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; and SHERI DILLON,

Respondents.

Index No. _____

Motion Sequence _____

(REDACTED)

MEMORANDUM OF LAW IN SUPPORT OF THE ATTORNEY GENERAL'S SPECIAL PROCEEDING AND APPLICATION TO COMPEL RESPONDENTS TO COMPLY WITH INVESTIGATORY SUBPOENAS

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PRELIMINARY STATEMENT

This application seeks to compel Respondents—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—to produce documents and provide testimony responsive to lawful subpoenas issued by the New York State Office of the Attorney General (OAG) as part of OAG's ongoing confidential civil investigation into potential fraud or illegality under Executive Law § 63(12).

OAG is currently investigating whether the Trump Organization and Donald J. Trump (Mr. Trump) improperly inflated the value of Mr. Trump's assets on annual financial statements in order to secure loans and obtain economic and tax benefits. One particular focus of this inquiry, as relevant here, is whether the Trump Organization and its agents improperly inflated, or caused to be improperly inflated, the value of the Seven Springs Estate.[1] Valuations of Seven Springs were used to claim an apparent $21.1 million tax deduction for donating a conservation easement on the property in tax year 2015, and in submissions to financial institutions as a component of Mr. Trump's net worth. OAG has not concluded its investigation and has not reached a determination regarding whether the facts identified to date establish violations of law.

There is no dispute that the subpoenas were lawfully issued, and Respondents have already produced significant amounts of responsive information. Following OAG's service of the subpoenas *duces tecum* to the Trump Organization and the other Respondents in December 2019 and thereafter, the parties have engaged in extensive good-faith discussions to facilitate

[1] Seven Springs is a parcel of real property consisting of approximately 212 acres within the towns of Bedford, New Castle, and North Castle in Westchester County, New York.

Respondents' compliance with the subpoenas, and subsequently to attempt to resolve OAG's concerns regarding the responses to those subpoenas. First Aff. ¶¶ 60-72, 116-132, 158-164, 193.[2] In the course of those discussions, the parties' disagreements have narrowed to a subset of disputed issues as to which the parties are now at impasse. OAG brings this application to present to the Court various unfounded and overbroad privilege assertions relating to responsive documents and testimony.

1. The Trump Organization has asserted privilege claims over purely business records and communications disclosed to third parties, claiming that they are protected by the *Kovel* doctrine. But that doctrine is inapplicable here. The *Kovel* doctrine extends the attorney-client privilege to an attorney's communication with certain third parties, but only when the third parties act essentially as a conduit for legal advice. Here, by contrast, the third parties who sent or received the ostensibly privileged communications did not facilitate communications with counsel, and were instead hired to serve the Trump Organization's *business* purposes. *See United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) ("[I]f the advice sought is the [non-legal professional's], rather than the lawyer's, no privilege exists."). Indeed, the Trump Organization's own outside counsel testified as much. First Aff. ¶ 177.

In addition, after initially professing to comply and agreeing on a date for testimony, the Trump Organization has now refused entirely to comply with a subpoena for Eric Trump's testimony.[3] Citing "those rights afforded to every individual under the Constitution," First Aff.

[2] Citations to "First Aff." are to the First Affirmation of Matthew Colangelo dated August 21, 2020 (First Aff.), and to the exhibits accompanying that affirmation. As set out in the separate Memorandum of Law in Support of the Attorney General's Motion to File *In Camera* and Under Seal, OAG has sought the Court's leave to file these exhibits under seal.

[3] Eric Trump is currently Executive Vice President of the Trump Organization, President of Seven Springs LLC, and Chairman of the Advisory Board of the Donald J. Trump Revocable Trust.

¶ 111, the Trump Organization has advised that Eric Trump will not comply with OAG's subpoena at all. Because Executive Law § 63(12) authorizes the Attorney General to take testimony where it bears a "reasonable relation to the subject-matter under investigation and to the public purpose to be achieved," *Matter of La Belle Creole Int'l, S.A. v. Attorney-General of the State of N.Y.*, 10 N.Y.2d 192, 196 (1961)—and because that threshold is easily met in connection with the testimony sought here—Eric Trump's categorical refusal to appear is unlawful, and he should be compelled to testify.

2. Respondent Charles Martabano has withheld hundreds of responsive records without even identifying those documents or attempting to substantiate the basis for his claims of privilege—a deficiency he has failed or refused to cure after months of discussion, and which waives any claim of privilege that may have attached. Mr. Martabano also refused to answer questions during his § 63(12) examination based on categorical and overbroad assertions of privilege or work-product protection that fail because his communications were disclosed to third parties, and because in many instances he was not providing legal advice.

3. Respondent Morgan Lewis is similarly withholding thousands of communications on claims of privilege that fail because the communications reflect principally a business—not a legal—function. And Morgan Lewis partner Sheri Dillon declined to answer numerous questions during her § 63(12) examination where no privilege could plausibly attach—going so far as to refuse to answer questions about basic facts necessary to determine if a privilege could even arise.

Petitioner therefore respectfully requests that the Court reject all of Respondents' privilege assertions and grant OAG's motion in its entirety.

BACKGROUND

I. The Attorney General's authority under Executive Law § 63(12).

Executive Law § 63(12) allows the Attorney General to bring a proceeding "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business."

The term "fraud" is "given a wide meaning so as to embrace all deceitful practices contrary to the plain rules of common honesty, including all acts, even though not originating in any actual evil design to perpetrate fraud or injury upon others, which do tend to deceive or mislead." *People ex rel. Cuomo v. Greenberg*, 95 A.D.3d 474, 483 (1st Dep't 2012). The term "illegality," as used in § 63(12), encompasses a violation of any federal, state, or local law or regulation. *People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 104 (3d Dep't 2005), *aff'd on other grounds*, 11 N.Y.3d 105 (2008); *see also Oncor Commc'ns, Inc. v. State,* 165 Misc. 2d 262, 267 (Sup. Ct. Albany Cty. 1995), *aff'd*, 218 A.D.2d 60 (3d Dep't 1996). The requirement to show "persistent" or "repeated" acts is met by, among other things, a showing of "separate and distinct fraudulent or illegal acts which affected more than one individual." *People v. 21st Century Leisure Spa Int'l Ltd.*, 153 Misc. 2d 938, 944 (Sup. Ct. N.Y. Cty. 1991); *see also State of New York v. Wolowitz*, 96 A.D.2d 47, 61 (2d Dep't 1983) (recognizing that § 63(12) allows "the Attorney-General to bring a proceeding when the respondent was guilty of only one act of alleged misconduct, providing it affected more than one person"); Exec. Law § 63(12) (defining "persistent" and "repeated").

OAG has broad authority under the statute to issue subpoenas and take sworn testimony to determine whether a proceeding should be brought. Exec. Law § 63(12). A sufficient factual basis for a § 63(12) subpoena exists if there is a "reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." *La Belle Creole*, 10 N.Y.2d at 196.

Because the Attorney General is presumed to be acting in good faith when issuing a subpoena, *Am. Dental Coop., Inc. v. Attorney-General*, 127 A.D.2d 274, 280 (1st Dep't 1987), a § 63(12) subpoena will not be quashed unless it seeks material "utterly irrelevant to any proper inquiry" or where the futility of the process "to uncover anything legitimate is inevitable or obvious." *La Belle Creole*, 10 N.Y.2d at 196; *see also Hogan v. Cuomo*, 67 A.D.3d 1144, 1145 (3d Dep't 2009) ("The information forming the factual basis need not be sufficient to establish fraud or illegality, or even provide probable cause, as long as the futility of the process is not inevitable or obvious.").

II. The Attorney General's investigation.

OAG opened this civil investigation in March 2019, after Michael Cohen, a former senior executive of the Trump Organization, produced to Congress copies of Donald J. Trump's financial statements for 2011, 2012, and 2013. *See* H. Hrg. 116-03 (Feb. 27, 2019), at 38. Mr. Cohen testified that these statements inflated the values of Mr. Trump's assets to obtain favorable terms for loans and insurance coverage, while also deflating the value of other assets to reduce real estate taxes. *See id.* at 13, 19, 38-39, 160.

Following that testimony, OAG began an investigation and determined that the financial statements were, in fact, provided to financial institutions. OAG also began to investigate whether such statements contained inflated values and were used in a way that would establish a violation of law. OAG has issued a number of subpoenas and has taken testimony seeking information material to these matters. OAG has not concluded its investigation and has not reached a determination regarding whether the facts identified to date establish violations of any applicable laws.

Given the confidentiality of this ongoing investigation, only the factual background necessary to present this motion to compel is set out in the following discussion. Additional

information regarding the factual basis for OAG's investigation regarding these and related matters is more fully set out in the Second Affirmation of Matthew Colangelo dated August 21, 2020 (Second Aff.), filed *in camera*. *See Michaelis v. Graziano*, 5 N.Y.3d 317, 323 (2005).

A. Mr. Trump's annual financial statements.

Since at least 2004, Mr. Trump and the Trump Organization have prepared an annual "Statement of Financial Condition of Donald J. Trump" similar to the documents Mr. Cohen produced to Congress. First Aff. ¶ 28. These statements contain Mr. Trump's assertions of net worth, based principally on asserted values of particular assets or groups of assets minus outstanding debt. The Statements of Financial Condition were compiled by accounting firm Mazars USA LLP (Mazars),[4] and relied on supporting data and documentation prepared by the Trump Organization. *Id.* ¶ 29.

Mr. Trump's Statements of Financial Condition were submitted to various financial institutions [redacted]

B. Seven Springs property valuation and conservation easement.

One of the assets included in Mr. Trump's Statements of Financial Condition is a property known as the Seven Springs Estate. Seven Springs is a parcel of real property that consists of approximately 212 acres within the towns of Bedford, New Castle, and North Castle in Westchester County, New York. *See* First Aff. ¶ 32. The property was purchased in

[4] "Mazars" includes predecessor entities Weiser LLP and Weiser Mazars LLP.

December 1995 for $7.5 million by Seven Springs LLC, which is part of the Trump Organization. *Id.*

Between approximately 1996 and 2014, Mr. Trump made various efforts to develop Seven Springs as a golf course, or to subdivide it for residential development. *See id.* ¶ 33. After these efforts failed or ceased, Mr. Trump decided to grant a conservation easement on Seven Springs, and thus apparently take an income tax deduction based on the lost development value of the property.[5] *See id.*

The Trump Organization retained an appraisal firm to provide a value for the easement. *Id.* ¶ 34. On June 1, 2015, Eric Trump on behalf of Seven Springs LLC, "c/o The Trump Organization," engaged Cushman & Wakefield, Inc., an appraiser and commercial real estate services company, "[t]o document the value of a conservation easement placed on a parcel of land for Federal and State income tax purposes." *Id.* ¶ 35. The engagement letter states that the appraisal "is intended only for" that use, *see id.*; and federal tax filings indicate that this appraisal was used for that purpose. *Id*.

On December 11, 2015, Mr. Trump executed an agreement whereby Seven Springs LLC granted a conservation easement over approximately 158 acres of its property to the North

[5] Property owners who donate land to a qualified organization, or who donate a conservation easement that restricts the uses of the property, can claim the value of that donation as an income tax deduction from their federal taxes. *See* 26 U.S.C. § 170(b)(1)(E), (h)(1); 26 C.F.R. § 1.170A-14. Under New York law, there is a linkage with various modifications between a taxpayer's state tax return and the taxpayer's federal return. *See, e.g.*, N.Y. Tax Law § 612(a). To minimize the risk of abuse and substantiate the value of a donation in excess of certain thresholds, federal law requires a taxpayer claiming an income tax deduction for the value of donated real property to obtain a written appraisal report prepared in accordance with generally accepted appraisal standards. *See* 26 U.S.C. § 170(f)(11)(E); 26 C.F.R. §§ 1.170A-13(c)(2), 1.170A-14(a), (i). The IRS has noted that some taxpayers, "often encouraged by promoters and armed with questionable appraisals, take inappropriately large deductions for easements." Internal Revenue Service, *Conservation Easements*, at https://www.irs.gov/charities-non-profits/conservation-easements.

