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,

Petitioner,

-against-

THE TRUMP ORGANIZATION, INC.; SEVEN SPRINGS LLC; ALLEN WEISSELBERG; ERIC TRUMP; CHARLES MARTABANO; MORGAN, LEWIS & BOCKIUS, LLP; SHERI DILLON; DONALD J. TRUMP; IVANKA TRUMP; AND DONALD TRUMP, JR.,

Respondents.

Index No. 451685/2020

MEMORANDUM OF LAW IN SUPPORT OF THE ATTORNEY GENERAL'S CROSS-MOTION TO COMPEL AND IN OPPOSITION TO RESPONDENTS' MOTION TO QUASH

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PRELIMINARY STATEMENT

Respondents Donald J. Trump, Ivanka Trump and Donald Trump, Jr. (collectively, "Respondents") assert that they may ignore lawfully issued subpoenas for sworn testimony because of what they contend is "an unprecedented and unconstitutional maneuver" by the Office of the Attorney General ("OAG"). But subpoenas to current and former top company officials—such as those at issue here—are routine in complex financial investigations and are amply warranted here. More than a year ago, at the outset of this special proceeding, OAG established – and this Court confirmed – that this investigation was lawful. Specifically, this Court has already compelled the production of previously withheld documents and held that Eric Trump and other Trump Organization agents, including its attorneys, and employees were obligated to testify.

Since that time OAG has developed significant additional evidence indicating that the Trump Organization used fraudulent or misleading asset valuations to obtain a host of economic benefits, including loans, insurance coverage, and tax deductions. And while OAG has not yet reached a final decision regarding whether this evidence merits legal action, the grounds for conducting the investigation are beyond reproach. As shown below and in the Supplemental Verified Petition filed herewith ("Supp. Pet."), it is a virtual certainty that each of the Respondents possesses information pertinent to those matters. It would be absurd to suggest (and Respondents do not even try to do so) that they lack such relevant information. Respondents thus have offered no legitimate ground to quash these subpoenas. Accordingly, their testimony should be compelled.

OAG's civil investigation has proceeded methodically, spanning more than 34 months. OAG has amassed considerable evidence pertinent to the matters under investigation — including, but not limited to, the matters described in the Supplemental Verified Petition and

exhibits thereto. Moreover, this investigation has proceeded in a manner consistent with standard procedures common in civil investigations conducted by OAG and other state and federal authorities, including with the supervision of this Court when necessary. Indeed, Respondents' motion to quash ignores the prior proceedings and is something of an about-face for them—coming only after their direct testimony was sought by subpoena. In fact, Mr. Trump personally—as well as Donald Trump, Jr. and the Trump Organization itself—previously cooperated with the investigation on various matters as it proceeded, OAG has taken sworn testimony from current and former Trump Organization employees, and OAG (with the Court's assistance) collected 900,000 documents comprising more than 5 million pages from the Trump Organization. The fact that there may be a parallel investigation being conducted by the District Attorney of the County of New York ("DANY") is neither unusual nor a sufficient ground for Respondents to avoid sitting for testimony. Nor does the participation of attorneys from OAG in any separate criminal investigation provide a basis for the Court to quash properly issued subpoenas.

The purported risk that Respondents identify as a basis to quash these subpoenas—that if they testify any evidence may tend to incriminate them (NYSCEF Doc. 354, Respondents' Memorandum of Law ("Respondents Mem.") at 12-14)—is no basis to quash at all (and would be a risk even if there were no DANY investigation). Each witness is free to invoke their Fifth Amendment privilege against self-incrimination. A witness's exercise of that right in a civil investigation (or any other civil or administrative proceeding) is neither uncommon nor a denial of a constitutional right. Rather, witnesses routinely face such a decision and invoke the privilege—as witnesses have done in this investigation. Nor is there any basis to stay enforcement of the lawful investigative subpoenas at issue here to await the uncertain outcome of

any grand jury investigation—a result that would stultify a vigorous, lawfully predicated civil investigation. *See, e.g., United States v. Kordel*, 397 U.S. 1, 11 (1970). Because this Court has already confirmed that the investigation is warranted and Respondents have failed to make any legitimate showing as to why the subpoenas should be quashed (let alone carry their heavy burden), this Court should order compliance with the subpoenas.

ARGUMENT

By now, the Court is well familiar with the standards applicable to a subpoena issued by the Attorney General pursuant to her authority under Executive Law § 63(12). A sufficient factual basis exists for a § 63(12) subpoena if there is a "reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." *Matter of La Belle Creole Int'l, S.A. v. Attorney-General of the State of N.Y.*, 10 N.Y.2d 192, 196 (1961); *see also American Dental Co-op., Inc. v. Att'y Gen. of State of N.Y.*, 127 A.D.2d 274, 280 (1st Dep't 1987) (requiring showing of "some factual basis for [Attorney General's] investigation"); *Matter of Roemer v. Cuomo*, 67 A.D.3d 1169, 1170 (3d Dep't 2009) (same). There is a presumption that the Attorney General is acting in good faith when commencing an investigation and issuing a subpoena. *See*, *e.g.*, *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988); *Roemer*, 67 A.D.3d at 1171; *Am. Dental Coop.*, 127 A.D.2d at 280.[1]

A § 63(12) subpoena issued by the Attorney General should only be quashed "where the information sought is 'utterly irrelevant to any proper investigation.'" *Evergreen Ass'n, Inc. v.*

[1] These standards apply equally to subpoenas for documents and testimony. *See New York State Comm'n on Gov't Integrity v. Congel*, 156 A.D.2d 274 (1st Dep't 1989) (commission imbued with the Attorney General's authority to conduct investigations under Executive Law § 63 "indisputably [had] the power to compel the attendance of witnesses, and, accordingly, no legal wrong [would] be suffered by the respondents if they [were] forced to appear pursuant to the subpoenas' command").

Schneiderman, 153 A.D.3d 87, 98 (2d Dep't 2017) (quoting *Anheuser–Busch,* 71 N.Y.2d at 331–332); *see also La Belle Creole*, 10 N.Y.2d at 196-97 (holding that, "[w]hatever the ultimate outcome" of the investigation, "there can be no doubt" that the records sought "were material and pertinent in an investigation whose purpose was to ascertain whether or not [a company] was carrying on its affairs in compliance" with State alcohol beverage control laws and Executive Law § 63(12)). In support of her subpoena, the Attorney General "must show only that the materials sought bear 'a reasonable relation to the subject matter under investigation and to the public purpose to be achieved.'" *Evergreen Ass'n*, 153 A.D.3d at 98 (quoting *Anheuser-Busch,* 71 N.Y.2d at 332).

An assertion of constitutional rights under the First or Fifth Amendment is insufficient to quash a *subpoena ad testificandum*. *See, e.g., New York State Comm'n on Gov't Integrity v. Congel*, 156 A.D.2d 274, 280 (1st Dep't 1989) (citing long-established rule that "privilege may not be used as a ground to quash a subpoena ad testificandum in advance of compliance" and "may not be asserted in advance of questions actually propounded") (cleaned up).

