NOT CURRENTLY SCHEDULED FOR ORAL ARGUMENT

No. 18-7185

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

K&D, LLC t/a Cork

Plaintiff-Appellant

v.

TRUMP OLD POST OFFICE, LLC, *et al*.

Defendants-Appellees

On Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR THE APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, Plaintiff-Appellant is K&D, LLC t/a Cork ("Cork") is a limited liability company organized under the laws of the District of Columbia. Cork has no parent corporation which owns 10% or more of it stock.

CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Plaintiff-Appellant certify as follows:

A. Parties, Intervenors, and Amici Curiae

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant.

B. Rulings Under Review

The ruling under review is the November 24, 2018 Memorandum Opinion and Order of the District Court for the District of Columbia in Civil Action No. 17-731 (RJL), granting Defendants' Motions to Dismiss. Joint Appendix ("JA") at 23. The Memorandum Opinion (JA at 11-22) is reported at 2018 U.S. Dist. LEXIS 199675.

C. Related Cases

Undersigned counsel are not aware of any related cases pending in this

Court or any other Court.

INTRODUCTION

The Trump International Hotel in Washington D.C. (the "Hotel") is operated by the Appellee Trump Old Post Office LLC ("Trump OPO"), and owned by Appellee and private citizen Donald J. Trump ("Trump"). The Complaint alleges that they engaged in unfair competition by touting the Hotel's connection to President Donald J. Trump, in violation of the common law of the District of Columbia. The Appellant K&D, LLC t/a Cork ("Cork" or "Appellant"), a competitor of the Trump Hotel, seeks only injunctive relief to stop the unfair competition from continuing.

Because this claim is based solely on the law of the District of Columbia, Appellant filed this case in the Superior Court of the District of Columbia. Appellee Trump was sued solely in his individual capacity as owner of the Trump Hotel. He nonetheless filed a timely notice of removal, based on 28 U.S.C. § 1442(a)(1), which is available to officers of the United States, but only if the claim is "for or relating to any act under color of such office."

Appellee Trump OPO filed a separate notice of removal, based on 28 U.S.C. § 1441(a), arguing that, although the complaint alleged only claims under the laws of the District of Columbia, because the complaint referred to a lease between Appellee Trump OPO and the General Services

Administration of the United States ("GSA"), therefore the claim arose under federal law over which district courts have original jurisdiction.

Appellant moved to remand the case to D.C. Superior Court, and after extensive briefing by all parties, the District Court resolved the remand motion by a one-word order: "Denied." Thereafter, Appellees moved to dismiss on various grounds, but the Court decided only that Appellant had failed to state a claim under the unfair competition law of the District of Columbia.

The decision below should be reversed. The District Court erroneously denied the Motion to Remand because it failed to recognize that this case is a purely private dispute that does not call into question any official act of the President and relies solely on District of Columbia, not federal law. As a result, instead of remanding this case to the courts of the District of Columbia, which have the responsibility for determining the common law of unfair competition law in the District of Columbia, the case was decided in the federal courts which are understandably reluctant to extend state common law beyond existing precedent. But even accepting that reluctance, the District Court failed to recognize the evolving nature of the common law of unfair competition in the District of Columbia and erroneously treated the prior cases as if they were a series of statutes that Appellant had to satisfy to state a claim.

STATEMENT OF JURISDICTION

This case was filed by the Appellant in the Superior Court for the District of Columbia on March 9, 2017, for unfair competition under the laws of the District of Columbia. Timely notices of removal to the U.S. District Court for the District of Columbia were filed by the Appellees, under 28 U.S.C. §§ 1441 and 1442(a)(1). As explained below, because the removals filed by Appellees were invalid, there was no basis for subject matter jurisdiction in the District Court.

The District Court denied Appellant's Motion to Remand by Minute Order on January 2, 2018 ("Minute Order"). JA at 9. On November 26, 2018, the District Court issued a Memorandum Opinion ("Opinion") granting Appellees' respective Motions to Dismiss for Failure to State a Claim. JA at 11. Appellant filed a timely appeal on December 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1291, as an appeal from a final order dismissing this action.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in concluding that removal by Appellee Trump under 28 U.S.C. § 1442(a)(1) - on the ground that the conduct of Appellee Trump that is the basis of the complaint related to acts undertaken by him under color of the office of President of the United States - was proper?
2. Did the District Court err in concluding that removal by Appellees under 28 U.S.C. § 1441(a) - on the ground that Appellant's complaint arises under the laws of the United States within the meaning of 28 U.S.C. § 1331 - was proper?
3. Did the District Court err in concluding the Appellant had failed to sufficiently allege tortious actions by the Appellees that fell within the scope of unfair competition under the common law of the District of Columbia?

RELEVANT STATUTES

Section 1442 of title 28 provides:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any

> agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

Section 1446(a) of Title 28 provides as follows:

> (a) Generally.--A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal,
>
> (b) together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

STATEMENT OF THE CASE

Statement of Facts

Because the District Court dismissed the Complaint as a matter of law, the factual allegations must be accepted as true.

The Complaint alleges that the Hotel, owned and/or operated by Appellees, has, since January 20, 2017, been engaging in unfair competition against Appellant, which has deprived Appellant of business and will continue to do so. Because Appellee Trump failed to divest himself of his ownership of the Hotel before he was inaugurated, he created an unfair competitive advantage for the Hotel. That unfair competition has been magnified by Appellee Trump OPO and others actively marketing access to the Hotel as an

opportunity for patrons to curry favor with the President and other federal officials, at the expense of area hotels and restaurants with no such political connections.[1]

The facts regarding the lease between Appellee Trump OPO and the GSA are not disputed. JA at 37 (Compl., ¶¶ 8-10). On February 6, 2012, the GSA announced that it had chosen The Trump Organization as the potential redeveloper of the Old Post Office Pavilion, 1100 Pennsylvania Avenue, N.W., in the District of Columbia, to be used for a hotel and restaurants (the "Hotel"). On June 12, 2013, GSA and Appellee Trump OPO agreed to the terms of a provisional lease, and a final lease between the United States, acting through GSA, and Appellee Trump OPO, dated August 5, 2013 (the "Lease"),

[1]After the Motion to Remand was denied, Appellant was permitted to file an Amended Complaint which made three changes: (1) the address of Cork's business was changed to reflect its move across the street; (2) an allegation that Appellee Trump encouraged a Member of Congress to patronize the Hotel was clarified to reflect that the encouragement took place before Appellee Trump was inaugurated; and (3) an allegation that Appellee Trump exited his vehicle in front of the Trump Hotel on his ride to the White House after the Inauguration was deleted. JA at 35. In Appellant's Memoranda in support of its Motion to Remand, it clarified allegation (2) and pledged to delete allegation (3), so that neither of them could be the basis of the ruling denying the Motion to Remand. For simplicity, all citations in this Brief are to the Amended Complaint in the Joint Appendix, which will be referred to as the "Complaint". Although the case was in the District Court when the Complaint was amended, the caption of the Amended Complaint was not changed to reflect the fact that the case was no longer in the Superior Court for the District of Columbia.

was signed by Appellee Trump. The Lease is for a term of sixty years, subject to the early termination provision in Section 4.4. The Hotel opened on September 12, 2016, under the name Trump International Hotel, when Appellee Trump was a candidate for President.

