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

DONALD J. TRUMP, *Plaintiff*, -against- MARY L. TRUMP, THE NEW YORK TIMES COMPANY d/b/a *THE NEW YORK TIMES*, SUSANNE CRAIG, DAVID BARSTOW, RUSSELL BUETTNER, JOHN DOES 1 THROUGH 10, AND ABC CORPORATIONS 1 THROUGH 10, *Defendants*.	Index No. 453299/2021 Motion Seq. No. 001 **MEMORANDUM OF LAW** **ORAL ARGUMENT REQUESTED** **PREFERENCE REQUESTED PURSUANT TO CPLR 3211(G)**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MARY L. TRUMP'S MOTION TO DISMISS

Dated: New York, New York
December 2, 2021

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I. INTRODUCTION

Former President Donald Trump personifies the evils that led the State of New York just last year to expand its "anti-SLAPP" law[1] to deter vexatious lawsuits aimed at chilling freedom of speech and of the press. As a private businessman, Mr. Trump filed a baseless defamation suit seeking billions of dollars simply to make a journalist's life "miserable" for reporting on Mr. Trump's net worth and to force the journalist to "spen[d] a whole lot" of money defending himself. *See* Ex. 1. As a candidate for President, Mr. Trump threatened to bring defamation lawsuits against the many women who credibly accused him of sexual misconduct. *See, e.g.*, Ex. 2. As President, he publicly encouraged his late-brother's unsuccessful lawsuit to enjoin their niece, Mary Trump, from publishing the book at issue in this case, *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man* (the "Book"). *See, e.g.*, Exs. 3-4. His administration unsuccessfully sought a prior restraint against his former National Security Advisor's book sharply criticizing Mr. Trump. *See, e.g.*, Ex. 5. And during his failed bid for a second term as President, Mr. Trump's campaign filed multiple defamation suits against news organizations. *See, e.g.*, Ex. 6.

Mr. Trump is, in other words, a serial SLAPP artist and this baseless lawsuit is more of the same. *See, e.g.*, Ex. 7 (Mr. Trump is "a powerful illustration of why more states need to enact anti-SLAPP laws ***to discourage libel bullies like Trump*** from filing frivolous lawsuits to chill speech" by "run[ning] up legal tabs for journalists and critics"); Ex. 8 ("SLAPPs are a favorite weapon of Trump."). Mr. Trump's filing of this case, three years after *The New York Times* published its Pulitzer Prize-winning story based on wide-ranging interviews, expert analyses, source material provided by Mary Trump, and other public and non-public documents and information, is nothing

[1] "SLAPP" is an acronym for strategic lawsuits against public participation.

more than a transparent effort to punish his niece and these journalists for disseminating truthful information of great public interest concerning Mr. Trump's fitness for the office and aspects of his personal and financial history that he had long sought to hide, to chill them and others from reporting on such information in the future.

To survive dismissal under New York's anti-SLAPP law, former President Trump must prove that his suit has a substantial basis. He cannot meet that stringent standard for myriad reasons. Mr. Trump's claims do not challenge as false a single word in either Mary Trump's Book or *The Times*' reporting, but instead hang on a confidentiality provision in a decades-old agreement settling specific disputes over the wills of Mr. Trump's parents and the withdrawal of certain medical benefits. Mr. Trump wields the confidentiality provision as if it were virtually unlimited in scope and time, precluding speech on issues that became of central public concern once he first ran for President of the United States. His interpretation is unreasonable and has already been rejected by Dutchess Country Supreme Court Justice Greenwald. ***First***, the decades-old confidentiality provision at issue was terminable at will and thus cannot form the basis of a breach of contract claim. ***Second***, even if the Agreement were enforceable (which it is not), former President Trump would have violated his reciprocal confidentiality obligations many times over and thus has no standing to bring this suit. ***Third***, the confidentiality provision is not a sweeping gag order; rather, it applies only to disclosure of the specific terms of the Agreement. ***Fourth***, if the confidentiality provision were broadly interpreted, it would be unenforceable because it is so vague as to preclude the mutual assent required for contract formation and because its enforcement would be contrary to public policy, including powerful First Amendment interests. ***Finally***, the non-contract claims are duplicative of his meritless contract claim and should therefore be dismissed.

When Mr. Trump "consent[ed] to be a candidate for a public office conferred by the election of the people," he voluntarily "put[] his character in issue, so far as it may respect his fitness and qualifications for office." *White v. Nicholls*, 44 U.S. 266, 290 (1845). The First Amendment guarantees that "the prerogatives of American citizenship" include "the right to criticize public men." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988). Yet this action is merely the latest in Mr. Trump's long line of frivolous lawsuits to chill speech that is critical of him. Far from meeting his heavy burden under the anti-SLAPP statute, former President Trump fails to state a claim. His meritless suit should be dismissed with prejudice, and Mary Trump should be permitted to seek attorneys' fees and damages incurred as a result of this SLAPP suit. *See* Civ. Rights Law § 70-a(1)(a).

