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DONALD J. TRUMP FOR PRESIDENT, INC.,
a Virginia not-for-profit corporation

Claimant,

-v-

OMAROSA MANIGAULT NEWMAN,
an individual,

Respondent,

_____x

RESPONDENT'S RESPONSE TO CLAIMANT'S MOTION FOR PROTECTIVE ORDER

RESPONSE TO CLAIMANT'S MOTION FOR PROTECTIVE ORDER

Respondent Omarosa Manigault Newman, by and through her undersigned counsel, hereby serves her Response to Claimant's Motion for Protective Order.

I. INTRODUCTION

On April 25, 2019, Claimant submitted a Stipulated Protective Order which allegedly sought to govern the rights and obligations of Ms. Manigault Newman during this arbitration and "at all times thereafter". Within said order, the Campaign sought a determination that this arbitration action is entirely "confidential." In addition, the Campaign sought to amend the rules governing this arbitration by implementing new rules which would "govern the handling of documents." [Claimant's Stipulated Protective Order, P. 1]

In response, Respondent filed a Motion for Protective Order and Objections to Claimant's proposed Stipulated Order. Respondent's previously filed motion addressed and briefed a number of issues that are clearly re-litigated in the Campaign's most recent Motion for Protective Order. As such, Respondent incorporates the arguments previously asserted into the present motion. A copy of Respondent's Motion for Protective Order and Objections to Claimant's Proposed Stipulated Order is attached hereto as Exhibit "A."

On July 5, 2019, Respondent further supplemented her response to the Campaign's overbroad Motion for Stipulated Protective Order. The Campaign's most recent Motion addresses a number of issues that have previously been briefed (and ruled upon) in Claimant's supplemental response. As such, Respondent incorporates the arguments previously asserted into the present motion. A copy of Respondent's Supplemental Memorandum in support of Respondent's Motion for Protective Order is attached hereto as Exhibit "B".

On July 8, 2019, Arbitrator Brown held a hearing on the issues and issued a number of rulings regarding the confidentiality of this arbitration and the materials exchanged in this arbitration. Specifically, Arbitrator Brown held that only documents deemed confidential by order or by stipulation are confidential. At this time, no such documents meet those requirements. Furthermore, Arbitrator brown held that Arbitration is not confidential.

Since the date of the hearing, there have been no amendments to the AAA rules governing this arbitration action and there have been no new agreements between the parties. As such, nothing has changed since the July 8, 2019 hearing that would warrant the re-litigation of these issues.

Nevertheless, on July 24, 2019, the Campaign filed this instant Motion for Protective Order Re: Discovery Materials. The Campaign, once-again, seeks to cast a blanket of

confidentiality around every word of every document produced to Ms. Manigault Newman in the action. In support of their motion, the Campaign makes three particular arguments: 1) the campaign is contractually entitled to an MPO based upon the underlying NDA, 2) the Campaign is entitled to the MPO under the First Amendment, and 3) the Campaign is entitled to the MPO because Respondent Manigault Newman, may at some point, disclose this material.

The arguments set forth by the Campaign are without merit, they do not establish the requisite "good cause" and for the reasons set forth within this Response, Claimant's Motion for such an overbroad protective order should be denied.

II. RES JUDICATA

A number of arguments set forth in support of Claimant's Motion have previously been briefed, argued and ruled upon. Within Claimant's most recent Motion for Protective Order, they attempt to re-litigate issues that were ruled upon at the most recent hearing held on July 8, 2019. This is precisely why Respondent asked for an Order and will insist on a record of all further hearings in this matter.

At the July 8, 2019 hearing, the arbitrator made the following determinations: 1) only documents deemed confidential by order or stipulation are confidential, 2) Arbitration is not confidential, 3) the NDA does not bind this matter to confidentiality because it is not a "separate agreement", and 4) Arbitrator Brown stated, "I can't prevent someone from using documents outside of this case" and that there was "no basis for stopping" Respondent from releasing any materials or pleadings, as arbitration is not confidential without a stipulation or order. To the extent that the Campaign seeks to re-litigate issues previously ruled upon, Respondent seeks that any such issue be stricken as res judicata.

At the hearing, Arbitrator Brown repeatedly ordered an "exchange log" be produced, outlining a general description of the documents and the Campaign's basis for asserting confidentiality. Once the privilege log is produced, the parties were to meet and confer regarding the confidentiality designations. On July 16, 2019, Counsel for the Claimant unilaterally insisted that "further meet and confer efforts would be futile" and proceeded to file the instant MPO. To the extent that this MPO seeks to re-litigate the issues previously brief, argued and ruled upon, or seeks to amend the procedures governing this arbitration action, Respondent moves to strike these arguments as res judicata. To the extent that this Motion brings forward any "new" arguments, the Respondent provides the following response.

III. SUBSTANTIVE ARGUMENT

On July 24, 2019, Donald J. Trump for President, Inc. filed a Motion for Protective Order re: Discovery Material. Within said motion, the Campaign again alleges that they are entitled to a broad protective order which would establish the confidentiality of all documents produced by Claimants in response to the Respondent's discovery requests.

