SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, Plaintiff-Respondent, -against- 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-Appellants,	Appeal No: 2023-04925 Sup. Ct. New York County Index No. 452564/2022 (Engoron, J.S.C.)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF-RESPONDENT'S MOTION TO DISMISS DEFENDANTS-APPELLANTS' INTERLOCUTORY APPEAL

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Defendants-Appellants Donald J. 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 LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC (collectively, "Appellants"), through their undersigned attorneys, respectfully submit this memorandum of law in opposition to Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York's ("NYAG") motion to dismiss Appellants' appeal from Supreme Court's September 27, 2023, decision and order (1) granting summary judgment to NYAG on the first cause of action, (2) denying Appellants' motion for summary judgment dismissing the complaint, and (3) granting NYAG's motion for sanctions to the extent of sanctioning certain of Appellants' counsel (the "Non-Party Appellants") in the amount of $7,500.00 each (the "Summary Judgment Decision").[1]

PRELIMINARY STATEMENT

Knowing full well that Appellants have been working for months to separately perfect their appeals from the Summary Judgment Decision (the "Summary Judgment Appeal") and Supreme Court's final judgment (the "Final Judgment Appeal"), both of which involve complex briefs, records, and appendices, NYAG now seeks to dismiss the Summary Judgment Appeal less than one month before Appellants' deadline to perfect the Summary Judgment Appeal and

[1] NYAG claims that she "does not seek to dismiss those separate sanctions appeals currently filed under the same docket number." NYSCEF Doc. No. 30 ("Mot.") at 1. However, NYAG opposed, and this Court subsequently denied, the Non-Party Appellants' motion to sever their notices of appeal. See NYSCEF Doc. Nos. 21-25; *infra* at pp. 10, 15-16.

five weeks before the deadline to perfect the Final Judgment Appeal.[2] Worse still, NYAG requests such relief by notice of motion rather than order to show cause, which motion NYAG has requested this Court decide by July 3, 2024. That is the *same day* that the Summary Judgment Appeal must be perfected and *five days* before the deadline to perfect the Final Judgment Appeal, which this Court has expressly ordered be perfected by the September Term. This blatant gamesmanship by NYAG has thrust the entire appeals process into disarray and thereby prejudiced Appellants' rights.

For example, if the Court were to grant NYAG's motion on July 3, 2024, Appellants would be forced to combine the Summary Judgment Appeal with the Final Judgment Appeal within just *five days* over a holiday weekend, a herculean endeavor that will require Appellants to reconfigure an already behemoth appellate record and overhaul their opening brief on the Final Judgment Appeal. Alternatively, if the motion were not yet decided by July 3, Appellants would be forced to file (1) a summary judgment brief with a record on appeal, (2) a final judgment brief and appendix solely containing arguments relating to the trial and entry of final judgment, and (3) a final judgment brief and appendix containing both summary judgment arguments and trial-related arguments. Setting aside the enormous expense of assembling those records on appeal and appendices, this undoubtedly places an undue burden on Appellants. Moreover, even though NYAG's dilatory and bad faith tactics have precipitated the instant crisis, NYAG has rebuffed Appellants' reasonable request that any motion to dismiss include a joint

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[2] As set forth more fully below, NYAG has been aware of Appellants' intention to separately perfect the Summary Judgment and Final Judgment Appeals since January 2024, when Appellants moved to sever the merits appeal from the sanctions appeal as part of the consolidated Summary Judgment Decision. See NYSCEF Doc. No. 21. At the very latest, NYAG was certainly aware in March 2024, when Appellants requested their first extension of time to perfect the Summary Judgment Appeal. See NYSCEF Doc. No. 26. NYAG's assertion that she became aware of Appellants' proposed course only within the last few weeks is simply false.

request for extension of the date to perfect both appeals pending the resolution of the motion, while still ensuring that the appeals are heard in the September Term. NYSCEF Doc. No. 30 ("Mot.") at Ex. E.

Compounding the impairment of Appellants' rights, NYAG's motion also undoubtedly prejudices Appellants' counsel, upon whom Supreme Court erroneously imposed sanctions. As this Court is aware, the Non-Party Appellants objected to the practical problems and prejudice that would inhere to them if the appeal of the sanctions award and the appeal of the summary judgment decisions proceeded under the same appeal number in January 2024 when they filed a motion to sever their notices of appeal. NYAG ***opposed*** that motion, which was subsequently denied. Now, NYAG has abruptly reversed course, offering tepid assurance that she does not seek to dismiss that portion of the order and effectively seeking the same relief she previously stated was improper.

Prior to filing this application, NYAG's proposed solution to a problem of its own making was for the parties to stipulate that Appellants' ability to challenge issues raised by the Summary Judgment Decision would be preserved in the Final Judgment Appeal. It is well-settled, however, that the parties have no power to determine such matters. Only this Court, and the Court of Appeals, retain the ability to determine and circumscribe their own appellate jurisdiction, as granted by the Constitution and circumscribed by statute.