Applying those standards here, this motion to compel must be granted and Respondents' motion to quash or stay enforcement of the subpoenas denied. The Court earlier determined that OAG had a good faith basis to conduct its investigation. Since that time, and as demonstrated by the robust factual records presented in the Supplemental Verified Petition, OAG has identified additional facts and evidence demonstrating the frequent use of misleading asset valuations in order to obtain financial benefits. The misleading practices appear to impact numerous assets reported by Mr. Trump on his Statements of Financial Condition. Among other things, the Statements or the backup material:

- Misstated objective facts, like the size of Mr. Trump's Trump Tower penthouse Supp. Pet. ¶¶ 54-61;

- Miscategorized assets outside Mr. Trump's or the Trump Organization's control as "cash," thereby overstating his liquidity, *e.g.* Supp. Pet. ¶¶ 135-141;

- Misstated the process by which Mr. Trump or his associates reached valuations, *e.g.* Supp. Pet. ¶¶ 80-91;

- Failed to use fundamental techniques of valuation, like discounting future revenues and expenses to their present value, *e.g.* Supp. Pet. ¶¶ 75-76, 90, 017-09, 113;

- Misstated the purported involvement of "outside professionals" in reaching the valuations, *e.g.* Supp. Pet. ¶¶ 184-188; and

- Failed to advise that certain valuation amounts were inflated by an undisclosed flat percentage for brand value, despite express language on the Statements asserting that the value of Mr. Trump's brand was not reflected the Statements pursuant to generally accepted accounting principles ("GAAP"), Supp. Pet. ¶¶ 80-98.

These misleading valuations were shared with lenders, Supp. Pet. ¶¶ 161-177, and insurers, Supp. Pet. ¶¶ 178-190, to obtain financial benefits. All of this in addition to the evidence indicating that Mr. Trump may have improperly obtained more than $5 million in federal tax benefits from misleading valuations of conservation easements at Seven Springs and Trump National Golf Club, Los Angeles ("Trump Golf LA"), Supp. Pet. ¶¶ 353; also, ¶¶ 191-294.

As set forth more fully below, each of the Respondents played a role in the preparation of the valuations, the operation of the properties, or the transactions at issue. Virtually all of the benefits from the misleading valuations accrued to Donald J. Trump. As a result, the testimony and materials sought bear a reasonable relation to the matters under investigation. Indeed, Respondents do not and cannot argue to the contrary given the detailed factual allegations in the Supplemental Verified Petition. That each of these witnesses may choose to invoke their Fifth Amendment protection (as would be their right) is no basis to relieve or delay the Respondents' duty to testify.

I. OAG is Entitled to Documents from Donald J. Trump

At the outset, Donald J. Trump offers no objection to that portion of his subpoena seeking the production of documents in his possession custody or control. Yet, to date, Mr. Trump has made no production of documents. Thus, the Court should compel compliance with that portion of the subpoena without delay.

Indeed, counsel for Mr. Trump already agreed he would produce Mr. Trump's documents. On December 3, 2021 – while leaving open the question of whether Mr. Trump would appear for testimony and objecting to the December 17, 2021 return date for document production – counsel for Mr. Trump agreed to produce responsive documents in advance of Mr. Trump's testimony. At the same time, however, counsel indicated an understanding that all relevant documents were in the possession of the Trump Organization: "As I explained, I believe the documents you are seeking are in the possession of the Trump Organization and not in the possession of my client. We agreed that document production would not be addressed by the date of December 17. We will, of course, work on getting the documents you seek, if any, prior to his testimony." Supp. Pet. ¶¶ 346.

But the Trump Organization has not made anything approaching a complete production of documents for Mr. Trump. While Mr. Trump famously does not use email or a computer, at least according to reports,[2] he regularly generated handwritten documents. In testimony as a corporate representative Alan Garten, (the Trump Organization's General Counsel), testified that there were file cabinets at the Trump Organization containing Mr. Trump's files, that Mr. Trump

[2] *See, e.g.*, Ashley Parker and Philip Rucker, Donald Trump waits in his tower — accessible yet isolated, Washington Post, January 17, 2017 ("He does not use email and rarely surfs the Internet, meaning that telephone calls, television appearances or physical proximity are the best ways to reach him."); Supp. Pet. ¶ 347 ("Well, he doesn't use e-mail, so there – so there is no e-mail.")

had assistants who maintained files on his behalf, that he received and maintained hard copy documents, and that he used Post-It Notes to communicate with employees. Supp. Pet. ¶ 347. Yet as of June 30, 2021 – more than 18 months after receiving the initial subpoena from OAG – the Trump Organization still had not searched for those documents. Indeed, Mr. Garten testified that, despite maintaining a "chronological file" of correspondence for Mr. Trump, this file was never searched because the Trump Organization determined, improbably, that Mr. Trump was not involved in the preparation of his own financial statements. *Id.* Supp. Pet. ¶ 347 ("Q. Was the chron file searched for responsive information? A. No, because we did not believe he had any involvement in any of the areas that were the subject of the subpoenas. Q. How did you reach that conclusion? A. By interviewing other key witnesses and determining who was involved.")

The Trump Organization reached this conclusion despite the explicit representation in each Statements of Financial Condition that "Donald J. Trump is responsible for the preparation and fair presentation of the financial statement in accordance with accounting principles generally accepted in the United States of America and for designing, implementing, and maintaining internal control relevant to the preparation and fair presentation of the financial statement." Supp. Pet. ¶ 26. Further, the Trump Organization inexplicably reached this conclusion despite testimony from its own Controller that Donald J. Trump would review and approve the Statements of Financial Condition with the Chief Financial Officer Allen Weisselberg.[3] Indeed, those financial statements repeatedly proclaim Mr. Trump's involvement in reaching the valuations they contain. *See*, *infra,* at Pt. II.A.1. In short, the conclusion that Mr. Trump had no "involvement in any of the areas that were the subject of the subpoenas" was divorced from any reasonable factual assessment.

[3] *See* infra at Pt. II.A.1; Supp. Pet. ¶ 348.

By July 2021, the Trump Organization itself produced documents further demonstrating that its conclusion about Mr. Trump's lack of involvement was unfounded. On July 22, 2021, the Trump Organization produced three letters from Mr. Trump in which he forwards his financial statement to an executive of a financial institution expressly discussing and touting the Statement. Supp. Pet. ¶ 349. In one example, in November 2011 Mr. Trump wrote to Richard Byrne, the Chief Executive Officer of Deutsche Bank Securities, enclosed his financial statement (including a note, "hopefully, you will be impressed!"), touted the prospects of the Doral property, and enclosed a separate letter that "establishes my brand value, which is not included in my net worth statement."[4] Metadata included with the production of those documents indicates that they are from the custodial files of Donald J. Trump. But there have been no further productions of Mr. Trump's custodial files since July 2021, despite the production of over 5 million pages comprising more than 900,000 documents since that time.[5] This abject failure persists despite correspondence from OAG in July and November 2021 specifically highlighting the failure of the Trump Organization to produce custodial documents for Donald J. Trump as an issue.

Beyond direct correspondence about his financial statement, there are also documents concerning Mr. Trump's involvement in the valuation of his property and the financial

[4] Supp. Pet. ¶ 349. Apart from the fact that the letter attaches a statement of financial condition, the contents of the communication concerning the financial prospects of the Doral property and the purported exclusion of brand value from the statements are of central importance to the investigation. As detailed in the Supplemental Petition, the claim that the "net worth statement" does not include "brand value" is false. Supp. Pet. ¶ 83.

[5] The volume of those productions do not relieve Mr. Trump or the Trump Organization of their obligations under the subpoenas. "A subpoena is not rendered invalid merely because it requires production of a substantial number of documents," as "relevancy, and not quantity, is the test of the validity of a subpoena." *American Dental Co-op*, 127 A.D.2d at 282-83 (citation and internal brackets omitted).

transactions that were predicated upon the accuracy of those valuations. For example, Mr. Trump initialed and approved as "OK" an email from Allen Weisselberg concerning the Trump Organization signing a 15-year master lease for retail space in 40 Wall Street as a guarantee in connection with the refinancing of that property with Ladder Capital in 2015.[6] Similarly, files from the Trump Organization reflect Mr. Trump signed and initialed a certification attesting to certain aspects of his statement of financial condition as part of the 2015 application to Ladder Capital. Supp. Pet. ¶ 350. And, Mr. Trump repeatedly signed personal certifications regarding his Statements of Financial Condition. *See*, *infra,* at Pt. II.A.1.

