IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

THE DISTRICT OF COLUMBIA, et al.)
Plaintiffs,)) Case No. 8:17-cv-1596-PJM
V.)
DONALD J. TRUMP, in his official capacity as President of the United States,)
,)
Defendant.)
)

MOTION TO STAY PROCEEDINGS

President Donald J. Trump, in his official capacity, respectfully asks this Court to exercise its inherent authority to stay all proceedings in this case, pending the resolution of the government's forthcoming petition for a writ of certiorari and any further proceedings in the Supreme Court. A stay is warranted because there is a reasonable probability that the Supreme Court will grant review and reverse the Fourth Circuit's denial of mandamus relief. A stay also would conserve the parties' and the Court's resources, would be in the public interest, and would not meaningfully injure Plaintiffs.¹

On May 14, 2020, the Fourth Circuit denied the government's petition for a writ of mandamus. Once the time for rehearing expires, that ruling will terminate the stay of district court proceedings that the Fourth Circuit issued on December 20, 2018. The government intends to seek Supreme Court review, but, in the interim, this unprecedented case will continue and discovery will presumably resume unless the current stay is extended. That intrusive and

¹ Counsel for Plaintiffs have indicated that Plaintiffs oppose this motion.

burdensome discovery into the President's financial affairs and official actions, including against five federal agencies, would require the government to expend substantial resources and impose irreparable harm on the President. *See, e.g.*, Subpoena to GSA, Req. No. 10 (Dec. 6, 2018) (attached as Ex. A) (seeking "all Communications with the President or White House Concerning the location of the headquarters of the Federal Bureau of Investigation"); Subpoena to Department of Defense, Req. Nos. 1 & 2 (Dec. 4, 2018) (attached as Ex. B) (seeking documents sufficient to show "any Payments" by the Department of Defense to "hotels, restaurants or event spaces in the Washington D.C. metropolitan area"). All this to continue a suit that six judges of the Fourth Circuit en banc court concluded "clear[ly] and indisputabl[y] ... should never be in federal court," *In re Trump*, 958 F.3d 274, 291 (4th Cir. 2020) (Wilkinson, J., dissenting), that nine judges acknowledged presses "novel" and "debatable" legal claims and injuries, and that the majority concluded could not be reviewed only based on its view of the "severely limited" scope of mandamus in this context, *id.* at 280, 286 (Motz, J., for the Court).

There is a fair prospect that the Supreme Court will grant further review and reverse. The Fourth Circuit resolved several important questions concerning the President's amenability to this extraordinary suit enforcing the prophylactic structural protections of the Emoluments Clauses as well as the President's ability to obtain immediate appellate relief. And the Fourth Circuit's resolution conflicts with precedents of the Supreme Court and other Courts of Appeals. The equities also favor a stay, in light of the separation-of-powers concerns with permitting this case and the requested discovery concerning the President to proceed before the Supreme Court has even had the opportunity to decide whether such an extraordinary suit against the President is proper at all. Indeed, the Fourth Circuit "recognize[d] that the President is no ordinary petitioner" and is entitled to "special solicitude" when "seeking a writ of mandamus." *Id.* at 280,

282. If the "great deference" that the Fourth Circuit "accord[s] him . . . as the head of the Executive branch" means anything at all, *id.* at 280, it at the very least counsels in favor of staying proceedings in this Court, thereby enabling the President to seek the Supreme Court's orderly consideration of the important questions presented by the mandamus petition.

ARGUMENT

I. STANDARD OF REVIEW

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "Especially in cases of extraordinary public moment," the opposing party "may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id.* at 256. As the Fourth Circuit has recognized, the proper use of this Court's general equity powers in efficiently managing its docket, "calls for the exercise of judgment which must weigh competing interests and maintain an even balance." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (quoting *Landis*, 299 U.S. at 254–55); *see also United States v. Ga. Pac. Corp.*, 562 F.2d 294, 296 (4th Cir.1977) (per curiam) ("The determination by a district judge in granting or denying a motion to stay proceedings calls for an exercise of judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket."). Here, the weighing of the various factors counsel in favor of a stay.

II. THE GOVERNMENT IS LIKELY TO PREVAIL IN THE SUPREME COURT

After this Court denied the government's motion to dismiss and declined to certify that denial for interlocutory appeal under 28 U.S.C. § 1292(b), the government filed a petition for

writ of mandamus in the Fourth Circuit. *See In re Trump*, 958 F.3d at 280-81. To obtain mandamus relief, a petitioner must show a "clear and indisputable" right to relief, the absence of "other adequate means" to attain relief, and that issuance of the writ "is appropriate under the circumstances." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004). Mandamus is justified when there are such "exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion." *Id.* at 380 (citation omitted). And "separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President." *Id.* at 382. "[T]he high respect that is owed to the office of the Chief Executive" should "inform the conduct of the entire proceeding," *id.* at 385, and "[a]ccepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities," *id.* at 382.

The Fourth Circuit nevertheless held that the President in his official capacity could not obtain mandamus of this Court's order denying the motion to dismiss, on the ground that the order did not rest on any "clear and indisputable" legal errors. *In re Trump*, 958 F.3d at 285; *see id.* at 285-87, 288-89. And the Fourth Circuit further held that mandamus was unavailable against this Court's order declining to exercise discretion to certify an interlocutory appeal on the ground that it "applied the correct legal standards" and "was not arbitrary or based on passion or prejudice." *Id.* at 285; *see id.* at 282-85. The government is likely to obtain Supreme Court review and reversal on at least one, if not both, of these holdings.

A. The Supreme Court Is Likely To Review And Reverse the Fourth Circuit's Denial Of Mandamus Concerning This Court's Denial of Defendant's Motion to Dismiss.

There is a reasonable probability that the Supreme Court would agree to review, and a fair prospect that it would reverse, the Fourth Circuit's holding that this Court's denial of Defendant's motion to dismiss was not "clear and indisputable" legal error warranting mandamus relief. *See Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (movant for a stay pending petition for certiorari must demonstrate both "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"). Among this Court's conclusions was that the President may be sued in his official capacity pursuant to an implied equitable cause of action directly under the Emoluments Clauses. That holding is contrary to the precedent of the Supreme Court as well as the D.C. Circuit, and the six dissenting judges on the en banc Fourth Circuit court would have granted mandamus and directed dismissal of the suit on this basis alone. *In re Trump*, 958 F.3d at 290, 293-303 (Wilkinson, J., dissenting).

1. The Supreme Court has squarely held that, in light of the separation of powers, federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866); *see Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality op.). The D.C. Circuit has held likewise: "A court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010); *see also In re Trump*, 958 F.3d at 297-98 (Wilkinson, J., dissenting) (noting that *Mississippi* accords with traditional equitable principles).

The Fourth Circuit rejected "two premises" of the President's invocation of *Mississippi*, *In re Trump*, 958 F.3d at 288, and it clearly erred in both respects.

First, the Fourth Circuit reasoned that the Emoluments Clauses are "restraints on the President," not sources of "official executive dut[ies]." *Id.* at 288; see also id. (noting that the President "has a duty to obey the law"). But the same argument was made in Mississippi itself, where the plaintiff State asked for "the President [to] be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional." 71 U.S. at 498. The Supreme Court rejected that argument, concluding that "[a]n attempt on the part of the judicial department of the government to enforce the performance" of "the duty of the President in the exercise of the power to see that the laws are faithfully executed" would be "an absurd and excessive extravagance." *Id.* at 499. As Judge Wilkinson's dissent put the point, "an obligation (i.e., a duty) that derives from one's government position (i.e., office)" is, by definition, an "official duty." *In re Trump*, 958 F.3d at 299.

Second, the Fourth Circuit reasoned that complying with the Emoluments Clauses is not a "discretionary function" but rather a "ministerial" act for which relief against the President may be permitted. *Id.* at 288; see Mississippi, 71 U.S. at 498 (leaving open whether a President may be "required to perform a mere ministerial duty"). That is so, the Fourth Circuit asserted, because determining the meaning of the Constitution is not an "executive function." *In re Trump*, 958 F.3d at 288. Again, precisely that argument was made in Mississippi, where the counsel for the State also argued that President Johnson's duty to follow the Constitution when executing the law was "a mere ministerial duty." 71 U.S. at 498. And the Supreme Court likewise decisively rejected that argument, holding that an act is ministerial only if it leaves "no room for the exercise of judgment" and "require[s] the performance of a single specific act." *Id.*

at 499. Here, on Plaintiffs' view, the Emoluments Clauses require the President to make "seemingly innumerable judgment calls about how [he] must organize his financial interests, sequester his real assets, or restructure his holdings." *In re Trump*, 958 F.3d at 299 (Wilkinson, J., dissenting). That is particularly true on the atextual understandings of those Clauses urged by Plaintiffs (who would require applying a vague "not [generally] available" standard). *See id.* at 44-45.

