SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. HAL B. GREENWALD
Justice.

SUPREME COURT: DUTCHESS COUNTY

ROBERT S. TRUMP,

Plaintiff,

-against-

MARY L. TRUMP and SIMON & SCHUSTER, INC.,

Defendants.

DECISION AND ORDER
Index No. 22020-51585
Motion Seq. No. 1

The following NYSCEF documents were reviewed and considered by the Court in rendering the within Decision and Order.

NYSCEF Doc. Nos. 1-9, 11-22, 24-45, 46-48, 49, 50-54, 55, 56-78, 79, 80, 81-103, 104, 105-109, 110-115, 116-118, 119, 122-124, 125-126, 128, 129-130, 132-134

RELEVANT FACTUAL BACKGROUND

Frederick Christ Trump, (Fred Trump) a prominent New York City real estate developer, was born October 11, 1905 and died June 25, 1999. He married Mary Anne Macleod on January 11, 1936 and they had five (5) children, Maryanne Trump Barry (born 1937), Fred Trump, Jr. (1938-1981), Elizabeth Trump Grau (born 1942), Donald Trump (born 1946) and Robert Trump (born 1948). Mary Anne Trump died on August 7, 2000. Litigation concerning the Estates of Fred Trump and of Mary Anne Trump, as well as multiple intra-family disputes were conducted in Queens County Surrogate's Court, *(Will of Fred C. Trump*, File No 3949-1999) and Nassau County Supreme Court, *Trump v. Trump*, Index No. 6795-2000). Both matters were settled by an "Agreement and Stipulation" (the Agreement) dated April 10, 2001. As it pertains to the instant matter, the Agreement was signed by Donald J. Trump, Maryanne Trump Barry and Plaintiff, ROBERT S. TRUMP, as "Proponents" and Fred C. Trump, III and Defendant MARY L. TRUMP, as "Respondents/Objectants". Plaintiff ROBERT S. TRUMP seeks a preliminary injunction against defendants MARY L. TRUMP and SIMON & SCHUSTER, INC. (S&S) premised upon the terms set forth in the aforesaid Agreement.

RELEVANT PROCEDURAL HISTORY

Sometime in the middle of June 2020, ROBERT S. TRUMP learned that defendant MARY l. TRUMP and defendant SIMON & SCHUSTER, INC. (S&S) had published or was about to publish and distribute a book concerning the Trump family and relationships entitled. "*Too Much and Never Enough, How My Family Created the World's Most Dangerous Man"* (the Book). In an attempt to stop the Book, Plaintiff ROBERT S TRUMP commenced an action in Queens Surrogates Court entitled *Probate Proceeding, Will of FRED C. TRUMP a/k/a FREDERICK CHRIST* TRUMP, File No 3949-1999, that was an attempt to bootstrap an action about the Book to the prior estate matters. The matter was dismissed for lack of jurisdiction by Hon Peter J. Kelly, Surrogate on June 25, 2020

On June 26, 2020, the instant action was commenced by the filing of a Summons and Verified Complaint in Dutchess County Supreme Court. The relief sought in the Verified Complaint includes specific performance of the Agreement, an allegation of anticipatory breach of the Agreement and money damages. Simultaneously, ROBERT S. TRUMP filed an Order to Show Cause (OSC) seeking a Temporary Restraining Order (TRO) and Preliminary Injunction (PI) wherein the Court set forth a return date of July 10, 2020. On Monday, June 29, 2020 the Court conducted a chambers conference by Skype with counsel representing all parties. The next day, June 30, 2020 the Court granted a TRO restraining and enjoining both defendants from activities in furtherance of publishing and distributing the Book. On July 1, 2020, after hearing oral argument from the defendants only, the Appellate Division, Second Department by Decision and Order on Application (Scheinkman, J.) vacated the TRO as against S&S and modified the TRO as against MARY L. TRUMP. This court adjourned the return date of the OSC from July 10, 2020 to July 13, 2020. In the intervening time, all parties submitted detailed and extensive supporting and opposition papers. The court is set to rule on the Preliminary Injunction.

THE AGREEMENT WAS A STIPULATION

The Agreement was a stipulation, signed by all parties who had all been represented by counsel, that ended the above referenced matters in two courts. It resolved an intra family dispute based upon the deaths of the parents and grandparents of the parties to the two lawsuits and the Agreement.

CPLR 2104 governs Stipulations and, in 2001 the time of the Agreement defined a stipulation:

AN,WL,TCSL,CPLR,SCPR,COMP
Rule 2104. Stipulations

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.

In the instant matter, the Agreement, in compliance with the above statute, was in the form of a writing, subscribed by all the parties and certain counsel, and was related to and settled matters

in two actions. As a stipulation is contractual in nature, it will be viewed subject to the parties' intent. (*See, Kraker v. Roll*,100 A.D.2d 424 [2nd Dep't, 1984]). Stipulations will not be lightly set aside, and to do so, good cause must be shown such as fraud, collusion, mutual mistake, duress, unconscionability, or that the stipulation is contrary to public policy (*See McCoy v. Feinman*, 99 N.Y.2d 295 (2002)).

It is well settled that parties to a lawsuit may chart their own course at the trial (*Stevenson v. News Syndicate*, 302 N.Y. 81, [1950]) and consent by stipulation or by their conduct to the law to be applied (*see e.g., Brady v. Nally*, 151 N.Y. 258, [1896]), and in doing so stipulate away statutory or even constitutional rights (*Matter of New York Lackawanna & Western R.R. Co.*, 98 N.Y. 447, [1885]). (*Matter of Mallinckrodt Med. v. Assessor of Town of Argyle*, 292 A.D.2d 721, [3rd Dep't, 2002] [internal quotation marks and citation omitted]; *accord Mitchell v. New York Hosp.*, 61 N.Y.2d 208, [1984]). Moreover, courts have favored and encouraged stipulations as a means of expediting or simplifying the resolution of disputes provided that such stipulations do not affront public policy *T.W. Oil v. Consolidated Edison Co.*, 57 N.Y.2d 574, (1982).

IS THE AGREEMENT AN ENFORCEABLE CONTRACT?

Assuming *arguendo* that the Agreement is a valid contract. What have the parties contracted for? What rights, if any, have been contracted away? What is the result?

As set forth in *Vecchio v Vecchio*, 182 A.D.3d 707 (1st Dep't, 2020), stipulations are construed as independent contracts and will only be vacated in the presence "of 'cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident,' a showing of unconscionability or a conflict with public policy" *Matter of Badruddin*, 152 A.D.3d 1010, (3rd Dep't, 2017) *lv dismissed* 30 N.Y.3d 1080, (2018), quoting *Hallock v. State of New York*, 64 N.Y.2d 224 (1984); *McCoy v. Feinman* 99 N.Y.2d 295 (2002); *Pinkham v. Pinkham*, 309 A.D.2d 1139 (3rd Dep't, 2003).

