20-2766-cv

United States Court of Appeals

for the

Second Circuit

DONALD J. TRUMP,

Plaintiff-Appellant,

– v. –

CYRUS R. VANCE, JR., in his official capacity as District Attorney of the County of New York and MAZARS USA, LLP,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE CYRUS R. VANCE, JR.

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PRELIMINARY STATEMENT

As the district court found in its meticulous analysis of Appellant Donald J. Trump's Second Amended Complaint ("SAC"), the four corners of that pleading—taking every allegation as true—fail to state facts or support plausible inferences that meet the basic pleading standards of Rule 12(b)(6).

That should not be surprising, given the context here. Appellant seeks to challenge a subpoena (the "Mazars Subpoena") issued to Mazars USA LLP ("Mazars"). That subpoena was issued by a duly-constituted New York County grand jury investigating potential crimes under New York law, and the subpoena came on the heels of numerous public reports describing possible financial wrongdoing by the Appellant's Manhattan-based company. Under well-settled and controlling principles, such a subpoena is presumptively valid.

Appellant's first challenge to the Mazars Subpoena, filed a year ago, centered on his novel theory that, as a sitting President, the Constitution conferred on him absolute immunity from any legal process whatsoever. That claim was rejected by every federal court that considered it, including this Court and the Supreme Court just two months ago.

On remand, Appellant is left with two state-law objections to the Mazars Subpoena: overbreadth and bad faith. But each of these theories has been rejected in the context of Appellant's failed immunity claim. At bottom, Appellant advances only three

conclusory assertions: (1) the grand jury issued a narrower subpoena to the Trump Organization prior to issuing the Mazars Subpoena; (2) the Mazars Subpoena mirrors another subpoena issued by the U.S. House of Representatives; and (3) published reports indicated that the grand jury investigation initially was focused on certain "hush money" payments, and the Mazars Subpoena goes beyond the scope of such payments.

For the reasons discussed herein, these recycled arguments fail under Rule 12(b)(6). Under long-settled pleading rules, a complaint cannot be premised on legal conclusions or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In reviewing a complaint, a court should look at the context, and "draw on its judicial experience and common sense." *Id.* at 679 (citation omitted). Applying that standard here, this Court should find that the face of the complaint fails to state a claim and affirm its dismissal by the district court.

STATEMENT OF THE ISSUE

Whether the district court correctly held that the SAC's allegations about a presumptively valid grand jury subpoena are facially insufficient to state a claim for overbreadth or bad faith under New York law.

STATEMENT OF THE CASE

A. Factual Background

This case arises from a grand jury investigation commenced in 2018 by the New York County District Attorney's Office (the "Office"). *See* JA16. The investigation

concerns a variety of business transactions and is based on information derived from public sources, confidential informants, and the grand jury process. In connection with the investigation, the Office has issued subpoenas on behalf of a sitting grand jury for financial and other records of Appellant, among other individuals and entities. *See* JA16-18.

1. Widespread Public Reports Have Alleged A Broad Array Of Financial Misconduct At Appellant's Manhattan-Based Companies

Numerous published reports have detailed financial improprieties by Appellant's Manhattan-based company (and many of its affiliates) that could potentially violate New York law. These reports have identified transactions spanning more than a decade, involving individual and corporate actors who were based in New York County. While the Court need not take judicial notice of such reports to conclude that the SAC fails to state a claim, the reports underscore that dismissal was the appropriate result in this case. By way of a snapshot, the reports have included, among other things, the following allegations:

- The Washington Post reported that Appellant routinely sent lenders multi-page "Statements of Financial Condition" purporting to describe his "properties, debts and multibillion-dollar net worth" that in fact "were deeply flawed" in that they "overvalued" assets, "omitted properties that carried big debts" and included "key numbers [that] were wrong." David A. Fahrenthold & Jonathan O'Connell, *How Donald Trump Inflated His Net Worth to Lenders and Investors*, WASH. POST, Mar. 28, 2019, https://wapo.st/2DsxZyo.

- As just one example, the same report detailed how Appellant's financial statements, starting in 2011, overstated real estate assets by hundreds of millions

of dollars. *Id.* In particular, Appellant's 2011, 2012, and 2013 financial statements are reported to have valued a property known as the "Seven Springs" estate in Westchester, New York, at between $261 and $291 million, while local authorities were alleged to have valued the same property at approximately $20 million. *Id.* Then, in 2018, Appellant's financial disclosure form classified the value of this property as between $25 million and $50 million. Donald J. Trump, Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) (2018).

- Similarly, Appellant's 2011 financial statement claimed that he had 55 home lots to sell at a golf course in Southern California, for at least $3 million each. Fahrenthold & O'Connell, *How Donald Trump Inflated His Net Worth to Lenders and Investors*. But according to city records, the public report alleged, at the time Appellant had only 31 lots available to sell there. The report concluded that Appellant had claimed credit for 24 lots (and over $72 million in expected revenue) that he did not actually have. The report made similar allegations of misrepresentations, again with supporting documentation, concerning claims about the size of a Virginia vineyard (overstated by 800 acres). *Id.*

- On August 21, 2018, the U.S. District Court for the Southern District of New York accepted a guilty plea from Michael Cohen, formerly Appellant's lawyer and an executive vice president at the Trump Organization, to a detailed felony Information charging, among other things, two counts of campaign finance violations related to so-called "hush money" payments that Appellant made in the run-up to the 2016 election in order to silence two women who claimed to have had extramarital affairs with Appellant. *United States v. Cohen*, 366 F. Supp. 3d 612, 618 (S.D.N.Y. 2019).

- The Information, and Cohen's related testimony, contained detailed allegations that executives at the Trump Organization, including Appellant, were knowing participants in a scheme to evade campaign finance restrictions by mischaracterizing the payments as legal expenses on the Trump Organization's books in 2016 and 2017. *See* Information Dkt. 2, at 11-18 ¶¶ 24-42, *United States v. Cohen*, No. 18-cr-602 (WHP) (S.D.N.Y. Aug. 21, 2018); *see also* Rebecca Ballhaus & Joe Palazzolo, *Michael Cohen Details Allegations of Trump's Role in Hush-Money Scheme*, WALL ST. J., Feb. 27, 2019, https://on.wsj.com/3fp2jap. No other individuals or entities were charged in connection with this scheme.

- Cohen subsequently made Appellant's financial statements public and testified to Congress that it was common for the Trump Organization to submit falsified financial records when the company applied for loans (testimony that investigative reporting tended to corroborate). *Hearing with Michael Cohen, Former Attorney to President Donald Trump: Hearing Before the H. Comm. on Oversight and Reform*, 116th Cong. 1 (Feb. 27, 2019). According to public reports, between 2012 and 2016, a lender called Ladder Capital extended loans worth over $250 million to the Trump Organization, and those loans were secured by properties located in New York County whose value was potentially overstated. Wendy Siegelman, *Trump's Two Largest Creditors — Ladder Capital Finance & Deutsche Bank*, MEDIUM, Dec. 2, 2017, https://bit.ly/32zRkrM.

- The Washington Post reported that, between 2004 and 2014, Appellant faced billions of dollars in debt liabilities and yet somehow had enough money to purchase "five houses, eight golf courses and a winery," including land in Scotland, for $400 million in cash rather than through mortgages. David A. Fahrenthold & Jonathan O'Connell, *After Selling Off His Father's Properties, Trump Embraced Unorthodox Strategies To Expand His Empire*, WASH. POST, Oct. 8, 2018, https://wapo.st/35iWaId. This same report suggested Appellant's liquidity was facilitated by "unconventional" borrowing practices beginning in 2012. *Id.*

- Still other public reports alleged that, in 2012, Trump Organization-related entities paid $48 million in full satisfaction of $130 million of outstanding debt related to the Trump International Hotel and Tower in Chicago. *Id.* The forgiven portion of that debt would generally be considered income for which the Trump Organization would owe taxes. *See generally* 26 U.S.C. § 61(a)(11). The reporting, however, indicates that the Trump Organization claimed publicly that it purchased the outstanding portion of the debt, and that it remains listed on Trump Organization books as a debt from one Trump Organization subsidiary to another. Fahrenthold & O'Connell, *After Selling Off His Father's Properties, Trump Embraced Unorthodox Strategies To Expand His Empire*. Yet the same subsidiary who purchased the debt is listed as being "practically worthless" on Appellant's financial statements, despite supposedly holding a multimillion dollar loan. Susanne Craig, *Trump Boasts of Rapport With Wall Street, but the Feeling Is Not Quite Mutual*, N.Y. TIMES, May 23, 2016, https://nyti.ms/32DETeF; Donald J. Trump, Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) (2015). Accordingly, it is possible that the Trump Organization may not have treated the forgiven debt as taxable income.