Appellants have made plain to NYAG that their intention to separately perfect the Summary Judgment and Final Judgment Appeals is not calculated to burden NYAG or the Court. Rather, it is a cautionary measure given the uncertainty created by the Court of Appeals' jurisprudence on the issue of whether an interlocutory order, such as the Summary Judgment Decision, "necessarily affects" the final judgment under CPLR § 5501. While the Court of

Appeals has articulated multiple tests in an attempt to resolve this question, the Court itself has acknowledged that its decisions are not a model of clarity, and do not give rise to a bright-line rule capable of straightforward application or reasonably predictable outcomes. To be sure, in Bonczar v. American Multi-Cinema, Inc., a fact-specific decision, the Court of Appeals recently determined that an interlocutory order from the Appellate Division reversing a grant of partial summary judgment did not necessarily affect the final judgment. 38 N.Y.3d 1023, 1025-1026 (2022) Appellants cannot risk declining to perfect the Summary Judgment Appeal where the Court of Appeals, on the facts of this complex case, might conceivably determine the Summary Judgment Decision does not necessarily affect the final judgment and, thus, cannot be reviewed in the Final Judgment Appeal.

The uncertainty resulting from the Court of Appeals' "necessarily affects" jurisprudence is augmented by the duplication of myriad issues between Supreme Court's Summary Judgment Decision and decision after trial, and its indulgent approach to permitting testimony and evidence at trial. NYAG's rejoinder is to oversimplify the issues in this complex case, wherein NYAG brought, by her 222-paragraph complaint, seven causes of action seeking draconian injunctive relief and many millions of dollars in disgorgement. The Summary Judgment Decision consolidated three motions, comprising hundreds of pages of briefing and hundreds of exhibits, relating to fifteen defendants over the course of more than ten years. NYAG's single-issue cases, in which appellants failed to properly preserve their appellate rights by failing to perfect either the interlocutory or final judgment appeal, are inapposite.

Appellants have taken all proper and appropriate steps to ensure that the countless errors in the Summary Judgment Decision and final judgment are properly preserved for this Court's and the Court of Appeals' consideration and review. Any "procedural tangle" and "unnecessary

burden[]" on this Court is attributable to NYAG's inexcusable delay in bringing this motion when she has been aware of Appellants' intention to perfect both appeals for at least four months. Mot. at 10. Consequently, Appellants respectfully request that the Court deny NYAG's motion.

STATEMENT OF FACTS

A. NYAG Brings an Enforcement Action Against Appellants Under Executive Law § 63(12) and Obtains a Preliminary Injunction.

On September 21, 2022, NYAG initiated the underlying civil enforcement action captioned *People v. Trump, et al.*, Index No. 452564/2022, in Supreme Court, New York County by filing of a summons and complaint following a three-year investigation. NYSCEF Doc. No. 3, Ex. B. The complaint alleges seven causes of action pursuant to Executive Law § 63(12). Id. At base, NYAG contends that Appellants engaged in fraudulent and deceptive conduct by submitting allegedly false Statements of Financial Condition ("SFCs") to induce banks to grant favorable loan terms to certain Appellant entities. Id.

On November 3, 2022, Supreme Court issued a decision granting NYAG's requests for (1) a preliminary injunction enjoining Appellants from selling, transferring or otherwise disposing of any non-cash assets listed on the 2021 SFC of President Donald J. Trump without first providing NYAG with 14 days' written notice; and (2) appointment of an independent monitor to oversee Appellants' financial statements and significant asset transfers. Id., Ex. D.

B. The First Department Modifies Supreme Court's Denial of Appellants' Motion to Dismiss.

On November 21, 2022, Appellants and Defendant Ivanka Trump filed motions to dismiss the complaint arguing, *inter alia*, that certain allegations in NYAG's complaint were time-barred based on the statute of limitations. Id., Ex. E. In a decision and order dated January

6, 2023, Supreme Court denied the motions in their entirety (the "MTD Decision"). Id., Ex. F. In a decision entered on June 27, 2023, this Court unanimously modified Supreme Court's MTD Decision by "dismiss[ing], as time-barred, the claims against defendant Ivanka Trump and the claims against the remaining defendants to the extent they accrued prior to July 2014 (with respect to those defendants subject to the August 2021 tolling agreement) and February 2016 (with respect to those defendants not subject to the August 2021 tolling agreement)" (the "First Department Decision"). Id., Ex. G at 2. The First Department further stated that "[t]he continuing wrong doctrine does not delay or extend these periods." Id. at 4.

