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

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SAMUEL D. NUNBERG,

Petitioner,

- and -

DONALD J. TRUMP FOR PRESIDENT, INC. and TRUMP 2012 PCA,

Respondents.

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REPLY AFFIRMATION

ANDREW T. MILTENBERG, an attorney duly admitted to practice law in the Courts of the States of New York, pursuant to CPLR 2106, affirms the following to be true under penalties of perjury:

1. I am a Partner in the firm of Nessenoff & Miltenberg, LLP, counsel for the Petitioner, Samuel D. Nunberg. I submit this affirmation in reply to the opposition submitted by the Respondents, Donald J. Trump for President, Inc. and Trump 2012 PCA (the "Trump Campaign" or "Respondents"), and in further support of Mr. Nunberg's application made pursuant to CPLR § 7503(b), to stay the arbitration proceeding improperly commenced against him by Respondents.

INTRODUCTION

2. Initially, in opposition to the application, Respondents do not submit an affidavit of any party or witness with actual knowledge of the facts. Instead, they only submit an affirmation of their newly retained counsel without personal knowledge to which documents are attached as exhibits.

3. Without any good faith basis, or opposing affidavit, the Respondents' counsel makes the absurd assertion that by defending himself against the unauthorized arbitration commenced by Trump 2012 PCA as a supporter of Donald J. Trump For President, Inc. seeking an award of $10 million, Mr. Nunberg is simply seeking publicity. While it may be the philosophy of the Trump Campaign that all publicity is good publicity, rest assured, Mr. Nunberg's legal steps taken in response to the substantial, yet frivolous unauthorized arbitration claims raised on behalf of the Trump Campaign, cannot rationally be deemed to be a publicity stunt.

4. Further, without basis, Respondent's counsel accuses Mr. Nunberg of revealing confidential information in his application to the Court. Instead of pointing to any sworn statement made by Mr. Nunberg in his application or any paragraph, sentence, phrase or word in his papers that may even remotely be deemed to be confidential under the Consulting Agreement, Respondents simply level unfounded, vague and general accusation of confidentiality without basis. A review of Mr. Nunberg's papers reveals that there are no confidential disclosures and that the Trump Campaign is simply whining that a former consultant has the chutzpah of defending himself aggressively against a baseless attack.

5. For example, any reference to the New York Page Six article that reported on the salacious argument between two Trump Campaign employees who were engaged in an embarrassing shouting on a public street over eight months after Mr. Nunberg was terminated can hardly be deemed to confidential. Nor can Mr. Nunberg's endorsement of Mr. Cruz contrasting his competency for the job of President as compared to Mr. Trump's based upon the public record, be deemed the revelation of confidential information or be deemed disparaging

under any rational definition. Yet those are the only two specific claims of alleged confidentiality breaches raised in the arbitration proceeding against Mr. Nunberg.

6. Further, it is disingenuous for the Respondents (especially a presidential candidate) and their counsel to contend that Mr. Nunberg's public policy argument presented based upon First Amendment grounds to stay the arbitration is frivolous. With substantial justification, Mr. Nunberg contends that arbitrators are ill-equipped to opine on the constitutional issues raised as a result of the Respondents' attack on Mr. Nunberg's free speech rights, which the Trump Campaign is attempting to suppress without justification by subjecting Petitioner to a costly arbitration proceeding regardless of the outcome.

7. Indeed, the cost of the emergency arbitrator in the arbitration that proceeded without participation of Mr. Nunberg, who chose to seek a stay in this case, was fixed at $500 an hour, and the proposed arbitration proceeding which will have three such well-paid arbitrators, no doubt, will be an automatic punishment designed to chill Mr. Nunberg's constitutional rights.

8. Such draconian costs alone, whether justified or not, are calculated by the Trump Campaign to suppress and chill any opinion Mr. Nunberg has the right to express concerning the presidential contest between Mr. Trump and Mrs. Clinton, and to punish Mr. Nunberg at the whim of Mr. Trump, who perceived disloyalty to his campaign by a former consultant. Certainly, Mr. Nunberg, as a citizen of this free country should be protected against such prior restraints of his free speech rights that the arbitration process itself will impose, especially where the arbitrators are ill-equipped to recognize or protect such fundamental rights.

9. This is made abundantly clear by the emergency order that Trump 2012 PCA sought and obtained *ex parte* from the emergency arbitrator, Richard H. Silberberg, Esq., who did little more than rubber stamp the form of relief submitted to him by The Trump

Organization's General Counsel without scrutinizing the Consulting Agreement itself or taking into account any potential prior restraint issue.

10. In that regard, the emergency relief granted at an *ex parte* hearing to Trump 2012 PCA, a non-existent entity, showed nothing more than an arbitrator's incompetency to deal with such complex issues by his signing an emergency order that granted the Trump Campaign more than the ultimate injunctive relief sought in the Statement of Claim itself with no justification from the text of the Confidentiality Agreement.