In support of this Motion for Protective Order (hereinafter "MPO"), the Campaign sets for three "new" arguments which, they allege, entitles them to said relief. First, the Campaign argues that they are contractually entitled to a MPO based upon the NDA agreement between Omarosa Manigault Newman and the Campaign. Second, the Campaign argues that they are entitled to a protective order based upon the privacy of association privilege under the First Amendment. Lastly, the Campaign argues that they are entitled to such an overbroad and all-encompassing MPO because "Respondent has (allegedly) previously disclosed Confidential Information and has threatened to publicly disclose the discovery material." [*Claimant Donald J. Trump For President Inc.,'s Motion for Protective Order Re: Discovery Material*, P. 8, 11, 12]

For the reasons set forth herein, Claimant's request for such a broad MPO must fail because Claimant has failed to establish the requisite good cause which entitles them to the overbroad relief which they seek.

Rule 26(c) of the Federal Rules of Civil Procedure grants the Court the discretion to issue protective orders that limit the extent and manner of discovery, in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c)(1). **A Federal Court, however, may only issue such an order "for good cause."** Id. Thus, **the party seeking a protective order bears the burden of establishing good cause and a specific need for protection**. See Pub. Citizen v. Liggett Grp., Inc., 858 F.2d 775, 779 (1st Cir. 1988) (citations omitted). **"A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements."** Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986); see also Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3rd Cir. 1994) **("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.")** (citations and quotation marks omitted).

The limitations of issuing protective orders in arbitration is more confined. R-23 of the AAA rules governing the Arbitration state in pertinent part:

> The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including without limitation: (a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality…"

The focus of R-23 is the "fair, efficient and economical resolution" of the case. To that end, the arbitrator has discretion of "conditioning any exchange or production of confidential

documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality."

Orders requiring confidentiality must therefore be (1) appropriate and (2) required to (3) preserve confidentiality. Such an order must also lead to a "(4) fair, (5) efficient and (6) economical resolution" of the case.

Instead, Claimant seeks an overbroad, overreaching, unconstitutional, and un-bargained for MPO, which again seeks to give Donald J. Trump and his Campaign immunity and legal rights to go after others which are not otherwise allowed under the rules governing the arbitration action.

Without first meeting its burden of proving that good cause exists, the Claimant prematurely seeks an overbroad Protective Order which is designed to prematurely designate every single word of every single document produced in response to Respondent's Request for Production as "confidential." For the reasons discussed below, good cause does not exist which entitles Claimant to their requested relief and Claimant's MPO should be summarily denied.

A. *CLAIMANT IS NOT CONTRACTUALLY ENTITLED TO AN OVERBROAD MPO PURSUANT TO NDA WHICH IS THE SUBJECT OF THIS UNDERLYING LITIGATION*

As their first argument, Claimant claims they are contractually entitled to such an overbroad MPO pursuant to the terms of the NDA, which is the subject of this entire dispute. In other words, the Campaign is seeking contractual relief in the form of a protective order prior to establishing the validity of the contract itself. The Claimant is essentially putting the cart before the horse and seeks relief without first establishing their entitlement to said relief. As discussed in greater detail below, Claimant's argument must fail and its request for such an overbroad protective order must be denied.

i. CLAIMANT HAS NOT MET ITS BURDEN OF ESTABLISHING THE EXISTENCE OF A VALID NDA

The Campaign argues within their motion that "because Respondent has already agreed to keep the Discovery Material Confidential under the Agreement, a Protective Order limiting the use of these materials to this Arbitration should be entered." [*Claimant's MPO*: P. 8] However, the Respondent disputes that she "has already agreed to keep the Discovery Material Confidential under the Agreement" and further disputes that the NDA is valid and enforceable and further disputes that the "Discovery Material" falls within the scope of the NDA. As such, the Campaign's conclusory statement that Ms. Manigault Newman "has already agreed to keep the Discovery Material Confidential" is highly contested, is unproven and is wholly insufficient to establish the requisite good cause for the issuance of this proposed MPO. *See Anderson v. Cryovac, Inc*., 805 F.2d 1, 7 (1st Cir. 1986) **"A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements."**

The Campaign further asserts that, "Respondent cannot evade her obligations to maintain the confidentiality of these documents based upon her stated intention to invalidate the Agreement. Respondent does not dispute that she executed the Agreement, and there has been no order invalidating the Agreement, in whole or in part. As such, the Agreement remains binding and enforceable." (*Motion for Protective Order Re: Discovery*: P. 10. L. 1-4)

Claimant's conclusory assertion fundamentally misstates the applicable burdens of proof in breach of contract cases. Claimant expressly argues that the *Respondent* has the burden of *invalidating* the NDA and if she fails to invalidate the NDA, in whole or in part, then the Agreement is automatically deemed "binding and enforceable" thus entitling the Campaign's to said MPO. Claimant's circular reasoning is legally flawed and must fail in that it seeks to

unlawfully shift in burden from the Claimant in *validating* the agreement, to Respondent's burden of *invalidating* the agreement. This argument is without support and must fail.