As discussed below, such reports place sufficient notice into the public record to render the SAC's claims implausible. In particular, if misstatements about business properties, wherever located, were conveyed from that business's headquarters in New York to New York-based business partners, insurers, potential lenders, or tax authorities, those misstatements could establish New York crimes such as Scheme to Defraud (Penal Law § 190.65), Falsification of Business Records (Penal Law § 175.10), Insurance Fraud (Penal Law §§ 176.15-176.30), and Criminal Tax Fraud (Tax Law §§ 1803-1806), among others.

Thus, even if the grand jury were testing the truth of public allegations alone, such reports, taken together, fully justify the scope of the grand jury subpoena at issue in this case.[1] As the Office represented to the Supreme Court, we "would have been remiss not to follow up." Oral Argument at 55:9, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635).

2. The Scope Of The Grand Jury Subpoenas

On August 1, 2019, the Office served the Trump Organization with a subpoena *duces tecum* (the "Trump Organization Subpoena") issued on behalf of the grand jury.

[1] Indeed, the temporal scope of the subpoena is moderate when compared to the temporal scope of misconduct alleged in public reports. The New York Times reported that Appellant engaged in "dubious tax schemes during the 1990s, including instances of outright fraud" and that he "helped his parents dodge taxes" by "set[ting] up a sham corporation to disguise millions of dollars in gifts" and undervaluing assets. David Barstow, Susanne Craig, & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father*, N.Y. TIMES, Oct. 2, 2018, https://nyti.ms/37TvkqZ.

The subpoena sought records and communications "[f]or the period of June 1, 2015, through September 20, 2018," relating to "Michael Cohen's employment by or work on behalf of Donald Trump or the Trump Organization at any time," and records relating to so-called "hush money" payments that Appellant agreed to make, through Cohen, to silence two women who claimed to have had extramarital affairs with Appellant. JA16-17. Shortly after service of the Trump Organization Subpoena, the Office conveyed to counsel for the Trump Organization its belief that tax returns could be responsive to the Trump Organization Subpoena to the extent that they related to the Cohen payments. JA17-18.

On August 29, 2019, the Office served Appellant's and the Trump Organization's accounting firm, Mazars, with the Mazars Subpoena, likewise issued on behalf of the grand jury. JA18. The Mazars Subpoena seeks two primary categories of documents: tax returns and financial statements (subparagraphs (a) and (b), respectively), for an eight-year period. *Id.* It also seeks three categories of supporting documentation necessary to fully understand those primary documents: the engagement agreements defining the accountants' role in creating the tax returns and financial statements; the source documents providing the accountants with the raw financial data; and the work papers and communications showing how the raw data was analyzed and treated in the preparation of the primary records (subparagraphs (c)-(e), respectively). *Id.* The records requested relate to Appellant, the Trump Organization, and related entities. *Id.* The subpoena seeks, in relevant part:

1. For the period of January 1, 2011 to the present, with respect to Donald J. Trump, the Donald J. Trump Revocable Trust, the Trump Organization Inc., the Trump Organization LLC, the Trump Corporation, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Acquisition LLC, Trump Acquisition, Corp., the Trump Old Post Office LLC, the Trump Foundation, and any related parents, subsidiaries, affiliates, joint ventures, predecessors, or successors (collectively, the "Trump Entities"):

    a. Tax returns and related schedules, in draft, as-filed, and amended form;

    b. Any and all statements of financial condition, annual statements, periodic financial reports, and independent auditors' reports prepared, compiled, reviewed, or audited by Mazars USA LLP or its predecessor, WeiserMazars LLP;

    c. Regardless of time period, any and all engagement agreements or contracts related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b);

    d. All underlying, supporting, or source documents and records used in the preparation, compilation, review, or auditing of documents described in items (a) and (b), and any summaries of such documents and records; and

    e. All work papers, memoranda, notes, and communications related to the preparation, compilation, review, or auditing of the documents described in items (a) and (b), including, but not limited to,

        i. All communications between Donald Bender and any employee or representative of the Trump Entities as defined above; and

        ii. All communications, whether internal or external, related to concerns about the completeness, accuracy, or authenticity of any records, documents, valuations, explanations, or other information provided by any employee or representative of the Trump Entities.

JA18.

As discussed in Section II, *infra*, the requests in the Mazars Subpoena, on their face, seek information about the many public allegations to date about possible financial

improprieties in New York County by the Trump Organization and its employees and affiliates.

B. Procedural History

On September 19, 2019, Appellant commenced this case, advancing the expansive claim that the Mazars Subpoena must be quashed because, as President, he is constitutionally immune from any state criminal process, even for unofficial conduct engaged in while he was a private citizen. Appellant alleged that the Mazars Subpoena was part of a "campaign" by elected officials to "harass[] the President" in "bad faith." Dist. Ct. Dkt. 27, at 13, 17.[2] Appellant cited as evidence for this assertion that the grand jury issued the Mazars Subpoena after Appellant's attorneys declined to produce tax returns in response to the Trump Organization Subpoena and that the Mazars Subpoena mirrored another subpoena issued to Mazars by the U.S. House of Representatives. *Id.* at 13-16.

Appellant's absolute immunity claim was thoroughly reviewed and rejected at every level of the federal courts. *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Trump v. Vance*, 941 F.3d 631 (2d Cir. 2019); *Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019). The Supreme Court also rejected the Solicitor General's alternative theory that a state prosecutor must make a heightened showing of need to issue a subpoena *duces tecum* to a

[2] "Dkt." refers to documents filed on this Court's docket under case number 20-2766. "2019 Dkt." refers to documents filed on this Court's docket under case number 19-3204. "Dist. Ct. Dkt." refers to documents filed on the district court's docket under case number 19-cv-8694.

sitting President. *Vance*, 140 S. Ct. at 2431. The Court held that a President sits "in nearly the same situation with any other individual" when served with a criminal subpoena for unofficial documents. *Id.* at 2429 (quoting *United States v. Burr*, 25 F. Cas. 187, 191 (No. 14,694) (C.C. Va. 1807) (Marshall, C.J.)).

The Supreme Court outlined the potential "subpoena-specific" arguments that "a President may avail himself of" when served with a criminal subpoena *duces tecum* by a state grand jury. *Id.* at 2430. Like "every other citizen," the Court held, a President may challenge the subpoena "on any grounds permitted by state law," which would include bad faith and overbreadth. *Id.* Further, given the Executive's unique role in our constitutional structure, the Court held that a President may also raise two arguments not available to "private citizens"—that a particular subpoena must be quashed because it is "an attempt to influence the performance of [a President's] official duties, in violation of the Supremacy Clause," or because compliance with it would unconstitutionally "impede [a President's] constitutional duties." *Id.*

The Supreme Court then remanded the case to the district court for Appellant to "raise further arguments as appropriate." *Id.* at 2431. The Court did not state whether, on the facts of this case, Appellant could state any viable claims for relief under any of the theories it outlined. *See id.* at 2425 (addressing Appellant's "*categorical* argument" for absolute immunity, not whether "*this* subpoena [*i.e.*, the Mazars Subpoena], in particular, is impermissibly burdensome").

