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December 1, 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) – Jones Testimony

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 further to Defendants' November 27, 2023, request to add Judge Barbara Jones ("Judge Jones" or "Monitor") to the witness list. The Court precluded Judge Jones' testimony on the basis that the request was untimely and "inappropriate." *See* **Exhibit A** at 5243:5-14. The Court expounded that it was "not aware of a single instance in which a litigant asked to examine an independent monitor, or anything like an independent monitor." *Id.* at 5243:15-20. However, the Court permitted Defendants to adduce authority for their request that Judge Jones be permitted to testify. Defendants respectfully submit that such request is both appropriate and proper under CPLR § 3101 and applicable case law, as Judge Jones is exceedingly relevant to important issues in the case.

The law of this state is clear: all adults are presumed competent to testify. *Brown v. Ristich*, 36 N.Y.2d 183 (1975) ("A witness is said to be capable when he has the ability to observe, recall and narrate, *i.e.,* events that he sees must be impressed in his mind; they must be retained in his memory; and he must be able to recount them with sufficient ability such that the presiding official is satisfied that the witness understands the nature of the questions put to him and can respond accordingly, and that he understands his moral responsibility to speak the truth."). It is beyond cavil that a nonparty can be subpoenaed to testify pursuant to CPLR § 3101(a) where his or her testimony is relevant to an issue in the case. The Court of Appeals in *Kapon v. Koch* concluded that CPLR § 3101(a)(4) "imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source" and that "so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." 23 N.Y.3d 32, 37 (2014). The 1984 amendment to CPLR § 3101(a) loosened nonparty disclosure requirements by "allow[ing] for the discovery of *any person* who possesses material and necessary evidence," and "eliminating the requirement that a party seeking disclosure first

obtain a court order." *Id.* at 36 (internal citations omitted). "[M]aterial and necessary," as used in § 3101, must "be interpreted liberally to require disclosure, upon request, of ***any facts bearing on the controversy*** which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Id.* at 38, *quoting Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968) (emphasis added).

Here, Judge Jones can testify as to the specific issues addressed in her reports and her observations and conclusions regarding the Defendants' business, accounting and compliance practices. This subject matter is plainly relevant to intent, materiality and, importantly, the need for prospective injunctive relief, all key issues in the instant trial.

The reports relate only to certain aspects of such practices and cannot possibly present the whole picture. Moreover, the reports have already been the subject of significant disagreement and the basis for disputed conclusions. Thus, Judge Jones testimony is essential to the presentation of a complete defense. Judge Jones is competent to testify, her testimony is both relevant and probative, there is no prejudice to the Attorney General, and there is no authority which precludes her testimony.

The Court states that the independent monitor's reports "speak for themselves." Ex. A at 5243:9-11. However, the Court may not properly rely on the reports themselves as the bases for any conclusions as to the existence or persistence of fraud. The reports constitute hearsay, inasmuch as they are out of court statements offered for their truth. *O'Connor v. Restani Const. Corp.,* 137 A.D.3d 672, 673 (1st Dep't 2016); *Bendik v. Dybowski*, 227 A.D.2d 228, 229 (1st Dep't 1996). If the Court intends to rely on the contents of the report, such contents, like all other trial evidence, must be introduced into evidence through the testimony of Judge Jones. Nor is the Court free to simply resolve any ambiguities in the reports based on its own conclusions. This is especially so when the author of the reports is readily available to testify. The Court is therefore not free to "decide what her reports mean and the implications thereof." Ex. A at 5301:9-10.

The Court has indicated it will preclude the testimony because Judge Jones is, *inter alia*, an "arm[] of the court, and [Defendants] cannot question the Court in this matter." Ex. A at 5243:6-8. However, there are only seventeen reported decisions in New York that include the phrase "independent monitor." Of those seventeen decisions, five were issued in this action, and none holds that an independent monitor is precluded from testifying or that the monitor is an "arm of the court."

