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

People of the State of New York, by Letitia James, 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; and Sheri Dillon, Respondents.	INDEX NO. 451685/2020 (*Redacted*) **RESPONDENTS MORGAN, LEWIS & BOCKIUS, LLP'S AND SHERI DILLON'S MEMORANDUM OF LAW IN OPPOSITION TO THE ATTORNEY GENERAL'S SPECIAL PROCEEDING AND APPLICATION TO COMPEL RESPONDENTS TO COMPLY WITH INVESTIGATORY SUBPOENAS** *Motion Seq. No. 2*

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PRELIMINARY STATEMENT

Respondents Morgan, Lewis & Bockius LLP ("Morgan Lewis" or the "Firm") and Morgan Lewis partner, Sheri Dillon ("Attorney Dillon"), through their respective undersigned counsel, hereby submit the foregoing Memorandum of Law in Opposition to the Motion to Compel Respondents to Comply with Investigatory Subpoenas filed by the New York State Office of the Attorney General ("OAG") on August 24, 2020.

This motion to compel is improper and should be denied outright. OAG has continuously put Respondents Morgan Lewis and Attorney Dillon in a precarious position for legal counsel by demanding production of documents and information over which a client – The Trump Organization[1] ("TTO") – has asserted good faith and legally viable privilege assertions. OAG's dispute is with TTO, not with Morgan Lewis or Attorney Dillon. Until and unless that dispute is resolved, either through agreement by TTO and OAG, or by decision of this Court, any attempt by OAG to compel Morgan Lewis and Attorney Dillon to breach their ethical obligations to TTO is grossly inappropriate.

The key legal question raised by the subpoena *duces tecum* that OAG issued to Morgan Lewis on December 19, 2020 (the "Subpoena") is whether Morgan Lewis attorneys were acting in their capacity as legal counsel with respect to the work provided in connection with the charitable donations of conservation easements. OAG insists that the work performed was for a business purpose and not a legal purpose. TTO contends that Morgan Lewis and Attorney Dillon were acting as lawyers on behalf of TTO in connection with the conservation easement donations – and Morgan Lewis and Attorney Dillon agree. As a result, Morgan Lewis and Attorney Dillon responded to OAG's continued requests to provide information as ethical lawyers are required to,

[1] The Trump Organization includes, in part, The Trump Organization, Inc.; DJT Holdings LLC; DJT Holdings Managing Member LLC; and Seven Springs, LLC.

by providing a rolling production of non-privileged documents and information while honoring TTO's privilege assertions and timely describing the materials withheld from production.

BACKGROUND

The ethical rules governing the legal profession bind every member of Morgan Lewis. Maintaining the attorney-client privilege is, perhaps, the most fundamental of those ethical rules. It certainly is "one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). New York recognizes the sanctity of the attorney-client privilege through its Rules of Professional Conduct (the "Rules"). Every member of the bar must swear under oath to uphold those Rules. In relevant part, the Rules provide: "[a] lawyer shall not knowingly reveal confidential information . . . unless the client gives informed consent." NY ST RPC Rule 1.6(1).[2] Information is confidential if it is "gained during or relating to the representation of a client, whatever its source, [and] is [ ] protected by the attorney-client privilege . . . or [is] information that the client has requested be kept confidential." *Id*. There is no exception for government subpoenas.

Not only is OAG bound by the same ethical rules as the attorneys at Morgan Lewis, but counsel for Morgan Lewis repeatedly reminded OAG that any decision to reveal confidential information regarding a legal representation belongs solely to the client and can be waived only by the client. As such, and absent a court order, New York's Rules of Professional Conduct have barred, and continue to bar, Morgan Lewis from unilaterally deciding to produce confidential documents and materials over which its client in a legal representation, TTO, maintains good faith assertions of privilege and work product protections.

[2] The Rules of Professional Responsibility for the District of Columbia and Georgia, where Attorney Dillon is barred, contain the same provisions. *See* D.C. Rule of Professional Conduct 1.6, Georgia State Bar Handbook Rule 1.6.

This dispute regarding whether Morgan Lewis must produce the at-issue documents, therefore, is—and always has been—between OAG and TTO. OAG knows this. If TTO told Morgan Lewis to produce all of its TTO-related files, Morgan Lewis ethically would be obligated to do so. Conversely, if TTO—in good faith—told Morgan Lewis not to disclose confidential files related to, or obtained through, its representation of TTO, Morgan Lewis ethically could not reveal the content of those documents to anyone. That is the exact situation that occurred here.

For the past nine months, Morgan Lewis worked extensively, cooperatively and transparently with OAG in its efforts to comply with all production obligations regarding non-privileged materials.[3] Morgan Lewis explained its collection, search and review process to OAG, including that the process would – and must – include a review by counsel for TTO prior to any production so that TTO, as the privilege-holder, would have the opportunity to knowingly assert or forego any applicable privileges or other protections over the documents at issue. Morgan Lewis began its rolling production of documents in response to the Subpoena in January 2020. Between January and August of 2020, Morgan Lewis produced materials to OAG on 24 separate occasions. Those productions consisted of email communications (including those that were internal to Morgan Lewis or between Morgan Lewis and "key employees" at TTO), internal hardcopy records, and—contrary to OAG's misrepresentation in its filing—more than 2,000 pages from files stored on Morgan Lewis's document management systems.[4]

[3] To provide context and assist the Court in understanding the extent to which Morgan Lewis worked and communicated with OAG in its efforts to comply with the Subpoena, we have prepared a summary of the communications, which is attached hereto as Exhibit 1 (Affidavit of Nathan J. Andrisani, Esq. or "NJA Aff.").

