PART 59 APR 05 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK -against- DONALD J. TRUMP, Defendant.	NOTICE OF MOTION TO QUASH DEFENDANT'S SUBPOENA TO MARK POMERANTZ AND FOR A PROTECTIVE ORDER Ind. No. 71543-23

PLEASE TAKE NOTICE that the People will move this Court, located at 100 Centre Street, New York, New York, on a date and time to be set by the Court, to quash defendant's subpoena *duces tecum* to Mark Pomerantz pursuant to CPL §§ 610.20(3) and (4); in the alternative, to enter a protective order permitting the People to conduct a privilege review of any responsive material from Mr. Pomerantz prior to its dissemination to defendant, and directing that any material produced to defendant pursuant to the subpoena shall be subject to the Court's May 8, 2023 Protective Order; and for such other and further relief as the Court may deem just and proper. A supporting affirmation, memorandum of law, and exhibits are attached to this notice of motion.

DATED: April 3, 2024

Respectfully submitted,

ALVIN L. BRAGG, JR.
District Attorney, New York County

By: */s/ Matthew Colangelo*
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK -against- DONALD J. TRUMP, Defendant.	AFFIRMATION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH DEFENDANT'S SUBPOENA TO MARK POMERANTZ AND FOR A PROTECTIVE ORDER Ind. No. 71543-23

AFFIRMATION

Matthew Colangelo, an attorney admitted to practice before the courts of this state, affirms under penalty of perjury that:

1. I am an Assistant District Attorney in the New York County District Attorney's Office. I am assigned to the prosecution of the above-captioned case and am familiar with the facts and circumstances underlying the case.

2. I submit this affirmation in support of the People's motion to quash defendant's subpoena *duces tecum* to former Special Assistant District Attorney Mark Pomerantz (Ex. 1).

3. Defendant is charged with thirty-four counts of falsifying business records in the first degree, PL § 175.10. These charges arise from defendant's efforts to conceal an illegal scheme to influence the 2016 presidential election. As part of this scheme, defendant requested that Michael Cohen, an attorney who worked for his company, pay $130,000 to an adult film actress shortly before the election to prevent her from publicizing an alleged sexual encounter with defendant. Defendant then reimbursed Cohen for the illegal payment through a series of monthly checks. Defendant caused business records associated with the repayments to be falsified to disguise his and others' criminal conduct.

I. The People's exhaustive discovery collection and review process, including their efforts to obtain and disclose discoverable materials from Mark Pomerantz.

4. The People have provided detailed accounts of their discovery efforts in this case in previous filings with the Court, including the People's efforts to obtain and disclose materials from former Special Assistant District Attorney Mark Pomerantz after his resignation in February 2022. Those filings include the People's March 18, 2024 Memorandum of Law in Opposition to Defendant's Motion Regarding Discovery ("March 18 MOL") and two affirmations submitted in connection with that motion, each also dated March 18, 2024, from Assistant District Attorney Matthew Colangelo ("March 18 Colangelo Aff.") and Pomerantz himself ("March 18 Pomerantz Aff."). The People are further informed by an additional affirmation of Pomerantz in response to the instant subpoena *duces tecum* dated March 29, 2024, and annexed hereto as Exhibit 2 ("March 29 Pomerantz Aff."). The People hereby incorporate those filings by reference.

5. The People will not repeat all of their discovery efforts as detailed in the incorporated filings. To summarize:

a. When Pomerantz resigned in February 2022, the Office requested that he return all case- and investigation-related materials in his possession. *See* March 18 Colangelo Aff. ¶ 4.

b. In March 2022, the Office sent Pomerantz a preservation notice in connection with the *People v. Trump Corporation* prosecution, which reminded Pomerantz of his obligation to return to the Office any case-related materials, and requested that he provide the Office with any "additional communications and materials" concerning, among other things, "the investigation or prosecution of . . . Mr. Trump" that he had not already provided. March 18 Colangelo Aff. ¶ 5.

c. After defendant was indicted and arraigned in the instant prosecution, the People reviewed all of Pomerantz's case-related emails and other electronic files, as well as hard copy records, that were in the People's possession and were even arguably related to the subject matter of the case, and produced to defendant all discoverable information identified through that review. *See* March 18 MOL at 12; March 18 Colangelo Aff. ¶ 6.

d. In June 2023, the People contacted Pomerantz through counsel and asked that Pomerantz [redacted] and requested that Pomerantz [redacted] March 18 MOL at 12; *see also* March 18 Colangelo Aff. ¶ 7; March 18 Pomerantz Aff. ¶ 1; March 29 Pomerantz Aff. ¶ 2 (Ex. 2).

e. Counsel for Pomerantz provided a small number of discoverable materials in response to the People's June 2023 request. *See* March 18 MOL at 12; March 18 Colangelo Aff. ¶ 8; March 18 Pomerantz Aff. ¶ 1; March 29 Pomerantz Aff. ¶ 3 (Ex. 2). In response to a follow-up request from the People in July 2023, Pomerantz's counsel located and produced [redacted]. *See* March 18 MOL at 12; March 18 Colangelo Aff. ¶ 9.

f. All discoverable materials thereby obtained from Pomerantz were produced to defendant. *See* March 18 MOL at 12; March 18 Colangelo Aff. ¶¶ 8-9.

g. In late January 2024, defense counsel asked the People about [redacted]—which had been produced by the People six months earlier—that, according to defense counsel, appeared to reference [redacted] involving Pomerantz that had not been provided. *See* March 18 MOL at 13; March 18 Colangelo Aff. ¶ 9.

h. After the People determined that we did not possess [redacted], we promptly contacted counsel for Pomerantz, asked that [redacted] reiterated our request that [redacted] and obtained from Pomerantz's counsel and disclosed to the defense [redacted], including many that were not actually discoverable. *See* March 18 MOL at 13; March 18 Colangelo Aff. ¶¶ 11-13; March 29 Pomerantz Aff. ¶ 4 (Ex. 2).

i. In March 2024, an attorney for Michael Cohen provided the People with [redacted] The People promptly produced [redacted] to the defense on the same day we received them (with one redaction relating to [redacted]), including [redacted] that did not contain discoverable material. *See* March 18 Colangelo Aff. ¶ 15.

j. After learning of [redacted], the People again contacted Pomerantz's counsel, who subsequently informed the People that [redacted]

[redacted]. *See* March 18 Colangelo Aff. ¶¶ 16-17; March 18 Pomerantz Aff. ¶¶ 3-6.

k. [redacted] that Pomerantz found in his subsequent search (*see* March 18 Pomerantz Aff. Ex. A) were identical to [redacted] that the People had already received from Cohen's attorney and disclosed to the defense. *See* March 18 Colangelo Aff. ¶ 17.

