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, -against- Donald J. Trump, *et al*., Defendants.	Index No. 452564/2022 Hon. Arthur Engoron Motion Seq. No. 40

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR RECUSAL

LETITIA JAMES
Attorney General of the State of New York
28 Liberty Street
New York, NY 10005

Kevin C. Wallace
Andrew Amer
Colleen K. Faherty
Alex Finkelstein
Sherief Gaber
Wil Handley
Eric R. Haren
Louis M. Solomon
Stephanie Torre

Of Counsel

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PRELIMINARY STATEMENT

Following an 11-week bench trial during which 40 witnesses testified, this Court concluded that Defendants—Donald J. Trump, his sons Eric Trump and Donald Trump Jr., and other Trump Organization executives and entities—had for a decade engaged in illegal business conduct in violation of Executive Law § 63(12). The Court's 92-page post-trial decision also confirmed its prior summary judgment ruling, which held that Defendants had engaged in repeated and persistent fraud in the conduct of their business.

The evidentiary record developed at the summary-judgment stage and later during the bench trial established that Defendants prepared numerous annual Statements of Financial Condition ("SFCs") that each inflated the value of Mr. Trump's net worth, by as much as $2.2 billion in a single year. Summary Judgment ("SJ") Decision (NYSCEF No. 1531) at 19; Post-Trial Decision (NYSCEF No. 1688) at 60-68. Defendants submitted those false and misleading SFCs to lenders, insurers, and government agencies in New York on over two dozen separate occasions through 2021, while certifying that the SFCs were true and accurate, to reap significant financial benefits. SJ Decision at 31-32; Post-Trial Decision at 68-74. Based on those determinations, the Court entered final judgment in the People's favor: (i) directing Defendants to disgorge hundreds of millions of dollars in ill-gotten profits from their fraudulent and illegal conduct; (ii) requiring Defendants to maintain an existing independent monitor and to install an independent director of compliance to support the monitor; and (iii) restricting Defendants' business activities in New York. Post-Trial Decision at 91-92.

Having suffered this crushing defeat based on the overwhelming evidentiary records developed by the Office of the Attorney General ("OAG") at summary judgment and trial, Defendants now ask the presiding justice who delivered final judgment against them to step aside

so that a different justice—one completely unfamiliar with this case and the reams of evidence exhaustively discussed in the summary judgment and post-trial decisions—can oversee their compliance with the court-ordered injunctive relief.

The purported factual basis for their extraordinary request is pure sophistry. Their motion springs from, and rests exclusively on, a single NBC News article about a lawyer with no involvement in this case purportedly mentioning to the Court during an impromptu encounter in the hallway of the courthouse his thoughts about New York's business fraud statute, Executive Law § 63(12). The lawyer confirmed that he never referenced this case or uttered the name "Trump" during the encounter, yet Defendants brazenly misrepresent the lawyer's hallway comments as being "about this case." Defendants' Recusal Memorandum of Law (NYSCEF No. 1762) ("Defs. MOL") at 6. Even assuming that the encounter occurred as reported secondhand by NBC News, it was not an "*ex parte* communication" because it was *not* specifically about this case but rather an abstract comment on the law. Nothing prohibits lawyers and judges from discussing the law in the abstract, and certainly no rule requires a judge to disclose abstract discussions of the law to the parties in every case before him that might require him to interpret and apply such law.

Defendants' distortion of the facts does not end with the NBC News article about the hallway encounter. Defendants also gin up what they describe as "an active and ongoing investigation" into the encounter based on an anonymous observation in the NBC News article that the "New York State Commission on Judicial Conduct will now consider whether the rules of judicial conduct were violated in this instance." Defs. MOL at 16. No credible evidence suggests there is such an investigation underway. Nor would it be relevant even if there were since the mere existence of an investigation does not pre-ordain that the investigation will result in any finding of wrongdoing—let alone find anything meeting the high bar that would suggest bias warranting

recusal.

