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

ROY COCKRUM; SCOTT COMER; and ERIC SCHOENBERG, Plaintiffs, v. DONALD J. TRUMP FOR PRESIDENT, INC., Defendant.	)	Civil Action No. 3:18-cv-484-HEH

PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF ON CHOICE OF LAW

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Plaintiffs demonstrated in their opening supplemental brief on choice of law that the last acts necessary to complete the torts alleged in this action occurred where the Plaintiffs were located because that is where their personal privacy was invaded, and, in the case of Mr. Comer, where that invasion also caused emotional distress. Because the legal injury addressed by each of these tort claims accrued when Plaintiffs were injured, *lex loci delicti commissi* doctrine requires the application of New Jersey, Tennessee, and Maryland law, respectively, to Plaintiffs' state-law tort claims.

Defendant's arguments in favor of applying the law of New York or Virginia contradict the law as set forth by the courts of Virginia, the Fourth Circuit, and this Court. ECF No. 89, Def's Supp. Response Br. on Choice of Law ("Def's Supp. Br."). First, Defendant incorrectly asserts that the place of the wrong for every tort must be the place where the defendant was located at the time of the wrongful act—an argument long rejected by this Court. Second, Defendant ignores the Fourth Circuit's conclusion that the injury in the invasion of privacy tort is a *personal* injury—which means that the last act necessary to complete this tort occurred where the plaintiff suffers that personal injury. Third, addressing Plaintiffs' alternative argument about the location of publication in a multi-state publication tort, Defendant misconstrues the law of Virginia as employing a "presumption" that the location of publication is a defendant's headquarters. There is no such presumption.

1. Defendant's argument in favor of New York law is predicated on misreading *lex loci* to turn on a defendant's location at the time of its wrongful act. Def's Supp. Br. at 1 (arguing that the place of the wrong was New York because Defendant should be understood to have acted from its New York headquarters). As Plaintiffs demonstrated in their opening supplemental brief, "The place of the wrong for purposes of the lex loci delicti rule, however, is

defined as the place where 'the last event necessary to make an act liable for an alleged tort takes place.'" *Quillen v. Int'l Playtex, Inc*., 789 F.2d 1041, 1044 (4th Cir. 1986) (quoting *Miller v. Holiday Inns, Inc*., 436 F. Supp. 460, 462 (E.D. Va.1977)); *see Ford Motor Co. v. Nat'l Indem. Co*., 972 F. Supp. 2d 850, 857 (E.D. Va. 2013); Restatement (First) of Conflict of Laws §377. Crucially, the event that completes a tort does not always occur where the defendant is located. Plfs' Supp. Br. (ECF No. 86) at 3. As this Court has explained, the *lex loci* doctrine looks to the last event necessary to complete the tort, "even if the actor has no control over the location of that last event." *Insteel Indus., Inc. v. Costanza Contracting Co*., 276 F. Supp. 2d 479, 486 (E.D. Va. 2003); *see also Quillen*, 789 F.2d at 1044 (last act necessary to complete the tort was injury to plaintiff).[1]

Defendant tries to avoid this conclusion by treating the entirety of every tort as if it comprised only an "act" of the defendant and not also the separate element of injury to the plaintiff. To that end, it quotes the statement in *Milton v. IIT Research Institute*, 138 F.3d 519, 522 (4th Cir. 1998) that Virginia law "selects the law of the place where the wrongful act occurred[.]" Def's Br. at 2. Defendant would read "the place where the wrongful act occurred" to mean "defendant's location when it acted wrongfully." That reading is incorrect because it would make *Milton* conflict with the many authorities holding that Virginia law chooses the

[1] Applying this principle, this Court concluded in *Insteel Industries* that the fraud action would be governed by the law of North Carolina, when a North Carolina-based plaintiff had received in North Carolina, and relied upon, allegedly false invoices created by a Maryland-based defendant, and North Carolina was where those false invoices were paid by plaintiff. 276 F. Supp. 2d at 486-87. None of the events that the Court held were the last events necessary to complete the fraud tort claim were actions of the defendant. *Id*. This Court expressly concluded that its analysis which resulted in application of the law of the plaintiff's domicile state—was consistent with the First, not the Second, Restatement of Conflicts. *Id.*

place where the last event needed to complete the tort took place, regardless of the defendant's location.

