notice. Williams v. Army & Air Force Exchange Serv., 830 F.2d 27, 30 n.2 (3d Cir. 1987). Notice is sufficient where there is an identity of interests between the parties. Kinnally v. Bell of Pa., 748 F. Supp. 1136, 1141 (E.D. Pa. 1990) (sufficient notice where the party has reason to expect his involvement as a defendant when he hears of the commencement of litigation).

The First Circuit has upheld the identity of interests concept. The institution of the action serves as constructive notice of the action to the parties added after expiration of the limitations period, when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it

was commenced. The identity of interest principle is often applied where the original and added parties are a parent corporation and its wholly owned subsidiary, two related corporations whose officers, directors, or shareholders are substantially identical and who have similar names or share office space, past and present forms of the same enterprise, or co-executors of an estate. Hernandez Jimenez v. Calero Toledo, 604 F.2d 99, 102–03 (lst Cir. 1979).

Rule 15(c)(1)(C)(i) may also require that the party to be brought in "received such notice of the action that it will not be prejudiced in defending on the merits." Lack of prejudice can result from having received the notice, and therefore the adequacy of the notice is also relevant. Delay extending discovery and trial preparation may be deemed prejudicial when justice so requires. That is not the case here.

In addition to a plethora of case law supporting the addition of Defendants where is adequacy of notice due to an identity of interests and lack of prejudice as we have here, due to the prompt filing of the amendments, Plaintiff's amendments also gain further support from the Supreme Court ruling in Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 541 (2010), although not directly on point. In that case, the Court held that relation back under Rule 15(c)(1)(C) depends on what the prospective defendant knew or should have known, not on the amending party's knowledge or timeliness in seeking to amend the pleading. The Court specifically rejected the idea that a plaintiff's "knowledge of a party's existence" constitutes an "absence of mistake." Krupski, 548–49 (majority opinion). The Court held that purpose of relation back in Rule 15(c) is "to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits." Krupski, 550. The distinction between Trump Organization, LLC and The Trump Organization is immaterial. What is of importance is

that the party knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity. As stated in Peterson v. Sealed Air Corp. 902 F.2d 1232 (7th Cir. 1990), "Finding that a corporation might receive notice within the meaning of Rule 15(c) if 'its president reads about the suit in The Wall Street Journal and recognizes that his firm is the right defendant' and that 'complaint naming GM that went on and on about the plaintiff's Thunderbird would alert Ford's agent that Ford was the right party.' Plaintiff could swap 'Corporation' for 'Incorporated' without hindrance from the rules," citing Dandrea v. Malsbary Mfg. Co., 839 F.2d 163 (3d Cir. 1988). Wright, Miller Kane, Federal Practice and Procedure § 1498 at 134-36.

Plaintiff's action against Defendants Trump Companies was tolled from the time of the original pleading under the legal theories of equitable estoppel and equitable tolling and thereby, were not prejudiced

EQUITABLE TOLLING: Similar to the jurisprudence previously stated applicable to Rule 15(c), Plaintiff ask the Court to apply the legal concept of equitable tolling to this case. That concept provides that if Defendants Trump Companies had notice of this suit and of their liability from the original complaint and were not prejudiced by being added in the amended complaints, the Court should deny Defendants motion to dismiss and in the interests of justice grant Plaintiff's amendments adding Defendants to this lawsuit. Defendant Trump has established dozens of entities with many various complicated names and titles, many of which are mere shells of companies that are not truly functioning entities to confuse, delay, and prevent legitimate tortious actions against them. Defendants, as evidenced in two other judicial proceedings and as properly alleged in Plaintiff's Second Amended Complaint, operate with

such opacity that they themselves cannot discern what is the proper name or entity for whom they work or are paid.

Accordingly, Plaintiff's improper naming was not improper at all. In fact, Defendants established and conducted their affairs in such a manner as to make it entirely difficult to name the proper parties and to execute service on them. Everything that Defendants do is intentionally done to obfuscate, confuse, and to deter litigation. Additionally, Defendants had actual notice of this suit through service on Defendant Trump and Defendant Trump Campaign, since they are alter egos of the Defendant Trump and Defendants' counsel represent all of them.