The Complaint alleges that the competition between the Hotel and other restaurants and hotels, such as Appellant, changed the day after Appellee Trump was elected President. At that time, "the competition between the Hotel and Cork began to favor the Hotel much more than before the election, with the result that many organizations and individuals, including citizens of nations other than the United States, substantially increased their use of the Hotel and its various facilities to the detriment of Cork." JA at 38 (Compl., ¶17). The Complaint alleged that

> The reason for the increase in business for defendants was the perception by many of the customers and prospective customers of the Hotel, substantially aided by the marketing efforts of officers and employees of the Hotel, as well as members of the family of defendant Donald J. Trump and others associated with him, that it would be to their advantage in their dealings with President Donald J. Trump and other agencies of the United States Government, if they patronized the Hotel.

JA at 39 (Compl., ¶18.)

This increase in business was not due to the superior quality of the Hotel but, as alleged, due to specific efforts of Appellee Trump OPO and others to

take advantage of the fact that the Hotel bears the name of the person who was about to become the President of the United States:

> Rather than take any significant steps to avoid exploiting public office for private gain, defendant Donald J. Trump, his family, and various White House staff and/or advisors have continued to promote the Hotel to maximize its exposure and income-producing potential.

JA at 39 (Compl., ¶20.) Paragraph 33 of the Complaint further alleged that "Defendants' operation of the Hotel and the restaurants, while Defendant Donald J. Trump serves as President of the United States, unfairly competes for customers in the relevant marketplace, including potential customers of Cork, impairing Cork's ability to compete with the Hotel on a level playing field." JA at 33. Moreover, as a result of the unfair competition by the Hotel, Appellant alleged that Cork has been and will continue to suffer losses of business, JA at 44 (Compl., ¶41), and that it lost customers directly to the Hotel as a result of Appellees' unfair competition. JA at 43-44 (Compl., ¶¶37, 38.)

In essence, Appellant's claim is that Appellee Trump's failure to divest his ownership interest in the Hotel prior to his Inauguration, combined with the marketing efforts of Appellee OPO and others on behalf of the Hotel to attract guests based on its connection to Appellee Trump, is so egregious that it constitutes unfair competition under the common law of the District of Columbia.

Notably, the Complaint named Appellee Trump solely in his individual capacity. JA at 37 (Compl., ¶ 5.) Part of the justification for this distinction between Appellee Trump's official acts as President and his acts as a private individual was a set of actions Appellee Trump took before he took office. Prior to his Inauguration, Appellee Trump claimed to have taken extensive steps to sever all of his operational relations with the Hotel and all of his other business enterprises. *See* Morgan Lewis White Paper, January 11, 2017 (Section II detailing plans of Appellee Trump to separate his businesses from his official duties as President), attached as Exhibit A to Appellant's motion to remand. JA at 64-69. By those actions, Appellee Trump himself recognized that anything that he does on behalf of the Hotel while he is President is done in his personal and not official capacity.

There is one other important fact alleged in the Complaint that bears on the issues before this Court. Although the sole asserted legal basis for Appellant's claim of unfair competition is the common law of the District of Columbia, the Complaint quoted section 37.19 of the Lease that provides:

> No member or delegate to Congress, or elected official of the Government of the United States or the Government of the District of Columbia, shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom; provided, however, that this provisions shall not be construed as extending to any Person who may be a shareholder or other beneficial owner of any publicly held corporation or other entity, if this

> Lease is for the general benefit of such corporation or other entity.

JA at 37 (Compl., ¶ 10).

The Complaint, however, did not assert a substantive legal claim based on this section of the Lease, such as one might pursue as a third party beneficiary of a contract. Rather, the Complaint quoted section 37.19, which applies to all elected federal and District elected officials, only to support its legal theory that, when elected officials derive economic benefits from a business in the District of Columbia while in office, doing so is seen as creating an unfair advantage over competitors of the elected official and thus supports a claim for unfair competition under the common law of the District of Columbia. JA at 43 (Compl., ¶¶ 35-37).

Proceedings Below

In his notice removing the case from the Superior Court, Appellee Trump relied on 28 U.S.C. § 1442(a)(1), which can only be invoked when an officer of the United States seeks removal because a complaint involves a claim "relating to any act [of the Officer] under color of such office." JA at 56-61. Appellant moved to remand both because its Complaint did not rely on any actions of Appellee Trump taken after he became an officer of the United States and because, to the extent that Appellee Trump took action regarding the Hotel after he became President, those acts were taken in his personal and

not official capacity, which meant that section 1442(a)(1) was not a proper basis of removal.

In its removal notice, Appellee Trump OPO, as a private company, did not rely on section 1442(a)(1). JA at 46-50. Instead, it contended that Appellant's claim arose under federal law, with jurisdiction based on 28 U.S.C. § 1331, because Appellant cited the terms of the federal Lease between Appellee Trump OPO and GSA, even though the Complaint expressly relied solely on the common law of the District of Columbia. *See id*.

Appellant moved to remand the case to the Superior Court. Both Appellees filed lengthy oppositions, and Appellant filed an extensive reply. The briefing was completed in mid-June 2017, with both sides requesting oral argument. The response of the District Court was issued January 2, 2018, through a minute order: "Denied." JA at 9.

After Appellant was permitted to file an Amended Complaint, which made no changes of substance from the original complaint, Appellees filed renewed Motions to Dismiss. Appellee Trump mainly sought dismissal on the ground that any actions of his that formed the basis of the Complaint were protected by absolute immunity under *Nixon v. Fitzgerald,* 457 U.S. 721 (1982). Both Appellees argued that Appellant's Complaint failed to state a

valid claim for unfair competition under the law of the District of Columbia. *See* JA at 14.

In addition, Appellee Trump OPO renewed its argument that Appellant's claim was one arising under federal law, but that, for a variety of reasons, Appellant could not prevail under applicable federal law. JA at 14. It also argued that the relief that Appellant sought – an injunction against the continued ownership by Appellee Trump of the Hotel – was specifically precluded by the Lease. JA at 14. In response, Appellant re-stated its position that it was not relying on federal law or suing under the Lease, that the interpretation of the Lease was a complicated question that could not be resolved on a motion to dismiss, and that even if an injunction were precluded, Appellant also sought declaratory relief which would still be available.

Following oral argument, the District Court issued a decision that solely addressed the District of Columbia's common law of unfair competition. JA at 6-11. The Court reviewed the cases cited by the parties, treating the decisions as if they were statutes, which had to be satisfied for there to be a valid claim of unfair competition, not common law rulings. JA at 11. Because it found no case with facts similar to this in which a court upheld a claim of unfair competition, it granted the Motions to Dismiss. JA at 9-11. According to the District Court, the closest case was *Ray v. Proxmire,* 581 F.2d 998 (D.C.

Cir. 1978), in which this Court rejected a number of claims against the principal defendant, who was the wife of a sitting Senator, including one that she engaged in unfair competition by running tours of Washington, D.C. which, because of her position, enabled her to obtain preferred access to certain venues. The District Court rejected the many distinctions to *Ray* raised by Appellant – most prominently that the defendant there was not a government official – and concluded that Appellant's Complaint must be dismissed for failure to state a claim on which relief can be granted under the common law of unfair competition of the District of Columbia. JA at 12.

