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.; DJT HOLDINGS, LLC; DJT HOLDINGS MANAGING MEMBER, LLC; SEVEN SPRINGS LLC; ERIC TRUMP; CHARLES MARTABANO; MORGAN, LEWIS & BOCKIUS, LLP; SHERI DILLON; DONALD J. TRUMP; IVANKA TRUMP; DONALD TRUMP, JR.; and CUSHMAN & WAKEFIELD, INC.,

Respondents.

Index No. 451685/2020

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE ATTORNEY GENERAL'S CIVIL CONTEMPT MOTION AGAINST RESPONDENT DONALD J. TRUMP

LETITIA JAMES
Attorney General of the State of New York
28 Liberty Street
New York, NY 10005

Kevin C. Wallace
Andrew Amer
Colleen K. Faherty
Alex Finkelstein
Wil Handley
Eric R. Haren
Louis M. Solomon
Austin Thompson
Stephanie Torre
Of Counsel

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PRELIMINARY STATEMENT

The Court's February 2022 Order directed Mr. Trump in the clearest of terms to "comply in full" with OAG's subpoena.[1] Instead, Mr. Trump served a "Response" that raised a number of boilerplate objections, provided answers subject to those objections, attested to searches that were also subject to the objections and described in the vaguest of terms, produced zero documents, and erroneously disavowed any obligation to produce responsive documents in the possession, custody, or control of the Trump Organization, even though, as the Court is well aware, the Trump Organization's production has been plagued by its own delays and compliance problems that have required this Court's ongoing intervention.

The Court should put an end to Mr. Trump's intransigence and subterfuge. The Court has already held that OAG is entitled to Mr. Trump's evidence. *See* February 2022 Order at 8. Mr. Trump should be held in civil contempt for his blatant failure to obey the Court's February 2022 Order and coerced to comply in full through the imposition of an appropriate fine. Full compliance means: (i) responding to each document demand without objection; (ii) conducting searches of all relevant physical locations, with details of the who, what, when, where, and how of each search (NYSCEF 361, Instruction No. 12); (iii) conducting searches of all electronic devices and other electronically stored repositories using technology-assisted review in consultation with OAG, including searches of Mr. Trump's mobile devices already identified (*id*., Instruction No. 8); (iv) producing all responsive documents and information in the form maintained, with the exception of the paltry 10 custodial documents of Mr. Trump *already produced* by the Trump Organization (*id*., Instruction Nos. 2 and 7); (v) identifying any

[1]The defined terms used in this reply brief are the same as those used in Petitioner's moving brief, NYSCEF 670.

responsive documents that have been destroyed or are no longer available with details on how and why they were not maintained (*id*., Instruction No. 3); and (vi) producing a standard privilege log for any documents being withheld on grounds of privilege (*id.*, Instruction No. 11).

ARGUMENT

I. RESPONDENT'S MARCH 31 "RESPONSE" VIOLATED THE COURT'S ORDER DIRECTING HIM TO "COMPLY IN FULL" WITH OAG'S SUBPOENA

A. Mr. Trump's Objections Are Improper

In response to this Court's February 2022 Order rejecting his motion to quash and directing him to "comply in full" with OAG's subpoena, Mr. Trump raised for the first time a raft of boilerplate objections to each of the eight document demands in the subpoena. Doubling down on this procedural gamesmanship, Mr. Trump insists that he was "well within his rights" to raise objections to the document demands at this stage of proceedings – after filing and losing a motion to quash (in which he raised *no* objections to the document demands) and after negotiating a four week extension beyond the two weeks provided in the Court's February 2022 Order for his document production. *See* Respondent Donald J. Trump's Memorandum of Law in Opposition to the Attorney General's Civil Contempt Motion Against Respondent Donald J. Trump, NYSCEF 720 ("Resp. Opp."), at 13.