Accordingly, Defendants Trump Companies were in no way prejudiced in preparing for this suit. They purposefully eluded service through their multiple names and distant incorporations, many of whom do not function as proper companies except to pass money from one entity to another. This Court would be hard pressed to find a Defendant whose modus operandi was so conceived for the purposes of evading liability for the principal, Defendant Trump.

EQUITABLE ESTOPPEL The legal principal of equitable estoppel provides that where Defendants hide or cover up the existence of a compromising relationship between themselves and other Defendants, the Defendants should be estopped or prevented from asserting a defense that would deny liability. In Doc. 65, ("Request For Entry of Default"), Plaintiff meticulously laid out the extremes that Trump Companies went to in order to avoid service. Trump Companies, through the powers of it's master, Donald J. Trump re-routed the US Mail from Trump Tower to a Trump shell company called "Trump For America, Inc." in Washington DC, as confirmed by USPS tracking receipt issued to Plaintiff on April 24, 2019. Emails from USPS Consumer Affairs employee, Bryant V. Jackson, further confirm delivery of the package to

"Trump For America," signed for by M. Naldo.

Freedom of Information Act ("FOIA") documents obtained and published by American Oversight, (FOIA# GSA-17-0072 Case# 17-1267), explain in their 3,730 page release that Whitehouse officials and officials related to the Whitehouse were ordered to re-route documents delivered to Trump Tower and send them to 1800 F Street, NW, Washington DC., 20270. In pages 2292 to 2313, Whitehouse staff state "All mail addressed to and intended for President Elect Trump needs to be re-directed to: Presidential Transition Headquarters 1800 F Street, NW Room G117 Washington, DC 20270-0117" https://assets.documentcloud.org/documents/4110106/GSA-Trump-Hotel-Correspondence.pdf (SEE APPENDIX TO THE DOC FOR MORE DETAILED INFO RE RE-ROUTING OF MAIL)

In this case, Defendants Trump Companies could easily stipulate under oath that Defendant Deck was not employed and that they did not pay Defendant Deck for security services at the time he committed multiple torts on the Plaintiff. However, they will not stipulate because they themselves do not know who they paid for what and when. The fact is that Defendant Deck was working for Defendants Trump Companies, Defendant Trump Campaign, and Defendant Trump because they are all one entity serving Defendant Trump and nobody can distinguish between them, not their employees, not their lawyers, not their accountants, and not Defendant Trump. Plaintiff properly alleged their liability in this lawsuit because Defendant Deck has made sworn statements, (on multiple occasions), that he was employed to perform security services from Defendants Trump Companies and Defendant Trump Campaign at or around the time of the No Labels Problem Solvers Event. The structures are meaningless, the fact is that they all alter egos and serve one master, Defendant Trump.

Trump Companies Have a Strong Connection to this Lawsuit Because their

Employee/ Agent Was one of the Main Tortfeasors in this Lawsuit.

In his Second Amended Complaint, Plaintiff has properly alleged that Defendant Deck as well as other members of their security were working and being employed and paid by Defendant Trump Companies at the Problem Solvers Event where Defendant Deck committed multiple torts on the Plaintiff.

DEFENDANT DECK WAS AN EMPLOYEE AND AGENT OF DEFENDANT TRUMP COMPANIES AND THEREBY DEFENDANT TRUMP COMPANIES IS VICARIOUSLY LIABLE FOR THE ACTIONS OF THE DEFENDANT TORTFEASORS

Defendant Trump Companies claims that it is not liable for the tortious conduct of Defendant Deck because he was an "independent contractor" of Defendant Trump Companies rather than agents or employees. Historically, the common law theory of respondeat superior arises from the concept that those who profit from the activities of their employees should also bear the burden of their employees tortious acts and has imposed liability on employers with the public policy prerogatives of deterrence, prevention and compensation of victims in mind.

New Hampshire seems to have drawn its theory of respondeat superior liability from the Restatement (Second) of Torts §409 and its fifteen exceptions. In fact it has been said that this rule is so riddled with exceptions that the "exceptions have practically subsumed the rule." Elliott v. Public Serv. Co. of N.H., 128 N.H. 676, 678, 517 A.2d 1185, 1187 (1986); Rowley v. City of Baltimore, 305 Md. 456, 505 A.2d 494, 497 (1986).

