

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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

Plaintiff,

vs.

DONALD J. 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,

Defendants.

Index No. 452564/2022
Engoron, J.S.C.

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A
MISTRIAL**

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Donald J. 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 (collectively “Defendants”) submit this Memorandum of Law in Support of Defendants’ Motion for a Mistrial pursuant to CPLR § 4402.

PRELIMINARY STATEMENT

The Constitution guarantees Defendants a fair and impartial trial. Here, in an unprecedented case commanding worldwide interest and attention, it is imperative that nothing compromise that guarantee and thereby undermine public confidence in our legal system. While counsel are subject to a gag order apparently imposed to impede the issues herein presented from becoming public, it is a fundamental precept of American jurisprudence that sunlight is the best disinfectant. Indeed, “[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.” Bridges v. California, 314 U.S. 252, 270-271 (1941). While the Court has restricted public criticism of itself on the issues herein presented in a series of unconstitutional gag orders entered *sua sponte*, the Supreme Court instructs that “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern.” Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

Moreover, there can be no doubt of the public perception of bias in this case. Even commentators who are politically opposed to President Trump have noted the biased nature of the

proceedings and the astonishing departures from ordinary standards of impartiality. *See, e.g.*, Andrew McCarthy, *Elected Dem AG and Judge Cook Up a Fraud Theory in Trump's New York Trial*, Nat'l Review (Nov. 7, 2023), at <https://www.nationalreview.com/2023/11/elected-dem-ag-and-judge-cook-up-a-fraud-theory-in-trumps-new-york-trial/> (“The case against the former president lacks victims, so Tish James and Arthur Engoron are inventing some.... Engoron keeps cutting Trump and his lawyers off by insisting that he has already decided Trump (a) committed fraud, (b) overvalued his assets, and (c) cannot be insulated by the disclaimer in his SFCs (advising counterparties to do their own due diligence in evaluating asset values).”).

This appearance of bias threatens both Defendants' rights and the integrity of the judiciary as an institution. As developed herein, in this case the evidence of apparent and actual bias¹ is tangible and overwhelming. Such evidence, coupled with an unprecedented departure from standard judicial procedure, has tainted these proceedings and a mistrial is warranted. Specifically, the Court's own conduct, coupled with the Principal Law Clerk, Allison Greenfield's (“Principal Law Clerk”) unprecedented role in the trial and extensive, public partisan activities, would cause even a casual observer to question the Court's partiality. Thus, only the grant of a mistrial can salvage what is left of the rule of law.

¹ On argument on Defendants' motion for a directed verdict, specifically the weight that should be accorded to President Trump's testimony, the Court asked the following question: “Can I bring up something not in the record, but a matter of public knowledge? I think the perfect call with Zelensky about the military aid, there might have been code rather than straightforward talk.” Affirmation of Clifford Robert, ¶ 67. Such reference to a purely political trope demonstrates the Court cannot separate his, and his Principal Law Clerk's, political bias from the obligation to be fair and impartial.

BACKGROUND

A. The Court's Extrajudicial Activities Create an Appearance of Impropriety

This Court has contravened the Code of Judicial Conduct (the “Code”) and created the appearance of impropriety through publicly commenting on a proceeding before him.

Affirmation of David Demarest (“Demarest Aff.”) ¶¶ 16. This Court, in his capacity as a Wheatley School alumnus, has publicly posted links in the Wheatley newsletter he maintains to articles disparaging parties and counsel, including Eric Trump, President Trump, Ms. Habba, and Cushman and Wakefield, and covering his own decisions, in derogation of the Code. 22 N.Y.C.R.R. § 100.3(B)(8) (“A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories”); see also Demarest Aff. ¶¶ 16-17.

- In an October 2, 2020, newsletter, this Court included links to articles about Eric Trump being compelled to testify in a subsection entitled “1967- Art Engoron – Articles about Decisions.” See Affirmation of Clifford Robert (“Robert Aff.”) ¶ 6.
- In the December 28, 2020, newsletter, the Court included links to articles about his decision on the Trump Organization’s claims of privilege from, *inter alia*, Bloomberg, the Washington Post, and CNN. Id. ¶ 7.
- In the February 16, 2021, newsletter, this Court included links to articles relating to the trial, characterizing one as a “humorous, irreverent take.” Id. ¶ 8.
- In the November 7, 2021, newsletter, the Court, in a section entitled “1967 – Man in the News,” linked five articles, again from the Washington Post, CNN, and

Bloomberg, about his order in the special proceeding compelling Defendants to turn over certain documents. Id. ¶ 9.

- In the March 14, 2022, newsletter, the Court likewise, in the “Graduate in the News” section, posted links to articles in the New York Times, Washington Post, and Politico regarding his decision in the special proceeding to order Defendants to testify. Id. ¶ 10.
- In the May 8, 2022, newsletter, the Court posted links to New York Times and Newsweek articles regarding his decision to hold President Trump in contempt. Id. ¶ 11.
- In June 2022, the Court again posted a link to an NPR article that President Trump had lost the appeal. Id. ¶ 12.
- On July 3, 2022, the Court similarly linked an article from Business Insider about Cushman & Wakefield and two days later held it in contempt. Id. ¶ 13.
- Finally, on September 11, 2022, just ten days before this lawsuit was filed, the Court posted a link to an Above the Law article criticizing Ms. Habba. Id. ¶ 14.