Mr. Trump had no right to assert *any* objections to OAG's subpoena on the March 31 deadline because he had already lost his motion to quash, which was "the proper *and exclusive* vehicle to challenge the validity" of OAG's subpoena. *Brunswick Hosp. Cen., Inc. v. Hynes*, 52 N.Y.2d 333, 339 (1981) (emphasis added); *see also Cuomo v. Dreamland Amusements, Inc.*, 22 Misc. 3d 1107(A), 880 N.Y.S.2d 223 (Sup. Ct. N.Y. Co. 2009)); *People v. Doe*, 170 Misc.2d 454, 456 (Sup.Ct. Monroe Co.1996)). Moreover, having failed to raise any objections to the document demands in his motion, Mr. Trump waived his right to object at any later point in time.

See e.g., Holloway v. Cha Cha Laundry, Inc., 97 A.D.2d 385, 385–86, 467 N.Y.S.2d 834, 835 (1st Dep't 1983); *Kimmel v. State*, 261 A.D.2d 843, 844, 690 N.Y.S.2d 383, 384 (4th Dep't 1999); *see also*, *Exxon Mobil Corp. v. Healey*, 28 F.4th 383 (2d Cir. 2022) (applying analogous Massachusetts law).

Mr. Trump ignores this precedent and relies instead on *Friedman v. Hi-Li Manor*, 42 N.Y.2d 408 (1977), for the proposition that a subpoena recipient may raise objections to a subpoena for the first time in response to a contempt motion. Resp. Opp. at 12. *Friedman* says no such thing. In *Friedman*, the issue was whether a "recipient of an office subpoena who desires to challenge its validity should be required to initiate a motion to quash rather than to await the institution of proceedings to compel compliance and then for the first time raise objection." 42 N.Y.2d at 413. The court declined to adopt a rule that would force the recipient to file a motion to quash, holding that "the recipient may properly raise his objections when the official" first moves to compel compliance. *Id*. Nothing in *Friedman* supports Mr. Trump's position that, after a court has ruled on cross-motions to quash and compel and ordered compliance, the subpoena recipient may then raise objections to the subpoena for the first time. Indeed, in *Friedman* the court held the objections were "timely made" because they were raised *during* the parties' motion practice to enforce the subpoenas. *Id*.

Mr. Trump's reliance on *Myerson v. Lentini Bros. Moving and Storage Co., Inc*., 33 N.Y.2d 250 (1973), is similarly misplaced. That case stands for the unremarkable proposition that a subpoena recipient may "always challenge the subpoena in court," *id* at 256 – which Mr. Trump did and lost – not that the recipient may "always challenge" a subpoena even after the court rejects his initial challenge brought by way of a proper motion.

Nor is there any merit to Mr. Trump's argument that he preserved his right to object to OAG's subpoena through an affirmative defense in his answer. Resp. Opp. at 13. The cross-motions before the Court were the "exclusive vehicle[s]" for Mr. Trump to raise objections to the document demands in the subpoena. *Brunswick Hosp.*, 52 N.Y.2d at 339. If that were not the case, as Mr. Trump's argues, then every subpoena recipient would receive two bites at the apple to challenge a subpoena – once when raising objections in a motion to quash and a second time based on different objections asserted in his answer. No case supports that nonsensical result.

Finally, Mr. Trump contends that "the objections are immaterial" because he provided a "full and complete answer" to each document demand. Resp. Opp. at 13. He did not. The answer he provided to each of the eight demands was expressly "[s]ubject to and without waiving" the numerous specific and general objections he raised and "incorporate[ed] all objections." *See, e.g.*, Faherty Aff., Ex. B at 5 (response to Request No. 1). As a result, his answer to each demand that nothing responsive exists is hollow. For example, Mr. Trump objects to each request as "grossly overbroad" and "unduly burdensome." His "nothing exists" answer is subject to those objections, but he does not state in what manner he narrowed the requests to make them, in his view, less "overbroad" and less "unduly burdensome." Similarly, Mr. Trump objects to each request as "unintelligible." Assuming that is in fact the case, how did he interpret the supposedly "unintelligible" demands in order to search for responsive documents and then assert that no responsive material exists? Because his "nothing exists" answers are all subject to his improper objections, they are patently insufficient.