That said, the New Hampshire courts generally apply the respondeat superior doctrine when the employee or agent commits a tort within the "scope of their employment." Conduct is considered being within the scope of employment if: "(a) it is of the kind he or she is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is

actuated, at least in part, by a purpose to serve the master." Pierson v. Hubbard, 802 A.2d 1162 (N.H. 2002); Porter v. City of Manchester, 921 A.2d 393, 397-398(N.H. 2007). For example, if an employee is sent upon a specific errand, using his or her own car but with the knowledge and permission of the employer, and it is agreed that the employee is acting within the scope of his or her employment at the time of the accident, the employer is liable for the acts whether or not the employer had control of the employees detailed operation of the motor vehicle. Hunter v. R.G. Watkins, 265 A.2d 15 (N.H. 1970). In light of New Hampshire rulings, Plaintiff finds Defendants' argument specious. First, merely stating that Defendant Tortfeasors are "independent contractors" does not make them so, even written contracts stating they are independent contractors have been held by many Courts to be insufficient to make them independent contractors for the purposes of vicarious liability. The alleged facts and proffered evidence reasonably infer that Defendant Deck was employed and paid by Defendant Trump Companies to support, protect, serve said Defendants in a master and servant relationship within the authorized time and space. Accordingly, in his second amended complaint, Plaintiff has correctly pled the elements of respondent superior liability as provided by New Hampshire common law. Although New Hampshire Courts have not ruled so, other States have applied The Restatement (Second) of Agency to the doctrine of respondeat superior and have asked whether the employer 1) had control of the alleged independent contractor; 2) whether the independent contractor was acting in the business interest of the employer; and 3) whether the work was within the scope of employment of the employer.

In those States, Courts have looked at "control" as the most significant factor. "Considering parties' contractual arrangements and on-site activities to conclude defendant was an employee… In workers' compensation cases, this court has consistently held that whether an

employer-employee relationship exists depends upon the employer's right to control the employee." Averett v. Grange 909 P.2d 246 (Utah 1995) For purposes of attaching vicarious liability to the employer, the main factor in determining whether a person is an employee or agent or independent contractor is *whether the employer has the right to control the manner in which the employee performs their job*." Thus, if an employer hires a contractor, that contractor, his employees, and all subcontractors under him are 'employees' if (1) the employer controls or supervises the contractor's work, and (2) such work is a part or process in the employer's trade or business." *Id*. at 307. The court further held, "It is not the actual exercise of control that determines whether an employer-employee relationship exists; it is the right to control that is determinative." Id. at 309 (citing Hinds v. Herm Hughes Sons, Inc., 577 P.2d 561 (Utah 1978); Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976); Smith v. Alfred Brown Co., 27 Utah 2d 155, 493 P.2d 994 (1972); Pinter Construction Co. v. Frisby, 678 P.2d 305, 308-310 (Utah 1984) ("Frisby was a subcontractor of Pinter Construction Company, which was under contract to construct a metal building. This court held that Frisby was an employee of Pinter because Pinter had the right to control Frisby. Therefore, this court held that Frisby, as an employee of Pinter, was entitled to workers' compensation.").

The Restatement (Third) of Agency § 7.07(2) provides: "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." As one discerns, the Restatement (Third) of Agency, the Courts regard control as the primary factor for determining whether or not an employee is within the scope of his or her employment. With control as the primary focus,

control and deterrence become a greater justification than whether the employee is acting to further the employer's business. The Courts focus on whether an employer had "actual or potential control" over an employee at the time of the injury to create vicarious liability.

Whether this Court applies New Hampshire law focused on the Restatement (Second) and it's myriad of exceptions or the Restatement (Second) or (Third) of Agency, Plaintiff has alleged a plausible set of facts demonstrating Defendant Trump Companies had control over Defendant Deck. Not only did Donald J. Trump and the Trump Companies have control over the Defendant Deck here, Deck acted to further the interests of Trump Companies and Defendant Trump.

