SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SAMUEL D. NUNBERG,	:	Index No. 653659/16
Petitioner,	:	IAS Part 3
	:	Hon. Eileen Bransten, J.S.C.
- against -	:	
	:	Motion Seq. No. 001
DONALD J. TRUMP FOR PRESIDENT, INC. and TRUMP 2012 PCA,	:	
Respondents.	:	

MEMORANDUM OF LAW IN OPPOSITION TO
PETITIONER'S MOTION TO STAY ARBITRATION

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Respondents Donald J. Trump for President, Inc. (the "Campaign") and Trump 2012 PCA ("Trump 2012") (collectively, "Respondents") respectfully submit this memorandum of law in opposition to the motion (the "Motion") by Petitioner Samuel D. Nunberg ("Petitioner") to stay the arbitration filed against him by Trump 2012 (the "Arbitration") which is now pending before the American Arbitration Association (the "AAA").

PRELIMINARY STATEMENT

In January 2015, Petitioner, a disgruntled former political consultant who was dismissed from the Campaign, duly signed a confidentiality and non-disparagement agreement (the "Confidentiality Agreement") pursuant to which he clearly and unequivocally agreed (i) that "any dispute arising under or relating to" the Confidentiality Agreement would be resolved by the parties through "binding arbitration" before the AAA; (ii) that he would "not contest" the submission of any dispute under the Confidentiality Agreement to the AAA; and (iii) that he had "read, understood and agree[d] to comply" with the terms of the Confidentiality Agreement, which he further recognized "creates a valid and binding legal obligation" on him.

Despite this clear and unequivocal language, Petitioner, in a calculated attempt to not only propel himself back into the spotlight, but use the Court and this Motion as a vehicle to disclose confidential information and make wild, outlandish and reckless accusations in flagrant violation of the Confidentiality Agreement, now seeks to permanently stay the Arbitration, arguing, among other things, that a valid arbitration agreement does not exist, and that a subsequent consulting agreement supersedes the Confidentiality Agreement. As demonstrated below, however, Petitioner is completely wrong on the law. It is well settled in New York that arbitration is a favored method of dispute resolution, that the only issue for judicial review on a motion to stay arbitration is whether a valid arbitration agreement has been made and that, where

a valid arbitration exists, all other issues in dispute are to be decided in arbitration and not by the court.

As a consequence, the instant motion must be denied and his Petition should be dismissed with prejudice.

STATEMENT OF FACTS

The Confidentiality Agreement and its Arbitration Clause

On or about January 1, 2015, Petitioner duly executed the Confidentiality Agreement pursuant to which he expressly agreed "not to disclose, disseminate or publish or cause to be disclosed, dismissed or published, any Confidential Information", "not to assist others in obtaining, disclosing, disseminating, or publishing Confidential Information", "not to detrimentally use any Confidential Information" and "not to demean or disparage publically" Trump 2012, Donald J. Trump ("Mr. Trump"), any of his family members or any of their associated or affiliated businesses or entities. *See* Confidentiality Agreement, Sections 1 and 2, a copy of which is annexed to the Affirmation of Lawrence S. Rosen ("Rosen Aff."), as **Exhibit A**.

More relevant to this proceeding, the Confidentiality Agreement contained a clear and unequivocal arbitration clause pursuant to which Petitioner expressly agreed that "any dispute arising under or relating to" the Confidentiality Agreement would be resolved by the parties through "binding arbitration" before the AAA and that he would "not contest" the submission of any dispute under the Confidentiality Agreement to the AAA. *See* Rosen Aff., Ex. A, §8(b).

