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**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION: FIRST DEPARTMENT**

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, Attorney General of the State of New York,

Plaintiff-Respondent,

-against-

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., THE 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,

Defendant-Appellants.

CLIFFORD S. ROBERT, ESQ. (Robert & Robert PLLC), MICHAEL FARINA ESQ. (Robert & Robert PLLC), CHRISTOPHER M. KISE, ESQ., (Continental PLLC), MICHAEL MADAIO, ESQ. (Habba Madaio & Associates, LLP), and ARMEN MORIAN, ESQ. (Morian Law PLLC),

Non-Party Appellants.

Case No.:
**2023-04925**

Supreme Court Index No.:
**452564/2022**

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# MEMORANDUM OF LAW IN FURTHER SUPPORT OF NON-PARTY APPELLANTS' MOTION TO SEVER APPEAL

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1. Non-party Appellants Clifford S. Robert, Esq. ("Robert & Robert PLLC"), Michael Farina Esq. ("Robert & Robert PLLC"), Christopher M. Kise, Esq. ("Continental PLLC"), Michael Madaio, Esq. ("Habba Madaio & Associates, LLP"), and Armen Morian ("Morian Law PLLC"), (collectively, "Counsel"), respectfully submit this memorandum of law in response to the affirmation in response submitted by Dennis Fan, Esq. ("Fan Aff.") on behalf of plaintiff-respondent People of the State of New York, by Letitia James, Attorney General of the State of New York ("plaintiff" or "Attorney General") and in further support of their joint motion pursuant to CPLR §603 and this Court's inherent discretionary powers to sever and assign a separate appellate case number to their appeal from that portion of the Decision and Order of the Honorable Arthur F. Engoron, J.S.C. ("Justice Engoron"), dated September 26, 2023, and duly entered by the Clerk of the Supreme Court of the State of New York, County of New York on September 27, 2023 (the "September 26 Order" or "Order"), imposing sanctions against Counsel.

## PRELIMINARY STATEMENT

2. The Attorney General is unable to dispute that those portions of the September 26 Order granting her motion for partial summary judgment ("Attorney General's Partial SJM") and denying Defendants' motion for summary judgment of dismissal ("Defendants SJM"), are entirely distinct from that portion of the Order granting her motion for sanctions against Counsel (the "Sanctions Motion"). Accordingly, the Attorney General agrees that this Court should permit Counsel to (1) file a separate record on appeal, (2) file separate briefs on appeal, and (3) receive a separate allotment of time for oral argument (Fan Aff., p. 2, ¶2). However, the Attorney General contends that Counsel's severed appeal should remain "consolidate[d] for purposes of argument" with Defendants' appeal from the Attorney General's Partial SJM and Defendants' SJM (Fan Aff.,

pp. 2-3, ¶¶3-4). The Attorney General's proposal is, in effect, that this Court grant severance in form but not in substance. The Court should reject such an approach.

3. As explained in Counsel's motion-in-chief, consolidation of the appeals will result in manifest prejudice to Counsel. A consolidated hearing of the appeals will not mitigate and will, in fact, maintain that prejudice. The relatively simple question this Court will answer on the sanctions appeal – whether Counsel's advocacy on behalf of their clients was "frivolous" within the meaning of 22 NYCRR §130-1.1 – is entirely distinct from the question of whether any of the parties was entitled to summary judgment as a matter of law. The Attorney General's assertion that the appeals should be heard at the same time because they "require the Court to understand and evaluate the summary-judgment record," (Fan Aff., pp. 2-3, ¶3), is not only wrong but is also proof positive of the significant risk to Counsel that the parties and the Court might conflate issues if the appeals are not separated. Whether Counsel's arguments on the summary judgment motions are successful has nothing to do with the propriety of sanctions award.

4. Moreover, a consolidated argument of the appeals will force Counsel to wait many months before their appeal of the sanction's decision is finally determined. Unlike Counsel's sanctions appeal, the summary judgment appeal is based upon a voluminous record, tens of thousands of pages of evidence, and a multitude of complex legal arguments, including the substantive boundaries of Executive Law §63(12). Perfection, briefing, and disposition of the summary judgment appeal will therefore consume a significant amount of time and resources. If the summary judgment appeal is subsumed by any appeal of the final judgment in the underlying action, as the Attorney General apparently believes should be the case (Fan Aff., p. 2, ¶3, fn. 1), these problems compound. It is unacceptably prejudicial to force Counsel to wait to be heard on a

matter of the utmost professional importance until entirely separate issues going to the merits their clients' defenses are argued.

5. Consolidation of the appeals for purposes of argument would render utterly meaningless any severance that this Court grants. Counsel respectfully submits that the Court should grant in its entirety the instant motion to sever.