The Second Amended Complaint (Doc. 75) makes clear in the first paragraph, the dominion Defendant Trump had over the Trump Companies with statements such as, "brave judges, like those in the Galicia et al. v. Donald J. Trump, et al. and KASHIYA NWANGUMA, et al. v. DONALD J. TRUMP, et al. cases, have attempted to hold Defendant Trump and those perpetrating violence on his behalf individually liable for condoning, authorizing, and participating in these rogue assaults." The first paragraph of the complaint also describes, "Trump supporters surrounded Plaintiff pushing him and punching Plaintiff viciously in the kidneys," and Plaintiff asking for assistance from Trump staff, who instead, "told him to shut up and leave," in furtherance of Defendant Trump's agenda. Appendix 8 of the complaint is full of videos which are titled after commands that Defendant Trump has given to Trump Companies and supporters, such as, "Get 'em out", "Take his coat", "Knock the crap out of em", and "Carried out on a stretcher." All of the commands in these instances are commands to commit violence, or do harm, and show the dominion Defendant Trump has over the Trump Companies, his campaign and his supporters.

On October 12, 2015, Defendant Trump, could at any time have prevented or deterred Defendants from committing the torts on the Plaintiff. Instead, Trump joked about Plaintiff's injuries "getting laughs" (Doc. 75 at ¶40) while soon new torts were unfolding right in front of him. Does anyone doubt that Defendants Trump Companies, led by Defendant Trump, had the power and control over the situation or that the Defendant Tortfeasors were acting within the scope of that employment? Additionally, Defendant Tortfeasors, "were often communicating through radios and headset apparatus." *Id*. at ¶168. Consequently, Plaintiff has plausibly alleged in his complaint such power and control in support of his claim that Defendant Trump Companies has respondeat superior liability.

In support of the Plaintiff's Complaint, Plaintiff cited Galicia v Trump. In that case, Justice Tapia found more than sufficient evidence of Defendant Trump's involvement in the controlling of security officers Deck, Gary Uher, and Keith Schiller. Justice Tapia explained:

> "There is ample evidence of Defendant Trump's dominion and control over the other defendants. In this analysis of the doctrine of respondeat superior, it must be noted the apparent association between defendants Trump, Trump Organization, and Trump Campaign, or synonymously the man, his company, and his campaign. Defendants' motion to disassociate the actions of Schiller, Uher, and Deck from Trump, his namesake company, and campaign as a matter of law is unavailing. To the contrary, plaintiffs raise ample issues of fact that contrary to moving defendants' claims, tends to exhibit Trump's dominion and control over Schiller, Uher, and Deck. Plaintiffs point out that Trump authorized and condoned the specific type of conduct of defendants Schiller, Uher, and Deck. Furthermore, plaintiffs proffer evidence that indicates Trump's knowledge of the altercation and subsequent seizure of the banner. The employment relationship between Uher and Deck and Trump Campaign is also a disputed issue of fact. Finally, the plaintiffs presented evidence that illustrates the close relationship between Trump and Schiller, indicating Trump's behest guided Schiller's actions. The fluidity of Schiller, Uher, and Deck's employment between Trump, Trump Campaign and Trump Organization present issues of facts that need to be addressed at trial." Galicia v Trump, INDEX NO. 24973/2015E NYSCEF DOC. NO. 342 Page 3, ¶ 8.

Also compelling are Defendant Deck's statements under oath. In an October 2, 2015

affidavit, in the case of Galicia v Trump, Defendant Deck wrote, "while conducting my duties and responsibilities to the Campaign, I observed a number of individuals… As part of my duties and responsibilities to the [Trump] Campaign I am tasked to utilize my extensive experience and training in law enforcement to assist in protecting personnel." INDEX NO. 24973/2015E NYSCEF DOC. NO. 38 ¶¶ 2, 3. Defendant Deck testified that he was "hired to preform [sic] security services for the Trump Organization." INDEX NO. 24973/2015E NYSCEF DOC 342, Page 20, (a scan of INDEX NO. 24973/2015E NYSCEF Doc 330 as an exhibit), (Deck tr at 27-32). Defendant Pittman testified in his affidavit (Doc. 75, at Appendix 16), "I was approached by a Trump Security Officer… The security Officer was identified as Edward Deck (11/16/1954)."