C. The Parties Cross-Move for Summary Judgment and NYAG Moves for Sanctions.

On August 4, 2023, after extensive discovery, NYAG filed a motion for partial summary judgment requesting that Supreme Court grant her judgment as a matter of law against all Appellants on the first cause of action. Id., Ex. L. NYAG's notice of motion requested an order "[f]inding in [NYAG's] favor judgment as a matter of law on Plaintiff's First Cause of Action for fraud under Executive Law § 63(12) and limiting the contested issues of fact for trial, by specifying such facts deemed established for all purposes in this action." Id., Ex. M. NYAG, argued, *inter alia*, that the following assets of the Trump Organization were overinflated in the SFCs from 2011 to 2021: (1) the triplex in Trump Tower, New York; (2) the Seven Springs property in Bedford, New Castle and North Castle; (3) the ground lease at 40 Wall Street, a 72-story tower located in Manhattan; (4) the Mar-a-Lago Club in Palm Beach, Florida; (5) Trump International Golf Club in Aberdeen, Scotland; (6) 1290 Avenue of the Americas in New York, New York and 555 California Street in San Francisco, California; (7) various Golf Clubs located in the United Stated that are either owned or leased by President Trump; (8) Trump Park Avenue, which consists of 134 residential condominium units that range from one to seven

bedrooms; (9) Trump Tower, a 68-story mixed-use property located at 725 Fifth Avenue; and (10) Vornado partnership cash and escrow deposits (collectively, the "Properties"). Id., Ex. L. On September 1, 2023, Appellants opposed NYAG's motion for summary judgment, arguing that summary judgment was improper because, *inter alia*, (1) the First Department Decision mandated dismissal of time-barred claims, (2) NYAG did not present sufficient evidence entitling her to judgment on the first cause of action, and (3) NYAG was not entitled to disgorgement as a matter of law. Index No. 452564/2022, NYSCEF Doc. No. 1292.

On August 4, 2023, Appellants filed a separate motion for summary judgment seeking dismissal of all time-barred claims pursuant to the First Department Decision and all remaining timely claims on other grounds, annexing the same exhibits submitted in opposition to NYAG's motion. Id., Ex. K. Appellants argued that (1) the First Department Decision mandated dismissal of time-barred claims, (2) there was insufficient record evidence to establish the elements of each cause of action, and (3) disgorgement was unavailable as a matter of law. Id. NYAG opposed that motion on September 1, 2023, annexing 59 exhibits and arguing that (1) the First Department Decision did not require Supreme Court to dismiss any claims, (2) certain of Appellants' arguments were frivolous, (3) she possessed evidence to support each cause of action, and (4) disgorgement was available as a remedy. Index No. 452564/2022, NYSCEF Doc. No. 1277. Both motions were fully briefed as of September 15, 2023. Id., NYSCEF Doc. Nos. 1442, 1474.

On September 5, 2023, NYAG separately moved for sanctions against Non-Party Appellants "based on frivolous conduct by Defendants and their counsel in asserting legal arguments in connection with the parties' pending [summary judgment motions] that were previously rejected by this Court and the First Department in this action." Index No. 452564/2022, NYSCEF Doc. No. 1264 at 1. On September 15, 2023, Defendants opposed that

motion, arguing, *inter alia*, that (1) the standards of review and the evidence available to Defendants in the motion for a preliminary injunction, the motions to dismiss, and the motions for summary judgment materially differed and (2) the fully developed factual record precluded NYAG from maintaining an Executive Law § 63(12) action. Id., NYSCEF Doc. No. 1448. The motion was fully briefed as of September 21, 2023. Id., NYSCEF Doc. No. 1481.

D. NYAG's Motions for Summary Judgment and Sanctions are Granted and Appellants Seek a Stay Pending Appeal.

On September 26, 2023, Supreme Court issued a decision and order denying Appellants' summary judgment motion in its entirety and granting NYAG's motion for partial summary judgment and motion for sanctions.[3] NYSCEF Doc. No. 3, Ex. A. Supreme Court refused to dismiss any claim as time-barred, in contravention of the First Department Decision. Supreme Court instead held that the relevant transactions "were not 'completed' while the defendants were still obligated to, and did, annually submit current SFCs to comply with the terms of the loan agreements." Id. at 17. Without expressly referencing the continuing wrong doctrine, Supreme Court found that each annual submission of an SFC revived NYAG's claims with respect to a particular transaction: "[A]ny SFC that was submitted after July 13, 2014, falls within the applicable statute of limitations." Id. at 18.

Supreme Court further awarded NYAG judgment on her first cause of action as against all Appellants on the ground that the SFCs misrepresented the values of the Properties. Id. at 18, 19. Supreme Court determined that the sole requirement for judgment on NYAG's standalone Executive Law claim was proof of a false statement used in business; materiality, reliance, intent,

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[3] The Summary Judgment Decision also cancelled certificates filed under GBL § 130 for entity Appellants and non-party entities controlled or beneficially owned by the individual Appellants and directed that the parties take steps to dissolve the cancelled LLCs, relief Supreme Court ultimately walked back in the final judgment. Id. at 35.

and damages were not required. Id. at 20. However, Supreme Court held that the second through seventh causes of action required "demonstrating some component of intent and materiality," which "require[d] a trial." Id.

