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

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Petitioner,

-against-

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

Respondents.

Index No. 451685/2020

REPLY MEMORANDUM OF LAW

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

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

Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATE STATUTES

OTHER AUTHORITIES

RULES

PRELIMINARY STATEMENT

OAG's previous submissions detail the good-faith basis for its investigation of misstatements in documents submitted to counterparties and the Internal Revenue Service.[1] Respondents' failure to address—much less rebut—the facts alleged in those submissions is a concession as to the gravity and extent of their conduct and confirms the merits of this investigation. Intervening developments further support the need for and legitimacy of OAG's investigation: Last week, after review of OAG's filings, Donald J. Trump's and the Trump Organization's former accounting firm informed the Trump Organization that the Statements of Financial Condition from 2011 through 2020 should no longer be relied upon, withdrew from representing the Trump Organization, and instructed the Trump Organization's General Counsel to inform recipients that the statements could no longer be relied upon.[2] This development further reinforces what OAG's previous submissions already showed: The Court should order Respondents' compliance with OAG's document and testimonial subpoenas.

It is no surprise that Respondents continue to ask the Court to halt OAG's Investigation. But their submissions—which ignore the record in this proceeding—fail to cast any doubt on the need for or propriety of OAG's Investigation. The suggestion that the subpoenas for Respondents' testimony implicate statutory and constitutional rights involving grand-jury testimony elides the fact that Executive Law §63(12) subpoenas do not call these witnesses before a grand jury and that, when testifying under such a subpoena, witnesses retain their Fifth Amendment rights. The argument that enforcement of the subpoenas should be stayed elides the fact that Respondents have abandoned any claim that they would be prejudiced by invocation of

[1] Unless otherwise noted, all abbreviations are from Petitioner's Memorandum of Law (Dkt. 359 "Pet. Mem."). Respondents' Opposition and Reply (Dkt. 642) is referred to as "Resp. Opp."

[2] Wallace Affirmation, dated February 14, 2022 ("Wallace Aff."), ¶4, Ex. 1.

those Fifth Amendment rights. Finally, the belated claim that this *investigation* constitutes selective *prosecution* elides the facts that Respondents have not identified any similarly situated entity who has been treated more favorably by OAG—and that, for almost three years, the Trump Organization, Donald J. Trump, and Donald Trump, Jr. have consented to, professed cooperation with, and at times actually cooperated with the investigation. Finally, this request to halt the investigation also overlooks this Court's prior findings that OAG is entitled to conduct its investigation and the Court's ongoing supervision of compliance with OAG's subpoenas.[3]

Respondents are surely aware of their burden to submit affidavits by persons with personal knowledge to contest OAG's factual assertions. *See* Order, Dkt. 255 (citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980)). Thus, Respondents' position could only be sustained if, like Respondents, the Court ignored the investigation's substance as described in the Supplemental Verified Petition and the absence of a sworn statement by any Respondent. Respondents' failure to offer any substantive response again concedes what this Court has repeatedly determined: OAG's investigation is in good faith and the witnesses involved in the transactions under investigation must be compelled to provide relevant documents and testimony.

ARGUMENT

1. Mr. Trump has failed to contest OAG's documentary subpoena.

Respondents offer no response to the showing that OAG is entitled to an order directing Mr. Trump and the Trump Organization to produce all responsive documents and certify the completeness of that production. Respondents claim that "OAG agreed to stay the subpoena [duces tecum] pending the filing of the motion to quash and its resolution by this Court." Resp.

[3] Dkt. 255, 280, 283, 302, 307, 313, 314.

Opp. 18 n.11. This is not accurate. The Court thus should direct the production of outstanding documents, including those in Mr. Trump's possession, custody, and control.

Mr. Trump and the Trump Organization should be ordered to affirm that their response is complete: The Trump Organization has produced seven files it identified as "additional 'chron' file correspondence of Donald J. Trump," but has not confirmed those records were a complete production. Given reports concerning Mr. Trump's destruction of documents covered by the Presidential Records Act,[4] he should be ordered to comply with Instruction 3 in the subpoena entitled "Documents No Longer in Your Possession" requiring a sworn statement regarding how documents were destroyed and by whom.[5]

2. OAG's civil subpoenas do not implicate CPL §190.40 or the New York Constitution.

Respondents reiterate their contention that they are entitled to the protections granted to witnesses who appear before a New York State grand jury. Resp. Opp. 5-20, 21-22. The first problem with this contention is self-evident: Respondents are not being called before a grand jury, and thus remain free to invoke their Fifth Amendment rights and refuse to testify on self-incrimination grounds. *See infra* at 4-5.