American Land Trust (NALT). *Id.* ¶ 36. On March 15, 2016, Cushman issued a written appraisal that valued the property as of December 1, 2015. *Id.* ¶ 37. The March 2016 appraisal determined that Seven Springs was worth $56.5 million as of December 1, 2015, before placement of the easement, and further concluded that the easement's value was $21.1 million. *Id.* ¶ 38. Seven Springs LLC likewise identified the "appraised fair market value" of the conservation easement as $21.1 million on tax forms submitted to the IRS in 2016 reporting the claimed value of donated property for income tax purposes. *Id.* ¶ 39.

Information regarding the valuation of Seven Springs is significant to the Attorney General's investigation. [redacted]

C. 40 Wall Street.

40 Wall Street is an office building located on Wall Street in New York City. The Trump Organization owns a "ground lease" pertaining to the property; that is, it holds a leasehold interest in the land and buildings on the land, but pays rent (known as ground rent) to the fee owner. First Aff. ¶ 40. The Trump Organization entered into a note and mortgage in connection with 40 Wall Street in 2005 with North Fork Bank, which subsequently merged into Capital One.

Id. ¶41. In 2010, that note and mortgage were modified to have a total principal loan amount of $160 million, $20 million of which was personally guaranteed by Mr. Trump. *Id.* ¶ 42. Loan documents required Mr. Trump [redacted] In approximately July 2015, the Trump Organization refinanced the $160 million loan on 40 Wall Street pursuant to a note and mortgage with Ladder Capital Finance, which was subsequently securitized pursuant to an agreement between Ladder Capital and Wells Fargo. First Aff. ¶ 44.

Information regarding the Trump Organization's reporting of the value of 40 Wall Street is significant to the Attorney General's investigation. [redacted]

D. Trump International Hotel and Tower Chicago.

The Trump Organization's business portfolio includes a property located in Chicago, Illinois known as the Trump International Hotel and Tower Chicago. First Aff. ¶ 45. In 2009 and all subsequent years, this property was omitted from Mr. Trump's Statement of Financial Condition, and OAG sought information as to the reason for this omission. In the course of that inquiry, OAG learned (as set forth more fully below) that large portions of the debt owed by the Trump Organization related to this property were forgiven, but OAG has been unable to confirm that these sums were recognized as taxable income.

In connection with the acquisition and development of the property, 401 North Wabash Venture LLC (401 North Wabash), the entity that owned the property, obtained loans secured by

mortgages on the property; and 401 Mezz Venture LLC (401 Mezz) which owned all of the equity interest in 401 North Wabash, obtained a loan from Fortress Credit Corporation (Fortress) secured by a pledge of the shares of 401 North Wabash (the Mezzanine Loan). *Id.* ¶ 46.

In or about July 2010, Fortress and 401 Mezz agreed to restate the Mezzanine Loan to reduce the outstanding principal and interest. *Id.* ¶ 47. When there is a reduction in the amount of an outstanding debt, there may be a taxable event for the borrower. 26 U.S.C. § 61(a)(11). Here, 401 Mezz deferred recognizing as income the amount of the debt forgiven by Fortress. First Aff. ¶ 48.

In or about March 2012, Fortress agreed to accept a discounted prepayment of the Mezzanine Loan. *Id.* ¶ 49. At the time, the amount of the outstanding debt, including interest and fees, was approximately $150 million; Fortress accepted $48 million in full satisfaction of the debt, forgiving more than $100 million. *Id.* Here again, the forgiveness of a portion of the debt may have been a taxable event to the borrower. 26 U.S.C. § 61(a)(11).

In the course of its investigation, OAG has sought merely to confirm that the amounts forgiven by Fortress were ultimately recognized as income (or an explanation as to why the Trump Organization was not required to do so). First Aff. ¶ 84. OAG raised this issue with the Trump Organization on or about April 7, 2020, and after subsequent discussions, the Trump Organization represented that its Chief Financial Officer, Allen Weisselberg, would testify as to those relevant matters. *Id.* ¶¶ 85-86. Mr. Weisselberg did not, however, have personal knowledge and the Trump Organization subsequently refused to produce documents to confirm these basic facts. *Id.* ¶¶ 87-93. Information regarding these transactions is significant to the Attorney General's investigation because of the general requirement that amounts forgiven under loan agreements ultimately be recognized as income, and because of the omission of this

property from Mr. Trump's personal financial statements. [redacted]

E. Trump National Golf Club – Los Angeles.

The Trump Organization's business portfolio includes a golf course and clubhouse in Los Angeles County, California, known as the Trump National Golf Club – Los Angeles (Trump Golf LA). On December 26, 2014, Mr. Trump executed an agreement whereby two Trump Organization entities, VH Property Corp. and VHPS LLC, granted a conservation easement over 11.54 acres of its property to the Palos Verdes Peninsula Land Conservancy. First Aff. ¶ 50. On March 4, 2015, Cushman issued a written appraisal that valued the property as of December 26, 2014. *Id.* ¶ 51. The appraisal determined that the Trump Organization's holdings were worth $107 million before placement of the easement, and further concluded that the easement's value was $25 million. *Id.* ¶ 52. Information regarding the valuation of Trump Golf LA is significant to the Attorney General's investigation. [redacted]

III. Assertions of privilege.

A. Subpoenas to the Trump Organization.

Based on information developed in the course of its investigation, OAG determined that subpoenas for documents and testimony from the Trump Organization were pertinent to and would assist the Attorney General's investigation. As relevant to this motion to compel, OAG accordingly served the subpoenas described below.

1. Subpoena for documents from the Trump Organization and Seven Springs LLC. OAG served subpoenas *duces tecum* on the Trump Organization and Seven Springs LLC on December 27, 2019. First Aff. ¶ 55. OAG's subpoena to the Trump Organization sought records related to the Statements of Financial Condition, and both subpoenas sought records related to the Seven Springs easement donation. *Id.* ¶ 56.

OAG and the Trump Organization (and Seven Springs LLC) have engaged in extensive good-faith discussions concerning the Trump Organization's compliance with the subpoenas, and subsequently to attempt to resolve OAG's concerns regarding the Trump Organization's responses to those subpoenas. *Id.* ¶¶ 60-72. The parties' disagreements have narrowed to a subset of disputed issues as to which the parties are now at impasse.

First, the Trump Organization is withholding or redacting dozens of responsive records—on the basis of attorney-client privilege, work product, or both—that relate to three properties important to OAG's investigation: Seven Springs, 40 Wall Street, and Trump Golf LA. *Id.* ¶¶ 74-83. Second, the Trump Organization has refused entirely to produce documents that would establish whether the loan forgiveness in connection with the loans on the Chicago property was recognized as income for tax purposes. *Id.* ¶¶ 90-93. Third, the Trump Organization is refusing to produce records that would confirm how the $21.1 million donation of the Seven Springs easement was reflected on applicable tax returns. *Id.* ¶¶ 94-98.

2. Subpoena for testimony from Allen Weisselberg. Allen Weisselberg is the Trump Organization's Chief Financial Officer. Based on information developed in the course of its investigation, OAG determined that Mr. Weisselberg likely possessed information relevant to OAG's inquiry, and served a subpoena for his testimony pursuant to Executive Law § 63(12) on March 18, 2020. *Id.* ¶ 58. After numerous discussions and several adjournments, counsel agreed to produce Mr. Weisselberg on July 16 and July 17. *Id.*

In the course of this examination, OAG asked Mr. Weisselberg if he had testified in the past before a federal grand jury (which has been reported publicly, and which Mr. Weisselberg himself is free to disclose). *Id.* ¶ 101. Counsel for Mr. Weisselberg asked for an opportunity to confer with other attorneys before Mr. Weisselberg answered any questions regarding the substance of any federal grand jury testimony. OAG conferred further with counsel present for Mr. Weisselberg, and the parties agreed to adjourn further questions on that matter to a subsequent examination date, so that counsel could have an opportunity to confer and advise Mr. Weisselberg appropriately. *Id.* ¶ 102. The examination proceeded as to other topics before concluding for the day. *Id.* ¶ 103.

Subsequently, after conferring further with separate counsel for Mr. Weisselberg, OAG advised that it did not intend to seek a court order compelling Mr. Weisselberg to answer any questions regarding the substance of any grand jury testimony, and would agree not to inquire into that topic during the continuation of Mr. Weisselberg's § 63(12) examination. *Id.* ¶ 104. On August 20, 2020, Mr. Weisselberg agreed through counsel to appear for the conclusion of his § 63(12) examination. *Id.* ¶ 105.

3. Subpoena for testimony from Eric Trump. As noted above, Eric Trump is an officer of the Trump Organization and Seven Springs LLC. *Id.* ¶ 15. Based on evidence developed in the

course of its investigation, OAG determined that Eric Trump likely possessed information relevant to OAG's inquiry [redacted]

On May 26, 2020, OAG served a subpoena for his testimony pursuant to Executive Law § 63(12). First Aff. ¶ 59.

By agreement with the Trump Organization's counsel, Eric Trump's examination was scheduled for July 22, and was subsequently confirmed for that date. *Id.* ¶ 107. Less than two days before Eric Trump's examination, counsel for the Trump Organization wrote OAG to advise that the Trump Organization had unilaterally decided not to produce Eric Trump on July 22 as scheduled. *Id.* ¶ 108. Asserting in *ipse dixit* fashion that questions OAG had posed to Mr. Weisselberg the prior week were "beyond the scope of [OAG's] civil inquiry," the Trump Organization requested confirmation that OAG was conducting a civil investigation, and unilaterally adjourned Eric Trump's attendance at his scheduled examination "until these issues have been resolved." *Id.*

OAG responded the next day to that letter and informed the Trump Organization that "[t]his Office does not currently have an open criminal investigation into these matters," that "we have not coordinated with another criminal law enforcement agency on matters related to this investigation," and that "if at any point we become aware of information that prompts this Office to open a criminal investigation or referral, we will advise counsel and proceed accordingly." *Id.* ¶ 109. OAG also requested Eric Trump's prompt availability for a rescheduled examination to be scheduled within the next week. *Id.* ¶ 110.

Despite receiving the requested assurances, counsel for the Trump Organization refused to comply with the subpoena to Eric Trump. Instead, on July 27, 2020, the Trump Organization advised that "we cannot allow the requested interview to go forward . . . pursuant to those rights afforded to every individual under the Constitution." *Id.* ¶ 111.

B. Subpoenas to Charles Martabano.

Charles Martabano is a land-use attorney who worked with the Trump Organization in connection with the potential development of the Seven Springs property beginning in or around 2011. *Id.* ¶ 112. OAG determined that Mr. Martabano would likely possess non-privileged information relevant to OAG's inquiry, including information regarding Mr. Martabano's frequent communications on these matters with third parties (such as local government agencies, engineering firms, and others). *Id.* ¶ 113. As described further below, OAG accordingly served subpoenas for both documents and testimony from Mr. Martabano.

1. Subpoena for documents from Mr. Martabano. OAG served a subpoena *duces tecum* on Mr. Martabano on January 8, 2020. *Id.* ¶ 115. Through counsel, Mr. Martabano initially refused to review or produce any records responsive to the January 8 subpoena, asserting that OAG had no authority to subpoena records from Mr. Martabano, that Mr. Martabano would decline to produce records on Fifth Amendment grounds, and that OAG should withdraw its subpoena. *Id.* ¶ 116. After further correspondence and several meet-and-confer discussions with counsel to both Mr. Martabano and the Trump Organization, Mr. Martabano agreed on March 2 that he would review and produce responsive records. *Id.* ¶ 117.

Mr. Martabano produced non-privileged records and a privilege log to OAG on June 18. *Id.* ¶ 120.[6] On June 19, Mr. Martabano's counsel represented that "our privilege review is complete," and that "[a]ll documents in Mr. Martabano's possession responsive to the subpoena duces tecum that are not listed on the privilege log have been produced." *Id.* ¶ 121.

