SUPREME COURT 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

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

Alina Habba, Esq.
HABBA MADAIO & ASSOCIATES, LLP
1430 U.S. Highway 206, Suite 240
Bedminster, New Jersey 07921
-and-
112 West 34th Street, 17th & 18th Floors
New York, New York 10120
Phone: (908) 869-1188
Fax: (908) 450-1881
Email: ahabba@habbalaw.com
Attorneys for Respondent, Donald J. Trump

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules and Statues

Respondent, Donald J. Trump ("Respondent"), submits this memorandum of law in opposition to the Office of the Attorney General's (the "OAG") civil contempt motion against Respondent for failing to comply with the Court's February 17, 2022 Order (the "Order") requiring that Respondent "comply in full" with the OAG's December 1, 2021 subpoena (the "Subpoena").

INTRODUCTION

As demonstrated below, the imposition of sanctions for civil contempt is a drastic remedy that is warranted only in the most egregious of circumstances. The present scenario cannot conceivably qualify since Respondent thoroughly complied with this Court's Order.

On December 1, 2021, the OAG issued the Subpoena to Respondent, individually, requesting that he produce a variety of documents relating to the OAG's ongoing investigation. The Subpoena, however, expressly noted that Respondent:

> "**need not produce documents in the possession, custody or control of the Trump Organization**, if such documents have previously been produced to this Office during the course of this investigation and you stipulate that the Trump Organization-produced documents can be used as if those documents were produced by you."

Affirmation of Alina Habba, Esq. dated April 19, 2022 ("Habba Aff."), Ex. A at Instruction C2 (emphasis added).

After conducting a diligent search and review, Respondent's counsel determined that Respondent was not in possession of any documents responsive to the Subpoena and that all potentially responsive documents were in the possession, custody or control of the Trump Organization. Consistent with the foregoing, on March 31, 2022, Respondent's counsel served a response (the "Response") to the Subpoena stating that, as for each demand, that he "has no documents or communications in his possession or custody that are responsive to this request and…refers to the documents and communications that have been previously produced by the Trump Organization to [the OAG] and…stipulates that, to the extent any documents or

communications contained in the [Trump Organization] Productions are responsive to this request, said documents and communications may be used as if those documents were produced by Respondent" – just as the Subpoena expressly authorized. In other words, Respondent complied with the exact language of the Subpoena.

Notwithstanding Respondent's compliance, on April 7, 2022, the OAG, seemingly in an effort to turn this matter into a public spectacle, proceeded to file the instant motion without warning and not surprisingly, simultaneously issued a press release denouncing Respondent's supposed 'disobedience' of the court order. In its motion, the OAG fails to explain how Respondent's response was insufficient in any way. The OAG's position is particularly confounding since the Response strictly adhered to the OAG's *own instructions*. Indeed, the purported 'deficiencies' raised by the OAG are precisely what was called for in the Subpoena, often matching the OAG's language word-for-word.

Further, the OAG has failed to explain how Respondent's supposed non-compliance has caused it to sustain any prejudice whatsoever. The OAG claims that it has been forced to incur unnecessary litigation expenses by virtue of Respondent's actions, but this could not be further from the truth. In defiance of well-established court rules, the OAG filed the instant application without making any effort to resolve the underlying issues or even so much as reach out to Respondent's counsel. While the OAG was publicly putting out a barrage of press statements about the instant motion, OAG counsel was privately rebuffing numerous attempts by Respondent's counsel to engage in good-faith discussions to address the issues at hand – going so far as to refuse Respondent's counsel's request for a simple phone call. Given the OAG's recalcitrant behavior, it is fair to question the OAG's motive in bringing the instant application, which appears to be little more than a contrived publicity stunt.

COUNTER-STATEMENT OF FACTS

On or about December 2, 2021, the OAG served the Subpoena upon Respondent. The Subpoena contains eight individual demands which seek disclosure of communications and documents that mainly relate to the Trump Organization's business dealings. The Subpoena also contains a set of instructions which outline the manner in which Respondent was required to respond. Notably, with regard to which particular documents Respondent was required to produce, the Subpoena qualifies:

> **If documents or information responsive to a request in this Subpoena are in your control, but not in your possession or custody, you shall promptly identify the person with possession or custody**. Additionally, **you need not produce documents in the possession, custody or control of the Trump Organization**, if such documents have previously been produced to this Office during the course of this investigation and you stipulate that the Trump Organization-produced documents can be used as if those documents were produced by you.