On October 4, 2023, Appellants filed notice of appeal of the Summary Judgment Decision. NYSCEF Doc. No. 1. On October 6, 2023, Appellants moved for a stay pending appeal of the Summary Judgment Decision. NYSCEF Doc. No. 3. That same day, a single Justice of this Court granted Appellants' application for a stay "solely to the extent of staying enforcement of Supreme Court's order directing the cancellation of business certificates." NYSCEF Doc. No. 6 at 2. The motion was fully briefed as of November 9, 2023, and a full panel of this Court issued an order on December 7, 2023, "continuing, pending hearing and determination of the appeals," the relief granted by a single Justice on October 6, 2023. NYSCEF Doc. Nos. 10, 11.

E. Supreme Court Conducts a Three-Month Trial on Time-Barred Claims and Enters Judgment against Appellants.

A three-month bench trial on NYAG's second through seventh causes of action and the availability of injunctive relief and disgorgement began on October 3, 2023, and concluded in January 2024. On February 16, 2024, Supreme Court issued a decision after trial finding Appellants liable on the second through seventh causes of action, awarding NYAG the sum of $464,576,230.62, inclusive of pre-judgment interest, in disgorgement, and imposing expansive and punitive injunctive relief. Index No. 452564/2022, NYSCEF Doc. No. 1688, 1699. Supreme Court's decision was reduced to judgment on February 23, 2024. Appeal No. 2024-01134, NYSCEF Doc. No. 3. On February 28, 2024, Appellants moved for a stay pending appeal pursuant to CPLR § 5519(c). Id.

On March 25, 2024, this Court stayed enforcement of the disgorgement penalty, the industry bars on individual Appellants, and the bar on applying for loans from New York financial institutions pending appeal, on the condition that Appellants post an undertaking in the reduced sum of $175 million. Appeal No. 2024-01134, NYSCEF Doc. No. 21. The Court ordered that the "[t]he aforesaid stay is conditioned on defendants-appellants perfecting the appeals for the September 2024 Term of this Court," *i.e.*, July 8, 2024. Id. Appellants posted their bond on April 1, 2024. Index No. 452564/2022, NYSCEF Doc. No. 1707.

F. Non-Party Appellants Move to Sever their Appeal from the Portion of the Summary Judgment Decision Imposing Sanctions and Appellants Obtain Extensions of Time to Perfect the Summary Judgment Appeal.

On January 23, 2024, Non-Party Appellants filed notices of appeal from the portion of the Summary Judgment Decision imposing sanctions. NYSCEF Doc. Nos. 12-20. On the same date, Non-Party Appellants filed a motion to sever their appeals from Appellants' appeal from the balance of the Summary Judgment Decision. NYSCEF Doc. No. 21. In that application, Non-Party Appellants argued, *inter alia*, that the factual and legal issues presented by their appeal of Supreme Court's grant of sanctions presented wholly distinct issues of law from Appellants' appeal. Id.

On February 13, 2024, NYAG opposed the motion to sever insofar as she argued that Non-Party Appellants should be permitted to file a separate brief but opposed "any request to hear movant's appeals separately from the underlying merits appeal." NYSCEF Doc. No. 22 at 2. The motion was fully briefed as of February 16, 2024. NYSCEF Doc. No. 23. On March 14, 2024, this Court denied the motion to sever. NYSCEF Doc. No. 25.

On March 26, 2024, more than two months after final judgment was entered, Appellants filed a letter with this Court pursuant to 22 N.Y.C.R.R. § 1250.9(b) to request a 60-day extension of the deadline to perfect the Summary Judgment Appeal from April 4, 2024, to June 3, 2024.

NYSCEF Doc. No. 26. The same day, Non-Party Appellants likewise wrote to request an enlargement of their time to perfect their appeal from the branch of the Summary Judgment Decision imposing sanctions until June 24, 2024. NYSCEF Doc. No. 27. On May 22, 2024, Appellants wrote to request a second 30-day extension of the deadline to perfect the Summary Judgment Appeal from June 3, 2024, to July 3, 2024. NYSCEF Doc. No. 28. On May 29, 2024, Non-Party Appellants wrote to request an enlargement of their time to perfect the sanctions appeal until July 21, 2024. NYSCEF Doc. No. 29.

G. NYAG Moves to Dismiss the Summary Judgment Appeal.

On May 28, 2024, approximately one month before the deadline to perfect both the Summary Judgment Appeal and the Final Judgment Appeal, NYAG wrote to counsel for Appellants seeking to discuss "some procedure- and scheduling-related aspects of the pending appeals in this case," noting that they "thought it could be helpful for us to chat before briefing got underway." Mot., Ex. E at 8. On June 3, 2024, NYAG wrote to Appellants in an email stating its position that "a grant of summary judgment necessarily affects the judgment, which means that any appeal from such an interlocutory summary judgment order would be dismissed." Id. at 5. Based on this position, NYAG requested that the parties "stipulate to the withdrawal of defendants' summary judgment appeal," with the proviso that NYAG "expressly agrees that all of defendants' challenges to the grant or denial of summary judgment can be raised in the appeal from judgment." Id. In the alternative, NYAG indicated that she would "file a motion to dismiss the summary judgment appeal" as the "only other realistic way of cleaning up the dockets." Id. at 6. NYAG specifically noted that motion practice "could result in some real inefficiencies (such

as having the summary judgment appeal dismissed a month from now, right as briefing as [sic] do [sic]).”). Id.