Mr. Martabano's June 18 privilege log contained 344 entries for documents withheld in whole or in part. *Id.* ¶ 122. Of those 344 entries, 268 identify the withheld documents only by a document ID number and statement of the claimed privilege (*i.e.*, "Attorney Client Privilege," "Attorney Client Communications," and/or "Attorney Work Product"), with no other information regarding the subject, author, recipients, or subject-matter summary of the document, and no further explanation of the basis for the withholding. *Id.* ¶ 123. The remaining 76 documents listed on the privilege log are identified with basic information regarding the date, sender, and recipients of the document, and with the same conclusory indication of the claimed privilege identified above, again with no further explanation of the basis for the withholding. *Id.* ¶ 124.

OAG advised Mr. Martabano's counsel that the June 18 privilege log was insufficient to justify the assertions of privilege and too cursory to permit any reasonable discussion between the parties. *Id.* ¶¶ 125-126. In the course of extensive correspondence and discussions, Mr. Martabano's counsel at first refused to cure the deficiencies in the June 18 privilege log before subsequently agreeing on July 8, 2020 to produce a revised privilege log on an indefinite timeline. *Id.* ¶¶ 128-131. Counsel has not to date produced a corrected privilege log and has not provided a date certain—or agreed to provide a date certain—for doing so. *Id.* ¶¶ 133, 136.

[6] Mr. Martabano's counsel provided records to the Trump Organization for its privilege review on or about April 9. First Aff. ¶ 118. Citing circumstances related to the coronavirus pandemic, other logistical difficulties, and the press of other work, counsel for the Trump Organization completed its privilege review almost two months later, on or about June 3. *Id.* ¶ 119.

2. Subpoena for testimony from Mr. Martabano. OAG served a subpoena *ad testificandum* on Mr. Martabano on June 15, 2020. *Id.* ¶ 137. Mr. Martabano initially agreed to provide testimony on July 7, but then refused to appear on that date, citing the parties' disagreement regarding the adequacy of Mr. Martabano's privilege log. *Id.* ¶ 138. Mr. Martabano subsequently agreed to appear on July 21, and his testimony was taken on that date. *Id.* ¶ 139.

Mr. Martabano's counsel directed Mr. Martabano not to answer any questions concerning any communications with representatives of the Trump Organization, including Eric Trump, even where those communications included third parties or did not relate to legal advice. *Id.* ¶ 140. Counsel also directed Mr. Martabano not to answer questions that counsel characterized as calling for "opinion" or "expert" testimony, including questions relating to a Town of Bedford resolution that Mr. Martabano drafted, discussed, and negotiated with an adverse party (the Bedford town planner). *Id.* ¶ 145.

In the course of his examination, Mr. Martabano testified that he reviewed documents in preparation for his testimony that refreshed his recollection as to matters OAG inquired about, and that had not been produced to OAG. *Id.* ¶¶ 146-148. In particular, Mr. Martabano testified that "virtually anything that I looked at would refresh my recollection, to be honest. This happened a long time ago." *Id.* ¶ 148. Based on that testimony, OAG requested "the production of all documents reviewed by this witness that refreshed his recollection to assist or aid in his testimony today." *Id.* ¶ 149. Mr. Martabano's counsel's response was a flat refusal: "It is not going to be produced." *Id.* ¶ 150.

By letter the following day, July 22, OAG memorialized its concerns regarding the objections that Mr. Martbano's counsel lodged during the July 21 examination, and requested

that those objections be withdrawn. *Id.* ¶ 153. Mr. Martabano's counsel responded on July 30 and refused to withdraw any of the objections asserted during Mr. Martabano's testimony. *Id.* ¶ 154. Mr. Martabano made two subsequent corrected productions of records, which his counsel said may be duplicative, were not accompanied by a privilege log, and did not represent a withdrawal of all privilege assertions identified on the existing privilege log. *Id.* ¶¶ 134-136.

C. Subpoenas to Morgan, Lewis & Bockius LLP.

Based on information developed in its investigation, OAG determined that Morgan Lewis and Vinson & Elkins, LLP (Vinson), the firms where Ms. Dillon performed her work on the Seven Springs and other transactions, would have relevant and non-privileged information. On December 19, 2019, OAG served subpoenas *duces tecum* on both firms. *Id.* ¶ 155.

1. Subpoena for documents from Morgan Lewis. At the outset of its discussions with the firms, OAG explained that it had subpoenaed the firms because it believed that each had responsive, non-privileged material, including records related to work performed for a business purpose and over which any claim of privilege has been waived. *Id.* ¶ 158. The firms agreed to review responsive records for non-privileged materials related to their work for the Trump Organization on potential and actual conservation easement donations.[7] *Id.* ¶ 159.

Morgan Lewis initially withheld numerous documents under boilerplate claims of privilege, but subsequently agreed to re-produce privilege logs with more specific descriptions of the records being withheld. *Id.* ¶ 162. Since January, Morgan Lewis has produced about 2,900 Morgan Lewis documents and 1,250 Vinson documents in response to the subpoenas. *Id.* ¶ 161.

As reflected on the privilege logs and discussed extensively among the parties, Morgan

[7] Vinson and Morgan Lewis agreed that Vinson would provide documents in its possession to Morgan Lewis, which Morgan Lewis would then review and (where no privilege was identified) produce to OAG. First Aff. ¶ 160.

Lewis has withheld responsive records on attorney-client privilege or work product grounds that OAG believes relate to work performed for business, not legal, purposes. *Id.* ¶ 164. In particular, except for communications involving third parties, Morgan Lewis has refused to produce substantive communications about any topic between Sheri Dillon and key employees of the Trump Organization, including Eric Trump. *Id.* ¶ 165. Similarly, Morgan Lewis has refused to produce what the firm refers to as its (or Vinson's) "purely internal files," including any files from their document management systems. *Id.* ¶ 166.

All told, Morgan Lewis is withholding or has redacted more than 3,000 documents relating to its and Vinson's work on the conservation easements under attorney-client, work-product, or other assertions. These records include:

- Documents withheld under a "settlement privilege" that purportedly relate to a settlement [redacted] *see id.* ¶ 168;
- Records relating to the business decision of *whether* to make an easement donation—including preliminary valuations performed by Cushman appraisers—and on what land the easement would be donated, *see id.* ¶ 169;
- Drafts, comments on, or edits to materials that are required under Treasury regulations to be produced by the appraisers—not the Trump Organization or counsel—and communications shared within the firms or with the Trump Organization about such materials, *see id.* ¶ 169; and
- Records reflecting advice on topics like compliance with Treasury regulations, zoning, development approvals, or environmental impact review where privilege or work-product protections have been waived by disclosure to Cushman, the IRS, OAG, or other third parties—and a broader set of records whose privilege or work-product protections the Trump Organization waived by disclosure of any legal advice regarding the conservation easements, *see id.* ¶ 170.

In discussions and correspondence, OAG has requested that these privilege assertions be withdrawn and that Morgan Lewis produce the documents. They have refused. *Id.* ¶ 171.

2. Subpoena for testimony from Sheri Dillon. OAG served a subpoena *ad testificandum* on Morgan Lewis partner Sheri Dillon on June 15, 2020. *Id.* ¶ 198. Ms. Dillon gave sworn testimony on August 11, 2020. *Id.*

At Ms. Dillon's examination, counsel objected and directed the witness not to answer questions on grounds similar to those that Morgan Lewis has cited in withholding documents—asserting a "settlement privilege" in objecting to questions [redacted]; attorney-client privilege and work-product protection in connection with Ms. Dillon's communications regarding business advice; and failing to acknowledge waiver of privilege or work-product protection where Morgan Lewis's communications have already been disclosed to OAG and other parties. First Aff. ¶¶ 199-202. Counsel made additional objections and directed the witness not to answer questions about the identity of the Trump Organization employee who, as Ms. Dillon told Cushman, had informed Dillon that "final [Town of Bedford] approvals would take another 3 to 6 months"; as well as questions regarding basic facts necessary to determine whether an attorney-client privilege or work-product protection applied at all. *Id.* ¶¶ 203-204.

D. Additional subpoenas issued in the course of this investigation.

In addition to the subpoenas OAG seeks to enforce by this motion, certain other subpoenas issued in the course of this investigation are pertinent to this motion to compel. Prior communications between the parties concerning these subpoenas are relevant background because, in the course of those communications, the Trump Organization withdrew all assertions of privilege, including when subpoena enforcement litigation was imminent.

1. Subpoenas for documents and testimony from Cushman & Wakefield. Cushman & Wakefield, Inc (Cushman), is the appraisal firm that the Trump Organization retained for several projects, including to document the value of the conservation easement placed over the Seven Springs Estate for federal and state income tax purposes. *Id.* ¶ 35. The Attorney General served

an initial subpoena *duces tecum* on Cushman on June 25, 2019. *Id.* ¶ 214. Based on information produced in response to that subpoena, OAG served other subpoenas on Cushman seeking additional documents and testimony. *Id.* ¶¶ 214-218.

The Trump Organization initially interposed numerous privilege objections to documents and testimony responsive to the Cushman subpoenas, broadly asserting that a *Kovel* relationship applied to all Cushman engagements involving Seven Springs. *Id.* ¶¶ 220-222. The parties negotiated these privilege disputes for more than two months before reaching impasse in mid-December 2019. *Id.* ¶¶ 224-228.

Having reached impasse, on December 17, 2019, OAG advised the Trump Organization that "[t]he Attorney General will seek judicial intervention today to compel Cushman & Wakefield's compliance with six investigatory subpoenas we have served on Cushman." *Id.* ¶ 228. That day, and shortly before OAG was to commence a proceeding in court, the Trump Organization agreed to withdraw "all assertions of privilege with regard to any documents or testimony from Cushman in response to the subpoenas issued by our office in connection with this investigation." *Id.*

2. Subpoenas for documents and testimony from Ralph Mastromonaco. Ralph Mastromonaco is a New York State licensed engineer who performed engineering services in connection with the Seven Springs development plan, including drafting subdivision maps, submitting documents to the town engineer of the Town of Bedford, and attending meetings of the Town of Bedford's Planning Board in support of applications for various approvals submitted by Seven Springs LLC. *Id.* ¶¶ 232-233. OAG served subpoenas for documents and testimony on Ralph Mastromonaco on December 5, 2019. *Id.* ¶ 231.

On December 10, 2019, OAG contacted the Trump Organization to confirm that the Trump Organization did not intend to assert any privilege in connection with the subpoenas served on Mr. Mastromonaco. *Id.* ¶ 234. On December 17, the Trump Organization confirmed that it was asserting no privileges as to Mr. Mastromonaco. *Id.* ¶ 240. The Trump Organization subsequently withheld communications involving Mr. Mastromonaco from the Trump Organization's own subpoena responses, and later stated that it would "reserve all privilege objections with respect to any and all documents and testimony involving Mastromonaco (with the exception of communications solely between Mastromonaco and Cushman and no other party)." *Id.* ¶¶ 242-249.

ARGUMENT

I. The Trump Organization has failed to comply with the Attorney General's subpoenas.

The Court should grant the Attorney General's motion to compel compliance with the subpoenas for documents and testimony issued to the Trump Organization and its officers.

A. The attorney-client privilege does not justify withholding the documents at issue.

1. Legal standard.

The attorney-client privilege "shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016) (citing C.P.L.R. 4503(a)(1)). The privilege "must be narrowly construed" because it "shields from disclosure pertinent information and therefore 'constitutes an obstacle to the truth-finding process.'" *Id.* at 624 (quoting *In re Jacqueline F.*, 47 N.Y.2d 215, 219 (1979)). The party asserting privilege bears the burden of establishing the privilege applies, and must show that the communications at issue were not only "between an

attorney and a client" but also made "'for the purpose of facilitating the rendition of legal advice or services'"; that the communications were "predominantly of a legal character"; that the communications were confidential; and that the privilege was not waived. *Id.* (quoting *Rossi v. Blue Cross Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593-94 (1989)).

