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

SUMMER ZERVOS, Plaintiff,	Index No. 150522/2017 Hon. David B. Cohen
v.	Motion Seq. No. 002
DONALD J. TRUMP, Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF PRESIDENT DONALD J. TRUMP'S APPLICATION FOR AN ORDER TO SHOW CAUSE SEEKING AN EXTENSION OF TIME TO RESPOND TO THE COMPLAINT, BIFURCATION OF MOTION TO DISMISS BRIEFING, AND A STAY OF DISCLOSURE

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Defendant Donald J. Trump respectfully submits this memorandum of law in support of his application for an order to show cause why he should not be granted: (i) an extension, pursuant to CPLR 2004, of 60 days of all dates in the February 2, 2017 stipulation between the parties ("February 2 Stipulation") (Dkt. No. 5); (ii) bifurcation of his CPLR 3211 motions to dismiss, so that the threshold issue of whether the United States Constitution bars this Court from adjudicating this action against President Trump during his Presidency will be briefed and resolved first, and deferring and preserving all other CPLR 3211 motions that must or may be filed until after that threshold issue is resolved and all appeals exhausted; and (iii) a stay of disclosure pursuant to CPLR 2201 and 3214(b) until all CPLR 3211 motions are fully resolved by the Court.[1]

PRELIMINARY STATEMENT

Defendant Donald J. Trump, the President of the United States, intends to file a motion to dismiss this action on the ground, among others, that the United States Constitution, including the Supremacy Clause contained therein, immunizes the President from being sued in state court while in office. This crucial threshold issue was raised, but not decided, by the U.S. Supreme Court in *Clinton v. Jones*, 520 U.S. 681, 691 & n.13 (1997). *See also* U.S. Const. art. VI, cl. 2. President Trump therefore requests that this Court follow the procedure followed in *Clinton v. Jones* -- which the U.S. Supreme Court approved -- to first adjudicate the threshold issue of Presidential immunity before reaching motions to dismiss Zervos's $2,914 defamation case on other grounds.

[1] Submitted herewith in support of the motion is the affirmation of Christine A. Montenegro, dated March 27, 2017 ("Montenegro Aff.").

This procedure is in accordance with a long line of U.S. Supreme Court cases that require the courts to show deference to the President and his schedule and that require immunity issues to be resolved first, because immunity does not just insulate a defendant from liability, but spares him or her from the burden of defending against a lawsuit in the first place. Here, allowing litigation on the merits to proceed prior to resolution of this crucial and threshold constitutional issue would unduly burden the President and would defeat the purpose of Presidential immunity. Accordingly, litigation of the merits of the defamation claim, including any and all other CPLR 3211 motions, should be stayed pursuant to CPLR 2201 and 3214(b) until this issue is fully litigated and any appeals exhausted.

President Trump also requests a sixty-day extension of the deadlines set forth in the February 2 Stipulation and a stay of disclosure until all motions filed under CPLR 3211 are fully resolved by this Court.

Given the importance of this threshold constitutional issue, and given "[t]he high respect that is owed to the office of the Chief Executive," which, as the U.S. Supreme Court has held, must "inform the conduct of the entire proceeding, including the timing and scope of discovery" *Clinton*, 520 U.S. at 707, the request should be granted.

BACKGROUND

On January 17, 2017, three days before President Trump was inaugurated as the 45th President of the United States, plaintiff Summer Zervos filed this action for defamation, seeking, among other things, an apology and $2,914 in damages. Zervos alleges that Trump defamed her

-- a former reality-TV star from Trump's television show, *The Apprentice* -- by responding to her unfounded public accusations against him during the presidential campaign.[2]

In late January 2017, Zervos's counsel, Mariann Wang, contacted President Trump's counsel to request that counsel accept service of the complaint via email. (Montenegro Aff. at ¶ 3.) On February 2, 2017, as a courtesy, President Trump's counsel agreed to accept service of the complaint, and the parties agreed to a briefing schedule, which provided, among other things, that President Trump's time to answer or move with respect to the complaint was extended to April 3, 2017, and that Zervos would have a reciprocal extension to oppose any such motion. (*Id*.; *see also* February 2 Stipulation.)

On March 16, 2017, counsel for President Trump, Christine Montenegro, called Ms. Wang to request an additional 60 days to respond to the complaint and adjourn all deadlines in the February 2 Stipulation by 60 days, due, among other things, to the importance of the threshold constitutional issue and the President and his staff's exceptionally busy schedule particularly during his first 100 days in office. (Montenegro Aff. at ¶ 5.) Ms. Montenegro also requested that Zervos's counsel agree to bifurcation of the briefing schedule on the motion to dismiss because it was necessary to first address the threshold constitutional issue of whether this Court has jurisdiction to hear this action against the President while he is in office. (*Id.*)

Specifically, President Trump intends to file a motion to dismiss the complaint (without prejudice to its reinstatement after he leaves office) and/or a motion to stay this action until the end of his Presidency on the crucial constitutional grounds that this Court lacks authority to adjudicate Zervos's claim under, among other things, the Supremacy Clause of the United States

[2] President Trump denies these unfounded accusations and will, if necessary, establish at the appropriate time that Zervos's allegations -- which have been disputed by a member of her own family -- are false, legally insufficient and made in a transparent politically-motivated attack.

