

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; AND
DONALD TRUMP, JR.,

Respondents.

Index No. 451685/2020

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

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PRELIMINARY STATEMENT

After full briefing and argument, Respondent Donald J. Trump was ordered to comply with a lawful subpoena issued by the Office of the Attorney General (“OAG”) seeking his testimony and relevant documents in connection with OAG’s ongoing investigation. This Court held (once again) that OAG’s investigation pursuant to New York Executive Law § 63(12) “was lawful” and that the subpoena issued to Mr. Trump was valid and enforceable. NYSCEF No. 654 (the “February 2022 Order”). In clear terms, this Court ordered Mr. Trump, among other things, “to comply in full . . . with that portion of the [OAG’s] subpoena seeking documents and information” by March 3, 2022, *id.* at 8, a date that was extended to March 31, 2022 because of OAG’s willingness to accommodate Mr. Trump’s request for additional time and the Court’s approval.¹

But rather than “comply in full” with the Court’s unambiguous directive by producing all responsive documents by March 31, Mr. Trump did not comply at all. Instead, he served a “Response” on OAG raising objections to each of the eight document requests in the subpoena based on grounds such as overbreadth, burden, and lack of particularity. Mr. Trump further asserted, subject to his objections, that he would *not* produce *any* documents responsive to OAG’s subpoena because his counsel (based on search efforts that have not been divulged) could not find any such documents and because of his counsel’s “information and belief” that if any such documents exist, the Trump Organization has them and OAG will just have to wait until the Trump Organization completes its production to get them.

This Court’s order was not an opening bid for a negotiation or an invitation for a new

¹ Although Respondent appealed this Court’s order compelling his compliance with OAG’s subpoena, he did not seek to defer the date for his full compliance with that portion of OAG’s subpoena seeking relevant documents pending the outcome of his appeal.

round of challenges to the subpoena. It was, rather, a court order entered after full briefing and argument during which Mr. Trump could have, but did not, raise any of the purported objections or assertions he has now raised. Under settled law, a party is not permitted to delay proceedings through seriatim submissions to challenge an investigative subpoena, so the ship has long since sailed on Mr. Trump's ability to raise any such objections. In any event, Respondent was ordered by the Court to "comply in full" with the document demands in OAG's subpoena by March 31. Mr. Trump's purported "Response" violates the Court's order; it is not full compliance, or any degree of compliance, but simply more delay and obfuscation. Mr. Trump should now be held in civil contempt and fined in an amount sufficient to coerce his compliance with the Court's order and compensate OAG for its fees and costs associated with this motion.

PROCEDURAL HISTORY

A. OAG's Subpoena and Related Motion Practice²

On November 1, 2021, OAG contacted counsel for the Trump Organization about obtaining sworn testimony from, *inter alia*, Donald J. Trump. After multiple communications on the issue, on December 2, 2021, Mr. Trump's counsel accepted service from OAG of a subpoena *duces tecum* and *ad testificandum* on his behalf. The subpoena sought documents and evidence to be produced by December 17, 2021 and Mr. Trump's testimony on January 7, 2022. *See* Affirmation of Colleen K. Faherty, dated April 7, 2022 ("Faherty Aff."), at ¶ 8. During scheduling discussions, Mr. Trump's counsel agreed that documents would be produced in advance of any scheduled testimony. *Id.* at ¶ 9.

² A thorough recitation of the facts and circumstances surrounding OAG's demands for the custodial documents of Donald J. Trump is detailed in the Supplemental Verified Petition (NYSCEF No. 630) ("Supp. Pet.") filed in this Special Proceeding and is incorporated herein. *See* Supp. Pet. ¶¶ 321-336, 346-351.

Subsequently, on December 9, counsel informed OAG that Mr. Trump intended to move to quash OAG's subpoena, and after extensive discussions, Mr. Trump (together with Ivanka Trump and Donald Trump, Jr.) stipulated to intervene in this action and all counsel agreed to a briefing schedule for the motion to quash and OAG's cross-motion to compel, which this Court approved on January 3, 2022. NYSCEF No. 318; Faherty Aff. at ¶ 11. Pursuant to the briefing schedule, Mr. Trump and his co-respondents moved on January 3, 2022 to quash OAG's subpoenas in their entirety. NYSCEF No. 321. Mr. Trump's arguments in support of the motion focused exclusively on defeating OAG's attempt to obtain his sworn testimony and raised no challenge to that portion of the subpoena seeking documents. NYSCEF No. 354. Subsequently, OAG cross-moved to compel compliance with its subpoenas, NYSCEF No. 357, and filed a 116-page Supplemental Verified Petition, NYSCEF No. 630, which included the procedural background on OAG's attempts to secure Mr. Trump's custodial documents.