The second problem is that OAG is not conducting a grand jury investigation of Respondents. In their opposition, Respondents go beyond their original allegation that OAG was "working together" with DANY and part of a "joint criminal investigative effort," and contend

[4] *See, e.g.,* Jacqueline Alemany, "National Archives had to retrieve Trump White House records from Mar-a-Lago," *Washington Post*, Feb. 7, 2022

[5] Dkt. 363.

that OAG has "ownership of the criminal investigation," actually "conducting a criminal investigation via a grand jury."[6] But nothing in the record supports Respondents' contention.

Respondents mistakenly rely upon articles, press releases, and television appearances concerning the indictment of Allen Weisselberg and the Trump Organization. Respondents are not parties to that proceeding and the indictment in that action was obtained solely by DANY,[7] not OAG. Respondents' only factual description of the interaction between OAG and DANY concerning that indictment and any ongoing investigation demonstrates only that OAG simply cross-designated attorneys to DANY. Respondents acknowledge that this is "presumably accurate, but hardly limiting" and contend that OAG was obligated to explain in detail any work with DANY. Resp. Opp. 12, n.6. But Respondents—despite their interactions with DANY since August 2019)[8]—have failed to make any showing that OAG has any control of the criminal investigation. Recognizing this lack of evidence, Respondents now ask this Court to authorize a fishing expedition in the form of an evidentiary hearing to explore OAG's work with DANY. *Id.*

As explained in greater detail below, Respondents have no basis to seek an evidentiary hearing. But to be clear: OAG has not convened a grand jury to investigate Respondents or the Trump Organization and it does not have a referral under Executive Law §63(2-3) that would grant it jurisdiction to prosecute offenses arising from the preparation or submission of the Statements of Financial Condition or the conservation-easement appraisals. Wallace Aff. ¶5. DANY has not transferred to OAG or the Attorney General the responsibility for any grand jury

[6] *Compare* Resp. Br. 2 ("jointly conducting") and 8 ("working together") *with* Resp. Opp. 19 ("ownership of the criminal investigation") and 20 ("The OAG is conducting a criminal investigation via a grand jury – so says the Attorney General.").
[7] https://www.nytimes.com/interactive/2021/07/01/nyregion/trump-organization-indictment.html
[8] In contesting disclosure of his tax returns, Mr. Trump stated that counsel "opened a dialogue with the District Attorney's Office" in August 2019. *See Trump v. Vance*, No. 19-cv-8694, Complaint (ECF 1) ¶45 (S.D.N.Y. Sept. 19, 2019).

proceeding involving Respondents, the Trump Organization, or any of its employees. *Id*. ¶6. While OAG cross-designated two attorneys to DANY in conjunction with Grand Jury Investigation No. 2018-00403803, those cross-designated attorneys report to, and operate at, the direction of DANY for the purposes of their work in conjunction with Grand Jury Investigation No. 2018-00403803. *Id*. ¶7. Those cross-designated attorneys continue to work on other grand jury investigations and operate at the direction of DANY on those investigations. *Id*. ¶8.

These facts are consistent with the public record, the statements of the Attorney General, and the holding of the Court of Appeals in *Matter of Haggerty v. Himelein*, 89 N.Y.2d 431 (1997). In *Haggerty*, the court held that where, as here, the District Attorney retains ultimate prosecutorial authority and the Attorney General "simply agree[s] to assist the district attorney by furnishing Assistant Attorneys–General to work with him and under his direction," no executive order granting superseding authority is required. 89 N.Y.2d at 436-37. There is "no provision of law . . . prohibiting the Attorney–General from providing the services of Assistant Attorneys–General to aid a county District Attorney in the prosecution of a criminal matter," nor is there "any jurisdictional bar to the appointment of a member of the Attorney–General's staff as an Assistant District Attorney to perform prosecutorial duties under the direction of the District Attorney." *Id*.

OAG has no grand jury investigation of Respondents, cross-designation of attorneys from OAG to a district attorney's office is not a grand jury investigation, and testimony under an Executive Law §63(12) subpoena does not implicate the immunity provisions of CPL §190.40.