Mr. Trump was not entitled to raise any objections to OAG's subpoena when directed to "comply in full" by March 31, and by doing so he violated the February 2022 Order.

B. Mr. Trump Cannot Pass Off His Compliance Obligation To The Trump Organization

Ignoring the improper objections he has asserted, to which all of his answers are subject, Mr. Trump contends that he has complied in full with the February 2022 Order because his counsel found no responsive documents "that were required to be separately produced by Respondent." Resp. Opp. at 7. But Mr. Trump's view of what he was required to "separately produce[]" is far too limited and without any basis; he claims that he was not obligated to separately produce responsive documents in his possession or custody that "have been previously produced" or "will be produced" by the Trump Organization. *See, e.g.*, Faherty Aff., Ex. B at 6 (response to Request No. 1); *see also id*. at 18, ¶ 8 (declining to provide responsive documents to the extent they are in the possession, custody, and control of the Trump Organization and "have been and/or will be produced by the Trump Organization"). In other words, Mr. Trump claims he "was not obligated to produce documents in the possession, custody or control of the Trump Organization." Resp. Opp. at 7.

Contrary to Mr. Trump's contention, Instruction No. 2 of OAG's subpoena does not support this limitation on his production obligation. The instruction provides that Mr. Trump need not produce only those responsive documents that "have previously been produced" by the Trump Organization - past tense. NYSCEF 361 at 3 (Section C.2.).[2] By reading into the instruction the words "or will be produced," Mr. Trump has improperly and materially expanded the category of documents excused from production pursuant to this instruction. His disingenuous reading of the instruction results in a glaring and material omission in his Response, and is particularly egregious given that (a) the Court ordered Mr. Trump to produce

[2] NYSCEF 361 is the signed version of OAG's December 2021 subpoena. The version of the subpoena that is attached as Exhibit A to the Habba Affidavit is unsigned.

all of his responsive documents independent, and in advance, of the completion of the Trump Organization's production, and (b) OAG refused to agree to extend the date for Mr. Trump's production to align with the Trump Organization's production deadline. Faherty Aff. at ¶¶ 17, 20.

Moreover, Mr. Trump's attempt to shift a significant portion of his production burden to the Trump Organization based on what he believes the company may produce in the future is further problematic given the compliance issues plaguing the Trump Organization's production to date; those issues have led to the need to appoint an independent third-party eDiscovery monitor and ongoing Court intervention through multiple orders, including one entered by the Court as recently as March 28, 2022. NYSCEF 667. OAG's subpoena directed to and served upon Mr. Trump individually places on him a non-transferable obligation to search for and produce responsive documents in his possession, custody, or control, which includes all responsive material that may also be in the possession, custody, or control of the Trump Organization.[3]

Pursuant to the plain language of OAG's subpoena and the February 2022 Order, Mr. Trump was required to produce on March 31 all responsive documents in his possession,

[3] Respondent complains that the term "control" is not defined in the subpoena instructions, Resp. Opp. at 8, but he is wrong. Instruction No. 2 states that documents or information in "your possession, custody, or control" "includes, without limitation, documents or information possessed or held by any of your officers, directors, employees, agents, representatives, divisions, affiliates, subsidiaries *or persons from whom you could request documents or information.*" NYSCEF 361 at 3 (Instruction No. 2) (emphasis added). In any event, quibbling over what the word "control" means in the context of a document demand is ridiculous. Every litigator understands full well what "possession, custody, or control" means in a document demand, or at least should. *See, e.g. Commw. of the N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 63 (2013) ("Indeed, various courts have interpreted 'possession, custody or control' to allow for discovery from parties that had practical ability to request from, or influence, another party with the desired discovery documents. As such, courts have interpreted 'possession, custody or control' to mean constructive possession.").

custody, or control to the extent not *already produced* by the Trump Organization – a carve-out that excuses from his production a mere 10 documents produced to date by the company from Mr. Trump's custodial files. *See* LaRocca Hornik Rosen & Greenberg LLP letter dated April 20, 2022 ("TTO April 20 Letter"), at 15 (noting that the Trump Organization "collected and produced 10 non-privileged 'direct' custodial documents of Donald J. Trump to the OAG").[4] By refusing to produce responsive documents that he believes the Trump Organization may produce in the future, Mr. Trump failed to "comply in full" with OAG's subpoena and violated the February 2022 Order.

