**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**RICHMOND DIVISION**

ROY COCKRUM, ET AL.,

*Plaintiffs*,

v.

DONALD J. TRUMP FOR PRESIDENT, INC.,

*Defendant*.

Case No. 3:18-cv-484-HEH

# DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC.'S SUPPLEMENTAL RESPONSE BRIEF ON CHOICE OF LAW

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## ARGUMENT

There are three ways in which the Court could rule that Plaintiffs fail to state a claim against the Campaign under Virginia's choice-of-law rules. First, and most obviously, the Court should apply the law of the State of New York. In Virginia, tort claims are governed by the law of the place of the wrong, and the place of the wrong is defined as the place of the defendant's wrongful act. Taking allegations in the Amended Complaint as true, the wrongful act in this case took place in New York. The alleged wrongful act is the posting of Plaintiffs' materials on the internet; Virginia presumes that a corporate defendant posts material on the internet from its headquarters; and the Campaign is headquartered in New York. Plaintiffs' claims fail under the law of New York, because New York does not recognize Plaintiffs' tort theories.

Second, if New York is not the place of the wrong, the Court should apply the law of Virginia. At the hearing on the motion to dismiss, the Court asked what it should do if the allegations in the complaint do not clearly identify the place of the wrong. The answer under Virginia's choice-of-law rules is simple: Where the place of the wrong is not clear from the complaint, a court should default to the law of the forum—*i.e.*, to Virginia's own law. As relevant here, Virginia law and New York law are identical. So the result is also identical: Plaintiffs' claims fail.

Finally, in all events, the Court need not affirmatively decide which state's laws *do* apply. All it needs to do is determine that the laws of Tennessee, New Jersey, and Maryland *do not* apply. Plaintiffs invoke the laws of these states, but they have not identified any "wrongful act," or for that matter any act at all, that occurred there. The only thing that happened in these states is that Plaintiffs live there. Yet Virginia's choice-of-law rules could not be clearer: A plaintiff cannot invoke his home state's laws based on his residence there.

Under any one of these three approaches—and also for the many further reasons set out in the Campaign's motion to dismiss—the Court should dismiss the tort claims.

**A. The Court should dismiss Plaintiffs' claims in accordance with New York law**

**1.** The parties agree that this Court should use Virginia's choice-of-law rules, because Virginia is the forum state. "Virginia applies the *lex loci delicti*, the law of the place of the wrong, to tort actions." *Milton v. IIT Research Institute*, 138 F.3d 519, 522 (4th Cir. 1998). Virginia defines the "place of the wrong" as the place where the defendant committed the wrongful act, not the place where the plaintiff suffered the injury.

This definition follows from the Virginia Supreme Court's decision in *Buchanan v. Doe*, 431 S.E. 2d 289 (Va. 1993). There, the Supreme Court explained: "The word 'tort' has a settled meaning in Virginia. A tort is any civil wrong or injury; a wrongful act." *Id.* at 291. *Buchanan* establishes that the place of the tort—the wrong—is the place of the "wrongful act."

The Fourth Circuit elaborated on this point in *Milton*. It began by quoting *Buchanan*: "The word 'tort' has a settled meaning in Virginia. A tort is any civil wrong or injury; a wrongful act." 138 F.3d at 522. The court continued: "Thus Virginia's choice of law rule selects the law of the state in which the wrongful act took place, wherever the effects of that act are felt." *Id.* at 522. The court repeated: "Virginia clearly selects the law of the place where the wrongful act occurred, even when that place differs from the place where the effects of injury are felt." *Id.* For example, if a plaintiff sues for "wrongful discharge," the case is governed by the law of the place of the "office," because that is the place where the "termination"—the wrongful act—occurred. *Id.* If a plaintiff sues for "fraud arising out of a failed real estate investment," the case is governed by the law of the place of the real estate, because that is the place where the fraud—the wrongful act—occurred. *Id.* And if a plaintiff sues for "a car accident," the case is governed by the law of the place of "the accident," once again because that is where the relevant "tortious conduct" occurred. *Id.* In short, the place of the wrong is the place of the "wrongful act" or "tortious conduct."