[4] Despite arguing that "Morgan Lewis has refused to produce . . . any files from their document management systems," Mem. at 19, OAG used materials produced from the Morgan Lewis document management system as exhibits to its filings in this matter. *See* ECF Nos. 53, 54.

But, as it would for any and every client, Morgan Lewis withheld from production certain materials that its client identified as privileged and protected.[5] Morgan Lewis did so after consulting with the privilege-holder and evaluating the viability of the client's good faith privilege assertions. OAG was aware of this process, and TTO's role in it, from the outset;[6] in fact, OAG's own production schedule accounted for TTO's need to engage with Morgan Lewis in pursuit of the Firm's good faith protection of TTO's confidences.

Throughout these nine months, Morgan Lewis also remained in constant and open dialogue with OAG as to both the bases and the ownership of the privileges asserted. Morgan Lewis also facilitated communications between OAG and TTO, which helped OAG and TTO resolve some disputes as to privilege without judicial intervention. But for those disputes on which TTO and OAG could not agree—namely, regarding the nature of Morgan Lewis's advice—Morgan Lewis could not ignore the good faith privilege assertions of its client, regardless of OAG's strident requests.

OAG further complicated this matter by refusing to allow counsel for TTO to be present for the video depositions of certain Morgan Lewis lawyers, including Attorney Dillon. By refusing to allow the privilege holder to be present at the deposition to assess privilege and work product protection assertions in real time, OAG placed the lawyer-deponents in the untenable situation of being unable to answer questions that implicated the lawyer's ever present obligations under Rule 1.6. OAG was advised repeatedly by Morgan Lewis and counsel for Sheri Dillon that TTO's presence was crucial to moving things forward in a cooperative and orderly fashion, and OAG

[5] Morgan Lewis has provided privilege logs identifying each such document.

[6] TTO is represented in this investigation by separate counsel, who has been active in advising TTO on the questions of privilege that have arisen under the Subpoena.

steadfastly refused to accept a simple proposed remedy to address potential privilege and work product issues.

Morgan Lewis has made clear to OAG throughout this process that it cannot and will not ignore a client's good faith and legally viable privilege assertions and produce the documents at issue – absent the client's knowing waiver or withdrawal of any applicable privilege protection, or an order of the Court – and that it will comply with the substance of an Order that answers the fundamental question underlying the Subpoena, *i.e.*, whether Morgan Lewis provided TTO with legal advice in connection with certain conservation easement donations. The fact that this Court now will have an opportunity to resolve these disputes through the legal process, rather than through OAG's continued demands that Morgan Lewis and Attorney Dillon take action that they could not, due to their ethical obligations, is a welcome development.

ARGUMENT

OAG seeks to compel Morgan Lewis to produce withheld documents and for Attorney Dillon to provide testimony regarding subjects over which TTO—the privilege holder—maintains good faith and legally viable bases for asserting privilege and other protections.

Morgan Lewis made TTO's positions with respect to the privileged nature of the various at-issue categories of documents and points of dispute clear at an early stage in discussions about the Subpoena. There are six categories of such documents and points of dispute: (1) substantive attorney-client communications; (2) internal records created and maintained during Morgan Lewis's representation of TTO regarding certain conservation easement donations; (3) materials reviewed by a former Morgan Lewis associate prior to giving testimony in this matter; (4) confidential communications with a retained third-party consultant; (5) settlement-related materials; and (6) deposition questions that Attorney Dillon declined to answer.

Because TTO has asserted a good faith basis for the attorney-client privilege and work product protection over the materials included in categories 1–2 and 4–5, Morgan Lewis ethically cannot produce those records to OAG.[7] As to the third and sixth categories, OAG has failed to establish that it is entitled to any information beyond what Morgan Lewis and Attorney Dillon already have provided to it. Through the following pages, Morgan Lewis and Attorney Dillon address each category in turn.

I. Communications between Morgan Lewis and TTO are Attorney-Client Communications Reflecting and Facilitating Legal Advice.

Morgan Lewis is a law firm, and it is in the business of providing its clients legal advice. It was engaged by TTO to provide confidential legal advice in connection with the actual and proposed conservation easement donations that are the subject of the Subpoena. Consistent with its legal engagement, Morgan Lewis attorneys assisted TTO in navigating the complex statutory and regulatory requirements, as interpreted by a voluminous body of case law, that arose in considering and executing the charitable donations of conservation easements. At each stage in the conservation easement process in which Morgan Lewis was involved, it analyzed the applicable tax law and offered legal advice within the confines of that law. Attorneys at Morgan Lewis viewed all documents received during the course of its engagement with TTO through that same legal lens.

OAG incorrectly asserts that the legal work Morgan Lewis performed was not legal advice and goes so far as to characterize the work as having a "plainly apparent business purpose." *See* Memorandum of Law in Support of the Attorney General's Special Proceeding and Application to Compel Respondents to Comply with Investigatory Subpoenas, ECF No. 11 ("Mem.") at 3, 42.

[7] Morgan Lewis similarly cannot produce these documents under OAG's unsubstantiated theory that a wide, subject-matter waiver has occurred here. *See infra* Section VII.

