UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

RODERICK WEBBER, Plaintiff v. EDWARD DECK, ET AL., Defendants	)	Case No. 1:18-cv-00931-LM

REPLY OF DONALD J. TRUMP TO PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS

Defendant Donald J. Trump submits this reply to plaintiff's objection to Mr. Trump's motion to dismiss the second amended complaint.

I. Introduction

In his opening brief, Mr. Trump explained why plaintiff's claims against him must be dismissed as a matter of law. Plaintiff's objection to Mr. Trump's motion does nothing to overcome the complaint's deficiencies highlighted in Mr. Trump's opening brief.

Plaintiff, for instance, makes a straw-man argument that Mr. Trump is not immune from civil liability. Yet Mr. Trump never claimed immunity. Mr. Trump, the sitting President of the United States, instead argued that the court should decline to exercise jurisdiction under the prudential separation-of-powers concerns raised in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Plaintiff's objection never responds to that argument actually made by Mr. Trump.

Plaintiff also cites nothing that supports his allegation that Mr. Trump can be held vicariously liable for the conduct of individuals who removed plaintiff from the No Labels event.

Plaintiff's reliance on "alter ego" and "central figure" theories is inconsistent with New Hampshire law.

Lastly, plaintiff's argument that Mr. Trump, who participated in the No Labels event as a private citizen, conspired with state actors to violate plaintiff's civil rights does not state a claim. Conspiracies must be alleged with particularity. The second amended complaint's vague and conclusory allegations that Mr. Trump "conspired" or had a "meeting of the minds" with Manchester police officers fall far short of this standard.

In light of the foregoing and plaintiff's failure to allege or argue a cognizable basis for Mr. Trump's direct liability, the second amended complaint must be dismissed with prejudice.

II. Argument

This court's analysis of Mr. Trump's motion to dismiss is limited to whether the facts pled in plaintiff's second amended complaint – *not* assertions made in plaintiff's objection – plausibly state a legal claim for relief. *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-87 (2009). They do not. The second amended complaint, at most, asserts a myriad of legal conclusions that this court should not accept as true. *King v. Friends of Kelly Ayotte*, 860 F. Supp. 2d 118, 123 (D.N.H. 2012), aff'd without opinion, 12-1891 (1st Cir. 2013) (citing authorities). The courts have been clear that allegations like those in the second amended complaint that are legal conclusions "with the defendant's name merely plugged into the elements of the claim fail to state a claim." *Katz v. McVeigh*, 931 F. Supp. 2d 311, 343

(D.N.H. 2013), aff'd without opinion, 13-1453, 13-1529 (1st Circ. 2014) (internal quotation marks and brackets omitted).[1]

A. The Supreme Court Has Made Clear that Lawsuits Against the Sitting President of the United States are Disfavored.

Plaintiff's objection contends that courts do not disfavor civil lawsuits against the sitting President of the United States. In support, plaintiff cites only cases holding that the sitting president is not immune from civil suit. This misunderstands Mr. Trump's argument.

As explained in Mr. Trump's opening brief, because of the "sheer prominence of the President's office," the President is "an easily identifiable target" for vexatious and politically motived lawsuits. *Nixon* 457 U.S. at 752–53. Moreover, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. Courts must therefore review complaints with care, and "balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch," Doc. 98 (06/05/2019) at 3, lest a plaintiff use "civil discovery" on "meritless claims" to interfere with the President's "ability to discharge" his constitutional responsibilities. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 382, 386 (2004). This prudential balancing test from *Nixon*

[1] As examples, this court has rejected the following conclusory statements as insufficient to state a claim: (1) that it was the policy and practice of an organization to fail to properly supervise, train and control its employees, who allegedly perpetrated abuse on children, *Katz*, 931 F. Supp. 2d at 342; (2) that employees of an organization "caused the publication of false, misleading and untrue information" about the plaintiffs, *id.* at 356; (3) that the defendants' actions were "inspired by unlawful racial animus," *King*, 860 F. Supp. 2d at 128; (4) that the defendants engaged in "concerted actions" to deprive the plaintiff of his due process rights, *Puiia v. Cross*, 2012 DNH 135 at 9; and (5) that a judge and members of the New Hampshire Attorney Discipline Office discriminated against a plaintiff's lawyer because of the plaintiff's ethnicity and national origin, *Omran v. Laplante*, No. 1:16-cv-00005-DBH, 2016 WL 3351921, at *3 (D.N.H. May 27, 2016), report and recommendation adopted, No. 1:16-cv-05-DBH, 2016 WL 3351005 (D.N.H. June 14, 2016). Plaintiff's bare allegations against Mr. Trump are equally deficient as these examples. Note: The President was unable to find the opinion for *Omran* on the court's website and therefore could not provide the citation in the form required by LR 5.3(b). He has therefore provided the citation in accordance with LR 5.3(c).