II. FACTS[2]

A. The Estate Actions

Mary Trump is the niece of former President Donald Trump. Trump Aff. ¶ 2. Over twenty years ago, Mary and others filed certain actions challenging Mr. Trump's revocation of health care benefits for Mary and others, including Mary's severely disabled infant nephew, and objections to probate proceedings in connection with the wills of Mary's grandparents, which were "the product of undue influence and fraud." Compl. ¶¶ 17-20; Trump Aff. ¶¶ 5-6. At that time, Mary also held interests in the real-estate empire that had been built by her grandfather, inherited upon the premature death of her father, which were not at issue in those proceedings. Trump Aff. ¶¶ 3-4.

[2] Unless otherwise noted, defined terms have the meaning assigned in the Complaint, internal quotation marks and alterations are omitted, emphases are added, alleged facts are assumed to be true solely for purposes of this motion, and referenced exhibits are attached to the Affirmation of Anne Champion.

Members of the Trump family sought to "fully, finally, and globally" resolve the two filed actions and also acquire Mary's interests in the family business by executing a confidential Agreement and Stipulation. Compl. ¶ 23; *see also* Ex. 9 (the "Agreement" or "Agmt."). Its stated purpose was the "compromise[] and settle[ment], on a 'global basis' in order to resolve all of [the parties'] differences pertaining to [] two (2) probate proceedings; [an] insurance case; partnership and corporate interests; as well as their interests in two (2) inter vivos trusts." Agmt. at 5. The Agreement was executed by seven Trump family members—including Mary and Mr. Trump—in April 2001. *Id.* at 20-21. Central to the Agreement were the withdrawal of objections to the probate proceedings, discontinuance of litigation concerning the withdrawal of medical coverage, the transfer of various interests from Mary and her brother to Mr. Trump and his siblings, and lump-sum payments to Mary and her brother. *Id.* §§ 6, 8, 14, 16. The amounts exchanged were based on valuations provided by Mr. Trump and his siblings that *The Times* later revealed to have been riddled with fraud. *See* Ex. 10.

Sections 2 and 3 of the Agreement contained reciprocal confidentiality provisions, stating that they were meant to "encourage a fair resolution of the matters in controversy" in light of the parties having "unanimously agreed that the public ha[d] no interest in the particular information involved." Agmt. § 1. Pursuant to the provisions' narrow terms, a group including Mary agreed not to "disclose any of the terms of th[e] Agreement" or information "concerning their litigation or relationship" with other parties "or their litigation involving the Estate[s]" of Mary's grandparents without "the consent of DONALD J. TRUMP, ROBERT S. TRUMP, and MARYANNE TRUMP BARRY" as well as certain "officers and directors" of particular entities. *Id.* § 2.

In return, Mr. Trump and others each "individually" agreed that, without "the written consent of FRED C. TRUMP, III and MARY TRUMP, LISA TRUMP and LINDA C. TRUMP," they would not "disclose any of the terms of th[e] Agreement" or information "concerning their litigation or relationship" with any of several enumerated members of the Trump family, nor would they disclose information concerning "their litigation involving the Estate[s]" of his parents. *Id.* § 3. While the provision states that the Agreement itself is confidential,[3] it does not extend confidentiality to documents exchanged during discovery in the Estate Actions. No financial consideration was provided for the confidentiality provisions. *See id.* § 16.

B. *The Times* Report

Public interest in the Trump family increased dramatically after the Agreement's execution in 2001, thanks largely to former President Trump's self-promotion efforts, ghostwritten books published under his name, and the 2004 debut of *The Apprentice* television series. Trump Aff. ¶ 12. Mr. Trump's eventual entry into national politics thereafter caused the Trump family to become among the most prominent and closely scrutinized in the world. *Id.*

Mr. Trump's self-aggrandizing mythology of entrepreneurial success was recast through a series of articles published by many investigative journalists. In 2016, for instance, *The Times* obtained portions of Mr. Trump's tax returns and published an article revealing that he may "have avoided taxes for nearly two decades." Compl. ¶¶ 34-36 (emphasis omitted). Thereafter, *The Times* approached Mary, who provided *The Times* with "documents that had been exchanged in the discovery proceedings of the Estate Actions." *Id.* ¶¶ 38, 42, 49. On October 2, 2018, *The Times* published an exhaustively researched 40-page article describing how the Trump family had employed "dubious tax schemes" and "instances of outright fraud" to transfer hundreds of millions

[3] Mr. Trump nevertheless publicly filed the Agreement in the fraud case pending against him. *Trump v. Trump*, No. 654698/2020 (N.Y. Sup. Ct.), Dkt. 63. The Agreement's complete terms had not previously been disclosed.

of dollars to Mr. Trump and his siblings while systematically evading their tax obligations. Ex. 10 (the "Report"); Compl. ¶¶ 67-70. The article's authors—defendants herein—were awarded a Pulitzer Prize for their work. Ex. 11.

The Report shed light on how then-President Trump and his siblings manipulated real-estate valuations and siphoned millions of dollars from their father's substantial real-estate interests. It further revealed that this scheme allowed them to conceal the true value of the real-estate holdings from family members—including Mary—and the government. *The Times*' investigative journalism first put Mary on notice of schemes by which she had been defrauded years earlier.