Under New York case law, and throughout nearly all of American Jurisprudence, a party seeking protection from an alleged breach of contract is burdened with establishing three material elements: 1) The existence of valid and enforceable contract, 2) a material breach of the contract, and 3) damages arising from the material breach. Here, Defendant seeks contractual protection in the form of an MPO, pursuant to a contract (the NDA) without first meeting their burden of establishing that the NDA is binding, valid, or enforceable. As such, any relief based thereon is premature.

It is uncontested, that **as of the time of this filing, the *Claimant* has not met its burden of establishing the existence of a valid of the NDA which governs the Respondent or this Arbitration action**. Nevertheless, the Claimant seeks this premature protection in the form of an MPO by shifting the burden of *invalidating* the NDA, to the Respondent.

While it may be true that as of the time of this filing, "There has been no order *invalidating* the Agreement, in whole or in part." However, that does not automatically establish that the Agreement "remains binding and enforceable." Nor does this fact automatically entitle the Campaign to said MPO. Simply put, this is not the standard and the Respondent does not have that burden.

It is equally true that there has been no order establishing the *validity* of the Agreement, in whole or in part. As such, it has *not* been established that the Agreement is "binding and enforceable." As such, Claimant has not met its burden of proving that it is contractually entitled to a protective order based upon the NDA without first establishing the validity of the NDA itself.

To the contrary, a Motion to Dismiss regarding the validity or applicability of the NDA is currently pending. Hearing on said Motion to Dismiss awaits discovery and without discovery there can be little progression towards reaching a resolution of Claimant's frivolous arbitration. The Respondent is literally stuck in a circle, like a snake eating its own tail.

ii. "SQUARELY WITHIN THE DEFINITION OF CONFIDENTIALITY"

Assuming arguendo, that the Campaign has somehow already met its burden of establishing the existence of a valid, binding and enforceable contract, (which it has not), the Campaign must also establish that that the documents sought to be protected by Claimant's proposed MPO are contractually protected by the NDA itself. For the reasons discussed below, Claimant has not met this burden and the Campaign is not entitled to such an overbroad and all-encompassing protective order.

The Campaign asserts that the, "Discovery material consists of Campaign communications relating to negotiations regarding Respondent, political strategies, written agreements, pay information and Campaign procedures/policies regarding the same, and details regarding the Campaign's email system." The Campaign further asserts that "This discovery material falls ***squarely*** within the definition of "Confidential information" under the written agreement". As such, the Campaign claims entitlement to said MPO. Respondent's conclusory assertions, even if true (which they are not), do not entitle the Respondent to such an overbroad protective order.

Confidential Information is defined under the NDA as, "all information (whether or not embodied in any media) of a private, proprietary or confidential nature…including, but not limited to, any information with respect to the personal life, political life, political affairs, and/or business affairs of Mr. Trump or of any Family Member, including but not limited to, the assets,

investment, revenue, expenses, taxes, financial statements, actual or prospective business ventures, contracts, alliances, affiliations, relationships, affiliated entities, bids, letters of intent, term sheets, decisions, strategies, techniques, methods, projections, forecasts, customers, clients, contacts, customer lists, contact lists, schedules, appointments, meetings, conversations, notes, and other communications of Mr. Trump, any Family Member, any Trump Company or any Family Member Company."

Significantly, Claimant has not met its burden of establishing that every word of every document produced contains confidential information which falls "squarely" within the definition of Confidential Information under the NDA. Quite the opposite is true. The NDA defines "Confidential Information" by expressly listing thirty-two (32) types of documents that fall squarely within the definition of "Confidential Information." However, the only commonality shared between the NDA's definition of "Confidential Information" and the definition of "Discovery material" is the term "strategy."

On its face, the definition of "Confidential Information" contained within the NDA does not include negotiations regarding Respondent, written agreements, pay information and Campaign procedures/policies regarding the same, and details regarding the Campaign's email system." Presumably, the Campaign is arguing that the "Discovery Material" falls within the overbroad and vague catch-all provision which includes "other communications of Mr. Trump, any Family Member, any Trump Company or any Family Member Company."

The Campaign's assertion that the "Discovery materials fall squarely within the definition of Confidential Information" is patently false. At best, the discovery materials could arguably fall within the catch-all provision. However, as previously argued, the catch-all provision is tremendously overbroad. As an example, the State of the Union Address would be

deemed confidential under the catch-all provision of the definition of "Confidential Information" under the NDA because it is a "communication from Mr. Trump."

Simply put, even if the Campaign proved the existence of a validly biding contract (which they have not), they are still burdened with establishing that all documents sought by Respondent's discovery requests "fall squarely within the definition of "Confidential Information" as defined by the NDA. The campaign has failed to meet this burden. As such, the overbroad and all-encompassing MPO sought by the Campaign should be denied.

iii. THE CASE LAW CITED BY THE CAMPAIGN DOES NOT SUPPORT THEIR CONTRACTUAL ENTITLEMENT TO A MPO

Despite not meeting either burden of 1) establishing the existence of a valid contract which contractually entitles the Claimant to said MPO and without 2) establishing that every word of every document produced falls within the scope of said NDA, the Campaign asserts that they are nevertheless entitled to the proposed MPO based upon common law precedent. The Campaign's reliance upon such precedent is misplaced as these cases are materially distinguishable from the present arbitration action and do not support Claimant's contractual entitlement to such an overbroad and sweeping protective order.

