To Be Argued By:
Brian J. Isaac
Time Requested: 15 Minutes

New York County Clerk's Index No. 452564/2022

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case Nos.
2023-04925
2024-01134
2024-01135

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, SEVEN SPRINGS LLC,

Defendants-Appellants.

ROBERT & ROBERT, PLLC, CLIFFORD S. ROBERT, MICHAEL FARINA, CONTINENTAL PLLC, CHRISTOPHER M. KISE, ARMEN MORIAN, MORIAN LAW PLLC, HABBA MADAIO & ASSOCIATES, LLP, and MICHAEL MADAIO,

Non-Party Appellants.

REPLY BRIEF FOR NON-PARTY APPELLANTS ROBERT & ROBERT, PLLC, CLIFFORD S. ROBERT, MICHAEL FARINA, CONTINENTAL PLLC, CHRISTOPHER M. KISE, ARMEN MORIAN, MORIAN LAW PLLC, HABBA MADAIO & ASSOCIATES, LLP, AND MICHAEL MADAIO

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Non-Party Appellants Clifford S. Robert, Esq. (Robert & Robert, PLLC), Michael Farina, Esq. (Robert & Robert, PLLC), Christopher M. Kise, Esq. (Continental PLLC), Michael Madaio, Esq. (Habba Madaio & Associates, LLP), and Armen Morian, Esq. (Morian Law PLLC) (collectively, "Counsel") submit this reply brief in further support of their appeal from that portion of the decision and order of the Honorable Arthur F. Engoron, J.S.C., dated September 26, 2023, and duly entered by the Clerk of the Supreme Court of the State of New York, County of New York, on September 27, 2023, which granted Plaintiff-Respondent People of the State of New York by Letitia James, Attorney General of the State of New York's ("NYAG") motion for sanctions against Counsel (the "Sanctions Decision").

PRELIMINARY STATEMENT

Supreme Court clearly abused its discretion in granting sanctions against Counsel for interposing good-faith legal arguments in support of their clients' motion for summary judgment dismissing NYAG's Executive Law § 63(12) claims. NYAG cannot refute ample blackletter law in this Department that 22 N.Y.C.R.R. § 130-1.1 does not permit Supreme Court to punish Counsel for zealous advocacy in this historic case merely because Supreme Court disagrees with certain of their arguments. Nor can NYAG fairly claim that these arguments were not of at least colorable merit when she opposes them at length in her 149-

page opposition brief. Nonetheless, NYAG avers that Counsel should have ignored their professional duties to their clients and risked leaving critical legal arguments unpreserved for appellate review because Supreme Court rejected similar arguments at earlier procedural junctures, under distinct standards of review, prior to joinder of issue, and without the benefit of a developed factual record. That is not, and cannot be, the standard for sanctions under 22 N.Y.C.R.R. § 130-1.1. Given the paucity of her opposition, NYAG well knows it.

In contrast to the lengthy discussion devoted to the arguments she claims are sanctionable, NYAG dedicates only seven pages at the very end of her 149-page brief to addressing Counsel's well-developed arguments on the limited scope of 22 N.Y.C.R.R. § 130-1.1. NYAG fails to address that Supreme Court's imposition of sanctions exceeded the rule's narrow definition of "frivolous" conduct. Since Counsel's arguments on summary judgment concerning the availability of disgorgement, NYAG's standing and capacity to bring this suit, and the impact of disclaimers on NYAG's evidentiary burden were merits-based and made in good faith, they were not sanctionable even if they ultimately did not succeed.