II. Defendant's March 18, 2024 subpoena duces tecum to Mark Pomerantz.

6. On or about March 18, 2024, defendant served a subpoena *duces tecum* on Mark Pomerantz in connection with this prosecution, with a return date of March 29, 2024. *See* Ex. 1.

7. The People became aware of the subpoena when counsel for Pomerantz alerted the People that counsel had been served. Defense counsel has never disclosed the existence of this subpoena to the People.[1]

8. Defendant's subpoena to Pomerantz seeks production of all "Documents," as defined in the subpoena, falling under four categories of requests, described more fully in the Memorandum of Law below. *See* Ex. 1. Request 1 seeks "all documents relating" to a purported memorandum prepared while Pomerantz was employed in this Office. *Id.* at 2. Requests 2 and 3 similarly seek "all Documents reflecting communications" as described in the subpoena for the period of February 2, 2021 through March 23, 2022 (approximately one month after the date of Pomerantz's resignation from this Office on February 23, 2022). *Id.* at 2-3. Finally, Request 4 seeks "all Documents reflecting communications with DANY personnel regarding the collection

[1] As discussed more fully in Part I.E of the Memorandum of Law below, the People note that, in this Court's March 1, 2024 order quashing two other subpoenas defendant served on Skyhorse Publishing and Melville House Publishing, this Court directed defendant "to immediately disclose all other subpoenas, if any, issued since December 18, 2023." Decision and Order on Mot. to Quash Def.'s Subpoena and for a Protective Order at 7 (Mar. 1, 2024).

of materials for purposes of discovery, disclosure, or litigation in" this case for the period from March 23, 2022 through the present. *Id.* at 3.

9. In response to the instant subpoena *duces tecum*, Pomerantz has prepared a sworn affirmation attesting that he possesses no materials responsive to Requests 1-3 that were not already in the possession of the District Attorney's Office. *See* March 29 Pomerantz Aff. ¶ 7 (Ex. 2). As for Request 4, Pomerantz has affirmed that he has no communications directly with DANY personnel about the People's discovery compliance in this matter because all such communications after the date of the Indictment in this case were between DANY and his attorneys; and that any communications Pomerantz himself had with his attorneys about discovery in this matter are protected from disclosure pursuant to the attorney-client privilege. *See id.* ¶ 8.

MEMORANDUM OF LAW

This Court has already issued three written opinions granting the People's motions, in full or in part, to quash subpoenas *duces tecum* served by defendant on Michael Cohen and the publishers of books written by Cohen, and denying defendant's motion to reargue. *See* Decision and Order on Mot. to Quash Def.'s Subpoena and for a Protective Order (Dec. 18, 2023) (the "December 18 Order"); Decision and Order on Def.'s Mot. to Reargue (Feb. 23, 2024) (the "February 23 Order"); Decision and Order on Mot. to Quash Def.'s Subpoena and for a Protective Order (Mar. 1, 2024) (the "March 1 Order"). Defendant has once again served a subpoena *duces tecum*, this time on former Special Assistant District Attorney Mark Pomerantz, that must be quashed.

As an initial matter, defendant's subpoena violates CPL § 610.20(3) because it fails to include the Court's indorsement despite being directed at a former employee in his capacity as an erstwhile officer or representative of the District Attorney's Office. It should be quashed on that basis alone. In any event, even had defendant followed the law by first seeking the Court's approval of the subpoena, he would not have been able to demonstrate the requisite reasonable likelihood

that it would disclose any relevant and material information and is not overboard or unreasonably burdensome. On the contrary, the People's own comprehensive efforts to obtain from Pomerantz and disclose to defendant any potentially discoverable materials—efforts that have been well documented for both the Court and the defense—leave no reasonable basis to believe that Pomerantz is currently in possession of any other materials to which defendant conceivably could be entitled. Defendant's effort to subpoena Pomerantz directly is an overbroad and unreasonably burdensome fishing expedition that seeks general discovery, is designed to circumvent limits on criminal discovery, and would intrude upon the attorney work product protection. This latest move in defendant's long-running strategy of burden and delay should be quashed in full.

I. Defendant's subpoena *duces tecum* to Mark Pomerantz should be quashed.

A. Legal standard.

The Criminal Procedure Law permits an attorney for a defendant in a criminal proceeding to issue a subpoena of the court, including a subpoena *duces tecum*, to any witness that the defendant would be entitled to require to attend court. CPL §§ 610.10(3); 610.20(3). To sustain such a subpoena, a defendant must show "that the testimony or evidence sought is reasonably likely to be relevant and material to the proceedings, and the subpoena is not overbroad or unreasonably burdensome." CPL § 610.20(4). The defendant bears the burden to show that this standard has been met. *People v. Kozlowski*, 11 N.Y.3d 223, 242-43 (2008).

"[T]he proper purpose of a subpoena *duces tecum* is to compel the production of specific documents that are relevant and material to facts at issue in a judicial proceeding." December 18 Order at 5 (citing *Kozlowski*, 11 N.Y.3d at 242). Subpoenas may not be used to determine if evidence exists or as "an attempt to conduct a 'fishing expedition,'" *People v. Gissendanner*, 48 N.Y.2d 543, 547 (1979); or to circumvent the procedure for discovery, *see Constantine v. Leto*, 157 A.D.2d 376, 378 (3d Dep't 1990), *aff'd*, 77 N.Y.2d 975 (1991).