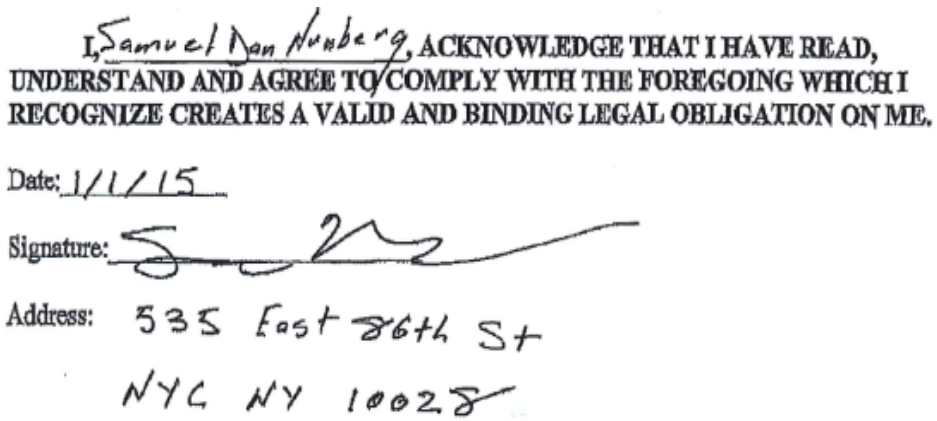
Specifically, Section 8(b) of the Confidentiality Agreement, entitled "Arbitration", states as follows:

> "Without limiting the Company's or any other Trump Person's right to commence a lawsuit in a court of competent jurisdiction in

> the State of New York, **any dispute arising under or relating to this agreement**, **may, at the sole discretion of each Trump Person, be submitted to binding arbitration in the State of New York pursuant to the rules for commercial arbitration of the American Arbitration Association, and you hereby agree to and will not contest such submissions**. Judgment upon the award rendered by an arbitrator may be entered in any court having jurisdiction."

See Rosen Aff., Ex. A, §8(b).

Not only did Petitioner duly sign the Confidentiality Agreement, but in doing so, expressly acknowledged that he had "read, understood and agree[d] to comply" with the terms of the Confidentiality Agreement, which he further recognized "creates a valid and binding legal obligation" on him. Petitioner's signature on the Confidentiality Agreement appears, as follows:


I, Samuel Dan Nunberg, ACKNOWLEDGE THAT I HAVE READ, UNDERSTAND AND AGREE TO COMPLY WITH THE FOREGOING WHICH I RECOGNIZE CREATES A VALID AND BINDING LEGAL OBLIGATION ON ME.

Date: 1/1/15

Signature:

Address: 535 East 86th St
NYC NY 10028

The AAA Proceeding

Consistent with the Confidentiality Agreement and the arbitration clause contained therein, on July 11, 2016, Trump 2012 duly filed a proceeding against Petitioner with the AAA seeking to hold Petitioner liable for disclosing certain Confidential Information and making certain disparaging remakes in violation of the Confidentiality Agreement. A copy of the Statement of Claim in the Arbitration is annexed to the Rosen Aff. as **Exhibit B**.

That same day, Trump 2012 also filed an emergency application with the AAA (the "Emergency Application"), pursuant to Rule 38(b) of its Commercial Arbitration Rules and

Mediation Procedures, seeking an immediate order preliminarily precluding Petitioner from publically disclosing Confidential Information in violation of the Confidentiality Agreement until such time as a determination could be made in the Arbitration as to whether Petitioner's disclosure of Confidential Information constituted a breach of the Confidentiality Agreement. The reason Trump 2012 felt compelled to file the Emergency Application was because Petitioner and his counsel had previously indicated that upon the filing of the Arbitration, they would be publically disclosing certain Confidential Information under the guise of a stay motion which they intended to file in this Court. Of course, that is exactly what they did.