Habba Aff., Ex. A at Instruction C2 (emphasis added). The instructions define the term "Person" as "any natural person or Entity." *Id.* at Instruction A14. Further, when identifying entities, the Subpoena directs Respondent to simply provide the entity's legal name. *Id.* at Instruction A12

The OAG was well apprised by Respondent that the documents sought would not likely be in his personal possession since the OAG's demands largely relate to the business affairs of the Trump Organization. On December 3, 2021, counsel for Respondent, Ron Fischetti, Esq., informed the OAG that "I believe the documents you are seeking are in the possession of the Trump Organization and not in the possession of my client." *See generally* Habba Aff., Ex. B.

On January 3, 2022, Respondents, Donald J. Trump, Ivanka Trump, and Donald Trump Jr., filed a motion to quash the OAG's subpoena, and the OAG filed a cross-motion to compel. On February 17, 2022, as stated in the Order, this Court denied Respondent's motion and ordered, among other things, that Respondent "comply in full, within 14 days of the date of this order, with

the portion of the Office of the Attorney General's Subpoena seeking documents and information." Habba Aff. at ¶5.

On February 28, 2022, Respondents proceeded to appeal the Order to the First Department. The parties agreed and stipulated that Respondent would respond to the document requests contained in the Subpoena on or before March 31, 2022. *See generally* Habba Aff., Ex. C.

Indeed, Respondent fully complied with the Subpoena by serving the Response. *See generally* Habba Aff., Ex. D. After a dutiful search, it was determined that Respondent simply did not have any of the requested documents in his personal possession or custody. To the extent any such documents were in his "control," said documents were in the possession, custody or control of the Trump Organization. In full compliance with the Subpoena, Respondent identified the Trump Organization as the "person" in possession of the requested documents and directed the OAG to refer to document production provided by the Trump Organization.

Seven days after Respondent proffered his response to the Subpoena, the OAG filed the instant motion seeking to hold Respondent in civil contempt. During the length of time between Respondent's submission of the Response and the filing of this motion, the OAG did not make a single attempt to reach out to the Respondent to resolve this issue in good faith. Instead, the OAG launced a 'full-press' attack on Respondent, and Letitia James, the Attorney General of New York, released the following statement to comport with the filing of its contempt motion, stating:

> "The judge's order was crystal clear: Donald J. Trump must comply with our subpoena and turn over relevant documents to my office. Instead of obeying a court order, Respondent is trying to evade it. We are seeking the court's immediate intervention because no one is above the law.[1]"

[1] https://ag.ny.gov/press-release/2022/athe Trump Organizationrney-general-james-files-motion-hold-donald-j-trump-contempt-failure-comply

Shortly thereafter, on April 7, 2022, in an attempt to resolve the outstanding issues without judicial intervention, Respondent's counsel reached out to the OAG to schedule a phone conference to address the OAG's contentions that Respondent did not comply with the Subpoena. While expressly stating that the Response is in full compliance, Respondent's counsel offered to amend the responses to the extent necessary to satisfy the OAG. *See generally* Habba Aff., Ex.E.

The OAG did not respond to Respondent's counsel's e-mail until April 11, 2022, in which OAG counsel refused to engage in even a simple phone call, stating that he disagrees with Respondent counsel's position and that "further discussions without the Court do not make sense." *Id*. In a follow-up attempt to address the OAG's concerns, Respondent's counsel sent a second email on April 12, 2022, responding that "While we maintain that the subpoena response was fully compliant, we remain open to amending it in a mutually-agreeable manner. Therefore, we would like to have a conference call to try to resolve this issue." *Id*. The OAG waited another two days before responding to this recent email, stating, in pertinent part, that "[f]rom OAG's perspective, no useful purpose would be served by having a conference call among counsel to discuss our competing positions." *Id*.

ARGUMENT

I. THE OAG HAS FAILED TO DEMOSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT A FINDING OF CIVIL CONTEMPT IS WARRANTED.

Judiciary Law § 753 provides that a court may "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" for "disobedience to a lawful mandate of the court." N.Y. Jud. Law § 753(A)(1). "The primary purpose of civil contempt is remedial," and is designed "to compensate the injured private

party or to coerce compliance with the court's mandate or both." *Palmitesta v. Palmitesta*, 166 A.D.3d 782, 782-83 (2d Dep't 2018).

To sustain a finding of civil contempt, the movant must establish that: (1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) the movant was prejudiced by the offending conduct. *See McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983). "A party seeking to hold another party in civil contempt has the burden of proving the contemptuous conduct by clear and convincing evidence." *Gray v. Giarrizzo*, 47 A.D.3d 765, 766 (2d Dep't 2008) (citing *Rupp-Elmasri v. Elmasri,* 305 A.D.2d 394, 395 (2003)); *see also Cassarino v. Cassarino,* 149 A.D.3d 689 (2d Dep't 2017) ("[A] motion to punish a party for civil contempt is addressed to the sound discretion of the Court, and the movant bears the burden of proving the contempt by clear and convincing evidence."). Every contempt application must be decided on the basis of its own unique facts and circumstances. *Banks v. Stanford*, 159 A.D.3d 134, 146 (2d Dep't 2018).