On June 6, 2024, Appellants responded via email. Appellants noted that the Court of Appeals’ jurisprudence on the “necessarily affects” question in determining the appealability and reviewability of interlocutory orders is far more complex than NYAG suggested. Id. at 1-4. Further, Appellants advised NYAG that the parties are unable to stipulate to either this Court or the Court of Appeals’ jurisdiction to hear and decide an appeal. Id. Appellants observed that NYAG had long been aware of Appellants’ intention to perfect the Summary Judgment Appeal separately but declined to raise the issue with Appellants or the Court until approximately one month before the deadline to perfect both appeals. Id.

On June 7, 2024, NYAG responded that she disagreed with Appellants’ interpretation of the Court of Appeals’ caselaw, that Appellants “should be filing one brief and one record from the final judgment appeal raising all relevant issues there,” and that NYAG would be filing a motion to dismiss later that day. Id. at 1. NYAG then filed the instant motion, returnable June 17, 2024, to “dismiss[] defendants’ interlocutory appeal on motion for summary judgment,[] or, in the alternative, requiring consolidated briefing in defendants’ interlocutory appeal and their appeal from final judgment.” Mot. at 1.

ARGUMENT

NYAG’S MOTION IS IMPROPER

A. NYAG’s Motion to Dismiss on the Eve of the Deadlines to Perfect the Summary Judgment and Final Judgment Appeals Prejudices Appellants and Non-Party Appellants.

NYAG moves to dismiss the Summary Judgment Appeal more than eight months after Appellants filed their notice of appeal from the Summary Judgment Decision on October 4,

2023. NYAG feigns that she only "learned" during a June 3, 2024, telephone conversation that Appellants "intended to separately and improperly perfect both the Interlocutory Summary Judgment Appeal and the Final Judgment Appeal." Mot. at 10. This is plainly false.

NYAG was duly served with Appellants' notice of appeal via NYSCEF filing and appeared in the Summary Judgment Appeal on October 6, 2023, to oppose Appellants' application for a stay pending appeal. Likewise, on February 26, 2024, NYAG was notified via NYSCEF that Appellants filed notice of appeal from the final judgment. Mere days after that, the parties engaged in contentious motion practice before this Court on the Final Judgment Appeal in connection with Appellants' application for a stay pending appeal. In their papers opposing Appellants' application, NYAG explicitly requested that if the Court were to grant a stay, including a partial stay, "the Court should set the appeal for the September 2024 Term." Index No. 2024-01134, NYSCEF Doc. No. 9 at 41. Nowhere in NYAG's 42-page memorandum of law, letter opposition to interim relief, or oral argument before Justice Singh on February 28, 2024, all of which occurred after entry of final judgment, did NYAG address the supposed procedural impropriety of the Summary Judgment Appeal. NYSCEF Doc. Nos. 5, 6, 9.

Critically, on March 26, 2024, one month after Appellants commenced the Final Judgment Appeal, Appellants requested an extension of time to perfect the Summary Judgment Appeal. NYSCEF Doc. No. 26. Two months later, on May 22, 2024, Appellants again requested an extension of time to perfect the Summary Judgment Appeal. NYSCEF Doc. No. 28. There can be no dispute that NYAG was aware of Appellants' two requests for extensions of time to perfect the Summary Judgment Appeal. Thus, NYAG was on notice that Appellants intended to perfect that appeal even after entry of a final judgment. NYAG had ample

opportunity to address their purported objections with Appellants or bring them to the Court's attention in the four months since final judgment was entered. She declined to do so.

Instead, NYAG raised her objections for the first time one month before Appellants must perfect the Summary Judgment Appeal and five weeks before they must perfect the Final Judgment Appeal based on NYAG's own position in its opposition to Appellants' stay application that the Final Judgment should be perfected for the September Term. Appeal No. 2024-01134, NYSCEF Doc. No. 9. Any intimation by NYAG that she moves now to ensure the Court addresses the issues in a "procedurally proper and efficient manner" is mere sophistry. Mot. at 2. By delaying this application until the eve of the deadline for perfection, NYAG instead sows new confusion about the upcoming filings and fosters inefficiency and prejudice to Appellants.

In a specious attempt to address this problem, NYAG, by notice of motion rather than order to show cause, seeks expedited relief in order to prevent Appellants from "starting to perfect two separate appeals in an improper manner that would violate black-letter New York law and impose practical burdens on the Court and OAG[,]" knowing full well that Appellants have been working on these appeals for months. Id. at 1. However, NYAG's half-hearted request for "expedited consideration . . . to obtain resolution before July 3, 2024," does not cure the manifest prejudice to Appellants. Id.[4] As discussed above, if the Court were to grant NYAG's motion on July 3, 2024, Appellants would be forced to combine the Summary Judgment Appeal with the Final Judgment Appeal within just five days over a holiday weekend—a virtual impossibility. Even worse, if the motion were not yet decided by July 3,

[4] Appellants also note that had NYAG wanted the motion to be resolved expeditiously, she could have brought the motion by order to show cause and sought interim relief. She elected not to do so.

