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

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| THE PEOPLE OF THE STATE OF NEW YORK<br><br>-against-<br><br>DONALD J. TRUMP,<br><br>Defendant. | PEOPLE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION REGARDING DISCOVERY<br><br>Ind. No. 71543-23 |

## INTRODUCTION

On March 8, 2024 defendant filed a motion alleging a grab-bag of meritless discovery arguments in the latest of a long series of attempts to evade responsibility for the conduct charged in the indictment. Since then, he has publicly filed several additional documents appending letters complaining of other purported discovery violations. The Court granted the People's motion to extend their deadline to respond to this motion until Monday, March 18, 2024. A separate memorandum of law contains the People's response to defendant's claims regarding recent productions from the U.S. Attorney's Office for the Southern District of New York. This memorandum responds to the rest of defendant's discovery arguments.

Defendant's motion and subsequent filings are a transparent attempt to shift the focus away from his own criminal conduct by pursuing remedies to which he is not entitled, including dismissal, a lengthy adjournment, and preclusion of evidence. His overall strategy has consisted of two primary components: (1) misstating or wholly inventing facts concerning the history of discovery productions, and (2) spinning a false narrative that the People have engaged in a coordinated campaign to *obstruct* his access to discovery. Yet his ability to do the latter rests entirely on his willingness to do the former. That is, only by grossly mischaracterizing the record

is he able to level spurious and reckless allegations of prosecutorial misconduct. *See* Defendant's Motion to Dismiss and For an Adjournment Based on Discovery Violations ("DB"): 5.

Nearly all of the complaints in his motion are based on claimed discovery violations from eight or nine months ago—constituting the very gamesmanship that the Legislature specifically sought to prohibit when it enacted CPL § 245.50(4). And even if defendant's arguments were not procedurally barred—which they are—they should be rejected as meritless.

Defendant has taken every possible step to evade accountability in this case for more than a year. He sought to deter the grand jury from considering the charges by promising "death and destruction" if indicted. He sought to intimidate the District Attorney and this Office by posting a photo of himself wielding a baseball bat at the back of the District Attorney's head.

Defense counsel has likewise stretched the boundaries of zealous advocacy in this case. Counsel told this Court on February 15 that the Florida trial date "is firm," having told a federal court one day earlier that "the Court's scheduling order does not suggest that the current trial date is firm." Counsel sought to recuse the Court by misrepresenting the Court's role in Allen Weisselberg's decision to plead guilty to fifteen felony offenses in 2022. Counsel sought to coerce this Office into abandoning admissible evidence at trial by threatening "serious legal and ethical consequences" for "individual prosecutors" on this case, and then widely publicizing those threats for the express purpose of end-running the restrictions this Court has put in place to protect the integrity of these proceedings. Blanche Letter 2, 11 (Mar. 4, 2024) (stating that because of "the extensive redactions you have convinced Judge Merchan to authorize in otherwise-public filings, we will be making this letter public").[1] And the argument that formed the basis of that threat of

[1] Defendant posted the March 4 Blanche letter that same night on his TruthSocial social media account.

"serious consequences" was so meritless that the Court just today rejected it as unsupported by "any treatise, statute, or holding from the courts in this jurisdiction, or others." Order on Def.'s Mots. *in Limine* at 1.

Enough is enough. These tactics by defendant and defense counsel should be stopped. A Grand Jury of regular New Yorkers indicted Donald Trump on thirty-four felony counts of falsifying business records to conceal criminal efforts to corrupt the 2016 presidential election. This Court held that the evidence supported those charges. The People respectfully urge this Court to reject defendant's motion in its entirety and, after the scheduled hearing on March 25, proceed to trial on the timeline set forth by the Court in its March 15 order.

## ARGUMENT

### I. The People acted appropriately in obtaining and disclosing [redacted]

#### A. The production of the [redacted] was timely.

On March 1, 2024, the People obtained [redacted] a likely witness in the upcoming trial. Efforts to obtain [redacted] earlier were unsuccessful because [redacted]. Hoffinger Aff. ¶ 15. The [redacted] was provided to defendant via password-protected link one business day after we obtained it. *Id.* ¶¶ 17-18.

Defendant makes a series of unsworn and inaccurate factual assertions which he believes entitle him to various "remedies" including dismissal, adjournment, and preclusion of Ms. Daniels' testimony. DB: 1-2, 4-5, 18-19, 22, 38-39, 41-42, 45-47. He uses these unsworn and inaccurate

factual assertions to support his outrageous claims of "prosecutorial misconduct" and his suggestion that our actions were "deeply unethical." DB: 5, 36; *see also* DB: 41.

First, defendant erroneously claims that the People's failure to obtain [redacted] prior to March 1 was "untimely" and demonstrates a lack of due diligence. DB: 1, 4-5. He claims, disingenuously, that the People "apparently refrained from collecting [redacted] from [redacted] until this month." DB: 38-39. This bald assertion is predicated on the mistaken assumption that [redacted] had access to and could have provided this [redacted] upon request. Such was not the case. Hoffinger Aff. ¶¶ 10, 19.

The People met with [redacted] on or about December 19, 2023, and the witness informed the Office that [redacted]. [redacted] *Id.* The People asked counsel for additional information about [redacted] including [redacted] and [redacted] *Id.* ¶¶ 10-11.

