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March 21, 2024

VIA NYSCEF
The Honorable Susanna Molina Rojas
Clerk of the Court
Supreme Court of New York
Appellate Division, First Department
27 Madison Avenue
New York, NY 10010

Re: *People v. Donal J. Trump, et al.*, Case Nos. 2024-01134, 2024-01135

Dear Ms. Rojas:

On March 20, 2024, the People of the State of New York, by Attorney General Letitia James (the "Attorney General"), filed a letter requesting leave to file a proposed Affirmation in Surreply to Appellants' Motion for a Stay Pending Appeal Pursuant to CPLR 5519(c). Contrary to this Court's well-known ordinary practice, the Attorney General attached the proposed Affirmation in Surreply ("Surreply") to that letter, resulting in widespread media coverage of her arguments. The seasoned appellate attorneys in the Solicitor General's Office were undoubtedly aware of the standard requirements and practice—and the ensuing media coverage of the improperly filed Surreply in this high-profile case was eminently predictable. The Court may draw its own conclusions about the propriety of this maneuver. In doing so, the Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

The same day, this Court directed the Attorney General to "remove the proposed sur-reply and only return the letter request for sur-reply providing a general explanation for why a sur-reply should be permitted without argument." Later that evening, the Attorney General filed a revised, one-paragraph letter requesting leave to file the proposed Surreply.

This request should be denied. The Attorney General's incredibly short letter provides only a cursory request and no specific rationale for filing a surreply. Moreover, even if the Court were to consider the improperly filed Surreply—which it should not do—the Court should reject it.

First, the only argument in the Attorney General's later-filed letter is that the "proposed surreply would address the new factual allegations and new legal arguments raised for the first time in the reply Affirmations of Gary Giulietti and Alan Garten and the reply memorandum of law in support of defendants' stay motion." March 20, 2024 Letter, at 1. That argument is incorrect

and meritless. Defendants' reply Affirmations respond directly to arguments made in the Attorney General's response brief. In her Opposing Brief, the Attorney General argued that Defendants supposedly "fail[ed] to provide information about what steps (if any) they have taken to secure an undertaking." Opp. Brief 18. In reply, Defendants submitted the Affirmations of Mr. Giulietti and Mr. Garten detailing the extensive steps taken to attempt to secure an undertaking, and further explaining that those steps were still ongoing when the stay motion was filed February 28, 2024. Reply Brief, at 8-9.

Thus, the reply Affirmations are directly responsive to the Attorney General's argument that Defendants "fail[ed] to provide information about what steps … they have taken to secure an undertaking," Opp. Brief 18. This is a textbook example of the *proper* use of reply affirmations. *See, e.g., Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562 (1st Dep't 1992) ("[T]he function of a reply affidavit is to address arguments made in opposition to the position taken by the movant."); *S.E.C. v. Symbol Techs., Inc.*, No. 04-cv-2276, 2010 WL 744359, at *6 (E.D.N.Y. Feb. 25, 2010) (permitting party to raise new evidence regarding the merits of case in reply, because that evidence was responsive to the opposing party's opposition).

In the improperly submitted Surreply, the Attorney General argues that "defendants here had no reason to wait for their reply to raise their allegations and arguments about the difficulty of obtaining a bond." Affirmation of Dennis Fan ("Fan Aff."), ¶ 3. However, as Defendants made clear in their Reply Brief, their diligent efforts to obtain a bond were still ongoing when they filed their stay motion. Reply Brief, at 8. In fact, critical information discussed in the reply Affirmations became available "within the past week" before they were filed. Garten Aff. ¶ 8. Moreover, the Attorney General argued in her Opposition Brief that Defendants' claims of impossibility should be disregarded *precisely because* the information was then incomplete. Opp. Brief, 18. In other words, in the Attorney General's view, the opening brief arguments were too early, and the reply brief arguments were too late. The Attorney General is inartfully attempting a losing argument of "heads I win, tails you lose." *Miller v. Equifax Info. Servs.*, LLC, 508 F. Supp. 3d 1166, 1169 (N.D. Fla. 2020).

