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April 12, 2023

Hon. Juan Merchan
New York State Supreme Court
100 Centre Street
Part 59
New York, New York 10013

Re: People v. Donald J. Trump
Indictment No. 71543/2023

Your Honor:

I respectfully submit this letter, as counsel for President Donald J. Trump, in response to the Court's request that I provide my position with respect to a letter dated April 3, 2023, which was filed by the People at President Trump's arraignment. As the Court is aware, that letter, which was authored by Clark O. Brewster ("Brewster"), counsel for Stephanie Clifford, also known as Stormy Daniels ("Daniels"), contends that both my firm and I have a conflict of interest in our representation of President Trump that requires our disqualification in this matter. That is patently false. As demonstrated below, Rule 1.18 of the New York Rules of Professional Conduct, relating to an attorney's duties to prospective clients, governs here. And, under section (c) of that provision, an attorney is subject to disqualification only if a prospective client could be "significantly harmed" by the attorney's representation of another. Clearly, that circumstance does not exist here. In fact, strikingly absent from her letter is any claim by Daniels that she could be "significantly harmed" by my and my firm's representation of President Trump in this matter.

At the outset, as evidenced by his letterhead and a search on the New York State Uniformed Court System's website, Daniels's attorney, Brewster, is not licensed to practice in New York State. Thus, despite casting unwarranted aspersions of unethical behavior, it would appear that Brewster's letter dated April 3, 2023, submitted on behalf of Daniels, evidences his own ethical violation, namely the unauthorized practice of law under Rule 5.5 of the New York Rules of Professional Conduct. *See Matter of In re Scheideler*, 147 A.D.3d 29, 31 (2d Dept. 2016) ("The issuance of settlement letters constitutes the practice of law."). For that matter, such unauthorized practice constitutes a misdemeanor criminal offense pursuant to Judiciary Law § 485. The foregoing is relevant when considering the merits of Brewster's assertions regarding the rules of ethics. Equally

relevant is the fact that Brewster disclosed his April 3, 2023 letter to the press in what amounts to an obvious publicity stunt, thereby further undermining the merits of his claim.

Turning to the merits,"defendants who retain counsel [ ] have a right of constitutional dimensions to representation by counsel of their own choice [and] that choice should not unnecessarily be obstructed by the court." *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir. 1969)(citation omitted); *see also*, *People v. Sapienza*, 75 A.D.3d 768, 770 (3d Dep't 2010) ("Criminal defendants have a constitutional right to be represented by counsel of their own choosing ...."); *People v. Sawyer*, 83 A.D.2d 205, 207 (4th Dep't 1981) (holding same), *aff'd*, 57 N.Y.2d 12 (1982). Importantly, the right to counsel of one's choice "is a valued right which will not be superseded absent a clear showing that disqualification is warranted." *Halberstam v. Halberstam*, 122 A.D.3d 679 (2d Dept. 2014).

In light of the foregoing, "any restrictions on [the] right [to counsel of one's choice] must be carefully scrutinized. Courts should also examine whether a motion to disqualify, made in ongoing litigation, is made for tactical purposes, so as to delay litigation and deprive an opponent of quality representation." *Skanska USA Bldg. Inc. v. Atl. Yards B2 Owner, LLC*, 146 A.D.3d 1, 13 (1st Dep't 2016) (citations and quotations omitted), *aff'd*, 31 N.Y.3d 1002 (2018); *see also*, *Mayers v. Stone Castle Partners, LLC*, 126A.D.3d 1, 4 (1st Dept. 2015) ("A party has a right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized.") (internal citations and quotation marks omitted). As aptly stated in *Ullmann-Schneider v. Lacher & Lovell-Taylor PC*,

> Disqualification during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants and denies a party's right to representation by the attorney of its choice. The right to counsel is a valued right and any restrictions must be carefully scrutinized. Furthermore, where the rules relating to professional conduct are invoked not at a disciplinary proceeding but in the context of an ongoing lawsuit, disqualification can create a strategic advantage of one party over another.