3. Respondents are not entitled to immunity for testimony provided outside the grand jury.

Although not mentioned by Respondents, there is a separate provision within the CPL that makes clear that any immunity in a non-grand jury setting is at the discretion of the

presiding official and can occur only after the witness appears and asserts a self-incrimination objection.

CPL §50.20 governs self-incrimination objections and grants of immunity in any "legal proceeding other than a grand jury proceeding." *See* CPL §50.20(1), (4). The statute applies three basic rules. *First*, "[a] witness who, without asserting his privilege against incrimination, gives evidence in a legal proceeding other than a grand jury proceeding *does not receive immunity*."[9] CPL §50.20(4) (emphasis added). Thus, there is no immunity for a witness in a non-grand jury proceeding who does not invoke her protection against self-incrimination. *Second*, a witness "may refuse to give evidence requested of him" on self-incrimination grounds and may not "except as provided in subdivision two, be compelled to give such evidence." CPL §50.20(1). Thus, once a witness invokes her protection against self-incrimination, the power to compel her to answer and confer immunity is limited to instances identified in CPL §50.20(2). And *third*, CPL §50.20(2) identifies how immunity is conferred. Only a "competent authority" identified in an "express provision of statute" may compel a witness to answer (and confer immunity) notwithstanding the witness's self-incrimination objection in response to a particular question. CPL §50.20(2)(a). *Brockway v. Monroe*, 59 N.Y.2d 179, 187 (1983) (the statute "contemplates…immunity on a question-by-question basis.").

This carefully crafted framework refutes Respondents' apparent contention that there exists any "right" to transactional immunity under CPL §190.40 that a witness may generalize to testimonial contexts other than the grand jury. To the contrary, the statutes detail a precise rule for non-grand jury testimony—requiring a witness to appear and invoke the privilege against self-incrimination to have even the possibility of immunity being conferred. CPL §50.20(1), (2),

[9] "Immunity" under CPL §§190.40 and 50.20 is transactional immunity. CPL §§190.35; 50.10.

(4). The statute is "clear and unambiguous" on that point and thus "should be construed so as to give effect to the words used." *People v. Brown*, 25 N.Y.3d 247, 250 (2015). Moreover, the Legislature's enactment of a particular rule for grand jury testimony, and another particular rule for non-grand jury testimony specifying the precise circumstances and by whom immunity could be granted, creates an "irrefutable inference" that the Legislature created no additional opportunities for a witness to obtain immunity.[10] *See, e.g.*, *People v. Page*, 35 N.Y.3d 199, 206-07 (2020). Legislative history confirms the point: CPL §50.20's "orderly, multistep process was designed by the Legislature to avoid conferring overly broad and unnecessary grants of immunity." *Brockway*, 59 N.Y.2d at 187-88.[11]

Under CPL §50.20's requirement that an "express provision of statute" confer the power to grant immunity, a host of statutes expressly allow courts and agencies to grant such immunity. *See, e.g.,* CPL §50.30 (court in criminal proceedings outside of grand-jury context); Banking Law §38(2); Insurance Law §306. Moreover, the Attorney General is expressly granted such power in the Martin Act and the Donnelly Act, as well as other statutes.[12] *See, e.g.*, GBL §§345, 359; BCL §1607. But, importantly, Executive Law §63(12) lacks such an express grant of power. Thus, OAG *lacks* the power to compel a witness in an Executive Law §63(12) examination to

[10] When the Legislature enacted the CPL in 1970, it chose to adopt an automatic approach to immunity in the grand jury (§190.40) but retained the requirement outside the grand jury (codified at §50.20) that a witness invoke her self-incrimination privilege. *See* Bill Jacket, Laws of 1970, Ch. 996, at 15; *see also* Laws of 1970, Ch. 996, at 3187, 3136.

[11] *See also* New York State Crime Commission, Third Report to the Governor, Attorney General, and Legislature of the State of New York, *reprinted in* Public Papers of Governor Thomas E. Dewey 573-74 (1953), https://nysl.ptfs.com/data/Library1/Library1/pdf/3227940_1953-VP1.pdf

[12] Notably a witness also must appear and invoke her self-incrimination protection when testifying under nonjudicial subpoena issued by the Organized Crime Task Force, a body within OAG that investigates and prosecutes cross-county organized crime activities and is empowered to appear in the grand jury. *See* Executive Law §70-a(1), (2), (6), (7).

testify over a self-incrimination objection under CPL §50.20. If Respondents appear and decline to answer on self-incrimination grounds, their testimony cannot be compelled.

