AMERICAN ARBITRATION ASSOCIATION

NEW YORK, NEW YORK

DONALD J. TRUMP FOR PRESIDENT, INC., a Virginia not-for-profit corporation,

Claimant,

v.

ALVA JOHNSON, an individual

Respondent.

CASE NO. 01-19-0003-0216

ORDER OF THE ARBITRATOR GRANTING RESPONDENT ALVA JOHNSON'S MOTION TO DISMISS

Hon. Judge Victor Bianchini (Ret.), Arbitrator

I. INTRODUCTION AND PROCEDURAL HISTORY

This arbitration was demanded by Claimant based on an alleged violation of a non-disclosure agreement (NDA). This agreement was entered into by the parties hereto as a part of an employment agreement and it provided for resolution of any dispute by arbitration. This decision follows Respondent's Motion to Dismiss of March 20, 2020, the Arbitrator's July 23, 2020 denial of Respondent's Motion to Dismiss. This decision also follows denial of Respondent's motion of September 1, 2020 for a stay of the Arbitration pending an anticipated decision of the U.S. District Court, Southern District of California on a matter examining the Constitutionality of an identical NDA as in this case, specifically, *Denson v. Donald J. Trump for President, Inc.*, 20. Civ. 4737 (PGG) (S.D.N.Y. Mar. 30, 2021), (hereinafter, *Denson II*).[1] Finally, if follows Respondent's March 31, 2021 Motion for Reconsideration of the July 23, 2020 Decision denying the Motion to Dismiss, after the decision by the U.S. District Court in *Denson II* was handed down. Thus, this decision decides the March 31, 2021 Motion for Reconsideration.

[1] U.S. District Court ruling in *Denson v. Donald J. Trump for President, Inc.*, 20 Civ. 4737 (PGG) (S.D.N.Y. Mar. 30, 2021), 2021 WL 1198666 (S.D.N.Y. Mar. 30, 2021), U.S. District Court Judge Paul Gardephe, presiding.

In his July 23, 2020 decision on the Motion to Dismiss, your Arbitrator denied the Motion in substantial part and granted it in part, leaving intact the primary claims of Claimant.[2] Then, as hereinbefore mentioned, while the decision in *Denson II* was pending, Respondent filed a motion for a stay of proceedings until such time that *Denson II* could be decided. The Arbitrator denied this motion as well, based on the reasoning that the motion was premature.

Thereafter, the U.S. District Court for the Southern District of New York decided the case against our Claimant involving the Constitutionality of an NDA identical to the one in the present case, which the Arbitrator has designated *Denson II*. Ms. Johnson renewed her Motion to Dismiss immediately after the *Denson II* decision was rendered by the U.S. District Court, Southern. District of California, U.S. District Court Judge Gardephe presiding. Then, while her Motion to Dismiss before this Arbitrator was pending, she supplemented her Motion to Dismiss with an additional case involving our Claimant involving an unrelated employee of Claimant, Omarosa Manigault-Newman, involving the Constitutionality of an identical confidentiality agreement as in this litigation, rendered by a New York Arbitrator.[3] Respondent has cited this *Manigault-Newman* case decision as further support for the unconstitutionality of the NDA in the present case, based on the principles and reasoning set forth in the decisions rendered in these two cases. Respondent has acknowledged that these cases are technically not precedent and has cited these decisions as persuasive authority, and the usage that New York law allows.

Follows is additional procedural history of this case;

A. *Alva Johnson v. Donald J. Trump and Donald J. Trump for President, Inc.* (Case No. 8:19-cv-00475-WFJ-SPF):

This case began as *Alva Johnson v. Donald J. Trump and Donald J. Trump for President, Inc.* in the U.S. District Court in the Middle District of Florida (Tampa), when

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[2] After extensive briefing and oral argument, on July 23, 2020, the Arbitrator, in a 28-page Order, denied the Motion to Dismiss, wherein, amongst other rulings and based upon New York law, this Arbitrator held that the First Amendment to the U.S. Constitution did not preclude considering the validity and enforceability of the non-disclosure agreement (NDA) in this case. Concurrently with the Motion to Dismiss on March 20, 2020, the parties disputed the categorization of the dispute as either "commercial" or "employment, affecting the fee-sharing aspects of the suit. In an Order filed on April 27, 2020, the Arbitrator ruled under New York law that the Claimant would be required to advance fees with a final determination on allocation to be made at the conclusion of the case.

[3] *Donald J. Trump for President, Inc. v. Omarosa Manigault Newman*, AAA-Case No.: 01-18-0003-0751, issued September 24, 2021 ("Order') by T. Andrew Brown, Arbitrator, (hereinafter "*Manigault-Newman*"), attached hereto as Exhibit "B."

