IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TRUMP OLD POST OFFICE LLC,	)	
	)	
Plaintiff,	)	**Case No. 2015 CA 006624 B**
	)	**Judge Jennifer A. Di Toro**
v.	)	
	)	**Next Event: December 16, 2016**
TOPO ATRIO, LLC, *et al.*,	)	**Defendant/Counterclaim**
	)	**Defendant's**
	)	**Expert Designation with Rule**
Defendants.	)	**26(b)(4) Statement**
	)	

EMERGENCY MOTION FOR PROTECTIVE ORDER

Plaintiff Old Post Office LLC ("Landlord") respectfully seeks entry by this Court of a protective order precluding Topo Atrio LLC ("Tenant") and ThinkFoodGroup LLC ("Guarantor") (collectively, "Defendants") from deposing Landlord's President, President-Elect Donald J. Trump ("Mr. Trump"), or, in the alternative, imposing reasonable limitations on both the length and scope of Defendants' examination. Such relief is warranted under D.C. Super. Ct. R. 26(c).

For the very same reasons argued by Landlord in its motion for a protective order in the companion case of *Trump Old Post Office LLC v. Zakarian et al.,* No. 2015 CA 5890 B (D.C. Super.), namely, that Mr. Trump possesses no unique, first-hand knowledge of the facts of this case that cannot be obtained from another of Landlord's representatives, Landlord seeks the entry of a protective order preventing Defendants from deposing Mr. Trump.[1] As in the *Zakarian* case, the fundamental issue here is simple: did Tenant have the legal right to terminate its lease with Landlord because of certain comments that Mr. Trump made on June 16, 2015 while announcing his candidacy for President of the United States? There is no dispute that Mr.

[1] It is incumbent upon the party seeking protection to file its own affirmative motion, accordingly, Landlord styles this as a Motion for Protective Order. This motion is also responsive to Defendants' Motion to Compel ("Mot.").

Trump made these comments. Accordingly, all that remains to be decided is (i) whether Tenant had the legal right to terminate the lease and (ii) if not, the amount of damages that may be recoverable by Landlord.

Despite these narrow issues, and despite Defendants' unfettered deposition access to witnesses with actual knowledge of the facts (namely, Donald Trump, Jr., Ivanka Trump, David Orowitz, and Ray Flores), Defendants insist on deposing Mr. Trump. Landlord, on the other hand, contends that Mr. Trump's deposition is wholly unnecessary. However, to the extent the Court believes that Mr. Trump's deposition must go forward, Landlord simply asks that, for good cause shown, the Court impose the following limitations: (i) that Defendants' examination of Mr. Trump be limited to a total of two (2) hours; and (ii) that Defendants be prohibited from asking Mr. Trump questions he was already asked, by highly competent counsel, at his deposition in the *Zakarian* case.[2] Should the Court rule that the deposition must go forward, these simple (but fair) limitations will balance Defendants' right to obtain discovery while not unreasonably interfering with the President-Elect's schedule handling matters of the utmost public importance.

FACTUAL BACKGROUND

On or about November 19, 2014, Landlord entered into an agreement of sublease (the "Sublease") with Tenant for certain restaurant space (the "Premises") at the new Trump International Hotel in Washington, D.C. ("Hotel"). On July 8, 2015, Tenant's co-owner and executive chef, José Andrés, was quoted in *The Washington Post* as saying that Tenant would no longer "move forward" with opening a restaurant at the Hotel because of certain political

[2] Because Defendants have already agreed to conduct the deposition at Mr. Trump's offices in New York, Landlord does not seek a protective order from this Court as to the location of Mr. Trump's deposition. Should Defendants refuse to honor their prior commitment to conduct the deposition at Mr. Trump's offices in New York, however, Landlord reserves the right to seek further relief from the Court as to the location of Mr. Trump's deposition.

statements that Mr. Trump made on June 16, 2015, concerning illegal immigration while announcing his candidacy for President of the United States.

On July 17, 2015, Landlord notified Tenant that it was in default under the Sublease due to Tenant's failure to deliver certain completed construction documents to Landlord. After Tenant failed and refused to cure its default, on July 31, 2015, Landlord terminated and canceled the Sublease. Also on July 17, 2015, Tenant sent Landlord a notice of its own alleging that, as a result of Mr. Trump's comments, Landlord had constructively evicted Tenant and violated the covenants of quiet enjoyment and good faith and fair dealing, claiming that Mr. Trump's statements rendered it impossible for Tenant to open and operate a successful restaurant.

On August 8, 2015, Landlord filed suit against Defendants for Tenant's breach of the Sublease. On October 7, 2015, Defendants countersued, claiming, among other things, that Mr. Trump's comments about immigration constituted Landlord's breach of the covenant of good faith and fair dealing. On November 8, 2016, Mr. Trump was elected President of the United States.