Defendant at one point asserts, remarkably, that "[t]he People did not produce any evidence relating to [redacted]' until March 4, 2024." DB: 2. This highly misleading assertion is belied by his subsequent concession in the same motion that notes of the December 19 interview with [redacted] contain reference to [redacted] DB: 19, 42. The People disclosed [redacted] two days later on December 21.[2]

[2] Defendant claims that he was "in no position based on those interview notes to understand the nature, extent, and substance of [redacted] that DANY produced on March 4, 2024, and the People would have quashed any efforts that we took to obtain it as they have in other instances." DB: 42. Putting aside the oft-repeated and wholly inaccurate defense theme that the People have obstructed

On or about January 31, 2024, [redacted] counsel informed us that [redacted]. Hoffinger Aff. ¶ 12. The People renewed our request for [redacted]; received [redacted] on February 13; and contacted outside counsel for the company on February 14. *Id.* ¶¶ 12-13. The People were in further touch with outside counsel and then an attorney at NBCUniversal on February 15 and 16. *Id.* ¶¶ 14-15. On February 16, we told counsel for NBCUniversal that the People would be issuing a trial subpoena for [redacted] counsel [redacted] and advised that [redacted] *Id.* ¶ 15. We immediately subpoenaed [redacted] on February 16, received it on March 1, and produced it to defendant one business day later, on March 4. *Id.* ¶¶ 16-18 & Exhibits 2, 3, & 4 thereto.

Therefore, the claim of "[u]ntimely production" (DB: 1) is incorrect. We diligently and repeatedly sought to contact the production company: subpoenaed [redacted] on February 16; received [redacted] on March 1, [redacted]; and produced it forthwith. Hoffinger Aff. ¶¶ 10-18. That timing exceeds our obligations under CPL § 245.60.

**B. The defendant's accusation that the People conspired to time the release of the Stormy documentary is false.**

Notwithstanding the foregoing discussion, defendant charges the People with attempting to *prevent* the defense from learning of the upcoming release of the documentary. Worse yet, he recklessly accuses the People of nefariously conspiring with Ms. Daniels to time the release to

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defendant's legitimate efforts to obtain relevant materials, the People were not aware of the nature, extent, and substance of [redacted] either until they viewed it at approximately the same time it was provided to the defense. Hoffinger Aff. ¶¶ 10, 17.

prejudice the jury pool.[3] He brazenly asserts that "[Daniels] and the People were working to hide the upcoming release of this 'documentary' to maximize its prejudicial effect on the venire *just a week before the scheduled start of jury selection*." DB: 42 (emphasis in original).[4]

The ostensible evidence offered in support of this offensive suggestion comes from the witness's public statement that she was "asked to kind of behave." *Id.* The defendant's claim is false and nonsensical. First, as we have already explained, the People have conveyed to all potential witnesses—including Ms. Daniels—the request that they not speak publicly about this case, and we believe the witness's comment is a reference to that admonition. People's MIL Opp. 10 n.2 (Feb. 29, 2024); *see also* Hoffinger Aff. ¶ 21. This request was made precisely to limit the very prejudice defendant now accuses us of fomenting. Second, the argument rests entirely on the false claim that Ms. Daniels controlled the release date of the NBCUniversal documentary; she did not. *Id.* ¶¶ 10, 19. Third, as discussed *supra,* the People subpoenaed NBCUniversal for [redacted]

[3] This accusation is disingenuous coming from a defendant who has endeavored to pollute the jury pool at every opportunity. *See* Mar. 4 Blanche Ltr. at 11 (because of "the extensive redactions you have convinced Judge Merchan to authorize in otherwise-public filings, we will be making this letter public"); Def.'s MIL 4-8; DB: 5 (requesting that defendant's instant motion, though replete with reckless smears on the integrity of the prosecutors and despite the fact that its submission had not yet been authorized by this Court, "be filed on the public docket immediately").

[4] Elsewhere, defendant is only slightly less egregious insofar as he accuses the People of knowledge of, but not complicity in, Ms. Daniels' purported endeavor to time the release to maximize prejudice to the jury. *See* DB: 2 ("[the People] made no mention of the fact—which they obviously were aware of—that [Daniels] was working with NBCUniversal to time the release of the 'documentary' for a week prior to the scheduled start of jury selection, on March 18"); DB: 39 (the "People plainly knew that NBCUniversal and [Daniels] planned to release the documentary on March 18, 2024, in a manner that is enormously prejudicial to jury selection on the current schedule [March 25]"); DB: 19 ("[Daniels'] work with NBCUniversal to further monetize her untrue testimony by releasing the video a week before the scheduled trial date reflects an egregious effort to prejudice the venue, which the People were undoubtedly aware of but failed to disclose, and which requires a dismissal and, if not granted, at the very least, an adjournment of the trial date").

[redacted], obtained it on the earliest available day, and produced it to defendant one business day later—before it was public. That's the polar opposite of concealment.

**C. Though they have no duty to do so, the People have endeavored to monitor and disclose public statements of their witnesses relating to the subject matter of the case.**

Defendant claims that the People have failed to meet a broader obligation to collect public witness statements from Ms. Daniels. DB: 4, 19. Notably, in making this claim, defendant did not advise this Court that the People have engaged in an ongoing and diligent effort to monitor and collect public statements from multiple witnesses, including Ms. Daniels, and promptly produced everything we located as it was retrieved.