Respondent readily concedes that the Order is lawful in its mandate to compel Respondent's to respond to the Subpoena, and that he had knowledge of the Order. Indeed, it was in adherence to this Court's directive that Respondent provided a thoroughly sufficient response to the Subpoena. Thus, for the reasons articulated below, the OAG has not—and cannot—show that the Response is in any way deficient nor that it caused the OAG to sustain even the slightest bit of prejudice.

A. Respondent Fully Complied with the Subpoena.

The OAG's claim that Respondent "did not comply at all" with the Subpoena is verifiably false. Pet. Mem. at Respondent provided a full and dutiful response, based on a diligent search of Respondent's records, which strictly adhered to the subpoena instructions provided by the OAG.

The party moving for civil contempt arising out of noncompliance with a subpoena *duces tecum* bears the burden of establishing, by clear and convincing evidence, that the subpoena has been violated and that "the party from whom the documents were sought had the ability to produce them." *Yalkowsky v. Yalkowsky,* 93 A.D.2d 834, 835 (1983); *see also Gray v. Giarrizzo,* 47 A.D.3d 765, 766 (2008). To hold a party in civil contempt, "the court must expressly find that the person's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding." *Clinton Corner v. Lavergne*, 279 A.D.2d 339, 341 (1st Dep't 2001).

Pursuant to the Order, the Court directed Respondent to "comply in full" with the OAG's subpoena *duces tecum*. As outlined below, that is precisely what Respondent did.

i. After a Diligent Search, Respondent Had No Responsive Documents Other Than Those in Possession, Custody or Control of the Trump Organization.

The OAG's main gripe with Respondent's subpoena response seems to be the lack of documents that were independently produced. While this result may be to the OAG's dissatisfaction, the fact is that a diligent search was performed and found that Respondent is not in possession of any of the requested documents. Further, as was expressly stated in the Subpoena's instructions, Respondent was not obligated to produce documents in the possession, custody or control of the Trump Organization.

Respondents' counsel, in coordination with Respondent and numerous aides, representatives, co-counsel, and others with knowledge of the whereabouts of Respondent's communications and documents, performed a diligent and comprehensive search for the requested items. The search failed to identify a single document in the possession or custody of Respondent that was responsive to the OAG's requests, at least none that were required to be separately produced by Respondent.

Given the contents of the Subpoena, the lack of responsive documents comes as no surprise. The Subpoena lists eight individual documents demands which seek disclosure of communications and documents that are almost exclusively business-oriented, relating to topics such as corporate financial statements, property asset valuations, project financing, etc. In other words, it seeks disclosure of the corporate records of the Trump Organization or, at the very least, documents that would be housed in its corporate offices. These are not documents that would be in Respondent's physical possession or custody. Moreover, as the OAG is keenly aware, Respondent "famously does not use email or a computer," meaning that the documents are likewise not in his digital possession or custody. *See* Pet. Amended Verified Petition ¶ 347 (NYSCEF Doc. No. 630). Further, as this Court may take judicial notice, Respondent left the Trump Organization in early 2017 to serve as President of the United States for the subsequent four years.

Based on the foregoing, Respondent did not have any responsive documents or communications in his personal possession or custody. To the extent any such documents were in his "control"—a term not defined in the subpoena instructions—those documents were in the possession and custody of the Trump Organization. The Subpoena dictates how Respondent is required to respond in this precise scenario. Specifically, Instruction C2 states as follows:

> "If documents or information responsive to a request in this Subpoena are in your control, but not in your possession or custody, you shall promptly identify the person with possession or custody. Additionally, you need not produce documents in the possession, custody or control of the Trump Organization, if such documents have previously been produced to this Office during the course of this investigation and you stipulate that the Trump Organization-produced documents can be used as if those documents were produced by you."

See Habba Aff., Ex. A at Instruction C2.