Although, the Agreement by its own terms may be a contract, it may not be relevant or applicable to the issues at hand. As stated previously, the Agreement settled two estate matters in Queens County Surrogate's Court and one plenary action in Nassau County Supreme Court. The parties to the Agreement indicated the purpose for the Agreement in the last "Whereas" paragraph (page 5) that stated:

WHEREAS, the parties hereto wish to avoid the uncertainty, further expenses and delay incident to protracted litigation and believe it is in the best interest of all concerned that the ***controversies raised by these proceedings be compromised and settled on a "global basis"…*** (Emphasis added)

The "controversies" concerned various members of the Trump family as well as a variety of business entities, such as corporations, LLCs, and partnerships. Issues revolved around estates, trusts, ground leases, real property ownership interests, cooperative apartments and medical benefits. Certain tax and financial information was provided, and all parties were represented by counsel as stated in one of the "Whereas" clauses in the Agreement.

Further, **Consideration** Paragraph 16, without divulging any of the specific financial information, stated: *"The "Proponents" agree to pay the "Objectants/Respondents" (of which MARY L. TRUMP was one) the following* ***in consideration of a 'global settlement" of all their differences."*** (Emphasis added), certain sums. The first page of the Agreement has three captions, two for the estate matters and one for the plenary action, so there is no question that the Agreement was intended to settle these "differences".

On page 6, of the Agreement it was agreed by all to seal the record in these matters by reason that "…the public has no interest in the particular information involved in the "global" resolution of their differences. Confidentiality is, in certain circumstances necessary in order to protect the litigants and encourage a fair resolution of the matters in controversy". Very often, its is necessary for there to be confidentiality regarding the terms of a settlement to reduce the potential for leverage in resolving litigation claims.

So, it can be argued that the Agreement settled complex, intra family and business-related disputes between family members concerning two estates and a plenary action related to medical coverage and other financial issues in the Supreme Court. It can certainly be asserted that the Agreement pertains to that litigation, as that is what a Stipulation of Settlement generally does, it settles a court case (or cases). Therefore, it could logically be inferred that the confidentiality clause contained in the Agreement, pertained only to these settlements and nothing else. Why would a 2001 settlement of two estate matters and a local Supreme Court case contain a clause prohibiting the parties to these actions to ever speak again about their relationships? One reason asserted is that the lawsuits concerned "public figures" as the Trump family might have been viewed at that time. Maybe it was looked at by the parties, as being important, even in 2001, that there be no speaking of the "relationships" between the Proponents and the Objectants. What can be discerned from the Agreement to lead us to finding the parties' intent? And does the intent relate to the current situation in 2020?

The underlying intra family disputes settled herein can certainly be likened to divorce proceedings, in its emotional and financial toll. It is well settled in matrimonial proceedings, such as *Korosh v Korosh*, 99 A.D.3d 909, (2nd Dep't, 2012) that: "A stipulation of settlement which is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation' " (*Ackermann v Ackermann*, 82 A.D.3d 1020, (2nd Dep't, 2011), quoting *Rosenberger v Rosenberger*, 63 A.D.3d 898, (2nd Dep't, 2009). Further, *Korosh* comments on whether the settlement is ambiguous and states: "In making this determination, the court also should examine the entire contract and consider the relation of the parties and the circumstances under which the contract was executed" (*Ayers v Ayers*, 92 A.D.3d 623 (2nd Dep't, 2012)).

Reviewing the Agreement and the words contained therein, considering what is known of the parties at that time and the circumstances of, what appeared to be somewhat nasty litigation, it is possible to read the Agreement and see a contract with a confidentiality clause. Yet, the clause is so overly broad, as to be ineffective. However, plaintiff insists that he can assert claims for specific performance and breach of contract against MARY L. TRUMP for publishing and

distributing the Book. Plaintiff ROBERT S. TRUMP, in an attempt to misinterpret the Agreement, would have this court puzzle the pieces of the Agreement so it would read as follows:

Without obtaining the consent of….ROBERT S. TRUMP…MARY L. TRUMP shall not…cause to be published, any….account….concerning their [her]….relationship with the "Proponents/Defendants" [ROBERT s. TRUMP].

Any violation of the terms of this Paragraph 2 shall constitute a material breach of this agreement. In the event such a breach occurs, "Objectants/Plaintiffs" [MARY L. TRUMP]…hereby consent to the granting of a temporary or permanent injunction against them…[MARY L. TRUMP]…further agree[s]….[ROBERT S. TRUMP] will suffer irreparable damage and injury in event of any such breach.

According to the above reading, the case is slam dunk. But it is not. Too many words, with too many meanings. The cost of the litigation that was settled should have been finalized with more specifics, more clarity, if the current situation was even comprehended, at the time the Agreement was signed

At this point in the litigation the Summons and Verified Complaint has not been served, no defendant has interposed any Answer with denials, affirmative defenses and/or counterclaims. However, plaintiff is seeking to "stop the presses", (which have already begun to print) until his claims are decided.

The matters before the Court concern two very different defendants. MARY L. TRUMP is an individual, a signatory to the Agreement, a recipient of certain settlement proceeds and the author of the Book. SIMON & SCHUSTER, INC. (S&S) is a multinational book publisher who allegedly contracted with MARY L. TRUMP as an author, to publish and distribute the Book. Plaintiff seeks to enjoin both from continuing to publish and distribute the Book and plaintiff must meet the necessary required criteria against both defendants, independent from, yet interrelated to each other.

SIMON & SCHUSTER, INC. IS NOT AN AGENT OF MARY L. TRUMP

Plaintiff seeks preliminary injunction against MARY L. TRUMP, as well as against S&S. Plaintiff argues, S&S, although a non-party to the Agreement should be enjoined to the injunction as they are agents or acting on behalf of MARY L. TRUMP by causing the book to be published, in light of being put on notice of the confidentiality agreement.

Defendant, S&S opposes plaintiff's application and argues that plaintiff is not entitled to any relief against S&S. S&S claims that a few months prior to entering a Publishing Agreement, MARY L. TRUMP's literary agent contacted S&S with an unsolicited proposal to publish MARY L. TRUMP's memoir. MARY L. TRUMP, represented to S&S that she was not encumbered by any other agreements, and represented that she had full authority to enter into a contract with S&S and to grant the rights as specified in the agreement. S&S contends that there was no basis to doubt the accuracy of MARY L. TRUMP's statements and included terms in the Publishing Agreement that S&S would be under no obligation to investigate the truthfulness of MARY L. TRUMP's statements. S&S stated that it entered into a publishing agreement with MARY L.