Specifically, OAG claims, without citing any foundation or legal authority, that "[c]oordinating the work necessary to evaluate the economic benefit of, and then obtain, a conservation easement is a business role." *Id.* at 43. Yet, OAG provides no basis to believe that TTO hired Morgan Lewis as outside counsel for any reason *other* than to provide legal advice. For example, OAG separately concedes that Morgan Lewis, on behalf of TTO, undertook efforts "to document the value of the easement" in order "[t]o comply with legal requirements regarding substantiation of the easement's value." *See* First Affirmation of Matthew Colangelo, ECF No. 10 ("First Aff.") ¶ 34.

Next, OAG argues that "New York courts have stressed that there is a 'heightened need to apply the privilege cautiously and narrowly' when an attorney with 'mixed business and legal responsibility' may 'blur the line between legal and nonlegal communications.'" Mem. at 42 (quoting *Saran v. Chelsea GCA Realty P'ship, L.P.*, 174 A.D.3d 759, 760 (2d Dep't 2019)). However, New York law, and in fact the very same case OAG quotes, provides: "because *in-house counsel* may serve as company officers, with mixed business and legal responsibility, and their involvement in the company may blur the line between legal and nonlegal communications, there is a heightened need to apply the privilege cautiously and narrowly in the case of *in-house counsel*, lest the mere participation of an attorney be used to seal off disclosure." *Saran*, 174 A.D.3d at 760 (emphasis added).

OAG's selective, piecemeal quotations from *Saran* in support of its innovative views of the law cannot stand and do not erase TTO's position, which is supported by the actual facts of *Saran*. Put simply, *Saran*, is inapposite to Morgan Lewis. *Saran* identified a heightened standard applicable to in-house attorneys who serve many functions and hold many (legal and non-legal) responsibilities at their corporate client. The case does not stand for the proposition that there is a

heightened standard or narrower protection applied to communications that involve outside counsel employed by law firms that are in the business of providing legal advice.

Contrary to OAG's assertions, the fact that Morgan Lewis provided legal advice with respect to a business transaction (*i.e.*, the charitable contribution of a conservation easement) does not mean that the advice was not legal in character. *See Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 106 (Sup. Ct., N.Y. Cty. 2003) (finding that advice about two contemplated mergers were primarily of a legal character and within the scope of the attorney client privilege). "So long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters." *Rossi v. Blue Cross & Blue Shield of Greater New York*, 73 N.Y.2d 588, 594 (1989). To hold otherwise would be to open the files of all transactional attorneys to discovery. The law does not protect only the files of litigators.

Importantly, and as OAG acknowledges, the record on this issue demonstrates that the advice given by Morgan Lewis was legal in nature. For example, as OAG cites repeatedly, the former Morgan Lewis associate who worked on one of the easement transactions was questioned by OAG about his work, and testified that "his sole purpose was to ensure that the work satisfied the legal requirements for deductibility." First Aff. ¶ 187; *see also* ECF No. 141 at 36 ([redacted]). OAG has not provided any facts to contradict that Morgan Lewis provided legal advice to TTO.

II. Files Internal to Morgan Lewis Related to the Conservation Easement Donations are Protected by CPLR 3101(c) and 3101(d)(2).

Similarly, Morgan Lewis has withheld some internal files its attorneys maintained during the course of their legal representation of TTO in connection with certain conservation easement

donations (*e.g.*, internal correspondence between Morgan Lewis attorneys and working drafts of legal instruments that remained internal to Morgan Lewis). Morgan Lewis has done so on the basis that they are confidential materials protected from disclosure by the attorney work product privilege.

The work product doctrine codified in CPLR 3101(c) grants absolute immunity from disclosure to "[t]he work product of an attorney." Disclosure of materials that are prepared by an attorney, acting as an attorney, is prohibited if it would reveal the attorneys' "legal research, analysis, conclusions, legal theory or strategy." *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep't 1980); *see also Competitive Enter. Inst. v. Attorney Gen. of New York*, 76 N.Y.S.3d 640, 643 (3d Dep't 2018). An attorney's work product can be reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The work product protection extends to draft documents containing the attorneys' legal research, analysis, conclusions, legal theory or strategy. *See, e.g.*, *Nab-Tern-Betts v. City of New York*, 618 N.Y.S.2d 306, 307 (1st Dep't 1994) (holding that a draft bill of particulars and a draft contractual provision were protected attorney work product); *Peerenboom v. Marvel Entm't, LLC*, 75 N.Y.S.3d 131, 132 (1st Dep't 2018) (explaining that "draft pleadings or emails discussing changes to such pleadings" constitute protected attorney work product).

The internal files that have been withheld include: (1) correspondence exchanged between counsel that were made in furtherance of the legal advice and strategy that Morgan Lewis provided to TTO regarding each actual and proposed conservation easement's compliance with federal income tax law; (2) attorneys' internal annotations and notes regarding draft appraisals, made by attorneys who, acting as such, analyzed the draft appraisals through the lens of the attorneys'

unique learning and training; and (3) other documents containing the attorneys' mental impressions and legal conclusions as to whether a proposed conservation easement donation satisfied the Internal Revenue Code, U.S. Treasury regulations, Internal Revenue Service ("IRS") guidance, and relevant case law to qualify for a tax deduction as a result of the donation of the conservation easement. These documents are immune from disclosure because they are "uniquely the product of a lawyer's learning and professional skills," *Hoffman*, 73 A.D.2d at 211, and disclosure would reveal Morgan Lewis attorneys' mental impressions and legal analysis of the impact of federal income tax laws and U.S. Treasury regulations on the proposed conservation easements.