That inter-family fraud is now the subject of a separate suit brought by Mary. As set forth in *Trump v. Trump*, No. 654698/2020 (N.Y. Sup. Ct.), Mary's father died when she was only 16 years old, leaving her with valuable interests in her family's real-estate empire. Her aunts and uncles—including Donald Trump—took control of those interests and committed to watch over them as her fiduciaries. Instead, they carried out complex fraudulent schemes to plunder Mary's interests, cover their tracks, and dupe Mary into falsely believing that nothing was wrong. When Mary's grandparents died years later, her aunts and uncles threatened to bankrupt her interests, put her infant nephew's life at risk, and used their position of power to con her into signing away her remaining interests for a fraction of what they were actually worth. The final phase of this scheme was effectuated through the very same Agreement—an Agreement Mary was fraudulently induced to sign under unconscionable conditions—that now forms the basis for Mr. Trump's claims here.

C. Mary's Book and the Prior Restraint Litigation

Understanding that her experience as then-President Trump's niece and a trained clinical psychologist provided her with unmatched insights, Mary decided to write a book about her family. Compl. ¶ 76; Trump Aff. ¶ 13. On June 26, 2020, then-President Trump's brother, Robert, filed

suit in the Supreme Court of Dutchess County seeking a temporary restraining order (the "TRO") and to enjoin publication of the Book based on the very same confidentiality provision at issue here. *Cf.* Exs. 3-4 (reflecting former President Trump's support of his brother's lawsuit). A TRO was initially granted before submission of any opposing briefing. That TRO was almost immediately narrowed by the Appellate Division, which observed that "[t]he passage of time and changes in circumstances" lessened interests in preserving confidentiality concerning the decades-old Estate Actions. Ex. 12 at 4 (unpublished). The Appellate Division also emphasized that the public's interest in the Trump family had increased significantly since 2001 because one of its members was now "President of the United States and a current candidate for re-election," and while "the legitimate interest in preserving family secrets may be one thing for the family of a real-estate developer, no matter how successful; it is another matter for the family of the President of the United States." *Id.* at 4-5.

The Supreme Court ultimately vacated the TRO and denied the preliminary injunction motion. Among other things, it rejected Robert Trump's sweeping interpretation of the Agreement's vague confidentiality provisions and ruled that he failed to establish a likelihood of success on the merits. *Trump v. Trump*, 128 N.Y.S.3d 801 (Sup. Ct. 2020). Mary's Book was released to instant success on July 14, 2020. Compl. ¶¶ 78, 89. Former President Trump lost re-election and left office on January 20, 2021.

D. This Action

On September 21, 2021, former President Trump commenced this action regarding Mary's disclosure of documents to *The Times* and the publication of her Book, more than a year after the Book's release and three years after *The Times*'s Report concerning the Trump family finances, seeking $100,000,000 in compensatory damages plus punitive damages. In doing so, he does not challenge the truth of either the Book or the *Times*' Report or explain how these truthful reports

caused him any harm, let alone the astronomical amount he is claiming, which is plainly intended to intimidate and chill further speech and reporting about him. Instead, he simply recycles his brother's already-rejected interpretation of the Agreement in service of meritless claims against Mary for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. *Id*. ¶¶ 92-118. Each should be dismissed.

III. ARGUMENT

A. This Is a Strategic Lawsuit Against Public Participation.

New York recognizes as a foundational right that "[e]very citizen may freely speak, write and publish his or her sentiments on all subjects." N.Y. Const., Art. I, § 8. A "cultural center for the Nation," this State deliberately enshrined the "basic democratic ideal of liberty of the press in strong affirmative terms" to "provid[e] the broadest possible protection to the sensitive role of gathering and disseminating news of public events" and "a hospitable climate for the free exchange of ideas." *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991).

New York therefore strongly disfavors strategic lawsuits against public participation, or "SLAPPs," which are brought "to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out." *Mable Assets, LLC v. Rachmanov*, 192 A.D.3d 998, 999-1000 (2d Dept. 2021). Rather, it "encourag[es] only meritorious litigation" and "protect[s] citizens' exercise of the rights of free speech," Sponsor Mem. of Sen. Hoylman (July 22, 2020), https://www.nysenate.gov/legislation/bills/2019/s52, "particularly where such rights are exercised ... with respect to issues of public concern," *Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21, 27 (S.D.N.Y. 2020). New York's anti-SLAPP law applies to all litigation "based upon: (1) any communication in … a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest." Civ. Rights Law § 76-a(1)(a). Because

"[n]othing in the statute itself categorically excludes any particular type of action from its operation," the question posed is whether former President Trump's claims are "***based on*** the defendant[s'] protected free speech." *Navellier v. Sletten*, 29 Cal.4th. 82, 89-93 (2002) (applying anti-SLAPP statute to contract claim).[4] Plainly, they are.