Finally, Defendants rely on the sheer number of media outlets that have run stories recycling the original NBC News article—like an image bouncing around a Fun House Hall of Mirrors—in an attempt to manufacture the appearance of impropriety and the need to "dispel[] the shadow that now looms over this Court's impartiality, fairness, and ability to adhere to the Code." Defs. MOL at 4. An appearance of impropriety cannot be based on the number of articles published by media outlets, as Justice Scalia concluded twenty years ago. *Cf., e.g.*, *Cheney v. U.S. District Court for the District of Columbia*, 541 U.S. 913, 923 (2004) (Scalia, J.) (rejecting argument that recusal was warranted because "20 of the 30 largest [newspapers] have called on Justice Scalia to step aside" and stating that "[t]he implications of this argument are staggering"). That is especially true where, as here, the articles simply regurgitate what a single news outlet has already reported and at least some of the articles are instigated by Defendants' own counsel. *See, e.g.,* Newsweek, *Alina Habba Issues Ultimatum to Judge Engoron*, June 22, 2024, available at https://www.newsweek.com/alina-habba-issues-ultimatum-judge-engoron-1916090. Defendants should not be heard to bemoan "the shadow that now looms" over this case when they are the ones attempting to cast the shadow.

* * *

Throughout this case, Defendants have engaged in spurious efforts to avoid accountability for their fraudulent and illegal business conduct by seeking to delegitimize this proceeding and attacking the Court's impartiality and integrity. Defendants began the case by making multiple, "procedurally improper and substantively unavailing" applications "essentially seeking [the] Court to recuse itself," and transfer the case to the Commercial Division. NYSCEF No. 180 at 5. Mr. Trump sued the Attorney General in Florida to frustrate this proceeding, accusing the Court of

"extreme bias." NYSCEF No. 182 at 25 ("Suffice it to say that this justice has also demonstrated extreme bias against President Trump, fining him $10,000 per day for claimed subpoena non-compliance despite his having produced millions of pages of documents.").[1] The attacks continued both in and out of court. Defendants accused the Court of refusing to adhere to decisions of the First Department. *See, e.g., Donald J. Trump et al. v. The Honorable Arthur F. Engoron, et al.*, Case No. 2023-04580 (NYSCEF. No. 9) at 1 ("Supreme Court again confirmed that he will not adhere to this Court's Decision"). Both in and out of court, Defendants called the Court biased and corrupt, leveled accusations of impropriety at the Court and its principal law clerk, and disrupted the course of the trial with extended soliloquies.[2] This motion is just more of the same tactic to undermine the Court's legitimacy in the face of Defendants' devastating defeat. The Court should have none of it.

PROCEDURAL HISTORY

A. The Summary Judgment and Bench Trial Decisions

In September 2023, the Court denied Defendants' motion for summary judgment and granted OAG's motion for partial summary judgment on its § 63(12) fraud claim. The Court determined based on the undisputed record that Defendants had committed fraud by repeatedly and persistently issuing false and misleading SFCs. As the Court summarized, Defendants' SFCs had built a "fantasy world" of misrepresentations and omissions: "rent regulated apartments are worth the same as unregulated apartments; restricted land is worth the same as unrestricted land;

[1] The $10,000 per day penalty that purportedly demonstrated "extreme bias" was in fact upheld on appeal. *See People v Trump*, 213 A.D.3d 503 (1st Dep't 2023).

[2] *See, e.g.,* Trial Tr. 3398:15 -21 ("I have to at least have fair comment on what I think is biased"); Trial Tr. 3398:06 -14 ("it gives off the appearance of impropriety"); Trial Tr. 3402:18 -24 ("I certainly have a right to question what is perceived by my client as bias"); Habba Press Statement, Nov. 6, 2023 ("This country is falling apart and if we don't stop corruption in our courtrooms, where attorneys are gagged, where attorneys are not allowed to say what they need to say to protect their client's interest, it doesn't matter what your politics are, everyone has a right in this country to get up and put a defense."), available at https://www.youtube.com/watch?v=feGOVDsiPKM.

restrictions can evaporate into thin air . . . ; and square footage [is] subjective." SJ Decision at 10. Defendants had also disregarded independent appraisals of Mr. Trump's assets, replacing the appraised values with "concocted" figures. *Id*. at 31.