On remand, the parties agreed that, if Appellant believed he had further appropriate arguments and included "any and all" such claims in an amended complaint filed by July 27, 2020, the Office would forbear enforcing the Mazars Subpoena until after the district court resolved the earliest dispositive motion. Dist. Ct. Dkt. 52, at 10.

On July 27, 2020, Appellant filed the SAC, which largely reiterates the arguments he raised in his original complaint. JA14-29. In it, Appellant asserts again that the Mazars Subpoena is a bad-faith attempt to harass him, because the Mazars Subpoena was issued after his attorneys declined to produce tax returns in response to the Trump Organization Subpoena, and because the Mazars Subpoena mirrors a congressional subpoena. JA18-20. Appellant also asserts that the Mazars Subpoena "seeks records that far exceed the [Office's] jurisdiction generally and the scope of this investigation specifically." JA22. Appellant claims to know the scope of the grand jury's investigation based on "published reports" he references in the SAC (but does not cite). JA16. These reports, according to Appellant, indicate that "the focus of the [Office's] investigation is payments made by Michael Cohen in 2016 to certain individuals." *Id.*[3]

[3] Appellant reproduces in the SAC (without citation) the following quote from an article in the New York Times: "Mr. Vance's office is exploring whether the reimbursements [Cohen made] violated any New York state laws . . . . In particular, the state prosecutors are examining whether the company falsely accounted for the reimbursements as a legal expense. In New York, filing a false business record can be a crime." JA16 (alteration in original). The SAC omits that the same article also states that "[i]t was unclear if … the [O]ffice had expanded its investigation beyond actions taken during the 2016 campaign." William K. Rashbaum & Ben Protess, *8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.*, N.Y. TIMES, Sept. 16, 2019, https://nyti.ms/3aji2qQ.

Although the factual allegations in the SAC are substantially the same as those in Appellant's prior two complaints, Appellant's legal theories have changed. No longer able to claim absolute immunity, Appellant now seeks in the SAC to quash the Mazars Subpoena based solely on state law grounds that have always been available to him as a "private citizen[]," *Vance*, 140 S. Ct. at 2430—that the Mazars Subpoena is overbroad and was issued in bad faith. JA28. Appellant has elected not to assert in the SAC either of the two constitutional claims the Supreme Court concluded might be available specifically to a President—that the Mazars Subpoena is an attempt to influence the Executive Branch of the Federal Government or that compliance with the Mazars Subpoena would impede his constitutional duties. *See Vance*, 140 S. Ct. at 2430; JA49 n.13; JA60 n.14.[4]

On August 3, 2020, the Office moved to dismiss the SAC for failure to state a claim. Dist. Ct. Dkts. 62-63, 66-69. On August 20, 2020, the district court issued a 103-page opinion (Marrero, J.) thoroughly analyzing the claims in the SAC and Appellant's opposition brief, and dismissed this case with prejudice and without leave to further amend. *Trump v. Vance*, --- F. Supp. 3d ---, 2020 WL 4861980 (S.D.N.Y. Aug. 20, 2020) (JA30-132). The district court made clear that it was not requiring Appellant "to

[4] The SAC recites in a conclusory phrase in each cause of action that the alleged overbreadth and bad faith violate "his legal rights, including those held under Article II of the Constitution." JA28 ¶¶ 57, 63. No facts, however, are alleged in support of this assertion, and Appellant does not claim that his causes of action derive from the Constitution.

provide concrete evidence or otherwise make a strong showing of his ultimate entitlement to relief," but instead reviewed the SAC consistent with the standard applicable to Rule 12(b)(6) motions. JA61-62. The court noted its "[h]igh respect for the President's office" and, in issuing its decision, recognized that a reviewing court should "be particularly meticulous to ensure that the relevant legal standards are correctly applied in this case." JA72-75 (citation omitted). At the same time, the district court acknowledged, consistent with the Supreme Court's opinion in this case, that "[h]igh respect for the President does not imply diminished respect for the ancient functions of the grand jury or the long-established standards governing challenges to its subpoenas." JA75.

Having considered "the allegations as a whole and construe[d] all reasonable inferences drawn from the well-pled allegations in the light most favorable to the nonmovant," JA75 n.16, the district court found that Appellant's "allegations regarding the timing and preparation of the Mazars Subpoena . . . do not plausibly state a claim for either overbreadth or bad faith." JA103; *see* JA75-102. In reaching its holding, the court did "not rely on the Shinerock Declaration, the news reports cited by the District Attorney, or the prior filings during the preliminary injunction phase of this proceeding." JA102; *see* JA78-79 n.19. Instead, the court found that the SAC's allegations regarding the Mazars Subpoena failed on their face to adequately allege overbreadth or bad faith. *See* JA103-118.

Appellant filed a notice of appeal and applied for an emergency stay, Dist. Ct. Dkt. 74, hours after the district court issued its order. The district court denied Appellant's motion for an emergency stay, *Trump v. Vance*, --- F. Supp. 3d ---, 2020 WL 4914390 (S.D.N.Y. Aug. 21, 2020) (Dist. Ct. Dkt. 75), and Appellant sought the same relief in this Court, Dkt. 16-2, at 1. This Court (Chin, J.) denied Appellant's application for an administrative stay, and scheduled his motion for a stay pending appeal for argument on September 1, 2020. Dkt. 35. To ensure this Court had ample opportunity to consider thoroughly the issues raised in Appellant's appeal, and to avoid further undue delay and procedural confusion,[5] the Office agreed to forbear enforcement of the Mazars Subpoena until after this Court issued a decision on Appellant's application for a stay pending appeal. Dkt. 61. After argument on September 1, 2020, a motions panel of this Court granted Appellant's request for a stay pending appeal and set this appeal for expedited briefing and argument. Dkt. 82.

SUMMARY OF ARGUMENT

Contrary to the Supreme Court's instruction in this case, Appellant asks this Court to accord his garden-variety claims of bad faith and overbreadth special treatment because he is the President. He claims that the district court erred because it applied a presumption of validity to the Mazars Subpoena. Courts have applied this presumption,

[5] Appellant asserted, at the time, his intention to file simultaneous emergency stay requests in the district court, this Court, and the Supreme Court. Dist. Ct. Dkt. 74, at 1.

which may be displaced only upon allegations demonstrating a clear showing of impropriety, to grand jury subpoenas for years. But Appellant contends it does not apply to him because, unlike anyone else, he can seek relief in federal court from a state grand jury subpoena. The Supreme Court rejected a similar request to alter traditional legal standards in this case just months ago in declining to adopt a heightened need test. It held that, in assessing ordinary bad faith and overbreadth objections, courts must generally treat a President like any other citizen, except they must accommodate the President's schedule, accord the President meticulous appellate review, and permit the President to bring such claims in a federal forum. Appellant has received, or is receiving, each of those accommodations, none of which absolves him of the obligation to allege facts sufficient to rebut the presumption of validity and state a claim for relief under ordinary substantive standards, as directed by the Supreme Court.

The SAC fails to state a claim that the Mazars Subpoena is overbroad. Appellant rests this claim on a thin reed: that the grand jury's investigation is limited to the 2016 "hush money" payments made by Michael Cohen. Appellant has not alleged a single, non-speculative fact to support this theory. He alleges that because the Trump Organization Subpoena appears to him to be limited to the 2016 "hush money" payments, that must be the grand jury's sole focus. But it simply is not reasonable to infer that one cherry-picked subpoena defines the entire scope of the grand jury's investigation. He further alleges that "published reports" he fails to identify in the SAC supposedly reveal that the grand jury's investigation does not extend past 2016. But no "published

report" Appellant has ever cited says that; to the contrary, several "published reports" provide a substantial factual basis to infer a much broader investigation. Appellant also repackages his old argument that the fact that the Mazars Subpoena mirrors a subpoena issued by the U.S. House of Representatives to Mazars demonstrates overbreadth. But two investigatory bodies calling for the same document set does not reasonably lead to the inference that the documents are outside the scope of either body's legitimate investigation. Finally, Appellant asserts that the scope of the Mazars Subpoena is inherently overbroad because it seeks documents from real estate entities that own properties outside New York and has an eight-year time period. The Mazars Subpoena's temporal and jurisdictional scope, however, is plainly reasonable. It was issued by a New York grand jury for documents related to New York-based entities and could reveal New York misconduct within the relevant statutes of limitations.

