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

THE PEOPLE OF THE STATE OF NEW YORK, - against - DONALD J. TRUMP, Defendant.	Ind. No. 71543-23 **AFFIRMATION OF SUSAN R. NECHELES IN SUPPORT OF DONALD J. TRUMP'S MOTION FOR THE COURT'S RECUSAL AND FOR AN EXPLANATION**

Susan R. Necheles, a partner at the law firm NechelesLaw LLP, duly admitted to practice in the courts of the State of New York, hereby affirms the following to be true under penalties of perjury:

1. I represent Donald J. Trump in this matter and submit this affirmation in support of his motion for the Court's recusal.

2. This Affirmation is submitted upon personal knowledge or upon information and belief, the source of my knowledge being conversations with prosecutors, conversations with other counsel, my review of court and other documents, and an independent investigation into the facts.

3. I incorporate by reference all factual statements made in the accompanying Memorandum of Law

4. In particular, during my representation of the Trump Corporation in *People v. The Trump Corp.*, Ind. No. 1473/2021, I learned the following from conversations with counsel for Allen Weisselberg:

a. Mr. Weisselberg's attorneys met with the Court on June 17th, where the Court informed Mr. Weisselberg's attorneys that unless Mr. Weisselberg cooperated with the People against the principal of the two corporate defendants in *People v. The Trump Corp.*, *i.e.*, former President Trump, and the corporate defendants, the Court would only offer Mr. Weisselberg a state prison sentence of at least one to three years imprisonment, even if Mr. Weisselberg pleaded guilty.

b. Alternatively, if Mr. Weisselberg went to trial and was convicted, the Court said it would sentence Mr. Weisselberg to a longer sentence of imprisonment than one to three years.

c. The Court told counsel for Mr. Weisselberg words to the effect of "what does he have to lose by trying to cooperate with the People?"

5. Exhibit A is a true and accurate copy of the Trump Corporation's Recusal Motion in *People v. The Trump Corp.*, Ind. No. 1473/2021.

6. Exhibit B is a true and accurate copy of the publicly-filed (redacted) Affirmation of Susan Hoffinger in Opposition to the Trump Corporation's Recusal Motion in *People v. The Trump Corp.*, Ind. No. 1473/2021.

Dated: May 31, 2023
New York, New York

By: _____

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EXHIBIT A

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

THE PEOPLE OF THE STATE OF NEW YORK,	
- against -	Index No. 1473/2021
THE TRUMP CORPORATION d/b/a THE TRUMP ORGANIZATION; TRUMP PAYROLL CORP. d/b/a THE TRUMP ORGANIZATION,	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS THE TRUMP CORPORATION AND TRUMP PAYROLL CORP.'S RECUSAL MOTION**
Defendants.	

Defendants Trump Corporation and Trump Payroll Corp. (collectively the "Corporate Defendants"), respectfully submit this memorandum of law in support of their motion for Your Honor's recusal from this case.

INTRODUCTION

Fundamental principles of fairness, embodied in the Due Process Clause, require Your Honor's recusal from this case. *See generally People v. Novak*, 30 N.Y.3d 222, 225 (2017); *People v. De Jesus*, 42 N.Y.2d 519, 523 (1977). Your Honor's role in procuring Mr. Weisselberg as a witness for the prosecution, in essentially directing how Mr. Weisselberg must testify at the upcoming trial, and in vouching for Mr. Weisselberg's testimony, are all acts which convey that Your Honor has reached the conclusion that the Corporate Defendants are guilty of the crimes charged. These acts create the appearance that Your Honor is not an impartial jurist and controlling precedent therefore requires Your Honor's recusal. *See People*

v. Towns, 33 N.Y.3d 326, 332 (2019). Moreover, Your Honor's significant role in Mr. Weisselberg's plea negotiations—including, among other things, telling Mr. Weisselberg's attorneys that the only way that Mr. Weisselberg would receive a non-custodial sentence would be if he cooperated with the People in helping to bring a criminal case against the principal of the Corporate Defendants; ultimately offering Mr. Weisselberg a shorter jail sentence than that offered by the People in order to induce him to plead guilty; requiring him to allocute to a detailed set of "facts" drafted by the prosecution; and to testify against the Corporate Defendants in accordance with that allocution —will all be part of the cross-examination of Mr. Weisselberg. If Your Honor does not recuse, it will be in the untenable position of having to rule on the allowability of questions into Your Honor's own actions and statements. For this reason, too, Your Honor should recuse himself.

I. **Factual Background**

Based on conversations with counsel for Mr. Weisselberg, contemporaneous notes of Your Honor's court attorney, a New York Times article, and the transcript of Weisselberg's guilty plea, we have put together the following description of the facts leading to Mr. Weisselberg' guilty plea, including Your Honor's role in plea negotiations. To the extent that the People or Court dispute these facts, we believe that a hearing is required, and in view of the preliminary showing that the Corporate Defendants make in this memorandum, we believe that any such hearing should be before a different judge.

Specifically, we are informed that Mr. Weisselberg, through his attorneys, initially attempted to work out a plea agreement directly with the People. Affirmation of Susan R. Necheles ("Aff."), ¶ 3(a). The prosecution team, however, insisted on a state prison term (meaning at least 1-3 years prison) unless Mr. Weisselberg cooperated and provided helpful evidence to the prosecution. The prosecutors also encouraged Mr. Weisselberg's attorneys to meet with Your Honor and see if Your Honor would offer Mr. Weisselberg a plea deal. *Id.* In response, Mr. Weisselberg's attorneys met with Your Honor on June 17th, where Your Honor informed Mr. Weisselberg's attorneys that unless Mr. Weisselberg cooperated with the People against the principal of the Corporate Defendants, *i.e.*, former President Trump, and the Corporate Defendants, Your Honor would only offer Mr. Weisselberg a state prison sentence of at least one to three years imprisonment, even if Mr. Weisselberg pleaded guilty. *Id.* at 3(b). Alternatively, if Mr. Weisselberg went to trial and was convicted, Your Honor said that it would sentence Mr. Weisselberg to a longer sentence of imprisonment than one to three years. Moreover, Your Honor stated that Mr. Weisselberg would be remanded by Your Honor as soon as the verdict was returned and that Your Honor would deny the defendant bail pending appeal (which Your Honor said was in keeping with his standard practice), so that Mr. Weisselberg would serve most or the entirety of his sentence even if his conviction was ultimately overturned by the Appellate Division. *Id. See* also Jonah E. Bromwich, Ben Protess and William K. Rashbaum, Inside the Negotiations That Led a Top Trump Executive to Plead Guilty, New York Times,

August 18, 2022 ("NYT Article"), attached as Ex. A ("And if Mr. Weisselberg was convicted, the judge warned that he would order him into custody that same day."). In short, Your Honor indicated that the "only way to avoid serving time behind bars … was if Mr. Weisselberg cooperated and pleaded guilty." *Id.* In particular, Your Honor told counsel for Mr. Weisselberg words to the effect of "what does he have to lose by trying to cooperate with the People?" Aff. ¶ 3(b).