A subpoena *duces tecum* may not be used to obtain work product or material protected from disclosure pursuant to applicable privileges. *See Kozlowski*, 11 N.Y.3d at 230; *In re Subpoena Duces Tecum to Jane Doe, Esq.*, 99 N.Y.2d 434, 436 (2003). Furthermore, "it is hornbook law that a former employee may not waive the former employer's privilege." *See Moynihan v. City of New York*, 2012 N.Y. Misc. LEXIS 5892, at *5, 2012 N.Y. Slip Op. 33078(U) (Sup. Ct. N.Y. Cnty. 2012) (citing *Radovic v. City of New York*, 168 Misc. 2d 58, 60 (Sup. Ct. N.Y. Cnty. 1996)).

The District Attorney has standing to move to quash here. *See* December 18 Order at 4-5 (citing *Matter of Morgenthau v. Young*, 204 A.D.2d 118, 118 (1st Dep't 1994)); March 1 Order at 2-3 (same).

B. The subpoena *duces tecum* is defective because it fails to include the Court's indorsement pursuant to CPL § 610.20(3).

As a threshold matter, the instant subpoena is improper because it fails to include the Court's indorsement. *See* CPL § 610.20(3). The 2019 Legislative amendments to § 610.20(3) removed the mandate that the defendant follow the procedure set forth in CPLR 2307, namely that the People are entitled to a motion on notice before the court may so-order a subpoena *duces tecum*. *See* Amendment Notes, Laws 2019, ch. 59, § 3 (Part LLL); CPLR 2307. However, the Legislature maintained the requirement that the Court's indorsement is a prerequisite to the issuance of a subpoena *duces tecum* "directed to any department, bureau or agency of the state or of a political subdivision thereof, or to any officer or representative thereof." CPL § 610.20(3). This language substantially mirrors the provision in CPLR 2307 that requires prior judicial authorization of a subpoena *duces tecum* issued to "a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of any books, papers or other things." CPLR 2307. New York courts have routinely applied the requirements of CPLR 2307 to District Attorney's Offices. *See Williams v. City of Rochester*, 151 A.D.3d 1698, 1698 (4th Dep't 2017); *Matter of*

Whitfield v. Bailey, 91 A.D.3d 491, 492 (1st Dep't 2012); *In re 121 Second Ave. Gas Explosion Litig.*, 2023 N.Y. Misc. LEXIS 4635, at *8-10 (Sup. Ct. N.Y. Cnty. 2023). Furthermore, as a matter of state law, a District Attorney is a constitutional officer, and an Assistant District Attorney may be appointed to assist in the performance of the District Attorney's duties. *See* County L. §§ 700, 702; *Schumer v. Holtzman*, 60 N.Y.2d 46, 50 (1983). Therefore, an individual who is subpoenaed in his or her capacity as a prosecutor is an officer or representative of a governmental agency as contemplated by the Criminal Procedure Law.

The record demonstrates that the only relationship Pomerantz has to the instant case stems from his former status as a Special ADA in the New York County District Attorney's Office. *See, e.g.*, March 29 Pomerantz Aff. ¶ 1 (Ex. 2); March 18 Pomerantz Aff. ¶ 1; Def.'s Mar. 8 Motion at 10-12, 16-17, 34, 36, 40. Indeed, any document, communication, or memorandum potentially subject to the subpoena squarely relates to content produced or informed by Pomerantz's tenure as a prosecutor in the District Attorney's Office. As such, the subpoena is directed at Pomerantz in his capacity as an erstwhile officer or representative of the District Attorney's Office, which is an agency of the state or a political subdivision thereof (*i.e.*, the City and County of New York). *See* CPL § 610.20(3). Therefore, the subpoena is facially invalid because it does not contain this Court's indorsement.

The requirement of a judicial indorsement reflects the long-standing principle that the Court retains the power to determine the scope of its own process. *See People v. Natal*, 75 N.Y.2d 379, 384-85 (1990). Defendant's "[f]ailure to comply with the procedural and substantive requirements" of the subpoena law demonstrates a flagrant disregard for the Court's authority and would certainly "constitute an 'abuse of subpoena process.'" *People v. Henry*, 2012 N.Y. Misc. LEXIS 2478, at *4 (Sup. Ct. Bronx Cnty. 2012) (quoting *Natal*, 75 N.Y.2d at 385). Indeed, had

defendant proceeded in accordance with CPL § 610.20(3), the Court could have evaluated whether a sufficient "showing required to sustain" the instant subpoena existed without the need for time-consuming motion practice that burdens the People, the Court, and the subpoena recipient alike. CPL § 610.20(4); *see People v. Swygert*, 57 Misc. 3d 913, 925 (Crim. Ct. Bronx Cnty. 2017) ("[u]pon receipt of a sufficient proffer, courts have the discretionary authority to issue a 'so-ordered' subpoena") (citing *People v. Villacorta,* 76 A.D.3d 911 (1st Dep't 2010) and *People v. Zilberman*, 297 A.D.2d 517 (1st Dep't 2002)). Hence, the subpoena is not only fatally defective because it lacks the signature of the Court, but also illustrates that defendant could not legally sustain his demands pursuant to CPL § 610.20(4) when required to do so. Therefore, the subpoena should be quashed in full.

C. The subpoena should be quashed because it is overbroad, unreasonably burdensome, not narrowly tailored, seeks protected work product, and is being used to circumvent limits on discovery.

To the extent the Court reaches the merits—notwithstanding defendant's failure to obtain this Court's indorsement of the subpoena—the subpoena should be quashed in full for the separate reason that each of defendant's demands far exceeds the permissible scope of a trial subpoena.

1. Request 1 should be quashed.

Request 1 seeks "all documents relating to" a purported "February 28, 2021 memorandum evaluating" (a) whether Stormy Daniels "committed 'extortion' and/or 'larceny,'" and (b) whether defendant "was a 'victim of blackmail.'" Ex. 1 at 2. In a footnote to this request, the subpoena references an excerpt from Pomerantz's book entitled "People vs. Donald Trump: An Inside Account." *Id.* at 2 n.1.