Read as a whole, the above provision plainly instructs that Respondent was not required to produce any documents that are in the "possession, custody or control of the Trump Organization,"

as long as those documents had already been produced to the OAG. *Id.* This provision is critical since the Trump Organization has independently produced a vast number of documents to the OAG throughout the course of the subject investigation. Thus, in accordance with Instruction C2, Respondent directed the OAG to the documents produced by the Trump Organization, to the extent applicable. The Response, which strictly adhered to Instruction C2—nearly matching the language word-for-word—stated as follows:

> **"…Respondent states that he has no documents or communications in his possession or custody that are responsive to this request and, to the extent any such documents or communications exist, said responsive documents are in the possession, custody or control of the Trump Organization. Accordingly… Respondent refers to the documents and communications that have been previously produced by the Trump Organization to Petitioner and, to the extent applicable, those documents and communications that will be produced by the Trump Organization to Petitioner in response to any pending request or subpoena…and stipulates that, to the extent any documents or communications contained in the [Trump Organizations] Productions are responsive to this request, said documents and communications may be used as if those documents were produced by Respondent."**

Habba Aff., Ex. D at 6-7.

Despite feigning surprise and outrage in its motion papers, the OAG was fully aware that Respondent was unlikely to be producing any responsive documents but, rather, would permissibly rely upon the Trump Organization's productions. On December 3, 2021, a mere two days after the OAG effected service of its subpoena, counsel for Respondent, Ron Fischetti had a conversation with the OAG, which he confirmed in a follow-up e-mail stating "I believe the documents you are seeking are in the possession of the Trump Organization and not in the possession of my client." Habba Aff., Ex. B. The OAG even acknowledges in its motion papers that Respondent does not use email, nor does he use a computer or any similar device for work purposes.

The OAG also takes issue with the purported lack of specificity in Respondent's response, complaining that the "Response does not specifically identify the potentially responsive documents

or information in the Trump Organization's custody or control[.]" Pet. Mem. at 6. The OAG similarly declares that the Response "omits any reference to documents in the *control* of [Respondent] – 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. Habba Aff., Ex. A at 3. Yet, in putting forth these arguments, the OAG again fails to pay heed to its own directives.

With regard to documents in Respondent's "control," but not his "possession or custody," Instruction C2 dictates: "[i]f documents are in your control, but not in your possession or custody, you shall promptly identify the person with possession or custody." This is exactly what Respondent did. He stated that there were no responsive documents in his "possession or custody, and to the extent there were any in his "control" he identified the Trump Organization as the "person" with custody of the responsive documents. Instruction A14 specifically denotes that a "person" includes "any natural person, or any Entity," such as the Trump Organization. *See* Habba Aff., Ex. A at Instruction A14. Read in conjunction with the remaining portion of Instruction C2, which excepts Respondent from producing documents that have been already been produced by the Trump Organization, he was under no obligation to produce documents in his "control," only to identify the Trump Organization as the entity in possession of them. *Id.*

As for Respondent's purported failure to delineate which particular documents he was relying upon in the Trump Organization's productions, there is simply no requirement in the instructions for him to do so.[2] Nor would such a requirement be reasonable. It would be unduly

[2] In its motion papers, the OAG disingenuously claims that Respondent should have identified the documents in accordance with Instruction C3, entitled "Documents No Longer in Your Possession," which calls for specific identification of any document that was "formerly in [Respondent's] possession, custody or control but is no longer available, or no longer exists." Pet.

burdensome—even impossible—for Respondent to determine which of the *millions* of documents produced by the Trump Organization documents should be construed as being in his "control" – a term which is not even defined in the subpoena instructions. This is especially true considering the grossly overbroad nature of the OAG's demands, which include requests like "[a]ll documents and communications concerning *any* valuation of *any* asset whose value is identified or incorporated into *any* Statement of Financial Condition." *See* Habba Aff., Ex. A at Demand D2 (emphasis added). These corporate records belong to the Trump Organization, not to Respondent, and he was expressly allowed to rely upon the company's productions to the OAG.

Therefore, Respondent's response was in full compliance with the OAG's subpoena.

ii. The OAG's Remaining Complaints are Without Merit

Despite the OAG's insistence to the contrary, none of the remaining issues raised by the OAG even remotely render the Response non-compliant with the Subpoena. Rather, the supposed "deficiencies" identified by the OAG are mere nitpicks as to the formatting, style and/or makeup of the Response that are wholly immaterial to its substance.

