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

SAMUEL D. NUNBERG,

Index No.

Petitioner,

-against-

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

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE

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INTRODUCTION

This memorandum of law is submitted by Petitioner Samuel D. Nunberg ("Mr. Nunberg" or "Petitioner"), in support of his application made pursuant to CPLR § 7503(b), to stay the arbitration proceeding improperly commenced against him by Respondent Trump 2012 PCA Donald J. Trump for President, Inc. (the "Trump Campaign" or "Respondents").

Without any valid arbitration agreement, in retaliation for Mr. Nunberg's change of political opinion to support Senator Ted Cruz and based upon an unfounded accusation that he planted a story in Page Six of the New York Post, the Trump Campaign is attempting to compel Mr. Nunberg to defend himself behind the closed doors of an arbitration proceeding in which it demands more than $10 million and punitive damages without any good faith basis.

As demonstrated below and in the accompanying Petition, Affidavits of Samuel D. Nunberg and Rebecca Nunberg, to which the Court is referred, it is respectfully submitted that not only must the arbitration proceeding be stayed because there is no valid arbitration agreement, it would violate public policy to permit this direct attack by the Trump Campaign upon Mr. Nunberg's Constitutional rights of Political Free Speech and Assembly under the United States and New York Constitutions.

PRELIMINARY STATEMENT

The facts supporting this application pursuant of CPLR § 7503(b), are set forth in the Petition and Affidavit both sworn to by Mr. Nunberg on July 12, 2016, to which the Court is respectfully referred. As set forth therein, Mr. Nunberg was formerly an at-will independent contractor pursuant to a Consulting Contract, dated as of April 14, 2015, with of the Donald J. Trump Exploratory Committee (the "Exploratory Committee"), pursuant to which he was retained as a political consultant during the period between April 14, 2015 and August 3, 2015.

The Consultant Agreement, which was drafted by the Exploratory Committee's attorneys, 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.

Despite the fact that Mr. Nunberg has no written agreement to arbitrate with the Trump Campaign and the controlling Consulting Agreement requires that disputes be heard in a New York Court, in retaliation for his change of political opinion and the free exercise of his First Amendment right to abandon his political backing of Mr. Trump and to endorse U.S. Senator Ted Cruz publicly, which he did, the Trump Campaign is attempting to bring a frivolous and retaliatory arbitration proceeding against him and to stifle his free speech.

Further, the Trump Campaign initiated this abusive and frivolous harassment of Mr. Nunberg in order to bludgeon Mr. Nunberg with a private arbitration proceeding in a misguided attempt to silence media coverage of a loud and angry argument witnessed by others on a public street between a former Trump Campaign staffer and another staffer, as reported in the New

York Post, Page Six, on May 19, 2016 in an article entitled *"Trump Campaign Staffers Get into Public Screaming Match"* by Emily Smith. Mr. Nunberg did not place that article in the *New York Post* concerning that event, although as reflected in the Statement of Claim, the Trump Campaign, for some paranoid reason, believes he did. Not only did that incident take place outside the scope of and long after the termination of Mr. Nunberg's political consulting relationship with the Trump Campaign, there were numerous witnesses and sources for that tawdry tabloid story.

In sum, there is no basis for the Trump Campaign to harass Mr. Nunberg with a frivolous arbitration proceeding seeking $10 million to be awarded to it against him by an arbitrator with absolutely no good faith basis in law or fact since Mr. Nunberg never agreed to arbitrate anything with the Trump Campaign. Nevertheless, on May 28, 2016 Trump Campaign initiated an arbitration that is entirely without merit against Mr. Nunberg without any agreement for arbitration with Mr. Nunberg.

Mr. Nunberg agreed to a standstill agreement with the Trump Campaign in mid-June in order to have this matter resolved without any public knowledge as the Trump Campaign's abuse of the star chamber of arbitration would be detrimental in stopping Hillary Clinton from becoming the 45th President of the United States. During this entire period, the Trump Campaign may very well have violated Federal Election Law by co-mingling corporate resources and failing to file the costs and expenditures the Trump Campaign has already incurred this past May and June.

