SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

ROBERT S. TRUMP,	:	
		Index No. 2020-51585
Plaintiff,	:	
		Hon. Hal Greenwald
v.	:	
MARY L. TRUMP, and SIMON & SCHUSTER, INC.	:	
	:	
Defendants.		

REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION; IN RESPONSE TO BRIEFS OF MARY L. TRUMP AND SIMON & SCHUSTER, INC.; AND IN RESPONSE TO PROPOSED *AMICUS* BRIEF

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INTRODUCTION

Hoping to make millions of dollars by publishing their book describing Mary L. Trump's relationship with Robert S. Trump and the other Proponents from the 2001 Settlement Agreement, the Defendants have deluged this Court with pages and pages of filings. However, these filings have obscured the central issue in this case with a cloud of questionable evidence and unpersuasive arguments.

That central issues are as follows—as to Mary Trump: **Is a party who agreed to settle a family dispute by signing an agreement not to later publish a book or memoir describing her relationships with other family members allowed to escape her contractual promise simply because one of those relatives later enters national politics, thereby making any such book potentially more profitable?**

And as to Simon & Schuster: **Does a book publisher who, having paid for the purported right to publish a book, later receives actual notice of the fact that the author has no legal right to publish the book, then have the right to rush ahead with publication and distribution of the book with full knowledge of the legal prohibition on publication, and thereby escape any court injunction that is entered against the author?**

The answer to both these questions is clearly "no". And that answer controls this case. Not only that—it must control this case. A "yes" answer to either of those questions would potentially render ineffective the numerous agreements that private litigants make to protect legitimately confidential information. Whether it be trade secrets, business confidences, family secrets, communications between therapist and client, even communications between attorney and client, a plethora of confidential relationships rely on the agreements of parties to keep legitimately secret matters secret—even including matters where there might be a great deal of

public interest, and even sometimes coupled with an agreement that on threat of a breach, an injunction may be entered.

This world of contractual secrecy **co-exists** with the world of prior restraint law described in detail by Defendants and their *amici*. But if their positions were actually adopted in this case, these worlds could no longer co-exist. **Every** contract that legitimately called for confidentiality would be called into question. **Every** party who sought to prevent confidential information from being disclosed to third parties so as to prevent irreparable harm would be faced with meeting the super-strict scrutiny that the courts have applied to the Pentagon Papers and other matters of threatened government censorship. Many such parties might not be able to meet that stringent test. As Simon & Schuster freely admits in its brief, there have been next to no reported cases where that test has ever been met.

Defendants and their *amici*'s implicit limiting principle for applying a prior restraint test is apparently their claim that Ms. Trump's book involves a form of political speech. Notably, Defendants do not actually ever express this as a limiting principle; they are quite clear that they believe **all** injunctions arising out of contract claims should be subject to the super-strict scrutiny test of the Pentagon Papers case and struck down. But they do, nonetheless, imply that perhaps it is the alleged "political content" of Ms. Trump's book that distinguishes it from other expression that has been enjoined by the courts. However, this argument is unpersuasive for at least two reasons.

First, Ms. Trump's supposed observations about her relationships with the Proponents are not a form of political speech. Two of the Proponents—Plaintiff Robert Trump and Judge Maryanne Trump Barry—are not even politicians. Even as to Donald Trump, who became president 15 years after the settlement agreement at issue was formed, her descriptions and

accounts of her "relationship" with Donald Trump are **personal observations**, not political commentary. At all times in this litigation, Plaintiff has emphasized the narrowness of his claim: Mary Trump is free to comment on political issues, free to comment on who she is voting for in 2020, and free to express whatever opinions she has about the President's performance in office. What she is barred from doing is writing about her relationship with the Proponents.

Second, even if Ms. Trump's book is characterized as "relevant to the election", allowing a contracting party to escape an agreement she made on the ground that it is "relevant to" an election has frightening implications. There are potentially a great number of private, confidential communications that might be argued to be "relevant" to an election. Most obviously, most politicians have probably consulted with attorneys at some point in their lives, with the expectation and perhaps even the contractual requirement that such communications remain confidential. And yet, if Mary Trump's position is accepted, any such attorney could ignore the privilege and write a book about all the damaging admissions that were contained in the politician's confidential lawyer-client communications. Similarly, if a politician were to consult a psychotherapist, and discuss his or her innermost thoughts during therapy, the psychotherapist could later cash in and tell all; after all, a politician's innermost thoughts could be viewed as "relevant" to the election.

At bottom, Mary Trump's position, if accepted, would mean that politicians could not enter into confidential relationships at all, even for the most legitimate of reasons, because the obligations would be terminated whenever an election came around, and the confidential information became "relevant" to it. That is not the law, and cannot be the law.

Simon & Schuster's position, and the position of Defendants' *amici*, fares no better. It is based on a completely false analogy between a book publisher and a newspaper. Newspaper

writers, at least in the United States, do not generally pay for news. They have ethical codes that prohibit them from engaging in unethical or illegal conduct to get stories. Accordingly, it is entirely sensible that they receive a privilege to publish news even if their source may have obtained the material illegally. That was, of course, one of the issues in the Pentagon Papers case—the Pentagon Papers themselves were purloined by a government employee and leaked to the *New York Times* and *Washington Post*.

However, the Supreme Court has been careful never to extend this privilege of a newspaper to publish illegally or wrongfully obtained information to anyone who collaborates with a source in the wrongful act. For instance, while a journalist has a First Amendment privilege to publish material obtained from a source who is a burglar, no case has ever held that a journalist him- or herself has the right to commit a burglary to obtain documents for a story.

This is what distinguishes a book publisher like Simon & Schuster from a newspaper. Book publishers do not passively receive, from sources, information independently obtained (perhaps sometimes through wrongful means). Rather, book publishers pay their authors to create books under lucrative publishing contracts; the manuscripts are then edited by employees of the publisher, as well as the author, in a collaborative process before publication. A book publisher who, for instance, pays its author to commit a burglary to obtain material for a book is thus in a completely different position than a journalist who passively receives material that a source obtained illegally. No case has ever extended the special privileges of newsgathering to book publishers, and Simon & Schuster's attempts to couch itself as the equivalent of a news organization are unavailing.

Simon & Schuster's arguments also fail because of their own bad faith actions in this case. Simon & Schuster has filed a false affidavit in this Court in which it claimed that it had

"no reason" to doubt Mary Trump's right to publish the book, when it has been on notice of the existence of her confidentiality agreement since at least June 16. Simon & Schuster has also suspiciously withheld the actual evidence that would corroborate or refute its contentions

Most notably, Simon & Schuster deliberately shipped books out **nine days after** learning about the existence of Mary Trump's contractual obligations hoping to obstruct the courts from enforcing Mary Trump's contract, moot any injunction proceeding, and score a lucrative payday even if the Book were to be ruled by this Court to be outside of the protections of the First Amendment and subject to an injunction. Simon & Schuster, having engaged in this reckless course of conduct and having thumbed its nose at the court system, has now come to this Court and argued that the supposedly irreparable harm that has resulted from **its own actions** in rushing out books after learning of the confidentiality obligation means they should prevail against Robert Trump's motion for injunctive relief. In fact, it means the opposite. Simon & Schuster analogizes to the recent case of John Bolton, where "the horse was out of the barn" because the government had delayed filing suit and seeking an injunction. In fact, Simon & Schuster, knowing full well that the owner of the horse had signed an agreement not to let him out, snuck out to the stables at midnight and deliberately let the horse out anyway.

Simon & Schuster, of course, pretends that there is nothing it could have done about any of this. According to them, once they signed a book contract with Mary Trump, the process could not be stopped. Indeed, in their briefs, Mary Trump and Simon & Schuster gleefully describe how their contract leaves them with no power to do anything to stop the book's release. And yet, they did not actually tender to this Court the contract that would confirm whether or not this claim is true. This Court should not credit their claims.

If Simon & Schuster's arguments, and the arguments of Defendants' *amici*, are accepted, the implications would be equally odious as they would be if Mary Trump's arguments are accepted. This would mean that any author, under any legal restriction, even one that included an agreement to submit to injunctive relief, would simply need to find a publisher willing to quickly get the book into distribution, if the author wished to circumvent his or her agreement. This would become the go-to approach for anyone subject to a legitimate confidentiality agreement they wished to breach. Simply find a publisher and put it in a book. If an attorney or therapist wants to publish confidential communications with a client or a patient, the answer would be the same: just find a publisher and put it in a book.[1] Such a holding would be especially, ruefully ironic given that the parties in this case clearly contemplated that Mary Trump or one of the other parties to the contract might attempt to do exactly what she was doing—they specifically mentioned "books" in the confidentiality clause, and further specifically mentioned that an "agent" would be subject to the injunction. In the legal world contemplated by Simon & Schuster and its *amici*, there is literally nothing that parties can do to prevent a publisher from publishing anything, no matter how sensitive, no matter how confidential, no matter how legitimate the interest in confidentiality. They argue that book publishers get a blanket exemption from **all** the rules.

[1] This line of argument also raises the issue of what constitutes a "book publisher" who can supposedly claim the privileges of a journalist. Simon & Schuster offers no definition and no criteria for who receives the extraordinary privilege it claims; it could even extend as far as a party who contracts with a personal friend to "publish" the confidential information using one of the many self-publishing websites available, like Amazon's Kindle Direct Publishing which allows anyone to publish a paperback and "electronic book". *See* https://kdp.amazon.com/en_US/. There also are many smaller publishers that specialize in publishing books containing extreme or objectionable content. Were the courts to recognize the privilege claimed by Simon & Schuster, even the most unethical publishers would hold a "First Amendment privilege" to publish works where they knowingly collaborated with authors to violate lawful and legitimate contractual restrictions or even engaged in illegal conduct.

There is, of course, much more to say here; Robert Trump has attempted to answer all of the material arguments made by the Defendants and their *amici* in the body of this brief, and there is a great deal to say to refute their arguments. But the ultimate conclusion is clear: this is **not** a case about the First Amendment. It is a case about family members who agreed to settle multiple hotly contested and publicized court cases by agreeing not to discuss those cases **or** their relationships with each other in public, including by writing a memoir or book containing such discussions. This proceeding is not seeking any violation of the First Amendment. Rather, Robert Trump has come to this Court because Mary Trump and her agent and co-conspirator, Simon & Schuster, are attempting to cash in on her relationship with the Proponents, and the agreement she voluntarily signed, prohibiting them from doing this, stands in their way. There is both no reason to set aside that agreement, and every reason to hold Mary Trump, and her agent and co-conspirator, Simon & Schuster, to the promise that she made. A preliminary injunction therefore should be issued against both of them.[2]

SUPPLEMENTAL PROCEDURAL HISTORY

This Court issued its TRO on June 30, 2020. On July 1, 2020, Defendants sought an emergency hearing with a single Justice of the Appellate Division and, that day, their application to reconsider the TRO was heard by Presiding Justice Scheinkman. On July 2, 2020, Presiding Justice Sheinkman issued an order (1) affirming the TRO as to Mary Trump as well as any "agent" acting on her behalf; but (2) modifying the TRO to not specifically name Simon & Schuster as her "agent". On July 6, 2020, Simon & Schuster announced publicly that despite the long lead time it had represented to the courts was needed to publish a book, it was moving up

[2] Defendants have presented evidentiary affidavits to this Court which contain inadmissible evidence. Robert Trump includes evidentiary objections in an Appendix at the end of this Memorandum of Law.

the date of publication of Mary Trump's book by two weeks: from July 28 to July 14, 2020. Alexandra Sternlicht, "Mary Trump Book's Publication Moved Up To July 14", *Forbes* (Jul. 6, 2020) (at https://www.forbes.com/sites/alexandrasternlicht/2020/07/06/mary-trump-book-to-be-published-july-14-publisher-announces-claims-muzzled-by-uncle/#46454122e870) (viewed Jul. 6, 2020).

ARGUMENT

I. A Preliminary Injunction Should Issue Against Mary Trump.

This brief will take each of the two Defendants' arguments in turn; Simon & Schuster's arguments are in many ways derivative of Mary Trump's arguments.

Importantly, the Court in this proceeding is only evaluating **likelihood** of success on the merits. The Court need not find, on any of these arguments, that Robert Trump is certain to succeed in order to enter a preliminary injunction.

a. Mary Trump Does Not Have a Valid Constitutional Objection To the Entry of the Injunction She Agreed To.

At the center of Defendants' arguments is the claim that no matter what Mary Trump may have contractually agreed to, no court can enjoin the publication of her book under the U.S. Constitution. This argument is without merit, because the "prior restraint" doctrine Defendants invoke applies to a completely different type of injunction against speech and has no application where a party has contracted away her right to speak in exchange for valid consideration.

i. U.S. Constitutional Standards

1. The Super-Strict Scrutiny Applied to Governmental Prior Restraints Has Never Been Applied To Parties Who Voluntarily Enter Into Contracts Agreeing Not To Speak.

Defendants and their *amici* cite numerous cases which hold that where the government seeks to prevent publication of speech, it must meet the highest possible level of scrutiny. Indeed, "[s]o strict is the scrutiny applied under the [prior restraint] doctrine that the Supreme Court has never upheld a law that it has characterized as a prior restraint on pure speech". Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N. Car. L. Rev. 1, 2 (1989). It is, to use Professor Gerald Gunther's famous aphorism, "strict in theory and fatal in fact". Thus, it is really a super-strict level of scrutiny that goes beyond even the strict scrutiny that is used where the government imposes content-based subsequent punishments on fully-protected expression. *See Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 502 U.S. 105, 118 (1991) (holding such punishments may be imposed if necessary to achieve a compelling state interest).

