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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

vs.

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC,

Defendants.

Index No. 452564/2022
(Engoron, J.S.C.)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECUSAL

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Defendants President Donald J. Trump ("President Trump"), Donald Trump, Jr., Eric Trump, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC (collectively, "Defendants") respectfully submit this memorandum of law in support of Defendants' motion for recusal pursuant to 22 N.Y.C.R.R. § 100.3(E)(1) or, in the alternative, an expedited evidentiary hearing on the issues raised herein before another Justice of this Court.

PRELIMINARY STATEMENT

The United States Constitution guarantees to all litigants a fair and impartial trial unsullied by outside influence. Judges are the neutral arbiters charged with safeguarding this bedrock principle. Accordingly, every judge has a duty to act at all times "in such a manner as to inspire public confidence in the integrity, fair-mindedness and impartiality of the judiciary." Matter of Esworthy, 77 N.Y.2d 280, 282 (1991). The New York Code of Judicial Conduct (the "Code") expressly provides that a judge must ***avoid even the appearance of impropriety***. 22 N.Y.C.R.R. § 100.2(A) (emphasis added). These responsibilities are only heightened where the judge also acts as sole finder of fact in a case that has commanded worldwide attention.

In this case with no victims, no evidence of detrimental reliance, no loss of any kind to any business or consumer, and no harm to any public interest, this Court imposed a disgorgement penalty in the unprecedented and unconstitutional sum of $464 million, awarded draconian injunctive relief that exceeds statutory authority and sought to restrain President Trump's massive global real estate empire in the conduct of lawful business. This staggering final judgment ignores the Appellate Division, First Department's controlling decision in this very case, and

violates the Excessive Fines and Due Process Clauses of the United States and New York State Constitutions. See U.S. Const. amend. VIII § 3, amend. XIV; N.Y. Const. art. I § 5, art. 1 § 6. Indeed, the $464 million award has been described as "using a Hellfire missile to annihilate an [alleged] shoplifter." The Editors, *Trump's $355 Million Civil Fraud Verdict*, WALL ST. J. (Feb. 17, 2024). "There was no real financial victim." Id. Thus, this Court's final judgment has certainly imperiled public confidence in the integrity of the New York legal system.[1]

Now, allegations have surfaced revealing this Court may have engaged in actions fundamentally incompatible with the responsibilities attendant to donning the black robe and sitting in judgment. Specifically, this Court has been publicly accused of engaging in prohibited communications regarding the merits of this case, in clear violation of the Code and this Court's solemn oath. Such conduct is "antithetical to the role of a judge." Matter of George, 22 N.Y.3d 323, 330 (2013). Moreover, to learn that this Court may well have disregarded basic ethical guidelines during the course of presiding over these notorious proceedings portends irreparable damage to the rule of law. In sum, this Court appears to have proceeded not only in contravention of controlling law and the Constitution, but perhaps also contrary to the governing standards of judicial conduct.

The gravity of these public allegations of potential misconduct is underscored by the fact that this Court, based upon public reporting, is also now apparently under investigation by the Commission on Judicial Conduct (the "Commission"). Consequently, at minimum, the appearance of impropriety is manifest and mandates recusal. The integrity of this tribunal and

[1] See, e.g., Jeb Bush and Joe Lonsdale, *Elon Musk and Donald Trump Cases Imperil the Rule of Law*, WSJ Opinion (Feb. 21, 2024); Andrew C. McCarthy, *Having Ruled that Trump Inflated Assets, Judge Engoron Is Suddenly Stunned That Assets Appear to Have Been Inflated*, National Review (Feb. 7, 2024); Steven Calabresi, *President Trump's Kafkaesque Civil Trial in New York State*, The Volokh Conspiracy (Feb. 18, 2024); Jonathan Turley, *Democrats weaponized justice system to punish Trump in business case*, N.Y. Post (Feb. 19, 2024); Michael Reagan, *Mob Rule Law Convicts Trump of Crimeless Crime*, Newsmax (Feb. 20, 2024).

President Trump's right to a fair and impartial trial, have been ineluctably imperiled. Under these circumstances, recusal is mandatory and essential to preservation of the rule of law.