At a minimum, therefore, the Fourth Circuit's attempt to distinguish *Mississippi* runs afoul of the Supreme Court's holding in *Franklin v. Massachusetts* that an "express statement by Congress" is required before the President himself may be subjected to suit for his official duties, "[o]ut of respect for the separation of powers and the unique constitutional position of the President." 505 U.S. at 800-01. Even assuming there may be a dispute as to whether Congress *could* authorize this suit against the President, it is indisputable that Congress *did not expressly* do so and that *Franklin* thus compels dismissal. *See In re Trump*, 958 F.3d at 305 (Wilkinson, J., dissenting).

2. The clear error in allowing this suit against the President to proceed is exacerbated by the clear error in judicially creating a cause of action to enforce the Emoluments Clauses against any covered federal official. Where, as here, Congress has not provided an express cause of action to enforce federal law, the creation of a "judge-made remedy" through an implied cause of action in equity is available only in "some circumstances" that present "a proper case." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326-27 (2015); see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (federal equity jurisdiction is limited to historical practices of the English Court of Chancery); In re Trump, at 958 F.3d at 293 (Wilkinson, J., dissenting). "[I]t is a significant step under separation-

of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action," because "the Legislature is in the better position" to weigh the competing considerations involved in authorizing private suits against public officials.

Ziglar v. Abbasi, 137 S. Ct. 1843, 1856-57 (2017). While courts may nevertheless wield "traditional equitable powers," id. at 1856, "Congress is in a much better position than" courts "to design the appropriate remedy" when "depart[ing] from past practice," *Grupo Mexicano*, 527 U.S. at 322.

The "classical[]" type of implied equitable suit, which "permit[s] potential defendants in legal actions to raise in equity a defense available at law," does not raise such separation-of-powers concerns. *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014); *see, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Such suits merely shift the timing and posture of litigating a legal question that Congress has authorized to be adjudicated in federal court. Here, by contrast, Plaintiffs assert an equitable cause of action even though they neither are "subject to or threatened with any enforcement proceeding," *Douglas v. Independent Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting), nor have had their own property or liberty interests directly infringed, *cf. American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902); *see also In re Trump*, 958 F.3d at 294, 296-97 (Wilkinson, J., dissenting). Thus, but for the judicial creation of a cause of action, this dispute would not be in federal court *at all*. Plaintiffs' attempt to wield the Constitution "as a cause-of-action-creating *sword*" poses greater separation-of-powers concerns than a typical implied equitable suit. *See Michigan Corr. Org.*, 774 F.3d at 906.

The Fourth Circuit did not dispute that Plaintiffs failed to identify a single case in which a court created a cause of action in these circumstances. *In re Trump*, 958 F.3d at 287. Instead, it

stated simply that the Supreme Court's precedent is "not obviously limited in th[at] way." *Id.*But that reverses the proper inquiry: "[t]o accord a type of relief that has never been available before" exceeds the constraints of "traditional equitable relief." *Grupo Mexicano*, 527 U.S. at 322; *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) ("[A] major departure from the long tradition of equity practice should not be lightly implied.").

- 3. In sum, and respectfully, this Court's denial of Defendant's motion to dismiss is "clear and indisputable" legal error that conflicts with precedents of the Supreme Court and the D.C. Circuit. And the Fourth Circuit's failure to grant mandamus in such circumstances is in severe tension with those precedents as well as *Cheney*'s admonition that "separation-of-powers considerations should inform . . . evaluation of a mandamus petition involving the President." 542 U.S. at 382; *see also id.* at 380-81 (recognizing that the mandamus "prerequisites" are "not insuperable" where ongoing district court proceedings "threaten the separation of powers"). At the very least, therefore, this is an exceptionally important question warranting the Supreme Court's review (and reversal) in light of "[t]he high respect that is owed to the office of the Chief Executive," which "should inform the conduct of the entire proceeding." *Id.* at 385; *see also, e.g., Trump v. Vance,* 140 S. Ct. 659 (2019) (granting certiorari in suit involving novel state grand-jury subpoena of President's personal records).
 - B. The Supreme Court Is Likely To Review And Reverse the Fourth Circuit's Denial Of Mandamus Concerning This Court's Decision Not To Certify An Interlocutory Appeal.

There is also a reasonable probability that the Supreme Court would agree to review, and a fair prospect that it would reverse, the Fourth Circuit's holding that this Court's decision not to certify an interlocutory appeal did not warrant mandamus relief. That holding conflicts with precedent of the Supreme Court as well as other Courts of Appeals, and five of the en banc

dissenters would have granted mandamus and directed dismissal of the suit on this basis too. *In re Trump*, 958 F.3d at 290, 314-322, 331 (Niemeyer, J., dissenting).

whenever the court is "of the opinion" that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Here, this Court's decision not to certify its denial of the motion to dismiss rested largely on the conclusion that there was no substantial ground to disagree with its earlier ruling. *See In re Trump*, 958 F.3d at at 313, 320-22. (Niemeyer, J., dissenting) (discussing this Court's reasoning). As Judge Niemeyer explained, however, that conclusion "amounted to a clear abuse of discretion": the legal questions raised in the President's motion to dismiss were "threshold matters that go to the heart of whether the case may proceed at all"; many of them were "novel" issues that had been addressed in "no prior decision"; and "the only other court to have considered a cause of action under the Emoluments Clauses" had "ruled differently than did the district court here." *See id.* at 321; *see also* pp. 13-15, *infra* (further showing why the section 1292(b) criteria were indisputably satisfied).

Notably, the Fourth Circuit en banc majority did not disagree with the dissent about proper application of the section 1292(b) standard, nor did it adopt this Court's analysis. Rather, it simply observed that this Court had "applied the correct legal standards" in a manner that "was not arbitrary or based on passion or prejudice." *In re Trump*, 958 F.3d at 285. The Fourth Circuit deemed that dispositive because it reasoned that, in such circumstances, even a "clear abuse of discretion" under Section 1292(b) could not satisfy the requirement for a "clear and indisputable" right to mandamus relief. *Id.* at 283. That holding is grave error.

First, the Fourth Circuit's holding is flatly contrary to the Supreme Court's controlling articulation in *Cheney* of the mandamus standard. *Cheney* reaffirmed that mandamus is appropriate in "exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion." 542 U.S. at 380 (emphasis added; citations omitted); accord id. at 390. In a footnoted response to that statement, the Fourth Circuit observed that *Cheney* did not "set forth a new, more lenient 'clear abuse of discretion' standard," given that, "immediately following th[e] statement," *Cheney* also reaffirmed the traditional three-prong standard, including the need for a "clear and indisputable" right to relief. *In re Trump*, 958 F.3d at 285 n.3. But as Judge Niemeyer's dissent correctly explained, it is well established under the traditional standard that the "clear and indisputable" element is satisfied if there is a "clear abuse of discretion." *Id.* at 315 (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), and *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)).

To be sure, the Fourth Circuit is correct that "a simple showing of error" or "a naked error of law" are not sufficient for mandamus. *Id.* at 283. But that in no way supports the Fourth Circuit's holding that mandamus cannot remedy exercises of discretion *even where* they are clearly indefensible in substance, if they were reached in a procedurally fair manner. Indeed, *Cheney* itself emphasized that mandamus is warranted where "the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties," without any further requirement that such impairment either involve a clear error of *law* (rather than discretion) or result from bad faith. 542 U.S. at 390.