Practically, this means that with respect to Mr. Trump's documents, the Trump Organization has produced next to none--while his personal counsel claims all relevant documents are in the Trump Organization's possession. But neither the Trump Organization nor Mr. Trump has confirmed that an adequate search has been conducted, much less that all of Mr. Trump's responsive documents have been produced. This game must end. Mr. Trump should be ordered to produce all responsive documents in his possession, custody, or control, including those within the possession of the Trump Organization, within two weeks of a decision from this Court and two weeks in advance of Mr. Trump's testimony, and to provide a certification attesting that an adequate search was conducted and certifying to the production's completeness.[7]

[6] Supp. Pet. ¶ 350. The master lease was necessary to guarantee income from the retail space because the Trump Organization was still negotiating with Balducci's Food Market to occupy the space at the time of underwriting. Supp. Pet. ¶ 350 at n. 58.

[7] As the Court is aware, an independent eDiscovery Firm has been retained by the Trump Organization pursuant to this Court's order dated September 3, 2021. Supp. Pet. ¶ 329. Should the Court agree with the relief requested here with respect to Mr. Trump's documents, OAG respectfully requests an order directing the retained third party promptly to generate a report on

II. OAG is Entitled to Sworn Testimony from Each of the Respondents.

A. Donald J. Trump's testimony must be compelled

Donald J. Trump has no plausible basis to defy the Attorney General's lawful testimonial subpoena. This Court already has affirmed the lawfulness of this investigation and ordered under C.P.L.R. 2308 that, in this investigation, individuals subpoenaed for testimony (including Eric Trump and other Trump Organization agents) must appear under the well-established standard that governs these proceedings. *See, e.g.*, Sept. 23, 2020 Order at 2 (NYSCEF Doc. 245) ("this Court hereby orders Eric Trump to appear to be deposed"); *id.* ("the depositions, or continued depositions, of Sheri Dillon [and] Charles Martabano . . . are ordered to be conducted"). In any event, Donald J. Trump's testimony plainly will bear a "reasonable relation" to financial statements and tax matters under investigation by OAG. *Anheuser-Busch,* 71 N.Y.2d at 332.

1. OAG's need for information concerning Mr. Trump's Statements of Financial Condition plainly warrants compelling his testimony.

The Statements of Financial Condition themselves, the detailed information set forth in the Supplemental Verified Petition, and the information provided below amply support compelling Mr. Trump's testimony.

At a basic level, the financial statements under investigation purport to reflect Mr. Trump's financial condition, purport to be his responsibility, and were the subject of certifications that he signed as to their truth and accuracy in connection with obtaining more than $300 million in loan proceeds (as well as other business transactions). There is no basis to claim that an individual so central to the documents and events in question lacks information bearing a

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Mr. Trump's custodial documents on a similar time frame. OAG has already noted the failure to identify and produce Donald J. Trump custodial documents as an issue for the eDiscovery Firm. Supp. Pet. ¶ 332.

"reasonable relation" to them. *See Congel*, 156 A.D.2d at 274 (affirming order compelling compliance with testimonial subpoenas to real estate company principals and noting that an agency "indisputably has the power to compel the attendance of witnesses"); *cf. Hogan v. Cuomo*, 67 A.D.3d 1144, 1146-1147 (3d Dep't 2009) (affirming order compelling compliance with subpoena seeking respondent's financial documents when respondent's financial dealings were under investigation); *Roemer v. Cuomo*, 67 A.D.3d 1169, 1170-1171 (3d Dep't 2009) (same). To the contrary, the knowledge of individual participants in events may be an important consideration with respect to liability and relief. *See, e.g.*, *People ex rel. Cuomo v. Greenberg*, 21 N.Y.3d 439, 447 (2013) (addressing issue of individuals' "knowledge of the fraudulent nature" of a transaction).

Indeed, the financial statements themselves illustrate that Mr. Trump is a proper testimonial witness in OAG's investigation. The financial statements in question are entitled, "*Donald J. Trump* Statement of Financial Condition."[8] They purport to reflect assets owned or controlled, directly or indirectly, by Donald J. Trump (or a revocable trust of which he apparently is sole beneficiary, Supp. Pet. ¶¶ 13, 335)—and the statements are replete with contentions that the valuations presented are assessments made by, *inter alia*, Mr. Trump. *See, e.g.,* Supp. Pet. ¶ 26. For example, the June 30, 2012 Statement of Financial Condition claims that Mr. Trump's assets were identified at values "determined *by Mr. Trump* in conjunction with his associates and, in some instances, outside professionals" and asserts that a group of "club facilities and related real estate" was valued at more than $1.5 billion in an "assessment [that] was prepared *by Mr. Trump* working in conjunction with his associates and outside

[8] Supp. Pet. ¶ 26 (emphasis added).

professionals."[9] Moreover, the Statements of Financial Condition in several years reflected that "*Donald J. Trump is responsible* for the preparation and fair presentation of the financial statement . . . ." Supp. Pet. ¶¶ 26, 338, 348 (emphasis added).

Furthermore, evidence obtained by OAG indicates that Mr. Trump was personally involved in reviewing and approving the Statements of Financial Condition before their issuance—a natural and logical focus of an investigation into whether a financial statement was fraudulent or misleading and, if so, who was responsible. *Cf.* United States Department of Justice, Principles of Federal Prosecution of Business Organizations, § 9-28.210 ("It is important early in the corporate investigation to identify the responsible individuals and determine the nature and extent of their misconduct.").[10] Jeffrey McConney, Senior Vice President and Controller at the Trump Organization, appears to have been one of the principal participants in preparing the Statements of Financial Condition.[11] When asked who reviewed these statements before they were finalized, he testified that his understanding was that "Allen Weisselberg I believe reviewed it with Mr. Trump," that "Allen spoke with Mr. Trump about something with the statement," and that "I guess we can assume" that Mr. Trump approved the statements before their issuance. Supp. Pet. ¶ 339. Mr. McConney testified that he "wasn't part of the conversations with Allen and Mr. Trump so I don't know what they said." *Id*. at ¶ 339.

[9] Supp. Pet. ¶¶ 26 (emphasis added).

[10] https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations

[11] Supp. Pet. ¶ 339 at n. 39. Evidence obtained by the Attorney General indicates that another individual, an Assistant Vice President, Financial Operations at the Trump Organization, became a principal participant in the creation of the Statements of Financial Condition approximately in November 2016.

Mr. Weisselberg, the Chief Financial Officer of the Trump Organization during the relevant period, similarly testified that it was "certainly possible" Mr. Trump discussed valuations with him and that it was "certainly possible" Mr. Trump reviewed the Statement of Financial Condition for a particular year before it was finalized. Supp. Pet. ¶ 340. When pressed about whether Mr. Trump and he approved particular Statements of Financial Condition before their issuance, Mr. Weisselberg repeatedly invoked his Fifth Amendment privilege. *Id.* at ¶ 340.

Given the testimony of Mr. McConney and Mr. Weisselberg, as well as the text of the statements themselves, it is appropriate to conclude that Mr. Trump was involved in the valuations contained on the statements and is the next logical subject of questioning regarding his participation in the creation of the Statements of Financial Condition and his approval of their contents.[12]

Mr. Trump also was personally involved in using the Statements of Financial Condition in numerous commercial transactions for his own financial benefit. Loans issued by Deutsche Bank Trust Company Americas ("Deutsche Bank") in connection with three Trump Organization properties are cases in point. A personal guaranty from Mr. Trump was a component of a $125 million financing deal for the Trump National Doral property. In furtherance of that guaranty, Mr. Trump provided certain prior financial statements, which he represented were "true and correct in all material respects" and "presents fairly Guarantor's financial condition."[13] Mr.