True to form, the Trump Campaign continued its assault on Mr. Nunberg's constitutionally guaranteed rights of free speech, public participation and freedom of association instead of negotiating in good faith during that hiatus. When Mr. Nunberg refused to kowtow to

the Trump Campaign's draconian demands that would deprive Mr. Nunberg of not only his constitutionally protected rights, but also his ability to make a living, the Trump Campaign reinstated its vindictive arbitration under the fictitious and non-existent alleged entity "Trump 2012 PCA."

Not only is proceeding with this fictitious so-called entity an abuse of process, the Trump Campaign's conducting business in that fashion is illegal. New York General Business Law § 130 (1) provides 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 any person who knowingly fails to comply with this provision is guilty of a misdemeanor and that "carrying on, conducting or transacting business as aforesaid who fails to comply with the provisions of this section shall be prohibited from maintaining any action or proceeding in any court in this state on any contract, account or transaction made in a name other than its real name until the certificate required by this section has been executed and filed in accordance with the provisions set forth herein." Since the Trump Campaign through the *ultra vires* entity, Trump 2012 PCA, has failed to comply with General Business Law § 130, he should not be permitted to conduct business by pursuing arbitration against Mr. Nunberg.

Further, CPLR § 7503(b) specifically provides for the imposition of a stay against such a misuse of the arbitration process when a party who has not participated in the arbitration demonstrates that there is no valid agreement to arbitrate. In the case at bar, no such valid written agreement exists. As such, the Petitioner also qualifies for an immediate stay, pending a final determination of the Petition on its merits.

In seeking to arbitrate this matter, the Trump Campaign is engaging in a heavy-handed and vindictive assault on a private citizen's constitutionally protected rights guaranteed under the United States and the State of New York Constitutions, which protect Mr. Nunberg's rights to engage in political speech and assembly. In so doing, the Trump Campaign is displaying a blatant disregard for the fundamental protections that Mr. Nunberg is entitled to under the Bill of Rights.

Accordingly, because of the lack of any Arbitration Agreement between the Petitioner and the Respondent and the public policy concerns that prohibit arbitration, this Court should grant an immediate stay of Arbitration.

POINT I

TRUMP 2012 PCA IS VIOLATING GENERAL BUSINESS LAW § 130 AND THEREFORE THIS ACTION MUST BE DISMISSED

Trump 2012 PCA is neither a legal entity authorized by the Department of State to do business in the State of New York nor an assumed name for a legal entity or individual authorized to do business in the State of New York under the provisions of General Business Law § 130. Nor has Trump 2012 PCA filed required certificates in the county clerk's offices as required for its principal to legally conduct business under that assumed name.

Since Respondent Trump 2012 PCA filed a Statement of Claim with the American Arbitration Association in order to extort $10,000,000 from Respondent Samuel Nunberg, it is "operating under assumed business names without the requisite governmental filing, the individual respondent violates General Business Law § 130(1)(a). That provision mandates the filing of an assumed business name certificate with the office of the clerk of the county "in which such business is conducted or transacted [setting forth] the full name or names of the person or persons conducting or transacting the same ... with the residence of each such

person....," it is perpetrating a fraud. See Vacco v. Lipsitz, 174 Misc. 2d 571, 578, 663 N.Y.S.2d 468, 473 (Sup. Ct. N.Y. County 1997).

In fact, "[t]he failure to comply with this filing requirement prevents an entity from maintaining an action except in its own name (GBL § 130(9))." American Express Travel Related Services Co. v. Assih, 26 Misc.3d 1016, 893 N.Y.S.2d 438 (Civ.Ct.Richmond Co. 2009).

General Business Law § 130 (9) provides that persons "carrying on, conducting or transacting business as aforesaid who fails to comply with the provisions of this section shall be prohibited from maintaining any action or proceeding in any court in this state on any contract, account or transaction made in a name other than its real name until the certificate required by this section has been executed and filed in accordance with the provisions set forth herein." Since Trump 2012 PCA has failed to comply with General Business Law § 130 (9), the Trump Campaign should not be permitted to conduct business illegally by proceeding with the arbitration.