Second, the Fourth Circuit's holding is also inconsistent with the precedent of at least two other Courts of Appeals concerning the availability of mandamus to compel certification of interlocutory appeal under Section 1292(b). The Eleventh Circuit granted such relief in

Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982), requiring the district court to rule on a threshold jurisdictional question and then to certify its order before conducting an asylum hearing that allegedly "would violate the separation of powers." *Id.* at 431-32. The court deemed the case to "present[] the truly 'rare' situation in which it is appropriate for [an appellate] court to require certification of a controlling issue of national significance." *Id.* at 431. Indeed, the Eleventh Circuit granted mandamus without even affording the district court the opportunity to exercise its discretion to deny certification, id. at 432, and thus it follows a fortiori that the Eleventh Circuit would have granted mandamus if faced with the circumstances here. Moreover, the D.C. Circuit granted similar relief in *In re Trump*, 781 F. App'x 1 (D.C. Cir. 2019), which was a parallel Emoluments suit brought against the President by Members of Congress. There, after finding that the district court's orders denying a motion to dismiss "squarely me[t] the criteria for certification under Section 1292(b)" and that the district court "abused its discretion" in refusing to certify "given the separation of powers issues present," the D.C. Circuit remanded the matter "for immediate reconsideration." *Id.* at 2. Although the court thus technically did not grant mandamus, it also did not deny relief outright in the face of a clear abuse of discretion; and the district court on remand unsurprisingly certified the interlocutory appeal. See Blumenthal v. *Trump*, 949 F.3d 14, 18 (D.C. Cir. 2020).

Contrary to the Fourth Circuit's suggestion, *In re Trump*, 958 F.3d at 383, those cases are entirely consistent with Section 1292(b). Although the statute "confers broad discretion upon district courts" in applying the certification criteria, it "does not provide that [such] discretion is unfettered and unreviewable." *Id.* at 315 (Niemeyer, J., dissenting). Even broad discretion can be exercised in a manner that constitutes a "clear abuse of discretion" warranting mandamus, *Cheney*, 542 U.S. at 380; *see also Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931

(2016). Indeed, the Fourth Circuit itself left open the possibility that a "bad faith" or "capric[ious]" denial of certification might warrant mandamus. *In re Trump*, 958 F.3d at 285. But if such abuses of discretion can be remedied—as is plainly appropriate—appellate courts likewise should be able to remedy abuses of discretion when they are firmly of the view, as the dissenting en banc judges were here, that this Court's reasoning for denying certification was not based in governing law or fact. *Id.* at 320 (Niemeyer, J., dissenting).

2. Notably, the majority of the en banc Court did not express any agreement with this Court's decision not to certify an interlocutory appeal. As Defendants have previously demonstrated, an "immediate appeal" from the motion to dismiss orders would "materially advance the ultimate termination of the litigation," because resolution in the President's favor of any of the "controlling question[s] of law" raised would require dismissal of this suit. 28 U.S.C. § 1292(b). And likewise, it is clear that there is a "substantial ground for difference of opinion" as to each of this Court's substantive rulings. *Id*.

First, this Court's decision to permit an implied equitable suit to enforce the Emoluments Clauses against the President is, at a minimum, subject to substantial grounds for disagreement. Indeed, as discussed, Defendants respectfully submit that it was clearly incorrect, see Section II.A, supra, and even the Fourth Circuit acknowledged that the government's "argument is plausible," In re Trump, 958 F.3d at 286.

Second, the Fourth Circuit likewise acknowledged that it is "a debatable question"—to say the least—whether this Court properly held that Maryland and the District of Columbia have legally and judicially cognizable interests supporting a suit to enforce the Emoluments Clauses.

Id. That is so for several related reasons.

To begin, even assuming a cause of action to enforce the Emoluments Clauses could ever be implied under Congress's grant of equity jurisdiction to Article III courts, these particular Plaintiffs' interests do not "fall within the zone of interests to be protected or regulated by the . . . constitutional guarantee in question." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quotation marks omitted). The zone-of-interests limitation on causes of action authorized by Congress is a "requirement of general application" that "applies unless it is expressly negated," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014), and it applies with even greater force to *implied* constitutional claims in equity, *see Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987). Notably, this Court stands alone in rejecting the conclusion that the Emoluments Clauses are "designed to prevent official corruption," not to "create a new legal interest for parties to be protected from lawful competition," as Plaintiffs assert here. *In re Trump*, 958 F.3d at 298 (Wilkinson, J., dissenting); *accord CREW v. Trump*, 276 F. Supp. 3d 174, 187 (S.D.N.Y. 2017).²

Moreover, stripped of their asserted competitive injuries, Plaintiffs cannot satisfy the minimum requirements of Article III standing. They assert only a generalized grievance, shared by all members of the public, in having an official comply with prophylactic provisions of the Constitution adopted for the benefit of the public generally. *See United States v. Richardson*,

² Although the Second Circuit reversed the zone-of-interests ruling in *CREW*, its amended opinion did so only on the technical ground that the district court should not have considered the zone-of-interests requirement as part of the government's motion to dismiss for lack of subject-matter jurisdiction, but rather as part of its motion for dismiss for failure to state a claim. 953 F.3d 178, 200 (2d Cir. 2019). The government's rehearing petition remains pending in the Second Circuit.

418 U.S. 166, 176-78 (1974); *accord In re Trump*, 958 F.3d at 305-06 (Wilkinson, J., dissenting); *id.* at 329 (Niemeyer, J., dissenting).

Indeed, Plaintiffs' asserted competitive injuries fail to satisfy Article III even on their own terms. The Supreme Court has rejected "a boundless theory of standing" in which "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). And reasonable judges have already disagreed as to the viability of Plaintiffs' slightly narrower, but inherently speculative, theory that: (1) certain government customers patronize the President's businesses because of his financial interests (rather than the businesses' other qualities, including their general association with the President); (2) those customers would otherwise patronize the limited venues in which Plaintiffs have a commercial interest (rather than any of the countless other venues in the region); and (3) any countervailing effect from other government customers who may be inclined to avoid the President's business because of his financial interests may be disregarded. *Compare CREW*, 953 F.3d at 189-200, *with id.* at 205-16 (Walker, J., dissenting), *and In re Trump*, 958 F.3d at 325-28 (Niemeyer, J., dissenting).

Finally, there are also substantial grounds for disagreement as to this Court's merits conclusion about the scope of the Emoluments Clauses. As the government has shown, the Clauses' use of the term "emolument" is limited to compensation accepted from a foreign or domestic government for services rendered by an officer in either an official capacity or employment-type relationship: that interpretation is supported by contemporaneous dictionaries, intra-textual comparisons, and consistent Executive practice from the Founding era to modern times. See, e.g., Defs.' Reply in Supp. of Mot. to Dismiss at 16-20, ECF No. 70. This Court's contrary interpretation, which would cover any "profit, gain, or advantage," renders parts of the

constitutional text superfluous and would lead to ahistorical and absurd results. *See In re Trump*, 958 F.3d at 300-01 (Wilkinson, J., dissenting).

3. In sum, the government respectfully submits that this Court's refusal to certify an interlocutory appeal was a "clear abuse of discretion" and the Fourth Circuit's denial of mandamus in such circumstances conflicts with decisions of the Supreme Court, the Eleventh Circuit, and the D.C. Circuit. And again, the unique constitutional status of the President further counsels in favor of the Supreme Court's review and reversal on this exceptionally important question.

III. THE EQUITIES SUPPORT A STAY PENDING FURTHER REVIEW.

Finally, the balance of equities also strongly favors the stay of proceedings in this Court pending Supreme Court review. If proceedings are not stayed, the President would be irreparably harmed, because this unprecedented and potentially sprawling suit would be allowed to continue and Plaintiffs would be able to probe into his personal finances solely because of the office he holds. *See Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019) (staying mandate of the D.C. Circuit pending Supreme Court review in suit concerning congressional subpoena of the President's accounting firm). Moreover, the Executive Branch would be irreparably harmed because five federal agencies would be required to comply with intrusive and burdensome subpoenas, including into sensitive matters about government decisionmaking. *See, e.g.*, Respondents' Br. in Opp'n to Petition for Writ of Mandamus 48, No. 18-2486 (4th Cir. Feb. 6, 2020) (speculating whether "policy decision[s]" were "influence[d]" by alleged Emoluments); Ex. A, Req. No. 10 (demanding "all Communications with the President or White House Concerning the location of the headquarters of the Federal Bureau of Investigation"); Ex. B, Req. No. 1 & 2 (demanding documents sufficient to show "any Payments" by the Department of

Defense to "hotels, restaurants or event spaces in the Washington D.C. metropolitan area"). Such subpoenas squarely implicate "the Executive's interests in maintaining its autonomy and safeguarding its communications' confidentiality." *Cheney*, 542 U.S. at 370. And Plaintiffs have refused to rule out seeking discovery against the President himself, deepening these separation-of-powers concerns. *See* Statement Pursuant to F.R.C.P. 26(f) at 4, ECF No. 132 ("Plaintiffs may also seek limited discovery from President Trump in his official capacity on the subject of his communications with foreign, state, and domestic government officials regarding the Hotel and/or Restaurant.").