[12] Evidence obtained by OAG also suggests that Mr. Trump had awareness of the financial picture of the Trump Organization. A memo dated October 15, 2016 and addressed to Mr. Trump reads, "per your request enclosed please find a detailed analysis setting forth our various business segments and their resulting operations." Supp. Pet. ¶ 358. The financial performance of Trump Organization businesses is a matter relevant to their value.

[13] Supp. Pet. ¶ 175, n 24. ((Referencing Doral Guaranty) (defining "Prior Financial Statements" to include Mr. Trump's "Statement of Financial Condition, dated as of June 30, 2011"). The loan

Trump signed that guaranty.[14] Mr. Trump also provided a personal guaranty for a $170 million loan in connection with the Trump International Hotel, Washington, DC (the "Old Post Office") property, and similarly provided his Statement of Financial Condition for the year ending June 30, 2013, which he represented was "true and correct in all material respects" and "presents fairly [Mr. Trump's] financial condition as of June 30, 2013."[15] Personal guaranties signed by Mr. Trump concerning the Chicago property reflected similar representations. Supp. Pet. ¶ 175.

In addition to providing the statements at inception of the various transactions, these loans also required Mr. Trump to annually deliver his Statement of Financial Condition for the ensuing years accompanied by a similar certification, which Mr. Trump subsequently provided. For example, in a document dated November 11, 2014, Mr. Trump "hereby certifie[d]" that his Statement of Financial Condition for the year ending June 30, 2014 and other identified documents "presents fairly and accurately in all material respects the financial condition of Guarantor for the period presented."[16]

There were potentially serious commercial consequences for any misrepresentations in such certifications and the Statements of Financial Condition to which they relate—even if only under the terms of these various loans. At origination, the truth of Mr. Trump's representations

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document expressly states that this representation was made "[i]n order to induce Lender to accept this Guaranty and to enter into the Credit Agreement and the transactions hereunder."); *also*, Supp. Pet. ¶ 342, n. 45.

[14] Supp. Pet. ¶¶ 175, 342.

[15] Supp. Pet. ¶¶ 175 at n. 26, 342 at n. 47. Evidence obtained by the Attorney General indicates that the Trump Organization obtained the Old Post Office loan proceeds in stages—with the last draw on the loan (totaling millions of dollars) occurring in 2017.

[16] Supp. Pet. ¶¶ 176 n. 28, 343 n. 49. For the June 30, 2015 statement, Trump Organization employees in May 2016 initially submitted a document signed by him certifying the June 30, 2014 statement, but soon corrected the error by submitting a corrected first page of the compliance certificate.

was a condition precedent to the bank's obligation to lend. Supp. Pet. ¶¶ 165, 344. Additionally, loan documents specified that an "Event of Default" would occur if "[a]ny representation or warranty of Borrower or Guarantor herein or in any other Loan Document" (including a compliance certificate) "shall prove to have been false or misleading in any material respect at the time made or intended to be effective." *Id.* at ¶¶ 165, 344.[17]

Mr. Trump also sent letters to third parties boasting about the contents of his financial statements—documents that are among the three custodial documents from Mr. Trump produced to OAG to date.[18] (*See, supra,* at Pt. I.)

In addition, as Mr. Trump appears to concede in his moving brief (Respondents Mem. at 13), if he appears for an interview under oath and "chooses not to testify" on the basis of his Fifth Amendment privilege, then "an adverse inference may be drawn in" a civil action—should OAG choose to bring one under Executive Law § 63(12). That concession necessarily means his appearance bears a "reasonable relation" to OAG's investigation—because the generation of an adverse inference against Mr. Trump or his businesses could support a judgment on the merits (even a grant of summary judgment) in that civil action. *See, e.g.*, *Access Capital*, 302 A.D.2d at 48 (affirming summary judgment based on adverse inference resulting from defendant's invocation of Fifth Amendment privilege against self-incrimination).

[17] Supp. Pet. ¶ 344 at n. 50. The term "Loan Document" included Mr. Trump's guaranty and "any other document, agreement, consent, or instrument which has been or will be executed in connection with" the loan agreement and guaranty. The same conditions applied to the Chicago and Old Post Office properties.

[18] Supp. Pet. ¶ 345 at n. 51.

In light of the above, there is no reasonable dispute that Mr. Trump's testimony about the preparation and use of his Statements of Financial Condition bears a "reasonable relation" to OAG's lawful civil investigation, and he must be compelled to testify.[19]

2. There is a reasonable basis to compel Mr. Trump's testimony concerning conservation easements he donated in 2014 and 2015

Mr. Trump's testimony likewise must be compelled concerning the conservation easements under investigation by the Attorney General—namely those donated at Seven Springs in Westchester County, New York and on a driving range at the Trump Golf LA in Palos Verdes, California.

OAG's investigation has identified evidence indicating that each of these donations was procured through conduct that generated appraisals submitted to the Internal Revenue Service that misstated or omitted material facts (or were otherwise misleading). *See supra* at Pt. II.A.2.

OAG's investigation likewise has obtained evidence indicating Mr. Trump's intimate involvement in the development of the Seven Springs property. For example, one witness, who described his employment role for the Trump Organization as the "direct representative of Donald Trump" overseeing work in counties including Westchester, testified that Mr. Trump directed that witness's activities, that he spoke to Mr. Trump personally about Seven Springs "[a]bout once a week," and that he "seldom" communicated in writing with Mr. Trump because Mr. Trump indicated "that he did not want things put in writing in communications between

[19] Indeed, Mr. Trump has previously testified about his Statements of Financial Condition and individual valuations contained therein. *See, e.g.*, Deposition of Donald J. Trump, *Trump v. O'Brien*, No. CAM-L-545-06, at 205-212, 270 (N.J. Superior Court) (Dec. 19, 2007).

us."[20] Mr. Trump has also publicly spoken about the development of the Seven Springs Property, including in a 2019 speech to the National Association of Realtors. Supp. Pet. ¶ 352.

Those matters were reflected on Mr. Trump's personal federal income tax returns for a series of years, which were produced to the OAG with Mr. Trump's personal authorization. Supp. Pet. ¶ 353. Moreover, the accounting firm that participated in preparing his tax returns has advised that conservation easements at Seven Springs and Trump Golf LA generated a federal tax benefit for Mr. Trump personally of more than $5 million over the course of tax years 2014 through 2018. OAG obtained that concession only after Mr. Trump personally authorized his accounting firm to communicate this information to OAG. Supp. Pet. ¶ 353.

In light of Mr. Trump's personal involvement in, and benefit from, these conservation easement donations, and Mr. Trump's own prior authorizations to release material to the Attorney General as part of this investigation, Mr. Trump's testimony plainly bears a "reasonable relation" to matters under investigation by OAG.

B. Donald Trump, Jr.'s testimony must be compelled.

Donald Trump, Jr.'s testimony similarly must be compelled because it too will bear a "reasonable relation" to matters under investigation by the Attorney General. Indeed, the Trump Organization (where Donald Trump Jr. has been employed through much, if not all, of the relevant period) has already agreed that Donald Trump, Jr. is a custodian whose documentary evidence would be produced in response to the Attorney General's subpoenas. There is no basis

[20] Supp. Pet. ¶¶ 286, 352. Even absent such direct testimony of Mr. Trump's involvement, knowledge of Mr. Trump's agents presumptively would be imputed to him as a matter of law in civil litigation. *See, e.g.*, *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465 (2010) ("Agency law presumes imputation even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud.").

to deny the Attorney General the ability to examine Donald Trump, Jr. regarding that evidence and evidence OAG has received from other sources.