The parties are now in the process of completing discovery and Defendants have demanded to take the deposition of Mr. Trump. Because Mr. Trump possesses no unique, first-hand knowledge of the facts of this case that cannot be obtained from another of Landlord's representatives, Landlord contends that Mr. Trump's deposition is unnecessary and serves no purpose other than to harass and, therefore, should be denied. Nevertheless, in the event this Court determines otherwise, Landlord is prepared to make Mr. Trump available to testify at his offices in New York (as Defendants have already agreed), but respectfully requests that the Court (i) limit the length of Defendants' examination of Mr. Trump to two (2) hours; and (ii) prohibit Defendants from asking Mr. Trump questions duplicative of those he was asked at

his deposition in the *Zakarian* case. Not only are Landlord's requests reasonable, they are also consistent with well-established case law.

ARGUMENT

I. DEFENDANTS SHOULD BE PRECLUDED FROM DEPOSING MR. TRUMP

There is ample case law supporting the proposition that high-ranking persons, particularly those with no, or very limited, knowledge, should be limited or outright restricted. "Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment." *Groupion, LLC v. Groupon, Inc.*, No. 11-0870 MEJ, 2012 WL 359699, at *2 (N.D. Cal. Feb. 2, 2012) (citation omitted); *see also Last Atlantis Capital, LLC v. AGS Specialist Partners*, Nos. 04-C-0397, 05-C-5600, 05-C-5671, 2013 WL 4759581, at *3-6 (N.D. Ill. Sept. 4, 2013) (granting the defendants' motion for a protective order concerning the depositions of two former high-ranking executives, noting that neither "possesses the type of unique, personal knowledge that would make their depositions appropriate [and] whatever knowledge or information they do possess generally about issues tangentially relevant to this case may be obtained (and has been obtained) from numerous other witnesses"); *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001) (stating that it might be appropriate to preclude deposition of a highly placed executive when the information the subpoena seeks is "unreasonably cumulative or duplicative"); *Salter v. The Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998) (upholding denial of plaintiff's request to depose high-ranking officer where there was no evidence that the officer had any involvement in the plaintiff's termination and upholding the trial court's decision to limit the deposition of another high-ranking officer to two hours, and further limiting the scope of deposition questions); *Bank of the Ozarks v. Cap. Mortg. Corp.*, No.

4:12–mc–00021 KGB, 2012 WL 2930479, at *2 (E.D. Ark. July 18, 2012) (quashing deposition subpoena issued to party's CEO because the requesting party did not demonstrate that the CEO possessed "truly unique" knowledge relevant to the case); *Burns v. Bank of America*, No. 03 Civ. 1685 (RMB)(JCF), 2007 WL 1589437, at *3, 5 (S.D.N.Y. June 4, 2007) (senior executive would not be required to testify where plaintiff failed to demonstrate that the corporate official had "some unique knowledge" of the issues in the case).

Here, it is undisputed that Mr. Trump is not just any apex deponent; he is the President-Elect. Thus, additional considerations are pertinent. Pragmatically, Mr. Trump has just over a month left to prepare to lead the country. That is, by January 20, 2017, Mr. Trump must have selected his Cabinet and be ready to execute on the duties of the Presidency, which includes managing 15 executive departments, more than 100 federal agencies, 2 million civilian employees and a budget of almost $4 trillion. It is not an overstatement that he is extremely busy handling matters of very significant public importance.

Mr. Trump's President-Elect status requires that this Court "balance the constitutional weight of the interest to be served [in the litigation] against the dangers of intrusion on the authority and functions of the Executive Branch." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982). While there is no constitutional bar to the exercise of judicial jurisdiction over a President in litigation that is unrelated to official duties, the separation of powers mandates that courts exercise "judicial deference and restraint" and work with the President on case scheduling and testimonial obligations. *Fitzgerald*, 457 U.S. at 753 (noting that "the President's constitutional responsibilities and status [are] factors counseling judicial deference and restraint"). "The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire

proceeding, including the timing and scope of discovery." *Clinton v. Jones*, 520 U.S. 681, 707 (1997).

Even more practically, Mr. Trump has not been involved in this dispute and, therefore, has only limited knowledge of the facts at issue. The political statements that were made by Mr. Trump on which Defendants rely are not in dispute. Not surprisingly, when questioned at his deposition in the companion *Zakarian* case—where the issues in dispute are virtually identical to the issues in this case—Mr. Trump testified that he possessed no knowledge regarding the negotiation of the sublease in that case ("I haven't been involved in it almost at all"), nor was he involved in the decision to terminate the sublease ("I wasn't too much involved in it. It was mostly my son and daughter, who you know.").[3]

For all of these reasons, Landlord respectfully requests that the Court enter a protective order precluding Defendants from deposing Mr. Trump in this action.