TRUMP's business entity, Compson Enterprises, LLC on August 29, 2019. On or about May 7, 2020, S&S formally accepted the manuscript and immediately went into production, setting a July 28, 2020 publication date. S&S alleges that far in advance of the notice that plaintiff provided on or about June 23, 2020 that he was seeking injunctive relief, and by the onset of this proceeding, 75,000 books had been printed and nearly half had already shipped to sellers along with the title to said books.

S&S further states that MARY L. TRUMP's book is about her personal perspective and critical insights on Donald J. Trump, as president, his formative years, her father's death and its relation to the neglect he experienced from his family, and information related to her family's financial dealings, which S&S deems to be newsworthy, valuable information for historians and citizens. S&S argues that as such, restraining a publication in this instance equates to a prior restraint of expression on a matter of public interest and would be unconstitutional, as it infringes upon its First Amendment protected speech. S&S purports that there is a heavy presumption to overcome to allow this type of restraint, and plaintiff must show in the record, that the matter sought to be restrained would immediately and irreparably create public injury, which plaintiff has not demonstrated.

S&S contends that plaintiff has not asserted a cognizable cause of action against S&S, and essentially has not made any other claim against S&S other than that founded in contract. S&S denies plaintiff's allegation that it is acting as an agent of MARY L. TRUMP and/or acting in concert with MARY L. TRUMP. S&S insists that plaintiff would not be successful on the merits against S&S, that plaintiff failed to show how he would be irreparably harmed without the injunction against S&S and plaintiff does not show that the balancing of the equities are in his favor. S&S submits that any injunction against it would cause substantial economic harm and irreparable damage to S&S. Lastly, S&S maintains, that plaintiff has not demonstrated with sufficiency, that the prior restraint is necessary to prevent immediate and irreparable public injury.

In reply, plaintiff declares that S&S like any other third party can be bound to an injunction if the Court finds S&S is acting as an agent for MARY L. TRUMP, as a third-party beneficiary of a contract or acting in concert with MARY L. TRUMP. Plaintiff argues that S&S is subject to the injunction because they are the agent of MARY L. TRUMP and/or acting in concert with MARY L. TRUMP. Plaintiff alleges that S&S had knowledge of the Agreement, at least by inquiry on June 16, 2020 and actual notice on June 23, 2020, yet intentionally moved forward with book distribution. Plaintiff states that S&S does not get the benefit of protections afforded to journalists or newspapers, in being able to publish unlawfully obtained information, because S&S did not passively receive the information but are involved in the improper activity of obtaining the information. In addition, plaintiff alleges that the relationship between S&S and MARY L. TRUMP is distinguishable from a journalist and its source, as they have more than an arm's length relationship, and both fare to gain a lucrative benefit from this publication, therefore it is a collaborative effort to evade the terms of the Agreement. Plaintiff argues that the injunctive relief requested against S&S is not seeking to restrain MARY L. TRUMP's political speech, akin to a prior restraint but more of a content neutral application of contract law, similar to a copyright injunction.

S&S is a non-party to the Agreement at issue. However, plaintiff asserts that S&S should be enjoined in this action, as S&S is acting as an agent of MARY L. TRUMP and/or in concert with her to publish the book. Ordinarily an injunction order should not be granted against a person who is not a party to the action. *See, Accardo v Rabinowitz,* 51 N.Y.S.2d 279, 280 (Queens County, Sup. Ct 1944). Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. Thus, it is well settled that officers, agents, servants of a party acting in collusion with a party may be bound by the injunction providing they are in privity with a party. *See, Estate of Rothko,* 84 Misc.2d 830, 868-869 (New York County, Sur. Ct. 1975), *decree mod sub nom. Will of Rothko,* 56 A.D.2d 499 (1st Dept 1977) *affd sub nom. Matter of Rothko's Estate,* 43 N.Y.2d 305 (1977).

However, plaintiff asserts that S&S should be enjoined in this action, as S&S is acting as an agent of MARY L. TRUMP and/or in concert with her to publish the book. Agency is a legal relationship between a principal and an agent. It is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act. The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority. *See, Faith Assembly v Titledge of New York Abstract, LLC,* 106 A. D. 3d 47, 58 (2nd Dept. 2013).

Plaintiff has not demonstrated the agency relationship between S&S and MARY L. TRUMP or that S&S has acted in concert with MARY L. TRUMP. The mere fact that S&S entered into a publishing agreement to publish MARY L. TRUMP's memoir – does not establish agent-principal relationship. To allege that the S&S entered the Publishing Agreement to intentionally circumvent the Agreement, or to act as an agent of MARY L. TRUMP and sidestep the Agreement would mean S&S had knowledge of the Agreement and requires more than a conclusory allegation. Plaintiff admits that it gave actual notice to S&S on June 23, 2020, days before this proceeding was initiated and whereby publication and distribution were already underway. Plaintiff has not shown that S&S had knowledge of the Agreement when it entered into the Publishing Agreement with MARY L. TRUMP in July 2019 or prior to the actual notice. Therefore, the theory that S&S entered the Publishing Agreement to act as an agent of MARY L. TRUMP or is a means to act in concert with MARY L. TRUMP does not have much weight.

Compensation given for the right to publish information or a book, does not make this contract a scheme to act as an agent any more than any other contract would – as consideration is a necessary element of all contracts. Plaintiff has not demonstrated that MARY L. TRUMP has any control or right to control S&S regarding the publication and distribution of the book. Based on the Publishing Agreement, its Rider and 109 paragraph Basic Agreement, S&S has exclusive rights to publish this book in the United States and other territories at this time and is not subject to MARY L. TRUMP's express, implied or apparent authority. Even if MARY L. TRUMP were to ask S&S to stop printing, publishing or distributing the book, S&S has no legal obligation to do so.

Plaintiff has tried to compare S&S's Publishing Agreement with MARY L. TRUMP to the unethical practices of journalists that pay sources for information, as if this is evidence of their collusion. However, this argument is also flawed. The facts presented demonstrate that MARY L. TRUMP's literary agent, who is not employed by S&S made unsolicited proposals to S&S and

other publishing companies for the rights to publish her memoir and S&S won the auction to contract for the publishing rights. There is no evidence presented to contradict these statements. There is also no evidence that S&S enticed MARY L. TRUMP to provide unlawful information, which would be more similar to the unethical practice of paying a source for information rather than merely entering into a contract. It is well settled that if a newspaper lawfully obtains truthful information of great public concern, even when stolen from a third party, the Courts will uphold the right of the press to publish such information, and restraint of such may be deemed unconstitutional. *See, Bartnicki v. Vopper*, 532 U.S. 514, (2001). Plaintiff has not demonstrated any impropriety on behalf of S&S in obtaining the publishing rights to MARY L. TRUMP's memoir or that S&S did not lawfully obtain the information.