The SAC's speculative and conclusory assertions of bad faith are likewise insufficient to survive a motion to dismiss. Appellant again relies on the same factual allegations that the Mazars Subpoena was issued after the narrower Trump Organization Subpoena and that it mirrors a congressional subpoena, and makes conclusory assertions that those facts demonstrate an impermissible, retaliatory motive in the issuance of the Mazars Subpoena.

Appellant's retaliation theory is based on several unreasonable inferences. It presupposes that there could be no valid reason for the grand jury to issue a subpoena to Mazars, which is not only unsupported by anything in the SAC but is also undermined

by the SAC's admissions that Mazars is a New York accounting firm and that the investigation includes business transactions involving multiple individuals. And a claim of retaliation implies that the Office felt wronged by certain conduct and sought to inflict harm on the perceived wrongdoer, a suggestion for which the SAC is devoid of factual support.

To the extent that Appellant argues that mirroring a congressional subpoena demonstrates a bad-faith failure to tailor the Mazars Subpoena to the grand jury's investigation, his argument fails because he cannot plausibly allege that the Mazars Subpoena is actually overbroad or untailored to the scope of the grand jury's investigation. Similarly, Appellant's conclusory claim that the Office's supposedly shifting explanations for basing the Mazars Subpoena on a congressional subpoena demonstrate bad faith is belied by the fact that the Office has repeatedly and consistently explained that both commonality of need for the records and efficiency support the choice to adopt language from Congress.

As the district court correctly ruled after its meticulous review of the SAC, these allegations do not state a claim upon which relief can be granted.

ARGUMENT

This Court reviews *de novo* a district court's grant of a motion to dismiss. *Pettaway v. Nat'l Recovery Solutions, LLC*, 955 F.3d 299, 304 (2d Cir. 2020). "To survive a Rule 12(b)(6) challenge, the complaint's factual allegations must be enough to raise a right to relief above the speculative level." *Yamashita v. Scholastic Inc.*, 936 F.3d 98, 104 (2d Cir.

2019) (citation and brackets omitted), *cert. denied*, 206 L. Ed. 2d 823 (Apr. 20, 2020). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *L–7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011) (quoting *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009)).

As the district court explained (JA55-56), assessing whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "Plausibility . . . depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *L–7 Designs, Inc.*, 647 F.3d at 430 (citing *Iqbal*, 556 U.S. at 673-683); *see also Kaufman v. Time Warner*, 836 F.3d 137, 145 (2d Cir. 2016) (refusing to consider the complaint "[i]n a vacuum" and concluding that "an inference" that the defendant violated the law was "not plausible" in light of the surrounding circumstances). A complaint's allegations must be "suggestive of," not "merely consistent with," "a finding of misconduct" to state an adequate claim for relief. *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)); *see also Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) ("[A] complaint must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion.").

I. THE MAZARS SUBPOENA IS ENTITLED TO A PRESUMPTION OF VALIDITY, WHICH THE COURT MUST CONSIDER ON A MOTION TO DISMISS

Contrary to Appellant's assertions (App. Br. 38-39), and as the district court explained (JA62-66), any analysis of whether Appellant's claims should be dismissed pursuant to Rule 12(b)(6) must start from the premise that the Mazars Subpoena is entitled to a presumption of validity, and Appellant's status as President does not alter that time-honored principle.

A. The Presumption Of Validity Applies To Rule 12(b)(6) Review

The law "presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority," including in issuing subpoenas *duces tecum*. *United States v. R. Enters., Inc.*, 498 U.S. 292, 300 (1991); *accord Virag v. Hynes*, 54 N.Y.2d 437, 443 (1981).[6] This presumption demands that a litigant challenging a grand jury subpoena put forward "more than mere 'speculat[ion]' and 'bare assertions' of impropriety" to successfully quash it. JA66 (alteration in original) (quoting *Virag*, 54 N.Y.2d at 444-45). To overcome the presumption, "the party challenging the subpoena" must "demonstrate, by concrete evidence, that the materials sought have no relation to the matter under investigation," have "no conceivable relevance to any legitimate object of investigation by the . . . grand jury," or "are so unrelated to the subject

[6] Although the Supreme Court was clear in *Vance* that bad faith and overbreadth challenges to a subpoena brought by a President are "state law" claims, *Vance*, 140 S. Ct. at 2430, it makes no difference here because the relevant standards under federal and New York law are materially identical.

of inquiry as to make it obvious that their production would be futile as an aid to the Grand Jury's investigation." *Virag*, 54 N.Y.2d at 444 (alteration in original) (citation omitted); *accord In re Grand Jury Proceeding*, 971 F.3d 40, 2020 WL 4744687, at *8 (2d Cir. Aug. 14, 2020).

As the district court's analysis demonstrated (JA66-118), even taking the factual allegations in the SAC as true, Appellant cannot come close to overcoming the presumption of validity accorded to the Mazars Subpoena. Perhaps for that reason, Appellant contends (App. Br. 38-40) that *he* should not be required to allege facts to overcome this presumption because, while occupying the presidency, he uniquely is entitled to ask a federal court to quash a state grand jury subpoena in a civil action, and that applying the presumption of validity to a motion to dismiss would somehow "alter" the applicable pleading standard.

While Appellant's status-based argument fails for the reasons described below, his broader assertion that the presumption should not apply at all on a motion to dismiss is foreclosed by precedent that he fails to address. Decisions in this Circuit have long dismissed at the pleading stage attempts by civil litigants to interfere with a sitting grand jury where the complaint fails to overcome the presumption of validity. *See D'Alessandro v. City of New York*, 713 F. App'x 1, 7 (2d Cir. 2017) (summary order) (applying presumption of regularity in grand jury proceedings to affirm dismissal under 12(b)(6) of claim for denial of due process); *Ostrer v. Aronwald*, 567 F.2d 551, 552-54

(1977) (per curiam) (affirming dismissal under 12(b)(6), *inter alia*, on ground that "appellants' speculations that the grand jury has insufficient evidence on which to indict them are not enough to overcome the presumption of regularity attached to grand jury proceedings; and, therefore, judicial interference with an on-going investigation is unwarranted"); *Melville v. Morgenthau*, 307 F. Supp. 738 (S.D.N.Y. 1969).

In *Melville*, individuals indicted for a conspiracy to destroy governmental and other buildings filed a civil action seeking an injunction restraining their prosecution, "an order requiring an evidentiary hearing to determine whether the grand jury that returned the indictment [against them] was unbiased and otherwise legally constituted," and "an order requiring the conduct of a voir dire examination by the Court of any grand jury which might return a subsequent or superseding indictment with regard to the alleged conspiracy." *Melville*, 307 F. Supp. at 739. As support for their claims, the plaintiffs annexed twenty-six examples of press coverage that they claimed "must inevitably have [had] the effect of giving rise to a substantial bias and prejudice against the plaintiffs in the minds of those who have read or heard about it, including the jurors on the grand jury . . . and any other persons who might be called on to serve on such grand jury." *Id.*

After carefully examining those news reports, the district court held that the plaintiffs failed to put forward allegations sufficient to displace the "presumption of regularity" that "adheres to grand jury deliberations" and declined on that basis to "review the action[s] of the grand jury." *Id.* at 740. The court explained that "[t]he grand

jury proceeding is not an adversary proceeding, open to the public, but rather investigatory and secret." *Id.* at 741. "To allow plaintiffs . . . to conduct a voir dire of the grand jury to determine whether any member thereof was unduly influenced by reports in the news media," the court continued, "would lead to chaos and confusion in the workings of the grand jury every time an indictment is returned in a case which catches the public eye and draws the attention of the press." *Id.* Just like the district court in this case, the court in *Melville* demanded "a clear showing of special circumstances" to second-guess a grand jury and held that "the papers before [it]" failed to make such a showing because they "consist[ed] solely of conjecture and [were] devoid of any proof that the grand jurors were improperly prejudiced by adverse publicity." *Id.* at 740-41.[7]

