SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

ROBERT S. TRUMP,

Plaintiff,

- against –

MARY L. TRUMP and SIMON & SCHUSTER, INC.,

Defendants.

Index No. 2020-51585

Hon. Hal B. Greenwald

SIMON & SCHUSTER'S MEMORANDUM OF LAW IN OPPOSITION TO APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

PRELIMINARY STATEMENT

The relief requested by Robert Trump—a prior restraint prohibiting Simon & Schuster, Inc. ("Simon & Schuster") from publishing Mary Trump's memoir, *Too Much and Never Enough* (the "Book")—is the "most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Remarkably, while asking for this most exceptional of remedies, Mr. Trump identifies no misconduct by Simon & Schuster. Instead, Mr. Trump believes that simply because he alleges that Ms. Trump violated a nondisclosure agreement, one that Simon & Schuster did not know about and was not a party to, he may force Simon & Schuster to stop the presses and throw the brakes on the delivery trucks, halting publication of the Book. Such an outcome would be unprecedented in this country. Mr. Trump has not even attempted to make the requisite showing that the public would be harmed by the publication of the Book and, absent that showing, his requested injunctive relief must be denied.

BACKGROUND

A. The Parties

1. Plaintiff Robert S. Trump

Plaintiff Robert Trump ("Plaintiff")[1] is the younger brother of President Donald J. Trump.

2. Mary Trump

Ms. Trump, who holds a Ph.D. in psychology from Adelphi University, is the niece of President Trump, Robert Trump, and Retired Third Circuit Court of Appeals Judge Maryanne Trump Barry, the co-executors of the Estate of Fred C. Trump. *See* Verified Complaint ("Compl.") ¶¶ 1, 4. She is the daughter of Fred Trump, Jr., the President's older brother who died in 1981.

[1] Mr. Trump is referred to in his Moving Papers as "Petitioner." In accordance with the case caption, however, this brief refers to him as "Plaintiff."

See Affirmation of Elizabeth McNamara dated June 26, 2020 ("McNamara Aff.") Ex. A at 16. Ms. Trump and her brother, also named Fred, sued the Trump family in 2000, after they discovered they were largely omitted from their grandfather's will, and, then in retaliation for that suit, the Trump family withdrew their medical benefits, including benefits for Fred's sick child. *See id.* Ex. B at 3. The lawsuit was resolved in 2001. Compl. ¶ 3.

3. Simon & Schuster

Simon & Schuster is one of the nation's preeminent publishing houses. Over the course of the last two decades, it has published scores of significant works related to national affairs by authors covering the political spectrum. Simon & Schuster is the publisher of such authors as Bob Woodward, Donald Trump, Hillary Clinton, Ivanka Trump, Jimmy Carter, George H.W. Bush, Laura Bush, John McCain, Dick Cheney, Walter Isaacson, David McCullough, Glenn Beck, and most recently, John Bolton. Affidavit of Jonathan Karp ("Karp Aff.") ¶ 5.

B. The *New York Times* Publishes a Pulitzer Prize Winning Article about the Trump Family

On October 2, 2018, *The New York Times* published an article entitled "Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father" written by David Barstow, Susanne Craig, and Russ Buettner (the "NY Times Article"). *See* McNamara Aff. Ex. A. The NY Times Article, which subsequently won the Pulitzer Prize, reported extensively on questionable tax schemes, including "instances of outright fraud" perpetrated by members of the Trump family that greatly increased the fortune that the surviving Trump children received from their father after his death. *See id.* at 2. The Article discussed the family's complicated relationship and included excerpts of depositions from the lawsuit between Ms. Trump and her family. *See id.* at 21. Notably, the article detailed the financial machinations that were used to reduce Fred Trump Sr.'s estate for inheritance by his children—many of the same actions at the heart of the suit by Ms.

Trump and her brother. The NY Times Article relies heavily on a source inside the Trump family who provided *The New York Times'* reporters with tax returns and other information. The Article also includes a quote from Plaintiff Robert S. Trump, as well as a threat from the President to sue *The New York Times*. *See id.* at 3, 26. No lawsuit was ever filed.