In addition to the absolute immunity provided by CPLR 3101(c), CPLR 3101(d)(2) protects Morgan Lewis's purely internal documents from disclosure to OAG. CPLR 3101(d)(2) protects Morgan Lewis's internal documents because the IRS regularly attacks and closely scrutinizes conservation easements, often resulting in litigation.[8] Indeed, concurrent with her legal work regarding two of the easement donations that are the focus of the OAG's investigation, Attorney Dillon also was working to resolve an active dispute with [redacted]. *See infra* at Section V. Because [redacted], TTO reasonably anticipated litigation regarding each conservation easement it donated. TTO's decision to retain Morgan Lewis attorneys who specialize in tax litigation further supports that conclusion.[9] Morgan

[8] In 2015, alone, the Tax Court decided at least six cases regarding donations of conservation easements. *See Atkinson v. Comm'r*, T.C. Memo 2015-236 (Dec. 9, 2015); *Legg v. Comm'r*, 145 T.C. 344 (Dec. 7, 2015); *Bosque Canyon Ranch, L.P. v. Comm'r*, T.C. Memo 2015-130 (Jul. 14, 2015); *Costello v. Comm'r*, T.C. Memo 2015-87 (May 6, 2015); *SWF Real Estate LLC v. Comm'r*, T.C. Memo 2015-63 (Apr. 2, 2015); *Balsam Mt. Invs., LLC v. Comm'r*, T.C. Memo 2015-43 (Mar. 12, 2015).

[9] [redacted]—the counter-party to one of the at-issue conservation easement donations—also relied on outside counsel. That attorney was not a litigator. Rather, he split his practice [redacted]

Lewis attorneys who provided legal advice to TTO in planning and ultimately donating a conservation easement necessarily coordinated with ecologists, appraisers, engineers, land trusts, and other parties to ensure that the donation complied with federal income tax law. The attorneys needed to be aware of every detail of each planned or donated conservation easement to ensure that the easement would withstand nearly certain IRS scrutiny.

In these circumstances, documents related to satisfying the tax law can be "prepared solely for purposes of litigation within the meaning of CPLR 3101[(d)(2)]." *In re New York Renu with Moistureloc Prod. Liab. Litig.*, No. 766,000/2007, MDL. 1785, 2009 WL 2842745, at *12 (D.S.C. Jul. 6, 2009) ("*In re New York Renu II*") (applying New York law). "It is common knowledge that reports made pursuant to legal obligations are not prepared in only one way. It is up to the lawyers (and necessary consultants) to figure out how to comply with the reporting obligations and yet retain the optimal legal position for their client under the circumstances," *i.e.*, the specter of future litigation where those same reports "could be subject to admission on behalf of plaintiffs in a forthcoming lawsuit." *Id.* In such cases, "the drafting process [i]s solely directed toward litigation" and warrants the protections of CPLR 3101(d)(2). *Id.*

Given these justifications supporting TTO's direction that Morgan Lewis maintain its internal, TTO-related documents in confidence, Morgan Lewis withheld or redacted many of its internal files. Absent TTO's "informed consent" to waive or withdraw its work product assertions or by an order of this Court to produce the documents at issue, Morgan Lewis may not disclose internal documents related to its representation of TTO in connection with certain conservation easement donations.

III. OAG is Not Entitled to Additional Information Regarding The Subset of Materials to Which a Former Morgan Lewis Associate Had Pre-Testimony Access.

OAG is not entitled to separate disclosure of the documents that Morgan Lewis's former associate testified refreshed his recollection. OAG seeks either a production or log of the documents that a former Morgan Lewis associate "reviewed before his examination" to "refresh[] his recollection" regarding the relevant conservation easement donation. Mem. at 48. Morgan Lewis, however, repeatedly has informed OAG that the documents to which its former associate had pre-testimony access already have been produced or identified on a privilege log provided to OAG. *See* ECF 137. Thus, OAG necessarily is asking this Court to order either: (1) the production of independently privileged or otherwise protected material made available to Morgan Lewis's former associate before he testified; or (2) that Morgan Lewis specifically identify which documents refreshed its former associate's recollection as to certain aspects of the relevant conservation easement donation. OAG has no basis for making either request.

First, the deponent here is—and at all relevant times was—an attorney. Before he testified, Morgan Lewis provided him with access to responsive documents bearing his name or within his custodial file. Many of those documents reflected the deponent's prior work product and attorney-client communications regarding a conservation easement donation. Each such document appears on a Morgan Lewis privilege log. The mere possibility that the deponent reviewed some combination of those independently privileged documents, and that they refreshed his recollection, does not render them discoverable. Under New York law "*the attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony*." *Beach v. Touradji Capital Mgmt., LP*, 99 A.D.3d 167, 172 (1st Dep't 2012) (emphasis added); *see also id.* at 171 ("[t]o the extent any portion of the [previously reviewed document] is

attorney work product, the privilege protects the [document] notwithstanding that the [witness] reviewed the [document] prior to his deposition").

