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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 **MEMORANDUM OF LAW** **ORAL ARGUMENT REQUESTED**

DEFENDANT MARY L. TRUMP'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

President Trump's family, through plaintiff Robert Trump ("Plaintiff"), asks this Court to ban a book discussing matters of utmost public importance. Plaintiff is pursuing this unlawful prior restraint on core political speech because the President and his family do not want the American people to hear Mary Trump's story. But the First Amendment, ordinary rules of contract law, and bedrock equitable principles defeat Plaintiff's extraordinary and unwarranted request for injunctive relief.

The First Amendment to the U.S. Constitution forbids prior restraints against the publication of books, especially books comprising core political speech relating to a sitting president running for reelection. Defendant Mary L. Trump, Ph.D. ("Ms. Trump")—a clinical psychologist and niece of the president—has written a "revelatory, authoritative portrait of Donald J. Trump and the toxic family that made him."[1] This book, titled *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man* (the "Book"), will shortly be released to take its place in our country's long tradition of free and open discussion of the character and fitness of America's public leaders—the lifeblood of our democracy. The Book is already a bestseller. *See* Ex. 22 (Amazon Best Sellers, https://www.amazon.com/best-sellers-books-Amazon/zgbs/books (accessed July 2, 2020)).

The injunction that Plaintiff seeks to block the Book is a "classic exampl[e]" of "a prior restraint." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931)). A prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity," *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (internal quotation marks omitted), and "may be imposed only in the most

[1] Champion Aff. Ex. 21 (*About the Book*, Simon & Schuster (accessed July 2, 2020)).

exceptional cases," *Porco v. Lifetime Entm't Servs., LLC,* 116 A.D.3d 1264, 1266 (3d Dep't 2014) (internal quotation marks omitted). And that presumption applies with its greatest force where, as here, the speech at issue concerns vital political discourse directly relating to an ongoing national election. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." (internal quotation marks omitted)). Moreover, the court may not grant a prior restraint if Plaintiff has not shown that the challenged speech threatens "imminent and irreversible injury *to the public*"—a risk Plaintiff has not even tried to argue exists here. *Porco*, 116 A.D.3d at 1266. The First Amendment thus unquestionably protects Ms. Trump's right to have this important work published, free from governmental prior restraint.

Plaintiff also cannot succeed on the merits of his contractual claims because the confidentiality provision in the decades-old Settlement Agreement of financial disputes that Plaintiff invokes is unenforceable and inapplicable. Indeed, the Settlement Agreement is unenforceable and void because Plaintiff and his siblings (including Donald Trump, the president of the United States) fraudulently induced Ms. Trump to enter into it based on false valuations that were revealed by the *New York Times* in its exposé of the Trump family finances in October of 2018 (Ex. 18). Moreover, Plaintiff filed a heavily redacted Settlement Agreement in an attempt to isolate the confidentiality provision from its context and make the agreement seem like a simple exchange of confidentiality for consideration. It is not. When read in the context of the agreement as a whole, as the Court must, it is clear that the double-facing confidentiality provision was intended to protect the details set forth in the Settlement Agreement itself regarding the financial terms of the settlement and the relationships between the various people, entities, and assets at issue in the Settlement, in order to facilitate the settlement process. It is not nearly specific enough

to constitute a valid waiver of First Amendment rights. That the parties did not intend that the Agreement impose the broad, sweeping, lifetime gag-order that Plaintiff alleges is demonstrated not only by the agreement itself but the parties' conduct since its execution. Plaintiff and his siblings have made multiple public comments over the years regarding their family relationships. Having done so, they cannot now advance an interpretation of the agreement that prohibits Ms. Trump also from commenting on her family relationships. In any event, it is well settled that where a contract is "indefinite as to its duration," the court should find "another construction" rather than "construe[] [it] to require perpetual performance." *Ketcham v. Hall Syndicate, Inc.*, 236 N.Y.S.2d 206, 212 (Sup. Ct. N.Y. Cty. 1962). The financial terms of the Settlement Agreement were long ago performed, and the confidentiality provision cannot be interpreted as a perpetual ban on these family members' ability to speak publicly about issues of public concern, in particular where one of those family members has voluntarily made his life a public issue by running for and becoming president of the United States.

Plaintiff has also failed to provide non-speculative allegations or evidence that he will suffer any harm at all, much less irreparable harm. Irreparable harm is an indispensable requirement for a preliminary injunction and it is not satisfied by a party's alleged consent to injunctive relief. Plaintiff must show that he will be irreparably harmed in the absence of an injunction, and Plaintiff's failure to make any such showing in either his verified complaint or his affirmation is fatal to his claim for injunctive relief.

Even if Plaintiff had adequately proven that release of Ms. Trump's book will cause him irreparable injury—and he has not—his application for injunctive relief still would have to be denied because the injunction he seeks is no longer capable of stopping that release. Ms. Trump has delivered the manuscript of the Book; under the agreement with Simon & Schuster, Ms. Trump

no longer has the power to stop its publication. And tens of thousands of copies of the Book have already been printed and shipped to retailers who will sell the book to the public regardless of any injunction this Court might impose on Simon & Schuster. Aff. of Mary Trump in Opp. to Pltf's Mot. for Preliminary Injunction ¶¶ 14–17 (M. Trump Aff.). Ms. Trump's words have already taken wing. Injunctive relief thus would be ineffectual. That means not only that the injunction should not issue, but also that Plaintiff lacks standing to seek it.

Finally, the balance of the equities heavily disfavors Plaintiff's attempt to stifle Defendants' core First Amendment rights to disclose information of manifest public importance in the months immediately preceding a presidential election.

Indeed, now that the Appellate Division has vacated the TRO against Simon & Schuster, Plaintiff's application for injunctive relief is even more of a nonstarter. As the Appellate Division observed,

> In determining whether to grant specific performance thorough the use of the equitable remedy of an injunction, courts should balance the legitimate interests of the party seeking to enforce the contract with other legitimate interests, including, especially in this context, the public interest. This balancing concept takes into account whether the provisions of the confidentiality agreement are temporally and geographically reasonable and the extent to which the provisions are necessary to protect the plaintiff's legitimate interests. . . . The passage of time and changes in circumstances may have rendered at least some of the restrained information less significant than it was at the time and, conversely, whatever legitimate public interest there may have been in the family disputes of a real estate developer and his relatives may be considerably heightened by that real estate developer now being President of the United States and a current candidate for re-election.

Dkt. 55 at 5 (Notice of Entry of Decision and Order on Application, *Trump v. Trump*, 51585/15 (2d Dep't July 1, 2020)). After the Appellate Division's order, Simon & Schuster will continue printing and delivering copies of the book to booksellers. Those books will end up in the hands of the public. The information they contain will be revealed. No injunction here can prevent any harm Plaintiff might identify from the loss of confidentiality over that information: it is already

no longer confidential. And Plaintiff cannot identify any legitimate confidentiality interest when none of the information in the book will be confidential regardless of what happens here.

Accordingly, the Court should immediately rescind the TRO against Ms. Trump and deny Plaintiff's request for injunctive relief.

BACKGROUND

I. The Trump Family.

Defendant Mary Trump is a clinical psychologist. She is the granddaughter of Fred Trump Sr., a Queens property developer, and the daughter of Fred Trump Sr.'s eldest son, Fred Trump Jr. Fred Trump Sr. had four other children: Elizabeth Trump; the Hon. Maryanne Trump Barry (a retired judge of the U.S. Court of Appeals for the Third Circuit); Plaintiff Robert Trump; and the current President of the United States, Donald J. Trump. M. Trump Aff. ¶ 2. Ms. Trump is thus the niece of President Trump. Ms. Trump's father, Fred Trump Jr., died in 1981 at the age of 42, when she was 16 years old.

Fred Trump Sr. built and managed a number of major real estate developments in New York City's outer boroughs, including prominent developments in Queens and Brooklyn. *See* Ex. 18 (David Barstow, Susanne Craig, and Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches From His Father*, N.Y. TIMES (Oct. 2, 2018)).[2] Fred Trump Sr. amassed a vast fortune building and managing these developments. When he passed away in 1999, his will divided the majority of his wealth in equal parts among his living children, with small bequests for each of his grandchildren. Because their father had passed away nearly twenty years before his

[2] Unless otherwise noted, all Exhibits refer to those attached to the Affirmation of Anne Champion, dated June 30, 2020.

father, this arrangement excluded Fred Trump Jr.'s children—Ms. Trump and her brother, Fred III—from any significant share of their grandfather's estate.

Three of Fred Trump Sr.'s children—Maryanne Trump Barry, Donald and Robert Trump—submitted his will for probate in Queens County Surrogate's Court. Ms. Trump and Fred III ("Objectants") filed objections to probate, contending that Fred Trump Sr.'s will was the product of undue influence and fraud. *See* Will of Fred C. Trump, No. 3949/1999 (Surr. Ct. Queens Cty.); M. Trump Aff. ¶ 3. Fred Trump Sr.'s wife, Mary Anne, died in 2000 and her will was also submitted to probate. While their objections to Fred Trump Sr.'s will were pending, these same Objectants, together with other relations, also filed a separate suit in Nassau County Supreme Court against members of the Trump family and certain corporate entities for cutting off their health insurance, including the policy covering Fred III's severely disabled infant child. M. Trump Aff. ¶ 4. These media covered these acrimonious disputes. *See*, *e.g.*, Ex. 14 (Heidi Evans, *Inside Trumps' Bitter Battle Nephew's Ailing Baby Caught In The Middle*, N.Y. DAILY NEWS (Dec. 19, 2000)) (reporting that "long-simmering generational resentments have been laid bare" by the dispute, and detailing Donald Trump's response to criticism over cutting off medical coverage); M. Trump Aff. ¶ 5.

At the time, Ms. Trump and Fred III also had other interests in the Trump empire, including interests in various ground leases, properties, notes, and service contracts. M. Trump Aff. ¶ 6. The parties entered into a global resolution of the litigations and these interests in a confidential Agreement and Stipulation executed on April 10, 2001 (the "Settlement Agreement"). The terms of the settlement, including the effective buy out of Ms. Trump and Fred III's pre-existing interests in the Trump empire, were based on valuations provided by Fred Trump Sr.'s children—Maryanne, Donald, and Robert—as well as valuations submitted to the IRS for tax purposes,

valuation opinions solicited from mortgage companies, and valuations calculated based on mortgage income received. M. Trump Aff. ¶ 12. As the *New York Times* later revealed, *see* Background, Part III, *infra*, these valuations were riddled with fraud.

II. The Settlement Agreement.

As Plaintiff revealed by filing this case, the previously non-public Settlement Agreement consists of 19 pages (not including signature pages), and 11 sections, including a preamble describing the parties to and nature of the actions to be settled; whereas clauses reciting certain relevant facts regarding those actions and the parties' desire to settle them; a confidentiality provision; and then multiple sections covering the disposition of the various proceedings and the substantial assets at issue in each of them. *See* Ex. 1. (Settlement Agreement). The Agreement resolved the various disputes through the exchange of assets and cash payments—the last of which Ms. Trump received in 2001, the same year it was executed. M. Trump. Aff. ¶ 8. No separate consideration was paid for the confidentiality agreed to; rather the confidentiality clause was included, as the Agreement states, because "the public has no interest in the particular information involved in the 'global' resolution of their differences." Ex. 1 ¶ 1. The sections redacted in the version of the Agreement filed by Plaintiff are essential to construing the contract and, in particular, the confidentiality clause. Therefore, Ms. Trump has filed a motion seeking to file the full, unredacted Settlement Agreement under seal.

The Settlement Agreement states that its purpose is the "compromise[] and settle[ment], on a 'global basis' in order to resolve all of [the parties'] differences pertaining to [] two (2) probate proceedings; the insurance case; partnership and corporate interests; as well as their interests in two (2) inter vivos trusts." Ex. A. at 5. In total, the Agreement settled six disputes between and among different sets of parties depending on their relationship to one another for any given dispute and subject.

A. The Parties.

The Settlement Agreement was executed by seven Trump family members: (1) Donald J. Trump, (2) Robert S. Trump, (3) Maryanne Trump Barry, (4) Linda C. Trump (Mary and Fred's mother), (5) Mary Trump, (6) Lisa Trump (Fred's wife), and (7) Fred C. Trump, III; and five law firms. *Id.* at 20-21. Certain of these parties executed the Agreement in different capacities depending on their relationship to their counterparties in each of the six disputes being settled. Specifically, Donald Trump, Robert Trump, and Maryanne Trump Barry, at various points throughout the Agreement, each are participating in at least twelve different relational capacities:

(1) Individually;

(2) as Co-Executors of the Last Will and Testament of Fred C. Trump;

(3) as Co-Executors of the Last Will and Testament of Mary Anne Trump;

(4) as shareholders and (5) officers and (6) directors of Apartment Management Associates, Inc.;

(7) as shareholders and (8) officers and (9) directors of Trump Management, Inc.;

(10) as partners in Midland Associates Group;

(11) as co-owners of certain ground leases;

(12) [redacted].

Ex. A at 1-5, 12, 15. Linda, Mary, Lisa, and Fred Trump III executed the Agreement individually, and Lisa and Fred III also did so in his relational capacity as parent and natural guardian of William Trump, then a minor. *Id.* at 1-5.