POINT II

THE ARBITRATION MUST BE STAYED SINCE MR. NUNBERG NEVER ENTERED INTO ANY AGREEMENT TO ARBITRATE WITH THE TRUMP CAMPAIGN AND THE ALLEGED AGREEMENT WITH TRUMP 2012 PCA IS NOT CONTROLLING

CPLR §7501 provides in part: "a written agreement to submit ... any existing controversy to arbitration is enforceable to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it." New York courts, however, have consistently required a writing as a prerequisite for a binding arbitration agreement. See Albrecht Chem. Co. v. Anderson Trading Corp., 298 N.Y. 437, 440, 84 N.E.2d 625 (1949) (holding telephone conversations between a buyer and a seller, which amounted to a contract, did not

create an arbitration agreement); Just In-Material Designs, Ltd., v. I.T.A.D. Assocs., Inc., 463 N.Y.S.2d 202, 94 A.D.2d 103 (1st Dep't 1983) (explaining that absent a clear and unequivocal written agreement to arbitrate, the court will not compel arbitration); Siegel v. 141 Bowery Corp., 280 N.Y.S.2d 232, 51 A.D.2d 209 (1st Dep't 1976)(explaining that arbitration is a matter of contract, which must be in writing); Application of Mandel, 201 N.Y.S.3d 620, 11 A.D.2d 651 (1st Dep't 1960) (explaining that an agreement to arbitrate, to be valid, must be supported by unequivocal consent in writing); Nehemiah Gitelson & Sons v. Weavetex Mills, 84 N.Y.S.2d 605, 274 A.O. 480 (1st Dep't 1948) (nothing that an oral agreement to arbitrate is unenforceable); but cf. Todtman, Young, Tunick, Nachamie, Hendler, Spizz & Drogin, P.C. v. Richardson, 672 N.Y.S.2d 87, 247 A.D.2d 318 (1st Dep't 1998) (explaining that while the principle that an agreement to arbitrate must be in writing is well-settled, where arbitration was based upon a stipulation made in open court and duly recorded, absence of an agreement in writing does not prevent arbitration). Here, there is no question that the parties failed to produce a valid written arbitration agreement.

As reflected in the Petition, Mr. Nunberg is a political consultant and in that capacity was first retained to provide consulting services directly to the Trump Campaign through a consulting company from January 2011 through December 2012 and then directly as an independent contractor during the period between January 2013 and April 2015 (except for a short hiatus in February and March 2014 as well as March 2015).

Mr. Nunberg thereafter entered into the Consulting Agreement, dated as of April 14, 2015, between The Donald J. Trump Exploratory Committee (the "Exploratory Committee") and Mr. Nunberg (the "Consulting Agreement") (See Petition, Exhibit "A"), pursuant to which Mr. Nunberg continued to provide political consulting services directly to the Trump Campaign

during the period between April 14, 2015 and August 3, 2015, when the at will Consulting Agreement was terminated without cause.

The Exploratory Committee is a separate and distinct entity from the Trump Campaign, and each is governed by distinct rules imposed by the federal election laws and regulations. The Consulting Agreement, which was in effect and governed Mr. Nunberg's employment during all times relevant to the claims raised in the Statement of Claim, was drafted by the Exploratory Committee's attorneys and has a clear and unambiguous forum selection clause, which mandates that all disputes must be resolved in a New York 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. (Emphasis supplied).

Mr. Nunberg never entered into an agreement to arbitrate any dispute with the Trump Campaign and the controlling Consulting Agreement he did enter into with the Exploratory Committee concerning the 2016 presidential campaign requires that disputes be heard only in a New York Court.

Nevertheless, on or about May 28, 2016, the Trump Campaign served Mr. Nunberg with a frivolous and retaliatory Demand for Arbitration and Statement of Claim before the American Arbitration Association, dated May 28, 2016 (the "Initial Demand for Arbitration" or "Initial Statement of Claim"), seeking damages of at least $10 million without any good faith basis. See Petition, Exhibit "B."