B. The Court’s Improper “Co-Judging”

This Court has also impermissibly exceeded its discretion in granting his Principal Law Clerk unprecedented status and input into these proceedings and restricted the speech of anyone who seeks to comment on this status, input and/or perceived partisan bias. This Court, has, during the special proceeding, all pre-trial proceedings and since this trial began, allowed his Principal Law Clerk to preside on the bench with him to his right-hand side. Demarest Aff. ¶ 21. This arrangement is depicted in the below photographs published by Getty Images and the Associated Press.



Justice Arthur Engoron presides over the former President Donald Trump's civil fraud trial alongside his principal clerk, Allison Greenfield. Michael M. Santiago/Getty Images



Justice Arthur Engoron presides over Donald Trump's civil fraud trial as his principal law clerk, Allison Greenfield, sits alongside him. | Shannon Stapleton/Pool via AP

As these photographs reflect, the Principal Law Clerk is given unprecedented and inappropriate latitude. Demarest Aff., ¶23. Indeed, before the Court rules on most issues, the Court either pauses to consult with her on the bench or receives from her contemporaneous written notes. Demarest Aff., ¶ 21. While a Justice of the Court no doubt has ample discretion to consult with his or her Law Secretaries, this unprecedented arrangement exceeds the outer limits of such discretion. Demarest Aff., ¶ 23. At a minimum, the appearance of “co-judging” is manifest, and the public (and litigants) may conclude fairly that an unelected staff member has, as is evident from the above images, a direct role in presiding over the trial. Demarest Aff., ¶ 23. This creates an appearance of impropriety contrary to the letter and spirit of the Rules of Judicial Conduct. See id. ¶ 23; see also 22 N.Y.C.R.R. § 100.2 (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities”). Only a judge, not an unelected staff member, may exercise judicial authority under the New York Constitution, and the People of New York declined to elect the Principal Law Clerk when she ran for office. She therefore has no constitutional authority to act as a “co-judge,” and the impropriety of her participation is further magnified by the fact that she has violated a separate canon of ethics by making partisan political contributions in excess of strict limits, *including to organizations actively supporting Attorney General James and opposing President Trump.*

The impact of this untoward level of participation by the Principal Law Clerk cannot be overstated. Indeed, during a candidate forum in connection with her erstwhile campaign for Manhattan Civil Court, the Principal Law Clerk herself framed her role as co-equal, describing her participation in a high-profile real estate case as follows: “*we* were incredibly active in that case” and “*we* tried to stop the two towers.” See <https://youtu.be/3Ug0lo7cYxo?feature=shared&t=2968> at 57:35 - 57:50. During that same

forum, she described her judicial philosophy as driven not by the facts and the law but by political considerations: “[o]ne thing that I think is incredibly important to consider, *what would the people who elected me want me to do* and is there any precedent . . . that would allow me to achieve that outcome.” Id. at 53:51-54:30. This statement is fully contrary to the Rules of Judicial Conduct which mandate that a judge must “be faithful to the law” and “not be swayed by partisan interests.” See Demarest Aff. ¶ 23; see also 22 N.Y.C.R.R. § 100.3(B)(1) (“A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.”).

C. The Gag Orders

Also, as part of her campaign, the Principal Law Clerk created and maintained a “Greenfield4CivilCourt” website, Instagram, and Twitter account. Robert Aff., ¶ 19. In February 2022, while the special proceeding against many of the same defendants was ongoing, she posted on her public “greenfield4civilcourt” Instagram endorsements from the Village Independent Democrats and the Grand Street Democrats. Id. ¶ 20. On February 26, 2022, she made a post purporting to withdraw from the Democratic primary but advised followers to “[k]eep an eye on this space.” Id. ¶ 21. Thereafter, she continued to post on the “greenfield4civilcourt” account. Id. ¶ 22. For example, on April 30, 2022, she posted the picture with Sen. Chuck Schumer² that ultimately was reposted by the @JudicialProtest Twitter account, and, subsequently, President Trump. Id. ¶ 24.

² She captioned the photograph as follows: “[s]o thrilled to attend the Chelsea Reform Democratic Club Founder’s brunch today honoring incredible and fearless lifelong public servants like @senschumer and @repmaloney. Thank you @crdcnyc for a fantastic event!!!!” Id. Upon information and belief, the “greenfield4civilcourt” account is still active but was made private in the days leading up to trial. Id. ¶ 25.

Following a repost of the Schumer picture by President Trump, in what may reasonably be interpreted as an effort to shield the Principal Law Clerk's "co-judging" and partisan political activity from public scrutiny, the Court *sua sponte* entered an unconstitutional gag order prohibiting all parties from "posting, emailing, or speaking publicly" about any members of his staff. NYSCEF Doc. No. 1619. Nonetheless, the Principal Law Clerk's unprecedented role in the proceedings thereafter continued to be the subject of significant on-the-record colloquy.

For example, on October 25, 2023, Mr. Kise described the "considerable tension" caused by her position on the bench and indicated that it is "unusual" for a Principal Law Clerk to sit on the bench. Robert Aff., ¶ 40. Mr. Robert described his experience in New York State, such that he had never seen a situation where "you're literally trying the case to two judges" with "notes constantly being passed," where it "would appear the Court is in consultation with the Principal Law Clerk" with each ruling. Id. ¶ 41. Mr. Robert further described that this Court would "appear to be leaning in one direction and then [will] either receive a note or there will be an eye gesture or a roll of the face and something changes and it is of significant concern to [Defendants]. Id. ¶ 42. Ms. Habba added, "It is incredibly distracting when there are eye rolls and constant whispering at the bench when I'm trying to cross-examine a witness. Id. ¶ 43.

