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

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SUMMER ZERVOS,

Plaintiff,

-against- Index No: 150522/2017

DONALD J. TRUMP,

Defendant.

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PLAINTIFF SUMMER ZERVOS'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

Plaintiff Summer Zervos submits this memorandum of law in opposition to the motion filed by Defendant Donald J. Trump ("Defendant" or "Mr. Trump") seeking bifurcation of his contemplated CPLR 3211 motions and a stay of disclosure. Pursuant to the Order to Show Cause issued by this Court on April 4, 2017 (ECF Docket Entry No. 20) and the Stipulation of the parties filed on March 28, 2017 (ECF Docket Entry No. 18) ("Stipulation"), Defendant's request for an extension to file its motion to dismiss has been withdrawn. *See* Stipulation ¶ 5.

PRELIMINARY STATEMENT

Plaintiff Summer Zervos filed this action seeking relief for the malicious, false and denigrating statements made about her by Defendant Donald J. Trump after she reported his unwanted, sexual touching of her. Among other things, Defendant said Ms. Zervos "lied," that she "fabricated" and "made up" these "phony" stories. There is no question that Defendant made these defamatory statements about Ms. Zervos before taking his current office. As in *Clinton v. Jones,* "[i]t is perfectly clear that the alleged misconduct of [Defendant] was unrelated to any of his official duties as President of the United States and, indeed, occurred before he was elected to that office." 520 U.S. 681, 686 (1997). Precisely because Defendant's underlying tortious behavior has nothing to do with his current duties or office, and because it occurred before he took that office, he does not have immunity from suit. No person is above the law in this country, including the President of the United States.

Defendant intends nonetheless to argue that he is immune from suit. He certainly is free to make that argument. But he goes even further: he seeks to be exempt from the mandatory rules of the CPLR as well, and asks this Court to allow him to make multiple, *seriatum* motions to dismiss under CPLR 3211, something the rule itself expressly prohibits him from doing. He further seeks to have this Court stay disclosure in the broadest possible fashion.

Although Defendant's papers are at times unclear and seemingly contradictory, it appears that he may be seeking a stay of all disclosure for the duration of his proposed multiple motions to dismiss *and* throughout the pendency of all appeals related to the multiple motions. Such a stay would be unprecedented and if granted, would effectively give Defendant *de facto* immunity even if he loses that legal argument, by protecting him from this suit for years. Neither the law, the rules, nor the facts support such an approach, and Defendant's requests should be denied.

FACTS

I. Plaintiff's Claim

Contrary to Defendant's effort to minimize Ms. Zervos's claim, it is of great significance to her and seeks far more than mere out-of-pocket damages.

As set forth in greater detail in the Complaint, Plaintiff Summer Zervos is one of many women who have been subjected to unwanted sexual touching by Defendant Donald J. Trump. Affirmation of Mariann Meier Wang, dated April 7, 2017 ("Wang Aff."), Exhibit 2 ¶ 1. By his own account, Defendant engaged in such assaultive behavior regularly, and with impunity, telling Billy Bush in an unguarded moment that he can "just start kissing [women]. . . Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything. Grab them by the pu**y. You can do anything." *Id.*

Ms. Zervos was ambushed by Mr. Trump on more than one occasion. *Id.* ¶ 2. Mr. Trump suddenly, and without her consent, kissed her on her mouth repeatedly; he touched her breast; and he pressed his genitals up against her. *Id.* Ms. Zervos never consented to any of this disgusting touching. *Id.* Instead, she repeatedly expressed that he should stop his inappropriate sexual behavior, including by shoving him away from her forcefully, and telling him to "get real." *Id.* Mr. Trump kept touching her anyway. *Id.*

Ms. Zervos confided in family and friends when these assaults first occurred in 2007, both after Mr. Trump kissed her on the mouth in New York twice and after he attacked her in a hotel room on a later occasion. *Id.* ¶ 3. But like so many women who have suffered this kind of sexual abuse, Ms. Zervos felt conflicted and confused for years about the incidents. *Id.* And, also like many women, she tried to take Mr. Trump at his word after she had rejected him, particularly since even after she refused to engage with him sexually, Mr. Trump still seemed interested in mentoring Ms. Zervos and giving her business and job advice. *Id.* Ms. Zervos decided that Mr. Trump's behavior had been an isolated set of incidents, and perhaps that he had even regretted the behavior. *Id.* She continued to look up to him for his success as a businessman, and spoke highly of him after he announced his candidacy. *Id.*

