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

SAMUEL D. NUNBERG,	:	Index No. 653659/16
Petitioner,	:	
- against -	:	
DONALD J. TRUMP FOR PRESIDENT, INC. and TRUMP 2012 PCA,	:	
Respondents.	:	

PETITIONER'S REPLY MEMORANDUM OF LAW

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INTRODUCTION

This memorandum of law is submitted by Petitioner Samuel D. Nunberg ("Mr. Nunberg" or "Petitioner"), in reply to the opposition of Respondents Trump 2012 PCA Donald J. Trump for President, Inc. (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.

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.

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 publicity stunt.

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.

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.

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. Indeed, the cost of the emergency arbitrator 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. 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.

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. 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

Making the emergency ruling even more preposterous, Mr. Silberberg admitted that 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. 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 Untied States Constitution.

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.

Further, even though Trump 2012 PCA does not exist and has no successors, and despite the fact that Confidentiality Agreement by its defined terms does not apply to all any and all affiliates of Trump 2012 PCA, companies that were not even 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.

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*.

In issuing the emergency order after the application was filed by Mr. Nunberg, Mr. Silberberg relied on certain quotes of an interview of Mr. Nunberg in GQ that took place in April 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.

Given the date of Mr. Nunberg's GQ interview that was set forth in 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. 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 representations made by the Trump Campaign as a basis for his issuance of an emergency prior restraint. 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".

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 new 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. 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.

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. 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. 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; . . .

This language, which is routine 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.

Lastly, Respondents contend that simply because the Trump Campaign switched horses to Trump 2012 PCA 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.

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.

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. 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.

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. 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.

POINT I

TRUMP 2012 PCA, A NON-EXISTING ENTITY WITH NO POWER TO CONTRACT, IS VIOLATING GBL § 130 AND THEREFORE THIS ACTION MUST BE DISMISSED

Nowhere in Respondents' papers do they deny that Trump 2012 PCA, the party to the Confidentiality Agreement, which was signed by Donald J. Trump as the "President" of Trump 2012 PCA, is a non-existent, fictitious business entity that failed to file any certificate to conduct business in accordance with New York General Business Law § 130 (1). That provision states that "[n]o person shall hereafter (i) carry on or conduct or transact business in this state under any name or designation other than his or its real name, unless acknowledged certificates are

filed in the county clerk's office where the business is conducted identifying the persons conducting such business in under that name."

Additionally, New York General Business Law § 130 (9) provides that "[a]ny person or persons carrying on, conducting or transacting business as aforesaid, who knowingly fails to comply with the provisions of this section . . . shall be guilty of a misdemeanor." Thus, Respondents' tacit admission of violating General Business Law § 130 by conducting business as "Trump 2012 PCA" without appropriate filings and their continued insistence that despite this admitted criminal violation they may continue to conduct business by proceeding with an arbitration in the State of New York to enforce an alleged confidentiality agreement that this make-believe entity foisted upon Mr. Nunberg, are nothing more than flagrant admissions of criminal conduct that this Honorable Court should not countenance. Since the Trump Campaign conducted business through the non-existent entity, Trump 2012 PCA, which failed to comply with General Business Law § 130, it should not be permitted to continue its illegal conduct of business in this jurisdiction by pursuing arbitration against Mr. Nunberg.

As displayed in the alleged Confidentiality Agreement itself, Donald J. Trump signed as "President," and Mr. Trump, who is on notice of this criminal statute, nevertheless is continuing to violate it by his attempt to conduct the business of proceeding to arbitration in through this sham company. To the extent that "Trump 2012 PCA" was pretending to be a corporation of which Mr. Trump was posing as the "President," it is now admitted that no corporate or other form of business entity documents have been filed to create it, as Petitioner demonstrated in the Affidavit of Rebecca Citron Nunberg, Esq., sworn to July 12, 2016, filed with his moving papers, which Respondents failed to refute.

Predicated upon such undisputed facts, it is axiomatic that such a non-existent corporate

entity, which has neglected to file any certificate of incorporation or to pay corporate filing fees and taxes, was and continues to be precluded from exercising any corporate powers or privileges that would make it competent to enter into the to proceed predicated upon that void contract to commence an arbitration proceeding. See Kiamesha Development Corp. v. Guild Properties, Inc., 4 N.Y.2d 378, 175 N.Y.S.2d 63 (1958) (a corporation that is neither de jure or de facto cannot acquire rights by contract or sue or be sued); 183 Holding Corp. v. 183 Lorraine Street Associates, 251 A.D.2d 386, 673 N.Y.S.2d 745 (2d Dep't 1998) (where corporation contracted to purchase property prior to incorporating, it could not specifically enforce the agreement because it lacked capacity to contract); Black Car and Livery Ins., Inc. v. H & W Brokerage, Inc., 15 Misc.3d 1111(A), 839 N.Y.S.2d 431 (Sup. Ct., Nassau Co. 2007) ("A corporation that does not exist cannot enter into a contract."); Mindlin v. Gehrlein's Marina, Inc., 58 Misc. 2d 153, 295 N.Y.S.2d 172 (Sup. Ct., Westchester Co. 1968) (where foreign corporation had failed to file certificate of incorporation, an attachment to property obtained by that entity at a time that it was neither a *de jur* or *de facto* corporation, was vacated as a nullity).