It is true that persons not parties to the action may be bound by an injunction, if there is proof that the non-party is a servant or agent of the defendant or acts in collusion or combination with them. However, in the absence of proof that a non-party is an agent, the non-party cannot be enjoined or punished for defendant's alleged wrong doings. *See, Rigas v Livingston*, 178 N.Y. 20, (1904). The fact that MARY L. TRUMP may have exceeded her rights by entering into the Publishing Agreement with S&S, does not provide proof of collusion or that S&S is MARY L. TRUMP's agent or acting in concert with her. Even as plaintiff asserts that the changing of publication dates, is solely to make it impossible to maintain the status quo, it is a highly conceivable notion that S&S may be acting in its own interests, which it contracted for, not at the behest of MARY L. TRUMP. Plaintiff fails to provide proof sufficient to show that that there is an agent-principal relationship between S&S and MARY L. TRUMP, or that S&S was acting in concert with MARY L. TRUMP to breach the Agreement.

REQUIREMENTS TO GRANT A PRELIMINARY INJUNCTION

It is well settled that for a preliminary injunction to be granted there are three required elements that must be established: (1) likelihood of success on the merits, (2) irreparable injury absent granting of a preliminary injunction, (3) and a balancing of the equities in the movant's favor. *Berman v TRG Waterfront Lender, LLC*, 181 A.D.3d 783 (2nd Dep't, 2020) (*see Keller v. Kay*, 170 A.D.3d 978, (2nd Dep't, 2018); *Carroll v. Dicker*, 162 A.D.3d 741, (2nd Dep't, 2018)). The elements to be satisfied must be demonstrated by clear and convincing evidence. *Liotta v* Mattone, 71 A.D.3d 741 (2nd Dep't, 2010). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*see Tatum v. Newell Funding, LLC*, 63 A.D.3d 911, (2nd Dep't, 2009); *Cooper v. Bd. of White Sands Condo.*, 89 A.D.3d 669, 669, (2nd Dep't, 2011). Whether a party is entitled to a preliminary injunction is a determination entrusted to the sound discretion of the motion court (*see Doe v. Axelrod*, 73 N.Y.2d 748 (1988); *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 A.D.3d 1057, (4th Dep't, 2020).

The court will decide about S&S first.

PRELIMINARY INJUNCTION AGAINST SIMON & SCHUSTER, INC.

In the absence of the agent-principal relationship, the relevance of prior restraint and First Amendment rights is of little or no effect as against S&S. However, the court will briefly comment on the requirements for a preliminary injunction to issue. It is the court's position that none of the

three prongs necessary for the court to grant a preliminary injunction against S&S have been met by plaintiff.

The action centers on the Agreement, and S&S was not a signatory. Two of the causes of action directly refer to the Agreement; breach of contract and specific performance. One cannot be held to breach a contract or specifically perform a contract that one is not a party to. *Black car & Livery Ins., Inc. v H & W Brokerage, Inc*, 28 A.D.3d 595 (2nd Dep't, 2006) (*see Blank v. Noumair*, 239 A.D.2d 534, (2nd Dep't, 1997); *Walz v. Todd & Honeywell*, 195 A.D.2d 455, (2nd Dep't, 1993). As set forth in S&S's opposition, it was unaware of the Agreement until several weeks ago, it is not a party to the Agreement, so there can be no cause of action against S&S for either breach of contract or specific performance, and thus plaintiff has a zero likelihood of success on the merits in this case.

The court agrees with S&S that *Fordham University v King*, 63 Misc.2d 611 (Special Term, 1970) is irrelevant It dealt with an injunction against a group of students that have protested against ROTC on the university's campus.

The irreparable harm that plaintiff claims consists of the release of so-called confidential information. At this juncture, when there has been heightened media attention from all sources and multiple comments made by a variety of Trump family members about te Agreement, it may be moot to enjoin publication and dissemination of Trump family laundry. Even ass set forth in *United States v Bolton*, 2020 WL 3401940 (United States District Court, District of Columbia, 2020) where the plaintiff sought to have the Court order the publisher, ""…to take any and all available steps to retrieve and destroy any copies of the book that may be in the possession of any third party.", the court refused to do so. And *Bolton* was dealing with information pertaining to national security, not 20-year-old family history.

The real possibility here is for S&S and the public to be irreparably harmed if the Book was enjoined. Certainly, there would be immense costs associated with the retrieval and confiscation of several thousand (hundred thousand) copies of the Book by S&S from a wide variety of book sellers. What would be the proposed cost of an undertaking if such an injunction were to ensue? How would the cost be calculated to comply with statutory requirements?

What about the public right to know? The Trumps were local in 2001. The leader of the Trump family in 2020 is global. Yet, this action was brought by ROBERT L. TRUMP and no one else. It is he who had to substantiate a claim for irreparable harm, no other Trump family member is specified. Plaintiff has not justified his claim for irreparable harm.

The issues of prior restraint and First Amendment rights will be detailed further in the within Decision and Order. However, case law has agreed that to impose an injunction herein upon S&S, a book publisher who received information from a potential author that **may** have violated an Agreement to which it was not a party, would be found to be unconstitutional.

The Court further finds that the balancing of the equities, where there is no privity of contract and no likelihood of success, plus there has been no evidence of irreparable harm, and in

light of the number of books already published and distributed and information already discussed by media and members of the Trump family, tilts in favor of S&S.

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LIKELIHOOD OF SUCCESS ON THE MERITS AGAINST MARY L. TRUMP

The subject action asserts three causes of action, specific performance of all defendants, breach of contract by MARY L. TRUMP and a declaratory judgment against MARY L. TRUMP. It appears the causes of action arise out from the Agreement and that SIMON & SCHUSTER, INC (S&S) is not a signatory to the Agreement. The crux of the dispute and a fundamental issue to be resolved for the granting or denying of a preliminary injunction is the Agreement. The parties simply do not agree to the meaning and implications of the Agreement. It is factually in dispute, and allegations of fraud have been raised.

However, if under provisional remedy of an injunction, the movant is awarded what it is ultimately seeking in its complaint, this would be tantamount to granting summary judgment where issue had not yet been joined, which is improper and would be invalid. *St. Paul Fire and Marie Insurance Company v York Claims Service, Inc.* 308 A.D.2d 347 (1st Dep't, 2003); CPLR 3212; *City of Rochester v Chiarella*, 65 N.Y.2d 92 (1985). To grant the injunction at this time, would validate the Agreement, and possibly foster plaintiff's claim for breach and specific performance. Remember that the moving party must establish all three (3) prongs, i.e. likelihood of success on the merits, irreparable harm and a balance of equities in movant's favor to be granted injunctive relief.