This super-strict scrutiny, however, does not apply to every court order preliminarily enjoining a publication. For instance, preliminary injunctions are often granted in copyright infringement suits, and are not treated as "prior restraints" or subjected to super-strict, "fatal in fact" scrutiny. So, for instance, in *Dr. Seuss Enterprises v. Penguin Books*, 109 F.3d 1394, 1403 n. 11 (9th Cir. 1997), the Ninth Circuit upheld an injunction blocking publication of a book that copied large swaths of Dr. Seuss' poems as part of an attempted satire of the O.J. Simpson trial. The court stated emphatically that the "prior restraint" doctrine had nothing to do with this sort of injunction: "We reject outright Penguin and Dove's claim that the injunction in this case constitutes a prior restraint in violation of free speech guaranteed by the United States Constitution." *Id.*; *accord Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.* 166 F.3d 65 , 74 (2d Cir. 1999) (the Second Circuit responding to a copyright defendant's prior restraint

argument: "We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement....").

Trademark injunctions, similarly, are not subjected to a "prior restraint" analysis. Thus, when the Dallas Cowboys Cheerleaders sued the makers of an adult film about a football cheer squad that used the plaintiffs' trademarks, the Court held that the preliminary injunction would not be analyzed as a prior restraint: "This is not a case of government censorship, but a private plaintiff's attempt to protect its property rights. The propriety of a preliminary injunction where such relief is sought is so clear that courts have often issued an injunction without even mentioning the first amendment." *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979); *accord Coca-Cola Co. v. Purdy*, 382 F.3d 774, 790 (8th Cir. 2004) (upholding injunction in trademark case: "Purdy's prior restraint argument warrants little discussion.").

Obviously, the "prior restraint" doctrine does not apply to every judicial order enjoining speech. This principle is so obvious that courts do not even consider it worthy of serious discussion. Defendants, in all their briefing, fail to offer any explanation of this, or any guidance to this Court as to when the prior restraint doctrine applies, and when it does not.

In fact, the prior restraint doctrine has nothing to do with cases where a speaker has made an enforceable contract not to speak. Rather, the prior restraint doctrine has been applied in two completely different situations: content-based government suppression of purportedly "dangerous" speech, and government licensing requirements. This can be seen from the facts of the prior restraint Supreme Court cases cited by Defendants:

Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713 (1931): court order shutting down a newspaper pursuant to a state law due to its "scandalous" content;

New York Times Co. v. United States, 403 U.S. 713, 714 (1971): court order obtained at the behest of the United States government, prohibiting the publication of the Pentagon Papers;

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976): court order "gagging" the news media from reporting about a court case;

Lovell v. City of Griffin, 303 U.S. 444, 451–52 (1938): city ordinance requiring a license to distribute circulars, advertising, or literature;

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963): state law creating censorship board with the power to ban books that are allegedly "harmful to minors";

Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 554-55 (1975): municipal theater which refused to allow the musical *Hair* to be staged, due to the content of the production;

Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 180-81 (1968) county obtained court injunction against staging of political rallies by racist politician;

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971): injunction entered against political leafleteers who were protesting racism.

When a governmental body seeks to enjoin speech in advance based on allegedly objectionable content, whether it is a secret study of U.S. military policy (the Pentagon Papers) or a stage musical containing nudity (*Hair*), the highest level of scrutiny is imposed and very few such injunctions will be permissible. However, the Supreme Court has never extended this doctrine beyond the two paradigmatic cases: (1) court injunctions against alleged "dangerous" speech content speech, and a government censor with the power to grant (or deny) permission before a speaker is allowed to speak.[3]

[3] Mary Trump correctly notes that under *Shelley v. Kraemer*, 334 U.S. 1 (1948) and a

The application of the super-strict scrutiny "prior restraint" doctrine to these two instances is entirely understandable. This does not, however, constitute a broad rule against any court injunction that affects speech. As noted above, courts have recognized broad powers to enjoin speech in such contexts as copyright and trademark without meeting the super-strict scrutiny "prior restraint" test. The copyright and trademark laws are content-neutral, and they do not constitute any sort of scheme of government censorship.

Private contract lawsuits like this case are extremely similar to copyright and trademark suits, and completely different from the two categories where the "prior restraint" doctrine has been applied: attempts by government to censor "dangerous" speech based on content, or permitting schemes where a censor's permission must be obtained from the government before speaking. Like the rules permitting the enforcement of copyrights and trademarks, the rule that private contracts are enforceable is not a content-based restriction on speech. Rather, it is a generally applicable rule that applies equally to contracts that restrict speech and those that do not. The law does not care whether your contract requires you to deliver widgets, or protect your employer's trade secrets. Nor does the law care whether your contract requires you to protect a trade secret, or requires you not to disclose avoid disclosure of financial information received in a merger transaction, or maintain confidential family secrets. Nor does the law care if the person you promised confidentiality to is a Democrat or Republican. The rule permitting the enforcement of contracts not to speak is fully content neutral. *See Interplay Entertainment Corp. v. TopWare Interactive, Inc.*, 751 F. Supp. 2d 1132 (C.D. Cal. 2010) (enjoining video game that

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line of other cases, court injunctions meet the "state action" requirement under the Constitution. However, that is irrelevant here, as the scope of the "prior restraint" doctrine is far narrower than the "state action" doctrine. Every court injunction satisfies "state action", but as set forth, *infra*, many such injunctions are not considered "prior restraints" even if they enjoin speech or expression.

infringes trademark: "Thus, an injunction, even one that prevents TopWare from releasing an artistic endeavor, does not constitute a prior restraint in violation of the First Amendment's free speech guarantee because the Lanham Act's prohibitions **are content neutral**.") (emphasis added); *DVD Copy Control Ass'n v. Bunner*, 75 P.3d 1, 17 (Cal. 2003) ("*only* content-based injunctions are subject to prior restraint analysis") (emphasis in original).[4]

In addition, again like copyrights and trademarks, the rules requiring that contracts be enforced are not any form of official censorship or suppression of ideas. **Contract law protects the integrity of promises**, *see, e.g.,* Mindy Chen-Wishart, "The Oxymoron of *Smith v. Hughes*", in *Exploring Contract Law* at 346 (Jason W. Neyers, Ed. 2009) ("The purpose of contract law is to protect the practice of undertaking voluntary obligations....") (emphasis removed), and furthers economic efficiency, *see, e.g.,* Eric A. Posner, *Economic Analysis of Contract Law After Thirty Years: Success or Failure*, 112 Yale L.J. 823, 833 (2003) ("[P]arties would maximize their utility if they could enter an optimal contract. They cannot enter such a contract in the absence of legal enforcement...."). In comparison, copyright law "promote[s] the progress of science and useful arts", U.S. Const. Art. I § 8, and trademark law protects consumers from confusion, 15 U.S.C. § 1125(a)(1)(A). In all of these cases, and unlike in the prior restraint cases, the purpose of the putative legal rules is **unrelated to suppressing speech**.

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[4] The California Supreme Court's opinion in *Bunner* is highly instructive, in that offers a trenchant criticism of the argument of the Defendants and their *amici* herein, where they just assume that any injunction enjoining a publication must constitute an unlawful prior restraint without actually offering any reasoned analysis of what the Supreme Court's prior restraint cases actually forbid. *Bunner* writes of two cases cited by Defendants: "*Procter & Gamble* [*Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996)] is less than helpful because the Sixth Circuit Court of Appeals apparently assumed the order [enjoining a newspaper from publishing information obtained from discovery subject to a protective order in a civil case] was a prior restraint and offered no analysis to support its assumption. For this reason, we also decline to adopt the reasoning of *Ford Motor Co. v. Lane*...[,] 67 F. Supp. 2d 745 [(E.D.Mich.1999) (holding enjoining publication of a trade secret is a prior restraint)]. *Bunner*, 75 P.3d at 19.

Accordingly, Defendants' invocations of the "prior restraint" doctrine are completely irrelevant to this case. That doctrine simply does not apply to any injunction entered against any form of expression under any circumstances. Rather, it applies to effectively bar two forms of official censorship: the government order enjoining "dangerous" speech, and the permit scheme designating an official censor. This case involves the enforcement of a contractual promise, which falls into neither of those categories. Enforcing the Settlement Agreement should not be analyzed as a prior restraint.[5]

2. The Preliminary Injunction Sought Here Would Be Consistent With the Cases Governing Contractual Confidentiality Agreements.

Importantly, the U.S. Supreme Court has never held that enforcing a contractual confidentiality provision should be analyzed as a prior restraint.

When confronted with asserted conflicts between the First Amendment and contractual enforcement, the U.S. Supreme Court has **enforced contracts**.

Cohen v. Cowles Media Co., 501 U.S. 663 (1991), upholds, against a First Amendment challenge, a breach of contract suit by a journalist's source, where the source contracted for anonymity with the journalist, and the journalist later published his identity in violation of the contract. The defendants in *Cohen* argued the same thing the Defendants argue here: that the

[5] Mary Trump, after pages of briefing in which she sets forth the principles of prior restraint law in an absolutist fashion as if they apply to any injunction against any expressive activity, admits that a number of cases have declined to apply the prior restraint doctrine with respect to various forms of less-protected and unprotected speech. *Mary Trump Bf.* at 28. However, she characterizes these as narrow "exceptions" to the prior restraint doctrine. In doing so, she ignores that the prior restraint doctrine is itself narrow, and in fact has only been applied by the Supreme Court in the two narrow sets of circumstances (content-based suppression of "dangerous" speech, and standardless permitting schemes) identified in this brief.

journalist lawfully obtained the plaintiff's identity and therefore had a First Amendment right to publish it. However, the Court rejected that argument:

> This case, however, is not controlled by this line of cases but, rather, by the equally well-established line of decisions holding that **generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news**. As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source.... The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws.... Similarly, the media must obey the National Labor Relations Act..., and the Fair Labor Standards Act...; may not restrain trade in violation of the antitrust laws...; and must pay non-discriminatory taxes.... It is, therefore, beyond dispute that "[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." ... Accordingly, enforcement of such general laws against the press is not

> subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

Id. at 669-670 (emphasis added).

The rules that Robert Trump is seeking to enforce are all generally applicable: rules regarding the enforceability of contracts, and rules regarding the availability of injunctive relief. *Cowles* indicates that generally applicable contract laws are not suspended merely because the case involves expressive activity.

In *Snepp v. United States*, 444 U.S. 507 (1980), the Court held that an employment agreement signed by a former CIA agent requiring a prepublication review before he published any book about his service, and imposing a constructive trust on the sale proceeds if no prepublication review was obtained, was enforceable.[6] Once again, when faced with a case where a party has contracted away First Amendment rights, the Court sided in favor of enforcing the contract.

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), though not expressly a contract case, is instructive as well. In *Rhinehart*, the Court held that a discovery protective order prohibiting dissemination of confidential discovery (i.e., an order that Defendants would surely categorize as a "prior restraint") could be properly imposed against a newspaper which was a party to a lawsuit. The Court did not analyze the protective order as a prior restraint at all. Rather, the Court held that the discovery rule should receive "no heightened First Amendment scrutiny", *id.* at 36, and upheld the law on the ground that the rule of procedure authorizing protective orders

[6] Importantly, the holding in *Snepp* turns on the fact that Mr. Snepp had contracted away his First Amendment rights. Absent such a contract, the Court has held that imposing a constructive trust on book proceeds is unconstitutional. *Simon & Schuster, Inc. v. Members of the New York Crime Victims Board*, 502 U.S. 105, 118 (1991) (striking down New York statute imposing constructive trust on proceeds of books written by former criminals).

"furthers a substantial governmental interest unrelated to the suppression of expression", *id.* at 35. *Rhinehart* shows that so long as a legal rule that is applied to speakers and which authorizes a court order prohibiting speech is generally applicable and justified on some legitimate basis other than the suppression of speech, it is not only not a prior restraint but will not be subjected to First Amendment scrutiny at all.

Mary Trump cites to a number of lower court cases which she contends involved constitutional strictures imposed on the enforcement of agreements not to speak. However, Mary Trump misconstrues these cases.

Mary Trump cites *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996), where the court held that *Business Week* could not be enjoined from publishing sealed discovery documents that it received from the public relations department of one of the parties, and which *Business Week* had no idea to be under any sort of protective order. However, *Procter & Gamble* can offer no help to Mary Trump, as the entire premise of *Procter & Gamble*'s holding is that *Business Week* was an independent publication that undertook no obligations under the protective order. Of course, in the case at bar, Mary Trump voluntarily executed the 2001 Settlement Agreement, and the *Procter & Gamble* court noted, citing *Rhinehart*, that **parties'** stipulated protective orders to protect the secrecy of documents produced in discovery **are binding**. *Procter & Gamble*, 78 F.3d at 225.

Mary Trump also cites *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253 (2d Cir. 2018), but it too does not support Mary Trump's position. In fact, *Ronnie Van Zant* holds precisely the opposite of what Defendants claim: the case **rejects** the argument that an injunction based on a contractual agreement not to speak is analyzed as a prior restraint under the First Amendment. In *Ronnie Van Zant*, members of the rock band Lynyrd Skynyrd had died in a

tragic plane crash. The surviving members, and the heirs of those who died, litigated whether the surviving members could carry on under the band's name. The litigation was settled, and the settlement agreement contained, among other terms, an unusual provision permitting any signatory to tell the story of their experiences in the band in a movie, but prohibiting any party from authorizing a movie that purported to be a history of the band. One of the band members (Pyle) then entered into an agreement with Cleopatra Records to cooperate in the making of a film, which was then made and marketed as the true story of the band's plane crash. The trial court entered an injunction against both Pyle and Cleopatra enjoining the distribution of the film.

The court started its analysis by flatly rejecting the argument the Defendants and their *amici* make here: "The Defendants, Appellants here, supported by several journalism and entertainment organizations, see this case as a classic First Amendment violation involving an unlawful prior restraint. It is not." *Id.* at 257. Instead, the court acknowledged First Amendment concerns but applied a standard of review where it would merely "examine with care" the terms of the contract. *Id.* at 258. In the end, rather than making a grand ruling on First Amendment law, the court punted with an ordinary ruling on contractual specific performance: "An initial, **and ultimately dispositive**, question on this appeal is whether the terms of the [agreement], implemented by the District Court's injunction, are inconsistent, or at least insufficiently specific, and hence unenforceable because they permit what they also appear to prohibit. Pyle is permitted to make a movie that describes his experiences with Lynyrd Skynyrd and to refer to the band, but he may not make a movie that is a history of the band." *Id.* (emphasis added).