C. Mary Trump Writes a Book about the Trump Family

As is common in book publishing, in May 2019, Simon & Schuster received an unsolicited proposal for a book written by Mary Trump (the "Book"). Karp. Aff. ¶ 6. The proposal was sent independently to three different imprints of Simon & Schuster: Scribner, Gallery, and Simon & Schuster. *Id.* Shortly thereafter, on May 9, 2019, Simon & Schuster had a meeting with Ms. Trump to discuss her proposal and what she envisioned concerning her proposed memoir. *Id.* Simon & Schuster (through its three imprints) decided to join an auction to acquire the rights to the work because Ms. Trump's work would address issues of profound importance to our country, with critical insights concerning the President of the United States, his formative years, and his family's financial dealings (which have been the subject of intense scrutiny by the press). *Id.* Simon & Schuster was not alone; about nine or ten other publishers had received Ms. Trump's proposal, and they also participated in the auction. Simon & Schuster won the auction. *Id.*

After negotiations over several months, on August 29, 2019, Simon & Schuster entered into a publishing agreement with Ms. Trump's entity Compson Enterprises LLC for the services of Mary L. Trump, the Author (the "Agreement"). (Ms. Trump signed an Individual Guarantee concerning the Agreement). *Id.* ¶ 7. In the Agreement, Ms. Trump warrants and represents, in relevant part, that she has the "full power and authority to make this agreement and to grant the rights granted hereunder" and that she "has not previously assigned, transferred or otherwise encumbered [the rights]." *Id.* The Agreement also includes Ms. Trump's representation that these warranties are "true on the date of the execution of this agreement" and "true on the date of the

actual publication" of the Book. *Id.* Further, the Agreement provides that the "Publisher shall be under no obligation to make an independent investigation to determine whether the foregoing warranties and representations are true and correct." *Id.*

Simon & Schuster had (and has) no reason to doubt the accuracy of Ms. Trump's warranties—she expressly warranted that there was no impediment to her ability to tell her own story. *Id.* ¶ 8. This conclusion was underscored in the meeting with Ms. Trump concerning her proposal for the Book. At the meeting, she revealed that she was the primary source for the NY Times Article. *Id.* Learning that, and knowing that no litigation resulted from the NY Times Article, Simon & Schuster was entirely confident in Ms. Trump's ability to tell her story regarding her own family (given that over a year before she worked closely with *The New York Times* to tell key elements of this story). *Id.*

Simon & Schuster did not learn anything about Ms. Trump signing any agreement concerning her ability to speak about her litigation with her family until shortly after press broke concerning Ms. Trump's Book about two weeks ago, well after the Book had been accepted, put into production, and printing had begun. *Id.* Simon & Schuster did not see any purported agreement between Ms. Trump and her family until this action was filed against Ms. Trump and Simon & Schuster. *Id.*

D. The Book

After the execution of the Agreement, the work entered the editorial process. *Id.* ¶ 9. On May 7, 2020, Simon & Schuster formally accepted the delivered work under the terms of the Agreement. The Book then moved into the production process. *Id.* Once Simon & Schuster formally accepted the manuscript for publication and initiated the publication process, Ms. Trump lost any ability she otherwise may have had to prevent or delay the Book's publication. *Id.*

The Book has a publication date of July 28, 2020, and the publication process already commenced. That process involves, among other things, printing copies of the book, processing orders, and shipping ordered copies to retailers and wholesalers to be available to customers by the publication date. *Id.* ¶ 10. As of today, at least 75,000 copies have been printed and bound and are ready for publication, and thousands have already shipped to sellers. *Id.* This schedule was set far in advance of Plaintiff providing notice of his intention to file a motion for injunctive relief and was in no way changed or expedited as a result of such notice. *Id.* In addition, Simon & Schuster has provided, and multiple booksellers have published, key information concerning the contents of the Book. *Id.* The Book is number one on the Amazon Best Seller List. *Id.* ¶ 18.

E. News of the Book First Becomes Public

On June 14, 2020, *The Daily Beast* published an article entitled "Revealed: The Family Member Who Turned on Trump" by Lachlan Cartwright that reported for the first time that Mary Trump was going to publish the Book (the "Article"). *See* McNamara Aff. Ex. B. Many of the revelations from the Book were reported in the Article. The Article disclosed that:

> One of the most explosive revelations Mary will detail in the book, according to people familiar with the matter, is how she played a critical role helping *The New York Times* print startling revelations about Trump's taxes, including how he was involved in 'fraudulent' tax schemes and had received more than $400 million in today's dollars from his father's real estate empire.

