FILED: APPELLATE DIVISION - 1ST DEPT 03/20/2024 08:42 AM 2024-01134
NYSCEF DOC. NO. 14 RECEIVED NYSCEF: 03/20/2024

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

March 20, 2024

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. Trump*, No. 2024-01134, 2024-01135

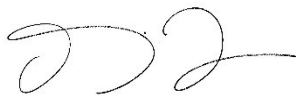
Dear Ms. Rojas:

Pursuant to 22 N.Y.C.R.R. § 1250.4, on behalf of respondent People of the State of New York, by Letitia James, Attorney General of the State of New York (OAG), I write to respectfully request permission to file the attached proposed surreply to defendants' motion for a stay pending appeal.

On March 18, 2024, defendants filed a reply in support of their motion that attached three affirmations and accompanying exhibits, containing new factual allegations and legal arguments that were not raised in their stay motion and to which OAG did not have an opportunity to respond. This Court has discretion to consider a surreply that responds to such new matters advanced for the first time in a reply. *See, e.g.*, *Matter of Shotkin*, 174 A.D.3d 146, 148 (1st Dep't 2019). The Court thus should either permit OAG to submit its proposed surreply or disregard the belated affirmations and the arguments that rely on them. *See Frangiadakis v 51 W. 81st St. Corp.*, 161 A.D.3d 478, 479 (1st Dep't 2018).

Accordingly, should this Court decline to accept the proposed surreply, then pursuant to C.P.L.R. 2214, OAG intends to file a motion to strike the new reply affirmations and exhibits, along with the arguments in defendants' reply brief that rely on those affirmations or exhibits, and to have that motion to strike considered in conjunction with defendants' stay motion.

Sincerely,



Dennis Fan
Senior Assistant Solicitor General
(212) 416-8921

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,	Nos. 2024-01134 2024-01135
Plaintiff-Respondent,	Supreme Court New York County Index No. 452564/2022
v.	
DONALD J. TRUMP, et al.,	
Defendants-Appellants.	

[PROPOSED] AFFIRMATION IN SURREPLY TO MOTION FOR A STAY PENDING APPEAL

DENNIS FAN, an attorney duly admitted to practice law in New York, affirms upon penalty of perjury in New York, which may include a fine or imprisonment, that the following is true:

1. I am a Senior Assistant Solicitor General in the Office of Letitia James, Attorney General of the State of New York (OAG), the plaintiff in this action. I submit this proposed affirmation in surreply to defendants' reply in support of their motion for a stay pending appeal. I am familiar with the facts and circumstances of this matter based upon my review of the relevant orders and decisions rendered and submissions filed by the parties in this action, and through communications with other OAG attorneys.

2. OAG submits this proposed surreply in response to new factual matter and legal arguments that defendants have improperly sought to introduce for the first time in their reply submission in support of their motion for a stay of enforcement of

Supreme Court's final judgment pending appeal. In particular, defendants' reply submission includes and relies on three affirmations and accompanying exhibits that contain new allegations and arguments pertaining to their extraordinary request to forego posting a full bond or deposit to obtain a stay of enforcement of the money judgment against them. OAG did not have any opportunity to respond to defendants' new allegations and arguments when it submitted its opposition to their stay motion. The Court should reject these new allegations and arguments for three reasons.

3. First, the Court should not consider defendants' new allegations and arguments—which contend that a full bond or deposit is a "practical impossibility" (Reply at 8-10)—because they are procedurally improper. It is axiomatic that new matters submitted on reply are not properly before the Court. *See Anderson v. Pena*, 122 A.D.3d 484, 485 (1st Dep't 2014). "[T]he function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion." *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562 (1st Dep't 1992); *see Guido v. Fielding*, 190 A.D.3d 49, 55 (1st Dep't 2020) (rejecting "new opinion" from an expert that introduces new facts). Indeed, defendants here had no reason to wait for their reply to raise their allegations and arguments about the difficulty of obtaining a bond, as their efforts to obtain that bond began before their stay motion was filed and indeed before judgment was even entered. (Giulietti Affirm. ¶¶ 9-10).