In reality, there is no conflict between *Milton* and Virginia law. *Milton* is consistent with those other authorities because "wrongful act" in *Milton* does not mean only the action of a defendant. As Defendant acknowledges, *Milton* relied on the Virginia Supreme Court's definition of "tort" as "a wrongful act." *See* Def's Br. at 2 (quoting *Milton* quoting *Buchanan v. Doe*, 431 S.E. 2d 289 (Va. 1993).[2] The "wrongful act" in this context refers to the complete tort. Thus, *Milton*'s statement that Virginia law selects the place where the wrongful act occurred simply means that Virginia law selects the place where the *tort* occurred. And a tort does not occur until the last event needed to complete the tort occurs. On that correct understanding, *Milton* is perfectly consistent with *Quillen*, *Insteel*, and the other authorities holding that Virginia law selects the place where the last event necessary to complete the tort occurs, regardless of the defendant's location.

Milton involved the tort of wrongful discharge. The plaintiff in *Milton*—a Virginian—had lost his job through an arguably wrongful discharge in Maryland, but argued that Virginia law should apply to his claim because he would experience the effects of lost income while home in Virginia. The Fourth Circuit, using Virginia choice of law principles, applied Maryland law because the injury that completed that tort occurred "in Maryland, where Milton had his office

[2] *Buchanan* itself contains no holding relevant to the issue of *lex loci* for torts. The dispute in *Buchanan* was whether an insurance dispute sounded in contract or tort law, and the Court held the claim was resolved by applying Virginia's statutory law governing contracts. *See* 431 S.E.2d 292-93. The definition of tort as a "wrongful act (not involving a breach of contract)," *id.* at 291, is perfectly consistent with Plaintiffs' analysis here, as the Virginia Supreme Court made clear that tort refers to legal injury: "Stated differently, a 'tort' is a 'legal wrong committed upon the person or property independent of contract,'" *id.* at 292. The Court never held, as Defendant argues, that the elements of various torts are comprised only of acts of the defendant—that has never been the law.

and where his dismissal was communicated to him." 138 F.3d at 522. *Milton* relied on *McMillan v. McMillan*, 253 S.E.2d 662 (Va. 1979), a case in which a Virginia resident was involved in a car accident in Tennessee. "[S]ome of the ill effects of [the plaintiff's] injuries were experienced by Mrs. McMillian at home in Virginia," the Fourth Circuit wrote, but "the Virginia Supreme Court readily applied Tennessee law to the suit, deeming Tennessee the place of the injury." *Milton*, 138 F.3d at 522.

In both *McMillan* and *Milton*, the relevant distinction is between legal injury (wrongful discharge, car accident) and the later practical effects of that injury (lost income, pain and suffering). Thus *Milton* distinguishes the place where the tort becomes complete from *other jurisdictions where the plaintiff might (also) experience subsequent harm*. *See* 138 F.3d at 522 ("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." (emphasis added)). In each case, the later consequential effects are irrelevant to the choice of law. Also irrelevant is the location of the defendant: in neither *Milton* nor *McMillan* did the court settle a choice-of-law question by asking about a defendant's location.[3]

[3] Defendant's contention the Virginia law somehow applies a "distinctive" or "unique" conceptualization of tort or legal injury is belied by closer examination of *Buchanan*, 431 S.E. 2d 289, as discussed above, and has no basis in law. Def's Br. at 7. Defendant cites for this principle a discussion of the difference between Virginia and Maryland choice of law principles in *Gen. Assur. of Am., Inc. v. Overby-Seawell Co*., 893 F. Supp. 2d 761, 778 (E.D. Va. 2012). But the distinction between Virginia and Maryland law in the eyes of the Fourth Circuit is simple, and is *not* based on any relevant difference in the definition of tort: Virginia follows the First Restatement of Conflicts of Law, while the Fourth Circuit has concluded that Maryland follows the Second Restatement in the context of multistate publication torts. *Id.* (citing *Johnson v. Oroweat Foods Co*., 785 F.2d 503, 511 (4th Cir. 1986); *see also Wells v. Liddy*, 186 F.3d 505, 528 (4th Cir. 1999) ("[T]he Court of Appeals of Maryland has indicated its willingness to apply more flexible choice-of-law rules from the Second Restatement in situations when the First Restatement rules have become unworkable.").