Moreover, as the Honorable Leonard B. Austin, a well-respected, retired Associate Justice of the Appellate Division, Second Department, confirmed in his expert affirmation, it is immaterial that Supreme Court previously found similar arguments unpersuasive at earlier stages of the litigation, where distinct standards

of review applied and limited facts were available to the parties. At the preliminary injunction stage, Supreme Court was required to assess only whether NYAG was likely to succeed on the merits of her underlying case. At the dismissal stage, Supreme Court was required to assess only the sufficiency of NYAG's pleading, reviewing only the complaint and the exhibits attached thereto and affording NYAG the benefit of all favorable inferences. At summary judgment, Supreme Court was required, for the first time, to consider a developed factual record. Thus, Counsel expressly framed legal arguments at summary judgment based upon the facts before Supreme Court, contending that the developed record required judgment in Defendants'[1] favor. Counsel were duty-bound to pursue and preserve all arguments that they believed were meritorious and necessary to their defense of their clients.

To be sure, Counsel continue to pursue the very same arguments concerning disgorgement, standing and capacity, and disclaimers on behalf of Defendants in their appeal from Supreme Court's consolidated decision and order on the parties' summary judgment motions and final judgment, as NYAG readily concedes.[2] Nowhere in the scores of pages NYAG devotes to addressing these arguments, which Defendants are able to present to this Court *precisely because of Counsel's*

[1] Unless otherwise noted, defined terms used herein have the meaning ascribed to them in Counsel's opening brief. NYSCEF Doc. No. 156.

[2] See, e.g., Brief for Respondent ("Resp. Br.") (NYSCEF Doc. No. 167) at 145 n.31.

vigorous advocacy and preservation efforts at summary judgment, does she claim that they are now frivolous. NYAG's pretense that the same arguments warranted sanctions when made before Supreme Court defies both logic and clear precedent from this Court that 22 N.Y.C.R.R. § 130-1.1 may not be used to restrict good-faith, colorable legal arguments. Indeed, as almost every seasoned litigator knows, it is not what you get in the trial court but what you keep in the Appellate Division that determines the ultimate efficacy of any contested litigation.

Finally, contrary to NYAG's assertion, prior sanctions against different parties for conduct in other cases cannot support a finding of frivolous conduct in this proceeding. Moreover, Counsel cannot be punished based upon allegations against their clients. NYAG has consistently sought to conflate the issues in the underlying action, wherein she claims Defendants engaged in widespread fraud, with the issues raised on Counsel's discrete appeal from the Sanctions Decision. Thus, she previously opposed severance of Counsel's appeal from Defendants' appeal and now buries her feeble retort to the significant issues raised by Counsel's appeal at the close of her 141-page narrative of fraud and malfeasance having nothing to do with Counsel or this appeal. This Court should not be swayed by such tactics.

As the extensive briefs and voluminous record on appeal illustrate, the underlying action presents complex, consequential issues of national import.

Counsel have appropriately advanced their clients' position on those issues throughout the course of the litigation. Counsel's advocacy was fully compliant with the standards governing professional conduct and based upon a good-faith interpretation of applicable law and the developed factual record at the summary judgment stage. Accordingly, Supreme Court's award of sanctions should be reversed as an abuse of discretion.

ARGUMENT

SUPREME COURT ERRED IN IMPOSING SANCTIONS AGAINST COUNSEL FOR INTERPOSING GOOD-FAITH LEGAL ARGUMENTS

A. NYAG Does Not Dispute that Counsel's Arguments Were of Colorable Merit and Made in Good Faith.

Pursuant to 22 N.Y.C.R.R. § 130-1.1, conduct is "frivolous" if, *inter alia*, "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." 22 N.Y.C.R.R. § 130-1.1(c)(1).[3] In determining whether conduct is frivolous,

> the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was

[3] Supreme Court found that Counsel's conduct was frivolous under 22 N.Y.C.R.R. § 130-1.1(c)(1). Supreme Court did not find, and NYAG does not contend, that Counsel undertook any conduct "to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" or that Counsel "assert[ed] material factual statements that are false," as required to support a finding of frivolous conduct under subsections two and three of the relevant rule. 22 N.Y.C.R.R. § 130-1.1(c)(2)-(3).

brought to the attention of counsel or the party.