Each claim against Mary predicates liability on protected speech—the publication of the Book and the provision of documents to journalists reporting on issues of public interest and concern. Compl. ¶¶ 97-98, 104, 109. Such widely disseminated writings constitute "communication[s] in … a public forum." Civ. Rights Law § 76-a(1)(a)(1); *see Lindberg v. Dow Jones & Co.*, 2021 WL 3605621, at *7 (S.D.N.Y. 2021) (newspapers are public fora); *Ctr. for Med. Progress v. Planned Parenthood*, 2021 WL 3173804, at *9 (S.D.N.Y. 2021) (magazines); *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 476-78 (Ct. App. 2000) (newsletters). Furthermore, all of the conduct alleged falls within § 76-a(1)(a)(2)'s broad "catch-all" provision because it "help[ed] to advance" and "assist[ed] in the exercise" of free speech, to whit the Report and Book. *Ojjeh v. Brown*, 43 Cal.App.5th 1027, 1039-42 (Ct. App. 2019) (fundraising and filmmaking protected); *see also Stutzman v. Armstrong*, 2013 WL 4853333, at *7 (E.D. Cal. 2013) ("speech in," "about," and efforts "aiding" publication of book); *Shepard v. Miler*, 2010 WL 5205108, at *7 (E.D. Cal. 2010) ("research and publication of a book").

This dispute involves issues of public interest, which is "construed broadly" to include "any subject other than a purely private matter." Civ. Rights Law § 76-a(1)(d). Courts generally defer "to editors in terms of what is of interest to the public," *Reus v. ETC Hous. Corp.*, 148 N.Y.S.3d 663, 669 (Sup. Ct. 2021), rather than "second guess … judgments as to news content,"

[4] California law is informative because New York's statute is based on California's. *Compare* Civ. Rights Law § 76-a(1)(a), *with* Cal. Civ. Proc. § 425.16(e)(3)-(4).

Lindberg, 2021 WL 3605621, at *8-10. Moreover, the Report "received a record-breaking amount of attention," Mary's Book was a "Best Seller," and both received extensive media coverage. Compl. ¶¶ 72-75, 85-86, 89. They each discussed then-President Trump, "a person … in the public eye" and "a topic of widespread, public interest." *Rivero v. AFSCME*, 105 Cal.App.4th 913, 924 (Ct. App. 2003); *see also Stutzman*, 2013 WL 4853333, at *6 (book concerning celebrity is of public interest). And given that then-President Trump held and was running again for public office, "discussion about [his] qualifications" presented "an inherently political question of vital importance" concerning "the very manner in which [the country] would be governed," *Damon*, 85 Cal.App.4th at 479; *see also Vogel v. Felice*, 127 Cal.App.4th 1006, 1015 (Ct. App. 2005) ("The character and qualifications of a candidate for public office constitutes ... an issue of public interest"); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (noting "the paramount public interest in a free flow of information" where speech concerns "anything which might touch on an official's fitness for office," including "dishonesty, malfeasance, or improper motivation").

Because the anti-SLAPP law applies, "the court may consider exhibits and other documents submitted" with this motion, and former President Trump bears the "heavy burden" to "demonstrate a substantial basis in law and fact for [his] claims." *161 Ludlow Food, LLC v. L.E.S. Dwellers, Inc.*, 2018 WL 3910990, at *3 (N.Y. Sup. Ct. 2018); *accord* CPLR 3211(g). As set forth below, Mr. Trump cannot meet this "stringent standard." *Duane Reade, Inc. v. Clark*, 2004 WL 690191, at *5 (N.Y. Sup. Ct. 2004).[5] Alternatively, dismissal is appropriate under CPLR 3211(a).

[5] CPLR 3211(g) does not identify the evidentiary standard that Mr. Trump must satisfy, though some courts have clarified that "[i]n order to avoid dismissal of [a] SLAPP suit complaint, plaintiff[s] must establish" the "substantial basis" for their claims "by clear and convincing evidence." *Duane Reade*, 2004 WL 690191, at *5; *see also id.* at *10 (finding plaintiff "failed to prove by clear and convincing evidence that [an] advertisement was defamatory or tortiously interfered with [plaintiff's] business relationships"). Regardless, Mr. Trump's claims also fail under lesser evidentiary standards.

B. Section 2 Is Terminable at Will.

Former President Trump treats the confidentiality provisions—already twenty years old—as perpetual. But "[u]nder New York law, it is well settled that a contract of indefinite duration is terminable at will unless the contract states expressly and unequivocally that the parties intend to be perpetually bound." *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Corp.*, 976 F.3d 239, 245 (2d Cir. 2020). That the parties are "free to terminate" such an agreement necessarily precludes "establish[ing] the contract was breached." *Beter v. Murdoch*, 2018 WL 3323162, at *8 (S.D.N.Y. 2018), *aff'd*, 771 F. App'x 62 (2d Cir. 2019); *see also Dorsett-Felicelli, Inc. v. Cnty. of Clinton*, 2011 WL 1097859, at *4 (N.D.N.Y. 2011) ("The essential element of breach of contract is absent when a contract is terminable at will."). Here, the financial terms of the Agreement were performed long ago—fulfilling the confidentiality provisions' purpose of protecting "the particular information involved in the 'global' resolution of [the parties'] differences." Agmt. § 1; Trump Aff. ¶ 8. Mary received no separate consideration for Section 2, which imposes the only ongoing obligation under the Agreement, with no "fixed or determinable duration." *Ketcham v. Hall Syndicate, Inc.*, 236 N.Y.S.2d 206, 212 (Sup. Ct. 1962). Indeed, the provision's purpose—"to protect the litigants and encourage a fair resolution of the matters in controversy," Agmt. § 1—is inconsistent with an infinite duration. The only reasonable interpretation is that once the financial aspects of the Agreement were performed, Section 2 "was terminable at will" and cannot support a contract claim. *Hampton Nav., Inc. v. Pinpoint Sys. Int'l*, 666 N.Y.S.2d 705, 706 (2d Dept. 1997) (affirming dismissal). Indeed, due to changed circumstances, it would be impossible to comply with Section 2. *See infra* Pt. III.E.1.