In October 2016, that all changed. *Id.* ¶ 4. On October 7, 2016, when Mr. Trump's own recorded, crude, and vulgar comments to Billy Bush on the *Access Hollywood* tapes, recorded in 2005, were broadcast, it became clear that Mr. Trump's sexually inappropriate behavior towards Ms. Zervos was entirely consistent with Mr. Trump's own words and with his belief that he had the right to sexually assault women – and even to boast about it. *Id.* Then, at the October 9, 2016 presidential debate, Defendant told the world a boldface lie: he stated in response to a direct question from Anderson Cooper that he had not ever done any of the things that he had bragged about to Billy Bush. *Id.*

For the first time, Summer Zervos saw Mr. Trump's behavior towards her for what it was: that of a sexual predator who had preyed on her and other women. *Id.* ¶ 5. She realized that she was just one of many women who had been victimized by Defendant's predatory conduct. *Id.* Ms. Zervos could no longer rationalize or excuse Defendant's behavior by telling herself that his behavior had been a mistake or an isolated incident for which he might

even be ashamed. *Id.* Mr. Trump had no shame. *Id.* His own boasting made clear that his behavior was intentional. *Id.*

Ms. Zervos knew that Donald Trump had lied – to the country and to the world – and knew that the statements he made to Billy Bush were not just words or "locker room" talk, but were evidence of his pattern of misconduct towards women. *Id.* ¶ 6. Ms. Zervos felt a responsibility to inform the public of the true facts. *Id.* It was unacceptable to stand by and allow a presidential candidate to lie openly, with impunity, to the American public about his personal behavior. *Id.* She came forward – as a number of other victims did – to inform the public of the facts she knew were true, and to make clear that Donald Trump had kissed and groped her without her consent, repeatedly. *Id.*

In response, Defendant lied again, and debased and denigrated Ms. Zervos with false statements about her. *Id.* ¶ 7. Mr. Trump stated falsely that he "never met [Ms. Zervos] at a hotel or greeted her inappropriately." *Id.* ¶ 8. He quickly went further, describing Ms. Zervos's experience, along with those of others, as "made up events THAT NEVER HAPPENED;" "100% fabricated and made-up charges;" "totally false;" "totally phoney [sic] stories, 100% made up by women (many already proven false);" "made up stories and lies;" "[t]otally made up nonsense." *Id.* He falsely stated: "Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened." *Id.* During the last presidential debate, he stated that these women were either being put forward by the Clinton campaign, or were motivated to come forward by getting "ten minutes of fame," and nothing more. *Id.* The numerous, specific defamatory statements are set forth more fully in the Complaint. *See id.* ¶¶ 55-74.

But it was Defendant who was lying when he falsely denied his predatory

misconduct with Summer Zervos, and derided her for perpetrating a "hoax" and making up a "phony" story to get attention. *Id.* ¶ 9. In doing so, he used his national and international bully pulpit to make false factual statements to denigrate and verbally attack Ms. Zervos and the other women who publicly reported his sexual assaults in October 2016. *Id.* ¶ 11. Defendant knew that his false, disparaging statements would be heard and read by people around the world, and that these women, including Summer Zervos, would be subjected to threats of violence, economic harm, and reputational damage. *Id.* Defendant knowingly, intentionally and maliciously denigrated Ms. Zervos, with conscious disregard of the impact that repeatedly calling her a liar would have upon her life and reputation. *Id.* His statements are plainly defamatory and caused serious harm. *Id.* ¶ 12. Ms. Zervos seeks a retraction and an apology, as well as compensatory and punitive damages for Defendant's tortious behavior.

II. The Trump Campaign's Involvement and Relevance

Defendant's intentional and malicious approach to his defamatory attacks on Ms. Zervos is evidenced not only by the plain language of his widespread, targeted, and denigrating remarks about her, and his own knowledge of their evident falsity, but also by his simultaneous active use of, and/or collusion with, those within his campaign organization to undermine and harm Ms. Zervos's reputation. In particular, as also detailed in the Complaint, Defendant's campaign put forward Ms. Zervos's first cousin, widely publicizing his false statements about her, and Defendant then republished those falsities. *See, e.g., id.* ¶ 62. And Defendant's campaign did more to target and undermine Ms. Zervos, even though she had reported the truth about Defendant's assaultive behavior. *See, e.g.*, Wang Aff., Exs. 3, 4.