The parties completed briefing on February 15, 2022, with additional papers filed on February 16. NYSCEF No. 650. Those additional papers involved two important matters. First, OAG noted that Mr. Trump (and the other respondents) had failed to properly answer OAG's Supplemental Verified Petition, both because their answers denied knowledge about subjects known to them and were not verified as required under C.P.L.R. 3020(a).³ The Respondents contended in response that verification was not required because, among other things, "an unverified answer is permitted as to allegations for which a witness has a fifth amendment privilege." NYSCEF No. 652, at 2. Second, OAG provided the Court with Mr. Trump's press release concerning certain information related to Mazars, the accounting firm responsible for

³ Indeed, as an example of the deficiencies inherent in his answer to the supplemental verified petition, Mr. Trump denied "knowledge or information" concerning OAG's allegation that "to date, Mr. Trump has made no production of documents" See NYSCEF No. 647 at ¶ 347.

compiling Mr. Trump's Statements of Financial Condition, which notably included material described as taken from the June 30, 2014 Statement of Financial Condition, and relayed purported "conversations with" Mazars about its "decision to withdraw." NYSCEF No. 651.⁴

B. The Court's February 2022 Order

On February 17, 2022, this Court held arguments on the parties' motions and issued an order that same day denying Mr. Trump's motion to quash, granting OAG's cross-motion to compel, and ordering Mr. Trump to "comply in full, within 14 days of the date of this order [by March 3, 2022], with that portion of the Office of the Attorney General's subpoena seeking documents and information," in addition to appearing for testimony within 21 days of the Order. February 2022 Order at 8; Faherty Aff. at ¶ 13.

Respondents then appealed to the First Department. The parties agreed, with the Court's approval, to adjourn the dates for the ordered examinations of Mr. Trump and his co-respondents until after the First Department decides the appeal. But there was no similar deferral of that portion of the February 2022 Order requiring Mr. Trump to produce documents. Faherty Aff. at ¶ 15. Indeed, Mr. Trump's counsel confirmed on March 1 that they "were not appealing on documents." *Id.*

During further discussions on March 1, counsel informed OAG that Mr. Trump would be unlikely to comply with the court-ordered deadline of March 3 to produce documents because of the potential locations they needed to search, which included Trump Tower and Mar-a-Lago. *Id.* at ¶ 16. Accordingly, counsel sought an extension of Mr. Trump's document production deadline, requesting to align the deadline with whenever the Trump Organization completed its

⁴ Mr. Trump's press release confirming his possession of at least one of his Statements of Financial Condition undermines the assertion by his counsel that he possesses no documents responsive to OAG's subpoena.

document production. OAG refused to grant such a lengthy extension—referring to the extensive procedural history and problems already litigated with the Trump Organization over its production, *see, infra*, at 6-7—and instead agreed to extend Mr. Trump’s production deadline to March 31, which Mr. Trump’s counsel agreed was acceptable and the Court approved. Faherty Aff. at ¶¶ 17, 20, Ex. A; NYSCEF No. 660.

C. Mr. Trump’s Failure to Comply with the February 2022 Order

Rather than “comply in full” with OAG’s subpoena relating to documents on March 31, Mr. Trump served on OAG instead a document entitled “Respondent Donald J. Trump’s Response and Objections to Petitioner’s Subpoena Duces Tecum,” which included his attorney’s “Affidavit [sic] of Compliance with Subpoena” (together, the “Response”). Faherty Aff. ¶ 21, Ex. B. In the Response, Mr. Trump raised 16 “general” objections and the following identical set of boilerplate “specific” objections (in addition to assertions of “applicable privilege or immunity”):

Respondent objects to this request because it is grossly overbroad, unintelligible, unduly burdensome, and does not adequately describe which documents and communications are requested or sought with reasonable particularity. . . . Respondent further objects to this request as overbroad as to time to the extent that it seeks documents and communications outside of the relevant statute of limitations period and is completely unbounded by any time limitations whatsoever.