* * *

The allegations against this Court were revealed in an article (and subsequent televised news segment) published by NBC New York on May 8, 2024 titled "High-profile New York lawyer says he tried to advise judge in Trump civil fraud case[.]" See Affirmation of Clifford S. Robert ("Robert Aff."), Ex. A; NBC New York, "Lawyer says he tried to advise Trump civil fraud judge, weeks before penalty decision," YOUTUBE.COM (May 8, 2024), available at https://www.youtube.com/watch?v=o1ZBhHbYbjY. The article recites the public statements of Adam Leitman Bailey, Esq. ("Mr. Bailey"), a non-party real estate attorney, who purportedly engaged in prohibited communications with this Court regarding the merits of this case, the permissible scope of the New York State Attorney General's (the "Attorney General") and this Court's own authority under Executive Law § 63(12), and the consequences of this Court's decision on business in the State. Mr. Bailey has publicly stated that these communications with this Court occurred mere weeks prior to issuance of the decision and final judgment in this case.

The Code flatly prohibits such communications. The only exception therein is the narrow circumstance where advice is obtained from a disinterested expert and subsequently disclosed to the parties. Neither requirement was met here. Mr. Bailey, who is the founder of the law firm of Adam Leitman Bailey, P.C. and reportedly claims to have sued President Trump in the past, is clearly not disinterested. See Robert Aff. Ex. A, Ex. B. He is certainly not the "expert" contemplated by the exception to the applicable prohibition. Moreover, this Court failed to notify any party of these communications to permit them an opportunity to weigh in and, if necessary, provide their own expert testimony.

While this Court has purportedly denied being influenced by Mr. Bailey, the appearance of impropriety engendered by Mr. Bailey's apparent communications with this Court, its obfuscation until three months after entry of Judgment, and the pendency of a Commission investigation remains. Where, as here, this Court's impartiality might reasonably be questioned under the circumstances, it must recuse. Indeed, there is no other means of dispelling the shadow that now looms over this Court's impartiality, fairness, and ability to adhere to the Code. The apparently credible (given the Commission investigation) allegations of prohibited communications create the appearance of impropriety and tarnish the integrity of this proceeding beyond repair. To preserve the integrity of the judiciary and the rule of law, Defendants respectfully request that this Court recuse itself from this case or, in the alternative, grant Defendants' request for an expedited evidentiary hearing on the issues raised herein.

BACKGROUND

A. Mr. Bailey is a Real Estate Litigator Who Has Appeared before this Court.

Mr. Bailey is a New York real estate litigator who claims to have sued President Trump no fewer than seven times. See Affirmation of Clifford S. Robert ("Robert Aff."), Ex B. Indeed, by his own admission, Mr. Bailey is "no fan of [President] Trump." See Robert Aff, Ex. A at 4.

Mr. Bailey is no stranger to this Court. Indeed, Mr. Bailey claims to have a longstanding relationship with this Court, having litigated before it "hundreds of times." Robert Aff., Ex. A at 4.[2] This Court has gone as far as to commend Mr. Bailey for his testimony in a prior decision. In Bd. of Managers of 60 E. 88th St. v. Adam Leitman Bailey P.C., this Court observed that "Bailey's testimony was fascinating: often perceptive and shrewd; sometimes impressionistic,

[2] Electronically filed public record reflects Mr. Bailey's representation in two cases before this Court and three reported decisions involving him or his firm.

his lofty ideals butting heads with the every-day reality of practicing law." 2014 N.Y. Misc. LEXIS 6263, at *11 (Sup. Ct. N.Y. Cty. 2014).

B. Mr. Bailey Has Publicly Discussed a Conversation that He Had with this Court and Conveyed the Impression that He Has Influenced this Proceeding.

