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October 17, 2023

Hon. Arthur Engoron
Supreme Court, New York County
60 Centre Street
New York, NY 10007

RE: *People v. Trump*, et al., No. 452564/2022

Dear Justice Engoron:

We write further to the discussion on the record regarding the admissibility of the testimony from Patrick Birney that Allen Weisselberg told him "Mr. Trump wanted his net worth on the Statement of Financial Condition to go up." (Trial Tr. 1409:16-1410:03)

As an initial matter, there is no dispute that Mr. Weisselberg's statement to Mr. Birney is admissible in the action. Because Mr. Weisselberg is a defendant in this action, Mr. Birney's testimony regarding his statement is plainly admissible against him. *See Reed v. McCord*, 160 N.Y. 330, 341 (1899) ("In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made."). In particular, Mr. Birney's testimony tends to show Mr. Weisselberg's "state of mind," *People v. Cromwell*, 71 A.D.3d 414, 415 (1st Dep't 2010), as well as his "motive," *708 Estates Corp. v. Royal Globe Ins. Co.*, 160 A.D.2d 621 (1st Dep't 1990). Counsel did not dispute that Mr. Weisselberg's statement to Mr. Birney is admissible to show state of mind. (Trial Tr. 1410:23-1411:5).

The Court need not decide the specific purposes for which Mr. Birney's statements are admissible at this stage, because the Court is presumed to be able to sift through the evidentiary record and consider only proper evidence in rendering a determination at the conclusion of trial based on the entire record. *See, e.g.*, *In re Dandre H.*, 89 A.D.3d 553, 554 (1st Dep't 2011).

Nevertheless, Mr. Weisselberg's statement to Mr. Birney is admissible on a number of additional grounds. Regardless of its truth, Mr. Weisselberg's statement tends to show the existence of an illicit agreement or scheme. *People v. Caban*, 5 N.Y.3d 143, 149 (2005) (holding statement admissible "as evidence of an agreement to commit the underlying crime—itself an essential element of the crime of conspiracy"). As *Caban* explained, the statement of one individual as to his intent to take a later action was evidence of an illicit agreement between that individual and others. *Id.* at 150 ("Torres's statement that he would provide the gun for a later homicide—even if ultimately untrue—was admissible for the fact that it was said, inasmuch as its utterance provided evidence of Torres's unlawful agreement with defendant and Garcia.").

Mr. Weisselberg's statement to Mr. Birney is also admissible for all purposes as a statement of a coconspirator. "[A] declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule." *Caban*, 5 N.Y.3d at 148. Here, a statement by Mr. Weisselberg evidencing his own motive and state of mind, made to a junior employee whose specific responsibility it was to prepare the supporting data spreadsheets for Mr. Trump's Statements of Financial Condition, was a statement made in furtherance of the alleged conspiracy.[1] Moreover, Mr. Weisselberg's statement would be admissible against other alleged coconspirators, regardless of when they may have joined the conspiracy. *People v. Flanagan*, 28 N.Y.3d 644, 663-64 (2017).

Counsel's statement that the coconspirator exception to the hearsay role only covers "statements between coconspirators, not between some alleged co-conspirator and some third party," (Trial Tr. at 1412:9-18), is incorrect. "The theory underlying the coconspirator's exception is that all participants in a conspiracy are deemed responsible for each of the acts and declarations of the others." *Caban*, 5 N.Y.3d at 148. That rule makes sense: conspirators often carry out their illicit objectives through statements to non-conspirators, and those statements are admissible if they are made in furtherance of, and during the course of, the alleged conspiracy. *See, e.g.*, *People v. Acevedo*, 192 A.D.2d 614, 614-15 (2d Dep't 1993) (tape recordings of conversation with undercover officers admissible under conspirator exception); *People v. Diaz*, 201 A.D.2d 1, 5 (1st Dep't 1995) (statements by coconspirator to undercover officer admissible).

Lastly, Mr. Weisselberg's statement to Mr. Birney is admissible as an admission of an opposing party. Under C.P.L.R. 4549, newly enacted in 2021, "[a] statement offered against an opposing party shall not be excluded from evidence as hearsay if made by . . . the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship." C.P.L.R. 4549. Here, at the time he made the statement, Mr. Weisselberg was Chief Financial Officer of the Trump Organization—an organization in which Donald Trump, Jr. and Eric Trump were the top executives. He was also the Trustee of the Donald J. Trump Revocable Trust. In both capacities—as Trustee and Chief Financial Officer (not to mention other officer titles within specific legal entities)—Mr. Weisselberg's statements in the course of his roles are admissible against his principals under C.P.L.R. 4549.

Respectfully submitted,

/s/ Eric Haren
Eric Haren
Assistant Attorney General

[1] That the Court has not yet reached a determination as to whether an illicit conspiracy existed does not preclude admission of Mr. Weisselberg's statement on these grounds; a statement may be conditionally admitted subject to a prima facie showing of a conspiracy made in the trial record. *Caban*, 5 N.Y.3d at 151. Such an "order of proof at trial is committed to the sound discretion of the trial court." *Id.*