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November 8, 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:

On behalf of the Office of the Attorney General ("OAG"), we write to advise the Court that OAG seeks leave to make an oral motion *in limine* tomorrow afternoon to preclude the testimony of four experts Defendants have included on their initial list of witnesses: Steven Laposa, Jason Flemmons, Steve Witkoff, and David Miller. For the reasons discussed below and to be addressed more fully during oral argument as permitted by the Court, the testimony of these experts should be precluded because: (i) the opinions to be offered by Laposa, Flemmons, and Witkoff are no longer relevant in light of the Court's September 26, 2023 Decision and Order (NYSCEF No 1531) granting Plaintiff partial summary judgment on Plaintiff's first cause of action for fraud under Executive Law § 63(12) ("Decision"); and (ii) Witkoff and Miller were designated solely in rebuttal to Plaintiff's experts whom Plaintiff determined there was no need to call, so there is nothing for either of them to rebut.

Defendants designated Steven Laposa as an expert witness in their affirmative case and disclosed his report on May 26, 2023; this report and an accompanying affidavit (like the expert reports and affidavits cited below for the others) were also submitted by Defendants to the Court as part of their summary judgment papers. *See* NYSCEF No. 1433, Affidavit and Summary Opinions of Steven Laposa, PhD dated May 26, 2023 ("Laposa Report"). Dr. Laposa's report discloses that he will offer the following six opinions concerning property valuations: (1) disparate but legitimate valuations of a specific property may co-exist; (2) property valuations are highly subjective and accordingly there may be wide valuation differences between stakeholders; (3) appraised market values are different from appraised investment values producing wide differences between the two; (4) various stakeholders have different outlooks on economics and market trends that explain wide variances in estimated valuations for a specific property; (5) appraising a trophy property presents unique challenges that explain disparate valuations between an appraiser and owner; and (6) Plaintiff's allegations fail to properly consider significant real estate economic and capital market trends from 2011 through 2021. *See* Laposa Report at 11.

Defendants also designated Jason Flemmons as an expert witness on accounting procedures and disclosed his expert report on May 26, 2023. *See* NYSCEF Doc. No. 1376, Expert Aff. of Jason Flemmons, attaching Expert Report of Jason S. Flemmons dated May 26, 2023 ("Flemmons Report") as Exhibit A. Mr. Flemmons' report discloses that he will offer the following five opinions: (1) GAAP provides significant latitude for reporting asset values in personal financial statements; (2) industry standards permit financial statements that contain GAAP exceptions to be issued, and the standards that pertain to accountants' reports accompanying financial statements provide different reporting formats that may be used depending on the presence and significance of such GAAP departures, even when the effect of the GAAP departures has not been quantified; (3) the notes to Mr. Trump's Statements of Financial Condition ("SFCs") and the accountants' compilation reports accompanying the SFCs collectively and expressly disclosed the methods used to determine the value for specific assets and identified significant departures from GAAP which did not preclude their issuance under authoritative professional and industry standards; (4) the Complaint alleges violations of GAAP that are based on flawed accounting analyses; and (5) the supporting documentation provided to the outside accountants retained to perform the compilations clearly identified exceptions to the requirements for Estimated Current Value under GAAP and accurately described the information that was provided by outside professionals. *See* Flemmons Report at 3-4.

Defendants further designated Steve Witkoff solely as a rebuttal expert witness in response to Plaintiff's valuation experts Constantine Korologos and Laurence Hirsh and disclosed his rebuttal report on June 30, 2023. *See* NYSCEF No. 1439, Expert Aff. of Steven C. Witkoff, attaching Expert Rebuttal Report of Steven C. Witkoff dated June 30, 2023 ("Witkoff Rebuttal Report") as Exhibit A, at ¶ 3. Mr. Witkoff's report discloses that he will offer the following two opinions concerning property valuations: (1) the Doral property is worth far more than the values that are set forth in the 2011 through 2021 SFCs based on a "forward-looking perspective as opposed to a conservative, buyer driven analysis;" and (2) Mr. Korologos's assessment of Defendants' valuations of 40 Wall Street fail to consider residential conversion of the property that would result in a significant increase in value. *See* Witkoff Rebuttal Report at 5-9.