Any privilege is waived if "a communication is made in confidence but subsequently revealed to a third party." *Id.* These rules ensure that the attorney-client privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* (quoting 8 Wigmore, Evidence § 2291 at 554 (McNaughton rev. 1961)).

In narrow circumstances, an attorney's communications with a non-client third party may be covered by the privilege if the "communications are made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communications." *People v. Osorio*, 75 N.Y.2d 80, 84 (1989) (citing *Kovel*, 296 F.2d at 921-22). This "*Kovel* exception" applies only 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). However, as the Second Circuit explained in considering whether the attorney-client privilege extended to an accountant employed by a law firm, the communications at issue must "be made in confidence for the purpose of obtaining *legal advice from the lawyer*. If what is sought is not legal advice but only accounting service, or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." *Kovel*, 296 F.2d at 922.

2. The Trump Organization cannot establish that the relevant communications were made for the purpose of rendering legal advice or were predominantly of a legal character.

The attorney-client privilege does not apply to the documents the Trump Organization is withholding because all evidence establishes that these communications were for a *business*

purpose, not for the purpose of rendering legal advice.

First, the Trump Organization is withholding dozens of communications on a claim of attorney-client privilege, on the ground that an attorney received or sent the communication—even though the records relate to the business purpose of obtaining Town of Bedford approval for residential subdivision of the Seven Springs property. First Aff. ¶¶ 74-75. Of these records, approximately forty are communications that involve Ralph Mastromonaco, the engineer hired to assist the Trump Organization with engineering plans required for the town approval process. *Id.* ¶ 75. An additional record is an email described as relating to "the potential engagement of a consultant" for the Seven Springs project in late May or early June 2015. *Id.* ¶ 76. And a final document includes redactions to an email from Eric Trump dated May 30, 2012, that he states will provide "a better context" for the documents attached to the email, which include sketch maps of the Seven Springs property. *Id.* ¶ 77. These records relate to the Trump Organization's business purpose of realizing a financial benefit from the subdivision, development, and sale of single-family lots on the Seven Springs estate—a longstanding business purpose of the Trump Organization, and one they discussed publicly and frequently.

These communications are not "predominantly of a legal character." *Ambac*, 27 N.Y.3d at 624. Mr. Mastromonaco performed services expressly limited to engineering services for the purpose of informing the Trump Organization's business decisions. *See* First Aff. ¶¶ 75, 233. When a business entity hires an outside party to prepare a report for a business purpose, the resulting communications and work product are not "of a legal character." *NYAHSA Servs., Inc. Self-Insurance Trust v. People Care Inc.*, 155 A.D.3d 1208, 1210 (3d Dep't 2017).

That these communications included the Trump Organization's outside law firm does not change this conclusion. As explained, the attorney-client privilege attaches only to

communications between an attorney and her client, and here Mr. Mastromonaco was not a client of the Trump Organization's outside counsel. Moreover, "information received by the attorney from other persons and sources while acting on behalf of a client do not come within the attorney-client privilege." *Kenford Co. v. County of Erie*, 55 A.D.2d 466, 469 (4th Dep't 1977); *see also Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 379 (1991); *Galasso v. Cobleskill Stone Prods., Inc.*, 169 A.D.3d 1344, 1347 (3d Dep't 2019).

Second, the Trump Organization is withholding documents that relate to the business purpose of claiming a tax deduction for donating a conservation easement over part of the Trump Golf LA property. One record is an email concerning payment in connection with the Trump Golf LA conservation easement, and includes outside counsel Sheri Dillon. In justifying this withholding, the Trump Organization's counsel explained that the easement was "a transaction which Ms. Dillon was primarily responsible for handling." First Aff. ¶ 79. This explanation defeats any privilege claim because a party cannot cloak a business matter in privilege by putting a lawyer in charge of it. The conservation easement was donated for the business purpose of obtaining a valuable tax benefit, *id.* ¶ 33; and 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." *Saran v. Chelsea GCA Realty P'ship*, 174 A.D.3d 759, 760-61 (2d Dep't 2019).

The Trump Organization is also withholding four communications regarding the Trump Golf LA easement that are exclusively between non-attorney employees (Heidi Mitchell and Jeff McConney) on a claim of "Privileged Communication." First Aff. ¶ 81. The Trump Organization has explained that these emails reflect Trump Organization employees responding to a request from counsel for information relating to an easement donation. *Id.* But the facts

establish that these communications relate to Cushman & Wakefield's appraisal of the Trump Golf LA conservation easement for business or tax purposes. One of the documents is a November 10, 2014 email stating that the request is "coming from Jill Martin and the team she is working with . . . I believe it is Cushman & Wakefield." Cushman & Wakefield was engaged the week before, on November 3, 2014, to "document the value of a conservation easement placed over a parcel of land located on the Trump National Golf Club Los Angeles for Federal and State income tax purposes." *Id.* Communications for the business purpose of estimating the value of a conservation easement to be placed on part of Trump Golf LA are not communications to "facilitat[e] the rendition of legal advice." *Ambac*, 27 N.Y.3d at 624.

Third, the Trump Organization has refused to produce one document described as an email from Mr. McConney to in-house counsel copying an outside accountant regarding the "Guarantor Statement of Financial Condition" for 40 Wall Street. First Aff. ¶ 82. The Trump Organization has also informed OAG that the communication is from "Mr. McConney to one of the Trump Organization's in-house attorneys concerning compliance with certain financial reporting obligations set forth in a loan agreement." *Id.* ¶ 83.

As noted above, the Trump Organization's loan with Capital One at the time required [redacted]

Communications for this business purpose, particularly when copied to the Trump Organization's third party accounting firm, are not "predominantly of a legal character" nor primarily made for the purpose of seeking legal advice. *Ambac*, 27 N.Y.3d at 624.

3. *Kovel* does not apply here.

The Trump Organization's communications with Ralph Mastromonaco, *see* First Aff. ¶ 75, must be disclosed for the separate reason that communications disclosed to a third party are

not protected by the attorney-client privilege. In extensive correspondence and during multiple meet-and-confer discussions, the only justification the Trump Organization has presented for its expansive privilege claim is that the *Kovel* doctrine protects these communications with Mr. Mastromonaco. *Id.* ¶¶ 75, 249. This assertion fails on both the law and the facts.

Kovel is a narrow doctrine that extends the attorney-client privilege to communications with a non-client third party *only* when the third party is hired to "facilitate communications" between the attorney and the client, *Osorio*, 75 N.Y.2d at 84; and only if the third party's role is to "help[] the attorney understand . . . information passed to the attorney by the client," such as by performing a role "analogous to an interpreter," *Ackert*, 169 F.3d at 139. In other words, the third party must be so inextricably tied to a confidential attorney-client communication, and so necessary for attorney and client to communicate with each other, as to become part of that privileged conversation. By contrast, where "the advice sought is the [non-legal professional's], rather than the lawyer's, no privilege exists." *Kovel*, 296 F.2d at 922.

Mr. Mastromonaco simply was not performing the limited role that *Kovel* covers. His purpose was not to help the Trump Organization understand its own lawyers, or vice versa; to the contrary, he testified that in performing his work on the Seven Springs project, he did not (and was not hired to) interpret or translate information between the Trump Organization and any of its lawyers, or to provide legal advice. First Aff. ¶ 233. The facts are instead clear that Mr. Mastromonaco was performing a separate business function—preparing engineering designs that, far from being limited to confidential attorney-client conversations, would instead be *submitted to a public agency* to obtain local government permission for residential development. *See supra* Part III.D.2.

The Trump Organization is also withholding two documents on attorney-client privilege

grounds that were copied to an external third-party accountant (Mr. Bender). But Mr. Bender testified that his function was not to facilitate communications between an attorney and the Trump Organization, and that he was not engaged to assist outside counsel and the Trump Organization understand each other on financial matters. First Aff. ¶ 80.

Under similar circumstances, courts have rejected attempts to invoke *Kovel*. In *United States v. Richey*, 632 F.3d 559 (9th Cir. 2011), a law firm hired an appraiser to appraise a property for purposes of a client's claiming a charitable deduction. *Id.* at 562. The Ninth Circuit held that *Kovel* provided no protection because "any communication related to the preparation and drafting of the appraisal for submission to the IRS was not made for the purpose of providing legal advice, but instead for the purposes of determining the value of the Easement." *Richey*, 632 F.3d at 569. The Third Department likewise recently concluded that an appraisal prepared by a firm retained by a party's counsel in litigation was not privileged, where "the primary purpose for which [the appraiser] was hired was to appraise [an asset] for estate tax filing purposes." *Galasso*, 169 A.D.3d at 1346-47; *accord Ackert*, 169 F.3d at 138-40 (holding that no *Kovel* privilege applied where in-house tax counsel consulted with an investment banker about the tax consequences of an investment); *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995) (holding that no *Kovel* privilege applied when a party's lawyer consulted an accounting firm for advice concerning the "tax implications of" a proposed merger).

Because Mr. Mastromonaco and Mr. Bender were hired to perform non-legal services (as an engineer and accountant, respectively), no attorney-client privilege applies to the withheld communications, and OAG respectfully requests that the Court order their production.

B. The Trump Organization has refused, without justification, to produce certain documents responsive to OAG's subpoenas.

The Trump Organization has refused entirely to produce documents in response to two

specific investigative inquiries relating to (1) the tax treatment of Fortress's forgiveness of debt in connection with the Chicago loan; and (2) the tax treatment of the Seven Springs easement donation.

1. For more than four months, OAG has sought documents or information necessary to confirm that amounts forgiven by Fortress in connection with the Trump Organization's loan on the Chicago property were ultimately recognized as income. First Aff. ¶¶ 84-85, 92. On May 1, 2020, OAG agreed to forebear on previous requests for documents on this issue after the Trump Organization committed that "we have confirmed that Allen Weisselberg will testify under oath that in connection with the applicable 2012 tax return, Trump recognized as income the amount of the debt that was forgiven by Fortress in connection with the 2012 Transaction." *Id.* ¶ 86. When examined by OAG, however, Mr. Weisselberg testified that he had no first-hand knowledge of this fact, had not reviewed the relevant documents to confirm that any such understanding was true, could not identify any return on which the forgiveness was treated as income, and instead was relying solely upon his recollection of conversations he had years earlier with the Trump Organization's accountants concerning the tax treatment of the amount of the debt that was forgiven. *Id.* ¶ 87.

Following that testimony, OAG asked the Trump Organization on July 29, August 7, and August 13 to produce documents sufficient to confirm that the loan forgiveness was recognized as income. *Id.* ¶¶ 88-89. The Trump Organization has declined to do so, and has failed entirely to present any argument why it should not. The Trump Organization has never argued—nor could it—that these records are "utterly irrelevant to any legitimate inquiry." *La Belle Creole*, 10 N.Y.2d at 196. And the parties have discussed this issue for more than four months, which—especially given the extremely targeted nature of OAG's request—far exceeds any reasonable

time period needed to comply. *See, e.g.*, *Am. Friends of Yeshivat Ohr Yerushalayim, Inc. v. United States*, No. 04-CV-1798 (CPS), 2009 WL 1617773, at *14 (E.D.N.Y. June 9, 2009). Production of responsive records should be compelled.

2. OAG has also sought information regarding the tax treatment of the Seven Springs conservation easement donation. First Aff. ¶ 94-97. As noted, OAG has identified evidence in the course of this investigation that Seven Springs LLC claimed the $21.1 million value of the conservation easement on tax forms submitted to the IRS for tax year 2015. *Id.* ¶ 94. Because Mr. Weisselberg was unable to testify regarding the tax treatment of the $21.1 million donation on the tax returns for the entities and individuals that owned Seven Springs LLC (including DJT Holdings LLC, Bedford Hills Corp, and Mr. Trump), OAG sought production of records from the Trump Organization sufficient to confirm how the $21.1 million donation was reflected on applicable federal, state, and city tax returns. *Id.* ¶ 96. The Trump Organization has declined to produce those records, instead suggesting to OAG that the tax forms prepared by Seven Springs LLC should suffice. *Id.* ¶ 98.