SUMMARY OF ARGUMENT

This case was improperly removed by both Appellees, and the District Court erroneously denied Appellant's Motion to Remand. Appellee Trump sought removal under section 1442(a)(1) which applies only when a federal officer asserts that the basis of a claim brought in state court are acts that the federal officer has undertaken as part of his official federal duties. That statute is inapplicable to Appellee Trump for two reasons.

First, Appellant's claim is that Appellee Trump was obligated by the District of Columbia law of unfair competition to divest himself of ownership in the Trump Hotel *before* he was sworn in as President, which is before his conduct could obtain the benefit of section 1442(a)(1).

Second, Appellee Trump's ownership of the Hotel, or for that matter any actions undertaken by him with respect to the Hotel while serving as President, were not acts taken under color of federal law, but were acts done in his purely private capacity. Section 1442(a)(1) permits removal only for claims based on conduct of federal officers as part of their official responsibilities and not for everything they do during the time when they are federal officers.

The removal of Appellee Trump OPO was also flawed. Its position is that Appellant's claim arose under federal rather than state (District) law and hence was removable based on 28 U.S.C. §§ 1331 & 1441. But Appellee is mistaken in its effort to re-cast Appellant's claim as arising under federal law. The Supreme Court has made it clear that a plaintiff may avoid raising a federal claim by choosing to plead only non-federal claims even where the elements on both claims are virtually identical. That is true even where a plaintiff asserts that the conduct in its non-federal claim also violates federal law. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning,* 136 S. Ct. 1562 (2016).

Even if this case was removable to federal court, the District Court erred in dismissing Appellant's unfair competition case on the merits. The central flaw of the District Court's Order granting dismissal was that it treated the

actions of President Trump, in continuing to own a Trump branded hotel, and competing with other local business, as just another incident of competition in the marketplace, and not tortious activity, simply because it did not fall within a narrow previous application of the tort of unfair competition.

In reaching this conclusion, the District Court ignored substantial precedent stating that the tort of unfair competition is evolving and not limited to certain enumerated bad or unfair acts, and then held that, without one of those specific acts, the marketing of the Hotel, with its implied promise of favorable treatment by the Trump Administration, is no more than everyday competition. Simply because the spouse of another elected official was not held liable by this Court 40 years ago for unfair competition in the District of Columbia, however, does not end the analysis as to whether the current set of egregious actions by Appellee Trump OPO and its supporters, rises to the level of unfair competition. As Appellant has alleged, when a President continues to own a Hotel with his name in the title, five blocks from the White House, that presents a very different situation from ordinary competition, especially when the Hotel's Lease supports the conclusion that its ownership creates a fundamental unfairness for its competitors such as Appellant. In its Order brushing that aside as regular competition, the District Court found that the factual situation was no different than any other celebrity owned hotel,

and failed to address the broad nature of the tort at issue to remedy a situation like the present.

STANDARD OF REVIEW

There are no factual disputes with respect to the denial of Appellant's motion to remand. The courts review jurisdictional issues *de novo*. *See Carey Canada, Inc. v. Columbia Casualty Co.*, 940 F.2d 1548, 1554 (D.C. Cir. 1991) (internal citations omitted).

Because the District Court dismissed the Complaint for failure to state a claim, the factual allegations must be accepted as true. The questions presented involve solely questions of law on which this Court exercises *de novo* review.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING APPELLANT'S MOTION TO REMAND

Appellees sought removal on two separate theories: (A) the claim against Appellee Trump was against a federal officer based on "acts" taken by him under color of federal law, and (B) the claim, while purporting to be based on the law of the District of Columbia, arose under federal law. The District Court did not explain which theory it accepted, let alone on what basis. However, because the District Court dismissed the case on the merits for failure to state a claim under the common law of the District of Columbia,

not federal law, presumably the Court disagreed with Appellees that Appellant's claim was based on federal law. Nevertheless, Appellant will show that neither basis for removal was proper, and that the case should be remanded to the Superior Court of the District of Columbia.

A. Federal Officer Removal Was Not Authorized.

Only Appellee Trump sought removal on the basis of the federal officer removal statute, 28 U.S.C. § 1442(a)(1). Although Appellee Trump relied only on paragraph (1), the entirety of subsection (a) below is helpful to the Court's understanding of that paragraph:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> (2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
>
> (3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

> (4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

Eliminating the unnecessary words from subsection (a)(1), and substituting "President" for "federal officer," it can be restated as follows:

> A civil action in a State court against the President may be removed by him to the district court, if there is a claim relating to any act of the President under color of his office.

Two preliminary points are worth noting. The statute does not allow federal officers in general, or even the President specifically, to remove a case against them based on their federal status alone: something more is required. Second, that something more is that the federal claim must relate (be based on) an "act" of the federal officer taken "under color of his office." Put another way, the claim at issue, or in this case the defense of the President, must "relate" to (or be based on) an "act" by the President and the act must be done "under color of his office." That means that not every act by a federal officer cited in a complaint is a basis for removal under section 1442(a)(1).

Although only subsection (1) is at issue in this case, the Supreme Court has looked to the comparable operative language in the other subsections to confirm that the interests Congress sought to protect under section 1442 as a whole are to assure that federal officers in all three branches who claim that their conduct is protected under federal law are able to litigate those federal defenses in federal court, if they so choose. Thus, in subsection (3), removal

by an officer of the courts of the United States is available only if the officer is acting "under color of office or in the performance of his duties [under federal law]." Similarly, in subsection (4) the same approach applies to an officer of either House of Congress who is acting "in the discharge of his official duty under an order of such House." Finally, removal also extends to private parties under subsection (2), where the party's title to a property is derived from a federal officer and the dispute calls in question "the validity of any law of the United States."

The federal officer removal statute is an exception to the rule, discussed *infra,* that federal court jurisdiction under section 1331 is only available if a plaintiff relies on federal law as a basis for his complaint, but not if federal law is at issue because of a federal affirmative defense. Nonetheless, even under section 1442, "federal officer removal must be predicated on the allegation of a colorable federal defense." *Mesa v. California,* 489 U.S. 121, 129 (1989). That requirement is not met in this case for two reasons.

First, the gravamen of Appellant's unfair competition claim is that once Appellee Trump became President Trump, he and his Hotel were engaging and benefiting from their unfair competition. Therefore, the wrongful act of Appellee Trump is that, prior to January 20, 2017, he failed to disentangle himself from the Hotel and, therefore, he will continue to receive financial

and other benefits from the Hotel earned during the period of his Presidency, even if they are not paid to him until he is no longer in office. Accordingly, it is Appellee Trump's pre-Presidential inaction, not any "act" that he undertook as President, that is the source of the claim against him. Since that conduct (inaction here) occurred before he became President, and before he obtained whatever federal officer defense/immunity he has as President, he has no colorable "federal" defense which is required for section 1442 removal.