In other words, *Ronnie Van Zant*: (1) rejects all of the argumentation of the Defendants and their *amici* herein that an injunction based on a contract not to speak is a prior restraint; (2) holds merely that in such cases the contract should be "examine[d] with care"; and (3) ultimately

finds that the contract at issue in that case was too vague and self-contradictory to support an injunction against the film. The 2001 Settlement Agreement at issue here does not suffer from the defects identified in *Ronnie Van Zant*: its terms are definite, not vague, and they expressly set forth a clear intention of the parties that Mary Trump and her agents can be enjoined.

Mary Trump claims *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981), stands for the proposition that even if an agreement was valid at the time it was entered into, its subsequent enforcement could constitute a prior restraint. *Mary Trump Bf.* at 25. This, however, is a gross mischaracterization of *National Polymer Products*. In *National Polymer Products*, the parties agreed to a protective order during discovery, but some of the protected evidence was later presented in open court at trial. The trial court nonetheless threatened to sanction a party for presenting some of the evidence produced in discovery, including already publicly disseminated evidence, at an academic conference after the case had concluded. The court held that restraining that post-trial use of evidence that had been protected for purposes of confidentiality during a court case and some of which had been publicly aired during trial could constitute a prior restraint, because the trial court had gone far beyond the terms of the parties' agreement. *National Polymer Products* does not hold that any time an agreement not to speak is enforced, the prior restraint doctrine applies; the case's holding is tied to its unique facts.

Mary Trump cites some overbroad rhetoric in *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2d Cir. 1963), which implies that contractual agreements to suppress speech are prior restraints. As noted above, U.S. Supreme Court cases make clear that this is not the law. In fact, subsequent cases have made clear that the *Crosby* case stands for nothing more than the established rule that a federal court cannot enjoin a libel. Because the parties stipulated to enjoin libelous speech, the

stipulation was void *ab initio*, and the District Court was not permitted to later enforce its order. *See Northridge Church v. Charter Township of Plymouth*, 647 F.3d 606 (6th Cir. 2011) ("[T]he court in *Crosby* set aside the order because "[t]he court was without power to make such an order." ... Therefore, *Crosby* rested on a unique jurisdictional issue that rendered the court entering the order without power to do so."); *see also Securities & Exchange Commission v. Allaire*, 2019 WL 6114484 at *3 (S.D.N.Y. Nov. 18, 2019) (stating that "*Crosby* turned on a unique jurisdictional issue" and suggesting that even the jurisdictional holding of *Crosby* has been undermined by later precedent).[7]

Denise Rich Songs, Inc. v. Hester, 2003 WL 25668881 (N.Y. Supr. Ct. Sep. 22, 2003), cited by Mary Trump, denies a preliminary injunction where the parties had agreed to maintain the confidentiality of certain trade secrets and confidential information as part of a songwriting contract, and the defendant disseminated information about a completely different subject matter, Denise Rich's illegal campaign contributions, to the press. The court also accepted the defendant's denial that he had made any disparaging statements about Ms. Rich that would violate the contract's non-disparagement clause. In a *dictum*, the court also said that an injunction would also constitute a prior restraint, though the court did not even analyze the request for injunctive relief under that standard. The unpublished trial court order is certainly not persuasive authority that injunctions that are consented to in a contract are analyzed as prior restraints.

[7] *Massartic v. Pinter*, 2014 WL 11443900, at *2 (C.D. Cal. Mar. 26, 2014), also cited by Mary Trump, is, like *Crosby*, premised on the notion that a federal court cannot enjoin a libel. *Id.* at *3 (citing rule against anti-libel injunctions). In any event, the *Massartic* court identified numerous procedural defects with the application for an injunction in that case, in that the papers did not offer any justification for the injunction and in fact did not even identify whether the application was opposed. *Massartic* is thus completely distinguishable.

Brammer v. KB Home Lone Star, L.P., 114 S.W.3d 101 (Tex. App. 2003), is along the same lines: the opinion mentions the prior restraint doctrine, but is decided on traditional equitable principles, not the prior restraint standard: the court holds that a plaintiff seeking an injunction to enforce a non-disclosure clause must show irreparable injury and that the plaintiff in *Brammer*, a developer suing home buyers who disparaged the homes that it had built, had not made a sufficient showing. *Id.* at 109. Further, the court held that a waiver of constitutional rights had to be unambiguous. *Id.* at 110.

Importantly, *Brammer* also **upheld** a content-neutral injunction against the appellants. The trial court had ordered that the appellants must not hold demonstrations that block ingress and egress within 600 feet of the homes, and could not use sound amplification equipment. The *Brammer* opinion analyzes these restrictions as content neutral regulations and **not** "prior restraints", and upholds them. *Id.* at 113.[8]

There is no constitutional bar to an injunction enjoining a book that a party lawfully contracted never to write. At most, there is simply a heightened standard for the Court to examine the parties' agreement.

While Defendants, here, throw a plethora of cases at this Court, hoping one will stick to the wall, in the end, this is simply not a constitutional prior restraint case. It is a mere contractual dispute.

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[8] Mary Trump cites *Globe International, Inc. v. National Enquirer, Inc.*, 1999 WL 727232, at *1 (C.D. Cal. Jan. 25, 1999), a fight between two tabloids over the right to first publication of an interview with a celebrity's alleged paramour, Suzen Johnson. However, whatever *Globe International* has to say about publishers, the opinion did not reach the issue of whether Ms. Johnson could be enjoined because she had signed a right of first publication agreement with the *Globe* (which would be the analogous issue to the one raised by Mary Trump here). Ms. Johnson had not received adequate notice of the proceedings. *Id.* at *3.

3. There Is No Exception To the General Principle of Contractual Enforcement for "Electorally Relevant" Books

Mary Trump makes one last First Amendment argument that must be addressed. She says that the relevance of her book to the 2020 election must automatically override any rules of contract law that might preclude her from publishing it. This argument is without merit.

First, it fails for a procedural reason. Mary Trump has not actually offered the content of her book into evidence in this proceeding. We know, of course, what Simon & Schuster, hyping the book, claims will be contained in it. Those admissions, presumably made with Mary Trump's cooperation, are sufficient to establish that Mary Trump is threatening to violate her contractual promise not to publish any book or memoir containing descriptions or accounts of her "relationship" with Proponents.

But this is different. Unlike Robert Trump, who must rely on what Mary Trump and Simon & Schuster are threatening to do, Mary Trump has an actual copy of her manuscript. She has in her possession evidence that would actually be crucial to resolving the issue of whether her writings are relevant to the 2020 election, an issue that she claims is crucial to her First Amendment arguments. Nonetheless, she has not presented, in any manner, a copy of the manuscript to the Court, or provided a copy to Robert Trump.

Under well-established law, when a party- offers weaker evidence while she has stronger evidence within her control, the other side may argue for an adverse inference that the unproduced evidence would be harmful to her position. *See, e.g., Clifton v. United States*, 45 U.S. (4 How.) 242, 274 (1846) (drawing adverse inference against party who had records of actual cost of goods sold and failed to produce them instead offering oral testimony; other party entitled to presumption that "if produced, it would give a complexion to the case at least

unfavorable, if not directly adverse, to the interest of the party"); *Jean-Pierre v. Touro College*, 40 A.D.3d 819, 820 (2d Dep't 2007) (criteria for adverse inference: "[the] document in question actually exists, that it is under the opponent's control, and that there is no reasonable explanation for failing to produce it").

Mary Trump failed to submit her manuscript to the Court or to Robert Trump, despite it being within her possession, custody, and control. This Court should infer that it does not contain electorally relevant information.

Independently, Mary Trump's proposed "electoral relevance" exception to contract law, which has never been recognized in a reported case, is unworkable. If any book that is "relevant" to an election may be published under the First Amendment, this would essentially mean that politicians have no legally cognizable expectations of confidentiality at all. After all, if a politician shares deep secrets about his or her character with a psychotherapist under cloak of confidentiality, could the therapist not attempt to publish a book in an election year and argue, as Mary Trump does, that it is "in the interest of the public to know the character of their leaders"? *See Mary Trump Bf.* at 23. A doctor, or a lawyer, or literally anyone who formed a confidential relationship with any politician could argue the same thing. The "electoral relevance" standard simply does not work in practice, nor has it ever been recognized in American jurisprudence.

The law is in fact clear that a therapist who attempts to breach his or her contractual duty of confidentiality and publish a book containing confidential therapy sessions can be enjoined from doing so. *Doe v. Roe*, 42 A.D.2d 559, 560 (1st Dep't 1973) (affirming entry of preliminary injunction against therapist's publication of "commercial book" and holding it "would not constitute an invalid prior restraint upon publication").[9]

[9] Mary Trump distinguishes *Doe* because the book there did not contain speech on a

Mary Trump analogizes to *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019), which held that while a non-disparagement provision of a settlement agreement in police brutality litigation was a waiver of First Amendment rights, and such waivers can be enforceable, *see id.* at 223 ("It is well-settled that a person may choose to waive certain constitutional rights pursuant to a contract with the government."), the non-disparagement provision would not be enforced to allow the city to withhold its settlement payments because Ms. Overbey had posted comments on online message boards commenting about her case. The court held that such waivers are enforceable if two conditions are met: "First, it was made knowingly and voluntarily... Second, under the circumstances, the interest in enforcing the waiver is not outweighed by a relevant public policy that would be harmed by enforcement." *Id.*

The court declined to enforce the provision based on the second prong of the test: the government could not enforce provisions where it was using its power to insist on non-disclosure in police brutality cases in order to cover up official misconduct. *Id.* at 224 ("[W]hen the government (1) makes a police-misconduct claimant's silence about her claims a condition of settlement; (2) obtains the claimant's promise of silence; (3) retains for itself the unilateral ability to determine whether the claimant has broken her promise; and (4) enforces the claimant's promise by, in essence, holding her civilly liable to itself, there can be no serious doubt that the government has used its power in an effort to curb speech that is not to its liking."). *Overbey* is thus a very limited holding: it does not invalidate all contracts not to speak, or even all contracts where someone might agree not to speak on an issue of public interest. Rather, it is a holding

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matter of significant public importance like Mary Trump's book supposedly does. However, Mary Trump does not get this from the opinion, which not only does not discuss whether the book is politically relevant, but in fact **broadens** the trial court injunction to include even publication of information about the patient within scientific publications, which the trial court had excluded. In other words, the *Doe* court did not consider the possible importance of the speech to be a justification for the therapist violating her confidentiality obligations.

that the government cannot use its power to require that settling plaintiffs give up their right to speak on issues of serious government misconduct.

Overbey thus is distinguishable from the facts here. Here, the 2001 Settlement Agreement concerns family relationships, not official misconduct. It was entered into by private parties, not the government. The agreement does not contain any penalty or liquidated damages clause requiring Mary Trump to, for instance, return half of the financial consideration she received. *Overbey* calls for a very limited review of contracts not to speak; a review that the Settlement Agreement easily satisfies.

ii. New York State Constitutional Standards.

In addition to her federal constitutional arguments, Mary Trump argues that the New York Constitution precludes injunctive relief in this case. Her New York state constitutional arguments also are without merit.

At least one New York appellate court has stated that this is clear-cut: "There can be little doubt that under the law of the State of New York and in a proper case, the contract of private parties to retain in confidence matter which should be kept in confidence will be enforced by injunction...." *MacDonald v. Clinger*, 84 A.D.2d 482, 486 (4th Dep't 1982) (quoting *Doe v. Roe*, 93 Misc. 2d 201, 210 (N.Y. Cty. Supr. Ct. 1977)).

1. New York's Governmental Prior Restraint Rule Works No Differently than the Federal Rule, and Has Never Been Applied to a Party Who Agreed to a Prior Restraint in a Contract.

Mary Trump's argument based on state constitutional law assumes the conclusion. Because cases have recognized that New York state courts reserve the right to interpret the New

York Constitution's free speech clause as broader than the U.S. Constitution's First Amendment, she argues, the New York courts must apply a stricter standard for the issuance of preliminary injunctions against parties who agree to limit their speech rights and consent to such injunctions, as Mary Trump did. However, Mary Trump does not offer this Court any analysis to support this argument.

First, notably, the New York Constitution's free speech clause does not by its terms appear to require a stricter rule with respect to contractual injunction cases than is applied under the First Amendment. It reads as follows: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. Const. Art. I § 8. This language has no application to the facts of this case: (1) Mary Trump is not being restricted from expressing her political sentiments, only from discussing certain familial relationships that she agreed not to discuss; (2) the injunction seeks to hold Mary Trump responsible for abusing her free speech rights by publishing a book she agreed not to publish; and (3) there is no New York statute or local ordinance or state or city regulation involved in this case, merely the enforcement of a private contract. There would be no reason, **in this case**, to interpret the language of the New York Constitution as providing Mary Trump with a broader free speech right to publish her book.

Indeed, California's Constitution has identical language, Cal. Const. Art. I § 2(a), and while California courts have the same power that New York courts have to find a broader speech right in the state constitution, the California Supreme Court in *Bunner* rejected the exact argument made by Mary Trump here, holding that the California Constitution was "coterminous"

with the U.S. Constitution on the issue of the treatment of content-neutral injunctions. *Bunner*, 75 P.3d at 19.

Mary Trump cites to no case that holds that content-neutral principles of contract law that permit enforcement of clauses limiting parties' speech are considered "prior restraints" or given any special scrutiny under New York constitutional law beyond what is available under the First Amendment. She has thus not established that with respect to this aspect of the law, the New York Constitution offers any broader protection.

2. There Is No New York Constitutional Requirement that an Order Enjoining Speech Pursuant to a Private Contractual Agreement Be "In the Public Interest".

Defendants argue there is a requirement under New York law that an injunction entered against speech inflict a "public injury". This is incorrect, and the cases that they cite are inapplicable here.