Respondent (in this action) brought an action as a plaintiff against Donald J. Trump (hereinafter "Trump") for battery, and against the Company, (hereinafter "Campaign") based on a claim of unequal pay founded on gender and race, on February 25, 2019, approximately two and one-half years after her claimed alleged battery by Trump.

This suit had its procedurally tortured beginnings following an encounter during a campaign stop by then candidate Trump before the Presidential election. At a campaign stop, Respondent and Trump had an encounter with our Respondent in a small trailer among a number of campaign workers. Respondent related that, "during a presidential campaign rally in Tampa, Florida on August 24, 2016, in a campaign recreational vehicle ("RV") filled with approximately 12 other people that "[Mr.] Trump grasped her hand and did not let go. He told her he knew she had been on the road for a long time and that she had been doing a great job. He also told Respondent that he would not forget about her, and that he was going to take care of her. "[H]e tightened his grip on [Respondent's] hand and leaned towards her. He moved close enough that she could feel his breath on her skin." Respondent then claimed that she "suddenly realized that Defendant Trump was trying to kiss her on the mouth," and attempted to avoid this by turning her head to the right. Defendant Trump kissed her anyway, and the kiss landed on the corner of her mouth.

It is noted that before the filing of her lawsuit, however, both at the time of the encounter and during the next approximately two-and-one-half years, Respondent made numerous supportive and positive statements about Trump. Moreover, prior to filing her federal lawsuit, but after leaving her position with the Campaign and shortly after Trump's successful election, Respondent sent one or more job applications to the White House asking to be appointed the various important positions within the U.S. Departments of State, Labor and Agriculture, including a position equivalent to the United States Ambassador to Portugal. Moreover, in a radio interview sometime in 2017, she praised Trump with phrases like "the nicest guy," "incredible person," "treats everyone as if they're part of his family,"—acts and statements completely inconsistent with a reasonable person's reaction to having been battered.

According to Claimant, the time of the filing of her complaint, the Campaign alleged that Respondent was represented by eight different litigation attorneys from multiple law firms and that she and they "launched a full-scale public relations assault on Mr. Trump and the Campaign which included approximately 100 separate communications to national news reporters…". The Campaign stated that it was not seeking to hold her liable for "in-court statements communicated by or on behalf of…" Respondent. The defendants in that action before the U.S. District Court, (U.S. District Court Judge William Jung) dismissed the complaint in its entirety, without prejudice, on the basis that the lawsuit was "political," effectively admonishing Respondent that the court would be willing to try a tort and wage lawsuit, but not a political one.

In the lawsuit, Mr. Trump and the Company moved to dismiss the unequal pay counts under Rule 12(b)(6) for failure to state a claim, and moved to strike portions of Ms. Johnson's pleading pursuant to Federal Rule of Civil Procedure 12(f). The U.S. District Court granted those motions in their entirety and dismissed the entire complaint without prejudice in June 2019.

1. <u>The Video</u>:

Following the entry of dismissal and prior to Respondent's deadline to file an amended complaint in the District Court, the Campaign surfaced a video of the alleged "kiss" calling into question the truthfulness of the allegations of battery, and submitted the video to the District Court. Judge Jung, after viewing the video, apparently expressed surprise, called counsel and in a most appropriate manner, politely and professionally, suggested that there might be a "little bit of reflection, a little objectivity, more distant view of where you're going to go with this," in an effort to give counsel for Respondent a perspective and gentle guidance as to the viability of her case, should they decide to file an amended complaint. After that phone call, Respondent abandoned her claim and notified the court that she was declining to amend her pleading.

A true copy of the video, recorded by a campaign volunteer who was present at the time of the incident was shared with this Arbitrator and the video is in possession of all counsel. Candidly, your Arbitrator observes that the video demonstrating the interaction between Trump

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and Respondent shows no inappropriate conduct, leading to the conclusion that Respondent's factual allegations regarding the August 2016 interaction were false.

More specifically, the video shows a brief interaction between Respondent and Trump, lasting only a few seconds, inside of the campaign RV surrounded by numerous people who are not identified on camera. In the Video, Respondent can be seen offering her cheek to Mr. Trump and her lips are clearly in the air next to his cheek with Trump's mouth completely clear of her face. In short, they are cheek-to-cheek. The Arbitrator finds that the video clearly shows that Trump did not "forcibly kiss" Respondent, nor kiss her mouth, nor attempt to kiss her mouth, as Respondent claimed in her lawsuit. No reasonable person viewing this video could conclude that anything improper took place.[4]

Nevertheless, the Arbitrator's focus in the Arbitration will be on the Constitutional aspects of the NDA in this Motion to Dismiss at this point, and its Constitutional implications. Any other causes of action arising out of the filing and dismissal of the federal lawsuit for battery, among other causes of action, are not a part of this set of claims and will not be the basis of any determination by the Arbitrator.