The Commentary to **C6312:1. Affidavits; Issues of Fact.** states:

Mere conclusory statements will not suffice. The affidavits and other evidence must contain factual detail. See, e.g., *U.S. Re Companies, Inc. v. Scheerer*, 41 A.D.3d 152, (1st Dep't, 2007); *Village of Honeoye Falls v. Elmer*, 69 A.D.2d 1010 (4th Dep't, 1979).

At this point, plaintiff asserts that the release of confidential information, no matter what it is amounts to irreparable harm. He is unaware of the information contained in the Book, in which case the court finds he does not sustain his claim; or there is already so much confidential information "out there" pertaining to the plaintiff, that it is moot for the court to even consider an injunction. In the instant matter, the movant has not shown sufficient information that he will be likely to have success on the merits of his case. Moreover, even if the court were to relax the standard applicable to likelihood of success, it still would fail. Plaintiff's arguments in support of a finding in his favor on his Verified Complaint are unavailing. Accordingly, the Court rules that ROBERT TRUMP has not demonstrated by "clear and convincing' evidence that he has a likelihood of success on the merits of his case.

IRREPARABLE HARM

As stated in E*astview Mall, LLC, Supra:* It is an anodyne proposition that "[i]rreparable injury, for purposes of equity, ... mean[s] any injury for which money damages are insufficient" (*Di Fabio v. Omnipoint Communications, Inc.*, 66 A.D.3d 635, (2nd Dep't, 2009). In the situation before the court, the only logical remedy is money damages.

Simply put. plaintiff claims the goal of the agreement was to prevent confidential information from being released. Was that so? Wasn't the Agreement a stipulation to settle multiple lawsuits? Make payments to several parties? There was no specific consideration given to anyone for confidentiality. The consideration was provided to settle disputes. The parties agreed to keep the settlement under seal. That's it.

Regarding the request for the court to take an adverse inference because the initial filings by S&S did not contain the publishing contract between MARY L. TRUMP and S&S, note that said publishing contract has subsequently been filed with the Court and its reading indicates MARY L. TRUMP has no ability to stop the Book or cancel its publication at this time. The court will thus not take an adverse inference concerning the terms of the contract between MARY L. TRUMP and S&S.

Plaintiff cites *International Creative Management, Inc. v. Abate*, 2007 WL 950092 (U.S. District Court, S.D.N.Y. 2007), which concerned an employment contract, disclosure of confidential information and a preliminary injunction. The contract in *Abate* stated in relevant part, "….that his [Abates] services were 'special, unique, extraordinary and intellectual", that any **breach of any material provision of the agreement will cause ICM "great and irreparable injury and damage,"** and that ICM is entitled to seek equitable relief for any breach of the agreement. (emphasis added). So, in *ICM v Abate, Supra,* a breach equals irreparable harm, which leads to equitable relief (injunction?). The issue in *ICM v Abate, Supra* however was that ICM could not meet its burden and establish irreparable harm but tried to rely solely on the contract provision. The District Court cites the Court of Appeals of the Second Circuit where it found, "…such language to be some evidence-although not conclusive-evidence-that breach of a confidentiality clause would constitute irreparable harm for the employer. See *North Atl. Instruments, Inc. v Haber*, 188 F.3d 38 (2d Cir. 1999). This Court is aware of no authority indicating that such a contract provision entitles the plaintiff to a *per se* finding of irreparable harm. *See Baker's Aid, Div. of M. Raubvogel Co. v. Hussmann Foodservice Co.,* 830 F.2d 13 (2d Cir.1987)." Thus, *ICM* is not persuasive, at best it suggests irreparable harm. However, one cannot "contract" for irreparable harm

Moreover, as set forth in *Firemen's Ins. Co. of Newark, New Jersey v. Keating*, 753 F. Supp. 1146, (United States District Court, S.D. New York, 1990) dealt with a surety sued by investors to force compliance with indemnity agreements. Plaintiff moved for a preliminary injunction and was denied and stated in its decision:

"The Second Circuit has repeatedly stressed the importance of a showing of irreparable harm by the movant. "[I]nequitable conduct alone cannot justify the entry of a preliminary injunction. The linchpin of such interim relief is that threatened irreparable harm will be prevented by that

injunction." *Buckingham Corp. v. Karp,* 762 F.2d 257, 262 (2d Cir.1985). " 'Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.' " *Citibank, N.A. v. Citytrust,* 756 F.2d 273, 275 (2d Cir.1985) (quoting *Bell & Howell: Mamiya Co. v. Masel Supply Corp.*, 719 F.2d 42, 45 (2d Cir.1983)); Mulligan, *Forward, Preliminary Injunction in the Second Circuit,* 43 Brooklyn L.Rev. 831, 833 (1977) (showing of irreparable harm is fundamental and traditional requirement in any action where preliminary injunctive relief is sought)."

Additionally, the court continued its discussion of irreparable harm in *Firemens' Ins. Co.* by stating:

"Finally, the Second Circuit has emphasized that it is not sufficient for a movant to demonstrate merely the possibility of irreparable harm. "An applicant for a preliminary injunction must show that it is *likely* to suffer irreparable harm if equitable relief is denied." *JSG Trading, supra,* 917 F.2d at 79 (emphasis in original). Thus, the standard that movant must meet is extremely high. "

Irreparable harm must be demonstrated, it is not obtained via a contract clause.

While the Agreement is deemed a contract, there simply are some things one cannot contract for, such as a **right to injunctive relief.** This must be determined by a court and supported by the movant sustaining all three (3) requirements for a preliminary injunction to be granted. *Art Capital* involved a dispute over a sale of Annie Leibovitz' photographic collection. Plaintiff sought a preliminary injunction to prevent defendants from breaching a confidentiality agreement as a negotiating tool. However, the subject Services Agreement had already been consummated. Therefore, as stated in *Art Capital Grp., LLC v. Getty Images, Inc.*, 24 Misc. 3d 1247(A), 2009 WL 2913531 (N.Y. Sup) quoting *Firemen's Ins. Co., Supra*, ["it is clear that the parties to a contract cannot, by including certain language in that contract, create a right to injunctive relief where it would otherwise be inappropriate"]), especially as further stated that, "… plaintiffs' assertions are conclusory and insufficient to establish that immediate and irreparable harm would result absent granting injunctive relief (*see Technology for Measurement v. Briggs*, 291 A.D.2d 902, [4th Dept 2002]). Lastly, *Ari Capital, Supra,* concludes and denies the motion for preliminary injunction and states: " It is equally settled law that there can be no irreparable injury where the injury has already been sustained (*see Allen v. Pollack,* 289 A.D.2d 426, 427 [2d Dept 2001]). Strikingly similar to the case at hand, one could say.