The law is clear. Even if a company hires what it believes to be an independent contractor, if the hiring party can exert control over and direct the work being done by the contractor to any degree, then that person is no longer an independent contractor and instead must be treated as an employee of the hiring company. Plaintiff has alleged in his second amended complaint sufficient facts and evidence supporting the elements necessary to support a plausible claim of vicarious liability on the part of the Defendant Trump Companies. Any reasonable person would find that an employment arrangement between Trump Companies and Defendant Deck and his participation in the event and his participation in the assault and battery of the Plaintiff would clearly indicate that they were acting at the behest of the Trump Companies and were employees and/or agents of the Trump Companies, and because Defendants Trump and Trump Companies had control over Defendant Tortfeasor and that Deck was thereby not an "independent contractor." Plaintiff should be entitled to the opportunity to further discover evidence to present at trial that said Defendant was an employee and/or agent of

Defendant Trump Companies and liability should extend to the Defendant Trump Companies. It would be inherently unjust for this Court to permit Defendant Trump Companies to escape respondeat superior liability while at the same time allow said Defendants to have gained from the cooperation of Defendant Tortfeasor acting under their control and at their direction and for their benefit. Accordingly, Defendants' motions to dismiss should be denied.

Plaintiff has alleged sufficient facts to state plausible claims that Trump Companies by jointly acting and/or conspiring with other Defendant Tortfeasors acted "Under Color of Law" and is, therefore, liable for (Counts 8- 13 and 15-17) as provided for by 42 U.S.C. §1983

42 U.S.C. §1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Supreme Court has held that private persons conspiring with local and state official(s) to deprive the Plaintiff of a federal right can be considered to be acting under "color of law" for purposes of Section 1983. In fact, Congress passed the "Ku Klux Klan Act of 1871," 42 U.S.C. §1983, to combat and provide redress for a vial ethos existing in the United States at that time. At that time, it was commonplace for State and Local officials together with law enforcement to gather friends and/or mobs, and using their badges of authority to assault, batter, maim, torture, rape, lynch, and murder their neighbors, former slaves, thus, denying them their civil rights with complete and total impunity.

To address the same horrors of that time or anytime, the Supreme Court has consistently held that private persons acting jointly with State or Local officials in the challenged action are acting "under color of law" for purposes § 1983 actions." In fact, it is enough that the private person is a willful participant in joint action with the State or its agents. Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) (Justice Harlan writes, "a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983); United States v. Price, 383 U.S. 787, 794 (1966)); Abbott v. Latshaw,164 F.3d 141, 147-48 (3d Cir. 1998). "[A]n otherwise private person acts 'under color of state law when engaged in a conspiracy with state officials to deprive another of federal rights." Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Dennis, 449 U.S. at 27-28); see also Adickes, 25398 U.S. at 152. In Cruz v. Donnelly, 727 F.2d 79 (3d Cir. 1984).

A §1983 defendant "may be held liable for 'those consequences attributable to reasonably foreseeable intervening forces, including acts of third parties.'" Warner v. Orange County Dep't of Prob., 115 F.3d 1068, 1071 (2d Cir. 1996) (quoting Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561 (1st Cir. 1989)). "Where multiple 'forces are actively operating,' . . . plaintiffs may demonstrate that each defendant is a concurrent cause by showing that his or her conduct was a 'substantial factor in bringing [the injury] about.' In a case of concurrent causation, the burden of proof shifts to the defendants in that 'a tortfeasor who cannot prove the extent to which the harm resulted from other concurrent causes is liable for the whole harm' because multiple tort-feasors are jointly and severally liable." Lippoldt v. Cole, 468 F.3d 1204, 1219 (10th Cir. 2006) (quoting Northington v. Marin, 102 F.3d 1564, 1568–69 (10th Cir. 1996)).

The existence of a conspiracy can be proved through circumstantial evidence. Adickes v.

S. H. Kress & Co., 398 U.S. 144, 152 (1970), 398 U.S. at 158 ("If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service.").