As a result of Your Honor pushing Mr. Weisselberg to cooperate, Mr. Weisselberg's attorneys agreed they would discuss with the District Attorney's Office whether Mr. Weisselberg had any valuable information about former President Trump to provide to the prosecution. *Id.* at 3(c). When it became apparent that he did not have any information that fit the District Attorney's Office's preconceived version of the facts, Mr. Weisselberg's attorneys sent Your Honor an additional letter, saying that the parties were at an impasse and would like to meet with Your Honor again. *Id.*

Over the next few weeks, the prosecutors, Mr. Weisselberg's attorneys, and Your Honor met and discussed various possible resolutions. *Id.* at 3(d). Finally, at a conference on August 15, the prosecutors suggested that if Mr. Weisselberg would, *inter alia*, (1) plead guilty to the entire indictment, (2) allocute to a detailed allocution drafted by the People, (3) agree to testify against the Corporate Defendants in a manner consistent with his allocution, and (4) agree that his sentence would be held in abeyance until after the trial of the Corporate Defendants, then the People would recommend a sentence of six months jail plus

five-years' probation. *Id.* at 3(e); *Accord* Notes of James Bergamo ("Bergamo Notes"), at 6, attached as Ex. B. Mr. Weisselberg's lawyers, however, argued for a shorter sentence. *See* Aff. ¶ 3(e); Bergamo Notes at 6 ("3 [months] please"); NYT Article ("Mr. Gravante pushed for an even shorter sentence"). In order to induce Mr. Weisselberg to plead guilty and testify against the Corporate Defendants, Your Honor agreed to impose a five-month jail term if Mr. Weisselberg fulfilled all of the conditions previously suggested by the prosecutors. Aff. at 3(g); Bergamo Notes at 6 ("If court undercuts …same conditions … has to cooperate"). Mr. Weisselberg accepted Your Honor's offer.

As mentioned, one of those conditions was that Mr. Weisselberg "fully allocute under oath to his participation in this tax evasion scheme and that of his co-defendants, the Trump Corporation and Trump Payroll Corporation." Transcript of Allen Weisselberg Guilty Plea ("Tr."), at 3, attached as Ex. C. But instead of allowing Mr. Weisselberg to allocute in his own words, Mr. Weisselberg was required, by the terms of the plea agreement with Your Honor, to answer yes to a number of factual questions that were drafted by the prosecutors.[1] Aff. at 3(h). These questions largely tracked the allegations in the indictment and articulated the People's theory of the case. *See* Bergamo Notes at 5 "(DANY wants a very specific allocution"); *id.* at 7 ("court will read questions for c[oun]ts 1, 2"). The

[1] We respectfully ask that Your Honor order the People to produce, as *Brady, Giglio*, and C.P.L. § 245.20(k) materials, all drafts of the allocution that were presented to Mr. Weisselberg or his attorneys by the People and all documents containing changes made by Mr. Weisselberg's attorneys, as well as any notes of the conversations with Mr. Weisselberg's attorneys concerning the substance of this allocution. *See, infra*, n. 5.

allocution also included at least one factual claim—that by "underreporting your compensation, you were able to increase your take-home pay, thereby eliminating the need for raises and saving the Trump Corporation from paying you additional salary and bonuses," Tr. at 14—that was not alleged in the Indictment or introduced in the grand jury and was included specifically to undercut a potential defense of the Corporate Defendants.

On the afternoon of August 17, Your Honor met with the Parties for a dry run of the plea allocution. Aff. ¶ 3(i). The next day, Allen Weisselberg entered his guilty plea. At that hearing, Your Honor questioned Mr. Weisselberg using the allocution written by the People. Your Honor also told Mr. Weisselberg that if he did not comply with any of the terms of his plea deal, Your Honor would be free to impose a sentence of up to 5–15 years in prison. Tr. 34.

Last week, the Corporate Defendants sent a letter to Your Honor raising concerns that Your Honor's role in Mr. Weisselberg's plea may require Your Honor's recusal. Ex. D. The Corporate Defendants also requested certain information and documents from Your Honor. Although Your Honor largely denied the requests for information, it did provide the Corporate Defendants with the notes of Court Attorney James Bergamo.

We now respectfully move for Your Honor's recusal from this case.

II. YOUR HONOR MUST RECUSE HIMSELF FROM PRESIDING AT THE TRIAL OF THE CORPORATE DEFENDANTS

"The right to an impartial jurist is a basic requirement of due process." *Novak*, 30 N.Y.3d at 225 (internal quotation marks omitted). *See also De Jesus*, 42 N.Y.2d at 523 ("'The right of every person accused of crime to have a fair and impartial trial before an unbiased court and an unprejudiced jury is a fundamental principle of criminal jurisprudence.'") (quoting *People v. McLaughlin*, 150 N.Y. 365, 375 (1896)); 22 N.Y.C.R.R. § 100.3(B)(4) ("A judge shall perform judicial duties without bias or prejudice against or in favor of any person.").

Moreover, "[n]ot only must judges actually be neutral, they must appear so as well." *Novak*, 30 N.Y.3d at 226. *See also* 22 N.Y.C.R.R. §100.2 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."). The relevant question is therefore "not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).

For these reasons, a court must remain "a neutral arbiter stationed above the clamor of counsel or the partisan pursuit of procedural or substantive advantage," and therefore cannot "improperly assume[] the advocacy role traditionally reserved for counsel." *People v. Towns*, 33 N.Y.3d 326, 332 (2019) (brackets added; internal brackets removed). It follows that the Due Process rights of a defendant are violated when a judge "personally negotiat[es] and enter[s] into a quid pro quo cooperation agreement with the codefendant whereby the court promise[s] to

sentence the codefendant within a specific range in exchange for his testimony against defendant." *Id.*

In *Towns*, "the trial court negotiated a plea agreement directly with the codefendant, under which the codefendant pleaded guilty to the entire indictment in exchange for a determinate sentence within the range of 9 to 15 years in prison." *Id.* at 328. Furthermore, the trial court said that the sentence imposed would be "entirely based upon the codefendant's level of cooperation in the prosecution of defendant, explaining that, if the codefendant testified candidly and honestly and cooperated with the District Attorney's Office in telling the truth, the court had every intention of imposing the lowest end of the term.'" *Id.* at 328–329 (internal brackets, quotation marks, and ellipses removed).

Under these facts, the Court of Appeals held that "the trial court improperly assumed the advocacy role traditionally reserved for counsel," when it "effectively procured a witness in support of the prosecution by inducing the codefendant to testify" in an inculpatory way about his co-defendant "in exchange for the promise of a more lenient sentence. *Id.* at 332 (internal brackets and quotation marks omitted). The Court therefore reversed the conviction and remanded for a trial before a different judge. *Id.* at 333.

In just the few years since *Towns*, at least three appellate division cases have reversed convictions on the basis of *Towns*. *See People v. Johnson*, 198 A.D.3d 1320, 1321 (4th Dept 2021); *People v. Greenspan*, 186 A.D.3d 505, 506 (2d Dept 2020); *People v. Lawhorn*, 178 A.D.3d 1466, 1467 (4th Dept 2019).

As discussed below, Your Honor improperly entered into a quid pro quo arrangement with Mr. Weisselberg to induce him to testify against the Corporate Defendants. Under *Towns*, therefore, Your Honor should recuse himself from the trial of the Corporate Defendants.

A. Your Honor's Role in Procuring Mr. Weisselberg as a Witness for the Prosecution Created an Appearance of Bias and Requires Your Honor's Recusal

As explained by the Court of Appeals in *Towns*, Your Honor's role in Mr. Weisselberg's plea agreement has created, at the very least, "the appearance or taint of partiality." *Towns*, 33 N.Y.3d at 331. In fact, what occurred in *Towns* is strikingly similar to what occurred in this case. As was true in *Towns*, Your Honor "personally negotiat[ed] and enter[ed] into a quid pro quo cooperation agreement with the codefendant whereby the court promised to sentence the codefendant within a specific range in exchange for his testimony against defendant." *Id.* at 332. Simply put, Your Honor himself promised Mr. Weisselberg a reduced sentenced if—and only if—he allocuted as requested by the People and testified against his co-defendants. This is apparent from the transcript of Mr. Weisselberg's guilty plea, at which Mr. Weisselberg's attorney stated that Mr. Weisselberg was pleading guilty "on the understanding that *the Court has promised* a sentence of five months incarceration, five years probation if all of the conditions of the disposition are satisfied." Tr. at 5 (emphasis added). Those conditions included Mr. Weisselberg "fully allocut[ing] under oath to his participation in this tax evasion scheme and that of his co-defendants, the Trump Corporation and Trump Payroll Corporation,"

and "agree[ing] to testify truthfully at the trial of the Trump Organization … as to the facts underlying his allocution and plea." *Id.* at 3. Your Honor later reiterated this point, stating that: "As a condition of your plea of guilty, *I have thus far promised you* a five month split sentence, meaning that you will serve a sentence of five months in jail, and that period of incarceration will be followed by five years of probation." *Id.* at 33 (emphasis added).