## ARGUMENT

## POINT I

## THIS COURT SHOULD GRANT COUNSEL'S MOTION TO SEVER IN ITS ENTIRETY TO AVOID MANIFEST PREJUDICE TO COUNSEL

6. As Counsel explained in their opening brief, "[s]everances…can be employed to avoid any possible prejudice" (Krause v. American Guarantee & Liability Ins. Co., 22 NY2d 147, 147 [1968]; see, CPLR §603). Here, severance is plainly warranted to prevent prejudice to Counsel. The Attorney General does not dispute that this Court may be more disposed to render a decision adverse to Counsel if it determines not to reverse the summary judgment ruling. Likewise, the Attorney General does not dispute that consolidation will significantly delay resolution of Counsel's straightforward sanctions appeal and prevent the Court from redressing an egregious injury to Counsel's professional reputations. The Attorney General's proposal that the appeals be severed but consolidated for purposes of argument fails to address either of these concerns. This Court can avoid significant prejudice to Counsel's independent rights and interests only by directing that the appeals be severed in every respect.

### A. Consolidation of the Appeals for Purposes of Argument is Very Likely to Result in Consideration of Improper Factors in Determining the Sanctions Appeal

7. Counsel explained at length in their motion-in-chief that consideration of the appeal from the Sanctions Motion at the same time as the appeal from the Attorney General's SJM and

Defendants' SJM carries a serious risk that the Court will apply, consciously or unconsciously, inappropriate factors and legal standards in resolving the sanctions appeal.

8. In the September 26 Order, Justice Engoron determined that a discrete subset of Counsel's legal arguments, which Counsel were not only well within their rights to make but were required to advance in order to fulfill their fiduciary duty to their clients, were frivolous within the meaning of 22 NYCRR §130-1.1. Under the portion of 22 NYCRR §130-1.1 upon which Justice Engoron relied, "conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." (22 NYCRR §130-1.1(c)(1)). In the same Order, applying the standard set forth under CPLR §3212 and considering tens of thousands of pages of evidence and a multitude of complex legal arguments, Justice Engoron separately determined that the Attorney General met her burden of demonstrating liability under Executive Law §63(12). The latter decision required Justice Engoron to determine that the Attorney General "established sufficiently [her first cause of action] to warrant the court as a matter of law in directing judgment," (CPLR §3212), in her favor. Clearly, the standard prescribed in 22 NYCRR §130-1.1 has nothing whatsoever to do with the standards prescribed in CPLR §3212 or Executive Law §63(12).

9. The Attorney General does not dispute that separate standards apply to each of the appeals, nor does she deny that conflation of the standards and issues raised in the summary judgment appeal with those raised in the sanctions appeal prejudices Counsel. Nonetheless, the Attorney General claims that consolidation for the purposes of argument is warranted to further "[j]udicial economy and efficiency," which she avers are "best served if a single panel can consider common issues of fact and law at the same time" (Fan Aff., pp. 2-3, ¶3).

10. The Attorney General's argument is based on the misleading premise that "Supreme Court's determination to order sanctions was based on its finding that the arguments made by movants in their summary judgment motion were frivolous" (Fan Aff., pp. 2-3, ¶3). As Counsel have explained, the Supreme Court's determination of the Sanctions Motion was premised on Justice Engoron's finding that Counsel's purported repetition, on behalf of the Defendants, of a small subset of arguments on summary judgment was "completely without merit in law and [could not] be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR §130-1.1(c)(1)). This finding is distinct and separable from Justice Engoron's findings that the Attorney General's arguments and evidence were sufficient to demonstrate entitlement to judgment as a matter of law and that none of Defendants' arguments and evidence were sufficient to raise a triable issue as to such entitlement or to warrant dismissal of a cause of action. Accordingly, the questions raised in each of the appeals are distinct and separable.

11. The Attorney General's suggestion that there are "common issues of fact and law" on both appeals that warrant consolidation (Fan Aff., pp. 2-3, ¶3), precisely demonstrates the danger Counsel seek to evade by severance. A primary purpose of severance is to *avoid* conflation of issues of fact and law and the prejudice such conflation could entail. Consolidation of the appeals for purpose of argument does precisely the opposite. Moreover, it would be neither necessary nor permissible for the Court to "gain[] a fuller understanding of the substance of [Defendants'] arguments in this action" (Fan Aff., p. 3, ¶4), by reference to a separate appellate record in resolving the sanctions appeal. Reversal of Justice Engoron's decision on the Sanctions Motion does not require this Court to determine whether Defendants' arguments are meritorious. Indeed, blackletter law dictates that attorneys *cannot* be sanctioned merely for making unsuccessful arguments on a motion for summary judgment.

12. To be perfectly clear, it is Counsel's position that even if this Court ultimately upholds every ruling made by Justice Engoron at trial, their actions cannot be considered frivolous under any recognized legal doctrine applicable to attorney conduct and standards that exist in this State. As such, allowing this narrow issue to be decided in a separate appeal that can likely be perfected within months and argued in connection with a normal calendar along with other diverse cases would have the salutary effect of: a) avoiding prejudice; b) simplifying the weighty issues that are sure to arise from the appeal of the motion for summary judgment or any resulting judgment; c) preventing delayed adjudication of issues of great importance to accomplished attorneys whose impeccable reputations have possibly been sullied by a sanction order that Counsel believe should never have been entertained, much less issued, in the first place; and d) allowing this Court to individually consider the important public policy issue of not penalizing attorneys for zealously representing unpopular clients or advancing cognizable legal positions that may be unpopular generally or with a given trial judge.