On September 27, 2023, this Court issued a decision, *inter alia*, granting summary judgment to the Attorney General on the first cause of action in her complaint, wherein she claimed that Defendants engaged in "repeated and persistent fraud" in violation of Executive Law § 63(12). NYSCEF Doc. No. 1531 at 2. This Court further directed the cancellation of Defendants' business certificates and dissolution of all cancelled entities. Id. at 35. On November 15, 2023, Defendants moved for a mistrial on the grounds that, *inter alia*, this Court was improperly influenced by its Principal Law Clerk's public partisan activities. See NYSCEF Doc. No. 1633-1637. This Court declined to sign Defendants' order to show cause and annexed a four-page advisory opinion justifying its conduct. See NYSCEF Doc. No. 1640.

On February 16, 2024, after a three-month non-jury trial, at which it acted as the sole factfinder, this Court issued a decision and order, *inter alia*, (1) finding Defendants liable on the second through seventh causes of action, (2) awarding the Attorney General more than $450 million in disgorgement, and (3) imposing extensive and punitive injunctive relief against Defendants (the "Judgment"). NYSCEF Doc. No. 1688. However, this Court reversed course and modified its summary judgment decision to the extent of vacating the directive to cancel Defendants' business certificates, reflecting that dissolving Defendants' companies *en masse* "could implicate serious economic concerns." Id. at 89. A day later, Mr. Bailey issued a statement to the Daily News about this Court's decision, calling the modification a "complete reversal of [this Court's] last castration of the Trump business" and speculating that President

Trump "absolutely must be feeling…relief in spades" when he learned that dissolution was off the table. Robert Aff., Ex. C at 54-55.

Several months later, on May 8, 2024[3], NBC New York published an article reporting that, by his own admission, Mr. Bailey communicated with this Court about this case in the weeks leading up to the Judgment. Robert Aff, Ex. A. According to NBC New York, on February 16, 2024, the day the Judgment was issued, Mr. Bailey stated in an on-camera interview with NBC New York that he:

> had the ability to speak to [this Court] three weeks ago…I saw him in the corner [at the courthouse] and I told my client, 'I need to go.' And I walked over and we started talking . . . I wanted him to know what I think [about the case] and why . . . I really want him to get it right.

Id. at 3. Mr. Bailey stated in the same interview that, while he is "a big fan of [this Court]," he "do[es] not think [this Court] is applying the law properly." NBC New York, "Lawyer says he tried to advise Trump civil fraud judge, weeks before penalty decision," YOUTUBE.COM (May 8, 2024) at 1:06-1:09.

Mr. Bailey claims he discussed the merits of the case, explained the application of Executive Law § 63(12), and advised this Court on analogous case law during this conversation. Id. at 2:34-2:44; Robert Aff., Ex. A at 4. According to Mr. Bailey, he also highlighted the potential economic repercussions of imposing a substantial financial penalty on President Trump. Robert Aff., Ex. A at 4. Mr. Bailey told NBC New York that he explained to this Court "that a fraud statute at issue in the case was not intended to be used to shut down a major company, especially in a case without clear victims" as "such a ruling would hurt New York's economy." Id. Mr. Bailey further claims that this Court had "a lot of questions." Id.

[3] This article was later updated on May 9, 2024.

On February 21, 2024, in a subsequent interview with NBC New York, Mr. Bailey confirmed again that he communicated with this Court. See NBC New York, "Lawyer says he tried to advise Trump civil fraud judge, weeks before penalty decision," YOUTUBE.COM (May 8, 2024) at 5:28-5:46. Although Mr. Bailey claims that President Trump was not mentioned by name in the conversation, when asked whether "it was obvious that [his] input was related to this case," Mr. Bailey stated "well[,] obviously we weren't talking about the Mets." See id. When NBC New York asked a spokesperson whether this Court had engaged in an *ex parte* communication with Mr. Bailey and whether the interaction was appropriate, a spokesperson responded in a written statement that:

> [N]o ex parte conversation concerning this matter occurred between Justice Engoron and Mr. Bailey or any other person. The decision Justice Engoron issued February 16 was his alone, was deeply considered, and was wholly uninfluenced by this individual.

Id. at 2:59-3:23.