The valuation and accounting issues raised in this case with respect to the preparation of the SFCs have already been resolved in Plaintiff's favor by the Court on summary judgment. The Court held in its Decision that "clear, indisputable documentary evidence" proves "defendants overvalued the assets reported in the SFCs." NYSCEF Doc. No. 1531 at 19. On a record that *included* the Laposa Report, Flemmons Report, and Witkoff Rebuttal Report (along with affidavits from Dr. Laposa and Messrs. Flemmons and Witkoff attaching and summarizing their reports), the Court reviewed in detail the valuation methods *actually employed* by Defendants for multiple properties and held no genuine issues of material fact preclude finding that Defendants were liable for fraud under § 63(12). *Id*. at 21-31. After reviewing the representations in the SFCs and the valuation methods used, the Court specifically held: (i) the value of the Triplex was fraudulently inflated in the SFCs from 2012 to 2016 (*id*. at 22); (ii) the value of Seven Springs was fraudulently inflated in the 2014 SFC (*id*. at 23); (iii) the value of the rent stabilized apartments at Trump Park Avenue was fraudulently inflated in the SFCs from 2014 to 2021 (*id*.); (iv) the value of 40 Wall Street was fraudulently inflated in the 2011, 2012, and 2015 SFCs (*id*. at 24-25); (v) the value of Mar-a-Lago was fraudulently inflated in the SFCs from 2014 to 2021

(*id*. at 27); (vi) the value of Aberdeen was fraudulently inflated in the SFCs from 2014 to 2019 (*id*. at 28); (vii) the value of certain golf courses was fraudulently inflated in the SFCs from 2014 to 2020 by including a "brand premium" and ignoring appraisals (*id*. at 28-29); (viii) the value of certain golf courses was fraudulently inflated in the SFCs from 2014 to 2020 by valuing membership deposit liabilities at zero (*id*. at 30); (ix) the value of cash was fraudulently inflated on the SFCs from 2013 to 2021 (*id*.); (x) the value of the Vornado partnership properties was fraudulently inflated in the SFCs for 2014 to 2016 and 2021 (*id*. at 31); and (xi) the value of licensing deals was fraudulently in the SFCs from 2014 to 2018 and 2020 to 2021 (*id.*).

Similarly, the Court resolved in Plaintiff's favor the accounting issues that Mr. Flemmons' opinions will address. Notwithstanding a record that included Mr. Flemmons' Report and affidavit, the Court has already determined that specified valuations in the SFCs, along with the notes concerning those valuations, were false and misleading. *See id.* at 28-31 (discussing misrepresentations in the notes to the SFCs concerning brand premium, membership deposit liabilities, and intra-company licensing deals). In addition, Mr. Flemmons' opinions concerning the GAAP departures and disclaimer language in the SFCs are not relevant because the Court held on summary judgment (for the third time) that the disclaimers do not insulate Defendants from liability because the language "put the onus for accuracy squarely on defendants' shoulders." *See id*. at 6. And the Court further held that these disclaimers were insufficient as a matter of law to insulate Defendants from liability because they did not "particularize the type of fact misrepresented or undisclosed and were unquestionably based on information peculiarly within defendants' knowledge." *Id.*

The Court noted in the Decision that the only issues remaining for trial were Plaintiff's illegality claims under § 63(12) (the second through seventh causes of action, which require additional proof of intent to defraud), the amount of disgorgement, and a determination on the third through ninth prayers for equitable relief sought in the Complaint. *Id*. at 34.

Based on the Court's Decision, Plaintiff's affirmative case has been appropriately narrowed to establishing the Defendants' intent to defraud, the amount of disgorgement, and facts bearing on Plaintiff's entitlement to the forms of equitable relief not already awarded by the Court. Defendants' affirmative case should be similarly circumscribed to focus only on the issues that remain in the case relevant to Plaintiff's second through seventh causes of action, disgorgement, and the additional prayers for equitable relief. The expert opinions of Dr. Laposa and Messrs. Flemmons and Witkoff have no relevance to those issues and should therefore be precluded.[1] *See, e.g., Disability Advocs., Inc. v. Paterson*, Civ. No. 03-3209, 2009 WL 1312112, at *2 (E.D.N.Y. May 8, 2009) *("*"This trial, occurring nearly six years after DAI filed this action, will resolve disputed issues of fact; it will not be an opportunity for Defendants to present additional or different evidence than was before the Court on the motion for summary judgment

[1] Mr. Witkoff's testimony is particularly irrelevant since there is no allegation that the Doral property was misvalued, as it was subject to multiple appraisals by Deutsche Bank during the pendency of the loan. *See, e.g.*, PX-302 at 1, 2. Likewise a residential conversion of the 40 Wall Street property was never the purported basis of valuation for the property on any of the SFCs at issue. *See, e.g.*, NYSCEF No. 1293 (Defendants' Response to Plaintiff's Rule 202.8-g Statement of Material Facts) at 44.

on issues this court already decided.") (internal citations omitted); *Federal Housing Financial Agency v. Nomura Holding Am. Inc.*, Civ. No. 11-6201, 2015 WL 629336, at *12 (S.D.N.Y. Feb. 13, 2015) (excluding expert witness from bench trial where value of testimony is "exceedingly minimal" and "easily outweighed by even the slight danger of the waste of time and undue delay that would accompany the testimony of an expert witness whose opinion could, at best, be marginally useful to defendants' case"); *Gorbea v. Verizon New York, Inc.*, No. 11-CV-3758, 2014 WL 2916964, at *2 (E.D.N.Y. June 25, 2014) ("Except as provided herein, claims that were dismissed or determined by summary judgment . . . may not be tried, and evidence relating thereto may not be introduced at trial."); *In re Cent. New York Oil and Gas Co., LLC*, 107 A.D.3d 1199, 1202 (3d Dep't 2013) (holding expert opinion was properly excluded as irrelevant to issues addressed at trial).