Given these undisputed facts, Respondents may not proceed in violation of GBL § 130 and attempt to rely upon the *ultra vires* Confidentiality Agreement, which was simply void *ab initio*. Given the established fact that Trump 2012 PCA did not and does not exist as a legal entity, it lacked any legal capacity to contract or to commence an arbitration proceeding to enforce that void instrument. The Court should not countenance the position of Trump 2012 PCA and its principals, which seeks to have this Court place its imprimatur upon their continued criminal violation of GBL § 130 by permitting them to proceed to arbitration.

POINT II

THE ARBITRATION MUST BE STAYED SINCE THE ALLEGED AGREEMENT WITH TRUMP 2012 PCA IS NOT CONTROLLING; AND THE DISPUTE IS BEYOND THE SCOPE OF THE CONFIDENTIALITY AGREEMENT

The record demonstrates beyond cavil that the Trump Campaign, which employed Mr. Nunberg as a political consultant for the 2016 primary and presidential campaign through the Consulting Agreement, is the real party in interest in this matter, and the only possible party that can claim any damages with respect to the claims arising after Mr. Nunberg's termination on August 3, 2015. It is also undisputed that the Trump Campaign commenced a prior arbitration proceeding on May 28, 2016, in which it claimed in the first Statement of Claim that the Trump Campaign had suffered damages in excess of $10 million. See Nunberg Affid., Exhibit "F" at ¶¶ 28, 32.

After being presented by Mr. Nunberg's counsel with the defense that neither the Exploratory Committee nor the Donald J. Trump Presidential Campaign had entered an agreement to arbitrate and that the Consulting Agreement expressly required all disputes to be heard in a New York Court, the Trump Campaign simply shifted its alleged losses of at least $10 million to the fictitious entity, Trump 2012 PCA, and commenced the second arbitration proceeding now at issue solely in the name of Trump 2012 PCA. The only basis of Trump 2012 PCA claiming such damages is its assertion in the Statement of Claim that it "supports the candidacy of Donald J. Trump for presidency of the United States . . . ." See Exhibit "G", at ¶

Not only would such transfer of such alleged claim by a presidential campaign to another entity – real or not – possibly violate campaign financing laws, this shell game played by the Trump Campaign solely to avoid the defense of Mr. Nunberg is simply a bad faith tactic in an attempt to improperly use "Trump 2012 PCA" to attempt to subject Mr. Nunberg to a costly

unauthorized arbitration proceeding to punish him for his switch of political allegiance to the Cruz Campaign.

Trump 2012 PCA, which on its face relates to business conducted solely in connection with the 2012 presidential campaign, cannot possibly be damaged by anything done by anyone during the 2016 presidential campaign. For Trump 2012 PCA to be used as a front to assert claims of damages on behalf of the real party in interest engaged in the 2016 presidential campaign, namely Donald J. Trump for President, Inc., is a travesty that the Court should not condone.

Mr. Nunberg performed his services related to the 2016 presidential campaign on behalf of Donald J. Trump, while engaged as a consultant through the Consulting Agreement with the Donald J. Trump Exploratory Committee. The Consulting Agreement, which incorporated the Confidentiality Agreement by reference into it in paragraph 8 of the Consulting Agreement, provides in paragraph 11 that all disputes must be resolved in a New York Court. By signing the Consulting Agreement, which attached the prior Confidentiality Agreement to it as an exhibit, as demonstrated in his affidavit submitted in support of this application without contravention by any witness on behalf of the Respondents, Mr. Nunberg intended that any dispute would be in court. See Nunberg Affidavit, ¶ 31.

To support its claim, it is alleged in the Second Statement of Claim only that "Trump 2012 supports the candidacy of Donald J. Trump for the presidency of the United States." It is preposterous to permit a "supporter of the Trump Campaign" to sue on behalf of the Trump Campaign, which is a distinct corporate entity, namely Donald J. Trump For President, Inc., which was the allegedly aggrieved claimant in the First Statement of Claim. Nunberg Affidavit, Exhitib "G", at ¶ 3.