The following day, counsel added, "I think that [President Trump] has a legitimate basis to raise these arguments because he is seeing as he's told me on a regular basis head nods, eye rolls, notes being passed, head shaking, you know, comments on arguments that I'm making." Id. ¶ 44. This Court, notably, had no rejoinder to that statement.

The following week, counsel requested further clarification as to how they could continue to make a record of the Court "accept[ing] a note" or other conduct they believed evinced bias, particularly given news reports of violations of the ethical rules by both this Court and his

Principal Law Clerk. Id. ¶ 46. Counsel also noted that since comments were made on the record about the constant note-passing, the closed-circuit camera angle had been changed, which made it more difficult for the public to see any note-passing.³ Id. ¶ 47.

After further colloquy, this Court concluded that he would continue to “consult” with his Principal Law Clerk “for the trial”—in fact, “every week or every day”—and to consider the record preserved and closed as the Court has “an unfettered, absolute right to consult with my law clerks anytime, anyplace about any matter. Id. ¶ 48. Ultimately, the Court issued a second gag order prohibiting even *counsel* from “making any public statements, in or out of court, that refer to *any* confidential communications, in any form, between my staff and me.” NYSCEF Doc. No. 1631 (emphasis in original).

The following day, counsel sought clarification asking whether moving for a mistrial would implicate the gag order, to which the Court responded, using counsel’s given name rather than his surname, “[d]on’t file that motion, Chris.” Robert Aff. ¶ 50. Then, after yet another “confidential communication” with the Principal Law Clerk the Court allowed Defendants to make a motion without violating the gag order but directed that any such motion would “ha[ve] to be in writing.” Id. ¶ 51

Imposing limits on a party and/or counsel’s ability to address in court the issues herein presented is simply not justifiable and certainly not consistent with the avoidance of an appearance of impartiality. The right to a fair trial is sacrosanct. Thus, anything that at all infringes, potentially or otherwise, on such a right must and should be questioned in an open and public forum.

³ The Court admitted knowing the camera angle had been changed but feigned ignorance as to the reason: “[a]s for the camera being moved, I was vaguely aware that Rob, the tech person, was switching the angle of the camera. Never occurred to me that it could have anything to do with what we’re discussing today or why it was.” Robert Aff. ¶ 47.

D. The Principal Law Clerk's Partisan Activities Are Imputed to the Court

The appearance of impropriety created by this Court's Principal Law Clerk's "co-judging," and this Court's repeated attempts to silence discussion thereof, is further exacerbated by her demonstrated partisanship, which is imputed to this Court under the Code. 22 N.Y.C.R.R. § 100.5(C).

First, this Court has violated the Code by permitting his Principal Law Clerk to contribute to Democrat causes in excess of the permitted amounts and engage in impermissible partisan activity. Demarest Aff. ¶ 29; see also 22 N.Y.C.R.R. § 100.5(C)(2) ("A judge shall prohibit members of the judge's staff" from "contributing, directly or indirectly, money or other valuable consideration in amounts exceeding \$500 in the aggregate during any calendar year."). As set forth below, *during the pendency of the special proceeding leading up to this case and then after this case was filed by the Attorney General*, she contributed over \$3,000 to Democrat candidates and organizations in 2022 and over \$900 in 2023. Robert Aff., ¶ 17. The official New York State website publicly chronicles these contributions as follows:

Expand	Contribution Date	Amount	Contributor Name	Detail Original Name	Contributor Address	Transaction Type	Contributor Type	Transfer Type	Recipient	Disclosure Report	Committee Type
+	05/02/2022	\$200.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Four Freedoms Democratic Club - ID# 2673	2022 State/Local 32-Day Pre-Primary	Authorized Multi-Candidate Committee
+	04/05/2022	\$175.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Chelsea Reform Democratic Club Crdc - ID# 11340	2022 State/Local July Periodic	Authorized Multi-Candidate Committee
+	06/15/2022	\$350.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		West Side Democrats, Inc - ID# 14178	2022 State/Local July Periodic	Authorized Multi-Candidate Committee
+	09/08/2022	\$50.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		New Yorkers For Alex Bores - ID# 9788	2022 State/Local 32-Day Pre-General	Authorized Single Candidate Committee
+	10/26/2022	\$50.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Four Freedoms Democratic Club - ID# 2673	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	07/25/2022	\$210.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Chelsea Reform Democratic Club Crdc - ID# 11340	2023 State/Local January Periodic	Authorized Multi-Candidate Committee

+	09/12/2022	\$100.00	Allison Greenfield		United States	A - Monetary Contributions Received From Ind. & Part.	Individual		Grand Street Democrats - ID# 20442	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	12/02/2022	\$125.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Hell's Kitchen Democrats - ID# 1032	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	11/21/2022	\$250.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Downtown Independent Democrats DID - ID# 18654	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	11/10/2022	\$250.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Downtown Independent Democrats DID - ID# 18654	2023 State/Local January Periodic	Authorized Multi-Candidate Committee
+	09/06/2022	\$250.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Village Independent Democrats - ID# 7276	2023 State/Local 32-Day Pre-Primary	Authorized Multi-Candidate Committee
+	12/27/2022	\$500.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Jim Owles Liberal Democratic Club - ID# 10404	2023 State/Local January Periodic	Political Action Committee