III. Procedural History

Plaintiff filed this action based on Defendant's personal statements and actions, which were all undertaken prior to his taking office as President of the United States. *See* Wang Aff., Ex. 2.

After multiple efforts to communicate with different potential counsel for Defendant, current opposing counsel, Marc Kasowitz, confirmed on January 27, 2017, that his firm would be representing Defendant in this matter. *Id.* ¶ 7. Counsel for Defendant agreed to accept service of the Complaint on Defendant's behalf via e-mail, and the parties entered into a stipulation governing the timing of any answer or motion response. *Id.* Plaintiff's counsel agreed to the suggested timeframe that defense counsel initially requested, that is, 60 days to answer or otherwise move. *Id.* ¶ 8, Ex. 5. The parties entered into a stipulation memorializing the schedule on February 2, 2017. *Id.* ¶ 9, Ex. 6 (ECF Docket Entry No. 5). The stipulation gave Defendant until April 3, 2017 to answer or otherwise move, as he had requested through his counsel. *Id.*

Defense counsel made no mention at that time of any intent to make multiple motions under CPLR 3211. *Id.* ¶ 8.

On March 16, 2017, approximately two weeks prior to the agreed-upon deadline, Christine Montenegro, counsel for Defendant, asked Plaintiff's counsel, Mariann Wang, for an additional 60 days to file a motion, and also for the opportunity to "bifurcate" Defendant's motions – *i.e.*, to make a motion to dismiss based on immunity first, and only after that, to make a second motion to dismiss addressing the legal sufficiency of the Complaint. *Id.* ¶ 10. Although Ms. Wang indicated that Plaintiff was not inclined to agree to such an approach, Ms. Wang said she would confer with her team and let them know about an extension.

On March 17, Ms. Wang suggested to Ms. Montenegro that Plaintiff would be amenable to some form of an extension, but asked for a courtesy in exchange, specifically with respect to a *subpoena duces tecum* that Plaintiff wished to serve on the campaign entity, Donald J. Trump President, Inc. Plaintiff's counsel made clear that Plaintiff's intent was not to compel the immediate production of responsive documents, but rather merely to serve the subpoena and ensure that responsive documents would be preserved. Specifically, Ms. Wang wrote:

> Christine:
>
> Per your request on our phone call yesterday, we would be amenable to agreeing to an extension of 30 days across the board to all aspects of briefing, but would ask for a courtesy as well in exchange. Specifically, we intend to serve a subpoena duces tecum on the campaign entity – Donald J. Trump President, Inc. – for documents relating to Plaintiff's claims, and we would ask that (a) you agree to accept service of that subpoena; (b) the parties agree that response to that subpoena is adjourned until Defendant's motion is decided or as otherwise ordered by the court; but (c) Defendant represents and warrants that all documents/material in the custody, control or possession of the campaign entity has been/shall be preserved until those documents must either be produced in this matter or this action is concluded, and all appeals have been exhausted, whichever is later. With respect to the last point, we are open to someone else from the campaign entity making that representation and warranty, but the point is that it should be someone who has the power to bind the entity and give direction to ensure the preservation of the documents.
>
> Mariann

Id., Ex. 7. Later on March 17, Ms. Montenegro responded that Defendant would not agree to this approach, and would seek relief from the Court. *Id.*, Ex. 8.

On March 21, 2017, Plaintiff served a *subpoena duces tecum* on Donald J. Trump President, Inc., seeking documents relevant to Plaintiff' s claims. A copy of the subpoena was also sent to counsel for Defendant, both by e-mail on March 22 at 9:27 a.m., and also by U.S. Mail on March 23. *See Id.*, Exs. 9, 10.

On March 22, 2017, at approximately 12:00 p.m., Plaintiff's counsel, Mariann Wang and Gloria Allred, conferred by telephone with defense counsel, Christine Montenegro, at her request. *Id.* ¶ 16. Ms. Montenegro indicated that Defendant might consider accepting service of the subpoena, but Ms. Wang noted that the subpoena had already been served, as indicated by her email that morning. *Id.* Ms. Montenegro again asked if Plaintiff would agree to bifurcation or an extension, as she had before. *Id.* Ms. Wang asked for the basis of Defendant's motion for immunity, and reiterated the suggested approach in her March 17 e-mail. *Id.* On March 24, 2017, Ms. Montenegro again said that Defendant would not agree to that approach and would seek relief from the Court. *Id.*, Ex. 11.