Initially, it is not disputed that Mr. Nunberg has no written agreement with the Trump Campaign, which is the real party in interest in this matter. All the allegations of statements made by Mr. Nunberg upon which the arbitration claim is based are directed at the Trump Campaign, not at Trump 2012 PCA, which does not even exist. Therefore, the Trump Campaign should not be permitted to compel Mr. Nunberg to arbitrate through the ruse of suing through its fictitious and non-existing straw man, Trump 2012 PCA.

Nor has it been disputed that the Trump Campaign employed Mr. Nunberg through the Consulting Agreement that Mr. Nunberg entered into with the Exploratory Committee. That Consulting Agreement, which was drafted by the Exploratory Committee's attorneys, that has a clear and unambiguous forum selection clause that mandates that all disputes must be heard in court, providing as follows:

> 11. Disputes. This Agreement will be governed by the law of the State of New York State. Any dispute relating to this agreement may be resolved only in a federal or state court sitting in New York State and you hereby submit to the jurisdiction of such courts and IRREVOCABLY WAIVE YOUR RIGHT TO TRIAL BY JURY (i.e., you agree that a judge and not a jury will hear and decide the case.

While arbitration is favored by New York public policy as a method is resolving disputes, "equally important is the policy that seeks to avoid the unintentional waiver of the benefits and safeguards which a court of law may provide is resolving disputes. Indeed, unless the parties have subscribed to an arbitration agreement it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent." TNS Holdings, Inc. v. MKI Sec. Corp., 92 N.Y.2d 335, 339 (1998), quoting Matter of Marlene Indus. Corp., v. Carnac Textiles, Inc., 45 N.Y.2d 327, 333-334 (1978). Because "[a]bitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so" (Thomas-CSF, S.A. v. American Arbitration Assoc. 64 F.2d 773, 779 [2d Cir. 1995]. A party

should not be compelled to arbitrate absent evidence that affirmatively establishes an express agreement to arbitrate (Mionis v. Bank Julius Baer & Co., Ltd., 301 A.D.2d 104 [1st Dep't 2002]. "The agreement must be clear, explicit and unequivocal... and must not depend upon implication or subtlety" (Matter of Waldron v. Goddess, 61 N.Y.2d 181, 183-184 [1984], quoting Schubtex, Inc., v. Allen Snyder, Inc., 49 N.Y.2d 1,6 [1979]; see also God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc. LLP, 6 N.Y.3d 371, 374 [2006]; Matter of Estate of Arthur Miller, 40 A.D.3d 861, 861-862, 835N.Y.S.2d 728 [2d Dep't 2007]).

The Consulting Agreement between Mr. Nunberg and the Exploratory Committee that controlled his employment, and attached the Confidentiality Agreement, explicitly provides that all disputes must be resolved in a court. Therefore, the rogue arbitration proceeding should be stayed.

Moreover, the confidentiality provisions of the Agreement attached to the Second Statement of Claim between the illegal entity, Trump 2012 PCA and Mr. Nunberg, does not apply to disputes involving the Trump Campaign, which is the real party in interest in this matter. That Confidentiality Agreement applies only to a "Trump Company," which is defined in paragraph 6(f) thereof, as follows:

> "Trump Company" means any entity, partnership, trust or organization that, in whole or in part, was created by or for the benefit of Mr. Trump or is controlled or owned by Mr. Trump.

The Trump Campaign, namely Donald J. Trump Presidential Campaign, Inc. did not existence prior to or at the time of the Confidentiality Agreement, and Mr. Nunberg did not agree or intend that it apply to any future entity such as the Trump Campaign. It cannot possibly permit the Trump Campaign that did not come into existence until 2016 to bootstrap its claim onto that void Confidentiality Agreement entered into solely with Trump 2012 PCA. Moreover,

any alleged damages cannot have been sustained by the fictitious Trump 2012 PCA by the alleged revelation of confidential information or disparaging remarks made by Mr. Nunberg concerning the Trump Campaign, with no mention of or relationship to Trump 2012 PCA. Thus, the dispute that Trump 2012 PCA is attempting to bring on behalf of the Trump Campaign solely as a supporter of Mr. Trump for president, cannot be compelled by Trump 2012 PCA.

Accordingly, since there is no agreement to arbitrate the claims raised in the Second Statement of Claim with respect to matters arising out of the 2016 presidential campaign cycle, it is respectfully submitted that the arbitration proceeding should be preliminarily and permanently stayed.