Donald Trump, Jr. is an Executive Vice President at the Trump Organization. According to his biography on the Trump Organization website, Donald Trump, Jr. joined the firm in 2001, oversaw "the construction, financing and development of Trump International Hotel & Tower, Chicago," played a role in developing Trump International Golf Links in Aberdeen, Scotland, and " is also responsible for all of the commercial leasing for the Trump Organization which includes properties such as Trump Tower on Fifth Avenue and 40 Wall Street in downtown Manhattan."[21] Moreover, evidence obtained by OAG confirms that Donald Trump, Jr. was involved with certain Trump Organization properties that are valued on Mr. Trump's Statement of Financial Condition, including 40 Wall Street, and was consulted in connection with the matters on the Statements of Financial Condition. Supp. Pet. ¶ 355.

Moreover, after Mr. Trump was sworn into office and his assets were placed into a revocable trust, Donald Trump, Jr. and Allen Weisselberg were the two trustees appointed to manage that trust. Supp. Pet. ¶¶ 14, 335, 356. The Statements of Financial Condition for the years ending June 30, 2016 and thereafter purport to have been Donald Trump, Jr.'s responsibility, in addition to Mr. Weisselberg's. As the June 30, 2016 Statement articulates: "*The Trustees* of the Donald J. Trump Revocable Trust dated April 7, 2014, as amended, on behalf of Donald J. Trump *are responsible* for the accompanying statement of financial condition . . . ." Supp. Pet. ¶ 356 (emphasis added). There are equivalent statements included on the Statements of Financial Condition from 2016 through 2020. *Id* at ¶ 356.

[21] https://www.trump.com/leadership/donald-trump-jr-biography; Supp. Pet. ¶ 14.

Donald Trump, Jr. also was directly involved in the loan transactions identified above. In particular, evidence obtained by OAG establishes that he personally certified on an annual basis the truth and accuracy of the Statements of Financial Condition of Donald J. Trump for 2016, 2017, 2018, and 2019 to Deutsche Bank. On some such certifications, Donald Trump, Jr. specified that he was doing so as "attorney in fact" for Donald J. Trump. Supp. Pet. ¶¶ 177, 357. In addition to those certifications, Donald Trump, Jr., made other representations concerning the financial performance of one or more individual properties to Deutsche Bank. Supp. Pet. ¶ 357.

Beyond the Statements of Financial Condition and particular assets therein, documents obtained by OAG establish that Donald Trump, Jr. received his own memoranda discussing the general financial position of the Trump Organization and detailed analyses as to the performance of specific assets. There are multiple memoranda addressed to him enclosing spreadsheets which provided a "detailed financial analysis" on the business segments in the Trump Organization portfolio. Supp. Pet. ¶ 358. The analyses contained projected cash flow figures, actual cash flow figures, and other data which would be relevant to the Statement of Financial Condition of Donald J. Trump. For example, the Statement of Financial Condition for 2017 includes cash in certain entities in which Mr. Trump is only a minority limited partner in a financial calculation reported as Mr. Trump's own liquidity (*see* Supp. Pet. ¶ 358)—but other internal documents sent to Donald Trump, Jr. reflected that any cash distributions from those entities were "at the discretion of" the general partner, not Mr. Trump. *Id.* at ¶ 358. Probing such discrepancies plainly is appropriate.

Given Donald Trump, Jr.'s involvement in these and other matters, his testimony plainly bears a reasonable relation to the matters under investigation by OAG and must be compelled.

C. Ivanka Trump's testimony must be compelled

Ivanka Trump similarly has no plausible basis to defy a lawful subpoena because her testimony plainly bears a reasonable relation to the matters under investigation. Indeed, the Trump Organization, where Ms. Trump was employed until 2017, Supp. Pet. ¶ 359, has already agreed that Ivanka Trump is a custodian whose documentary evidence needs to be produced in response to the OAG subpoenas. There is no basis to deny OAG the ability to examine Ms. Trump regarding that evidence and evidence OAG has received from other sources.

Ms. Trump was a key player in many of the transactions identified above. For instance, in an attempt to obtain financing with respect to the Doral property, she was copied on a letter from Donald J. Trump to the Chief Executive Officer of Deutsche Bank Securities enclosing Mr. Trump's Statement of Financial Condition. Supp. Pet. ¶ 366. Moreover, in the course of negotiating with Deutsche Bank financing for the Doral property, she was responsible for securing loan terms, which included a personal guaranty by Mr. Trump for which his representations regarding his financial condition would be (and were) made. Supp. Pet. ¶ 368. Ms. Trump similarly discussed other, less favorable terms with respect to Doral with other financial institutions for financing options not personally guaranteed by Mr. Trump. Supp. Pet. ¶ 367. Ms. Trump also played similar roles with respect to the Trump Organization's financing with respect to the Chicago and Old Post Office properties. Supp. Pet. ¶¶ 361-74.

Ivanka Trump also played a key role in the Trump Organization's effort to obtain a ground lease from the United States Government (General Services Administration, or "GSA") in connection with the Old Post Office property in Washington, DC. As part of that process, she submitted the Trump Organization's presentation in response to the GSA's Request for Proposal. Supp. Pet. ¶ 362. That presentation and the associated bid explicitly incorporated the Statement of Financial Condition of Donald J. Trump. Supp. Pet. ¶ 363. ("Trump's real estate investments

are funded from Donald J. Trump's significant net worth, which is composed of a wide range of capitalized affiliates. Please find Trump's Statement of Financial Condition in an envelope submitted with each copy of this proposal."). Later, after the Trump Organization had won the bid from GSA and obtained financing from Deutsche Bank, Ivanka Trump signed documents (draw requests) necessary to obtain loan proceeds from Deutsche Bank. Supp. Pet. ¶ 375.

In addition to her knowledge of the uses of the financial statements under investigation, Ivanka Trump also has relevant information regarding the valuation of assets contained therein. In particular, she was able to ask for and access financial summaries and projections covering properties or businesses in the Trump Organization portfolio. Moreover, Ms. Trump occupied an apartment at Trump Park Avenue for which she obtained apparently extraordinarily favorable terms—a monthly rental rate that was a mere fraction per square foot of what other penthouse tenants paid in the building, with an option to purchase the unit for $8,500,000. During the same period (over several years), Mr. Trump's Statement of Financial Condition incorporated values for the same apartment between $20,820,000 and $25,000,000. Supp. Pet. ¶¶ 132.

Given Ivanka Trump's involvement in these and other matters, her testimony plainly bears a reasonable relation to the matters under investigation by OAG and must be compelled.

III. Parallel Criminal Proceedings Provide No Legal Basis to Quash or Stay Enforcement of the Subpoenas

As Respondents purport to "recognize" (Respondents Mem. at 12), the Attorney General has ample authority under Executive Law § 63(12) to conduct civil investigations into potential financial fraud, such as the methodical investigation OAG has conducted to date, as described above and in the Supplemental Verified Petition. And, as Respondents cannot deny either, Mr. Trump tried and failed to halt any parallel criminal or grand jury investigation. *See Trump v. Vance*, 140 S. Ct. 2412 (2020). The nub of Respondents' argument here is that there is something

"unprecedented" about the coexistence or conduct of such investigations that entitles them to avoid (contrary to settled precedent in the First Department) their duty to appear for testimony. Respondents' Mem. at 14, 16.