3. New York law explicitly contemplates parallel criminal and civil proceedings.

Even if OAG were itself conducting a criminal investigation, that would not bar the use of civil process or office subpoenas, *see* Pet. Mem. Point III. Respondents nevertheless argue that under New York law, "an agency conducting a criminal investigation through an active grand jury is required, if the witness is subpoenaed, to examine the subject or target of the investigation before the grand jury." Resp. Opp. 5. First, that argument ignores the fact that federal practice is indeed instructive, and, relied upon by Respondents in multiple instances. *See, e.g.,* Resp. Opp. 15-16, 17-19. But more importantly, the argument ignores that—as established in OAG's opening brief—the Legislature expressly granted OAG dual, overlapping civil and criminal authority in a host of areas, like the Martin Act and the Donnelly Act. *See* Pet. Mem. 25-26. The First Department has upheld the issuance of civil process under the Donnelly Act to officers even after their company was indicted. *See Dellwood Foods, Inc. v. Abrams*, 84 A.D.2d 692 (1st Dep't 1981), *affirming* 109 Misc.2d 263 (Sup. Ct. Bronx Cty. 1981). Moreover, OAG has the express power, through the Organized Crime Task Force, to conduct criminal investigations involving administrative subpoenas for testimony and to appear before the grand jury. *See, supra,* n.10. Immunity depends not upon the nature of the investigation or what might be happening in other courts or offices, but on what means the government uses to procure the testimony and what rules the Legislature has imposed on those means (*see* CPL §50.20). Here, the use of a civil subpoena under Executive Law §63(12) as part of a civil investigation means OAG cannot immunize Respondents and cannot compel their testimony over a Fifth Amendment objection.

4. Selective enforcement does not apply to discretionary subpoenas.

Respondents argue for the first time in on reply that OAG's subpoenas should be quashed because the Attorney General is selectively investigating them under Executive Law §63(12) in violation of their right to equal protection. Respondents insist that they are entitled to discovery and an evidentiary hearing on this belated claim. Resp. Opp. 23. Respondents' selective enforcement claim has no merit.

Equal protection "forbids a public authority from applying or enforcing an admittedly valid law 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances.'" *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686,693 (1979) (quoting *Yick Wo v. Hopkins,* 118 U.S. 356, 373–374 (1886)).[13] That is, "that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification." *303 W. 42nd St.*, 46 N.Y.2d at 693. However, while the Court of Appeals has recognized this type of equal protection claim "in cases involving the *enforcement* of the criminal laws and the administrative regulation of public health, safety and morals," *id.*, the Court has never extended the principle to *investigation* by discretionary civil subpoenas.

Unsurprisingly, Respondents fail to cite any case extending the principle of selective enforcement to cases involving discretionary administrative subpoenas: Over a decade ago, the Supreme Court held in *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008), that a selective enforcement claim did not apply to a state agency's discretionary decision to terminate a public employee. *Id*. at 603 ("[S]ome forms of state action . . . involve discretionary

[13] Analysis of a selective enforcement equal protection claim "is the same under the federal and state constitutions." *Campaign for Fiscal Equity, Inc. v. State of New York,* 86 N.Y.2d 307, 319–20 (1995).

decisionmaking based on a vast array of subjective, individualized assessments. . . . In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise."). Under this same rationale, selective enforcement does not apply to other discretionary acts like issuing an administrative subpoena.[14] *See New Covenant Charter Sch. Educ. Fac. Ass'n v. Bd. of Trustees of State Univ. of New York*, 2010 WL 5468692, at *2 (Sup. Ct., N.Y. Cty. Nov. 29, 2010); *see also DePietro v. City of New York*, 2010 WL 449096, at *10 (E.D.N.Y. Feb. 2, 2010).

5. Respondents fail to carry their heavy burden of establishing selective enforcement.

Even if Respondents could assert selective enforcement to challenge a discretionary administrative subpoena under Executive Law §63(12), the outcome would be the same because Respondents identify no one treated differently who is similarly situated to them and cannot establish that the investigation is without a legal basis.

a. Respondents have not identified any comparators.