Defendants obtain the alleged "public injury" requirement from *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 558 (1986), a case overturning an injunction entered against an adult bookstore as an alleged public nuisance. Here is what *Cloud Books* actually says about "public injury": "It is established in this State that the government may not impose a prior restraint on freedom of expression **to silence an unpopular view**, absent a showing on the record that such expression will immediately and irreparably create public injury" *Id.* (emphasis added).

This, of course, is entirely consistent with what the First Amendment requires and which is discussed in this brief. Recall, the prior restraint doctrine applies to two categories of governmental action, and one is a **content-based** injunction against speech that is considered

"dangerous". The Court of Appeals in *Cloud Books* is essentially saying the same thing: that content-based restraints on expression are subject to its heightened, "public injury" requirement.

Cloud Books, however, has nothing to do with the enforcement of a contract provision, which is content neutral. This can be further seen by reviewing the antecedent case cited by *Cloud Books: East Meadow Community Concerts Ass'n v. Board of Education*, 18 N.Y.2d 129, 134 (1966). *East Meadow Community Concerts* involved a local school board's decision to bar a performance of the folk singer Pete Seeger, because of his left-wing and anti-war views.

This "public injury" rule has been cited in only two other published cases: *Madole v. Barnes*, 20 N.Y.2d 169, 174-75 (1967), which held that denying a white nationalist group a permit to hold a demonstration at a public building was unconstitutional because no public injury was shown (again, clearly a content-based prior restraint), and *Porco v. Lifetime Entertainment Services*, 116 A.D.3d 1264 (3d Dep't 2004), where the public injury test was invoked as an alternate ground, along with a slew of federal First Amendment arguments, for refusing to enjoin a film that told the true crime story of the plaintiff, who murdered his father and attempted to murder his mother, on the asserted grounds that it violated the murderer's rights under CPLR §§ 50 & 51.

Porco is an extreme case, which is inapplicable here for a number of reasons. First, Mary Trump agreed not to publish a book; she is not being sued for violating Robert Trump's right to commercially exploit his name and likeness. Second, the plaintiff in *Porco* was seeking equitable relief but had massive issues with unclean hands (and enforcement of his right of publicity could have run afoul of one of the most famous case holdings in the history of this state's jurisprudence, *Riggs v. Palmer*, 115 N.Y. 506, 511 (1889) (holding defendant who murdered his grandfather could not inherit under his will: "No one shall be permitted to... take

advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.")). Third, the discussion of the public injury rule is a *dictum*, as there are several other reasons offered for why Mr. Porco was not entitled to his injunction. In any event, *Porco* does not even analyze the issue of content-neutrality, which was central to *Cloud Books* and *East Meadow Community Concerts*. Because of the Court of Appeals' express statements limiting the "public injury" requirement to content-based prior restraints, *Porco* cannot be read as providing for any broader legal rule here.

b. The 2001 Settlement Agreement Is Valid And Subsisting Under New York Law.

In addition to constitutional claims, Mary Trump challenges the validity of her Settlement Agreement under New York contract law. None of these arguments have merit either.

Mary Trump scrupulously avoids or minimizes several important facts in her briefing but which are undisputed: (1) the Settlement Agreement settled multiple acrimonious lawsuits and included the payment of significant consideration to Mary Trump; (2) the parties agreed to mutual confidentiality provisions; (3) the mutual provisions include an express consent to an injunction against Mary Trump and any agent of hers, and (4) the mutual provisions contain an express admission that a breach of the confidentiality agreement would result in irreparable harm.

i. There Was No "Fraud" in the Inducement of the Contract, And Mary Trump Has No Valid Basis to Rescind Her Confidentiality Agreement.

Mary Trump's claim that she is entitled to escape her confidentiality obligation on the ground of fraud is absurd. First, Mary Trump and the other Objectants were represented by able

counsel: John J. Barnosky, who has been recognized as a top trusts and estates lawyer. *Settlement Agreement* at 4; *see also Settlement Agreement* at 5 ("WHEREAS all interested parties have been represented by counsel...."). The following is a partial list of Mr. Barnosky's accomplishments from the "Best Lawyers" website:

> Mr. Barnosky is the past chair of the Estate and Trust Law Committee of the Nassau County Bar Association. He served as Chair of the 4,500 member Estate and Trust Law Section of the New York State Bar Association and was a member of the Association's Task Force on Court Reorganization.
>
> In 2016, the publication Chambers High Net Worth recognized Mr. Barnosky as a Leading Individual, NY Private Wealth: Disputes.
>
> He has been selected for inclusion in The Best Lawyers in America annually since 1999 in the fields of Litigation-Trusts & Estates and Trusts & Estates.
>
> In 2017, he was named a "Lawyer of the Year" by the publication.
>
> He was included in The Best of the U.S.'s 2008 List of the Best Lawyers in the U.S.
>
> He was selected for the 2007- 2016 New York Super Lawyers-Metro lists (Estate & Trust Litigation) and was named one of the Best Trusts & Estates Lawyers in America by American Lawyer in the November 2004 issue.

https://www.bestlawyers.com/lawyers/john-j-barnosky/30937 (viewed Jul. 5, 2020).

It is highly unlikely that a lawyer as accomplished as Mr. Barnosky would have ever advised a client to settle a case based on fraudulent valuations, where alleged fraud could have been discovered by simply looking at the sale prices of some comparable properties (which is

Mary Trump's fraud claim, based entirely on the third-hand assertions of a *New York Times* story about the family's properties). For Mary Trump's theory to be true, Mr. Barnosky would have to have been incompetent.

On the other hand, it is very likely that a skilled trusts and estates litigator such as Mr. Barnosky would advise clients that a will contest claim is always difficult to prove and expensive to litigate, and that it often makes more sense to accept a substantial settlement, even if it is somewhat less than what the Objectants wanted.

Importantly, for Mary Trump's fraud allegation to have any credibility, she must at the very least need to articulate why she supposedly was taken in by what she claims to be a blatant and obvious fraud, despite being represented by an expert trusts and estates lawyer who surely understood the warning signs to look for with respect to fraudulent claims in will contest litigation, and the correct approaches for countering any such fraud. One single sentence in her affidavit, stating that she would not have signed if she had known the purported "actual" values of the properties, does not even come close to the required compelling evidence of a fraud that she is required to prove.

The Settlement Agreement further contains language confirming that each party has reviewed the agreement and consulted with their attorney: "The parties agree that each has had sufficient opportunity to review this Agreement and Stipulation with their attorney and each executes this instrument after due consideration and of his or her own volition." *Settlement Agreement* ¶ 22 at 18.

The Agreement continues: "The execution of this Agreement and Stipulation is being completed on a voluntary basis and each party represents that they were under no compulsion to execute this agreement and they have been fully advised throughout the negotiations to resolve

their differences between the parties as to all negotiations and representations made to each other as well as to the Court." *Settlement Agreement* ¶ 24 at 18.

These provisions render Mary Trump's position even more unworthy of belief. She asks this Court to believe that her expert trusts and estates attorney not only failed to make basic inquiries about the valuation of properties before settling, but also had her sign several positions that describe in florid terms the legal advice that she had received.

"To plead a claim for fraud in the inducement or fraudulent concealment, plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations." *ACA Financial Guaranty Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1044 (2015). Under these circumstances, Mary's claim—that she acted in justifiable reliance on representations made by the Proponents when settling hotly contested litigation against them, while apparently ignoring the advice of her able counsel, all the while signing an agreement that said she received full and complete legal advice from her lawyers and entered the settlement voluntarily—is simply not credible.[10]

Independently, Mary Trump's fraud claim fails for another reason as well: she is **not** claiming that she either did not understand the **confidentiality** obligation or was fraudulently induced to enter into **that** provision. To the contrary, her fraud claims are directed solely to the

[10] Mary Trump argues that the claims were merely "financial" and therefore the confidentiality terms were not essential to the Settlement Agreement. This is belied by the Settlement Agreement itself, which lists the confidentiality terms up front, before the financial terms, rather than back in the contractual boilerplate. In addition, however, the allegations in the will contest cases were **personal** as well as financial, including allegations that Mary Trump's relatives cut her out of wills, used undue influence to overcome the will of Proponents' father, Fred C. Trump, and committed many personal wrongs against her. A hint of this can even be seen in the advance publicity for her book, where she apparently accuses Proponents of causing the tragic, early death of her own father. She made **personal** claims based on the relationships between her and her relatives, and aired those claims publicly. Family confidentiality was at the essence of the Settlement Agreement.

financial terms of the Settlement Agreement. "In New York, a party who entered into a contract induced by fraudulent representations had three remedies open to him. 1). He might rescind the contract and sue in an action at law to recover the consideration with which he had parted. To maintain such action he was required to restore or offer to restore whatever he had received. 2). He might bring an action in equity to rescind the contract and in that action have full relief.... 3). He might retain what he had received and bring an action at law to recover the damages sustained." *Fitzgerald v. Title Guarantee & Trust Co.*, 290 N.Y. 376, 378-79 (1943).

Mary is seeking to do something entirely different: (1) keep all the benefits of the contract while (2) rescinding a separate portion of the agreement (the confidentiality clause) that she does not contend she was fraudulently induced to enter into. There is no law that supports that option. The law is clear that she cannot do this. *See, e.g., Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007) (party alleging fraud in the inducement of contract is nonetheless bound to contractual jury trial waiver where there was no evidence that party was fraudulently induced into the waiver).[11]

ii. The Settlement Agreement Bars the Book as the Defendants Have Described It.

Mary Trump makes a number of contractual interpretation arguments as to why the Settlement Agreement does not bar her writing a book about her relationship. None have merit.

"[W]hen the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein." *Nichols v. Nichols*, 306 N.Y. 490, 496 (1954). "[W]e are required to adjudicate their rights according to the unambiguous terms of the contract and

[11] Mary Trump cannot seriously contend that she did not understand the implications of the **confidentiality clause** she entered into. As Defendants' papers remind us *ad nauseam*, she is a "clinical psychologist" and therefore fully understands confidentiality obligations regarding family relationships.

therefore must give the words and phrases employed their plain meaning." *Laba v. Carey*, 29 N.Y.2d 302, 308 (1971).

The word "relationship", used in the context of the settlement of a legal dispute among family members, refers to the term's most natural meaning: kinship. *See* https://www.merriam-webster.com/dictionary/relationship (defining "relationship" as "the relation connecting or binding participants in a relationship: such as KINSHIP") (viewed Jul. 6, 2020). This is not ambiguous. What else would "relationship" mean? Mary Trump suggests it means "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". However, that would render the word "relationship" superfluous, because the other words of the confidentiality provision already provide that the parties will not comment about the litigation or the financial terms of the settlement. *American Express Bank Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 (1st Dep't 1990) ("A contract should be construed so as to give full meaning and effect to all of its provisions.").

Additionally, Mary Trump's interpretation does not make sense for another reason: it does not harmonize with the breadth of the media covered by the confidentiality provision. If the intention was merely to protect a few financial terms from public dissemination, why would the contract state that the parties 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", regarding the subject matter of the clause? *See Settlement Agreement* ¶ 2. Who writes a diary or memoir, or a fictionalized treatment, of the financial terms of a settlement agreement? The only interpretation of "relationship" that makes any sense is its most natural interpretation—it refers to Mary Trump's

familial relationships with the Proponents, which the parties contemplated might very well someday become the subject of a diary or memoir, whether fictionalized or not, and their suspicious were correct because Mary Trump is now attempting to do just that.

In the face of this, Mary Trump's attempts to rewrite the confidentiality clause are absurd. The fact that the provision does not contain magic words such as "each of", or refers to some corporate parties who were parties to the Settlement Agreement, does not negate the provision's obvious meaning. Further, Mary Trump points to what might have been a minor drafting error in Robert Trump's reciprocal obligation of confidentiality, where he might be prohibited from writing a memoir about one of the other Proponents. However, Mary Trump points to no authority that a minor drafting error in another provision of the contract invalidates a provision where the obligations are clear.[12]

Mary Trump also argues that the Settlement Agreement is unenforceable because one of the business entities that would have had to have given consent to her book, Apartment Management Associates, Inc., apparently has disbanded. *Mary Trump Bf.* at 40-41. Obviously, if she had the consent of the other parties to the agreement, she would have a reasonable argument that she is excused from obtaining the consent of an entity that no longer exists on grounds of impossibility. *See Kinzer Const. Co. v. State*, 125 N.Y.S. 46, 55 (N.Y. Ct. of Claims 1910) (conditions that "relate to an insignificant part of the contract... excuse performance only to the extent to which performance is impossible, and leave what has been done valid"). However, Mary Trump offers no argument or authority as to how that would serve to extinguish the separate rights that Robert Trump holds (or that his siblings: Maryanne and Donald hold), to

[12] Mary Trump also cites *Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 200 (2001), for the proposition that where parties intentionally omit terms from a contract, such terms should not be read into the contract by a court. However, Mary Trump has not established that these parties intentionally omitted anything from the Settlement Agreement.

give or withhold consent with respect to a book containing descriptions or accounts of Mary Trump's relationship with Proponents.

Finally, Mary Trump re-casts her excuse of performance argument (answered *infra*) as a contractual construction argument, contending that because Donald Trump has made a very few *de minimis* public comments about Mary Trump, and Robert Trump made one comment in support of his brother's Presidential campaign, Mary Trump can have this Court rewrite the contractual requirement that she get the Proponents' consent to publish a full-length book about her relationships with them. This argument makes no sense whatsoever.

Mary Trump is correct that course of performance evidence may be used to interpret a contract. If the parties' agreement seems to say one thing, but through the way they act in performing the contract, they clearly meant something else, courts may use that evidence to deduce what they actually agreed to. *Federal Insurance Co. v. American Insurance Co.*, 258 A.D.2d 39, 44 (1st Dep't 1999).