On March 27, 2017 at 10:26 p.m., Defendant filed the instant Order Show to Cause and supporting papers. (ECF Docket Entry Nos. 12-17.)

On March 28, 2017, Ms. Wang spoke to Ms. Montenegro about the briefing schedule on the Order to Show Cause, and they later further e-mailed about it as well. Wang Aff. ¶ 19. During the course of those communications, Ms. Montenegro sought a broad stay of all discovery. *Id.* Ms. Wang once again reiterated that Plaintiff would not agree to an unlimited stay, but also did not seek the production of documents immediately, for instance, from the campaign, but instead sought merely to ensure that all documents and materials would be preserved until discovery was fully underway. *Id.* Ms. Montenegro indicated that she would see whether defense counsel could either agree to such an approach or find someone from the campaign to make a representation about the preservation of documents or materials responsive to the subpoena. *Id.* ¶ 20.

On April 6, 2017, Ms. Wang spoke again to Ms. Montenegro, who again sought to confer about bifurcation, but it again became clear that the parties could not agree to an

approach, because Plaintiff would not consent to an unlimited stay while multiple 3211 motions were made. *Id.* ¶ 21. In that same conversation, Ms. Montenegro did again indicate that she would see whether she could obtain a representation concerning the preservation of documents being sought from the campaign entity, and asked whether, if that were obtained, Plaintiff would consent to a stay of disclosures at least until Defendant's motion to dismiss is filed. *Id.* ¶ 22. Plaintiff's counsel indicated that Plaintiff does not dispute that once Defendant serves his single motion to dismiss, the automatic stay would be in place, and that Plaintiff will not be pursuing additional discovery between now and the service of that motion so long as she has written assurances about the campaign entity's preservation of documents. *Id.* ¶ 22. Ms. Montenegro indicated she would get back to Ms. Wang, but Ms. Wang has not yet heard anything further. *Id.*

ARGUMENT

I. THERE IS NO BASIS FOR DEFENDANT'S BIFURCATION APPLICATION

A. CPLR 3211(e) Forbids the Relief Defendant Seeks

Defendant seeks permission to make two *seriatum* motions to dismiss pursuant to CPLR 3211. Def. Memo. at 1 (seeking "bifurcation of his CPLR 3211 motions"). Defendant asks this Court to rule that if his initial CPLR 3211 motion to dismiss based on "immunity" is denied, then he will be permitted to file a second pre-answer motion to dismiss for failure to state a cause of action pursuant to CPLR 3211. *See* Order to Show Cause dated April 4, 2017 (ECF Docket Entry No. 20) (directing Plaintiff to show cause why Defendant should not be permitted to "bifurcate[e] his CPLR 3211 motions to dismiss," to file an initial CPLR 3211 motion addressing the "threshold issue" of whether this Court is "bar[red] . . . from adjudicating this action," and to file additional "CPLR 3211 motions" in the future).

Defendant fails to acknowledge the CPLR provision that explicitly prohibits such an approach. CPLR 3211(e) provides that:

> At any time before of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and ***no more than one such motion shall be permitted***.

CPLR 3211(e) (emphasis added). Often referred to as the "single motion rule," CPLR 3211(e) means what its plain language says: that a defendant shall not bring more than one motion to dismiss pursuant to CPLR 3211(a). *See, e.g., Landes v. Provident Realty Partners II, L.P.*, 137 A.D.3d 694, 694 (1st Dep't 2016); *Miller v. Schreyer*, 257 A.D.2d 358, 361 (1st Dep't 1999); *Grosso Moving & Packing Co. v. Damens*, 233 A.D.2d 128, 128 (1st Dep't 1996).

This rule "has both procedural and administrative missions. It is designed to protect the pleader from being harassed by repeated CPLR 3211(a) motions and to spare the court's motion calendars the burden of a CPLR 3211 motion more than once in the same case." Siegel, *New York Practice* § 273 (4th ed.); *see also Oakley v. Cty. of Nassau*, 127 A.D.3d 946, 947 (2d Dep't 2015) ("The purpose of the single-motion rule is not only to prevent delay before answer . . . but also to protect the pleader from being harassed by repeated CPLR 3211 (a) motions.") (quotation omitted); *Bailey v. Peerstate Equity Fund, L.P.*, 126 A.D.3d 738, 739 (2d Dep't 2015). This rule also provides corollary protection against an unfettered stay which, pursuant to the automatic stay provision in CPLR 3214(b), would be in effect during the pendency of each *seriatum* 3211 motion were multiple 3211 motions allowed. *See infra* Point II.