	06/01/2022	\$250.00	Allison Greenfield	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Jim Owles Liberal Democratic Club - ID# 10404	2022 State/Local 11-Day Pre-Primary	Political Action Committee
	06/01/2022	\$250.00	Allison Greenfield	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Jim Owles Liberal Democratic Club - ID# 10404	2022 State/Local 11-Day Pre-Primary	Political Action Committee
	03/10/2022	\$100.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Sivin for New York - ID# 186373	2022 State/Local 32-Day Pre-Primary	Authorized Single Candidate Committee
	05/12/2022	\$125.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Sivin for New York - ID# 186373	2022 State/Local 32-Day Pre-Primary	Authorized Single Candidate Committee
	03/03/2022	\$50.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		Sivin for New York - ID# 186373	2022 State/Local 32-Day Pre-Primary	Authorized Single Candidate Committee
	02/13/2022	\$25.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		New York County Democratic Committee - ID# 6732	2022 State/Local 32-Day Pre-Primary	Constituted County House Keeping Committee
	07/17/2022	\$50.00	ALLISON GREENFIELD	[REDACTED]	A - Monetary Contributions Received From Ind. & Part.	Individual		New York County Democratic Committee - ID# 6732	2022 State/Local 32-Day Pre-General	Constituted County House Keeping Committee

As noted, the 2023 partisan political contributions were made *while this action was pending!*⁴

Expand	Contribution Date	Amount	Contributor Name	Detail Original Name	Contributor Address	Transaction Type	Contributor Type	Transfer Type	Recipient	Disclosure Report	Committee Type	Filer type
+	04/06/2023	\$100.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Coda District Leaders - ID# 5385	2023 State/Local 32-Day Pre-Primary	Authorized Multi-Candidate Committee	County
+	05/17/2023	\$100.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Coda District Leaders - ID# 5385	2023 State/Local 32-Day Pre-Primary	Authorized Multi-Candidate Committee	County
+	02/06/2023	\$20.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Friends Of Kim - ID# 16541	2023 State/Local July Periodic	Authorized Single Candidate Committee	County
+	05/30/2023	\$250.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Jim Owles Liberal Democratic Club - ID# 10404	2023 State/Local 11-Day Pre-Primary	Political Action Committee	State
+	01/26/2023	\$56.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		Harvey For New York - ID# 308705	2023 State/Local July Periodic	Public Campaign Finance Committee	State
+	07/21/2023	\$75.00	Allison Greenfield			A - Monetary Contributions Received From Ind. & Part.	Individual		New York County Democratic Committee - ID# 6732	2023 State/Local 32-Day Pre-General	Constituted County House Keeping Committee	County
+	03/23/2023	\$400.00	ALLISON GREENFIELD			A - Monetary Contributions Received From Ind. & Part.	Individual		Four Freedoms Democratic Club - ID# 2673	2023 State/Local July Periodic	Authorized Multi-Candidate Committee	State

More troubling than even the fact of these contributions exceeding lawful limits, many (if not all) of these organizations *actively support the Attorney General!* For example, the president of the Grand Street Democrats published an op-ed in October 2020 proclaiming that “Letitia James Serves as Last Line of Defense Against Trump Administration.” See <https://www.gothamgazette.com/130-opinion/9811-letitia-james-last-line-defense-against-trump-administration>. The Principal Law Clerk contributed to the Grand Street Democrats, which

⁴ Complete copies of the contributions spreadsheet are available online at <https://publicreporting.elections.ny.gov/Contributions/Contributions>.

endorsed the Attorney General in 2022 openly supported her fight against President Trump, on September 12, 2022—*less than two weeks before the Attorney General filed this action!*



See <https://twitter.com/grandstreetdems/status/1348994426580979713>. Moreover, on October 27, 2022, *while this case was pending*, the Principal Law Clerk attended a Grand Street Democrats event, where speakers, *inter alia*, openly advocated for Joe Biden. See <https://www.youtube.com/watch?v=DMCEeSLugHE> at 6:40-7:15. Speakers also commented, to significant applause, on the fight against “development and the profits of big real estate” and the “consequences of the former President,” *i.e.*, President Trump. See <https://youtu.be/DMCEeSLugHE?feature=shared&t=609> at 12:14-12:21 and 12:24-12:31.

All these contributions and partisan activities violate the Code and are attributable to the Court. Indeed, even as a candidate for judicial office, Ms. Greenfield was bound by Section 100.5 of the Code, which precludes a “candidate for public election to judicial office” from, *inter alia*, “**engaging in [] partisan political activity**,” “publicly endorsing . . . another candidate for public office,” and “**attending political gatherings**.” At base, “a judge or a non-judge who is a candidate for public election to judicial office . . . shall maintain the dignity appropriate to judicial office.” 22 N.Y.C.R.R. § 100.5(A)(4). Yet here, the Principal Law Clerk, who sits on the bench next to the presiding judge, co-judging and consulting with him on a real-

time basis about nearly every ruling, has engaged in prohibited partisan political activity with respect to *the parties before the Court, while their case is pending before the Court.*