According to NBC New York, Mr. Bailey, this Court, and the Office of Court Administration ("OCA") have refused to respond to inquiries since February 2024. See Robert Aff., Ex. A at 7-8. Since these allegations have come to light, it is reported that the New York State Commission on Judicial Conduct has launched an investigation into this Court's conduct. See Robert Aff., Ex. C. Robert Tembeckjian, the Commission's Administrator and Counsel, has declined to comment, citing a strict confidentiality statute. Robert Aff., Ex. A at 6. At least a dozen news outlets have reported on both the alleged *ex parte* communication and the pending investigation. Robert Aff., Ex. A, Ex. C.

ARGUMENT

THIS COURT'S ALLEGED *EX PARTE* COMMUNICATION MANDATES RECUSAL

A. This Court's Alleged Unauthorized *Ex Parte* Communication Violates the Code of Judicial Conduct.

It is the judge's "duty to uphold the independence and integrity of the judiciary by not engaging in ex parte communications concerning a pending matter." Matter of Levine, 74 N.Y.2d 294, 297 (1989); see Matter of Ayres, 30 N.Y.3d 59, 63 (2017) ("[I]t is a violation of a judge's solemn oath to abandon the role of neutral decisionmaker or engage in ex parte communications on the merits of a case."). *Ex parte* communications are "fundamentally incompatible with the responsibilities of judicial office." Matter of Ayres, 30 N.Y.3d at 63. Indeed, prohibited communications "jeopardize[] the public confidence in the integrity and impartiality of the judiciary, indispensable to the administration of justice in our society, and warrant[] removal from office." Matter of Levine, 74 N.Y.2d at 297.

In accordance with these principles, the Code states that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding." 22 N.Y.C.R.R § 100.3(B)(6); see also Code of Conduct for U.S. Judges, Canon 3(A)(4) ("Canon 3(A)(4)") ("[A] judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested.").

The law is clear that any communication outside of the presence of the parties or their lawyers must be strictly scrutinized. The Court is obligated to avoid attempted *ex parte* communications, and if an *ex parte* communication does occur, the Court should, at minimum, promptly notify all parties of the communication. See 22 N.Y.C.R.R. § 100.3(B)(6); see also Advisory Comm. on Jud. Ethics Op. 96-95 (1996). The appropriate remedy for the *ex parte* communication is notification to the parties and recusal. See People v. Lester, 2002 NY Slip Op 40063(U), *3-4 (Just. Ct. Nassau Cty. 2002) (court recused itself after receiving an *ex parte* communication from a *pro se* litigant); see also Matter of VonderHeide, 72 N.Y.2d 658, 659-660 (1988) (upholding the Commission's decision to remove petitioner Town Justice after finding petitioner had, *inter alia*, engaged in *ex parte* communications and made judgments based on those communications). The severity of this measure is warranted by the irremediable appearance of impropriety created by *ex parte* communications:

> An *ex parte* communication is not time for a jurist to pretend that the contact is a genie in a bottle. Instead of exploring that inference, it is for the Judge to be reserved, guarded, circumspect and to shun conduct that would be misinterpreted. A Judge may appear uncaring, insensitive or inhumane, but it is better that he be viewed this way then if he or she is open to being approached, to being corrupted.

Lester, 2002 N.Y. Slip. Op. 40063(U) at *3. *Ex parte* conversations are, by their nature, "unfair and can be misleading," as "[t]he facts may be incomplete or inaccurate, the problem can be incorrectly stated or other matters can be incorrectly stated." Matter of Fuchsberg, 426 N.Y.S.2d 639, 648 (N.Y. Ct. Jud. 1978) (internal citations and quotations omitted).

Here, it is beyond dispute that neither Defendants nor the Attorney General were present during the purported communication with Mr. Bailey. Nor did this Court ever notify either party that the purported communication took place, which would have at least permitted an

opportunity for comment on the substance of the conversation, as conveyed by this Court. Worse yet, Mr. Bailey's account indicates that this Court not only permitted but welcomed such prohibited communication. According to Mr. Bailey, this Court was an active participant in a conversation concerning the merits of the case, wherein this Court asked Mr. Bailey a "lot of questions." Robert Aff, Ex. A at 4. As illustrated above, Mr. Bailey is not a disinterested expert. He is a real estate litigator with a vested interest in the construction of Executive Law § 63(12) and the penalties thereunder.