Key to the *Beach* holding was the fact that a colorable, independent claim of attorney work-product attached to underlying document itself. 99 A.D.3d at 171. Yet it is a distinction that OAG ignores in the cases it cites (each of which predates *Beach* by more than 15 years). *See McDonough v. Pinsley*, 239 A.D.2d 109, 109 (1st Dep't 1997) (no claim that reviewed document was, itself, attorney work product or an attorney-client communication); *Grieco v. Cunningham*, 128 A.D.2d 502, 502 (2d Dep't 1987) (no claim that reviewed written statements themselves contained attorney work product or attorney-client communications); *Doxtator v. Swarthout*, 38 A.D.2d 782, 782 (4th Dep't 1972) (doctor reviewed written notes that did not contain attorney work product or attorney-client communications).

Taken together, the cases relied upon by OAG show that a witness may be compelled to produce specifically identified, non-privileged materials used to refresh that witness's pre-testimony recollection (even where the witness's attorney provided the documents for that pre-testimony review) but that a witness may not be compelled to produce independently privileged materials used for the same purpose. Morgan Lewis already has produced all non-privileged materials to which the deponent had pre-testimony access. And Morgan Lewis already has identified on a privilege log all independently privileged documents to which the deponent had pre-testimony access. OAG has no basis to request anything more.[10]

[10] There should be no dispute that the attorney-client privilege likewise is not waived when an attorney-witness—placed in the unusual position of being deposed regarding a past representation—reviews his past attorney-client communications. Those documents clearly are independently protected. Although it is unclear whether OAG believes any such waiver would occur, its request to this Court asks only for a review regarding which withheld documents are protected under CPLR 3101(c). Any *in camera* review of these documents must also assess whether the at-issue documents implicate the attorney-client privilege.

Second, OAG knows that Morgan Lewis cannot provide a log explicitly identifying which documents refreshed its former associate's recollection as to certain, specific aspects of the relevant conservation easement donation. That is because OAG never asked Morgan Lewis's former associate to identify the "documents he reviewed in preparation for his testimony [that] refreshed his recollection" as to any *specific points*. Mem. at 48.

The record shows that after the deponent volunteered that documents (in the abstract) refreshed his recollection as to certain, specific points, OAG's questioning attorney failed to ask the deponent *which* documents did so:

ECF No. 141 at 43.

Because OAG has refused to provide Morgan Lewis with an un-redacted copy of the relevant transcript,[11] Morgan Lewis—and this Court—are left with no information regarding *which specific* documents refreshed the witness's recollection regarding *specific* points, if any such evidence is even in the record. Any attempt on the part of Morgan Lewis to "disclose" such documents, therefore, would require Morgan Lewis to try to answer the very question of *which specific* documents refreshed the witness's recollection as to specific questions asked by OAG.

Morgan Lewis cannot be forced to conduct that cleanup on behalf of OAG, especially where—as here—any such effort would entail inappropriate guesswork on the part of Morgan Lewis. On the current record, all that Morgan Lewis can do is provide a log to OAG of all

[11] The transcript that OAG filed with this Court is heavily excerpted and redacted. OAG, however, has refused TTO's requests that respondents be provided with complete copies of the transcripts from which OAG cherry-picks testimony in support of its arguments. OAG similarly did not allow any respondent to order a transcript. Morgan Lewis, therefore, is constrained to respond to this argument without access to the full record.

produced, redacted, or withheld responsive documents bearing the witness's name or within his custodial file. OAG has the ability to run the exact same report from the documents and information that Morgan Lewis has already provided. Morgan Lewis should not be ordered to undertake such a fool's errand after nine months of abiding by OAG's requests.

In any event, counsel's selection of the materials they used to prepare the former associate for his deposition constitutes protected work product immune from disclosure under CPLR 3101(c) and 3101(d)(2).[12] *See Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986) ("where, as here, the deponent is opposing counsel and opposing counsel has engaged in a process of selecting and compiling documents in preparation for litigation, the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product")*; see also Kodak Graphic Commc'ns Canada Co. v. E.I. du Pont de Nemours & Co.*, No. 08–CV–6553T, 2012 WL 413994, at *5 (W.D.N.Y. Feb. 8, 2012) (recognizing that the Second Circuit has applied the work product doctrine to attorney compilations of documents and noting that "[w]here the requesting party already has 'all relevant, non-privileged evidence,' its demand that the opposing party disclose its attorney's selection and compilation of certain documents is often a thinly-veiled effort 'to ascertain how counsel intends to marshall the facts, documents and testimony in [his] possession, and to discover the inferences that [counsel] believes properly can be drawn from the evidence it has accumulated.'" (quoting *SEC v. Morelli.*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992)). Counsel for the witness made that clear during the deposition, when he objected to the overbroad question of [redacted] ECF No. 141 at 13 (emphasis added). Indeed, any such broad and unfettered

[12] Morgan Lewis represented, and continues to represent its former associate for purposes of responding to the July 8, 2020 subpoena *ad testificandum* served on him by OAG.

disclosure would reveal counsel's analysis, conclusions, legal theory and strategy in the specific context of their preparations for their witness's testimony in *this* litigation.

Accordingly, OAG already has all of the information to which it is entitled regarding the witness's pre-testimony conduct.

IV. Communications Between Counsel and a Third Party are Protected Under the Terms of That Third Party's Engagement by Morgan Lewis.