Mr. Trump was at all relevant times the ultimate beneficial owner of all direct and indirect interests in Seven Springs LLC, and the treatment of the $21.1 million donation on the owner's applicable tax returns is self-evidently pertinent to OAG's investigation. In response to OAG's targeted requests, the Trump Organization has never argued relevance, privilege, undue burden, or inability to comply—indeed, the Trump Organization has never given any reason whatsoever for ignoring OAG's request for these responsive records. The Court should compel the Trump Organization to produce these records without further delay.

C. Eric Trump's testimony should be compelled.

Eric Trump has no plausible basis to defy a lawful subpoena, and his testimony should be compelled.

As set forth above, a subpoena is sufficiently supported if it has a "reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." *La Belle Creole*, 10 N.Y.2d at 196. Under that standard, in order to *quash* the subpoena (a remedy not even sought by Eric Trump) he would have to demonstrate that any "information sought is utterly irrelevant to any proper inquiry" or that "the futility of the process to uncover anything legitimate is inevitable or obvious." *Libre by Nexus, Inc. v. Underwood*, 181 A.D.3d 488 (1st Dep't 2020) (quoting *Matter of Kapon v. Koch*, 23 N.Y. 3d 32, 38 (2014)); *see also La Belle Creole*, 10 N.Y.2d at 196.

The evidence in the Attorney General's possession demonstrates beyond any doubt that Eric Trump cannot meet that demanding standard. The Trump Organization has already agreed that Eric Trump is a custodian whose documentary evidence would be produced in response to the Attorney General's subpoenas, and numerous relevant communications involving Eric Trump have been produced by other parties (in many cases with notice to, and no objection from, the Trump Organization). *See, e.g.*, First Aff. ¶ 61; [redacted] There is no basis to deny the Attorney General the ability to examine Eric Trump regarding that evidence. Perhaps recognizing as much, Eric Trump initially agreed to appear to testify on July 22, balking less than two days before he was scheduled by agreement to give testimony. First Aff. ¶¶ 107-108.

As to the substance of matters relating to Seven Springs, Eric Trump was intimately involved in the Trump Organization's development efforts on the Seven Springs site.[8] [redacted]

[8] Material widely available on the Internet demonstrates his familiarity with the Seven Springs property. For example, in the video at the following link, Eric Trump describes the property in detail and makes representations regarding development approvals. Forbes Life, *Growing Up Trump: Inside the Family's $19.5M Estate*, YouTube (July 17, 2014), https://www.youtube.com/watch?v=z6oZeEiyb_w.

[redacted] In light of the evidence of Eric Trump's direct involvement in these and other events, it is impossible for him to demonstrate his testimony would be "utterly irrelevant" to the Attorney General's inquiry.

As described above, Eric Trump, through a letter by his counsel describing OAG's § 63(12) subpoena as a "request," purported to invoke "those rights afforded to every individual under the Constitution" as justification for refusing to testify. First Aff. ¶ 111. This refusal to appear followed OAG's assurance that this Office does not currently have an open criminal investigation into these matters, has not coordinated with another criminal law enforcement agency on these matters, and would promptly advise the Trump Organization's counsel if at any

point OAG opened a criminal investigation or made a criminal referral. *Id.* ¶ 109. OAG's response fully addressed any concerns the Trump Organization's counsel claimed to have.

Given the context in which this abrupt turnabout arose (purported concern about a criminal proceeding), it is possible to read it as an invocation of the Fifth Amendment privilege.[9] But is well-established that "a blanket claim of [such] privilege could not be invoked prior to questions actually having been asked." *Application of Waterfront Comm'n of N.Y. Harbor*, 245 A.D.2d 63, 64 (1st Dep't 1997); *see also Matter of Parkhouse v. Stringer*, 17 Misc. 3d 1119(A) (Sup. Ct. N.Y. Cty. 2007), *aff'd*, 55 A.D.3d 1 (1st Dep't 2008), *aff'd*, 12 N.Y.3d 660 (2009). Hence, the Fifth Amendment cannot plausibly support Eric Trump's blanket refusal to testify. Nor has Eric Trump established any other basis to refuse to comply with his "general duty to give what testimony one is capable of giving." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).[10]

The Court should therefore "direct[] respondent to appear and respond to specific questions, at which time he [can] avail himself of the Fifth Amendment privilege." *Waterfront Comm'n*, 245 A.D.2d at 64.

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[9] The Fifth Amendment privilege against self-incrimination of course applies not only in criminal cases, but also in civil and administrative proceedings; and, whereas silence may not lead to an adverse inference in a criminal case, it may do so in a civil proceeding. *DeBonis v. Corbisiero*, 155 A.D.2d 299, 300-01 (1st Dep't 1989) (adverse inference drawn in fraud case).

[10] The Trump Organization also stated in its July 27, 2020 letter that it would not comply with the subpoena to Eric Trump because of "certain public statements by the Attorney General directed at our clients." First Aff. ¶ 111. The Trump Organization has not identified any statements that implicate Eric Trump's constitutional rights, and courts have rejected like claims from Eric Trump in the recent past. *See People v. Trump*, 62 Misc. 3d 500, 509 (Sup. Ct. N.Y. Cty. 2018) (rejecting motion to dismiss by Eric Trump and other respondents based on alleged appearance of partiality or bias by the Attorney General, and holding that "given the very serious allegations set forth in the petition, I find that there is no basis for finding that animus and bias were the sole motivating factors for initiating the investigation and pursuing this proceeding"); *accord Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 707 (S.D.N.Y. 2018) (reviewing the Attorney General's public statements and finding no basis to "infer an improper purpose from any of these comments"; instead, the "comments suggest only that [the Attorney General] believes that an investigation is justified").

II. Mr. Martabano has failed to comply with the Attorney General's subpoenas for documents and testimony.

The Court should grant the Attorney General's motion to compel compliance with the subpoena *duces tecum* and subpoena *ad testificandum* served on Charles Martabano.

A. Mr. Martabano's claims of privilege over responsive documents are waived for failure to substantiate the claims on an adequately detailed privilege log.

In response to OAG's January 8 subpoena *duces tecum*, Mr. Martabano has withheld hundreds of admittedly responsive records that are identified on a privilege log containing—at best—boilerplate statements of privilege. First Aff. ¶¶ 123-124. OAG has advised Mr. Martabano on numerous occasions over a period of months that such cursory privilege invocations are insufficient to establish a basis for withholding responsive records. *Id.* ¶¶ 125-131. Mr. Martabano's refusal to cure this deficiency after multiple opportunities waives any claim of privilege and warrants compelled disclosure of these records.

As noted, the party asserting a privilege bears the burden of establishing that the privilege applies. *Ambac*, 27 N.Y.3d at 624. To establish application of a privilege, the responding party must identify withheld documents with a specific claim of privilege and sufficient information to describe how that claim of privilege applies. *Anonymous v. High Sch. For Envtl. Studies*, 32 A.D.3d 353, 359 (1st Dep't 2006) ("defendants failed to assert anything more than boilerplate claims of privilege, which are insufficient as a matter of law"). The "mere assertion that items constitute attorney's work product or material prepared for litigation will not suffice." *Graf v. Aldrich*, 94 A.D.2d 823, 824 (3d Dep't 1983). Instead, the responding party must present an appropriately detailed privilege log to substantiate any claim of privilege. *See, e.g.*, *Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 566 (2d Dep't 2012) (citing *Chakmakjian v. NYRAC, Inc.*, 154 A.D.2d 644, 645 (2d Dep't 1989)); *see also Anonymous*, 32 A.D.3d at 359; *Fox Paine & Co., LLC v. Houston Cas. Co.*, 51 Misc. 3d 1212(A) (Sup. Ct. Westchester Cty. 2016).

Here, Mr. Martabano produced a privilege log listing 344 responsive documents withheld from production, of which 268 identify the withheld documents only by a document ID number and statement of the claimed privilege—nothing more. First Aff. ¶ 123. The remaining 76 entries on the privilege log contain only basic bibliographic information (including sender, subject, and date), along with the same bare statements of claimed privilege: "Attorney Client Privilege," "Attorney Client Communications," and/or "Attorney Work Product." *Id.* ¶ 124. Mr. Martabano has failed or refused to cure these shortcomings after months of specific and repeated requests. *Id.* ¶¶ 125-133. Mr. Martabano's refusal to cure has hindered OAG's investigation and made it impossible for OAG to assess and discuss the merits of these privilege claims as to the hundreds of documents Mr. Martabano is withholding.

Mr. Martabano's repeated failure to provide a privilege log that contains even the most basic information needed to support his claims of privilege "amounts to a waiver of any claim of privilege for the documents sought." *Anonymous*, 32 A.D.3d at 359 (ordering disclosure for failure to provide a privilege log). OAG served the subpoena *duces tecum* on Mr. Martabano more than seven months ago, on January 8, 2020. First Aff. ¶ 115. Mr. Martabano failed to produce any documents in response to a January 2020 subpoena until June 2020, and then produced a log utterly failing to meet required standards. *Id.* ¶¶ 125-133. Mr. Martabano's repeated refusal to provide even rudimentary information on a privilege log more than seven months after being subpoenaed is a stall tactic that should result in the waiver of any alleged privilege claims.[11] *Essex Ins. Co. v. Interstate Fire & Safety Equip. Co. / Interstate Fire & Safety Cleaning Co.*, 263 F.R.D. 72, 76-77 (D. Conn. 2009) (ordering disclosure where party's

[11] Waiver due to these plainly insufficient logs is particularly appropriate because the Trump Organization (the holder of any purported privilege) was intimately involved in the privilege review of Mr. Martabano's responsive documents. First Aff. ¶¶ 118-119.

failure to support its privilege claims for "more than five months" was a "stall tactic that unquestionably and unfairly delayed discovery").

B. The attorney-client privilege does not justify Mr. Martabano's refusal to testify about *all* conversations with any representative of the Trump Organizaion.

In response to OAG's June 15, 2020 subpoena *ad testificandum*, Mr. Martabano appeared for a § 63(12) examination and gave sworn testimony on July 21. First Aff. ¶¶ 137, 139. During that examination, Mr. Martabano's counsel objected numerous times on privilege grounds and directed Mr. Martabano not to respond to *any* questions concerning Mr. Martabano's conversations with Eric Trump or other individuals at the Trump Organization—even after being asked to limit objections to communications that concerned or related to legal advice. *Id.* ¶ 141. Mr. Martabano's counsel also directed the witness not to answer any questions concerning communications about documents he sent to or received from representatives of the Trump Organization, even where those documents were also communicated to or shared with third parties. *Id.* ¶ 142.

These objections are unsupportable. As noted in Part I.A.1 above, it is black-letter law that a party invoking the attorney-client privilege must establish that the communications at issue were made to facilitate "the rendition of legal advice or services" and were "predominantly of a legal character." *Ambac*, 27 N.Y.3d at 624 (quoting *Rossi*, 73 N.Y.2d at 593-94). Yet Mr. Martabano's counsel expressly declined OAG's request to narrow his instruction only to communications regarding legal advice, First Aff. ¶ 141, effectively taking the view that every communication by an attorney is *ipso facto* privileged. That is not the law. *See Ambac*, 27 N.Y.3d at 624 (explaining that the attorney-client privilege "must be narrowly construed" because it "shields from disclosure pertinent information and therefore 'constitutes an obstacle to the truth-finding process.'") (quoting *In re Jacqueline F.*, 47 N.Y.2d at 219).

Equally foundational is the doctrine that the attorney-client privilege only applies where the communication is made *in confidence*; communications between a client and counsel in the known presence of a third party are not privileged. *Id.* at 625; *see also Osorio*, 75 N.Y.2d at 84. Yet counsel directed Mr. Martabano not to answer questions about communications that went beyond Mr. Martabano's client (the Trump Organization), and instead were shared with third parties, including Ralph Mastromonaco. First Aff. ¶ 142. There is no privilege here.