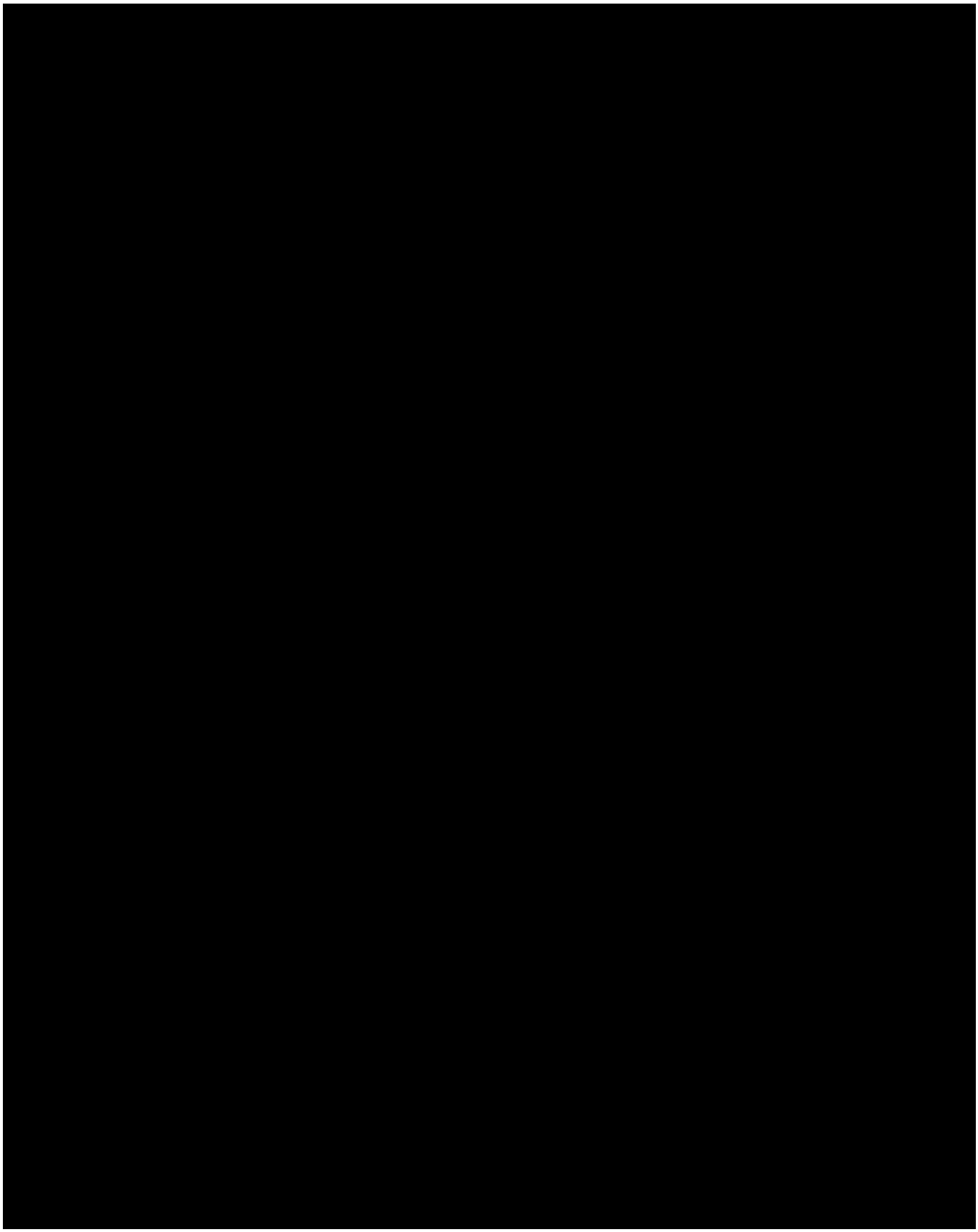
B. The Subject Matter.

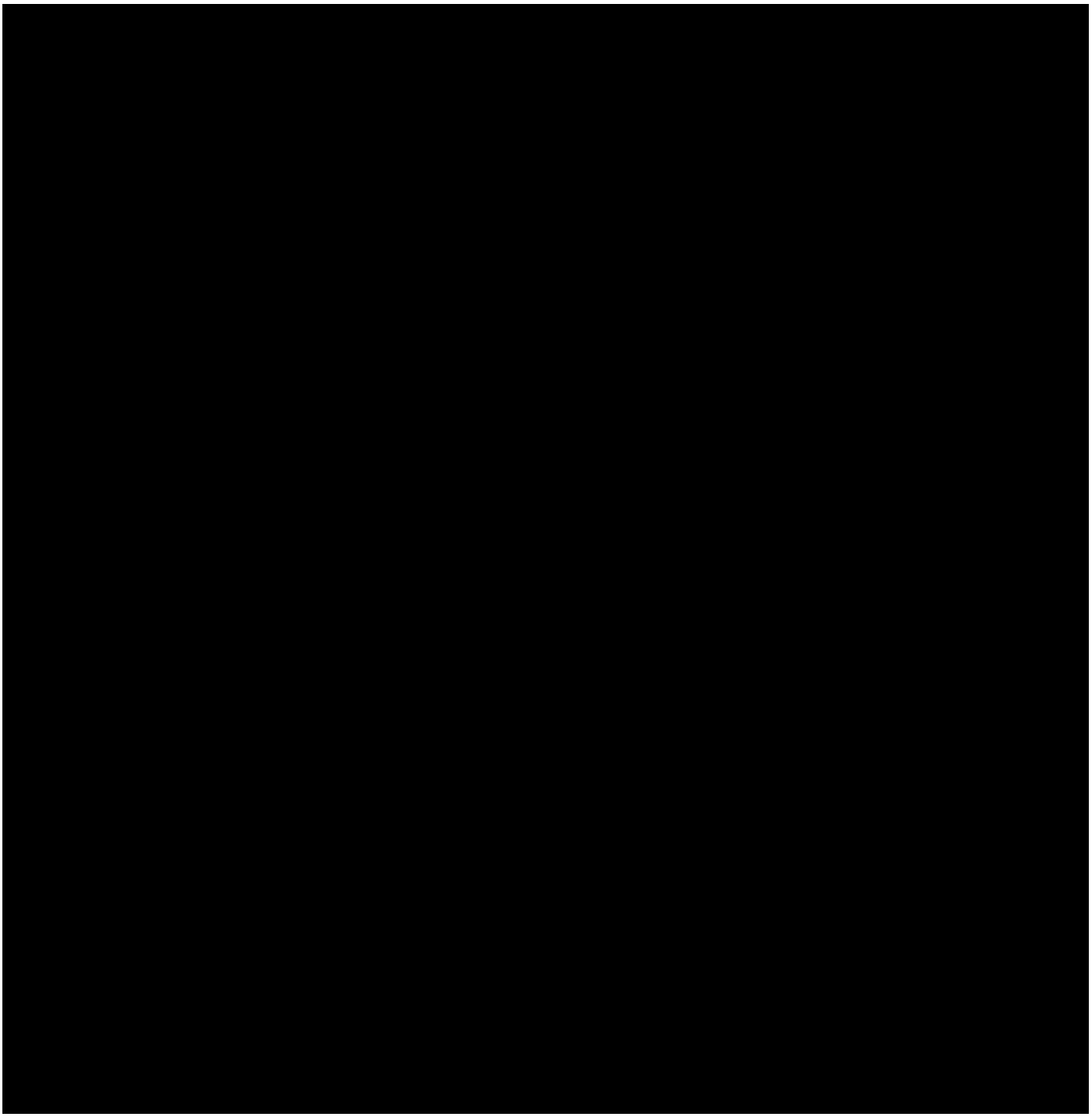
Unlike Plaintiff, Ms. Trump has provided the entire Settlement Agreement for the Court's review. As the Court can now see for the first time, the Agreement resolved six financial and business disputes among members of the Trump family and the named corporate entities:

(1) the objections filed by Mary and Fred Trump to the probate of Fred C. Trump's estate;

(2) the objections filed by Mary and Fred Trump to the probate of Mary Anne Trump's estate:

(3) a Nassau County lawsuit brought by Mary, Lisa, Linda and Fred Trump III to prevent Donald Trump, Robert Trump, and Maryanne Trump Barry from terminating medical benefits, including those for Fred Trump III's disabled child, William;





C. The Confidentiality Provisions.

The Settlement Agreement includes mutual, "double facing" confidentiality clauses. The Settlement Agreement reflects no consideration for the confidentiality provisions.

As the basis for the confidentiality provisions, parties on both sides "unanimously agreed that the public has no interest in the particular information involved in the 'global' resolution of

their differences." Ex. 1 ¶ 1. One clause provides that "Objectants," including Ms. Trump and her counsel at Farrell Fritz PC, also a signatory, would not "disclose any of the terms of [the] Agreement" or "directly or indirectly publish or cause to be published" any "description or depiction" "concerning their litigation or relationship with the 'Proponents/Defendants' or their litigation involving" the Estates, without first obtaining approval. Ex. 1 ¶ 2. Approval was required from all of the Proponents, including Donald Trump, Robert Trump, and Maryanne Trump Barry, "as well as officers and directors of Apartment Management Associates, Inc. and Trump Management, Inc." *Id.*

The mirror clause provides that Proponents—Fred Trump Sr.'s children Maryanne Trump Barry, Donald Trump, and Robert Trump, as well as officers and directors of Apartment Management Associates, Inc. and Trump Management, Inc., and their counsel Stephen Schwartz and Louis Laurino, also signatories to the Settlement Agreement—similarly agreed not to "disclose any of the terms of this Agreement and Stipulation" and not to "publish . . . any . . . description or depiction" of any kind whatsoever, whether fictionalized or not, concerning their litigation or relationship with the 'Proponents/Defendants,' 'Objectants/Plaintiffs' or their litigation" involving the Estates without the consent of Ms. Trump and the other Objectants. Ex. 1 ¶ 3.

III. Public Information About The Trump Family And Its Finances.

The Trump family has consistently been in the public eye for decades. Plaintiff has been the subject of media coverage for many years, including during his high-profile divorce, which invited attending reporting on his personal life and finances. *See* Ex. 16 (Dareh Gregorian, *Big Bucks at Stake In Another Trump Divorce*, N.Y. POST (Dec. 2, 2008)). For that matter, journalists even engaged in significant coverage of the very disputes resolved in the Settlement Agreement itself. *See* Exs. 14-15.

Other authors and journalists have followed suit over decades. Exs. 15, 19-20. Dozens of books have been written about the Trumps, including a family history published the year before the Settlement Agreement was executed, *see*, *e.g.*, Champion Aff. ¶ 25; Gwenda Blair, THE TRUMPS: THREE GENERATIONS THAT BUILT AN EMPIRE (2000), and exposés from (ex-) family members, *see*, *e.g.*, Ivana Trump, RAISING TRUMP (2017). Multiple books discuss the Trump family's finances, including one by investigative journalist Timothy L. O'Brien.[3] *See* Champion Aff. ¶ 27; Timothy L. O'Brien, TRUMPNATION: THE ART OF BEING THE DONALD (2005); *see also* David C. Johnston, THE MAKING OF DONALD TRUMP (2016) (detailing Trump's family history, personal biography, and business career). Indeed, a book published just earlier this year details Donald Trump's lengthy financial relationships with Deutsche Bank. *See* David Enrich, DARK TOWERS: DEUTSCHE BANK, DONALD TRUMP, AND AN EPIC TRAIL OF DESTRUCTION (2020).

President Trump himself has contributed to his and his family's notoriety in a variety of ways, including as the author of nearly twenty books on a variety of topics, including his family, his wealth, his businesses, and his own life. *See*, *e.g.,* Donald J. Trump & Tony Schwartz, TRUMP: THE ART OF THE DEAL (1987); Donald J. Trump & Kate Bohner, TRUMP: THE ART OF THE COMEBACK (1997); Donald J. Trump & Meredith McIver, TRUMP NEVER GIVE UP: HOW I TURNED MY BIGGEST CHALLENGES INTO SUCCESS (2008); *see also* Champion Aff. ¶¶ 25-27 (listing books published about members of the Trump family).

Among the most notable of all the media coverage of the Trump family is a bombshell investigative piece published in the *New York Times* on October 2, 2018, describing schemes

[3] Donald Trump later filed an unsuccessful defamation lawsuit against O'Brien based on O'Brien's statements that Trump was not in fact, as claimed, a billionaire. *See generally Trump v. O'Brien*, 29 A.3d 1090 (N.J. App. Div. 2011). The trial judge granted O'Brien's summary judgment motion and dismissed the case in 2009, and that dismissal was upheld on appeal. *Id.* at 1092, 1094–95, 1103.

Donald Trump and his father employed to transfer nearly a half a billion dollars to Donald Trump, Robert Trump, and Maryanne Trump Barry, while systematically evading their tax obligations. *See* Ex. 18.

