From: Summer Zervos <[redacted]>
Sent: Sunday, August 09, 2015 12:23 PM
To: foxnewstips@foxnews.com
Subject: Trump Hit On Me

I was on the Apprentice. After the show was completed, Trump invited me to a hotel room under the guise of working for him. He had a different agenda. Please contact me to speak further as I have tried to make contact.

[redacted]
Summer Zervos

Sent from my iPhone

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

SUMMER ZERVOS,

Plaintiff,

DONALD J. TRUMP,

Defendant.
----------x

Index No.: 150522/2017

Hon. Jennifer G. Schecter

Motion Seq. No. 006

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO DE-DESIGNATE DOCUMENTS THAT WERE IMPROPERLY DESIGNATED "CONFIDENTIAL"

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Plaintiff Summer Zervos submits this Memorandum of Law in support of Plaintiff's motion to de-designate certain non-confidential documents that Defendant and his company, so-called "non-party" The Trump Organization LLC ("the Trump Organization"), produced in discovery but improperly designated as "confidential" in an attempt to shield them from public scrutiny.[1]

Preliminary Statement

This case, fundamentally, is about the truth. Summer Zervos told the truth when she stated publicly that Defendant sexually assaulted her. Defendant then deliberately and maliciously lied when he attacked her by falsely, repeatedly declaring to millions of people that she fabricated the events for money, fame, and political purposes. *See generally* Complaint (Dkt. No. 1) (Exhibit A[2]) ¶¶ 54-78. Plaintiff commenced this action in January 2017 to prove that the truth matters, and that deliberate false attacks are both profoundly harmful and violate the law.

The truth is particularly crucial in the context of reporting sexual assaults committed by those with all the power against those with none. A sexual perpetrator who attacks his victim yet again with malicious falsehoods does so to make clear to the world and those he abuses that his victims must never reveal their truth, and that they should instead remain silenced and ashamed. It is, in effect, an expansion and perpetuation of the abuse.

Summer Zervos seeks to vindicate her rights and has prosecuted this action through active discovery to uncover the truth and to hold Defendant accountable for his lies.

[1] Plaintiff has argued already that the Trump Organization is under the effective control of Defendant for purposes of this litigation, which has been evidenced throughout this case. *See* Dkt. No. 188. The Court indicated during the October 26, 2018 conference with the parties that it need not address that issue as a practical matter because the Trump Organization was going to produce documents in response to a subpoena and not charge any costs.

[2] All references to "Exhibit __" refer to the exhibits appended to the accompanying Affirmation of Mariann Meier Wang dated October 24, 2019.

Despite delays, the court process has worked.[3] During discovery, Defendant and his company, the Trump Organization, were forced to produce documents that corroborate, in striking detail, the public account that Plaintiff gave before this case was filed regarding her interactions with Defendant.

Long before this case was filed, Plaintiff publicly described exactly when, where, and how the sexual assaults took place. Defendant insisted that there was no truth to Plaintiff's allegations, but he has now been forced to produce documents from his own files confirming that he and Plaintiff were exactly where she said they were exactly when she said they were there. In a further effort to hide the truth, Defendant/the Trump Organization initially designated those documents "confidential" pursuant to the Stipulation for the Exchange of Confidential Information (the "Confidentiality Stipulation" (Dkt. No. 168, Exhibit B)), and it was only after months of legal wrangling, and a recent telephone conference last Friday with the Court, that Defendant and the Trump Organization finally and begrudgingly agreed to lift a number of those baseless designations. Exhibit C (De-Designated Documents Produced in Discovery by Trump Organization).

But there is one critical piece that they insist on keeping secret. Defendant and the Trump Organization still refuse to withdraw the "confidential" designation that they baselessly attached to [redacted]

[3] While some adjournments were jointly agreed to, the serious litigation delay has all come from Defendant. To cite just a few examples: he delayed serving non-party subpoenas until only 11 days were left on the then-applicable discovery deadline (and over a year after Plaintiff served non-party subpoenas); he delayed for months in addressing ESI issues; he missed the March 2019 deadline for contesting privilege log issues by almost two months and is just now re-raising them; he failed even to use the July 2018 medical authorization we provided to him, and notified us about his failure, without explaining why, to request a new one only nine months later.