As with the above, OAG and TTO have reached different conclusions regarding the discoverability of certain communications between Morgan Lewis attorneys and an expert retained by those attorneys. TTO has a good faith and legally viable basis for instructing Morgan Lewis to place such communications on a privilege log. New York law recognizes that "communications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication, generally will be privileged." *People v. Osorio*, 75 N.Y.2d 80, 84 (1989) (citing *United States v. Kovel*, 296 F.2d 918, 921–922 (2d Cir. 1961)); *see also Spicer v. GardaWorld Consulting (UK) Ltd.*, 181 A.D.3d 413, 414–415 (1st Dept. 2020) (holding privilege applies to otherwise privileged communications "where the presence of [agent of the attorney or client] is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality" (citation omitted)). Further, "[t]he scope of the privilege is not defined by the third parties' employment or function, [but] depends on whether the client had a reasonable expectation of confidentiality under the circumstances." *Id.* at 414. Communications with a third party remain privileged if the third party, "play[s] a role analogous to an interpreter in helping the attorney understand . . . information passed to the attorney by the client." *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999).

At the direction of TTO, Morgan Lewis withheld or redacted documents involving an engineer who performed services under a written *Kovel* agreement with the Firm.[13] The *Kovel* agreement explicitly provides that [redacted] *See* NJA Aff. at ¶ 36 n.2. Consistent with the terms of the *Kovel* agreement, the engineer played a role analogous to an interpreter in aiding the Firm understand engineering concepts, residential concept plans, and local residential ordinances. The Firm used the engineer's guidance to evaluate whether TTO could donate a conservation easement on TTO's property in Ranchos Palos Verdes, California and qualify for a tax deduction under the Internal Revenue Code, U.S. Treasury regulations, and relevant case law. Consequently, the engineer's services fall squarely within the *Kovel* exception, and TTO had a reasonable expectation of confidentiality under these circumstances.

Absent TTO's "informed consent" to waive or withdraw its privilege assertions or an order of this Court, Morgan Lewis cannot produce to OAG the withheld documents.

V. *OAG Has Not Shown That It Is Entitled to Documents Relating to* [redacted]

At the direction of TTO, Morgan Lewis withheld from production documents related to settlement discussions in 2012 between TTO and [redacted]

[13] On August 21, 2020—before Morgan Lewis had access to the filings in the above-captioned litigation—Morgan Lewis produced to OAG a privilege log identifying the documents it withheld and redacted involving the at-issue engineer. *See* NJA Aff. at ¶ 43.

OAG contends that it is not bound by the disclosure standard forth in CPLR 3101(a), which requires disclosure of all matter "material and necessary" in the prosecution or defense of an action. Citing no authority for the proposition, OAG argues that CPLR 3101(a) "does not apply in the context of a law-enforcement subpoena issued under Executive Law § 63(12)." Mem. at 48–49. Yet the very Executive Law on which OAG relies provides explicitly that "the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas *in accordance with the civil practice law and rules*." Executive Law § 63(12) (emphasis added). Because New York's civil practice law and rules apply to OAG investigations, so, too, does the requirement in CPLR 3101(a) that the materials sought be "material and necessary" to OAG's investigation.

Indeed, New York law protects settlement-related materials absent a showing that they are material and necessary to the matter. *See* CPLR 3101(a); *Hiller v. Amella*, 128 A.D.3d 897, 898 (2d Dep't 2015); *Altonen v. Kmart of N.Y. Holdings, Inc.*, 94 A.D.3d 920 (2 Dep't 2012). In its numerous communications with OAG regarding OAG's questioning of TTO's direction to withhold from production the settlement-related documents, Morgan Lewis, on behalf of TTO, repeatedly asked OAG to explain why these settlement-related materials are material and necessary to OAG's current investigation. *See* NJA Aff. at ¶ 31.e ([redacted]); *id.* at ¶ 37 ([redacted]). OAG, however, repeatedly refused that request: "[redacted]" ECF No. 153. Because OAG made no such showing and because TTO continued to question the

relevance to this investigation of OAG's request for [redacted], Morgan Lewis was required to withhold these materials from production based on its client's good faith assertions of protection.[14]

VI. Attorney Dillon Properly Declined to Answer Questions During Her Examination that Called for Disclosure of Information Protected by the Attorney-Client Privilege or the Work Product Doctrine.

Before serving Attorney Dillon with a subpoena *ad testificandum*, OAG knew that separate counsel was advising TTO on privilege in this matter. Thus, OAG was aware that whether one of its planned examination questions called for privileged information was a question for TTO and its separate counsel to answer. For this reason, counsel for Attorney Dillon repeatedly asked OAG to permit lawyers for TTO – the privilege holder – to be present at her examination to assert TTO's privilege or work product objections. *See* Ex. 2 (Affidavit of Graeme Bush, Esq. or "Bush Aff.") at ¶¶ 5–10. This was the most efficient way for OAG to determine whether its questions called for answers that TTO deemed to be privileged. OAG nevertheless refused to permit TTO – the privilege holder – to be present, asserting its authority under Executive Law § 63(12) to determine who can be present at an investigatory examination. Bush Aff. at ¶ 7. OAG's decision forced Attorney Dillon to comply fully with her ethical obligations under Rule 1.6 of the Rules of Professional Conduct by asserting privilege or work product in response to any question that might conceivably call for disclosure of privileged material. She did not, and does not, have the authority to waive privilege for TTO in the face of the TTO's instruction to preserve the privilege. OAG's

