

October 24, 2020

VIA E-MAIL

Mr. Marc E. Kasowitz
Kasowitz Benson Torres LLP
1633 Broadway
New York, NY 10019

Re: Public Criticism of White House Advisors Jared Kushner and Ivanka Trump

Dear Mr. Kasowitz:

I write to respond to your recent letter, in which you threaten to sue my client, The Lincoln Project, for openly criticizing Jared Kushner and Ivanka Trump. You object specifically to two Times Square billboards (featured below for your immediate reference) that associate your clients with the Trump Administration's failed COVID-19 response.



You boldly predict that the result of your lawsuit “will doubtless be enormous compensatory and punitive damages.”

Please peddle your scare tactics elsewhere. The Lincoln Project will not be intimidated by such empty bluster.

Your clients are no longer mere Upper East Side socialites, able to sue at the slightest offense to their personal sensitivities. Mr. Kushner and Ms. Trump are public officials. They have been public officials since President Trump, in a gross act of nepotism, awarded Mr. Kushner and Ms. Trump senior White House positions in 2017. The placement of Mr. Kushner

and Ms. Trump in these high-level White House offices has been disastrous for Americans everywhere, but it is now also devastating to the prospects of your would-be lawsuit.¹

Americans have the right to discuss and criticize their public officials freely. The U.S. Supreme Court has described this as a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”² Public officials have periodically tried, as Mr. Kushner and Ms. Trump do here, to evade accountability and muzzle dissent by threatening or filing defamation lawsuits against critics. Fortunately, substantial constitutional protections are afforded to those who speak out about public officials.³ The Lincoln Project plans to avail itself of these constitutional protections to duly criticize Mr. Kushner and Ms. Trump until they cease to be public officials, at approximately Noon Eastern Standard Time on January 20, 2021.

The Lincoln Project’s billboards, in any event, are entirely accurate.

Contrary to your claim that “Mr. Kushner never made any such statement,” *Vanity Fair* reported in a widely circulated article that Mr. Kushner did indeed say that New Yorkers “are going to suffer and that’s their problem” during the time that he was entrusted to lead our nation’s COVID-19 response.⁴ The Lincoln Project explicitly cited *Vanity Fair* as the source for Mr. Kushner’s featured statement. Please contact us again if at some point you somehow succeed in convincing *Vanity Fair* to retract its article, but I trust that this supplemental explanation settles the matter for now as to Mr. Kushner’s reported remark.

Your additional assertion that “Ms. Trump never made any such gesture” is similarly incorrect. While serving as a White House official and in violation of federal ethics rules, Ms. Trump infamously endorsed a commercial product this past July by posting a picture of herself

¹ As public officials, Ms. Trump and Mr. Kushner must satisfy the First Amendment “actual malice” standard to bring a libel claim: With clear and convincing evidence, they must show that The Lincoln Project made statements with knowledge the statements were false or with reckless disregard of whether the statements were false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). At a minimum, they must show that The Lincoln Project actually “entertained serious doubts as to the truth” of its statements. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

² *Sullivan*, 376 U.S. at 270.

³ As Chief Justice Rehnquist wrote for a unanimous court in *Hustler Magazine, Inc. v. Falwell*, “[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office.” 495 U.S. 46, 51-52 (1988). As the Court has long explained, “[o]ne of the prerogatives of American citizenship is the right to criticize public men [and women] and measures.” *Id.* (quoting *Baumgartner v. United States*, 322 U.S. 665, 674-74 (1944)) (emphasis added).

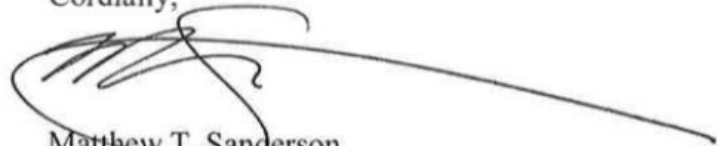
⁴ Katherine Eban, “That’s Their Problem”: How Jared Kushner Let the Markets Decide America’s COVID-19 Fate, *Vanity Fair* (Sept. 17, 2020), available at <https://www.vanityfair.com/news/2020/09/jared-kushner-let-the-markets-decide-covid-19-fate>. Mr. Kushner, a Senior Advisor to the President and one of the most powerful public officials in America, expressed his view as to why so many New Yorkers were dying from COVID-19: “Cuomo didn’t pound the phones hard enough to get PPE for his state. . . . His people”—New Yorkers—“are going to suffer and that’s their problem.” The billboard does nothing more than quote Mr. Kushner’s own language except for one truthful bracketed substitution for contextual clarity. Instead of Governor Cuomo’s “people,” the billboard says simply: “[New Yorkers] are going to suffer and that’s their problem.”

holding a 15.5-ounce can of Goya® Black Beans with the caption “If it’s Goya, it has to be good.”⁵ The Lincoln Project replaced that can of Goya® Black Beans with statistical references to 33,366 dead New Yorkers and 221,247 dead Americans. Why? Because Ms. Trump endorses the Trump Administration policies that have led to an unacceptable number of American deaths every bit as much as she once endorsed that can of beans.⁶ This truth may cause Ms. Trump personal discomfort, but her bruised self-image does not change the fact that this billboard accurately depicts her support of a federal response that has utterly failed to prevent an unmitigated tragedy for the United States.

The Lincoln Project would welcome the opportunity to further establish the truthfulness of its Time Square billboards through litigation and discovery, so sue if you must.⁷ In the meantime, may I suggest that if Mr. Kushner and Ms. Trump are genuinely concerned about salvaging their reputations, they would do well to stop suppressing truthful criticism and instead turn their attention to the COVID-19 crisis that is still unfolding under their inept watch. These billboards are not causing Mr. Kushner and Ms. Trump’s standing with the public to plummet. Their incompetence is.⁸

This isn’t over. Mr. Kushner and Ms. Trump will hear more from The Lincoln Project soon.

Cordially,



Matthew T. Sanderson
Member
Caplin & Drysdale, Chartered
Counsel to The Lincoln Project

⁵ Ivanka Trump Twitter Account (July 14, 2020), <https://twitter.com/IvankaTrump/status/1283221019684110337>.

⁶ See, e.g., Cory Sharber, *In Cincinnati, Ivanka Trump Says Her Father has ‘Moved Mountains’ to Fight COVID*, WVXU.org, <https://www.wvxu.org/post/cincinnati-ivanka-trump-says-her-father-has-moved-mountains-fight-covid-19>.

⁷ Your clients are hereby notified that they should retain any and all documents, including emails and other electronic files, relating to the matters at issue. Your clients are further advised that in any lawsuit arising from these matters, The Lincoln Project would intend to seek expedited discovery and to depose Ms. Trump and Mr. Kushner in videotaped proceedings and to depose each individual that attended the March 21 meeting on which *Vanity Fair* reported.

⁸ The Second Circuit has held that “a plaintiff’s reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject.” *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 352 (S.D.N.Y. 1998) (quoting *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 3030 (2d Cir. 1986)). In one of the seminal libel-proof-plaintiff cases, the U.S. District for the Southern District of New York held that mobster John “Boobie” Cerasini had a reputation so “tarnished” and given that he was “generally reputed to be an associate of organized crime,” that he could claim no damages for defamation; “if there is little or no harm to a plaintiff’s already low reputation, then the statements are not actionable.” *Id.* Mr. Kushner’s and Ms. Trump’s claims will fare no better than Boobie Cerasini’s given their tarnished reputations on COVID-19.