Moreover, putting aside the impropriety of Mr. Trump's effort to shift his own production obligations onto the Trump Organization, his counsel's assurances (without any apparent basis) that any responsive material in Mr. Trump's "control" will be part of the Trump Organization's production is undermined by the recent status report OAG has received from the independent third-party e-Discovery monitor overseeing the Trump Organization production efforts, HaystackID. According to HaystackID's April 18, 2022 report, there is no ongoing effort to search for responsive material from Mr. Trump's electronic devices; the HaystackID report identifies two mobile phones for Mr. Trump, but indicates it is "Unknown" whether the devices have been collected for discovery.[5] HaystackID April 18, 2022 Report, Ex. C at lines 63-64.[6] The report also indicates that Mr. Trump's longtime executive assistant, Rhona Graff, has a

[4] A copy of this letter was provided to the Court by counsel for the Trump Organization by electronic mail on April 20, 2022.

[5] The TTO April 20 Letter mentions only Mr. Trump's "TTO-issued mobile phone" but makes no mention of the two personal mobile devices identified by HaystackID. TTO April 20 Letter at 15.

[6] HaystackID provided a copy of this report to the parties and the Court via electronic mail on April 18, 2022.

laptop and desktop computer located at Trump Tower, but neither one has been collected for discovery, so they have not been searched either. *Id*. at lines 221-22.

C. Counsel's Affidavit Certifying To The Search For Responsive Documents Is Legally Insufficient

The affidavit submitted by Mr. Trump's counsel, Michael Madaio, certifying to the "search" that uncovered zero responsive documents is grossly deficient. Mr. Madaio does not attest that he personally conducted the search, but rather that it was conducted either by him or "others," which means he may have had no personal involvement in the search at all. Faherty Aff., Ex. B at 17 (¶ 3). He does not identify the "others," nor does he provide any details at all about where or how the searches were conducted, despite the clear instruction in OAG's subpoena to do so:

> You shall produce a copy of all written or otherwise recorded instructions prepared by you concerning the steps taken to respond to this Subpoena. For any unrecorded instructions given, you shall provide a written statement under oath from the person(s) who gave such instructions that *details the specific content of the instructions and any person(s) to whom the instructions were given*.

NYSCEF 361 at 5 (Instruction No. 12) (emphasis added). Even in the absence of this instruction, controlling precedent requires far more specificity in the certifying attorney's affidavit than Mr. Madaio provided:

> When the response to a discovery request is, in effect, that there are no responsive documents within the party's custody, possession, or control, that party must provide a detailed statement, under oath, by someone with direct knowledge of the facts setting forth the past and present status of the relevant documents; where they were kept; what efforts, if any, were made to preserve them; the circumstances surrounding their disappearance or destruction; and the means and methods used to conduct a search for them. *In short, the affidavit submitted must provide the court with a basis to find that the search conducted was a thorough one or that it was conducted in a good faith effort to provide the necessary records to the plaintiff.*

WMC Mortg. Corp. v. Vandermulen, 32 Misc. 3d 1206(A), 2011 WL 2586411, at * 4 (Sup. Ct. Suffolk Co. June 29, 2011) (emphasis added) (cleaned up) (citing *Jackson v. City of New York*, 185 A.D.2d 768, 770 (1st Dep't 1992) and *Tower Ins. Co. of New York v. Headley*, No. 102578/2008, 2009 WL 2578547 (Sup. Ct. New York Co. August 11, 2009). The "bald and conclusory assertions" by Mr. Madaio that a "diligent search" was conducted that uncovered no responsive documents in Mr. Trump's possession or custody (even putting aside the exclusion of documents within his "control") is "clearly insufficient." *Vandermulen*, 2011 WL 2586411, at *4.