B. <u>This Arbitration - The Original Filing of Claim With the American Arbitration Association and the Applicable Rules Governing the Dispute</u>:

Thereafter, and on September 23, 2019, Claimant filed for an arbitration with the American Arbitration Association (AAA) together with a Statement of Claims, alleging that she breached the

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[4] See Videotaped Deposition of Alva Johnson, July 8, 2019, (Ms. Johnson admits she continued working for the Campaign and said "a lot of very supportive things about Mr. Trump in those six weeks after the alleged kiss"); (Email message from Ms. Johnson, Sept. 26, 2016: "The Boss is doing a phenomenal job tonight!! Keep praying and cheering him on."); (Text message from Ms. Johnson, Oct. 8, 2016: "Mr. Trump is doing so well. Holding him up in prayer."), (Letter of recommendation authored by Ms. Johnson, signed by a campaign worker and sent to two U.S. Senators, Aug. 18, 2017: "[Ms. Johnson's] commitment to the President is unwavering") (emphasis added), Ex. 28 (Letters of recommendation authored by Ms. Johnson, signed by Republican Men's Club President and sent to two U.S. Senators, Aug. 14, 2017: "[Ms. Johnson continues to maintain ardent support for the President and his policies . . . . She is an early supporter of President Trump and is well known by ex-campaign staff and the President's supporters as one of his staunchest loyalists") (emphasis added), Ex. 29 (Email message from Ms. Johnson, Feb. 22, 2017: Johnson vows to "remain [a] vocal cheerleader[] for President Trump and his policies").

confidentiality[5] and non-disparagement agreement with the Claimant. On March 4th and 6th, 2020, Claimant filed a First Amended Statement of Claims.

The First Amended Statement of Claims alleges that Respondent breached the Agreement by disclosing Confidential Information, making non-privileged disparaging statements outside of court proceedings about Trump Persons and failing to return or destroy materials containing Confidential Information. Clearly, the Claimant in this Arbitration relies on the NDA in pursuing Respondent in this action—placing the NDA squarely in controversy and by virtue of such, has unmistakably implicated its Constitutionality and viability.

An immediate dispute arose concerning the nature of the claim, either employment or commercial, centering on the issue of attorney's fees. At this point, the Arbitrator was required to resolve the dispute and did so by entering an order on April 28, 2020, ruling that New York law afforded certain litigants relief from any conflicting American Arbitration Association rules or any contractual provisions based on public policy grounds, with discretion vested in the arbitrator to determine whether a respondent litigant had the financial resources to suffer an order to pay attorney's fees and costs should there be an requirement to enter such an order based on prevailing party rules. The Arbitrator ruled on that dispute ordering that "1. Claimant [would] be responsible for the fees and costs in accordance with the Employment Fee Schedule…; 2. Respondent shall not be responsible for the fees and costs of this arbitration pending further order of the Arbitrator;" and 3. "The Arbitrator reserves judgment on the allocation of fees until after the case has been presented and upon inquiry within the hearing" [if any].

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[5] Confidentiality agreements normally spell out what is being protected, and *in this agreement*, there are substantial provisions concerning what is considered confidential. Sections 1., a., b., and c., contain the prohibitions pertaining to disclosure of confidential material. The remaining sections are devoted to spelling out prohibitions against storing, or memorializing information onto storage devices, servers, internet sites or retrieval systems (whether electronic, cloud based, mechanical or otherwise); and when referring to confidential information furnished to the employee, using terms such as copies, abstracts, notes, reports, or other materials furnished, including copies extracts, or other reproductions whether physical, electronic cloud based or otherwise, with an obligation to destroy all documents, memoranda notes or other writings that are based upon the Confidential Information. The agreement lists as confidential any means of expression, including but not limited to verbal, written, or visual, including but not limited to audio recording of any type written text, drawing, photograph, film, video, or electronic device, book, article memoir, diary, letter, essay, speech, interview, panel or roundtable discussion, image, drawing, cartoon, radio broadcast, television broadcast, video, movie, theatrical production, Internet website, email, Twitter tweet, Facebook page, or otherwise.

C. Respondent's Request for Stay Pending Decision on *Denson v. Donald J. Trump for President, Inc*:

Then, on September 1, 2020, Respondent requested a stay of the proceedings in New York state court while the *Denson II* case, the basis for this present motion to reconsider the denial of previous Motion to Dismiss, was being heard. The motion for stay was based on the motion by Denson before the District Court, specifically, that Denson was seeking 1) a declaration that the Campaign's form non-disclosure agreement ("NDA") "to be null, void, and unenforceable," and based on this finding that a summary judgment issue based on this Declaratory Relief Motion, and 2) the Campaign responded with its own Motion to Dismiss the complaint filed by Denson.

After receiving motion papers and hearing argument, this Arbitrator entered an order denying the motion for stay as premature, based upon the reasoning that the mere filing of such a matter would not justify delaying the processes in this case.