Crucially, this promise of a five-month sentence was Your Honor's, not the People's. The People's plea offer was to recommend a six-month split sentence. *See* Tr. at 4 ("If the defendant lives up to all of these conditions in good faith, the People will recommend in the aggregate, a split sentence of six months incarceration[.]"). That this was Your Honor's offer is also confirmed by reporting by the New York Times. In an article on Mr. Weisselberg's plea negotiations, the Times reports that:

> Mr. Weisselberg's lawyers, Nicholas A. Gravante Jr. and Mary E. Mulligan, pressed for leniency, emphasizing their client's age, frail health and past service in the National Guard and arguing that the district attorney's demand for a six-month jail term was excessive. The judge had previously warned that Mr. Weisselberg's only chance for probation was cooperating with the broader investigation into Mr. Trump's business practices. With that off the table, he proposed a compromise: Over the objections of the district attorney's office, the judge would agree to the five-month sentence.

NYT Article.[2] It is further confirmed both by contemporaneous notes taken by Your Honor's Court Attorney, *see* Bergamo Notes, at 6 (describing one of the conditions of

[2] *See also id.* ("It appeared as if a deal might not materialize until a breakthrough came in recent days. The prosecutors made a new offer: They would be willing to seek only a six-month sentence for Mr. Weisselberg if he pleaded guilty to all 15 felonies, including that he conspired with the company — a move that would tip the scales against the Trump Organization at its October trial. … When Mr. Weisselberg's lawyers met with the

Your Honor's plea offer ("if Court undercuts") as "has to cooperate"), and by statements made to undersigned counsel by counsel for Mr. Weisselberg. *See* Aff. at 3(g).

All of this is exactly what was prohibited by *Towns*. The Court of Appeals held that a "defendant [i]s denied the right to a fair trial when the trial court negotiated and entered into a cooperation agreement[3] with a codefendant requiring that individual to testify against defendant in exchange for a more favorable sentence." *Id.* at 328. The Court stressed that, by "personally negotiat[ing] and enter[ing] into a quid pro quo cooperation agreement with the codefendant whereby the court promised to sentence the codefendant within a specific range in exchange for his testimony against defendant" … the trial court improperly assumed the advocacy role traditionally reserved for counsel." *Id.* at 332.

Similarly, Appellate Division opinions applying *Towns* make clear that its central holding is the prohibition on a trial judge entering into a plea agreement with a defendant where the defendant receives a more lenient sentence in exchange for testimony against a co-defendant. For example, the Fourth Department held

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prosecutors and the judge on Monday, Mr. Gravante pushed for an even shorter sentence, arguing that the Trump Organization's refusal to plead guilty should not be held against his client. The judge proposed five months, of which Mr. Weisselberg would probably serve 100 days.").

[3] The *Towns* Court uses the term "cooperation agreement" to refer to an agreement with a judge requiring the defendant to testify in exchange for a reduced sentence. That is what concerned the Court of Appeals in *Towns* and the Appellate Divisions in *Johnson*, 198 A.D.3d at 1321, *Greenspan*, 186 A.D.3d at 506, and *Lawhorn,* 178 A.D.3d at 1467. And that is exactly what has occurred here as well.

"that the court committed reversible error when it 'negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence." *Johnson*, 198 A.D.3d at 1321 (4th Dept 2021) (quoting *Towns*, 33 N.Y.3d at 328) (brackets in the original). It "conclude[d] that, 'by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to '[a] fair trial in a fair tribunal.'" *Id.* So, too, the Second Department held that "the County Court committed reversible error when it 'negotiated and entered into a [plea] agreement with a codefendant requiring that individual to testify against defendant in exchange for a more favorable sentence.'" *Greenspan*, 186 A.D.3d at 506 (2d Dept 2020) (quoting *Towns*, 33 N.Y.3d at 328) (brackets in the original). *See also Lawhorn*, 178 A.D.3d at 1467 (4th Dept 2019) (same).

Nor does it matter that Your Honor did not initiate the idea that Mr. Weisselberg's plea agreement require that he cooperate with the prosecutors by (1) allocuting to specific facts dictated by the prosecutors, and (2) testifying in accordance with that allocution at trial—that this was initially proposed by the People. Ultimately, it was the shorter jail sentence offered by Your Honor that induced Mr. Weisselberg to plead guilty. In fact, in *Greenspan* the People had also proposed, and actually entered into, a separate plea agreement with the cooperating witness where she agreed to testify against defendant Greenspan. *See* Greenspan Supplemental Appellate Brief, attached as Ex. E. There, the Suffolk County District Attorney's Office offered the cooperating witness a plea agreement where,

in exchange for testifying against Greenspan, she was allowed to plead down from murder to second-degree attempted robbery, with the People recommending a sentence of 2-7 years in prison. *Id.* at 2. The trial judge then made its own offer: If the cooperating witness testified against Greenspan, the trial judge would sentence her to probation. *Id.* at 3. Nevertheless, the Appellate Division held that the trial judge's agreement with the co-defendant violated the holding of *Towns*. *Greenspan*, 186 A.D.3d at 506. It is thus irrelevant who initiated the idea of rewarding Mr. Weisselberg with a reduced sentence for his agreement to testify against the Corporate Defendants. Your Honor's decision to sweeten the plea offer to induce Weisselberg to cooperate with the People renders this Court biased and requires recusal.

In short, "whatever [Your Honor's] subjective intentions," by "effectively procur[ing] a witness in support of the prosecution," Your Honor created, at the very least, an appearance of bias that requires recusal. *See Towns*, 33 N.Y.3d at 331, n. 3 (holding "that a showing of actual bias is [not] required").

B. Your Honor's Role in Essentially Directing how Mr. Weisselberg Must Testify at Trial Also Requires Your Honor's Recusal

In addition to its concern over the trial judge procuring a witness for the prosecution, the Court of Appeals in *Towns* also criticized the fact that the trial court "informed the codefendant that one of the primary touchstones of its determination concerning the codefendant's truthfulness and cooperation would be the codefendant's previously recorded statements to police," and thus the fact "that the trial court essentially directed the codefendant on how the codefendant must

testify in order to receive the benefit of the bargain." *Id.* at 329, 332–333. Your Honor here likewise "essentially directed [Mr. Weisselberg] on how [Mr. Weisselberg] must testify in order to receive the benefit of the bargain." *Towns*, 33 N.Y.3d at 333. As discussed above, the terms of Mr. Weisselberg's plea agreement with Your Honor require that "he must fully allocute under oath to his participation in this tax evasion scheme and that of his co-defendants, the Trump Corporation and Trump Payroll Corporation" and "then must testify in the upcoming trial of the Trump Organization as to the facts underlying his allocution and plea." Tr. at 3.

That allocution, as Your Honor was aware from meetings that occurred in your Chambers, was drafted by the prosecutors. In fact, Your Honor's Court Attorney's notes of one of the plea negotiation meetings state that "DANY wants a very specific allocution." That "very specific allocution" was drafted in a way that directly implicated the Corporate Defendants in the conduct charged in this case. *See* Tr. 10–18.