Ms. Daniels has a public persona and has spoken publicly in the past about her interactions with defendant. For that reason, the People made reasonable efforts to seek out and monitor comments or reported comments by Ms. Daniels that could even arguably be considered discoverable as witness statements under CPL § 245.20(1)(e), impeachment evidence under CPL § 245.20(1)(k), or were otherwise related to the subject matter of this case or discoverable under CPL § 245.20. In the course of our investigation and our ongoing compliance with Article 245, the People located and produced in discovery an estimated 124 public statements by this witness, including approximately eight videotaped statements, two audio recordings, more than three dozen articles containing witness quotes, and approximately 72 social media posts or other statements. We produced those statements as we obtained them and in the course of our ongoing supplemental discovery productions on June 8, July 24, August 3, August 11, September 22, December 21, January 19, February 9, February 26, March 4, and March 15. Whatever the People's obligation to monitor ongoing public statements from a witness with a public persona whose statements are equally available to both the People and the defense, *see* CPL § 245.20(2), that obligation was massively exceeded.

The suggestion that the People were required to advise defendant that witness statements we had not seen would be released at some future date finds no support anywhere in Article 245 or any other authority. *See* CPL § 245.60 (defining continuing duty to disclose); *People v. Ward*, 203 N.Y.S.3d 907, 910 (Sup. Ct. Erie Cnty. 2024) (no duty to disclose name of potential witness who had been mentioned during grand jury presentment until witness provided statement on charged conduct and completed photo array); *People v. Arroyo*, 78 Misc. 3d 1239(A), at *10 (N.Y. Crim. Ct. Kings Cnty. 2023) (continuing duty to disclose triggered by People's "receipt of any such records" obtained after filing of certificate of compliance).

**D. Defendant's remaining claims about discovery violations relating to the Stormy documentary are equally meritless.**

Defendant next asserts that the People committed a discovery violation by belatedly disclosing that [redacted][5] As a preliminary matter, defendant fails to cite any authority for the proposition that the People have a duty to seek out and disclose information concerning a private contract between a potential witness and a publisher. *See People v. Askin*, 68 Misc.3d 372, 383 (Sup. Ct. Nassau Cnty. 2020) (request for paperwork from the "crime victims board" pertaining to victim's endeavor to seek reimbursement for medical expenses not subject to discovery under CPL § 245.20(1)(*l*) because "[t]here is no logical reasoning that seeking reimbursement of medical expenses already paid by a victim equates with a 'promise, reward or inducement' when the agency providing the reimbursement is not under the control of the People nor funded by the People").

Nonetheless, in response to an inquiry by the defense and consistent with the presumption of openness, CPL § 245.20(7), the People endeavored to follow up with counsel for Ms. Daniels

[5] This argument is not contained in the defendant's motion for discovery sanctions, but rather in his March 14, 2024 Letter to the Court, p. 1-2.

concerning [redacted]. Hoffinger Aff. ¶¶ 19-20. The People were informed for the first time that [redacted] *Id.* The People immediately disclosed [redacted] to amplify the notes of the December 19, 2023 interview so as not to leave the erroneous impression that [redacted] *Id.* ¶ 20 & Ex. 5.

Finally, defendant complains that the trailer for the documentary "shows excerpts of an agreement that is subject to the Court's protective order." DB: 18. To the extent that defendant is implying that Ms. Daniels violated the protective order, the argument fails because Ms. Daniels is not subject to the Court's protective order concerning discovery. She is a signatory to the Non-Disclosure Agreement displayed in the trailer and is free to do what she wants with her copy thereof. Any suggestion that the People supplied the document displayed in the trailer is flatly untrue.

**E. The defendant is not entitled to the relief he seeks.**

The People have scrupulously complied with Article 245 in connection with the documentary and have done nothing that approaches a discovery violation. And even if any aspect of this discovery and disclosure did establish a violation—which it does not—no remedy is appropriate. Defendant received [redacted] before its release. He now has at least six to eight weeks to review any witness statements in [redacted] before the witness may testify. He suffers no prejudice and has sufficient time to prepare.

## II. The People's disclosure of two belatedly-discovered [redacted] complied with Article 245 and merit no discovery relief.

Defendant seeks relief based on the February 9, 2024 and March 13, 2024 production of [redacted] DB: 1, 16-17, 41-42; Mar. 14 Blanche Ltr. at 2. The People complied with their obligations under Article 245 in connection with those productions, and no relief is warranted.

### A. The People's diligent, good-faith efforts throughout discovery.

In certifying compliance with Article 245, the People are required to state that "after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery," the prosecution has disclosed and made available all known material and information. CPL § 245.50(1).

In this case, the People made extraordinary efforts to comply with our discovery obligations. We developed an updated, mandatory Article 245 training for case team ADAs and paralegals assigned to this case; and reviewed and produced grand jury minutes, subpoena compliance, bank records, witness statements, witness phones, hard-copy records, and materials obtained from outside agencies. We examined all electronic and networked files for current and former ADAs and other staff on this investigation; examined the records gathered in related investigations; and conducted an exhaustive review of email messages from dozens of custodians. We then made rolling discovery productions on May 23, June 8, June 9, June 15, and July 24, 2023, and certified compliance on July 24 and acknowledged our continuing duty to disclose.