The Court has recently ordered both parties, including Defendant, to be deposed by December 6, 2019 and for Defendant to provide four dates for his deposition, with discovery closing January 30, 2020. *See* Dkt. No. 249.

[redacted].[4] The only argument they have advanced for insisting that these nine pages of documents not be publicly disclosed is that they contain Defendant's former cell phone number, which they contend is "confidential." That argument is nothing short of absurd given that Defendant no longer uses that number and, indeed, himself publicized it to his millions of Twitter followers during the 2016 campaign. Defendant evidently is aware that the documents at issue closely corroborate Plaintiff's detailed account of their interactions. That is not a valid reason for Defendant to use the Confidentiality Stipulation to continue to conceal the truth.

Background

Plaintiff alleges that, in late 2007, Defendant ambushed and sexually assaulted her on multiple occasions. Complaint ¶¶ 23-34 (Exhibit A). Defendant repeatedly touched her, groped her, and kissed her, even after she clearly and forcefully expressed her rejection of those sexual contacts, with both her words and actions. *Id.*

Plaintiff had come to know Defendant through her time in pre-production and her appearance on the fifth season of *The Apprentice*, which was filmed around the fall of 2005. *Id.* ¶¶ 19-20. In a remarkably prescient moment, Defendant fired Plaintiff on the first episode of her season for stepping in to clarify something about a colleague who was about to be fired – she insisted on intervening to tell the truth, and Defendant then turned to her and fired her for doing so. After Plaintiff explained, "I'm being truthful, and I'll always be truthful," Defendant responded, "How stupid is that?" *See* https://www.youtube.com/watch?v=DuGC6AcG6x4&t=211s (beginning at 3:31).

Plaintiff's account of Defendant's sexual assaults on her is corroborated by numerous statements and actions she took many years before she ever spoke out or filed this

[4] The documents at issue, which are Bates numbered TRUMPORG_000101 through 000109, are attached as Exhibit D to the Wang Affirmation and filed *in camera*. An unredacted version of this Memorandum of Law is also being filed *in camera*.

case. Plaintiff reported Defendant's assaults to family members and close friends immediately after they occurred and then again over the years. Complaint ¶ 3. She confronted Defendant about his inappropriate behavior, both in a phone call shortly after the assaults and in an email sent through his secretary Rhona Graff in April 2016. Exhibit E (Statement of Summer Zervos, Oct. 14, 2016) at 3-4. Plaintiff also considered taking more formal legal action with respect to Defendant many years ago and in fact reached out to multiple lawyers back in 2011, including to Gloria Allred, whose records reflect that contact. Plaintiff also contacted Fox News in August 2015 and reported that Defendant had "invited me to a hotel room under the guise of working for him" but had instead acted inappropriately toward her. Exhibit F (Email from Plaintiff to Fox News). The fact that Plaintiff sought legal counsel in 2011 and spoke about this to others including a news organization – years before the events of 2016 at issue in this case – strongly supports the inference that her core narrative is true. In addition, Plaintiff produced in discovery a polygraph test showing that she told the truth, Exhibit G, as well as photographs of the original, hard copy *New York Times,* Southern California edition, that contained an article about mortgages – the very hard copy that Defendant gave her in December 2007 when he told her that she should default on her mortgage because defaulting on debt obligations was central to his business model, Exhibit H. *See also* Exhibit E at 3; Complaint ¶ 33.[5]

But that is not all. Plaintiff's account of the underlying sexual assaults has now been corroborated, in close detail, by documents produced *from Defendant's own files*. In particular, the Trump Organization has produced copies of Defendant's calendar entries and itineraries from late 2007 through early 2008 – the period in which Ms. Zervos reported she met with and was assaulted by Defendant. Those newly de-designated documents line up with Ms. Zervos's detailed public account with striking accuracy. For example:

[5] Because it was a Sunday print edition, it appears that newspaper was delivered to Defendant prior to the listed date of December 23, 2007.