However, the material that Mary Trump cites to simply does not show that the parties understood the Settlement Agreement to permit tell-all books about the Objectants' family relationships with the Proponents, or vice-versa. Mary Trump cites to the following sources (*see Mary Trump Bf.* at 36)::

(1) An article in which President Trump discusses his mother and his sister, neither of whom were Objectants to the Settlement Agreement;

(2) An article in which President Trump jokes that he and his sister were switched at birth, but which does not discuss his relationship with Objectants;

(3) An article in which Robert Trump supports his brother Donald's run for President but does not discuss his relationship with Objectants;

(4) An anodyne comment by President Trump where he said he had a "good relationship" with Mary Trump's brother Fred Trump III (an Objectant);

(5) A comment by President Trump, stating generically that Mary Trump signed a non-disclosure agreement, but in no way commenting on his relationship with her; and

(6) A statement by President Trump that he was angry about the will contest lawsuits and was glad they settled, but not making any comment on his relationships with the Objectants.

None of this comes close to any party waiving their rights under the Settlement Agreement to obtain the consent of the other parties before publishing a tell-all book about their relationships, or for that matter, acting as if they had the right to publish a tell-all book about family relationships. All that Robert (the Plaintiff) did was voice his support for his brother's run for office. The remainder of the comments were not by Robert, and cannot demonstrate how Robert construes the Settlement Agreement. Even if they are considered, at most they show that *de minimis*, contentless, passing references to matters are not covered by the Settlement Agreement. The confidentiality clause specifically refers to books, diaries, memoirs, descriptions and accounts, not contentless passing references.

iii. The Agreement Is Sufficiently Clear to Constitute a Waiver of Mary Trump's Right to Write Her Book.

Mary Trump argues that because the contract does not specifically mention the magic words "First Amendment", it cannot constitute a valid waiver. This argument grossly misconstrues the law.

As noted above, several cases do require that contractual waivers of the right to speak be explicit and not vague.[13] However, there is nothing vague about what Mary Trump agreed not to do. Mary Trump agreed not to publish any descriptions or accounts of the litigation she settled, or her relationship with three family members. And she agreed not to do so in a list of different media forms, including books, diaries, and memoirs. This is a clear waiver.

What Mary Trump is attempting to do is create a sort of *Miranda* warning for confidentiality agreements, where every party to such an agreement must acknowledge a set of warnings that they are specifically waiving rights under the First Amendment. This is a preposterous requirement, not called for in any published case, which would result in millions of confidentiality agreements being invalidated. This Court should resist Defendants' urgings to create such a new requirement in the law.

The Connecticut Supreme Court discussed the governing cases and rejected Mary Trump's "must mention the First Amendment specifically" argument: "We are persuaded by the weight of authority that an agreement that restricts speech, but that does not expressly refer to first amendment rights, constitutes a valid waiver of those rights, as long as the waiver was intelligent and voluntary. As the[] cases recognize, when an agreement clearly sets forth the restrictions on constitutionally protected speech, the talismanic recital of the words 'first amendment' would not add materially to the party's understanding of the right being waived." *Perricone v. Perricone*, 972 A.2d 666, 682 (Conn. 2009).

As the Court said in *Perricone*, "in determining whether a waiver of first amendment rights was intelligent and voluntary, the court should consider whether the parties to the contract

[13] Notably, the fact that this rule exists refutes Mary Trump's claim that agreements not to speak about issues of public concern are never enforceable. If such agreements were never enforceable, there would be no need for a "clear waiver" rule.

had relative bargaining equality, whether they negotiated the terms of the contract, whether the party seeking to avoid the waiver was advised by competent counsel and the extent to which that party has benefited from the agreement". *Id.*

Here, the Settlement Agreement was negotiated among parties represented by highly competent litigation counsel, and each received financial benefits from the agreement as well as the settlement of multiple acrimonious lawsuits, and a confidentiality agreement that applied to both sides. The provision is clear as to what Mary Trump could not do: publish any book, diary, or memoir containing descriptions or accounts of her relationships with three of her family members. She made a valid waiver of her First Amendment rights.

iv. The Settlement Agreement Has Not Expired.

Mary Trump argues that the Settlement Agreement's confidentiality clause must be interpreted as time-limited, and further argues that whatever a reasonable time limit on the provision might be, it has expired. Neither of these arguments has merit.

First, the principle where a contract will be construed as containing some form of time limitation is nothing more than a contract construction guideline. As Mary Trump concedes, if the parties agree to a perpetual obligation, they can do so. *Mary Trump Bf.* at 43.

The 2001 Settlement Agreement contains several provisions that indicate there would be no expiration date on the confidentiality obligation. First, the purpose clauses include the statement that it is intended to be a "global" settlement, i.e., a settlement of all of the parties' disputes. *Settlement Agreement* at 5. Second, the confidentiality provisions are the very first executory provisions in the agreement, even before the financial terms, thereby confirming their importance to the agreement. *Settlement Agreement* at 5 *et seq.* Third, the confidentiality provisions themselves are comprehensive, repeatedly saying that they apply to "any" memoir or

diary, "any" book, and "any" court proceeding. *Settlement Agreement* ¶¶ 2-3. Fourth, the parties agreed to mutual general releases, i.e., releases that would run in perpetuity. *Settlement Agreement* ¶ 18. Fifth, the Settlement Agreement was made binding on heirs, successors, assigns, administrators, and executors of the parties. *Settlement Agreement* ¶ 21. Sixth, the Settlement Agreement provided that Queens County Surrogate's Court would retain jurisdiction to implement and carry out the terms of the agreement. *Settlement Agreement* ¶ 25. And seventh, the parties provided that the agreement could only be modified by a signed writing. *Settlement Agreement* ¶ 26.

Mary Trump's claim that this sort of confidentiality provision should be time-limited is quite novel. While commercial non-disclosure agreements are sometimes subjected to reasonable time limits, clauses that prohibit parties from personally disparaging each other often are not. "Although the term of the consulting agreement itself was only three years, the nondisparagement clause is by its terms perpetual, which appears to be common..., and, so far as we are aware, unexceptionable." *E.E.O.C. v. Severn Trent Services*, 358 F.3d 438, 440-41 (7th Cir. 2004); *see In re Holcomb Health Care Services*, 2008 WL 4546261 at *8 (Bankr. M.D. Tenn. Jun. 20, 2008) (explaining holding of *Severn Trent*: "In other words, where the parties freely negotiated, in conjunction with their settlement agreement, a mutually enforceable anti-disparagement provision, the court has no basis to set that provision aside.").

While there are no New York cases on point on the inclusion of perpetual clauses prohibiting personal or familial disparagement in settlement agreements signed by relatives, it is clearly the policy of New York State that confidentiality in family relationships is entitled to perpetual protection. This can be seen in *Prink v. Rockefeller Center, Inc.*, 48 N.Y.2d 309, 314

(1979), where the Court of Appeals held that the spousal privilege survived even the death of a spouse.

This construction makes sense given the nature of the Settlement Agreement. As Mary Trump concedes, there was extensive publicity regarding the will contest and Nassau County actions between the parties to the Settlement Agreement. The parties had a reasonable basis to seek any further airing of private family matters in the New York press. Having lived through it once, they did not wish to live through it again. Thus, no time limitation was attached to the mutual confidentiality restrictions in the Settlement Agreement.

The cases cited by Mary Trump, which hold that people may not be bound to perpetual **commercial** relationships absent clear contractual intent, are thus distinguishable. *Ketchum v. Hall Syndicate, Inc.*, 37 Misc. 2d 693, 699 (N.Y. Cty. Supr. Ct. 1962); *Compania Embotelladora del Pacifico, S.A. v. Pepsi Cola Co.*, 607 F. Supp. 2d 600, 603 (S.D.N.Y. 2009) (indefinitely renewable agreement to supply comic strips for syndication); (perpetual soft drink bottling contract); *CNH Industrial N.V. v. Reese*, 138 S. Ct. 761, 763 (2018) (collective bargaining agreement).

Beter v. Murdoch, 2018 WL 3323162 at *8 (S.D.N.Y. Jun. 22, 2018), the one case Mary Trump cites that at least involves some sort of a confidentiality agreement, involved a time-barred claim for breach of contract based on the supposed breach of a contract by a newspaper publisher not to disclose the name of its source. Because the claim was time-barred (and, the court also noted, may have even been barred by the Statute of Frauds), the short discussion about the duration of the contract is a *dictum*. In any event, the *Beter* court did not set forth any of the terms of the agreement at issue, so the opinion has little informative to say about the issue of when a contract will be construed to run in perpetuity.

Additionally, even if a time limitation were to be implied into the Settlement Agreement, it should be related to what the parties were attempting to accomplish in the confidentiality clauses. These clauses were a response to the publicity that the family's legal disputes had received, which in turn resulted from the fact that Donald Trump was a famous real estate developer and celebrity in New York, Fred C. Trump had been a famous real estate developer as well, and Maryanne Trump Barry was a federal judge. Thus, the reasonable duration of the confidentiality obligation would be that it might expire at such time that none of the remaining Proponents or Objectants were famous and thus the likelihood of the publication and wide dissemination of a book, diary, or memoir containing descriptions and accounts of either the litigation or family relationships would be low. This time limitation would be consistent with the case cited by Mary Trump, *Sanchez v. Department of Veterans Affairs*, 949 F.3d 734, 737 (Fed. Cir. 2020), which allowed a settlement agreement permitting a VA doctor to work a compressed work schedule and which did not specify an end date would be extended 16 years under the facts of that particular case: "Other circuits have examined the surrounding circumstances of the contract, in particular, 'the background against which it was executed,' to determine a reasonable time." *Id.* As an example, *Sanchez* in turn cited *Eagle-Picher Co. v. Mid-Continent Lead & Zinc Co.*, 209 F.2d 917, 918 (10th Cir. 1954), which held that an indefinite joint venture contract would be interpreted as requiring the joint venture to continue as long as it was profitable, because that was the object of the contract.

Here, the object of the confidentiality provisions was to stop members of a famous family from airing their private family disputes in public. Thus, the reasonable time period for confidentiality would be the time period when parties to the contract remain in the public eye.

Mary Trump's arguments for a shorter time limit are without merit. First, she argues that circumstances have changed because Donald Trump went into politics. However, that is a difference in degree and not of kind; Donald Trump was already a famous individual in 2001, and certainly a very prominent public figure whose family relationships would have been of interest to the public.

Additionally, Mary Trump's argument conflates two concepts: her right to comment on political issues, including her opinion of the President, and her claimed right to write about her family relationships. She only waived the latter asserted right (to publish a book about her family relationships), not the former.

Next, Mary Trump falsely states that she received no consideration for the confidentiality agreement—that clearly is untrue. She received significant financial consideration under the Settlement Agreement, as well as a mutual confidentiality promise from the Proponents.

Mary Trump proposes earlier termination dates, such as the dates when some businesses mentioned in the Settlement Agreement ceased trading. However, those are events completely divorced from the purpose of the confidentiality clause, which was not to afford some notional consent right to Apartment Management Associates, but to prevent members of the Trump family from airing their private family grievances in the press. It would be completely arbitrary to say that the closure of one or another business entity somehow extinguishes the confidentiality provision.

Notably, all of Mary Trump's arguments are centered on the supposed lack of any important interest of one party, Donald Trump, with respect to continued confidentiality. However, there are two other people who were Proponents and who hold confidentiality interests under the Settlement Agreement: Plaintiff Robert Trump and Maryanne Trump Barry. They

each hold interests in the confidentiality clause as well, and Mary has not made any showing that those interests were somehow terminated by the election of President Trump. Mary Trump made her promise to Robert Trump as well as to her uncle Donald; Plaintiff Robert Trump therefore has independent standing to assert his contractual right to withhold consent to a book about family relationships, irrespective of President Trump's ascension to office.

v. Mary Trump Is Not Excused from Performing the Settlement Agreement.

Mary Trump argues that several comments by President Trump, and one by Robert Trump, constitute "breaches" of the Settlement Agreement that allegedly excuse her performance. The doctrine of excuse of performance applies only to a **material** breach of the contract. *Markham Gardens L.P. v. 511 9th LLC*, 38 Misc. 3d 325, 331 (Nassau Cty. Supr. Ct. 2012) ("When one party commits a material breach of a contract, the other party to the contract is relieved, or excused, from further performance under the contract...."). A breach is "material" if it "if it goes to the root of the agreement between the parties". *Id.*

The statements Mary Trump identifies at pages 36-37 of her brief are mostly anodyne statements by President Trump about his mother and sister, who are not Objectants. There is one statement by President Trump about having a "good relationship" with Mary's brother Fred, and one statement in which President Trump says that Mary is bound by an NDA. Finally, there is one statement (and only one statement) identified that came from Robert Trump, in which he endorsed Donald's campaign for President. None of these are breaches of the confidentiality clause at all, but even if they were held to be, they would not be "material". The root of the Settlement Agreement was not an agreement by the parties not to make passing, generic comments to reporters that the parties had a good upbringing or a good relationship, or an

agreement not to endorse a family member's presidential campaign. These events are simply not sufficient to justify an excuse of performance defense.

c. The 2001 Settlement Agreement Bars Mary Trump's Book, As It Has Been Marketed by Ms. Trump and Simon & Schuster.

The moving papers set out Simon & Schuster's marketing of the book, which makes clear that the central selling point of Mary Trump's book is that it contains detailed discussions of her relationships with the Proponents.

The case of *Caren Ee v. Alan Ee*, 124 A.D.3d 1102 (3d Dep't 2015), offers support for Robert Trump's construction of the Settlement Agreement. In *Caren Ee*, the court interpreted a similar agreement to the 2001 Settlement Agreement. In *Caren Ee*, the parents of an autistic son had divorced, and due to the fact that the autistic child had received some press attention for his visual art skills, they entered into a marital separation agreement (which was formalized as a court order) in which any books or movies "dealing with the son or his artwork" would only be published if both parents consented. Caren later published a book about a medical condition, which she believed her son had, and which extensively referred to her son's condition. However, Alan did not hear about the book until years after its publication. Nonetheless, he sought an injunction to stop his ex-wife from doing publicity for the book. While the court declined that injunction on *Bolton* grounds: the "horse has left the barn" because the book had been on sale for years, 124 A.D.3d at 1107, the court nonetheless rejected all of Caren's contractual construction arguments. Specifically, the court said that "deal with" was obviously broad language, and while the book's broad thrust may have been Caren's thoughts about the medical condition, there were dozens of references to her son and his medical conditions, and therefore the book "dealt with" the son and was prohibited under the parties' agreement.