[14] Consistent with its ethical obligations, Morgan Lewis incorporates in this response the position that TTO has taken in its own brief in support of its continued direction that Morgan Lewis withhold from production certain settlement-related materials. Morgan Lewis, however, separately notes its disagreement with OAG's position that "Ms. Dillon's provision of certain of the documents at issue to Cushman in the context of a completely different engagement suggests that, in 2014, she did not consider herself to be under any obligation of confidentiality." Mem. at 49. What OAG fails to note, and what OAG's selective excerpting of exhibits from that email cannot change, *see* ECF No. 154, is that Attorney Dillon provided those materials in 2014 to the *same* Cushman appraiser who helped her reach a confidential settlement with [redacted]. Confidentiality is not erased by re-sharing information with someone who already has access to it.

decision to deny the request that counsel for TTO be present put her in the very situation about which OAG now complains. OAG was wrong and now is attempting to blame Attorney Dillon for its own poor judgment.

OAG's motion to compel and supporting papers confusingly describe different arguments for the position that Attorney Dillon's privilege and work product assertions were improper. In the Memorandum of Law, OAG seeks an order from this Court that "Ms. Dillon's testimony should be compelled over these objections [on the ground of attorney-client privilege or work product] for three reasons[:]" (i) "no attorney-client privilege plausibly attaches;" (ii) she was providing business, not legal advice; and (iii) there was no basis for her work product assertions. Mem. at 51. Whether the privilege assertions should be upheld is between TTO – the privilege holder – and OAG, and for this Court to decide; but Attorney Dillon's assertions on behalf of her client during her examination were entirely reasonable and consistent with her ethical obligations under Rule 1.6.

For example, the only question OAG identifies covered by the first reason is Attorney Dillon's objection and refusal to answer a question regarding which person at TTO provided information contained in an email that OAG showed her. But OAG was asking for information that was not disclosed in the document. If an attorney has that information as a result of a confidential communication with the client, it is privileged notwithstanding that the document has been disclosed.[15] OAG provides no other example of a privilege assertion it claims is improper for the first reason.

[15] Attorney Dillon's counsel made this very point during the examination:

[redacted]

The second reason—that Attorney Dillon was providing business advice—has been addressed above. Suffice it to say here that Attorney Dillon is a lawyer, not a business advisor, who at all times while working for TTO was providing legal advice. The questions OAG uses as examples show on their face that she was providing legal advice concerning the tax requirements for charitable donations of conservation easements. For example, OAG contends the following questions implicate business advice:

ECF 104 at 146-47. The question at issue clearly and expressly seeks information about what Attorney Dillon needed to provide legal advice on "case law and regulations."

OAG also argues that the following questions implicate business advice:

ECF 104 at 107.

[redacted]

ECF 104 at 84. Although OAG redacted the preceding question, the "requirements" referred to are legal and regulatory requirements involving conservation easements.[16]

Attorney Dillon reasonably declined to answer these questions, which explicitly asked what she needed to evaluate the legal and regulatory requirements applicable to the conservation easement on which she was providing legal advice to her client. To disclose how Attorney Dillon evaluated these legal requirements would intrude on privileged and work product protections.

Finally, OAG argues that Attorney Dillon's assertion of work product should be rejected because her advice was not in anticipation of litigation and therefore is not protected under CPLR 3101(d)(2). Before addressing this argument, it is important to recognize that there is an entirely independent basis under CPLR 3101(c) for declining to disclose Attorney Dillon's work product. As discussed above, her legal analysis and thought processes in connection with advising her client are independently confidential work product under this section. OAG makes no argument that this basis does not apply to the questions she declined to answer because they called for work product.

With respect to litigation work product under CPLR 3101(d)(2), OAG argues that Attorney Dillon should be required to answer unspecified questions about the [redacted] because it is the Firm's obligation to prove that the disputed information is "immune from discovery." Mem. at 52. This argument misses the mark on multiple grounds.

[16] OAG cites testimony from one of the appraisers that he performed the preliminary appraisal to assist the client in making a business judgment whether to proceed with a conservation easement donation. Mem at 43–44. OAG should be required to produce the entire transcript of the appraiser's examination—its selective quotation of his testimony has the consequence that the respondents and the Court do not have the entire record that may put this cherry-picked quotation in context. But, even if the appraiser believed he was performing a preliminary appraisal for business purposes, that does not gainsay that Attorney Dillon had her own reasons for getting a preliminary appraisal having to do with her legal advice to the client concerning the ability to satisfy IRS requirements for a charitable donation of a conservation easement. At best, for OAG the appraiser's testimony creates a dispute of fact about the purpose for the preliminary appraisal.

First, it is not Attorney Dillon's obligation to support the privilege assertion where her client, TTO, has retained separate counsel explicitly for the purpose of advising TTO regarding assertions of privilege in this manner. Because any claim of privilege made by Attorney Dillon was pursuant to pre-testimony direction received from TTO and TTO's separate counsel, it is TTO—as privilege holder—who must support that assertion. That is the very reason why counsel for Attorney Dillon repeatedly asked that separate counsel for TTO be permitted to attend her examination. But because TTO's counsel was not permitted to be present, the privilege-holder was not in a position to do so.