It was, we submit, improper for Your Honor to agree to participate in this process by permitting the People to force Mr. Weisselberg to make a detailed allocution which was drafted by the prosecutors. The normal purpose of a plea allocution is to ensure "that the defendant understood the charges and made an intelligent decision to enter a plea." *People v. Goldstein*, 12 N.Y.3d 295, 301 (2009). There is not even a need for the defendant "to recite every element of the crime pleaded to." *Id.* That, obviously, was not the purpose of the lengthy and detailed allocution Mr. Weisselberg gave. Instead, the purpose of the required allocution

was to lock in Mr. Weisselberg's testimony against the Corporate Defendants. This becomes clear when one considers what would have happened if Mr. Weisselberg had just pleaded guilty and been sentenced without a requirement that he testify against his co-defendants. In such a case, the prosecutors could have subpoenaed him and forced him to testify. *See* Bergamo Notes at 5 (the People stating that they "will subpoena AW"). But in that case, Mr. Weisselberg would not have been locked into specific, and inculpatory, testimony, and there would have been no leverage to ensure he inculpated the Corporate Defendants and its employees at trial. Thus, the whole point of the plea agreement generally, and the allocution specifically, was to lock Mr. Weisselberg into inculpatory testimony about the Corporate Defendants. This is also apparent from the terms of Mr. Weisselberg's plea deal, which required him not only to "fully allocute under oath to *his* participation in this tax evasion scheme," but also "that of his co-defendants, the Trump Corporation and Trump Payroll Corporation." Tr. at 3 (emphasis added).

It was therefore improper for Your Honor to agree to participate in a lengthy allocution whose sole purpose was to lock Mr. Weisselberg into testifying at trial to a version of the facts written by the prosecution and deliberately adverse to his co-defendants. *See* Opinions of the Advisory Committee on Judicial Ethics, Op. 14-152 ("Likewise, although a judge may ask a criminal defendant any questions the judge has determined are legally permissible or legally required, … the judge should not accede to the district attorney's request that the judge conduct plea allocutions in a particular manner[.]"). It was also improper for the prosecutors in this case to

encourage Your Honor to act in this way. *See* N.Y.R.P.C. 8.4(f) ("A lawyer shall not … knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.").

By requiring Mr. Weisselberg, as a condition of his plea agreement with Your Honor, to allocute in a way that directly inculpated his co-defendants, and then requiring Mr. Weisselberg to testify at trial "as to the facts underlying his allocution," Tr. 3, Your Honor "essentially directed" how Mr. Weisselberg must testify at trial in order to receive his hoped for five-month sentence.[4]

C. By Entering into a Plea Agreement with Mr. Weisselberg, Your Honor has Effectively and Improperly Vouched for his Testimony

In addition, Your Honor's direct role in getting Mr. Weisselberg to agree to testify against his co-defendants will necessarily—but improperly—vouch for the credibility of his testimony. *See Towns*, 33 N.Y.3d at 330 ("Defendant asserts that the trial court effectively stepped into the role of prosecutor and impliedly vouched for the trial testimony of the codefendant[.]"). Any argument made by the defense that Mr. Weisselberg's allocution and testimony is not credible will, in the jury's mind, likely run into the fact that Your Honor apparently felt his allocution and

[4] It is true that Mr. Weisselberg was told he needed "to testify truthfully at the trial of the Trump Organization." Tr. 3, 32. But the defendant in *Towns* was also told he needed to "testify truthfully," *Towns*, 33 N.Y.3d at 329, and the Court of the Appeals still found that, "by tying its assessment of the truthfulness of the codefendant's testimony to that individual's prior statements to police, the trial court essentially directed the codefendant on how the codefendant must testify." *Id.* at 332. It is obvious that Mr. Weisselberg cannot hope to contradict his allocution at trial and still obtain leniency from Your Honor. That was, after all, the entire purpose of his lengthy allocution.

testimony credible enough to promise him a shorter sentence in exchange for them. Furthermore, Your Honor's interest in inducing Mr. Weisselberg to testify against the Corporate Defendants will likely imply to the jury that Your Honor believes the Corporate Defendants to be guilty—because of course the Court would not encourage Mr. Weisselberg to testify against defendants the Court thought innocent. *Cf.* Opinions of the Advisory Committee on Judicial Ethics, Op. 09-118 (stressing that "the court should not be the source or inspiration for a plea agreement as it would create an appearance of partiality and an indication that the judge is predisposed towards the defendant's guilt.").

Moreover, Your Honor's involvement in inducing Mr. Weisselberg to testify against the Corporate Defendants will put them in the untenable position of arguing that Your Honor himself wrongfully induced a witness to falsely implicate his co-defendants. Your Honor should therefore recuse himself from this case.

D. The Cross-Examination of Mr. Weisselberg, which will Address Your Honor's Involvement in Procuring Mr. Weisselberg's Guilty Plea, will Necessarily Result in Your Honor Being Actually Biased

Finally, in addition to the appearance of bias created by Your Honor procuring, and vouching for, a witness for the prosecution, as discussed above, Your Honor's direct and personal involvement in Mr. Weisselberg's plea negotiations means that Your Honor's actions and statements will now be an integral part of the cross-examination of Mr. Weisselberg. Based on conversations with the People, we believe the People will argue at trial that, since Mr. Weisselberg will testify at trial that he is guilty of all the crimes charged in the Indictment and that he conspired

with the Corporate Defendants to commit those crimes, the Corporate Defendants are guilty of those same crimes. *See* Penal Law § 20.20(2)(b) ("A corporation is guilty of an offense when … [t]he conduct constituting the offense is engaged in … by a high managerial agent acting within the scope of his employment and in behalf of the corporation"). An important line of Mr. Weisselberg's cross-examination will therefore be that Mr. Weisselberg did not in fact conspire with the Corporate Defendants or with any person who worked for the Corporate Defendants but was forced to allocute and testify that he did because he feared that Your Honor would otherwise sentence him to a lengthy prison sentence. Your Honor will thus be in the untenable position of having to rule on the permissibility of questions about Your Honor's own statements and actions. The following are just a few possible questions of this sort that may be posed to Mr. Weisselberg:

- "Isn't it a fact that you pleaded guilty not because you think you are actually guilty but because the Judge told your lawyers that he would remand you the day you were convicted and not give you bail pending appeal?";
- "Isn't it a fact that you allocuted to conspiring with the Corporate Defendants not because it is true that you entered into such a conspiracy but because that was the only way the Judge would promise you a five-month sentence?"; and
- "Isn't it a fact that you must testify to everything that you were told to say at your allocution because otherwise the Judge told you that he could sentence you to up to five to fifteen years in prison?"[5]

[5] The government's involvement in the crafting of a defendant's allocution, for example where "the prosecutor scripts the allocution in its entirety," or where "the prosecutor edits the substance of the allocution in order to preempt arguments that the government knows are at the heart of the trial defendants' defense," can "constitute appropriate impeachment evidence for the jury." *United States v. Ahuja and Shor*, No. 18-cr-328 (KPF) (S.D.N.Y. Dec. 17, 2021), ECF No. 457 at Tr. 27. Both of those circumstances occurred in this case.

If the People object, whether on hearsay, relevancy, or other grounds, to any of these, or similar, questions, Your Honor will need to rule on whether the defense can inquire about Your Honor's own statements and actions. That will place Your Honor in a conflicted position, as Your Honor will necessarily be "fully invested in the presentation of the testimony" in a way that presents Your Honor's involvement in the best light and thus also is "in favor of the People." *Towns*, 33 N.Y.3d at 335 (Rivera, J., concurring); *accord id.* at 334 (Rivera, J., concurring) ("The judge's protective view of that 'deal' led the People to intercede when Your Honor initially ruled to prohibit defense counsel from cross-examining the codefendant on the details of his personal cooperation agreement with the trial judge, prohibiting defense counsel from even identifying the so-called gate keeper on this cooperation agreement, insistent that it did not matter with whom the agreement was made.") (internal brackets and quotation marks omitted).[6] *See also* Ex. E at 4 (describing the trial judge's conflicted rulings in *Greenspan*).