The Article also reports that the Book will discuss Ms. Trump's father's death from alcoholism and her contention that "Donald and Fred Sr." had "neglected him at critical stages of his addiction." After the Article was published, numerous publications around the world reported on the memoir. *See* McNamara Aff. Exs. C–H. Then, on June 21, 2020, President Trump was interviewed by Axios about Ms. Trump's Book, during which he said:

> She's not allowed to write a book . . . .You know, when we settled with her and her brother, who I do have a good relationship with — she's got a brother, Fred, who I

> do have a good relationship with, but when we settled, she has a total . . . signed a nondisclosure.

See McNamara Aff. Ex. I at 1-2. President Trump's comments about the Book and the nondisclosure agreement also garnered further media attention, including reports in *The Daily Beast*, the *New York Post*, *Business Insider*, and CNN.com, among others. *See* McNamara Aff. Exs. J–M.

F. The Verified Complaint

On June 23, 2020, Robert Trump erroneously initiated an action in Queens County Surrogate's Court—the court that handled the probate of his father's will—seeking to enjoin Simon & Schuster's publication of the Book. On June 25, 2020, the Surrogate's Court *sua sponte* dismissed that action, finding that the forum was "presumptively improper" since the "controversy is a dispute regarding private rights and obligations which fall outside the parameters of subject matter jurisdiction of the Surrogate's Court." *See* June 25, 2020 Order of Surrogate's Court for the County of Queens, File No. 1999-3949/A at 2.

On June 26, 2020, Plaintiff re-filed this action in Dutchess County Supreme Court. The Verified Complaint sets forth the terms of the settlement agreement between Ms. Trump and the Trump family and alleges that Ms. Trump breached the agreement in writing the Book and delivering it for publication. *See* Compl. ¶¶ 21–24, 40. In particular, the Complaint alleges that Ms. Trump violated the agreement by seeking to publish "a. Information about how Mary L. Trump provided the family's confidential tax returns to *The New York Times*, b. Insight into the supposed 'inner workings' of the Trump family, c. Allegations that the late Fred Trump and the President neglected Mary's father, Fred Trump, Jr, supposedly contributing to his early death, and d. Mary Trump's personal observations, allegedly informed by her training as a psychologist, about her supposedly 'toxic' family." *Id.* ¶ 28.

The Complaint asserts no cognizable cause of action against Simon & Schuster, alleges no wrongdoing by Simon & Schuster, and does not even allege that Simon & Schuster was aware of Ms. Trump's agreement with the Trump family (let alone, a party to the agreement). Instead, the Complaint alleges the agreement may extend to Simon & Schuster because it covers Ms. Trump's "agents," and based on this, and nothing more, seeks an injunction "permanently enjoining and barring Respondents Mary L. Trump, Simon & Schuster, Inc., and anyone acting in concert with them or on Mary L. Trump's behalf, from publishing any descriptions or accounts of Mary L. Trump's relationship with any of the Proponents." *Id.* ¶ 44.

ARGUMENT

Simon & Schuster is already in the process of publishing the Book, in which Ms. Trump tells her own story about life as a member of the Trump family—a story that includes information about financial and familial misdeeds by the President of the United States and his siblings. The official publication date is just weeks away, and Simon & Schuster has already taken substantial steps to meet that deadline. This Book addresses issues of profound importance to our country, with critical insights concerning the President of the United States, his formative years, and his family's financial dealings. Ms. Trump offers a personal perspective on President Trump—valuable eyewitness source material for historians and citizens. This Court should reject Plaintiff's efforts to silence it.

I.
AN ORDER PROHIBITING SIMON & SCHUSTER FROM PUBLISHING THE BOOK WOULD BE UNCONSTITUTIONAL

A. Prior Restraints on Publication are Presumptively Unconstitutional

Regardless of Plaintiff's efforts to dress up his claim as a banal breach of contract issue, the requested relief is among the most extraordinary remedies a litigant can request under the law—a prior restraint of speech on a matter of public interest. *See Nebraska Press*, 427 U.S. at

559, 562; *Alexander v. United States*, 509 U.S. 544, 549 (1993) ("Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints."). The request must be denied.