Beter v. Murdoch, in which a plaintiff alleged that defendants breached a perpetual confidentiality agreement by disclosing his name in a news article, is on all fours. *Beter* held that the contract claim "fail[ed] on the[] merits" because "the terms of the contract" did not "include

its duration." 2018 WL 3323162, at *8. Accordingly, the defendants were "free to terminate the contract by disclosing Plaintiff's name in the Article, and Plaintiff cannot establish the contract was breached." *Id.* The Second Circuit affirmed because—as here—the contract claim was "meritless." 771 F. App'x at 63.

Because the Agreement has no specified procedure or timeline for termination, Mary was within her rights to terminate Section 2 at any time, including by providing documents to *The Times* or writing the Book. Neither act provides the predicate for a breach of contract claim.[6]

C. Former President Trump Cannot Enforce the Agreement.

Under black-letter contract law, former President Trump cannot enforce the Agreement because either he already terminated it, *see supra* Pt. III.B, or he breached its confidentiality provisions prior to any alleged breach by Mary. "One of the essential elements of a cause of action for breach of contract is the performance of its obligations by the party asserting the cause of action for breach." *Cnty. of Jefferson v. Onondoga Dev., LLC*, 151 A.D.3d 1793, 1795-96 (4th Dept. 2017). Mr. Trump claims that Mary breached Section 2 by disclosing facts relating to "her personal relationship" with their relatives and "facts and circumstances" surrounding the Estate Actions. Compl. ¶¶ 80, 86. But Mr. Trump has done the same thing many times over, breaching the reciprocal confidentiality provisions under his own (untenable and incorrect) interpretation of the Agreement. Long before Mary's alleged breach in 2017, Compl. ¶ 38, Mr. Trump publicly discussed his "relationship" with his siblings countless times, *see, e.g.*, Exs. 13-18, without obtaining the written consent purportedly required under Section 3 of the Agreement, Trump Aff. ¶ 14. In 2016, *The Times* interviewed Mr. Trump for an article in which he discussed his anger

[6] If Mr. Trump argues that "it can be implied" the confidentiality provisions were "to continue for a reasonable time" and thus are "not terminable at will," *Bd. of Ed. v. Port Jefferson Station Teachers Ass'n*, 387 N.Y.S.2d 515, 518 (Sup. Ct. 1976), any such implied time-constraint would have expired years ago, *see Trump*, 69 Misc.3d at 302 (confidentiality provisions would be "reasonable" if limited to "a period of 5 years, even 10").

towards Mary and her brother, saying they had been disinherited because of their grandfather's "tremendous dislike" of their mother but that the Estate Actions were "settled 'very amicably.'" Ex. 19. Under former President Trump's reading of the confidentiality provisions, Section 3 would bar him from publicly discussing Mary, her brother, or their mother.

Mr. Trump's suit cannot proceed because he is suing Mary for addressing the same topics he previously discussed with *The Times* and others. Nor can he argue his own breaches are less culpable. Section 3 provides that "[a]ny violation" thereof "***shall constitute a material breach*** of the Agreement." Because he "did not comply with the conditions of the agreement," as he asserts them here, Mr. Trump "may not seek to enforce it." *Daniel Perla Assoc. v. Krasdale Foods, Inc.*, 12 A.D.3d 555, 557 (2d Dept. 2004).

D. Mr. Trump's Interpretation of the Confidentiality Provision Is Untenable

Assuming *arguendo* that Section 2 is enforceable, it bars discussing only the details of the Agreement. There is no basis for interpreting Section 2 as a sweeping, lifetime prohibition of any and all discussion related to the Trump family in a manner that would have deprived the public of critical information concerning then-President Trump and impeded Pulitzer Prize-winning journalism. A narrow reading properly reflects the Agreement's language and the parties' course of performance. Further, it is consistent with the principle that "courts should, where possible, avoid reaching constitutional questions," such as the First Amendment issues raised here, by resolving disputes "on the basis of state law." *Moore v. Cohen*, 2021 WL 2986398, at *4 (S.D.N.Y. 2021).

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). Here, the purpose of the mutual confidentiality obligations is evident: Because the parties "unanimously agreed that the public ha[d] no interest ***in the particular information involved in***

the 'global' resolution of their differences," maintaining confidentiality concerning the Agreement's terms served to "encourage a fair ***resolution of the matters in controversy***." Agmt. § 1. Their express purpose forecloses Mr. Trump's overbroad and unsupportable reading of Section 2. *See Lipper Holdings, LLC v. Trident Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dept. 2003) (contracts "should not be interpreted to produce a result that is absurd" or "contrary to the reasonable expectations of the parties"). The Agreement was executed long ago—and while Mary contends that resolution was based on fraud—the Book and the Report are not focused on the "particular information involved" in that resolution.