Respondents' overheated rhetoric cannot avoid the reality that parallel civil and criminal investigations into the same set of alleged facts is routine and encouraged as a matter of sound and efficient law enforcement policy at the federal and state level. That is true whether the investigations are being conducted by one agency—for example, a single United States Attorney's Office—or multiple offices or agencies as in this case.[22] And for decades, New York courts have permitted law enforcement agencies conducting parallel civil and criminal investigations to use evidence gathered from the civil matter in parallel criminal proceedings. In that situation, a party testifying in the civil proceeding should have notice of the pending criminal investigation sufficient to invoke Fifth Amendment protection (if she chooses to do so), and the sole basis for the civil investigation should not be to obtain evidence for the criminal matter. [*See*, *infra,* at Pt. III.B] Here, Respondents—as their own motion indicates (Respondents Mem. at 14)—plainly are on notice that they may need to invoke their Fifth Amendment privilege. It is beyond dispute that the Attorney General's civil investigation is well-founded; OAG has collected ample evidence from the Trump Organization and others, and has the statutorily authorized goal of determining what, if any, civil enforcement action should be taken and what civil remedies should be sought. Indeed, the Trump Organization produced over 5

[22] While Respondents occasionally characterize the investigation as a "unified criminal investigation" by DANY and OAG, what their papers actually describe is the cross-designation of OAG attorneys to DANY. Respondents Mem. at 14, 6. The practice of having Assistant Attorneys General cross-designated to a county prosecutor's office is routine and has been sanctioned by the Court of Appeals. *See Matter of Haggerty v. Hamelin*, 89 N.Y.2d 431, 437 (1997).

million pages of documents and more than a dozen witnesses for testimony in response to OAG's subpoenas over the past 34 months without ever challenging OAG's good-faith basis for seeking such evidence.

A. Coordination between parallel civil and criminal proceedings is standard procedure

Contrary to Respondents' attempt to portray coordination between civil and criminal authorities as unprecedented, government coordination of civil and criminal matters involving the same alleged misconduct arising out of the same facts is routine and encouraged. At the federal level, as far back as 1997, the United States Department of Justice ("DOJ") acknowledged that the challenge of complex cases "requires greater cooperation, communication and teamwork between the criminal and civil prosecutors who are often conducting parallel investigations of the same offenders and matters." Memorandum from the Attorney General, Coordination of Parallel Criminal, Civil and Administrative Proceedings (July 28, 1997), found at https://www.justice.gov/archives/ag/ag-memo-coordinate-parallel-criminal-civil-administraative. The DOJ recognized at the time that "[i]n order to maximize the efficient use of resources, it is essential that our attorneys consider whether there are investigative steps common to civil and criminal prosecutions" and "[w]hen appropriate, criminal [and] civil . . . attorneys should coordinate an investigative strategy," noting in particular that "evidence can be obtained without the grand jury by administrative subpoenas" . . . and "can then be shared among the various personnel responsible for the matter." *Id*. More recently, DOJ has codified its guidance on coordination between civil and criminal proceedings in its Justice Manual, which highlights in several respects the federal policy encouraging coordination among civil and criminal federal authorities to, among other things, "deter future misconduct" and "secure the full range of the government's remedies." *See* DOJ, Justice Manual, Organization and Functions Manual § 27,

https://www.justice.gov/jm/organization-and-functions-manual-27-parallel-proceedings. Thus, as the Manual articulates, DOJ's "policy is that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings." *Id.*[23] Indeed, as the Justice Manual spells out, "it is essential that an effective and successful response involve an evaluation of criminal, civil, regulatory, and administrative remedies," *id.*, because in some cases a civil (rather than criminal) resolution may be appropriate, *id.* The Justice Manual further provides:

> Every United States Attorney's Office and Department litigating component should have policies and procedures for appropriate coordination of the government's criminal, civil, regulatory, and administrative remedies. Such policies and procedures should stress early, effective, and regular communication between criminal, civil, and agency attorneys to the fullest extent appropriate to the case and permissible by law, and should specifically address the following issues, at a minimum:
>
> * * *
>
> Investigation: During the investigation, attorneys should consider investigative strategies that maximize the government's ability to *share information among criminal, civil, and agency administrative teams, including the use of investigative means other than grand jury subpoenas for documents or witness testimony* . . . .
>
> * * *
>
> Parallel actions are important to the Department's efforts to hold accountable individuals who commit corporate malfeasance. Early and regular

[23] The United States Securities and Exchange Commission ("SEC"), which has civil jurisdiction over enforcement of federal securities laws, likewise recognizes in its Enforcement Manual that "[p]arallel civil and criminal proceedings are not uncommon" and that, "[i]n furtherance of the SEC's mission and as a matter of public policy, the staff is encouraged to work cooperatively with criminal authorities, to share information, and to coordinate their investigations with parallel criminal investigations when appropriate." *See* SEC, Division of Enforcement, Enforcement Manual § 5.2.1 (2017), available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

> communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the fullest range of the government's potential remedies and promotes the most thorough and appropriate resolution in each case.

DOJ Justice Manual, 1-12.000 – Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (updated November 2018) (emphasis added), available at https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings.

New York investigative bodies are routinely "vested with investigative powers" to subpoena witnesses and documents as part of a civil investigation, with the understanding that the investigative body may "come across evidence of criminal wrongdoing" that will need to be communicated to appropriate law enforcement authorities. *See, e.g.*, *Congel*, 156 A.D.2d at 275-76 (discussing executive order vesting state commission with authority under Executive Law § 63(12) to investigate various state entities concerning laws, regulations, and procedures relating to maintaining ethical practices and standards in government and recognizing the possibility that documents and testimony elicited through office subpoenas may lead to criminal referrals). The fact that OAG may have reason to share evidence obtained during a good faith civil investigation with a prosecutorial agency does not "signify any limitation on the scope of its inquiry which would prevent it from obtaining the materials" sought in its civil investigation. *Id*. at 279.

Indeed, OAG is, under state law, an agency expressly empowered to carry out parallel investigations. For example, under the Martin Act, the Attorney General may institute civil enforcement proceedings and bring criminal prosecutions for securities or commodities fraud. *See* General Business Law (GBL) §§ 353, 358. Similarly, Executive Law 63(12) empowers the Attorney General to conduct civil investigations into persistent or repeated fraud or illegality in

the conduct of business and, in certain circumstances (such as with referrals by certain other agencies or officials), to prosecute offenses under the laws of this State. *See* Executive Law § 63(2), (3), (10), (12). Thus, parallel investigations that may involve civil or criminal remedies are within the competence and authority of OAG by legislative design. *See generally* 4E N.Y. Prac., Com. Litig. In New York State Courts § 126.23 (5th ed.).

B. Controlling case law requires denial of Respondents' motion to quash or stay enforcement of the OAG subpoenas

The First Department has squarely and repeatedly rejected the central premise of Respondents' motion, holding instead that the possibility that they will invoke the protection of the Fifth Amendment against self-incrimination in civil testimony provides no basis to quash or stay their testimonial obligation. Respondents offer no legal justification to craft an exception for them to this controlling principle, instead electing to ignore these controlling precedents in their briefing.

In *Access Capital, Inc. v. DeCicco*, 302 A.D.2d 48, 51 (1st Dep't 2002), the First Department affirmed a grant of summary judgment based in part on adverse inferences drawn against a party who asserted his Fifth Amendment privilege. The First Department explained that, "[w]hile a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence." *Id*. at 51 ((*citing United States v Rylander,* 460 U.S. 752, 761 (1983)).

Relying on *Access Capital*, the First Department affirmed the denial of a motion to stay a civil action pending the conclusion of a related criminal investigation, holding that "[t]he

assertion of the privilege against self-incrimination is an insufficient basis for precluding discovery." *Fortress Credit Opportunities I LP v. Netschi*, 59 A.D.3d 250, 250 (1st Dep't 2009).