A prior restraint on speech is universally recognized to be "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 U.S. at 559, 562. In fact, "a chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints on publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). Every request for a prior restraint thus comes to a court with "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (same). Indeed, more than two hundred years of unbroken precedent establish a "virtually insurmountable barrier" against the issuance of just the sort of prior restraint on a media outlet that Plaintiff now seeks.[2] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

The Supreme Court has repeatedly limited the imposition of a prior restraint to "exceptional cases" such as the intended publication of the sailing dates of military transports or the number and location of troops in a time of war. *Near*, 283 U.S. at 716. And, it has resisted expanding this class of cases. For example, in the "Pentagon Papers" case, the Court rejected the government's request to enjoin the publication of allegedly stolen government documents, despite assertions that publication could impair national security. *N.Y. Times*, 403 U.S. at 714 (per curiam); *see also id.* at 726 (Brennan, J., concurring). Importantly, these rules are no less applicable where the restraint

[2] This Court would be hard pressed to find a more concrete principle of law. Even before the ratification of the First Amendment in 1791, the Court recognized that since seventeenth century England, the common law gave "to every citizen a right of investigating the conduct of those who are entrusted with the public business" and further "effectually preclude[d] *any attempt* to fetter the press by the institution of a licenser." *See Respublica v. Oswald*, 1 U.S. 319, 325 (1788).

is temporary and "justified as necessary to afford the courts an opportunity to examine the claim more thoroughly." *Id.* at 727; *United States v. Ouattrone*, 402 F.3d 304, 310 (2d Cir. 2005) (Sotomayor, J.) ("A prior restraint is not constitutionally inoffensive merely because it is temporary.").

These principles were reaffirmed in 1994 in an action seeking to enjoin the broadcast of a news report about conditions in a food processing factory in the CBS News program, *48 Hours*. In *CBS v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers), Justice Blackmun wrote:

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.' Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this 'most extraordinary remedy' only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.

Id. at 1317 (citations omitted). This remains true even where a publisher obtains the information through "calculated misdeeds." *Id.* at 1318.

Just this month, Judge Royce Lamberth of the United States District Court for the District of Columbia, denied a request similar to this one seeking an injunction to block the publication of a book by Ambassador John Bolton entitled *The Room Where It Happened*. *See United States v. Bolton*, 20-cv-1580(RCL), 2020 WL 3401940 (D.D.C. June 20, 2020). In that case, the United States alleged that Bolton violated his non-disclosure agreement by drafting and seeking to publish his book and, as here, asked the court to enjoin the book's publication on that basis. The court declined to do so *even after* determining that Bolton "likely jeopardized national security by disclosing classified information in violation of his nondisclosure agreement obligations." *Id.* at *3. Nonetheless, the court held "for reasons that hardly need to be stated, the Court will not order a nationwide seizure and destruction of a political memoir." *Id.* at *4. The denial of the injunction

in the *Bolton* action underscores how quixotic is Plaintiff's quest—even when a judge determines national security is at risk, an injunction cannot issue.

In addition, New York has "its own exceptional history and rich tradition" of a free press, *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 250, 566 N.Y.S.2d 906, 914 (1991), under which the scope of protection provided by Article 1, Section 8 of the New York State Constitution is "often broader than the minimum required by the Federal Constitution," *id.* at 249, 566 N.Y.S.2d at 914 (quoting *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529, 528 N.Y.S.2d 1, 5 (1988)) ("[T]he consistent tradition in this State of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events . . . call[s] for particular vigilance by the courts of this State in safeguarding the free press against undue interference.") (internal quotation marks and citations omitted). New York courts, therefore, employ what is arguably an even *higher* standard than the federal courts, refusing to order a prior restraint against speech "absent a showing on the record that such expression will immediately and irreparably create *public* injury." *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 558, 510 N.Y.S.2d 844, 847 (1986) (emphasis added); *see Madole v. Barnes*, 20 N.Y.2d 169, 174–75, 282 N.Y.S.2d 225, 229 (1967) (barring prior restraints except where "such expression will immediately and irreparably create injury to the *public* weal") (internal quotation marks, citation omitted) (emphasis added); *Porco v. Lifetime Entm't Servs*. LLC, 116 A.D.3d 1264, 1266, 984 N.Y.S.2d 457, 459 (3d Dep't 2014) (vacating restraining order against docudrama where the "broadcast would not create the type of *imminent and irreversible injury to the public* that would warrant the extraordinary remedy of prior restraint") (emphasis added).