Indeed, the Court's holding that Defendants fraudulently inflated many assets in the SFCs on a summary judgment record that included reports and affidavit testimony from these proffered experts further confirms that their opinions are irrelevant, even as to the issues that have been decided.[2] *S*ee *Raskin v. Wyatt Co*., 125 F.3d 55, 65 (2d Cir. 1997) ("As we read the opinion, [the district court] concluded that the [expert's] report was probative of no material fact, from which we deduce that it was, in [the district court's] view, irrelevant and inadmissible. We therefore can review this ruling as evidentiary in character . . . ."). Moreover, the trial is not an opportunity to debate what Mr. Trump's actual net worth was in any given year. Plaintiff has alleged and already proven that many of Mr. Trump's assets were fraudulently inflated in the SFCs; his actual net worth in any year or the "correct" estimated current value of any particular asset in the SFCs is simply not relevant, either to the issues as framed by the Complaint or (more importantly) to the issues that remain following the Decision. *See Town & Country Linen Corp. v. Ingenious Designs LLC*, Civ. No. 18-5075, 2022 WL 2757643, at *3 (S.D.N.Y. July 14, 2022) ("Additionally, testimony that relates only to issues that are no longer in the case after the Court's summary judgment ruling . . . will be excluded as no longer relevant to any issue in the case.").

[2] To the extent Defendants attempt to argue that their experts' opinions are relevant to the issue of materiality on Plaintiff's illegality claims for making a false financial statement and committing insurance fraud, such an argument is without merit. The "materiality" issue under those penal law claims is whether the extent of the inflation already determined by the Court is material in relation to the overall value of the asset as set forth in the relevant SFC, not whether some hypothetical value Defendants could have come up with based on valuation methods offered by Defendants' experts but not actual employed by Defendants at the time would reduce the degree of inflation. *See United States v. Litvak*, 808 F.3d 160, 185-86 (2d Cir. 2015) ("The District Court did not exceed its allowable discretion in excluding this portion of [the expert's] testimony. Whether the prices were 'fair' was not an element of any of the crimes with which [defendant] was charged . . . . The principal issues at trial were whether a reasonable investor might have found the misstatements important and whether [defendant] intended to deceive the purported victims. . . . Whether a victim later made a profit or loss on the bonds it purchased from [defendant] has no bearing on whether [defendant's] misrepresentations were material or whether [defendant] intended to deceive the purported victims. Thus, the District Court did not exceed its allowable discretion in excluding this portion of [the expert's] testimony.")

Finally, the Court should preclude Messrs. Witkoff and Miller from testifying at trial for the additional reason that Defendants designated these two witnesses solely as rebuttal experts in response to experts disclosed by Plaintiff who have not testified, and therefore there is nothing in the record for them to rebut.[3] As the First Department has explained, when a party has offered no testimony for an expert to "contradict[], impeach[] or discredit[]," it is "error to admit [the expert's] testimony under the guise of rebuttal." *Maglione v. Cunard Steamship Co*., 30 A.D.2d 784, 784 (1st Dep't 1968) (internal quotations and citations omitted); *see also Wilmot v Methodist Hosp*., 202 A.D.2d 304, 304 (1st Dep't 1994) ("[W]hether to permit the introduction of rebuttal evidence rests within the sound discretion of the trial court.").

For the foregoing reasons, to be more fully discussed during oral argument as permitted by the Court, Plaintiff will seek an order precluding Defendants from calling at trial Dr. Laposa and Messrs. Flemmons, Witkoff, and Miller.

Respectfully submitted,

____/s/ Andrew Amer_____
Andrew Amer
Special Counsel

[3] Mr. Miller's expert rebuttal report was disclosed on June 30, 2023, and provided opinions responsive to those proffered by Plaintiff's insurance expert witness Tom Baker. *See* NYSCEF Doc. No. 1434, Expert Aff. of David B. Miller, attaching Expert Rebuttal Report of David B. Miller, dated June 30, 2023 ("Miller Rebuttal Report") as Ex. A, at ¶¶ 3, 12. Defendants similarly submitted this rebuttal report to the Court as part of their summary judgment papers.