The Trump Campaign's improper attempt to commence arbitration proceedings against Mr. Nunberg after the Consulting Agreement was terminated was without basis in law or fact and was done in malicious retaliation for Mr. Nunberg's subsequent change of political opinion

and in violation of Mr. Nunberg's First Amendment right to abandon his political backing of the Trump Campaign and to freely exercise his political choice to endorse and associate with U.S. Senator Ted Cruz, as Mr. Nunberg did publicly.

Further, in retribution the Trump Campaign abused process and maliciously attempted to use the private arbitration forum, as well as the *in terrorem* demand of over $10 million in damages set forth in the Statement of Claim without good faith basis, against Mr. Nunberg in a misguided attempt to cover up media coverage of a tawdry public argument between a former Trump Campaign staffer and current staffer, as reported in the New York Post, Page Six article on May 10, 2016 entitled *"Trump Campaign Staffers Get into Public Screaming Match"* by Emily Smith. A copy of the New York Post, Page Six article, dated May 19, 2016, is annexed to the Petition as Exhibit "C".

Without basis, the Trump Campaign falsely alleged in the Initial Statement of Claim (and reprises that false claim in the Second Statement of Claim even after Mr. Nunberg denied that claim in an affidavit) that Mr. Nunberg provided that story concerning Mr. Lewandowski and the Trump Campaign female staffer to the New York Post.

Not only did Mr. Nunberg not provide the reported information to the New York Post concerning that public display which was witnessed by others on a public street, on information and belief, the reported public quarrel between Trump Campaign personnel occurred outside the scope of the activities the Trump Campaign. As such, none of the alleged restrictions arguably arising out of the Consulting Agreement control disclosure of such public extracurricular activities.

In any event, there is no agreement between the Trump Campaign and Mr. Nunberg to arbitrate the disputes alleged in either the First or the Second Statement of Claim filed with the American Arbitration Association.

Furthermore, as reflected in the Consulting Agreement, which was in effect during the period between April 14, 2015 and the date of Mr. Nunberg's at will termination on August 3, 2015, the Exploratory Committee and Mr. Nunberg did not agree to submit any dispute to arbitration before the American Arbitration Association.

To the contrary, the Consulting Agreement's forum selection provision that was drafted and required by the Exploratory Committee's counsel expressly provides that "[a]ny 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."

Upon notice provided to the Trump Campaign that Mr. Nunberg was seeking a stay of the arbitration, the Trump Campaign withdrew its Initial Statement of Claim and entered into a standstill agreement to provide the parties with a hiatus to amicably resolve the matter. Despite Mr. Nunberg's attempts to resolve the matter in good faith, that could not be accomplished.

Thereupon, on July 11, 2016, the fictitious and *ultra vires* entity called Trump 2012 PCA has attempted to proceed to arbitration on behalf of the Trump Campaign by filing a the Seond Statement of Claim with the AAA. Trump 2012 PCA was improperly utilized by the Trump Campaign as a fictitious entity when he toyed with campaigning for the presidency in the 2012 presidential campaign. That so-called entity, which is attempting to conduct business illegally, has nothing to do with the instant 2016 presidential campaign, which is at issue in this dispute against Mr. Nunberg. Nevertheless, recognizing that the Trump Campaign has no standing to arbitrate, and despite the fact that Trump 2012 PCA could never suffer any damages since it does

not exist and has no relevance to the 2016 presidential campaign, the Trump Campaign is perpetrating a fraud by claiming it can proceed to arbitration in the name of Trump 2012 PCA.

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.

Initially, Mr. Nunberg has no written agreement with the Trump Campaign, which is the real party in interest in this matter. Therefore, the Trump Campaign cannot compel Mr. Nunberg to arbitrate. Without basis, the Trump Campaign is relying upon an agreement that Mr. Nunberg entered into with the Exploratory Committee. However, 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 F2d 773, 779 [2d Cir1995]. 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 862, 861-862 [2nd Dep't 2007]).