Our productions through July 24, 2023 were consistent with the presumption of openness codified at CPL § 245.20(7) and far exceeded our discovery obligations. For example, we produced to defendant the entire production from the *People v. Trump Corp.* prosecution because of the presence of overlapping witnesses and entities. We also produced publicly available

materials if in our possession, including defendant's own statements on social media and in public speeches; and including court filings to which defendant himself is a party.

Since certifying compliance, the People have also diligently complied with our continuing duty to disclose and have made 21 supplemental discovery productions as we obtained additional discoverable information.[6] These productions again include records we produced in an excess of caution and for the avoidance of any doubt regarding our diligence—including by producing to defendant documents that were provided to us by his own company (from counsel who has also appeared in this case); and by producing defendant's own ongoing public comments about this and other cases back to him. Each production dating back to last May has been clearly identified on a running, updated index of discovery and has been organized into clearly labeled production folders that describe the source and category of records. In all, our discovery productions consisted of approximately two million records consisting of some ten million pages that were correctly and timely produced starting in May 2023.

The People have also diligently complied with other discovery obligations: we served an Automatic Discovery Form on May 23, 2023, and updated it on five subsequent occasions (on June 8, July 24, September 22, and December 21, 2023, and on January 29, 2024) to reflect relevant changes to our disclosures, including as we identified witnesses whose testimony we expected to present at trial. And we have disclosed more than 400 case-in-chief exhibits for trial pursuant to

[6] It is inconceivable that during the course of trial preparation, particularly in a document-heavy case, that the People would not learn of the existence of additional materials that they then must obtain and provide. Indeed, the discovery statute expressly acknowledges this reality by imposing a continuing duty to disclose. CPL § 245.60 ("If either the prosecution or the defendant subsequently learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of this article had it known of it at the time of a previous discovery obligation or discovery order, it shall expeditiously notify the other party and disclose the additional material and information as required for initial discovery under this article"). Defendant's draconian interpretation of Article 245 would render this provision superfluous.

CPL § 245.20(1)(o), dating back to an initial designation in August 2023 that we have supplemented on five subsequent occasions on January 3, January 29, February 13, March 6, and March 15, 2024. If on this record the People have fallen short of their obligations under Article 245, it is difficult to conceive how, in a case involving such a large volume of documents, the People could ever achieve satisfactory compliance.

As pertinent here, our discovery efforts also included an exhaustive review of materials created by former Special ADA Mark Pomerantz. We reviewed all of Mr. 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 this case, and produced all discoverable information identified through that review. Colangelo Aff. ¶ 6. In addition, we also contacted Mr. Pomerantz through counsel in the course of our discovery collection process so the People could collect and review any potentially discoverable information in his possession if not already preserved on a DANY system. *Id.* ¶ 7 & Ex. 7. We asked that [redacted] and requested that [redacted] *Id.* We then followed up with Mr. Pomerantz through counsel in response to an ongoing quality control review of our discovery. *Id.* ¶ 9. We produced all discoverable information that Mr. Pomerantz identified and produced to the Office in response to our requests for discoverable information in his possession. *Id.* ¶¶ 8-9.

On January 29, 2024, defense counsel asked about [redacted] the People had produced in discovery six months earlier that [redacted] *Id.* ¶ 10. Defense counsel advised that [redacted] itself was not in the People's production and asked if the People could locate and produce it and any other related [redacted]. *Id.* After searching the People's records, we determined that we did not possess [redacted]. *Id.* ¶ 11. Because [redacted] we contacted his counsel and asked for assistance in locating it and any other [redacted]. *Id.*

Counsel was able to locate the [redacted] in question and produce them to the People—along with [redacted] whether discoverable or not—late in the day on Thursday, February 8. *Id.* ¶ 12. Less than 24 hours later, and after applying redactions solely to protect [redacted] from disclosure, the People produced those [redacted] to the defense in a supplemental discovery production. *Id.* ¶ 13 & Ex. 8. In producing these [redacted] to the defense, we noted that the production exceeded our discovery obligations because it included [redacted] that were not discoverable; and that the remaining [redacted] referred to information that was previously disclosed, either verbatim or in substance. *Id.*

As noted above, the People had already contacted Mr. Pomerantz through counsel multiple times before filing our COC; had requested all discoverable documents within his possession, including any discoverable communications not otherwise captured on a DANY system; and had received and produced the discoverable records that we collected before filing our initial COC. We then followed up repeatedly in response to a question from defense counsel and the

identification of [redacted] *Id.* ¶¶ 15-17. Mr. Pomerantz attests by sworn affirmation that in reviewing records in his possession for discoverable documents in June and July, Mr. Pomerantz inadvertently overlooked [redacted]; and that in conducting a follow-up search in February 2024 to locate [redacted], he was not able to locate [redacted] *Id.* ¶ 17; *see also* Pomerantz Aff. ¶¶ 3-6. He did previously locate—and the People timely produced—[redacted].[7]

**B. The People complied with Article 245, and no relief is warranted for the February 9 disclosure.**

In light of the above, there is no discovery violation here at all; and no remedy is appropriate or warranted under Article 245.