Constitution. U.S. Const. art. VI, cl. 2. As the U.S. Supreme Court recognized in *Clinton v. Jones*, "[b]ecause the Supremacy Clause makes federal law 'the supreme Law of the Land,' . . . any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed,' . . . may implicate" issues of federalism, comity, and "the interest in protecting federal officials from possible local prejudice that underlies the authority to remove certain cases brought against federal officers from a state to a federal court." *Clinton*, 520 U.S. at 691 & n.13.

On March 17, 2017, Ms. Wang, counsel for plaintiff, rejected Ms. Montenegro's requests via email. (Montenegro Aff. at ¶ 6.) Ms. Wang wrote that she would agree to only a 30-day extension but only if President Trump's counsel agreed to accept service of Zervos's subpoena to the Trump Campaign and the Campaign agreed to make a representation that it would preserve documents. Ms. Wang made this request despite the fact that President Trump's counsel does not represent the Campaign and Zervos's counsel was free to send a letter to the Campaign requesting that the Campaign preserve its documents. On March 17, 2017, President Trump's counsel notified Ms. Wang that we would seek relief from the Court. (Montenegro Aff. at ¶ 7.)

On March 21, 2017, Ms. Montenegro called Ms. Wang in a further attempt to avoid the need for Court intervention. On March 22, 2017, Ms. Montenegro, Ms. Wang and Gloria Allred (Zervos's counsel) had a call during which Ms. Wang explained she was unwilling to agree to an extension unless a representative for the Campaign provided a representation about document preservation. Ms. Wang also indicated that she would not agree to bifurcate the briefing schedule. (Montenegro Aff. at ¶ 8.) On March 24, 2017, President Trump's counsel notified Ms. Wang that we could not agree to Zervos's demands. (Montenegro Aff. at ¶ 9.)

ARGUMENT

I. A 60-Day Extension Of The Deadlines Set Forth In The February 2 Stipulation Should Be Granted.

President Trump seeks, pursuant to CPLR 2004, a 60-day extension of time to the deadlines to file his immunity motion to dismiss and to the other deadlines set forth in the February 2 Stipulation. Where, as here, a requested extension is not unreasonable and does not cause material prejudice to the opposing party, a court properly exercises its discretion in granting the request. *Santos v. City of New York*, 703 N.Y.S.2d 511, 512 (2d Dep't 2000) (holding that the trial court "providently exercised its discretion in granting the motion" for an extension of time to answer, as the delay was not willful or lengthy and did not cause prejudice to the opposing party).

The requested extension is reasonable and should be granted, especially in light of the critical importance of the immunity issue and the consequent need to provide the Court with a full analysis of the relevant constitutional law and analysis, as well as the President's extremely busy schedule during his first 100 days in office. As the U.S. Supreme Court has repeatedly recognized, courts should show great deference to the President and his duties: "The high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton*, 520 U.S. at 707; *see also Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) ("Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint.").

Furthermore, Zervos will suffer no material prejudice if the deadlines in the February 2 Stipulation are extended by 60 days. The extension does not deny Zervos her day in court, and none of the relief that Zervos has sought -- such as an apology and $2,914 in damages -- is urgent

or time-sensitive. *See Pacific Carlton Dev. Corp. v. 752 Pacific, LLC*, 2007 WL 6875639, at *3 (Sup. Ct., Kings Cty. Apr. 25, 2007) ("[T]he complaint in this action seeks money damages only and plaintiffs have failed to articulate that they would suffer any prejudice were defendants to be granted an extension."). Thus, even if Zervos could state a cause of action for defamation -- and President Trump will demonstrate if necessary at the appropriate time that she cannot -- this Court can grant her relief at a later date.

II. The Briefing Schedule Should Be Bifurcated To Address Constitutional Presidential Immunity First.

President Trump requests bifurcation of the briefing schedule so that this Court can first resolve whether it has authority under the United States Constitution to assert jurisdiction over the President and adjudicate this case during his time in office. It would undermine not only judicial economy, but the very immunity he asserts and which the United States Constitution affords him by compelling him to litigate this action on the merits before that immunity is resolved.