II. SHOULD THE COURT ORDER MR. TRUMP'S DEPOSITION TO PROCEED, THE EXAMINATION SHOULD BE LIMITED IN BOTH LENGTH AND SCOPE

Should the Court, however, determine that Defendants still have the right to depose Mr. Trump, it is well within this Court's power to reasonably limit discovery, including the length and scope of depositions. *See, e.g.*, *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 716 (D.C. 2013) (upholding trial court's limitation of a particular deposition to three hours, noting that the trial judge stressed the "importan[ce] for all parties to focus" on the issues in dispute and thus the "deposition needed to be tailored to only those claims"). Here, there is ample good cause to issue the protective order sought by Landlord, which seeks only to (i) limit the deposition of Mr. Trump to two hours and (ii) preclude questioning duplicative of

[3] Because the issues in the *Zakarian* case are virtually identical to the issues in this case, Landlord, while preserving all objections, agrees to allow Defendants to use the deposition transcript of Mr. Trump in the *Zakarian* case for all purposes in this litigation.

the *Zakarian* examination. *See* D.C. Super. Ct. R. 26(b)(2)(C)(i) ("On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that the discovery sought is unreasonably cumulative or duplicative.") and (c)(1)(D) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following…forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.").

Not only are these modest limitations reasonable, they are consistent with what has already transpired in the companion *Zakarian* case. In that case, Mr. Trump's deposition, taken by highly-capable opposing counsel, took only two hours to complete—start to finish and inclusive of all breaks—and covered all of the topics (and more) that are pertinent in this litigation, namely, Mr. Trump's vision for the Hotel and involvement in its construction, Mr. Trump's role in the negotiation of the Zakarian sublease, Mr. Trump's statements in June and July 2016, the termination of the Zakarian sublease, the efforts to mitigate damages undertaken by Landlord and the Hotel, and much more. Because the issues in *Zakarian* are virtually identical to the issues in this case (and because Defendants already have access to the full 114-page deposition transcript of Mr. Trump in the *Zakarian* case) and, assuming Defendants are acting in good faith (and not for the purpose of harassing, annoying, or burdening Mr. Trump), there is simply no good reason why a deposition on the same topics in this lawsuit should take longer.

Further, it also stands to reason that a fact witness who testified under oath should not be asked the same questions that were already asked. Asking duplicative questions is the very definition of harassing, annoying, and oppressive conduct. *See* 10A Fed. Proc., L. Ed. § 26:468 (2016) ("It is inappropriate for counsel examining a deponent to repeatedly and deliberately

duplicate questions previously asked by other counsel. Such a practice can support a motion to terminate a deposition if employed to such an extent that bad faith or a motive to harass the deponent can properly be inferred."); *Smith v. Logansport Cmty. Sch. Corp.*, 139 F.R.D. 637, 646 (N.D. Ind. 1991) (noting "that it would not be appropriate for counsel examining a deponent to repeatedly and deliberately duplicate questions previously asked by other counsel").

Questions that are not, in fact, functionally duplicative are fair game. In response to this reasonable request, Defendants set up a strawman by suggesting that Landlord is attempting to cut off inquiries into "topics." (Mot. at 6.) To be clear, Landlord is not seeking protection from questioning of the same topics in this upcoming deposition. Rather, Landlord is simply seeking to sensibly streamline this deposition.

For all of these reasons, should the Court order the deposition to take place, Landlord requests that a reasonable limitation of two hours be placed on the deposition and that duplicative questions not be re-asked. Landlord's counsel will, of course, continue to work with Defendants' counsel reasonably and in good faith in every way possible.

Dated: December 13, 2016

Respectfully submitted,

/s/ Rebecca Woods

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CERTIFICATION PURSUANT TO RULE 12-I

Undersigned counsel hereby certifies that she conferred with counsel for Defendants Topo Atrio, LLC and ThinkFoodGroup, LLC and that Defendants do not consent to the relief sought in this Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 2016, a true and correct copy of the foregoing Emergency Motion for Protective Order was served via electronic mail on the following counsel:

Brigida Benitez, Esq.
Jessica I. Rothschild, Esq.
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Counsel for Defendants Topo Atrio, LLC, et al.

/s/ Rebecca Woods
Rebecca Woods

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ORDER

Upon consideration of Plaintiff's Emergency Motion for Protective Order in the above-captioned action, it is this _____ day of _____, 2016, hereby:

ORDERED that Plaintiff's Emergency Motion for Protective Order is hereby GRANTED; and it is

FURTHER ORDERED that no deposition of Mr. Donald J. Trump shall occur.

[OR IN THE ALTERNATIVE]

FURTHER ORDERED that the deposition of Donald J. Trump is limited to no more than two (2) hours in duration and the questioning in said deposition shall be limited to questions not previously asked and answered in the case of *Trump Old Post Office LLC v. Zakarian et al*., No. 2015 CA 5890 B (D.C. Super.).

IT IS SO ORDERED.

_____
Judge Jennifer A. Di Toro