remains the controlling standard to determine whether the federal courts should refrain from exercising their jurisdiction.

Plaintiff's objection places undue reliance on the Supreme Court's decision in *Clinton v. Jones*, 520 U.S. 681 (1997), as supporting the exercise of jurisdiction here. To begin with, *Clinton* did not purport to overrule *Nixon*. Unlike in that case, which involved allegations that Mr. Clinton *himself* had made unwanted advances on, and retaliated against, Ms. Jones, *id.* at 685, plaintiff has asserted no allegation that Mr. Trump personally committed any wrongful act against plaintiff. In fact, the only interaction between Mr. Trump and plaintiff alleged in the second amended complaint is a statement by Mr. Trump to plaintiff where he said that "You look healthy to me" in response to plaintiff's claim he was injured at an earlier event. The potential interests to be served in civil litigation involving allegations of torts personally committed by a sitting President are substantially greater than in this case – which rests on a broad (and erroneous) theory of vicarious liability to try to shoehorn a claim against the sitting President for alleged acts of others.

The weakness of plaintiff's broad theories, coupled with plaintiff's apparent hostility toward Mr. Trump, makes clear that this is a vexatious, politically motivated lawsuit as to Mr. Trump. *See, e.g.*, Doc. 75 (05/22/2019) at ¶1 ("Defendant Trump's goal is to deprive press and anyone asking serious questions from having a voice, and thereby create a 'chilling effect' on speech in order to exert control over our political system and our nation's affairs for his own personal gain."). Plaintiff appears only to have named Mr. Trump as a defendant because of who he is, not anything that he did. This case thus presents a paradigm circumstance in which the court should decline to exercise civil jurisdiction under *Nixon*.

B. Plaintiff Does Not Allege or Argue a Cognizable Basis Upon Which to Impose Vicarious Liability on Mr. Trump.

Mr. Trump's opening brief in support of his motion to dismiss demonstrated that plaintiff's second amended complaint fails to allege a basis on which the court could conclude that the individuals who removed plaintiff from the No Labels event were Mr. Trump's employees or agents. Doc. 140 (07/15/2019) at 8-9 et seq. Plaintiff does not maintain in his objection that any of those individuals were Mr. Trump's employees or agents under traditional standards of employment or agency. Instead, plaintiff argues that Mr. Trump should be held liable under either an alter ego or "central figure" theory – neither of which is supported by New Hampshire law.

1. Plaintiff Has Not Alleged Facts That Would Enable the Court to Infer That Mr. Trump is the "Alter Ego" of Any of the Other Defendants.

Plaintiff contends in the second amended complaint that Mr. Trump is vicariously liable for plaintiff's removal from the No Labels event based on allegations that the individuals who removed plaintiff from the event were Mr. Trump's agents. See, e.g., Doc. 75 (05/22/2019) at ¶112. In his objection to the motion to dismiss, however, plaintiff devotes ten pages to a new argument that Donald J. Trump for President, Inc. (the "Campaign"), The Trump Organization, Inc., Trump Organization, LLC, The Trump Corporation, and The Trump Foundation are a single enterprise and that Mr. Trump "sits at the top, controlling them all." Doc. 140 (07/15/2019) at 3-13 and *id.* at 12. According to plaintiff, these entities are "one and the same" and "everybody knows" that Mr. Trump "dominates and controls those entities," making him the "alter ego" of the single enterprise. *Id.* at 11.