II. A Preliminary Injunction Should Issue Against Simon & Schuster.

Simon & Schuster is the instrument through which Mary Trump seeks to consummate her plan to make a substantial sum of money by violating her promise to Robert Trump. The parties to the agreement specifically contemplated that any books that violated confidentiality stipulations would be published by book publishers, and attempted to bind not only the parties but their agents.

Simon & Schuster has also acted in bad faith and made material misrepresentations to the Court. Far from a journalist with an arm's length relationship with its source, Simon & Schuster is Mary Trump's agent, and also her co-conspirator, in her entire seedy enterprise. Simon & Schuster should be enjoined from publishing the book by this Court.

a. Presiding Justice Scheinkman's Order Does Not Bar Issuance of a Preliminary Injunction Against Simon & Schuster.

Presiding Justice Scheinkman, a single Justice of the Appellate Division, struck Simon & Schuster's name from the temporary restraining order. This ruling was in no way law of the case. *Bauer v. Planning Board*, 256 N.Y. 477 (2d Dep't 1990).

It was also an extremely narrow ruling. Presiding Justice Scheinkman was careful **not** to hold that Simon & Schuster could not be bound as a matter of law, and **did not** adopt any absolutist standard under the First Amendment for injunctions against a publisher. Rather, he merely ruled that (1) because Simon & Schuster was not a party to the Settlement Agreement, there was no basis for it to be **specifically** bound to a TRO based on that agreement, *Scheinkman Order* at 6; and (2) while the TRO properly extended to Mary Trump's "agents" (who were bound under the Settlement Agreement and established injunction law), "the evidence submitted

is insufficient" for Presiding Justice Scheinkman to **name** Simon & Schuster as an "agent" in the TRO, *id*.

Additionally, Presiding Justice Scheinkman made clear that Mary Trump could and did make a valid waiver of her First Amendment rights, *Scheinkman Order* at 4, and that the contractual provision and law binding "agents" to injunctions exists to prevent a party from circumventing an injunction by means of an agent, *id.* at 5.

This very narrow ruling does not in any way preclude this Court from making an independent judgment about Simon & Schuster's role and conduct in this proceeding.

b. Simon & Schuster Is Not a Newspaper, And Is Not Entitled to Claim the Privileges of Journalists Who Have Arms-Length Relationships With Unpaid Sources.

At the center of Simon & Schuster's argument is a claim that it is the equivalent of a newspaper publisher. Simon & Schuster thus argues that it may claim all the special privileges that a newspaper publisher holds, including to publish material obtained from its sources where the source may have stolen the information, or obtained the information illegally, tortiously, or in violation of a contractual obligation or even a legal privilege.

However, a book publisher is not a newspaper, and the difference between the two is precisely congruent with the dividing line between when a newspaper can and cannot claim a First Amendment privilege for newsgathering. And that is this: a journalist may utilize material obtained in contravention of some legal obligation **only** when the journalist has no involvement in the improper activity and merely passively receives the information from a source.

This comes straight out of controlling U.S. Supreme Court authority. *Bartnicki v. Vopper*, 532 U.S. 514 (2001), is the leading case which establishes the journalist's privilege to

publish illegally obtained information. In *Bartnicki*, a radio station obtained illegally wiretapped conversations of public sector union negotiators. The Court held that the radio station had a First Amendment right to air the tapes—it was journalism on a matter of public concern.

Here, however, was the Court's statement of its holding: "**a stranger's** illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern". *Id.* at 535 (emphasis added). The journalist's privilege to an exemption from the rules of legal liability turns on the fact that the journalist receives information from "a stranger". The Court's opinion identifies three important provisos with respect to its holding, and the first two concern this issue: "First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." *Id.* at 525.

These sentences form the essence of the journalist's legal privilege. The journalist is not involved in the source's underlying wrongful conduct. The journalist simply receives the information after it is wrongfully obtained, and publishes it.

At least in the United States, the practice of "checkbook journalism", *i.e.*, paying sources for news, is considered unethical. *See* Society of Professional Journalists, *SPJ Ethics Committee Position Papers: Checkbook Journalism* at https://www.spj.org/ethics-papers-cbj.asp (viewed Jul. 6, 2020). Book publishers, by contrast, always pay for content. Newspapers maintain arm's length relationships with their sources; book publishers enter into detailed contractual relationships with their authors and share the proceeds of the books that are published. Newspapers write and control their own stories and do not involve sources in the writing or

editing process; in book publishing, the author creates the work, though the book publisher often assists with editing. . Newspapers fact-check their stories; book publishers do not fact-check their books. *See* Kate Newman, "Book Publishing, Not Fact Checking", *The Atlantic* (Sep. 3, 2014) (at https://www.theatlantic.com/entertainment/archive/2014/09/why-books-still-arent-fact-checked/378789/) (viewed Jul. 6, 2020).

Book publishers also, as Simon & Schuster freely admits it did here, seek warranties from the author that the author has the legal right to write the book. Newspapers seek no such warranties from their source, because no warranties are necessary—a source (a "stranger" as *Bartnicki* puts it) does not write the news articles, the reporters does.. The book publisher knows going in that it its author is not a "stranger" but rather its contracting partners, and the book publisher does not have that same protections as does a newspaper publisher regarding its sources, and thus the book published accounts for that completely different relationship in its contracts with its authors.[14]

In contract law, there are many ways that third parties can find themselves bound by provisions of contracts. They can be found to be the agents of a contracting party. They can be found to be alter egos. They can be found to be third party beneficiaries of a contract. And they can be bound to an injunction if they act "in concert" with a party subject to injunctive relief. These rules, just like the rules that bind Mary Trump, are **content-neutral**. They do not care

[14] Simon & Schuster argues it is in fact no different from a newspaper publisher because Mary Trump has "no control" over the publication of the book. *Simon & Schuster Bf.* at 16 n. 5. This should be disregarded because Simon & Schuster has not tendered to the Court its actual contract with Mary Trump, which would be the best evidence of what actual controls she has over the process. In any event, it is also not believable for an independent reason: it is common knowledge that publishers such as Simon & Schuster employ editors who work with authors in a collaborative fashion on the books that Simon & Schuster contracts to publish. Simon & Schuster is very careful in the papers not to deny that Mary Trump was assigned an editor who worked on her manuscript with her.

whether it is a book being published or a durable good being manufactured. They do not care if the book is about a Democrat or a Republican. These rules are not an attempt to suppress "dangerous" ideas, and they are not a licensing or permitting system where a government censor determines whether what Simon & Schuster seeks to publish, is fit to publish.

Accordingly, the prior restraint caselaw is just as distinguishable as to Simon & Schuster, as it is as to Mary Trump. If a party to a confidentiality agreement secretly transmits the information to a newspaper reporter in an arm's length, reporter-source relationship, and injunctive relief were sought against the newspaper, the prior restraint doctrine would apply, because there is no rule of contract law that binds newspapers to the confidentiality agreements made by their sources. However, if a book publisher enters into a commercial transaction with an author, in which money is paid in exchange for a license to publish copies of the book, that book publisher is not a newspaper and its author is not a "stranger" under *Bartnicki*. And if a book publisher goes ahead with publication, to share in a profitable enterprise with its author, **knowing** that it is putting the author in breach of a confidentiality obligation that includes an agreement to injunctive relief against the author and her agents, the enforcement of that contractual obligation against the book publisher under an "agent" or "acting in concert" theory is a content neutral application of contract law, not a prior restraint. Thus, Simon & Schuster's case citations miss the point. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), involved a gag order entered against news organizations who were attempting to cover a public legal proceeding. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931), involved a court order shutting down a newspaper based on its alleged "scandalous" content. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) involved a court order suppressing a news story written by reporters who had no involvement in the theft of the documents they sought to

publish. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), involved a state law creating censorship board with the power to ban books that are allegedly "harmful to minors", *i.e.*, a content-based restriction, not an imposition of a content neutral rule of contract law.[15]

Simon & Schuster also cites Justice Blackman's opinion in chambers in *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers), in support of its position. *Davis* is not a decision of the U.S. Supreme Court; it is merely the decision of a single justice in chambers, which does not constitute controlling authority. "As a single justice order, [*Davis*] is arguably not binding...." *Bunner*, 75 P.3d at 18.

Even if taken as persuasive authority, *Davis* confirms the differences between book publishing and news reporting. In *Davis*, a **source** of CBS News, an employee at a meatpacking plant, wore a hidden camera to work to document unsanitary practices. Like other journalists, and unlike Simon & Schuster, CBS was not paying the worker to violate his contract with his

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[15] Interestingly, Simon & Schuster cites Justice Scalia's **dissent** in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 797 (1994) (Scalia, J., concurring in part and dissenting in part), in which Justice Scalia defines a prior restraint as an "injunction against speech". However, the majority **rejected** Scalia's position and instead ruled that the injunction against speech in proximity to an abortion clinic was content-neutral and would not be evaluated as a prior restraint. *Id.* at 763-64. Simon & Schuster also cites a definition from Chief Justice Rehnquist of a prior restraint in *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'"), but the *Madsen* court, just one year later and in an opinion by Chief Justice Rehnquist, adopted the narrower definition where the application of content neutral laws, even in the form of an injunction, was not a prior restraint.

Simon & Schuster presents *Respublica v. Oswald*, 1 Dallas (1 U.S.) 319, 325 (Pa. Supr. Ct. 1788), as a United States Supreme Court case prohibiting prior restraints. As the United States Supreme Court was not even created until March 1789, *Oswald* could not, of course, be a United States Supreme Court case, and indeed it was not one, despite appearing in the United States Reports. In that era, the Supreme Court used private reporters of decisions, and the first such reporter, Alexander Dallas, mixed U.S. Supreme Court opinions with his own reports of Pennsylvania cases. *Oswald* was a Pennsylvania Supreme Court case, not a U.S. Supreme Court case.

employer: "The employee received no compensation for his cooperation." *Id.* at 1316. The meatpacker sued and obtained an injunction against CBS News, and Justice Blackman issued an emergency stay of the injunction. Justice Blackman's failed to analyze whether the injunction was in fact content-neutral or content-based, but his ultimate conclusion was supportable because CBS was reporting the news, not entering into a financial collaboration to sell books. The meatpacker's remedies, under the facts of that case, were against its employee.

Book publishers are subject to content neutral rules that allow for publication to be enjoined. As one example, such injunctions are common in copyright law. As noted *supra*, copyright (and trademark) injunctions are **never** analyzed as prior restraints, because copyright and trademark are both bodies of content-neutral laws. *See, e.g., Dr. Seuss Enterprises v. Penguin Books, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (enjoining publisher of satirical book about OJ Simpson case which borrowed extensively from copyrighted Dr. Seuss works); *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (enjoining publisher of Harry Potter encyclopedia which copied content from J.K. Rowling's popular book series); *Harpercollins Publishers LLC v. Open Road Integrated Media, LLP*, 58 F. Supp. 3d 380 (S.D.N.Y. 2014) (enjoining publisher of infringing e-book); *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987) (enjoining Macmillan's publication of biography of composer); *Paramount Pictures Corp. v. Carol Publishing Group*, 11 F. Supp. 2d 329 (S.D.N.Y. 1998) (owner of *Star Trek* media franchise successfully enjoins publisher of book about cultural phenomenon of *Star Trek* because book contained infringing plot summaries of copyrighted *Star Trek* works).

This is not to say, of course, that there could never be an actual prior restraint against a book publisher. However, it would need to be within the two categories of prior restraint cases: either an injunction enforcing a content-based law based on the alleged "dangerousness" of a

book, or the decision of a board of censors to refuse publication of a book due to its content. In contrast, Robert Trump seeks nothing more than to apply established, content-neutral principles of contract and injunction law to a book publisher.

United States v. Bolton, 2020 WL 3401940 (D.D.C. June 20, 2020), cited by Simon & Schuster, is not applicable. *Bolton* held that the U.S. government was not entitled to an injunction against a book that contained classified information, where the government was on notice for months regarding the content of the book (Bolton had submitted a manuscript to the government for review) and did not file suit until the last moment, after the books had shipped. In contrast, in the case at bar, Simon & Schuster did not announce Mary Trump's book until June 16 (despite having signed its agreement to publish in early May), moved up the publication date twice: It was August 11, then moved up to July 28, then moved up again to July 14 after this case was filed. Simon & Schuster also rushed books out the door on June 25 **nine days after** receiving full notice that Mary Trump had signed a confidentiality agreement covering the content of her book and had consented to injunctive relief. Nothing comparable to this occurred in *Bolton*.

Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996), cited by Simon Schuster, held that *Business Week* could not be enjoined from publishing sealed discovery documents that it received from the public relations department of one of the parties, and which *Business Week* had no idea to be under any sort of protective order. Here, Simon & Schuster paid for the rights of the book, was on inquiry notice of the existence of a confidentiality agreement no later than June 16, and was on actual notice of the existence of such an agreement (and had a copy of the confidentiality agreement) no later than June 23. Two days later, Simon

& Schuster began to ship the Book at issue, not sooner. There is no comparison between *Business Week* and Simon & Schuster.

Matter of Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986), cited by Simon & Schuster, held that a newspaper could not be held in contempt for publishing the FBI's illegal wiretaps of an alleged organized crime figure which it obtained in response to a FOIA request. Again, this is a far cry from a book publisher paying for a manuscript, collaborating with the author to publish, and then rushing publication when it becomes clear that the publication may be subject to a court injunction.