11. Making the emergency ruling even more preposterous, Mr. Silberberg admitted that he granted the relief without any finding of wrongdoing by stating: "To be clear, the Emergency Arbitrator makes no finding regarding whether any particular information is Confidential Information entitled to protection under the Confidentiality Agreement, only that the issue is arbitrable and should be fully vetted by the arbitration tribunal." See Interim Award, at page 11.

12. Nevertheless, without finding any breach of the Confidentiality Agreement, the emergency arbitrator proceeded to issue broad, baseless and illegal injunctive relief that extended far beyond the plain language of the Confidentiality Agreement itself or the relief sought in the Statement of Claim, and without any regard to the First Amendment of the United States Constitution.

13. The emergency arbitrator did not even restrict relief in favor of the parties or named beneficiaries set forth in the Confidentiality Agreement and blithely extended relief in favor of non-parties to the Confidentiality Agreement and the arbitration proceeding. Although Corey Lewandowski, Hope Hicks and Daniel Scavino are not defined persons entitled to relief under the express terms of the Confidentiality Order, Mr. Silberberg deemed it appropriate to

amend and expand that contract to include them as beneficiaries by ordering Mr. Nunberg to refrain from speaking ill against them personally.

14. Further, as previously demonstrated in the Affidavit of Rebecca Nunberg, Esq., submitted in support of this application, Trump 2012 PCA does not exist and, as such has no successors. Despite the fact that Confidentiality Agreement by its defined terms does not apply to any and all affiliates of Trump 2012 PCA, companies that were not extant at the time of the agreement, or any and all employees of such uncovered entities, Mr. Silberberg, disregarding the plain terms of the Confidentiality Agreement itself, issued relief that expanded the scope of the beneficiaries exponentially in favor of the Trump Campaign to suppress Mr. Nunberg's free speech to just about anything Mr. Trump wanted to suppress willy-nilly during the presidential campaign.

15. Moreover, ordering that any and all applications by Mr. Nunberg to Court be made under seal, regardless of the Court rules that restrict such censorship, Mr. Silberberg simply joined the Trump Campaign to place inexcusable and illegal barriers upon Mr. Nunberg's right to seek redress of his grievances in Court and be protected by due process afforded in a judicial proceeding, and to muzzle his arguments. By requiring any filing to be made under seal, the emergency arbitrator placed an undue restraint on Mr. Nunberg's fundamental rights, which a competent Court would no doubt address even *sua sponte*.

16. In issuing the emergency order after the application was filed by Mr. Nunberg in this Court, Mr. Silberberg relied on certain quotes of an interview of Mr. Nunberg in GQ that actually took place in or about March 2016 that did not go to press until June 20, 2016, as evidence of Mr. Nunberg's alleged violation of an arbitration standstill agreement entered into between Mr. Nunberg and the Trump Campaign after the first arbitration proceeding was

commenced on May 28, 2016, through July 1, 2016 and then extended to July 5, 2016. A copy of the June 20, 2016 GQ article in annexed hereto as Exhibit "A".

17. Given the date of Mr. Nunberg's GQ interview that was set forth on page seven of the article itself as being eight months after Mr. Nunberg was fired in August 2015, the Trump Campaign was well aware that Mr. Nunberg was interviewed in March 2016, long before any arbitration proceedings had been commenced by them.

18. Despite that knowledge, in bad faith, the Trump Campaign misrepresented to the emergency arbitrator, and now to this Court, that Mr. Nunberg somehow violated the standstill agreement entered into by the parties after the first Statement of Claim was filed in late May 2016 simply because GQ held up publication of Mr. Nunberg's March 2016 interview until June 20, 2016. Had Mr. Silberberg taken the time to actually read the article to see that Mr. Nunberg had been interviewed long before any arbitration proceedings had been commenced by the Trump Campaign, he could not possibly have granted such relief on such an obviously false representation made by the Trump Campaign as a basis for his issuance of an emergency prior restraint.

19. Nevertheless, without any compunction, the emergency arbitrator issued an emergency order granting relief in excess of the scope of the permanent injunctive relief sought by Trump 2012 PCA in its Statement of Claim. See Statement of Claim, at ¶ 35, annexed to Nunberg Moving Affidavit, as Exhibit "G".

20. Remarkably, although Trump 2012 PCA by its counsel entered into a standstill agreement pending a decision in this matter in open court on July 13, 2016 in this proceeding when the order to show cause was first presented, now its counsel disingenuously argues that

because a temporary restraining order or preliminary injunction was not sought in the order to show cause, no such relief should be granted.

21. As set forth in the order to show cause entered in this matter itself, the Court in its own handwriting interlineated the stipulation of counsel as follows: "The attorneys have agreed to a standstill re: the AAA proceeding until the court has an opportunity to decide this matter." Now characteristically, the Trump Campaign is reneging on its agreement, and questioning the authority of the Court to grant the very relief.