The Agreement's language further forecloses this suit. The Complaint focuses on disclosures concerning Mary's "personal relationship" with Mr. Trump. Compl. ¶ 86; *see also id.* ¶¶ 71, 76, 80, 98. But Section 2 says nothing about their ***personal*** relationship. It narrowly concerns the "Objectants/Plaintiffs[']" "relationship with the 'Proponents/Defendants,'" wherein "Objectants/Plaintiffs" is defined to be a group comprised of Mary, her mother, her brother, and her sister-in-law; and "Proponents/Defendants" is defined as a group that includes Mr. Trump and others. While certain of the Proponents/Defendants are included "individually" and in other capacities, Section 2 applies only to the Objectants/Plaintiffs as a collective. There is no language, such as "individually," indicating it applies to Mary on an individual basis. Section 2 also refers to the relationship between the Proponents/Defendants and the Objectants/Plaintiffs' law firm, further indicating that its use of the word "relationship" has nothing to do with personal relationships. The "relationship" at issue between the two sides of the disputes—including corporate officers, directors, estate executors, and lawyers—existed only in connection with the Estate Actions and their settlement.

Had the parties intended to preclude speaking about personal relationships, the Agreement "could easily have clarified that intent in any number of ways." *NML Cap. v. Argentina*, 17 N.Y.3d 250, 260-61 (2011). For instance, it could have referred to all of the enumerated persons in their individual capacities, or specified that it was addressing their "personal" or "familial relationships." It did not. Likewise, the parties could have included a non-disparagement provision. They did not. Given Section 2's discussion of estates, corporate entities and law firms, it would be "absurd" to conclude the Objectants/Plaintiffs "reasonably expect[ed]" to render their personal relationships confidential. *Reape v. N.Y. News, Inc.*, 122 A.D.2d 29, 30-31 (2d Dept. 1986). Instead, the only reasonable interpretation of Section 2 is that endorsed by Justice Greenwald: "The parties agreed to keep the settlement under seal. That's it." *Trump*, 69 Misc.3d at 299; *see also id.* at 304 ("the Trump family relationships" are not confidential).

The signatories' conduct also belies a broader interpretation. Generally, the "course of performance under the contract is considered to be the most persuasive evidence of [the parties'] agreed intention." *Fed. Ins. Co. v. Ams. Ins. Co.*, 258 A.D.2d 39, 44 (1st Dept. 1999). Here, it reveals that either Mr. Trump has repeatedly breached Section 3 since shortly after executing the Agreement, *see supra* Pt. III.C, that he understood the reciprocal confidentiality obligations narrowly protected only the Agreement's details, or both. In fact, after then-President Trump learned of the Book's forthcoming publication, he immediately responded by discussing his "good relationship with" Mary's brother, and his "settle[ment] with [Mary] and her brother." Ex. 20. And on other occasions, his siblings have each publicly discussed their relationship with him. *See* Exs. 13, 21-22. Either these all constitute breaches of Section 3, or the reciprocal confidentiality provisions do not mean what former President Trump now suggests.

At most, the mutual confidentiality obligations prohibit disclosure of the Agreement's details. Because such details are not discussed in the Book and Mary is alleged to have provided to *The Times* only documents exchanged during discovery in the Estate Actions, Compl. ¶¶ 38, 42, 49, Mr. Trump has not pleaded a breach.

E. Section 2 Is Not Enforceable as Interpreted by Mr. Trump.

1. Section 2 is impermissibly vague.

It is axiomatic that "definiteness as to material matters is of the very essence in contract law," and "[i]mpenetrable vagueness and uncertainty will not do." *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 (1981). Accordingly, "[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract." *F&K Supply Inc. v. Willowbrook Dev. Corp.*, 732 N.Y.S.2d 734, 737 (3d Dept. 2001). "Even if the parties believe they are bound, if the terms of the agreement are so vague and indefinite that there is no basis or standard for deciding whether the agreement had been kept or broken, … there is no enforceable contract." *Candid Prods., Inc. v. Int'l Skating Union*, 530 F. Supp. 1330, 1333-34 (S.D.N.Y. 1982). Moreover, the requirement that parties must "know what is required of them so they may act accordingly" takes on special import "[w]hen speech is involved" because it is "necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

The reciprocal confidentiality provisions in the Agreement are so vague as to be meaningless. For instance, they prohibit "directly or indirectly publish[ing] or caus[ing] to be published" material concerning a variety of topics but fail to define any of those crucial words, including what it means to "indirectly" "caus[e]" something "to be published." Agmt. §§ 2-3. Similarly, the pivotal sentence ends by prohibiting "assist[ing] or provid[ing] information to others in connection therewith," again without defining those terms. *Id.* There is no explanation of what

"information" is at issue, nor a clear antecedent for "therewith," which could refer to several verbs or nouns in a sentence that meanders aimlessly for half a page. This raises endless unanswerable questions. If any signatory describes their family tree, have they "provide[d] information to others in connection" with "relationship[s]" they are not allowed to discuss? Is every signatory liable because they indirectly caused the Book and/or the Report to be published by executing the Agreement twenty years ago? If Mary purchases a newspaper subscription that partially funds journalism concerning her family, has she violated Section 2 by "indirectly … caus[ing]" such reporting "to be published" or "assist[ing]" the newspaper "in connection therewith"? And did Mr. Trump violate Section 3 by starring on *The Apprentice* or running for office, both of which caused countless such publications? Because the confidentiality provisions are not "sufficiently definite," they do not "give rise to an enforceable agreement." *Express Indus. & Terminal Corp. v. Dep't of Transp.*, 93 N.Y.2d 584, 591 (1999).