The Fourth Circuit brushed aside these harms on the ground that the President could still seek mandamus relief from specific discovery orders. *In re Trump*, 958 F.3d at 287 & n.8. But if the President is entitled to mandamus relief from the failure to dismiss the suit, he is entitled to avoid discovery altogether, and thus is irreparably harmed by the need to seek piecemeal protection against individual discovery orders instead. To issue a stay pending certiorari would also be consistent with the Fourth Circuit's recognition that the President deserves "special solicitude" when seeking mandamus. *Id.* at 282.

Nor will any countervailing harm result from a stay. Although a stay would delay discovery for a short, additional period to allow the Supreme Court to decide in an orderly fashion whether this suit should be allowed to proceed at all, that delay will not impose any material harm on the State of Maryland and the District of Columbia. Even setting aside that their alleged injuries are not cognizable, those injuries are almost all financial in nature (directly or indirectly), and Plaintiffs never sought a preliminary injunction. Some delay in obtaining relief that would redress their asserted injuries thus does not come close to outweighing the significant separation-of-powers harms posed by this suit against the President and the

burdensome discovery imposed on five federal agencies (not to mention numerous other private parties).

CONCLUSION

Defendants respectfully ask that the Court stay proceedings pending the resolution of the government's forthcoming petition for a writ of certiorari and any further proceedings in the Supreme Court.

Dated: June 12, 2020 Respectfully submitted,

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Exhibit A

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND Greenbelt Division

THE DISTRICT OF COLUMBIA and THE STATE OF MARYLAND,

Plaintiffs,

V.

DONALD J. TRUMP, President of the United States of America, in his official and in his individual capacity,

Defendant.

Civil Action No. 8:17-cv-01596-PJM

NOTICE OF SUBPOENA

TO:

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Trial Attorney
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PLEASE TAKE NOTICE, pursuant to Federal Rule of Civil Procedure 45, that the District of Columbia and State of Maryland intend to serve a subpoena, in the form attached hereto, on the General Services Administration on December 6, 2018, or as soon thereafter as service may be effectuated.

Dated: December 6, 2018

THE STATE OF MARYLAND

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United States District Court

for the District of Maryland

The District of	of Columbia, et al)		
Donald	laintiff v. d J. Trump)))	Civil Action No. 8:17-cv-01596-P.	JM
	fendant)		
			, INFORMATION, OR OBJECTS EMISES IN A CIVIL ACTION	į
To: The General Service			eneral Counsel of the General Servic , Washington, DC, 20405	es Administration;
_			is subpoena is directed)	
Production: YO	U ARE COMMANDED to pro	duce at t	ne time, date, and place set forth below	w the following
	stored information, or objects,		ermit inspection, copying, testing, or	
Place: Cohen Milstein S	ellers & Toll PLLC		Date and Time:	
	venue, N.W. Ste 500		January 3, 2019, 9:00 AM	
other property possessed	or controlled by you at the time	, date, a	ermit entry onto the designated prem d location set forth below, so that the perty or any designated object or ope	e requesting party
Place:			Date and Time:	
Rule 45(d), relating to yo		et to a su	ed – Rule 45(c), relating to the place oppoena; and Rule 45(e) and (g), relationing so.	
	CLERK OF COURT		OR Austin	Slale Ja S
	Signature of Clerk or Deputy	Clerk	Attorney's sign	ature
The name, address, e-mai	il address, and telephone numbe	er of the	attorney representing (name of party)	
The District of Columbia a	_		, who issues or requests this s	ubpoena, are:
		, DC 200	01; stephanie.litos@dc.gov; 202-724-	-
			tulin@oag.state.md.us; 410-576-696	

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Case 8:17-cv-01596-PJM Document 170-1 Filed 06/12/20 Page 5 of 20

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 8:17-cv-01596-PJM

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

	ubpoena for (name of individual and title, if an	ny)	
late)	·		
☐ I served the s	subpoena by delivering a copy to the nar	med person as follows:	
		on (date) ;	or
☐ I returned the	e subpoena unexecuted because:		
tendered to the v	witness the fees for one day's attendance	States, or one of its officers or agents, I e, and the mileage allowed by law, in the	
iees are \$	for travel and \$	for services, for a total of \$	0.00
I declare under p	penalty of perjury that this information i	s true.	
:			
		Server's signature	
		Printed name and title	

Additional information regarding attempted service, etc.:

Case 8:17-cv-01596-PJM Document 170-1 Filed 06/12/20 Page 6 of 20

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action(Page 3)

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

- (1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- **(B)** within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
- (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
 - **(B)** inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

- (A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
- **(B)** Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

- (A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
 - (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
 - (iv) subjects a person to undue burden.
- **(B)** When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.
- (C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
 - (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

- (1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:
- (A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
- **(B)** Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
- (C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.
- **(D)** Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

- (A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
 - (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.
- **(B)** *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

UNITED STATES DISTRICT COURT DISTRICT OF MARYLAND GREENBELT DIVISION

THE DISTRICT OF COLUMBIA AND THE
STATE OF MARYLAND,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America,

Defendant.

Case No. 8:17-cv-01596

ATTACHMENT A TO SUBPOENA TO THE GENERAL SERVICES ADMINISTRATION

- 1. "Agreement" means any oral or written contract, arrangement, or understanding, whether formal or informal, between two or more Persons, together with modifications or amendments thereto.
 - 2. "All" shall be construed as all, each, any, and every.
- 3. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these Requests all information that might otherwise be construed to be outside their scope.
- 4. "Communications" is used in the broadest sense possible and means every manner of disclosure, transfer, or exchange of information to another Person or Persons, whether orally, written, electronically (including e-mail, voicemail, voicemail which is delivered by email, text messages, tweet, direct messages, instant messaging, other social media communication, and/or

any other form of electronic correspondence or exchange), by Document, mail, personal delivery, face-to-face meeting, or otherwise. All such Communications in writing shall include, without limitation, printed, typed, handwritten, or other Documents.

- 5. "Concerning" means relating to, referring to, describing, evidencing, or constituting, in whole or in part, directly or indirectly, the stated subject matter.
- 6. "Document(s)" means written, recorded, and graphic material of every kind and Electronically Stored Information—including drawings, graphs, charts, photographs, sound recordings, video recordings, images, and other data and data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by you into a reasonably usable form. A draft or non-identical copy is a separate document within the meaning of this term. Document(s) includes the labels or metadata associated with each original or copy.
 - 7. "Donald J. Trump" refers to Donald J. Trump, the individual.
- 8. "Electronically Stored Information," or "ESI" means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise) of any electronically created or stored information, including e-mail, instant messaging, videoconferencing, SMS, MMS, or other text messaging, and other electronic correspondence (whether active, archived, unsent, or in a sent or deleted-items folder), word-processing files, spreadsheets, databases, unorganized data, Document metadata, presentation files, video recordings, and sound recordings, regardless of how or where the information is stored, including if it is on a mobile device.
- 9. "Emoluments Clauses" means the language in U.S. Const. art. I, § 9, cl. 8 prohibiting any "Person holding any Office of Profit or Trust" from accepting "any present,

Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State," absent "the Consent of the Congress" and the language in U.S. Const. art. II, § 1, cl. 7 prohibiting the President from "receiv[ing] within that Period any other Emolument from the United States, or any of them."