Plaintiff's single enterprise theory of liability is based largely on California law and is inconsistent with New Hampshire law. *See Michnovez v. Blair, LLC*, 795 F. Supp. 2d 177, 186-

87 (D.N.H. 2011) (single enterprise theory is law in California but New Hampshire Supreme Court decisions are irreconcilable with this theory), *citing Village Press, Inc. v. Stephen Edward Co.*, 120 N.H. 469, 471 (1980). New Hampshire's alter-ego doctrine is far more circumscribed than in California. Under New Hampshire law, the doctrine of piercing the corporate veil to reach the corporation's alter ego permits a "person with a claim against a corporation to recover from the principal of that corporation *when the principal abuses the corporate form*." *Martinez v. Petrenko*, 792 F.3d 173, 181 (1st Cir. 2015) (emphasis supplied) (citing *Terren v. Butler*, 134 N.H. 635, 638-40 (1991)). To state a veil-piercing claim, "plaintiffs must allege facts that show the defendant suppressed the fact of incorporation, misled his creditors as to the corporate assets, or otherwise used the corporate entity to promote injustice or fraud." *McCarthy v. Waxy's Keene, LLC*, 2016 DNH 133 at 11 (internal quotation marks omitted) (citing authorities). The fraud or injustice must be *caused* by the misuse of the corporate form. *Bates v. Private Jet Commercial Grp., Inc.*, 2013 DNH 030 at 2-3 ("It is only when the shareholders disregard the separateness of the corporate identity and when that act of disregard causes the injustice or inequity or constitutes the fraud that the corporate veil may be pierced." (*quoting NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 (10th Cir. 1993))). In determining whether a corporation and its owners are alter egos, New Hampshire courts have also considered whether shareholders disregarded corporate formalities. *GE Mobile Water, Inc. v. Red Desert Reclamation, LLC*, 6 F. Supp. 3d 195, 203 (D.N.H. 2014) (citing *Mbahaba v. Morgan*, 163 N.H. 561, 569 (2012)); *see also Terren*, 134 N.H. at 640.

Plaintiff has not alleged that Mr. Trump suppressed the Campaign's or Trump Organizations' status as jural entities, misled creditors as to their assets, caused plaintiff's alleged injuries by disregarding the corporate form, or disregarded corporate formalities. Under

New Hampshire law, then, plaintiff has failed to allege facts that would permit the reasonable inference that Mr. Trump is the alter ego of the Campaign or the Trump Organizations.

C. Plaintiff's Allegations that Mr. Trump is a "Central Figure" in the Campaign and the Trump Business Entities Does Not Support Imputation of Vicarious Liability to Mr. Trump for the Allegedly Tortious Conduct Described in the Second Amended Complaint.

Plaintiff contends that Mr. Trump should be held liable for the tortious acts of alleged agents of the Campaign because he was the "guiding spirit" or "central figure" behind the alleged wrongdoing. Doc. 140 (07/15/2019) at 14. Plaintiff has alleged no facts supporting this characterization.

Plaintiff relies principally on *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902 (1st Cir. 1980), a case applying Puerto Rico law, in which the court held that "[c]ases which have found personal liability on the part of corporate officers have typically involved instances of *direct personal participation*, as where the defendant was the 'guiding spirit' behind the wrongful conduct . . . or the 'central figure' in the challenged corporate activity." *Escude Cruz*, 619 F.2d at 907 (emphasis supplied). In other words, central-figure liability is not a form of vicarious liability. It is predicated upon a corporate officer's direct participation in allegedly wrongful conduct.

Plaintiff also cites *Marks v. Polaroid Corp.*, 237 F.2d 428 (1st Cir. 1956), which addressed the validity of federally granted patents. In that case, a small, close corporation was alleged to have infringed on patents held by the Polaroid Corporation. The close corporation held licenses to patents owned by Alvin Marks. *Id.* Marks was a one-third owner of the corporation, supervised and directed the building of the machines used to manufacture the product, was thoroughly familiar with the details of the processes, and was the patentee of the patents licensed to the corporation. *Id.* at 435. The court held that Marks was the "guiding

spirit" behind the corporation's infringement because the infringement would not have occurred but for his personal actions. *Id.* The court found Marks to be more than an officer, board member, or owner. He was the "moving, active, conscious force behind [the corporation's] infringement." *Id.; cf. Coach, Inc. v. Sapatis*, 27 F. Supp. 3d 239 (D.N.H. 2014) ("[M]ere 'status as an officer of a corporation that has allegedly [contributorily] infringed . . . without more is not a basis for liability as a contributory infringer.'"). In this case, the only act plaintiff attributes to Mr. Trump is his statement "You look healthy to me." There is no allegation that Mr. Trump even knew of, let alone suggested or directed plaintiff's removal from the No Labels event. In short, even assuming the truth of all the facts alleged in the complaint, plaintiff does not state a plausible claim that that Mr. Trump was a central figure or "guiding spirit" in bringing about plaintiff's alleged injuries.