Specifically, the Campaign cites to multiple cases to support the argument that it is contractually entitled to such a broad MPO based upon the NDA. However, **these cases are not breach of contract actions wherein the validity or scope of the "confidentiality agreements" themselves are in dispute.**

In the present matter, the entire dispute of the underlying arbitration action concerns the validity/invalidity and scope of the subject NDA/Confidentiality Agreement. The Campaign summarily alleges that this disputed NDA entitles them to the relief requested within their MPO. However, these allegations are clearly in dispute and determinations concerning the

validity/invalidity and scope of the NDA have not yet been made. Until such determinations are made, Claimant has not established a contractual entitlement to said MPO.

The following cases were relied upon by Claimant; In *Hasbrouck v. BankAmerica Hous. Servs.*, 187 F.R.D. 453 (N.D.N.Y.), *aff'd sub nom. Hasbrouck v. BankAmerica House. Servs., Inc*., 190 F.R.D. 42 (N.D.N.Y. 1999), the underlying litigation concerned an action brought "pursuant to Title VII alleging discrimination on the basis of sex." *Id.* In *McKnight v. Stein Mart, Inc*., 1996 WL 481079 (E.D. La. Aug. 22, 1996), the court was tasked with deciding "an action brought under Title VII and other civil rights statutes…" Id. *In re New York Cty. Data Entry Worker Prod. Liab. Litig.,* 162 Misc. 2d 263, 266 (N.Y. Sup. Ct. 1994), the "dispute concerned a products liability action." Id. In *Phillips ex rel Estates of Byrd v. Gen. Motors Corp*., 307 F.3d 1206 (9th Cir. 2002), the court was determining a "products liability case against a truck manufacturer." Id. In *Flynn v. Portland Gen. Elec. Corp*., 1989 WL 112802 (D. Or. Sept. 21, 1989), the action was an "age discrimination case." Id. These cases are materially distinguishable from the present matter because they are not breach of contract cases in which the confidentiality agreement/NDA are in dispute.

In addition, **in all of the cases cited by Claimant in support of their contractual entitlement to said MPO, the courts were not tasked with determining the validity/invalidity or scope of the confidentiality agreements because the validity of the confidentiality agreements were uncontested.** Here, the validity of Claimant's NDA is the subject matter of this dispute. Here, the arbitrator is tasked with determining the validity or invalidity of the Campaign's NDA. Here, the validity of the Claimant's NDA is contested on numerous grounds as set for in Respondent's first responsive pleading. As such, the cases relied

upon by the Campaign are wholly and materially distinguishable from the present arbitration action.

Furthermore, **the cases cited by Claimant in support of their contractual entitlement to said MPO are not persuasive or instructive to the present matter because in all of the cases relied upon by the Claimant, the court issued the MPO to protect the privacy of third parties.** For example, in *Hasbrouck*, the Plaintiff sought a protective order for discovery requested by the Defendant regarding the terms of a settlement the plaintiff had previously entered into with a third party. In *McKnight*, the court sought to protect the interests of a third party by entering an MPO which maintained the confidentiality of "any and all information relating to any aspect of [the third party's] employment." In *Wendt*, a limited protective order was entered regarding a pre-trial deposition of a third-party former employee of the Defendant, whom had executed confidentiality agreements with the Defendant.

Here, there are no third party interests involved. Here, the Respondent is seeking discoverable material from the Campaign in an effort to defend herself against this meritless arbitration action. As such, third-party privacy considerations are wholly inapplicable to the present cases. Likewise, the rationale used by the Courts in reaching their decisions is not applicable to the present arbitration action.

In sum, the Campaign is not contractually entitled to the requested MPO because it has not met its burden of establishing the existence of a valid contract between Omarosa Manigault Newman and Donald J. Trump for President, Inc. In addition, the Campaign is not contractually entitled to the requested MPO because the Campaign has not met their burden of establishing that every word of every document produced to the Respondent in response to her discovery requests, fall within the scope of a legally valid and enforceable NDA. The Campaign has also

not disposed of the pending Motion to Dismiss. Lastly, the Campaign is not contractually entitled to said MPO under common law. The precedent cited by the Campaign is completely distinguishable from the present matter and provides no support for the Campaign's ultimate request for such an overbroad MPO. For the foregoing reasons, the Campaign's MPO should be summarily denied.

In the event that a protective order is issued based upon the NDA in dispute, without first determining the validity of the NDA in dispute, an inconsistent ruling is likely which would result in a windfall for the Campaign and substantial prejudice to the Claimant. For example, if such an overbroad MPO is prematurely entered by this arbitrator and it is later subsequently determined that the NDA itself is invalid, Ms. Manigault Newman would still be forever prohibited from disclosing any information received by the Campaign in this arbitration action. The prohibition from disclosure would not be based upon the NDA itself, but rather the MPO that was prematurely entered in this action. This example illustrates the practical pitfalls of putting the cart before the horse and granting the Campaign contractual relief in the form of an MPO without first establishing the validity of the contract itself. The Campaign's MPO must be summarily denied because they have not met their burden of establishing that they are contractually entitled to it.