First, the OAG disingenuously argues that the "Affidavit of Compliance" (the "Affidavit") submitted with Respondent's response is somehow defective. This contention is simply non-sensical. The Affidavit was nearly identical to the form provided by the OAG and comported in form and substance in every conceivable way. That the OAG takes issue with the Affidavit is perplexing. For example, the OAG takes aim at the representation in the Affidavit that the affiant "personally made or caused others to make a diligent search of all of Respondent's relevant records for materials sought by the Subpoena." Yet, the form affidavit provided by the OAG includes a

---

Mem. at 15. Contrary to the OAG's assertion, this provision is inapplicable since the documents produced by the Trump Organization to the OAG are still available and/or in existence.

nearly indistinguishable line which states that "I made or *caused to be made* a diligent, complete and comprehensive search for all Documents and information requested by the Subpoena[.]" (emphasis added). *See* Habba Aff., Ex. D at 17. Similarly, the OAG complains of Respondent's use of the phrase "to the best of my knowledge and belief," despite the fact that this language is taken word-for-word from the template form. *Id.* at 17-18 ("Respondent's productions and responses to the Subpoena are complete and correct to the best of my knowledge and belief."); *compare to* Subpoena, template affidavit at 10 ("Respondent's productions and responses to the Subpoena are complete and correct to the best of my knowledge and belief."). The OAG's apparent dissatisfaction with *its own language* does not make Respondent's response any less sufficient.

Second, the OAG claims that Respondent has refused to comply with HaystackID's request for written responses "despite having been appointed months ago." The OAG's position is misleading and incorrect. HaystackID only sent request for written responses from Respondent on March 30, 2022. Habba Aff. at ¶8. Respondent submitted his response mere days later on April 8, 2022. Habba Aff. at ¶9. This issue is therefore moot and, more importantly, consistent with Respondent's good faith efforts to comply with HaystackID's search efforts.

Third, the OAG contends that the Response improperly raises objections to the breadth, scope, and burdensomeness of the requests in the Subpoena. The OAG argues that, since Respondent did not raise these objections in a motion to quash, they were thereby waived. This position is neither supported by case law nor common practice. It is well settled that a recipient of a non-judicial subpoena is "not required to initiate a motion to quash" to raise objections; rather, the recipient "may properly raise his objections when the official issuing the office subpoena first seeks judicial sanction for noncompliance." *Friedman v. Hi-Li Manor*, 42 N.Y.2d 408, 413 (1977) (citations omitted). Further, it is well settled that recipient of "non-judicial subpoena *duces tecum*

may always challenge the subpoena in court on the ground it calls for irrelevant or immaterial documents or subjects the witness to harassment. *Myerson,* 33 N.Y.2d at 256 (citations omitted).

Here, Respondent was well within his rights to set forth his various objections to the breadth, scope and particularity of the demands contained in the Subpoena. In its moving papers, the OAG conveniently omits that Respondent had properly raised these objections in his Answer, which was filed on February 14, 2022. *See* NYSCEF Doc. No 647. In particular, Respondent's Seventh Affirmative Defense stated:

> The subject subpoenas and subsequent requests for documents, information and testimony made by Petitioner are objectionable in that, among other things, they call for irrelevant and immaterial records, are overly broad and unduly burdensome, and do not state the documents sought with reasonable particularity.

Id. at 54. Accordingly, these objections were preserved by Respondent and properly asserted in his Response. Regardless, the objections are immaterial since Respondent did indeed proffer a full and complete answer to each of the OAG's document demands. Thus, even if the objections were not properly asserted, Respondent complied in good faith all the same.

Based on the foregoing, the OAG's contention that Respondent's response is deficient in any material way is wholly without merit.

B. ***The OAG Is Unable to Show That Its Rights Have Been Prejudiced***

Even assuming *arguendo* that Respondent willfully violated the Order—which he did not—the OAG has not shown that its rights have been prejudiced in any way.

There can be no finding of civil contempt absent clear and convincing evidence of prejudice to a party to the litigation. *Penavic v. Penavic*, 109 A.D.3d 648, 650 (2d Dep't 2013). To satisfy the prejudice element, the moving party must prove the accused conduct "was calculated to, or actually did, defeat, impair, impede, or prejudice [the moving party's] rights or remedies." *Olson v. Olson,* 177 A.D.3d 567 (1st Dep't 2019); *see also Powell v. Clauss*, 93 A.D.2d 883 (2d Dep't

1983) ("[A]n adjudication of civil contempt is not warranted because there is no finding that defendant's actions were calculated to or actually did defeat, impair or prejudice the rights and remedies of the plaintiff."); *El-Dehdan v. El-Dehdan*, 114 A.D.3d 4, 11 (2d Dep't 2013) ("The element of prejudice to a party's rights is essential to civil contempt, which aims to vindicate the rights of a private party to litigation."). Contempt is a drastic remedy which should not be granted absent clear right to relief. *Pinto v. Pinto*, 501 N.Y.S.2d 835 (1st Dep't 1986).