4. Second, defendants' reply affirmations are unreliable. The affirmation from Gary Giulietti does not disclose that he was an expert witness for defendants at

trial or that Supreme Court found Mr. Giulietti's trial testimony to lack credibility. (*See* Ex. R, Post-Trial Decision at 51.) As the court explained, Mr. Giulietti "has an ongoing personal and professional relationship with Donald Trump." (*Id.*) Moreover, Mr. Giulietti has a "personal financial interest in the outcome of the case," because his company earns commission from the Trump Organization, including $1.2 million in 2022. (*Id.* at 51 & n.36.) The court further found that Mr. Giulietti's testimony was inconsistent with the testimony of other witnesses, including another defense expert. (*Id.* at 51.) And while Mr. Giulietti's affirmation purports to draw from his experience working in the insurance industry (Giulietti Affirm. ¶ 3), the court observed that he had never served as an expert in this area (Post-Trial Decision at 51 n.35).

5. The affirmation from Alan Garten is also unreliable. As Supreme Court found, he was personally involved in the fraudulent and illegal conduct that gave rise to the judgment in this case—including falsifying the reported size of Mr. Trump's triplex apartment and helping defendants prepare Mr. Trump's false and misleading 2020 and 2021 Statements of Financial Condition. (*Id.* at 31, 39-40, 61.) And as the Trump Organization's general counsel, Mr. Garten has professional interests in this litigation. In any case, Mr. Garten's affirmation in large part relies on Mr. Giulietti's unreliable representations. (Garten Affirm. ¶¶ 5-7, 12.)

6. Third, and in any event, defendants' new factual allegations and legal arguments fail to support their extraordinary request for a stay based on a bond or deposit of less than one-fourth of the money-judgment amount. Defendants' argument that obtaining a full bond is purportedly impossible is based on the false premise that

they must obtain a single bond from a single surety for the entire judgment amount of $464 million. (*See* Giulietti Affirm. ¶ 12 (alleging "only a handful of sureties" are available "for a sum as high as the Judgment Amount").) But appealing parties may bond large judgments by dividing the bond amount among multiple sureties, thereby limiting any individual surety's risk to a smaller sum, such as $100 or $200 million apiece. *See, e.g.*, Supersedeas Bond at 2, *Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd.*, No. 09-cv-290 (W.D. Pa. May 16, 2014), ECF No. 955 (17-surety group of $6 million to $430 million); Supersedeas Bond at 1-2, *Oracle USA Inc. v. SAP AG*, No. 07-cv-1658 (N.D. Cal. Jun. 20, 2011), ECF No. 1076-1 (10-surety group of $5 million to $570 million); Supersedeas Bond at 2, *Fed. Hous. Fin. Agency v. Nomura Holding Am. Inc.*, No. 11-cv-6201 (S.D.N.Y. July 6, 2015), ECF No. 1796 (4-surety group of $10 million, $150 million, $165 million, $175 million).

7. Moreover, contrary to the assertions in Mr. Giulietti's reply affirmation (*see* Giulietti Affirm. ¶¶ 16, 22), there is nothing unusual about even billion-dollar judgments being fully bonded on appeal. *See, e.g.*, Supersedeas Bond, *Sony Music Entertainment v. Cox Communications, Inc.*, No. 18-cv-950 (E.D. Va. Feb. 8, 2021), ECF No. 731 ($1 billion); Supersedeas Bond, *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846 (N.D. Cal. Mar. 11, 2014), ECF No. 3028-1 ($1 billion); Supersedeas Bond, *Carnegie Mellon*, No. 09-cv-290 (W.D. Pa.), ECF No. 955 ($1.54 billion); Supersedeas Bond, *Oracle*, No. 07-cv-1658 (N.D. Cal.), ECF No. 1076-1 ($1.33 billion).

8. Defendants assert (Giulietti Affirm. ¶¶ 13-18) that they are unable to post a bond or a deposit because their assets are tied up in real property rather than

cash or liquid securities. But as Mr. Garten affirmed, at least one surety company—Chubb, the same company that bonded the money judgment in *Carroll v. Trump*, No. 20-cv-7311 (S.D.N.Y. Mar. 8, 2024), ECF No. 318-1—was willing to consider accepting real estate as collateral. (*See* Garten Affirm. ¶ 8.) The use of real estate as collateral for an appeal bond is hardly impossible as a general matter. *See, e.g.*, *In re Prosser*, No. 06-br-30009, 2017 WL 5614901, at *1 (D.V.I. Nov. 20, 2017) (appeal bond collateralized by real estate in St. Croix); *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 375 (1991) (appeal bond collateralized by 19.8 acres of industrial property); *In re Alwan Bros.*, 112 B.R. 294, 296 (Bankr. C.D. Ill. 1990) (appeal bond collateralized by 9 parcels of land). And though defendants acknowledge that "it is possible" to use an irrevocable letter of credit to obtain a bond (Giulietti Affirm. ¶ 15), they do not explain why a bank would not accept real property to finance that letter of credit. *See, e.g.*, *Stephens v. Three Finger Black Shale Partnership*, No. 11-16-00177-CV, 2017 WL 3495390, at *1 (Tex. App. Mar. 23, 2017) (real property to finance irrevocable letter of credit for appeal bond); *see also Century Sur. Co. v. 350 W.A., LLC,* No. 05-cv-1548, 2007 WL 2688488, at *4 (S.D. Cal. Sept. 7, 2007) (real property may be "converted to a form of collateral acceptable to the surety" for appeal bond).