22 N.Y.C.R.R. § 130-1.1(c).

Where the conduct reflected in the record does not fit within the narrow definition of "frivolous" set forth in 22 N.Y.C.R.R. § 130-1.1(c), an award of sanctions by the court is an abuse of discretion. See Matter of Kings County Hosp. v. M.R., 226 A.D.3d 513, 513 (1st Dep't 2024); Talos Capital Designated Activity Co. v. 257 Church Holdings LLC, 226 A.D.3d 414, 416 (1st Dep't 2024). In this Department, courts are instructed to avoid the imposition of sanctions pursuant to 22 N.Y.C.R.R. § 130-1.1 where a party asserts colorable, albeit ultimately unpersuasive, arguments made in good faith. See Gordon Group Invs., LLC v. Kugler, 127 A.D.3d 592, 594-595 (1st Dep't 2015), citing Yenom Corp. v. 155 Wooster St. Inc., 33 A.D.3d 67, 70 (1st Dep't 2006). Even a "somewhat colorable argument" does not warrant sanctions under 22 N.Y.C.R.R. § 130-1.1(c)(1). Kremen v. Benedict P. Morelli & Assoc., P.C., 80 A.D.3d 521, 523 (1st Dep't 2011).

NYAG utterly fails to address 22 N.Y.C.R.R. § 130-1.1(c)'s narrow definition of frivolous conduct or this Department's steady line of precedent holding that the good-faith interposition of colorable, merits-based arguments without intent to harass is not a basis for sanctions under the rule. Instead, NYAG asserts that Supreme Court imposed sanctions "because several factors, taken

together, all showed that the arguments were completely without merit." Resp. Br. at 143. Rather than explain what those "factors" consisted of, however, NYAG merely reiterates her conclusion that Counsel's arguments could not be colorable because Supreme Court had rejected similar arguments at earlier stages of the litigation. Id. As set forth more fully in Counsel's opening brief and infra, it cannot be frivolous for Counsel to raise arguments that necessarily depend on the facts available to the parties and Supreme Court at different procedural junctures.

As well, it is perfectly proper for an attorney to make arguments that a trial judge may disagree with in order to preserve same for appellate review. NYAG's argument, at its core, could require an attorney to forego potentially meritorious appellate arguments to avoid a sanction claim against the latter personally. To say that this result is contrary to settled rules of jurisprudence is an understatement in the extreme.

As a preliminary matter, however, Counsel's arguments cannot be characterized as "completely without merit" under any reasonable view. Id. NYAG's action raises complex issues of first impression regarding the scope of NYAG's authority under Executive Law § 63(12) in the absence of consumer-facing conduct, reliance, materiality, intent, causation, or any public or private harm. Given the stakes of this case, it was critical that Counsel vigorously present and preserve Defendants' legal arguments, particularly when they are issue-

determinative arguments related to such matters as executive standing and capacity, the impact of disclaimers, and the availability of disgorgement as a matter of law. The briefing on the plenary appeal confirms that these arguments are both important and contentious. Nothing in NYAG's 149-page brief intimates that they are frivolous or should not be heard by this Court. Rather, as here, Counsel based their arguments on a good-faith interpretation of Executive Law § 63(12), relevant caselaw, and the developed factual record.

Further, as adumbrated previously, NYAG ignores Counsel's ethical obligation to make and preserve arguments on behalf of their clients. Counsel were and are bound to advocate zealously for their clients at each stage of the underlying proceeding, to make all colorable and good-faith arguments, regardless of whether Supreme Court agrees, and to preserve their clients' appellate rights. An affirmance of Supreme Court's Sanctions Decision would chill zealous advocacy under threat of sanction. In the absence of any evidence or claim that Counsel's conduct was motivated by bad faith or to impede the proceedings, Supreme Court clearly abused its discretion.