To succeed on a claim for selective enforcement, a plaintiff must show "that [she was] treated differently from other similarly situated individuals." *Harlen Assocs. v. Inc. Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (cleaned up). These comparators must be similarly situated in all material respects. *See Joglo Realties, Inc. v. Seggos*, No. 16-CV-1666, 2016 WL 4491409, at *9 (E.D.N.Y. Aug. 24, 2016); *Fernandez v. Town of Benson*, 196 A.D.3d 1019,

[14] Under Executive Law §63(12), OAG has "broad authority to investigate 'repeated fraudulent or illegal acts' . . . and to issue subpoenas in connection with such investigations," *Roemer v. Cuomo*, 67 A.D.3d 1169, 1170 (3d Dep't 2009), and these subpoenas are lawful where OAG has properly determined in its discretion that "the information sought is reasonably related to a proper subject of inquiry." *Matter of Nicholson v. State Comm'n On Jud. Conduct*, 50 N.Y.2d 597, 611 (1980). Accordingly, OAG's discretionary decision to issue a subpoena in any particular civil investigation under §63(12) cannot be subject to a selective enforcement claim. *Engquist*, 553 U.S. at 603; *see also New Covenant Charter*, 2010 WL 5468692, at *2.

1022 (3rd Dep't 2021). Respondents' burden under this test "is a weighty one," as "[c]ommon sense and public policy dictate," because there is a presumption that OAG's "enforcement of laws is undertaken in good faith and without discrimination." *303 W. 42nd St.*, 46 N.Y.2d at 694.

Respondents "have offered no evidence that any [one] allegedly exempted [from OAG's investigation] is 'similarly situated.'" *Dezer Ent. Concepts, Inc. v. City of New York*, 8 A.D.3d 37, 39 (1st Dep't 2004). Respondents cite to no other person identified in congressional testimony as having engaged in fraud and misrepresentation whom OAG has declined to investigate—particularly not any with a history of enforcement actions and complaints regarding alleged fraudulent conduct. Nor do they identify another person shown through substantial evidence to have used false and misleading financial statements to obtain financial benefits whom OAG has not subpoenaed.[15] Because they have "not identified any reasonably similar comparators," Respondents' argument that the testimonial subpoenas at issue here should be quashed on selective-enforcement grounds necessarily fails. *Vanderveer v. Zoning Bd. of Appeals Town of E. Hampton*, No. 20-cv-4252, 2021 WL 3745741, at *2 (2d Cir. Aug. 25, 2021) (summary order).

b. There is no serious dispute that OAG's investigation has ample justification.

Respondents have also failed to show that "there was no rational basis for the prosecutorial choice[]" made by OAG to issue the subpoenas in question. *People v. Blount*, 90 N.Y.2d 998, 999 (1997).

As a threshold matter, Respondents are precluded by *res judicata* from contending no rational basis exists for the investigation by virtue of the Court's prior orders because: (1) the

[15] Respondents' conclusory assertion that the Investigation "was treated very differently than other investigations conducted by OAG," Resp. Opp. 33, without any evidentiary support whatsoever, is entitled to no weight. *Dezer*, 8 A.D.3d at 39.

previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action. *See Monahan v. N.Y.C. Dep't of Corr.,* 214 F.3d 275, 285 (2d Cir. 2000). All three elements are satisfied.

First, this Court issued multiple final orders that adjudicated on the merits the lawfulness of OAG's investigation. Dkt. 255, 277, 302, 314. These orders were final, appealable court orders that resolved discrete issues in their entirety and therefore have preclusive effect. *See Matter of Abrams*, 62 N.Y.2d 183, 192 (1984).

Second, Respondents were in privity with the Trump Organization when the Court issued these final orders because Respondents' "interests were adequately represented by" the Trump Organization, Eric Trump, and Mr. Trump's personal tax counsel, not least because Mr. Trump owns and controls the Trump Organization, *see Trump v. Vance*, 977 F.3d 198, 203–04 (2d Cir. 2020), and their interests in responding to OAG's subpoena are fully aligned with the interests of the Trump Organization and Eric Trump. *See NYP Holdings, Inc. v. McClier Corp.*, 83 A.D.3d 426, 427–28 (1st Dep't 2011).

Third, Respondents had a full and fair opportunity to litigate the propriety of OAG's investigation. At no point during the numerous contested rounds of briefing, evidentiary submissions, and hearings here did anyone contend that OAG's investigation was unlawful, pretextual, or lacked a rational basis. Rather, the Trump Organization *consented* to the September 2021 Stipulation and Order—which identified Respondents here as custodians[16]—and has purported to cooperate with the investigation by submitting numerous witnesses for testimony and producing documents.