Second, Attorney Dillon and her counsel gave several reasons that work product would apply, and OAG has cherry-picked one and, by not providing the entire transcript, is submitting an incomplete record to the Court.

Third, if OAG wanted to explore the foundation for the privilege or work product assertion, it was free to do so, but not by asking for information that itself was privileged or work product. *See Barber v. BPS Venture, Inc.*, 31 A.D.3d 897, 897 (3d Dep't 2006) (quoting *Watson v. State of New York*, 53 A.D.2d 798, 799 (3d Dep't 1976)) ("In conducting depositions, questions should be freely permitted 'unless a question is clearly violative of . . . some privilege recognized in law'"); *see also* 22 N.Y.C.R.R. 221.2.

Fourth, OAG asks for a broad order requiring Attorney Dillon to testify over the work product objection but does not identify the specific questions it believes are not protected. OAG's general description that she was instructed not to answer how her work was different because of t[redacted], confirms that the nature of the question is important to this Court's ability to make privilege rulings—on its face OAG is explicitly asking Attorney Dillon

to disclose her legal analysis and strategy in describing how her work was affected by the anticipated litigation.[17]

As the forgoing discussion of particular questions demonstrates, Attorney Dillon's assertion of privilege and work product on TTO's behalf—using her and her counsel's best judgment because TTO itself was not permitted to be present—were entirely reasonable. The motion to compel seeks broad rulings that Attorney Dillon should be compelled to answer questions beyond specific questions that OAG contends were the subject of a misplaced objection. As the discussion above illustrates, how a question is asked is directly relevant to whether it calls for confidential protected information—it is improper for OAG to request this Court to issue a broad, general order that the attorney-client privilege and work product protection may not be asserted. *See Slapo v. Winthrop Univ. Hosp.*, No. 604139/14, 2020 WL 5223046, at *5 (N.Y. App. Div., 2d Dep't Sept. 2, 2020) ("It is well settled that a trial court should not rule on the propriety of deposition questions which have not yet been asked, because such rulings should be made after a specific question has been asked and its answer refused."). Nor may OAG rely on its strategic decision during the examination not to ask certain questions because of its conclusion that a privilege objection would be lodged.[18] First Aff. at ¶ 210; ECF 104 at 11. OAG cannot avoid its obligation to present specific questions that it believes do not call for privileged information by

[17] OAG argues that where a document, in this case an appraisal, is prepared for submission with a tax return, it "is not prepared because of the prospect of litigation." Mem. at 53. OAG has the appraisal, however, and it is entirely unclear what question OAG thinks Attorney Dillon should answer because of this apparently irrelevant assertion.

[18] During Attorney Dillon's deposition OAG's examining counsel revealed that he would decline to ask further questions because of anticipated objections: [redacted] ECF No. 104 at 11. Attorney Dillon's counsel rejected this gambit on the record, informing him that while OAG could conduct the examination any way it chose, Attorney Dillon had objected and would continue to object on a question-by-question basis to only those questions that appeared to call for confidential, protected answers, and that OAG was free to ask questions in a way that did not intrude on privilege. *Id.*

pointing to its strategic decision not to ask further questions. *Tardibuono v. Cty. of Nassau*, 181 A.D.2d 879, 881 (2d Dep't 1992) ("[I]n an ordinary case, rulings on the propriety of deposition questions should only be made once a specific question has been asked, and its answer has been refused . . . .").

This Court should deny OAG's motion to compel Attorney Dillon to testify to privileged and work product matters that her client has asked her to maintain in confidence. Before deciding any of the privilege and work product issues OAG has raised regarding Attorney Dillon's testimony, the Court should require the OAG to disclose (i) the particular questions to which it seeks to have this Court compel an answer; and (ii) a copy of the entire transcript of Ms. Dillon's examination, and any other information or evidence that it relies on for its argument. This will enable the privilege holder—TTO—to determine whether it wishes to maintain or withdraw the objection, and in cases where TTO chooses to maintain the objection, the Court will be in a position to rule on the questions actually in dispute, rather than issue a broad general order without regard to the particular questions at issue.[19]

VII. It Is For The Court, Not OAG, To Determine Whether Waiver Has Occurred.

OAG correctly notes that the privilege holder "bears the burden of showing that privilege and work-product protection has not been waived." Mem. at 53. But Morgan Lewis is not bound by OAG's assertion that waiver has occurred, and cannot be faulted for refusing to accept OAG's *ipse dixit* that waiver occurred. *See* NJA Aff. at ¶ 16 ([redacted]); ECF No. 107 at 4 ([redacted]

[19] In the event this Court does compel Attorney Dillon's testimony, it should also enter an order permitting counsel for TTO to attend that deposition, thereby allowing TTO to protect its privileges in real time.

[redacted]); ECF No. 112 at 6 ([redacted]).

There are legal disputes between OAG and TTO over asserted privileged protections and claimed waivers of privilege that OAG has long known this Court must decide. Until a decision on these issues is made by this Court, it continues to be improper and counter-productive for OAG to put third-party subpoena recipients and legal counsel in the untenable position of responding to demands for the production of documents over which the privilege-holder has asserted privilege protections.

CONCLUSION

For the foregoing reasons, Respondents Morgan Lewis and Attorney Dillon respectfully ask this Court to deny OAG's petition, insofar as that petition's request for relief is directed at Morgan Lewis and/or Attorney Dillon.

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Dated: September 16, 2020

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