B. FIRST AMENDMENT: PRIVACY OF ASSOCIATION

The second argument presented by the Campaign in support of their entitlement to an all-encompassing MPO is one based upon the privacy of association privilege guaranteed by the First Amendment. Setting aside the irony of the Campaign asserting a First Amendment privilege in the present arbitration action, the campaign's argument is completely without merit because Omarosa Manigault Newman is not a government actor, she is not seeking documents

related to campaign strategy and advertisements and because the Campaign has not met its burden set forth in the very case that they rely upon.

In support of their First Amendment argument, the Campaign relied upon a single case, *Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009). In *Perry*, same sex couples brought action against state officials alleging that the ballot proposing to amend California constitution to ban gay civil marriages violated Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Plaintiff sought production of certain internal campaign communications concerning **strategy and messaging**. The proponents sought protection from the Plaintiff's requests by arguing they were protected from disclosing said documents pursuant to the First Amendment's association privilege.

The *Perry* Court went on to state the procedure that one must follow when seeking First Amendment protections. The Court held, **"a claim of First Amendment Privilege is subject to a two-part framework. The party asserting the privilege "must demonstrate…a 'prima facie showing of arguable first amendment infringement.'** Brock v. Local 375 Plumbers Int'l Union of Am., 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting United States v. Trader's State Bank, 695 F.2d 1132, 1133 (9th Cir. 1983)). **This prima facie showing requires applicants to demonstrate the enforcement of the [discovery requests] will result in 1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the member's associational rights. If appellants can make the necessary prima facie showing, the evidentiary burden will then shift to the government…[to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest…[and] the least**

restrictive means of obtaining the desired information." Id. see also *Dole v. Serv. Employees Union, AFL-CIO*, Local 280, 950 F.2d 1456, 1459-61 (9th Cir. 1991).

Respondent fails to see any relevant or persuasive correlation between the present case and *Perry*. In the present case, Respondent Manigault Newman, as a private individual, has served limited discovery pertaining to the issues of arbitrability. Specifically, Ms. Manigault Newman has requested documents related to the drafting, negotiation, and execution of the subject NDA. At this stage of arbitration, Respondent Manigault Newman has not sought documents pertaining to "campaign strategy and advertisement." As such, at this stage of arbitration, the issuance of such an overbroad protective order would be premature because discovery is already sufficiently limited so as to not include documents related to campaign strategy or advertisement.

Furthermore, the campaign is not entitled to said MPO based upon the First Amendment because the Campaign has not established a prima facie case of First Amendment infringement by producing the documents that Ms. Manigault Newman has requested. Again, the Campaign has not even set forth an argument, let alone established a prima facie case, that their freedom of association has been infringed in any way. As such, the Claimant has failed to meet its burden and is not entitled to their requested relief.

In addition, for the Campaign to seek protection under the First Amendment they must prove that the government or a government actor is infringing upon their constitutional right. It is undisputed that Ms. Manigault Newman is a private citizen. Unlike the Campaign, Ms. Manigault Newman is not so sufficiently entwined with the government so as to consider her a public actor. The Campaign has not even made this argument. Nevertheless, the *Perry* case makes the state action requirement very clear wherein it states,

> An individual's freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from **interference by the State** unless a correlative freedom to engage in group effort towards those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)…"The right to associate for expressive purposes is not, however, absolute." Id…Infringements on that right may be justified by **regulations adopted to serve compelling state interests**, unrelated to the suppression of ideas, that cannot be achieved through means less restrictive of associational freedoms." Id… **The government** may abridge the freedom to associate directly, or "abridgment of such rights, even though unintended, may inevitably follow from varied forms of **governmental action**." NAACP, 357 U.S. at 461, 78 S.Ct. 1163. Thus the **government** must justify its actions not only when it imposes direct limitations on associational rights, but also when **government action** "would have the practical effect 'of discouraging' the exercise of constitutionally protected political rights." Id.

In the present case, the Campaign is seeking First Amendment protection without first establishing (or even arguing) that their first amendment privileges are being infringed by the government. Again, it is undisputed that Ms. Manigault Newman is not a government actor. Rather, she is a private individual who is seeking the documentation necessary to defend herself in the meritless arbitration action. As such, the Campaign's claim that they are entitled to such an overbroad MPO based upon the First Amendment's freedom to associate is without merit, the *Perry* case in wholly inapplicable, and Claimant is not entitled to their requested overbroad MPO.

C. *RESPONDENT HAS NOT PREVIOUSLY DISCLOSED CONFIDENTIAL INFORMATION*

The third argument presented by the Campaign is that "there is good cause for entry of a protective order based on Respondent's prior conduct and statements indicating she will publicly disclose discovery exchanged in this action." [*Claimant's MPO*: P. 12, L. 3-4]

In support of this argument, the Campaign asserts that "Respondent has already made numerous disclosures of Confidential Information in violation of the Agreement, including in her Book and releasing several recordings to the media. [*Statement of Claim*, ¶¶ 9, 20-22, 30-31]."