Ms. Zervos publicly stated on October 14, 2016 that: "In 2007 I was going to be in New York for a social obligation. I contacted Mr. Trump's office to see if he was available for lunch. I was informed that he could not have lunch, but that he would make time to meet with me at his office." Exhibit E, at 1. Ms. Zervos then described in her statement how Defendant kissed her on the lips twice during that meeting, which made her feel nervous and embarrassed. *Id.*

- The newly de-designated documents, which the Trump Organization produced in discovery, include:

  (1) an email from Ms. Zervos to Defendant's secretary Rhona Graff in the fall of 2007 inquiring whether Ms. Zervos could take Defendant to lunch when she was in New York, Exhibit C, at TRUMPORG_000353;

  (2) a response from Ms. Graff in which she told Ms. Zervos to reach out when she was in town and that she could meet with Defendant at Trump Tower, *id.*, at TRUMPORG_000355; and

  (3) Ms. Zervos's follow-up email on December 3, 2007 when she arrived in town, *id.*, at TRUMPORG_000351.

  Ms. Zervos also stated that soon after her meeting with Defendant at Trump Tower, Defendant reached out and reminded her that he had plans to visit Los Angeles. She stated that he then called after he had just landed in Los Angeles from Las Vegas (a fact that Keith Schiller, Defendant's bodyguard, later mentioned to her) and in that call he eventually asked her to meet him that evening at the Beverly Hills Hotel so they could go to dinner. Exhibit E, at 1-2.

- Itinerary documents produced by the Trump Organization (which were recently de-designated) corroborate that Defendant flew from Las Vegas to Los Angeles on December 21, 2007 and stayed at the Beverly Hills Hotel for two nights, until December 23, 2007. Exhibit C, at TRUMPORG_00003-00004.

  Ms. Zervos stated that when she arrived at the hotel, "[t]he security guard opened the door and [she] went in." Exhibit E, at 2.

- The newly de-designated itinerary documents show that Schiller was present with Defendant in Los Angeles during that trip. Exhibit C, at TRUMPORG_00003.

Ms Zervos described in her public statement how Defendant grabbed and sexually assaulted her in his Beverly Hills Hotel bungalow. Exhibit E, at 2.

- Once again, Defendant's calendar shows him staying at the Beverly Hills Hotel on December 21, 2007. Exhibit C, at TRUMPORG_00003-00004.

