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December 12, 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 this letter on behalf of Defendants President Donald J. Trump ("President Trump"), Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC's (collectively, "Defendants") in support of Defendants' application to preclude testimony from the Attorney General of the State of New York ("NYAG") proposed rebuttal witnesses, Kevin Sneddon ("Sneddon") and Eric Lewis ("Lewis").

For the reasons set forth below, the NYAG should not be permitted to supplement its case to include the testimony of Sneddon and Lewis, who are not proper rebuttal witnesses. Allowing the NYAG to bolster its case-in-chief after Defendants have rested would be patently unfair and improper. Further, Lewis's "expert" report and anticipated testimony are nothing more than mere conjecture and should be rejected by this Court.

A. The NYAG's Proposed Witnesses Are Not Proper Rebuttal Witnesses.

It is blackletter law that "[i]n New York, 'the rules concerning the proper scope of rebuttal evidence are clear. The party holding the affirmative of an issue must present all evidence concerning it before he closes his case. Thereafter, that party may introduce evidence in rebuttal only.'" People v. Harris, 98 N.Y.2d 452, 489 (2002), quoting People v. Harris, 57 N.Y.2d 335, 345 (1982). Rebuttal evidence "is not merely evidence which contradicts defendant's evidence and corroborates that of" the plaintiff. People v. Alvino, 71 N.Y.2d 233, 248 (1987). Rather, "rebuttal evidence is evidence which overcomes some affirmative fact" or other new matter that a defendant

has proffered in reply to the case-in-chief. Id.; see People v. Harris, 98 N.Y.2d at 489. "In some instances, rebuttal evidence may also be used for impeachment purposes." People v. Harris, 98 N.Y.2d at 489, citing People v. Harris, 57 N.Y.2d at 345; Ankersmit v. Tuch, 114 N.Y. 51 (1889); see Reinoso v. New York City Transit Authority, 204 A.D.3d 426, 427 (1st Dep't 2022) (plaintiff's failure to offer expert testimony as part of case-in-chief "deprived her of the right to make use of it as affirmative evidence," although she could introduce such testimony "to impeach or discredit" defendant's witness).

"The opportunity to present rebuttal, however, does not permit a party to hold back evidence properly part of the case-in-chief and then submit that evidence to bolster the direct case after the opponent has rested." People v. Harris, 98 N.Y.2d at 489. The reason for this limitation is twofold. First, it precludes gamesmanship by a plaintiff such as here by the NYAG, who could otherwise abuse rebuttal to inflict manifest "unfairness" upon "an opponent who has justly supposed that the case in chief was the entire case which he had to meet." Id. at 489 (internal quotation marks omitted), citing 6 Wigmore, Evidence § 1983, at 672 (Chadbourn rev. 1976). Second, the rule avoids "the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning." Id. Courts therefore preclude proffered rebuttal testimony that is "cumulative in part" and "could have been presented as part of [the plaintiff's] case-in-chief." Matter of Yudelka A. M. v. Jose A. R., 72 A.D.3d 622, 623 (1st Dep't 2010).

The NYAG was obligated to present the entirety of her case-in-chief before she rested. While this Court has discretion to permit the presentation of additional evidence after Defendants rest, (see CPLR § 4011), New York law heavily circumscribes what may be admitted at this juncture. The NYAG's proposed witnesses are not proper "rebuttal witnesses." If the Court permits them to provide affirmative evidence, it unfairly advantages the NYAG by allowing it to supplement its case after Defendants have rested. The Court must and should decline to do so.

i. ***Kevin Sneddon.***

Initially, Defendants note that the NYAG flatly refused to provide this Court with ***any*** information as to the subject matter of Sneddon's purported rebuttal testimony. While this Court has expressed that it does not know the extent to which a party must disclose the subject matter of a rebuttal witness' testimony, the scope of such rebuttal testimony is unquestionably highly circumscribed. The NYAG does not have an unfettered ability to label witnesses it could have called on its direct case as "rebuttal witnesses" to circumvent evidentiary rules.

Thus, Sneddon cannot testify to bolster the NYAG's case-in-chief. Sneddon may only testify to overcome some new matter Defendants have attempted to prove or to impeach or discredit Defendants' witnesses. The NYAG's refusal or inability to identify any cognizable purpose for Sneddon's testimony is therefore fatal.