Moreover, the jury may wrongly assume that Your Honor's legal rulings on whether to sustain objections to the hypothetical line of questions above are based on Your Honor's own view of the (contested) facts. *Cf. De Jesus*, 42 N.Y.2d at 524 (holding that "[s]ince the presence of the Judge is likely to be equated with the

[6] In fact, under circumstances like these a judge is generally required to recuse himself. *See* 22 N.Y.C.R.R. §100.3(E)(1)(a) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where … the judge has personal knowledge of disputed evidentiary facts concerning the proceeding.").

majesty of the law himself ... care must be taken to guard against the possibility that the stated opinion of the trial court or even the suggestion of an opinion might be seized upon by the jury and eventually prove decisive.").

As Your Honor will necessarily be actually biased in this case, Your Honor should recuse himself from the upcoming trial of the Corporate Defendants.

CONCLUSION

For the reasons set forth above, we respectfully submit that Your Honor should recuse himself from this case. To the extent that the People or Your Honor dispute any of facts alleged herein, we respectfully request a hearing on this matter. We also respectfully request oral argument on this motion.

Dated: September 8, 2022
New York, NY

Respectfully submitted,

By: _____

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

THE PEOPLE OF THE STATE OF NEW YORK,	Index No. 1473/2021
- against -	
THE TRUMP CORPORATION d/b/a THE TRUMP ORGANIZATION; TRUMP PAYROLL CORP. d/b/a THE TRUMP ORGANIZATION,	**AFFIIRMATION OF SUSAN R. NECHELES IN SUPPORT OF DEFENDANT'S MOTION TO RECUSE THE COURT**
Defendants.	

Susan R. Necheles, a partner at the law firm NechelesLaw, LLP, duly admitted to practice in the courts of the State of New York, hereby affirms the following to be true under penalties of perjury:

1. I represent the Trump Corporation and the Trump Payroll Corp., in this matter and submit this affirmation in support of its motion to recuse the Court.

2. This Affirmation is submitted upon personal knowledge or upon information and belief, the source of my knowledge being my review of court and other documents, statements by counsel for the People and Allen Weisselberg, and an independent investigation into the facts.

3. Based on my conversations with counsel for Mr. Weisselberg, I have learned the following:

   a. Mr. Weisselberg, through his attorneys, initially attempted to work out a plea agreement directly with the People. The prosecution team, however, insisted on a state prison term (meaning at least 1-3 years prison) unless Mr.

Weisselberg cooperated and provided helpful evidence to the prosecution. The prosecutors also encouraged Mr. Weisselberg's attorneys to meet with the Court and see if the Court would offer Mr. Weisselberg a plea deal.

b. Mr. Weisselberg's attorneys met with The Court on June 17th, where the Court informed Mr. Weisselberg's attorneys that unless Mr. Weisselberg cooperated with the People against the principal of the Corporate Defendants, *i.e.,* former President Trump, and the Corporate Defendants, the Court would only offer Mr. Weisselberg a state prison sentence of at least one to three years imprisonment, even if Mr. Weisselberg pleaded guilty. Alternatively, if Mr. Weisselberg went to trial and was convicted, the Court said that it would sentence Mr. Weisselberg to a longer sentence of imprisonment than one to three years. Moreover, the Court stated that Mr. Weisselberg would be remanded by the Court as soon as the verdict was returned and that the Court would not grant bail pending appeal (which the Court said was in keeping with the Court's standard practice), so that Mr. Weisselberg would serve most or the entirety of his sentence even if his conviction was ultimately overturned by the Appellate Division. The Court told counsel for Mr. Weisselberg words to the effect of "what does he have to lose by trying to cooperate with the People?"

c. As a result of the Court pushing Mr. Weisselberg to cooperate, Mr. Weisselberg's attorneys agreed they would discuss with the District Attorney's Office whether Mr. Weisselberg had any valuable information about former President Trump to provide to the prosecution. When it became

apparent that he did not have any information that fit the District Attorney's Office's preconceived version of the facts, Mr. Weisselberg's attorneys sent the Court an additional letter, saying the parties were at an impasse and would like to meet with the Court again.

d. Over the next few weeks, the prosecutors, Mr. Weisselberg's attorneys, and the Court met and discussed various possible resolutions.

e. At a conference on August 15, the prosecutors suggested that if Mr. Weisselberg would, among other things alia, (1) plead guilty to the entire indictment, (2) allocute to a detailed allocution drafted by the People, (3) agree to testify against the Corporate Defendants in a manner consistent with his allocution, and (4) agree that his sentence would be held in abeyance until after the trial of the Corporate Defendants, then the People would recommend a sentence of six months jail plus five-years' probation.

f. Mr. Weisselberg's lawyers asked the Court to agree to sentence Mr. Weisselberg to a sentence shorter than six months.

g. In order to induce Mr. Weisselberg to plead guilty and testify against the Corporate Defendants, the Court agreed to impose a five-month jail term if Mr. Weisselberg fulfilled all of the conditions previously suggested by the prosecutors.

h. Mr. Weisselberg was not allowed to allocute in his own words. Instead, Mr. Weisselberg was required, by the terms of the plea agreement with the Court, to answer yes to a number of factual questions that were drafted by the prosecutors.

i. On the afternoon of August 17, the Court met with the Parties for a dry run of the plea allocution.

4. Exhibit A is a true and accurate copy of an New York Times article titled "Inside the Negotiations That Led a Top Trump Executive to Plead Guilty."
5. Exhibit B is a true and accurate copy of the notes of James Bergamo, the court attorney to the Hon. Juan Merchan.
6. Exhibit C is a true and accurate copy of the transcript of Allen Weisselberg's guilty plea.
7. Exhibit D is a true and accurate copy of a letter sent by the Corporate Defendants to the Hon. Juan Merchan.
8. Exhibit E is a true and accurate copy of a supplemental brief for defendant-appellant filed in *People v. Greenspan*, 2017-06063 (2d Dep't).

Dated: September 8, 2022
New York, N.Y.

By: _____

Susan R. Necheles
Necheles Law LLP
1120 Avenue of the Americas, 4th Floor
New York, NY 10036
[redacted]0
[redacted]

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK -against- THE TRUMP CORPORATION, d/b/a THE TRUMP ORGANIZATION, TRUMP PAYROLL CORP., d/b/a THE TRUMP ORGANIZATION, ALLEN WEISSELBERG, Defendants.	AFFIRMATION OF SUSAN HOFFINGER IN OPPOSITION TO DEFENDANTS' MOTION TO RECUSE Ind. No. 1473/2021

SUSAN HOFFINGER, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I am an Executive Assistant District Attorney, Chief of the Investigation Division at the New York County District Attorney's Office (the "People"), am assigned to the prosecution of the above-captioned case under Indictment Number 1473/2021 (the "Indictment") and am familiar with its facts.

2. I submit this affirmation along with the accompanying Memorandum of Law in Opposition to the Trump Corporation and Trump Payroll Corp.'s Motion to Recuse the Court dated September 8, 2022 ("TC Recusal Motion").

3. The facts set forth below are based on my personal knowledge, the People's records and files that pertain to this case, conversations with counsel and the Court, and all the proceedings herein.

4. On August 18, 2022, Defendant Allen Weisselberg pleaded guilty to all 15 counts charged in the Indictment pursuant to a plea agreement Mr. Weisselberg entered into with the People. As the transcript of his plea reflects, "the parties…reached a resolution" with the plea conditions set forth on the record by ADA Joshua Steinglass on behalf of the People. *See* August 18, 2022 plea transcript (Exhibit C to the TC Recusal Motion), Tr. 2:24-4:14. The terms of the Mr. Weisselberg's plea agreement with the People

set forth on the record are: that the People will recommend a split sentence of 6 months incarceration followed by 5 years' probation if Mr. Weisselberg lives up to a number of plea conditions, including that he fully allocute under oath to his participation in this tax evasion scheme and that of his co-defendants, the Trump Corporation and Trump Payroll Corporation, both doing business as the Trump Organization (the "TO"), and that he testify truthfully at the upcoming trial of the TO as to the facts underlying his allocution and plea. If Mr. Weisselberg fails to live up to all of the plea conditions agreed to with the People, the People will instead recommend significant state prison. Tr. 3:2-4:14.

