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April 23, 2024

Via Email
Honorable Juan M. Merchan
Acting Justice - Supreme Court, Criminal Term

Re: People v. Trump, Ind. No. 71543/23

Dear Justice Merchan:

We respectfully submit this letter, with the Court's permission, regarding defense objections to certain AMI business records offered by DANY. *See* Tr. 1095. For the reasons set forth below, the AMI business records that DANY offered today present double-hearsay issues that DANY must address before publishing these Exhibits to the jury, and DANY should not be permitted to elicit lay-witness opinions regarding the meaning of communications in which they did not participate.

I. Applicable Law

The Court of Appeals "admits evidence consisting of multiple layers of out-of-court statements," "provided each such layer overcomes a hearsay exception or is not offered for its truth." Guide to N.Y. Evid. Rule 8.21, Note. With respect to business records in particular, "[t]he admission of an out-of-court statement that is included within a properly admitted business record is itself admissible for the truth of its contents *only if* the statement meets the requirements of an exception to the hearsay rule; otherwise the statement is admissible for having been made and not for its truth." *Id.* Rule 8.08(a) (emphasis added).

"While properly authenticated e-mails may be admitted into evidence under the business records exception, it would be insufficient to survive a hearsay challenge simply to say that since a business keeps and receives e-mails, then ergo all those e-mails are business records . . . ." *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013); *accord Morisseau v. DLA Piper*, 532 F. Supp. 2d 595, 621 n.163 (S.D.N.Y. 2008). The same logic applies to text messages.

A lay witness may offer opinion testimony interpreting a communication where the opinion is "rationally based on the witness's personal perception." Guide to N.Y. Evid. Rule 7.03(1)(a). The rational-basis requirement reflects "the familiar requirement of first-hand knowledge or observation." *United States v. Flores*, 945 F.3d 687, 706 (2d Cir. 2019).

II. Discussion

The emails and text messages marked as People's Exhibits 163 – 179A contain a second layer of hearsay that DANY must address before additional communications from these categories of Exhibits are shown to the jury. *See, e.g., People v. Zambrano*, 114 A.D.2d 872, 872 (2d Dep't 1985) (describing "burden of making a specific offer of proof as to the admissibility of the testimony after the People's objection thereto"). In addition, DANY should not be permitted to

elicit lay opinions regarding the meaning of communications from witnesses who were not a party to the communications. Set forth below are examples of these issues from the thumb drive of Exhibits that DANY offered today. *See* Tr. 1050.

People's Exhibit 163 is an AMI email thread that does not include Mr. Pecker. President Trump does not dispute that the header data for the top message is an AMI business record, but the remainder of the exhibit contains a series of inadmissible out-of-court factual assertions by non-testifying witnesses. For example, the bottom email in the thread is a November 13, 2015 email that purports to describe the details of Sajudin's allegations—notwithstanding the Court's *in limine* ruling that DANY could not "explore the underlying details" relating to allegations by Sajudin and McDougal. 3/18/24 Op. at 4; *see also* Tr. 1063:9-11 (similar objection to testimony regarding Sajudin-related details).

People's Exhibit 170 is a text message from Keith Davidson—who is not an AMI employee and had no business duty to communicate accurately—to Dylan Howard. We concede that the header data associated with the message is an AMI business record, but Davidson's factual assertion in the body of the message is not inadmissible hearsay.

People's Exhibit 171A is a series of text messages between Howard and Gina Rodriguez, who is not an AMI employee and also lacked the relevant business duty. The Exhibit contains a series of factual assertions by Rodriguez that are not themselves business records and are only relevant if offered for their truth. *See, e.g.*, Doc. IDs 000038719-20 (Rodriguez asserting "[s]o we killed the story because I thought he would sue me . . . But stormy Daniels was his mistress").

People's Exhibit 172A is a series of text messages between Howard and [redacted]. Mr. Pecker's foundational testimony relating to texts messages was limited "to the extent that AMI employees' phones are used *for business purposes*" and AMI's ability "to extract *business-related information*." Tr. 1052:17-18 (emphasis added). The Exhibit contains personal communications that are inadmissible hearsay. Mr. Howard was not under a business duty to communicate accurately with [redacted], and no other hearsay exception applies.

Finally, the Court should preclude DANY from eliciting interpretative testimony by Mr. Pecker or other witnesses with respect to communications in which they did not participate. *See, e.g.*, Tr. 1081:15-18 (objection sustained); Tr. 1081:14-15 (DANY asking regarding PX 164, "what did you understand 'Trump non-published story' to be a reference to"). Under Rule 7.03(1)(a), witnesses who did not participate in the communications lack the required rational basis to offer such a lay opinion. *See Flores*, 945 F.3d at 706; *United States v. De Peri*, 778 F.2d 963, 978 (3d Cir. 1985) (affirming admissibility of participant's interpretative opinions where "based upon his direct perception of the event" and "not speculative").

Respectfully Submitted,

/s/ Todd Blanche
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Cc: DANY attorneys of record