Appellants would be forced to file (1) a summary judgment brief with a record on appeal, (2) a final judgment brief and appendix solely containing arguments relating to the trial and entry of final judgment, and (3) a final judgment brief and appendix containing both summary judgment arguments and trial-related arguments. Setting aside the herculean endeavor that will require Appellants to reconfigure an already behemoth appellate record and overhaul their opening brief on the Final Judgment Appeal, and the extraordinary cost of assembling those records on appeal and appendices, this undoubtedly places an undue burden on Appellants. Moreover, NYAG has rebuffed Appellants' request that any motion to dismiss include a joint request for extension of the date to perfect both appeals pending the resolution of the motion while still ensuring that the appeals are heard in the September Term. Mot. at Ex. E.

Non-Party Appellants' rights are also prejudiced by both the timing and substance of NYAG's motion. While NYAG claims in a footnote to its notice of motion and a paragraph of its affirmation that she "does not seek to dismiss those separate sanctions appeals currently filed under the same docket number," that is precisely the relief that Non-Party Appellants sought, and NYAG opposed, in February 2024. Id. at 1, 10; see also NYSCEF Doc. Nos. 21, 23. This Court adopted NYAG's position in its March 14, 2024, order declining to sever the notices of appeals. NYSCEF Doc. No. 25. NYAG's newfound realization that "Supreme Court's interlocutory order sanctioning *counsel* did not necessarily affect the final judgment" is the clear corollary of what Appellants argued, *i.e.*, that the sanctions motion, initially a separate motion sequence, presents entirely different issues from the cross-motions for summary judgment and should be considered separately by this Court. Mot. at 8-9. It is also the direct opposite of NYAG's own argument against severance. In announcing that she is not "seek[ing] to dismiss the separate Sanctions Appeal," NYAG effectively seeks the reverse outcome of the Court's order on the motion to sever. Mot. at 8-9.

Additionally, as set forth more fully below, the "blackletter law" that the right to a direct appeal of an interlocutory order terminates with entry of final judgment would apply with equal force to the putative appeal of the sanctions award. NYAG's guarantees to the contrary are meaningless. Consequently, if the Court were to dismiss the entire appeal on those grounds, Non-Party Appellants would be left without any vehicle by which to redress their clear and manifest injury.

Finally, NYAG purports to bring a motion to "dismiss defendants' interlocutory appeal on motion for summary judgment" before that appeal has even been perfected. As NYAG is aware, Appellants' current deadline to perfect their appeal is July 3, 2024. Consequently, NYAG's motion to dismiss a not-yet-perfected appeal is unripe. Rather, NYAG should have sought to strike Appellants' notice of appeal of the Summary Judgment Decision. Moving to strike would also obviate the problems presented by seeking to "dismiss" a portion of an appeal where this Court denied a prior motion to sever.

B. NYAG Improperly Oversimplifies the Court of Appeals' Admittedly Inconsistent Jurisprudence.

1. The Parties Cannot Stipulate to Jurisdiction.

As a threshold matter, it is beyond cavil that the parties are not permitted to stipulate to enlarge appellate jurisdiction or predetermine the scope of the Court's review. See Matter of Shaw, 96 N.Y.2d 7, 13 (2001) ("[T]he parties are without authority to stipulate" to bring non-appealable issue before Court of Appeals); Amherst & Clarence Ins. Co. v. Cazenovia Tavern, Inc., 59 N.Y.2d 983 (1983) (attorneys for litigants cannot, by agreement between them, "predetermine the scope of our review"); Commissioner of Social Servs. of the City of New York v. Harris, 26 A.D.3d 283, 286 (1st Dep't 2006) ("Nor could the parties stipulate to enlarge our appellate jurisdiction."); see also Porco v. Lifetime Entertainment Servs., LLC, 176 A.D.3d

1274, 1275 (3d Dep't 2019) ("[T]he parties cannot create or consent to our jurisdiction where it would otherwise not exist."). The appellate courts exercise jurisdiction conferred by the New York Constitution, as limited by statute. Ocean Accident & Guarantee Corp. Ltd. v. Otis Elevator Co., 291 N.Y. 254, 255 (1943).