The requirement that anyone challenging a grand jury process—whether in a motion to quash or in a civil action—must allege facts sufficient to overcome the presumption of validity is derived from the fundamental policy against disrupting the traditional grand jury process, as the *Melville* court recognized. *Cf. Barr v. Abrams*, 641 F. Supp. 547, 554 (S.D.N.Y. 1986) (Leval, J.) ("Federal courts cannot permit the civil rights

[7] Similarly, in *In re Grand Jury Investigation*, 683 F. Supp. 78 (S.D.N.Y. 1988), taxpayers filed an action seeking "an order prohibiting the government from pursuing an indictment against them for alleged tax violations" because, among other reasons, they claimed "federal and state [criminal] investigations were cooperatively conducted" based on information leaked to the press. *Id.* at 78. The district court declined to grant such an order or to permit the taxpayers to conduct an evidentiary hearing because their allegations failed to displace the "strong presumption of regularity [that] attaches to grand jury proceedings." *Id.* at 79. Like in *Melville*, the court's decision was rooted in its finding that the taxpayers' allegations were facially insufficient and did not warrant "threaten[ing] the integrity of the grand jury" or "thwart[ing] its progress." *Id.* at 80.

action to be used as a combative defense against a state criminal prosecutor's conduct of an investigation."). This accords with the Supreme Court's recent analysis in *Vance*: In rejecting Appellant's absolute immunity claim, the Court explained that "the public interest in fair and effective law enforcement" precludes a court from "hobbl[ing] the grand jury's ability to acquire 'all information that might possibly bear on its investigation,'" even at the request of a sitting President, unless there is a special reason to do so. *Vance*, 140 S. Ct. at 2430 (quoting *R. Enters.*, 498 U.S. at 297). The Court also stressed the importance of "longstanding rules of grand jury secrecy," which, if violated, could carry felony charges. *Id.* at 2427.

Decades of criminal jurisprudence likewise confirm that "a grand jury subpoena issued through normal channels is presumed to be reasonable"; "the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance"; and a party challenging subpoenas may not invade the secrecy of the grand jury process absent a clear showing of bad faith. *R. Enters.*, 498 U.S. at 301; *accord United States v. Ulbricht*, 858 F.3d 71, 106 (2d Cir. 2017) ("[T]he proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." (alteration in original) (quoting *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979))), *abrogated on other grounds*, *Carpenter v. United States*, 138 S. Ct. 2206 (2018). As the district court explained (JA61-62), the fact that, as in *Melville*, this case is in a different procedural posture than an ordinary motion to quash does not mean that the Court may close its eyes to fundamental protections that preserve the integrity of grand jury investigations, including the stringent

protection of grand jury secrecy, and the presumption of validity to protect against witnesses who "'continually litigate the threshold validity of [grand jury] subpoenas' and thereby delay the grand jury's proceedings." JA65 (quoting *Virag*, 54 N.Y.2d at 445).

Moreover, as the district court explained (JA56-57), it is appropriate and not at all unusual to apply a presumption of validity or regularity at the pleading stage in other civil actions, for example, those alleging malicious prosecution claims. *See, e.g.*, *Hadid v. City of N.Y.*, 730 F. App'x 68, 71-72 & n.1 (2d Cir. 2018) (summary order) (affirming dismissal of malicious prosecution claim that failed to overcome presumption of probable cause triggered by a grand jury indictment and noting that dismissals of such claims on this basis are "routine[]"); *Lewis v. City of N.Y.*, 591 F. App'x 21, 22 (2d Cir. 2015) (summary order) (affirming dismissal of malicious prosecution claim because the "complaint fail[ed] to rebut" the "presumption of probable cause" created by a grand jury indictment).

Applying presumptions to dismiss civil claims at the pleading stage is also well-accepted in other contexts. *See, e.g.*, *Buday v. N.Y. Yankees P'Ship*, 486 F. App'x 894, 898-99 (2d Cir. 2012) (summary order) (presumption against finding a copyright interest where employee created a work on behalf of an employer); *Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 807 F.3d 502, 505, 508 (2d Cir. 2015) (Katzmann, C.J.) (presumption afforded by business judgment rule); *Affinity LLC v. GfK Mediamark Research & Intelligence, LLC*, 547 F. App'x 54, 57 (2d Cir. 2013) (summary order) (presumption in antitrust cases that the effect on competition was *de minimis*); *De Jesus v. Sears, Roebuck*

& Co., Inc., 87 F.3d 65, 70 (2d Cir. 1996) (presumption of separateness afforded to related corporations in RICO cases); *Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126, 137 (2d Cir. 2007) (presumption of employment at will in New York).

B. Appellant's Status Does Not Alter The Presumption Of Validity

Contrary to Appellant's assertions (App. Br. 37-43), his status as President does not absolve him of the obligation to allege plausible, non-speculative facts sufficient to overcome the presumption of regularity in bringing garden-variety overbreadth or bad faith claims to quash a grand jury subpoena.[8] The Supreme Court's rejection of the Solicitor General's heightened need standard in *Vance* suggests the exact opposite: The Court held that, "as respects [his private] paper[s]," Appellant stands "in nearly the same situation with any other individual" when served with a grand jury subpoena. *Vance*, 140 S. Ct. at 2429 (quoting *Burr*, 25 F. Cas. at 191 (Marshall, C.J.)). "And it is only 'nearly'—and not 'entirely'—because the President retains the right to assert privilege over documents that, while ostensibly private, 'partake of the character of an official paper.'" *Id.* (quoting *Burr*, 25 F. Cas. at 191-92 (Marshall, C.J.)). Here, of course, Appellant has asserted no privilege, and thus is "entirely" subject to the same standards as any other individual.

[8] The Court need not resolve whether the presumption of regularity would attach if a President alleged that a state criminal subpoena influenced or impeded Article II functions, because, as noted above, Appellant has not advanced those claims here.

Appellant's status as President entitles him only to three procedural accommodations, none of which displaces the Mazars Subpoena's substantive presumption of validity. First, Appellant is entitled to scheduling adjustments to account for his constitutional functions. Appellant asserts that applying the traditional presumption of validity to the Mazars Subpoena would be inconsistent with the Supreme Court's admonition that courts must pay "high respect . . . to the office of the Chief Executive," including in "the application of procedural rules governing the timing and scope of discovery." App. Br. 38 (internal quotation marks omitted) (quoting *Vance*, 140 S. Ct. at 2428). But he takes those words out of context and fails to note that in the portions of the *Vance* opinion he cites, the Supreme Court was relying on *Clinton v. Jones*, 520 U.S. 681 (1997). The Supreme Court clearly did not mean by its citation to *Jones* to grant Appellant unique procedural rights to invade the province of the grand jury based on conjectural and speculative assertions of overbreadth and bad faith. Rather, it simply cautioned courts to "schedule proceedings so as to avoid significant interference with the President's ongoing discharge of his official responsibilities" and adapt the "timing and scope of discovery" to permit a President to discharge his constitutional functions. *Vance*, 140 S. Ct. at 2430 (quoting *Clinton*, 520 U.S. at 707; *id.* at 724 (Breyer, J., concurring in the judgment)).

Second, Appellant is entitled to "particularly meticulous" appellate review of his legal claims. Appellant asserts (citing a non-binding concurrence) that in *Vance*, the

Supreme Court admonished district courts to accord him "particularly meticulous" review, which would preclude the application of the traditional presumption of validity. App. Br. 40 (quoting *Vance*, 140 S. Ct. at 2432-33 (Kavanaugh, J., concurring in the judgment)). That, again, distorts the Supreme Court's words. The Court merely restated that "appellate review" of "a subpoena directed to a President" must be "particularly meticulous," *Vance*, 140 S. Ct. at 2430 (quoting *United States v. Nixon*, 418 U.S. 683, 702 (1974)), "to ensure that the [applicable legal] standards . . . have been correctly applied," *Nixon*, 418 U.S. at 702. The Supreme Court did not indicate in any sense that it intended to displace the traditional presumption of validity, or that "meticulous" review gave a sitting President a unique prerogative to challenge a grand jury subpoena based on conjectural or speculative allegations.