- 10. "Emoluments Litigation" refers to *Citizens for Responsibility & Ethics in Washington v. Trump*, 17-cv-458 (S.D.N.Y.); *District of Columbia & Maryland v. Trump*, 8:17-cv-01596 (D. Md.); *Blumenthal v. Trump*, 17-cv-1154 (D.D.C.), and any other existing or future lawsuits alleging that President Donald J. Trump has violated the Emoluments Clauses.
- 11. "Financial Interest" means (i) direct or indirect ownership of an interest and/or (ii) interest in a share of revenue.
 - 12. "Including" shall be construed as "including, but not limited to".
- 13. "Lease" means Lease Number GS-LS-116-1307, that certain Ground Lease dated as of August 5, 2013, by and between the United States of America, acting by and through the Administrator of General Services, as landlord, and Trump Old Post Office LLC, as tenant.
 - 14. "Payment" includes both direct and indirect payments.
- 15. "Person(s)" includes without limitation any natural person, entity, individual or group of individuals, partnership, joint venture, unincorporated association, corporation, firm, or estate.
- 16. "Trump Trust" refers to any trust or other instrument to which Donald J. Trump has been a beneficiary or potential beneficiary at any time since January 20, 2017.
- 17. "Washington D.C. metropolitan area" means the counties and cities designated as "central" in the Washington-Arlington-Alexandria DC-VA-MD-WV Metropolitan Statistical Area as defined by the Office of Management and Budget Bulletin No. 15-01, which includes the

District of Columbia; Montgomery County, MD; Prince George's County, MD; Arlington County, VA; Fairfax County, VA; Fauquier County, VA; Loudoun County, VA; Prince William County, VA; Stafford County, VA; Alexandria city, VA; Fairfax city, VA; Falls Church city, VA; Manassas city, VA; and Manassas Park city, VA.

18. "You" and "Your" mean the Administrator of General Services and the General Services Administration ("GSA"), the recipient of these requests, present and former officers, directors, employees, attorneys, agents, and representatives of the GSA, and each Person acting or purporting to act on behalf of the GSA.

GENERAL INSTRUCTIONS

- 1. In responding to these Requests, You are to furnish all available information, including information in the possession, custody, or control of Your agents and all Persons acting on Your behalf. This includes Documents presently in the possession, custody or control of Your attorney(s) or their investigators or any third party or parties to whom You have surrendered possession, custody or control, or who are acting on Your behalf, or who have otherwise obtained possession, custody or control, or who, upon Your request, would surrender possession, custody or control to You.
- 2. If any responsive Document was, but no longer is, in your possession, custody or control, produce a description of each such Document. The description shall include the following:
 - (a) the name of each author, sender, creator, and initiator of such Document;
 - (b) the name of each recipient, addressee, or party for whom such Document was intended;
 - (c) the date the Document was created;
 - (d) the date(s) the Document was in use;

- (e) a detailed description of the content of the Document;
- (f) the reason it is no longer in your possession, custody or control; and
- (g) the Document's current location.
- (h) If the Document is no longer in existence, in addition to providing the information indicated above, state on whose instructions the Document was destroyed or otherwise disposed of, and the date and manner of the disposal.
- 3. If You claim the attorney-client privilege, or any other privilege or protection (including work product, deliberative process, joint defense, or common interest protections) for any Document, You shall provide the following information with respect to each such Document:
 - a. the type of privilege or protection claimed;
 - b. the type of Document;
 - c. the general subject matter of the Document;
 - d. the date of the Document;
 - e. such other information as is sufficient to identify the Document for a subpoena duces tecum, including, where appropriate, the name and title of the author of the document, the name and title of any recipient, and identification of anyone providing legal counsel;
 - f. the Request(s) to which the Document is responsive; and
 - g. any other information required to be furnished by Fed. R. Civ. P. 26(b)(5).

Provide the information requested in this instruction in a searchable and sortable electronic format and with sufficient specificity to enable the undersigned counsel and the Court to assess the applicability of the claimed privilege or protection.

- 4. These Requests shall be deemed continuing in nature so as to require production of all additional or different Documents or information responsive to these Requests, which You discover, receive, or generate between the time of the original production and trial.
- 5. All Documents and/or other data which relate to the subject matter of this case or these requests must be preserved. Any destruction involving such Documents must cease, even if it is your normal or routine course of business to delete or destroy such Documents or data and even if you believe such Documents or data are privileged or otherwise need not be produced.
- 6. Documents shall be produced in the manner described in the attached Appendix Regarding Form of Production.
- 7. Unless otherwise stated, the relevant time period for all requests are for Documents created or originating on or after January 1, 2013.

REQUESTS FOR DOCUMENTS

REQUEST FOR PRODUCTION NO. 1:

All Documents Concerning draft and final versions of any Agreements between the United States of America, acting by and through the Administrator of General Services and Trump Old Post Office LLC, including the Lease, the January 20, 2017 amendment, and any other amendments, codicils, exhibits, or appendices.

REQUEST FOR PRODUCTION NO. 2:

All Documents Concerning the Lease or Trump Old Post Office LLC's compliance with the Lease, including Communications between You and Trump Old Post Office LLC, Donald J. Trump, any entities in which Donald J. Trump has a Financial Interest, Trump Trust, and/or the officers, employees, agents, or individuals purporting to act on behalf of any of those Persons.

REQUEST FOR PRODUCTION NO. 3:

All Documents sufficient to identify the names and titles of all individuals with responsibilities relating to the Lease, including those whose responsibilities included or include negotiating, interpreting, monitoring, or enforcing the Lease.

REQUEST FOR PRODUCTION NO. 4:

For the period from November 8, 2016 to the present, all Documents Concerning the Emoluments Clauses and Emoluments Litigation.

REQUEST FOR PRODUCTION NO. 5:

All Documents Concerning any annual and/or monthly statements submitted by Trump Old Post Office LLC to You pursuant to the Lease.

REQUEST FOR PRODUCTION NO. 6:

For the period November 8, 2016 to the present, All Documents showing or referring to any Payments by You to the Trump International Hotel Washington D.C. ("Trump International Hotel"), BLT Prime by David Burke Washington, D.C. ("BLT Prime"), or any Business providing goods or services within the Trump International Hotel or BLT Prime, including credit card and billing receipts and records, and all Documents Concerning tax exempt Payments and payors.

REQUEST FOR PRODUCTION NO. 7:

For the period January 1, 2014 to the present, Documents sufficient to show any Payments by You to hotels, restaurants, or event spaces in the Washington D.C. metropolitan area other than those Businesses covered by Request for Production No. 6.

REQUEST FOR PRODUCTION NO. 8:

For the period November 8, 2016 to the present, all Documents Concerning Communications relating to the Trump International Hotel, BLT Prime, or any other Business covered by Request for Production No. 6.

REQUEST FOR PRODUCTION NO. 9:

For the period November 8, 2016 to the present, all Documents Concerning the policies, guidelines, factors, and other venues You considered in choosing the restaurants, hotels, or event spaces You used in the Washington D.C. metropolitan area.

REQUEST FOR PRODUCTION NO. 10:

For the period November 8, 2016 to the present, all Communications with the President or White House Concerning the location of the headquarters of the Federal Bureau of Investigation.

REQUEST FOR PRODUCTION NO. 11:

Any Document or Communication Concerning the potential future use(s) of the space that would be left vacant by the relocation of the headquarters of the Federal Bureau of Investigation.

Date: December 6, 2018

Leah J. Tulin

THE STATE OF MARYLAND

THE DISTRICT OF COLUMBIA

Stephanie E. Litos

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Attorneys for Plaintiffs *admitted pro hac vice

APPENDIX TO DOCUMENT REQUESTS REGARDING FORM OF PRODUCTION

A. <u>Hard Copy Paper Documents</u>

- 1. <u>All hard copy paper documents</u> should be produced as TIFF image files (black-and-white) and as JPEG image files (color) in electronic form. Each filename must be unique and match the Bates number of the page. The filename should not contain any blank spaces and should be zero padded (for example ABC0000001).
- 2. Each delivery should be accompanied by an image cross reference file that contains document breaks.
- 3. A delimited text file that contains available fielded data should also be included, at a minimum including Beginning Bates Number, Ending Bates Number, Custodian and Number of pages, as well as link to OCR text if any (see below). The following delimiters should be used:

a. Field Separator (ASCII:0020)

b. Quote (ASCII:0254)

c. Multi-Entry Delimiter (ASCII:0059)

d. <Return> Value in Data (ASCII:0174)

- 4. To the extent that documents have been run through an Optical Character Recognition (OCR) software in the course of reviewing the documents for production, full text should also be delivered for each document. Text should be delivered on a document level in an appropriately formatted text file (.txt) that is named to match the first bates number of the document.
- 5. A text cross reference load file should also be included with the production delivery that lists the beginning Bates number of the document and the relative path of the text file for that document on the production media.
- 6. The TIFF images should be produced as single-page Group IV TIFF format at 300 dpi with an Opticon image load file. The Opticon image load file should contain the BEGBATES value for each corresponding document and appropriate path or folder information to the corresponding images that comprise each document. Each TIFF or JPEG image should be individually Bates numbered. The Bates number must not obliterate, conceal, or interfere with any information on the produced document.
- 7. Every TIFF file in each production must be referenced in the production's corresponding load file. The total number of TIFF files referenced in a production's load file should match the number of TIFF files in the production.