Contrary to Defendant's characterization, Def's Supp. Br. at 7, Plaintiffs contend that it is the place of their legal injury, *not* the place of any later consequential "harm the plaintiff experiences as a consequence of the wrongful act," that settles the choice-of-law question. Thus, Plaintiffs do not rely, as Defendant contends, on location of the subsequent consequential effects of these torts which ranged from identity theft and financial damages, chilling effect on political contributions, and harm to Mr. Comer's career and mental health, among other things to be proven at trial. In this respect *Milton* and *McMillian* are consistent with Plaintiffs' argument.

Defendant also fails to recognize that the location of legal injury *can* be the location of a plaintiff, where the injury that completes a tort is personal, as in *Quillen*. *See* 789 F.2d at 1044. The Fourth Circuit's analysis in *Quillen* did not conflict with Virginia law. To the contrary, the Court relied on Virginia law to assess the last act necessary to complete the tort at issue. *Quillen* is not the only case where *lex loci*, properly applied, leads a court to apply the law of the location of the plaintiff, in light of the last act necessary to complete a tort. *See, e.g.*, *Insteel Indus.*, 276 F. Supp. 2d at 486-87; Restatement (First) of Conflict of Laws §377 cmt. a, n.4 (in fraud cases, the place of the wrong is "*where the loss is sustained, not where fraudulent representations are made*").

2. For any given tort, the last event necessary to complete the tort depends on the particular elements of that tort. Plfs' Supp. Br. at 4-5. As this Court explained:

> The location where "the last event necessary to make an act[or] liable for an alleged tort takes place" *will vary amongst different claims, depending on what elements comprise the particular claim* and which element is deemed to provide the "last event necessary" to make the actor liable for the particular tort at issue.

Ford Motor Co., 972 F. Supp. 2d at 857 (emphasis added); *see also* Restatement (First) of Conflict of Laws §377 cmt. a ("What acts and events are necessary to constitute a tort is a question of the law of Torts[.]"). Defendant has no response to this principle of law. This Court

must, under this well-established law, look to the elements of the torts at issue to determine where the last event necessary to complete the torts took place. In the present case, the torts became complete when the Plaintiffs sustained legal injury by having their privacy invaded by the publication of their private facts. Plfs' Br. at 4 (citing *Brown v. Am. Broad. Co*., 704 F.2d 1296, 1302 (4th Cir. 1983) (tort of invasion of privacy accrues upon plaintiffs' injury); Restatement (Second) of Torts §652A.[4]

The Fourth Circuit has identified the nature of the injury that completes this tort as personal to the individual. *Brown*, 704 F.2d at 1302 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967) ("In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view[.]")); *see also* Restatement (Second) of Torts § 652I, cmt, a ("The right protected by the action for invasion of privacy is a *personal right*[.]" (emphasis added)). The Fourth Circuit's analysis is consistent with the way that New Jersey, Tennessee, and Maryland treat these torts: as personal injury torts. *See Smith v. Datla*, 164 A.3d 1110, 1124 (N.J. App. Div. 2017) (describing the injury as "injury to the person"); *Beard v. Akzona, Inc*., 517 F. Supp. 128, 132 (E.D. Tenn. 1981); *Hollander v. Lubow*, 351 A.2d 421, 427 (Md. 1976) (quoting R. Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, 362-63 (1915): "Another phase of the same interest is the demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers. . . . Such publicity with

[4] Defendant has found an Eighth Circuit case reciting the elements of this tort without specifically mentioning injury. Def's Br. at 8-9 (citing *McNally v. Pulitzer Pub. Co*., 532 F.2d 69, 78 (8th Cir. 1976)). That does not establish the last act necessary to complete the legal injury protected against by this tort in the Eighth Circuit, much less in the states relevant here. For example, the model jury instructions from New Jersey—the relevant state for Mr. Schoenberg—for publication of private facts clearly contain the element of injury. *See* N.J. Model Jury Instructions, Charge 3.14, at 8-9, *available at* https://njcourts.gov/attorneys/assets/civilcharges/3.14.pdf?c=IMt.

respect to private matters of purely personal concern is an injury to personality."). In other words, the invasion of privacy is a personal injury in the same way that physical injury is personal. For any plaintiff, it occurs at the plaintiff's location. Plfs' Supp. Br. at 4-5. The same is true of the emotional distress tort. *Id*. at 5.