The *New York Times* report demonstrates how the Trumps manipulated real estate valuations and siphoned millions of dollars from Fred Trump Sr.'s real estate interests to Trump-owned entities, in part by paying significant mark-ups on purchases that were in reality simply transfers from one Trump entity to another. Ex. 18 at 6, 22–23. According to the *Times* article, those millions of dollars, effectively untaxed gifts, flowed to the owners of those entities—Donald, Robert, Maryanne, and a Trump family cousin. Ex. 18 at 6. Fred Sr. then increased property valuations reflected in the inflated purchase prices to justify rent increases for thousands of tenants in his buildings in Queens and Brooklyn. Ex. 18 at 6.

The *Times* reported that this scheme allowed Fred Sr. and his children to conceal assets from family members and investors. Ex. 18 at 26–33. According to the *Times*' analysis of Fred Trump Sr.'s tax returns, the Trumps claimed in 1995 that their real estate holdings were worth only $41.4 million. Ex. 18 at 27. Yet, less than a decade later, in 2004, banks valued the same real estate *at nearly $900 million*. *Id.*

The *Times* investigative report revealed that the valuations that formed the basis of the Settlement Agreement were demonstrably fraudulent—and that Ms. Trump and her brother had been cheated out of millions of dollars. For example, assets whose disposition was governed by the settlement included [redacted]. The *Times* found that the Trump family had engineered "friendly" appraisals for Beach Haven and Shore Haven Apartments—two of the largest "crown jewels" of Fred Trump's empire—that were significantly and deliberately undervalued to avoid a variety of tax payments.

Ex. 1 at 29. Those undervalued appraisals, part of the Trump tax avoidance scheme, were relied upon in the Settlement Agreement—which Ms. Trump has testified she would not have signed if she had known about the fraudulent appraisals. *See* M. Trump Aff. 12; Champion Aff. ¶¶ 26-27.

IV. Mary Trump's Book And This Action.

Since the resolution of the dispute over Fred Trump Sr.'s estate, Ms. Trump's family members, already prominent New Yorkers, have become some of the most prominent and closely scrutinized individuals in the world. With the election of President Trump, Ms. Trump's experience as both a close family member of a sitting president and a trained clinical psychologist means that she possesses unmatched insights and information going to the heart of current affairs, which are otherwise unavailable to the public. Ms. Trump wrote a book to share these insights called *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man*. She executed an agreement (acting through an LLC) with the prominent publishing house Simon & Schuster, Inc., to publish the Book. *See* Affidavit of Jonathan Karp, dated June 26, 2020 ("Karp Aff.") ¶ 7. The Book is scheduled for release in the U.S. later this month. Under Simon & Schuster's contract, Ms. Trump has no contractual right or ability to stop the publisher from publishing the Book. *See* Affidavit of Jonathan Karp ¶ 9 ("Karp Aff.") ("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."). And as Simon & Schuster explains in its brief, approximately 75,000 copies of the Book have already been prepared for publication, and the publisher has started shipping those books to booksellers.

On June 14, 2020, news about the Book's forthcoming publication leaked to the press. *See* Ex. 13, (Lachlan Cartwright, *Revealed: The Family Member Who Turned On Trump*, DAILY BEAST (June 14, 2020)). The unique importance of Ms. Trump's unrivaled perspective on the current President in an election year was unmistakable: Although the Book is still almost a month away

from release, the news set off an avalanche of media coverage and the Book is currently at the top of Amazon's bestseller list. Ex. 22.

Slowly, the Trump family eventually began to react to news of the Book's publication as well. A week after the Book was first known to the public, on June 21, President Trump told a reporter that Ms. Trump was "not allowed to write a book." The President continued:

> [W]hen 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 . . . [A] very powerful one. . . . It covers everything. . . . I have a brother, Robert, very good guy, and he's—he's very angry about it. . . . But she signed a nondisclosure agreement and she's obviously not honoring it if she writes a book. It's too bad. I have a good relationship with [Mary Trump's] brother. I actually had him—he was in here. He was sitting right in the seat where you are last week, unrelated to that. I didn't even know—maybe two weeks ago. I didn't even know about a book coming out until just the other day.

Ex. 5 at 2–4 (Jonathan Swan, *Trump Says Niece "Not Allowed" to Write Book Because of Nondisclosure Agreement*, AXIOS (June 21, 2020)) (some alterations in original).

Foreshadowed by President Trump, the next day, President Trump's brother, Robert, filed a Petition and Motion for a Preliminary Injunction and Temporary Restraining Order before the Queens County Surrogate's Court, in the Fred Trump Sr. probate proceeding, which has been settled for almost 20 years, seeking to impose an unconstitutional prior restraint on the Book. The Surrogate's Court promptly dismissed the matter as beyond its jurisdiction because the proceedings of which it was a part are long over.[4] Robert then filed his Complaint in this Court on June 26, 2020.

The Complaint makes a number of extraordinary claims. Plaintiff alleges that "[c]onfidentiality was at the essence of the Settlement Agreement", Compl. ¶ 5—even though the

[4] Ex. 6 (Order on Petition and Motion for Preliminary Injunction and Temporary Restraining Order, *Will of Fred C. Trump*, No. 3949/1999 (Surr. Ct. Queens Cty. Jun. 25, 2020)).

Settlement Agreement resolved financial—not personal—disputes, and the recited purpose and scope of the confidentiality clause was to protect "the particular information involved in the 'global resolution' of [the parties'] differences. Indeed, the majority of the Agreement is devoted to spelling out financial terms and describing the disposition of various assets. But Plaintiff has redacted all of that material here, providing ample indication regarding what he actually considers confidential, while attempting to present the confidentiality clause in isolation. And although the Complaint admits that Plaintiff has not seen the contents of the Book, it nevertheless alleges that publication of its contents would violate the confidentiality provisions of the Settlement Agreement. Compl. ¶¶ 7, 28.

Plaintiff sought a preliminary injunction and a temporary restraining order ("TRO") by Order to Show Cause. The Court heard argument on June 29 in a chambers conference by Skype and granted the TRO against Ms. Trump and Simon & Schuster around noon on June 30. Ms. Trump and Simon & Schuster promptly appealed to the Second Department and argued the appeal that same afternoon. The following day, on July 1, 2020, the Second Department vacated the TRO as to Simon & Schuster and narrowed it as to Ms. Trump. Dkt. 55; *see also* Ex. 17 (Margaret Sullivan, *Now the World Can Read Mary Trump's Blistering Book About Her Uncle*, WASHINGTON POST, (July 2, 2020). Notably, the Second Department—which did not reach Ms. Trump's First Amendment arguments and did not have a full copy of the Settlement Agreement before it—stated that "the restraining order should be reassessed by the Supreme Court in view of the defendants' answering papers." Dkt. 55 at 8.

LEGAL STANDARD

"To establish the right to a preliminary injunction, the plaintiff must prove by clear and convincing evidence (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities in the plaintiff's favor." *19*

Patchen, LLC v. Rodriguez, 153 A.D.3d 1382, 1383 (2d Dep't 2017). "[P]reliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant." *Emanuel Mizrahi, DDS, P.C. v. Angela Andretta, DMD, P.C.*, 170 A.D.3d 1120, 1123 (2d Dep't 2019) (quoting *Saran v. Chelsea GCA Realty Partnership, L.P.*, 148 A.D.3d 1197, 1199 (2d Dep't 2017)). "If key facts are in dispute, the relief will be denied." *Scotto v. Mei*, 219 A.D.2d 181, 182 (1st Dep't 1996) (quoting *Faberge Int'l v. Di Pino*, 109 A.D.2d 235, 240 (1st Dep't 1985)).

Notably, "'it is clear that the parties to a contract cannot, by including certain language in that contract, create a right to injunctive relief where it would otherwise be inappropriate.'" *Art Capital Group, LLC v. Getty Images, Inc.*, 901 N.Y.S.2d 904, 2009 WL 2913531, at *10 (Sup. Ct. N.Y. Cty.) (quoting *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1146, 1154 (S.D.N.Y. 1990)). The Court "must perform a standard inquiry" into the preliminary injunction factors and only grant an injunction if the plaintiff meets his burden of satisfying those factors. *Ardis Health, LLC v. Nankivell*, 2011 WL 4965172, at *3 (S.D.N.Y. Oct. 19, 2011).

As for injunctions sought against speech, the standard is even higher: "It is established in [New York] that the government may not impose a prior restraint on freedom of expression . . . 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 (1986) (emphasis added); *accord Porco v. Lifetime Entm't Servs., LLC*, 116 A.D.3d 1264, 1266 (3d Dep't 2014) (New York courts do not grant "the extraordinary remedy of prior restraint" unless the speech in question would create "imminent and irreversible injury to the public").

ARGUMENT

Plaintiff asks this Court to take the unprecedented and extraordinary step of halting the printing presses on a book criticizing the President in an election year. It is difficult to imagine a clearer violation of the First Amendment's prohibition against prior restraints. Plaintiff's reliance on a single confidentiality provision ripped out of context from a massive settlement agreement—one that resolved six different disputes between individuals who at various times were acting in 12 different capacities—does not come close to justifying that outcome. Without providing *any* evidence of harm to himself or harm to the public, Plaintiff has failed completely to meet his heavy burden of justifying judicial interference with the timely publication of the Book. The Court should deny Plaintiff's request for preliminary injunctive relief.

I. Plaintiff Has Not Established A Likelihood Of Success On The Merits.

Plaintiff cannot show a likelihood of success on the merits for multiple reasons, any of which is independently sufficient to reject Plaintiff's request.

First, the First Amendment to the U.S. Constitution and Article I, Section 8 of the New York Constitution clearly foreclose injunctive relief because granting such relief would amount to an impermissible prior restraint against core political speech in an election year. Plaintiff has not even alleged, much less demonstrated, that the publication of the Book would threaten injury to the public, as New York law requires to justify *any* prior restraint. The Court therefore would lack power to enter a preliminary injunction preventing publication of the Book even if the Court believed that Plaintiff were otherwise entitled to relief.

Second, the Settlement Agreement does not prohibit Ms. Trump from publishing the Book, is unenforceable, and is invalid. Properly read in the context of the full Agreement—which the Court can review for the first time, now that Ms. Trump has provided it—the Settlement Agreement's confidentiality provision does not cover the Book at all. To the extent it could purport

to cover the Book, it is too vague to establish a waiver of First Amendment freedoms. In any event, whatever force the confidentiality provisions once had, they have now expired, given the passage of two decades since the Agreement was executed, during which time Donald Trump has become the President of the United States. Finally, the evidence will show that the Settlement Agreement was procured by fraud and cannot be enforced.

A. A Prior Restraint Is Not A Constitutionally Permissible Method Of Enforcing The Settlement Agreement's Confidentiality Provision.

Plaintiff asks this Court to enjoin the printing of a book. Centuries of precedent prohibit the Court from granting this request for an unconstitutional prior restraint on political speech.

It is well-settled that judicial orders "forbid[ding] speech activities" for any length of time—whether "[t]emporary restraining orders" or "permanent injunctions"—are "classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993); *see also*, *e.g.*, *Near*, 283 U.S. at 713 ("suppression" by way of "injunction" is a "restraint upon publication"); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224-25 (6th Cir. 1996) (judicial order "prohibiting publication" is a "classic case of a prior restraint"). This rule applies even in disputes between private parties over contractual nondisclosure agreements. The "'prior restraint'" in such cases is *not* the underlying agreement itself—which may yet be enforceable by remedies such as damages—but the coercive action of the court in enforcing the agreement by "approv[ing] . . . *an injunction*" that restricts speech.. *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253, 257 (2d Cir. 2018) (per curiam) (emphasis added). Courts in these cases exercise "state power" when they enforce state law, and they accordingly lack constitutional authority to order injunctive relief when doing so would "impose invalid restrictions on" the defendant's "freedoms of speech and press." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *see Phil. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (First Amendment applies in "a suit by a private party"); *cf.*

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 n.17 (1996) (judicial application of state law in private lawsuits is subject to restrictions of Constitution); *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *9 (N.Y. Sup. Ct. Apr. 19, 1996) (constitutional right to publish on "an issue of public importance" will "negate" and "preclude" judicial relief that would otherwise be available under state law).

A prior restraint is "the most serious and the least tolerable infringement on First Amendment rights" and "one of the most extraordinary remedies known to our jurisprudence." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559, 562 (1976); *accord Porco*, 116 A.D.3d at 1265. The elimination of prior restraints was in fact the "chief purpose" of the First Amendment. *Near*, 283 U.S. at 713; *accord Lovell v. City of Griffin*, 303 U.S. 444, 451–52 (1938). And if anything, the "risk of infringing on speech protected under the First Amendment *increases*" when "a prior restraint takes the form of a court-issued injunction," because injunctions—unlike statutes and other laws of general applicability—can target specific speakers and speech. *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union*, 239 F.3d 172, 176 (2d Cir. 2001) (citing *Madsen v. Women's Health Ctr.,* 512 U.S. 753, 764 (1994)) (emphasis added).