In support of Claimant's conclusory assertion that Ms. Manigault Newman "has already" violated the NDA, counsel cites not to facts, but rather to himself and the allegations raised in the Statement of Claim for Breach of Contract. This might be the most circular of propositions to date. It's like saying you can't do something because you won't do it. The Campaign will not engage in meaningful discovery to dispose of the Motion to Dismiss. So they are going to keep saying the same thing, hoping for a different result. This conclusory assertion is insufficient to establish the requisite "good cause" for issuing a protective order because **"A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements."** Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986); see also Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3rd Cir. 1994) **("Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing.")** (citations and quotation marks omitted).

To be clear, as of the time of this filing, there has never been a determination that Ms. Manigault Newman has violated the NDA in anyway. Nor has there been a determination that the NDA is even valid or enforceable. The Campaign's conclusory assertions are insufficient to warrant an MPO.

In an attempt to manufacture the need for an MPO, the Campaign claims that an MPO is necessary because "Respondent has also threatened to publicly disclose documents produced by the Campaign herein in the unrelated Department of Justice lawsuit against her." To a large extent, this issue has already been briefed, argued and ruled upon.

As previously argued, New York common law has consistently held that arbitration materials are not confidential and are subject to disclosure in other lawsuits, like the one filed by the United States Department of Justice. *See Galleon Syndicate Corp. v. Pan Atl. Group Inc*.,

637 NYS2d 104, 105 (3rd Dept. 1996). **("Parties to arbitration proceedings governed by Rules of American Arbitration Association (AAA) are not prohibited, in the absence of a separate confidentiality provision, from disclosing documents generated or exchanged during arbitration.")** See also, *Kamyr, Inc. v. Combustion Eng'g*, 161 A.D.2d 233, 554 N.Y.S.2d 619). **("Evidentiary material at an arbitration proceeding is not immune from disclosure."**) *See Galleon supra* at 105 **("There is no confidentiality privilege precluding disclosure of the material requested as the parties to the arbitration proceeding governed by the Rules of the American Arbitration Association are, in the absence of a confidentiality provision, not prohibited from disclosing documents generated or exchanged during the arbitration and since evidentiary material at an arbitration is not immune from disclosure.")**

While it may be true that the Campaign has the desire to prohibit the disclosure of some of these documents in the DOJ case, desire alone is insufficient to establish the requisite "good cause." As previously discussed, this arbitration material is not automatically confidential simply because the Campaign sent Ms. Manigault Newman to this arbitration. Furthermore, the Campaign has still yet to cite to any authority which authorizes the arbitrator to issue an MPO which extends beyond this arbitration action and forever. As such, the Campaign is not entitled to the relief requested by virtue of their fear that Ms. Manigault Newman might potentially disclose some documents in the DOJ case. Under the law, she is allowed to defend herself and she fully intends on doing so.

In further support of this argument, the Campaign cites to multiple cases which stand for the proposition that "Judicial Safeguards in the form of protective orders and confidentiality agreements exist and are mandated for information which is **subject to abuse if widely**

disseminated." *Mann ex. Rel. Akst. V. Cooper Tire Co*., 33 A.D.3d 24, 36 (N.Y. App. Div. 2006); see also McLaughlin v. G.D. Searle, Inc., 38 A.D.2d 810, 811 (N.Y. App. Div. 1972) ("material confidential in nature, or information which is **subject to abuse if widely disseminated**, shall be afforded judicial safeguards where possible.")

Despite citing these cases, the Campaign failed to establish (or even argue) how every single word of every single document produced in response to Respondent's discovery requests, are "subject to abuse if widely disseminated." Id. As such, the Campaign has failed to establish their entitlement to such an overbroad and sweeping protective order.

To the extent that the Campaign truly believes that certain information contained within certain documents produced are "subject to abuse if widely disseminated" the Campaign is free to seek a protective order regarding such information on a document-by-document basis, pursuant to the applicable rules governing the Arbitration.

D. PROCEDURES FOR DESIGNATING ARBITRATION MATERIAL AS CONFIDENTIAL

Within their motion, the Campaign also seeks to re-write the rules governing this arbitration action. At no time has the Arbitrator ever requested that the parties amend the rules governing this arbitration or the procedures established for seeking protective orders. Nevertheless, the Campaign's MPO states "the Protective Order also includes the following procedures for designating additional materials as "Confidential".

1. "In the event that any party to the arbitration desires to designate any additional materials exchanged in the arbitration as "Confidential," it may do so on a provision basis."

2. "Any other party may challenge this provision designation by providing written notice of the same within seven (7) days of receipt of the production/disclosure. If no challenge

is made by any other party within this time period, the material shall be deemed "Confidential" under the Protective Order.

3. During the ten (10) day period following the written notice of a challenge, the parties shall meet and confer in an effort to resolve such challenge in good faith (the "Meet and Confer Period")

4. If the parties are unable to resolve the dispute, the designating party shall have ten (10) days following the expiration of the Meet and Confer Period to file a motion for an order to designate the challenged material as "Confidential" and

5. Any challenged material shall maintain its provisional confidentiality designation pending the Arbitrator's decision on the dispute.