B. Plaintiff Has Not Met His Burden to Overcome the Constitutional Presumption Against Prior Restraints

Plaintiff has not demonstrated any injury to the public, and, for that reason alone, his Motion must be denied. Indeed, Plaintiff has made no effort to demonstrate that the public will be irreparably harmed by the publication of the Book. He just claims that he may suffer *personal* damage if "private or disparaging information" about his relationship with Ms. Trump is revealed to the public (or, as the President put it: "Robert . . . is very angry about it"). *See* Memorandum of Law in Support of Petitioner's Motion for Preliminary Injunction and Temporary Restraining Order ("MOL") at 9. But that is not the kind of "exceptional" circumstance meriting a prior restraint. Simply put, Plaintiff's anger cannot override Simon & Schuster's First Amendment rights. *See Porco*, 116 A.D.3d at 1266, 984 N.Y.S.2d at 459 (refusing to grant injunction when "any alleged harm or injury flowing from the content of the film would be limited to plaintiff alone"); *Rosemont Enterprises, Inc. v. McGraw-Hill Book Co.*, 85 Misc. 2d 583, 588, 380 N.Y.S.2d 839, 844 (Sup. Ct. N.Y. Cty. 1975) (refusing to grant injunction when "[t]he harm which the plaintiff asserts that it will suffer is confined to contractual rights and economic interests" and "defendants' constitutional rights are at stake on the other side"); *TVC Albany, Inc. v. Am. Energy Care, Inc.*, No. 1:12-CV-1471 (MAD/CRH), 2012 WL 5830705, at *6 (N.D.N.Y. Nov. 16, 2012) (refusing to grant injunction when plaintiff "offers only broad allegations concerning its potential loss of reputation and good will").

Indeed, the public interest, rather than being sufficient to compel silence, favors disclosure: The Book includes Ms. Trump's invaluable insights about the President of the United States and his financial dealings, among other things. Americans have a right—even a need—to know such information. And they have demonstrated their interest in learning about the President—the Book is already a Best Seller on Amazon. *See* Karp Aff. ¶ 18. Plaintiff's discomfort with the contents

of the Book, in the face of the public interest in the Book, falls cosmically short of the showing required to justify a prior restraint.

In short, Plaintiff has failed to demonstrate that he is entitled to the extraordinary remedy that he seeks.

II.
PLAINTIFF CANNOT MEET HIS BURDEN FOR A PRELIMINARY INJUNCTION

Even apart from the dispositive constitutional defects in his application for injunctive relief, Plaintiff cannot meet the basic requirements required for the issuance of a temporary restraining order or preliminary injunction. *See* CPLR 6301.

Preliminary injunctive relief is viewed as a drastic remedy that requires the party seeking such relief to make a clear showing of "a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v. Fine Arts Horns., Inc.*, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 49 (2005); *see Scotto v. Mei*, 219 A.D.2d 181, 182, 642 N.Y.S.2d 863, 864 (1st Dep't 1996) (same); *Faberge Int'l, Inc. v. Di Pino*, 109 A.D.2d 235, 240, 491 N.Y.S.2d 345, 349 (1st Dep't 1985). A party "seeking to invoke such stringent relief is obliged to establish a clear and compelling legal right thereto based upon undisputed facts." *Estate of Hemingway v. Random House, Inc.*, 49 Misc. 2d 726, 728, 268 N.Y.S.2d 531, 535 (Sup. Ct. N.Y, Cty. 1966), *aff'd*, 25 A.D.2d 719 (1st Dep't 1966); *see also FAMO, Inc. v. Green 521 Fifth Ave., LLC*, No. 109028-2007, 2007 WL 2890236, at *6 (Sup. Ct. N.Y. Cty. Sep 18, 2007) (same).

As an initial matter, Plaintiff cannot demonstrate a likelihood of success on the merits because he has alleged no cognizable claim against Simon & Schuster. In fact, the only cause of action alleged against it is a claim for "specific performance." *See* Compl. ¶¶ 31–36. But to the extent "specific performance" is a cause of action and not merely a remedy, it can *only* be asserted

when there is an underlying contract to which the defendant is a party. *See Victory State Bank v. EMBA Hylan LLC*, 169 A.D. 963, 967, 95 N.Y.S.3d 97, 103 (2d Dep't 2019) ("Because the individual defendants are not parties to the [contract], they cannot be held liable thereunder and cannot be directed to specifically perform any obligations thereunder."). Here, Simon & Schuster was not a party to the settlement agreement between Plaintiff and Ms. Trump, did not know about the contract's existence until press broke for the Book, and had not even seen the contract until Plaintiff filed it in redacted form in this litigation. *See* Karp Aff. ¶ 8. There is, therefore, no cause of action asserted against Simon & Schuster and, as a consequence, no likelihood of success. This failure to plead a cause of action bears emphasis—Plaintiff is seeking to silence one of the most prominent American publishers without alleging that it engaged in *any* actual wrongdoing at all. This alone is grounds to deny the injunction.