The word "shall" in CPLR 3211(e) makes clear that courts lack discretion to decline to apply the rule.

B. There Is No Constitutional or Other Basis for Ignoring CPLR 3211(e)

Defendant fails to cite a single case in which any court has ever ignored the plain language of CPLR 3211(e) and allowed a defendant to bring a threshold "immunity" motion to dismiss, followed by a second pre-answer motion to dismiss, and we are aware of no such case. Defendant appears to be arguing that it would be unconstitutional for this Court to apply CPLR 3211(e) and require him to make his threshold "immunity" argument at the same time as whatever challenges he may wish to assert about the sufficiency of the Complaint, in a single motion, before he answers. But this unprecedented argument has no merit.

Defendant relies primarily on *Clinton v. Jones*, a federal case in which the District Court allowed President Clinton to bring a threshold immunity motion prior to bringing a subsequent motion challenging the sufficiency of the complaint. But that case was subject to different procedural rules. Indeed, in granting President Clinton's request, the District Court expressly noted that Rule 12 of the Federal Rules of Civil Procedure, which governs motions to dismiss in federal court, "specifically allows for successive motions to dismiss for failure to state a claim." *Jones v. Clinton*, 858 F. Supp. 902, 906 (E.D. Ark. 1994).

Moreover, President Clinton *answered the complaint* before making his second motion, *see Jones v. Clinton*, 974 F. Supp. 712, 731–32 (E.D. Ark. 1997), which appears to be what the Defendant in this case seeks to avoid. The law is clear that Defendant is entitled to challenge the sufficiency of the Complaint any time after issue is joined pursuant to CPLR 3212, even if he did not raise such challenge in his pre-answer motion to dismiss. *See, e.g., Kinberg v. Schwartzapfel, Novick, Truhowsky, Marcus, PC*, 136 A.D.3d 431, 431 (1st Dep't 2016). Defendant therefore has at least two options: he may bring all of his legal challenges to the Complaint now in a single motion; or he may bring a threshold pre-answer immunity motion

now, and if he loses, make a second dispositive motion after he answers, just like President Clinton did. Holding Defendant to those options is entirely consistent with *Clinton v. Jones* and raises no issues of a constitutional magnitude.

Clinton v. Jones also strongly undercuts Defendant's reliance on "qualified immunity" cases, which insulate state actors from personal liability for official acts absent the violation of a clearly established right. Def. Memo. at 6-7 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and *Siegert v. Gilley*, 500 U.S. 226 (1991)). *Clinton v. Jones* makes clear that this Defendant is *not* entitled to qualified immunity – or any other species of official acts immunity – because this case involves *unofficial* conduct by Defendant *before* he assumed office: "The principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." 520 U.S. at 692-93; *see also id.* at 694 (holding that the rationale for recognizing qualified immunity for official conduct "provides no support for an immunity for *unofficial* conduct") (emphasis in original). As the Court squarely held, "we have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity." *Id.*[1] (citations omitted).

For this reason, Defendant's repeated references to the "singular" importance of his office, Def. Memo. at 6, 7, are misplaced. *Clinton v. Jones* borrowed that formulation from *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which merely reaffirmed the uncontroversial proposition that a President is entitled to absolute immunity for damage caused by his *official*

[1] Defendant also cites a case involving the "speech or debate" immunity that can apply to statements made by sitting Senators or Members of the House of Representatives. Def. Memo. at 7 (citing *Helstoski v. Meanor*, 442 U.S. 500 (1979)). Obviously, that form of immunity is not relevant here either.

acts. That is not this case. In this case, Defendant maliciously attacked and lied about Plaintiff, who accurately reported his unwanted sexual touching, well before he took office.