The unpublished trial court opinion in *Globe International, Inc. v. National Enquirer, Inc.*, 1999 WL 727232 (C.D. Cal. Jan. 25, 1999), is also distinguishable. In *Globe International*, the plaintiff tabloid signed Suzen Johnson, a celebrity's paramour, to do an exclusive interview, only for its competitor, the *National Enquirer*, to also interview Johnson and race to publication. The *Globe* sought an injunction. Importantly, the Court acknowledged the *Dr. Suess Enterprises* case and the fact that injunctions against publishers can be permissible. *Globe International*, 1999 WL 727232 at *5. However, the Court held the *Globe* could not establish a likelihood of success, because it could not prove what the *Enquirer* was going to publish and whether it would be a violation of its agreement with its source, Johnson. *Id.* Here, Simon & Schuster has told us that they are going to publish a book about Mary Trump's relationships with her family members. This is the entire sales hook.

Ford Motor Co. v. Lane, 67 F. Supp. 2d 745 (E.D. Mich. 1999), denied an injunction under the Uniform Trade Secrets Act sought against a blogger who received internal documents from a source within Ford and published them on his website. *Lane*, again, involved a journalist (passively receiving content from a source), not a book publisher (actively paying authors and

collaborating with them in the production of a book). (Notably, the California Supreme Court also criticized the *Lane* court for mislabeling the trade secret injunction, which was based on content-neutral trade secret laws, as a prior restraint. *DVD Copy Control Ass'n v. Bunner*, 75 P.3d 1, 19 (Cal. 2003).)

Huggins v. Povitch, 1996 WL 515498 (N.Y. Supr. Ct. Apr. 19, 1996), cited by Simon & Schuster, was a trial court order which was "not approved by reporter of decisions for reporting in state reports" and "not reported in N.Y.S.2d". In other words, it has no precedential value at all. At any rate, it involved a non-disparagement agreement with an injunctive relief provision, but the Court found the statements at issue were not defamatory and the clause was never violated. It is irrelevant to this case.

New York law is no more helpful to Simon & Schuster. Like Mary Trump, Simon & Schuster never actually explains **why** the language of the New York Constitution supposedly imposes stricter restrictions on injunctions enforcing contractual confidentiality clauses, and argues that the inapplicable "public injury" rule, which applies only to where an injunction is entered based on a viewpoint-based legal rule, applies to contractual injunctions. It does not. These arguments should be rejected for the same reasons that they do not help Mary Trump.

c. The Complaint Pleads Valid Grounds for Injunctive Relief Against Simon & Schuster.

Simon & Schuster argues that the specific performance cause of action does not plead a valid cause of action against it. In doing so, it pretends that the Complaint alleged a different theory of liability than it actually did.

The cases cited by Simon & Schuster stands for an unobjectionable principle: breach of contract actions cannot be brought against defendants who are not in privity of contract. However, this is not the capacity in which Simon & Schuster is named in the Complaint.

Simon & Schuster is named as a party to be bound by an injunction, not a party to the contract. Under well-established New York law, **non-parties** who act as agents with knowledge of an injunction, who act "in concert", or who act in "collusion or combination" with a party can be bound to an injunction. *People v. Poray*, 67 Misc. 2d 591, 592 (Monroe Cty. Supr. Ct. 1971) ("[A]n injunction order is binding even upon persons who are not parties to the action if they have knowledge of the order and are either employees or agents of the defendant, or act in collusion or combination with him."); *Fordham University v. King*, 63 Misc. 2d 611 (Bronx Cty. Supr. Ct. 1970) ("A person may be bound by the terms of an injunction even though not a party to the action in which it is granted if he has notice or knowledge of the order and is within the class of persons whose conduct it is intended to be restrained or if he acts in concert with a person who is in that class.")

Thus, because specific performance is available on the Settlement Agreement, if Simon & Schuster falls within any of those categories, **it may be bound to an injunction whether or not it is named as a party to this action**.

Naming Simon & Schuster as a party to the specific performance claim therefore caused no prejudice to Simon & Schuster and merely facilitated its appearance in this proceeding to assert its rights. However, whether or not Simon & Schuster is officially a "party" to the action, it may be bound to an injunction if a proper basis (agency, "in concert", collusion or combination) is established.

Accordingly, Simon & Schuster's cases, which hold that non-parties are not liable for breach of contract and may be dismissed out of specific performance actions, are irrelevant to this proceeding.

d. Simon & Schuster May Be Validly Named in the Injunction.

Simon & Schuster, like any book publisher, is not an arm's length journalist passively receiving content from a source and then writing a story that utilizes the content. Rather, Simon & Schuster collaborated with Mary Trump, and may be enjoined just like any other non-party who collaborates with a defendant.

i. Simon & Schuster Acted As Mary Trump's Agent.

The Settlement Agreement contains Mary Trump's consent to an injunction not only against herself but against any "agent". This language covers Simon & Schuster.

1. The Obvious Purpose of the "Agent" Clause of the 2001 Settlement Agreement Was to Consent to an Injunction Against Publishers.

Simon & Schuster starts off with a false premise: that because the contracting Trump family members used the word "agent", they were referring to legal fiduciaries. Words in contracts are "construed according to the sense and meaning of the terms which the parties have used". *Hartol Products Corp. v. Prudential Insurance Co.*, 290 N.Y. 44, 47 (1943). Before jumping to the conclusion that these parties must have meant a legal fiduciary, the Court must examine the Settlement Agreement and the context in which it uses the term "agent".

The provision reads as follows: "In the event such breach occurs, [Objectors, including Mary Trump], as well as their 'counsel', hereby consent to the granting of a temporary or permanent injunction against them (or against any agent acting in their behalf) by any court of

competent jurisdiction prohibiting them (or their agent) from violating the terms of this Paragraph." *Settlement Agreement* ¶ 2. Read in that context, "agent" clearly does not mean "fiduciary". This provision is a consent to an injunction for violating a confidentiality provision, which in turn bars the publication of certain descriptions and accounts in a form of a book, diary, or memoir. The only plausible reason why the parties would extend this protection to "agents" is because books do not publish themselves—they need publishers. In other words, **the parties to the Settlement Agreement were contemplating precisely this case**. They were contemplating that a party to the agreement would contract with an "agent" to "act[] in their behalf" in publishing a book that was subject to being enjoined, and they wanted to make sure the provision extended to such "agents". This is the common, non-legal sense of the word "agent", the first definition from Lexico: "A person who acts on behalf of another person or group." https://www.lexico.com/en/definition/agent (viewed Jul. 6, 2020).

Thus, Simon & Schuster completely misconstrues this provision. It was not intended to bind fiduciaries, because fiduciaries do not assist contracting parties in circumventing confidentiality clauses. **It was intended to bind publishers**, who **act on an author's behalf** by bringing the author's work out to the public and disseminating it, and then paying the author a portion of the sales revenues. Simon & Schuster is an agent under this provision. It can be bound to an injunction under the 2001 Settlement Agreement.

2. Even if a Legal Agency Is Required, Simon & Schuster Is Acting As Mary Trump's Agent.

Independently, even if a legal agency is required, there is evidence that **Simon & Schuster's standard form book contract**, which Simon & Schuster has withheld from the Court, creates such an agency. A 1999 standard form book publishing contract from Simon &

Schuster is posted on the Internet. It contains a provision creating a **legal** agency relationship: "The Publisher shall have the exclusive right, but shall not be obligated, **as agent of the Author** to dispose of the shared secondary rights as to which it has authority from the Author." https://contracts.onecle.com/california-culinary/simon.pub.1996.02.22.shtml (viewed Jul. 1, 2020) (emphasis added). Given that Simon & Schuster has not tendered its contract with Mary Trump, this Court should infer it contains provisions creating a legal agency.

ii. Independently, Simon & Schuster Is "Acting in Concert" With Mary Trump and Is Properly Bound Under Traditional Principles Governing Court Injunctions.

Agency is not the only valid theory on which an injunction can bind a non-party. Simon & Schuster can be bound as "acting in concert" with Mary Trump.

1. Simon & Schuster Acted in Concert With Mary Trump.

Simon & Schuster has acted "in concert" with Mary Trump. A third party publisher who actively collaborates with a party to circumvent contractual restrictions against disclosure of information is acting in concert. *In re Zyprexa Injunction*, 474 F.Supp.2d 385 (E.D.N.Y. 2007), and the case affirming it on appeal, *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186 (2d Cir. 2019), are on point. In *Zyprexa* and *Gottstein*, a party to a multidistrict pharmaceutical products liability action wanted to leak documents that were produced under a protective order in the case. So, the party conspired with a sympathetic *New York Times* reporter and an out of state Alaskan lawyer, Gottstein, having Gottstein subpoena the documents that were produced in the *Zyprexa* case, ostensibly for use in the lawyer's own case, but actually for the purpose of then leaking the documents to the *New York Times* reporter. The District Court and the Second Circuit both held that an injunction could properly be issued prohibiting the dissemination of the documents that

were the subject of this scheme and mandating they be returned to the parties. The District Court held that this was "not the kind of classic prior restraint that require[ ] exacting First Amendment scrutiny", 474 F. Supp. 2d at 417, and that issue was not appealed.

Gottstein appealed to the Second Circuit, and argued that was a non-party and could not be enjoined. The Second Circuit held that the District Court's injunction properly extended to the out of state lawyer, who was "acting in concert" with a party to the case within the District Court's jurisdiction:

> Gottstein contends that we should adopt a rule saying that district courts have jurisdiction only over parties and signatories to their discovery orders, such that courts are powerless to enjoin the actions of other entities that aid and abet the violation of those orders.... [I]f taken to its logical conclusion, Gottstein's proposed rule would render protective orders little more than liability-generating documents. **If courts cannot bind third parties who aid and abet the violation of their protective orders, then any party, agent, attorney or expert who comes into possession of material he wanted to use against the producing party could simply disseminate the information quickly, then deal with the damages issue after the fact.**
>
> *Gottstein*, 617 F.3d at 195 (emphasis added).

Simon & Schuster's response is to cleverly declare itself a "media defendant[]", *Simon & Schuster Bf.* at 18, as if that makes it the same thing as a newspaper and distinguishes all the "in concert" cases. However, not all "media defendants" are the same, and as noted above, the privileges that journalists hold arise from their arm's length relationships with unpaid sources

who have no control over what the journalist writes. Simon & Schuster, like any book publisher, collaborates with its authors who write the books, and acts in concert with them.

The cases cited by Simon & Schuster are not applicable. *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*, 906 F.3d 253, 258 (2d Cir. 2018), contains some lofty First Amendment rhetoric, but in the end, acknowledges that injunctions may extend to those acting "in concert" and merely requires that the underlying contract specifically cover the expressive material at issue. In *Ronnie Van Zant* (involving a band member who collaborated on a documentary film about the band that was claimed to violate a highly ambiguous contractual provision), the standard was not met. Under the facts in this case, the standard has been met.

United States v. Bolton, 2020 WL 3401940 (D.D.C. June 20, 2020), does not reject an "in concert" theory; it simply holds that the government's delay in that case mooted any injunction.

Republic of Kazakhstan v. Does 1-100, 2015 WL 6473016 at *2 (S.D.N.Y. Oct. 27, 2015), declined to enjoin a newspaper from publishing secret documents received from a confidential source and relating to the government of Kazakhstan. This is a standard example of the journalist's First Amendment privilege, and does not concern a non-party to an agreement who was acting "in concert" with an enjoined party, as Simon & Schuster has been.

Simon & Schuster claims that the only "in concert" activity Robert Trump alleges is its publication of a book. This claim is both false and misses the point. It is false because Robert Trump has alleged many other acts by Simon & Schuster—from misleading the Court about its dealings with Mary Trump and its knowledge of the Settlement Agreement, to moving up the publication date, to rushing the publication of the book—which go beyond the mere publication of a book. It also misses the point. "Publishing a book" is not the same thing as "publishing a book protected by the First Amendment". Publishers in copyright injunction cases are

"publishing books" too, but that does not mean they are not acting in concert with their authors and properly enjoined. Simon & Schuster has not established that it has a First Amendment right to publish the book it wishes to publish, when it has acted in concert with its author to attempt to prevent court enforcement of her confidentiality agreement.

2. The Fact That the 2001 Settlement Agreement Did Not Specifically Mention Those "Acting in Concert" with Mary Does Not Bar an "Acting in Concert" Injunction.

Presiding Justice Scheinkman reasoned that an injunction could not issue on an acting in concert theory because the Settlement Agreement mentioned "agents" but did not mention "acting in concert". *Scheinkman Order* at 5. This ruling was not law of the case, *Bauer v. Planning Board*, 256 N.Y. 477 (2d Dep't 1990), and it was erroneous. The power of courts to grant injunctions against non-parties acting in concert with parties comes from remedies law. It is not a function of the contract, and indeed, many injunctions are issued with that language where there is no contract at all.

It would be different, of course, if the parties to the Settlement Agreement disclaimed the application of an injunction to those acting "in concert" with Mary Trump, but the parties did not do so. They specifically contemplated that publishers like Simon & Schuster would be bound as "agents". There is no reason to construe that as a **restriction** on the scope of injunctive relief.

III. The Balance of Equities Favors Robert Trump.

a. Robert Trump Will Suffer Irreparable Harm from Publication.

Mary Trump, at the outset, **stipulated** that the release of the book would cause irreparable harm to Robert Trump. It is right there in the plain language of the Settlement Agreement. *Settlement Agreement* ¶ 2 ("[Objectors] and their 'counsel' further agree that

[Proponents] will not have an adequate remedy at law in the event of any breach by [Objectors] hereunder and [Proponents] will suffer irreparable damage and injury in event of any such breach.").