Similarly, in *Matter of Campbell v New York City Transit Auth*., 32 AD3d 350, 352 (1st Dep't 2006), the First Department explained that "[t]he law is clear that a court is not required to stay a civil action until a pending related criminal prosecution has been terminated so that a party can avoid the difficulty of choosing between presenting evidence in his or her own behalf and asserting his or her Fifth Amendment rights."

And in *Congel*, 156 A.D.2d at 280, the First Department (in a case involving a commission to which the Attorney General's § 63(12) powers had been delegated) ordered testimonial subpoenas enforced, notwithstanding the respondents' claim that testimony would result in "attempted elicitation of irrelevant and constitutionally privileged information." In rejecting respondents' claim, the First Department relied on the "long established rule" that privilege "may not be used as a ground to quash a subpoena ad testificandum in advance of compliance," and that the burden would be on the respondents during their testimony to assert a privilege in response to "questions actually propounded." *Id.*

Based on this controlling First Department precedent, the Court should deny Respondents' motion to quash or stay enforcement of the subpoenas on account of any related DANY criminal investigation and indictments. Respondents tellingly cite none of these controlling precedents from the First Department, and that is for good reason: the First Department's approach is consistent with decades of established case law. More than 50 years ago, the U.S. Supreme Court held that it was proper for the government to pursue parallel civil and criminal investigations where the defendants giving evidence in the civil proceeding were aware that the government was contemplating criminal proceedings and the defendants could

have, but did not, invoke their Fifth Amendment privilege. *See United States v. Kordel*, 397 U.S. 1, 4-8 (1970).

The Court further explained that the government was not required "to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial," a result that would "stultify enforcement of federal law."[24] *Id*. at 11.

There can be no serious doubt that OAG's civil investigation is being conducted in good faith and for bona fide civil enforcement purposes, including to determine whether to impose liability under Executive Law § 63(12) and to seek appropriate remedies. As discussed more fully in the Supplemental Verified Petition, OAG commenced the investigation in March 2019 based upon Congressional testimony provided by former Executive Vice President at the Trump Organization and Special Counsel to Donald J. Trump, Michael Cohen,[25] asserting that the Trump Organization and Mr. Trump had made material misrepresentations in various financial statements for the purpose of obtaining loans and insurance coverage on more favorable terms. OAG has methodically investigated those allegations; indeed, the Trump Organization has already provided substantial documentary and testimonial discovery in response to subpoenas issued by OAG in connection with its civil investigation, without ever challenging OAG's good

[24] The *Kordel* Court did, however, recognize that it might be improper for the government to bring a civil action "solely to obtain evidence for its criminal prosecution" or fail "to advise the defendant in its civil proceeding that it contemplates his criminal prosecution." 397 U.S. at 11-12. Respondents do not and cannot allege any improper purpose here.

[25] The criminal information filed in the United States District Court for the Southern District of New York in connection with Mr. Cohen's guilty plea to various offenses identified him as "Executive Vice President" at a "Manhattan-based real estate company" and as "'Special Counsel' to the owner of the Company ("Individual-1"). *See* Criminal Information, *United States v. Cohen*, No. 18-cr-00602-WHP, ECF No. 2 (Aug. 21, 2018). That information alleges certain financial misconduct undertaken by Mr. Cohen and "executives of the Company." *Id.* ¶¶ 37-40.

faith. That puts the validity of OAG's civil investigation beyond dispute; "having complied with the process, the subpoenaed party no longer possesses the option of challenging its validity or the jurisdiction of its issuer" because "[a]ny other rule would open the door to never-ending challenges to the validity of subpoenas, perhaps even years after initial issuance and compliance." *Brunswick Hosp. Center, Inc. v. Hynes*, 52 N.Y.2d 333, 339 (1981); *see also In re Cuomo v. Dreamland Amusements Inc.*, Index No. 401816/08, 2009 WL 81139 at *5 (N.Y. Sup. Ct., N.Y. Co. Jan. 6, 2009) ("Once there has been compliance with the subpoena, a motion to quash is unavailable.").

But even if Respondents were not barred at this late date from challenging the validity of the civil investigation, OAG is presumed to be acting in good faith and need only show that the materials sought are reasonably related to the subject matter under investigation and to the public purpose to be achieved. *Anheuser-Busch*, 71 N.Y.2d at 332. Moreover, OAG has broad discretion in determining when an inquiry is warranted under Executive Law § 63(12). *People v. Greenberg*, 21 N.Y.3d at446 ("The statutes on which the Attorney General relies are broadly worded anti-fraud provisions, prohibiting among other things "repeated fraudulent or illegal acts" and "persistent fraud or illegality") (quoting Exec. Law § 63 (12)); *People v Lower E. Side Intl. Community School*, 2001 N.Y. Misc. LEXIS 1386, 5-6 (N.Y. Sup. Ct., N.Y. Co. 2001) (recognizing Exec. Law § 63(12) defines fraud broadly). Here, OAG seeks the testimony of the Respondents to determine, among other things, the nature and extent of their participation in, and knowledge of, the creation of the statements of financial condition, including the procurement of property valuations and to what extent the statements were used to gain favorable loan terms and insurance coverage. *See, supra*, at Pt. II. Their testimony is directly related to the focus of the investigation and is appropriate for OAG to obtain in order to achieve the public purpose of

identifying and deterring acts of fraud and illegality and to determine relevant individuals' levels of responsibility for misconduct identified in the investigation.

Respondents' cited authority for the proposition that the Court has the discretion to grant the requested relief to quash or stay enforcement of the subpoenas, and should do so, misses the mark.

With respect to quashing the subpoenas, Respondents rely on two First Department cases that are easily distinguishable. In *Rodrigues v. City of New York*, 193 A.D.2d 79 (1st Dep't 1993), the issue was whether a district attorney had the authority to issue subpoenas outside the process of the court without a grand jury being convened. *Id*. at 86. The case had nothing to do with the authority of OAG (as opposed to a district attorney) to issue subpoenas in furtherance of a *civil* investigation under Executive Law § 63(12). Similarly, *People v. Rutter*, 202 A.D.2d 123 (1st Dep't 1994), has no relevance here. *Rutter* involved the question of whether a prosecutor owed a duty to disclose exculpatory evidence in the possession of other law enforcement agencies where there is a joint investigation, *id*. at 238, which has no bearing on the enforceability of an administrative subpoena issued by OAG.

With respect to staying enforcement, Respondents rely on only one First Department decision, *Britt v. International Bus Servs., Inc*., 255 A.D.2d 143 (1st Dep't 1998), which is also easily distinguishable. *Britt* – which predates *Access Capital* and *Fortress Credit* – involved whether to stay a tort action arising from a bus accident. The driver had been indicted in New Jersey for vehicular homicide and assault based on the accident. The driver intended to invoke his Fifth Amendment privilege against self-incrimination if called to testify in the civil action—a result that would have wholly deprived his employer (the bus company) of the ability to present a competent defense. *Id*. at 144. For that reason, the First Department held that a stay was

warranted. No such extraordinary circumstances are present here: (1) there is no pending civil enforcement action on the merits of the statements of financial condition and tax matters discussed above, (2) there is no criminal indictment respecting those matters, and (3) there is no claim that Respondents would be prevented from mounting a defense in a subsequent civil action on the merits respecting those matters if Mr. Trump, Donald Trump, Jr., and Ivanka Trump assert their Fifth Amendment privileges when providing civil testimony (indeed, such a claim would be premature given that there is no pending civil enforcement action.) Their mere desire to avoid a potential adverse inference at some indeterminate time in the future in a civil proceeding resulting from that choice (which is their right to make) is simply not a sufficient legal basis to grant a stay: "[t]he assertion of the privilege against self-incrimination is an insufficient basis for precluding discovery." *Fortress Credit*, 59 A.D.3d at 250; *see also Access Capital,* 302 A.D.2d at 51.

