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October 19, 2023

VIA NYSCEF
Hon. Arthur F. Engoron
Supreme Court of the State of New York
New York County
60 Centre Street
New York, New York 10007

Re: *People of the State of New York, et al. v. Donald J. Trump, et al.*,
Index No. 452564/2022 (Sup. Ct. New York County)

Dear Justice Engoron:

This firm represents Defendants Donald Trump, Jr. and Eric Trump in the above-referenced matter. We write on behalf of all Defendants in response to the October 17, 2023 letter filed by Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York ("Plaintiff" or "NYAG") (NYSCEF No. 1562), and to respectfully request that the Court strike from the record that portion of non-party witness Patrick Birney's testimony stating, that Allen Weisselberg told him that "Mr. Trump wanted his net worth on the Statement of Financial Condition to go up." As set forth below, such testimony is inadmissible, and Plaintiff's claims to the contrary are meritless.

First, Plaintiff's claim that the Court may knowingly admit hearsay statements into evidence now, over Defendants' objection, without making a final decision on the objection until some later date, is simply untenable. In support of this claim, Plaintiff cites a single case, *In Re Dandre H.*, wherein the First Department determined that presentation during a bench trial of certain testimony exceeding the bounds of the prompt outcry exception was, ***in that case***, harmless error. *Matter of Dandre H.*, 89 AD3d 553, 554 [1st Dept 2011]. The decision thus stands for the rather unremarkable principle that a judge, unlike a jury, is not automatically tainted merely because otherwise inadmissible testimony is uttered in his or her presence. However, *In Re Dandre H.*, plainly does ***not*** authorize a Court to delay evidentiary rulings until some later, unspecified date outside of the courtroom and the presence of the parties and the public. Moreover, it does ***not*** countenance the knowing admission of improper hearsay evidence nor insulate the Court from the presumption that, upon knowingly admitting such improper hearsay evidence, the Court will then rely on such evidence when ultimately rendering its decision. Indeed, inadmissible hearsay is never rendered admissible merely because it is offered in a bench trial.

Second, Plaintiff claims that Mr. Weisselberg's alleged hearsay statement is both (a) admissible for the truth of the matter asserted as a party admission; and (b) admissible for a non-hearsay purpose, i.e., demonstrating a party's "state of mind". Neither claim is availing. Although party admissions may be admissible when they constitute "plain admissions of facts and circumstances" material to an issue in the case, they are clearly *inadmissible* when they are mere admissions of what a party "had heard, without adoption or indorsement." *Reed v McCord*, 160 NY 330, 341 [1899]. Thus, in *Reed*, the Court of Appeals permitted the introduction of the defendant's plain statement of the cause of the underlying accident but *expressly noted* that the statement would *not* have been admissible if the defendant had admitted that his understanding of causation derived from external sources.[1]

Here, Mr. Weisselberg's alleged hearsay statement to Mr. Birney that "Mr. Trump wanted his net worth . . . to go up" is in no sense a "plain admission" by Mr. Weisselberg of any pertinent fact or a material element of any cause of action alleged against Mr. Weisselberg or any other Defendant. Indeed, it is merely a recitation of what Mr. Weisselberg allegedly heard from President Trump without adoption or indorsement.[2] In addition, Mr. Weisselberg's alleged hearsay statement to Mr. Birney cannot be indicative of Mr. Weisselberg's "state of mind" or "motive."[3] Although hearsay statements may be admissible for a non-hearsay purpose such as demonstrating "state of mind," a non-hearsay purpose does not exist here. The alleged hearsay statement is "irrelevant unless offered to prove the truth of the matter asserted," i.e., that President Trump wanted his net worth to go up in the Statements of Financial Condition, "and for that purpose it [is] inadmissible hearsay." *People v Reynoso*, 73 NY2d 816, 818–19 [1988]. That Mr. Weisselberg was employed by the Trump Organization is irrelevant and does not change the outcome.