In response to the Emergency Application, on July 11, 2016, the AAA appointed Richard H. Silberberg, Esq., Co-Chair of the International Arbitration & Litigation practice group at Dorsey & Whitney LLP, to hear the Emergency Application. On July 12, 2016, Mr. Silberberg held a hearing on the Emergency Application at AAA's offices in Manhattan. Petitioner and his counsel, however, failed and refused to attend. After hearing and considering the Emergency Application, on July 13, 2016, Mr. Silberberg issued an interim award enjoining Petitioner "from disclosing any information of a private, proprietary or confidential nature" concerning Mr. Trump, his family, all current and former employees of Respondents, Mr. Trump's business affairs as well as the strategies, policies, finances, relationships and business dealings of Respondents. A copy of the Interim Award is annexed to the Rosen Aff. as **Exhibit C**. Despite the foregoing, Petitioner continues to use this Motion as well as these court proceedings to violate the Confidentiality Agreement.

ARGUMENT

I. NEW YORK COURTS HAVE LONG FAVORED ARBITRATION AS A METHOD OF RESOLVING DISPUTES

It is well settled that arbitration is a favored method of dispute as a matter of public policy. *See Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007) (citations omitted). *See also 166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp.*, 78 N.Y.2d 88, 93 (1991). New York "favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties." *Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co.*, 37 N.Y.2d 91, 95 (1975).

"[A]rbitration is a creature of contract," and therefore, it "has long been the policy of this State to interfere as little as possible with the freedom of consenting parties in structuring their arbitration relationship." *Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 465 (2010). Therefore, this Court's role is necessarily "limited to interpretation and enforcement of the terms agreed to by the parties." *Id.* "Any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration." *State of New York v. Philip Morris Inc.*, 30 A.D.3d 26, 31 (1st Dep't 2006).

II. PETITIONER'S MOTION TO STAY THE ARBITRATION SHOULD BE DENIED AS A MATTER OF LAW

It is well settled that on a motion to either compel or stay arbitration under CPLR 7503, the Court's sole responsibility is to determine whether (i) a valid agreement to arbitrate has been made and (ii) the issue in dispute falls within the scope of the arbitration agreement. CPLR 7503(a) and (b). *See Edgewater Growth Capital Partners, LP v. Greenstar North America Holdings, Inc.*, 69 A.D.3d 439 (1st Dep't 2010) (affirming trial court's order compelling arbitration where there the agreement in dispute contained a "broad arbitration clause" and "the claims brought by defendant fit within [its] scope"); *VR Capital Group Ltd. v. Broadridge*

Financial Solutions, Inc., 139 A.D.3d 519 (1st Dep't 2016) (affirming the trial court's (Bransten, J.) order compelling arbitration where "there was a valid agreement to arbitrate" and "the issue sought to be submitted to arbitration fell within the scope of the agreement's broad arbitration clause"); *JetBlue Airways Corp. v. Stephenson*, 88 A.D.3d 567, 570-71 (1st Dep't 2011) (where the parties are subject to an arbitration agreement, "[o]nly three threshold questions may be decided by a court … (1) whether the agreement to arbitrate is valid; (2) whether the parties have complied with the agreement; and (3) whether the claim is timely"); *Schenkers Int'l Forwarders, Inc. v. Meyer*, 164 A.D.2d 541, 543 (1st Dep't 1991) (reversing trial court's order staying arbitration where it was "clear that the parties entered into a valid arbitration agreement" and the dispute between the parties was "encompassed within the contract's broad arbitration clause").

A. <u>The Confidentiality Agreement Contains a Valid Agreement to Arbitrate</u>

"Although no particular wording is required to constitute a valid, binding arbitration agreement, the language used must be clear, explicit and unequivocal." *Blizzard Cooling, Inc. v. Park Developers & Builders, Inc.*, 134 A.D.3d 867 (2d Dep't 2015). *See also* ***Ritter v. Wilson Elser Moskowitz Edelman & Dicker, LLP***, 2015 WL 4615881, *1 (Sup. Ct. N.Y. Co. July 30, 2015) (Bannon, J.); *Reinforced Concrete & Masonry Constr. Inc. v. Americon Const., Inc.*, 2015 WL 3430626, *3 (Sup. Ct. N.Y. Co. May 29, 2015) (Jaffe, J.).