In February 2024, the Court issued a 92-page post-trial decision. Based on its detailed descriptions of documentary evidence and witness testimony, the Court made extensive factual findings, credibility determinations, and conclusions of law. As in its summary judgment decision, the court again detailed the numerous misrepresentations and omissions found in Mr. Trump's SFCs. Post-Trial Decision at 60-68. The Court explained that Defendants' certification and submission of the SFCs to lenders, insurers, and government agencies to reap financial benefits constituted fraud. *Id*. at 68-74. And the Court confirmed based on the trial record that the misrepresentations and omissions were material because they inflated the value of Mr. Trump's assets and thus Mr. Trump's net worth and liquidity by enormous sums. *Id*. at 76-77.

The Court also issued detailed findings regarding Defendants' liability on the § 63(12) illegality claims. The Court held that Defendants' misconduct constituted repeated or persistent illegality because it violated Penal Law prohibitions against falsifying business records and issuing false financial statements. In reaching this determination, the Court found that overwhelming evidence established Defendants' intent to defraud, such as evidence of their active participation in preparing the false and misleading SFCs, direct role in approving or certifying the SFCs, intimate knowledge of the misrepresentations, and high degree of control over the Trump Organization. *Id*. at 77-80. The Court further found that Defendants Allen Weisselberg and Jeffrey McConney had engaged in insurance fraud by making intentional misrepresentations to insurance companies. *Id*. at 81. And the Court found that the Defendants had engaged in conspiracy to violate the Penal Law prohibitions at issue. *Id.* at 79-81.

On the basis of these findings of fact and conclusions of law, the Court issued several forms of equitable relief. The Court required Defendants to disgorge $363.8 million in ill-gotten profits, plus prejudgment interest. *Id.* at 91. The Court also issued injunctive relief to prevent Defendants from committing future misconduct. For example, the Court explained that despite the independent monitor's oversight since November 2022, Defendants had continued to produce incomplete, inconsistent, or incorrect financial disclosures and had not imposed adequate internal controls to prevent future fraud. *Id.* at 85-87. The Court further explained that Defendants had engaged in prior, documented instances of corporate malfeasance. *Id.* at 87-88. And the Court noted that despite all the evidence, Defendants refused to acknowledge that the SFCs were problematic; indeed, Mr. Trump insisted at trial that no changes were needed at the Trump Organization. *Id.* at 87. Accordingly, the Court extended the term of the independent monitor for three years and required the Trump Organization to retain an independent director of compliance to establish financial-reporting protocols and approve future financial disclosures. *Id.* at 88-89. The Court further restricted Defendants' business activities in New York, by: (i) enjoining Mr. Trump and various Trump Organization entities from applying for loans from any financial institution chartered by or registered with the New York State Department of Financial Services for three years; (ii) barring Mr. Trump, Mr. Weisselberg, and Mr. McConney from serving as an officer or director in New York for three years and barring Donald Trump, Jr. and Eric Trump for two years; and (iii) prohibiting Mr. Weisselberg and Mr. McConney from serving in financial-management roles in New York permanently. *Id.* at 89-90.

B. The Recusal Motion

Defendants have moved for recusal based on a single NBC News article published on May 8, 2024, recounting an interview with a stranger to this case, a previously-disbarred real estate

lawyer named Adam Leitman Bailey. Defs. MOL at 3. According to Bailey's account as reported in the article, he approached the Court unsolicited in the hallway of the courthouse and commented on the "fraud statute" codified at Executive Law § 63(12). *See* Affirmation of Clifford S. Robert (NYSCEF No. 1763) ("Robert Aff."), Ex. A at 2-3. While Bailey quipped that his comments about § 63(12) obviously were not "about the Mets," Bailey confirmed during the interview that he "didn't even mention the word Donald Trump" or otherwise reference this case. *Id*. at 3, 5.

When asked for comment, a court spokesperson advised the NBC News reporter that "no *ex parte* conversation concerning this matter occurred between Justice Engoron and Mr. Bailey or any other person." *Id.* at 3. The article also quoted Professor Bruce Green, Director of Fordham Law School's Center for Law and Ethics, who explained that "judges don't have to live in a bubble" and "[w]hether a judge's hallway conversation with a lawyer is permissible or impermissible depends on the conversation," noting there is no rule precluding a judge and lawyer from talking about the law in the abstract. *Id*. at 6.