Here, Mr. Nunberg and the Trump Campaign not only never entered into any agreement to arbitrate, but also the Consulting Agreement between Mr. Nunberg and the Exploratory Committee explicitly provides that all disputes are to 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 the Trump Campaign, which is the real party in interest in this matter. That Agreement and its confidentiality provision apply 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 was not in existence prior to or at the time of the 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 Agreement with 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

PETITIONER AND RESPONDENT DID NOT INTEND TO INCORPORATE THE ARBITRATION AGREEMENT CONTAINED IN THE CONFIDENTIALITY AGREEMENT INTO THE CONSULTING AGREEMENT

An arbitration agreement can only be incorporated by reference if that reference clearly shows such an intent to arbitrate. General Railway Signal Corp. v. L.K. Comstock & Co., Inc., 254 A.D.2d 759, 678 N.Y.S.2d 208 (4th Dep't 1998) (holding that the references in the subcontract regarding the plaintiff's assumption of certain obligations that "flow-down" from the prime contract are an equivocal and ambiguous regarding a similar assumption of the prime contract's alternative dispute provisions and, thus, do not meet the rigid standards necessary to establish an explicit commitment by plaintiff to alternative dispute resolution as provided in the prime contract); Aerotech World Trade Ltd. v. Excalibur Systems, Inc., 236 A.D.2d 609, 654 N.Y.S.2d 386 (2d Dep't 1997) (holding that a provision of a management agreement, which stated that all of the terms and conditions in a sales agreement between the same parties would be binding on the parties if not mentioned otherwise in the management agreement, failed to incorporate by reference the arbitration clause contained in the sales agreement, and therefore, claims arising under the management agreement were not arbitrable, where the management agreement contained no arbitration clause or provision explicitly incorporating any provision of sales agreement).

Further, a contract containing an arbitration clause may only incorporate conditions precedent to arbitration contained in another document if there is additional evidence showing intent to adopt an arbitration clause contained in another contract or document. Pearl Street Development Corp. v. Conduit & Foundation Corp., 41 N.Y.2d 167, 391 N.Y.S.2d 98, 359 N.E.2d 693 (1976) (where the Court states that the general contract and subcontract must both have clauses to arbitrate disputes). A general incorporation of such other contract or document by reference, without specific mention of the arbitration clause, does not obligate the parties to arbitrate. New York Tele. Co. v. Alvord and Swift, 49 A.D.2d 726, 372 N.Y.S.2d 671 (1st Dep't 1975); Arthur Pile & Foundation Corp. v. Bonjay Housing Corp., 27 Misc. 2d 305, 208 N.Y.S.2d 823 (Sup 1960); Emerson Radio & Phonograph Corp. v. Illustrated Technical Products Corp., 12 Misc. 2d 1000, 178 N.Y.S.2d 277 (Sup. Ct. N.Y. Co. 1958) (holding that a provision in a letter of intent agreement did not indicate an intent to incorporate by reference all other provisions of such contract form, and in the absence of a showing that the arbitration clause in such form was ever considered or referred to, the parties could not be compelled to participate in arbitration..)

The Trump Campaign improperly relies on a clause in the Confidentiality Agreement entered into with Trump 2012 PCA (See Nunberg Affidavit, "Exhibit "B"), which is not incorporated in the Consulting Agreement, to bring its frivolous and meritless claim to arbitration. The Consulting Agreement explicitly states:

> 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.

The intent not to arbitrate disputes cannot be made clearer in paragraph 11 of the Consulting Agreement. The reference to the Confidentiality Agreement in paragraph 8 the Consulting Agreement does not demonstrate any contrary intention to arbitrate, especially given the unequivocal direction in the Consulting Agreement mandating that "[a]ny dispute relating to this agreement may be resolved only in a federal or state court sitting in New York State."