**2.** Where a plaintiff sues a defendant for publishing information, the defendant's "wrongful act" or "tortious conduct" occurs in the location from which the defendant publishes the information. Where the defendant is a corporation, courts ordinarily presume that the defendant made the publication from its corporate headquarters. Here are some examples.

• In *ABLV Bank v. Center for Advanced Defense Studies Inc.*, 2015 WL 12517012 (E.D. Va. April 21, 2015), a bank that did business "in New York" sued a corporation "based in Washington, D.C." for defamatory statements in an online report. *Id.* at *1. The court applied D.C. law: "[I]t is undisputed that [the] report was published from [the defendant's] Washington, D.C. office. It is irrelevant that the negative effects of the publication were felt in New York; any reputational damage caused by [the report] occurred everywhere due to the nature of online publication. Thus, D.C. law shall govern the case." *Id.* at *2.

• In *Wiest v. E-Fense, Inc.*, 356 F. Supp. 2d 604 (E.D. Va. 2005), the plaintiff sued a corporation for libel and invasion of privacy on account of statements published on the corporation's website. The court ruled: "Because Plaintiff alleges that 'the website in question is controlled from [the defendant's] corporate headquarters located in Virginia,' and the allegedly defamatory statements were published on this website, Virginia law applies." *Id.* at 608.

• In *Mid-Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 1993 WL 130131406 (Va. Cir. Sep. 22, 1993), a plaintiff sued a Virginia company for making false statements that tortiously interfered with contractual relations. The state court ruled: "The allegedly wrongful acts of the defendants emanated from Virginia. Any promotion of false rates, or other fraudulent acts, flowed from the company's principal place of business in Tyson's Corner, Virginia. Because Virginia is the locus for any wrongful acts which may have occurred, Virginia substantive law regarding tortious interference should apply." *Id.* at *1.

**3.** In this case, the alleged wrongful act is the publication of material on the internet. The Amended Complaint alleges that the Campaign has "its permanent headquarters in New York." (Am. Compl. ¶ 35.) As a result, the Court should presume that the Campaign published the materials from New York. In the words of the state court in *Mid-Atlantic*, because New York is the Campaign's "principal place of business," it is the place from which the "allegedly wrongful acts … emanated," the place from which the alleged torts "flowed," and "the locus for any [alleged] wrongful acts." *Mid-Atlantic*, 1993 WL 130131406, at *1. The upshot is that New York law governs Plaintiffs' tort claims. There is no dispute that New York law rejects those claims.

### B. If the Court cannot determine the place of the wrong from the complaint, it should dismiss Plaintiffs' claims in accordance with Virginia law

At the hearing on the motion to dismiss, the Court asked what it should do if it cannot determine from the complaint whether New York is the place of the wrong. Virginia's choice-of-law rules answer the Court's question. They establish a backup rule: If a court cannot determine the place of the wrong from within the four corners of the complaint, it should, at the motion-to-dismiss stage, apply the law of the forum state—*i.e.*, the law of Virginia. For example:

• In *Overstock.com, Inc. v. Visocky*, 2018 WL 5075511 (E.D. Va. Aug. 23, 2018), the court ruled: "Plaintiff has failed to provide any specific information as to where the wrongful acts … took place. Therefore, because Plaintiff has provided no information upon which to conduct a formal choice-of-law analysis, the [court] will utilize Virginia law, as the law of the forum state." *Id.* at *9 n.5.

• In *Jeffrey J. Nelson & Assocs. v. LePore*, 2012 WL 267342 (E.D. Va. July 5, 2012), the court ruled: "Here, there is nothing in the Counterclaim … indicating where the alleged tortious acts took place. … Because it is presently unclear where the allegedly wrongful acts took place, the Court will … apply Virginia law with respect to the tort related counterclaims." *Id.* at *7.