These exact procedures were suggested in Claimant's previously filed "Stipulated Protective Order." **At the hearing held on July 8, 2019, this court ultimately ruled that the "Stipulated Protective Order" would not be granted because the Campaign lacks the authority to change the rules governing this arbitration and because Ms. Manigault Newman does not agree to be bound by the Campaign's amendments.** Despite no changes on this issue since the last hearing date, the requested MPO, once-again, seeks to shift the burden to the Respondent for challenging the designation of "confidential material." The AAA rules of arbitration and the law governing this action do not entitle the Campaign to its requested relief.

In support of this requested relief, the Campaign asserts that, "If such procedures are not instituted, a party seeking to designate additional material as confidential in this action would be required to move for an order each and every time, prior to disclosing the material to the other party, which would be burdensome for the parties and the Arbitrator, and delay disclosure of the material at issue." The Campaign's argument is devoid of logic.

As an initial matter, the AAA rules and the laws governing this arbitration dispute always places the burden on the party seeking the protection. As such, pursuant to the rules governing the arbitration, the Campaign has the burden of establishing the confidentiality of each and every document that they assert is confidential. The proposed MPO seeks to shift this burden to Ms. Manigault Newman to challenge the confidential designation. Specifically, under the proposed MPO, Ms. Manigault Newman would be burdened with "challenging this provisional designation by providing written notice of the same within seven (7) days of receipt of the production/disclosure." [*Motion for Protective Order re: Discovery*, P. 14] Making matters worse, if no challenge is made by Ms. Manigault Newman within seven days, the material shall be deemed "Confidential" under the Protective Order without any further action or determination of the arbitrator. Simply put, the Campaign is not entitled to the relief requested because they are not entitled to change the rules and shift the burdens at their whim.

Additionally, the MPO seeks to grant "provisional confidentiality" to all documents produced in response to Ms. Manigault Newman's discovery requests. Despite making this argument twice, the Campaign has still yet to cite to any authority which authorizes the protection of "provisional confidentiality" of any documents.

Under the law, to establish the confidentiality of the documents, the Campaign is burdened with seeking a MPO for each piece of confidential information contained within the documents produced. If the Campaign seeks to abuse this power by summarily claiming that all documents are confidential (or even provisionally confidential), then they must prove it. The burden is on them. Confidentiality is the exception, not the rule. To date, the Campaign has failed to establish with any particularity how any of the documents produced in response to

Respondent's limited discovery requests should fall under a blanket of confidentiality. As such, the Campaign's MPO must be denied.

The Campaign further claims that "Respondent would not be prejudiced through these procedures as she would be free to challenge any confidentiality designations and the burden to maintain the designation would be on the Campaign." There are numerous falsehoods in this conclusory statement. First, Ms. Manigault Newman is not "free" to challenge the confidentiality designations under the MPO. Rather, she is "burdened" with challenging each and every designation of "confidentiality" within seven (7) days or else the material will forever be considered confidential. Despite making this argument twice, the Campaign has still yet to cite to any authority which authorizes them to place that burden upon the Respondent.

Furthermore, of course Ms. Manigault Newman would be prejudiced by the implementation of such an overbroad MPO. To date, the Campaign has produced (or is prepared to produce) hundreds of documents relating to the drafting, execution and negotiation of the agreement. The Campaign has certainly not met its burden of proving "good cause" exists to cover these hundreds of documents in a blanket of confidentiality. Nevertheless, the Campaign seeks "provisional confidentiality" without hearing, and places the burden on the Respondent to challenge the "provisional confidentiality." The granting of the MPO would prejudice Ms. Manigault Newman and place a tremendously time consuming burden of challenging the confidentiality of hundreds of documents. This burden is unlawful and unnecessary, especially considering that her discovery request have already been sufficiently limited to the issue of arbitrability.

In short, if the Campaign seeks to establish the confidentiality or every single document produced in response to Ms. Manigault Newman's discovery request, then that burden lies with

them. Ms. Manigault Newman will not stipulate to the proposed shift in burdens and the Campaign has cited to no authority which entitles them to said protection. As such, Claimant's MPO must be denied.

IV. PREJUDICIAL IMPACT ON RESPONDENT

The Campaign repeatedly asserts that Ms. Manigault Newman would not be prejudiced if this protective order is granted. This assertion could not be further from the truth. In addition to the arguments presented above, the granting of the MPO would prejudice Ms. Manigault Newman by hindering her ability to defend herself in the lawsuit filed against her by the Department of Justice.

The Campaign claims that "The discovery material has no relevance to the lawsuit brought by the Department of Justice – that action relates to her failure to file the required financial disclosures after leaving her position in the White House, in violation of the Ethics in Government Act, which bears no relationship to her breaches of the Agreement."