The Second Statement of Claim repeatedly asserts that Mr. Nunberg is being sued for breach of the Confidentiality Agreement with Trump 2012 PCA, and it seeks $10 million against him for the breach thereof. However, at the time of each of the alleged breaches of confidentiality claims arose, Mr. Nunberg's independent consulting agreement that controlled the relationship of the parities was his Consulting Agreement with the Exploratory Committee. That Consulting Agreement in paragraph 8 not only incorporated by reference the terms of the Confidentiality Agreement with Trump 2012 PCA, but it also mandates in paragraph 11 that disputes must be brought in a New York Court.

To the extent there is any ambiguity whether this matter should be arbitrated or litigated, Trump 2012 PCA or the Trump Campaign should not benefit, and this issue should be construed against them. This is especially true since the Trump Campaign's and the Exploratory Committee's counsel drafted these one-sided agreements. See In re Flintlock Constr. Servs., LLC v. Weiss, 122 AD3d 51, 61 (1st Dep't 2014) (when ambiguities in a written contract exist, the contract must be read in favor of the non-drafting party).

Accordingly, it is respectfully submitted that the Respondent is entitled stay the unfounded arbitration proceeding commenced without a valid arbitration agreement

POINT IV

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 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, to add insult to injury, 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.

Where the enforcement of an arbitration clause is against public policy, it should not be enforced. Mineola Union Free School Dist., 46 N.Y.2d. *at* 571 Siegel, N.Y. Prac. § 587 (5th ed.). 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) citing Whitney v. California, 274 U. S. 357, 274 U. S. 375-376 (1927)) 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, 583 U.S. 310, 320 (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 Trump Campaign is seeking in excess of $10,000,000.00 and punitive damages because Mr. Nunberg endorsed Sen. Ted Cruz and allegedly used "a serious of derogatory remarks concerning Mr. Trump." This is especially hypocrical for a candidate who frequently describes his opponents as "losers," "crooked," "child molesters," and "liars." Even this past weekend the Trump Campaign compared the 2012 Republican Presidential nominee, Mitt Romney, to a "dog."[1]

A review of the language utilized by Mr. Nunberg in the endorsement of Sen. Cruz, which was based on philosophical and policy differences, is tame by comparison and in no way

[1] See Kristen Yeast, Trump hits back at Romney, denies racism charges, Politico. *http://www.politico.com/story/2016/06/donald-trump-mitt-romney-racism-224214#ixzz4BIku83Ej*

is derogatory. Mr. Nunberg's endorsing remarks were simply a rational expression of political opinion based on statements made in the public record by Mr. Trump after the contractual relationship with Mr. Nunberg was severed. An arbitrator is not well-equipped to protect such fundamental Constitutional rights that Courts have expertise in construing. These constitutional questions fall under the jurisdiction of a New York State or Federal courts where the Trump Campaign's abusive and capricious claims should be heard, if at all.

This is along the lines of the same illegal attack the Trump Campaign made against the Cruz for President Campaign ("Cruz Campaign") in a Cease and Desist Demand Letter ("Letter") threatening a defamation suit against the Cruz Campaign for airing an advertisement which cited Mr. Trump's own words from a 1999 interview on Meet the Press. It is worthwhile to quote the Cruz Campaign's response to the Trump Campaign's Letter:

> Mr. Trump and his campaign are certainly free to disseminate information as they see fit to respond to the statements and advertisements from opposing campaigns. It is an entirely different matter, however, to threaten a defamation action against an opposing candidate for simply using your client's own words and actions. In fact, it is laughable. Are you seriously suggesting that the voter should not be allowed to hear what Mr. Trump has said or know what Mr. Trump has done? Since I suspect your client might answer in the affirmative, I suggest you advise him that the courts are not in the business of censoring political debate. *See e.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964) ("Thus, we consider this case against the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials".)[2]

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

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[2] *See* Sara Gonzales, *The Ongoing Ted Cruz Response To Trump's Lawsuit Threat Is Pretty Epic, Red State* http://www.redstate.com/saragonzales/2016/02/17/ongoing-ted-cruz-response-trump%E2%80%99s-lawsuit-threat-pretty-epic/ .

safeguards available in a court of law. Accordingly, based upon these strong public policy considerations, the Court should stay the arbitration.