Id., Ex. B at 1-4 (for General Objections) and 5-16 (for Specific Objections). Mr. Trump’s response to each document demand further asserted, “[s]ubject to and without waiving” his specific and general objections, that “he has no documents or communications in his possession or custody that are responsive” to each document demand, and to the extent such documents exist they “are in the possession, custody or control of the Trump Organization.” *Id.* at 5-16.

The Response omits any reference to documents in the *control* of Mr. Trump –referring only to those in his “possession or custody” – despite the instruction in the subpoena calling for all responsive documents in his “possession, custody or control.” See NYSCEF No. 361 at Instruction C2 (“The Subpoena calls for all responsive documents or information in your possession, custody *or control*.”) (emphasis added). If a document was in the control of Mr. Trump but not his possession or custody, he was obligated to “*promptly* identify the person with possession or custody.” *Id.* (emphasis added). Moreover, Mr. Trump’s Response does not specifically identify the potentially responsive documents or information in the Trump Organization’s custody or control, and in any event did not lead to the production of all responsive material by the March 31 deadline.⁵

Also included as part of the Response was an affidavit from Mr. Trump’s attorney attesting in a vague and conclusory manner that he “personally made or caused others to make a diligent search of all of [Mr. Trump’s] relevant records for materials sought by the Subpoena,” and that for each document demand he “was unable to locate any responsive documents that are in [Mr. Trump’s] possession or custody.” Faherty Aff., Ex. B at 17 (¶ 3), 18-20 (¶¶ 8-15). Counsel further attested that, “to the best of his knowledge and belief” – without disclosing the basis for such knowledge and belief – to the extent any such responsive documents exist they are with the Trump Organization, and therefore Mr. Trump “refers to documents that have been and/or will be produced by the Trump Organization” for each demand. *Id.* at 18-20 (¶¶ 8-15).

⁵ Mr. Trump was obligated to produce, by the March 31 deadline, any responsive custodial document in his possession, custody or control and any responsive custodial document in the possession, custody, or control of the Trump Organization if it had not been produced to OAG already.

D. The Trump Organization's Production Deficiencies

As this Court is aware, the Trump Organization and OAG stipulated on September 2, 2021, to certain terms concerning the company's ongoing subpoena responses, as well as the potential need to "retain at [the Trump Organization's] expense, an independent third-party e-discovery firm ... to oversee the identification, collection, and review of electronically stored information ... responsive to OAG's subpoenas." NYSCEF No. 314. The Trump Organization subsequently complied with OAG's demand to retain a third-party eDiscovery firm, which the parties agreed would be HaystackID. Faherty Aff. at ¶ 5.

On March 18, 2022, however, based on the Trump Organization's conduct in significantly restricting the ability of HaystackID to communicate with OAG concerning its progress, OAG sought the Court's intervention to enforce the remaining terms of the September 2, 2021 order and ensure full compliance with the remaining document productions owed by the Trump Organization under OAG's subpoenas. NYSCEF No. 661. After a lengthy hearing on March 28, 2022, this Court ordered HaystackID to provide detailed weekly reports and complete its obligations by April 22, 2022, and ordered the Trump Organization to provide a detailed report by April 20, 2022 and comply in full with all aspects of OAG's subpoenas by April 29, including the complete production of all documents by April 15, 2022. NYSCEF No. 667; Faherty Aff. at ¶ 7. Notably, in the Trump Organization's most recent status report concerning its subpoena response, the company identified as the only ongoing effort to find responsive material a search of the General Counsel's mobile phone. Faherty Aff. at ¶ 26, Ex. C. That means the Trump Organization is not presently searching any of Mr. Trump's custodial files or devices, and has no intention of doing so between now and April 15, 2022. Moreover, HaystackID submitted a status report on April 4 stating that they made a request to Donald J. Trump for written

interview responses on March 30, 2022, but have not received any response.⁶ Faherty Aff. ¶ 27. Nor has HaystackID received any response from Mr. Trump's longtime executive assistant, Rhona Graff, a likely source of knowledge concerning Mr. Trump's custodial documents. *Id.*

ARGUMENT

I. THE COURT SHOULD FIND RESPONDENT DONALD J. TRUMP IN CIVIL CONTEMPT FOR VIOLATING THE COURT'S FEBRUARY 2022 ORDER

After a court has granted a motion to compel compliance with an administrative subpoena, “further disobedience is a violation of the order” and may be the subject of a contempt proceeding. Siegel, N.Y. Prac. § 385 (6th ed.) (citing *Dias v. Consolidated Edison Co. of New York, Inc.*, 116 A.D.2d 453, 454 (1st Dep’t 1986)). An application for civil contempt may be commenced “by an order of such court or judge requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense.” N.Y. Judiciary Law § 756.