E. The Court's Demonstrable Bias

The foregoing partisan conduct from both this Court and his Principal Law Clerk has resulted in biased rulings throughout these proceedings. First, the Court refused to transfer this complex case to the Commercial Division, where it unquestionably belongs. Robert Aff., ¶ 54. Shortly thereafter, on November 22, 2022, before the Attorney General even opposed Defendants' motion to dismiss or any discovery had been exchanged, this Court determined the trial would begin on October 2, 2023, the date suggested by the Attorney General in her proposed preliminary conference order.⁵ NYSCEF Doc. Nos. 228-229. The Court ignored both the presumptive 15-month standard in complex commercial cases and the burden imposed on the defense to review and assimilate millions of pages of documentary evidence and evaluate dozens of witnesses. Robert Aff., ¶ 56. This compressed schedule also provided a massive advantage to the Attorney General, whose staff had already conducted an exhaustive, three-year investigation in preparation for filing the case and taking it to trial. Robert Aff., ¶ 57. Thereafter, despite a letter request and a motion by Defendants, this Court refused to adjourn the trial, stating it did not "see a need for extensive disclosure." NYSCEF Doc. No. 528, 558.⁶

On January 6, 2023, this Court denied Defendants' motions to dismiss in their entirety. NYSCEF Doc. No. 453. On June 27, 2023, the First Department, on appeal of this Court's decision, modified the underlying decision and order, dismissing certain claims as time-barred

⁵ This Court entered the Attorney General's proposed preliminary conference order essentially as written. NYSCEF Doc. Nos. 228-229.

⁶ The third-party discovery received by Defendants in December 2022 consisted of several terabytes of data containing 700,000 documents, which, after processing and de-duplicating, would require more than 11,000 hours to review. Robert Aff., ¶ 57.

and directing this Court to determine the scope of the tolling agreement. NYSCEF Doc. No. 641. On September 5, 2023, with an impending trial date and no action by this Court to comply with the First Department mandate, Defendants moved for a brief stay of trial until after this Court ruled on the motions for summary judgment. Defendants submitted a fifteen-page memorandum of law, affirmations in support, and three exhibits. NYSCEF Doc. Nos. 1267-1272. Less than twenty-four hours later, this Court uploaded an unsigned order to show cause with the notation “[d]ecline to sign; Defendants’ arguments are completely without merit.” NYSCEF Doc. No. 1275.

Defendants were then forced to commence an Article 78 proceeding to compel this Court to comply with the First Department’s directives. Case No. 2023-04580, NYSCEF Doc. Nos. 2-4. This Court finally issued a decision on the summary judgment motions on September 26, 2023, a mere five days before trial was scheduled to begin. NYSCEF Doc. No. 1531. That thirty-five-page decision denied Defendants’ motion in its entirety and granted the Attorney General’s motion for summary judgment.⁷ The Court also granted the Attorney General’s motion for sanctions against Defendants’ counsel. *Id.* This left the Defendants in the unprecedented position of discovering what claims and issues would actually be tried just a few days before beginning a months-long trial with dozens of witnesses.

The trial began as ordered on October 2, 2023. On October 3, 2023, the Court, *sua sponte*, imposed its first gag order based on President Trump’s reposting of the Principal Law Clerk’s Schumer photograph:

Consider this statement *a gag order forbidding all parties from posting, emailing, or speaking publicly about any members of my staff.* Any failure to

⁷ The Court imposed sanctions on Defendants’ counsel for making legal arguments to preserve same for appeal. *Id.*

abide by this directive will result in serious sanctions. NYSCEF Doc. No. 1619 (emphasis added).⁸

In contravention of the Judiciary Law and Rules of the First Department, the Court subsequently twice sanctioned President Trump for violation of that gag order. On October 20, 2023, this Court *sua sponte* issued another order finding that President Trump violated the gag order because the original post was inadvertently still archived on the Trump campaign website. NYSCEF Doc. No. 1584. This Court proceeded to state that “this Court is way beyond the ‘warning’ stage” and fined him \$5,000. *Id.*

On October 25, 2023, during Mr. Cohen’s testimony, this Court *sua sponte* raised President Trump’s statement to the press made moments before in the hallway outside the courtroom:

It was just brought to my attention that the Associated Press reported, I wasn’t there, this is the Associated Press, that Mr. Donald J. Trump just stated the following to the press outside the courtroom:

“This judge is a very partisan judge with a person who is very partisan sitting alongside of him, perhaps even much more partisan than he is.”

Now, it’s very easy for the public, for anyone to know who that person is.

Robert Aff. ¶ 33. This Court simply assumed President Trump was referring to the Principal Law Clerk. NYSCEF Doc. No. 1598. While President Trump testified, under oath, he had been referring to Mr. Cohen,⁹ this Court nonetheless concluded, *relying on its own testimony* describing the layout of the bench and witness box, that:

As the trier of fact, I find that the witness is not credible; that he was referring to my law clerk, the principal law clerk, who is sitting much closer to me, who doesn’t have a barrier, whom I

⁸ President Trump’s caption to the post was as follows: “Schumer’s girlfriend, Alison [sic] R. Greenfield, is running this case against me. How disgraceful! This case should be dismissed immediately.” Robert Aff., ¶ 25.

⁹ President Trump also testified that he believed the Principal Law Clerk was “very biased against us” and that he had “made that clear.” Robert Aff. ¶ 36.

believe has been accused by the defendant of being partisan or Democrat or partisan Democrat. I hereby fine you \$10,000, which is on the low side, to be paid within 30 days to the Lawyer's Fund for Client Protection. Robert Aff. ¶ 37.