**B. Consolidation of the Appeals for Purposes of Argument will Significantly Delay Resolution of a Matter of Serious Consequence to Counsel's Professional Interests**

13. It is beyond dispute that the sanctions improperly imposed against Counsel pursuant to 22 NYCRR §130-1.1 have inflicted, and will continue to inflict, a serious injury to Counsel's professional standing and reputation. Counsel's professional records are a foundation of their careers and, understandably, paramount to their continued work as officers of the court. Accordingly, Counsel seek to resolve their appeal of the Sanctions Motion as quickly as possible.

14. Consolidation for the purpose of argument will certainly, and significantly, undermine that objective. Briefing of the summary judgment appeal, based upon a voluminous record and complex legal issues, will undoubtedly require far more time than briefing of the sanctions appeal. Even more troubling, the Attorney General indicates in a footnote to the

Affirmation of Dennis Fan that she believes "[a]ny appeal from [a final] judgment will subsume defendants' pending appeal from the summary-judgment rulings" (Fan Aff., p. 2, ¶3, fn. 1). The final judgment in the underlying action, which has not even been issued, will likely span over a hundred pages. The record on appeal of the judgment, entered after a *three-month* trial, will span tens of thousands of pages. Perfection and briefing of that appeal is unlikely to be completed for many, many months.

15. The Attorney General conveniently ignores the implications this would have for Counsel's appeal of the Sanctions Motion. If Counsel are forced to tie the hearing of their appeal to the hearing of the summary judgment appeal, and the summary judgment appeal is later consolidated with an even more complex appeal from the final judgment, Counsel are unlikely to receive a decision on the discrete issue of sanctions until at least 2025. Moreover, Counsel's independent interests risk being lost in a morass of summary judgment briefing, three months of trial testimony, and a multitude of legal challenges having nothing to do with the sanctions appeal.

16. The Attorney General has no answer for these concerns. Instead, the Attorney General suggests that Counsel cannot be heard to complain about delay because they have not yet perfected their appeal. This argument is disingenuous. Without an order of severance, Counsel cannot perfect the appellate record on the separate issue of sanctions. At this juncture, only one appellate record, which would incorporate both the discrete record on the Sanctions Motion and the voluminous record on the Attorney General's SJM and Defendants' SJM, can be filed. Once again, the Attorney General proves Counsel's argument; continued consolidation of the appeals will necessarily result in delay of the resolution of the sanctions appeal. Conversely, severance of the appeals for all purposes will streamline and expedite disposition of Counsel's appeal of the Sanctions Motion.

## CONCLUSION

**WHEREFORE**, for the reasons set forth above and, in the motion-in-chief, non-party appellants Counsel respectfully request that this Court issue an order severing their appeal from the September 26 Order for Sanctions and direct the Clerk of the Court to issue a separate appellate case number for Counsel's Notices of Appeal (NYSCEF Doc. Nos. 12-20).

**Dated: New York, New York**
**February 16, 2024**

Respectfully submitted,

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***-and-***

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<u>**AFFIDAVIT OF SERVICE**</u>

STATE OF NEW YORK )
SS.:
COUNTY OF NEW YORK )

Danielle Henderson being duly sworn, deposes and says:

I am over 18 years of age, I am not a party to the action, and I reside in Kings County in the State of New York. I served a true copy of the annexed ***Memorandum of Law in Further Support of Non-Party Appellants' Motion to Sever Appeal*** on February 16, 2024 via NYSCEF, addressed to the last known address of the addressee as indicated below:

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Danielle Henderson

Sworn to before me this
16th day of February 2024

NOTARY PUBLIC

Case No.: 2023-04925
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, Attorney General of the State of New York,

Plaintiff-Respondent,

-against-

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC. THE 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,

Defendants-Appellants.

-----------------------------------------------------------------------------------------------------------X

CLIFFORD S. ROBERT, ESQ. (ROBERT & ROBERT PLLC), MICHAEL FARINA, ESQ. (ROBERT & ROBERT PLLC), CHRISTOPHER M. KISE, ESQ. (CONTINENTAL PLLC), MICHAEL MADAIO, ESQ. (HABBA MADAIO & ASSOCIATES, LLP) AND ARMEN MORIAN, ESQ. (MORIAN LAW PLLC),

Non-Party Appellants.

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**MEMORANDUM OF LAW IN FURTHER SUPPORT OF NON-PARTY APPELLANTS' MOTION TO SEVER**

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To:
Attorney(s) for

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*Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contention contained in the annexed document are not frivolous.*

*Dated*: *February 16, 2024* *Signature*: ____________________________
*Print Signer's Name*: _________________________