Here, the OAG has not shown that it sustained any prejudice stemming from Respondent's purported failure to comply with the Subpoena, nor can it since the Response was in full compliance with the instructions of the Subpoena. Even to the extent the OAG is able to show that there was some minor deviation, any such 'deficiency' would have been immaterial and certainly does not rise to the level of civil contempt. Indeed, the OAG has failed to explain how the Response, even if not wholly comporting to its directives, has compromised its rights in any meaningful way as is required to establish contempt. *See Troiano v. Ilaria*, 205 A.D.2d 752, 752 (1994) (affirming denial of contempt where party seeking contempt order failed to demonstrate alleged infractions prejudiced that party's rights); *Chambers v. Old Stone Hill Rd*, 66 A.D.3d 944, 946 (2009) (affirming denial of motions for contempt where movants failed to demonstrate any harms resulting from alleged violations).

The OAG singularly relies on the fact that it engaged in litigation to compel Respondent's response to the Subpoena in support of its contention that it was somehow prejudiced by Respondent's conduct. However, it is well established that counsel fees are recoverable only if all the requirements, including prejudice, are separately established. *See Mundell v. N.Y.S. Dep't of Transp.*, 185 A.D.3d 1470 (4th Dep't 2020) (Finding that petitioner was not entitled to counsel fees where it failed to demonstrate prejudice by clear and convincing evidence). Every litigant

incurs counsel fees when bringing a contempt motion; this basis, on its own, is not sufficient to establish prejudice. As such, the OAG's paltry submission that it engaged in litigation does not demonstrate that its rights have been prejudice by Respondent's alleged non-compliance. Absent independent proof of prejudice, there can be no contempt. *See City of Poughkeepsie v. Hetey*, 121 A.D.2d 496 (2d Dep't 1986) (affirming denial of contempt motion absent proof of prejudice (actual or intended)).

Further, if either party bears responsibility for unnecessarily involving the Court in this issue, it is the OAG. Rather than make a good-faith effort to resolve its perceived issues with the Response and allow Respondent an opportunity to cure any alleged deficiencies, the OAG instead opted to prematurely file the instant application without so much as notifying Respondents' counsel. Even worse, subsequent to filing, the OAG has continually rebuffed Respondent's counsel's numerous attempts to engage in good-faith discussions to resolve the apparent issues with the Response. To date, the OAG still will not even so much as have a phone call with Respondents' counsel to discuss these issues. While Respondent maintains that the Response is fully complaint, as set forth above, he is willing to make mutually agreeable revisions to the extent that it will avoid unnecessary motion practice and court intervention. This position has been clearly communicated to the OAG. Thus, the OAG's position that it has been prejudiced is dumbfounding. It claims that it is being forced to incur unnecessary litigation costs while simultaneously contravening well established 'meet and confer' rules that are designed to prevent unnecessary litigation. The OAG's failure in this regard is a fatal defect in its contempt application – it cannot prove prejudice since any superfluous litigation costs have been self-imposed.

Further, as stated above, and conceded by the OAG, the Trump Organization has independently produced a significant number of documents in response to OAG's numerous

document demands. Respondent is not obligated to produce any of these documents, nor are there any additional documents that are being withheld. In other words, the OAG is *already in possession* of all of the documents it seeks in its document demands. Given these circumstances, the OAG's rights have not been prejudiced in the slightest. *See U.S. Bank Nat'l Ass'n v. Sirota*, 189 A.D.3d 927 (2d Dep't) (holding that denial of the borrowers' requests to impose civil contempt on the lender for its delay in releasing insurance proceeds to the borrowers was proper as the lender had released the proceeds months before the contempt request).

Therefore, given that the OAG has failed to demonstrate that it has suffered "actual loss or injury" as a result of Respondent's conduct, this contempt motion must be denied as the relief it seeks is punitive in nature, not compensatory.

II. THE INSTANT MOTION IS PROCEDURALLY DEFECTIVE DUE TO OAG'S FAILURE TO COMPLY WITH SECTION 202.20(f)

The OAG's inexplicable refusal to engage in good-faith discussions with Respondent's counsel prior to filing the instant application is not only damning proof as to the lack of prejudice it sustained, it is also a violation of court rules that renders this application procedurally improper.

Uniform Civil Rules for the Supreme Court and the County Court Section 202.20-f(b) (effective February 1, 2021) states, in pertinent part:

> (a) To the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice.
>
> (b) Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference.

NY CLS Unif. Rules, Civil Cts § 202.20-f. The Rule also requires that any discovery motion be accompanied by an affirmation from counsel attesting to having conducted such in-person or telephonic conference, and detailing when the conference took place, who participated, and the

length of time of the conference. The Rule further provides that the "failure of counsel to comply with this rule may result in the denial of a discovery motion, without prejudice to renewal once the provisions of this rule have been complied with, or in such motion being held in abeyance until the informal resolution procedures of the court are conducted." *Id*.