Moreover, the Complaint contains no allegation of any specific conduct by Appellee Trump after he became President that is relied on as a basis for Appellant's unfair competition claim. Initially, Appellee Trump pointed to two allegations that might have been construed as part of Appellant's claim. However, as explained in note 1, *supra,* before the District Court denied the Motion to Remand, Appellant clarified that the one act took place before the Inauguration and eschewed reliance on the other, which it subsequently deleted in its Amended Complaint. Indeed, in ruling against Appellant on the merits of its unfair competition claim, the District Court fully described Appellant's claim and never identified a single act taken by Appellee Trump since he became President – let alone any official act - that was any part of Appellant's Complaint.

Second, as *Mesa* makes clear, not every colorable defense is a colorable *federal* defense simply because it is raised by a federal officer. In *Mesa*, Postal Service employees were charged with criminal conduct relating to the manner in which they drove their vehicles while on duty. *See Mesa*, 489 U.S. at 123. They sought removal on the ground that as federal officers – without more – they were entitled under section 1442 to have the state law criminal charges against them decided in federal, not state court. *See id.* The employees made this argument even though the charges had asserted no defense under federal law that gave them any special protection not available to any other individuals facing the same charges. *Id*. at 133-134.

Because the employees in *Mesa* had no federal defense, the Court rejected their attempt to remove the case under subsection 1442(a)(1). "In sum, an unbroken line of this Court's decisions extending back nearly a century and a quarter have understood all the various incarnations of the federal officer removal statute to require the averment of a federal defense." *Id*. Thus, under section 1442(a)(1), the federal officer must point to a specific act taken as a federal officer and that act must give rise to a federal defense, which does not simply mean any defense on the merits.

Appellee Trump's removal notice cited *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), a case that was filed in federal court, but would surely have been

removable under section 1442(a)(1) had it been filed in a state court. There is no doubt that the basis for the claim there – that President Nixon's decision to discharge the plaintiff from his job with the Air Force was an "unlawful retaliation for his truthful testimony before a congressional Committee" – was within the scope of the President's authority over the Air Force, even if the reasons for the discharge may have been unlawful. *Id.* at 757 (citing statutory authority over Air Force). The Court granted the ex-President broad immunity, but only "from damages liability for acts within the 'outer perimeter' of his official responsibility." *Id*. at 756. To be sure, as the Court ruled in *Jefferson County, Ala v. Acker,* 527 U.S. 423, 431 (1999), a federal defendant need not win his case on a federal defense to be entitled to removal, but the defense must at least be colorable as a matter of federal law. However, as Appellant demonstrates below, Appellee Trump has no colorable federal defense because, even if Appellant relied on post-Inauguration conduct by Appellee Trump to support its claim of unfair competition, anything that Appellee Trump did was in his personal rather than official capacity.[2]

[2]Although Appellant seeks only injunctive, not monetary relief, it does not distinguish *Fitzgerald* on that ground. Appellant recognizes that, if it prevails in this case, the loss to Appellee Trump would affect him in his personal, not official capacity, in contrast, for example, to the President's loss in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952), in which only his official powers were diminished.

In this respect, this case is like *Mesa* where any defenses that the drivers of the postal vehicles had there were either factual or based on state, not federal law. However, Appellee Trump reads *Fitzgerald* so broadly as to immunize everything President Trump did or might do between now and the moment he is no longer President. While there is language in *Fitzgerald* that points out both the broad reach of Presidential power and the fact that he is on duty twenty-four hours a day, seven days a week, 365 days a year, the overriding rationale of the justification for Presidential immunity relates to assuring that the President carries out his official duties, without fear of personal monetary liability, for decisions that might turn out to be mistaken or even unlawful. *See Fitzgerald*, 457 U.S. at 755-758. For those official decisions, there are other means of challenging them, unlike suits like this one, for which this claim under local law is Appellant's only remedy.

Furthermore, as Chief Justice Burger emphasized in his concurring opinion in *Fitzgerald,*

> [t]he immunity is limited to civil damages claims. Moreover, a President, like Members of Congress, judges, prosecutors, or congressional aides – all having absolute immunity – are not immune for acts outside official duties." 457 U.S. at 759.

That opinion focused on the separation of powers basis for the immunity, a rationale that has no bearing on the purely private acts of federal officials of all branches of government. *See also Forrester v. White*, 484 U.S. 219, 230

(1988) (rejecting absolute immunity defense in claim of unlawful sex discrimination by judge who fired subordinate court employee); *Zarcone v. Perry,* 572 F.2d 52, 53-54 (2d Cir. 1978) (no immunity for judge who ordered street vendor, who sold judge coffee the judge disliked, to be brought in handcuffs to chambers by Sheriff).

In the court below, Appellee Trump relied on *Acker*, but that reliance is misplaced because the operative facts are readily distinguishable. Jefferson County imposed a licensing fee on certain occupations, including lawyers, and the County construed that to apply to the defendants' occupation – in that case, being federal judges. *See Acker*, 527 U.S. at 427-429. Under the ordinance, it was "unlawful" for any person to engage in his or her occupation without paying the fee. *Id*. at 428. The judges contended that the County was seeking to prevent them from carrying out their federal duties by conditioning their right to be federal judges on the payment of the fees. *Id*. at 439. The County disagreed and sued the judges in the local court system. *Id*. at 430. The judges removed under section 1442(a)(3), the judicial analog to the removal provision on which Appellee Trump relies. *Id*. at 427.

Because the propriety of removal was contested and jurisdictional in *Acker*, the Supreme Court reviewed it, along with the merits and another procedural defense raised by the County. In upholding removal, the Court

focused on the portion of the county law that made the failure to pay "unlawful." *Id*. at 432. The judges read that provision as creating liability for carrying out their official duties as federal judges without paying the licensing fee. *Id*. at 439. No one doubted that deciding cases and issuing orders were "acts" or official duties of federal judges. Moreover, there was no dispute that, if the County had sought to enjoin them from doing what federal judges do until they paid the licensing fees, the judges would have been entitled to remove that injunction action to federal court (where they almost certainly would have enjoyed immunity).

Here, contrary to Appellee Trump's claim, Appellant is not relying on the common law of the District of Columbia to "regulate the President of the United States." Nor does Appellant contend that his "Presidency is unlawful" based on the District's law of unfair competition or that he can be enjoined from carrying out his duties as President on account of the District's law of unfair competition. All that Appellant asks is that Appellee Trump comply with the laws of the District of Columbia, just as everyone else must do within the territorial limits of the District.

One essential fact that undermines Appellee Trump's claim of official immunity for his conduct at issue in this case is that, prior to his Inauguration, he claims to have taken steps to sever all of his relations with the Hotel and

all of his other business enterprises. *See* Morgan Lewis White Paper, January 11, 2017 (Section II detailing plans of Appellee Trump to separate his businesses from his official duties as President) (JA at 65-66). Whether he actually did so is not part of this case. However, his promise to do so eliminates any argument that, whatever post-Inauguration actions regarding the Hotel he may have taken (or failed to take), they cannot, by the representations of the law firm representing him in this case, be the basis of a claim of official immunity. In effect, Appellee Trump himself has recognized, as is clear from the very text of his law firm's White Paper, that any actions on behalf of the Hotel he may take while he is President are in his personal, and not official capacity. Indeed, even without Appellee Trump's promise, because the Hotel is a private not a federal entity, there cannot be *any* acts of Appellee Trump or those in his Administration that would constitute official acts to promote the business interests of the Hotel, even though it is owned by the President of the United States. Moreover, Appellee Trump has not pointed to any action taken by him in his official capacity, whether cited in the Complaint or not, that would serve to justify, as a matter of federal law, the unfair competition from the Hotel that has caused Appellant's injuries.