ARGUMENT

I. DEFENDANTS FAIL TO SHOW ANY BASIS FOR RECUSAL

New York law mandates a judge's recusal only upon narrow statutory grounds, such as pecuniary interest or a relationship to the parties by blood or marriage, that Defendants do not claim exist here. *See* Judiciary Law § 14. In the absence of such mandatory grounds for recusal, the judge is the "sole arbiter" of whether to recuse himself voluntarily, as a matter of discretion, due to an alleged appearance of impropriety. *People v. Moreno,* 70 N.Y.2d 403, 405 (1987); *see also People v. Grasso,* 49 A.D.3d 303, 306 (1st Dep't 2008). Judgments as to an appearance of impropriety lie solely within the "personal conscience of the court," a purely subjective standard. *Moreno,* 70 N.Y.2d at 405, 407; *see also People v. Glynn,* 21 N.Y.3d 614, 618-19

(2013); *Matter of Barney v. Van Auken,* 97 A.D.3d 959, 960 (3d Dep't 2012). This is true even where it might have been "better practice" to maintain the appearance of impartiality, "when recusal is sought based upon impropriety as distinguished from legal disqualification." *Moreno,* 70 N.Y.2d at 406 (internal quotations omitted); *see also Schwartzberg v. Kingsbridge Heights Care Ctr., Inc.*, 28 A.D.3d 465 (2d Dep't 2006) ("In the absence of a legal disqualification under Judiciary Law § 14, a trial judge is the sole arbiter of the need for recusal, and his or her decision is a matter of discretion and personal conscience."); *Khan v. Dolly*, 39 A.D.3d 649 (2d Dep't 2007) (same). A trial court's discretionary decision declining voluntary recusal will not be disturbed on appeal unless the justice "abused his discretion as a matter of law." *Glynn,* 21 N.Y.3d at 618.

Defendants' purported "evidence" supporting their assertion of an appearance of impropriety is nonexistent. They first point to the unsolicited conversation that Bailey told the media he initiated with the Court a few weeks before the Court issued its post-trial decision, which they say was an *ex parte* communication giving rise to the appearance of impropriety. Defs. MOL at 9-10, 12. Defendants then seek to buttress their claim of an appearance of impropriety by asserting that the Commission on Judicial Conduct ("Commission") has launched an investigation into the Bailey hallway conversation and pointing to numerous articles reporting on the NBC News interview with Bailey by various media outlets, including Newsmax, the Daily Caller (co-founded by Tucker Carlson), and the British tabloids Daily Mail and The Independent.

None of this amounts to a hill of beans. There was no *ex parte* communication *about this case* between Bailey and the Court based on Bailey's own account as reported by NBC News, which is the only "evidence" relied upon by Defendants. Nor is there any credible evidence that the Commission has launched an investigation into the Bailey encounter, which would be irrelevant in any event. Finally, the fact that the NBC News article has been picked up by other

news outlets contributes absolutely nothing to the analysis; repetition of Bailey's interview with NBC News in articles from other media outlets does not transform the content of his comments about the law in the abstract into an *ex parte* communication about this case or manufacture an appearance of impropriety.

A. There Was No *Ex Parte* Communication

A communication with a judge outside the presence of counsel qualifies as an "*ex parte* communication" only when it concerns "a pending or impending proceeding." 22 N.Y.C.R.R. 100.3(B)(6); *see Matter of Ayres*, 30 N.Y.3d 59, 63 (2017) ("[I]t is a violation of a judge's solemn oath to . . . engage in ex parte communications *on the merits of a case*.") (emphasis added); *R&R Capital LLC v. Merritt*, No. 0604080/2005, 2008 WL 2090472 (N.Y. Sup. Ct. N.Y.County) (May 7, 2008) (denying recusal motion based on finding there were no *ex parte* communications "regarding this case"), *aff'd*, 56 A.D.3d 370 (1st Dep't 2008). Conversations between a non-party lawyer and a judge about abstract legal concepts, including particular statutes, divorced from any specific reference to a "pending or impending proceeding" simply do not amount to *ex parte* communications within the meaning of the rules governing judicial conduct.