Courts are particularly disinclined to hold a party in contempt in connection with a routine discovery dispute. *See Lopez v. NYC Transit Authority*, 925 N.Y.S.2d 84 (1st Dep't 2011) (finding that the Transit Authority's decision to file a contempt motion as opposed to first availing itself of other remedies was "wholly inexplicable and equally meritless."); *see also Oak Beach v. Babylon Beacon*, 62 N.Y.2d 158, 166–167 (1984) (holding that "a court must resort to other more general provisions of the law in the rare instances where it may be necessary to hold a person in contempt for failure to make disclosure in a civil case.").

Since becoming effective little over a year ago, New York courts have consistently held that a party's failure to comply with Uniform Rule 202.20-f mandates the denial of any related discovery motion. *See Taylor v. Ultimate Class Limousine*, 2021 N.Y. Misc. LEXIS 5203 (Sup. Ct. Bronx Cty. 2021); *Velazquez v. Campuzano*, 2021 N.Y. Misc. LEXIS 4173 (Sup. Ct. Bronx Cty. 2021). In fact, discovery motions that fail to comply with Uniform Rule 202.20-f are routinely denied even if the movant has previously issued various good faith letters. *See Muhammed v. Palarchie*, 2021 N.Y. Misc. LEXIS 4550 (Sup. Ct. Bronx Cty. 2021).

Here, the OAG never attempted to schedule a conference, either telephonically or otherwise, to discuss any perceived deficiency with Respondent's subpoena response. There is nothing contained the OAG's motion regarding any compliance with the terms of Uniform Rule 202.20- f or even any efforts of counsel to comply with the rule. Indeed, the OAG repeatedly refused to engage in so much as a phone-call even after the motion was filed, when Respondent's

counsel made numerous attempts to resolve the discovery dispute without judicial intervention. Clearly, Respondent's counsel was, and is, ready, willing, and able to fully discuss the matter with the OAG to correct any perceived deficiencies. Instead of engaging in good faith discussions to resolve the outstanding issues, the OAG proceeded to issue a self-gratifying press release that was solely aimed to publicly excoriate Respondent. To date, the OAG remains steadfast in its refusal to discuss this disclosure dispute with Respondents' counsel.

As such, the OAG has failed to meet the 'meet and confer' requirements of NY CLS Unif. Rules, Civil Cts § 202.20-f. It has additionally failed to demonstrate that "any further attempt to resolve the dispute nonjudicially would have been futile." *Jackson v. Hunter Roberts Constr. Group*, 139 A.D.3d 429 (1st Dep't 2016). Therefore, the OAG's motion is inherently defective for failing to comply with failing to abide by the court rules and should be rejected for this reason alone.

III. THE IMPOSITION OF FINES IS NOT WARRANTED, AND TO THE EXTENT IT IS, THE AMOUNT SOUGHT BY THE OAG IS OVERLY EXCESSIVE AND EXCEEDS THIS COURT'S STATUTORY AUTHORITY.

Finally, in addition to the OAG's application completely lacking merit and being procedurally defective, the OAG's request for a daily fine of $10,000 is a grossly excessive amount that is not statutorily authorized and would not serve civil contempt's understood purpose of compensating the wronged party for damages suffered as the result of a violation of a clear and unambiguous order.

A. The Proposed Fine Has No Foundation as a Compensatory Remedy.

While criminal contempt is used to punish those who wrongfully rebel against judicial authority and is employed "to protect the integrity and dignity of the judicial process and to compel respect for its mandates," civil contempt penalties are invoked "not to punish but, rather, to

compensate the injured private party or to coerce compliance with the court's mandate." *See Department of Housing Preservation v. Deka Realty Corp.*, 208 A.D.2d 37, 42 (2d Dep't 1994); *see also* Judiciary Law § 750.

The OAG has proffered no reasoning or logic to justify a $10,000 per-day fine, nor explained whether the amount sought is remedial or relates to any loss that OAG has suffered as the result of Respondent's purportedly contemptuous conduct. In its motion, the OAG merely recites boilerplate case law to fortify its position, with no accompanying evidence of any ascertainable loss. *See* Pet. Mem. at 19. As the OAG has failed to prove actual loss, this Court may "only impose a fine which does not exceed the complainant's costs and expenses, plus an additional $ 250." *See* N.Y. Jud. Law § 773; *Berkowitz v. Astro Moving & Storage*, 240 A.D.2d 450, 452 (2d Dep't 1997) (Parties in contempt for failure to timely comply with ordered inspection in Article 78 proceeding were entitled to modification of fine that included damages, attorney fees, and costs where opposing party failed to prove actual loss resulting from such delay; thus, under CLS Jud § 773, court was limited to imposing fine for costs and expenses of opposing motion to renew, plus additional $250.); *Barclays Bank v. Hughes*, 306 A.D.2d 406, 407-08 (2d Dep't 2003) (where wife was held in contempt by lower court for failing to comply with subpoena served in effort to collect on judgment obtained against husband, contempt order was modified by reducing fine from amount of judgment to statutory fine of $ 250); *Weissman v Weissman*, 131 A.D.3d 529, (finding that the statutory maximum of a $250 fine per occurrence was proper as Defendant failed to make a showing of any actual damages); *Vider v Vider*, 85 A.D.3d at 908 ("Where no actual damages are shown, the amount of a fine for a civil contempt cannot exceed $250.").