Although the Supreme Court has held that acting jointly with state officials is sufficient, the Third Circuit has suggested that the plaintiff must establish the elements of a civil conspiracy, express or implied "meeting of the minds," and an act in furtherance, in order to use the existence of the conspiracy to demonstrate state action. Melo v. Hafer, 912 F.2d 628, 638 n. 11 (3d Cir. 1990) (addressing plaintiff's action-under-color-of-state-law argument and"assum[ing], without deciding, that the complaint alleges the prerequisites of a civil conspiracy"), aff'd on other grounds, 502 U.S. 21 (1991). The Melo court cited Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980)). (Plaintiff must show both a conspiracy to violate the plaintiff's federal rights and an overt act in furtherance of the conspiracy that results in such a violation); Great Western Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 179 (3d Cir. 2010) (plead facts establishing a "meeting of the minds").

The Supreme Court's references to the "conspiracy" test do not emphasize the overt-act-resulting-in-violation requirement. Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970). (the relevant act in violation of the plaintiff's federal rights would necessarily have constituted an action by a co-conspirator in furtherance of the conspiracy); Hindes v. F.D.I.C., 137 F.3d 148, 158 (3d Cir. 1998) ("[F]ederal officials are subject to section 1983 liability when sued in their official capacity where they have acted under color of state law, for example in conspiracy with state officials").

Plaintiff has clearly alleged in his Second Amended Complaint that Defendant Trump Companies had an express or implied "meeting of the minds" with the Defendant Tortfeasors to prevent Plaintiff from publicly asking a question of Defendant Trump and to prevent Defendant Trump from having to seriously answer said question and then punished Plaintiff for attempting to ask that question. By failing to intervene or prevent the harm to Plaintiff, although he had control over Defendant Tortfeasors who were his agents and employees, Defendant Trump Companies demonstrated that they had a meeting of the minds for Defendant Tortfeasors to violate Plaintiff's civil rights. Hence, Defendant Trump Companies' conduct was a substantial factor in bringing about the injury to the Plaintiff and Defendant Trump Companies should be held jointly and severally liable with the other Defendant tortfeasors. As in *Adickes*, Plaintiff has pled sufficient facts to make out a plausible claim that Defendant Trump Companies and Defendants Deck, Doucette, and Defendant Pittman had a meeting of the minds to violate Plaintiff's civil rights.

Video evidence clearly demonstrates Defendants jointly participating together to violate Plaintiff's civil rights. **None** of the Defendants were acting alone. "Defendant Doucette, Deck, Trump staff, and Unidentified Individuals make a human wall around Plaintiff blocking his return to his seat." Doc. 75 (05/22/2019) at ¶ 43. "Defendant Doucette says something into Defendant Deck's ear." *Id*. at ¶ 49. "Defendants Deck and Pittman throw Plaintiff head-first into a table knocking it over." *Id*. at ¶ 53. "Defendants Deck, Pittman and Cosio push Plaintiff a few more feet, eventually aggressively throwing Plaintiff to the ground as Defendant Deck swears loudly at Plaintiff." *Id*. at ¶ 55b. "Defendant Aldenberg (with a rank of Sergeant, at the time), arrives and tells Plaintiff, 'you are not being detained,' and Defendant Craig concurs, saying, 'you can leave.'" *Id*. at ¶ 61. "Plaintiff, of his own accord, sits on a public park bench waiting for

Defendant Aldenberg to return with the battery, but instead records Defendant Aldenberg conferring with Defendants Pittman, Cosio and Craig in front of the Radisson Hotel/ Expo Center." *Id*. at ¶ 63. "Defendants Aldenberg, Craig, and Pittman arrest Plaintiff." *Id*. at ¶ 64.

Defendants performed acts in furtherance of their "meeting of the minds," jointly and for a common purpose and at no time did any of the Defendants attempt to stop, prevent, or protect Plaintiff from the deprivation of his civil rights. Plaintiff Second Amended Complaint has properly pled facts claiming that Defendant Deck conspired or jointly acted with Manchester Defendants in committing multiple torts on the Plaintiff. 42 U.S.C. 1983 provides that those who conspire with those acting under "color of law," are themselves liable under the civil rights laws. Defendant Deck as an employee of Defendants Trump Companies passes liability on to the Defendants Trump Companies. Accordingly, Defendants' motions to dismiss should be denied.