Based on Bailey's own account to NBC News as described in the article cited by Defendants as the sole basis for this recusal motion, Bailey referenced only the "fraud statute" Executive Law § 63(12) during his unsolicited hallway conversation and "didn't even mention the word Donald Trump" or otherwise mention this case. Robert Aff., Ex. A at 3, 5. Nevertheless, Defendants falsely describe Bailey's hallway conversation as being "about this case." Defs. MOL at 6. Indeed, where the NBC News article quotes Bailey as saying that he wanted the judge "to know what I think and why," Defendants resorted to inserting in brackets after "know what I think" the words "about the case," despite there being no mention of Bailey referencing *this case* and Bailey's express disavowal during the interview that he uttered the words "Donald Trump."

Compare Robert Aff., Ex. A at 2 *with* Defs. MOL at 6. That Defendants had to resort to inserting "about this case" in the news article quote is sleight of hand bordering on deception.[3]

In the same deceptive vein, Defendants assert that Bailey "discussed the merits of the case" with the Court during the unsolicited hallway encounter, citing to page 4 of the NBC News article and the video clip of the NBC News story that aired on television. Defs. MOL at 6. But neither source provides any support for the bogus claim that Bailey ever discussed the "merits of the case" during the encounter, much less mentioned this case at all. Rather, as noted above, Bailey asserted that he referenced only the fraud statute and never mentioned this case or the words "Donald Trump."

Indeed, to the extent one credits the accuracy of Bailey's recitation to the press, he read the statute in a manner consistent with the interpretation offered by *Defendants*; that Executive Law 63(12) "was not intended to be used to shut down a major company, especially in a case without clear victims." Robert Aff., Ex. A at 3. And while the NBC News article in question notes that "Engoron had rejected a similar argument raised by the Trump team in court," Defendants fail to mention that fact in their brief and instead insinuate that Bailey was seeking to influence the Court to rule against them. *See, e.g.*, Defs. MOL at 14 ("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.") That is the precise opposite of what was reported. There can be no

[3] This is not the first time Defendants have used misleading quotations to portray the Court as somehow biased. Tr. 3864:06-15 ("THE COURT: The first line on that screen: This Court stated it is 'not here to hear what President Trump has to say.' Do you remember what I said right after that? MR. KISE: I don't have it in front of me. I have that -- MR. WALLACE: I believe Your Honor said you are here to hear him answer questions. THE COURT: That's exactly what I remember. So I think it is misleading to just have the first half.")

contention that the Court "relied" upon anything Bailey purports to have said. This is yet another example of Defendants' misleading sleight of hand.

As quoted in the same NBC News article, Professor Bruce Green, Director of Fordham Law School's Center for Law and Ethics, confirmed that it is not improper "for judges and lawyers to talk about the law in the abstract." Robert Aff., Ex. A at 6. At most, Bailey's hallway encounter with the Court amounted to an abstract, wholly unprompted commentary about New York's business fraud statute that is the basis for many enforcement actions brought by OAG in New York Supreme Court. *See, e.g.*, *People v. Leasing Expenses Co., LLC.*, No. 452357/2020, 2021 WL 775698 (N.Y. Sup. Ct. N. Y. Ct.y 2021) (Engoron, J.), *aff'd*, 199 A.D.3d 521 (1st Dep't 2021). Taken to its logical extreme, Defendants' position would require the Court to disclose to the parties during the life of this case every instance in which a lawyer discussed the interpretation of any statute that might apply in this case in any context, including in a brief or during oral argument. Nothing in the Judiciary Law or rules of judicial conduct require such an absurd result.

The decision in *R&R Capital* is on point. In that case, the plaintiffs moved to recuse the presiding justice after he decided the action against them. *R&R Capital*, 2008 WL 2090472. The motion was based on an allegation "that a non-party, an attorney, allegedly confessed that he engaged in improper communications with this Court regarding this case." *Id.* The allegation was set forth in sworn affidavits from people other than the non-party lawyer, who "flatly denied" in his sworn affirmation having such communications with the judge about the case. *Id*. And by its decision, the court "also denie[d] that the alleged communication took place." *Id*. The court held in denying the motion:

> The absence of any allegation that this Court actually said or did anything improper resolves the issue of recusal. No judge may recuse based upon wrongful acts allegedly committed by some other person. Because this Court holds no bias for or against any party to this dispute, but has expressed in our determination of the issues

put before us who shall be the prevailing side, there is no basis upon which recusal may be granted.

Id.