This request is overbroad, unduly burdensome, and would impermissibly circumvent limits on criminal discovery. The request seeks to compel Pomerantz to produce not just the purported memorandum of February 28, 2021, but "*all* documents relating to" that memorandum, without

regard to whether any such documents relate to the subject matter of the case. *Id.* at 2 (emphasis added). The People conducted an exhaustive review of materials in our files and produced all discoverable information to the defendant; we made additional extensive efforts to obtain any potentially discoverable materials directly from Pomerantz; and we disclosed to the defense materials that were thereby received, above and beyond our discovery obligations. *See supra* Aff. ¶¶ 4-5; *see generally* Decision and Order on Omnibus Motions at 25 (Feb. 15, 2024) (summarizing the voluminous discovery produced by the People). Based on this record, there is simply no reasonable likelihood that defendant's subpoena request would yield new, discoverable information that would be "relevant and material to the proceedings." CPL § 610.20(4). Indeed, Pomerantz himself has affirmed, after receiving the subpoena, that he is not in possession of any responsive materials relating to this case that are not already in the People's possession or otherwise protected by attorney-client privilege. *See* March 29 Pomerantz Aff. ¶¶ 7-8 (Ex. 2).

At best, then, Request 1 seeks production that is duplicative of what the People have already disclosed and accounted for—or appropriately withheld as work product—through our diligent efforts to comply with our obligations under the discovery laws. It would be redundant, to say the least, to require Pomerantz to conduct yet another search for these materials in response to this subpoena, and defendant's request should therefore be quashed as unreasonably burdensome. At worst, the request is "a fishing expedition for the purpose of discovery or to ascertain the existence of evidence," *Decrosta*, 182 A.D.2d at 931 (citations omitted), or an attempt "to expand the discovery available under existing law" by demanding materials to which the defense is not actually entitled, *Matter of Terry D.*, 81 N.Y.2d 1042, 1045 (1993), or both. For those separate reasons, too, the request far exceeds the bounds of a permissible subpoena and should be quashed.

Request 1 is also improper and should be quashed because it calls for the production of privileged work product that is exempt from discovery. *See* CPL § 245.65; *see also* CPLR 3101(b), (c), (d)(2). The purported memorandum identified in the subpoena would have been prepared by this Office's attorneys as part of their legal analysis in a criminal investigation; Pomerantz himself would have come into possession of the memorandum and any related materials only by virtue of being employed as a Special Assistant District Attorney. Indeed, the subpoena describes the memorandum as having "evaluat[ed]," *inter alia*, whether certain criminal or otherwise unlawful acts—*i.e.*, "extortion," "larceny," or "blackmail"—were committed in relation to a potential witness in this case or the defendant. Ex. 1 at 2. Hence, there are only two categories of "documents relating" to that memorandum that arguably may exist: (1) material generated by lawyers in the District Attorney's Office in furtherance of evaluating a legal theory of prosecution; and (2) the documentary evidence upon which such a legal analysis was conducted.

The first category of potential documents clearly constitutes core work product that is exempted from discovery under CPL § 245.65, and defendant's attempt to obtain it by means of subpoena to a former employee should be denied. *See* CPL § 245.65; *see also* CPLR 3101(b), (c), (d)(2); December 18 Order at 7; *Matter of Terry D.*, 81 N.Y.2d at 1044-45; *Smith v. City of New York*, 49 A.D.3d 400, 401 (1st Dep't 2008) (work product protection applies to an assistant district attorney's "mental impressions, conclusions, opinions or legal theories in the underlying criminal action"); *Constantine*, 157 A.D.2d at 378. Furthermore, Pomerantz, as a former employee, is not entitled to waive any privilege held by this Office who employed him. *See Moynihan*, 2012 N.Y. Misc. LEXIS 5892, at *5. The District Attorney's Office does not waive its privilege against production of work product, and therefore it would be futile to seek that protected material from this former employee. And as a separate but related basis for quashing this request, any materials

that Pomerantz were to identify as potentially responsive would need to be reviewed for privilege prior to disclosure to the defense, imposing another unreasonable burden on the People, too.

As to the second possible category of document "relating to" the memorandum—*i.e.*, documents containing facts underlying any legal analysis—defendant's attempt to compel Pomerantz to produce those documents explicitly as "relating to" the memorandum would essentially recreate for the defense the steps that went into any legal analysis. This itself would tend to reveal the operation of an attorney's thought process and therefore constitute another improper use of a subpoena to reveal work product in circumvention of the limits on discovery. *See* CPL § 245.65; CPLR 3101(b), (c), (d)(2); December 18 Order at 7; *Matter of Terry D.*, 81 N.Y.2d at 1044-45; *Constantine*, 157 A.D.2d at 378; *see also Smith*, 49 A.D.3d at 401. And all of the underlying discoverable facts related to the subject matter of this case have already been disclosed to defendant in discovery as required by CPL § 245.20(1) in any event; he is not entitled to examine the People's work product identifying which of those facts may have informed purported legal analyses the People may have prepared in the course of their investigation.

Finally, to the extent that Request 1, or indeed any portion of the instant subpoena, seeks evidence of Pomerantz's own purported opinions about anything, the subpoena should be quashed on the entirely separate ground that it violates the Court's Decision and Order on the People's Motions *in Limine*. *See* Decision and Order on People's Motions in Limine at 5 (Mar. 18, 2024) (holding that "Defendant is precluded from . . . arguing or introducing evidence regarding Pomerantz's purported views on the instant prosecution as expressed in his book.").

Accordingly, it is not "reasonably likely" that Pomerantz would possess "relevant and material" information that defendant is entitled to receive, and did not already receive, beyond

what is required by the criminal discovery statute, and Request 1 should be quashed in full. CPL § 610.20(4); *Kozlowski*, 11 N.Y.3d at 242-43; *Matter of Terry D.*, 81 N.Y.2d at 1044-45.