B. Counsel Were Not Precluded from Interposing Arguments at Summary Judgment Based on a Developed Factual Record.

There can be no dispute that the standards applicable to a motion for a preliminary injunction, a motion to dismiss, and a motion for summary judgment are fundamentally different. On NYAG's motion for a preliminary injunction,

Supreme Court was required to assess whether NYAG was likely to succeed on the merits of her underlying case based on the evidence annexed in favor of and in opposition to the motion. See Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862 (1990). On Defendants' motions to dismiss, Supreme Court was required to assess the sufficiency of NYAG's pleading based on the face of the complaint and the exhibits attached thereto, affording NYAG the benefit of all favorable inferences. See Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007). By contrast, at the summary judgment stage, Supreme Court was required to determine whether a triable issue of fact existed based on a developed factual record that, here, consisted of thousands of pages of exhibits. See Mazurek v. Metropolitan Museum of Art, 27 A.D.3d 227, 228 (1st Dep't 2006); see, e.g., A.2099-12726; 13078-23143; 23207-23511.

Moreover, NYAG cannot dispute blackletter law that a holding on a motion for a preliminary injunction or motion to dismiss does not bar a party from subsequently moving for summary judgment on the same issues later in the proceeding. See, e.g., Town of Concord v. Duwe, 4 N.Y.3d 870, 875 (2005); Moses v. Savedoff, 96 A.D.3d 466, 468 (1st Dep't 2012). Because the scope of the review on a motion for summary judgment necessarily differs, the doctrine of law of the case is inapplicable, and the parties can continue to litigate issues even though they were previously addressed at these earlier procedural junctures. See,

e.g., J.A. Preston Corp. v. Fabrication Enters., 68 N.Y.2d 397, 402 (1986); Friedman v. Connecticut Gen. Life Ins. Co., 30 A.D.3d 349, 349-350 (1st Dep't 2006), aff'd as modified, 9 N.Y.3d 105 (2007).

NYAG, like Supreme Court, simply ignores this precedent and instead argues that the factual record developed during discovery could not affect whether disgorgement is available under Executive Law § 63(12) or whether NYAG had standing and capacity to bring this action. This argument fails for two principal reasons.

First, Counsel's argument that disgorgement is not an available remedy under the governing statutory framework was made for the *first time* at summary judgment. See A.23585-23589. NYAG does not dispute this. In fact, the record clearly demonstrates that Counsel's prior arguments for dismissal of NYAG's disgorgement demand focused only on NYAG's failure to allege any harm or loss, not whether the statutory framework supported the claim. See, e.g., A.26493.

Nonetheless, NYAG claims that Counsel failed to acknowledge that this Court had already ruled that Executive Law § 63(12) authorizes NYAG to seek disgorgement and other equitable relief. See Resp. Br. at 143. NYAG's argument overstates this Court's June 27, 2023, decision. On appeal from Supreme Court's decision denying Defendants' motions to dismiss, this Court recited:

> The New York Legislature enacted Executive Law § 63(12) to combat fraudulent and illegal commercial conduct in New York.

> Under this provision, "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York" for disgorgement and other equitable relief (Executive Law § 63[12]).

People v. Trump, 217 A.D.3d 609, 610 (1st Dep't 2023). This Court then rejected Defendants' argument that the failure to allege losses requires dismissal of a claim for disgorgement under Executive Law § 63(12). Specifically, this Court stated: "[T]he failure to allege losses does not require dismissal of a claim for disgorgement under Executive Law § 63(12) (*see People v Ernst & Young LLP*, 114 AD3d 569, 569-570 [1st Dept 2014])." Id.

While NYAG highlights this Court's reference to "disgorgement and other equitable relief," (id.), as categorically resolving the matter of the availability of disgorgement under Executive Law § 63(12), the record and the decision itself make clear that Defendants' argument on appeal was far more limited. Defendants' argument at summary judgment that Executive Law § 63(12), in the absence of a claim under another statute with a broad residual clause such as the Martin Act, cannot authorize disgorgement as a matter of statutory interpretation was not before this Court.[4] Thus, Counsel did not disregard settled authority on the issue of

[4] NYAG's argument that Counsel's purported omission of text from People v. Greenberg, 27 N.Y.3d 490, 496-497 (2016), is a basis for sanctions is improperly raised for the first time on

whether disgorgement is available as a standalone remedy under the statutory framework. Counsel found no authority that has so held, nor did NYAG cite such authority, and one may presume that no such authority exists. Moreover, even if such controlling authority existed, it would not have been frivolous for Counsel to make good-faith arguments seeking a reasonable extension, modification, or reversal of that existing law.