Defendant's unsupported assertion that addressing the legal sufficiency of the Complaint would "distract" him "from his public duties," Def. Memo. at 7, is implausible. Defendant cannot credibly claim that he would have any significant involvement in preparing a memorandum of law challenging the legal sufficiency of Plaintiff's defamation claim. *See Clinton v. Jones*, 520 U.S. at 708 (rejecting the distraction argument that Defendant attempts to make here because there tends to be "little if any personal involvement by the defendant" in cases that are resolved before trial). Applying CPLR 3211(e) therefore will not in any way diminish, much less "negate," whatever immunity Defendant believes may apply. Def. Memo. at 7. It merely means that when Defendant's able lawyers prepare their forthcoming motion, they will include both Defendant's immunity arguments and also whatever other pre-answer legal arguments they may wish to make that Plaintiff's defamation claim is not well pled.

Defendant's observation that immunity arguments should be addressed as early as possible in a case, Def. Memo. at 6-7, is a red herring. The cases he cites merely hold that except where immunity arguments turn on disputed factual questions, such arguments can and should be addressed before discovery. Nobody is questioning that here. Of course Defendant is entitled to make his threshold immunity argument now. But the premise that Defendant is entitled to make that argument now does not support the conclusion that he is entitled to make that argument *exclusively* now. That simply is not the law. Contrary to Defendant's spin, the fact that government officials are entitled to a ruling on their immunity arguments "at the earliest possible stage of the litigation" does not mean they have a right to such a ruling before they make other pre-answer, purely legal arguments. *See*, *e.g.*, *Arbuckle v. City of New York*, 14 Civ.

10248 (ER), 2016 WL 5793741 (S.D.N.Y. Sept. 30, 2016) (adjudicating both immunity and other threshold legal arguments in a single pre-answer motion); *Clay v. City of New York*, 14 Civ. 9171 (RMB), 2016 WL 5115497 (S.D.N.Y. Sept. 9, 2016) (same); *Arminio v. Holder*, 15 Civ. 5812 (NSR), 2016 WL 4154893 (S.D.N.Y. Aug. 1, 2016) (same).

Nor is there any merit to Defendant's suggestion – again wholly unsupported – that "judicial economy" supposedly supports his position. Def. Memo. at 6. Surely it affords the Court a benefit, and imposes no burden, to provide it with full briefing on all threshold legal issues at the same time. CPLR 3211(e) is "designed to avoid duplication" and "to spare the court's motion calendars the burden of a CPLR 3211 motion more than once in the same case." Siegel, *New York Practice* § 273 (4th ed.). Given that applying CPLR 3211(e) would distract neither Defendant nor the Court, there is no basis to ignore the plain and mandatory language of that statute.

In summary, nobody is seeking to preclude Defendant from making whatever immunity, jurisdiction, or other threshold legal arguments he wishes to make in his motion to dismiss. Far from seeking to delay the prompt adjudication of Defendant's immunity argument, Plaintiff is eager for Defendant to bring his motion as soon as possible. Pursuant to CPLR 3214(b), no disclosure will take place until his motion to dismiss is decided by this Court. There thus is no constitutional or other basis for dispensing with the mandatory rule embodied in CPLR 3211(e), and allowing Defendant the opportunity to make *seriatum* motions to dismiss.

II. DEFENDANT'S APPARENT REQUEST FOR AN UNFETTERED STAY OF DISCLOSURE SHOULD BE REJECTED

Defendant is requesting some kind of stay of disclosure. It is not entirely clear what he is asking for. Point III of Defendant's memorandum of law appears to seek "a stay of all disclosure in this action until all CPLR 3211 motions have been fully resolved *by this Court*."

Def. Memo. at 8 (emphasis added). Other sections of his memorandum of law appear to go further, suggesting that he may be seeking a stay of all disclosure until "*any appeals [are] exhausted*." *Id.* at 2 (emphasis added).

To the extent that Defendant merely seeks to stay disclosure until *this* Court resolves its forthcoming motion to dismiss, the appropriateness of that request turns on whether he will be permitted to file multiple pre-answer CPLR 3211 motions. As discussed in Point I, *supra*, there is no basis for Defendant's unprecedented request for relief from the mandatory single-motion rule in CPLR 3211(e). So long as Defendant is required to follow the single-motion rule – and assuming he is not currently seeking a stay pending any appeal – we expect there to be no dispute about the stay, because Plaintiff agrees that pursuant to CPLR 3214(b), disclosure automatically is stayed from the service of the notice of motion to dismiss until this Court resolves the (single) forthcoming CPLR 3211 motion, and Plaintiff remains hopeful that the only open issue on disclosures *prior* to that automatic stay taking effect will be resolved with a representation on preservation of documents. *See infra* at 16-17.