For example, Sneddon, a former real estate broker for Trump International Realty, cannot be called now to testify regarding any communications with Defendant Allen Weisselberg ("Mr. Weisselberg") and others regarding the valuation of the Trump Tower triplex. The NYAG called Mr. Weisselberg during its case-in-chief and conducted a robust examination over the course of two days. Defendants elected not to recall Mr. Weisselberg. Moreover, in its examination of Defendant Jeffrey McConney, the NYAG elicited that Sneddon had provided the valuation for the triplex based upon 30,000 square feet. Mr. McConney did not controvert this testimony when he was recalled. There is simply no affirmative fact or new matter regarding Sneddon that Defendants introduced during their case-in-chief. Rather, all testimony relevant to Sneddon's role in the triplex valuation was entered into the record during the NYAG's case-in-chief. If the NYAG wished to present Sneddon's testimony to bolster her claims, she was required to do so before she rested. Likewise, even if the NYAG believes she could have impeached testimony presented by Mr. McConney or others during her case-in-chief, she was not free to delay that attempt at impeachment until after Defendants rested.

In sum, the NYAG's failure to call Sneddon during its case-in-chief deprives it of the right to use Sneddon's testimony as affirmative evidence. Further, there is no basis to permit the NYAG to "impeach" statements made nearly two months ago, which have not been controverted by any new evidence Defendants have presented.

ii. ***Eric Lewis.***

The NYAG's proffer of Lewis, whom the NYAG hired as an "expert" accounting professor, likewise attempts to cure deficiencies in the NYAG's case-in-chief. It is beyond cavil that Lewis's opinions should have been presented long before the NYAG rested, and that Lewis's reports cover matters far beyond what Defendants have presented. Nonetheless, the NYAG made the strategic choice not to call Lewis and Defendants "justly supposed that the case in chief was the entire case which [they] had to meet." People v. Harris, 98 N.Y.2d at 489.

If this Court nonetheless elects to ignore established precedent and permit Lewis to testify, such testimony must be limited to the rebutting affirmative facts elicited during Defendants' case. Further, Defendants submit that they must be allowed to recall Professor Eli Bartov ("Professor Bartov") and/or Jason Flemmons ("Mr. Flemmons") to elicit surrebuttal evidence. Surrebuttal is an established concept under New York law and is clearly warranted here. Cf. CPL § 260.30 (codifying right of criminal defendant to "offer evidence in rebuttal of the people's rebuttal evidence" at trial). The NYAG's choice not to present any expert testimony until after Defendants rest means that Defendants have been precluded from anticipating and responding to the NYAG's experts in their own case-in-chief. As a result, Professor Bartov and Mr. Flemmons, who have testified as Defendants' experts in accounting, financial reporting misconduct, GAAP, credit analysis, and other matters, were unable to opine on Lewis's reports. Defendants must be given an opportunity to rebut the NYAG's case by recalling Professor Bartov and/or Mr. Flemmons to address what will now be novel, and inappropriate, evidence.

B. Lewis's Report and Testimony Are Mere Conjecture.

Lewis should not be permitted to testify as to the contents of his expert report, and the report itself should not be admitted into evidence. Lewis's report and the substantive opinions contained therein purport to rely on the expert opinions of Constantine Korologos ("Korologos") and Laurence Hirsh ("Hirsch"), whose reports are not in evidence and who did not testify at trial. Lewis cannot opine based on matters outside of the trial record. Moreover, since the factual foundation of Lewis's testimony is the unreliable opinion of *other* experts who will neither testify nor be cross-examined at trial, Lewis's testimony and his report violate the prohibition against hearsay and the best evidence rule. In sum, his anticipated testimony is nothing more than mere conjecture offered as purported "expert" opinion and should be summarily rejected by this Court.

It is well-settled that, while an expert witness may, in his or her area of expertise, reach conclusions beyond the ken of an ordinary layperson, the witness may not do so by assuming material facts not in evidence. See Cillo v. Resjefal Corp., 16 A.D.3d 339, 341 (1st Dep't 2005); Gathers v. New York City Transit Authority, 242 A.D.2d 506, 507 (1st Dep't 1997); Quinn v. Artcraft Const., Inc., 203 A.D.2d 444, 445 (2d Dep't 1994). Rather, the expert may only state opinions resting on facts in the record or personally known to the witness. See Gomez by Gomez v. New York City Housing Authority, 217 A.D.2d 110, 117 (1st Dep't 1995) (internal citations omitted); Wright v. New York City Housing Authority, 208 A.D.2d 327 (1st Dep't 1995) ("While an expert may, in his area of expertise, reach conclusions beyond the ken of the ordinary layman, he may only do so on the basis of the established facts. He may not himself create the facts upon which the conclusion is based.").

Expert opinion is nothing more than conjecture if the factual foundation of the expert's opinion is, as in this case, another nontestifying expert's interpretation of the facts. See Wagman v. Bradshaw, 292 A.D.2d 84, 87 (2d Dep't 2002). The admission into evidence of unreliable secondary evidence in the form of a nontestifying expert's report violates the prohibition against hearsay and the best evidence rule. Id. "Inasmuch as such a written report is inadmissible, logic dictates that testimony as to its contents is also barred from admission into evidence." Id. Further, the improper admission of a nontestifying expert's report prejudices the party against whom the report is offered, who is deprived of the opportunity to cross-examine the expert witness.