In any event, even assuming the Court has discretion to stay enforcement of a civil investigative subpoena (not even a civil enforcement action) because of the existence of a related criminal investigation, discretionary factors would not support entry of a stay here. The remaining New York cases cited by Respondents in support of their contrary position are either cases from the Second Department, trial courts outside New York County, or federal courts both within and outside the Second Circuit. None of those decisions is binding on this Court, which is required to follow the First Department's decisions in *Access Capital* and *Fortress Credit*; nor would their reasoning in any event compel a ruling in favor of Respondents here.

First, some courts applying a discretionary standard in related contexts consider whether a stay is necessary to avoid complicating both proceedings. *See, e.g., Zonghetti v. Jeromack*, 150 A.D.2d 561, 562-563 (2d Dep't 1989). Here, Respondents fail to identify any added complexity

that would arise if the subpoenas are enforced, so this factor weighs in favor of denying their motion.

Second, some courts consider as a factor whether an indictment has been issued against the civil party for matters within the scope of the civil subpoena sought to be enforced. *See Securities and Exchange Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 ("The case at bar is a far weaker one for staying the administrative investigation. No indictment has been returned; no Fifth Amendment privilege is threatened."); *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc*., 175 F. Supp. 2d 573, 576 (S.D.N.Y. 2001) (noting that district courts in the Second Circuit "generally grant the extraordinary remedy of a stay only after the defendant seeking a stay has been indicted."). This factor weighs against granting a stay; there are no criminal indictments against any of the Respondents for the investigative matters referenced above and described in the Supplemental Verified Petition.

Third, some courts consider the extent to which the subpoenaed individual's constitutional rights are implicated. *See, e.g., Sterling Nat'l Bank*, 175 F. Supp. 2d at 578; *De Siervi v. Liverzani*, 136 A.D.2d 527, 528 (2d Dep't 1988);[26] *Brock v. Tolkow*, 109 F.R.D. 116,

[26] *De Siervi* involved a purely private civil action concerning a mortgage assignment in which one of the defendants had been indicted on charges related to forging that assignment. 136 A.D.2d at 527-28. In that situation—a civil action in which the civil claims, and a criminal prosecution involving essentially total factual overlap and thus the potential for collateral estoppel to streamline the civil action—the Second Department held the trial court had discretion to stay the civil action. *Id.* Those circumstances are not present here, particularly at the investigative stage; nor did *De Siervi* involve a civil law enforcement agency with its own power and duty to seek redress for persistent fraud and illegality in the conduct of business. In any event, more recent Second Department authority echoes points in controlling First Department precedent that the possibility a witness will "invoke the privilege against self-incrimination is not a basis for precluding civil discovery." *El-Dehdan v. El-Dehdan*, 114 A.D.3d 4 (2d Dep't 2013) ("that the witness may invoke the privilege against self-incrimination is not a basis for precluding civil discovery") (citing *Matter of Astor*, 62 A.D.3d 867 (2d Dep't 2009)). *El-Dehdan*

119 (E.D.N.Y.1985). Notably, in *Sterling* the court held, relying on *Kordel*, that "forcing a defendant to choose between waiving his Fifth Amendment privilege or suffering the adverse inference which results in the civil case from invoking his privilege does not violate due process." *Id*. at 578. Applying that holding here weighs in favor of denying Respondents' motion, as would the numerous cited decisions holding that the mere desire to avoid an adverse inference in a civil proceeding is an insufficient basis to halt civil process.

Fourth, staying enforcement of the subpoenas would result in substantial prejudice to OAG, which is endowed with considerable law enforcement power under New York law to police deceptive or misleading conduct in the financial and commercial spheres and otherwise protect the fairness of the markets. "[P]rotecting the citizenry against fraud [is] undoubtedly [a] legitimate state interest." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 43 (1980). Moreover, there is a strong governmental interest in protecting financial institutions from fraud. *See* S. Rep. No. 98-225, at 377 (concerning enactment of federal bank-fraud statute) (cited in *Loughrin v. United States*, 573 U.S. 351, 361 (2014)); *see also Sterling Nat'l Bank*, 175 F. Supp. 2d at 580 (noting the importance of the public interest in preventing fraudulent practices); C*itibank, N.A v. Hakim*, Index No. 92 Civ. 6233, 1993 U.S. Dist. LEXIS 16299, at * 8 (S.D.N.Y 1993) ("The public interest in financial institutions['] promptly recovering misappropriated funds is significant, particularly when weighed against the interest in a merely conjectural criminal prosecution."). Halting the Attorney General's lawful authority to carry out her duties by seeking testimony of high-ranking current and former corporate officials would work substantial harm to those interests. *See Maryland v. King*, 567 U.S. 1301, 1301-02 (2012) (Roberts, C.J.) ("[A]ny

involved a finding of contempt that subsequently was affirmed by the Court of Appeals, which noted that "a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination." *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 37-38 (2015).

time a State is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury.") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 404 U.S. 1345, 1351 (1977)); *id.* (noting that "ongoing and concrete harm to [a State's] law enforcement" interests supported a stay of ruling enjoining operation of state statute). Moreover, the *Dresser* court noted as one reason a civil enforcement agency ought not be forced to await a criminal outcome is that the agency's ability to build or bring a case would be prejudiced—through faded memories, witnesses who pass away, or limitations periods expiring.[27] *Dresser*, 628 F.2d at 1377.

Finally, civil remedies available to OAG are robust and not duplicative of punishment that could be imposed in a criminal prosecution. Under Executive Law § 63(12), OAG is authorized to seek a broad range of remedies in a civil action seeking to advance these and other interests in combating commercial fraud, including revoking a license to conduct business within the state, moving to have an officer or director removed from board of directors, and restitution and disgorgement of ill-gotten gains. *See, e.g.*, *People ex rel. Schneiderman v. Greenberg*, 27 N.Y.3d 490, 497-98 (2016). Indeed, just last week, the Southern District of New York acting under federal authority and Executive Law § 63(12) ordered that Martin Shkreli would be "barred for life from participating in the pharmaceutical industry and . . . ordered to disgorge $64.6 million in net profits from his wrongdoing." *Federal Trade Comm'n, State of New York, et al. v. Shkreli*, No. 20 Civ. 0706, 2022 WL 135026, at *1 (S.D.N.Y. Jan. 14, 2022) (Cote, J.).[28] OAG is authorized by law to seek these remedies, designed to protect the public welfare,

[27] After OAG identified a series of extensive production failures, on August 27, 2021 the Trump Organization signed a tolling agreement, but only through April 30, 2022. Supp. Pet. ¶ 328.

[28] As the Court noted in that opinion, the Attorney General under Executive Law § 63(12) may seek "a permanent and plenary ban in a particular industry," 2022 WL 135026, at *44, as well as "disgorge[ment] [of] unlawfully gained profits wherever they were derived," *id.* at *46.

separate and apart from any incarceration or fine that might be imposed by a court in a criminal prosecution. A stay would unduly impair the ability of OAG to seek these robust civil remedies, including by constraining OAG's ability to ascertain through direct testimony the level of responsibility of certain high-ranking individuals in any identified misconduct—matters that naturally inform a law enforcement determination regarding what remedies are appropriate to seek and against whom to seek them, should a civil enforcement action be brought.

CONCLUSION

Based on the foregoing, OAG respectfully requests that the Court deny the Respondents' Motion to Quash and grant OAG's cross-motion to compel the production of all records and testimony sought pursuant to the OAG subpoenas, along with such other and further relief the Court deems necessary and appropriate.

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Dated: New York, New York
January 18, 2022

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