First, the People's initial and supplemental COCs are valid because they were filed after "exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery," and because the COCs were filed after good faith, reasonable efforts to comply. CPL § 245.50(1). The Court of Appeals recently explained that Article 245 requires diligence and good faith effort, not perfection: "[r]easonableness, then, is the touchstone." *People v. Bay*, 2023 N.Y. Slip Op. 06407, at *5. "There is no rule of 'strict liability'; that is, the statute does not require or anticipate a 'perfect prosecutor.'" *Id.* at *6. The People's efforts described above more than meet this reasonableness test—not just as a whole but in particular to any potentially-discoverable materials in Mr. Pomerantz's possession. The People

[7] Notwithstanding the efforts chronicled above, counsel has suggested that the People had an obligation to perform "a forensic review and collection of discoverable data from Pomerantz's phone." Mar. 14 Blanche Ltr. at 2. The [redacted] in question were [redacted] *See* Pomerantz Aff. ¶ 3. Seizing the personal device of a former employee to conduct a forensic search would be unreasonable and, in any event, the Office has no authority under which to do so in these circumstances.

requested the return of any case- and investigation-related materials from Mr. Pomerantz when he resigned from the Office; specifically directed him to preserve any materials in his possession in March 2022; searched his emails, electronic files, and hard-copy files as part of our review for discoverable material in this case; and requested through counsel that he search his personal devices in June 2023 and again in July 2023 for discovery compliance in this case. Colangelo Aff. ¶¶ 4-9. Of the People's total production, the defense then identified questions in late January 2024 with only 19 records (not even 0.001% of the volume of records produced); and of those 19 records, the review of one single document identified [redacted] that had been previously overlooked and that the People produced in less than one day when discovered. *Id.* ¶¶ 10-13. And when separate counsel for a witness described [redacted] on March 13, 2024, the People immediately reviewed [redacted] determined that it had not previously been in our possession, produced it to defendant within a few hours, and asked Mr. Pomerantz through counsel how his prior search efforts had failed to locate it. *Id.* ¶¶ 15-17; *see also* Pomerantz Aff. ¶ 6. Mr. Pomerantz has now explained in a sworn affirmation how his previous searches failed to locate this [redacted]. Pomerantz Aff. ¶ 6; *see also* Colangelo Aff. ¶ 17. A former employee's failure despite searching to locate [redacted] on two occasions is not a basis for relief on this record, where there can be no question regarding the People's efforts through preservation demands, search requests, and repeated follow up to exercise due diligence and make reasonable inquiries.

Second, the defense is not entitled to any remedy under CPL § 245.80 because defendant suffers absolutely no prejudice from this disclosure. The handful of arguably discoverable [redacted] produced on February 9 contain no new information or evidence, and instead include information already conveyed many times over in the People's exhaustive prior discovery

productions, including in information defendant has possessed since the People's first production on May 23, 2023. The [redacted] include references to requests for consideration already fully and previously disclosed, including requests for [redacted]; related requests regarding [redacted]; requests for [redacted]; and requests [redacted] These requests were all already disclosed—either verbatim or in substance—in dozens of other documents already produced, including meeting notes, emails, written correspondence, and other text messages. No relief is appropriate given these facts. *See People v. Caruso*, 219 A.D.3d 1682, 1684 (4th Dep't 2023) ("County Court did not err in refusing to impose a remedy or sanction because defendant failed to show he was prejudiced by the belated disclosure. In addition, we note that defendant had reasonable time to prepare and respond to the ostensibly new information.").

The same is true of the [redacted] on March 13 and disclosed on that day. The [redacted] again relate to the same request for consideration that the People previously disclosed, and do not change any party's understanding of the underlying facts regarding Cohen's requests for consideration and the People's response. *See* Hoffinger Aff. ¶¶ 3-9.

Third, no adjournment is warranted or appropriate under CPL § 245.80 or otherwise. CPL § 245.80 separately provides that "[r]egardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material." An adjournment is not warranted because none of the information conveyed in [redacted] is new—as noted above, all of these categories of 245.20(1)(*l*) information were previously disclosed in discovery, including in the People's very first production more than eight months ago on May

23, 2023. Because there is no "new material" as required by 245.80(1)(a), there is no need for any additional time to prepare or respond. Even if new—which it is not—the People disclosed these [redacted] less than one day after obtaining them and more than six weeks before the current trial date. Six weeks is ample time for defense counsel to respond to and address the information in these handful of arguably discoverable [redacted]

Any further adjournment would be particularly inappropriate here because the document that defense counsel cited to inquire about these [redacted] was contained in a production the People nearly eight months ago, on July 24, 2023. CPL § 245.50(4)(b) required defendant to alert the People of any claimed deficiencies "as soon as practicable" to avoid the precise risk of strategic delay that is occurring here. And the entire point of that statute is to give the People an opportunity to promptly identify and correct any discovery issues, which is exactly what we did here.

Finally, and as noted above, defendant was fully apprised of the circumstances behind the February 9 disclosure of [redacted] more than a month ago. But he never responded to the People's February 9 correspondence producing [redacted]; and did not raise concerns about the disclosure at the February 15 hearing—despite the Court's express invitation to identify issues for the Court's resolution. Defendant instead concealed his claimed discovery objection and raised it two weeks before the scheduled start of trial as part of a collection of other meritless claims. For this reason alone, the Court should deny all relief on this complaint.

**C. Redactions to the February 9, 2024 production are solely to shield [redacted] from disclosure.**

Defendant also seeks relief (DB: 17, 41) regarding redactions in [redacted] that was produced on February 9. Defendant never raised this objection to the People before filing this motion, and the Court should again summarily deny it for failure to comply with CPL § 245.50(4).