110 A.D.3d 469, 469–70 (1st Dep't 2013)(quotations, citations, brackets and ellipses omitted).

Against the preceding backdrop, it bears emphasis that "[a] movant seeking disqualification of an opponent's counsel faces a heavy burden." *Skanska USA Bldg. Inc.*, 146 A.D.3d at 13; *HoganWillig, PLLC v. Swormville Fire Co.*, 210 A.D.3d 1369, 1372–73 (4th Dep't 2022) ("The

party seeking disqualification of a law firm or an attorney bears the burden of making a clear showing that disqualification is warranted."); *Ullmann-Schneider*, 110 A.D.3d at 470 (holding same); *Kramer v. Meridian Cap. Grp.*, LLC, 201 A.D.3d 909, 912 (2d Dep't 2022) (holding same). For the following reasons, no movant will be able to sustain that heavy burden in this case.

In her letter, Daniels claims that my firm "allegedly" expressed its willingness to represent her upon payment of a quoted retainer fee. Daniels's letter, p.2. That is blatantly untrue, which is why, despite touting email communications with my firm, Daniels fails to cite any such emails to support her contention. Instead, Daniels oddly cites to comments by me during an interview with CNN on March 15, 2018, to support her false claim that I "allegedly presented her with a representation offer." Daniels's letter, p.2. However, nothing in my commentary, which Daniels quotes at length, supports her position. Nonetheless, even had my firm been willing to represent her (which it was not), that unsupported assertion does not alter the fact that neither I nor my firm ever did so. By her own concession, Daniels was never an actual client, as her consultation never led to her retention of me or my firm. Thus, as referenced above, the "prospective client" rule under Rule 1.18 of the New York Rules of Professional Conduct controls. The relevant sections thereof provide:

> (a) Except as provided in Rule 1.18(e), a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter ***if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter***, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

Duties to Prospective Clients, NY ST RPC Rule 1.18 (emphasis added).

Although Daniels recites the preceding rule in passing, it remains in her letter untethered to the facts. Indeed, Daniels never alleges any circumstance relating to her consultation that could be "significantly harmful" to her in this matter. Nor can she do so, as the information she conveyed during her consultation is, at a bare minimum, already in the public domain. As such, it cannot be deemed "significantly harmful":

> [C]ourts have held that information is not "significantly harmful" if it is public information, if it merely regards the "history of the dispute," or if it is "likely to be revealed at [the moving party's] deposition or in other discovery." *Zalewski [v. Shelroc Homes, LLC]*, 856 F. Supp. 2d [426] 435 [N.D.N.Y. 2012]; *Bell v. Cumberland Cty.*, No. 09-6485 (JHR) (JS), 2012 WL 1900570, at *8 (D.N.J. May 23, 2012) (applying the New Jersey analog to N.Y.R.P.C. 1.18).

Benevida Foods, LLC v. Advance Magazine Publishers Inc., 2016 WL 3453342, at *11 (S.D.N.Y. 2016); *see also*, *Mendelson v. Evans*, No. 20 CV 2583 (VB), 2022 WL 2834106, at *6 (S.D.N.Y. July 20, 2022) ("The types of information that are not usually significantly harmful include: information that is public; information regarding the history of the dispute; and information likely to be revealed at deposition or in other discovery.") (citations and quotations omitted); *Xiao Hong Liu v. VMC E. Coast LLC*, No. 16CV5184AMDRML, 2017 WL 4564744, at *4 (E.D.N.Y. Oct. 11, 2017) (holding same); *Azria v. Azria*, 184 A.D.3d 419, 420 (1st Dep't 2020) ("The wife fails to show that the partner with whom she met received information from her that could be significantly harmful to her in connection with the Dobrish Firm's representation of the husband. Furthermore, the financial information she shared with the partner would have been subject to discovery and was already known to the husband.") (citations omitted); *Gabel v. Gabel*, 101 A.D.3d 676, 677 (2d Dep't 2012) ("[T]he defendant did not argue, and there are no facts in the record to support a finding, that the prior representation concerned any confidential information regarding the value of the corporation (see Business Corporation Law §§ 402, 403) or that the attorney was provided with any information that is not contained in the corporate filing itself."); *Eisner v. Cusumano Const., Inc.*, No. 17142014, 2014 WL 11035571, at *7 (Sup. Ct. Nassau Co. Aug. 20, 2014), *rev'd on other grounds*, 132 A.D.3d 940 (2d Dep't 2015) ("[I]t appears that the emails referenced and relied upon by plaintiffs involved nothing more than basic background information, information that is attached to their own complaint and matters of public record.... There is nothing in the emails that could be harmful, much less significantly harmful, to the plaintiffs. Disqualification of defendants' counsel is accordingly denied.").