Further, "an alternative reason to reject the surreply" is that the "new argument[s] in the surreply" are "meritless." *Chung v. Lamb*, 73 F.4th 824, 830 (10th Cir. 2023); *see also, e.g., SEC v. Xia*, No. 21-CV-5350 (PKC) (RER), 2022 WL 2784871, at *2 (E.D.N.Y. July 15, 2022). For example, in a baseless personal attack,[1] the proposed Surreply argues that Mr. Giulietti and Mr. Garten are supposedly "unreliable" witnesses. Fan Aff. ¶¶ 4-5. But the Attorney General never disputes the veracity of *any* specific claim in Mr. Giulietti's and Mr. Garten's Affirmations and

[1] The Attorney General inappropriately and without basis accuses Mr. Garten of being "personally involved in … fraudulent and illegal conduct." Fan Aff. ¶ 5 (citing Judgment, at 31, 39-40, 61). The cited pages of the Court's judgment contain no such finding, the trial record includes no evidence of any fraudulent or illegal conduct by Mr. Garten, and the conduct that the Attorney General accuses Mr. Garten being "involved in" was not in any way fraudulent or illegal.

provides no reason to doubt any of their assertions. The Attorney General does not dispute, for example, that (1) Defendants have approached 30 sureties through four separate brokers without success, Garten Aff. ¶ 5; (2) Defendants' efforts to obtain a bond have been unsuccessful due to "insurmountable difficulties," *id.* ¶ 4; (3) very few sureties will underwrite a bond over $100 million, Giulietti Aff. ¶ 12; (4) "none of these sureties will accept hard assets such as real estate as collateral," *id.* ¶ 13; (5) "an irrevocable letter of credit [contrary to the Attorney General's incorrect and baseless statements] … would still typically have to be fully backed by cash or cash equivalents," *id.* ¶ 15; (6) "[i]n the surety world … an appeal bond of $464 million is commercially unattainable for a privately owned company," *id.* ¶ 17; (7) "most sureties … require collateral of approximately 120% of the amount of the judgment," which in this case would exceed $557 million, *id.* ¶ 19; (8) "most sureties typically charge a premium in the range of 2% per year … paid up front," which results in an irrecoverable up-front cost over $18 million, *id.* ¶ 20; and (9) posting a bond of this magnitude would require "***cash or cash equivalents approaching $1 billion*** so as to collateralize the bond and have sufficient capital to run the business," *id.* ¶ 17. (emphasis added)

In short, while attempting to cynically and wrongfully tar the Defendants' witnesses as "unreliable," the Attorney General does not actually dispute the truth of a *single one* of their specific claims. This is unsurprising, because these claims are undeniable to those with knowledge of real estate and sureties. *See, e.g.,* Peter Coy, *Why Donald Trump Can't Put Up a Bond*, N.Y. TIMES (Mar. 18, 2024) (explaining that "insurance regulation" renders sureties unable to post such massive bonds for privately held companies because "the state insurance departments that regulate surety bond companies don't allow that kind of business"); *id.* (agreeing with Mr. Giulietti that, "[f]or Trump to have gotten the bond he needs to appeal, he would have needed to post about $1 billion in cash and liquid securities, more than twice the size of the judgment"); The Editors, *Letitia James Turns the Screws on Trump*, WALL ST. J. (Mar. 18, 2024) (explaining that the unwillingness of sureties to accept real-estate collateral "isn't surprising," and that "[i]nsurers may also fear Ms. James' legal retribution if they provide the bond to Mr. Trump").

The Attorney General argues that "appealing parties may bond large judgments by dividing the bond amount among multiple sureties." Fan Aff. ¶ 6. That assertion is without merit. As explained in Defendants' Affirmations, those separate bonds would still require a *total collateralization* of cash or cash equivalents in excess of $557 million, regardless of how many sureties were involved. Giulietti Aff. ¶ 19. Indeed, the cases cited by the Attorney General reinforce this point. Fan Aff. ¶ 6.