Second, NYAG contends that Supreme Court "appropriately found additional support" for sanctions because Defendants had previously advanced similar standing and capacity to sue arguments earlier in the litigation. Resp. Br. at 145. This argument is specious. Defendants' argument that NYAG lacks standing and/or capacity to maintain this action because there is no public interest being vindicated, was, at the time of the preliminary injunction motion and motions to dismiss, predicated on limited facts. Only at summary judgment could Defendants avail themselves of a developed factual record demonstrating that, even after discovery, NYAG adduced no evidence of reliance, causation, or harm to the public or any other party. NYAG ignores this fundamental distinction as well as the voluminous caselaw, referenced above and at length in Counsel's opening brief,

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appeal and was not relied upon by Supreme Court in imposing sanctions. See Resp. Br. at 144; A.31-34. Moreover, nothing in the record suggests that Counsel excised text from any relevant caselaw in order to mislead the court. In fact, the cited section clearly seeks to distinguish Greenberg on the basis that it included both a Martin Act and Executive Law § 63(12) claim and quotes Greenberg's holding to explain that the Martin Act, unlike Executive Law § 63(12), has a "broad residual relief clause." Resp. Br. at 144; A.23588-23589.

making clear that Defendants could not be bound by Supreme Court's holdings on the issue of standing and capacity at the preliminary injunction and dismissal phases.

Similarly, Counsel's argument at summary judgment that expert and fact witness testimony regarding disclaimers in Defendants' statements of financial condition was fatal to NYAG's claims was entirely proper.[5] To the extent that NYAG argues that Supreme Court had twice rejected Counsel's argument on this point and warned Counsel that it was frivolous, (id. at 147-148), NYAG again disregards the fact that Supreme Court considered those arguments in the context of motions for a preliminary injunction and to dismiss the complaint. It is blackletter law that none of Supreme Court's holdings on these issues have preclusive effect at the summary judgment stage. Nor does NYAG's assertion that Counsel's disclaimer argument is not "meaningfully different from their prior rejected argument" transmogrify legitimate legal argument into frivolous conduct. Id. at 147. As Justice Leonard B. Austin (ret.) opined, (see A.26015-26039), Counsel should not have been faulted for pursuing good-faith arguments, notwithstanding that Supreme Court disagreed with them previously in the litigation.

[5] As NYAG concedes, this Court did not address Counsel's argument about the disclaimers because it was not raised on the appeal from the denial of the motions to dismiss. See Resp. Br. at 147.

C. Supreme Court Erred in Considering Prior Sanctions Issued in Unrelated Matters.

In the last paragraph of its brief, NYAG posits that Counsel are "mistaken" that Supreme Court inappropriately considered prior sanctions against President Trump and one member of his legal team in a wholly unrelated matter. Resp. Br. at 148. NYAG points only to the unremarkable requirement that courts consider the "circumstances under which the conduct took place" when assessing whether sanctions are warranted. Id., quoting 22 N.Y.C.R.R. § 130-1.1(c). NYAG's reading of the rule is grossly overbroad and disingenuous.

Both context and logic make plain that 22 N.Y.C.R.R. § 130-1.1(c) does not authorize consideration of unrelated conduct, in other proceedings, by other parties, as a basis for an award of sanctions. As Counsel have explained, the rule requires consideration of

> the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

22 N.Y.C.R.R. § 130-1.1(c). Each part of this provision references specific factors that bear on the nature of "the conduct" being considered as "frivolous" itself. Utterly absent is any indication that *other* conduct, in *other* cases, by *other* parties constitutes a "circumstance[] under which the [allegedly frivolous] conduct took place." Id.