THE PLAINTIFF HAS ALLEGED FACTS SUFFICIENT TO STATE A CLAIM THAT DEFENDANT TRUMP COMPANIES OWED A DUTY OF CARE TO PLAINTIFF AND ARE LIABLE FOR NEGLIGENCE (COUNT IV)

Defendant Trump Companies contend that "Count Four must be dismissed because The Trump Organization Defendants did not owe a duty of care to the Plaintiff." Defendants further contend, "Private parties have no general duty to protect others from the criminal attacks of third parties" unless one of three exceptions applies: "(1) a special relationship exists; (2) special circumstances exist; or (3) the duty has been voluntarily assumed." citing *Dupont v. Aavid Thermal Techs*.,147 N.H. 706,709 (2002). Defendants' argument is critically flawed. As laid out previously, entities/ companies are liable for intentional acts of their employees. Edward Deck was an employee of Defendant Trump Companies (at or around the time of the incident), as he

testified in Galicia v Trump, INDEX NO. 24973/2015E NYSCEF DOC 342, Page 20

Even if the court concluded that Defendant Deck was not an employee of Defendant Trump Companies, (which he is/ or was), cases such as Remsburg v. Docusearch, 149 N.H. 148 (N.H. 2003), state, "The special circumstances exception includes situations where there is 'an especial temptation and opportunity for criminal misconduct brought about by the defendant,'" citing Walls v. Oxford Management Co., 137 N.H. at 658 (quotation omitted). Remsburg continues, "This exception follows from the rule that a party who realizes or should realize that his conduct has created a condition which involves an unreasonable risk of harm to another has a duty to exercise reasonable care to prevent the risk from occurring" *Id*.

Defendant Trump, as well as Trump security Keith Schiller are foreseeably dangerous individuals, who were world famous for their acts of violence and incitement to violence long before they entered the world of politics, wherein Mr. Trump has continued to incite violence at his events. As stated in paragraph 140 of the Second Amended Complaint, "Defendant Trump has purposefully cultivated fright, through his wrestling persona, in which he has bragged, that he wants people to be 'scared' and 'frightened' of his men… the violence Defendant Trump and his wrestlers committed on WWE was real. In fact, the Honorable Vanessa L. Bryant in Connecticut District Court has ruled in McCullough v. WWE that there is enough evidence to show that the violence on WWE is real, to the extent that she allowed Plaintiffs Singleton and LoGrasso to proceed… Defendant Trump promoted himself on World Wrestling Entertainment as 'Chairman of The Trump Organization,' just the same as Trump promoted himself at No Labels Problem Solvers."

Appendix 7 of Doc. 75, also makes reference to: "VIOLENT ACT BY DONALD TRUMP #1 VIDEO" in which Defendant Trump struck a man in the face on June 22, 2009,

"VIOLENT ACT BY DONALD TRUMP #2 VIDEO" in which Defendant Trump tackled a man and punched him in the face at least five times, while other wrestlers at the same event beat each other to bloody messes on July 19, 2011, "VIOLENT ACT BY DONALD TRUMP #3 VIDEO" in which Defendant Trump is seen Dec 8, 2013, pushing a man over a table, mirroring Defendant Deck's Oct 12, 2015 attack on Plaintiff, "VIOLENT ACT BY DONALD TRUMP #4 VIDEO" in which Defendant Trump is seen March 28, 2007, hitting another wrestler in the lobby of Trump Tower in New York City and Keith Schiller knocks the man to the ground. Staged, or not, the case of McCullough v WWE showed evidence that this violent behavior could cause, "head injury and… permanent brain damage," making Defendant Trump and his security staff foreseeable dangerous, and fraught with risk. (SEE APPENDIX TO DOC. 128.) Defendant Trump Companies knew or should have known that dangerous persons such as Defendant Trump, as well as Edward Deck, Keith Schiller may or were going to be present at the No Labels event. Said individuals have a history of violence and/or torts, assaults, and/or batteries and/or incitement to violence.Appendix 8 of Doc. 75 makes reference to several videos with Donald Trump's statements inciting violence in the titles, such as, "Get 'em out" video, "Take his coat" video, "Knock the crap out of em" video, "Carried out on a stretcher" video.