The Appellate court's Decision & Order on Application (Scheinkman, J.) addresses equity and suggests the court look to balancing the plaintiff's interests against that of other interests, including the public involvement and states at page 4:

This balancing concept takes into account whether the provisions of the confidentiality agreement are ***temporally and geographically reasonable*** *and the extent to which the provisions are necessary to protect the plaintiff's legitimate interests. …The confidentiality agreement here does not have any temporal or geographic limitation.*

Remember, at the time the Agreement was agreed upon, the Trump family were New York based real estate developers and not much else. They were not elected officials or TV personalities. The issues that were the subject of the Agreement were intra family issues, not of worldwide concern, or even national interest. Maybe, taking from Justice Sheinkman's Decision, what if the Agreement was **temporally** set for a period of 5 years, even 10; and what if the Agreement had a **geographical** prohibition of disseminating anything about the Trump family limited to the five boroughs, even Westchester, NYS? The Tri-State area? Would that make the Agreement more reasonable, more readily defensible? Valid even? Possibly. Instead, the Agreement has no time limits, and no geographical prohibition. Does that make the Agreement easier to defend at this time and place, more practical to support, likely for it to succeed on the merits? I think not.

In *Tech. For Measurement, Inc. v. Briggs*, 291 A.D.2d 902, (4th Dep't, 2002) which dealt with a manufacturer's representative and former employer's dispute over a covenant not to compete, appellate court reversed the lower court's finding for a preliminary injunction and stated:

"While restrictive covenants tending to prevent an employee from pursuing a similar vocation after termination of employment are, as a general rule, disfavored by the courts, they will be enforced if they are ***reasonably limited temporally and geographically, necessary to protect the employer's legitimate interests, and neither harmful to the general public nor unduly burdensome to the employee****"* (emphasis added) *(Asness v. Nelson, 273 A.D.2d 165, 711 N.Y.S.2d 717; see, BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 389, 690 N.Y.S.2d 854, 712 N.E.2d 1220; Columbia Ribbon & Carbon Mfg. Co. v. A–1–A Corp., 42 N.Y.2d 496, 499, 398 N.Y.S.2d 1004, 369 N.E.2d 4). Plaintiff failed to establish that the restrictive covenant was reasonable in scope or necessary to protect its legitimate interests. In addition, plaintiff's conclusory allegations fail to establish that irreparable harm will result if the preliminary injunction is not granted (see, Genesis II Hair **199 Replacement Studio v. Vallar, 251 A.D.2d 1082, 1083, 674 N.Y.S.2d 207).*

In the matter before this Court, Plaintiff has failed to meet his burden of demonstrating, imminent, irreparable harm, **to him** (emphasis added). His allegations are unsupported and conclusory. They are without any specifics as to how he, ROBERT S. TRUMP will suffer irreparable harm. Remember the Plaintiff is ROBERT S. TRUMP and no one else. There has been nothing offered that demonstrates that the actions by MARY LTRUMP in publishing the Book will irreparably harm sole plaintiff ROBERT S. TRUMP. Thus, the second requirement for the court to issue a preliminary injunction is not satisfied.

<u>BALANCING OF THE EQUITIES</u>

What equities? Whose equities?
Generally, it would be balancing the equities between the plaintiff/ movant and the defendant to determine if the preliminary injunction were to be granted. (*Felix v. Brand Serv. Group LLC,* 101 A.D.3d 1724, (4th Dep't, 2012). However, there may be public policy considerations to consider when ruling on a preliminary injunction. *Eastview Mall, LLC, Supra,* especially in a case such as this matter before the court, when it is alleged the information, the speech contained in the Book concerns a sitting President of the United States, who incidentally is not the plaintiff. What standing does ROBERT S. TRUMP have to act on his brother's behalf, if that is how he is

approaching this lawsuit. Who really stands to "lose" (or gain?), if the Book continues to be published and distributed as it is claimed by S&S? Is it plaintiff?

Reminder. The issue before the Court is whether to grant a preliminary injunction against MARY L. TRUMP and S&S to enjoin each of them from continuing to publish print and distribute the Book, when it has already been previewed by millions. To repeat, for the plaintiff to be granted this provisional relief he must have demonstrated: (1) likelihood of success on the merits of the action; (2) the danger of irreparable injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party. *See, Nobu Next Door, LLC v. Fine Arts Housing, Inc*.,4 N.Y.3d 839, (2005); *see also* CPLR 6301.

It is also important in this matter for the court, in balancing the equities, to be cognizant of the public's interest in the Book. As stated in Justice Scheinkman' s Decision and Order on Application:

The passage of time and changes in circumstances may have rendered at least some of the restrained information less significant than it was at the time and, conversely, whatever legitimate public interest there may have been in the family disputes of a real estate developer and his relatives may be considerably heightened by that real estate developer now being President of the United States and a current candidate for re-election.

To reiterate the court's position, the Agreement was a stipulation that settled multiple lawsuits and in exchange consideration was paid out, no specific consideration was paid for confidentiality. Further, what was confidential was the financial aspect of the Agreement, which may not be so interesting now as it might have been in 2001. On the other hand the non-confidential part of the Agreement, the Trump family relationships may be more interesting now in 2020 with a Presidential election on the horizon.

If the public does in fact have an interest in the Book, but plaintiff argues it should not be published because MARY L. TRUMP's contract with S&S breaches the Agreement, in whose favor does the balancing of the equities tip? The application for injunctive relief by plaintiff consisted of his one page, 7 paragraph Affidavit that stated his residency and that he signed and has complied with the Agreement and has not consented to the Book. His counsel affirmed that he gave prior notice to MARY L. TRUMP and S&S to the application for injunctive relief. The supporting Memorandum of Law detailed the history of the Agreement, a timeline for the Book's publication and argument to support the injunctive relief application. No mention of the public interest, First Amendment or prior restraint was made at the time the TRO was granted.