On the merits, although defendant fails to advise the Court of this fact, the People explained in our transmittal correspondence to defendant on February 9 that we "redacted only references to [redacted] from [redacted]." Colangelo Aff. ¶ 13. That information is not discoverable. No criminal defendant—and especially one who, as this Court has repeatedly found, has such a long and active history of harassing and trying to intimidate his perceived adversaries—is entitled to [redacted] relating to a former ADA or the attorney to a witness. In any event, these [redacted] are among the items being provided for this Court's *in camera* review. *See* Part III below.

**III. Work-product redactions to the People's internal emails are appropriate.**

Defendant continues his baseless attacks on the integrity of the prosecution team in a section of his motion entitled "The People's Efforts to Withhold Communications Relating to Cohen." DB: 8. The record, however, demonstrates the precise opposite. As detailed in the previous section, the People shared a font of information making plain the fact that [redacted] The People also disclosed numerous communications demonstrating that [redacted] The defense team has ample ammunition with which to question Mr. Cohen about the extent to which his desire to receive a benefit—even a benefit that was never provided—impacts his veracity.[8] Notwithstanding these disclosures, defendant asks the Court (DB: 1, 8-14, 39-41) to order relief based on work-product

[8] That defendant is keenly aware of and prepared for this potential cross-examination is evident not only from the instant motion, but also from his March 13, 2024 letter to ADA Mangold in which he states "these [redacted] *See* Mar. 14, 2024 Blanche Ltr., Ex. 3 (emphasis added).

redactions applied to a subset of DANY emails that the People produced in discovery on July 24, 2023. For both procedural and substantive reasons, this request is meritless.

The People's discovery productions included approximately 523 emails that we produced to defendant on July 24, 2023 after a comprehensive review of our records for potentially discoverable email communications. Colangelo Aff. ¶ 18. The People applied redactions to a subset of those emails for work product as permitted by CPL § 245.65, and where necessary to avoid disclosing the names DANY staff members whose identity is protected from disclosure by the Court's May 8, 2023 Protective Order. *Id.* Six months later, on Saturday morning, January 27, 2024, defense counsel first contacted the People with a general question about those redactions. *Id.* ¶ 19 & Ex. 8, p. 8. The People responded in less than an hour, still on Saturday morning, and asked defense counsel to identify the Bates numbers of the records the defense wanted us to review. *Id.* Defense counsel responded by initially declining to identify any specific documents and instead pointed only to a production folder containing more than 500 records. *Id.* ¶ 19 & Ex. 8, p. 6-7.

The next day—on Sunday, January 28—the People reiterated our offer to review any records the defense would identify, and explained that in general our redactions in the entire discovery production were made only for work product or where authorized by the Court's protective order. *Id.* ¶ 20 & Ex. 8, p. 5-6. We also noted that we had disclosed on several dozen occasions since May 2023 that we were redacting or withholding certain content on attorney work product grounds. *Id.* (listing the People's approximately 28 prior disclosures of the basis for redactions in our discovery productions). In response, on Monday, January 29, the defense agreed to identify the documents that they believed raised specific concerns, and then raised a series of questions about 19 documents and asked for a response by Friday, February 2. *Id.* ¶ 21 & Ex. 8, p.

3-4. As noted, all of those questions related to documents the People had produced to the defense six months earlier, on July 24, 2023. *Id.* ¶ 21.

The People diligently began reviewing defense counsel's questions about those 19 documents while also managing the demands of other pretrial motions and trial preparation steps both for the February 15 hearing and the scheduled trial date of March 25. *Id.* ¶ 22. We re-reviewed each of the 19 documents and, in an email on February 2 (defendant's requested deadline), not only confirmed that "all of the redactions fell into the two categories that we previously described (*i.e.*, redactions of attorney work product or redactions consistent with the Court's protective order)," but provided four paragraphs of additional information about the redactions to disclose as much additional context as possible without revealing the substance of the underlying work product. *Id.* ¶ 23 & Ex. 8, p. 2.[9]

Defendant did not respond to that email. *Id.* ¶ 24. A few days later, on February 8, the Court emailed counsel an agenda for the February 15 hearing and expressly invited the parties to "please let me know by Tuesday the 13th whether there are any other issues you would like us to address on Thursday." *Id.* ¶ 25. Defendant did not respond to the Court's email either. *Id.* ¶ 26. And although defendant's redaction questions were at that point fully aired, defendant neither asked the Court to add this issue to the agenda for the February 15 hearing nor raised it at that hearing, even though the People raised other discovery topics for the Court's resolution.

Instead, defendant waited weeks longer to send a "notice of discovery violations" to the People on March 6, which asserted (among other things): "you have yet to adequately address the unauthorized redactions" to the DANY email production; and which demanded: "[w]e require a

[9] As described below, the People will provide unredacted copies of these documents to the Court for *in camera* review.

response by the end of the day on March 7, after which we will pursue judicial intervention and appropriate sanctions." *Id.* ¶ 28. This motion followed on March 8.