Virginia is not alone. It is a longstanding principle of choice of law that, where a court cannot determine the law that properly applies, it should default to the application of forum law. *See, e.g.*, *Karim v. Finch Shipping Co.*, 265 F.3d 258, 272 (5th Cir. 2001) ("When the parties have failed to conclusively establish foreign law, a court is entitled to look to its own forum's law"); *Pioneer Credit Corp. v. Carden*, 245 A.2d 891, 234 (Vt. 1968) ("In this dilemma, … the trial court was justified in turning to the law of the forum"); *Leary v. Gledhill*, 84 A.2d 725, 728 (N.J. 1951) ("[Upon] failure to plead and prove the applicable foreign law ... courts … merely apply the law of the forum as the only law before the court"); *Savage v. O'Neil*, 5 Hand 298, 301 (N.Y. 1871) ("in the absence of proof our own law must of necessity furnish the rule").

In this case, the Campaign believes that the Court *can* determine the place of the alleged wrongful act from the complaint, because of the presumption that a corporation acts from its headquarters. But if the Court disagrees, Virginia law identifies the proper approach: Apply Virginia's own law, because Virginia is the forum state.

The law of Virginia leads to the same result as the tort law of New York, namely, the dismissal of Plaintiffs' tort claims. The public-disclosure claims must be dismissed, because Virginia, like New York, "does not have a common law right of privacy." *Brown v. Am. Broad. Co.*, 704 F.2d 1296, 1303 (4th Cir. 1983); *see WJLA-TV v. Levin*, 564 S.E. 2d 383, 394 n.5 (Va. 2002) (holding that "the General Assembly has implicitly excluded [public disclosure of private facts] as [an] actionable tor[t] in Virginia"). The intentional-infliction claim must also be dismissed, because a plaintiff may not use the intentional-infliction tort to circumvent the unavailability of the privacy tort, and because, in any event, "a plaintiff may not assert a cause of action in Virginia for civil conspiracy to intentionally inflict emotional distress." *Almy v. Grisham*, 639 S.E. 2d 182, 189 (Va. 2007).

### C. The Court should, at a minimum, dismiss the tort claims on the ground that Tennessee, New Jersey, and Maryland law do not apply to this case

In all events, the Court does not need to decide which state's laws do govern this case. Plaintiffs have pleaded claims specifically under the laws of Tennessee, New Jersey, and Maryland; therefore, the Court need only decide that the laws of those states do *not* govern this case.

There is one thing—and only one thing—that distinguishes Tennessee, New Jersey, and Maryland from the remaining 47 states in the Union. That is the allegation that Plaintiffs lived in those states at the time of the alleged torts. But it is blackletter law in Virginia that a plaintiff cannot invoke the law of a state merely because he happens to be domiciled there. The Virginia Supreme Court has explicitly rejected "the so-called 'modern trend' [of] applying the law of the domicile of the parties." *McMillan v. McMillan*, 253 S.E.2d 662, 663 (Va. 1979). And the Fourth Circuit has ruled that "application of the law of plaintiff's domicile" to tort cases would "disregard the directive of Virginia law." *Milton*, 138 F.3d at 522. That should be the end of the case.

Plaintiffs nonetheless make three general arguments for choosing the law of their home states. Each argument is unpersuasive.

*First*, Plaintiffs argue that their home states' laws govern because "the Plaintiffs suffered legal injury" in those states. (Supp. Mem. 4.) This argument is incorrect. Under Virginia law, the commission of the wrongful act *is* the "legal injury." *Milton* explains: "The word 'tort' has a settled meaning in Virginia. *A tort is any civil wrong or injury; a wrongful act*." 138 F.3d at 522 (emphasis added). *Milton* continues: "[In a claim] for fraud arising out of a failed real estate investment in Virginia … Virginia law governed … *as Virginia was the place where the tortious conduct—the legal injury—occurred*." *Id.* (emphasis added). In other words, under Virginia law, "injury occurs at the point of the wrongful act." *Self Insured Servs. Co. v. Panel Sys., Inc.*, 2018 WL 5260025, at *7 (E.D. Va. Oct. 22, 2018).