Appellee Trump's claim here is that any of his actions that relate in any way to the Hotel during his presidency are entitled to official immunity. But that position is in direct conflict with his position in a case now in the Second Circuit in which he is appealing a ruling that his use of his Twitter account is purely private and hence not subject to the First Amendment. *See Knight First Amendment Institute at Columbia University v. Trump,* 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *appeal pending* 2d Cir, No. 18-1691 (argued March 26, 2019). The opinion below is lengthy, but one quote from it, largely based on stipulations to which Appellee Trump agreed, demonstrates the gulf between his position in that case, where he is represented by the Justice Department, and his position here:

> Since the President's inauguration, the @realDonaldTrump account has been operated with the assistance of defendant Daniel Scavino, "the White House Social Media Director and Assistant to the President [who] is sued in his official capacity only." Stip. ¶ 12. "With the assistance of Mr. Scavino in certain instances, President Trump uses @realDonaldTrump, often multiple times a day, to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business. President Trump sometimes uses the account to announce matters related to official government business before those matters are announced to the public through other official channels."
> Stip. ¶ 38.

302 F. Supp. 3d at 552-553.

Moreover, the notion that every act that the President takes during the duration of his Presidency is entitled to official immunity would produce highly dubious results, both as colorable federal defenses and as a basis for removal. Consider the following hypothetical removals to federal court if Appellee Trump's broad theory of federal officer removal were sustained:

(1) Melania Trump files for divorce in New York, asserting: "Living in Washington is intolerable for Baron and me and you refuse to come back to NY";

(2) President Trump is playing golf at the Army Navy Club with the Ambassador from Japan, and fails to pay attention to the person crossing the fairway, hits his shot, striking the person in the head, and is then sued in Superior Court on grounds of negligence;

(3) President Trump invites a tailor to come to the White House and measure him for a hand-made tuxedo that he will wear only for state dinners. After the tuxedo arrives, the President is displeased with the work and refuses to pay, whereupon the tailor sues him in Superior Court;

(4) President Trump files his 2017 New York States income tax return, which includes his presidential salary and other taxable income, but his accountants make some mistakes and the State claims he owes them $10,000, plus interest and penalties for negligence. When he refuses to pay, and after exhausting all avenues required by N.Y. law, the State files suit in the appropriate state court seeking payment of the amount owed;

(5) President Trump refuses to pay the lawyers who are defending him in this case. After the case is concluded, they sue him in Superior Court and he claims absolute immunity; and

> (6) Monica Lewinsky sues President Bill Clinton for his sexual advances toward her in the White House in the Superior Court.

If Appellee Trump's removal is proper here, then removal would be permissible in each of these examples, yet in none of them would there be an even colorable federal defense.

Section 1446(a) of title 28 requires that a notice of removal must contain "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). As explained above, Appellee Trump has no federal defense to the Complaint other than the untenable argument that as President he is immune from any claim arising while he is President or that in any way relates to his position as President. Moreover, the thrust of section 1442(a)(1) on which he relies is that the defense must be to some act that he has undertaken while President. Or, as Appellee Trump stated in his notice of removal, removal is available "so long as the federal officer defendant raises a colorable federal defense and shows a nexus between the complained-of conduct and the federal officer's official authority." JA at 59, Notice of Removal, ¶ 20.

However, his notice of removal contains only one paragraph that identifies *any* act that Appellant alleges that Appellee Trump took while President on which it bases its federal defense:

> The complaint alleges that President Trump has taken several acts *in his official capacity* that in the plaintiff's view "promote

> the Hotel to maximize its exposure and income-producing potential" rather than "avoid exploiting [his] public office for private gain."

JA at 58 (Compl., ¶ 20) (emphasis added).

There are two major problems with Appellee's claim that this assertion satisfies the requirements of sections 1442(a)(1) and 1446(a). First, the phrase "in his official capacity" is not in quotes because it cannot be found anywhere in the Complaint and because Appellee Trump has been sued only in his personal capacity. As Appellant has shown above, a President has immunity only for acts in his official capacity, and unless Appellee Trump is correct in his apparent claim that everything he does as President is immune from claims like this, he does not present a colorable federal defense to this action. Moreover, no matter how wide Presidential immunity extends, it cannot apply when the President seeks to promote his private economic interest in a property in which he holds a major beneficial interest. Indeed, the Complaint did not even assert that Appellee Trump promoted the Hotel after he became President. But even if it had, there would be no colorable federal defense to Appellant's unfair competition based on that active promotion of his personal financial interests.

In his Opposition to the Motion to Remand, but not in his notice of removal, Appellee Trump cited the Complaint's allegation that White House staff and Trump family members have been promoting the Trump Hotel. JA at 39 (Compl., ¶ 20.) But that allegation provides no greater basis for removal, and perhaps less. The Complaint does not contend that these promotional activities were undertaken at the urging of Appellee Trump, which would, of course, be inconsistent with his public promises not to mix his presidential duties with his private economic interests. And, because this case does not seek to impose liability on White House staff for those actions, there is no need to consider what immunity, if any, they would have or what the substantive claim against them might be.

Appellee Trump has also previously argued that Appellant is basing its claim on his Inauguration itself. Appellant agrees that *if* liability were based on the President's swearing in, that would raise at least a colorable immunity question. But Appellant cited to the Inauguration only to demarcate the time at which the unfair competition began. Despite Appellee Trump's effort to obfuscate the issues, Appellant asserts that the critical causal event was Appellee Trump's failure – prior to that date – to divest (as instructed by the U.S. Office of Government Ethics) or take appropriate steps to prevent the unfair competition from arising once Appellee Trump became President.

B. Because Appellant's Claim Is Based on the Law of the District of Columbia, Not Federal Law, Removal Under 28 U.S.C. §§ 1331& 1441 Was Not Proper.

Both Appellees have asserted that the case was properly removed to federal court because Appellant's claim arose under federal, not District of Columbia law, despite the fact that the Complaint relied solely on District of Columbia, not federal law. However, neither Appellee has identified any federal law that provides for injunctive relief (or, for that matter, damages) based on the facts in this case or on unfair competition generally, and they specifically argue that Appellant has no claim based on the Lease, federal or otherwise.

Absent diversity of citizenship, a defendant may remove a case that expressly relies on state law in only two circumstances. First, where Congress has preempted an entire field of law, such as under federal labor laws, the only claims are federal claims, and hence federal question removal is proper despite the fact that the complaint only states claims under state law. *See, e.g., Metropolitan Life Ins. Co. v Taylor*, 481 U.S. 58 (1987) (upholding removal based on preemptive effect of § 502(a)(1)(B) of Employee Retirement Income Security Act of 1974); *see also Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968) (upholding removal based on preemptive effect of § 301 of Labor Management Relations Act of 1974). In those situations,

because there is no remaining state law claim to assert, the case is either removable because it arises under federal law, or it must be dismissed because there is no state law claim that is not preempted. In such cases, Congress has generally provided a federal remedy, to the exclusion of state remedies, even if the federal remedy does not entitle a particular plaintiff to prevail. In this case, however, there is no arguable federal remedy applicable to the facts of Appellant's unfair competition claim, and so this basis for removal is not available for Appellees.