The Court should deny defendant's motion on procedural grounds alone because of defendant's intentional and strategic delay. Defendant first raised questions about the People's July 2023 email production six months later in January 2024—which alone disentitles him to any relief for his failure to "notify or alert the opposing party as soon as practicable." CPL § 245.50(4)(b). Any such challenge was due with defendant's omnibus motions, and he has not shown good cause for delay. CPL § 255.20(1); *see Chavers*, 80 Misc. 3d 1218(A), at *1-2 (defendant's delay of thirty-seven days after the certificate of compliance to identify purportedly missing discovery "flouted not only the forty-five-day rule of Article 255 but also the 'as soon as practicable' rule of Article 245"); *People v. Valentin*, 81 Misc. 3d 1218(A), at *6-7 (N.Y. Crim. Ct., Bronx Cnty. 2023).

Even setting aside that initial six-month delay, defense counsel's subsequent decision to lie in wait until two weeks before the scheduled trial—after the People fully answered his questions on February 2, and even in the face of an *express judicial invitation* to raise "any other issues" at the February 15 pretrial hearing—is a further flagrant violation of the CPL that the Court should not indulge. *See People v. Henriquez*, 80 Misc. 3d 1220[A], at *3 (Crim. Ct. Bronx Cnty. 2023) (for defense counsel to "strategically delay their CoC challenge . . . would undoubtedly contravene the Legislative intent which animates CPL § 245.50(4)(b)"); *People v. Smith*, 79 Misc. 3d 649, 654 (Sup. Ct. Queens Cnty. 2023) ("[T]o diminish any opportunity for manipulation and to provide some guidance on a party's duty to challenge a COC within a reasonable period of time, the Legislature amended the statute to require that the actions necessary to challenge a COC be made 'as soon as practicable'").

On the merits, defendant's argument also fails. It is black letter law that work product is not discoverable. CPL § 245.65. The People carefully reviewed thousands of our internal emails; produced discoverable facts in those emails where Article 245 applied—including witness statements and requests for rewards or inducements, *see* CPL § 245.20(1)(e), (1)(*l*)—and appropriately withheld only work product following a careful analysis that the redacted material consisted of the "legal research, opinions, theories of conclusions" of an "attorney or the attorney's agents." CPL § 245.65. Nothing in the six pages of screenshots from the People's production that defendant reprints in his motion (DB: 8-13) supports an argument that the People withheld discoverable material. Instead, it supports exactly what is described above: we conducted a careful, line-by-line review; disclosed discoverable information even when that information was contained within emails that otherwise consisted of attorney mental impressions; and withheld legitimate work product, which is not discoverable. Our approach throughout was consistently to err on the side of disclosure. CPL § 245.20(7). There is no basis to direct the removal (DB: 41) of all redactions.

Nor does the disclosure on March 13, 2024 of [redacted] that the People obtained that day change any aspect of this analysis. As noted in Part II.B above, the People recently learned of [redacted] We promptly obtained and disclosed [redacted] within hours of learning of their existence. As described above, [redacted], at most, demonstrate that [redacted] Hoffinger Aff. ¶¶ 6-7. Defendant contends, without authority, that work product privilege is somehow waived because [redacted]

[redacted]" Mar. 13, 2024 Blanche Ltr. at 1. But "[t]he work product privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality." *Bluebird Partners v. First Fid. Bank*, 248 A.D.2d 219, 225 (1st Dep't 1998). Defendant goes on to suggest that "communications within DANY regarding whether and to what extent to provide the benefit that Cohen was seeking" are also discoverable, and he demands the production of "internal communications." *Id.* Counsel's unsworn speculation about potential government misconduct (DB: 40) has no support in the record. Any such communications are textbook work product and are plainly not discoverable without regard to whether a hypothetical draft letter was discussed with counsel. CPL § 245.65.

The People do not oppose submitting the challenged documents to the Court for *in camera* review so the Court can assess the withholdings, DB: 41, and are prepared to submit three categories of records for the Court's review. First, we will submit [redacted] (with redactions marked but not applied so the Court can identify the redactions that the People applied in their discovery productions). Second, and for context, the People will submit [redacted]—all of which were produced in full to defendant, with redactions only to protect personal and unrelated [redacted] from disclosure.[10] These [redacted] may aid the Court in determining whether information contained in the remainder of the *in camera* submission has been adequately disclosed such that invasion of the People's work

[10] Defendant has also complained about redactions to [redacted]. *See* Part II.C above. As noted, we have previously informed him that redactions to [redacted] involve [redacted] and are unrelated to the subject matter of the case. To alleviate any concerns, these [redacted] are being provided to the Court *in camera* in unredacted format, again, with highlights to demonstrate material that was redacted in discovery productions.

product is not warranted. Third, the People will submit [redacted] [11] The People believe the [redacted] *see* Hoffinger Aff. ¶ 5, confirm the deliberative and work-product nature of the draft.

**IV. Defendant's complaints about redactions to [redacted] are meritless and should be summarily denied because of defendant's strategic delay.**

Defendant seeks relief based on "heavily redacted [redacted]" that were produced on June 8, 2023. DB: 6, 39-40. Defendant's March 8 motion is the first time, ever, that defendant has raised any concern about those redactions, *see* Colangelo Aff. ¶ 29, and the request for relief should be summarily denied because of that inexplicable delay alone. CPL § 245.50(4)(b), (c); *see People v. Chavers*, 80 Misc. 3d 1218(A), at *1-2 (Sup. Ct. Kings Cnty. 2023).