The Court thereafter issued the second gag order prohibiting even *counsel* from commenting on his Principal Law Clerk's public conduct in the courtroom. NYSCEF Doc. No. 1631.

Finally, this Court's evidentiary rulings throughout the trial have been both legally misguided and biased in favor of the Attorney General. For one, this Court has overruled, as a matter of course, any objection to the Attorney General's introduction of time-barred evidence under the guise it bears on potential injunctive relief, despite being clearly rejected by the First Department decision. Robert Aff. ¶ 62. The First Department unequivocally dismissed as time-barred claims that accrued prior to July 2014 for defendants subject to the tolling agreement and claims that accrued prior to February 2016 for the other defendants. NYSCEF Doc. No. 641. The First Department further directed this trial be circumscribed to the timely claims that accrued, *i.e.*, the loans closed, after 2014. Nonetheless, the Court has overruled summarily Defendants' continuing objections to documents indisputably predating that period, as well as testimony on events prior to 2014. Robert Aff. ¶ 65. This Court has also permitted the introduction of hearsay testimony under inapplicable exceptions and, in some circumstances, without identifying *which* Defendant(s) it might be admissible against. Robert Aff. ¶ 63.

Additionally, this Court denied Defendants' motion *in limine* to preclude expert testimony explicitly keyed to filling in gaps in the Attorney General's *prima facie* case with testimony that the Attorney General failed to elicit from fact witnesses. NYSCEF Doc. Nos. 1623-1624. The Attorney General never elicited any testimony from any bank representative as to what, if anything, the respective banks would have done differently in approving the subject

loans. NYSCEF Doc. No. 1623. Instead, this Court permitted the Attorney General to backfill the hole in her *prima facie* case with the testimony of a purported expert. Id.

ARGUMENT

A MISTRIAL IS WARRANTED DUE TO DEMONSTRABLE BIAS

A. The Legal Standard For a Mistrial

CPLR § 4402 provides that “[a]t any time during the trial, the court, on motion of any party, may order a continuance or a new trial in the interest of justice on such terms as may be just.” The “decision to grant or deny a mistrial in the interest of justice pursuant to CPLR 4402 is within the sound discretion of the court, and is to be made on a case-by-case basis.” Johnson-Hendy v. Mosu, 201 A.D.3d 896 (2d Dep’t 2022). The denial of such a motion “may, given the facts of a particular case, constitute reversible error where it appears that the motion should have been granted to prevent a substantial possibility of injustice.” Id. “A fair trial in a fair tribunal is a basic requirement of due process.” People v. Towns, 33 N.Y.3d 326, 328 (2019), quoting In re Murchison, 349 U.S. 133 (1955). Moreover, “[n]ot only must judges actually be neutral, they must appear so as well.” Towns, 33 N.Y.3d at 331. Where a trial court “abandon[s] the role of neutral arbiter and assume[s] the function of an interested party,” it “creat[es] a specter of bias that requires reversal.” Id. at 328.

The code of judicial conduct underscores fully the importance of these responsibilities. See 22 NYCRR § 100.2(A) (“[A] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); 22 NYCRR § 100.3(B)(4) (“A judge shall perform judicial duties without bias or prejudice against or in favor of any person.”). The Code further provides that a “judge shall prohibit members of the judge’s staff who are the judge’s personal appointees from . . .

contributing, directly or indirectly, money or other valuable consideration in amounts exceeding \$500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions.” 22 N.Y.C.R.R. § 100.5(C)(2); see also Judicial Ethics Opinions 07-11 (2007), 10-76 (2010), 97-103 (2010), available at: <https://ethicssearch.nycourts.gov/>. Finally, the Code provides that “[a] judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories.” 22 N.Y.C.R.R. § 100.3(B)(8).

B. The Court’s Ample Bias Warrants a Mistrial

1. This Court Has Violated the Code Both Directly and By Imputation

First, as detailed above, the Court’s own public comments in the Wheatley newsletter are beyond the pale. The Court is indisputably bound by the Code, which precludes comment on a pending or impending case. 22 N.Y.C.R.R. § 100.3(B)(8) (“A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories.”); see also 22 N.Y.C.R.R. § 100.4(A) (“A judge shall conduct all of the judge’s extra-judicial activities so that they do not . . . cast reasonable doubt on the judge’s capacity to act impartially as a judge.”) Regardless of the venue, and the fact that the links were often posted without comment¹⁰, this Court’s repeated publicizing of its own rulings—and, worse, previewing forthcoming rulings—gives an appearance of impropriety in contravention of the Code. Id.

This Court has also violated the Code by permitting his Principal Law Clerk to make political donations in excess of the permitted amount. See 22 N.Y.C.R.R. § 100.5. This conduct is directly imputed to the Court under the Code. See Demarest Aff. ¶29. Additionally, the

¹⁰ The Court’s sanction of President Trump makes clear it understands the import of reposting.