Third, Appellant is entitled to seek relief from a state grand jury subpoena based on allegations of overbreadth and bad faith—which sound in "state law," *Vance*, 140 S. Ct. at 2430—in a federal forum, which no other citizen can do. But the mere fact that Appellant is entitled to a special forum to litigate his claims provides no basis to water down the presumption of validity accorded by both federal and state law to grand jury subpoenas.

Nothing about the district court's dismissal of the SAC ran afoul of any of these three principles, and the Supreme Court made clear in *Vance* that Appellant is not entitled to any further special rights. The district court was therefore correct to require Appellant to meet the same standard as anyone else in bringing his claims to quash or

enjoin the Mazars Subpoena: he needed to allege more than mere conjecture and speculation to overcome the presumption of validity traditionally accorded to grand jury proceedings. And while application of the presumption here is fatal to the SAC, should the Court decline to apply the presumption, the SAC's allegations still fail, for the reasons described below, to state a claim for relief. *See Yamashita*, 936 F.3d at 104.

II. THE SAC FAILS TO PRESENT PLAUSIBLE ALLEGATIONS OR SUPPORT REASONABLE INFERENCES THAT THE MAZARS SUBPOENA IS OVERBROAD

Contrary to Appellants' assertions (App. Br. 18-30), the SAC does not contain well-pleaded factual allegations sufficient to survive Rule 12(b)(6) review of his overbreadth claim. This is because the SAC, and any reasonable inferences that could be drawn from it, fail to plausibly allege that the Mazars Subpoena seeks materials with "no conceivable relevance to any legitimate object of investigation by the . . . grand jury." *Virag*, 54 N.Y.2d at 444 (citation omitted) (ellipses in original).

The district court did not, as Appellant contends (App. Br. 24-27), violate Rule 8 of the Federal Rules of Civil Procedure by so concluding. The SAC's bare reliance on the Trump Organization Subpoena, the mirroring of the congressional subpoena, and "published reports" does not plausibly suggest that the Mazars Subpoena seeks such irrelevant materials that it must be quashed, particularly in light of the information in the public record. *See, e.g.*, *Kaufman*, 836 F.3d at 145-46; *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) ("A plaintiff's job at the

pleading stage, in order to overcome a motion to dismiss, is to allege enough facts to support the inference that a conspiracy actually existed.").

As explained above, to overcome the presumption of validity on grounds of overbreadth, the SAC must allege that the Mazars Subpoena seeks materials that bear "no relation to the matter under investigation," have "no conceivable relevance to any legitimate object of investigation by the . . . grand jury," or "are so unrelated to the subject of inquiry as to make it obvious that their production would be futile as an aid to the Grand Jury's investigation." *Virag*, 54 N.Y.2d at 444 (citation omitted) (ellipses in original); *accord In re Grand Jury Proceeding*, 2020 WL 4744687, at *8. The SAC attempts to do this based entirely on three allegations: (1) that the grand jury issued a narrower subpoena to the Trump Organization prior to issuing the Mazars Subpoena, thereby supposedly demonstrating that much of the Mazars Subpoena bears no relation to its investigation; (2) that the Mazars Subpoena mirrors a subpoena issued by the U.S. House of Representatives to Mazars, thereby supposedly suggesting that it calls for documents unrelated to the subject of the grand jury investigation; and (3) that "published reports" Appellant has never actually cited indicate that the grand jury's investigation is limited to the 2016 "hush money" payments made by Michael Cohen, and thus the Mazars Subpoena sweeps too broadly. *See* App. Br. 21-23. These three arguments collapse under scrutiny.

A. The Mazars Subpoena Is Not Overbroad Simply Because It Is Broader Than The Trump Organization Subpoena

Appellant's theory (App. Br. 21) that the Trump Organization Subpoena alone defines the scope of the grand jury's investigation, and thus the broader Mazars Subpoena is overbroad by definition, is facially unsound because Appellant has been on notice, for nearly a year, of contrary information. *See* Br. of Def.-Appellee, 2019 Dkt. 99, at 8 n.3 ("[T]he Office's investigation goes beyond the scope of the Trump Organization Subpoena."). Singling out one subpoena and declaring that it defines the full scope of a grand jury's inquiry is illogical, particularly in a months-long financial investigation. Grand juries routinely issue subpoenas in an iterative process, with later subpoenas building on new information and leads generated from returns on earlier subpoenas. Not surprisingly, grand juries often seek different information from different entities, and at times the same information from different entities. Grand juries have a duty to follow "every available clue" wherever it may lead, *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970), which may in some cases cause "the scope of an investigation [to] broaden," JA98 (citing *Full Gospel Tabernacle, Inc. v. Attorney-General*, 142 A.D.2d 489 (3d Dep't 1988)). The district court therefore correctly found it implausible that the Trump Organization Subpoena—rather than the Mazars Subpoena—defined the full scope of the grand jury's investigation.[9]

[9] The SAC likewise asserts without any basis that "[i]n 2018, a New York County grand jury began investigating whether certain business transactions from 2016 violated New York law." JA14. Even

B. The Mazars Subpoena Is Not Overbroad Because It Mirrors a Congressional Subpoena

Appellant's argument (App. Br. 22-23) that the Mazars Subpoena is overbroad because it mirrors another subpoena issued by the U.S. House of Representatives to Mazars is also baseless. He alleges that "[i]t is 'inconceivable,'" JA26, that the Office might seek the same documents as Congress, and that the similarity between the subpoenas therefore demonstrates that the Mazars Subpoena is overbroad. But as the district court explained (JA86-94), the SAC provides no basis to infer impropriety from the fact that Congress sought the production of certain documents from Mazars for legitimate, legislative purposes, and the grand jury simultaneously sought the same documents for its own legitimate, law enforcement purposes. It would be implausible to conclude from the mere fact that Congress and the grand jury both sought the same records—related to the same published reports of financial misconduct—that the records could have no conceivable relevance to the matters under investigation by the grand jury.

C. Appellant Has Not Plausibly Alleged That The Grand Jury's Investigation is Limited To The 2016 "Hush Money" Payments

Appellant's contention (App. Br. 21) that unspecified "published reports" have revealed to him that the grand jury is only investigating the 2016 "hush money" payments is yet another argument that collapses upon review. The SAC does not actually

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if that were true, the SAC offers no plausible basis to infer that the grand jury's investigation remained so limited when the Mazars Subpoena was issued in August 2019. *See* JA95-100.

cite a single news report, much less one that states the grand jury's investigation is as limited as Appellant claims. The SAC does recite the following quote from one report: "Mr. Vance's office is exploring whether the reimbursements [Cohen made] violated any New York state laws," JA16, but it omits that the same article goes on to state that "[i]t was unclear if … the [O]ffice had expanded its investigation beyond actions taken during the 2016 campaign." Rashbaum & Protess, *8 Years of Trump Tax Returns Are Subpoenaed by Manhattan D.A.* Thus, Appellant has not plausibly alleged that any "published report[]" actually says what he claims about the supposedly limited scope of the grand jury's investigation.

D. The Mazars Subpoena Is Appropriately Tailored To The Grand Jury's Investigation

Appellant also argues that, even if the investigation is not limited to the 2016 payments, the Mazars Subpoena's "unlimited breadth means it cannot possibly be reasonably tailored to *any* particular investigation." App. Br. 27 (emphasis in original). In particular, Appellant contends that the subpoena is unsupported by "*any* threshold level of suspicion." *Id.* (emphasis in original). This allegation is mere speculation, given that Appellant cannot know, given the presumptively regular functioning of grand jury secrecy rules, what predicate supports the grand jury's investigation. On this ground alone, Appellant's allegation is insufficient to support his claim of overbreadth, and—as did the district court—this Court may thus dismiss based solely on the four corners of the SAC.