Second, Appellee Trump OPO's notice of removal correctly stated that in most cases a plaintiff may elect to rely solely on state law, but that courts may nonetheless conclude that, despite the label, the claim is based on federal law because only by proving a violation of federal law can the plaintiff prevail. In the typical case, the plaintiff could have pled a federal claim, but chose not to do so (notably, Appellees have never identified what that claim might be here). Although Appellees' discussion of the applicable legal principles is substantially correct, their application to the facts of this case is not.

The Supreme Court recently decided a case that demonstrates the error of this effort at removal. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning,* 136 S. Ct. 1562 (2016), the Court rejected the attempt by the defendant to use the plaintiffs' citation of federal law as part of their state law

complaint to transform the case into one arising under federal law and make it removable. The claim there was based on the illegality of the defendant's naked short sales, and relied exclusively on New Jersey law. *Id.* at 1566-67. However, the complaint:

> referred explicitly to [SEC] Regulation SHO, both describing the purposes of that rule and cataloguing past accusations against Merrill Lynch for flouting its requirements. And the complaint also couched its description of the short selling at issue here in terms suggesting that Merrill Lynch had again violated that [federal] regulation, in addition to infringing New Jersey law.

Id. (citations to record omitted).

Defendant removed the case to federal court, relying on both Section 1331 and Section 27 of the Securities Exchange Act. *Id*. at 1564. Plaintiffs' Motion to Remand was denied, but the Third Circuit reversed and the Supreme Court upheld the remand order. *See id*. Before the Supreme Court, the defendant did not rely on "arising under" removal jurisdiction under Section 1331, but instead argued, unsuccessfully, that Section 27's exclusive jurisdiction was broader than removal under Section 1331. *Id*. at 1564-1565. The Court concluded that the standards were the same and found removal to be improper under Section 1331. *Id*. at 1566.

Just like this case, the plaintiffs in *Merrill Lynch* based their claim solely on state law. They did cite SEC regulations in support of the claim, but that citation did not alter the outcome so as to provide a basis for removal. *Id*.

at 1567-1569. Here, there is even less reason to conclude that Appellant's claim arises under federal law because the Complaint does not rely on or even cite to any federal statute or regulation. Instead, it cites a provision in the Lease that Appellees signed with GSA, which forbids Appellee Trump and all other federal and District of Columbia elected officials from receiving any benefits from the Hotel while holding their elected offices. *See* JA at 37, (Complt., ¶ 10). The Lease is a contract, not a federal law, or for that matter a law of any kind. Rather, it is a voluntary agreement that Appellant contends is an acknowledgment by Appellees that elected officials covered by section 37.19 are engaging in unfair competition if they receive any benefits from the Hotel. Just as plaintiffs in *Merrill Lynch* cited SEC short sale regulations in support of their claim that defendant's conduct violated New Jersey law, so here Appellant cited section 37.19 in support of its District of Columbia law-based claim of unfair competition. Thus, even if the GSA lease constituted federal law (as opposed to an obligation created *under* federal law), the holding in *Merrill Lynch* establishes that removal on that basis is not available.

The error of Appellees' approach is apparent if one asks whether Appellees would still argue that Appellant has asserted a federal claim if section 37.19 were *not* in the Lease, and Appellant made the same claim of unfair competition. Obviously not. Therefore, the inclusion of that portion

of the Lease in the Complaint did not transform an unfair competition claim under District of Columbia law into one under federal law. Appellant's claim might have appeared to be marginally weaker had the parties to the Lease not agreed to include section 37.19, but that would be because of the requirements of District law, not as the result of any federal statute or common law.

Nor does *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308 (2005), which has been relied upon heavily by Appellee Trump OPO, undermine this conclusion. To be sure, in upholding federal question removal there, the Court ruled that there is no requirement under Section 1331 that there be a specific federal cause of action that would support the plaintiff. *Id*. at 312. However, in that case, the plaintiff's sole claim was that the prior sale of its property to satisfy a federal tax obligation to the Internal Revenue Service had been done in violation of a federal statute governing the terms and conditions of that sale. *Id*. at 310-311.The Court upheld removal because the only questions in the case, as presented by the plaintiff's complaint, involved federal tax law; hence the absence of an express federal cause of action there did not result in the legal issues having to be resolved by state court judges. *Id*. at 319-320. The Appellant's claim here is based on District of Columbia law, and there is no need to interpret or

apply any federal law. *Grable,* therefore, has no bearing on this case because of the very different context in which that case arose.[3]

Bender v. Jordan, 623 F. 3d 1128 (D.C. Cir. 2010), is similar to *Grable*, and thus similarly distinguishable. The claim at issue there was for breach of contract, but the contract was based almost entirely on the rights and obligations created by a rule of a federal agency. *Id*. at 1129-1130. For that reason (and perhaps others which this Court did not reach), after *sua sponte* raising the jurisdictional question, this Court concluded that federal courts had jurisdiction under Section 1331 because the claims of both parties would be resolved largely based on "a nearly pure issue of federal law." *Id.* at 1130. The same reasoning applies to distinguishing *District of Columbia v. Group Hospitalization and Medical Services, Inc.,* 576 F. Supp. 2d 51 (D.D.C. 2008), in which the principal disputed issue was the meaning of the federal charter under which that defendant operated, even though the claim was nominally based on District of Columbia law.

[3] In addition, the United States was brought in as a third-party defendant in *Grable*, and it could surely have removed if the primary basis for removal had been rejected. Because the tax sale was upheld, the claim against the United States was dismissed as moot, but it still appeared as an amicus in the Supreme Court supporting removal.

Nor does the other Supreme Court decision that was significantly relied upon by Appellee Trump OPO, *Gunn v. Minton,* 568 U.S. 251 (2013), support removal. There, a state law legal malpractice claim arose out of defendant's unsuccessful representation of the plaintiff in a patent suit. *Id*. at 251. Under 28 U.S.C. § 1338, the federal district courts have exclusive jurisdiction over cases arising under patent law, but the legal malpractice claim had been filed in Texas state court. That State's Supreme Court ruled that its courts had no jurisdiction over the malpractice claim, and the Supreme Court unanimously reversed. *Id*. at 251-252. It did so despite concluding that issues of federal patent law were both disputed and necessarily had to be decided in the case. *Id*. at 259-60. Here, as demonstrated above, there is no issue of federal law, and no court need be familiar with, or apply, any federal law governing the Hotel Lease to resolve Appellant's unfair competition claim. Hence, *Minton* is irrelevant to the remand question here.