The statutory basis for civil contempt in New York is straightforward. Judiciary Law § 753 provides, in relevant part, that “[a] court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced” including “any” disobedience to a lawful mandate of the court. N.Y. Judiciary Law § 753(A)(3). The objective of civil contempt is not to punish the contemnor but either to compensate the injured party or to coerce compliance with a court’s mandate (or both). *Dep’t of Envtl. Prot. of City of New York v. Dep’t of Envtl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 239 (1987). “[C]ivil contempt seeks ‘the vindication of a private

⁶ HaystackID provided a copy of its report to the parties and the Court via electronic mail on April 4, 2022.

right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss or interference with that right.” *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 34 (2015) (quoting *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983)). There is no willfulness requirement for civil contempt. *McCormick*, 59 N.Y.2d at 583.

A party must establish the following four elements to support a finding of civil contempt: (1) there was a lawful court order in effect clearly expressing an unequivocal mandate; (2) it must appear, with reasonable certainty, that the party to be held in contempt has disobeyed the order; (3) the party to be held in contempt had knowledge of the order, although it is not necessary that the party actually be served with the order; and (4) the moving party must demonstrate that its rights have been prejudiced. *See El-Dehdan*, 26 N.Y.3d at 29 (citing *McCormick*, 59 N.Y.2d at 583); *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994).

As a party to this proceeding, Mr. Trump obviously had knowledge of the February 2022 Order, so the third element is clearly met. For the reasons articulated below, the remaining three elements are satisfied as well, and accordingly, the Court should find Mr. Trump in contempt, and may do so without a hearing. *Sexter v. Kimmelman, Sexter, Warmflash & Leitner*, 277 A.D.2d 186, 187 (1st Dep’t 2000).

A. The Court’s February 2022 Order Unequivocally Required Mr. Trump To “Comply In Full” By Producing All Documents Responsive To OAG’s Subpoena By March 31, 2022

With respect to the first factor, the existence of a lawful order is beyond dispute. On January 4, 2022, Mr. Trump filed a motion to quash OAG’s subpoena seeking his documents and testimony. OAG subsequently cross-moved to compel compliance with the same subpoena on January 18, 2022. After complete briefing and argument, this Court denied the motion to quash, granted the cross-motion to compel, and ordered Mr. Trump to “comply in full” with OAG’s

subpoena. February 2022 Order at 8. Although the parties, with the Court’s approval, agreed to adjourn compliance with that portion of the ruling concerning testimony until after the First Department rules on Mr. Trump’s appeal, there was no such adjournment of the court-imposed deadline for Mr. Trump to “comply in full” with the document demands in the subpoena. Indeed, as part of the negotiated stipulation to address the timing of the parties’ appellate briefing, Mr. Trump—without raising any further objections or concerns to OAG regarding document production—agreed that he would comply in full with that portion of OAG’s subpoena seeking documents by March 31. NYSCEF No. 660.

Accordingly, “a lawful order of the court, clearly expressing an unequivocal mandate, was in effect.” *McCormick*, 59 N.Y.2d at 583.

B. Mr. Trump’s March 31 Response Violates The February 2022 Order

Mr. Trump’s March 31 Response was legally improper and completely ineffectual for the purpose of complying with OAG’s subpoena for three reasons.

First, a party is not permitted to respond to a subpoena by merely serving objections on the subpoena issuer. “A motion to quash or vacate ... is the proper *and exclusive* vehicle to challenge the validity of a subpoena or the jurisdiction of the issuing authority. *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, “[s]uch a motion must be made promptly, generally *before the return date of the subpoena.*” *Brunswick Hosp.*, 52 N.Y.2d at 339 (emphasis added). In the circumstances presented here, long after the subpoena’s return date had passed, and long after this Court denied the motion to quash, Mr. Trump had no further right to contest the subpoena.

Second, Mr. Trump waived any right to object to the enumerated document demands in the subpoena, putting aside the procedural impropriety of his Response, by failing to raise any objections the specific demands in his previously-filed motion to quash. *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); *also, Exxon Mobil Corp. v. Healey*, 28 F.4th 383 (2d Cir. 2022) (applying analogous Massachusetts law). He cannot take a second bite at the apple by attempting to raise objections anew after losing his motion to quash. *Cf. Sigety v. Abrams*, 632 F.2d 969, 977 (2d Cir. 1980) (holding that party’s “duty under the subpoena duces tecum” could not be discharged by offering unreasonable sworn testimony).