There is thus a "'heavy presumption' against [the] constitutional validity" of prior restraints. *Neb. Press Ass'n*, 427 U.S. at 558 (quoting *Org. for a Better Austin v. Keef*, 402 U.S. 415, 419 (1971)); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (same). Prior restraints may be justified, if at all, only in the most exceptional circumstances—such as to prevent the disclosure of the troop locations in wartime, *Near*, 283 U.S. at 716, or to "suppres[s] information that would set in motion a nuclear holocaust," *N.Y. Times*, 403 U.S. at 726 (Brennan, J., concurring). It bears emphasizing that, in more than "two centuries of existence, the [U.S.] Supreme Court has *never* upheld a prior restraint on pure speech" pertaining to matters of public

concern. *In re Providence Journal Co*., 820 F.2d 1342, 1348 (1st Cir. 1986) (Wisdom, J.) (emphasis added); *accord Procter & Gamble*, 78 F.3d at 227. Even the release of the Pentagon Papers—top-secret information that "would be harmful to the Nation and might even be prosecuted after publication as a violation of various espionage statutes," *Neb. Press Ass'n*, 427 U.S. at 591–92 (discussing *N.Y. Times*, 403 U.S. 713)—did not justify a prior restraint.

The standard for a prior restraint is even more stringent in New York. This State is a "cultural center for the Nation" and "has long provided a hospitable climate for the free exchange of ideas" through "the free speech guarantee of the New York State Constitution," which is "often broader than the minimum required by the Federal Constitution." *Immuno AG. V. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) (citing N.Y. Const. art. I, § 8). Thus, New York has made clear that a prior restraint must be justified by immediate and irreparable "*public* injury." *Cloud Books, Inc.*, 68 N.Y.2d at 558 (emphasis added). It is not enough for a plaintiff seeking a prior restraint to show that he *personally* will be harmed; he must show that the *public at large* will be harmed by the speech. *See E. Meadow Ass'n v. Bd. of Educ.*, 18 N.Y.2d 129, 134 (1966) (prior restraint requires "immediate and irreparable injury to the public weal"). Only "imminent and irreversible injury *to the public*" can "warrant the extraordinary remedy of prior restraint." *Porco*, 116 A.D.3d at 1266 (emphasis added).

Here, Plaintiff has not provided even a shred of evidence or argument suggesting that publication of the Book will cause "imminent and irreversible injury *to the public*." *Porco*, 116 A.D.3d at 1266 (emphasis added). At most, Plaintiff might argue that publishing the Book could affect him *personally*. But where "alleged harm or injury flowing from" speech is "limited to [the] plaintiff alone" and would not harm the public, it is "constitutionally impermissible . . . to forbid

that speech prior to its actual expression." *Porco*, 116 A.D.3d at 1266. That is the case here. And it is not enough, under New York law, to justify a prior restraint against speech.

Not only has Plaintiff failed to show that publication of the book would produce *public harm*, but prompt publication of the Book is manifestly in the *public interest* because it will allow Ms. Trump to convey her unique perspective in a timely manner. Indeed, enjoining Ms. Trump's book would produce exactly the type of private and public harms that prior-restraint doctrine exists to prevent. With respect to Ms. Trump's own First Amendment rights, an injunction would completely deprive her of the ability to speak: "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, a prior restraint 'freezes' it." *Neb. Press Ass'n*, 427 U.S. at 559. Separately, there is a "paramount public interest in a free flow of information" that, like the speech at issue here, "concern[s] public officials [and] their servants," including "anything which might touch on an official's fitness for office." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). It has long been recognized in this country that "when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office," because "it is the interest of the people to know" the truth about the character of their leaders. *White v. Nicholls*, 3 How. 266, 290 (1845). And "few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation." *Garrison*, 379 U.S. at 77. Ms. Trump seeks to publish information based on her unique position as a close family member of a sitting President seeking reelection—information that will speak to the President's character and fitness for office. It is difficult to imagine a more pressing subject for the national discourse than this core political speech.

Plaintiff has made no attempt to argue that he satisfies the stringent requirements for a prior restraint. Instead, Plaintiff contends that a preliminary injunction prohibiting publication of a book does not even *implicate* the First Amendment when the author has signed a confidentiality agreement. This position is demonstrably incorrect. It is one thing to say in the abstract, as the Second Department did, that Ms. Trump has the general right to "contract away her First Amendment rights." Dkt. 55 at 6. But it is quite another to say that a court can *enforce* that contract with the type of relief requested here—an *injunction* prohibiting speech on pressing matters of public concern. None of the First Amendment cases cited by the Second Department granted an injunction restraining that kind of speech, and in fact *Ronnie Van Zant* affirmatively *rejected* a "'prior restraint.'"[5] 906 F.3d at 257. For its part, the Second Department explicitly left open the question whether "restrain[ing] [Ms. Trump] from publishing a work concerning the character and fitness of the President in an election year would unduly infringe on her First Amendment rights, notwithstanding her entry into the confidentiality provision of the settlement

[5] The cases relied on by the Second Department stand for the unremarkable proposition that parties can agree in a contract to refrain from speaking. None of these cases stand for the proposition that injunctive relief is an appropriate remedy where, as here, the suppressed speech involves public issues of significant public interest. And none support the conclusion that the confidentiality provision in the Settlement Agreement is in fact enforceable against Ms. Trump. *See Trump v. Trump*, 179 A.D.2d 201 (1st Dep't 1992) (holding that it did not violate the Constitution to include a confidentiality agreement in a divorce decree); *Anonymous v. Anonymous*, 233 A.D.2d 162 (1st Dep't 1996) (holding that a confidentiality agreement was not per se "unenforceable as against public policy"); *Speken v. Columbia Presbyterian Med. Ctr.*, 304 A.D.2d 489 (1st Dep't 2003) (holding that the presence of a confidentiality provision in a settlement agreement did not "offend the public policy against prior restraint of speech"); *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc*, 906 F.3d 253 (2d Cir. 2018) (*vacating injunction* while noting it was possible for parties "to limit by contract publication rights"); *Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 204 (3d Cir. 2012) (holding that a court was not required to vacate a consent decree that contained a provision limiting First Amendment rights); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975) (explaining government employee can contractually waive right to disclose classified information).

agreement." Dkt. 55 at 7. And the court emphasized that "the restraining order should be reassessed . . . in view of the defendants' answering papers." *Id.* at 8. For the reasons explained below, the First Amendment requires denying Plaintiff's request for an injunction interfering with Ms. Trump's right to speak.

A confidentiality provision in a contract does not defeat the First Amendment's prohibitions against prior restraints. The principle that constitutional constraints apply to judicial resolution of private disputes, *see BMW*, 517 U.S. at 572 n.17; *Hepps*, 475 U.S. at 777; *Sullivan*, 376 U.S. at 265, applies with full force to judicial enforcement of private agreements under state contract law. *See Shelley v. Kraemer*, 334 U.S. 1, 19-20 (1948); *Ronnie Van Zant*, 906 F.3d at 257. Thus, "[e]ven where individuals have entered into express agreements not to disclose certain information, . . . the courts have held that judicial orders *enforcing* such agreements" via injunction "are prior restraints implicating First Amendment rights." *In re Halkin*, 598 F.2d 176, 189-90 (D.C. Cir. 1979) (emphasis added), *abrogated on other grounds by Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). Irrespective of whether an agreement or order is "vali[d]" when "originally entered," "its subsequent enforcement by injunction against a party disputing its scope" may amount to "a prior restraint which cannot be upheld without supporting findings" that satisfy the stringent standards set forth above. *Nat'l Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981). Nor does an agreement not to publicly disclose information "establish a waiver of First Amendment rights"—as explained below, such a waiver can be "inferred only in 'clear and compelling' circumstances," as when a party has explicitly "agreed to forego any First Amendment claim." *Halkin*, 598 F.2d at 189 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967); *see infra*, at 38–43.

Courts have thus routinely declined to issue injunctive relief to enforce contractual provisions prohibiting speech, reasoning that such enforcement would be an unconstitutional prior restraint. In *Ronnie Van Zant*, for example, the parties entered into a settlement agreement that restricted how they could use the band Lynyrd Skynyrd's name and history; the district court entered the settlement agreement as a court order. *Id*. at 255–56. When one of the parties subsequently sought to create a movie about the band's history, the remaining parties filed suit and obtained from the court an injunction prohibiting distribution of the film. *Id*. at 256. Noting that the particular injunction at issue was not a "classic" prior restraint in the sense that it focused on "distribution of the Film and other related activities" rather than "making or releas[ing]" the film, the Second Circuit nevertheless correctly explained that the injunction *did* implicate "'prior restraint'" principles. *Id.* at 256-57. "[E]ven though the injunction here has allegedly been imposed *as a result of private contract* rather than government censorship," the court explained, it warranted scrutiny as a prior restraint because it "restrain[ed] the viewing of an expressive work prior to its public availability." *Id*. at 257 (emphasis added) (internal quotation marks omitted).

The application of prior-restraint doctrine to judicial enforcement of contracts has been settled law in the Second Circuit for more than half a century. In *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), the litigants settled a defamation case by agreeing that the defendant would not publish statements concerning the plaintiffs or their business activities, and the district court entered the settlement agreement as a court decree. *Id*. at 484. Yet the Second Circuit held that this order "enjoin[ing] publication of information" amounted to an unconstitutional "prior restraint . . . against the publication of facts which the community has a right to know and which [the defendant] has the right to publish." *Id*. at 485. The court explained that the district court was

"without power to make such an order," and that the mere fact that the parties may have agreed to it was "immaterial." *Id*.

Other courts agree that an injunction enforcing a contractual restraint on speech amounts to a prior restraint. In *Denise Rich Songs Inc. v. Hester*, for example, the plaintiff alleged that the defendant's statements to newspapers violated a non-disparagement provision and sought an injunction to enforce the terms of the agreement. 2003 WL 25668881 (N.Y. Sup. Ct. Sep. 22, 2003). The court denied an injunction, noting that "under the circumstances here, a preliminary injunction is not properly employed to effect a prior restraint on speech." *Id.* Similarly, in *Brammer v. KB Home Lone Star, L.P.*, a Texas appellate court deleted provisions of an injunction that purported to enforce a contractual nondisparagement provision by "enjoin[ing] the content of the [defendants'] speech." 114 S.W.3d 101, 106 (Tex. App. 2003). The court held that the injunction "constitutes an unconstitutional prior restraint on the [defendants'] freedom of speech," even assuming that the plaintiff had "a probable right to recovery of damages following a trial on the merits." *Id.* The court noted that the injunction enforcing the non-disparagement provision—like any other prior restraint—came to the court "with a 'heavy presumption' against its constitutional validity." *Id.* at 107 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). Other courts have similarly declined to issue injunctions enforcing contractual agreements not to speak based on prior-restraint principles. *See Caren EE. v. Alan EE.*, 124 A.D.3d 1102, 1107 (3d Dep't 2015); *Massartic v. Pinter*, 2014 WL 11443900, at *2 (C.D. Cal. Mar. 26, 2014); *Globe Int'l, Inc. v. National Enquirer, Inc.*, 1999 WL 727232, at *1 (C.D. Cal. Jan. 25, 1999). Indeed, First Amendment interests are so strong in this area that courts have refused to enforce contractual limitations on speech even when injunctive relief is *not* at issue. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 224 (4th Cir. 2019).

In light of this case law, it is simply untenable for Plaintiff to claim that a preliminary injunction to ban a book about the President as he runs for reelection does not implicate the First Amendment's prohibition on prior restraints. Prior-restraint doctrine forms a key pillar of First Amendment protection. Exceptions to the rule that prior restraints are forbidden exist only at the edges of protected speech, in the peripheral areas traditionally accorded lesser constitutional status. For example, in the narrow category of true "obscenity"—*i.e.*, predominantly "prurient" sexual material that offends community standards and "is utterly without redeeming social value," *Miller v. California*, 413 U.S. 15, 21 (1973)—a "prescreening arrangement can pass constitutional muster" (though only "if it includes adequate procedural safeguards"). *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 571 n.13 (1980)). Commercial speech, too, "may not" be subject to "traditional prior restraint doctrine," *id.*—or at least "not fully," *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 668 n.13 (1985), in part because false advertising holds less constitutional "value," *id.* at 646, and in part because its intrinsically "durable" nature reduces the "likelihood of its being chilled," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). Needless to say, the core political speech at issue in this case is worlds away from qualifying for these narrow, partial exceptions to prior restraint doctrine, all of which address matters "of purely private concern" under the First Amendment. *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001). Rather, Plaintiff's effort at book-banning strikes at the very heart of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 534 (quoting *Sullivan*, 376 U.S. at 270).