Here, Lewis's testimony as to the contents of his report should be precluded because the report relies on the opinions of Korologos and Hirsh. Throughout his report, Lewis explicitly refers to and utilizes Korologos's and Hirsh's analyses. Fundamentally, Lewis's report lacks an independent basis for his own opinions. For example, in concluding that the SOFCs materially misstated the value of President Trump's real estate assets, Lewis admitted that "I have been instructed by Counsel to assume that the highest values listed for the assets examined in Mr. Korologos's and Mr. Hirsh's reports are the appropriate adjusted amount of current value for purposes of my analysis." He added that "I am only considering the impact of the misstatements of value relating to the real estate assets reviewed by Mr. Korologos and Mr. Hirsh."

Lewis's inappropriate reliance on the opinions of Korologos and Hirsh pervades his report. In a 67-page report, Lewis cites to Hirsh's report no less than 169 times, and Korologos's report no less than 127 times. His overreliance on other experts underscores that Lewis is not an expert in the valuation of commercial real estate and has no experience or independent qualification to evaluate the assets in the SOFCs. Lewis is not a licensed CPA and has no distinguishing credentials or practical experience to qualify him as an accounting expert.

Thus, Lewis's report and his opinions indisputably rely on the opinions of Korologos and Hirsh. But neither Korologos nor Hirsh testified, and their reports are not in the trial record. Defendants have not, and will not, have an opportunity to cross-examine the conclusions of Korologos or Hirsch. Accordingly, Lewis should be precluded from assuming material facts based on the Korologos and Hirsh reports. Since virtually all of Lewis's opinions are premised on those reports, Lewis should not be allowed to testify.

Further, the exception to the rule that expert opinion evidence must be based on facts in the record or personally known to the witness is not applicable here. Under the "professional reliability" exception, an expert may only rely on out-of-court material where there is evidence establishing the reliability of that material. See Hambsch v. New York City Transit Auth., 63 N.Y.2d 723, 725–726 (1984). Here, there has been no showing by the NYAG that Hirsh and Korologos's reports were reliable, and Defendants have not had the opportunity to cross-examine Hirsh or Korologos. See D'Andraia v. Pesce, 103 A.D.3d 770, 772 (2d Dep't 2013). Indeed, Korologos's and Hirsh's reports themselves rely on Lewis's report. See NYSCEF Doc. Nos. 1488, 1494.

Even assuming that the underlying reports could be deemed reliable, they cannot provide the principal basis for Lewis's opinion on the ultimate issue in the case. See Hinlicky v. Dreyfuss, 6 N.Y.3d 636, 645–646 (2006) ("While some jurisdictions allow otherwise inadmissible materials relied upon by an expert witness to reach the jury for non-hearsay purposes, we have acknowledged the need for limits on admitting the basis of an expert's opinion to avoid providing a conduit for hearsay.") (internal citations omitted). In that vein, "experts may not assume the very question their testimony seeks to prove." Simo v. New York City Transit Auth., 13 A.D.3d 609, 611 (2d Dep't 2004); citing Cassano v. Hagstrom, 5 N.Y.2d 643, 646 (1959).

Here, although Lewis claims to have reviewed the SOFCs, he relies on Korologos and Hirsh's reports to both interpret the SOFCs and support his conclusions. As to each year's SOFC, Lewis concludes that, "[a]ccording to Mr. Korologos and Mr. Hirsh, Mr. Trump overstated the value of certain real estate assets." In doing so, Lewis improperly assumes the ultimate issue in the case—that the SOFCs were materially misleading—without articulating how. Thus, there is no basis to admit Lewis's report or his testimony. See e.g., Ippolito v. Consolidated Edison of New York, Inc., 177 A.D.3d 715 (2d Dep't 2019) (reversing jury verdict on liability where "the expert reached his conclusion … by assuming material facts not supported by the evidence and by guessing and speculating in drawing that conclusion," such that the expert had no knowledge of

when the sidewalk was constructed, when the manhole had been installed, or the weight and inside dimensions of the manhole structure); In re 91st Street Crane Collapse Litigation, 154 A.D.3d 139 (1st Dep't 2017) (precluding expert testimony not based on facts in the record, contradicting facts in the record, including by witnesses and physical evidence, and lacking foundation); Cleghorne v. City of New York, 99 A.D.3d 443 (1st Dep't 2012) (reversing denial of summary judgment to dismiss the complaint where expert's opinion was predicated on a nine-year-old affidavit lacking any specific measurement for the level of toxins present).

Should the Court have any questions, please feel free to contact me.

Respectfully submitted,

ROBERT & ROBERT PLLC

Clifford S. Robert

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cc: All Counsel of Record (via NYSCEF)