Third, Plaintiff claims that Mr. Weisselberg's hearsay statement is admissible for the truth of the matter asserted as a co-conspirator statement. However, such statements may be admissible as an exception to the hearsay rule "***only when a prima facie case of conspiracy has been established . . . without recourse to the declarations sought to be introduced.***" *People v Caban*, 5 NY3d 143, 148 [2005] (emphasis added) (citation omitted). In *People v Ardito*, 86 AD2d 144, 147 [1st Dept 1982], the First Department held that a coconspirator's statements were inadmissible because plaintiff failed to first establish a conspiracy by evidence independent of the declaration by the coconspirator. Likewise, in *People v Malagon*, 50 NY2d 954, 955–56 [1980], the Court of Appeals

[1] Additionally, *Reed* involved hearsay statements that had been made at a formal hearing before the board of coroners and were introduced at trial by the official stenographer present at the hearing. Thus, the statements bore significant indicia of reliability wholly absent here.

[2] Plaintiff ignores the fact the testimony at issue here involves two layers of hearsay—(i) President Donald J. Trump's *purported* statement to Allen Weisselberg, and (ii) Allen Weisselberg's *purported* statement to Patrick Birney—both of which need to be subject to a hearsay exception to be offered for the truth of the matter asserted. *See People v Ortega*, 15 NY3d 610, 620-621 [2010] [permitting evidence consisting of several layers of hearsay as long as *each* layer is subject to a hearsay exception or is not offered for its truth]).

[3] In any event, there is nothing in the record establishing President Trump actually made the statement to Mr. Weisselberg.

deemed such evidence inadmissible because Plaintiff failed to submit proof "other than the hearsay statements, showing that a conspiracy existed at the time the statements were made."

Here, Plaintiff argues that Mr. Weisselberg's hearsay statement was made "during the course" of a conspiracy, but Plaintiff has failed to first establish a *prima facie* case of conspiracy (i.e., evidence establishing (1) the existence of the alleged conspiracy, (2) when the alleged conspiracy began and/or (3) when the statement itself was made). Plaintiff's unsupported allegations are plainly insufficient to warrant the admission of Mr. Weisselberg's hearsay statement. Mr. Weisselberg's hearsay statement therefore cannot be, as the Plaintiff intends, admitted as evidence of any alleged conspiracy. *See, e.g., People v Bac Tran,* 80 NY2d 170, 180 [1992] ["Where circumstantial evidence is weakly held together by subjective inferential links based on probabilities of low grade or insufficient degree, a prima facie case [of conspiracy] will not be deemed satisfied"] [internal citations and quotations omitted]; *People v Hernandez*, 155 AD2d 342, 342 [1st Dept 1989] ["Since the People failed to establish an independent *prima facie* case as to defendant's membership in the conspiracy, the trial court erred in admitting (and considering) the hearsay accusations of defendant's alleged co-conspirators"].

Finally, Plaintiff claims that "Mr. Weisselberg's alleged statement would be admissible against other alleged coconspirators,[4] regardless of when they may have joined the conspiracy." Plaintiff relies on *People v Flanagan* for this proposition, but badly misconstrues that case. What the Court of Appeals actually held in *People v Flanagan* is that "when a conspirator *subsequently joins* an ongoing conspiracy, any *previous* statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator pursuant to the coconspirator exception to the hearsay rule." *People v Flanagan*, 28 NY3d 644, 663–64 [2017].

[4] Plaintiff also conflates the principle that a statement by one putative co-conspirator is admissible against another co-conspirator with the principle that the statement itself need not be made between co-conspirators. While New York courts have held certain statements between a co-conspirator and undercover officers are admissible under the co-conspirator exception (i.e., *People v. Acevedo*, 596 N.Y.S. 2d 151 (2d Dept. 1993), that would not apply here as Mr. Birney clearly is neither an alleged co-conspirator himself nor an undercover officer.

Defendants therefore respectfully request that the Court strike from the record that portion of Mr. Birney's testimony stating that Mr. Weisselberg told him that "Mr. Trump wanted his net worth on the Statement of Financial Condition to go up."

We remain available for further argument at the Court's direction.

Respectfully submitted,

ROBERT & ROBERT PLLC

Clifford S. Robert

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cc: All Counsel of Record (via NYSCEF)