Principal Law Clerk's position as a *de facto* co-judge violates the Code. As noted, this unprecedented arrangement exceeds the discretion of the Court and creates the appearance, if not the fact, of a co-judge presiding over the trial. Demarest Aff. ¶ 23. Indeed, having the Principal Law Clerk sitting on the bench leads inexorably to the conclusion she is acting in accordance with her overtly public and partisan views to essentially implement what "the [political] people who [support] me want me to do." The notion she somehow provides impartial input is, based on her own words and conduct, untenable. This creates an appearance of impropriety which violates the Code. See id. ¶ 23, citing 22 N.Y.C.R.R. § 100.2 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities"). Indeed, "Court employees shall avoid impropriety and the appearance of impropriety in all their activities" and "shall conduct their outside activities in a manner that does not conflict with their employment duties." 22 N.Y.C.R.R. § 50.1.

The Principal Law Clerk's extensive partisan activities during the pendency of the special proceeding and this action violate the Code.¹¹ As set forth in detail above, public postings with prominent Democrats, contributions to Democrat causes in excess of the amount permitted under the Code, and support for, *inter alia*, the Grand Street Democrats and attendance at and participation in highly partisan political activities both violates the Code and raises serious concerns regarding bias and impartiality, especially given her active role "co-judging" this trial.¹² All of this conduct, including supporting political groups vehemently opposed to President

¹¹ The fact the Principal Law Clerk was campaigning for judicial office while engaging in certain of the conduct does not exculpate her or this Court, as ***there is no exception to the stated maximum contribution limit or other relevant Rules for candidates.*** Demarest Aff. ¶ 30; see also § 100.5(A)(4) ("[A] judge or a non-judge who is a candidate for public election to judicial office . . . shall maintain the dignity appropriate to judicial office.")

¹² She has also engaged with and financially supported numerous other partisan political organizations, including (1) the Manhattan Democrats, whose County Leader, Keith Wright, has spoken out against President Trump and in favor of Alvin Bragg's indictment, (2) the Village Independent Democrats, who endorsed the Attorney General and campaigned actively against President Trump, and (3) the Four Freedoms Democratic Club, which has likewise taken anti-Trump positions. Robert Aff., ¶ 18.

Trump, was singularly partisan and, thus, in violation of the Code. Demarest Aff. ¶ 29. Simply put, the Court must “be faithful to the law” and “not be swayed by partisan interests.” 22 N.Y.C.R.R. § 100.3(B)(1).

In sum, there is simply no room at the bench for such open and obvious indicia of bias. Indeed, left unchecked, the introduction of such demonstrable pro-Attorney General and anti-Trump/big real estate bias into a case of worldwide interest involving the front-runner for the Presidency of the United States impugns the integrity of the entire system.

2. The Gag Orders and Enforcement Thereof Evince Further Bias

The gag orders and the enforcement thereof reveal the Court has christened itself *camera stellata*: judge, jury, and executioner, proceeding *sua sponte* to act against President Trump in violation of the Constitution, the Judiciary Law, and First Department rules. This Star Chamber approach is particularly indefensible when the gag orders *actually shield the Court itself from public criticism for perceived bias*—one of the most fundamental rights under the First Amendment. *See Landmark Commc'ns*, 435 U.S. at 839. This Court’s efforts to silence counsel from objecting to and creating a record of what anyone could observe publicly taking place in the courtroom during the trial thus plainly augment the appearance of impropriety. Demarest Aff., ¶ 12.

First, the October 20, 2023, sanction was raised *sua sponte* by this Court upon its own independent, *ex parte* investigation, in violation of the Judiciary Law and First Department rules. A Court is permitted to summarily punish contempt, *i.e.*, in the absence of a motion on notice or order to show cause, only “[w]here the offense is committed in the immediate view and presence of the Court.” Judiciary Law § 755; see also Judiciary Law § 751. The continued existence of an online post, inadvertent or otherwise, on President Trump’s website is indisputably outside the

view and presence of this Court.¹³ Setting aside the procedural infirmities of punishing President Trump in contravention of principles of fundamental fairness and due process, and the plain language of Judiciary Law, this Court has made clear it would like nothing more than to manufacture reasons to sanction the frontrunner for the 2024 Presidential election because he disagrees with him about the existence of bias in these proceedings.

Second, the October 26, 2023, sanction was again raised *sua sponte* after the Court learned of a remark President Trump made to the Associated Press during Mr. Cohen's testimony that this Court is "very partisan [] with a person who is very partisan sitting alongside of him." NYSCEF Doc. No. 1598. That remark was also made outside of this Court's presence but nonetheless punished summarily in contravention of Judiciary Law §§ 751, 755.¹⁴ Put simply, this Court had no authority under the Judiciary Law or any other law to summon President Trump to the stand for spontaneous questioning. Worse even, this Court summarily deemed President Trump's testimony "not credible." Robert Aff. ¶ 37.¹⁵

A trial judge cannot serve "in the roles of complainant, indicter, prosecutor and Judge, a situation at odds with the notion of fundamental fairness." People v. Alomar, 93 N.Y.2d 239, 245 (1999), citing In re Murchison, 349 U.S. 133, 137 (1955). Yet here, this Court has served as (1) complainant, in *sua sponte* raising the issue of the statement to the Associated Press, (2) indicter,

¹³ To the extent that the order consisted of vituperative criticism of his Principal Law Clerk and this Court's testimony was necessary to the adjudication thereof, this Court should have been disqualified from "presiding at [any] plenary hearing or trial." 22 N.Y.C.R.R. § 604.2(a)(1).