Third, advising OAG that it must await the completion of the Trump Organization’s production to obtain any of Mr. Trump’s responsive documents that may exist does not “comply in full” with the February 2022 Order and flies in the face of the parties’ negotiated understanding that Mr. Trump would independently produce his responsive documents *before* the Trump Organization completed its production. Faherty Aff. at ¶ 17. Mr. Trump cannot delegate to the Trump Organization his obligation to comply with the Court’s directive to produce responsive documents.⁷ And his attempt to do so is particularly contumacious here for two reasons: (i) OAG expressly rejected—as Mr. Trump well knew—Mr. Trump’s request to

⁷ Although the subpoena states that Mr. Trump does not need to produce documents already provided to OAG by the Trump Organization if he will stipulate that the documents may be used as if produced by him, that does not excuse his failure to produce documents: (a) of which he is the custodian that the Trump Organization has not yet produced; or (b) that he otherwise has in his possession, custody or control that has not been identified with sufficient specificity for OAG to locate within the Trump Organization productions. Indeed, Mr. Trump plays fast and loose with his obligation by referencing documents in his “custody and possession” while omitting the word “control,” but the Court’s order makes no such distinction. He must produce all responsive documents in his custody, possession or “control.” NYSCEF No. 361 at Instruction C2.

align the date of his production with the date for the completion of the Trump Organization's production because of OAG's pressing need for Mr. Trump's documents⁸ (Faherty Aff. at ¶ 17); and (ii) as the Court is well aware from the recent status conference, there are numerous problems with the Trump Organization's production, all of which resulted in the Court ordering the Trump Organization and HaystackID to file detailed reports on the progress of the Trump Organization's production. *See, supra*, at 7-8. Accordingly, assurances from Mr. Trump's counsel (without any apparent basis) that all responsive documents supposedly in Mr. Trump's control are in the possession of the Trump Organization and will be included in the Trump Organization's future productions is cold comfort, and certainly no substitute for Mr. Trump's own compliance with OAG's subpoena as compelled by the February 2022 Order.

Moreover, notwithstanding the asserted "diligent search of [Mr. Trump's] relevant records" purportedly made by his counsel, Faherty Aff. ¶ 21, Ex. B at 17 (¶ 3), it appears that many categories of documents that should logically be in Mr. Trump's custody, control, or possession have not been searched for or produced by him, or for that matter produced by the Trump Organization. As the Court is aware, the recent report from HaystackID reflects that Mr. Trump has not yet responded to a request from that firm "for written responses"—suggesting that, despite having been appointed months ago, HaystackID has received no information from Mr. Trump concerning his records and has not personally interviewed him, nor has HaystackID received any response on behalf of Mr. Trump's longtime executive assistant.⁹ Mr. Trump was

⁸ That set of circumstances suggests that, when OAG and the Court did not agree to Mr. Trump's desired approach, he took it upon himself to pursue the path that expressly had been rejected by "refer[ring] OAG] to the documents and communications that have been" or "will be" produced by the Trump Organization. *See, supra*, at 6; *see also*, Faherty Aff. Ex. B.

⁹ HaystackID Report, Apr. 4, 2022, at 9-10 (categorizing "actual and potential custodians not yet

the chief executive—and remains the beneficial owner through a trust he can revoke at any time—of a large amalgam of real estate and other assets subject to this investigation, and he appears highly likely to have been in possession, custody or control of numerous documents bearing on the matters under investigation. These include, but are not limited to, the following categories:

- **The statements of financial condition and related documents, including documents bearing on Mr. Trump’s review, approval, or consideration of those statements (Responsive to Subpoena Request Nos. 1, 3, 8).** Mr. Trump’s statements of financial condition were, until 2017, styled as statements of Mr. Trump himself and purported to be Mr. Trump’s responsibility; indeed, he personally certified the accuracy of the statements to financial institutions. Evidence indicates that Mr. Trump maintained personal files and used Post-It Notes—which, obviously, stick on top of documents—to communicate with his subordinates. Supp Pet., ¶ 347. Evidence also indicates Mr. Trump reviewed and approved the statements of financial condition. Supp. Pet. ¶348 n55. OAG is entitled to all evidence concerning Mr. Trump’s involvement in the preparation, review, approval, and certification of these financial statements. The fact that Mr. Trump can, for purposes of a press release, acquire one such statement within 24 hours of OAG’s submission (*see* NYSCEF No. 651) strongly suggests that Mr. Trump has ready access to and control over documents concerning those statements—whether at a property in New York, Florida, or at any other location, or with any of his many agents.
- **Documents, notes, or similar materials containing Mr. Trump’s handwriting that relate to valuation of the assets reflected on Mr. Trump’s statements of financial condition (Responsive to Subpoena Request Nos. 2, 7).** As the Court is aware, several variables may bear on a property’s valuation—including its net income, its square footage, any legal restrictions or agreements bearing on the ability to develop the property, and other factors. Evidence indicates Mr. Trump had a hands-on management style and received reports regarding his properties’ financial performance. Supp. Pet. ¶ 103 (Mr. Trump on several occasions discussed membership and revenue strategy for Briarcliff golf club); *id.* at ¶ 341 n44, (memo addressed to Mr. Trump entitled “Re: 2015 Corporate Operating Financial Summary”). Given Mr. Trump’s purported meticulous involvement and focus on his business enterprise, it seems incredible that now virtually no documents exist reflecting his personal receipt and review of information regarding his assets that would bear on their valuation and could be compared against information

interviewed” into categories including “Pending Response,” and identifying “Donald J. Trump” as having been sent a request for written responses on March 30, 2022 that remains unanswered), 11 (noting “HaystackID attempted to contact [Rhona Graff’s] counsel several times but has received no response whatsoever.”).

used for purposes of his Statement of Financial Condition. And if such documents were created but no longer exist, that destruction must be documented and attested to.

- **Tax-related materials, including audit-related documents and communications (Responsive to Subpoena Request Nos. 2, 4, 5).** Documents produced by the Trump Organization reflect that [REDACTED]

[REDACTED] Moreover, Mr. Trump must produce all documents related to the IRS audits of his taxes. Based on evidence collected to date, as well as Mr. Trump's own admission, he has been under "continuous audit" for some time. *See, e.g.,* <https://www.cnbc.com/video/2018/11/07/trump-my-taxes-are-under-continuous-audit.html>. Information in OAG's possession indicates that Mr. Trump had prior negotiations with the IRS during the subpoena time period about other valuation-related matters, and valuations and allocations otherwise can play a significant role in assessing tax liability. In addition, although OAG has received Mr. Trump's personal income tax returns from 2011 to 2018, other tax returns from 2010 to the date of service (December 1, 2021) have not been produced. NYSCEF No. 361 at 6.

- **Insurance Related Documents (Responsive to Subpoena Request Nos. 2, 8).** Mr. Trump and the Trump Organization submitted his statement of financial condition to insurers and their insurance broker. *See* Supp Pet. ¶¶178-190. Additionally, Mr. Trump has insurance policies on his personal residences and other assets listed in the statement of financial condition. It is likely that Mr. Trump retains responsive policy related materials (such as copies of policies and broker correspondence).

This list is not intended to be exhaustive because OAG does not know precisely which documents are still in Mr. Trump's possession or where he maintains all of his business-related records.¹⁰ OAG does not know whether he kept such records in different locations, whether he destroyed any records (such as by discarding Post-It Notes), or whether he had a practice of not maintaining (or instructing subordinates not to maintain) records concerning certain decisions,

¹⁰ OAG does not know if Mr. Trump ever used a cell phone or other mobile device to communicate about Trump Organization business. No device belonging to Mr. Trump is identified in the April 4 HaystackID Report, indicating no search or collection of Mr. Trump's mobile devices has been conducted. However, that said, Mr. Trump has been a prolific Twitter user, which has been associated with his personal cell phone, and which at one point, prior to his inauguration, drew public speculation about security concerns. *See, e.g.,* <https://bgr.com/politics/donald-trump-phone-samsung-galaxy-s3/>.

such as review or approval of financial statements. But Mr. Trump is in a position to know those things and it is his burden in response to this Court's order to identify responsive materials and produce them. Additionally, it is Mr. Trump's burden to identify with specificity which materials produced by the Trump Organization are also in his files and attest for each document that the version he has is an identical copy and does not contain additional information such as handwritten or Post-It Notes. NYSCEF No. 361.