While Respondent appreciates counsels legal commentary on a case that he is not involved with, his assertions are simply untrue and counsel lacks the requisite information and/or knowledge to even present such arguments. As an initial matter, counsel for the Claimant is not a party to the DOJ lawsuit. Counsel for the Claimant does not represent either party to the DOJ lawsuit. Counsel for the Claimant is unaware of the defenses that will be presented in the DOJ lawsuit. Most importantly, counsel for Claimant is not the judge presiding over the DOJ lawsuit. As such, counsel for the Claimant in this arbitration action lacks the authority to unilaterally determine (without even knowing the facts or defenses of the case) that "the discovery material has no relevance" to the DOJ lawsuit.

As the defendant in the lawsuit brought by the DOJ, Respondent Manigault Newman fully anticipates defending herself against such actions and may very well submit documents produced in this arbitration to support her defenses. She is entitled to do so under the law. *See Galleon Syndicate Corp. v. Pan Atl. Group Inc.*, 637 NYS2d. 104, 105 (3rd Dept. 1996) ("Parties to arbitration proceedings governed by Rules of American Arbitration Association (AAA) are not prohibited, in the absence of a separate confidentiality provision, from disclosing documents generated or exchanged during arbitration.") See also, *Kamyr, Inc. v. Combustion Eng'g*, 161 A.D.2d 233, 554 N.Y.S.2d 619) ("Evidentiary material at an arbitration proceeding is not immune from disclosure.")

In addition to the prejudicial impact concerning the DOJ case, the issuance of said MPO would further impact Ms. Manigault Newman's rights and privileges. As discussed throughout this arbitration action, Ms. Manigault Newman as a former federal employee is entitled to heightened protections under the Federal Whistleblower Enhancement Act. In addition, Ms. Manigault Newman has the constitutional right to discuss matters of public concern as guaranteed by the First Amendment.

The MPO formulated by the Campaign seeks to eliminate these statutory and constitutional protections by gagging Ms. Manigault Newman and prohibiting her from disclosing information that she is otherwise entitled to disclose. The overwhelming prejudicial impact of issuing this protective order warrants its denial.

V. BAD FAITH

The Statement of Claim was filed on August 14, 2018. Next week marks the one year anniversary of this arbitration action. In the past year, the parties have not made any headway towards reaching a resolution. To date, Ms. Manigault Newman has not received the responses

to the discovery requests that were submitted months ago. Instead, she has had to defend three overbroad motions for protective orders.[1] The Campaign continues to refuse to provide this necessary documentation until Respondent agrees to an MPO.

In essence, the Campaign is using the requested discovery documents as leverage in an attempt to coerce Ms. Manigault Newman (and her counsel) into signing a separate and legally binding MPO. Discovery of this arbitration should not be used as a bargaining chip. The Campaign's continued refusal to provide these documents, without Respondent first signing an MPO, has delayed this arbitration action and has forced Respondent to expend significant sums of money in defense of such broad motions.

The arguments presented in the present MPO is just more of the same. Here, the Campaign, once again, is withholding the necessary discovery documents so that they can coerce Ms. Manigault Newman into signing an agreement which waives her statutory and constitutional rights. The Campaign's continued refusal to provide Respondent with the documents necessary to defend herself in the arbitration action is in bad faith and is being used as a bargaining chip to compel Ms. Manigault Newman to waive her rights. She will not waive her rights, but she will enforce them. Ms. Manigault Newman has the right to defend herself in this action and seeks to compel the Campaign to provide these documents, without further delay, so that the parties can proceed in the interest of judicial economy.

CONCLUSION

As discussed above, the three arguments which the Campaign relies upon in support of such an overbroad protective order must fail. The Campaign has not established that they are

[1] 1) **Claimant Donald J. Trump for President, Inc.'s Motion for Protective Order re: Respondent's Discovery**, filed February 28, 2019, 2) Claimant Donald J. Trump for President, Inc.'s **Stipulated Protective Order**, filed April 25, 2019, and 3) Claimant Donald J. Trump for President, Inc.'s **Motion for Protective Order re: Discovery Material,** filed July 24, 2019.

contractually entitled to said MPO, the Campaign has not established entitlement to said MPO under the First Amendment, and the Campaign has not established entitlement to an MPO because Ms. Manigault Newman "may" disclose documents elsewhere. In additional, the Campaign is not entitled to shift the burdens as set forth within the proposed MPO. Furthermore, the issuance of such an overbroad protective order would have a significantly prejudicial impact on Ms. Manigault Newman by affecting her statutory and constitutional rights and is likely to result in a windfall for the Campaign, at Ms. Manigault Newman's expense.

WHEREFORE, Respondent Manigault Newman seeks an order denying the Campaign's Motion for such an overbroad protective order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Charles J. Harder, Esquire, Anthony J. Harwood and Ryan J. Stonerock, Harder LLP, 260 Madison Avenue, Sixteenth Floor, New York, New York 10016, (Attorneys for Claimant) by e-mail to Charder@HarderLLP.com ; AHarwood@HarderLLP.com ' Rstonerock@HarderLLP.com; and Ann Lesser, Vice President, American Arbitration Association, 120 Broadway, 21st Floor, New York, NY 10271 at AnnLesser@adr.org ; this **7th** day of August, 2019.

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