D. Respondent's Present Motion for Reconsideration Subsequent to the Decision in Denson v. Donald J. Trump for President, Inc:

A decision on *Denson II* was finally rendered on March 30, 2021 by the U.S. District Court. Respondent now requests that the Arbitrator reconsider his previous Order denying the Motion to Dismiss based long-awaited decision in *Denson II*, a case involving essentially an identical NDA to the one involved this case, as well as the case of *Omarosa Manigault v. Donald J. Trump, Inc. for President,* AAA case #01-18-0003, ("*Manigault-Newman"*), an arbitration case involving the identical NDA in the present case. She argues, citing *Denson II*, that this new decision, by the federal judge in *Denson II,* granted summary judgment for Plaintiff Denson by "concluding that the 'enormous scope of its flawed, indefinite and uncertain provisions and non-disparagement revision' rendered it unenforceable. She also argues that 'the Campaign's past efforts to enforce the non-disclosure and non-disparagement provisions demonstrate that it is not operating in good faith to protect what it has identified as legitimate interests. Respondent also requests that the Arbitrator consider the reasoning of the *Manigault* case, as he decides the matter.

Procedurally, because counsel for Claimant, Harder, LLP, notified this Arbitrator that they had withdrawn from representing Claimant on April 28, 2021 and that in-house counsel, Justin Clark and Alex Cannon, of the firm of Election Law, LLC, had substituted in as new counsel of record representing Claimant. This substitution occurred during the pendency of this already well-briefed Claimant opposition. Thus, this matter was decided on the already-filed briefs. Thus, this Order will address the written opposition to Respondent's Motion to Dismiss as well as the decisions in *Denson II* and *Manigault-Newman* in determining the outcome of this Motion to Dismiss.

II. <u>DISCUSSION ON CURRENT MOTION TO DISMISS</u>:

A. <u>Claimant's Objection to Motion to Dismiss</u>:

Claimants respond that the instant Motion to Dismiss should be denied in its entirety on grounds that: 1) there are no valid grounds for a motion for reconsideration under New York law; 2) the proper vehicle for such a claim is a motion for reargument or for leave to renew, which motions are unavailable to Respondent by Rule; and 3) the motion is untimely.

Claimants also argue that *Denson II* is only 1) "purported[ly]" persuasive authority; 2) that it has no "*stare decisis* effect;" 3) is apparently unpublished; 4) this arbitral tribunal is not bound by the rulings of the federal tribunal; and 5) it does not change the law or constitute precedent. Claimants also argue that 6) this Arbitrator's initial ruling was correct on the Motion to Dismiss, and the Court in *Denson II* was wrong. Although Manigault-Newman was decided and cited after the Claimant opposed the Motion to Dismiss, the Arbitrator will infer that the objections made to *Denson II* apply equally to *Manigault-Newman*.

Claimant argues that procedurally, the motion is improper, because the proper motion would be for reargument or renewal, but Respondent doesn't qualify for those motions based on procedural grounds. The present motion is for reconsideration only, and is only permitted when some new fact arises that was not available at the time the original motion was made. Here, Claimants argue, there are no new facts to justify reconsideration. [Citations omitted]. Claimants point out that the requirements of New York Civil Practice Law & Rules (CPLR) 2221, "Motion

affecting prior order," requiring that such a motion must be brought "within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

Procedurally, because counsel for Claimant, Harder, LLP, notified this Arbitrator that they had withdrawn from representing Claimant on April 28, 2021, and that in-house counsel, Justin Clark and Alex Cannon, of the firm of Election Law, LLC, had substituted in as new counsel of record representing Claimant, his substitution of counsel occurred during the pendency of this motion and no new brief was filed in the matter. The Arbitrator's decision in *Manigault* was not addressed except very briefly in oral argument. Thus, this Order will address previous counsel's written opposition to Respondent's Motion to Dismiss as well as the decisions in *Denson II* and *Manigault-Newman* in determining the outcome of this Motion to Dismiss

1. The Motion for Reconsideration:

Claimant (in this case) argues that New York law does not support a motion for reconsideration, citing New York Civil Practice Law & Rules (CPLR), Rule 2221, pointing out that such a motion is only appropriate when there is a new fact or new facts that fairness would dictate be allowed to be presented in the circumstances. It argues, this is nothing more than a *de facto* motion for reargument or renewal, motions which do not comply with the procedural requirements in CPLR Rule 2221, subsection (d).

2. Which Rules Apply—New York Civil Procedure or AAA Commercial Rules In A Motion for Reargument Under New York's CPLR 2221:

Subsection (d) states as follows: "(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion…" New York Civil Practice Law & Rules (CPLR) 2221.

On the other hand, Respondent argues that New York's Civil Practice Law and Rules (CPLR) do not apply to this arbitration, and the Arbitrator agrees. CPLR does not govern this Arbitration. With the exception of the employment rules governing the advancement of fees for the arbitration, which the Arbitrator has already decided in favor of the employment fee schedule,

the AAA Commercial rules apply, as the NDA provides. As Respondent points out, the NDA applies New York law with respect to substantive issues, but does not apply to procedural rules.