Finally, to the extent Mr. Trump or somebody at his direction ensured that responsive records, including those concerning certain decisions respecting his statements of financial condition, would not be preserved, he was required on March 31 by the Court's order to explain the nature and extent of that records purge. The subpoena—which Mr. Trump has been ordered by this Court to fully comply with—expressly and clearly requires him to identify any document “formerly in [his] possession, custody or control [that] is no longer available,” and for such documents to identify a series of facts, including when the document became unavailable and “whether it was misplaced, lost, destroyed or transferred; and if such document has been destroyed or transferred, the conditions of and reasons for such destruction or transfer. . . .” *Id.* at Instruction 3. Mr. Trump has failed to comply with that instruction—just as he has failed to comply with the Court's production order.

The deficient affidavit from Mr. Trump's counsel further highlights his discovery compliance failures. First, it fails to include any details concerning the “diligent search” conducted for responsive records, including which records were sought, what locations were searched, or what individuals worked with counsel or at his direction to conduct such a search. Faherty Aff. at Ex. B. The Trump Organization's General Counsel, Alan Garten, testified that file cabinets were maintained at the company's offices on behalf of Mr. Trump, Mr. Trump's

assistants maintained documents on his behalf, and Mr. Trump used Post-It Notes to communicate with employees. *See* Supp. Pet. NYSCEF No. 630 at ¶ 326. Furthermore, counsel indicated that there were multiple locations that needed to be searched in order to comply with OAG’s subpoena, including Trump Tower and Mar-a-Lago.¹¹ Faherty Aff. at ¶ 16. Mr. Trump’s counsel’s affidavit reflects no effort to identify documents at any of these locations.

Finally, Mr. Trump’s Response fails to identify where in the Trump Organization’s productions any such responsive records are located—nowhere does Mr. Trump or his counsel identify such documents by Bates number or otherwise describe where such documents can be found in the Trump Organization’s voluminous productions to date. Nor is it evident on what basis Mr. Trump’s counsel is able to aver “on knowledge and belief” that any responsive documents are with the Trump Organization and either “have been” produced “and/or will be produced by the Trump Organization” on some future date. *Id.*, Ex. B at 18-20 (¶¶ 8-15). Indeed, the Trump Organization’s latest weekly update on its production suggests there is no effort underway by the Trump Organization to search for Mr. Trump’s custodial documents; and the latest update by HaystackID confirms that Mr. Trump has failed to respond to written interview questions about his custodial files and that his longtime executive assistant is unresponsive through her counsel. *Id.*, Ex. C; ¶ 27; Haystack Report at 10 (“HaystackID made a request to [Donald J. Trump] for written interview responses on March 30, 2022. HaystackID is awaiting return of the written interview responses.”), 11 (“HaystackID attempted to contact [Rhona Graff’s] counsel several times but has received no response whatsoever.”). As the Court will recall, the Trump Organization’s counsel recently stated that productions were nearly complete,

¹¹ Press statements by the National Archives indicate that Mr. Trump has stored at least some personal documents at Mar-a-Lago. *See* <https://www.archives.gov/press/press-releases/2022/nr22-001>.

saving a single cellular phone and certain “clean up” activities [referenced in the Court’s recent order], such as “downgrades”—with no articulation about Mr. Trump’s custodial documents except a more general refrain that what does not exist cannot be produced.

Taking together the deficiencies in counsel’s affidavit concerning his search efforts and the lack of any discernable basis for counsel’s “knowledge and belief” that the Trump Organization has produced or will produce in the future any of Mr. Trump’s documents responsive to the subpoena, the Court should hold that Mr. Trump’s Response utterly fails to “comply in full” with the February 2022 Order. *See Sigety*, 632 F.2d at 977 (holding that party’s “duty under the subpoena duces tecum” could not be discharged by offering unreasonable sworn testimony).

C. OAG’s Rights Have Been Prejudiced By Respondent’s Disobedience

The final element of civil contempt is prejudice. Where a motion for civil contempt is brought by the State, prejudice may be to “the rights or remedies of the State acting in the public interest.” *State v. Stallings*, 183 A.D.2d 574, 575 (1st Dep’t 1992); *see State v. Unique Ideas, Inc.*, 44 N.Y.2d 345, 349 & n.* (1978) (holding that civil contempt award should compensate victims who were prejudiced by violation of injunction obtained as part of consent judgment in consumer fraud suit brought by OAG).