Defendant's motion should be rejected on the merits as well. With one exception, the People produced versions of the exact same [redacted] with no redactions in the same folder of the same production on the same date.[12] *See* Colangelo Aff. ¶ 30. In other words, defendant already has—and has possessed for nine months—the unredacted [redacted] he complains about.

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[11] Notwithstanding defendant's overbroad request, there is no theory under which previous versions of [redacted]—are discoverable. They are the very essence of work product.

[12] They were even produced in a production folder with adjacent file names that clearly identify the redacted and unredacted versions of [redacted]. For example, a file named [redacted] was produced in a clearly labeled production folder and literally next to a

The one [redacted] with minor redactions—[redacted]—contains only the original redactions applied by the federal government. *Id.* ¶ 31. The People have no ability to unredact those portions of the document. And from context it appears that the document was redacted only to shield [redacted]. *See id.* Ex. 9. As the Court's review will confirm, this document is not "heavily redacted" (DB: 6); and no discovery relief is appropriate as to a document that defendant received last summer, that he never complained about before, and that the People have no ability to unredact.

**V. The People obtained and produced [redacted] one day after we obtained it from the witness.**

On February 20, 2024, the People learned for the first time, from counsel to a witness, that [redacted] Conroy Aff. ¶ 3. We then obtained [redacted] from counsel on February 21 and produced it three business days later, on February 26. *Id.* ¶¶ 4-5. The production of this document in supplemental discovery, three days after the People obtained it, is timely under CPL § 245.60.

Defendant's claim that the People did not explain the timing of this production (DB: 17) is incorrect; we explained in correspondence on both February 26 and March 7 that we first received [redacted] on February 21, three business days before we produced it. And the claim that we should have obtained it earlier is unavailing. Even assuming the CPL § 245.20(2)

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file name[redacted]." Defendant's inclusion of this argument in his motion suggests he is more interested in manufacturing and publicizing perceived discovery violations then in using the materials provided to prepare for trial in this matter.

obligation to ascertain discoverable information applies to this document,[13] the People's efforts described here meet the obligation of diligence and good faith investigation. And defendant received the document a month before scheduled jury selection and with ample time to review it.

## VI. The People's rebuttal expert disclosure was timely and proper.

Defendant contends that the People's March 1 rebuttal expert notice was either "untimely" (DB: 39) or "strategically timed" to fall after defendant's opposition deadline for motions *in limine* (DB: 2). But on February 23, defendant advised the Court that he consented to a March 1 disclosure deadline in response to the People's application for that relief. Colangelo Aff. ¶¶ 32-33 & Ex. 10. And the People acted diligently and in good faith to identify and retain a testifying expert as promptly as possible following defendant's disclosure: Mr. Noti was not retained as a testifying expert until March 1, the same day the People disclosed the topics of his testimony. *Id.* ¶¶ 34-36.[14]

The Court's ruling today likely moots defendant's objection to the scope of the proposed rebuttal testimony. Defendant argues (DB: 17, 39) that expert testimony regarding Cohen's guilty plea to FECA violations, AMI's admissions of fact in connection with a federal non-prosecution agreement, and the FEC's findings of knowing and willful FECA violations are not responsive to Mr. Smith's proposed testimony. That proposed testimony was responsive to Mr. Smith's expected

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[13] The duty to ascertain in CPL § 245.20(2) provides, in part, that the People "shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under" CPL § 245.20(1). Information relevant to "promises, rewards and inducements" made to a witness is of course discoverable under CPL § 245.20(1)(*l*), but it is unlikely that inducements by a federal law enforcement agency outside the People's control and in the course of a separate federal investigation fall within that provision.

[14] Mr. Noti was initially retained by the People as a nontestifying, consulting expert on January 11, 2024. He was expressly not retained as a testifying expert and the People did not intend to designate him as a testifying expert until on or about February 29, 2024. The People first asked Mr. Noti to consider serving as a testifying response expert on February 29, 2024. We reached agreement that he would do so on March 1, 2024; disclosed his potential testimony pursuant to CPL 245.20(1)(f) that day; and executed an Agreement memorializing that retention a few days later, on March 8. *See* Colangelo Aff. ¶¶ 35-36.

testimony about the "enforcement environment" in 2016 as it bears on the "intent of relevant parties," including defendant, AMI witnesses, and Cohen. Def.'s MIL Opp. 7. The People understand the Court's March 18, 2024 Order on the People's Motions in Limine to preclude that testimony, so responsive testimony is likely unnecessary. However, if defendant opens the door by improperly eliciting expert testimony on the "enforcement environment" in 2016, it is surely responsive for the People's expert to address that topic, including by explaining—for example—that AMI admitted as fact that "[a]t all relevant times" in connection with the McDougal payoff, "AMI knew that corporations such as AMI are subject to federal campaign finance laws, and that expenditures by corporations, made for purposes of influencing an election and in coordination with or at the request of a candidate or campaign, are unlawful," and that "[a]t no time did AMI report to the Federal Election Commission that it had made the $150,000 payment to the model." AMI Statement of Admitted Facts (Sept. 20, 2018), at https://www.justice.gov/usao-sdny/press-release/file/1119501/download.

In sum, the People have fully complied with, and often exceeded, the mandates of Article 245. We respectfully ask this Court to deny defendant's motion in all respects.

DATED: March 18, 2024

Respectfully submitted,

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