B. All Electronic Documents

- 1. <u>All electronic documents</u> should be produced in such fashion as to identify the location (i.e. the network file folder, hard drive, backup-tape or other location) where the documents are stored and, where applicable, the natural person in whose possession they were found (or on whose hardware device they reside or are stored). If the storage location was a file share or work group folder, that should be specified as well.
- 2. Attachments, enclosures, and/or exhibits to any parent documents should also be produced and proximately linked to the respective parent documents containing the attachments, enclosures and/or exhibits.
- 3. For all documents originating in electronic form, documents should be produced as native format and in the order that they were stored in the ordinary course of business, i.e. emails that attach documents or spreadsheets should not be separated from each other and should be linked using the Group Identifier field above. The file name should match the bates number assigned to the file.
- 4. For Documents that are produced from electronic format, the full extracted text will be provided by a link in the main (.DAT) load file. The following extracted data and metadata fields shall to be provided in the load file:
 - a. Begbates
 - b. Endbates
 - c. Group Identifier¹
 - d. Custodian
 - e. Other Custodian (if cross-custodian de-duplication is employed)
 - f. Path (original path for edocs, inbox path for emails)
 - g. Document Type
 - h. Confidentiality Designation
 - i. Subject (for emails)
 - j. To (for emails)
 - k. From (for emails)

¹ The Group Identifier should contain the Begbates value of an attachment's parent document. The Group Identifier for a parent document is equal to the Begbates for the parent document.

- l. Cc (for emails)
- m. Bcc (for emails)
- n. Received Date/Time (for emails)
- o. Sent Date/Time (for emails)
- p. Time Offset Value (indicate which time zone the data is set to when processed)
- q. E-mail Has Attachments (Yes/No filed indicating if there are attachments to an e-mail)
 - r. E-mail Attachment Count (number of attachments to an e-mail)
- s. Link to Extracted Text (body of email for email, extracted text of document for edocs and attachments)
 - t. File Author (for Attachments and Edocs)
 - u. File Name (for Attachments and Edocs)
 - v. File Create Date/Time (for Attachments and Edocs)
 - w. File Modify Date/Time (for Attachments and Edocs)
 - x. Page Count
 - y. MD5 Hash Value
 - z. Path to Native File
 - aa. Has Hidden Data: Yes or blank (Hidden data refers not only to Excel files with hidden columbs, rows, spreadsheets, etc., but also PowerPoint files in which comments or other fields may be hidden)
- 5. Extracted full text (not OCR text) should be delivered for each electronic document. The extracted full text should be delivered on a document level according to the specifications above similar to paper documents.
- 6. Social Media and Web Content. Social media and other web content shall be produced as Group IV TIFF images with associated metadata load files. The parties will further confer regarding the specific web pages and available metadata.

C. Production of Structured Data

Databases or structured data should be produced in a mutually agreeable data exchange format. To the extent a response to discovery requires production of discoverable electronic information contained in a database, the producing party will make available a data dictionary or equivalent information identifying the specific fields included in its database and what sort of information is stored in each field, so that the parties may meet and confer regarding which data elements will be extracted for production. Ultimately, production should be in an exportable electronic file (*e.g.*, Excel or CSV format).

D. <u>Non-Substantive Files</u>

System and program files defined on the National Institute of Standards and Technology ("NIST") list need not be processed, reviewed or produced.

E. Color

For files not produced in their native format, if an original document contains color, the producing party may produce black and white image(s). At the request of the receiving party, the parties shall meet and confer regarding production of color image(s) for specific documents.

F. Bates Numbering

- 1. Document Images. Each page of a produced Document shall have a unique page identifier ("Bates Number") electronically "burned" onto the image at a location that does not unreasonably conceal or interfere with any information from the source document. Any confidentiality legend shall be "burned" onto each document's image at a location that does not unreasonably obscure any information from the source document. Redacted documents will be so identified by electronically "burning" the legend "Redacted" onto each document's image at a location that does not unreasonably obscure any information from the source document.
- 2. Native Format Documents. Documents produced in Native Format will be produced with a placeholder TIFF image. Each TIFF placeholder will contain the Bates number and confidentiality designation, if any.
- 3. Confidentiality Designations. Information designated as "CONFIDENTIAL INFORMATION" pursuant to the terms of a Protective Order entered by the Court in the Litigation, or that has been redacted in accordance with applicable law or court order, shall show the confidentiality designation both on the face of all TIFFs pertaining to such item/document, and in the appropriate data field in the load file.

When any "CONFIDENTIAL INFORMATION" is converted to a printed or imaged format for use in any submission or proceeding, the printout or page image shall bear the protective legend on each page in a clear and conspicuous manner, but not so as to obscure the content.

G. Production Media

Documents shall be produced by SFTP site or on CD-ROM, DVD, external hard drive (with standard PC compatible interface), or such other readily accessible computer or electronic media as the parties may hereafter agree upon (the "Production Media"). Each item of Production Media shall include: (1) its own unique name and a consistent naming convention; (2) text referencing that it was produced in the Litigation; and (3) the Bates range contained on such Production Media item.

H. Attachments

Email attachments and embedded files or links must be mapped to their parent by the Document or Production number. If attachments and embedded files are combined with their parent documents, "BeginDoc" and "EndDoc" fields listing the unique beginning and ending number for each document and "BeginAttach" and "EndAttach" fields listing the begin and end of the entire document family must be included.

I. Embedded Objects

Objects embedded in Microsoft Word and .RTF documents, which have been embedded with the "Display as Icon" feature, will be extracted as separate documents and treated like attachments to the document. Other objects embedded in documents shall be produced as native files.

J. <u>Compressed Files</u>

Compression file types (i.e., .CAB, .GZ, .TAR, .Z, .ZIP) shall be decompressed in a reiterative manner to ensure that a zip within a zip is decompressed into the lowest possible compression resulting in individual folders and/or files.

K. <u>Production Problems</u>

Documents that present imaging or format production problems shall be promptly identified and disclosed to the requesting party; the parties shall then meet and confer to attempt to resolve the problems.

Exhibit B

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND Greenbelt Division

THE DISTRICT OF COLUMBIA and THE STATE OF MARYLAND,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States of America, in his official and in his individual capacity,

Defendant.

Civil Action No. 8:17-cv-01596-PJM

NOTICE OF SUBPOENA

TO:

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Civil Division, Federal Programs Branch
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PLEASE TAKE NOTICE, pursuant to Federal Rule of Civil Procedure 45, that the District of Columbia and State of Maryland intend to serve a subpoena, in the form attached hereto, on the Department of Defense on December 4, 2018, or as soon thereafter as service may be effectuated.

Dated: December 4, 2018

THE STATE OF MARYLAND

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Attorney General of Maryland

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Solicitor General

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/s/ Leah J. Tulin

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United States District Court

for the
District of Maryland

	District	or iviary	ana		
Donald	of Columbia, et al laintiff v. d J. Trump fendant))))	Civil Action No.	8:17-cv-01596-	PJM
SUBPOENA	TO PRODUCE DOCUMENT INSPECTION OF PR				TO PERMIT
To: The United Sta	tes Department of Defense c/o L 1600 Defense Pent	agon, W		301	eneral Counsel;
1			_		
	U ARE COMMANDED to produce stored information, or objects, an ent A				
Place: Cohen Milstein Sellers & Toll PLLC 1100 New York Avenue, N.W. Ste 500 Washington, D.C. 20005			Date and Time:		
			January 3, 2019, 9:00 AM		
other property possessed	mises: YOU ARE COMMAND or controlled by you at the time, rvey, photograph, test, or sample	date, an	d location set forth	n below, so that t	he requesting party
Place:			Date and Time:		
Rule 45(d), relating to yo	ovisions of Fed. R. Civ. P. 45 are ur protection as a person subject and the potential consequences of	to a sub	poena; and Rule 4		
	CLERK OF COURT		OR Auss	and me	State Jack
	Signature of Clerk or Deputy (Clerk		Attorney's sig	gnature
The name, address, e-mai	il address, and telephone number	of the a	ttorney representi	ng (name of party)	
The District of Columbia a	•		• •	es or requests this	subpoena are:
	St. NW, Ste. 630 S, Washington,	DC 2000		•	•
	Place, 20th Floor, Baltimore, MD		<u> </u>		