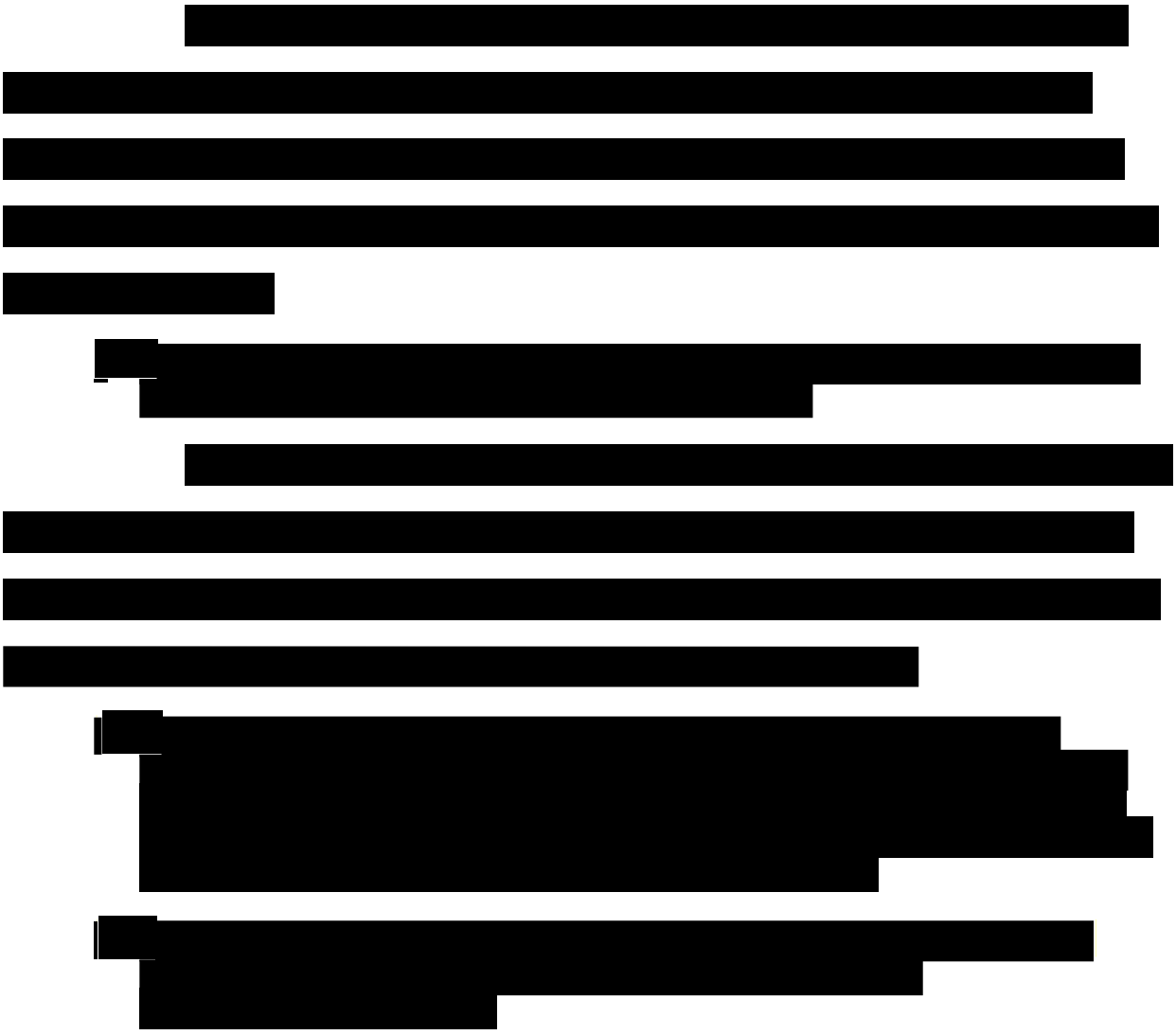
Ms. Zervos stated that before she left that night, Defendant "told [her] to meet him the next morning at his golf course in Palos Verdes." Exhibit E, at 3.

- Defendant's itinerary and calendar confirm that Defendant visited the Trump National Golf Club in Palos Verdes the next morning on Saturday, December 22, 2007. Exhibit C, at TRUMPORG_00004 (a typo on the calendar entry incorrectly states the date as December 21).

Thus, Defendant's own records – produced for the first time in 2018, long after Ms. Zervos initially spoke out – strongly corroborate Plaintiff's account of the sexual assaults that Defendant inflicted on her, and prove that Defendant lied. *See, e.g.,* Complaint ¶ 8 ("I never met her at a hotel . . .").

The additional Documents from Defendant's own files that are at issue in this motion – [redacted] – corroborate Plaintiff's account of the sexual assaults with even more granularity and with a degree of precision that Plaintiff could not have known were she not telling the truth about those interactions when she spoke publicly about them before this case was filed. For example:

[redacted]



The documents at issue in this motion therefore provide even more irrefutable proof that Plaintiff's detailed account of her interactions with Defendant is accurate.

Defendant's Attempts to Misuse the Confidentiality Stipulation

The Confidentiality Stipulation governs the designation of materials that "the parties agree merit confidential treatment" in this case. Exhibit B ¶ 1. By its terms, it provides that "[e]ach party *may* designate Documents produced . . . in connection with this action as 'confidential.'" *Id*. ¶ 2 (emphasis added). Paragraph 3 then carefully limits the categories of information that a party has the option to designate in this manner, namely materials that contain:

> (i) trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to

> the conduct of that party's business or the business of any of that party's customers or clients;
> (ii) social security numbers, bank account numbers, specific and/or detailed personal financial information of a party, home addresses, personal email addresses, personal telephone numbers, or an employee's wage information;
> (iii) medical or mental health records or medical or mental health information about a party; or
> ([iv]) the identity of any person who has made an allegation of sexual assault, sexual misconduct, or sexual harassment against a party but who has not identified herself publicly.