Here, as in *R&R Capital*, the only assertion of a communication with the Court "about this case" comes from a source other than the non-party lawyer who purportedly engaged in the communication (here, the Defendants' counsel in their moving brief), the non-party lawyer has denied ever mentioning "Donald Trump" or otherwise referencing this case during the encounter, and the Court has, through a spokesperson, denied that any "ex parte conversation concerning this matter occurred," Defs. MOL at 7. Defendants' own mischaracterization of Bailey's purported hallway encounter with the Court is an unsubstantiated allegation flatly denied by Bailey and the Court that fails to establish there was any *ex parte* communication requiring recusal. *R&R Capital,* 2008 WL 2090472 ("[Movants] cite no authority for the proposition that an unsubstantiated allegation of impropriety warrants recusal.").

B. There Is No Credible Evidence of An Ethics Investigation, Which Would Be Irrelevant in Any Event

Nor can Defendants bootstrap their claim of an appearance of impropriety based on their separate, but equally concocted, assertion that there is "now apparently" an investigation into Bailey's interaction with the Court by the Commission. Defs. MOL at 2. Defendants' sole support for this assertion is the NBC News article, which reports based on *unidentified sources* that the Commission "will now consider whether the rules of judicial conduct were violated in this instance," even though the Commission's administrator declined to confirm to NBC News that there is any pending investigation. Robert Aff., Ex. A at 4. From this anonymously-sourced assertion by NBC News as of May 8, Defendants leap to the unsubstantiated claim that "there is apparently *now an active and ongoing investigation* of these matters by the Commission"—despite any credible evidence that the Commission ever opened an investigation, or if it did, whether it

currently is "active and ongoing." Defs. MOL at 16 (emphasis added).

In any event, even if the Commission opened an investigation into Bailey's hallway encounter, it would not matter. As the NBC News article itself notes, only "[a]bout one in four investigations result[s] in a finding of wrongdoing," so the mere pendency of an investigation would provide no basis to infer any appearance of impropriety, let alone one suggestive of bias that would warrant recusal.

C. Press Articles Repeating the NBC News Story Are Irrelevant

Finally, the Court should soundly reject Defendants' contention that an appearance of impropriety exists here because the NBC News article "has already been amplified by at least a dozen news outlets" reaching millions. Defs. MOL at 13. So what? Defendants cite no authority for the proposition that an appearance of impropriety requiring recusal can be based on the number of times a single news story is recycled by various media outlets, including at the instigation of Defendants' own counsel. *See, e.g.,* Newsweek, *Alina Habba Issues Ultimatum to Judge Engoron*, June 22, 2024, available at https://www.newsweek.com/alina-habba-issues-ultimatum-judge-engoron-1916090. The Fourth Estate wields no such power to force recusal. Rather, the determination of whether there exists an appearance of impropriety lies solely within the "personal conscience of the court," *Moreno,* 70 N.Y.2d at 405, and must be based on the conduct of the judge, not conduct by others (including reporters), *R&R Capital*, 2008 WL 2090472 ("The absence of any allegation that this Court actually said or did anything improper resolves the issue of recusal. No judge may recuse based upon wrongful acts allegedly committed by some other person.")

* * *

A lawyer who has no involvement with this case claims he spoke to the Court about Executive Law § 63(12) without ever mentioning "Donald Trump" or otherwise referencing this

case. Nothing concerning this purported interaction about New York's business fraud statute in the abstract is the least bit improper. "[T]here is no basis upon which recusal may be granted." *R&R Capital*, 2008 WL 2090472.

CONCLUSION

For all the foregoing reasons, the People request that the Court deny Defendants' motion for recusal in its entirety and grant such other and further relief as is just and proper.

Dated: New York, New York
July 26, 2024

LETITIA JAMES
Attorney General
State of New York

By: /s/ Andrew Amer
Andrew Amer
Special Counsel
28 Liberty Street
New York, New York 10005
(212) 416-6127
andrew.amer@ag.ny.gov

Attorney for the People of the State of New York

CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court ("Uniform Rules"), I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 4,419 words, calculated using Microsoft Word, which complies with the Uniform Rules.

Dated: New York, New York
June 26, 2024

LETITIA JAMES
Attorney General of the State of New York

By: /s/ Andrew Amer

Andrew Amer
Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6127
andrew.amer@ag.ny.gov

Attorney for the People of the State of New York