OAG has had to litigate over the enforcement of the subpoena served on Mr. Trump for months based on Mr. Trump’s dilatory conduct—which forced OAG to move to compel; forced OAG to oppose a motion to quash; and forced OAG to sift through voluminous productions that fail to identify documents from Mr. Trump’s custodial files or provide any information about what locations were searched or when. The Court already noted that there is “copious evidence of possible financial fraud” concerning financial statements that purport to be Mr. Trump’s

responsibility and that he certified to personally. February 2022 Order at 8. OAG’s investigation into that matter cannot further be stymied by Mr. Trump’s attempts to avoid responding to lawful process seeking documents in his possession, custody or control, with which the Court has already ordered him to “comply in full.”

II. THE COURT HAS THE AUTHORITY TO IMPOSE A SUITABLE REMEDY OF FINES AND COSTS TO COERCE COMPLIANCE AND COMPENSATE OAG

Section 5104 of the CPLR and § 753(A) of the New York Judiciary Law generally provide that a court may punish a party who violates a court order for civil contempt. Judiciary Law § 753(A) gives this Court the “power to punish, by fine and imprisonment, or either” any “disobedience to a lawful mandate of the court.” N.Y. Judiciary Law § 753(A)(3). “If an actual loss or injury has been caused to a party to an action ... a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court.” N.Y. Judiciary Law § 773.

In addition to this codified contempt power, “it has long been recognized that courts have the inherent power to enforce respect for and compliance with their judgments and mandates by punishment for contempt, which power is not dependent upon any statute.” *Gabrelian v. Gabrelian*, 108 A.D.2d 445, 450 (2d Dep’t 1985), *appeal dismissed*, 66 N.Y.2d 741 (1985), *abrogated in part on other grounds by Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1 (1986). Accordingly, a court “invoking its power to punish for civil contempt may, if necessary, look beyond the specific provisions of [the Judiciary Law] and resort to its inherent common law contempt power.” *Id.*, 108 A.D.2d at 451.

As the First Department recognized in *Alvarez v. Snyder*, citing with approval to *Gabrelian*:

The general principle that courts inherently may do that which is necessary to ensure the integrity of the proceedings over which they preside has been long recognized in New York. Inherent power, by its nature, does not derive from express statutory authority, but is governed by the need to reasonably enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. Inherent power is a recognized adjunct to judicial power when a Judge must discharge a responsibility, but lacks guidance from explicit legislative or decisional authority. Especially in such “gray area situations”, the exercise of inherent authority derives from common-law tradition as a means “to fill the gaps of express law and to respond to problems . . . so that the adjudicative process can function.

264 A.D.2d 27, 35 (1st Dep’t 2000) (cleaned up); *see also Arroyo v. Board of Educ. of City of New York*, 110 A.D.3d 17, 23 (2d Dep’t 2013) (noting that court’s inherent powers recognized in *Alvarez* should be effectively implemented to preserve a “level playing field for all litigants”) (Rivera, J.P., concurring).

Here, OAG requests that the Court impose an appropriate remedy for Mr. Trump’s contemptuous conduct consisting of: (i) a daily fine on Mr. Trump until he produces all responsive documents in the amount of \$10,000 per day, a sum sufficient to coerce his compliance with the Court’s February 2022 Order; and (ii) an award to OAG of its fees and costs associated with filing this contempt motion, to be determined based on OAG’s further submission of a costs affidavit. *See Pala Asets Holdings Ltd v. Rolta, LLC*, No. 652798/2018, 2021 WL 6051428, *9 (Sup. Ct. N.Y. Co. Dec. 21, 2021) (imposing civil contempt fine of \$10,000 per day on corporate executive to compel compliance with court’s order); *Arm Internet Inv. I Ltd. v. C Media Ltd.*, No. 655844/2016, 2022 WL 228035, at *4 (N.Y. Sup. Ct. Jan. 26, 2022) (“the most effective way to encourage defendants to comply with the Stipulation of Settlement and this court’s prior orders is to issue a prospective per diem fine until the contempt is purged.”); *Int’l Bus. Machines Corp. v. United States*, 493 F.2d 112, 115 (2d Cir. 1973) (“In regard to the amount of the coercive fine it was proper for the court to take into account the

contemnor's resources and ability to pay."); *In re Johns-Manville Corp.*, 26 B.R. 919, 923 (Bankr. S.D.N.Y. 1983) ("in punishing for civil contempt, a court is empowered to impose a sanction sufficient to coerce the respondents into complying.").

CONCLUSION

Based on the foregoing, 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 deemed by the Court to be 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 7, 2022

Respectfully submitted,

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