It is also impossible to actually "obtain[] the consent" contemplated by Section 2. That consent must be provided by, *inter alia*, Robert Trump, who passed away last year, and certain "officers and directors" of entities that no longer exist. Trump Aff. ¶¶ 2, 6. The Agreement made no express contingency for such changed circumstances. Uncertainty as to how Section 2 might be satisfied through consent also renders the provision unenforceable. *See Mocca Lounge, Inc. v. Misak*, 462 N.Y.S.2d 704, 762 (2d Dept. 1983) (courts cannot "supply the material terms by implication" where "the void is too great, the omissions are too noticeable and the risk of ensnaring a party in a set of contractual obligations that he never knowingly assumed is too serious").

Because of these infirmities, Section 2 has already been found to be unenforceable. In the prior restraint litigation, Justice Greenwald found Section 2 "so overly broad, as to be ineffective," comprised of "[t]oo many words, with too many meanings." *Trump*, 69 Misc.3d at 291. That

accords with *Denson v. Donald J. Trump for President, Inc.*, which recently held that former President Trump could not enforce confidentiality agreements against his campaign staff. 2021 WL 1198666 (S.D.N.Y. 2021). Like Section 2, then-President Trump's campaign agreement was impermissibly "vague and indefinite" because it was "impossible for [signatories] to know what speech [they had] agreed to forego." *Id.* at *16. As here, that rendered the contract unenforceable by precluding any "possibility of mutual assent." *Id.*

Finally, that Mr. Trump reads Section 2 as restricting core First Amendment rights further confirms that the provisions are too vague to be enforceable. Because "the waiver of a fundamental constitutional right must be undertaken voluntarily, knowingly and intelligently," it must be "explicitly waived" rather than waived by implication. *Legal Aid Soc'y v. City of N.Y.*, 114 F. Supp. 2d 204, 226-27 (S.D.N.Y. 2000); *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967) (requiring "clear and compelling" waiver). The Agreement does not mention waiving signatories' constitutional right to engage in "free public discussion of the stewardship of public officials," nor the "prized privilege to speak [their] mind … on all public institutions." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 275 (1964). Moreover, no such waiver could have been knowingly made in 2001, years before Mr. Trump first ran for office, at which time Mary could not foresee the implications of agreeing not to discuss her uncle. Accordingly, the Court should avoid an overbroad construction of Section 2 that plainly is inconsistent with the parties' contemporaneous intentions.

2. Section 2 is contrary to public policy.

Contracts that conflict "with an overriding public interest" are "invalid" because they "violate public policy." *Mercado v. Schartz*, 92 N.Y.S.3d 582, 588–89 (Sup. Ct. 2019). The "decision to refrain from enforcing a particular agreement depends upon a balancing of the policy considerations against enforcement and those favoring the encouragement of transactions freely

entered into by the parties." *New England Mut. Life Ins. Co. v. Caruso*, 538 N.Y.S.2d 217, 274 (1989). Here, Section 2 is invalid because it violates two vital public interests: freedom of speech and disclosure of fraudulent activity.

This case is not a legitimate effort to enforce a valid confidentiality provision—indeed, it is far too late to serve that purpose. Instead, the former President attempts to wield a vague, inapplicable, confidentiality provision in a decades-old agreement as a cudgel to punish and deter "[t]he sort of robust political debate encouraged by the First Amendment," including "speech that is critical of those who hold public office." *Falwell*, 485 U.S. at 51. Courts have long rejected litigants' varied efforts to involve the judiciary in imposing a "'chilling' effect on speech" that is anathema "to freedoms protected by the First Amendment." *Id.* at 52; *see also*, *e.g.*, *N.Y. Times*, 376 U.S. at 267-83. So long as litigation concerns "speech relat[ing] to a matter of public concern," "regardless of the claim at issue, the heightened First Amendment protections apply." *Moore*, 2021 WL 2986398, at *10.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times*, 376 U.S. at 270. That commitment "has its fullest and most urgent application to speech uttered during a campaign for public office," as citizens' right "to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Then-President Trump's personal interest in "subject[ing Mary] to contractual liability for speaking" about him in the midst of his reelection campaign is "contrary to [that] well-established First Amendment interest." *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 224 (4th Cir. 2019) (holding settlement agreement's non-disparagement provision unenforceable). As Justice Greenwald held, "viewed in the context of the current Trump

family circumstances," Section 2 would "offend public policy" if it restrained Mary's "protected speech." *Trump*, 69 Misc.3d at 308. Because "[e]nforcing a waiver of First Amendment rights for the very purpose of insulating public officials from unpleasant attacks would plainly undermine [a] core First Amendment principle," former President Trump's claims "enforcing [Section 2] to avoid harmful publicity stumbles out of the gate." *Overbey*, 930 F.3d at 226.