B. Neither Exception to the Code's Bar on *Ex Parte* Communications Applies.

There are two narrow exceptions to the Code's proscription on *ex parte* communications. First, a communication required for scheduling or administrative purposes is permitted where it does not "affect a substantial right of any party, . . . provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the *ex parte* communication and allows an opportunity to respond." 22 N.Y.C.R.R. § 100.3(B)(6)(a). This exception is clearly inapplicable to the facts presented.

Second, where a judge "obtain[s] the advice of a disinterested expert on the law applicable to a proceeding before the judge," the communication is permitted "if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond." 22 N.Y.C.R.R. § 100.3(B)(6)(b). In Matter of Fuchsberg, the Court on the Judiciary held that a judge had violated Canon 3(A)(4) and the Code by engaging in *ex parte* communications with law professors on at least twelve different cases without notifying any

parties to the case. 426 N.Y.S.2d at 646-648.[4] Consequently, there was "no opportunity [] for the parties or their attorneys to comment upon the expert rendering the advice or the substance of the advice rendered as is required by [] Canon [3(A)(4)] and the Rule." Id. at 647.

This exception is equally inapplicable here. Even if this Court erroneously considered Mr. Bailey a "disinterested expert on the law," it inarguably failed to notify the parties of the communication or afford the parties a reasonable opportunity to respond to Mr. Bailey's advice. Indeed, this Court has both denied that this communication took place and, seemingly confirmed that some conversation *did* occur by claiming to have been "uninfluenced" by Mr. Bailey's advice in entering Judgment. Robert Aff., Ex. A at 4. The latter defense also begs the question of whether this Court engaged in any other *ex parte* communications that it does not believe sufficiently "influenced" the Judgment to warrant disclosure.

C. The Appearance of Impropriety Mandates Recusal

The Code provides that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." 22 N.Y.C.R.R. § 100.2(A). See also 22 N.Y.C.R.R. § 100.3(A) ("The judicial duties of a judge take precedence over all the judge's other activities."); 22 N.Y.C.R.R. § 100.3(B)(4)

[4] The Court described the *ex parte* contact in that case as follows:

> In certain of the instances the consultation amounted to a telephone conversation with a professor in which new developments in the relevant area of law were discussed. In other instances respondent sent the briefs in the case to the professor and asked him to prepare and submit a memorandum containing the latest authorities. In three instances, respondent sought and obtained from law professors draft opinions. Substantial portions of the language of the opinions eventually published by respondent in these cases were taken from the draft opinions which had been submitted by the law professors. Finally, in at least one, and possibly two, cases, respondent forwarded an unpublished draft opinion of another Judge on the Court of Appeals to a law professor with whom he was consulting without notifying the Judge in question.

Id. at 646.

("A judge shall perform judicial duties without bias or prejudice against or in favor of any person."). Accordingly, the Code requires that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." 22 N.Y.C.R.R § 100.3(E)(1). As "Judges should strive to avoid even the appearance of partiality," Judges should "err on the side of recusal in close cases." Matter of Murphy, 82 N.Y.2d 491, 495 (1993). "[I]t may be the better practice in some situations for a court to disqualify itself in a special effort to maintain the appearance of impartiality." People v. Moreno, 70 N.Y.2d 403, 406 (1987) (internal citations omitted). See also Corsini v. Corsini, 199 A.D.2d 103, 103-104 (1st Dep't 1993) (holding that recusal "is applicable even where the purpose [] is to maintain the appearance of impartiality").