2. Requests 2 and 3 should be quashed.

Requests 2 and 3 are similarly improper. These requests seek "all Documents reflecting communications—including communications using personal (non-DANY) electronic devices or personal (non-DANY) email and electronic messaging accounts—with" various individuals for the period from February 2, 2021 through March 23, 2022. Ex. 1 at 2-3. Request 2 seeks communications with Cohen, two of Cohen's attorneys, or then-DANY Investigator Jeremy Rosenberg relating to (a) "Cohen's recollection of interactions" with defendant, defendant's "staff," various potential fact witnesses, AMI, or "AMI personnel"; (b) "[a]ny form of bias or animosity" toward defendant; or (c) "[r]equests for benefits or other consideration, including requests for submissions to judges presiding over cases in which Cohen was a party or otherwise interested." *Id.* at 2-3. Request 3 seeks documents "reflecting" communications with "potential witnesses other than Cohen, or those witnesses' counsel, relating to facts at issue in DANY's investigation" of defendant. *Id.* at 3.

Each of these requests should be quashed in full. As discussed with respect to Request 1, the People undertook a diligent and comprehensive effort to obtain case-related materials in Pomerantz's possession that were not already in the People's custody, and turned over to the defense any such items that are even arguably discoverable. As with Request 1, there is again no reasonable likelihood that either Requests 2 or 3 would result in any new information that has not previously been disclosed to defendant and that would be "relevant and material to the proceedings," and the requests should thus be quashed on those grounds. CPL § 610.20(4). Given the redundant nature of the requests, it further appears that they are designed to circumvent limits on discovery, *see Matter of Terry D.*, 81 N.Y.2d at 1044-45; *Constantine*, 157 A.D.2d at 378; *see*

also CPL § 245.30(3) (authorizing discovery from the prosecution or any third party only where the defendant shows, among other requirements, that the information "relates to the subject matter of the case and is reasonably likely to be material"), and are a "fishing expedition for the purpose of discovery or to ascertain the existence of evidence." *Matter of Decrosta*, 182 A.D.2d at 931 (citations omitted). The requests should be quashed for those separate reasons as well.

In particular, although Requests 2 and 3 seek to compel Pomerantz to produce documents relating to communications made using "personal (non-DANY)" devices and accounts, Ex. 1 at 2-3, the People specifically asked Pomerantz, in June 2023, to search for and provide for potential disclosure [redacted] that were not already preserved on a DANY system. *See supra* Aff. ¶ 5. The People diligently turned over to the defense any discoverable materials that we thereby received from Pomerantz, as well as materials that exceeded our discovery obligations. *See id.* And in response to subsequent developments, the People promptly and diligently followed up with Pomerantz in February 2024 and again in March 2024; identified [redacted] that Pomerantz had overlooked in prior searches; produced those [redacted] to the defense; and provided a comprehensive description of our diligence in sworn affirmations to the Court. *See id.* Aff. ¶¶ 5(g)-5(k).

To be sure, defendant's subpoena to Pomerantz seeks records through March 23, 2022—approximately one month after his resignation from the District Attorney's Office—and the People's request to Pomerantz was [redacted]. *See* Ex. 1 at 2-3. But there is simply no reasonable likelihood that Pomerantz would actually be in possession of any discoverable communications and related documents from the month after he resigned, when he no longer worked at DANY and had no role relating to this (or any other) case from this Office. Defendant's speculative demand for materials

from a former employee that may have been created after his resignation is an improper use of the subpoena power as a tool for "general discovery." *Gissendanner*, 48 N.Y.2d at 547. Moreover, Pomerantz has now affirmed under oath that he is not, in fact, in possession of any materials relating to the instant case that would be responsive for the period requested—including the month following his resignation—that are not already in the People's possession, *see* March 29 Pomerantz Aff. ¶ 7 (Ex. 2); making it all the more plain that defendant cannot meet his burden to sustain either Request 2 or 3 in his subpoena.

Although no more is needed to quash Requests 2 and 3, those requests should also be quashed on undue burden grounds because of the largely undefined breadth of materials they seek. Particularly because there is no basis to conclude that there are any responsive records that were not already produced to defendant or withheld on an appropriate basis, these requests for "*all* documents" for more than a year of communications with a number of individuals and entities relating to a variety of topics—like Cohen's "recollection of interactions" with defendant, other individuals, and various undefined "staff" or "personnel," without any limitation as to time or scope—are overbroad and ambiguous. Ex. 1 at 2-3 (emphasis added). And because the People have already produced all statements from Michael Cohen that relate to the subject matter of this case as part of discovery, *see* CPL §§ 245.20(1)(b), (e), (k)(iv), to permit defendant to subpoena former employees for "all documents" regarding Cohen's "recollection of interactions" would be to allow a "wild goose chase" that is the hallmark of an undue burden. *See People v. Edwards*, 77 Misc. 3d 740, 745 (Crim. Ct. Bronx Cnty. 2022); March 1 Order at 6.

Request 2(b), which seeks documents reflecting communications—again over a period of approximately 14 months—relating to "[a]ny form of bias or animosity" toward defendant (Ex. 1 at 3), should also be quashed because its ambiguous reference to "[a]ny form of bias or animosity"

fails to specifically identify what it is seeking, and as such is impermissibly unlimited in scope. Although a subpoena *duces tecum* may be used by the defense to seek "specifically identified materials," *Kozlowski*, 11 N.Y.3d at 241, that are reasonably likely to contain information "revealing specific biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand," *Gissendanner*, 48 N.Y.2d at 548 (quotation and citation omitted), what defendant is trying to do is skip the initial step of identifying specific materials that could contain such relevant and material information. He instead seeks to conscript Pomerantz into sorting through more than a year of communications to identify any that may reveal "[a]ny form of bias or animosity." This is nothing more than an "unrestrained foray" "in the hope that the unearthing of some unspecified information would enable [defendant] to impeach [a] witness." *Gissendanner*, 48 N.Y.2d at 549 (citations omitted).

Even if it were appropriate to shift the burden of deciphering Request 2(b) to the target of the subpoena, the request should still be quashed because the broad and ill-defined demand for materials showing "[a]ny form of bias or animosity" is not "directed towards revealing *specific* biases, prejudices or ulterior motives related directly to personalities or issues in the instant matter." December 18 Order at 7 (emphasis added); *see Gissendanner*, 48 N.Y.2d at 548 (citing *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). By its own terms, the request does not rise above an impermissible search for information relating to "general credibility." *Gissendanner*, 48 N.Y.2d at 548.