Unsurprisingly, NYAG can point to no rule or caselaw authorizing a court to consider past conduct by counsel or clients resulting in sanctions in entirely different proceedings.[6] Indeed, such a standard would defy fundamental principles of fairness, due process, and respect for the jurisdiction of other tribunals. Supreme Court's ruling that Counsel can be penalized based upon awards of sanctions against President Trump or other members of his legal team in separate cases, for entirely distinct conduct, or in matters pending outside of this jurisdiction, sets a dangerous precedent and must be rectified.

NYAG's assertion that Supreme Court did not rely on "prior conduct" is false and belied by the Sanctions Decision itself. Resp. Br. at 148. Supreme Court explicitly ruled that there was "a larger context to the sanctions issue" and that "[s]everal defendants are no strangers to sanctions." A.33. Supreme Court then cited its prior issuance of sanctions against President Trump in a separate investigatory proceeding that preceded the instant action for his purported failure to comply with discovery obligations as well as sanctions imposed against President Trump and only one member of his legal team in a case pending in the

[6] NYAG cites Justicebacker Inc. v. Abeles, 2024 WL 3330209 (Sup. Ct. N.Y. Cty. July 8, 2024), for the proposition that a court may consider a party's "history of misconduct" in assessing sanctions. Resp. Br. at 148. This is misleading. In that case, Supreme Court considered the plaintiff's prior dilatory tactics *in the same action* as evidence that the plaintiff's conduct was undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. Justicebacker Inc., 2024 WL 3330209, at *5-*6. This bears no resemblance to Supreme Court's consideration of conduct *in other actions* and *by other parties* here.

Southern District of Florida. A.33-34. Notably, NYAG does not dispute that Mr. Robert, Mr. Farina, Mr. Kise, and Mr. Morian were not involved in any way in either of those proceedings. Moreover, any consideration of those separate proceedings was precluded even as to the one involved Counsel. Supreme Court's improper reliance on these proceedings was an explicit abuse of discretion and only amplifies the appearance that Supreme Court punished Counsel for their association with President Trump rather than their conduct as advocates for President Trump.

Finally, affirmance of the sanction award at bar could have profoundly negative consequences for New York jurisprudence generally. For example, could an attorney be sanctioned for moving for a directed verdict at the close of the proof because a judge expressed a consistent view that the evidence at trial presented a question of fact for the jury even though the failure to move for a directed verdict operates as a waiver of the right to assert such claim on appeal? See Miller v. Miller, 68 N.Y.2d 871, 873 (1986). More ominously, could an attorney who sought to change existing law on the ground that same was unfair or not reflective of modern norms be sanctioned for seeking to distinguish contrary precedent where the trial judge indicated that he or she was inclined to follow that precedent as a matter of comity? See D'Alessandro v. Carro, 123 A.D.3d 1, 6 (1st Dep't 2014). Here, of course, Counsel were not challenging accepted precedent; they were

merely engaged in a vigorous defense of a client that had not defaulted in a single transaction with parties with whom Counsel's clients were in direct privity in a one-of-a-kind case where the clients were facing a potentially crushing personal liability that came to fruition when the trial court issued its post-trial decision. Asking or encouraging counsel to back off from asserting potentially meritorious defenses or claims in that scenario is the *antithesis* of good lawyering.

The law only protects, changes, and advances when litigants can challenge claims, defenses, and precedent without fear of retaliation by means of a sanction award. Indeed, courts exist for the very purpose of affording litigants the right to advance claims and defenses that they believe fairly reflect the law or what it should be. Historically, our courts have welcomed vigorous advocacy, recognizing that it is necessary to protect the rights of parties and that it allows the law to develop in accordance with changed circumstances. Inhibiting that conduct works a detriment to a jurisprudential system that is rightly viewed as exemplary in the legal community. This Court should decline the invitation to endorse that paradigm.

CONCLUSION

Counsel respectfully request that this Court reverse the portion of Supreme Court's decision and order awarding sanctions against Counsel and grant any other and further relief as it may think proper.

Dated: New York, New York
August 30, 2024

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO 22 N.Y.C.R.R. § 1250.8(j)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 4,121.