9. Defendants' allegations (Giulietti Affirm. ¶ 13; Garten Affirm. ¶ 8) thus boil down to the proposition that sureties have been unwilling to accept Mr. Trump's real-estate holdings as collateral *in this case*. Yet defendants supply no documentary evidence that demonstrates precisely what real property they offered to sureties, on what terms that property was offered, or precisely why the sureties were unwilling

to accept the assets. As far as the Court can infer, sureties may have refused to accept defendants' specific holdings as collateral because using Mr. Trump's real estate will generally need "a property appraisal" (Dan Huckabay, *Staying Judgment with Appeal Bonds*, Appellate Issues (Am. Bar Assn., Summer 2019)) and his holdings are not nearly as valuable as defendants claim (*see* Post-Trial Decision at 60-68).

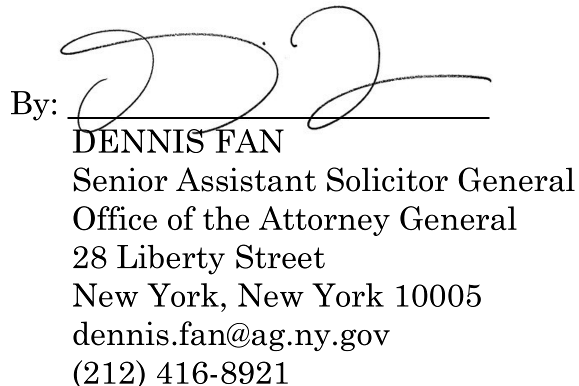
10. Even accepting defendants' assertion that real estate is difficult for a surety to accept as collateral (*see* Giulietti Affirm. ¶ 14), defendants fail to propose a serious alternative to fully secure the judgment. Defendants object to a possible "fire sale" if they were to sell assets to generate cash to use as collateral for a bond or as a deposit (Reply at 9)—but the alternative would be to shift the risk of executing on defendants' illiquid assets to OAG. If 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 (*cf.* C.P.L.R. 5528 (allowing court-appointed officer to hold real estate)) or should have otherwise pledged security in real-estate holdings with sufficient value to secure payment of the entire judgment. *See, e.g.*, *John Wiley & Sons v. Book Dog Books, LLC,* 327 F. Supp. 3d 606, 650 (S.D.N.Y. 2018) (real property "worth substantially more than the judgment" for "clear assurance of payment"); *Athridge v. Iglesias*, 464 F. Supp. 2d 19, 21-22, 24 (D.D.C. 2006) (real property in excess of $7.1 million in lieu of $5.5 million bond); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 757 F. Supp. 1101, 1105 (S.D. Cal. 1990) ("real property security with a value twice the amount of the jury award").

11. Also unavailing are the new legal arguments that defendants offer for the first time in their reply. Defendants invoke (Reply at 5-6) C.P.L.R. 5240 as authority for a stay of enforcement of the judgment. But the exclusive means to use that statute is "to bring an appropriate action pursuant to CPLR article 52" to enjoin a specific attempt at enforcement. *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 37 N.Y.3d 591, 595 (2021). C.P.L.R. 5240 does not authorize a blanket appellate stay of the kind that defendants seek here.

12. In the concluding paragraph of their reply (Reply at 29), defendants also improperly request leave to appeal to the Court of Appeals from any denial of their stay motion and a temporary stay pending that request. Defendants can seek leave to appeal to the Court of Appeals only by filing a motion after the Court issues its order. *See* 22 N.Y.C.R.R. § 1250.16(d).

13. As defendants offer no basis for a stay pending appeal, this Court should deny their motion in full.

Dated: New York, New York
March 20, 2024



By: ______________________________

DENNIS FAN
Senior Assistant Solicitor General
Office of the Attorney General
28 Liberty Street
New York, New York 10005
dennis.fan@ag.ny.gov
(212) 416-8921