The parties are unable to determine, by stipulation or otherwise, the scope of appellate review of the issues presented by the Summary Judgment Decision. Contrary to NYAG's repeated requests, appellate jurisdiction is not the parties' prerogative to determine. Rather, it is the exclusive province of the appellate courts to determine whether an interlocutory order necessarily affects the final judgment. See, e.g., Matter of Aho, 39 N.Y.2d 241, 248 (1976); Siegmund Strauss, Inc. v. East 149th Realty Corp., 81 A.D.3d 260, 265-267 (1st Dep't 2010). Pursuant to CPLR § 5501, this Court has authority in the first instance to determine whether an interlocutory order of Supreme Court necessarily affects the final judgment and is thus reviewable by the Court in determining an appeal from the final judgment. Siegmund Strauss, Inc., 81 A.D.3d at 265-267. The Court of Appeals is independently authorized to make the same determination for purposes of its own review pursuant to CPLR § 5501. Further, the Court of Appeals is empowered to determine whether an order of this Court on an interlocutory appeal necessarily affects an appeal from a final judgment. Bonczar v. Am. Multi-Cinema, Inc., 38 N.Y.3d at 1025-1026; see also CPLR § 5602.

NYAG concedes that "dismissal of the Interlocutory Summary Judgment Appeal will not preclude defendants from raising any of their arguments challenging the summary-judgment decision to this Court" because "those arguments simply must be raised in the Final Judgment Appeal," but those concessions alone do not dictate this Court's or the Court of Appeals' jurisdiction. Mot. at 8. To be sure, *if* this Court agrees with NYAG that the two appeals must be

effectively consolidated, Defendants strongly agree that they would be able to raise all their challenges to the Summary Judgment Decision in the Final Judgment Appeal—and the Court should so hold if it comes to that conclusion. Ultimately, however, this Court, not NYAG, will decide the scope of its own appellate jurisdiction, which the parties cannot control by stipulation.

2. The Court of Appeals Has Acknowledged the Inconsistency and Unpredictability of the "Necessarily Affects" Test.

CPLR § 5501 provides, in relevant part, that "[a]n appeal from a final judgment brings up for review: (1) any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal." CPLR § 5501(a)(1). The Court of Appeals has acknowledged that its "opinions have rarely discussed the meaning of the expression 'necessarily affects' in CPLR 5501 (a)(1)." Oakes v. Patel, 20 N.Y.3d 633, 644 (2013). Indeed, the Court has recently stated that "[w]e have never attempted, and we do not now attempt, a generally applicable definition" of the phrase "necessarily affects." Bonczar, 38 N.Y.3d at 1025, quoting Oakes, 20 N.Y.3d at 644.

Thus, with respect to the parameters of an appellate court's "necessarily affects" analysis, "[v]arious tests have been proposed, but how to apply them to particular cases is not self-evident, and [the Court of Appeals'] decisions in this area may not all be consistent." Oakes, 20 N.Y.3d at 644. The test has been articulated as follows: "[A] non-final order 'necessarily affects' a final judgment 'if the result of reversing that order would necessarily be to require a reversal or modification of the final [judgment]' and 'there shall have been no further opportunity during the litigation to raise again the questions decided by the [non-final] order.'" Siegmund Strauss, Inc. v. East 149th Realty Corp., 20 N.Y.3d 37, 42 (2012), citing Karger, Powers of the New York Court of Appeals § 9:5 at 304–305, 311 (3d ed. rev.); see also Bonczar, 38 N.Y.3d at 1025 ("[W]e have

asked whether the nonfinal order 'necessarily removed [a] legal issue from the case' so that 'there was no further opportunity during the litigation to raise the question decided by the prior non-final order.'") (citations omitted). Framed differently, the appellate court may ask the following question: "[A]ssuming that the nonfinal order or judgment is erroneous, would its reversal overturn the judgment? If it would, it's a reviewable item; if it would not, and the judgment can stand despite it, it is not reviewable." Siegmund Strauss, Inc., 20 N.Y.3d at 42, citing Siegel, N.Y. Prac. § 530 at 940 (5th ed 2011) (internal quotations omitted). Appellate courts interpreting the "necessarily affects" requirement have also examined whether the prior order "str[uck] at the foundation on which the final judgment was predicated." Bonczar, 38 N.Y.3d at 1025, citing Matter of Aho, 39 N.Y.2d 241, 248 (1976); Tyrone D. v. State of New York, 24 N.Y.3d 661, 666 (2015).

The Court of Appeals' application of the "necessarily affects" test has not always been a model of clarity. See, e.g., Bonczar, 38 N.Y.3d at 1025 (order denying plaintiff's motion for summary judgment did not necessarily affect the final judgment where it did not remove any issues from the case and the parties had further opportunity to litigate issues before a jury); Oakes v. Patel, 20 N.Y.3d at 644 (order denying a motion to amend necessarily affected the final judgment); Siegmund Strauss, Inc., 20 N.Y.3d at 41-42 (order dismissing counterclaims and third-party complaint necessarily affected the final judgment); GIT Indus., Inc. v. Rose, 81 A.D.2d 656, 656-657 (2d Dep't 1981) (order reversing grant of summary judgment and remanding for trial necessarily affected the final judgment where it established a law issue in the case); Matter of Aho, 39 N.Y.2d at 248 (order denying motion for change of venue necessarily affected the final judgment).