To elide this pleading failure, Plaintiff claims that he should be awarded a prior restraint against Simon & Schuster on the grounds that Ms. Trump entered into the Settlement Agreement more than twenty years ago. But the presumption against prior restraints is not overcome merely because of the confidentiality provision in the Settlement Agreement, to which Simon & Schuster was not a party, and Plaintiff fails to cite a single case in which a prior restraint has been granted in such a circumstance. To the contrary, in case after case, courts across the country have consistently recognized that imposing an injunction in a case like this—where a publisher receives information from a source who allegedly violated a confidentiality agreement—would be unconstitutional. In *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996), a leading First Amendment case with facts strikingly similar to those here, the Sixth Circuit held that "[p]rohibiting the publication of a news story . . . is the essence of censorship." *Id.* at 225. In that case, a district court had enjoined *Business Week* magazine from publishing an article

disclosing the contents of documents that were under seal in a lawsuit. The information contained in the documents was leaked to *Business Week* by a lawyer in violation of a confidentiality agreement. On appeal, the Sixth Circuit admonished the district court for "rush[ing] to judgment" and failing to "engage[] in the proper constitutional inquiry." *Id.* It explained, "preventing a news organization from publishing information in its possession on a matter of public concern" violates the Constitution and "[t]he private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." *Id.* This was true even though the information was obtained through a violation of a confidentiality agreement. *Id.*; *see also Matter of Providence Journal Co.*, 820 F.2d 1342, 1349 (1st Cir. 1986) (holding that it would be an unconstitutional prior restraint to prevent the Providence Journal Company from publishing information obtained through a FOIA request, "[e]ven if the materials had been given to the Journal improperly or unlawfully").

Numerous other courts have followed the *Procter & Gamble* court's reasoning. In *Globe International, Inc. v. National Enquirer, Inc.*, No. 98-10613 CAS (MANX), 1999 WL 727232 (C.D. Cal. Jan. 25, 1999), for example, the court held that it would be an unconstitutional prior restraint to prohibit *Enquirer* magazine from publishing a story even though the source for the story had allegedly breached her confidentiality and exclusivity agreements with the plaintiff. The court explained that the plaintiff "may have a valid dispute with [the source] over the alleged breach of her agreements, but it has failed to provide any basis for seeking a Court order restricting what the Enquirer may publish." *Id.* at *5. And in *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745 (E.D. Mich. 1999), the court held that it would be an unconstitutional prior restraint to prevent an online journalist from publishing internal Ford documents provided to him by Ford employees in violation of their confidentiality agreements. The court explained, "Ford's commercial interest in

its trade secrets and [the defendant's] alleged improper conduct in obtaining the trade secrets are not grounds for issuing a prior restraint." *Id.* at 753.[3]

Despite this litany of cases prohibiting precisely what Plaintiff asks this Court to do here, Plaintiff still seeks his white whale of an injunction for two reasons, neither of which has merit:

First, Plaintiff claims that Simon & Schuster was Ms. Trump's "agent" and is therefore bound by the provision of the Settlement Agreement that states: "In the event such breach occurs, [Objectors], as well as their 'counsel,' hereby consent to the granting of a temporary or permanent injunction against them (or against any agent acting on their behalf)." *See* MOL at 11. This argument, which posits that Simon & Schuster can be bound by an agreement that pre-existed its relationship with Ms. Trump by almost twenty years and whose existence was unknown to it, is specious at best. Simon & Schuster was not acting as Ms. Trump's agent in publishing the Book. Under New York law, agency is a "fiduciary relationship which results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act. It is a relationship whereby one retains a degree of direction and control over another." *Broyles & Broyles, Inc. v. Rainbow Square, Ltd.*, 125 A.D.2d 933, 934, 510 N.Y.S.2d 331, 331 (4th Dep't 1986) (internal quotations and citations omitted). Thus, in order for Simon & Schuster to be the "agent" of Ms. Trump, Plaintiff would have to show that Ms. Trump retained control over Simon & Schuster's ability to publish the Book. He has not—and