[16] Dkt. 314 at 8.

Accordingly, the lawfulness of the investigation was necessarily decided by this Court's prior orders enforcing OAG's subpoenas pursuant to CPLR §2308, which requires the Court to find that "[OAG's] subpoena[s] were authorized." CPLR §2308 (b). Respondents are precluded from now arguing otherwise in support of their selective enforcement claim.

Even in the absence of preclusion, Respondents cannot demonstrate that the investigation has no rational basis because, in addition to the presumption that OAG is acting in good faith when commencing an investigation, *see, e.g., Anheuser-Busch*, 71 N.Y.2d at 332, there is strong and compelling evidence of OAG's good-faith basis for this investigation. The investigation was opened based on the congressional testimony by Michael Cohen alleging Mr. Trump and the Trump Organization improperly inflated asset valuations to obtain financial benefits. That testimony provided a sufficient good-faith basis for OAG to commence the investigation pursuant to Executive Law §63(12). Respondents proclaim it "stretches all credibility to believe" OAG put "any legitimate stock into" Mr. Cohen's testimony. Resp. Opp. 32. But OAG did consider significant the testimony that the Statements of Financial Condition were inflated—a finding vindicated by the evidence obtained to date and Mazars's notification that those statements should not be relied upon (*see* Wallace Aff., Ex. 1). The substantial evidence uncovered by OAG during the investigation detailed in OAG's Supplemental Verified Petition (Dkt. 630), which Respondents ignore, leaves no doubt that OAG opened and has continued to pursue the investigation in good faith and with ample justification.

c. Respondents have no entitlement to discovery or a hearing.

Even if a selective enforcement claim could apply to an administrative subpoena (it cannot), there is no basis here for discovery or an evidentiary hearing—relief absent from

Respondents' Notice of Motion and raised for the first time on reply.[17] "To establish…an evidentiary hearing as of right, a petitioner must show, *on the strength of sworn affidavits and other proof supplying factual detail*, that he is more likely than not to succeed on the merits." *303 W. 42nd St.*, 46 N.Y.2d at 695-96 (emphasis added). Only this "meaningful showing" similar to the test for a preliminary injunction "will enable a court to infer the reasonable probability of success." *Id*. at 696. Here, Respondents provide no proof suggesting that OAG's investigation was pretextual and without justification, nor any other evidence suggesting Respondents have a likelihood of success on their selective enforcement claim or other arguments, nor any rebuttal to the Supplemental Verified Petition. "That fact alone arguably justifies granting the petition in its entirety." Order, Dkt. 255 at 1 (citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980).).

CONCLUSION

OAG respectfully requests that the Court grant this application and compel the production of all records and testimony sought pursuant to OAG's subpoenas and deny Respondents' application.

[17] *Compare* Dkt. 321 *with* Resp. Opp. 35.

DATED: February 14, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

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

Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6376
kevin.wallace@ag.ny.gov

Attorneys for the People of the State of New York

Word Count: 4,200

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

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, Petitioner, -against- THE TRUMP ORGANIZATION, INC.; DJT HOLDINGS LLC; DJT HOLDINGS MANAGING MEMBER LLC; SEVEN SPRINGS LLC; ERIC TRUMP; CHARLES MARTABANO; MORGAN, LEWIS & BOCKIUS, LLP; SHERI DILLON; DONALD J. TRUMP; IVANKA TRUMP; AND DONALD TRUMP, JR., Respondents.	Index No. 451685/2020

AFFIRMATION OF KEVIN C. WALLACE

KEVIN C. WALLACE, an attorney duly admitted to practice before the Courts of this State, does hereby state the following pursuant to penalty of perjury:

1. I am an attorney in the Office of the New York State Attorney General who appears on behalf of the People of the State of New York in this special proceeding.

2. I am familiar with the facts and circumstances set forth in this Affirmation, which are based upon my personal knowledge, the investigative materials obtained during the course of this investigation, and information contained in the files of the Office of the Attorney General ("OAG").

3. I submit this Affirmation in support of OAG's cross motion seeking to compel production of documents and testimony (Dkt. 357).

4. Attached hereto as Exhibit 1 is a true and correct copy of a letter dated February 9, 2022, from William J. Kelly of Mazars USA LLP to Alan Garten, Executive Vice President and Chief Legal Officer of the Trump Organization.