Thereafter at the appellate level and in this Court in opposition, besides refuting plaintiff's application for a preliminary injunction, MARY L. TRUMP's papers contain a virtual history of First Amendment Rights and "prior restraint" caselaw. What follows herein is a brief synopsis of the law, in no way meant to be a complete recitation of all the caselaw and quotations provided by the attorneys for MARY L. TRUMP. It is proclaimed, the enjoining of the publication of the Book is classic "prior restraint" and cannot be tolerated. The Book is characterized as "political speech". *Procter & Gamble v Bankers Trust Co.*, 78 F.3d 219 (6th Cir.1996). "Freedom of speech" is invoked *N.Y.Times Co. v Sullivan*, 376 U.S.254 (1964). Prior restraint is deemed to be unconstitutional. *Neb. Press Ass'n v Stuart*, 427 U.S. 539 (1976). It is noted that the release of the

so-called Pentagon Papers, did not amount to prior restraint. In New York law, under *Arcara v Cloud Books*, 68 N.Y.2d 553 (1986) if the government is the one seeking to enjoin speech "public injury", must be shown. Injunctions are seen as "state power". There is a significant presumption against the constitutional validity of prior restraints, even if it concerns leafletting *Org. for a Better Austin v Keef*, 402 U.S. 415 (1971). This court finds that *Alexander v United States* 509 U.S. 544 (1993) dealt with criminal forfeiture of obscene material. It was found that the forfeiture was a criminal penalty, the material was not "taken" on the suspicion of being obscene, before a judicial determination. It was not a "prior restraint". The papers overlook *Near v Minnesota ex rel. Olson*, 284 U.S. 697 where the US Supreme Court held that a Minnesota statute that found a newspaper that had published defamatory articles against public officials was a nuisance, and by being deemed a nuisance a court could permanently enjoin that paper from being published, was unconstitutional and further that this, prior restraint would be, "…the essence of censorship".

Besides arguing First Amendment defenses, MARY L. TRUMP also asserted the invalidity of the Agreement and questioned its terms. Further assertions are made that First Amendment prohibitions against prior restraint are not defeated by contractual agreements. *Shelley v. Kraemer*, 334 U.S. 1 (1948) concerned restrictive covenants in deeds that prohibited ownership by members of a certain race which covenants were upheld by lower courts. The US Supreme Court reversed holding that judicial action sought to enforce these covenants amounted to state action which cannot violate the 14th Amendment and must be denied. In the matter before this court, if an injunction were to ensue, granted by a state court to purportedly enforce an agreement, this action, according to MARY L. TRUMP, would violate the First Amendment.

Even where litigation is involved, where injunctive relief is sought to prevent the participants from discussing a case with the news media, the relief sought has been denied. *CBS, Inc. v Young* 522 F.2d 234 (6th Cir. 1975); *Chase v Robson*, 435 F.2d 1059 (7th Cir. 1970).

Speech is so important, that courts have ignored how the information has been obtained, and still denied injunctive relief. *In re Halkin*, 598 F.2d 176 (United States Court of Appeals, District of Columbia Circuit, 1979); citing *First National Bank of Boston v Bellotti*, 435 U.S. 765 (1978); *New York Times Co. v United States*, 403 U.S. 713 (1971); *Rodgers v United States Steel Corp.*, 536 F.2d 1001 (3rd Cir. 1976; *United States v. Bolton*, 2020 WL 3401940 (United States District Court, District of Columbia, 2020).

In *Crosby v Bradstreet* Company, 312 F.2d 483 (United States Court of Appeals, Second Circuit) a businessman sought relief from a 30-year-old stipulation that prevented a credit reporting company from reporting on him. The court determined that to continue the injunction would be improper as a prior restraint, regardless that the parties had stipulated to be enjoined. In the instant matter, it would be prior restraint if the contract, even if agreed, could stand and the Book not be published.

The court finds the following cases unpersuasive as to plaintiff's application for aa preliminary injunction:

Dr. Seuss Enterprises v. Penguin Books, 109 F.3d 1394 (9th Cir. 1997) in which the court upheld an injunction against Penguin who had sought to publish a satire about the O J Simpson trial in the

same manner as a Dr. Seuss book. This decision dealt with copyright, trademark, "substantial similarity" and a "fair use inquiry", all of which are not persuasive in determining the instant matter.

Nihon Keizai Shimbun, Inc. v Comline Business Data, Inc., 166 F.3d 65 (2d Cir. 1999), copyright infringement was found as to certain items, specific injunctive relief was granted as were money damages. Again, inapplicable to this case.
Dallas Cowboys Cheerleaders, Inc. v Pussycat Cinema, Ltd., 604 F.2d 200 (United States Court of Appeals, Second Circuit, 1979) found that the distinctive clothing worn by the Dallas Cowboys football team cheerleaders was trademarked and that "fair use" did not apply. The court found the preliminary injunction did not constitute "prior restraint", that this was not governmental censorship.
Coca-Cola Company v Purdy, 382 F.3d 774 (*United* States Court of Appeals, Eighth Circuit, 2004) to prevent defendant from misappropriating domain names and attempting to use the First Amendment to protect his misleading use of plaintiffs' marks, a preliminary injunction was entered. Dissimilar to the matter before the court.
Macdonald v Clinger, 84 A.D.2d 482 (4th Dep't, 1982) where the court found an action sounded in tort where a psychiatrist disclosed personal information learned during a course of treatment.. Quote continues: **"…and compensated in damages."**
Interplay Entertainment Corp. v Topware Interactive, Inc., 751 F. Supp. 2d (United States District Court, C.D. California, 2016) concerned a trademarked video game "Battle Chess", where the party seeking the injunction established the three requirements necessary for it to be granted. Accordingly, the balancing of the equities in this matter, falls in favor of the defendants, not plaintiff.

The instant application herein for a preliminary injunction was made with the imperfect knowledge whether the Book had been published. Courts have held that pre-publication censorship will "…be constitutionally tolerated only upon 'a showing on the record that such expression will immediately and irreparably create public injury.". *Porco v Lifetime Entertainment Servs., LLC*, 116 A.D. 3d 1264 (3rd Dep't, 2014) citing *Arcara Cloud, Supra; Near, Supra; CBS Inc. v. Davis*, 114 S. Ct. 912 (1994). In *CBS* a single Supreme Court Justice stayed an injunction concerning footage taken by CBS of defendant's factory concluding that: *If CBS has breached its state law obligations, the First Amendment requires that the Federal remedy its harms through a damages proceeding rather than through suppression of protected speech."*. ROBERT has not shown any damages either to himself individually or to the public if the Book is published.

THE APPELLATE COURT DECISION

The Decision and Order on Application (Scheinkman, J) dated July 1, 2020 cited several cases while stating:

While Ms. Trump unquestionably possesses the same First Amendment expressive rights belonging to all Americans, she also possesses the right to enter into contracts, including the right to contract away her First Amendment rights.

In the matter of *Trump v Trump*, 179 A.D.2d 201 (1st Dep't, 1992), a strikingly similar non-disclosure clause in a matrimonial proceeding had been removed *sua sponte* by the lower Court from the supplemental judgment of divorce. The Appellate Division agreed the confidentiality clause should remain in the decree and reinstated that specific paragraph stating:

Since it is clear that the trial court exceeded its "limited authority to disturb the terms of a separation agreement" (Kleila v Kleila, 50 NY2d 277, 283) and paragraph 10 does not, on its face, offend public policy as a prior restraint on protected speech (see, Snepp v United States, 444 US 507), we modify to incorporate the terms of said Agreement into the supplemental judgment as agreed to by the parties.