[3] Plaintiff attempts to distinguish these cases from the present case on the grounds that Simon & Schuster is not a newspaper relying on a source that provided information in violation of a confidentiality agreement but instead is publishing a book written by an author who has purportedly violated such an agreement. This is a distinction without a difference. Simon & Schuster is in the business of publishing speech, no different than a newspaper. Ms. Trump provided Simon & Schuster with information as part of an arm's length transaction and has no control over the publication of that information. *See* Karp Aff. ¶ 9. None of the cases cited here hinges on the fact that the media organization, rather than the source, wrote the words that were to be published. To the contrary, in *Globe*, the articles sought to be enjoined were interviews with a party that broke a confidentiality agreement. *See* 1999 WL 727232, at *2. And in *Ford Motor Co.*, the online journalist was merely publishing internal Ford documents that were sent to him from individuals violating confidentiality agreements. *See* 67 F. Supp. 2d at 747.

cannot—make such a showing. Ms. Trump and Simon & Schuster are two independent parties that entered into an arm's length transaction and Simon & Schuster—not Ms. Trump—maintains the right to control the publication of the Book. Karp Aff. ¶ 9.

Second, Plaintiff claims that an injunction may be extended to individuals acting "in concert" with a party bound by an injunction. *See* MOL at 11. Yet the case that Plaintiff cites for this proposition—involving an injunction against students (not media defendants) engaged in "violent," and "illegal" behavior on a university campus—has no applicability to the facts at hand. *Fordham Univ. v. King*, 63 Misc. 2d 611, 612, 313 N.Y.S.2d 208, 210 (Sup. Ct. Bronx Cty. 1970). To the contrary, courts that have grappled with injunction applications similar to Plaintiff's request here have noted that an "in concert" theory raises serious First Amendment concerns. *See Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253, 258 (2d Cir. 2018) (vacating an injunction against a movie producer that was not a signatory to a consent order after noting that "the application of an injunction to an entity that contracts with someone arguably bound by its terms in order to prepare an expressive work . . . raises serious concerns not present in the typical [injunction] situation"); *United States v. Bolton*, No. 1:20-cv-1580 (RCL), 2020 WL 3401940, at *4 (D.D.C. June 20, 2020) ("[T]he government asks this Court to order Bolton 'to instruct his publisher to take any and all available steps to retrieve and destroy any copies of the book that may be in the possession of any third party.' For reasons that hardly need to be stated, this Court will not order a nationwide seizure and destruction of a political memoir."); *Republic of Kazakhstan v. Does 1-100*, No. 15-Civ. 1900(ER), 2015 WL 6473016, at *2 (S.D.N.Y. Oct. 27, 2015) (rejecting the application of the "in concert" theory to enjoin a news organization that published materials allegedly stolen by computer hackers).

That is particularly so here. The only alleged "in concert" conduct by Simon & Schuster is the publication of the Book. But as a matter of constitutional law, Simon & Schuster cannot be penalized for such conduct. As the United States Supreme Court held in *Smith v. Daily Mail Publishing Co.*, "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. 97, 103 (1979); *see also The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) ("[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496–97 (1975) (holding that, under the First and Fourteenth Amendments, the State of Georgia could not sanction a news organization that accurately published a rape victim's name obtained from judicial records open to public inspection). Years later, the Supreme Court reaffirmed this principle in *Bartnicki v. Vopper*, proclaiming that the First Amendment bars the imposition of civil liability against a publisher for truthful speech about a matter of public concern,[4] even if a third-party who provided information relied upon in the reporting obtained that information unlawfully. 532 U.S. 514, 535 (2001). If it is unconstitutional to bring a cause of action for civil liability against a publication in such a circumstance, an injunction that punishes Simon & Schuster for the act of publishing—even in the face of allegations that Ms. Trump acted inappropriately—is plainly and patently unconstitutional.

[4] The New York Court of Appeals has adopted an expansive and deferential definition of "public concern," noting that "[t]he press, acting responsibly, and not the courts must make the *ad hoc* decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable." *Gaeta v. N.Y. News, Inc.*, 62 N.Y.2d 340, 349, 477 N.Y.S.2d 82, 85 (1984). Here, Ms. Trump's book unquestionably relates to a matter of legitimate public concern—the financial and familial difficulties of the President of the United States as well as the truthfulness of the President and his family members in their statements to the American public. Because Simon & Schuster did not obtain the documents in an unlawful manner, it cannot be held liable for its accurate reporting of the newsworthy information that it received.