3. Defendant contends that Virginia law presumes that publication-based torts occur at the location of a corporate defendant's headquarters. Def's Supp. Br. at 3. Such a "presumption" would be, as Plaintiffs previously demonstrated, inconsistent with both the First Restatement of Conflicts of Law, and how reputational torts have long been treated for *lex loci* purposes, including by this Court. Rather, for publication-based torts, courts have consistently held that the legal injury occurs at the location where the information *reaches* the public and causes reputational harm, not the location where the document was created. *See Wells*, 186 F.3d at 521-22 ("In defamation actions, the place of the harm has traditionally been considered to be the place where the defamatory statement was published, *i.e., seen or heard by non-parties*." (emphasis added)); *see also* Plfs' Supp. Br. at 6-7; Restatement (First) of Conflict of Laws § 377 cmt. a, n.5.[5]

[5] The commentary to the First Restatement of Conflict of Law is directly contrary to Defendant's assertion that the place of publication is where the document was created (where the website was controlled) rather than where the information was viewed:

> *Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated.*
> Illustration:
> 7. A, broadcasting in state X, slanders B. B is well and favorably known in state Y and the broadcast is heard there by many people conversant with B's good repute. The place of wrong is Y.

Restatement (First) of Conflict of Laws § 377 cmt. a, n.5 (emphasis in original).

None of the cases Defendant cites employed such a presumption. In *ABLV Bank v. Center for Advanced Defense Studies Inc.*, 2015 WL 12517012 (E.D. Va. April 21, 2015), the Court held that the place of the wrong for a libel claim—which accrues when a defendant communicates the alleged defamatory statement to any third party—was the District of Columbia because it was "undisputed" that publication took place there. *Id.* at *2. Similarly, in *Mid-Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 1993 WL 13031406 (Va. Cir. Sep. 22, 1993) —a case about tortious interference with contracts and unfair competition not an invasion of privacy or any other reputational tort—the court established Virginia as the place of that particular wrong not on the basis of a presumption but on the basis of the specific "facts of the case presented to the court." *Id.* at *1. And *Wiest v. E-Fense, Inc.*, 356 F. Supp. 2d 604 (E.D. Va. 2005), involved a *pro se* plaintiff and choice of law was not contested. *See id.* 608 n.2; Plfs' Supp. Br. at 7. None of these cases remotely holds that Virginia law presumes that the last act necessary to complete any publication-based tort occurs at corporate headquarters.[6]

Defendant's argument also does not withstand factual scrutiny, when compared to the allegations in Plaintiffs' Amended Complaint. Defendant may have been headquartered in New York, but there is no allegation whatsoever that the Defendant provided the material or controlled the WikiLeaks website from New York. Again, Defendant is conflating its actions in

[6] As Plaintiffs previously explained in the alternative, even if this Court analogizes these privacy torts to reputational torts, the location of the legal injury would be the location where the information reaches the public, not the location where a document was created or from which it was sent (the doorstep, not the printing press). Plfs' Supp. Br. at 6-8. The Court would then need to solve the multi-state publication problem by choosing as the place of the wrong, in the way most consistent with the nature of this tort, a single state from among the many states where the information was made available. Given the nature of the privacy interests invaded, the outcome of the multi-state publication analysis should land on the states where the plaintiffs were located, just as Judge Hand did in *Mattox v. News Syndicate Co.*, 176 F.2d 897, 900 (2d Cir. 1949). Plfs' Supp. Br. at 7-8.

furtherance of the conspiracy, some but not all of which occurred in New York, with the last act necessary to complete these torts, which occurred elsewhere. Plfs' Supp. Br. at 9-10.

4. Finally, Defendant argues that this Court should conclude that the law of the forum state, Virginia, should apply because the Court cannot discern from the face of the complaint where Plaintiffs' legal injuries occurred. Def's Supp. Br. at 4-5. Defendant only reaches this conclusion by misconstruing the *lex loci* standard, ignoring the applicable law on the nature of the specific torts at issue, and ignoring the relevant factual allegations. The personal injury to these Plaintiffs could not have occurred in New York, nor in Virginia, where the Defendant, and the Defendant only, was located. The location of each of these Plaintiffs was his home state: Tennessee for Mr. Cockrum, New Jersey for Mr. Schoenberg, and Maryland for Mr. Comer. Those locations control these torts.