Of course, the reason Mary Trump agreed to this is that it is true. Obviously, if the goal of an agreement is to prevent confidential information from being released, the release of such confidential information is irreparable. While a party may attempt to recover damages for the loss of confidentiality, such damages can never fully remedy the harm.[16]

In response, Mary Trump argues Robert Trump will suffer no irreparable harm because the horse has supposedly already left the barn. She has, she asserts, "no contractual right or ability to halt the Book or cancel its publication". Mary Trump Bf. at 50. In fact, however, we do not know this, because she and Simon & Schuster have both steadfastly failed to tender the publishing agreement. Once again, where stronger evidence is available to a party, but the party produces weaker evidence instead, this Court may draw an adverse inference. *Clifton v. United States*, 45 U.S. (4 How.) 242, 274 (1846) (drawing adverse inference against party who had records of actual cost of goods sold and failed to produce them instead offering oral testimony; other party entitled to presumption that "if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party"); *Jean-Pierre v. Touro College*, 40 A.D.3d 819, 820 (2d Dep't 2007) (criteria for adverse inference: "[the] document in

[16] Mary Trump argues that a contractual stipulation of irreparable harm or to injunctive relief is never conclusive. She is correct about this, and Robert Trump has from the outset relied not solely on the contractual stipulations but also to the facts of the case which establish entitlement to an injunction and irreparable harm. However, the contractual stipulations which Mary Trump agreed to (and which were mutual) constitute evidence which corroborates the other facts in the record showing that Robert Trump will suffer irreparable harm from Mary Trump's breach of the Settlement Agreement. *International Creative Management, Inc. v. Abate*, 2007 WL 950092 at *6 (S.D.N.Y. Mar. 28, 2007) (contractual stipulation to irreparable harm constitutes "some evidence-although not conclusive evidence-that breach of a confidentiality clause would constitute irreparable harm").

question actually exists, that it is under the opponent's control, and that there is no reasonable explanation for failing to produce it").

In this case, Mary Trump and Simon & Schuster make broad claims about how their contract supposedly leaves them with no power to do anything to stop the book's release. However, they failed produce the contract that would confirm whether or not this is true. The Court should not credit their claims.

Nor should the Court be persuaded by Mary Trump's case citations. *Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 716 (2d Dep't 2011), involved a monetary dispute where a trial court erroneously enjoined the collection of rent. Obviously money paid out can be paid back, so there was no irreparable harm there as there is with the loss of confidentiality. *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739-40 (2d Dep't 2010), involved an ordinary suit for damages for breach of contract; damages were, of course, an adequate remedy. *Neos v. Lacey*, 291 A.D.2d 434, 435 (2d Dep't 2002), involved the breach of a noncompetition clause within a particular territory; the damages were purely economic loss to the plaintiff's business. *Duane Reade v. Rockaway Crossing, LLC*, 18 A.D.3d 337, 337 (1st Dep't 2005), involved the breach of an obligation to maintain commercial property; the maintenance costs could be easily calculated.

Mary Trump argues that irreparable harm was not suffered because unlike in the cases Robert Trump cited, there is no "real world" injury from the disclosure of family secrets. *Mary Trump Bf.* at 54 ("The information at issue in th[e] cases [cited by Robert Trump] had an obvious potential for tangible, real-world injury to the movant...."). This is a shocking argument for a clinical psychologist, who is subject to stringent ethical obligations in the maintenance of family secrets, to make in a court of law. It should be summarily rejected.

Finally, Mary Trump argues that by publicizing some of the terms of the Settlement Agreement by filing a redacted copy in his moving papers, Robert Trump has waived the confidentiality protections of the agreement. This argument is refuted by the plain language of the agreement, which permits such a filing. *Settlement Agreement* ¶ 3 ("The parties hereto may disclose those material and necessary matters covered in said paragraphs in any proceeding to enforce this Agreement.").

b. Mary Trump Will Suffer No Harm Because She Is Merely Being Held to Her Contractual Promise.

Mary Trump entered this litigation having agreed in writing she has no right to publish a book, memoir, or diary containing descriptions or accounts of her relationship with her family. **If she is enjoined from doing so, she loses nothing—except money she was never entitled to earn, and to distribute content that she was never entitled to distribute.** (Importantly, this issue is only reached after the Court determines she has no constitutional right to publish her book. So that constitutional argument cannot be repackaged as a claim of harm within the balance of equities.)

The problem Mary Trump faces is that nobody is actually interested in her political opinions, which she is free to express. The only thing that makes her book salable is that she is going to apply her supposed expertise as a clinical psychologist to analyze her relationships with her uncles and aunt (the Proponents). In other words, the only way her book makes money is if she breaches the Settlement Agreement and breaches it as soon as possible.

In addition, she cannot seek solace in the balance of equities for another reason—she, like her publisher, has unclean hands. *Grosch v. Kessler*, 256 N.Y. 477, 478 (1931) (party seeking the aid of equity must do equity herself). Not only did Mary Trump know that she had

contracted away her right to write about her relationships with Proponents, but she also knew that she had agreed that any injunction would not only bind her but also her agents. So, if her own allegations and those of Simon & Schuster are even believed, she gave up all control over the publication of her book before the announcement, in the hopes that she could moot the injunctive relief she had contractually agreed to. She also, if Simon & Schuster's claims are credited, allegedly made false representations and warranties to her publisher that there were no restrictions on her book—further evidence of unclean hands.

Mary Trump had another option available to her. She could have, before shopping her manuscript or signing any publishing contract, come to court seeking a declaratory judgment that she was entitled to publish her book notwithstanding the terms in the 2001 Settlement Agreement. While Robert Trump contends that Mary Trump's arguments have no merit, she could have raised them and sought a judicial determination before seeking to release her book, on grounds that the contract alleged had expired, or allegedly was procured by fraud, or allegedly is protected by the First Amendment. Then she could have abided by whatever judgment the Court issued. None of that would have violated her obligations under the Settlement Agreement.

Instead, she and Simon & Schuster embarked in a calculated plan to run out the clock and to prevent any court from enforcing her confidentiality agreement. She attempts to profit not only from the deliberate violation of her contractual obligations, but from a calculated obstruction of the judicial process. This Court should not allow her to do so.

c. Any Harm Suffered by Simon & Schuster Is a Result of Its Own Actions in Attempting to Rush Books Out the Door Before a Court Could Rule on the Confidentiality Agreement.

Simon & Schuster's arguments of irreparable injury are, if anything, even weaker than Mary Trump's. Simon & Schuster originally set the publication date on this book for August 11, then moved it to July 28. Either of those publication dates gave Simon & Schuster plenty of time to litigate (starting on June 16, when Simon & Schuster admittedly learned of the confidentiality provisions at issue) whether or not the publication of this book was protected by the First Amendment.

But Simon & Schuster **chose** to rush. It is clear why it did this. It wanted to argue the book was "out the door". The problem is, the book was not out the door. **Everything that Simon & Schuster did after June 16 was its own choice**. The First Amendment did not command Simon & Schuster to rush to ship books. The First Amendment did not command it to file a false affidavit in Court purporting to state that it had no reason to doubt the accuracy of Mary Trump's warranties.[17] The First Amendment did not command it to release 15,000 copies of the book two days after it read the words of the confidentiality agreement at issue, within court papers seeking a TRO on the publication of the book. The First Amendment did not command it to once again move the publication date of the book up by two more weeks, to July 14, 2020, even though it was still potentially subject to the TRO (as Mary Trump's agent) and is facing a preliminary injunction.

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[17] The Karp Affidavit avers that "Simon & Schuster had (and has) no reason to doubt the accuracy of Ms. Trump's warranties—she expressly warranted that there was no impediment to her ability to tell her own story.... And we never saw any purported agreement until this action was filed against Ms. Trump and Simon & Schuster." *Karp Affidavit* ¶ 8. In fact, Mary Trump's confidentiality agreement was publicized on **June 16**, and Simon & Schuster, a large publisher with a skilled legal department, would have seen the *Daily Beast* story and immediately asked to see Mary Trump's confidentiality agreement, assuming they had not already seen it. Asawin Suebsaeng & Lachlan Cartwright, "Trump Considers Suing His Niece Over Her Tell-All Book, Saying She Signed an NDA", *Daily Beast* (Jun. 16, 2020) (at https://www.thedailybeast.com/trump-considers-suing-his-niece-mary-trump-over-her-tell-all-book-saying-she-signed-an-nda) (viewed Jul. 6, 2020). Accordingly, Karp's Affidavit is false.

Not only that, the latest decision to move up the book disproves another thing Simon & Schuster has told the courts repeatedly: that the process of book publishing is such that Simon & Schuster must start the process very early to make sure the book comes out on time. *See Karp Affidavit* ¶ 10 ("it takes significant time to get books printed, folded, glued, bound, cased, and shipped"). If that were really true—if Simon & Schuster were required to ship books on June 25 in order to release on July 28—how were they able to then move the release date up two weeks to July 14? **Simon & Schuster did not need to ship books on June 25. They *wanted* to ship books on June 25, to try and obstruct the New York Supreme Court in being able to effectively enjoin the content in the book that violates the 2001 Settlement Agreement.**

This Court should not credit Simon & Schuster's injuries as a product of its First Amendment rights being violated. Simon & Schuster is the sole cause of whatever harm it might suffer as a result of an injunction. Simon & Schuster could have come to court honestly and attempted to vindicate whatever First Amendment rights it thinks it has, while affording Robert Trump a full and fair opportunity to litigate his claims of a contractual right to enjoin publication. Instead, Simon & Schuster attempted to reset the clock to zero and then claim it ran out. Its claims of irreparable harm should be rejected.[18]

CONCLUSION

For the foregoing reasons, a preliminary injunction should issue enjoining and restraining Mary L. Trump and Simon & Schuster, Inc., together with their respective members, officers, employees, servants, agents, attorneys, representatives and all other persons acting on behalf of

[18] The briefing has not discussed an undertaking, which is a statutory requirement for a preliminary injunction. Robert Trump believes that the only provable damages that Defendants can establish at this time if an injunction were entered wrongfully would be interest on the expected book sales, while publication was delayed. Robert Trump estimates such interest at no more than $20,000, and respectfully requests the Court set bond at that amount or lower.

or in concert with either or both of them, from publishing, printing or distributing, directly or indirectly, any book or any portions thereof in any medium containing any descriptions or accounts of Mary L. Trump's relationship with Robert S. Trump, Donald Trump, or Maryanne Trump Barry, or assisting any other person or entity in such publication, printing, or distribution, or providing such descriptions or accounts to any other person (other than counsel of record in this case).

Dated: July 7, 2020

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APPENDIX: EVIDENTIARY OBJECTIONS TO DEFENDANTS' EVIDENCE

Karp Affidavit ¶ 7:

"After negotiations over several months, on August 29, 2019, Simon & Schuster entered into a publishing agreement with Ms. Trump's entity Compson Enterprises LLC for the services of Mary L. Trump, the Author (the "Agreement"). (Ms. Trump signed an Individual Guarantee concerning the Agreement). As the signatory to the Agreement on behalf of Simon & Schuster, I am very familiar with the contents of the Agreement. In the Agreement, Ms. Trump warrants and represents, in relevant part, that she has the "full power and authority to make this agreement and to grant the rights granted hereunder" and that she "has not previously assigned, transferred or otherwise encumbered [the rights]." Agreement ¶ 37. The Agreement also includes Ms. Trump's representation that these warranties are "true on the date of the execution of this agreement" and "true on the date of the actual publication" of the Book. Id. ¶ 44. Further, the Agreement provides that the "Publisher shall be under no obligation to make an independent investigation to determine whether the foregoing warranties and representations are true and correct." Id. ¶ 43.

Objection: Best Evidence. Simon & Schuster has failed to produce the actual writing, which is in its possession, custody and control.

Karp Affidavit ¶ 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."

Objection: Best Evidence; Legal Conclusion. Simon & Schuster has failed to produce the actual writing, and Karp's legal conclusion as to what rights Mary Trump had is inadmissible.

Karp Affidavit ¶ 13:

"Simon & Schuster no longer maintains control of the copies of the Book that have been shipped to the large national chains, online retailers, and small independent booksellers referenced in the previous paragraph of this Affidavit."

Objection: Legal Conclusion. Karp is not competent to testify as to who has legal control of any such copies, and Simon & Schuster has not tendered any actual documents that would show they have no control.

Karp Affidavit ¶ 14:

"I understand that in the Complaint in this action, Mr. Trump does not actually state any cause of action against Simon & Schuster. Instead, it is alleged that Simon & Schuster may somehow be enjoined because it is Ms. Trump's "agent." In no way is there an agency relationship between Simon & Schuster and Ms. Trump for book rights."

Objection: Legal Conclusion and Best Evidence. Karp has no qualification to state what does or does not state a cause of action. Simon & Schuster has not produced the contract that would show if there is any sort of agency relationship.

Mary Trump Affidavit ¶ 13:

"I never believed that the Settlement Agreement resolving discrete financial disputes could possibly restrict me from telling the story of my life or publishing a book discussing anything contained in the Book, including the conduct and character of my uncle, the sitting President of the United States, during his campaign for re-election, my aunt Maryanne, a former federal judge, or my uncle Robert, a prominent public figure. Moreover, my uncle, the President, has spoken out about our family and the will dispute on numerous occasions."

Objection. Unexpressed Subjective Intent. What Mary Trump claims to have "understood", but did not communicate to Robert, is completely irrelevant to the contract's meaning. *Hudson-Port Ewen Assocs. v. Kuo*, 165 A.D.2d 301, 305 (3d Dep't 1991).

Mary Trump Affidavit ¶ 16:

"Once the Book was formally accepted by Simon & Schuster, I lost any ability to prevent or delay the publication of the first edition of the Book. Indeed, I have no control even over the publication date."

Objection: Legal Conclusion and Best Evidence. Mary Trump has no qualification to state what legal controls she may or may not have; such controls may be in the written contract, which Simon & Schuster has not produced.

Mary Trump Affidavit ¶ 17:

"Today Simon & Schuster has exclusive control over the publication of the Book. I have no control over and do not direct Simon & Schuster's print schedule or shipping schedule. I do not direct and do not have the power to direct, how many copies they print, when they print them, or to whom they ship them. I do not control or direct Simon & Schuster's relationships with reviewers, booksellers, and news media. I do not direct nor do I have the power to direct, to whom they ship copies of the Book and in what quantities."

Objection: Legal Conclusion and Best Evidence. While Mary Trump may testify as to what she customarily does and how she approaches her relationship with Simon & Schuster, the portions dealing with the "powers" she has are outside her competence of a lay witness and are matters for the Court to decide based on the actual contract, which Simon & Schuster has not tendered to the Court.