Next, Plaintiff has not adequately pled that there will be irreparable injury from the disclosures. The law is clear that once information has been published, there can be no harm for its republication. *See Bolton*, 2020 WL 3401940, at *4 (denying preliminary injunction because the book had already been published). As the Complaint makes clear, Plaintiff is concerned that Ms. Trump will reveal details about her dealings with *The New York Times*, her difficult relationship with her family, and the Trump family's financial dealings. But all of those facts have been made public. Ms. Trump's role in the NY Times Article was already disclosed in the *Daily Beast* Article. *See* McNamara Aff. Ex. B at 2. Contemporaneous news reports surrounding Ms. Trump's suit twenty years ago laid bare the rancorous relationship between the Trump family and Ms. Trump. *See id.* Exs. O–P. Even the President of the United States underscored this contentious relationship in his interview with Axios earlier this week. *See id.* Ex. I at 2. And the allegedly fraudulent financial dealings of the Trump family have been widely reported, not just by the NY Times Article, but by press all over the world. *See id.* Exs. Q–S.[5]

The irreparable harm to Simon & Schuster, on the other hand, is hard to overstate and the balance of equities tilts heavily in its favor. It is axiomatic that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976), *overruled in part on other grounds by Branti v. Finkel*, 445 U.S. 507 (1980) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *see also Uhlfelder v. Weinshall*, 10 Misc. 3d 151, 157, 810 N.Y.S.2d 275, 282 (Sup. Ct. N.Y. Cty. 2005) ("[V]iolations of First Amendment rights are commonly considered de facto irreparable injuries."),

[5] In addition, Plaintiff lacks standing to assert irreparable harm on behalf of any third-party to his Complaint, including both President Trump and his sister, former Third Circuit Court of Appeals Judge Maryanne Trump Barry. *See Fed. Ins. Co. v. Metro. Trans. Auth.*, 2017 WL 2929471, at *3 (S.D.N.Y. Jul. 10, 2017) ("[T]he theoretical possibility of harm to third parties is not relevant to, and does not establish, the required showing of irreparable harm to [] the proponent of injunctive relief in this application.").

aff'd on other grounds, 47 A.D. 3d 169, 845 N.Y.S.2d 41 (1st Dep't 2007); *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) ("[E]ven a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect."). The damage resulting from "even a prior restraint of the shortest duration . . . is extraordinarily grave." *CBS v. U.S. Dist. Ct.*, 729 F.2d 1174, 1177 (9th Cir. 1984). To the extent Plaintiff is arguing that the temporary restraining order or preliminary injunction will merely preserve the status quo, "[w]here the freedom of the press is concerned . . . the status quo is to 'publish news promptly that editors decide to publish.'" *Procter & Gamble*, 78 F.3d at 226 (quoting *Providence Journal*, 820 F.2d at 1351). "A restraining order disturbs the status quo and impinges on the exercise of editorial discretion." *Id.* Thus, any balancing of the equities clearly favors Simon & Schuster.

And Simon & Schuster faces real, practical harms if an injunction should issue. Simon & Schuster has invested considerable resources in editing, printing, shipping, and preparing to publish approximately 75,000 copies of the Book. Once copies of the Book ship in response to a purchase order—which already occurred prior to this Court's issuance of a temporary restraining order—title to the physical copies passes from Simon & Schuster to the retailer or wholesaler. *See* Karp Aff. ¶ 13. As mentioned, the Book is already designated an Amazon Best Seller. *See id.* ¶ 18. Particularly given that Plaintiff has not even alleged wrongdoing by Simon & Schuster, if Simon & Schuster is not now able to sell the Book, the loss of this investment would be a serious economic harm indeed.

Finally, when balancing the equities, this Court must consider the "enormous public interests involved," *Seitzman v. Hudson River Assocs.*, 126 A.D.2d 211, 214, 513 N.Y.S.2d 148, 150 (1st Dep't 1987), namely, the public's right to read this material. *See First Nat. Bank of Bos.*

v. Bellotti, 435 U.S. 765, 783 (1978). Ms. Trump has a story to tell about her family, her personal experiences with, and insights into, the President of the United States, and the dubious financial dealings that provided the foundations for the President's real estate empire. The American public has a right to information about the President's claimed wealth—particularly as he has repeatedly touted his wealth as a credential for his presidency. A twenty-year-old Settlement Agreement to which Simon & Schuster is not bound should not interfere with the public's right to read that information.

CONCLUSION

The relief requested by Plaintiff is unprecedented and unconstitutional. For the reasons discussed above, Simon & Schuster respectfully requests that this Court deny Plaintiff's application for injunctive relief preventing the publication of the book *Too Much and Never Enough*.

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Respectfully submitted,

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