The Arbitrator deems that in the context of this case, given its Constitutional underpinnings, that to deprive the Respondent of the opportunity to ask the Arbitrator to revisit his original opinion to consider whether he mistakenly applied the law in this matter, given the 1) application of the AAA Procedural Rules; and 2) the artificial semantic differences between the terms "reconsideration" and "reargument," would be inappropriate and unfair in the circumstances. Moreover, the Motion to Dismiss is predicated on the legal concept of Constitutionality, and is thus "based upon matters of…law allegedly overlooked or misapprehended by the [Arbitrator] in determining the prior motion. After all, the Arbitrator invited a reconsideration which anticipated a reargument on his ruling when he said in his original Order denying dismissal, "[p]erhaps at hearing, there will be sufficient evidence upon which to reconsider, but at this point in the proceedings, there is *insufficient authority* to justify dismissing the case on First Amendment Grounds." [Emphasis supplied]. In effect, the Arbitrator reserved for himself the right to reconsider the ruling based upon authority, which the Arbitrator finds involves "reargument." This clearly is appropriate within the AAA Rules.

In addition, while the Arbitrator is aware that the New York Rule appears to require a motion to reargue be labeled as such, the Arbitrator does not believe that this is a substantive requirement that should deprive a litigant of the right to call attention to an Arbitrator, who may have mistakenly rejected, overlooked or simply failed to recognize the appropriate application of Constitutional law, in rendering a decision on a matter involving important Constitutional implications. To request a "reconsideration" is logically a request to reargue. The Arbitrator is puzzled as to the rationale for such a distinction, which the Arbitrator sees as antiquated, and importantly, arbitrary, at best. To rule against the Respondent on what is a mere semantical oddity, would not be appropriate. Moreover, the Arbitrator perceives no prejudice to Claimant in interpreting the Rule in such a manner. Claimant obviously knew what was being requested. There could have been no surprise, and therefore no prejudice to Claimant that Respondent wanted

to reargue the Arbitrator's previous ruling. To hold otherwise would be to elevate form over substance. Indeed, even counsel for Claimant referred to the matter in his letter of opposition of April 20, 2020, to the Arbitrator, that the matter was one of reargument in such a way that he acknowledged that what Respondent was seeking was reargument.

Moreover, although the Rule relating to reargument, CPLR Rule 2221 (d) requires a filing within thirty days after service of a copy of the order, the bases upon which this motion is founded, did not come into existence until almost a year later. When the decision in *Denson II* was released for public consumption, Respondent requested a rehearing practically on the same day as its release, constructively seeking relief withing thirty days.

3. Motion to "Renew:"

First, a motion to "renew" is the equivalent of reargument. Thus, the main basis of allowing the Motion is based on the AAA Rules as stated above. Nevertheless, Respondent argues that if CPLR were to govern, Ms. Johnson's Motion should not be read as a motion for leave to reargue (which applies when "matters of fact or law allegedly [were] overlooked or misapprehended by the court") but as a motion for leave to renew (which applies when "new facts not offered on the prior motion . . . [or] a change in the law that would change the prior determination"). As discussed above, the Arbitrator considers this principally a Motion to Renew. See CPLR 2221(d)(2), (e)(2).

4. Persuasive Authority, Dispositive Motions, and Arbitrator Authority:

Thus, although Claimants argue that *Denson II* (and now *Manigault-Newman* are only 1) "purported[ly]" persuasive authority; 2) that it has no "*stare decisis* effect;" 3) is apparently unpublished; 4) this arbitral tribunal is not bound by the rulings of the federal tribunal; and 5) it does not change the law or constitute precedent and also argue that 6) the Arbitrator's initial ruling was correct, and the 7) Court in *Denson II* was wrong, the Arbitrator disagrees that the Court in *Denson II* was wrong.

Indeed, while both *Denson II* and *Manigault-Newman* are clearly only persuasive authority, for the reasons stated above, the Arbitrator believes that the application of their

reasoning is appropriate and, indeed, essential. In addition, while the Arbitrator appreciates the endorsement that the Arbitrator was correct in his initial decision, the Arbitrator believes the Denson II and Manigault-Newman cases to be correct in their analyses, and , after due consideration of these two well-reasoned decisions on the Constitutionality of the NDA provisions of the employment agreement, acknowledges his errors in his first decision and now reconsiders the Constitutionality of NDA in favor of Respondent as further discussed below.