22. While it is true that Mr. Nunberg did not participate in that alleged emergency proceeding, he was justified in absenting himself therefrom since participation in the arbitration would preclude his seeking relief in Court pursuant to CPLR Article 75 to stay the arbitration. When he was notified that the second Statement of Claim was filed by Trump 2012 PCA on July 11, 2016, Mr. Nunberg's counsel immediately provided notice that he would be seeking a stay in this Court prior to any notice by the Trump 2012 PCA's attempt to obtain an emergency order to silence Mr. Nunberg.

23. All the initial papers in support of Mr. Nunberg's stay application were filed on July 12, 2016 before the alleged emergency order was issued. Moreover, at the July 13, 2016 hearing before this Court, the Respondents' counsel stipulated to a standstill agreement concerning any and all proceedings in the arbitration proceeding until this Court had an opportunity to rule on the Petitioner's application, which in effect rendered that emergency order nugatory. Nevertheless, now Respondents' counsel argues the emergency arbitrator's order issued after this proceeding was commenced somehow restricts the pleadings that may be filed in this Court.

24. The Respondents argument shows nothing more than complete disregard for the authority of this Court or Mr. Nunberg's right to seek a Court ruling pursuant to CPLR Article 75. Moreover, it is utterly false that Mr. Nunberg did not seek preliminary relief in his papers. As set forth in the portion of the order to show cause that was stricken by the Court upon counsel's standstill stipulation, Mr. Nunberg sought the following relief:

> **IT IS ORDERED** that the arbitration in this matter, commenced by Respondent Trump 2012 PCA before the American Arbitration Association, claim confirmation number 01-16-0002-0329, on or about July 11, 2016, shall be stayed pending the determination of this application; . . .

25. This language, which is standard preliminary relief sought in connection with an application to stay arbitrations, is the equivalent of seeking a temporary restraining order and a preliminary injunction, and the Respondents' specious argument that such interim relief was not sought should be rejected out of hand.

26. Lastly, Respondents contend that simply because the Trump Campaign switched horses ro make "Trump 2012 PCA" the claimant in the second arbitration proceeding in order to enforce the Confidentiality Agreement rather than proceeding with the original parties to the first arbitration, Donald J. Trump for President, Inc. or The Donald J. Trump Exploratory Committee (the "Exploratory Committee"), which entered into the Consulting Agreement, dated as of April 14, 2015, between the Exploratory Committee and Mr. Nunberg (the "Consulting Agreement"), Mr. Nunberg may not invoke the forum selection clause in the Consulting Agreement requiring all disputes to be heard in a New York court. That is simply incorrect.

27. First, since Trump 2012 PCA is a non-existent business entity posing as a corporation, whose pretend "President", Donald J. Trump, signed the Confidentiality Agreement, the phantom corporation, Trump 2012 PCA, had no legal competency to enter into the

Confidentiality Agreement, and that agreement simply is void, together with its arbitration clause contained therein.

28. Second, when the Confidentiality Agreement was annexed to the Consulting Agreement pursuant to paragraph eight thereof, and the Exploratory Committee (with whom Mr. Nunberg was employed through August 1, 2015 as an independent consultant) became a party thereto, the Confidentiality Agreement was integrated into the Consulting Agreement, which requires all disputes to be heard in a New York Court.

29. As Mr. Nunberg set forth in this paragraph 31 of his moving affidavit without any opposition from Respondents:

> 31. Moreover, while the Consulting Agreement, which was drafted by the Exploratory Committee's counsel, refers to and incorporates the Confidentiality Agreement in Paragraph 8 thereof, I did not intend to incorporate into the Consulting Agreement the inconsistent arbitration provision contained in the Confidentiality Agreement. I accepted the forum selection clause in the Consulting Agreement calling for resolution of disputes only in a New York court, with due process protections, and by entering into that subsequent and superseding agreement I did not agree to proceed in a private arbitration proceeding.

30. Thus, upon executing the Consulting Agreement with the Exploratory Agreement, it was Mr. Nunberg's unrefuted understanding and intention that the forum selection clause in the Consulting Agreement calling for resolution of disputes only in a New York court, with the appurtenant due process protections, superseded the one-sided arbitration provision in the Confidentiality Agreement.

31. Accordingly, Mr. Nunberg's unrefuted sworn position should control the outcome of this application, rather than the affirmation of counsel without any personal knowledge of the negotiations leading up to the relevant agreements.

CONCLUSION

32. For the foregoing reasons, and upon the Petition, all prior Affidavits and accompanying memoranda of law, Petitioner respectfully requests that this Court enter a stay of the Arbitration Proceeding pending the determination of this CPLR Article 75 Proceeding.

Dated: New York, New York
August 4, 2016

Respectfully submitted,

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