Receivers are described in the case law as an "arm of the court", but such cases are inapposite. *See, e.g., U.S. Capital Ins. Co.*, 36 Misc. 3d 635, 637 (Sup. Ct. N.Y. Cty. 2012) ("Thus, a court-appointed receiver acts as an arm of the court and is immune from liability for actions grounded in his or her conduct as receiver"), *citing Bankers Fed Sav. v. Off W. Broadway Devs.*, 227 A.D.2d 306 (1st Dep't 1996). Indeed, this Court specifically held, in its November 3, 2022, decision on the preliminary injunction that Defendants conflated an independent monitor with a receiver

"when, in fact, they perform two very different functions," *i.e.,* "the former oversees, the latter controls." *People v. Trump*, 2022 N.Y. Misc. LEXIS 6657, at *19 (Sup. Ct. N.Y. Cty. Nov. 3, 2022). This Court elaborated that "OAG ask[ed] for the appointment of an independent monitor to oversee the: (1) submission of financial information provided to any accounting firm compiling a 2022 SFC for Mr. Trump; (2) submission of all financial disclosures to lenders and insurers; and (3) corporate restructuring or disposition of significant assets. *This limited function is entirely different from the functions of a receiver*, who would, in effect, take control of the entire organization." *Id.* (emphasis added). Moreover, whether a receiver is subject to liability is irrelevant to whether she can testify to relevant factual information. *See U.S. Capital Ins. Co.*, 36 Misc. 3d. at 636-638.

Moreover, ***even if*** Judge Jones was a receiver rather than an independent monitor (*i.e.,* an "arm of the Court"), courts of this state have permitted a receiver to testify as a witness. *See Continental Ins. Co. v. Equitable Trust Co.*, 229 A.D. 657, 658 (1st Dep't 1930) (affirming an order directing, *inter alia,* that "Robert C. Adams, as Federal equity receiver, appear for examination as a witness on behalf of the plaintiffs before trial and give testimony with respect to the books in his possession or under his control as receiver"); *see also Yarinsky v. Yarinsky*, 2 A.D.3d 1108 (3d Dep't 2003) (describing testimony taken from a "certified public accountant appointed as receiver by Supreme Court" at an evidentiary hearing); *cf. Benjamin Franklin Fed. Savings. Ass'n v. PJT Enters. Inc.*, 149 Misc. 2d 688, 689, 691-692 (Sup. Ct. Cortland Cty. 1991) (permitting Petitioner, who was "employed by the receiver," to testify). In *Continental Ins. Co.*, the Court below held that "to hold that Mr. Adams as a witness could not be examined as receiver would be tantamount to holding that the order already made permitting him to be examined as an individual or as vice-president of defendant corporation, was erroneous" and that the Court "did not believe that it was." *Continental Ins. Co. v. Equitable Trust Co.*, 137 Misc. 28, 41-42 (Sup. Ct. N.Y Cty. 1930). The Court thus concluded that "[i]n the circumstances here disclosed[,] I am of the opinion that the motion should be granted to the extent of requiring Mr. Adams, the receiver, to submit to examination as a witness before trial." *Id.* at 42. These cases certainly establish that witnesses "like an independent monitor" can be called to testify.

Finally, the Attorney General has not demonstrated prejudice due to the untimely disclosure. *Rivera v. New York City Hous. Auth.*, 177 A.D.3d 499, 500 (1st Dep't 2019); *Singleton v. Consol. Ed. Co. of N.Y., Inc.*, 112 A.D.3d 491, 492 (1st Dep't 2013). While Judge Jones was not included in the initial witness list, she has been intimately involved in this case since this Court's November 14, 2022, decision appointing her as independent monitor, and the Attorney General is fully familiar with and capable of cross-examining her on her role in the case. *See* NYSCEF Doc. No. 193. Indeed, the Attorney General has had unfettered *ex parte* access to the Monitor since her appointment. The Attorney General has also made arguments and taken positions based on the actions of the Monitor. Thus, any suggestion of prejudice to the Attorney General would be specious.

The foregoing demonstrates that Judge Jones is presumed competent to testify and not precluded from testifying because her addition is untimely or she is an "arm of the court." In fact, this Court must permit Judge Jones to testify as her testimony is exceedingly relevant to the defense of the action.

Respectfully submitted,

ROBERT & ROBERT PLLC

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cc: All Counsel of Record (via NYSCEF)