Beyond that, a mountainous record of criminal convictions and public allegations of misconduct, of which the court may take judicial notice, further confirms the reasonableness of the Mazars Subpoena's timeframe and its specific document requests. While the basis and scope of the grand jury's investigation may not be disclosed publicly, the public record alone, taken not for its truth but for the notice that it provided to the parties, further establishes the implausibility of the SAC's allegations of bad faith and overbreadth.[10]

As described above, *supra* pp. 3-5, detailed investigative reports have identified questionable tax and other schemes by the Trump Organization dating back to the 1990s, "including instances of outright fraud." Barstow, Craig, & Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father*. In particular, public reports have alleged that Trump Organization executives used fraudulent financial

[10] The Court may consider the news articles cited herein because Appellant either incorporated them into the SAC by relying on an unspecified set of "published reports" or because Appellant purposefully incorporated only cherry-picked portions of such reports that would be helpful to him while omitting other reports that were equally featured in the public record. *See, e.g.*, *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 44 (2d. Cir. 1991) ("Plaintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision on the motion."); *Hicks v. Wells Fargo Bank, N.A.*, 2020 WL 3172771, at *4 (W.D.N.Y. June 15, 2020) ("A plaintiff—particularly one whose claims are grounded on documents, such as written correspondence between him and the defendant—cannot defeat a Rule 12(b)(6) motion simply by cherry-picking 'helpful' documents to cite in the complaint, while deliberately ignoring other relevant documents that might tend to undercut his claims."). The Court may also take "judicial notice of the fact that [this] press coverage . . . contained certain information" about the Trump Organization that could conceivably be relevant to the grand jury's investigation without accepting the reports as true. *See Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008).

statements as part of long-standing practices of overstating assets sent to potential business partners and lenders and minimizing assets in tax returns. *See, e.g.*, Fahrenthold & O'Connell, *How Donald Trump Inflated His Net Worth to Lenders and Investors*; Ballhaus & Palazzolo, *Michael Cohen Details Allegations of Trump's Role in Hush-Money Scheme*; Fahrenthold & O'Connell, *After Selling Off His Father's Properties, Trump Embraced Unorthodox Strategies To Expand His Empire*.

These public accounts, on their face, when juxtaposed with the Mazars Subpoena, on its face, fully support the conclusion that the Mazars Subpoena is reasonably tailored, and fatally undermine Appellant's contrary assertions.[11] And while the Court need not rely upon them to conclude that the SAC fails to state a claim, to do so would in no way be improper. A "court is permitted to consider and take judicial notice of certain documents, such as matters of public record, and reject the truthfulness of those allegations that are contradicted by the documents." *Fowlkes v. Rodriguez*, 584 F. Supp. 2d 561, 574 (E.D.N.Y. 2008); *accord In re Aegon*, 2004 WL 1415973, at *5 (S.D.N.Y. June 23, 2004).

As described above, the Mazars Subpoena principally calls for two types of documents, tax returns and financial statements, as well as the underlying preparatory records necessary to understand those primary documents. It seeks such documents as

[11] None of the discussion herein reflects information or materials protected by grand jury secrecy. Rather, the information set forth below comes from the face of the Mazars Subpoena as it appears in the SAC, and public reports (none of which are cited here for the truth of the assertions contained therein).

they relate to Appellant and ten specified entities over an eight-year period. The Mazars Subpoena therefore plainly does not, as the Appellant contends, ask "for *every* Mazars has that is in any way related to the President and his businesses, in any part of the world." App. Br. 30 (emphasis in original). Instead, as is plain from the face of the subpoena, each category of documents listed is reasonably related to one or more of the published reports of potential financial misconduct at the Trump Organization. *See generally United States v. Vilar*, 2007 WL 1075041, at *45 (S.D.N.Y. Apr. 4, 2007) ("The keystone of the analysis is not the quantity of the documents sought, nor the link between the grand jury's demands and the charges ultimately brought, but the potential connection between the materials requested and the investigation at the time the subpoena is issued.").

In this regard, any investigation into the types of potential financial improprieties described above would of necessity require a review, not only of tax returns, but source documents, working papers, and communications of the sort identified in the Mazars Subpoena, to evaluate the accuracy and good faith of the positions taken in the filings, as well as the roles of various employees and other potential witnesses. Similarly, non-tax-related financial statements (and their supporting materials including, again, communications) would be necessary to evaluate the valuation discrepancies described in the public reports, to determine the reason for such differences and whether they have a good faith basis under applicable accounting or other principles.

As for the number of entities specified in the Mazars Subpoena for whom documents are requested, interrelationships among related companies (particularly in a private enterprise) would require a wide review of the flows of funds and accounting treatments, again to ensure an accurate understanding. It is not uncommon for complex financial investigations to involve numerous interrelated corporate entities which commingle assets, liabilities, and tax reporting obligations in a complex and dynamic web.[12] Determining the existence, or absence, of misconduct in such instances requires full access to the books and records of the related entities. For example, it would be common for a group of related entities, such as those identified in the Mazars Subpoena, to consolidate the reportable financial information of subsidiaries into a single statement or tax filing. *See generally United States v. ConocoPhillips Co.*, 744 F.3d 1199, 1208 (10th Cir. 2014) (noting that in certain circumstances, "members of an affiliated group report their [federal] tax liability as a single consolidated group on a single consolidated tax return during a consolidated return year"); *accord* N.Y. Tax Law § 210-C ("Combined Reports"). Of course, whether one or more of the identified entities generated separate, relevant financial statements and tax filings must be ascertained by reference to the records themselves.

[12] *See, e.g.*, *People v. Olivet University* (N.Y. Co. 2020), https://bit.ly/3crV1Dj ($35 million financing fraud and money laundering scheme involving financial statements prepared by out of state accounting firm for a New York university and numerous related businesses claiming assets and income throughout the world).

Of the nine corporate entities listed in the Mazars Subpoena, a majority of them are either incorporated in New York or registered as doing business in New York. *See generally* Corporation & Business Entity Database, New York Department of State, Division of Corporations, State Records & UCC, https://www.dos.ny.gov/corps/bus_entity_search.html. Further, in his 2017 Executive Branch Personnel Public Financial Disclosure Report, Appellant listed "New York, NY" as the entity's city and state for each of the nine corporate entities. *See* Donald J. Trump, Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) (2017), at 2-12; Kevin Breuninger & Dan Mangan, *Trump's Financial Disclosure Report Released, Says President 'Fully Reimbursed' Michael Cohen*, CNBC, May 16, 2018, https://www.cnbc.com/2018/05/16/trumps-financial-disclosure-report-released.html (including a link to the 2017 Report). Moreover, of the 565 entities listed in Appellant's 2017 Financial Disclosure Report, the vast majority list "New York, NY" as the city and state, including, *inter alia*, DT Marks Dubai LLC, Trump Marks Toronto Corp., and Trump Marks Philippines LLC. *Id.*; *see* App. Br. 4, 22. In light of such public record information, Appellant's contention that the Mazars Subpoena reaches beyond the appropriate geographical scope of a New York County grand jury investigation is not reasonable.

Finally, as to the Appellant's claims that the Mazars Subpoena is overbroad because it seeks documents going back more than five years and relates in part to entities and transactions outside New York, JA21-22; *see also* App. Br. 28-30, the salient fact is

that the Mazars Subpoena was issued by a New York grand jury for records relating to conduct by New York-based individuals and entities.[13] New York criminal law applies to acts that occurred partially within and partially outside of Manhattan and to acts that took place more than five years ago that are part of a continuing course of conduct. *See People v. McLaughlin*, 80 N.Y.2d 466, 471 (1992); *People v. E. Ambulance Serv., Inc.*, 106 A.D.2d 867, 868 (4th Dep't 1984). The Mazars Subpoena's eight-year time period dates to the earliest relevant financial statement (from 2011) made public to date, and public reports have asserted that the Trump Organization regularly distributed such statements with overvalued assets for many years after 2011.