Neither of the cases cited by Plaintiff remotely supports his effort to avoid prior-restraint doctrine. In both cases, the agreements at issue simply prevented former employees from sharing

proprietary, confidential information from their prior employer with the employer's competitor. *See N. Telecom v. Volt Info. Scis.*, 195 A.D.2d 1088, 1088 (4th Dep't 1993); *RenewData Corp. v. Strickler*, 2006 WL 504998, at *1 (Tex. App. Mar. 3, 2006). It is unremarkable that courts may sometimes enforce narrow, limited agreements not to engage in commercial speech by disclosing proprietary commercial information. That kind of information has long been recognized as an exception to the rule, "not fully" subject to "traditional prior restraint principles," *Zauderer*, 471 U.S. at 668 n.13, and it has nothing in common with the core political speech that Plaintiff attacks. For similar reasons, any attempt by Plaintiff to draw support from unrelated cases addressing disclosures of purely private—and even legally privileged—information would fail as well. *E.g.*, *Doe v. Roe,* 42 A.D.2d 559, 560 (1st Dep't 1973) (enjoining a psychoanalyst from publishing "confidential communications" with a former patient, including a "near-verbatim record of her psychotherapeutic treatment," that "undisputed[ly] . . . relate[d] to the case history of plaintiff and her family"). Those cases are entirely irrelevant to Ms. Trump's core political speech on public issues of vital national importance. The Supreme Court has expressly distinguished the First Amendment analysis applicable to "disclosures of trade secrets or domestic gossip or other information of purely private concern" from political expression on public issues. *Bartnicki*, 532 U.S. at 533. First Amendment protections are at their broadest where the speech concerns "a public official or figure" and "is of public concern." *Hepps*, 475 U.S. at 775. Thus, an order "incidentally enjoining speech in order to protect a legitimate property right," such as a trade secret or other proprietary information, on a "content-neutral basis," *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 881 (2003), cannot be compared to Plaintiff's proposed ban on Ms. Trump

"printing . . . any book" discussing the qualifications of a sitting President currently seeking reelection, Order to Show Cause 1.[6]

Nor can Plaintiff find solace in the fact that a preliminary injunction would be temporary. The U.S. Supreme Court has made clear that the burden on the person seeking a prior restraint "is not reduced by the temporary nature of a restraint." *Neb. Press Ass'n*, 427 U.S. at 559. To the contrary, "'[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury'" to the speaker. *N.Y. Progress & Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013). "Where freedom of the press is concerned, … the status quo is to 'publish news promptly that editors decide to publish,'" so temporary injunctive relief actually "*disturbs* the status quo" rather than preserves it. *Procter & Gamble*, 78 F.3d at 225-227 (discussing the differences between "temporary injunctive relief in the First Amendment realm" and "everyday resolution of civil disputes"). "A prior restraint is not constitutionally inoffensive merely because it is temporary." *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005). Here, as in *In re Providence Journal*, granting even temporary injunctive relief would be a "transparently invalid prior restraint on pure speech." 820 F.2d at 1352.

In sum, under the First Amendment, Plaintiff cannot use a breach-of-contract claim to obtain a court order banning a book of national importance—especially where Plaintiff has not argued, and could not argue, that the Book would do any harm to the public. "If [Ms. Trump] has

[6] Even in the zone of lesser constitutional protection, the First Amendment does not lose force altogether, as some courts have still declined to enforce prior restraints on constitutional grounds where the plaintiff has failed to justify injunctive relief. *E.g.*, *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317-18 (1994) (Blackmun, J., in chambers) (staying lower court's injunction of claimed trade-secret violation, among other claims, as likely unconstitutional prior restraint); *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 746 (E.D. Mich. 1999) (denying motion for preliminary injunction because "an injunction restraining Defendant's publication of Ford's trade secrets would constitute an invalid prior restraint of free speech in violation of the First Amendment").

breached [her] state law obligations, the First Amendment requires that [Plaintiff] remedy [his] harms through a damages proceeding rather than through suppression of protected speech." *CBS, Inc.*, 510 U.S. at 1318. The Court should deny Plaintiff's request for a preliminary injunction.

B. The Settlement Agreement Does Not Mean What Plaintiff Says And Cannot Be Read to Ban The Book.

Plaintiff's interpretation of the Settlement Agreement is wrong. This is obvious after review of the entire Settlement Agreement and all its terms—perhaps why Plaintiff sought a preliminary injunction based on a contract while providing the Court only a heavily redacted version of the contract to review. Now that the Court can, for the first time, see the confidentiality provision in its proper context, the truth emerges: A plain reading of the Settlement Agreement shows that the confidentiality provision applies only to the details disclosed in the Settlement Agreement regarding the disputes and assets at issue, and the parties' relationships to those disputes and assets. The confidentiality clause of the Settlement Agreement is far too ambiguous to constitute the voluntary, knowing, and intelligent waiver of First Amendment rights required by law. And if the provision meant what Plaintiff says it means, it would be unenforceable as a matter of public policy. The fact that Robert Trump and his siblings have continued to comment publicly on their various family relationships and the estate litigation to the news media on various occasions since the Agreement was executed. M. Trump Aff. ¶ 11. This post-execution performance demonstrates that the Agreement does not mean what Plaintiff says it does. Moreover, the sweeping perpetual obligation Plaintiff attempts to place on Ms. Trump is unreasonable in scope.

1. The Settlement Agreement, Properly Read, Does Not Prohibit Ms. Trump From Publishing The Book.

The plain terms of the Settlement Agreement itself foreclose Plaintiff's broad reading. "The fundamental, neutral precept of contract interpretation is that agreements are construed in

accord with the parties' intent." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). Here, the parties explained the purpose of the confidentiality provisions in the contract itself, stating that the parties "have unanimously agreed that the public has no interest in the *particular information* involved in the 'global' resolution of their differences." Ex. 1 ¶ 1 (emphasis added). They continued, "Confidentiality is, in certain circumstances, necessary in order to protect the litigants and encourage a fair resolution of the matters in controversy." *Id*. This stated "purpose" of the confidentiality provision—to encourage a fair resolution of the dispute—does not support the extremely broad reading Plaintiff proffers of the confidentiality provision as precluding all public comment about the interpersonal, family relationships and interactions among the individual parties to the Settlement Agreement, even including events far post-dating the Settlement Agreement.

The language on which Plaintiff relies does not support this interpretation either when viewed in context—the very context that Plaintiff omitted when he chose to file only a heavily redacted version of the Agreement in support of this action. A court should "examine the entire contract," *Korosh v. Korosh*, 99 A.D.3d 909, 911 (2d Dep't 2012), and "particular terms and expressions are to be considered in their context and in the light of the intention of the parties as manifested by the agreement as a whole," *Fortis Fin. Servs. v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 383 (1st Dep't 2002) (citation and internal alteration omitted)). New York courts will not interpret an agreement in a manner that "produce[s] a result that is absurd, commercially unreasonable, or contrary to the reasonable expectation of the parties." *Matter of Lipper Holdings, LLC v. Trident Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dep't 2003) (citations omitted). The confidentiality provision cited by Plaintiff states:

> Without obtaining the consent of Donald J. Trump, Robert S. Trump, and Maryanne Trump Barry, individually and as Co-Executors of the Estate of Fred C. Trump,

> deceased, and individually and as Co-Executors of the Estate of Mary Anne Trump, deceased, as well as officers and directors of APARTMENT MANAGEMENT ASSOCIATES, INC. and TRUMP MANAGEMENT, INC. ("Proponents/ Defendants") in advance, Fred C. Trump, III and Mary L. Trump, Lisa Trump and Linda C. Trump ("Objectant/Plaintiffs") as well as Farrell Fritz, P.C. (their counsel) shall not disclose any of the terms of this Agreement and Stipulation, and in addition shall not directly or indirectly publish or cause to be published, any diary, memoir, letter, story, photograph, interview, article, essay, account, or description or depiction of any kind whatsoever, whether fictionalized or not, concerning their litigation or relationship with the "Proponents/Defendants" or their litigation involving the Estate of Fred C. Trump and the Estate of Mary Anne Trump, or assist or provide information to others in connection therewith.

Ex. 1 ¶ 2. The text of the agreement's provisions, when read "in their context and in the light of the intention of the parties as manifested by the agreement as a *whole*," *id*. (emphasis added), confirms that the purpose and effect of the confidentiality provision is limited to the details of the Settlement set forth in the Agreement itself regarding the financial details of settlement and relationship between the parties and the various assets and cases settled.

First, the provision by its terms restrains Ms. Trump, her brother, his wife, their mother, and their attorney, from "disclos[ing] any of the terms of this Agreement" or to publish any "description of any kind whatsoever . . . concerning their litigation or relationship with the 'Proponents/Defendants'" as a group. Ex. 1 ¶ 2. There is no language, such as "each of" or "individually" indicating that this provision applies to any comment any individual on one side of the provision may make regarding any individual on the other side of the provision. And indeed, the group of "Proponents/Defendants" includes officers and directors of corporate entities and individuals acting in their capacity as Executors of the estates of Fred and Mary Anne Trump, and the group of "Objectant/Plaintiffs" includes a law firm, indicating that use of the word "relationship" here has nothing to do with "familial relationship." *Id.* ¶ 2. The "relationship" between the two sides of this dispute—including corporate officers and directors and lawyers serving as escrowees, trustees, and in other relevant roles—exists only in connection with the

business and monetary disputes settled. Had the parties intended to prevent any *individual* on one side of the case from speaking about his or her personal relationship or kinship with any other *individual* on the other side of the case, they could have so provided. *See NML Capital v. Argentina*, 17 N.Y.3d 250, 260–61 (2011) (noting that had contract drafter intended certain result "it could easily have clarified that intent in any number of ways"); *Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 200 (2001) (rejecting party's interpretation where "the record evidences that the parties may have intentionally omitted" certain language during drafting).[7] The parties could have said "personal" or "familial" relationships but they did not. Given that the provision addresses corporate entities and law firms, it defies common sense that "relationship" as used in the agreement refers to *personal* relationships. *See Reape v. N.Y. News, Inc.*, 122 A.D.2d 29, 30–31 (2d Dep't 1986) (rejecting contract interpretation that "would lead to an absurd result . . . in favor of one which would better accord with the reasonable expectations of the parties").

The mirror provision binding "Proponents/Defendants" only reinforces this interpretation because if it were interpreted as Plaintiff suggests, it would prevent the Trump siblings from making comments about themselves or each other without all of their consent. That provision reads:

> Without obtaining the written consent of Fred C. Trump, III and Mary Trump, Lisa Trump and Linda C. Trump ("Objectant/Plaintiffs") in advance, Donald J. Trump, Robert S. Trump and Mary Anne Trump Barry, individually and as Co-Executors of the Estate of Fred C. Trump, deceased, and individually and as Co-Executors of the Estate of Mary Anne Trump, deceased, and as officers and directors of APARTMENT MANAGEMENT ASSOCIATES, INC. and TRUMP MANAGEMENT, INC. ("Proponents/Defendants") as well as Stephen J.

[7] Notably, the contract itself shows the parties to it knew how to make a provision apply "individually," but did not do so when it came to imposing confidentiality. For example, the Objectant/Plaintiffs would need advance collective approval from Robert, Donald, and Maryanne, "*individually*" and "as Co-Executors" of their parents' estates. Ex. 1 ¶ 2. Yet in the very same sentence the parties chose not to state that the confidentiality prohibitions applied to information about each of them "individually."

> Schwartz, Esq. And Louis D. Laurina, Esq. (their counsel) shall not disclose any of the terms of this Agreement and Stipulation and in addition shall not disclose any of the terms of the Agreement and Stipulation [sic], and in addition shall not directly or indirectly publish or cause to be published, any diary, memoir, letter, story, photograph, interview, article, essay, account, or description or depiction of any kind whatsoever, whether fictionalized or not, concerning their litigation or relationship with the *"Proponents/Defendants", "Objectants/Plaintiffs"* or their litigation involving the Estate of Fred C. Trump and the Estate of Mary Anne Trump, or assist or provide information to others in connection therewith.

Ex. 1 at 7-8, ¶ 3 (emphasis added). Unlike the provision applicable to Ms. Trump, her brother, his wife, their mother, and their attorney, this provision purports to restrain Plaintiff and his siblings from commenting on their "relationships" not just with persons on the other side of the dispute but with "Proponents/Defendants," that is—themselves—without the consent of Ms. Trump and others.

Notably, the Settlement Agreement did *not* include a non-*disparagement* provision to protect the parties' personal reputations—although the parties could have included such a provision if they were concerned with personal reputations. *See Reiss*, 97 N.Y.2d at 200. Nor did the contract contain a provision providing that after-acquired information or future events would be covered by the confidentiality provision—though, again, they could have so provided. Plaintiff's attempt to broadly restrain any individual on either side of the dispute from making any public comment on his or her personal family relationships at any time in the future, including regarding events that had not yet occurred, "strain[s] the contract language beyond its reasonable and ordinary meaning." *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459 (1957). The confidentiality provisions instead are plainly read as covering the discrete details regarding the Settlement.

Plaintiff's contrary reading—that a confidentiality provision in a settlement agreement about multiple litigations and significant assets not involved in any litigation is, in actuality, a broad restraint preventing the parties from *ever* talking about their *personal* "relationships" in any

way without the consent of multiple individuals and corporate officers and directors—defies common sense and would quickly produce "absurd" results, indeed, the very result Plaintiff seeks here. *Lipper Holdings*, 1 A.D.3d at 171. Neither side could have "reasonabl[y] expect[ed]" that this is what they were agreeing to, and Ms. Trump has affirmed she never had any expectation that she could not tell her life story. *Id.*; M. Trump Aff. ¶ 13. Here, rather than preventing Ms. Trump from "publicly discuss[ing] [her] relationship with" Robert Trump, Donald Trump, and Maryanne Trump Barry, as Plaintiff argues, Mot. 2, the confidentiality provision relates to the details of the Settlement, including the financial terms and the relationships between the parties, the disputes and the assets at issue, as set forth in the Settlement Agreement itself.