Mr. Mastromonaco does not meet the narrow exception discussed in Part I.A.3 above where the third party is engaged in a role akin to a "hired interpreter" necessary to facilitate communication between attorney and client. *Osorio*, 75 N.Y.2d at 84; *see also Kovel*, 296 F.2d at 921-22. For the reasons noted earlier, Mr. Mastromonaco was not performing such a role; and more important, Mr. Martabano made no showing that he was: counsel objected to questions about communications between Mr. Martabano and Mr. Mastromonaco on the bare assertion that "[t]o the extent that Ralph Mastromonaco is on there, he is clearly a member of the legal team assisting in the things that [Mr. Martabano] was doing." First Aff. ¶ 143. This claim falls short of establishing that Mr. Mastromonaco was performing the role of "hired interpreter" whose assistance was necessary to enable communication between an attorney and client.[12]

C. Mr. Martabano's refusal to answer questions on the ground that they called for "opinion" testimony is improper.

During Mr. Martabano's examination, counsel repeatedly objected and directed the witness not to provide any testimony which counsel incorrectly characterized as "expert opinion." *Id.* ¶ 145. In particular, counsel objected to a line of questions concerning the Town of Bedford resolution relating to the potential development of the Seven Springs property, and

[12] In addition, as noted *supra* Part III.D, the the Trump Organization long ago waived any privilege that may ever have existed with respect to communications with Mr. Mastromonaco.

which Mr. Martabano personally discussed and negotiated with town officials. *Id*. In response to questions about Mr. Martabano's understanding of a particular term that he had negotiated in the resolution, counsel directed Mr. Martabano not to answer on the ground that "he is not here as an expert witness." *Id.* ¶ 145.

This objection was unsupportable because OAG's questions went squarely to Mr. Martabano's knowledge and understanding of a document he negotiated. Mr. Martabano testified that he was personally involved in negotiations with the Town of Bedford regarding the resolution; had factual information as to what was discussed; and also had factual information regarding what the parties understood the terms of the document to mean at the time that document was negotiated. *Id.* ¶ 145. Testimony regarding the facts surrounding a document Mr. Martabano negotiated with an adverse party, including the meaning of key terms in that document, does not in any way call for improper opinion testimony; to the contrary, it is core factual testimony within the witness's personal knowledge. *See, e.g.*, *313-315 W. 125th St. L.L.C. v Arch Specialty Ins. Co*., 138 A.D.3d 601, 602 (1st Dep't 2016) (noting issue of intent and deposition testimony of person who negotiated agreement); *Blackburn Food Corp. v. Ardi, Inc.*, 66 N.Y.S. 3d 840, 844-46 (Sup. Ct. Suffolk Cty. 2017) (crediting testimony from witness with personal knowledge regarding the parties' intent in lease negotiations). It is absurd to suggest that the understanding of a person who negotiated the term of a resolution can be categorically shielded from discovery by lawful subpoena simply by categorizing it as opinion.

Indeed, even if the testimony sought from Mr. Martabano were his lay opinion (and it is not), that is no basis to withhold it when sought by lawful subpoena. Even at a *trial*, there is no categorical prohibition on opinion testimony by such a lay witness. Instead, a witness may offer a lay opinion "when the subject matter of that testimony is such that it is impossible to accurately

describe certain facts without including some opinion or impression." *People v. Dax*, 233 A.D.2d 177, 178 (1st Dep't 1996) (witness may offer lay opinion "when the subject matter of that testimony is such that it is impossible to accurately describe certain facts without including some opinion or impression") (citing *People v. Russell*, 165 A.D.2d 327, 332 (2d Dep't 1991), *aff'd*, 79 N.Y.2d 1024 (1992)); *accord* Fed. R. Evid. 701. Because such testimony is admissible in a trial, it follows that an "opinion" objection provides no basis to shield testimony in response to an investigative subpoena like the one at issue here.

D. Mr. Martabano improperly refused to produce documents that he reviewed and that refreshed his recollection.

Finally, Mr. Martabano testified that he reviewed documents in preparation for his testimony that refreshed his recollection as to matters OAG inquired about, and that had not been produced to OAG. First Aff. ¶¶ 146-148. Based on that testimony, OAG requested the documents that refreshed Mr. Martabano's recollection to assist in his testimony, and Mr. Martabano's counsel categorically refused. *Id.* ¶¶ 149-150 ("It is not going to be produced."). That position is meritless.

"An adversary is entitled to inspect, and use on cross-examination, a writing that was reviewed by a witness to refresh her recollection while testifying." Robert A. Barker & Vincent C. Alexander, 5 Evidence in New York State & Federal Courts § 6:81 (2d ed. 2001 & supp. 2019). This right "helps protect against the introduction of false, forged or manufactured evidence." *Id.*; *see also* N.Y. Guide to Evidence § 6.09(2) (quoting *People v. Gezzo*, 307 N.Y. 385, 394 (1954)). This principle applies equally to review of writings to refresh recollection *before* testifying at a pre-trial examination. *See McDonough v. Pinsley*, 239 A.D.2d 109, 109 (1st Dep't 1997); *Grieco v. Cunningham*, 128 A.D.2d 502, 502 (2d Dep't 1987); *Doxtator v. Swarthout*, 38 A.D.2d 782, 782 (4th Dep't 1972).

It follows that when a witness uses a writing to refresh his recollection, and then testifies based on that recollection, any privilege over a document that refreshed his recollection is waived (with a narrow exception described below). In particular, "the conditional privilege that attaches to material prepared for litigation is waived when used by a witness to refresh a recollection prior to testimony." *Beach v. Touradji Capital Mgmt., LP*, 99 A.D.3d 167, 171 (1st Dep't 2012). Similarly, any privilege over factual material prepared at counsel's direction is waived by review before a deposition to refresh the witness's recollection. *Merrill Lynch Realty Commercial Servs., Inc. v. Rudin Mgmt. Co., Inc.*, 94 A.D.2d 617 (1st Dep't 1983). The Second Department likewise has held that *any* privilege under C.P.L.R. 3101, including the attorney-client privilege and work product protections, is waived over a document when a witness reviews that document "to refresh his recollection as to the events of the incident" before a deposition. *Grieco*, 128 A.D.2d at 502.

These principles apply here. Mr. Martabano's testimony could not have been clearer: virtually everything he reviewed refreshed his recollection about the events pertaining to the Seven Springs property. First Aff. ¶¶ 146-148. Hence, such materials must be produced.

A limited exception to that principle may apply to information that is attorney work product in the narrow sense of that term under C.P.L.R. 3101(c).[13] In the context of adversarial litigation between two parties, the First Department has concluded that work-product protection

[13] The "work product" protection in New York is "limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy." *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep't 1980). "That is, it must be something peculiar to the lawyer's trade and talent. The defendant's lawyer may have undertaken a factual investigation and drawn up a report of it. If a lay person could have done the same thing, the report does not enjoy the immunity of (c) merely because the lawyer drew it instead." C.P.L.R. 3101, Practice Commentaries (citing *Geffner v. Mercy Med. Ctr.*, 125 A.D.3d 802 (2d Dep't 2015)).

under C.P.L.R. 3101(c) is not waived by the pre-deposition review of material that is "impressions, directions, etc., of counsel" and conveyed "by the attorney." *Beach*, 99 A.D.3d at 170-72.

That limited exception would not permit counsel's blanket refusal to produce here. Mr. Martabano was acting essentially as a lobbyist: negotiating various engineering, lot design, plat design, and other similar matters between the Trump Organization and the Town of Bedford, appearing before the Planning Board, and urging the Board members to approve a subdivision. First Aff. ¶ 112; [redacted] Such work plainly does not consist, even primarily, of work that is uniquely a lawyerly skill. *Cf. Matter of Grand Jury Subpoena (Bekins Record Storage Co.)*, 62 N.Y.2d 324, 329 (1984) (no privilege as to communications with lawyer acting as commercial consultant); *U.S. Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 164 (E.D.N.Y.1994) ("Lobbying conducted by attorneys does not necessarily constitute legal services for purposes of the attorney-client privilege."). Neither Mr. Martabano nor the Trump Organization have claimed that Mr. Martabano played any role in litigation on behalf of Seven Springs. In addition, because such documents may reflect the conduct of negotiations with town officials, any such protection would be waived (by disclosure of underlying facts to town officials in negotiations) or never have existed (because it reflected information from town officials). *See Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991*, 959 F.2d 1158, 1165 (2d Cir. 1992) ("Documents created by and received from an unrelated third party and given by the client to his attorney in the course of seeking legal advice do not thereby become privileged."); *United States v. Robinson*, 121 F.3d 971, 975 (5th Cir. 1997).

At a minimum, as occurred in *Beach*, the Court should require Mr. Martabano to promptly submit to the Court for *in camera* review any document he reviewed in preparation for

his deposition—and identify with specificity which, if any, portions of those materials are protected by the narrow work product protection of C.P.L.R. 3101(c).

III. Morgan Lewis has failed to comply with the subpoenas.

The Court should grant the Attorney General's motion to compel compliance with the subpoenas for documents and testimony issued to Morgan Lewis and Sheri Dillon.

A. Morgan Lewis cannot establish that the relevant communications were made for the purpose of rendering legal advice or were predominantly of a legal character.

As discussed *supra* Part I.A.2, communications for a business purpose are not protected under attorney-client privilege. 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." *Saran*, 174 A.D.3d at 760-61. Instead of asserting the privilege "cautiously and narrowly," however, Morgan Lewis has withheld all substantive communications with the Trump Organization and communications internal to Morgan Lewis despite the plainly apparent business purpose of much of Ms. Dillon's work on the easement donation projects. The Court should compel Morgan Lewis to revisit its privilege assertions and withhold only those portions of records that relate specifically to the provision of legal advice.

Ms. Dillon and her associates "facilitated"—or, according to the Trump Organization's own characterization of their role, "quarterback[ed]"—projects establishing the value of potential easement donations, considering them, and then fulfilling the requirements to make the donations tax deductible. First Aff. ¶¶ 172, 223. This work involved coordinating communications and deliverables between ecologists, appraisers, engineers, and the Trump Organization to ensure that each party provided any information related to evaluating the potential value of such a donation, deciding if a donation would provide sufficient economic benefit, and then producing

the necessary components for a tax-deductible easement donation. *Id.* ¶ 172. Coordinating the work necessary to evaluate the economic benefit of, and then obtain, a conservation easement is a business role.

As the Trump Organization's repeated requests—coordinated through Ms. Dillon—for preliminary valuations show, it cannot be seriously disputed that Ms. Dillon and others working with her at the firm performed business work on the Seven Springs, Trump Golf LA, and other potential easement-donation transactions. On behalf of the Trump Organization, Ms. Dillon obtained multiple valuations of each property before the easements' donation. *Id.* ¶ 173. The evidence shows that the Trump Organization, with Ms. Dillon, used these preliminary valuations to consider the business decision of whether donating an easement would provide sufficient economic benefit—not legal issues like whether an easement could be donated in compliance with the tax code. For instance, in describing the decision not to make the Trump Golf LA easement donation in 2012 after a low preliminary valuation, Ms. Dillon explained she and her client had delayed the planned transaction: "Given the weak market in 2012, we put the project on hold while looking for a more fulsome market recovery." *Id.* ¶ 174. The Trump Organization's coordination of these preliminary valuations—and the business decision of whether to make donations relying on the valuations—through counsel does not make the communications legal in nature.