In the matter entitled *Ronnie Van Zant, Inc. v. Cleopatra Records, Inc*, 906 F.3d 253, 257 (2d Cir. 2018), the United States Court of Appeals, Second Circuit vacated an injunction, reasoning that although the injunction was as a result of a private agreement (as is sought herein), what was to be enjoined was a:

"…viewing of an expressive work prior to its public availability, and courts should always be hesitant to approve such an injunction. "Any prior restraint on expression comes to [the Supreme] Court with a heavy presumption against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) (internal citations and quotation marks omitted); see Melville Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4-14 (1984) ("[P]ermanent injunctions ... are classic examples of prior restraints.").

As can be seen by the instant proceeding, a question to be answered is whether the confidentiality clauses in the 2001 Agreement, viewed in the context of the current Trump family circumstances in 2020, would "…offend public policy as a prior restraint on protected speech…". Yes, it should, as it would be a prior restraint on speech.

Notwithstanding that the Book has been published and distributed in great quantities, to enjoin MARY L. TRUMP at this juncture would be incorrect and serve no purpose. It would be moot.

In *Speken v. Columbia Presbyterian Med. Ctr.*, 304 A.D.2d 489 (1st Dep't, 2003) plaintiff attempted to vacate a confidentiality provision of a settlement agreement citing public policy concerns. As the motion court stated and was affirmed by the appellate court, the clause that prevented plaintiff from discussing or disseminating information about a malpractice action did not offend public policy against prior restraint of speech. (*Speken v Columbia Presbyt. Med. Ctr.*, 278 A.D.2d 154 (1st Dep't, 2000)) A private contract was upheld and not vacated, however unlike the instant matter, there were no public policy concerns.

Anonymous v. Anonymous, 233 A.D.2d 162 (1st Dep't, 1996) concerned a matrimonial stipulation that contained a confidentiality clause about the parties' marriage that provided for a $500,000 per-breach offset as liquidated damages. The appellate court found that the defendant did not make out a sufficient case for breach of the stipulation, despite finding that such a confidentiality agreement is enforceable, as not being against public policy.

The United States Court of Appeals, Third Circuit in *Democratic National Committee v. Republican National Committee*, 673 F.3d 192 (2012) enforced a Consent Decree entered by the DNC and RNC. The terms in the Decree to restrict disclosure of specific information were found to be nonviolative of the restricted party's First Amendment rights since consideration had been exchanged.

Another factor to be considered by this Court is what is the status of publication? According to Jonathan Karp, CEO of S&S (in his initial Affidavit in Opposition to the Order to Show Cause (NYSCEF Doc. No.25), paragraph 10: "As of today, [June 30, 2020] approximately 75,000 copies have been printed and bound and are ready for publication, thousands of which have already been shipped…In addition, Simon & Schuster has provided, and multiple booksellers have published, key information concerning the contents of the Book." Karp submitted an Amended Affidavit sworn to July 2, 2020 (NYSCEF Doc. No. 81) wherein he specifically states that, "…over 35,000 of which have already been shipped.", referring to copies of the Book.

Currently, there is pending an Order to Show Cause by which S&S seeks to file Karp's Second Amended Affidavit (NYSCEF Doc. No. 132) sworn to July 8, 2020which states at paragraph 14 that after the Appellate Division vacated this Court's TRO against S&S, "…over 600,000 copies of the Book had been printed and shipped to retail booksellers large and small from national chains and online entities to a host of small, independent booksellers all over the country. In the intervening days, the Book has been extensively reviewed and commented on in the press, and excerpts of the book are widely available.".

There is no doubt that the Book is out in the public eye in significant quantities and has reached millions of people by the tremendous attention it has gained by the media. Another "balancing" test for the Court is between plaintiff and S&S. Comparing the potential enormous cost and logistical nightmare of stopping the publication, recalling and removing hundreds of thousands of books from all types of booksellers, brick and mortar and virtual, libraries and private citizens, is an insurmountable task at this time. To quote *United States v. Bolton*, 2020 WL 3401940 (United States District Court, District of Columbia) (Lambeth, J.) "By the looks of it the horse is not just out of the barn, it is out of the country.".

Lastly, in the vernacular of First year law students, "Con. Law trumps Contracts".

By reason of all the foregoing it is

ORDERED that the Temporary Restraining Order entered against MARY L. TRUMP as modified by the Appellate Division Decision & Order on Application (Scheinkman, J.) dated July 1, 2020 is **VACATED**; and it is further

ORDERED that the Order to Show Cause of plaintiff ROBERT S. TRUMP, made pursuant to CPLR 6301 seeking a preliminary injunction enjoining and restraining MARY L. TRUMP together with her respective members, officers, employees, servants, agents, representatives and all others acting on behalf of or in concert with her, from publishing, printing or distributing, directly or indirectly, any book or any portions thereof, including but not limited to the book entitled: "Too Much and Never Enough, How My Family Created the World's Most Dangerous

Man", in any medium containing any descriptions or accounts of MARY L. TRUMP's relationship with ROBERT S. TRUMP, Donald Trump, or Maryanne Trump Barry, or assisting any other person or entity in such publication, printing or distribution, or providing such descriptions or accounts to any other person (other than counsel of record in this case is **DENIED**; and it is further

ORDERED that the Order to Show Cause of plaintiff ROBERT S. TRUMP, made pursuant to CPLR 6301 seeking a preliminary injunction enjoining and restraining SIMON & SCHUSTER, INC. together with its respective members, officers, employees, servants, agents, representatives and all others acting on behalf of or in concert with it, from publishing, printing or distributing, directly or indirectly, any book or any portions thereof, including but not limited to the book entitled: "Too Much and Never Enough, How My Family Created the World's Most Dangerous Man", in any medium containing any descriptions or accounts of MARY L. TRUMP's relationship with ROBERT S. TRUMP, Donald Trump, or Maryanne Trump Barry, or assisting any other person or entity in such publication, printing or distribution, or providing such descriptions or accounts to any other person (other than counsel of record in this case is **DENIED**.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: July 13, 2020
Poughkeepsie, New York

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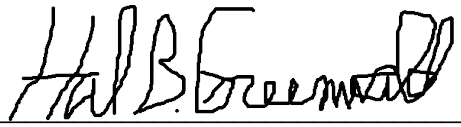

HON HAL B. GREENWALD, J.S.C

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Please contact Chambers before submitting motion papers to Judge Greenwald's Chambers.

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