5. In principle, what was agreed to between the People and counsel for Mr. Weisselberg was that in exchange for the People's reduced recommendation of a split sentence of 6 months' incarceration followed by 5 years' probation, instead of state prison, Mr. Weisselberg would waive his right to any 5th Amendment privilege and testify truthfully at trial pursuant to subpoena as to the facts underlying his allocution and plea.

6. As for the plea allocution, the Court specifically confirmed on the record with Mr. Weisselberg's counsel that they had reviewed with the People ahead of time the factual questions the Court would ask Mr. Weisselberg, that counsel for Mr. Weisselberg had agreed with the factual questions and had reviewed them with Mr. Weisselberg, and that Mr. Weisselberg was ready to proceed with his answers. Tr. 9:22-10:6.

7. The facts provided herein, in relevant part, confirm the critical steps that led up to the plea agreement between Mr. Weisselberg and the People and are offered to provide an accurate record in light of the allegations in the TC's Recusal Motion based on second-hand purported facts as set forth in the accompanying affirmation of Susan Necheles.

8. On June 9, 2022, two days after filing his notice of appearance for Mr. Weisselberg, Nicholas Gravante, unsolicited, called me and stated in substance that he wanted to work out a disposition, that Mr. Weisselberg was willing to plead to all 15 counts in the Indictment, and that Mr. Gravante wanted to

see if the Court would agree to a sentence of probation, with other terms including repayment of all taxes due. Mr. Gravante stated in substance that if the People would agree to a sentence of probation, he could potentially persuade the TO to resolve the matter as well. He asked if I were willing to meet with the Court with him to see if the Court would give Mr. Weisselberg probation on a plea to the entire Indictment and also asked if the People were willing to consent to probation. I responded that I would meet with the Court with him but that the People's recommendation would involve state prison.

9. On June 10, 2022, Mr. Gravante spoke with me by telephone and stated in substance that he wanted to request time from the Court to meet with us in chambers, that he understood the People would recommend state prison, but wanted to find out the Court's position. Mr. Gravante said he would contact the Court after the next scheduled court appearance on June 17th.

10. On June 13, 2022, the Court sent an email to all counsel canceling the upcoming June 17, 2022 court appearance as premature because of recent supplemental motion filings, advising that the Court envisioned a commencement date for trial in late summer or early fall, and reminded both parties not to engage in any matter that would prevent being available during that time. The Court also stated: "In the meantime, please advise whether there have been any discussions about a possible disposition of either or both defendants. If the parties are interested in having those discussions and believe that the Court's involvement might be helpful, please contact James Bergamo to schedule a conference." *See* June 13, 2022 emails, true and correct copies of which are attached as Exhibit A.

11. On June 13, 2022, Mr. Gravante and I spoke again by telephone and he stated in substance that he wanted to reach out to the Court about disposition. Mr. Gravante confirmed that if Mr. Weisselberg pleaded guilty to the Indictment, he could provide a full factual allocution including against the TO, just not against Donald J. Trump. We discussed whether Mr. Weisselberg would have a 5th Amendment privilege if after his plea the People were to subpoena him to testify.

12. On June 13, 2022, Mr. Gravante emailed Mr. Bergamo stating: "I entered my notice of appearance

on behalf of Mr. Weisselberg last week in the above referenced mater. Following up on the Court's email of earlier today, Susan Hoffinger and I would like to arrange a call with you at your convenience tomorrow. Please let us know what time, if any, might work for you." *See* June 13, 2022 emails, true and correct copies of which is attached as Exhibit B.

13. On June 14, 2022, Mr. Gravante and I called Mr. Bergamo, and Mr. Gravante stated in substance that he wanted to accept the Court's invitation to meet, that he would welcome assistance in conversations about resolution, that there were no offers from the People, that he understood our position but the parties were at an impasse. Mr. Gravante stated in substance that, in the first instance, he preferred to meet the Court without the TO lawyers. Mr. Gravante further stated in substance that he knew the Court had discretion on these charges to sentence the defendant to probation over the objection of the People, and that he would like to discuss such a disposition with the Court along with other conditions including repayment of taxes due and owing. Mr. Gravante stated in substance that his client would like to resolve the case, that a non-custodial sentence was not being recommended by the DA's Office, but that the Court could provide such a disposition within those parameters. A meeting with the Court was scheduled for June 17, 2022.

14. On June 17, 2022, members of the prosecution team, Mr. Gravante and an associate of his firm met with the Court in chambers. Mr. Gravante confirmed to the Court that Mr. Weisselberg was willing to plead guilty to the entire Indictment, and that he was seeking a non-custodial sentence. He stated in substance that it was in his client's best interest to plead guilty and that if we reached an agreement, he might be able to exert pressure on the TO to reach a disposition, but he hoped it would not be held against his client if the TO did not agree to plead. I represented that the People recommended state prison for Mr. Weisselberg, along with repayment of taxes, penalties and interest and a waiver of appeal, and requested that the Court not split the defendants, with whatever sentence the Court offered to Mr. Weisselberg contingent on the TO pleading guilty as well. I described the scope of the TO's long running

tax evasion scheme, involving a number of executives and employees who benefitted and evaded taxes while the TO also evaded payment of payroll taxes, described Mr. Weisselberg's critical role in the scheme as CFO overseeing the accounting department, quantified the magnitude of his benefit from the scheme, and noted that he also set up a similar tax fraud arrangement for his son Barry. I also described Mr. Weiselberg's role [redacted] I urged the Court not to provide Mr. Weisselberg with a non-incarceratory sentence. After considering the presentations by both sides, the Court stated in substance that the only way he would give a non-incarceratory sentence to Mr. Weisselberg was with the People's recommendation. The Court also stated in substance that he would provide a fair trial free from politics, but that he takes white collar crime seriously and if convicted, Mr. Weisselberg would be facing state prison. The Court added that in cases where state prison is the sentence after conviction, it is his general practice to remand a defendant. The Court also stated that that the Court would not require a global disposition involving the TO if Weisselberg wanted to plead guilty, but the Court would require a waiver of appeal. Notably, during this meeting, Mr. Gravante only asked the Court for probation, which the Court rejected, but did not inquire as to the duration of a jail or prison sentence the Court would offer Mr. Weisselberg prior to trial on a plea to the Indictment.

15. Among the inaccuracies contained in the TC's Recusal Motion, in the June 17, 2022 meeting, it was the People, not the Court, who suggested that Mr. Weisselberg cooperate, and there was no statement by the People or the Court that Mr. Weisselberg had to cooperate against Donald J. Trump or the TO. I stated in substance that the only way the People would recommend a non-custodial sentence for Mr. Weisselberg was if he cooperated, offering that he could proffer and provide information that he had consistently refused to provide. Mr. Gravante stated in substance that he could not recommend that Mr. Weisselberg do so, and that he could not cooperate on the tax crimes. A member of the prosecution team

offered the possibility of Mr. Weisselberg proffering, at first, solely regarding statements of financial condition. Mr. Gravante expressed in substance a concern that Mr. Weisselberg might proffer but it would not be fruitful enough for the People to recommend a non-incarceratory sentence. I confirmed that we would bring to the Court's attention Mr. Weisselberg's efforts. The Court stated in substance that he would take into consideration Mr. Weisselberg's good faith efforts.

16. On June 17, 2022, outside chambers and the presence of the Court, Mr. Gravante stated in substance to members of the prosecution team, that he would see if Mr. Weisselberg could provide to the People any information about the statements of financial condition. But he noted that he was not optimistic.