It is also obvious that the purported "diligent search" conducted either by Mr. Madaio or unidentified "others" was woefully incomplete based on Mr. Trump's erroneous interpretation of Instruction No. 2. In his affidavit, Mr. Madaio attests that a "diligent search" was made "of all of Respondent's relevant records for materials sought by the Subpoena, *in accordance with the instructions* and definitions set forth in the Subpoena." *Id*. (emphasis added). Mr. Trump incorrectly construes Instruction No. 2 to relieve him of any obligation to produce responsive material that is in the possession, custody, or control of the Trump Organization. Based on the careful wording of Mr. Madaio's affidavit, it is readily apparent that there was no search conducted for any responsive material in Mr. Trump's "control" that was also within the possession, custody, or control of the Trump Organization based on Mr. Trump's erroneous belief that he had no obligation to separately produce such documents. At a minimum, that means there was no independent search by Mr. Trump's counsel of the following: (i) Mr. Trump's "chron" files; (ii) Mr. Trump's hard copy calendars; (iii) the files located in cabinets outside Mr. Trump's office; (iv) the storage room by Mr. Trump's office; (v) the Executive Office storage closet; (vi) the file cabinets located on the 25th and 26th floors; and (vii) files

maintained in off-site storage. *See* TTO April 20 Letter at 15. Nor did Mr. Trump's counsel conduct an independent search of tens of thousands of custodial documents belonging to Mr. Trump's longtime executive assistant Rhona Graff, or any of the following locations "likely to house responsive information in her possessions, custody, and/or control": (i) Ms. Graff's emails; (ii) the drives from Ms. Graff's desktop; (iii) Ms. Graff's hard copy paper files; (iv) Ms. Graff's electronically stored calendar entries; or (v) Ms. Graff's emails that were automatically backed up from her cell phone to her desktop's local C drive. *Id*. at 11.

* * *

Mr. Trump's Response on March 31 was the antithesis of full compliance with OAG's subpoena – it was just more of the same obstinate, dilatory tactics Mr. Trump has employed for the past six months in an effort to deprive OAG of his evidence. Enough is enough.

II. OAG HAS SUFFERED SUBSTANTIAL PREJUDICE AS A RESULT OF MR. TRUMP'S CONTINUED REFUSAL TO COMPLY WITH OAG'S SUBPOENA

OAG began the process of seeking testimony and documents from Mr. Trump individually on November 1, 2021. After communications throughout the month of November, counsel for Mr. Trump accepted service of the subpoena on December 2, 2021, at which point production of documents was due on December 17, 2021. Faherty Aff. at ¶¶ 8-9. Counsel then informed OAG that Mr. Trump would move to quash the subpoena instead of complying. After full briefing on the parties' cross-motions to quash and compel, the Court issued its February 2022 Order requiring Mr. Trump's compliance in full with OAG's document demands within two weeks, a deadline that was extended by another four weeks to accommodate Mr. Trump's request for additional time purportedly based on counsel's need to search for documents at Trump Tower and Mar-a-Lago. *Id*. at ¶ 16. Ultimately, the March 31 deadline for the production of Mr. Trump's responsive documents was reached after six months of effort by OAG through

emails, phone calls, letters, motion practice, and Court intervention. Despite all of these efforts, OAG has still not obtained any evidence from Mr. Trump in response to the subpoena. There can be no serious dispute that, as a direct result of Mr. Trump's ongoing contumacious conduct, the rights of OAG, acting in the public interest, have been clearly and significantly prejudiced.[7] *See State v. Stallings*, 183 A.D.2d 574, 575 (1st Dep't 1992).