Request 3, meanwhile, fails to sufficiently identify even the individuals with whom the requested communications would have been made. It instead offers the vague demand for communications "with potential witnesses other than Cohen, or those witnesses' counsel." Ex. 1 at 3. Who those witnesses might be, or what precisely defendant means by "potential witnesses,"

is left unexplained, making this request impermissibly broad on that ground, too. *See Sinai v. O'Connor*, 2019 N.Y. Slip Op. 31492(U), at *2 (Sup. Ct. N.Y. Cnty. 2019) ("[T]he party subject to the subpoena is not required to 'cull the good from the bad'"; "courts have the option to quash those subpoenas in their entirety, rather than prune them.") (quoting *Platt v. GC ENG & Assocs. Eng'g, P.C.*, 2014 N.Y. Slip Op. 31579(U), at *3 (Sup. Ct. N.Y. Cnty. 2014)).

3. Request 4 should be quashed.

Request 4 seeks, for the period "from March 23, 2022 through the present," "all documents reflecting communications with DANY personnel regarding the collection of materials for purposes of discovery, disclosure, or litigation in *People v. Trump*, Indictment No. 71543-23." Ex. 1 at 3.

This request should be rejected out of hand because any communications with DANY on these topics would not be "relevant and material to facts at issue in a pending judicial proceeding." *Kozlowski*, 11 N.Y.3d at 242; *see also* CPL § 610.20(4). Instead, this request is nothing more than an attempt by defendant to conduct discovery on discovery—to root through this Office's communications made in furtherance of its efforts to comply with its discovery obligations. Although—as the People have attested in multiple sworn affirmations and other Court filings—those communications would clearly show that the People far exceeded their obligations of due diligence and reasonable efforts to obtain and provide automatic discovery to defendant under Article 245, that information is not "relevant and material to the determination of guilt or innocence." *Gissendanner*, 48 N.Y.2d at 548. It is therefore not properly the subject of a trial subpoena. *See id.*; CPL § 610.20(4).

In any event, the People have explained at length our good-faith, diligent efforts to comply with Article 245—including by diligently requesting and obtaining materials from Pomerantz in the course of discovery—in a signed memorandum of law and sworn affirmations submitted to

this Court on March 18, 2024 (the same day defendant served this subpoena on Pomerantz). *See* March 18 MOL at 10-14; March 18 Colangelo Aff. ¶¶ 3-17; March 18 Pomerantz Aff. ¶¶ 1-6; *see also* March 29 Pomerantz Aff. ¶¶ 2-7 (Ex. 2). The People and the Court have already spent far more time than warranted on defendant's baseless efforts to conduct discovery on discovery.

D. In the alternative, the Court should order that any material responsive to the subpoena shall be reviewed by the People before its production, and shall be subject to the Court's May 8, 2023 Protective Order.

For the many reasons described above—including that the subpoena is both procedurally invalid under CPL § 610.20(3) and substantively invalid under CPL § 610.20(4)—the Court should quash defendant's subpoena in full. To the extent the Court believes any sub-part of the subpoena is enforceable, however, the People respectfully request in the alternative that the Court enter a protective order pursuant to CPL § 245.70 and the Court's inherent authority governing defendant's use and disclosure of any material defendant obtains. In this regard, the People would request two forms of relief.

First, if any portion of the subpoena is enforced and Pomerantz thereafter identifies responsive material for production, the People respectfully request leave from the Court to conduct a privilege review of that material prior to its dissemination to defendant. *See* CPL §§ 245.35 (court may order any measures designed to reduce or streamline litigation of any disputes about discovery), 245.65 (excluding work product from automatic discovery), 245.70 (for good cause shown, the Court may "order that discovery or inspection of any kind of material or information . . . be denied, restricted, conditioned or deferred, or make such other order as is appropriate"); *see also People v. Weiss*, 176 Misc. 2d 496, 498-500 (Sup. Ct. N.Y. Cnty. 1998) (holding that an Article 245 protective order is the appropriate vehicle to regulate the production of documents sought by a defense subpoena, because "[i]t is difficult to conceive . . . that the court to which a judicial subpoena is returnable does not retain inherent authority and oversight over it, or that it cannot

regulate the production of documents or items issued under its imprimatur"); *People v. Winston*, 2023 N.Y. Misc. LEXIS 5407, at *6-7 (Crim. Ct. Bronx Cnty. Sept. 11, 2023) ("The court can . . . impose reasonable conditions upon granting or denial of a motion to quash or modify." (citing CPLR § 2304)). As noted, no former employee may waive any privilege held by this Office. *See Moynihan*, 2012 N.Y. Misc. LEXIS 5892, at *5. Permitting the People to conduct a privilege review of any responsive records before production to defendant is authorized by the CPL and narrowly tailored to protect the People's right to ensure that any claim to privilege be preserved.

Second, if any part of the subpoena is enforced, the People ask the Court to order that any material defendant obtains through the subpoena shall be subject to the same restrictions on use and disclosure as are imposed by the Court's May 8 Protective Order. The Court previously granted this request for relief in connection with the subset of records defendant obtained through the subpoena to Michael Cohen, "to reduce the potential for further witness intimidation and harassment on the part of Defendant." December 18 Order at 12. Given that the instant subpoena requests, *inter alia*, records of communications with potential trial witnesses, the same reasons that supported the Court's earlier determination are present here.

E. The Court should direct defendant to disclose any other trial subpoenas he has issued since the December 18 Order.

Because the People only learned about the instant subpoena when contacted by counsel for Pomerantz, the People also respectfully restate and incorporate by reference their February 2, 2024 request that the Court direct defendant to disclose to the People and the Court any outstanding trial subpoenas he has issued since the December 18 Order. *See* People's Motion to Quash Subpoenas to Book Publishers dated February 2, 2024, at 7-9 ("People's Feb. 2 MOL"). And to the extent the Court's March 1, 2024 Order on this question was at all unclear, the People further respectfully request that the Court direct defendant that any future defense subpoenas must be disclosed to the

People and the Court at the same time they are issued in order to ensure prompt identification and resolution of any disputes.