That conclusion is also made readily apparent by conduct of Plaintiff and his siblings. The three of them have spoken about their relationships with each other, with Ms. Trump and her brother, as well as about the estate litigation, on multiple occasions. *See* Ex. 7 at 9–10 (Robert Kolker, *New York's Power Siblings*, N.Y. MAG. (Nov. 18, 2002)) (President Trump and Maryanne Trump Barry discussing their relationship growing up, Maryanne's cooking, and President Trump's birthday); Ex. 9 at 2 (Jason Horowitz, *Familiar Talk on Women, from an Unfamiliar Trump*, N.Y. TIMES (Aug. 18, 2015)) (President Trump describing a conversation with his sister and stating "Maybe they mixed us at birth. Maybe one of us got mixed up a little bit. Who knows."); Ex. 10 at 2 (Richard Johnson, *Donald Trump's Brother Robert Emerges*, PAGE SIX (Jan. 17, 2016)) (Plaintiff showing support for his brother's presidential campaign by stating that "If he were to need me in any way, I'd be there. Anything I could do to help."). Indeed, just weeks ago, President Trump commented on his "relationship" with Fred Trump III, and among the "Objectants" in the Settlement Agreement, stating that "I have a good relationship with [Mary Trump's] brother. I actually had him—he was in here. He was sitting right in the seat where you

are last week, unrelated to that. I didn't even know—maybe two weeks ago." Ex. 5 at 4. He also described Robert as a "very good guy," and described him as "very angry" about the Book. *Id.* In addition, President Trump commented on the terms of the Settlement Agreement, also a violation under Robert's overly broad interpretation, when he told a reporter, "when we settled, she has a total . . . signed a nondisclosure . . . [A] very powerful one. . . . It covers everything. . . . But she signed a nondisclosure agreement and she's obviously not honoring it if she writes a book." *Id*. at 2, 4. President Trump has made other statements over time disclosing details about the resolution of litigation over his father's estate. *See*, *e.g.*, Ex. 8 at 4 (Jason Horowitz, *For Donald Trump, Lessons From a Brother's Suffering*, N.Y. Times (Jan. 2. 2016)) (stating, "I was angry because they sued" and that the litigation had settled "very amicably"). Indeed, by filing publicly selective provisions of the Settlement Agreement despite its textual prohibition against making its terms public, Robert has also violated his own overbroad interpretation.

The parties' "course of performance under the contract"—including the President's public discussion of his family—is "the 'most persuasive evidence of the agreed intention of the parties,'" *Fed. Ins. Co. v. Ams. Ins. Co.*, 258 A.D.2d 39, 44 (1st Dep't 1999) (quoting *Webster's Red Seal Publ'ns. v. Gillberton World-Wide Publ'ns*, 67 A.D.2d 339, 341 (1st Dep't 1979)). In any event, if the Agreement were to be interpreted as Plaintiff alleges here, these repeated breaches would excuse Ms. Trump's continued performance. *See Viacom Outdoor, Inc. v. Wixon Jewelers, Inc.*, 82 A.D.3d 604, 604 (1st Dep't 2011) (when a plaintiff has committed "a material breach of the parties' contracts," the counterparty to those contracts is "excused from performing its contractual . . . obligations"); *see also Daniel Perla Assocs. v. Krasdale Foods, Inc.*, 12 A.D.3d 555, 557 (2d Dep't 2004) (plaintiff who does not comply with agreement cannot seek to enforce it); *see Unloading Corp. v. New York*, 132 A.D.2d 543, 543 (2d Dep't 1987) (affirming dismissal

of a breach-of-contract claim where the "claimant failed to establish that it had performed its obligations under the contract").[8]

2. The Settlement Agreement Is Too Vague To Waive Ms. Trump's First Amendment Rights Or To Authorize an Injunction.

Two important principles of contract construction also support Ms. Trump' interpretation of the Settlement Agreement and undo Plaintiff's. One is the First Amendment, as the provision is too ambiguous and vague to support the banning of a book—and if it did indeed ban Ms. Trump's book—on issues of the greatest public concern during an election year, it would be unenforceable. The second, discussed in Section I.B.3 below, is that where, as here, a contract is "indefinite as to its duration," "it is well settled in New York" that the court should find "another construction" rather than "constru[e] [it] to require perpetual performance." *Ketcham v. Hall Syndicate, Inc.*, 236 N.Y.S.2d 206, 212 (Sup. Ct. N.Y. Cty. 1962).

As Justice Scheinkman correctly noted, "Ms. Trump unquestionably possesses the same First Amendment expressive rights belonging to all Americans," and also possesses "the right to contract away her First Amendment rights." Dkt. 55 at 6. But the law requires such a waiver to be "undertaken voluntarily, knowingly, and intelligently." *Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 226 (S.D.N.Y. 2000). Whether a party has waived federal constitutional rights such as First Amendment is a "federal question controlled by federal law." *Id*. at 226. Especially where First Amendment rights are involved, unless a purported waiver provision

[8] At a minimum, these repeated breaches preclude injunctive relief. It is well-established that "he who comes into equity must come with clean hands." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). And "[t]he misconduct which will bar equitable relief need not be sufficient to constitute the basis of a legal action; any willful conduct which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean as long as the conduct pertains to the matter in litigation." *Pecorella v. Greater Buffalo Press, Inc.*, 107 A.D.2d 1064, 1065 (4th Dep't 1985) (internal citation omitted).

"*explicitly* waive[s] [the party's] free speech rights," a court will find that no waiver occurred. *Id.* at 227 (emphasis added); *see also*, *e.g.*, *Curtis Publ'g*, 388 U.S. at 145 (requiring "clear and compelling" evidence); *cf. FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (finding broadcaster's due process rights were violated and noting that "void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way"); *id.* at 253–54 ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."); *Karem v. Trump*, 960 F.3d 656, 664-65 (D.C. Cir. 2020).

Here, the Settlement Agreement does not come close to providing a "clear and compelling" or "explicit" waiver of Ms. Trump's First Amendment right to be free from prior restraints on speech of public concern. The Settlement Agreement never even mentions First Amendment rights or otherwise acknowledges the potential for the confidentiality provision to suppress them in perpetuity, let alone "explicitly waive[s]" them. *Legal Aid Society*, 114 F. Supp. 2d at 227. Absent that "clear and compelling" showing, the Court should not adopt an absurdly overbroad construction of the contract that would result in a waiver of Ms. Trump's free speech rights that the record does not support.

The confidentiality provision properly interpreted applies to the details set forth in the Settlement Agreement, and if it purports to go beyond that, it does not exhibit a voluntary, knowing, or intelligent waiver by any individual of the free speech rights at issue here. It is at best ambiguous whether it prohibits the counterparties from talking about each other as a group, or individually. It is ambiguous whether it refers to personal relationships, financial relationships,

formal contractual relations, or something else. Adding to this ambiguity, the mirror provision in Paragraph 3, which imposes similar obligations on Plaintiff and his siblings, also restrains them—in Plaintiff's misreading—from making public statements *about each other* without the consent of Ms. Trump, her brother, and others. Ex. 1 ¶ 3.

The consent provisions are also ambiguous. The Agreement purports to require consent from all three of Donald Trump, Robert Trump, and Maryanne Trump Barry, each in three separate capacities: as individuals; as co-Executors of the estates of Fred Trump Sr. and Mary Anne Trump Barry; and as the officers and directors of two Trump family entities, Apartment Management Associations, Inc. and Trump Management, Inc. (though the provision could also be read to require the assent of the other officers and directors of those companies too—it is unclear). Ex. 1 ¶ 2. Moreover, according to the New York Secretary of State database, Apartment Management Associates, Inc., no longer has an active business registration, suggesting that it no longer exists or is operative.[9] And the only officer listed on the corporate records for the entity from which Donald resigned—John Walter—is deceased.[10] Indeed, upon assuming the presidency, Donald publicly "resign[ed] from each and every office and position" he held in a variety of entities, including "Trump Management Inc." Ex. 11 (Donald J. Trump Signed Resignation Statement (dated Jan. 19, 2017)); see also Ex. 12 (Jill Disis et. al, Drew Griffin, Curt Devine, and Scott Bronstein, *Trump Organization documents say he has resigned from more than 400 businesses*,

[9] *See* Ex. 2 (N.Y. Dep't of State, Apartment Management Association, Inc. registration search results).

[10] *See* Ex. 3 at 1 (N.Y. Dep't of State, Trump Management Inc. registration, identifying John W. Walter as CEO of Trump Management); Ex. 4 (Gwenda Blair, *Did the Trump Family Historian Drop a Dime to the New York Times?*, POLITICO (October 7, 2018)).

CNN MONEY (Jan. 23, 2017)). It is thus unclear how Ms. Trump could have complied with this consent provision were Donald's approval required in all his representative capacities.

Waiver of fundamental rights cannot be "presumed" or "lightly inferred," *Doe v. Marsh*, 105 F.3d 106, 111 (2d Cir. 1997), and "courts must indulge *every* reasonable presumption *against*" a party waiving her First Amendment rights. *Id*. at 111 (emphasis added). The drastic, perpetual reading Plaintiff gives to this confidentiality clause does not overcome the presumption against waiver. Illustratively, courts have even refused to find a "knowin[g], voluntar[y], and intelligen[t] . . . waive[r] on the constitutional safeguards" protecting speech when a party to a settlement agreement promised "not to use any public medium such as the internet or any broadcast or print medium or source to complain [about] or disparage" the other party. *Brammer*, 114 S.W.3d at 109-11.

As a result of these convoluted, uncertain, and now impossible-to-comply-with terms, the confidentiality provision is insufficiently definite to support an injunction imposing a prior restraint on the Book's publication.

And even if this provision were found to be sufficiently explicit to constitute a waiver of Ms. Trump's constitutional rights, it would still be unenforceable. Courts have long held that contracts restricting constitutional rights—even in the case of a knowing and explicit voluntary waiver—are unenforceable where they violate important public policies. Thus, even if Ms. Trump had explicitly agreed to waive her First Amendment rights against prior restraints on every topic whatsoever regarding the Trump family for all time in a clear, comprehensible provision, the Court could not now enforce that waiver to ban the Book because the overwhelming First Amendment interest in speech on important "public issues" outweighs any "interest in enforcing" a contractual waiver of free speech rights, particularly one as old and vague as this. *Overbey v. Mayor of*

Baltimore, 930 F.3d 215, 223 (4th Cir. 2019). At a minimum, grave constitutional concerns counsel against a broad reading of the Settlement Agreement that would permit the Trump family to enjoin Ms. Trump from speaking.

In *Overbey*, the Fourth Circuit considered a victim of police violence who had settled her claims against the police and agreed to a non-disparagement provision in her settlement agreement. *Id.* at 220. Later, after she spoke publicly about her experience, the police department refused to pay the balance of her settlement payment, contending that she had breached the settlement's non-disparagement provision. *Id.* The Fourth Circuit held the non-disparagement provision unenforceable: Speech on "claims of police misconduct . . . assuredly f[e]ll into the 'public issues' category"; enforcing the non-disparagement clause would run "contrary to the citizenry's First Amendment interest"; and none of the countervailing interests were "strong enough" to justify enforcing the clause. *Overbey*, 930 F.3d at 224.

Similarly, the Book—sharing unique and powerful insights about the current president, five months before he stands for reelection—indisputably touches on the most central of all "public issues." The Book advances public interests at the very heart of the First Amendment. *See Citizens United*, 558 U.S. at 339 ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office."); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988) ("The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office."). Plaintiff tries to weigh against those monumental values his purported desire to keep quiet nondescript family squabbles from decades ago. The balance is not even close. *Cf. Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394–97, 1399 (9th Cir. 1991) (holding that a settlement agreement that purported to prevent a party from "seeking or holding elective office" could not be enforced even though the

party had "knowingly waived his constitutional rights" because "the right of the people to elect representatives of their own choosing to public office" "vastly outweighed any interest in enforcement"). Plaintiff's interpretation would thus render the confidentiality provision unenforceable.

3. The Settlement Agreement—And Its Confidentiality Provision—Has Expired.

Plaintiff asks—two decades after the Settlement Agreement was signed—that this Court interpret it as imposing a perpetual obligation not to say anything regarding Ms. Trump's personal "relationships" with her family members, as they existed then, in the past, or in the future. Not only is this not a reasonable interpretation of the confidentiality provisions, it is impermissible under New York law because "if the parties to a contract intend for it to be perpetual, they must expressly say so." *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 607 F. Supp. 2d 600, 603 (S.D.N.Y. 2009). The Settlement Agreement here contains no such provision. At a bare minimum, the agreement would need to state that the confidentiality provisions apply until the parties' deaths—but it does not even provide that. Plaintiff's argument for a perpetual and overbroad restriction on Ms. Trump's constitutional free speech rights in the absence of "explici[t]" contractual language is particularly disfavored, as set forth in Section I.B.2, *supra*. *Legal Aid Society*, 114 F. Supp 2d at 227.

Where, as here, a contract is "indefinite as to its duration," "it is well settled in New York" that the court should find "another construction" rather than "constru[e] [it] to require perpetual performance." *Ketcham v. Hall Syndicate, Inc.*, 236 N.Y.S.2d 206, 212 (Sup. Ct. N.Y. Cty. 1962). Moreover, "contracts that are silent as to their duration will ordinarily be treated not as 'operative in perpetuity' but as 'operative for a reasonable time.'" *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 763 (2018) (quoting 3 A. Corbin, Corbin on Contracts § 553 at 216 (1960)).