Although Daniels states that she communicated with my firm, what she fails to convey is the specific substance of such communications. Importantly, Rule 1.6(b)(5) and (6) of the Rules of

Professional Conduct permit a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary" in order to, respectively, "defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct" and "comply with other law or court order." Given that Daniels has accused me and my firm of operating under an unethical conflict of interest, and the Court has sought our position with respect thereto, revealing the nature of her consultation with my firm is now necessary. Accordingly, kindly note that such consultation pertained exclusively to the issue of whether her non-disclosure agreement with President Trump was enforceable. While the facts relating thereto would likely be revealed in discovery, it cannot be sufficiently underscored that such facts have already been made public by Daniels herself.

Specifically, in a complaint filed in the Superior Court of the State of California for the County of Los Angeles on March 6, 2018, a copy of which is annexed hereto as Exhibit A, Daniels publicly disclosed the information she communicated to my firm, which included the existence of the non-disclosure agreement, the circumstances of its negotiation, and the identity of the parties' proxies. In a similar vein, Daniels also revealed such information during a 60 Minutes interview on August 22, 2018, and in her memoir, entitled, "Full Disclosure," which was published on October 2, 2018. A transcript of her interview is annexed hereto as Exhibit B, and the relevant portions of her memoir, which detail the information she conveyed to my firm, is annexed hereto as Exhibit C.

Morever, the fact that Daniels could not be significantly harmed by her consultation with my firm in this case is supported by the subject matter of the Indictment. As stated above, Daniels conferred with my firm regarding whether her non-disclosure agreement was enforceable. In contrast, irrespective of the agreement's enforceability, what is at issue in this matter is the categorization of the payment made to Daniels. Thus, there is nothing about her communications with my office that could significantly harm her. But again, separate and apart from their substance, the only communications made by Daniels to my firm involved information which not only will likely be revealed in discovery but is already in the public domain. And, beyond cavil, both of those categories of information are quintessentially not "significantly harmful." *Benevida Foods, LLC*, 2016 WL 3453342, at *11.

Because the facts and law clearly refute Daniels's position, she does not even attempt to explain how any information she conveyed to my office could significantly harm her. Instead, she makes vague, unsubstantiated assertions which cannot possibly carry the heavy burden a movant would bear to disqualify defendant's counsel of his choice. In *Streichert v. Town of Chester*, No. 19-CV-7133 (KMK), 2020 WL 6047719, at *3 (S.D.N.Y. Oct. 13, 2020), the Court, when presented with a motion to disqualify counsel under Rule 1.18, held that it would "give little weight to vague,

unsubstantiated assertions that non-public information was disclosed." In this matter, Daniels does not even allege that any information she conveyed to my firm is non-public, let alone significantly harmful. Nor could she convincingly do so given her public disclosures to date, as the attachments to this letter clearly evidence.

In sum, despite her general claim that my firm and I have a conflict of interest requiring our disqualification as President Trump's counsel in this matter, the facts and law belie any such notion. Because President Trump's constitutional right to counsel of his choice "is a valued right which will not be superseded absent a clear showing that disqualification is warranted," *Halberstam*, 122 A.D.3d at 679, and a movant here could not sustain that heavy burden, both my firm and I should be permitted to continue as defense counsel in this matter.

Your consideration is greatly appreciated.

Respectfully submitted,

Joseph Tacopina

cc: All counsel