Mr. Trump's suit also runs headlong into "serious public interests" in "the disclosure of fraudulent activity." *DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F. Supp. 1039, 1046 (S.D.N.Y. 1996). In New York, "an agreement to suppress the evidence of a crime" is "illegal." *Union Exch. Nat'l Bank v. Joseph*, 231 N.Y. 250, 253 (1921); *see also Signapori v. Jagaria*, 84 N.E.3d 369, 378 (Ill. Ct. App. 2017) (declining to "enforce a contract that purports to bar a party … from reporting another party's alleged misconduct" because "requiring [concealment of] possible crimes or tortious conduct … is contrary to public policy"); 7 Williston on Contracts § 15:8 (4th ed.) ("bargains tending to stifle criminal prosecution," including "by suppressing investigation" or deterring "detection or punishment of crime, are void as against public policy"). As acknowledged in the Book, Mary "learned more about [her] family's finances than [she had] ever known" as a result of *The Times*' dogged reporting and her role therein, including discovering "the long litany of potentially fraudulent and criminal activities [her] grandfather, aunts, and uncles had engaged in." Trump Aff. ¶ 10. Mr. Trump now seeks retribution because Mary, along with many others, helped *The Times* uncover his history of "dubious tax schemes" and "outright fraud," Compl. ¶¶ 49, 70. Indeed, multiple experts quoted in the Report explained that his actions "smell[ed] like a crime" and "could constitute criminal tax fraud," and former President Trump's namesake company was subsequently indicted for criminal tax violations, *see People v. Trump Corp.*, No.

1473-21 (N.Y. Sup. Ct.). That Section 2 would otherwise shield Mr. Trump's criminal conduct from coming to light is grounds for its invalidation.[7]

F. The Implied Covenant and Unjust Enrichment Claims Are Duplicative.

"Ordinarily, a breach of the duty of good faith and fair dealing is considered a breach of contract" and "[r]aising both claims in a single complaint is redundant." *ARS Kabirwala, LP v. El Paso Kabirwala Cayman Co.*, 2017 WL 3396422, at *4 (S.D.N.Y. 2017); *see also Mill Fin., LLC v. Gillett*, 122 A.D.3d 98, 104 (1st Dept. 2014). Mr. Trump's implied covenant and contract claims are both based upon Mary's disclosure of purportedly "confidential information" to *The Times* and in her Book. Compl. ¶¶ 80, 96-98, 104. Because the implied covenant claim is not "based on allegations different from those underlying the accompanying breach of contract claim," it is "redundant and must also be dismissed." *ARS Kabirwala*, 2017 WL 3396422, at *4.

Similarly, an unjust enrichment claim cannot lie where a "relevant contract exists." *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 433 (S.D.N.Y. 2017); *see also Ga. Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012). Accordingly, if the Agreement remains "valid and enforceable," the unjust enrichment claim is precluded. *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987). But unjust enrichment also fails even if Mr. Trump's contract claim is dismissed, because Mr. Trump must plead that Mary "obtained a benefit which in equity and good conscience should be paid" to him. *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d

[7] Mr. Trump does not explain how he arrived at his alleged compensatory damages figure of $100,000,000. Though it is impossible to conceive of any valid basis for this number, to the extent he claims these damages are reputational, this is a defamation and libel suit in disguise and is barred by the one-year statute of limitations for such claims because the Report was published in October 2018 and the Book was published in July 2020, Compl. ¶¶ 67, 78, well over a year before Mr. Trump filed this action on September 21, 2021. *See Gallagher v. Metro N. Commuter R.R. Co.*, 846 F. Supp. 291, 293-94 (S.D.N.Y. 1994) (applying one-year limitations period to claim for infliction of emotional distress and noting "it is difficult to conceive what harm [Plaintiff] could have experienced … except harm to his reputation"); *Beter*, 2018 WL 3323162, at *7 (dismissing contract claim as disguised defamation claim filed after the statute of limitations and noting that New York keeps "a watchful eye for claims sounding in defamation that have been disguised as other causes of action.").

777, 790 (2012). If Mary "did not breach or was not bound" by Section 2, "then it would not be unjust for [her] to retain [what] she earn[ed]" from the Book's publication. *Freedom Mortg. Corp. v. Tschernia*, 2021 WL 1163807, at *5 (S.D.N.Y. 2021). Regardless of the Agreement's enforceability, the unjust enrichment claim therefore "must be dismissed." *Id.*

IV. CONCLUSION

For the foregoing reasons, each claim against Mary Trump should be dismissed.

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CERTIFICATION OF COUNSEL

I hereby state, pursuant to Rule 17 of the Commercial Division Rules, that the foregoing brief was prepared Microsoft Word. Pursuant to Microsoft Word's word count feature, the total number of words in the foregoing brief (excluding the caption, table of contents, table of authorities, signature block, and this certification) is 6,994.

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