"What constitutes a reasonable time is determined based on the circumstances." *Sanchez v. Dep't of Veterans Affairs*, 949 F.3d 734, 736 (Fed. Cir. 2020); Restatement (Second of Contracts) § 204 ("When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.").

As the Second Department explained yesterday in this very case, the court should "tak[e] into account whether the provisions of the confidentiality agreement are temporally and geographically reasonable and the extent to which the provisions are necessary to protect the plaintiff's legitimate interests." Dkt. 55 at 6 (citing *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389 (1999)). Courts performing that inquiry also consider what reasonable interpretation of a confidentiality provision would avoid "harm[] to the general public." *BDO Seidman*, 93 N.Y.2d at 389. As the Appellate Division noted in its order in this case, the balance struck between those factors depends on the "passage of time and changes in circumstances" since the agreement was executed. Dkt. 55 at 6.

Plaintiff reads the confidentiality provision of the Settlement Agreement to impose a perpetual, comprehensive ban on speech in which the public has a constitutionally protected interest of enormous gravity—operating against Ms. Trump for the rest of her life, no matter where she spoke or what she said, as long as it related in some way to her "relationships" with these family members. That is clearly not reasonable. There is no dispute that the financial terms of the Settlement Agreement were long ago performed. M. Trump Aff. ¶¶ 8-10. Ms. Trump received no separate or specific consideration in exchange for the confidentiality provision, which was mutual, and receives no ongoing compensation at all. *Cf*. Dkt. 55 at 6 (*"*A court may enforce an agreement preventing disclosure of specific information without violating the restricted party's First

Amendment rights if the party received consideration in exchange for the restriction."). And the confidentiality provision provides that it is based on the parties' agreement "that the public *has no interest in the particular information* involved in the 'global' resolution of their differences," and that confidentiality is "necessary in order to protect the litigants and encourage a fair resolution of the matters in controversy." Ex. 1 at 5-6 ¶ 1 (emphasis added). In other words, the confidentiality provision was about protecting the settlement process and the details regarding the settlement as they then existed, and has no useful life once the settlement is completed, the terms fully performed, and the consideration contemplated therein paid—or at most, lasted for only a "reasonable time" thereafter. The parties' agreement the "public has no interest in the particular information involved in the 'global' resolution of their differences" is certainly no longer valid in view of President Trump's election and the New York Times exposure of the fraudulent valuations that underlie this very agreement.

Even if the confidentiality provisions could be construed to outlive the performance of the agreement, a "reasonable time" limitation would certainly have been reached by the time of any of the following events: (a) the date that Apartment Management Associates, Inc., ceased to exist, (b) when Donald announced his candidacy for president on June 16, 2015 (thereby making all aspects of his life—including his family relationships—of unquestionable public interest),[11] or (c) at the very latest in January 2017, when he was inaugurated and resigned his positions with all family businesses, including Trump Management, Inc. Indeed, it does not appear that any of

[11] The U.S. Supreme Court has recognized a "paramount public interest" in the specific kind of information Plaintiff hopes to suppress. *Garrison*, 379 U.S. at 77. It is not remotely "reasonable" to think that the parties intended confidentiality obligations imposed as part of a dispute over Fred Trump Sr.'s estate two decades ago would prevent his granddaughter from sharing her unique, valuable perspective on the 2020 presidential election.

Donald Trump, Robert Trump, or Maryanne Trump Barry still serve as an officer or director or Apartment Management Associates, Inc. or Trump Management, Inc.—and Apartment Management Associates appears no longer to exist.[12] A confidentiality provision that binds them in their capacity as officers of those companies—and requires their consent in those capacities—cannot outlast their service in those roles. In these circumstances, and without any language specifically confirming that the confidentiality provisions would be perpetual, any force the confidentiality provision once had has long since expired.

Moreover, circumstances have substantially changed since the Agreement was executed. *See supra* 12–14. At the time the Settlement Agreement was executed, the parties agreed that "the public [had] no interest in the particular information involved" in the Agreement, and it was therefore appropriate to seal information and records related to it. Mot. 1 ¶ 1. Nothing could be further from the truth now. The subjects of the confidentiality provision have been written about extensively. *See* Background, Section III, *supra*; Champion Aff. ¶¶ 25-27. And Plaintiff has not shown, and cannot show, that the two-decade-old settlement-related information that Ms. Trump had *at that time* remains confidential, sensitive, or would be damage him if released. To the contrary: now that Simon & Schuster are not subject to any injunctive relief, the Book will continue progressing toward publication and thousands more copies will be in the hands of the public in short order. Any information in the Book Plaintiff hopes to suppress will be public. And he has no legitimate interest in extending the lifespan of the confidentiality provision any further. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) (courts "must also assess the probable efficacy of prior restraint on publication as a workable method of protecting" the

[12] Indeed, as noted *supra*, on January 19, 2017, after he was elected to the presidency, President Trump confirmed his resignation from "each and every office and position" he held with his affiliated companies, including Trump Management, Inc. Ex. 11-12.

asserted interest); *BDO Seidman*, 93 N.Y.2d at 391 (courts should "identify the legitimate interest" of the party asserting confidentiality and determine whether the agreement "is no more restrictive than is necessary to protect that interest").

Against Plaintiff's non-existent interest in extending the lifespan of the confidentiality provision, the Court must weigh the significant interest of the public in obtaining the information Plaintiff seeks to suppress. In the interval, the Trump family has since become the subject of international scrutiny and constant media coverage. Ms. Trump's uncle is the President of the United States. And the U.S. Supreme Court has recognized a "paramount public interest" in the specific kind of information Plaintiff hopes to suppress. *Garrison*, 379 U.S. at 77. It is not remotely "reasonable" to think that the parties intended confidentiality obligations imposed as part of a dispute over Fred Trump Sr.'s estate two decades ago would prevent his granddaughter from sharing her unique, valuable perspective on matters of great public concern involving public figures at the heart of national politics. Dkt. 55 at 6 ("[C]ourts should balance the legitimate interests of the party seeking to enforce the contract with other legitimate interests, including, especially in this context, the public interest. . . . [W]hatever legitimate public interest there may have been in the family disputes of a real estate developer and his relatives may be considerably heightened by that real estate developer now being President of the United States and a current candidate for re-election").

Beter v. Murdoch is instructive. There, the Plaintiff provided information to a news organization under a confidentiality agreement that she alleged the organization had breached when it published a story "using her information and name." 2018 WL 3323162, at *7 (S.D.N.Y. June 22, 2018), *aff'd*, 771 F. App'x 62 (2d Cir. 2019). The court rejected this argument in part because "the terms of the contract . . . [did] not include its duration." *Id.* at *8. The court

acknowledged that New York law did not permit a contract to impose "perpetual" obligations "'[a]bsent a fixed or determinable duration or an express provision that the duration is perpetual.'" *Id.* (quoting *Compañia Embotelladora Del Pacífico*, 607 F. Supp. 2d at 603). And because there was no explicit provision that the contract would be perpetual, the court held that the plaintiff "[could not] establish the contract was breached." *Id.*

Just as in *Beter*, the Agreement here does not set a limit on its duration, and certainly did not provide that its confidentiality provisions would apply in perpetuity—including after one of its subjects became President of the United States. The Second Department recognized this, too, explaining that although it "may be one thing for the family of a real estate developer" to have a "legitimate interest in preserving family secrets," "it is another matter for the family of the President of the United States." Dkt. 55 at 7.

4. The Settlement Agreement Was Procured By Fraud And Is Unenforceable.

Plaintiff's conduct goes deeper than flouting freedoms guaranteed by the First Amendment. Ms. Trump will also be able to show that Plaintiff and other members of the Trump family fraudulently induced her to enter into the Settlement Agreement—an independent reason why this Court should not grant injunctive relief.

A contract is fraudulently induced, and therefore cannot be enforced, if one party to the contract makes a knowing misrepresentation of material present fact, that is both (i) collateral to the contract and (ii) intended to deceive another party and induce that party to act on the misrepresentation. *See GoSmile, Inc. v. Levine*, 81 A.D.3d 77, 81 (1st Dep't 2010). A settlement agreement should be "closely scrutinized" and "set aside upon a showing that it is . . . the result of fraud." *Chapin v. Chapin*, 12 A.D.3d 550, 551 (2d Dep't 2004). In *Chapin*, for example, one party to a settlement had claimed at the time that he had "virtually no assets" when it was later

discovered he had contemporaneously purchased hundreds of acres of waterfront policy; the court set aside the settlement as fraudulently induced. *Id.* at 550–51; *see also Cervera v. Bressler*, 85 A.D.3d 839, 841–42 (2d Dep't 2011) (stipulation could be set aside where one party had misrepresented her financial circumstances).

Plaintiff and his siblings induced Ms. Trump into accepting the Settlement Agreement by massively misrepresenting the value of the assets in which Ms. Trump had an interest, including [redacted]. *See* Exs. 1, 18. For example, according to the *Times*' analysis of Fred Trump Sr.'s tax returns, as of a few years before the Settlement Agreement, the Trumps claimed in 1995 that their real estate holdings were worth only $41.4 million. Ex. 18 at 27. Yet, less than a decade later, in 2004, after the Settlement Agreement was executed, banks valued the same real estate *at nearly $900 million*. *Id*.

Ms. Trump discovered these misrepresentations, and the decades-long scheme to evade taxes that created them, when the *New York Times* published its investigative report analyzing the Trump family's finances. *See* Ex. 18. Ms. Trump relied on these misrepresentations and would not have signed the Settlement Agreement had she known the truth. Mary Trump Aff. ¶ 11. And because the Settlement Agreement was based on and induced by fraud, it cannot be enforced—and cannot bar publication of Ms. Trump's book. *Chapin*, 12 A.D.3d at 551; *see Estate of Lennon by Lennon v. Screen Creations, Ltd.*, 939 F. Supp. 287, 293 (S.D.N.Y. 1996) ("A court may deny injunctive relief . . . where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party.").

II. Plaintiff Has Not Shown Irreparable Harm.

To establish a right to preliminary injunctive relief, the "movant must show that the irreparable harm is imminent, not remote or speculative." *Family-Friendly Media, Inc. v.*

Recorder Television Network, 74 A.D.3d 738, 739 (2d Dep't 2010). Even more importantly, in New York an injunction against *speech* is only available where publication threatens "imminent and irreversible injury *to the public*"—a risk Plaintiff has not even tried to argue exists here. *Porco*, 116 A.D.3d at 1266. And where a plaintiff seeks to enjoin speech, an injunction is not permitted unless it is actually a "workable method of protecting" Plaintiff's asserted interests. *Nebraska Press Ass'n*, 427 U.S. at 565. Plaintiff's conclusory allegations, set out in a page-long affidavit, cannot satisfy any part of this standard. Certainly, Ms. Trump should be allowed to probe Plaintiff's allegations of harm through discovery before any preliminary injunction issues.

Beginning with the most straightforward point, injunctive relief against Ms. Trump is inappropriate because it could not stop any injury Plaintiff might actually incur. Here, under Simon & Schuster's contract to publish the Book, Ms. Trump has no contractual right or ability to halt the Book or cancel its publication; Simon & Schuster is an independent actor, working in its own interests, with exclusive control over the publication of the Book. *See* Karp Aff. ¶ 9 ("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."); Mary Trump Aff. ¶ 17. And as Simon & Schuster explains in its brief, the Court cannot enjoin the publisher itself. Any injunction the Court grants would thus be futile.

Even more importantly, even if Ms. Trump theoretically had the power to stop the Book from being published, she could not do so in reality. "It is . . . settled law that there can be no irreparable injury where the injury has already been sustained." *Art Capital Grp., LLC v. Getty Images, Inc.*, 901 N.Y.S.2d 904, at *10 (Sup. Ct. N.Y. Cty. 2009). Here, any injury Plaintiff might possibly suffer from publication of the Book already exists and no injunction can stop it. As the District Court for the District of Columbia recently observed in a similar situation, "the horse is

. . . out of the barn.'" *United States v. Bolton*, 2020 WL 3401940, at *4 (D.D.C. June 20, 2020). In his letter to the Court of June 26, Plaintiff acknowledged that the *Bolton* case was a problem for him, explaining that "the Court held that even though the government had established that Mr. Bolton violated his contractual obligations in publishing his book, no injunction could issue because while the book had not yet been released, it had been distributed and numerous people had access to copies of the book." *Trump v. Trump*, No. 2020-51585, Dkt. 17 (Sup. Ct. Dutchess Cty. Jun. 26, 2020); *see also N.Y. Times*, 403 U.S. at 733 (White, J., concurring) (explaining that when "many [purportedly] unauthorized people" already have "access" to the challenged publication, "equitable relief . . . at best" has a "doubtful" chance "to avert anticipated damage"). Plaintiff's counsel was exactly right. As Simon & Schuster has told the Court, 75,000 copies of the Book were already printed, bound, and prepared for publication by the time Plaintiff even brought this action, and the publisher had already started shipping thousands of those books to booksellers. Now that the Second Department has vacated the TRO as to Simon & Schuster, moreover, the publisher will continue lawfully printing and distributing still more copies of the Book in the days leading up to the preliminary-injunction hearing on July 10. The Book is already a bestseller, and key information about the Book's contents has already been published by multiple booksellers. The Book is being reported on in the media and has been "widely publicized," *Procter & Gamble*, 78 F.3d at 225, including by the President himself. *See* Ex. 5. "[I]n the Internet age, even a handful of copies in circulation could irrevocably destroy confidentiality." *Bolton*, 2020 WL 3401940, at *4. The Book is now far more widely distributed than that.