POINT III

THE TRUMP CAMPAIGN'S ABUSE OF THE ARBITRATION CLAUSE IN THE CONFIDENTIALITY AGREEMENT IN CONTRAVENTION OF MR. NUNBERG'S CONSTITUTIONAL RIGHTS VIOLATES PUBLIC POLICY

The Respondents gloss over in their response the argument set forth in Mr. Nunberg's application that the Trump Campaign's abuse of the arbitration clause in the Confidentiality Agreement is an unwarranted attempt to punish and chill Mr. Nunberg's fundamental rights guaranteed under the First Amendment of the U.S. Constitution And Article I, Sections 8 (Freedom of Speech) and 9 (Freedom of Assembly) of the New York Constitution violates public policy and should not be condoned by the Court. Moreover, in direct contravention of the public policy of New York the Trump Campaign is seeking punitive damages against Mr. Nunberg in an attempt to silence him. This blatant abuse of public policy should not be condoned by the Court, and the arbitration proceeding should be stayed.

The courts in New York have long held that arbitration is foreclosed "when it 'contravenes a strong public policy, almost invariably involving an important constitutional or

statutory duty or responsibility.'" Mineola Union Free School Dist. v. Mineola Teachers Ass'n, 46 N.Y.2d 568, 571 (1979), citing Matter of Port Jefferson Sta. Teachers Assn. v. Brookhaven-Comsewogue Union Free School Dist., 45 N.Y.2d 898, 899, 411 N.Y.S.2d 1, 2, 383 N.E.2d 553, 554, (1978); 5 N.Y. Jur. 2d, Arbitration and Award, § 32 ("If there is some statute, decisional law, or public policy which prohibits arbitration of the subject matter of a dispute, arbitration will not be directed.").

In commencing this arbitration proceeding, the Trump Campaign is unabashedly attempting to punish Mr. Nunberg for exercising his First Amendment rights under the United States Constitution and rights to Free Speech and Assembly under the New York State Constitution. The Trump Campaign's utter contempt and disregard for the Bill of Rights is an issue for the Court, not an arbitrator. Protection of those rights should not be left to the whim of an arbitrator.

The United States Supreme Court has explained that "[t]hose who won our independence believed . . . that public discussion is a political duty, and that this should be a fundamental principle of the American government... Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." New York Times Co. v. Sullivan, 376 U. S. 254, 270 (1964) (Brandeis, L., concurring). Further, "First Amendment standards [ ] 'must give the benefit of any doubt to protecting rather than stifling speech.'" (Citizen's United v. Federal Election Comm'n, 558 U.S. 310, 327, 130 S.Ct. 876, 891 (2010) *citing* New York Times Co. at 269–270). The Trump Campaign's allegations concerning the Mr. Nunberg's endorsement of Sen. Cruz and the alleged communications with the press concerning the public argument between the former Trump

Campaign staffer and current staffer (which Mr. Nunberg denies making), both fall under constitutionally protected speech.

The proceedings to date before the American Arbitration Proceeding demonstrates the arbitrator's incompetency to deal with the issue of free speech that is obvious from the claims made against Mr. Nunberg concerning his endorsement of Ted Cruz in the primaries that apparently triggered Donald Trump's wrath. Mr. Nunberg simply compared the qualifications of Donald Trump with Ted Cruz based upon public statements made in debates and elsewhere after Mr. Nunberg was terminated from the Trump Campaign. Nothing in the Consulting Agreement prevented Mr. Nunberg from assisting another candidate, which would permit Mr. Nunberg to make such comparisons to be made if he did so. Yet, the Trump Campaign used the expensive arbitration process against Mr. Nunberg to squelch his expression of his political opinion.

The First Department makes it clear that prior restraints of free speech are strongly disfavored. In Rosenberg Diamond Dev. Corp. v. Appel, 290 A.D.2d 239, 239, 735 N.Y.S.2d 528, 529 (1st Dep't 2002), the Appellate Division opined:

> Prior restraints on speech are strongly disfavored (see, Ramos v. Madison Square Garden Corp., 257 A.D.2d 492, 684 N.Y.S.2d 212). Free speech is protected from censorship "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest" (Terminiello v. City of Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131, *reh. denied,* 337 U.S. 934, 69 S.Ct. 1490, 93 L.Ed. 1740; accord, Edwards v. South Carolina, 372 U.S. 229, 237, 83 S.Ct. 680, 9 L.Ed.2d 697). Prior restraints are not permissible, as here, merely to enjoin the publication of libel (see, Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163; Ramos v. Madison Square Garden, supra).

Certainly, the Trump Campaign must seek the state action of a Court to enforce the invidious emergency order. Mr. Nunberg should not be subjected to such improper censorship and the *in terrorem* effect of such an illegal order upon judicial enforcement thereof during this presidential campaign cycle, as the Trump Campaign is attempting to do.

The substantial constitutional rights of Mr. Nunberg that must be construed in this case should not be left to the whims of an arbitrator to decide without the evidentiary and due process safeguards available in a court of law. Accordingly, based upon these strong public policy considerations, the Court should stay the arbitration.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court enter a stay of the Arbitration Proceeding pending the determination of this CPLR Article 75 Proceeding.

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Respectfully submitted,

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