5. Change in the Law & Binding Authority:

Respondent asks that the Arbitrator interpret the Denson ruling as a "change in the law that would change the prior determination." CPLR 2221(e)(2). Respondent argues that there is no express requirement that this "change in the law" stem from binding authority. See, e.g., Dinallo v. DAL Elec., 60 A.D.3d 620, 621 (N.Y. App. Div. 2009) (stating "[a] clarification of the decisional law is a sufficient change in the law to support renewal"); Wash. Apts., L.P. v. Oetiker, Inc., 43 Misc.3d 265, 268 (Sup. Ct., Erie Cnty. 2013) (explaining that "[a] development in the case law of another department—decisional law that is merely persuasive and not binding—constitutes a 'change in the law' for purposes of a motion to renew when, as here, the court cites to, and relies on, a subsequently reversed decision from that other department"). The Arbitrator finds that these citations support the principle that under CPLR 2221 the Arbitrator has the discretion to reconsider Ms. Johnson's Motion to Dismiss.

Thus, the Arbitrator's interpretation of the application of the AAA Procedural Rules and his ruling in the first Motion to Dismiss decision, being conditioned on the possibility that sufficient authority could be provided to justify dismissal of the case, the Arbitrator rejects Claimant's argument on the foregoing discussion. In this case, the Arbitrator finds that the AAA Procedural Rules, and the above reasoning is sufficient to reconsider his previous decision.

However, Respondent argues that Rule 33 of the AAA confers on the Arbitrator the discretion to decide whether to hear dispositive motions and, as discussed above, the Arbitrator agrees. Moreover, as they argue, based on Wash. Apts. L.P. v. Oeticker, Inc., 43 Misc.3d 265,

268 (Sup. Ct. Erie Cnty. 2013) ("decisional law that is merely persuasive and not binding, constitutes a "change in the law' for purposes of a motion to renew.") There is no prejudice here.

B. Respondent's Renewed Motion to Dismiss In Light of *Denson II:*

In the decision by the U.S. District Court in *Denson II*, dated March 30, 2021, the Court ruled that the Motion for Summary Judgment be granted "to the extent that the Employment Agreement's non-disclosure and non-disparagement provisions…will be declared invalid and unenforceable as to Denson."

In its lead-up to invoking the reasoning of *Denson II*, Respondent argues that New York Contract Law requires that the material terms of a contract be definite and certain, citing *Joseph Martin, Jr., Delicatessen v. Schumacher* 52 N.Y.2d 105, 109 (Ct. of Appeals of NY 1981, a case cited in both *Denson II* and *Manigault Newman*. ("…before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained"), and it must be definite, citing *In re Express Indus & Terminal Corp. v. N.Y.k State Dep't of Transp.*, 93 N.Y.2d 584, 589 (Ct. of Appeals of NY 1999)("Enforceability of a contract requires "a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.")

Respondent further invokes the edict of *Ashland Mgmt. Inc. v. Altair Invs. NA*, AD3d 97, 102 (1st Dept. 2008) aff'd as modified, 14 NY3d 774 (2010)("Restrictive covenants, such as confidentiality agreements, are subject to specific enforcement to the extent that they are reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public, and not unduly burdensome to the employee."). Relying on the *Denson II* decision, Respondent, quoting Denson II, argues that "many of the Categories—including "personal life,' "relationships,' and 'political and business affairs'—are vague and none of the categories are further defined or limited,"

In its reasoning on Respondent's argument, the Arbitrator will further address the holdings by the District Court that apply to Respondent's challenge. The *Denson II* Court found as follows:

1. The U.S. District Court's "Standing" Analysis:

This matter, being in Arbitration, the question of standing has no application in determining whether the Arbitrator can adjudicate the Constitutionality of the NDA. Of course the Arbitrator can do so. The Federal Court did observe that to establish an injury to qualify for standing, the "invasion of a 'legally protected interest' that is 'concrete and particularized' and actual or imminent, not conjectural or hypothetical," did exist in that case. Such is the case here. Thus, although there is little evidence of what the campaign's intent would be should they prevail against the Respondent, her First Amendment rights are in issue, just as Denson's rights were in *Denson II*. Indeed, the court stated, with supporting citations, that "the Campaign has engaged in a pattern of enforcing or threatening to enforce the Employment Agreement's non-disclosure and non-disparagement provisions against former Campaign employees, including Denson, Newman, Sims, and *Johnson*." [Emphasis supplied]. There is no question that the Constitutional questions raised in the *Denson II* case are applicable to this case. The *Denson II* court stated that "[this] pattern of conduct plainly demonstrates that there is a substantial risk of a further action against Denson or other Campaign employees should they speak in a way that the Campaign believes it violates the Employment Agreement." As in *Denson II*, there is no indication in this case that the Campaign has definitively stated that it will not assert the non-disclosure and non-disparagement provisions against Respondent Johnson in the future. Thus, Claimant has demonstrated "a substantial risk that the harm will [re]occur." [Citations omitted].