In the instant action, <u>Section 8(b)</u> of the Confidentiality Agreement, entitled "<u>Arbitration</u>", could not be clearer, more explicit or more unequivocal, expressly providing that "any dispute arising under or relating to this agreement, may, at the sole discretion of each Trump Person, be submitted to binding arbitration in the State of New York pursuant to the rules for commercial arbitration of the American Arbitration Association." In addition, Petitioner further agreed in <u>Section 8(b)</u> that he would "not contest" any submissions to the AAA. Not

only did Petitioner, as part of signing the Confidentiality Agreement, expressly acknowledge that he had "read, understood and agree[d] to comply" with its terms, which included this arbitration provision, but he further recognized that the Confidentiality Agreement and all of its terms and conditions "creates a valid and binding legal obligation" on him.

Regardless, simply by signing the Confidentiality Agreement, Petitioner, -- as the party to be charged -- is presumed to have known the contents of the Confidentiality Agreement and to have assented to them. *See Arakawa v. Japan Network Grp.*, 56 F. Supp. 2d 349, 352 (S.D.N.Y. 1999) *(*"[p]ursuant to New York law, 'a person who signs a contract is presumed to know its contents and to assent to them'")*; see Kopple v. Stonebrook Fund Mgmt., LLC,* 21 Misc.3d 1144(A) (Sup. Ct. N.Y. Co. July 12, 2004)*; Shah v. Monpat Cost., Inc.,* 65 A.D.3d 541 (2d Dep't 2009) (enforcing arbitration agreement where contract explicitly incorporated document containing arbitration clause); *Res v. Masterworks Dev. Corp.*, No. 120295/03, 2004 WL 2309269, at *2 (Sup. Ct. N.Y. Co. July 27, 2004) (enforcing arbitration clause in signed confidentiality agreement where agreement provided that plaintiff agreed to arbitration if he signed agreement).

Accordingly, any argument by Petitioner that he did not agree to arbitrate is simply not credible.

B. <u>The Dispute Falls Within the Scope of the Arbitration Clause</u>

There can also be no question that the underlying dispute between the parties falls within the scope of the arbitration clause. To be clear, the arbitration clause contained in <u>Section 8(b)</u> of the Confidentiality Agreement is broad, encompassing "any dispute arising under or relating to this agreement." In Trump 2012's Statement of Claim filed in the Arbitration, Trump 2012 has alleged that Petitioner breached the terms of the Confidentiality Agreement, specifically

Sections 1 and 2 thereof, by disclosing certain "Confidential Information" and making certain disparaging remarks. *See* Rosen Aff., Ex. B.

As a result, the underlying issues clearly fall within the scope of the parties' agreement to arbitrate.

III. PETITIONER CANNOT DENY THE FACT THAT THE CONFIDENTIALITY AGREEMENT CONTAINS A VALID WRITTEN AGREEMENT TO ARBITRATE

In support of his Motion, Petitioner incredulously argues that he never entered into a valid written agreement to arbitrate (*see* Moving Br., Point II), **but**, that to the extent that the Confidentiality Agreement contains a valid written agreement to arbitrate, such agreement to arbitrate was not properly incorporated by reference into the April 14, 2015 consulting agreement entered into between Petitioner and the Campaign (the "Consulting Agreement", a copy of which is annexed to the Rosen Aff. as **Exhibit D**) (*see* Moving Br., Point III). In addition to being completely disingenuous and inconsistent, Petitioner's arguments are wholly without merit.