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Case 8:17-cv-01596-PJM Document 170-2 Filed 06/12/20 Page 5 of 18

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 8:17-cv-01596-PJM

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

	ubpoena for (name of individual and title, if an	ny)	
late)	·		
☐ I served the s	subpoena by delivering a copy to the nar	med person as follows:	
		on (date) ;	or
☐ I returned the	e subpoena unexecuted because:		
tendered to the v		States, or one of its officers or agents, I e, and the mileage allowed by law, in the	
iees are \$		for services, for a total of \$	0.00
I declare under p	penalty of perjury that this information i	s true.	
:			
		Server's signature	
		Printed name and title	

Additional information regarding attempted service, etc.:

Case 8:17-cv-01596-PJM Document 170-2 Filed 06/12/20 Page 6 of 18

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action(Page 3)

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

- (1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- **(B)** within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
- (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
 - **(B)** inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

- (A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
- **(B)** Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

- (A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
 - (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
 - (iv) subjects a person to undue burden.
- **(B)** When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.
- (C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
 - (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

- (1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:
- (A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
- **(B)** Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
- (C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.
- **(D)** Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

- (A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
 - (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.
- **(B)** Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

UNITED STATES DISTRICT COURT DISTRICT OF MARYLAND GREENBELT DIVISION

THE DISTRICT OF COLUMBIA AND TH	E
STATE OF MARYLAND,	

Plaintiffs,

Case No. 8:17-cv-01596

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America,

Defendant.

ATTACHMENT A TO SUBPOENA TO THE UNITED STATES DEPARTMENT OF DEFENSE DEFINITIONS

- 1. "All" shall be construed as all, each, any, and every.
- 2. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these Requests all information that might otherwise be construed to be outside their scope.
- 3. "Business(es)" means any partnership, joint venture, unincorporated association, limited liability company, corporation, firm, estate, or trust.
- 4. "Communications" is used in the broadest sense possible and means every manner of disclosure, transfer, or exchange of information to another Person or Persons, whether orally, written, electronically (including e-mail, voicemail, voicemail which is delivered by email, text messages, tweet, direct messages, instant messaging, other social media communication, and/or

any other form of electronic correspondence or exchange), by Document, mail, personal delivery, face-to-face meeting, or otherwise. All such Communications in writing shall include, without limitation, printed, typed, handwritten, or other Documents.

- 5. "Concerning" means relating to, referring to, describing, evidencing, or constituting, in whole or in part, directly or indirectly, the stated subject matter.
- 6. "Document(s)" means written, recorded, and graphic material of every kind and Electronically Stored Information—including drawings, graphs, charts, photographs, sound recordings, video recordings, images, and other data and data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by You into a reasonably usable form. A draft or non-identical copy is a separate document within the meaning of this term. Document(s) includes the labels or metadata associated with each original or copy.
- 7. "Electronically Stored Information," or "ESI" means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise) of any electronically created or stored information, including e-mail, instant messaging, videoconferencing, SMS, MMS, or other text messaging, and other electronic correspondence (whether active, archived, unsent, or in a sent or deleted-items folder), word-processing files, spreadsheets, databases, unorganized data, Document metadata, presentation files, video recordings, and sound recordings, regardless of how or where the information is stored, including if it is on a mobile device.
- 8. "Emoluments Clauses" means the language in U.S. Const. art. I, § 9, cl. 8 prohibiting any "Person holding any Office of Profit or Trust" from accepting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State," absent

"the Consent of the Congress" and the language in U.S. Const. art. II, § 1, cl. 7 prohibiting the President from "receiv[ing] within that Period any other Emolument from the United States, or any of them."

- 9. "Emoluments Litigation" refers to *Citizens for Responsibility & Ethics in Washington v. Trump*, 17-cv-458 (S.D.N.Y.); *District of Columbia & Maryland v. Trump*, 8:17-cv-01596 (D. Md.); *Blumenthal v. Trump*, 17-cv-1154 (D.D.C.), and any other existing or future lawsuits alleging that President Donald J. Trump has violated the Emoluments Clauses.
 - 10. "Including" shall be construed as "including, but not limited to".
 - 11. "Payment" includes both direct and indirect payments.
- 12. "Person(s)" includes without limitation any natural person, entity, individual or group of individuals partnership, joint venture, unincorporated association, corporation, firm, or estate.
- "central" in the Washington-Arlington-Alexandria DC-VA-MD-WV Metropolitan Statistical Area as defined by the Office of Management and Budget Bulletin No. 15-01, which includes the District of Columbia; Montgomery County, MD; Prince George's County, MD; Arlington County, VA; Fairfax County, VA; Fauquier County, VA; Loudoun County, VA; Prince William County, VA; Stafford County, VA; Alexandria city, VA; Fairfax city, VA; Falls Church city, VA; Manassas city, VA; and Manassas Park city, VA.
- 14. "You" and "Your" mean the recipient of these requests and shall include all present and former officers, directors, employees, attorneys, agents, and representatives and any Person acting or purporting to act on behalf of any of the above, and all subordinate agencies, departments, and divisions.

GENERAL INSTRUCTIONS

- 1. In responding to these Requests, You are to furnish all available information, including information in the possession, custody, or control of Your agents and all Persons acting on Your behalf. This includes Documents presently in the possession, custody or control of Your attorney(s) or their investigators or any third party or parties to whom You have surrendered possession, custody or control, or who are acting on Your behalf, or who have otherwise obtained possession, custody or control, or who, upon Your request, would surrender possession, custody or control to You.
- 2. If any responsive Document was, but no longer is, in Your possession, custody or control, produce a description of each such Document. The description shall include the following:
 - (a) the name of each author, sender, creator, and initiator of such Document;
 - (b) the name of each recipient, addressee, or party for whom such Document was intended;
 - (c) the date the Document was created;
 - (d) the date(s) the Document was in use;
 - (e) a detailed description of the content of the Document;
 - (f) the reason it is no longer in Your possession, custody or control; and
 - (g) the Document's current location.
 - (h) If the Document is no longer in existence, in addition to providing the information indicated above, state on whose instructions the Document was destroyed or otherwise disposed of, and the date and manner of the disposal.

- 3. If You claim the attorney-client privilege, or any other privilege or protection (including work product, deliberative process, joint defense, or common interest protections) for any Document, You shall provide the following information with respect to each such Document:
 - a. the type of privilege or protection claimed;
 - b. the type of Document;
 - c. the general subject matter of the Document;
 - d. the date of the Document;
 - e. such other information as is sufficient to identify the Document for a subpoena duces tecum, including, where appropriate, the name and title of the author of the document, the name and title of any recipient, and identification of anyone providing legal counsel;
 - f. the Request(s) to which the Document is responsive; and
 - g. any other information required to be furnished by Fed. R. Civ. P. 26(b)(5).

Provide the information requested in this instruction in a searchable and sortable electronic format and with sufficient specificity to enable the undersigned counsel and the Court to assess the applicability of the claimed privilege or protection.

- 4. These Requests shall be deemed continuing in nature so as to require production of all additional or different Documents or information responsive to these Requests, which You discover, receive, or generate between the time of the original production and trial.
- 5. All Documents and/or other data which relate to the subject matter of this case or these requests must be preserved. Any destruction involving such Documents must cease, even if it is Your normal or routine course of business to delete or destroy such Documents or data and even if You believe such Documents or data are privileged or otherwise need not be produced.

6. Documents shall be produced in the manner described in the attached Appendix Regarding Form of Production.

REQUESTS FOR DOCUMENTS

REQUEST FOR PRODUCTION NO. 1:

For the period November 8, 2016 to the present, all Documents showing or referring to any Payments by You to the Trump International Hotel Washington D.C. ("Trump International Hotel"), BLT Prime by David Burke Washington, D.C. ("BLT Prime"), or any Business providing goods or services within the Trump International Hotel or BLT Prime, including credit card and billing receipts and records, and all Documents Concerning tax exempt Payments and payors.

REQUEST FOR PRODUCTION NO. 2:

For the period January 1, 2014 to the present, Documents sufficient to show any Payments by You to hotels, restaurants, or event spaces in the Washington D.C. metropolitan area other than those Businesses covered by Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 3:

For the period November 8, 2016 to the present, all Documents Concerning the Emoluments Clauses and Emoluments Litigation.