The Attorney General argues that "there is nothing unusual about even billion-dollar judgments being fully bonded on appeal." Fan Aff. ¶ 7. But "[i]n the unusual circumstance that a bond of this size is issued, it is provided to the largest public companies in the world, not to individuals or privately held businesses." Giulietti Aff., ¶ 16. In fact, the cases cited by the Attorney General all involve bonds posted by such conglomerate, enormous companies (Cox Enterprises being the only one which is not publicly traded, but still having annual revenues of

over $20 billion)—*i.e.*, Samsung (market capitalization $98.5 billion[2]), Cox Enterprises (annual revenue $22.1 billion[3]), Marvell Technology (market capitalization $56.3 billion[4]), and SAP SE (market capitalization $220.5 billion[5]). Fan Aff. ¶ 7.

The Attorney General argues that Chubb "was willing to consider accepting real estate as collateral." Fan Aff. ¶ 8 (citing Garten Aff. ¶ 8). But Mr. Garten goes on to explain—in the very same sentence that Mr. Fan's Affirmation cites—that "within the past week, Chubb notified Defendants that it could not accept real property as collateral," and that "this decision was not surprising given that Chubb was the only surety willing to even consider accepting real estate as collateral." Garten Aff. ¶ 8.

The Attorney General also argues that "[i]f defendants were truly unable to provide an undertaking, they at a minimum should have consented to have their real-estate interests held by Supreme Court to satisfy the judgment," such as "allowing a court-appointed officer to hold real estate." Fan Aff. ¶ 10. The suggestion is both impractical and unjust. The Attorney General cites no New York case law to support this contention. In any event, from the perspective of risk, the Attorney General's proposal of a "court-appointed officer" to "hold real estate" is functionally equivalent to what Supreme Court *has already imposed* through the requirement of a court-appointed monitor to oversee Defendants' business operations. Judgment, at 88-89.

Perhaps worst of all, the Attorney General argues that Defendants should be forced to dispose of iconic, multi-billion-dollar real-estate holdings in a "fire sale." Fan Aff. ¶ 10. But "[o]btaining such cash through a "fire sale" of real estate holdings would inevitably result in massive, irrecoverable losses—textbook irreparable injury." Reply Brief, at 10. The Attorney General provides no basis to dispute this obvious economic reality. *See Letitia James Turns the Screws on Trump*, WALL ST. J., *supra* (noting that President Trump's "lawyers rightly argue" that "to unload property in a fire sale" would inflict "an enormous, irreparable loss"). It would be completely illogical—and the definition of an unconstitutional Excessive Fine and a Taking—to require Defendants to sell properties at all, and especially in a "fire sale," in order to be able to appeal the lawless Supreme Court judgment, as that would cause harm that cannot be repaired once the Defendants do win, as is overwhelmingly likely, on appeal.

In sum, by demanding an undertaking in the full amount of the judgment in order to appeal, the Attorney General and Supreme Court have sought to impose a patently unreasonable, unjust, and unconstitutional (under both the Federal and New York State Constitutions) bond condition, which would cause irreparable harm and foreclose any review of Supreme Court's deeply flawed

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[2] *See* https://finance.yahoo.com/quote/BC94.L.

[3] *See* https://www.forbes.com/companies/cox-enterprises/?sh=20f66d7a5ef4.

[4] *See* https://finance.yahoo.com/quote/MRVL?.tsrc=fin-srch.

[5] *See* https://finance.yahoo.com/quote/SAP?.tsrc=fin-srch.

decision in this case. "For Trump to have gotten the bond he needs to appeal, he would have needed to post about $1 billion in cash and liquid securities, more than twice the size of the judgment." Peter Coy, N.Y. TIMES, *supra*. "[D]efendants are entitled to due process, which includes the right to appeal. Ms. James is trying to short-circuit the justice system to get Mr. Trump, as she promised she would during her 2018 campaign." *Letitia James Turns the Screws on Trump*, WALL ST. J., *supra*. Imposing an unachievable bond requirement here would "defeat or impair [this Court's] appellate jurisdiction" to review Supreme Court's badly erroneous Judgment in this case. *Schwartz v. New York City Hous. Auth.*, 219 A.D.2d 47, 48 (2d Dep't 1996).

If the Court has any concerns about these or any issues raised in the parties' briefs, Defendants respectfully request that the Court schedule oral argument to consider those issues.

Respectfully submitted,

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CLIFFORD S. ROBERT

cc: All Counsel of Record (by NYSCEF)