Appellee Trump OPO's other argument is that, because the relief that Appellant seeks is precluded by the Lease that is governed by federal law, removal under Section 1331 is proper. Although Appellee Trump OPO did not employ the preemption label, its argument is a poorly disguised effort to conceal that defense. According to Appellee Trump OPO, even if Appellant stated a valid claim for unfair competition under District law, the federal law

governing the Lease would preclude any court from granting the relief requested. That is the standard language of preemption. Appellant strenuously disagrees that the Lease and/or federal law would preclude granting the injunctive relief that it seeks on the merits, but in any event, that issue is not relevant on the threshold issue of remand.

The flaw in this argument is that preemption, other than field preemption, is only an affirmative defense and not a basis for federal question removal under section 1441, on which Appellees rely. *Caterpillar, Inc. v Williams*, 482 U.S. 386, 393 (1987):

> Thus, it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the Appellant's complaint, and even if both parties concede that the federal defense is the only question truly at issue.
> (Emphasis in original).

In *Caterpillar*, the Court discussed the exception for complete preemption due to the existence of a federal claim, but Appellees do not suggest that the exception applies here. Indeed, even when the federal defense is the preclusive impact of a prior federal court decision, removal on that basis is improper. *See, e.g., Rivet v. Regions Bank of Louisiana,* 522 U.S. 470 (1998).

Finally, the issue on the Motion to Remand was not whether Appellees have a valid preemption defense, but whether Congress has authorized them to remove this case to federal court based on its assertion of a federal preemption defense. The answer to that question is plainly no, and Appellees' attempted federal question removal on that basis must also be rejected.[4]

II. THE DISTRICT COURT ERRONEOUSLY RULED THAT APPELLANT FAILED TO STATE A CLAIM BASED ON THE DISTRICT OF COLUMBIA COMMON LAW OF UNFAIR COMPETITION.

At its heart, Appellant's claim is that Appellee Trump's failure to divest his ownership interest in the Hotel prior to inauguration, together with the efforts of Appellee Trump OPO and those working on its behalf to promote the connection between the Hotel and President Trump, is so egregious that it constitutes unfair competition. As a result of the unfair competition by the Appellees, Appellant has alleged it has directly suffered economic losses.

[4] "If the Court concludes that the case was properly removed, it may wish to consider certifying the third question presented - whether Appellant stated a claim for unfair competition under the common law of the District of Columbia - to the District of Columbia Court of Appeals, pursuant to D.C. Code § 11-723(a)."

In their Motions to Dismiss, Appellees raised federal defenses as well as their contention that Appellant failed to state a claim for unfair competition under the common law of the District of Columbia. Because the District Court did not rule on the federal law defenses, and because many of the federal law issues overlap substantially with the issues of removal, this brief will not address them separately.

"Unfair competition *is not defined in terms of specific elements*, but by various acts that would constitute the tort if they resulted in damages." *Hanley-Wood, LLC v. Hanley Wood, LLC*, 783 F.Supp.2d 147, 153 (D.D.C. 2011) (*citing Furash & Co. v. McClave*, 130 F. Supp. 2d 48, 57 (D.D.C. 2001) (emphasis added)). "These acts include interference with access to business." *Furash & Co.,* 130 F. Supp. 3d at 57 (*citing B & W Mgmt. v. Tasea Inv. Co.*, 451 A.2d 879, 881 n.3(D.C. 1982)(emphasis added); *see also Econ. Research Servs. v. Resolution Econs., LLC*, 208 F. Supp. 3d 219, 231 (D.D.C. 2016) (same). Therefore, a party may state a viable claim for unfair competition by alleging tortious interference with advantageous business relations. *See Hanley Wood*, 783 F. Supp. 2d at 153 (noting that allegations of interference with plaintiff's business satisfied pleading requirements for "fluid requirements of the tort for unfair competition"); *see also Bus. Equip. Ctr. v. DeJure-Amsco, Corp.*, 465 F. Supp. 775, 788 (D.D.C. 1978) (concluding

cause of action for tortious interference with business relations is "virtually the same as that for unfair competition").

The District of Columbia Court of Appeals, which has the final word on the scope of the common law tort of unfair competition in the District of Columbia, has not spoken to the issue in 37 years, and even then, much of what it said was dicta, often in cases in which the plaintiff had made multiple objections to the defendant's conduct, only one of which was unfair competition. *See Tasea Inv. Co.*, 451 A.2d at 881 n.3. That Court has never held that the tort is limited to situations of passing off one's goods as those of another, or engaging in acts to destroy a rival, or using illegal methods. In addition, the District Court recently confirmed that the tort is not defined only by specific elements. *See Econ. Research Servs.*, 208 F. Supp. 3d at 231 (*citing Tasea Inv. Co.*, 451 A.2d at 881 n.3). "On the simplest conceptual level, the law of unfair competition seeks to prevent 'people from playing dirty tricks.'" Rogers, Book Review 39 Yale L.J. 297, 301 (1929), *quoted* in *Grempler v. Multiple Listing Bureau*, 258 Md. 419, 425-26, 266 A.2d 1, 4 (1970).

Indeed, it has been recognized for decades that this doctrine has been evolving. As The American Law Institute noted:

> The law has not yet developed a complete generalized standard for measuring trade practices like the standard of reasonable care

> in negligence. In part this is due to differing standards of commercial morality in the various industries; in part it is due to the fact that this branch of the law developed eclectically from the law dealing with the older wrongs which were not directly related to trade practices and competition. *But the tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade*.

3 Restatement of the Law Second, Torts ch. 35, §§ 539-540 (1977) (emphasis added). While the original basis of equitable relief was the fraudulent deception of the purchaser, the Supreme Court in *Int'l News Service v. Associated Press*, 248 U.S. 215, 236 (1918), held that "the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired," and it is that right that furnishes the basis of the tort of unfair competition in this case.

Legal commentators have confirmed that the tort of unfair competition is not limited to any list of enumerated types of actions that would constitute the tort. *See* Restatement of the Law Third, Unfair Competition, § 1 (1995)("One who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability to the other for such harm unless: (a) the harm results from acts or practices of the actor actionable by the other under the rules of this Restatement relating to . . . o*ther acts or practices of the actor determined to be actionable as an unfair method of*

competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public.") (emphasis added).

The Restatement further explains: "A primary purpose of the law of unfair competition is the identification and redress of business practices that hinder rather than promote the efficient operation of the market. Certain recurring patterns of objectionable practices form the basis of the traditional categories of liability specifically enumerated in Subsection (a)(1)-(3). *See id.* However, these specific forms of unfair competition do not fully exhaust the scope of statutory or common law liability for unfair methods of competition, and Subsection (a) therefore includes a residual category encompassing other business practices determined to be unfair." *Id.* at Comment G (emphasis added).

The conclusion is that an entity or individual commits the tort of unfair competition when its actions impair its competitor's "ability to compete for any opportunity" or "caused any other competitive injury." *Sabre Int'l Sec. v. Torres Advanced Enter. Sols., LLC*, 13 F. Supp. 3d 62, 70-71 (D.D.C. 2014). Courts have awarded injunctive relief on an unfair competition claim when a plaintiff pleads "interference with Plaintiff's business." *Hanley Wood LLC*, 783 F. Supp. 2d at 153. Although the District Court has explained that "unfair competition is a 'limited' tort given our society's encouragement of

'aggressive economic competition," *Econ. Research Servs., Inc. v Resolution Econ*., LLC, 308 F. Supp. 219, 231 (D.D.C. 2016), this Court has recently held that certain types of improper interference with access to the business qualify as unfair competition. *See Camarda v. Certified Fin. Planner Bd. of Stds., Inc.,* 672 F. App'x 28, at *30 (D.C. Cir. 2016) (*citing* and *quoting B&W Mgmt.*, 451 A.2d at 881 n3).