REQUEST FOR PRODUCTION NO. 4:

For the period November 8, 2016 to the present, all Documents Concerning Communications relating to the Trump International Hotel, BLT Prime, or any other Business covered by Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 5:

For the period November 8, 2016 to the present, all Documents Concerning the policies, guidelines, factors, and other venues You considered in choosing the restaurants, hotels, or event spaces You used in the Washington D.C. metropolitan area.

6

Date: December 4, 2018

Leah J. Tulin

THE STATE OF MARYLAND

THE DISTRICT OF COLUMBIA

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Attorneys for Plaintiffs *admitted pro hac vice

APPENDIX TO DOCUMENT REQUESTS REGARDING FORM OF PRODUCTION

A. <u>Hard Copy Paper Documents</u>

- 1. <u>All hard copy paper documents</u> should be produced as TIFF image files (black-and-white) and as JPEG image files (color) in electronic form. Each filename must be unique and match the Bates number of the page. The filename should not contain any blank spaces and should be zero padded (for example ABC0000001).
- 2. Each delivery should be accompanied by an image cross reference file that contains document breaks.
- 3. A delimited text file that contains available fielded data should also be included, at a minimum including Beginning Bates Number, Ending Bates Number, Custodian and Number of pages, as well as link to OCR text if any (see below). The following delimiters should be used:

a. Field Separator (ASCII:0020)

b. Quote (ASCII:0254)

c. Multi-Entry Delimiter (ASCII:0059)

d. <Return> Value in Data (ASCII:0174)

- 4. To the extent that documents have been run through an Optical Character Recognition (OCR) software in the course of reviewing the documents for production, full text should also be delivered for each document. Text should be delivered on a document level in an appropriately formatted text file (.txt) that is named to match the first bates number of the document.
- 5. A text cross reference load file should also be included with the production delivery that lists the beginning Bates number of the document and the relative path of the text file for that document on the production media.
- 6. The TIFF images should be produced as single-page Group IV TIFF format at 300 dpi with an Opticon image load file. The Opticon image load file should contain the BEGBATES value for each corresponding document and appropriate path or folder information to the corresponding images that comprise each document. Each TIFF or JPEG image should be individually Bates numbered. The Bates number must not obliterate, conceal, or interfere with any information on the produced document.
- 7. Every TIFF file in each production must be referenced in the production's corresponding load file. The total number of TIFF files referenced in a production's load file should match the number of TIFF files in the production.

B. All Electronic Documents

- 1. <u>All electronic documents</u> should be produced in such fashion as to identify the location (i.e. the network file folder, hard drive, backup-tape or other location) where the documents are stored and, where applicable, the natural person in whose possession they were found (or on whose hardware device they reside or are stored). If the storage location was a file share or work group folder, that should be specified as well.
- 2. Attachments, enclosures, and/or exhibits to any parent documents should also be produced and proximately linked to the respective parent documents containing the attachments, enclosures and/or exhibits.
- 3. For all documents originating in electronic form, documents should be produced as native format and in the order that they were stored in the ordinary course of business, i.e. emails that attach documents or spreadsheets should not be separated from each other and should be linked using the Group Identifier field above. The file name should match the bates number assigned to the file.
- 4. For Documents that are produced from electronic format, the full extracted text will be provided by a link in the main (.DAT) load file. The following extracted data and metadata fields shall to be provided in the load file:
 - a. Begbates
 - b. Endbates
 - c. Group Identifier¹
 - d. Custodian
 - e. Other Custodian (if cross-custodian de-duplication is employed)
 - f. Path (original path for edocs, inbox path for emails)
 - g. Document Type
 - h. Confidentiality Designation
 - i. Subject (for emails)
 - j. To (for emails)
 - k. From (for emails)

¹ The Group Identifier should contain the Begbates value of an attachment's parent document. The Group Identifier for a parent document is equal to the Begbates for the parent document.

- l. Cc (for emails)
- m. Bcc (for emails)
- n. Received Date/Time (for emails)
- o. Sent Date/Time (for emails)
- p. Time Offset Value (indicate which time zone the data is set to when processed)
- q. E-mail Has Attachments (Yes/No filed indicating if there are attachments to an e-mail)
 - r. E-mail Attachment Count (number of attachments to an e-mail)
- s. Link to Extracted Text (body of email for email, extracted text of document for edocs and attachments)
 - t. File Author (for Attachments and Edocs)
 - u. File Name (for Attachments and Edocs)
 - v. File Create Date/Time (for Attachments and Edocs)
 - w. File Modify Date/Time (for Attachments and Edocs)
 - x. Page Count
 - y. MD5 Hash Value
 - z. Path to Native File
 - aa. Has Hidden Data: Yes or blank (Hidden data refers not only to Excel files with hidden columbs, rows, spreadsheets, etc., but also PowerPoint files in which comments or other fields may be hidden)
- 5. Extracted full text (not OCR text) should be delivered for each electronic document. The extracted full text should be delivered on a document level according to the specifications above similar to paper documents.
- 6. Social Media and Web Content. Social media and other web content shall be produced as Group IV TIFF images with associated metadata load files. The parties will further confer regarding the specific web pages and available metadata.

C. Production of Structured Data

Databases or structured data should be produced in a mutually agreeable data exchange format. To the extent a response to discovery requires production of discoverable electronic information contained in a database, the producing party will make available a data dictionary or equivalent information identifying the specific fields included in its database and what sort of information is stored in each field, so that the parties may meet and confer regarding which data elements will be extracted for production. Ultimately, production should be in an exportable electronic file (*e.g.*, Excel or CSV format).

D. <u>Non-Substantive Files</u>

System and program files defined on the National Institute of Standards and Technology ("NIST") list need not be processed, reviewed or produced.

E. Color

For files not produced in their native format, if an original document contains color, the producing party may produce black and white image(s). At the request of the receiving party, the parties shall meet and confer regarding production of color image(s) for specific documents.

F. Bates Numbering

- 1. Document Images. Each page of a produced Document shall have a unique page identifier ("Bates Number") electronically "burned" onto the image at a location that does not unreasonably conceal or interfere with any information from the source document. Any confidentiality legend shall be "burned" onto each document's image at a location that does not unreasonably obscure any information from the source document. Redacted documents will be so identified by electronically "burning" the legend "Redacted" onto each document's image at a location that does not unreasonably obscure any information from the source document.
- 2. Native Format Documents. Documents produced in Native Format will be produced with a placeholder TIFF image. Each TIFF placeholder will contain the Bates number and confidentiality designation, if any.
- 3. Confidentiality Designations. Information designated as "CONFIDENTIAL INFORMATION" pursuant to the terms of a Protective Order entered by the Court in the Litigation, or that has been redacted in accordance with applicable law or court order, shall show the confidentiality designation both on the face of all TIFFs pertaining to such item/document, and in the appropriate data field in the load file.

When any "CONFIDENTIAL INFORMATION" is converted to a printed or imaged format for use in any submission or proceeding, the printout or page image shall bear the protective legend on each page in a clear and conspicuous manner, but not so as to obscure the content.

G. Production Media

Documents shall be produced by SFTP site or on CD-ROM, DVD, external hard drive (with standard PC compatible interface), or such other readily accessible computer or electronic media as the parties may hereafter agree upon (the "Production Media"). Each item of Production Media shall include: (1) its own unique name and a consistent naming convention; (2) text referencing that it was produced in the Litigation; and (3) the Bates range contained on such Production Media item.

H. Attachments

Email attachments and embedded files or links must be mapped to their parent by the Document or Production number. If attachments and embedded files are combined with their parent documents, "BeginDoc" and "EndDoc" fields listing the unique beginning and ending number for each document and "BeginAttach" and "EndAttach" fields listing the begin and end of the entire document family must be included.

I. Embedded Objects

Objects embedded in Microsoft Word and .RTF documents, which have been embedded with the "Display as Icon" feature, will be extracted as separate documents and treated like attachments to the document. Other objects embedded in documents shall be produced as native files.

J. <u>Compressed Files</u>

Compression file types (i.e., .CAB, .GZ, .TAR, .Z, .ZIP) shall be decompressed in a reiterative manner to ensure that a zip within a zip is decompressed into the lowest possible compression resulting in individual folders and/or files.

K. <u>Production Problems</u>

Documents that present imaging or format production problems shall be promptly identified and disclosed to the requesting party; the parties shall then meet and confer to attempt to resolve the problems.