A. Petitioner Agreed in the Confidentiality Agreement to Arbitration

In the first instance, Petitioner simply cannot deny that he entered into a valid written agreement to arbitrate when he duly executed the Confidentiality Agreement. Not only does Section 8(b) of the Confidentiality Agreement, entitled "Arbitration", expressly provide that "any dispute arising under or relating to" the Confidentiality Agreement would be resolved through "binding arbitration", he also agreed that he would "not contest" the submission of any dispute under the Confidentiality Agreement to the AAA. Considering the fact that Petitioner expressly acknowledged that he had "read, understood and agree[d] to comply" with the Confidentiality Agreement prior to signing, and recognized that it "creates a valid and binding

legal obligation" on him, it is utterly disingenuous for him to continue to deny the existence of a valid agreement to arbitrate.

B. Trump 2012 Is Not Seeking to Enforce the Consulting Agreement

Even more disconcerting is Petitioner's argument that his agreement to arbitrate in the Confidentiality Agreement was not properly incorporated into the Consulting Agreement. To be clear, Trump 2012 is not attempting to enforce the Consulting Agreement. Instead, as the Statement of Claim filed in the Arbitration makes perfectly clear, the Arbitration is solely limited to Trump 2012's claims that Petitioner breached his obligations under the terms of the Confidentiality Agreement. See Rosen Aff., Ex. B, ¶ 1. The Consulting Agreement is not at issue in the Arbitration and is not referenced once in the Statement of Claim. More importantly, the Campaign is not even a party to the Arbitration. While Respondents did initially bring suit in arbitration under both the Confidentiality Agreement and the Consulting Agreement on May 28, 2016, that proceeding was voluntarily discontinued pursuant to an agreement reached by the parties to that proceeding. A copy of the Notice of Discontinuance filed with the AAA is annexed to the Rosen Aff. as **Exhibit E**. As a result, Petitioner's argument that the arbitration provision contained in the Confidentiality Agreement was not properly incorporated into the Consulting Agreement is a "red herring" as Trump 2012 is not trying to enforce the Consulting Agreement in the Arbitration. Indeed, Trump 2012 is not even a party to the Consulting Agreement.

C. The Confidentiality Agreement Constitutes an Independent, Stand Alone Agreement Which Exists Separate and Apart from the Consulting Agreement

Also unavailing is Petitioner's argument that the Consulting Agreement supersedes and supplants the Confidentiality Agreement. Under accepted rules of contract construction, a contract will only be read to replace or take precedence over a prior agreement where there is

"definitive language" in the newer agreement indicating that it supersedes the prior agreement. *Globe Food Servs. Corp. v. Consol. Edison*, 184 A.D.2d 278, 279 (1st Dep't 1992) (rejecting argument that a newer agreement replaced an earlier one "in the absence of more definitive language" indicating that it "'supersedes' any prior agreement").

Here, however, Petitioner cannot point to any such language in the Consulting Agreement. To the contrary, Paragraph 8 of the Consulting Agreement expressly states the exact opposite, namely, that the Confidentiality Agreement "continues in full force and effect, binds [the Parties] (as if [the Campaign] were originally made a party to it), and will survive the termination of the [Consulting] Agreement." Rosen Aff., Ex. D. In any event, and as mentioned above, provided this Court finds that the Confidentiality Agreement contains a valid agreement to arbitrate, this issue is solely for the determination of the AAA in the Arbitration. *See Skyline Steel, LLC v. PilePro LLC*, 139 A.D.3d 646, 646 (1st Dep't 2016); *Matter of Gramercy Advisors LLC v. J.A. Green Dev. Corp.*, 134 A.D.3d 652, 653 (1st Dep't 2015); *Oldroyd v. Elmira Sav. Bank, F.S.B.*, 956 F. Supp. 393 (W.D.N.Y.1997) ("[A]ll doubts concerning the arbitrability of claims should be resolved in favor of arbitration."); *cf. Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 496 (1st Dep't 2009), *aff'd* 14 N.Y.3d 850 (2010), *cert denied* 562 U.S. 962 (2010) ("Although the question of arbitrability is generally an issue for judicial determination, when the parties' agreement specifically incorporates by reference the AAA rules ... courts will leave the question of arbitrability to the arbitrators.").