The Trump Organization disregarded those limited, enumerated categories of information that may be designated "confidential" under the Confidentiality Stipulation, and instead designated "confidential" every one of the 702 pages of documents it produced, regardless of whether there was any basis for doing so. Plaintiff initially raised the issue of the Trump Organization's over-designation of documents as Confidential on October 16, 2018. *See* Dkt. No. 216 at page 3, n.2.

Plaintiff's counsel contacted counsel for the Trump Organization on April 1, 2019 to seek clarification of the Trump Organization's basis for designating certain documents "confidential." We noted at that time that the cell phone number for Defendant that is listed in the documents at issue has been public for years and has been publicly disclosed by Defendant himself. Wang Aff. ¶ 12. After Plaintiff's counsel inquired about this twice, Matthew Maron, counsel for the Trump Organization, responded on April 25, 2019 but did not explain why the documents at issue were confidential, stating only that they "were designated 'Confidential' under [paragraph] 3(a)(ii)" of the Confidentiality Stipulation. We responded to the Trump Organization the same day, pointing out that its response was insufficient to satisfy the meet and confer process, and asking Mr. Maron to explain which language in the Confidentiality Stipulation supposedly applied. *Id.* ¶ 13.

On May 1, 2019, Mr. Maron stated that the Documents "are deemed 'Confidential' under paragraph 3(a)(ii) [of] the Confidentiality Stipulation as they consist of personal telephone information. Your position that the phone number referenced in these

documents was 'disclosed' in a news article provides no basis whatsoever to support their de-designation." On May 2, 2019, we wrote to Mr. Maron to formally request that certain Trump Organization productions, including the documents at issue in this motion, be de-designated, but we received no response. We wrote again on May 9, 2019 to follow up, but once again we received no response. *Id.* ¶ 14.

On October 10, 2019, we wrote to counsel for Defendant and the Trump Organization to notify them that we intended to bring the dispute over the improper confidentiality designations to the attention of the Court. On October 17, 2019, counsel participated in a telephone conference with Michael Rand, Principal Law Clerk to the Honorable Jennifer G. Schecter. During that call, Mr. Rand directed the parties to meet and confer one last time regarding the confidentiality designations of the documents at issue. If the parties could not resolve the issue, Mr. Rand indicated that the next step in accord with the Confidentiality Stipulation would be for Plaintiff to file, by Order to Show Cause, a motion to de-designate the documents. *Id.* ¶¶ 15-16.

On October 21, 2019, we conferred with counsel for Defendant and the Trump Organization. Defense counsel informed us for the first time that they were withdrawing the confidential designation for several pages of Defendant's itineraries and other documents from 2007 that were in dispute, after baselessly designating them confidential and then refusing to remove that designation in numerous conferrals. Notably, although Mr. Maron from the Trump Organization was on the line, counsel for Defendant was the one who informed us of this change, confirming again that Defendant has functional control over the Trump Organization and that they are one and the same for purposes of this litigation. *Id.* ¶ 17. *See* Dkt. No. 216 at 1 n.1 (Plaintiff's Section of Joint Letter to Court) ("Plaintiff has already pointed out to the Court that Defendant has the ability to direct the Trump Organization with respect to all documents and

files, and that for purposes of producing documents or providing information relevant to this lawsuit, Defendant controls the Trump Organization."); *see also* Dkt. No. 188.

In that conferral call, counsel for Defendant further stated that they will not withdraw the confidential designation with respect to the documents at issue in this motion. Plaintiff's counsel again asked for the basis for that designation, and the parties made the same arguments back and forth yet again, with counsel for Defendant stating unequivocally that they will not change their position on this issue. The only basis Defendant's counsel presented for keeping those documents from the public is that they contain Defendant's former cell phone number. Wang Aff. ¶ 18.

Paragraph 4 of the Confidentiality Stipulation provides that, if a party receiving information does not concur with the confidentiality designation, and the party that produced the information does not agree to declassify such document, the receiving party "may move before the Court for an order declassifying those documents or materials." Accordingly, we now make this motion pursuant to that provision and as permitted by the call with the Court on October 21.