17. On July 19, 2022, Mr. Gravante and Mary Mulligan, also representing Mr. Weisselberg, met with members of the prosecution team at our offices. Mr. Gravante stated in substance that he thought about canceling the meeting with us because he had nothing from Mr. Weisselberg that would be satisfactory to us, but they still wanted to meet with us. Mr. Gravante and Ms. Mulligan asked us about other available options for incarceratory sentences, less than state prison, for Mr. Weisselberg. We advised that on a plea to the Indictment, the Penal Law provided the Court may sentence Mr. Weisselberg to a definite sentence of up to one year in jail, or a "split" sentence with a period of jail up to a maximum of 6 months followed by anywhere from 3 to 5 years' probation.

18. On July 23, 2022, Mr. Gravante and Ms. Mulligan called and stated in substance that they wanted to see the Court again to inquire if the Court would agree to a "split" sentence for Mr. Weisselberg on a plea to the Indictment, and they asked if the People would consent. I stated in substance that we might consider recommending less than state prison, but only with a global resolution involving the TO pleading guilty as well.

19. On July 27, 2022, in a telephone call with Mr. Gravante and Ms. Mulligan, Mr. Gravante represented that he might be able to get Mr. Weisselberg to accept 30 days of incarceration with probation.

Counsel asked if the People could recommend a split sentence. I reiterated in substance that we might consider it only if there was a global resolution with the TO.

20. On July 28, 2022, in a telephone call with Mr. Gravante and Ms. Mulligan, I confirmed that if the TO was on board with a plea, the People could recommend 6 months jail with 5 years' probation, the maximum "split" sentence, for Mr. Weisselberg. Mr. Gravante said they would email the Court to set up a meeting for the next day.

21. On July 28, 2022, Mr. Gravante emailed the Court asking if the Court would meet with us the next day to help the parties continue to try to resolve the matter, stating "we are currently at an impasse." Ms. Mulligan followed up with an email to the Court stating she hoped to see the Court tomorrow, schedule permitting. *See* July 28, 2022 Gravante and Mulligan emails, true and correct copies of which are attached as Exhibit C. A meeting in chambers was scheduled for the next day, July 29, 2022.

22. On July 29, 2022, members of the prosecution team and counsel for Mr. Weisselberg met with the Court in chambers. Ms. Mulligan stated in substance that we were at an impasse. She emphasized for the Court Mr. Weisselberg's his willingness to take full responsibility and stated they were authorized by Mr. Weisselberg to accept a plea to all charges with one month jail with probation, with the possibility of a global disposition involving a felony plea from the TO. Mr. Gravante stated in substance that he would exert pressure on the TO to plead but asked the Court not to hold it against Mr. Weisselberg if that could not be accomplished. I stated in substance that the People were seeking a global resolution and if the TO would plead to charges in the Indictment, we would consider recommending for Mr. Weisselberg a 6-month split along with repayment to taxing authorities of taxes, penalties and interest owed over the course of the scheme and a waiver of appeal. I stated in substance that if there were no such global resolution for all defendants, the People would continue to recommend state prison for Mr. Weisselberg. After considering arguments from both sides, the Court stated in substance that he would be willing to give Mr. Weisselberg a 4-month split sentence (with the other terms as noted above) as part of a global

disposition. Ms. Mulligan suggested the Court adjourn its decision on defense motions scheduled for August 12, 2022, to give Mr. Weisselberg time to confer with his family before providing an answer.

23. On August 3, 2022, in a call with Mr. Gravante and Ms. Mulligan, Ms. Mulligan told us in substance that they were authorized to accept for Mr. Weisselberg a 3-month split sentence with repayment of taxes, and they intended to send a letter to the Court outlining their request. When we inquired as to the TO's willingness to join the global disposition, Mr. Gravante responded in substance "leave it to us," they would first nail down the jail time for Mr. Weisselberg and then they would do all they could to work on the TO. Mr. Gravante stated in substance that he understood the People would recommend state prison if the TO were not on board with a plea.

24. On August 3, 2022, Ms. Mulligan sent an email to the Court attaching a letter stating in substance that Mr. Weisselberg had authorized his attorneys to agree to a sentence of 3 months' incarceration followed by a term of probation and payment of back taxes with penalties and interest and outlining the basis for their request. Ms. Mulligan's email advised that both sides were available to discuss the matter with the Court that afternoon or the following day. *See* August 3, 2022 Mulligan email and letter, true and correct copies of which are attached as Exhibit D.

25. On August 4, 2022, counsel for Mr. Weisselberg and members of the prosecution team met with the Court via video conference. The Court confirmed he had reviewed Ms. Mulligan's letter and asked the People for our position on the letter. I advised that the People's recommendation as part of a global disposition remained a 6-month split. The Court stated in substance that he read Ms. Mulligan's August 3 submission describing that Mr. Weisselberg had served in the US military. The Court noted that service to our country was indeed meaningful and asked Ms. Mulligan for more information, which she provided. After consideration of all the defendant's circumstances, the Court agreed that as part of a global disposition with the TO, he would offer Mr. Weisselberg a "split" sentence of 3 months jail followed by 5 years' probation, a waiver of appeal, and repayment of all back taxes, penalties and interest on a plea to

the Indictment. I stated in substance that the People would request a full factual allocution and noted that if there were no plea by the TO, the People would subpoena Mr. Weisselberg to testify at the trial of the TO. Ms. Mulligan stated in substance that Mr. Weisselberg would still have a 5th Amendment privilege not to testify because of his federal tax liability. Mr. Gravante stated in substance that if there were no joint resolution with the TO, they would work out the allocution with the People and seek to speak with the Court again. The Court noted in substance that he generally does the allocution himself, walking the defendant through all the required factual language of each count.

26. On August 9, 2022, Mr. Gravante called and stated in substance that no progress was being made with the TO. He further stated in substance that he understood our position was that if Mr. Weisselberg pleaded guilty alone, he would have to allocute factually, which would implicate the TO.

27. On August 11, 2022, Ms. Mulligan emailed the Court indicating some concern about the Court mentioning ongoing negotiations between Mr. Weisselberg and DANY regarding a possible disposition at the upcoming Court conference on August 12, 2022. Ms. Mulligan stated in substance that if a global resolution could not be reached by August 19th, they would be in touch with the Court shortly thereafter. *See* August 11, 2022 Mulligan email, a true and correct copy of which is attached as Exhibit E.

28. On August 11, 2022, I had a telephone call with Mr. Gravante and, Ms. Mulligan in which Ms. Mulligan stated in substance that they were deeply disappointed there was no global resolution with the TO, but that they hoped to continue discussions with us about other options for Mr. Weisselberg, making clear they wanted to get his plea done. I stated in substance that if Mr. Weisselberg wanted a plea deal, he would have to fully and truthfully allocute factually under oath, waive any 5th Amendment privilege and testify at trial as to the facts underlying his plea and allocution, repay all taxes, penalties and interest pursuant to a closing agreement with NY State Tax, and execute a waiver of appeal. If he fulfilled all those conditions, I informed counsel, we would recommend a 6-month split. In order to prevent the plea negotiations from compromising ongoing trial preparation, and in light of various lawyers' vacations

scheduled in August, I insisted the plea happen by August 19th. Mr. Gravante and Ms. Mulligan agreed to discuss with Mr. Weisselberg our proposed plea deal and get back to us right after the court appearance on August 12th.

29. After the court appearance on August 12th, Mr. Gravante, Ms. Mulligan and lawyers from the Kostelanetz firm representing Mr. Weisselberg called, stating in substance that they wanted to discuss the details of the plea deal for Mr. Weisselberg. I reiterated in substance that the plea had to be next week, that we would draft a factual allocution for them to review, that Mr. Weisselberg must fully and truthfully allocute factually at his plea under oath, must testify truthfully at the trial of the TO as to the facts underlying his plea and allocution, waive appeal and pay back taxes, penalties and interest as determined by NY State Tax in a closing agreement. I stated these were the parameters of our plea deal upon which we would recommend a 6-month split. We agreed to call the Court to see if we could meet Monday morning to discuss our plea agreement.