Plaintiffs, however, argue that the "legal injury" occurred in their home states (where they experienced the harm), rather than in the Campaign's state (where the allegedly wrongful act was committed). Plaintiffs are playing semantic games with the word "injury": Instead of defining the "legal injury" as the commission of the wrongful act, they define the "legal injury" as the harm the plaintiff experiences as a consequence of the wrongful act. That argument is mistaken. There are numerous cases from Virginia holding that the place of the wrong is the place where the actor acted, not the place where the plaintiff sustained the harm. For example:

• "Virginia's choice of law rule selects the law of the state in which the wrongful act took place, wherever the effects of that act are felt." *Milton*, 138 F.3d at 522.

• "[The] inquiry looks at where the allegedly tortious conduct took place." *JTH Tax, Inc. v. Williams*, 310 F. Supp. 3d 648, 657 (E.D. Va. 2018).

• "[The] claims are governed by the law of the place where [the defendant's] allegedly tortious conduct took place, irrespective of where [the plaintiff] sustained the injury." *General Assur. of Am., Inc. v. Overby-Seawell Co.*, 893 F. Supp. 2d 761, 778 (E.D. Va. 2012).

To be sure, Plaintiffs identify some authorities—such as the First Restatement of Conflict of Laws, a treatise from 1935, and cases from outside Virginia—that focus on the place of the plaintiff's harm. But these authorities do not reflect *Virginia* law, because they do not account for Virginia's distinctive interpretation of the concepts of "tort" and "legal injury." This Court has recognized that Virginia is unique: "Indeed, it is under Maryland law, not Virginia law, that the place of the tort is considered to be the place where the [harm] was suffered, not where the wrongful act took place. Although both states recognize the doctrine of *lex loci delicti*, Maryland and Virginia courts differ in their discussion of the doctrine in this critical respect." *Gen. Assur.*, 893 F. Supp. 2d at 778.

*Second*, Plaintiffs argue that their home states' laws govern because "the last event" necessary to complete the tort occurred in those states. (Supp. Mem. 2 (quoting *Quillen v. Playtex, Inc.*, 789 F.2d 1041 (4th Cir. 1986).) Under Virginia law, however, the last event occurred in New York, and certainly not in Plaintiffs' home states. Virginia interprets the term "last event" to refer to the last wrongful act: "The place of the harm is defined as the place where the last event necessary to make an actor liable for an alleged tort takes place. *This inquiry looks at where the allegedly tortious conduct took place*." *JTH*, 310 F. Supp. 3d at 657 (emphasis added).

Once more, Plaintiffs are playing semantic games. In their view, the "last event" occurs when the last element of the plaintiff's cause of action falls into place, not when the defendant engages in the last wrongful act. Virginia, however, simply does not interpret the "last event" test that way. In Virginia, the place of the last event is the place of the "wrongful act," not the place where "the effects of that act are felt." *Milton*, 138 F.3d at 522.

Under Plaintiffs' contrary interpretation, *Milton* would become a dead letter. *Milton* explicitly distinguished between the "wrongful act" and the "effects of that act." 138 F.3d at 522. But Plaintiffs' "last event" theory would collapse that distinction. After all, damages is an element of almost every tort claim. And damages necessarily occur after the wrongful act. Therefore, under Plaintiffs' interpretation, the plaintiff's damages (rather than the defendant's wrongful act) will almost always be the "last event" necessary to complete the tort. That cannot be right, because it is the opposite of what the Fourth Circuit said in *Milton*.

In all events, Plaintiffs lose even under their own interpretation of the "last event" test. "The generally recognized elements of the tort of public disclosure of private facts are: (1) the publication, (2) absent any waiver or privilege, (3) of private matters in which the public has no legitimate concern, (4) such as to bring shame or humiliation to a person of ordinary sensibilities."

*McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 78 (8th Cir. 1976); *see* Restatement (Second) of Torts § 652D. As a result, the "last event" that completes the tort is the defendant's publication of the private information. The reader's receipt of the information is not an event necessary to complete the tort, because, as Plaintiffs themselves state, the tort "does not require proof" that anyone "actually read the material." (Supp. Mem. 8 n.5; *see* Second Restatement § 652D, comment a.) The plaintiff's suffering also is not an event necessary to complete the tort, because the fourth element asks whether the disclosure would objectively cause suffering to "a reasonable person," not whether the disclosure subjectively caused suffering to this particular plaintiff. Second Restatement § 652D. Even under Plaintiffs' own logic, then, the last event must be the defendant's disclosure of the material. Yet there is no allegation in the complaint that the Campaign made the disclosure in Tennessee, New Jersey, or Maryland.

*Third*, Plaintiffs argue that the Court should apply the law of their home states because the place of the tort in a case involving internet publication is the location of "the reader's computer screen." (Supp. Mem. 7.) Plaintiffs realize that the "reader's computer screen" is not located in any one particular state, or even in any one particular country, because WikiLeaks published Plaintiffs' emails "to the entire world." (Am. Compl. ¶ 1.) Plaintiffs, therefore, further specify that the place of the tort is the place of the "computer screen" that "matters most," which they claim is the computer screen in each plaintiff's home state. (Supp. Mem. 8.)

Plaintiffs' "matters most" test is a transparent effort to reverse binding Virginia law. The test is the functional equivalent of the Second Restatement of Conflict of Laws, under which multistate cases are governed by the law of the place that has the "most significant relationship" to the case. § 150(1). The Virginia Supreme Court, however, has expressly "declined an invitation to adopt the so-called 'most significant relationship' test, recommended by Restatement

(Second) of Conflict of Laws … , for resolving conflicts of laws arising in multistate tort actions." *Jones v. R.S. Jones & Assocs.*, 431 S.E. 2d 33, 34 (Va. 1993). Plaintiffs' "matters most" test simply repackages the rejected "most significant relationship" test under a different label.

Plaintiffs' approach also contradicts *Kylin Network (Beijing) Movie & Culture Media Co. v. Fidlow*, 2017 WL 23853843 (E.D. Va. June 1, 2017) (Hudson, J). There, the Court explained: "The Second Restatement of Conflict of Laws accounts for multistate defamation by applying the law of the state with the most significant relationship to the occurrence—typically the state where the defamed individual was domiciled at the time of publication. … However, Virginia has never adopted this provision of the Second Restatement. In fact, Virginia has expressly rejected the Second Restatement's 'most significant relationship test' for multistate tort actions generally." *Id.* at *3 n.2. So also here.

In addition, Plaintiffs' approach contradicts this Court's decision in *ABLV Bank*. In that case, as already discussed, a bank that did business in New York sued a Washington, D.C. corporation for online defamation. 2015 WL 12517012, at *1. The bank argued that New York law governed the case because (in the words Plaintiffs used here) New York mattered most: "New York [is] a banking and financial center," "[the bank's] efforts to open a New York office [were] frustrated," and "its banking relationships in New York [had] suffered." *Id.* This Court, however, rejected the argument: "It is irrelevant that the negative effects of [the] publication were felt in New York." *Id.* at *2. There is no difference between the argument Plaintiffs make in this case and the argument rejected in *ABLV Bank*.

In sum, there is no basis for applying Tennessee, New Jersey, and Maryland law here.

## CONCLUSION

The Court should grant the motion to dismiss.

Dated: February 8, 2019

Respectfully submitted,

/s/ Nikki L. McArthur

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**CERTIFICATE OF SERVICE**

I certify that on February 8, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

Dated: February 8, 2019

/s/ Nikki L. McArthur
Nikki L. McArthur
*Counsel for Donald J. Trump for President, Inc.*