Although Ms. Dillon claimed in testimony that she would have to disclose "how I go about providing . . . legal advice" to explain why she obtained a "preliminary valuation" before a client decided to donate a conservation easement, evidence OAG has obtained shows otherwise. *Id.* ¶ 175. First, the Cushman appraiser who performed a preliminary valuation for Seven Springs testified specifically that he was asked to provide a "preliminary range of values" as a

"preliminary factfinding decision-making tool" for the Trump Organization and Ms. Dillon: "This was just information that we were trying to develop for them to make a business decision." *Id.* ¶ 176. Second, the Morgan Lewis associate who worked on the Seven Springs transaction testified that he knew of no requirement in the Treasury regulations to provide preliminary valuations, and explained that the Cushman appraisers provided preliminary valuations so that the Trump Organization could make a "business decision." *Id.* ¶ 177.

Any withheld communications about preliminary valuations are therefore not privileged because they were for a business purpose, *see NYAHSA Servs.*, 155 A.D.3d at 1210, and are not "predominantly of a legal character." *Ambac*, 27 N.Y.3d at 624. One example, an email from Eric Trump that Ms. Dillon forwarded to Cushman, illustrates the absence of any legal component to these discussions: Eric Trump identified two comparable properties for Ms. Dillon and argued that the properties should increase Cushman's valuation of the Seven Springs property. First Aff. ¶ 178. Ms. Dillon appears to have forwarded that email to Cushman while editing only the subject line to say "comps from Eric," but Morgan Lewis withheld or has not identified Mr. Trump's initial email to Ms. Dillon. Regardless, the email shows that Ms. Dillon, Eric Trump, and the Cushman appraiser were discussing the business question of Seven Springs' correct valuation—not the tax code or legal advice. *Id.*

Other communications between Ms. Dillon and the Cushman appraisers further demonstrate the business purpose of this work. These communications frequently addressed the economic assumptions and valuation decisions central to the work the Cushman appraisers were required to perform. *Id.* ¶ 179. The Trump Organization's and Ms. Dillon's December 2015 response to a valuation in a draft of the Seven Springs appraisal suggests that, in that case, her client communications were not of a legal nature at all: as memorialized in an email the appraiser

wrote afterwards, Ms. Dillon told the Cushman appraiser that "the client blew up at her," and Ms. Dillon thus began "trying to convince us to restore the $2,100,000 [valuation for each development lot], begin sales during year 1, and anything else that would push it up." *Id.* ¶ 183. In another communication, Cushman resisted repeated comments from Morgan Lewis about valuation-related factors in the appraisal, including (among others) the timing of expected lot sales: "We've been over these issues and there is no point in dredging them up again. It's time to agree to disagree and move on." *Id.* ¶ 184.

Additional evidence makes even more clear that Morgan Lewis, in "quarterbacking" the transaction, was acting as a go-between to coordinate among the different parties to the donation, a business transaction. After the March 2016 appraisal was completed and all necessary parties had executed an IRS Form 8283 documenting the transaction, NALT alerted Morgan Lewis to a problem with the appraisal: the appraisal used a definition of "market value" relevant to a real-estate related financial transaction, not the definition related to easement-donation valuations. Raising NALT's concern to Cushman, Morgan Lewis asked Cushman to change its March 15, 2016 appraisal to correct the error NALT had identified. In response, Cushman followed the advice initially provided by NALT to Morgan Lewis, and provided a revised appraisal in April, updated to reflect the date of the revision. At Ms. Dillon's instruction, a Morgan Lewis lawyer then asked one of the Cushman appraisers to backdate the appraisal to March 15. The appraiser refused, citing her obligations under appraisers' professional standards. *Id.* ¶ 185. It cannot be contended that records relating to this episode—conveying the third party donee's request regarding Cushman's work product and asking Cushman to backdate that appraisal—were created solely for the purpose of providing legal advice to the Trump Organization, or were uniquely the product of a lawyer's learning and professional skills. *See*

infra Part III.C. OAG is entitled to all records related to Morgan Lewis's communications with NALT and Morgan Lewis's request to Cushman for a backdated appraisal.

To be clear, OAG does not contend that, absent the waiver explained in Part IV below, Morgan Lewis must produce legitimately privileged communications that relate to legal advice regarding the appraisals' compliance with tax law. But Morgan Lewis's refusal to produce internal and client communications that clearly relate to distinct business functions is not supportable.

B. Morgan Lewis's broad work-product claims cannot be supported.

Morgan Lewis is withholding or has redacted more than 2,500 documents on broad and unsupportable claims of work-product protection. New York law recognizes a protection for "[a]ttorney's work product," C.P.L.R. 3101(c), and for trial preparation materials prepared by an attorney, C.P.L.R. 3101(d)(2). Neither provision can plausibly be stretched to cover the extraordinarily broad claims of protection Morgan Lewis has asserted—for instance, to all "purely internal" documents. First Aff. ¶ 166.

The trial-preparation protection provided under C.P.L.R. 3101(d)(2) is "narrowly applied to materials prepared by an attorney, acting as an attorney, which contain his or her analysis and trial strategy." *NYAHSA Servs.*, 155 A.D.3d at 1211 (quoting *Kinge v. State of New York*, 302 A.D.2d 667, 670 (3d Dep't 2003)). Only "documents prepared principally or exclusively to assist in anticipated or ongoing litigation" fall within these protections, and documents drafted to comply with regulatory requirements are not protected work product where they were "designed to serve more than [the] one purpose" of assisting in litigation. *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 116 (Sup. Ct. N.Y. Cty. 2003). Documents prepared to satisfy tax valuation requirements—like those at issue here—do not fall within these where there was no reason to anticipate any litigation over the value of Seven Springs. As the Morgan Lewis

associate working with Ms. Dillon on the Seven Springs project testified, his sole purpose was to ensure that the work satisfied the legal requirements for deductibility, First Aff. ¶ 187—not, as Morgan Lewis now seeks to contend, to anticipate any litigation that might arise after those regulations were satisfied. *Richey*, 632 F.3d at 568 (appraisal work file for conservation easement was not prepared "because of" prospect of litigation because appraisal was required to be attached to federal tax forms).

The much narrower work-product privilege contained in C.P.L.R. 3101(c) applies only to "materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *In re N.Y. City Asbestos Litig.*, 109 A.D.3d 7, 12 (1st Dep't 2013). Morgan Lewis appears to be withholding thousands of records that it cannot establish were "prepared by counsel acting as such." *Id.* (*quoting Brooklyn Union Gas Co. v. Am. Home Assurance Co.*, 23 A.D.3d 190, 190-91 (1st Dep't 2005)).

As discussed *supra*, much of Morgan Lewis's work appears to have been business work that a consultant could perform, or comments or edits to the work performed by other professionals, such as appraisers. By definition, none of that work is "uniquely" lawyerly. For example, Morgan Lewis prepared tables and other materials to be slotted into the Cushman appraisal—"work product" that, under the Treasury regulations, is uniquely that of the appraiser. First Aff. ¶ 188. This work does not fall under the work-product protections of C.P.L.R. § 3101(c): "the term attorney's work product is self-explanatory . . . and 'the attorney cannot convert . . . the independent work of another, already performed, into his own.'" *Stenovich*, 195 Misc. 2d at 117 (quoting *Montgomery Ward Co. v. City of Lockport,* 44 Misc. 2d 923, 925 (Sup. Ct. Niagara Cty. 1964)). Morgan Lewis's edits, additions, or comments to other professionals'

work—whether "purely internal" or shared with the client or other parties—must be produced, as must any other work product that does not fall within C.P.L.R. 3101(c)'s narrow scope.

C. Morgan Lewis should produce documents that its former associate testified refreshed his recollection.

During his testimony, a former Morgan Lewis associate who worked on the Seven Springs transaction with Ms. Dillon testified at least nine times that documents he reviewed in preparation for his testimony refreshed his recollection. First Aff. ¶ 189. OAG reasonably requested that Morgan Lewis provide those documents, or, if it wished to assert claims of privilege, log them. Morgan Lewis refused to do so. *Id.* ¶¶ 190-191. As discussed *supra* Part II.D, an attorney may not generally use documents to refresh a witness's recollection and then withhold them from production. Morgan Lewis should be ordered to disclose the documents the former associate reviewed before his examination and that refreshed his recollection.

At a minimum, the Court should require Morgan Lewis to promptly submit to the Court for *in camera* review any document the former associate reviewed in preparation for his deposition—and identify with specificity which, if any, portions of those materials are protected by the narrow work-product protection of C.P.L.R. 3101(c).

D. Morgan Lewis should produce the documents it is withholding on a claim of "settlement privilege."

On instruction from the Trump Organization, Morgan Lewis has declined to produce approximately 24 records concerning "settlement-related documents" it insists are "protected from disclosure under New York Civil Practice Laws and Rules 3101(a)." First Aff. ¶ 192. These documents relate to an apparent settlement the Trump Organization reached [redacted] In correspondence and in meet-and-confer discussions, OAG has explained that the caselaw allowing private parties to withhold settlement

materials under C.P.L.R. 3101(a) does not apply in the context of a law-enforcement subpoena issued under Executive Law § 63(12). The Trump Organization and Morgan Lewis have nonetheless insisted that OAG provide a proffer showing that these documents are material and necessary to its investigation. First Aff. ¶ 194.

Despite their purported confidentiality, Cushman has already produced to OAG—after the Trump Organization's review of Cushman's documents and withdrawal of all privilege claims—certain of the documents that Morgan Lewis appears to be withholding; these documents involve [redacted] The Trump Organization has never asserted [redacted], and 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.

Regardless, New York law provides that a civil law-enforcement subpoena from the Attorney General can compel the production even of confidential agreements. *People v. Ackerman McQueen*, 67 Misc. 3d 1206(A), at *6-7 (Sup. Ct. N.Y. Cty. 2020) (*citing Cosby v. Am. Media, Inc.*, 197 F. Supp. 3d 735, 742 (E.D. Pa. 2016)). And although OAG need not provide any proffer, the relevance of the documents to OAG's investigation is clear: [redacted]

[redacted]

E. Morgan Lewis may not withhold third-party communications.

Morgan Lewis should be compelled to produce records of communications with a third-party engineer who performed work related to the Trump Golf LA conservation easement. Since March 2020, OAG has asked Respondents if they intend to assert privilege over any documents related to the Trump Golf LA transaction on the basis of a *Kovel* claim. On July 28, Morgan Lewis informed OAG that it was withholding (but had not logged)[14] communications involving an engineer who provided the estimates underlying the Trump Golf LA appraisal. First Aff. ¶ 196. As the Cushman appraiser responsible for the valuation of the Trump Golf LA easement donation explained to Ms. Dillon in an email discussing engineering difficulties at the property, "[h]igher costs of development decrease the value of the property." *Id.* ¶ 197. The engineer's assessments of the Trump Golf LA property's suitability for development thus form the foundation of Cushman's appraisal of the property. For the reasons discussed *supra* Part I.A, these records should be disclosed: there is no basis to withhold communications with an engineer where that engineer's opinions are a basis for an appraisal submitted to the IRS in connection with an apparent tax deduction.

[14] OAG understands that the firm currently anticipates producing those logs on August 21, 2020. Because Morgan Lewis has already identified the Trump Organization's basis for withholding communications with the Trump Golf LA engineer, the privilege logs are not necessary for this application to compel. Separately, OAG is not here moving to compel production of documents listed on three privilege logs newly produced on August 18, 2020. Those privilege logs identify approximately 926 additional documents withheld or redacted and appear to implicate many of the privilege issues addressed in this application. OAG will confer with Respondents before determining whether any of these withholdings require judicial intervention.

F. Ms. Dillon's testimony should be compelled.

During her Executive Law § 63(12) examination, Ms. Dillon's counsel repeatedly objected and directed the witness not to answer questions on the ground of attorney-client privilege or work product protection. First Aff. ¶ 201. Ms. Dillon's testimony should be compelled over these objections for three reasons.

First, counsel asserted plainly overbroad objections to questions by OAG where no attorney-client privilege plausibly attaches. For example, the witness declined to answer questions about the identity of an individual with whom she spoke at the client organization. *Id.* ¶ 203. But it is hornbook law that the fact of a client's name, "in and of itself, is not privileged, as it is considered to be neither confidential nor a communication." *D'Alessio v. Gilberg,* 205 A.D.2d 8, 9 (2d Dep't 1994).