Thus, in *Clinton v. Jones*, a civil action against President Clinton, the U.S. Supreme Court explicitly acknowledged the appropriateness of resolving the immunity issue first: "Relying on our cases holding that immunity questions should be decided at the earliest possible stage of the litigation, our recognition of the 'singular importance of the President's duties,' and the fact that the question did not require any analysis of the allegations of the complaint, the [trial] court granted the request [to bifurcate]." 520 U.S. at 686. The U.S. Supreme Court has repeatedly recognized that whether a defendant has "an entitlement not to stand trial or face the other burden of litigation" is a preliminary legal question that must be resolved first. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (holding that the "entitlement is an *immunity from suit* rather than a mere defense to liability") (emphasis in original); *Siegert v. Gilley*, 500 U.S. 226, 232

(1991) ("One of the purposes of immunity . . . is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.").

President Trump intends to file a motion to dismiss or stay this action until he leaves office on the ground that the United States Constitution, including the Supremacy Clause, immunizes President Trump from being sued in this action while he is in office. *Clinton*, 520 U.S. at 691 & n.13. This crucial threshold constitutional issue has nothing to do with the legal insufficiency of Zervos's complaint and must be resolved before the merits on a motion to dismiss are reached.

Moreover, as in *Clinton v. Jones*, the public interest mandates that the immunity issue be resolved before proceeding further. *See Clinton*, 520 U.S. at 706-07. The "singular importance of the President's duties" warrants a stay where civil actions, such as this one, "frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the President was designed to serve." *Nixon*, 457 U.S. at 753. Requiring President Trump to litigate the merits on a motion to dismiss the complaint, in addition to moving to dismiss on grounds of Presidential immunity, would negate the very interests that that immunity is designed to protect. This principle has been recognized in cases involving assertions of immunity by a wide array of public officials and entities. *See, e.g.*, *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (immunity conferred on Members of Congress by Speech or Debate Clause "was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'") (quoting *Dombrowksi v. Eastland*, 387 U.S. 82, 85 (1967)); *Galante ex rel. Galante v. Cty. of Nassau*, 720 N.Y.S.2d 325, 328 (Sup. Ct., Nassau Cty. 2000) (recognizing the "broad purpose of

providing government workers with immunity from defending lawsuits, as well as immunity from liability."), *aff'd as modified sub nom. Galante v. Cty. of Nassau*, 740 N.Y.S.2d 225 (2d Dep't 2002).

Given that this fundamental threshold issue on the President's entitlement to immunity needs to be resolved before this case can proceed, it would be a waste of judicial resources for this Court to entertain briefing on issues which this Court lacks the power to even hear. *See, e.g.*, *Peluso v. Red Rose Rest., Inc.*, 910 N.Y.S.2d 378, 378-79 (2d Dep't 2010) (affirming order granting CPLR 2201 stay of all proceedings pending resolution of threshold issue in related declaratory judgment action); *HSBC Bank, USA v. Despot*, 130 A.D.3d 783, 783–84 (2d Dep't 2015) (in light of goal of "preserving judicial resources, the Supreme Court providently exercised its discretion in granting the cross motion [to stay the proceedings].").

III. A Stay Of Disclosure Should Be Granted.

A stay of all disclosure in this action until all CPLR 3211 motions have been fully resolved by this Court should also be granted, given that, as noted, "the timing and scope of discovery" should be informed by deference to the Executive Branch of the federal government. *Clinton*, 520 U.S. at 707. Moreover, the filing of President Trump's immunity motion will automatically stay disclosure under CPLR 3214(b). It would serve no purpose to allow for disclosure at this stage when disclosure will soon be stayed during the pendency of that imminent motion. *See In re Trump Hotel S'holder Derivative Litig.*, 1997 WL 442135, at *1-2 (S.D.N.Y. Aug. 5, 1997) (accepting defendants' argument that "in light of the imminent filing of their motion to dismiss . . . . discovery [should be] stayed pending resolution" of defendants' dismissal motion); *AIG Fin. Prods. Corp. v. ICP Asset Mgmt., LLC*, 2014 WL 4646851, at *2 (Sup. Ct., New York Cty. Sep. 12, 2004) (granting defendants' letter application to stay expert discovery until the court resolves the anticipated motion to dismiss).

CONCLUSION

For the foregoing reasons, this Court should grant the relief sought by President Trump and order (i) an extension, pursuant to CPLR 2004, of 60 days of all dates in the February 2 Stipulation; (ii) bifurcation of his CPLR 3211 motions to dismiss, so that the threshold issue of whether the United States Constitution bars this Court from adjudicating this action against President Trump during his Presidency will be briefed and resolved first, and deferring and preserving all other CPLR 3211 motions that must or may be filed until after that threshold issue is resolved and all appeals exhausted; and (iii) a stay of disclosure pursuant to CPLR 2201 and 3214(b) until all CPLR 3211 motions are fully resolved by the Court.

Dated: March 27, 2017
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