¹⁴ This sanction was plainly predicated on the Court's own record testimony on the orientation of the bench and the witness box and consisted of vituperative criticism about this Court and his Principal Law Clerk, such that this Court was disqualified from conducting the examination of President Trump or presiding over the proceedings at all. 22 N.Y.C.R.R. § 604.2(a)(1).

¹⁵ In the written decision characterizing President Trump's testimony as "hollow and untrue," this Court relied on its interpretation of the Oxford English Dictionary definition of "alongside," President Trump's "past public statements" about Mr. Cohen, and that I "mirror[ed] the language [President Trump] used in public statements to the press on October 2, wherein he inappropriately and unquestionably spoke" about his Principal Law Clerk. NYSCEF Doc. No. 1598.

in calling President Trump to the stand to give testimony, (3) prosecutor, in questioning President Trump on the stand, and (4) judge, in deeming President Trump not credible and issuing the decision sanctioning him. Such a conflation of roles is plainly improper under New York law and in derogation of deeply rooted principles of due process and fundamental fairness. Indeed, “[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused of his investigations.” Murchison, 349 U.S. at 137. The Court here effectively “assumed the advocacy role traditionally reserved for counsel and ventured from its own role as a neutral arbiter stationed above the clamor of counsel or the partisan pursuit of procedural or substantive advantage.” People v. Towns, 33 N.Y.3d 326, 328 (2019). Worse even, it did so to prevent public comment on his Principal Law Clerk and her demonstrated, and public, partisan activity.

Even if President Trump had referred to the Principal Law Clerk - which he did not - the veracity and propriety of the conclusion that she is a partisan has only been bolstered since the statement was made. Having made credibility findings of testimony the Court compelled in violation of the rules, all the while presiding over a bench trial, the Court cannot un-ring the bell of its own demonstrated bias. This entire episode establishes fully the Court has already determined President Trump is incredible based on nothing more than the Court’s own surmise. To proceed with a bench trial under these circumstances would be the apogee of bias.

Third, on November 3, 2023, the Court impermissibly extended its gag order to counsel for seeking to preserve for the appellate record their well-founded objections. This unconstitutional order interferes with counsel’s ability to zealously advocate for their clients and was entered after—and arguably, because of—comments by counsel on the record relative to the Principal Law Clerk’s “co-judging” and potential bias. In the written order, this Court again

specifically named “defendants’ principal attorneys” and accused them of making “repeated, inappropriate remarks” about his Principal Law Clerk “falsely accusing her of bias against them and of improperly influencing the ongoing bench trial.” NYSCEF Doc. No. 1631. As the record herein reflects, the record observations of counsel were both accurate and well-founded.

Nonetheless, the gag order curtails Defendants’ rights by precluding their counsel from abiding by their ethical obligations to create a thorough record on appeal. *Id.* Given the Principal Law Clerk’s obvious and demonstrable partisan activities, and her *de facto* role as “co-judge,” the notion of impeding counsel’s ability to establish a record and/or seek appropriate relief creates an unquestionable appearance of bias and impropriety inconsistent with both the Code and the constitutional guarantee of a fair trial.

3. Other Rulings

As noted above, this Court’s evidentiary and *in limine* rulings at trial demonstrate bias. The reason for these rulings appears plain: the Court intends to, in contravention of the First Department’s decision, consider “evidence,” rather than “claims,” accruing prior to 2014 in order to grant overbroad and unauthorized injunctive and monetary relief. The Court’s rejoinder throughout the trial—effectively that it is uniquely capable of separating the wheat from the chaff—neither vitiates the harm now nor the inevitable harm that will result from an adverse judgment. The Court’s desire to “get the whole picture” and not “blind” itself does not justify admitting time-barred, hearsay, or improper expert evidence. Robert Aff. ¶ 65.

In sum, this Court’s bias is exemplified well by remarks made during President Trump’s own November 6, 2023, testimony. Specifically, this Court stated it is “not here to hear what [President Trump] has to say.” Robert Aff. ¶ 59. The Court expounded as follows: “[w]ell, Mr.

Kise, I think you said several times we should hear what he did, what the witness has to say. No, I am not here, and these people are not here, and the Attorney General is not here to hear what [President Trump] has to say.” Id. ¶ 60.

The role of the Court, particularly in a bench trial, is to carefully listen to and consider the testimony of all witnesses without bias or predilection. The foregoing statements, especially coupled with the Court's prior, and inappropriate, finding President Trump is not credible, certainly create an appearance of bias. These record facts also lead, fairly, to the conclusion the Court has predetermined the outcome of this proceeding and is merely going through the motions before it ultimately doles out punishment.

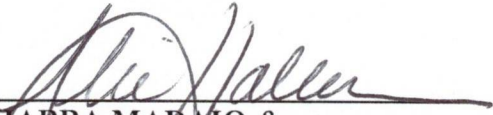
On a fundamental level, the way to dispel the appearance of impropriety is not to double down by precluding comment on it or by simply ignoring its manifest existence. At this point, the taint of these proceedings is both obvious and irreversible. Worse even, the Court has abrogated its constitutional responsibility to ensure each Defendant, including President Trump, receives a fair trial free from even the appearance of impropriety and impartiality. Therefore, given the demonstrable partisan bias present on the bench at trial, the only way to maintain public confidence in a truly independent and impartial judiciary and the rule of law is to bring these proceedings to an immediate halt.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant a mistrial and grant any other such and further relief it may think proper.

Dated: New York, New York
November 15, 2023

Respectfully submitted,


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