At least one court has held that a government official, acting for his own personal benefit but utilizing his official government authority, could be held liable for unfair competition when his acts interfered with the access of one to do business in a certain area. *Better Gov't Bureau v. McGraw*, 904 F. Supp. 540, 546 (S.D. W. Va. 1995). There, a state Attorney General attempted to thwart a watchdog group's access to conduct business under its regular name by filing for a business license for a substantially similar name, while also acting in concert with other government employees to eliminate the watchdog's ability to do business in that state. *Id*. at 543-546. The Court held that the Attorney General could be liable in his personal capacity for his acts that may constitute unfair competition. *Id*. at 549.

Moreover, and unlike any other cases cited by Appellees or the District Court, there is section 37.19 of the Lease, to which Appellees agreed when they signed the Lease. That provision applies to over 500 elected officials

whose positions give them actual significant influence, or the appearance of such influence, regarding political activities conducted in the District of Columbia. Although Appellant does not assert a claim based on the Lease, that section supports the underlying premise of what type of factual circumstances constitute unfair competition. The obvious concern is that individuals or groups seeking to curry favor with those government officials will do so by patronizing the businesses of those elected officials, instead of those of their competitors.

The exhibits submitted by Appellee Trump OPO below helpfully reinforce this conclusion. Those include what are asserted to be the standard GSA lease forms (for much less complicated transactions than the one for the Hotel) in 1999 (Exhibit D) and the revised version in 2013 (Exhibit E). *See* JA at 121- 126. Paragraph L in both forms provides as follows:

> L. No member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of the lease agreement, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to any corporation or company if the agreement be for the general benefit of such corporation or company. JA at 123, 126.

Several points about the standard lease confirm Appellant's understanding of the import of section 37.19 in the context of its unfair competition claim. First, the persons covered by standard form paragraph L are not only federal executive branch officials who might have an ability to

control how GSA manages the lease. Members of Congress are included, which might suggest a concern over *indirect* interference by those Members with jurisdiction over GSA, but that is belied by the inclusion of all Members, as well as delegates and resident commissioners, who plainly have no vote or other ability to influence GSA. Thus, paragraph L appears to be exactly what Appellant contends section 37.19 is: a common understanding that it is unfair for certain government officials to have beneficial interests in government leases.

Section 37.19 is a more carefully tailored version of this understanding based on the location of the Hotel in downtown Washington D.C. It adds the President and all elected District of Columbia officials for whom ownership interests in the Hotel would provide both political and financial benefits of the kind that the common law of unfair competition is designed to prevent. For these reasons, the common law principle underlying section 37.19 – confirmed by standard lease form paragraph L– is that it is unfair to competitors such as Appellant for elected officials to benefit from their financial interests in leases of government property in a location in which their authority runs.

This reading is further confirmed by *United States v. Dietrich*, 126 F. 671, 675 (C.C.D. Neb. 1904), in which the court analyzed a statute containing similar language to section 37.19:

> In other words, the statute and the contract declared an utter incompatibility between being a member of or delegate to Congress, and being at the same time charged with a duty to perform the contract and clothed with a right to receive any benefit therefrom. [. . . .] To the suggestion that in practical operation this view will result in loss or injury to persons who become members of or delegates to Congress while holding and enjoying contracts or agreements with the United States, we answer that such cases are not of frequent occurrence, and that the acceptance of a seat in Congress is entirely voluntary.[5]

In its Memorandum Opinion, the District Court nonetheless stated that Appellant had failed to state a claim upon which relief could be granted for two reasons: (a) the binding impact of *Ray v. Proxmire*, 581 F.2d 998 (D. C. Cir. 1978), and (b) that Cork had not sufficiently pled facts demonstrating conduct by the Appellees that went beyond mere competition. JA at 15-22. With all due respect, the District Court's analysis was flawed and should be reversed.

[5]This opinion was authored by Judge Willis Van Devanter, who later served as a Justice of the Supreme Court of the United States.

This Circuit's analysis in *Proxmire* is simply inapposite to the circumstances presented by Cork. In *Proxmire* – a case litigated over 40 years ago by a *pro se* plaintiff – the offending individual was the spouse of a U.S. Senator, not the Senator himself, and the advantage of increased business came not through any implied promises of official favors from an elected official, but merely "special tours" to places not normally accessible to the public. 581 F.2d at 1002-03.

There was no allegation by the plaintiff in *Proxmire* that the individuals who patronized the Senator's wife's business were doing so in order to curry favor with the Senator himself in the interest of securing future official actions from him in their favor.[6] It is that distinction which drives a wedge between *Proxmire* and the present case. Cork does not merely allege that the competition from the Trump Hotel is unfair as a matter of law due to the President's celebrity and status. Cork sufficiently alleged that the Hotel is luring business away from Cork with the implicit promise that patronizing the Trump Hotel will curry favor with President Trump or his inner circle and increase the likelihood that the U.S. Government (upon instruction from President Trump or his inner circle) will take official action to benefit those

[6] In addition, the defendant in *Ray* never signed a lease with a provision similar to section 37.19 of the GSA lease.

who are patrons of the Trump Hotel. This was specifically alleged in the Complaint. JA at 38-39 (Compl., ¶¶ 17-19).

The facts in this case are vastly different from those described by the District Court and the Appellees. Cork, like other hospitality businesses, seeks to attract both foreign and domestic customers including government, political, legal and lobbying leaders. Because the Trump Hotel and its restaurants are owned by President Trump, they have an unfair advantage because the Hotel and others promote the connection between it and the Presidency.

No court has allowed a sitting President or any other elected official to personally profit by owning a hotel or a restaurant that takes business from competing enterprises in the vicinity. Appellant is prepared to prove through admissible evidence that the business activities of the Hotel and restaurant are actively promoted to curry favor with the President of United States and his inner circle. Although not illegal, these promotional activities are designed to funnel profits to the President and his family. In doing so, they fly in the face of the principle of section 37.19 regarding benefits to elected officials, which embodies the understanding of fair competition norms and helps define what constitutes unfair competition under the law of the District of Columbia.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with instructions to remand the case to the Superior Court for the District of Columbia, or, in the alternative to the District Court, for further proceedings on the merits of Appellant's unfair competition claim.

Respectfully submitted,

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May 15, 2019

CERTIFICATE OF COMPLIANCE

I, Bradley P. Moss, counsel for the Appellant K&D LLC, do hereby certify pursuant to FRAP 26(g)(1), that the foregoing Brief of Appellant contains 11,592 words, excluding those portions of the brief specifically authorized by that Rule and Circuit Rule 32(e) to be excluded.

/s/

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Bradley P. Moss

CERTIFICATE OF SERVICE

I hereby certify, pursuant to D.C. Circuit Rule 25(c) that on May 15, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/

Bradley P. Moss

May 15, 2019