POINT V

MR. NUNBERG IS ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF

CPLR §7503(b) provides that a party that has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under CPLR §7502(b).

It is well settled that only a party who has not participated in the arbitration may apply to have it stayed. Matter of National Cash Register Co., 8 N.Y.2d 377, 382 208 N.Y.S.2d 951 (1960). As the Petitioner in this matter was never served with Notice of the Arbitration of May 28, 2016 and has not participated in the arbitration of June 14, 2016, said Petitioner is entitled to a stay of arbitration.

Notwithstanding the statutory basis for the stay, it is well settled that in order to obtain a preliminary injunction a party must demonstrate (1) the likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional remedy is withheld, and (3) a balance of equities tipping in the moving party's favor Aetna Ins. Co. v. Capasso, 75N.Y.2d 860, 552 N.Y.S.2d 918 (1990); Jane Doe v. Axelrod, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44 (1988); W. T. Grant Co. v. Srogi, 52 N.Y.2d 496, 517, 420 N.E.2d 953, 963 (1981); Four Times Square Associates, L.L.C. v. Cigna Investments, Inc., 306 A.D.2d 4, 5, 764 N.Y.S.2d 1, 2 (1st Dep't 2003); Maltby v. Harlow Meyer Savage, Inc., 223 A.D.2d 516, 637 N.Y.S.2d 110 (1st Dep't), appeal dismissed without op., 88 N.Y.2d 874, 645 N.Y.S.2d 448 (1996); CPLR §§ 6301, 6311 (McKinney 2016).

There could be little doubt that the Mr. Nunberg will ultimately succeed on the merits of his claim that the arbitration should be stayed; there is no written agreement between the Mr. Nunberg and the Trump Campaign to arbitrate. The Consulting Agreement, which controlled Mr. Nunberg's employment as a political consultant during the 2016 presidential campaign cycle, explicitly states that all disputes will be "resolved only in a federal or state court sitting in New York State...." A prima facie showing of the likelihood of success on the merits is sufficient and actual proof of the right to ultimate relief is left to further court proceedings. McLaughlin, Piven, Vogel Inc., v. W.J. Nolan & Company, Inc., 114 A.D.2d 165, 498 N.Y.S.2d 146 (2d Dep't 1986). In this case, the Petitioner has made more than a prima facie showing of success on the merits.

That irreparable harm and injury to the Mr. Nunberg is imminent and continuing. The Trump Campaign's demand for arbitration and its onerous demand for $10 million in damages show that the Trump Campaign is attempting to silence and punish the Mr. Nunberg for his endorsement of Senator Ted Cruz, which he has a constitutional right to do. Further, the Trump Campaign is attempting to destroy Mr. Nunberg's political consulting business. Mr. Nunberg cannot operate freely in the political arena under the cloud of a Demand for Arbitration. To prevent this intolerable chill upon Mr. Nunberg's fundamental constitutional right to engage in political speech and business, it is respectfully submitted that Mr. Nunberg is entitled to the imposition of temporary and preliminary injunctive relief by the Court. Barclay's Ice Cream Co. Ltd., v. Local #757, 51 A.D.2d 516, 378 N.Y.S.2d 395, affirmed 41 N.Y.2d 269, 392 N.Y.S.2d 278; Rinaolo v. Berk, 188 A.D2d 297, 590 N.Y.S.2d 490.

The Trump Campaign or the fictious and *ultra vires* Trump 2012 PCA cannot show any prejudice in maintaining the status quo pending a hearing and final determination of this matter

on its merits. On the other hand, the prejudice to the Mr. Nunberg is imminent, substantial and irreparable. When the loss to a party sought to be enjoined is less or non-existent as compared to the loss sustained by the moving party, the balance of equities favor the moving party. Roach v. Bruder, 108 Misc, 2nd 523, 437 N.Y.S.2d 823. Here, the equities balance heavily in favor of Mr. Nunberg, who should be entitled to engage in constitutionally protected speech and to make a living without the unbridled interference of the Trump Campaign.

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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