The People's February 2, 2024 motion to quash noted that we were, at that time, aware of three subpoenas defendant had issued since the Court's December 18, 2023 Order quashing the Cohen subpoena; and that all three of those subpoenas included, in part, requests the Court had already adjudicated and rejected.[2] *See* People's Feb. 2 MOL at 8. We therefore asked the Court to "direct defendant to disclose any other trial subpoenas he has issued since the December 18 Order." *Id.* The Court's March 1 Order provided, as relevant here: "Defendant is hereby directed to immediately disclose all other subpoenas, if any, issued since December 18, 2023."

Since the Court's March 1 Order, defendant has not disclosed the issuance of any subpoenas to the People. We have, however, learned from the subpoena recipients themselves of three more defense subpoenas that defendant issued after the Court's March 1 Order: the March 18 subpoena to Pomerantz that is the subject of this motion; a March 11 subpoena to NBCUniversal (which NBCUniversal has moved to quash); and a March 11 subpoena to Stormy Daniels.

Given the likelihood that defendant has served yet more third-party subpoenas that have not come to the attention of the People or the Court and that may also seek to evade the Court's prior orders, the People again respectfully request that the Court direct defendant to disclose all

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[2] We are not aware of any steps defendant took to advise these third parties of the Court's prior orders, including those aspects of the Court's orders that quashed requests for the same records being sought through these subsequent subpoenas. To the People's knowledge, the USAO learned of the Court's December 18 order from the People only after defendant subpoenaed the USAO and that office advised the People of the subpoena. And in response to questions from the USAO regarding why the Court's order on duplicative requests that this Court already quashed should not be treated as "law of the case," defendant stated to the USAO that the Court's prior orders "are unlawful"; "should not be persuasive"; and "constituted a flawed and erroneous application of the legal framework that was relevant to his decision—C.P.L. § 610.20(3)-(4)." Jan. 31, 2024 Blanche Ltr. to USAO (Ex. 4 to the Mar. 18, 2024 Conroy Aff.).

trial subpoenas he has issued since the December 18 Order, including all subpoenas issued since the Court's March 1 Order.

This relief is warranted under the circumstances and proportional to the needs of this case. The CPL authorizes defense counsel to issue subpoenas but "do[es] not confer unrestricted and unfettered subpoena power." *People v. D.N.*, 62 Misc. 3d 544, 550 (Crim. Ct. Bronx Cnty. 2018). Instead, "[b]ecause the statutory subpoena authority is so broad, and the recipient may be subject to contempt sanctions for failure to comply, by necessity courts have imposed limitations on the use of subpoena power." *Matter of Terry D.*, 81 N.Y.2d at 1044 (citations omitted). This Court has "the inherent authority, consistent with constitutional constraints" and absent an express prohibition, to implement pretrial procedures "where the purpose and effect of those rules is to enhance the search for truth, to reduce the importance of secrecy and surprise, and to expedite and make more efficient pretrial procedures." *People v. Atwood*, 101 Misc. 2d 291, 293 (Sup. Ct. N.Y. Cnty. 1979); *see also People v. Segal*, 54 N.Y.2d 58, 64-67 (1981).

Defendant's ongoing employment of subpoenas that seek the same records from different third parties that this Court has already prohibited him from obtaining; or that seek the same records that the People already produced or appropriately reviewed and withheld in discovery; or which—like the instant subpoena—are palpably deficient for failure to comply with clear statutory prerequisites, represents a continuing improper use of court process that unduly burdens the People, third parties, and the Court. An order directing defendant to disclose all trial subpoenas he has issued since the December 18 Order, and requiring defendant to provide contemporaneous notice to the People and the Court when any subpoenas are issued in the future, is an appropriate exercise of the Court's discretion in these circumstances.

Dated: April 3, 2024

Respectfully submitted,

/s/ Matthew Colangelo
Matthew Colangelo
Christopher Conroy
Katherine Ellis
Susan Hoffinger
Becky Mangold
Joshua Steinglass
Assistant District Attorneys

Exhibits to People's Motion to Quash
and for a Protective Order (Apr. 3, 2024)

Exhibit 1

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

THE PEOPLE OF THE STATE OF NEW YORK,	:	
- against -	:	Indictment No. 71543-23
DONALD J. TRUMP,	:	**SUBPOENA DUCES TECUM**
Defendant.	:	

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To: Mark Pomerantz

YOU ARE HERBEY COMMANDED, all business and excuses being laid aside, to produce, at the Supreme Court of the State of New York, of the County of New York, Part 59, 100 Centre Street, New York N.Y., 10013, on or before March 29, 2024, at 10:00 a.m., the Documents responsive to the Requests set forth below.

The requirements of this subpoena *duces tecum* may be met by delivery of the responsive Documents by email or overnight delivery service, provided that it is received on or before the return date set forth herein.

DEFINITIONS

1. "Documents" means communications, electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained directly, or, if necessary, after translation by the responding party into a reasonably usable form. Documents also includes any draft or non-identical copy of any of the foregoing materials.

INSTRUCTIONS

1. This subpoena covers all Documents in or subject to your possession, custody or control, including all Documents that are not in your immediate possession but that you have the effective ability to obtain, that are responsive, in whole or in part, to any of the individual requests set forth below.

2. To the extent there are no responsive Documents to a particular Request, please indicate that in your response. If a Document once existed and has been lost, destroyed, or is otherwise missing, please provide sufficient information to identify the Document and the details concerning its non-existence.

3. To the extent that a Document otherwise responsive to any of the Requests is withheld on the ground(s) that it is subject to a privilege, please provide a log that identifies each such document and the specific reason for which it is being withheld in sufficient detail to allow assessment of the validity of the withholding.

4. If you redact any portion of a Document, please provide the reason for the redaction in sufficient detail to allow assessment of the validity of the claimed need for redaction.