D. There are No Allegations in the Second Amended Complaint Upon Which the Court Could Reasonably Infer that Mr. Trump was Acting Under Color of Law.

Plaintiff contends that Mr. Trump, who attended the No Labels event as a private citizen, is liable for federal civil rights violations under 42 U.S.C. §1983 on theory that private persons acting jointly with state or local officials are acting under color of law. Doc. 140 (07/15/2019) at 20. To begin with, plaintiff has not pled any facts alleging that Mr. Trump was acting jointly with state or local officials. The second amended complaint alleges that other parties worked in concert with the Manchester police, not Mr. Trump. Doc. 75 (05/22/2019) at ¶¶ 41-55.

"When the named defendant in a section 1983 case is a private party, the plaintiff must show that the defendant's conduct can be classified as state action . . . . If there is no state action, the plaintiff's claim fails." *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 8 (1st Cir. 2015) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)); see also *United States v. Price*, 383 U.S. 787,

794 n.7 (1966) ("In cases under §1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment"). The Supreme Court has explained that in order to convert private actions into state action, there must be "something more." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). The Supreme Court has used four tests to determine whether there has been the requisite "something more": (1) the public function test; (2) the state compulsion test; (3) the nexus test; and (4) the joint action test. *Id.* Plaintiff relies only on cases applying the state compulsion and joint action tests, both of which prove inapposite to the facts alleged here.

Under the state compulsion test private conduct will be considered state action only if it takes place "against a backdrop of state compulsion or involvement." *Adickes,* 398 U.S. at 169. Plaintiff does not allege any facts in his second amended complaint that would support an inference that Mr. Trump himself took action against plaintiff as a result of compulsion or involvement by state actors. On the contrary, plaintiff's second amended complaint alleges that individuals other than Mr. Trump engaged in tortious conduct for which Mr. Trump should be held liable. Doc. 75 (05/22/2019) at ¶¶41-55. That is not sufficient to state a claim under the state compulsion test.

Under the joint action test, private conduct will be considered state action only when a private party jointly participates with a state official in the carrying out of the state actor's duties, such as by seizing disputed property. *Lugar*, 457 U.S. at 941. Plaintiff has not alleged any facts that would support an inference that Mr. Trump acted jointly with a state actor at the No Labels event. At most, plaintiff alleges that Mr. Trump was merely aware that the Manchester police were present to maintain order at the event. Yet the joint action test does not convert a private

party into a state actor simply because the private party relies "on some state rule governing their interactions with the community surrounding them." *Id.* at 937.

Plaintiff's application of the joint action test, moreover, is premised on his assertions that there was a conspiracy between Mr. Trump and the individuals who removed plaintiff from the event. Doc. 140 (07/15/2019) at 24. An allegation of conspiracy, however, must include facts establishing that an agreement was made. *Katz*, 931 F. Supp. 2d at 340. An allegation of parallel conduct and an assertion of conspiracy is insufficient to state a claim. *Id*. at 340. A conclusory allegation that an agreement was made at some unidentified point in time likewise will not suffice. *Id.*

Plaintiff has not alleged the making of any such agreement, or even of parallel conduct between Mr. Trump and those who removed plaintiff from the No Labels event. Instead, plaintiff has relies on bald statements such as "Defendant Trump had an express or implied 'meeting of the minds' with the Defendant Tortfeasors" without actually alleging any facts that, if true, would establish an agreement. Plaintiff's generic and barebones allegations do not state a claim for conspiracy or, by extension, joint action in which Mr. Trump participated. *Ante* at 2-3. Doc. 140 (07/15/2019) at 24.

III. Conclusion

In accordance with the foregoing, Mr. Trump respectfully requests that plaintiff's claims against him be dismissed.

Respectfully submitted,

Donald J. Trump,
By His Attorneys,

Date: July 26, 2019

/s/ Bryan K. Gould

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CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically upon the persons listed below through the court's ECF system.

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