Of concern here, the Court of Appeals recently held in Bonczar that the Appellate Division's interlocutory order reversing Supreme Court's grant of partial summary judgment on the issue of liability on plaintiff's Labor Law claim did not necessarily affect the final judgment in that case. Bonczar, 38 N.Y.3d at 1026. In the underlying interlocutory order, the Appellate Division held that "factual questions existed as to whether a statutory violation occurred and as to proximate cause," such that the issues were "left undecided." Id. at 1026. Consequently, the Court of Appeals held that the order "did not remove any issues from the case," as "[t]he parties had further opportunity to litigate those issues and in fact did so during the jury trial" after the case was remanded. Id. This jurisprudence at least raises the concern that the dismissal of the Summary Judgment Appeal might deprive Appellants of an appellate avenue to raise their challenges to the erroneous Summary Judgment Decision, which would be an untenable situation. Therefore, to ensure that all the disputed issues are fairly subject to appellate review, Appellants oppose the dismissal of the Summary Judgment Appeal.

Moreover, the application of the "necessarily affects" test here is far from straightforward given that the Summary Judgment Decision was followed by a three-month trial, at which dozens of witnesses were permitted to testify, at times on issues seemingly decided in the Summary Judgment Decision. For example, in the Summary Judgment Decision, Supreme Court dismissed the expert opinion of Eli Bartov, an accounting professor who explained that generally accepted accounting principles permit preparers to choose from a variety of asset valuation methods in determining estimated current value, insofar as the Court deemed the opinion "ensconced in numerous lines of academic jargon," "factually incorrect," and "wholly conclusory." NYSCEF Doc. No. 3, Ex. A at 28-29. Nonetheless, Supreme Court permitted

Professor Bartov to testify at length at trial and made new findings with respect to his testimony in its decision after trial. Index No. 452564/2022, NYSCEF Doc. No. 1688 at 59.

Likewise, Supreme Court made determinations as to the value of specific properties on summary judgment, yet dedicated nearly ten pages of its decision after trial to re-assessing the valuations of those properties.[5] Compare NYSCEF Doc. No. 3, Ex. A at 21-30, with Index No. 452564/2022, NYSCEF Doc. No. 1688 at 60-68. Moreover, Supreme Court declined to explain the basis for its grant of injunctive relief by connecting it to any particular cause of action or purported fraudulent valuation, making it near-impossible to apply any iteration of the "necessarily affects" test to that relief. Index No. 452564/2022, NYSCEF Doc. No. 1688 at 89-92.

Consequently, while Appellants will adhere to any directive from this Court, Appellants presently intend to perfect two appeals to ensure that this Court and the Court of Appeals are able to redress the myriad errors in both the Summary Judgment Decision and final judgment in a cogent and efficient manner.

The caselaw NYAG cites for the proposition that "[a] party's right to a direct appeal from an interlocutory order lapses upon the entry of a final judgment" is distinguishable. Mot. at 5-6. In Kirby v. Turner Construction Co., this Court dismissed an appeal from a post-trial order reducing damages where the appellant failed to timely file notice of appeal from the judgment. 286 A.D.2d 618 (1st Dep't 2001). In Bingham v. Struve, this Court dismissed an appeal from an order denying plaintiffs' motion for summary judgment and striking defendant's counterclaims where it had "previously denied a motion . . . to dismiss the appeal" because of its "expectation

[5] Appellants maintain that the determinations made in the Summary Judgment Decision were both premature and substantively improper.

that there would be an appeal from the final judgment," and "the appeal from the final judgment ha[d] been abandoned." 245 A.D.2d 154 (1st Dep't 1997). In Chase Manhattan Bank, N.A. v. Roberts & Roberts, Inc., this Court likewise dismissed an appeal granting summary judgment to plaintiff where "an appeal was taken from the order granting summary judgment . . . but not from the subsequent judgment . . . implementing that order." 63 A.D.2d 566, 567 (1st Dep't 1978).

In none of the foregoing cases did this Court dismiss an interlocutory appeal where the appellant properly noticed and perfected the appeal of the final judgment. There is no dispute here that Appellants have filed timely notices of appeal from the decision after trial and final judgment and intend to perfect the Final Judgment Appeal in accord with this Court's directive.

* * *

In sum, it is imperative that Appellants are entitled to raise all issues on appeal—both their arguments challenging the errors in the Summary Judgment Decision, and their arguments challenging the errors in the final judgment. Especially in light of NYAG's prejudicial delay in raising this issue, Appellants respectfully submit that the proper procedural course is for this Court to permit both appeals to proceed, as perfected separately. However, if the Court disagrees and holds that the two appeals must be combined into the Final Judgment Appeal, the Court should expressly hold, as NYAG concedes, that "dismissal of the Interlocutory Summary Judgment Appeal will not preclude [Appellants] from raising any of their arguments challenging the summary-judgment decision to this Court." Mot. at 8.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court deny NYAG's motion and grant any such other and further relief it may deem proper.

Dated: New York, New York
June 13, 2024

Respectfully submitted,

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