D. Petitioner's Arguments Should Be Heard in Arbitration

Regardless of the merits, the proper forum for resolving Petitioner's arguments is the AAA and not this Court. As is the case here, once parties to a broad arbitration clause make a valid choice of forum, all questions with respect to the validity and effect of subsequent

documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator. *See, e.g., Metalink Marine v. Ned Chartering & Trading*, 207 A.D.2d 688, 689 (1st Dep't 1994); *see also In re Estate of Cassone*, 63 N.Y.2d 756, 758-759 (1984) ("It is well established that the question of whether an agreement to arbitrate has been abrogated or abandoned involves issues which must be resolved by the arbitrator."); *Two Cent. Tower Food v. Pelligrino, et al.*, 212 A.D.2d 441, 442 (1st Dep't 1995) ("It is well-settled that issues which go to the validity of the substantive provisions of a contract are to be resolved by an arbitrator, even where there are allegations that the underlying agreement was abandoned or terminated, which could have the effect of negating the agreement's arbitration clause.").

Thus, provided that this Court finds, as a threshold matter, that the Confidentiality Agreement contains a valid, binding arbitration clause, all additional arguments by the parties should be both heard and decided by the AAA in the Arbitration and not by this Court.

IV. PETITIONER'S PUBLIC POLICY ARGUMENTS BORDER ON FRIVOLITY

In yet another attempt to circumvent the Confidentiality Agreement which he voluntarily signed, Petitioner argues that Trump 2012's "abuse of the arbitration clause in the Confidentiality Agreement is an unwarranted attempt to punish and chill Petitioner's [First Amendment] rights…," and therefore, the Arbitration is improper and should be stayed on public policy grounds. Moving Br. 15-19.

Not surprisingly, Petitioner fails to cite a single case to support this proposition. While Petitioner relies on both *Mineola Union Free Sch. Dist. v. Mineola Teachers Ass'n*, 46 N.Y.2d 568, 571 (1979) and *Matter of Port Jefferson Sta. Teachers Assn. v Brookhaven-Comsewogue Union Free School Dist.*, 45 N.Y.2d 898, 899 (1978), in both of those cases the court confirmed

arbitration awards finding that the arbitration of the dispute did *not* violate public policy. Indeed, if Petitioner's argument were true, parties could never enter into confidentiality agreements, let alone resolve their disputes in arbitration.

V. SINCE THE ORDER TO SHOW CAUSE DOES NOT MENTION THAT PETITIONER IS SEEKING TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF, SUCH REQUEST SHOULD BE DENIED

CPLR 2214 requires that a notice of motion (or an order to show cause, as is the case here) specify the relief sought on behalf of a party. Where a moving party fails to formally and specifically demand certain relief, the court should deny such request. *See Arriaga v. Michael Laub Co.*, 233 A.D.2d 244 (1st Dep't 1996); *see also Kolanu Partners LLP v. Sparaggis*, 2016 WL 3057997, *6, 2016 N.Y. Slip Op. 30987(U), *13 (Sup. Ct. N.Y. Co. May 31, 2016) (citing *Arriaga*) (same); *The Bank of New York Mellon v. Cobblestone Estates, Inc.*, 2009 WL 2626454, 2009 N.Y. Slip Op. 31872(U) (Sup. Ct. N.Y. Co. Aug. 17, 2009).

Although Petitioner's moving memorandum sets forth arguments supporting his request for temporary and injunctive relief, nowhere in the Order to Show Cause is there any mention that Petitioner is seeking such relief in connection with his application. This glaring omission requires denial by this Court of any attempt by Petitioner to seek injunctive relief as part of the Motion.

CONCLUSION

For the reasons set forth above and in the accompanying Rosen Affirmation, Respondents respectfully request that the Court deny Petitioner's Motion and dismiss his Petition with prejudice, and grant Respondents such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 28, 2016

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