2. **<u>Whether the Non-Disclosure Provision is Reasonable & Sufficiently Definite in the Context of *Denson II's* Summary Judgement Motion.</u>**

It is instructive to review *Denson II's* argument concerning the deficiencies of the non-disclosure and non-disparagement provisions in her case, which are, as conceded by Claimant to be "identical" to Respondent's employment agreement. Denson II, argued that "the Employment Agreement's non-disclosure and non-disparagement provisions are unenforceable under New York law because they (1) do not 'contain any temporal limit'; (2) define 'Confidential Information' to include 'staggeringly broad categories' including 'anything 'Mr. Trump insists

remain private or confidential'; (3) restrict speech on matters of highest political importance and subject Campaign workers to potentially crippling financial penalties for exercising basic rights'; (4) 'lack the requisite definiteness required of all valid agreements'; (5) 'contravene[] public policy' by violating 'the United States' and New York's commitment to public debate on matters of public concern . . .[and] New York's public policy against contracts that prevent the reporting of misconduct'; and (6) are unconscionable."

a. Indefiniteness, Vagueness and Uncertainty (Ashland Test):

In analyzing this issue, the District Court turned to the case of *Ashland Mgmt. Inc. v. Altair Invs. NA, LLC*, 59 A.D.3d 97, 102 (1st Dept. 2008), aff'd as modified, (hereinafter "*Ashland*"), a New York case. The District Court recognized that such restrictive covenants can be valid and can operate to enforce confidentiality agreements as long as they are "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee." *Ashland (Citations Omitted).* The District Court, stated that "[t]hat under New York contract law, however, '[i]mpenetrable vagueness and uncertainty will not do, because "definiteness as to material matters is of the very essence in contract law.'" The District Court concluded that the *Denson II's* "employment agreement's non-disclosure provision does not meet any of the elements of the *Ashland* test." Moreover, the court stated that "the broad categories of information covered by the non-disclosure provision—which in themselves are not exhaustive—could conceivably cover any information related to the Campaign. It is thus impossible for Denson to know what speech she has agreed to forego, and there is not possibility of mutual assent." Finally, the court stated that "the vagueness and breadth of the provision is such that a Campaign employee you have no way of knowing what may be disclosed, and accordingly Campaign employees are not free to speak about anything concerning the Campaign."

b. Reasonable in Time:

Observing that the time provision in *Denson II*, had no time limit, it being unlimited, were vague and its thirty-five categories of private, proprietary, or confidential information, were also

undefined. The Denson II Court stated that "[a]s to whether the provision is 'reasonable in time,' the provision has no time limit." The District Court's finding that this portion of the non-disclosure provision is vague, overbroad and undefined, render it "not reasonable," "unduly burdensome," and "chills the speech of Denson [II] and other former Campaign workers about of public interest, the non-disclosure provision is harmful…". The Court declined to modify the *Ashland* Test in granting the Motion for Summary Judgment as to the Employment Agreement's non-disclosure provision.

Thus, it being conceded that the provisions of Respondent's non-disclosure agreement are identical to the *Denson II's* agreement, Claimant's argument must fail.

c. <u>The Non-Disparagement Provision</u>:

The non-disparagement provision of the NDA stated in part that Respondent "During the term of your service and at all times thereafter you hereby promise and agree not to demean or disparage publicly the Company, Mr. Trump, any Trump Company, any Family Member, or any Family Member Company or any asset any of the foregoing own, or product or service any of the foregoing offer, in each case by or in any of the Restricted Means and Contexts and to prevent your employees from doing so." To this point, the Denson II Court stated that the NDA "…is defined to cover President Trump, his family members, many of whom are unnamed, and any legal entity 'that, in whole or in part, was created for the benefit of…or is controlled by any of his family members…President Trump alone is affiliated with more than 500 companies." The court went on to say that it "…concludes that there is no manifestation of mutual assent to sufficiently definite to assure that the parties are truly in agreement with respect to [the scope of the non-disparagement provision].'"

d. <u>Blue Penciling Is Not Available</u>:

In its initial opposition to Respondent's Motion to Dismiss, Claimant argued that "…the Arbitrator has the power to partially enforce the agreement or sever part of the Agreement and enforce the remainder (for the purposes of this arbitration only)," citing *Ashland* (holding that "if a jury were to find that defendants violated an otherwise valid agreement, the court could simply

modify the agreements' duration to one more reasonable under the circumstances")*, Trans-Cont'l Credit & Collection Corp. v. Foti,* 704 N.Y.S.2d 106 (N.Y. App. Div. 2000)(unenforceable non-compete provisions of employment agreement are severable from the confidentiality provision which may be enforced against employee). and, *BDO Seidman*, 93 N.Y.2d at 395, ("The prevailing, modern view rejects a per se rule that invalidates entirely any overbroad employee agreement…"). However, the *Denson II* Court reasoned: "Blue penciling is not appropriate here. As an initial matter, "blue penciling" in [*Denson II*] would involve much more than a paring down of duration and geographical scope. In order to render the non-disclosure and non-disparagement provisions enforceable, the court would have to engage in a wholesale re-drafting of these provisions. The Campaign has cited no case law suggesting that this Court may re-write these provisions in that fashion." Given the identical nature of the NDA's in *Denson II* and our case, the Arbitrator adopts the reasoning of the *Denson II* court and declines to "blue pencil" the agreement.