An injunction against speech is only permissible if "prior restraint on publication" would "*probably* [be] eff[ective] . . . as a workable method" of protecting Plaintiff's interest. *Nebraska*

Press Ass'n, 427 U.S. at 565. But here an injunction could not actually silence the speech Plaintiff seeks to block. And for that reason an injunction must be denied.

Even if an injunction could succeed here in changing the outcome—it cannot—Plaintiff still has failed to meet the mandatory showing of irreparable harm. He has not attempted to allege or argue that harm will result to the *public* from the publication of the Book—an absolute prerequisite for any injunction to issue against speech on public issues in New York. *Porco*, 116 A.D.3d at 1266; *see supra*, at 22-24. And worse—he has not even managed to show that he will suffer any irreparable harm *to himself* from publication of the Book. Plaintiff of course lacks standing to assert irreparable injury on behalf of people other than himself, including his brother President Trump. And Plaintiff has done nothing to establish that he would be irreparably harmed from the Book's publication personally. His allegations of irreparable harm consist of pointing to second-hand descriptions of the Book in news media, which he claims "make clear that [it] will contain confidential information about Mary L. Trump's relationship with" himself and other members of the "Trump family." Compl. ¶ 28. Relying on these descriptions, he simply assumes that this information will inflict irreparable harm on him, without explaining what that harm would look like. Mot. at 8–9.

These vague, perfunctory allegations are insufficient as a matter of law to establish irreparable harm—especially where, as here, Plaintiff seeks the extraordinary relief of a prior restraint on constitutionally protected speech. *See supra*, at 19–31; *see also*, *e.g.*, *Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 716 (2d Dep't 2011) (plaintiff's "vague and conclusory allegations that its principals would suffer harm to their business reputations were not sufficient to establish irreparable injury"); *Family-Friendly Media*, 74 A.D.3d at 739–40 (affirming denial of preliminary injunction where "the plaintiff made only conclusory allegations and failed to point to

any imminent and non-speculative harm that would befall it in the absence of a preliminary injunction"); *Neos v. Lacey*, 291 A.D.2d 434, 435 (2d Dep't 2002) (concluding that "plaintiff's bare conclusory allegations were insufficient to" establish irreparable harm). Plaintiff bears the burden of showing more than this to justify the extraordinary remedy of a preliminary injunction. He has not done so.

Any harm Plaintiff might be able to establish is, at worst, readily curable with money damages—and because Plaintiff has an adequate remedy at law, he cannot obtain an injunction here. *See*, *e.g.*, *Duane Reade v. Rockaway Crossing, LLC*, 18 A.D.3d 337, 337 (1st Dep't 2005). "Damages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable." *Scotto*, 219 A.D.2d at 184. If the statements in the Book are injurious to Plaintiff in a legally cognizable way, Plaintiff can seek money damages. *Cf. Metro. Opera*, 239 F.3d at 177 (explaining that "equity will not enjoin a libel absent extraordinary circumstances" because "ordinarily libels may be remedied by damages").

Yet, if the statements in the Book do *not* injure Plaintiff—and he has not come forth with any allegation or evidence that they do—they are not actionable, and Plaintiff would have no damages and would not be entitled to any relief. *See*, *e.g.*, *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 537 (1st Dep't 1988) (dismissing breach-of-contract claim where plaintiff failed to "demonstrate how the defendant's alleged breach of the confidentiality agreement caused plaintiffs any injury").

Plaintiff attempts to buttress his irreparable-harm arguments by relying on *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624 (E.D.N.Y. 1996), in which the court relied on a "presum[ption]" of irreparable harm "where a trade secret has been misappropriated," *id.* at 628, and *Willis of N.Y. v. DeFelice*, 299 A.D.2d 240 (1st Dep't 2002), in which the First Department found irreparable harm

based on the use of a company's "confidential and proprietary information" by its former employees, *id*. at 242–43. *See* Mot. at 8. Both cases are readily distinguishable. The information at issue in those cases had an obvious potential for tangible, real-world injury to the movant; it was proprietary, commercial information of the kind that can often be regulated where speech on public issues cannot. *See supra*, at 29–30. Plaintiff has not attempted to show any comparable injury from the publication he seeks to enjoin.

Plaintiff also tries to fill in the gaps in his allegations by emphasizing that the confidentiality provision includes terms purporting to "consent[] to . . . injunctive relief" and "agree[] that in the event of a breach . . . [Plaintiff] would suffer irreparable harm." Mot. 7-8 (citing Ex. 1 ¶ 2). This does not save Plaintiff's shortcomings. "[I]t is clear that the parties to a contract cannot, by including certain language in that contract, create a right to injunctive relief where it would otherwise be inappropriate." *Art Capital Group*, 2009 WL 2913531, at *10 (quoting *Firemen's Ins. Co. of Newark, N.J.*, 753 F. Supp. at 1154); *see also Barranco v. 3D Sys. Corp.*, 952 F.3d 1122, 1130 (9th Cir. 2020) ("[T]he terms of a contract alone cannot require a court to grant equitable relief.") (collecting cases). It makes no difference that the confidentiality provision specifically claims that any breach will cause irreparable injury: Courts have repeatedly held that contractual provisions purporting to establish irreparable harm "d[o] not control whether equitable relief is appropriate." *Art Capital Group*, 2009 WL 2913531, at *10. This Court is "both required and entitled to make an independent finding of irreparable harm before" granting injunctive relief. *Gramercy Warehouse Funding I LLC v. Colfin JIH Funding LLC*, 2012 WL 75431, at *4 (S.D.N.Y. Jan. 6, 2012) (finding that plaintiff failed to establish irreparable harm notwithstanding contractual provision stating that "a breach . . . would constitute irreparable harm" and emphasizing that this contractual provision was "not dispositive"). Even where a

"confidentiality agreement declares that money damages would be inadequate in the event of a breach," the court must still find that irreparable harm actually exists—the contract alone does not answer the question. *Id.* (refusing to issue an injunction because plaintiff had failed to establish irreparable harm, even though the parties' "confidentiality agreement declares that money damages would be inadequate in the event of a breach"); *see also Int'l Bus. Machines Corp. v. Visentin*, 2011 WL 672025, at *7 n.4 (S.D.N.Y. Feb. 16, 2011) ("[A] contract provision does not, as a matter of law, constitute conclusive evidence that irreparable harm has occurred.").

Because the extraordinary remedy of a preliminary injunction is only available where demanding criteria are met, the Court must always "perform a standard inquiry into the existence of irreparable injury." *Ardis Health, LLC v. Nankivell*, 2011 WL 4965172, at *3 (S.D.N.Y. Oct. 19, 2011) (finding that plaintiffs "have not demonstrated irreparable harm"). Where, as here, the movant "fail[ed] to produce any evidence of irreparable harm, other than . . . conclusory statement[s]," courts have refused to grant injunctions, regardless of whether the parties previously agreed to "contractual language declaring money damages inadequate in the event of a breach." *Baker's Aid, A Div. of M. Raubvogel Co., Inc. v. Hussmann Foodservice Co.*, 830 F.2d 13, 16 (2d Cir. 1987) (affirming denial of preliminary injunction).

In any case, Plaintiff's own conduct has made clear that there is no actual risk of harm here. Plaintiff chose to file this application publicly, not under seal, disclosing the exact information he alleges is confidential—including "the terms of th[e] Agreement" itself (Dkt. 9), which had never been publicized before Plaintiff's filing. Plaintiff himself has thus deliberately chosen to publish information the Settlement Agreement purports to deem confidential rather than filing his papers under seal, showing conclusively that publishing such information will cause him no actual harm.

III. The Equities Do Not Favor Injunctive Relief.

Plaintiff's request for injunctive relief fails for the additional reason that the equities strongly counsel against a prior restraint on the Book.

In considering the balance of the equities when "ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation." *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 A.D.3d 1057 (4th Dep't 2020). Entering a preliminary injunction against Ms. Trump would inflict profound and irreparable injury. Although an order enjoining speech may look like other orders granting injunctive relief, "it is a different beast in the First Amendment context" because an injunction "*disturbs* the status quo and impinges on the exercise of" rights protected by the First Amendment. *Procter & Gamble*, 78 F.3d at 226 (emphasis added). It is well-established that "'[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury'" to the speaker. *N.Y. Progress & Protection PAC*, 733 F.3d at 486 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Plaintiff seeks an injunction that would restrain Ms. Trump from sharing insights she alone can share on the current President during his re-election. There may be no more serious First Amendment injury in American law. *See Citizens United*, 558 U.S. at 339.

The interests of the public are equally serious here and the injury to the public just as grave. The underlying premise of the First Amendment is that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945). The public thus has a significant, constitutionally protected interest in an "unhampered flow of ideas and information." *Pocket Books, Inc. v. Dell Publ'g Co.*, 49 Misc. 2d 252, 256 (Sup. Ct. N.Y. Cty. 1966). Books and literary works, in particular, have long been protected as "organ[s] of public opinion" and as "significant medium[s] for the communication of ideas." *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film*

Corp., 22 A.D.2d 452, 457 (1st Dep't 1965) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

The injunction risks serious injury to the public interest. Whatever Plaintiff might argue about the confidentiality provision of the Settlement Agreement at the time it was "originally" executed, the context has changed dramatically. *Nat'l Polymer Prod., Inc.*, 641 F.2d at 424. Once the confidentiality provision would have, at most, suppressed speech about family squabbles and the estate of a wealthy property developer. Now, Plaintiff now tries to use the same contract to ban a book expressing uniquely important insights into the President of the United States as he campaigns for re-election. The public has an enormous political interest in obtaining Ms. Trump's perspective.

Against these profound interests, Plaintiff has little to offer in support of his injunction. He has not shown that publication of the Book would produce a legally cognizable harm to him at all, much less an irreparable one. And he has no personal interest in shielding President Trump from negative publicity. To the extent he has identified any interest at all that his injunction could advance, it is at best a conclusory, diffuse interest in confidentiality itself. But that is simply not enough to overcome the public interest in Ms. Trump's speech. As the Second Department put it in the order on appeal in this action, "the legitimate interest in preserving family secrets may be one thing for the family of a real estate developer, no matter how successful; it is another matter for the family of the President of the United States." Dkt. 55 at 6-7.

Regardless, any interest Plaintiff has in enforcing this diffuse desire for confidentiality is already a lost cause. Now that the Appellate Division has lifted the injunction as to Simon & Schuster, the Book will be available to the public no matter the result of this action. The information in the Book will be public and Plaintiff cannot assert any interest in its ongoing

confidentiality—much less an interest heavy enough to overcome the public interests measured against it.

And in any case Plaintiff has already shown that his interest in confidentiality is in reality a mere pretext, invalidating any argument that the equities tip in his favor. He has now filed this action publicly and not under seal, in two different courts, including a number of provisions in the Settlement Agreement—deliberately disclosing terms of the Agreement and significant facts about his relationship with Ms. Trump. *See* Compl. ¶¶ 12–25 (describing litigation over estate of Fred C. Trump, the estate of Mary Anne Trump, and the Settlement Agreement); Ex. 1 (making public a redacted version of the Settlement Agreement); Mot. 2–5. Under his reading of the Settlement Agreement, this violates the very confidentiality he claims to be defending here. Although the Agreement authorizes certain disclosures that are made in proceedings to enforce its terms, Plaintiff could have easily filed his papers under seal and thus avoided publishing information that he now argues should be shielded by a prior restraint on core political speech. By failing to do so—and by authorizing his counsel to issue repeated statements to the press while this action was pending—Plaintiff has made clear that the confidentiality interests he claims to defend are in reality a pretext. Indeed, for years before this litigation was filed, Plaintiff and his siblings have regularly spoken about topics he now claims are strictly confidential—including last week when President Trump spoke in detail about Ms. Trump, her brother, and the Settlement Agreement itself. *See supra*, at 15–16, 36–37.

Under these circumstances, judicial interference with the Book's publication would be unprecedented. There are no circumstances here that would warrant such historic interference. To the contrary, Plaintiff and his siblings are situated like countless other litigants who have tried and

failed to use the courts to block constitutionally protected speech. The exceptionally strong public interest in reading the Book thus forecloses injunctive relief.

CONCLUSION

The Court should immediately rescind the TRO against Ms. Trump and deny Plaintiff's requests for a preliminary injunction. In the event the Court grants injunctive relief, it should order Plaintiff to provide Ms. Trump with an undertaking that he will pay Ms. Trump "all damages and costs which may be sustained by reason of the injunction" "if it is finally determined that he . . . was not entitled to an injunction," and accept briefing from the parties on the amount at which the undertaking should be set. CPLR 6312(b).

Dated: New York, New York
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