Second, no attorney-client privilege attaches to testimony regarding topics where Ms. Dillon was providing advice for business—not legal—purposes. For example, Ms. Dillon was unable to offer any non-privileged reason why counsel would need a preliminary valuation of the Seven Springs property to provide legal advice. Ms. Dillon testified that "Morgan Lewis's role was to help the client evaluate a potential easement donation and then to help them execute and make sure that it would be to fully satisfy the law in perpetuity as well as satisfy the treasury regulation. As well as the case law interpreting the treasury regulation." First Aff. ¶ 206. Asked to explain why Morgan Lewis would need preliminary valuations to comply with case law and the Treasury regulations, Ms. Dillon said she believed this implicated "work product" and "how I go about providing that legal advice." *Id.* Her counsel instructed her not to answer the question. *Id.* In light of other evidence that the only purpose for providing a preliminary valuation is to facilitate making a business decision, *see supra* Part III.A, Ms. Dillon should be directed to

provide responsive testimony or substantiate the assertion that her work on a preliminary valuation was predominantly of a legal nature.

Third, Ms. Dillon's refusal to answer OAG's questions about the basis for work-product assertions was also improper. Even where the prospect of litigation may be "cogent at the time," work performed for multiple purposes does not warrant work-product protection if litigation is but "but one of the motives." *Stenovich*, 195 Misc. 2d at 116 (quoting *Chem. Bank v. Nat'l Union Fire Ins. Co.*, 70 A.D.2d 837, 838 (1st Dep't 1979)). Although the Morgan Lewis associate testified that the "sole purpose" of his work was to ensure that the easement donation complied with Treasury regulations, Ms. Dillon claimed that her work was also performed in anticipation of litigation. First Aff. ¶ 208. In justifying the anticipation of litigation, Ms. Dillon claimed, among other reasons, that "the client was under continuous audit." *Id.* But after OAG asked for an explanation of how she performed any work differently because of this "continuous audit," Ms. Dillon took an instruction not to answer because the question called for privileged information; the witness further refused to discuss this purported continuous audit, taking an instruction not to answer a question related to the audit of the Seven Springs transaction on work-product and privilege grounds. *Id.* ¶ 209.

It is "incumbent upon [a] respondent to prove that the disputed records should be held immune from discovery, and the mere assertion that they constitute an attorney's work product or material prepared in anticipation of litigation will not suffice." *Stenovich*, 195 Misc. 2d at 116. Morgan Lewis cannot have it both ways. If the firm wishes to support a work-product claim based on Ms. Dillon's purported anticipation of litigation, OAG is permitted to inquire about the "continuous audit" that Ms. Dillon cited as justification for her anticipation of litigation, and explore testimony that a particular project was in fact performed in anticipation of

litigation: for instance, that Ms. Dillon would have produced, reviewed, or edited documents whose submission was required for the easement to be tax deductible any differently in the absence of prospective litigation. *Richey*, 632 F.3d at 568. Moreover, where the preparation of a document (such as an appraisal) is for the purpose of submission with a tax return, and that document is required to be submitted with the return to support a claimed deduction, that document is not prepared because of the prospect of litigation. *See id.*

IV. Any privilege assertions have been waived.

Finally, even if privilege and work-product protections ever existed in relation to the documents and testimony at issue here, those protections have been waived by disclosure to third parties, including in selective disclosures to OAG.

The Trump Organization bears the burden of showing that privilege and work-product protection have not been waived. *Ambac*, 27 N.Y.3d at 624; *Nab-Tern-Betts v. City of New York*, 209 A.D.2d 223, 224 (1st Dep't 1994). Privilege is waived if an initially confidential communication is "subsequently revealed to a third party." *Ambac*, 27 N.Y.3d at 624. And disclosures to third parties waive the attorney-client privilege not only as to that communication, but also to communications relating to the same subject matter. As a general matter, "[t]he waiver of the attorney-client privilege . . . normally compels the production of other documents protected by the privilege which relate to the same subject." *Stenovich*, 195 Misc. 2d at 109 (quoting *In re Baker*, 139 Misc. 2d 573, 576 (Sup. Ct. Nassau Cty. 1988)).

Privilege may not be used as a "sword and shield" via selective disclosure, including to a governmental agency. *See People v. Greenberg*, 50 A.D.3d 195, 202-03 (1st Dep't 2008) (stating that voluntary production to the Securities and Exchange Commission resulted in a "complete waiver of the privilege"). A party's affirmative acts to place privileged material at issue and to selectively disclose such information effects a subject matter waiver. *Am. Re-*

Insurance Co. v. U.S. Fid. & Guar. Co., 40 A.D.3d 486, 492 (1st Dep't 2007). For example, a party may not release information ostensibly favorable to its position, but "withhold[] the raw data that might be prone to scrutiny" from an adversary. *See In re N.Y. City Asbestos Litig.*, 109 A.D.3d at 13-14; *accord Nab-Tern-Betts*, 209 A.D.2d at 224 (same, including work product).[15]

Applying these standards, any applicable privilege that ever existed over the materials disputed here has been waived.

First, the Trump Organization has waived privilege over materials in its possession relevant to the value of the Seven Springs property as reflected in the appraisal submitted to the Internal Revenue Service. "[I]t would be fundamentally unfair for [a taxpayer] to disclose the valuation report [to the IRS] while withholding its foundation." *United States v. Sanmina Corp.*, No. 15-cv-92, 2018 WL 4827346, at *2-4 (N.D. Cal. Oct. 4, 2018); *see also Richey*, 632 F.3d at 566-67; *In re Grand Jury Proceedings*, 219 F.3d 175, 184 (2d Cir. 2000) (privilege waived when party makes "deliberate decision to disclose privileged materials in a forum where disclosure was voluntary and calculated to benefit the disclosing party"). Thus, it is inappropriate for the Trump Organization to submit a valuation based on certain assumptions to the IRS, but withhold information in its possession undermining those assumptions. Disclosure to the IRS demonstrates that the Trump Organization intentionally placed the value of Seven Springs "at issue" between itself and tax authorities. *See In re N.Y. City Asbestos Litig.*, 109 A.D.3d at 13-14 (holding that the company "should not be allowed to use its experts' conclusions as a sword by

[15] Because work-product protection is waived by disclosure to a third party "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, L.P. v. First Fid. Bank, N.A.*, 248 A.D.2d 219, 225 (1st Dep't 1998), a waiver necessarily occurs when such material is disclosed to an adverse governmental entity or to a third party in an arms-length business transaction.

seeding the scientific literature with [its own] funded studies, while at the same time using the privilege as a shield by withholding the raw data that might be prone to scrutiny"); *see also Deacy v. Port Auth. of N.Y.*, No. 2004682011, at *2 (Sup. Ct. Bronx Cty. Aug. 25, 2013) (proper to order party to produce material relied upon in preparing valuation report), *aff'd*, 117 A.D.3d 520, 520 (1st Dep't 2014).

This argument applies with particular strength here because matters about which Ms. Dillon's testimony is sought include valuation-related matters on which she commented during the appraisal process in communications already produced to OAG. The Trump Organization, through Ms. Dillon, repeatedly asked Cushman to consider matters pertaining to development approvals in valuing Seven Springs for conservation easement purposes. For example, Ms. Dillon stated: "we understand from our client that final approvals would likely take another 3-6 months, as opposed to one year." First Aff. ¶ 182. But Ms. Dillon's counsel instructed her not to answer even basic questions about this communication—asserting that even the identity of the person at the Trump Organization who provided this information was privileged because "that would be a person at the client." *Id.* ¶ 203. It is "fundamentally unfair," *Sanmina Corp.*, for Ms. Dillon to have conveyed valuation-related information to the appraisers preparing an appraisal that was submitted to the IRS, but to invoke privilege to shield further disclosure on that topic.

Indeed, the Trump Organization disclosed the 2016 appraisal to at least three other third parties to rely on: [redacted]

[redacted] Those disclosures heighten the need for disclosure of information going to the legitimacy of the valuation.

Moreover, as a general matter, the Trump Organization repeatedly disclosed to third parties conclusions of value for Seven Springs in Mr. Trump's Statements of Financial Condition [redacted] The Trump Organization is not permitted to disclose those reported valuations but then shield under the cloak of privilege matters that may undermine those assertions of value or assertions of value on the appraisal submitted to the IRS.

Second, the same principle of waiver applies to the $25 million valuation reached by Cushman for a conservation easement placed over a driving range at the Trump Golf LA. There, as with Seven Springs, an appraisal was prepared and submitted to the IRS. No privilege therefore attaches to material regarding or undermining the valuation in the appraisal; in other words, privilege is waived as to that subject matter. *Sanmina Corp.*, 2018 WL 4827346 at *2-4; *see also Richey*, 632 F.3d at 566-67. [redacted] There is no basis to allow the Trump Organization to present a valuation to the IRS and other third parties, but cloak other information in its possession pertaining to that value in privilege.

Third, through selective disclosure to OAG, the Trump Organization has waived any

privilege over information relating to, or undermining, the claimed $21.1 million valuation of the Seven Springs easement.

Approximately eight months ago, OAG and the Trump Organization were at impasse over an assertion of *Kovel* privilege by the Trump Organization in connection with the Cushman subpoenas described above. First Aff. ¶ 228. The Trump Organization broadly asserted privilege, under a purported *Kovel* agreement, to "all documents and communications relating to, in connection with, or otherwise concerning the 2015 conservation easement at the Seven Springs property, including the valuation thereof." *Id.* ¶ 223. Describing the process to prepare a preliminary valuation and then a donation of the easement as a "project that Sheri Dillon was quarterbacking," the Trump Organization objected to production of "all communications (internal at Cushman & Wakefield; as well as those with Sheri Dillon and/or other lawyers at her office), workpapers, work product, records, and other documents prepared or received by C&W in connection with this project, regardless of their nature of the source from which they emanated." *Id.* ¶ 223.

On December 17, 2019, having reached impasse, OAG advised the Trump Organization that the Attorney General would seek judicial intervention that day to compel Cushman's compliance with the subpoenas. Shortly before OAG commenced that judicial proceeding, the Trump Organization withdrew all claims of privilege it had asserted in connection with all of the Cushman documents and testimony: "The Trump Organization withdraws all assertions of privilege with regard to any documents or testimony from Cushman in response to the subpoenas issued by [OAG] in connection with this investigation." *Id.* ¶ 230. On the same date, the Trump Organization acknowledged that it was not asserting any privilege over communications with Mr. Mastromonaco, the engineer who worked on the site. *Id.* ¶ 240. And, similarly, the Trump

Organization had previously withdraw privilege over documents and communications involving Insite Engineering. *Id.* ¶ 235.

This chain of events has all the hallmarks of a party selectively disclosing purportedly privileged information. Knowing OAG had access to the appraisal, the Trump Organization invoked a broad *Kovel* claim to delay proceedings. But when pushed to defend its *Kovel* assertions in court, the Trump Organization instead revealed information it previously claimed was privileged. The disclosure was selective: it permitted disclosure of material in Cushman's files, which included representations about the state of approvals for Seven Springs. It permitted disclosure from engineers who performed work and prepared maps integral to the appraisers' value conclusions, including Insite and Mr. Mastromonaco. The law does not permit the Trump Organization to disclose that purportedly privileged material, but then selectively withhold information from individuals who may have been aware of information undermining the appraisers' conclusions. *See, e.g.*, *In re N.Y. City Asbestos Litig.*, 109 A.D.3d at 13-14.[16]

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.

[16] To the extent the Court has any question regarding whether the attorney-client privilege or work-product protection applies, Petitioner requests that the Court direct Respondents to submit the challenged documents for *in camera* review. *See NAMA Holdings, LLC v. Greenberg Traurig LLP*, 133 A.D.3d 46, 48, 59-60 (1st Dep't 2015).

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Respectfully submitted,

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