Doc. 75 (Appendix 4) lists dozens of cases of police misconduct, by the Manchester Police which vividly illuminate their troubled history, and show beyond a shadow of a doubt that the No Labels Problem Solvers event was foreseeably dangerous. The fourth and fifth sentences of ¶164 of the Second Amended Complaint state, "Of the documented years, available to the public, (2008-2017), there were at least 96 claims of rudeness/ conduct unbecoming (21 substantiated), 35 allegations of ineffective service (22 substantiated), 41 claims of unnecessary/ excessive force (2 substantiated), 62 allegations of Improper police action/ Improper conduct/

unlawful conduct (46 substantiated), and 56 claims of Neglect of Duty, (45 substantiated). Other claims of misconduct included (but is not limited to illegal activity, unlawful conduct, unlawful arrest, threatening behavior, Police Harassment, Untruthfulness, theft, evidence tampering, ineffective police service, and racial bias." In Manchester Defendants Answer, Doc. 101, they state, "The fourth and fifth sentences of the first paragraph of Paragraph 164 cite to Manchester Police Internal Affairs Investigation reports which speak for themselves."

At the Oct 12, 2015 event, Plaintiff asked Trump "if he was aware that Plaintiff had been assaulted in Rochester."Doc. 75 at ¶ 40. "Defendant Doucette, Deck, Trump staff, and Unidentified Individuals make a human wall around Plaintiff blocking his return to his seat." Id. at ¶ 43. "Defendants Deck and Pittman throw Plaintiff head-first into a table knocking it over." *Id*. at ¶ 53. Defendant Deck, who assaulted and battered Plaintiff was an employees and agent of Defendant Trump Companies who owed a duty of care. The Defendants, "breached that duty of care and their breach proximately caused the Plaintiff's injuries." *Id*. at ¶ 134. "Due to Defendant Deck's previous history of assaults and batteries, Defendants… were aware or should have been aware that Defendant Deck and Trump Companies security and Trump supporters were prone to commit assault and battery on any person they perceived to be opposed to Defendant Trump." *Id*. at ¶ 135.

Plaintiff has properly alleged that Defendant Deck was an employee/agent of Defendant Trump Companies at the time of the No Labels Problem Solver event and that he did indeed commit multiple torts upon the Plaintiff. Plaintiff has alleged sufficient facts to make a plausible claim of Negligence by Defendant Trump Companies as provided by New Hampshire law. Defendant Trump Companies are liable under respondeat superior because Defendants Deck, was an employee or agents of Defendant Trump Companies. Plaintiff had included evidence of

negligence in support in Appendices 1-16 of Plaintiff's Second Amended Complaint, (Doc. 75.) Accordingly, Defendants' motions to dismiss should be denied.

REFERENCE: Many of the same issues are found and argued in many of the replies and motions, and so for economy please reference them.

CONCLUSION: Defendant's motion to dismiss should be denied in its entirety and Plaintiff should be given the opportunity to further discover what, when, and how Defendants Trump Companies, Defendant Trump Campaign, and Defendant Trump employed Defendant Deck in regard to Plaintiff's complaint. If, as Defendants seem to claim, that they did not pay Defendant Deck for security services relating to the events of this complaint, Defendants can easily, legally, and with candor stipulate to that fact. However, as Plaintiff has properly alleged and contends herein and as evidenced by Defendant Deck and Mr. Schiller's previous admissions in other lawsuits, none of these individuals seem to know exactly for what entity they are working and those entities seem to not know for sure whom they are paying for what and when. However, they all know that they are working for Defendant Trump because those entities are mere alter egos of Defendant Trump; Not even their lawyers can properly name their clients in some of the documents submitted to this very Court. Therefore, Plaintiff asks the Court to deny Defendants' motion and permit the facts to tell the truth rather than these corporate fictions because the FEC filings and previous court cases, and Defendant Deck certainly have told a different story than what the Defendants herein contend.

Pro Se Plaintiff, Roderick Webber,

Signed_Rod Webber, July 12, 2019