"Judges are held to standards of conduct more stringent than those acceptable for others." Matter of Ayres, 30 N.Y.3d at 66 (internal citations and quotations omitted). "Judicial and attorney members of the panel are required to avoid the slightest appearance of impropriety." Felner v. Shapiro, 94 A.D.2d 317, 322 (1st Dep't 1983). Courts "must be constantly vigilant to avoid even the appearance of bias which may erode public confidence in the judicial system as quickly as would the damage caused by actual bias." People v. Zappacosta, 77 A.D.2d 928, 929 (2d Dep't 1980); see also Johnson v. Hornblass, 93 A.D.2d 732, 733 (1st Dep't 1983) ("[T]he 'appearance of justice' might be better served by [the judge's] recusal . . . [as] judicial proceedings should never be conducted save in a manner and under circumstances that reflect complete impartiality. Not only must there be no partiality, in fact, even the appearance of partiality is to be avoided."); Ahmed v. Brucha Mtge. Bankers Corp., 82 Misc. 3d 1230(A), at *8 (Sup. Ct. Kings Cty. 2024) (stating that a court determining whether to recuse should consider the "need[] to maintain the appearance of impartiality, to maximize public confidence in the

judicial branch of government, and to avoid engendering speculation injurious to the Court in which [the Court] sit[s]").

As Alan Sheinkman, former Presiding Justice of the Second Department, opined, if this Court engaged in "*any* substantive dialogue" about the proceeding, that dialogue "should be disclosed" and "[t]he fact that this lawyer made these statements – unprompted – during a recorded TV interview should raise serious concerns." Robert Aff., Ex. A at 5-6 (emphasis added). These concerns, which strike at the foundation of public confidence in the integrity and impartiality of the judiciary, cannot be allayed by any remedy other than recusal.

The Court's statement that the Judgment was "wholly uninfluenced by this individual" does nothing to mitigate the perception of impropriety created by the fact of the *ex parte* communication. The Code does not carve out an exception for short conversations or communications this Court subjectively or defensively deems insignificant. Rather, the Code seeks to prevent a judge from acting in a way that would undermine the integrity of the proceedings and the judiciary more broadly. Thus, the test is not whether there is actual impropriety, but "whether the circumstances would give the appearance of bias or be reasonably regarded as bias." Felner, 94 A.D.2d at 322 ("Basic to every judicial and quasi-judicial proceeding is that the integrity of the decision-making body must be above reproach and even the appearance of impropriety should be avoided.").

Here, concerns as to this Court's partiality are apparent to even the meanest understanding. This trial, as with every other proceeding involving President Trump, has been subject to unrelenting national and international news coverage. The alleged prohibited conversation has already been amplified by at least a dozen news outlets, reaching an audience of millions of Americans, with the general election less than six months away. See Robert Aff., Ex.

A, Ex. C. The Commission's ongoing investigation into this Court's conduct has also been widely reported. At this juncture, the taint of impropriety has so permeated this case that it is irremediable.

The need to avoid any appearance of impropriety is particularly salient where, as here, this Court is the sole fact finder. That appearance of impropriety is further exacerbated where this Court imposed a baseless and excessive award of $464 million in disgorgement relief and punitive injunctive relief, including industry bars and proscriptions on obtaining loans. It is incumbent on this Court, as an elected representative of the people of this State and this County, to recuse itself in light of the demonstrable appearance that it allowed itself to be influenced by and relied upon the biased opinions, conveyed in secret, of an unelected nonparty attorney who has previously sued President Trump multiple times.

D. The Court Has Jurisdiction to Hear This Motion.

The law is well-settled that "a case, for general purposes, remains within the jurisdiction of the trial court while it is appealed and that, except for matters pertinent to the appeal, all other applications must be made to the trial court because 'the case is regarded as still pending in the court of original jurisdiction.'" Ruben v. Am. & Foreign Ins. Co., 185 A.D.2d 63, 67-68 (4th Dep't 1992), citing Henry v. Allen, 147 N.Y. 346, 347 (1895). Moreover, the Judgment includes a directive that the Hon. Barbara Jones remain as an independent monitor and supervise the Trump Organization for three years. See NYSCEF Doc. No. 1688. Thus, this Court remains in a supervisory capacity over President Trump and the other Defendants. On March 21, 2024, this Court issued an order setting forth Judge Jones' "enhanced role" going forward (the "Monitorship Order"). See NYSCEF Doc. No. 1706. The Monitorship Order included requirements that Judge Jones issue written reports to the Court and "meet and discuss her work