5. OAG has not convened a grand jury to investigate Donald J. Trump, Donald Trump, Jr. or Ivanka Trump ("Respondents") or the Trump Organization, and it does not have a referral under Executive Law § 63(2-3) that would grant it jurisdiction to prosecute offenses arising from the preparation or submission of any Statements of Financial Condition for Donald J. Trump or any conservation-easement appraisals, including those identified in the Supplemental Verified Petition (Dkt. 630).

6. The District Attorney of the County of New York ("DANY") has not transferred to OAG or the Attorney General the responsibility for any grand jury proceeding involving Respondents, the Trump Organization, or any of its employees.

7. While OAG cross-designated two attorneys to DANY in conjunction with Grand Jury Investigation No. 2018-00403803, those cross-designated attorneys report to, and operate at, the direction of DANY for the purposes of their work in conjunction with Grand Jury Investigation No. 2018-00403803.

8. Those cross-designated attorneys continue to work on other grand jury investigations and operate at the direction of DANY on those investigations.

9. If the Court requires any additional confidential information concerning the foregoing disclosures, OAG is prepared to provide any necessary submissions in camera. *See Michaelis v. Graziano*, 5 N.Y.3d 317 (2005) (appropriate to provide "confidential aspects" of agency investigation to court on an in camera basis); *Dellwood Foods, Inc. v. Abrams*, 84 A.D.2d 692 (1st Dep't 1981), *affirming* 109 Misc.2d 263, 270 (1981) (denying motion to quash nonjudicial subpoenas in part because "in-camera offer of proof from the Attorney General"

showed legitimate basis to investigate and not to prepare already-indicted criminal case for trial); *see also Am. Dental Coop., Inc. v. Attorney-General*, 127 A.D.2d 274, 280 (1st Dep't 1987). Indeed, this Court already has permitted OAG to make similar in camera submissions in this proceeding. *See* Sept. 23, 2020 Order, Dkt. 254, at 2.

Dated: New York, New York
February 14, 2022

KEVIN C. WALLACE

Wallace Affirmation
Exhibit 001

mazars

Mazars USA LLP
135 West 50th Street
New York, New York 10020

Tel: 212.812.7000
www.mazars.us

February 9, 2022

VIA ELECTRONIC MAIL
Alan Garten, Esq.
The Trump Organization
Executive Vice President and Chief Legal Officer
725 Fifth Avenue
New York, NY 10022

Re: Statement of Financial Condition for Donald J. Trump - 2011-2020

Dear Alan,

We write to advise that the Statements of Financial Condition for Donald J. Trump for the years ending June 30, 2011 – June 30, 2020, should no longer be relied upon and you should inform any recipients thereof who are currently relying upon one or more of those documents that those documents should not be relied upon.

We have come to this conclusion based, in part, upon the filings made by the New York Attorney General on January 18, 2022, our own investigation, and information received from internal and external sources. While we have not concluded that the various financial statements, as a whole, contain material discrepancies, based upon the totality of the circumstances, we believe our advice to you to no longer rely upon those financial statements is appropriate.

As we have stated in the Statements of Financial Condition, Mazars performed its work in accordance with professional standards. A subsequent review of those workpapers confirms this.

Due in part to our decision regarding the financial statements, as well as the totality of the circumstances, we have also reached the point such that there is a non-waivable conflict of interest with the Trump Organization. As a result, we are not able to provide any new work product to the Trump Organization.

As of this writing, there are only a limited number of tax returns that still remain to be filed, including those of Donald J. Trump and Melania Trump. We will be providing you a list of those returns and their status towards completion separately.

The due date to file those returns is February 15, 2022. We believe the only information left to complete those returns is the information regarding the Matt Calimari Jr. apartment. As you know, Donald Bender has been asking for this information for several months but has not received it. Once that information is provided to your new tax preparers, the returns can be

mazars

completed. However, if those returns are filed late, there may be a late filing penalty of $10,000 per return, which will likely be subject to abatement. We also believe that due to prior tax payments, there was an overpayment of taxes, thus, there should be no late payment penalty if these returns are in fact filed late.

Mazars will continue to do everything reasonably possible to facilitate a smooth transition to your new tax preparers.

Best regards,

William J. Kelly

Digitally signed by William J. Kelly
DN: cn=William J. Kelly, o=Mazars USA, LLP, ou=General Counsel, email=william.kelly@mazarsusa.com, c=US
Date: 2022.02.09 10:06:03 -05'00'

William J. Kelly