There is No Basis for the Documents to be Designated "Confidential"

There is no basis for the documents at issue in this motion to be designated "confidential" under the terms of the Confidentiality Stipulation. The sole basis that the Trump Organization has provided for designating the documents "confidential" is that they contain Defendant's old cell phone number.[6] But it is undisputed that the phone number is not currently used by Defendant, that it has not been for years, and that this long-dead former telephone number has been widely reported in the media and is anything but a secret. *See* Tanya Basu, "Donald Trump Just Gave Out His Own Cell Phone Number," *Time*, Aug. 4, 2015, *available at* https://time.com/3983939/donald-trump-gawker-cell-phone.

[6] It was the Trump Organization that designated these documents "confidential". [redacted]

Not only had this phone number been publicly known and widely disseminated at least since August 2015, after the number was disclosed publicly, Defendant himself publicized the number as part of a publicity stunt to draw attention to his presidential campaign. *See* Polly Mosendz, "Donald Trump Turns Leaked Cellphone Number Into Campaign Move," *Newsweek*, Aug. 4, 2015, *available at* https://www.newsweek.com/donald-trump-turns-leaked-cell-phone-number-campaign-move-359662. Indeed, as of the date of this filing, Defendant himself continues to make that cell phone number publicly available on his Twitter account. *See* https://twitter.com/realdonaldtrump/status/628590822913650688.

The presence of a nonworking former cell phone number that Defendant himself has disclosed and continues to disclose to the public is not a basis for designating a document "confidential." *See JetBlue Airways Corp. v. Helferich Patent Licensing, LLC*, 960 F. Supp. 2d 383, 397 (E.D.N.Y. 2013) ("Any countervailing privacy interest of [the party seeking sealing] cannot defeat the strong presumption of public disclosure where the material it seeks to seal is already in the public domain."). Accordingly, the Court should order the removal of the "confidential" designation that the Trump Organization inappropriately attached to these documents, and allow all redacted or sealed documents filed with this motion to be re-filed without sealing or redaction. *See Estee Lauder Inc. v One Beacon Ins. Group, LLC*, No. 602379/05, 2013 WL 1703243, at *5 (Supreme Court, N.Y. Cnty. Apr. 12, 2013) (ordering unsealing of discovery documents because party that designated them confidential "failed to provide a basis justifying the confidentiality designations for the subject discovery").

The relief Plaintiff seeks is not merely compelled by the language of the Confidentiality Stipulation and by common sense. It also is necessary to comply with the broad "presumption of public access" to court documents under both the First Amendment and New York law. *See Danco Labs., Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 7 (1st Dep't 2000). "The public interest in openness is particularly important on matters of public

concern, even if the issues arise in the context of a private dispute about which secrecy, then, may well prove the greater detriment to the public." *Id.* (citations omitted). There is a strong public interest in making these documents accessible to the public because they contain highly relevant evidence that strongly corroborates Ms. Zervos's report that Defendant sexually assaulted her – allegations that formed the basis for Defendant's defamatory statements. [redacted] There is a substantial public interest in evidence that tends to prove that Ms. Zervos's allegations are accurate. On the other hand, there is no countervailing interest in secrecy because the documents do not contain any sensitive information that is not already public. *See JetBlue Airways Corp.*, 960 F. Supp. 2d at 397. *See also Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 & n.11 (2d Cir. 2004) ("[Courts] simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again. . . . Once [information] is public, it necessarily remains public."). The mere fact that Defendant would prefer to keep all of his documents confidential, or to keep all documents that prove Ms. Zervos's claim confidential, is not a basis for denying public access to documents in which there is a substantial public interest. *See Mosallem v. Berenson*, 76 A.D.3d 345, 351 (1st Dep't 2010) ("neither the potential for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records"; rather, a party seeking confidentiality must demonstrate "specific harm . . . that outweighs the importance of public access to the records").

Conclusion

For all of these reasons, the Court should order that the documents contained in Exhibit D be de-designated and treated as not confidential for all purposes.

Dated: October 24, 2019
New York, New York

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