CONCLUSION

Plaintiffs respectfully submit that the proper outcome of the application of the *lex loci delicti commissi* doctrine to the claims at issue in this case is to apply the law of Tennessee to Mr. Cockrum's claim, the law of New Jersey to Mr. Schoenberg's claim, and the law of Maryland to Mr. Comer's claims.

Respectfully submitted,

Dated: February 15, 2019

By: */s/ Elizabeth C. Burneson*

Counsel for Plaintiffs

KELLY J. BUNDY (VSB No. 86327)
ELIZABETH C. BURNESON (VSB No. 93413)
Hirschler Fleischer, a Professional Corporation

2100 E. Cary Street (23223)
Post Office Box 500
Richmond, VA 23218-0500
Telephone: (804) 771-9505
(804) 771-9528
Facsimile: (804) 644-0957
E-mail: kbundy@hirschlerlaw.com
lburneson@hirschlerlaw.com

BENJAMIN L. BERWICK (MA Bar No. 679207)
(*pro hac vice*)
United to Protect Democracy
10 Ware St.
Cambridge, MA 02138
202-579-4582
Ben.Berwick@protectdemocracy.org

IAN BASSIN (NY Attorney Registration No. 4683439) (*pro hac vice*)
United to Protect Democracy
222 Broadway, 19th Floor
New York, NY 10038
202-579-4582
Ian.Bassin@protectdemocracy.org

JUSTIN FLORENCE (D.C. Bar No. 988953)
(*pro hac vice*)
ANNE TINDALL (D.C. Bar No. 494607)
(*pro hac vice*)
CAMERON KISTLER (D.C. Bar No. 1008922)
(*pro hac vice*)
United to Protect Democracy
2020 Pennsylvania Ave. NW, #163
Washington, DC 20006
202-579-4582
Justin.Florence@protectdemocracy.org
Anne.Tindall@protectdemocracy.org
Cameron.Kistler@protectdemocracy.org

JESSICA MARSDEN (N.C. Bar No. 50855)
(*pro hac vice*)
United to Protect Democracy
510 Meadowmont Village Circle, No. 328
Chapel Hill, NC 27517
202-579-4582
jess.marsden@protectdemocracy.org

STEPHEN P. BERZON (CA State Bar No. 46540)
(*pro hac vice*)
BARBARA J. CHISHOLM (CA State Bar No. 224656) (*pro hac vice*)
DANIELLE LEONARD (CA State Bar No. 218201)
(*pro hac vice*)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
sberzon@altber.com
bchisholm@altber.com
dleonard@altber.com

NANCY GERTNER (MA Bar No. 190140)
pro hac vice)
Fick & Marx
100 Franklin Street, 7th floor
Boston, MA 02110
(857) 321-8360
ngertner@fickmarx.com

RICHARD PRIMUS (MI Bar No. P70419)
(*pro hac vice*)
The University of Michigan Law School*
625 S. State Street
Ann Arbor, MI 48109
(734) 647-5543
PrimusLaw1859@gmail.com
* For identification purposes.

STEVEN A. HIRSCH (CA State Bar No. 171825)
(*pro hac vice*)
Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 94111-1809
(415) 391-5400
shirsch@keker.com

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2019, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of Court for the Eastern District of Virginia, Richmond Division, using the Court's CM/ECF system, which thereby caused the above to be served electronically on all registered users of the Court's CM/ECF system who have filed notices of appearance in this matter of such filing (NEF) to all registered parties.

Dated: February 15, 2019 By: */s/ Elizabeth C. Burneson*

Counsel for Plaintiffs
KELLY J. BUNDY (VSB No. 86327)
ELIZABETH C. BURNESON (VSB No. 93413)
Hirschler Fleischer, a Professional Corporation
2100 E. Cary Street (23223)
Post Office Box 500
Richmond, VA 23218-0500
Telephone: (804) 771-9505
(804) 771-9528
Facsimile: (804) 644-0957
E-mail: kbundy@hirschlerlaw.com
lburneson@hirschlerlaw.com