C. Respondent's Renewed Motion to Dismiss In Light of *Manigault-Newman:*

Similar to the reasoning in *Denson II*, is that of the *Manigault-Newman* case, an arbitration between a former employee of our Claimant involving an identical NDA to the one in our case. The Arbitrator in *Manigault-Newman* fairly tracked the *Denson II* reasoning and made the a number of findings in granting *Manigault-Newman's* Motion for Summary Judgment. After rejecting the argument that Manigault-Newman held a much more important job than that of Ms. Denson, together with her status as a participant in Trump's reality television show, "The Apprentice," during which her participation was characterized as "nasty" and "confrontational," which the Claimant argued called for stricter confidentiality, the Arbitrator, in granting the Motion for Summary Judgment, discussed the following points:

1. New York Contract Law Requires Definiteness and Certainty for Mutual Assent & the *Ashland* Standard:

Citing New York law, the Arbitrator recognized that contractual terms must be definite and clear, and lacking these qualities, there can be no binding contract, and held that "…the provisions fail [of this NDA] as vague and indefinite "…and therefore unenforceable." Based on this

reasoning, the Arbitrator granted respondent's Motion for Summary Judgment and dismissed the Amended statement of Claim is in its entirety. In doing so, the Arbitrator, citing the *Ashland* case, held that in the enforcement of restrictive covenants, such as confidentiality agreements, (similar to the ones the subject of this arbitration), are subject to the specific enforcement to the extent that they are "reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee."

Citing New York caselaw, *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 (1981) ("[U]nless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy"), and *Cobble Hill Nursing Home, Inc. v. Hemy & Warren Corp.,* 74 N.Y.2d 475, 482 (1989), (citing Restatement [Second} of Contracts§ 33(2), 33, Comment [a]., "If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract."), the arbitrator found that the provisions of the NDA were vague and indefinite and therefore "void and unenforceable."

2. "Blue Penciling:"

The *Manigault-Newman* arbitrator also held that there could be no correction to the agreement, such as filling the gaps, or, as previously discussed, "blue penciling" the missing terms,, should there be some objective method of supplying a missing term, the arbitrator declined to do so saying, "…it's impossible for the arbitrator to rewrite the terms of the Agreement to leave the parties with what they mutually bargained for."

3. **The Non-Disparagement Provision is Likewise Vague and Uncertain**:

In observing that "disparagement is not defined in the agreement, and declining to determine the precise meaning of the term as not determinative of the Motion for Summary Judgment. Rather, the arbitrator found the agreement to be "indefensibly vague and indefinite" regarding the "protected entities," namely, "the Company, Mr. Trump, any Trump Company, any Family Member, or any Family Member Company or any asset of any of the forgoing own, or product or service any of the foregoing offer." Based on the arbitrator's finding that the terms

were vaguely defined in the NDA, the arbitrator found that the non-disparagement provisions of the Agreement were vague, indefinite, and therefore void and unenforceable. The arbitrator thereupon granted Respondent's Motion for Summary Judgment and dismissed the Amended Statement of Claim in its entirety.

III. <u>THE PARTY'S COMPETING REQUESTS FOR ATTORNEY'S FEES & COSTS</u>:

Based on discussions with counsel during the argument on the Motion to Dismiss, the Arbitrator anticipates that both Respondent and Claimant will bring motions requesting that legal fees and the costs of this proceeding be awarded against in their respective favors. The Arbitrator further anticipates that their respective submissions will cite to the controlling portion of the Agreement, which provides that the prevailing party in any action or arbitration is allowed reasonable legal fees and costs. However, because of the unique history of this case, the Arbitrator will allow both parties to submit a fee and costs request, together with argument on their respective positions.

IV. <u>CONCLUSION</u>:

Based on the foregoing discussion and in reliance on the authorities set forth in its reasoning, Respondent's MOTION TO DISMISS THE AMENDED STATEMENT OF CLAIM on the grounds that the Agreement is vague and unenforceable in its confidentiality provisions, as well as in its vague and unenforceable non-disparagement prohibitions under New York contract law, is GRANTED. An award of legal fees and costs shall be determined upon the submission of papers by the parties in accordance with a schedule to be determined by the Arbitrator. The Arbitrator Orders the parties to meet and confer on a date certain, after consulting with the Arbitrator on his schedule, to determine argument on such a motion.

IT IS SO ORDERED:

Dated this 21st of November 21, 2021,

Judge Victor E Bianchini, Arbitrator