To the extent that Defendant is asking this Court to rule that disclosure should be stayed until "*any appeals are exhausted*," Def. Memo at 2 (emphasis added), there plainly is no basis for such a request, which is at best premature, and at worst, effectively would provide him the relief of immunity from suit *de facto,* regardless of whether he loses his legal argument with respect to that issue.

First, with respect to the request being premature, once the automatic stay in CPLR 3214(b) is lifted after this Court decides Defendant's CPLR 3211 motion, Defendant will be free to ask this Court to continue the stay if he has lost the motion, and the Court will be best

positioned to evaluate any such request at that juncture. If Defendant is dissatisfied with the result, CPLR 5518 will entitle him to seek a stay from the Appellate Division.

Second, if a stay is entered at the outset, now and through all pending appeals, or even worse – if all of Defendant's request is granted, *i.e.*, multiple, *seriatum* motions to dismiss are permitted, and there is a stay pending all such motions and all appeals of such motions – this Court would effectively be granting Defendant *de facto* immunity from suit. In *Clinton v. Jones*, there was no stay of disclosure. The only issue before the Supreme Court was whether the more limited stay of the *trial* amounted to *de facto* immunity. The Court observed that a blanket discovery stay, as opposed to a trial stay, would amount to *de facto* immunity. *See* 520 U.S. at 706. Yet that is precisely what Defendant seeks here.

In any event, *Clinton v. Jones* even reversed the approach of staying only the trial itself. As the Court stated:

> Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial. The complaint was filed within the statutory limitations period. . . and delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party. The decision to postpone the trial was, furthermore, premature.

520 U.S. at 707-08. Allowing a stay while *seriatum* motions are briefed and decided in this Court, and then further appealed at each and every level, could draw motion and appeals practice out for years. It would thus effectively be granting Defendant's motion for immunity even before it is briefed and argued. This attempt to create *de facto* immunity before that issue is even litigated should be denied.

Finally, insofar as the concern for a stay raised by Defendant relates *only* to disclosure occurring prior to any *single* motion Defendant makes under CPLR 3211, Plaintiff has only one concern, which it has already raised repeatedly with Defendant: ensuring the

preservation of all documents and materials (whether electronic, digital or hard copy) including those in the custody and control of the non-party campaign entity, Donald J. Trump President, Inc., particularly given the concern that that entity has documents concerning Defendant's malicious and intentional efforts to publish or circulate false, denigrating facts about Plaintiff through third parties. *See supra* at 5; Wang Aff., Exs. 3, 4. It was that concern that animated earlier communications by Plaintiff's counsel to Defense counsel, Wang Aff. ¶ 11, Ex. 7, and ultimately the service of the *subpoena duces tecum* on Donald J. Trump President, Inc. *Id.*, Exs. 9, 10. That subpoena is returnable on April 21, 2017. *Id.* Plaintiff *expressly, repeatedly offered to adjourn any response to that subpoena as long as there is a written representation that the responsive documents and materials would be preserved. Id.* ¶¶ 11, 19, 22, Ex. 7. Defense counsel has most recently indicated that she would try to obtain such a representation, but Plaintiff has heard nothing further on this point. *Id.* ¶ 22. In the event that Defendant or the non-party campaign entity refuses to offer any such representation, Plaintiff would, once this issue is ripe, seek the Court's assistance. Indeed, a case cited by Defendant in its papers provides support for a ruling directing relevant parties to preserve all documents. *Cf. In re Trump Hotel S'holder Derivative Litig.*, 96 Civ. 7820 (DAB)(HBP), 1997 WL 442135, at *2 (S.D.N.Y. Aug. 5, 1997) (directing preservation of all documents).

CONCLUSION

Defendant's motion seeking a bifurcation and permitting him to make multiple motions to dismiss should be denied. Separately, to the extent Defendant seeks an unfettered stay beyond the stay of disclosures automatically imposed by CPLR 3214(b), the request should likewise be denied.[2]

Dated: April 10, 2017
New York, New York

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*Application for admission *pro hac vice* pending.
** Application for admission *pro hac vice* to be filed soon.

[2] As set forth above, the question of how the outstanding *subpoena duces tecum* to the campaign entity is not yet ripe, as of the filing of this memorandum of law.