The OAG is only able to point to a single case where a daily fine of $10,000 was deemed appropriate. That matter, *Pala Assets Holdings Ltd v. Rolta, LLC*, is wholly distinguishable from

the facts at hand. In *Rolta,* a judgment debtor was ordered to turn over all cash on hand, as well as shares and membership interests to satisfy an outstanding $200 million judgment. *Pala Assets Holdings Ltd v. Rolta*, *LLC*, 2021 NY Slip Op 32790(U) at 17-18 (Sup. Ct.). Upon the judgment debtor's failure to do so, the court held the judgment debtor in contempt and imposed a fine of $10,000 per day until it complied. The moving party in that matter was successfully able to prove an ascertainable loss of at least $200 million, which justified the imposition of a $10,000 daily fine. The court found the $10,000 remedy to be reasonable in that unique scenario due to the immense size of the judgment. *Id.* at 17-18. ("the court adopts plaintiffs' more reasonable proposal to fine Pulusani $10,000 per day. In the court's view, this lesser amount is sufficient to coerce defendants' compliance, taking into consideration the $200 million judgment and defendants' resources."). The present facts are entirely different. Not only is the OAG unable to show that Respondent violated this Court's Order, but it has also failed to show that it has sustained any ascertainable loss. The OAG has not provided an accompanying affidavit stating a pecuniary loss, and the only possible expense incurred by the OAG would be its counsel fees, which, as described above, simply does not meet the requisite standard.

In short, the OAG's request for a fine in the amount of $10,000 per day exceeds all relevant statutory authority and is wholly unjustified by case law.

B. The Proposed Fine Has No Foundation as a Coercive Remedy.

The OAG's requested fine similarly fails to serve the alternate purpose of coercing Respondent's further compliance with the Order. A coercive fine may be imposed in a civil contempt proceeding, if at all, "only if the contemnor is given an opportunity to purge" the contempt by rectifying the violation of the court order. *See, e.g., Ruesch v. Ruesch*, 106 A.D.3d

976, 977 (2d Dep't 2013); *NYC Transit Auth. v. Transport Workers*, 35 A.D.3d 73, 86 (2d Dep't 2006).

As evidenced by the record, Respondent complied with the Subpoena and proffered responses prior to the stipulated deadline of March 31, 2022. The OAG is now seeking documents that Respondent simply does not have in his possession, a fact that OAG was well aware of before proceeding with the filing of the within application. As a matter of practicality, Respondent has no way to avoid the draconian daily fine because he does not possess the documents sought. *See, e.g., Probert v. Probert*, 67 A.D.3d 806, 808 (2d Dep't 2009) ("the [lower court] improvidently exercised its discretion in affording the [defendant] the opportunity to purge his contempt by payment of the sum of $50,000, as the record did not establish that the [defendant] had the ability to pay that amount.").

The overly excessive amount of the fine suggested is yet another fundamental deficiency in the OAG's application. The Court of Appeals has held that "in selecting contempt sanctions, a court is obliged to use the "least possible power adequate to the end proposed." *McCain v. Dinkins*, 84 N.Y.2d 216, 229 (1994). It bears repeating that the OAG rebuffed Respondent's repeated attempts to reach out to the OAG to discuss the outstanding issues between the issues. Instead of filing this punitive motion, the OAG could have very well reached out to the Court to schedule a conference to address the OAG's claims. The OAG elected not to choose these alternative remedies and instead chose to immediately move for contempt.

CONCLUSION

For the foregoing reasons, the OAG's contempt motion fails on all levels. It is utterly bereft of merit, not statutorily authorized, and procedurally improper. Respondent complied in full and in good faith with the OAG's subpoena and the OAG has not been prejudiced in any way. Therefore, the instant motion must be denied in its entirety.

Dated: April 19, 2022
New York, New York

Alina Habba, Esq.
HABBA MADAIO & ASSOCIATES, LLP