In sum, nothing in the SAC supports Appellant's conclusory assertion that the grand jury's investigation is limited to Cohen's 2016 payments or is otherwise not properly tailored. Rather, Appellant "merely speculate[s] as to what, in [his] view, was the Grand Jury's purpose in seeking the business records," which is "insufficient to overcome the presumption that the materials sought were relevant to the Grand Jury's investigation." *Virag*, 54 N.Y.2d at 445-46. Accordingly, the SAC states no claim for relief on a theory that the Mazars Subpoena is overbroad.

[13] Appellant's argument might have force in a different factual context—if, for example, a state prosecutor from Iowa issued a subpoena to Mazars seeking documents related to the Trump Organization's transactions without any geographic nexus to Iowa: such a request indeed might raise jurisdictional objections sufficient to overcome the presumption of regularity.

III. APPELLANT'S ASSERTION OF BAD FAITH RETALIATION IS BASELESS SPECULATION, UNSUPPORTED BY ANY WELL-PLED FACTS IN THE SAC

In contrast to his arguments about overbreadth, Appellant appears to recognize (App. Br. 30-31) that for his bad faith claim to survive a motion to dismiss, he must plausibly allege facts sufficient to overcome the presumption of validity. He has failed to do so here.

To overcome the presumption of validity on a theory of bad faith, a party challenging a grand jury subpoena must put forward more than "bare assertion[s]," *Congregation B'Nai Jonah v. Kuriansky*, 172 A.D.2d 35, 38 (3d Dep't 1991), "hearsay, irrelevancies," and "conclusory" statements regarding the usefulness or propriety of a grand jury subpoena, *In re Kronberg*, 95 A.D.2d 714, 716 (1st Dep't 1983). Only "credible, particularized allegations" of bad faith displace the presumption of validity. *Id.*; *accord In re Grand Jury Proceeding*, 2020 WL 4744687, at *8.

Appellant's claim of bad faith rests entirely on two allegations that he makes in relation to his overbreadth claim: the issuance of the narrower Trump Organization Subpoena, and the fact that the Mazars Subpoena mirrors a congressional subpoena. From these two allegations, Appellant draws the conclusory assertion that they demonstrate an impermissible motive in the issuance of the Mazars Subpoena. But his speculation fails to put forth any "factual content that allows the court to draw the reasonable inference" that the Office acted in bad faith. *Iqbal*, 556 U.S. at 678.

Appellant asserts that the Mazars Subpoena was issued in bad faith because it was "in response to—and in retaliation for—a dispute over the scope of" the Trump Organization Subpoena. App. Br. 32. Appellant's theory is based on nothing more than the fact that the Office issued the Trump Organization Subpoena on August 1, 2019, JA16, and later that month "[w]hen the President's attorneys pointed out that the subpoena could not plausibly be read to demand [tax] returns, the District Attorney declined to defend his implausible reading. He instead retaliated by issuing a new subpoena to Mazars, a neutral third-party custodian, in an effort to circumvent the President," JA17-18; *see* App. Br. 32. That conclusory statement, and the irrelevant assertion that certain information sought by the Mazars Subpoena was "the subject of intense public interest and an ongoing dispute between the President and Congress," App. Br. 32, is the full extent of the SAC's "factual" support for its claim of retaliation, which fails to support a reasonable inference that the Office acted in bad faith.

This claim of bad faith presupposes that there could be no valid reason for the grand jury to issue a subpoena to Mazars. Not only is that unsupported by anything in the SAC, it is undermined by the SAC's admissions that Mazars "is a New York accounting firm," JA15, and that the investigation includes "business transactions involving multiple individuals whose conduct may have violated state law," JA16 (quoting *Vance*, 140 S. Ct. at 2420). As explained in Section II, *supra*, the documents requested in the Mazars Subpoena would clearly be relevant and necessary to an investigation of the public allegations of potential wrongdoing. To credit the inference that no valid

purpose supported the Mazars Subpoena would turn the presumption of validity afforded the grand jury process on its head. *See* JA88-89.

Appellant's claim of retaliation further requires the Court to draw the inference that the Office felt wronged by the Trump Organization Subpoena negotiations and sought to inflict undue harm on the perceived wrongdoer. But the SAC is devoid of any facts indicating that was the case. Indeed, the SAC does not even assert that there was a "dispute" between the Office and Appellant prior to the issuance of the Mazars Subpoena; it simply points out that the President's lawyers represented that no tax records were responsive to the Trump Organization Subpoena, and then inexplicably concludes that the Office "retaliated by issuing a new subpoena to Mazars." JA18. That is not a well-pled fact, and it cannot sustain Appellant's assertion of bad faith. *See* JA87-88.

Appellant further claims that basing the Mazars Subpoena on the congressional subpoena demonstrates "complete disregard for the tailoring requirement," and "alone[] states a claim of bad faith." App. Br. 31. But this allegation goes to overbreadth, not to bad faith, as the authorities cited by Appellant make clear. *See In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083, 1088 (9th Cir. 2016) (where a subpoena is not tailored in accordance with "a reasonable effort to request only those documents that are relevant and non-privileged, consistent with the extent of its knowledge about

the matter under investigation," it is improper "given its overbreadth") (citation omitted).[14] And as explained in Section II, *supra*, Appellant has failed to plausibly allege that the subpoena is overbroad or untailored to the scope of the grand jury's investigation.

Appellant also argues that he has plausibly alleged bad faith by suggesting that the Office has "shift[ed]" its explanation for basing the Mazars Subpoena on congressional subpoenas. App. Br. 32-33. That is false. As the Office has repeatedly and consistently explained from the outset, both commonality of need for the records and efficiency support the choice to adopt language from Congress. *See, e.g.*, Sept. 25, 2019 Hr'g Tr., Dist. Ct. Dkt. 38, at 30:15-25 (explaining that the congressional subpoena mirrored the scope of what the Office needed from Mazars, and would have already prompted Mazars to begin the process of identifying and gathering responsive records); Defendant's Reply in Support of Motion to Dismiss, Dist. Ct. Dkt. 68, at 7 n.3 (same). And while Appellant is, of course, correct that his factual allegations must be accepted as true for the purposes of a motion to dismiss, App. Br. 33, he has failed to plead any facts relating to the Office's consistent rationale for the similarities between the subpoenas that could support an inference of bad faith or improper motive and avoid the need for dismissal.

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[14] Appellant cites *Burns v. Martuscello*, 890 F.3d 77 (2d Cir. 2018), an inapposite case that did not involve a subpoena but rather a claim that the First Amendment protected plaintiff's refusal to act as a prison informant. In response to defendants' analogy to the government's subpoena power, the court simply noted that "[a] subpoena can be contested, and a court may quash or limit the scope of the subpoena if it is overbroad, or otherwise abusive of an individual's rights and privileges." *Id.* at 92.

In essence, Appellant argues (App. Br. 34-36) that he must be allowed to go forward with his speculative claims of bad faith, no matter how implausible, because he is the President. That is not the law, and that is not how Rule 12(b)(6) works. To survive a motion to dismiss, he must make "credible, particularized allegations" of bad faith that could plausibly overcome the presumption of validity that attaches to grand jury subpoenas. *In re Kronberg*, 95 A.D.2d at 716; *accord In re Grand Jury Proceeding*, 2020 WL 4744687, at *8. Through that lens, this case is a simple one. Neither the fact that the grand jury issued the narrower Trump Organization Subpoena prior to issuing the Mazars Subpoena, nor the fact that the Mazars Subpoena mirrors a congressional subpoena, reveals or permits the Court to draw a reasonable inference that the Office acted in bad faith.

CONCLUSION

Appellee respectfully requests that the Court affirm the judgment of the district court.

Dated: New York, NY
September 21, 2020

Respectfully submitted,

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