with the Court as necessary." Id. at 5. In a supplemental order issued on April 26, 2024, this Court modified the Monitorship Order to allow the monitor to "share information and communicate with the Court and any party on an *ex parte* basis." NYSCEF Doc. No. 1756 at 1. As this Court has stated, court-appointed monitors are an arm of the Court and can only remain in place while the court retains jurisdiction over a case. See, e.g., Matter of U.S. Capital Ins. Co., 948 N.Y.S.2d 549, 551-552 (Sup. Ct. N.Y. Cty. 2012). Therefore, the Court has expressly retained jurisdiction to oversee and direct the monitorship, even post-final judgment, and thus has jurisdiction to hear and decide this motion.

E. In the Alternative, the Court Should Hold an Evidentiary Hearing.

In the event that the Court does not recuse itself from this case, Defendants request an expedited evidentiary hearing before another Justice of the Court on the veracity of Mr. Bailey's allegations and the Court's and OCA's denial.[5] At such hearing, Mr. Bailey, this Court and others would be called as witnesses and testimony elicited regarding the substance of the purported prohibited communications and any other such similar communications. An evidentiary hearing is necessary when a conflict involves "relevant factual disputes." See Elghanayan v. Elghanayan, 107 A.D.2d 594, 594-595 (1st Dep't 1985), citing Kaufman v. Kaufman, 63 A.D.2d 609 (1st Dep't 1978); see also Matter of Beiny, 132 A.D.2d 190, 215 (1st Dep't 1987) ("Where material factual issues remain respecting an attorney's conduct or the propriety of disqualification, an evidentiary hearing is in order."). The Court of Appeals has held

[5] To ensure that the parties and this Court possess all information relevant to the disposition of this motion, Defendants intend to issue a subpoena to Mr. Bailey. The subpoena seeks production of, *inter alia*, all communications between this Court and Mr. Bailey to the Courthouse at 60 Centre Street, New York, NY 10007. See Robert Aff. Ex. D.

that an attorney accused of professional misconduct must have an opportunity to confront the witnesses and subject them to cross-examination:

> Upon the return of that order the accused is heard. He may confess, he may explain, he may deny. If he confess, the court may at once render its judgment. If he explain, the court may deem the explanation sufficient, or the reverse. But if he meets accusation with denial, the issue thus raised is to be tried, summarily it is true, by the court itself, or by a referee, but nevertheless to be tried, and on that trial the accused is not to be buried under affidavits or swamped with hearsay, but is entitled to confront the witnesses, to subject them to cross-examination, and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to the members of the bar the common rights and ordinary privileges of the citizen.

Matter of Long, 287 N.Y. 449, 455-456 (1942), quoting Matter of Eldridge, 82 N.Y. 161, 167-168 (1880) (internal quotations omitted). The practice should be no different here.

This Court has simultaneously denied the existence of any *ex parte* communication while seemingly confirming that such conversation did take place by stating that it did not influence this Court's decision. Mr. Bailey has, on two occasions, publicly stated that the *ex parte* communication occurred and involved substantive discussion of the issues presented in the case. Moreover, there is apparently now an active and ongoing investigation of these matters by the Commission. Consequently, there are substantial issues of fact regarding both the existence of the communications and their potential impact on this Court's decision. Therefore, an evidentiary hearing is necessary to safeguard Defendants' constitutionally guaranteed right to a fair and impartial trial and the integrity of the judiciary.[6]

[6] Given the Court would necessarily testify at any evidentiary hearing, such hearing should be referred to another judge of this Court. Cf. 22 N.Y.C.R.R. § 604.2(d)(1) (disqualifying judge from presiding over contempt hearing where the allegedly contumacious conduct "consists primarily of personal disrespect to or vituperative criticism of the judge."). See Robert Aff. at ¶ 18.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court recuse itself, or, in the alternative, set the matter down for an evidentiary hearing, and grant any such other and further relief it may think proper.

Dated: New York, New York
June 20, 2024

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court, I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 5,237 words. The foregoing word counts were calculated using Microsoft® Word®.

Dated: Uniondale, New York
June 20, 2024

CLIFFORD S. ROBERT