30. On August 12, 2022, Mr. Gravante and I called Mr. Bergamo to request a meeting with the Court on Monday August 15th to discuss Mr. Weisselberg's expected plea. Mr. Gravante also asked if the Court had time on Friday August 19th for Mr. Weisselberg's plea, because the plea deal with the People required it happen by Friday.

31. On August 12, 2022, we received an email from James Bergamo confirming that Judge Merchan would meet with us in chambers on Monday August 15 at 10 am, stating: "Please be prepared to discuss, among other things, a waiver of appeal and the parameters of an allocution." *See* August 12, 2022 Bergamo email, a true and correct copy of which is attached as Exhibit F.

32. Later in the day on August 12, 2022, members of the prosecution team met with Ms. Mulligan and Mr. Haggerty at our offices to discuss the plea allocution. We discussed that the allocution would include the facts contained in counts 1 and 2 of the Indictment and agreed that we would draft and provide the proposed factual allocution on Monday morning for their review with Mr. Weisselberg. We

further indicated we anticipated that counts 3-15 were far shorter and would simply track the language in the Indictment. At one point, Ms. Mulligan stated in substance that Mr. Weisselberg would plead guilty to Count 15 in the Indictment, but she was not sure if Mr. Weisselberg recalled the specifics. We suggested in substance that Mr. Weisselberg review the [redacted] to Mr. Weisselberg, to see if [redacted] refreshed his recollection. We agreed to meet Monday morning before meeting with the Court for defense counsel to review our proposed allocution. Ms. Mulligan confirmed they would also withdraw their motions and waive further discovery, and we agreed NY State Tax would give Mr. Weisselberg until October 24, 2022 to pay what he owed.

33. It is common practice in cases brought by New York State prosecutors -- particularly those with extensive factual allegations in a speaking indictment -- for prosecutors and defense counsel to agree on the specific factual allocution in advance of the plea, with the allocution questions to be asked on the record either by prosecutors or the Court, at the Court's discretion.

34. On the morning of August 15, 2022, we provided defense counsel for Mr. Weisselberg with our proposed questions for the factual allocution for counts 1 and 2 for their review. *See* Proposed Questions/Factual Allocution for Defendant Allen Weisselberg, a true a true and correct copy of which is attached as Exhibit G.

35. Thereafter, on August 15, 2022, counsel for Mr. Weisselberg and members of the prosecution team met in chambers with the Court. ADA Joshua Steinglass stated in substance that the People had been consistent in recommending state prison in the absence of genuine cooperation – which we had never gotten – or a global disposition with the TO – which was not happening. He informed the Court that we had now discussed with counsel a third option under which we could recommend a 6-month split notwithstanding a non-global disposition, that is a set of plea conditions between the People and Mr. Weisselberg as follows: Mr. Weisselberg enters a guilty plea to all counts by Friday August 19th, fully and truthfully allocutes under oath, including to language in the speaking

counts of Indictment, agrees to testify truthfully at the trial of the TO to the facts underlying his plea and allocution, makes full repayment of taxes, penalties and interest to NY City and NY State tax authorities prior to sentence with amounts to be determined by NY State Tax, withdraws all defense motions, including *Kastigar*, waives appeal, and agrees that his sentence would be held in abeyance until after his testimony to ensure compliance. If Mr. Weisselberg fulfilled these conditions in good faith, the People would recommend a 6-month split. If he did not live up to these plea conditions, the People would recommend state prison. We would further ask the Court to advise defendant at time of plea that the Court could impose any sentence up to 5-15 years in prison in the event of defendant's noncompliance. ADA Steinglass asked the Court to allow us to submit proposed questions to supplement the legal allocution language of counts 1 and 2, the speaking counts of the Indictment, to ensure a sufficient plea without the Court having to go through 16 pages of the factual allegations contained in the Indictment as to those counts. ADA Steinglass confirmed that we met with counsel for Mr. Weisselberg Friday afternoon to discuss the allocution, and that we showed the proposed questions for the factual allocution to defense counsel prior to coming to chambers. ADA Steinglass offered that we were expecting to submit agreed upon proposed factual allocution questions to the Court later that day or the following day if we still needed to work out any issues with defense counsel. Finally, ADA Steinglass confirmed that we would put on the record the conditions of the People's plea agreement with Mr. Weisselberg. The Court agreed he would give Mr. Weisselberg the 6- month split and sentence him after his testimony at trial, pursuant to the plea agreement between the People and Mr. Weisselberg. Defense counsel requested that the Court consider sentencing Mr. Weisselberg to less than 6 months jail, particularly given his [redacted], and that he would have to cooperate and testify at trial as a significant witness. In what appeared to be a gesture of mercy, the Court agreed to a 5-month split and scheduled the plea for Thursday morning.

36. Directly after meeting with the Court, on August 15, 2002, Ms. Mulligan, Mr. Gravante and Mr. Haggerty met privately with Mr. Weisselberg in a conference room in our offices for approximately an hour and a half to review the Proposed Questions/Factual Allocution for Defendant Allen Weisselberg. *See* Exhibit G. After reviewing with Mr. Weisselberg, counsel came out of the conference room and asked us to make changes to a single question on page 3 to add "Are you now aware" and the years "2005 to 2021" so that the question would read "Are you now aware that unreported income, in total, from 2005 to 2021, amounts to approximately $1.76 million?" We agreed to make the requested change. Counsel for Mr. Weisselberg requested no other changes to the Proposed Questions/Factual Allocution (Exhibit G) and stated in substance that Mr. Weisselberg could answer all the questions in the affirmative. Exhibit G is the only draft of our proposed allocution questions for Mr. Weisselberg. At around 1:38 pm that afternoon, we emailed James Bergamo our Proposed Questions/Factual Allocution for Defendant Allen Weisselberg (the final version including the edits requested by defense counsel), confirming that defense counsel for Mr. Weisselberg had agreed to them. *See* August 15, 2022 email attaching Proposed Questions/Factual Allocution for Defendant Allen Weisselberg, a true a true and correct copy of which is attached as Exhibit H.

37. On August 16, 2022, Mr. Gravante called and stated in substance that at trial, if asked on cross examination whether Donald J. Trump knew about the tax scheme, Mr. Weisselberg's answer would be no. When I pointed out that Mr. Weisselberg was not competent to testify as to Mr. Trump's state of knowledge, Mr. Gravante agreed and stated in substance that if Mr. Weisselberg were asked if he had conversations with Donald J. Trump about the tax treatment of payments to Mr. Weisselberg, he would say no.

38. On August 17, 2022, the Court asked to be provided among other things with "a list of agreed upon conditions of the negotiated plea." The People provided such list, confirming that these were, in fact, "the plea conditions we have agreed to." *See* August 17, 2022 emails, a true and correct copy of

which is attached hereto as Exhibit I.

39. On August 17, 2022, at 5 pm, members of the prosecution team and defense counsel for Mr. Weisselberg met with the Court via video conference and discussed the mechanics of the plea, with the Court answering last-minute questions to be sure everyone understood the process of entering the plea. The Court stated in substance that he would read the agreed upon factual allocution questions for counts 1 and 2. During the meeting, Mr. Gravante stated in substance that at trial, if Mr. Weisselberg were asked on cross whether he had conversations with Donald J. Trump about the tax treatment he would say no and also that Mr. Weisselberg would not be able to testify to anyone else's scienter other than his own and that of James McConney.

40. On August 18, 2022, Mr. Weisselberg pleaded guilty to all 15 counts in the Indictment, pursuant to the plea agreement Mr. Weisselberg entered into with the People, as described in paragraph 4 above.

Dated: New York, New York
September 19, 2022

Susan Hoffinger
Executive Assistant District Attorney
Chief, Investigation Division
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