In its moving papers, OAG identified several categories of documents and information that it believes Mr. Trump should have produced but has not. Faherety Aff. at ¶ 25. Identifying these categories required OAG to sift through voluminous productions from the Trump Organization and others, which were littered with extraneous material and failed to provide any information about what locations and devices connected to Mr. Trump were searched, when they were searched, and whether or not any previously existing documents were destroyed. The status report submitted on April 20, 2022 by the Trump Organization leaves several open questions concerning these categories (which OAG will separately address with the Court in the context of its continuing compliance dispute with the Trump Organization), and Mr. Madaio's affidavit confirms he made no independent search for responsive documents relating to any of these categories among the material in the possession, custody, or control of the Trump Organization. *See, supra*, at Point I.B-C.

Accordingly, Mr. Trump's conduct continues to stymie OAG's months-long endeavor to obtain the full universe of Mr. Trump's relevant custodial documents to OAG's substantial prejudice and in flagrant violation of the Court's February 2022 Order.

[7] Respondent's contention that OAG's sole claim of prejudice is litigation costs, Resp. Opp. at 14, is simply incorrect.

III. THIS IS NOT A DISCOVERY MOTION, SO SECTION 202.20-f DOES NOT APPLY

Respondent's contention that OAG was required to comply with Section 202.20-f of the Court's Uniform Civil Rules is a head-scratcher. That rule, which requires parties to meet and confer in good faith, applies to discovery disputes not contempt motions. *See* 22 NYCRR 202.20-f(a) ("To the maximum extent possible, *discovery disputes* should be resolved through informal procedures, such as conferences, as opposed to motion practice.") (emphasis supplied). Here, the parties conferred in good faith before filing their cross-motions to quash and compel with respect to OAG's subpoena. Mr. Trump's violation of the Court's order resulting from that motion practice does not trigger anew any further obligation to confer. Mr. Trump's argument that OAG was required to engage in more negotiations after he failed to comply in full with OAG's subpoena on March 31 renders the February 2022 Order merely the starting the point for another round of posturing; it is simply more of the same delay tactic he has employed since OAG first sought his evidence back in November 2021.

Moreover, none of the cases cited by Respondent supports the proposition that Section 202.20-f is relevant here. *Lopez v. New York City Transit Authority*, 925 N.Y.S.2d 84 (1st Dep't 2011), involved an unsuccessful contempt motion in personal injury action where the "[p]laintiff demonstrated a good faith effort to comply with the preliminary conference order," the order was "not unequivocal[]," and the defendant failed to show prejudice as a result of plaintiff's conduct. *Id*. at 85. This case could not be more different, including the fact that this is a special proceeding to enforce an administrative subpoena rather than a plenary action where remedies under C.P.L.R. 3126 for disobeying court orders are readily available. The decision in *Oak Beach v. Babylon,* 62 N.Y.2d 158 (1984), is similarly inapposite. That case involved the issue of whether New York's co-called Shield Law protected a journalist who refused to comply with a

court order requiring disclosure of his source from the imposition of remedies available in a plenary action under C.P.L.R. 3126; there was no dispute that the Shield Law protected the journalist from being held in contempt. *Id*. at 166-67. Respondent's remaining three cases, by his own description, involve discovery motions, Resp. Opp. at 17, so they have nothing to do with a motion brought for civil contempt.

CONCLUSION

OAG respectfully requests that the Court grant OAG's motion to: (i) hold Respondent Donald J. Trump in civil contempt for violating the Court's February 2022 Order requiring him to comply in full with that portion of OAG's subpoena seeking documents and information; (ii) assess a daily fine against Mr. Trump of $10,000 or an amount otherwise sufficient to coerce his compliance with the Court's February 2022 Order; (iii) compensate OAG for Mr. Trump's disobedience in the form of an award of OAG's costs and fees in connection with filing this motion; and (iv) award such other and further relief the Court deems necessary and appropriate.

Dated: New York, New York
April 22, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

By: */s/ Andrew Amer*
Kevin C. Wallace
Andrew Amer
Colleen K. Faherty
Alex Finkelstein
Wil Handley
Eric R. Haren
Louis M. Solomon
Austin Thompson
Stephanie Torre

Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6127
Andrew.Amer@ag.ny.gov

Attorneys for the People of the State of New York

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