REQUESTS

1. Please provide all documents relating to the February 28, 2021 memorandum evaluating, *intera alia*, whether (a) Stephanie Clifford, a/k/a "Stormy Daniels," committed "extortion" and/or "larceny," and (b) whether President Trump was a "victim of blackmail."[1]

2. For the period from February 2, 2021 through March 23, 2022, please provide all Documents reflecting communications—including communications using personal (non-DANY) electronic devices or personal (non-DANY) email and electronic messaging accounts—with Michael Cohen, Lanny Davis, Danya Perry, or Jeremy Rosenberg relating to:

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[1] *See* M. Pomerantz, People vs. Donald Trump: An Inside Account at 57-58 (2023).

a. Cohen's recollection of interactions with President Trump, President Trump's staff, Clifford, Karen McDougal, Dino Sajudin, Keith Davidson, American Media, Inc. ("AMI"), or AMI personnel;

b. Any form of bias or animosity toward President Trump; or

c. Requests for benefits or other consideration, including requests for submissions to judges presiding over cases in which Cohen was a party or otherwise interested.

3. For the period from February 2, 2021 through March 23, 2022, please provide all Documents reflecting communications—including communications using personal (non-DANY) electronic devices or personal (non-DANY) email and electronic messaging accounts—with potential witnesses other than Cohen, or those witnesses' counsel, relating to facts at issue in DANY's investigation of President Trump.

4. For the period from March 23, 2022 through the present, please provide all Documents reflecting communications with DANY personnel regarding the collection of materials for purposes of discovery, disclosure, or litigation in *People v. Trump*, Indictment No. 71543-23.

Dated: March 18, 2024

By: /s/ Todd Blanche

Todd Blanche
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Blanche Law PLLC
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New York, NY 10005
212-716-1260
toddblanche@blanchelaw.com

Attorneys for President Donald J. Trump

Exhibit 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK -against- DONALD J. TRUMP, Defendant.	AFFIRMATION Ind. No. 71543-23

Mark F. Pomerantz, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I served as a Special Assistant District Attorney ("SADA") in the New York County District Attorney's Office ("DANY"), working on an investigation of Donald Trump and related persons and entities, from February 2, 2021, to February 23, 2022, when I resigned from my position.

2. After the indictment in this case was returned in April 2023, DANY contacted my attorneys and, in service of their discovery obligations under CPL Article 245, asked that I [redacted] I was asked specifically to [redacted]

3. After receiving this request, I conducted a diligent search of materials in my possession that I had made or maintained as part of my work for the District Attorney's Office. I provided requested materials to my attorneys, who forwarded them to DANY so that DANY could produce any discoverable materials. The decisions about what materials to produce to the defense were made entirely by DANY.

4. As described in my affirmation dated March 18, 2024 (attached as Exhibit 1), on several occasions in February and March of this year, DANY contacted my lawyers and asked that I [redacted]. I

reviewed my text messages and provided the requested text messages to my lawyers, who relayed them to DANY.

5. Because DANY requested material not already preserved on a DANY system, I did not provide DANY with retained copies of materials that were already preserved on a DANY system. So, by way of example, if I received an electronic copy of a witness interview memo from other DANY personnel, or sent materials to DANY personnel via email, DANY already had access to those materials and could produce any discoverable materials as necessary.

6. My production to DANY was limited to materials that related to the subject matter of the indictment that had been returned against Mr. Trump.

7. I have reviewed a subpoena addressed to me, issued by counsel to Mr. Trump and dated March 18, 2024. Upon learning of the subpoena, I once again conducted a diligent search of material in my possession that I made or maintained as part of my work on the Trump investigation. With regard to the Requests 1-3 of the March 18, 2024, subpoena, my search yielded no materials related to the subject matter of the pending prosecution that are not already in the possession of the District Attorney's Office.

8. Request 4 of the March 18, 2024, subpoena seeks documents reflecting communications with DANY personnel regarding the collection of material for purposes of discovery, disclosure, or litigation in this case. Request 4 has nothing to do with the facts at issue in the prosecution, but rather appears to be directed to probing the adequacy of the means by which the District Attorney's Office gathered materials for purposes of making discovery. Although I provided DANY with materials I was requested to produce, I had no role in DANY's decisions about discovery. Further, after the return of the indictment in this case, all communications with DANY personnel about the collection of my materials in connection with this case took place between my lawyers and DANY. To the extent I have materials reflecting my communications with my own lawyers about these matters, I believe that those materials are covered by the attorney-client privilege, and I respectfully object to their production to Mr. Trump's lawyers on that basis.

Dated: March 29, 2024
New York, New York

Respectfully submitted,

/s/ Mark F. Pomerantz

Mark F. Pomerantz

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

THE PEOPLE OF THE STATE OF NEW YORK -against- DONALD J. TRUMP, Defendant.	AFFIRMATION Ind. No. 71543-23

Mark F. Pomerantz, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. On July 11, 2023, in response to a request from DANY, my counsel produced, on my behalf, documents, emails, and text messages created and maintained as part of my work as an Assistant District Attorney on the Trump investigation that may have not have already been preserved on the DANY system.

2. In early February, 2024, in response to a follow up request from DANY, I performed a search for text messages between myself and Lanny Davis, an attorney for Michael Cohen. Despite reviewing my phone for potentially discoverable texts in connection with my July 2023 search, I had inadvertently overlooked certain texts, and on February 8, 2024, my counsel produced the results of my follow up search, which included various text messages.

3. Also in early February, in connection with DANY's request, I checked my iPhone to see if I had any text messages between myself and Danya Perry, another lawyer for Michael Cohen who had been referenced in a text message that had been sent to me by Mr. Davis and called to my attention by DANY.

4. Though I did not have Ms. Perry saved as a contact on my phone, I knew her telephone number from the text message that Mr. Davis had sent me. I therefore entered her phone number in the search function of the texting application on my iPhone.

5. The result of that search yielded only the single text to me from Mr. Davis which contained the reference to Ms. Perry and her telephone number. I knew that DANY already had that text. I did not locate any other text messages with Ms. Perry as a result of that search.

6. DANY has now directed my attention to additional text messages that were exchanged between me and Ms. Perry. I was able to locate these messages on my iPhone by entering her phone number in the "Compose" screen (rather than the search screen) in the texting application of my iPhone. This brought up messages in the text chain with Ms. Perry, rather than the single message yielded by using the "search" function. The full text message conversation I had with Ms. Perry is attached as Exhibit A.

Dated: March 18, 2024
New York, New York

Respectfully submitted,

/s/ Mark F. Pomerantz

Mark F. Pomerantz

EXHIBIT A