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,

Plaintiff,

vs.

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC,

Defendants.

Index No. 452564/2022

IAS Part 37
Hon. Arthur F. Engoron

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO COMPEL THE DEPOSITION TESTIMONY OF NON-PARTY WITNESS MICHAEL D. COHEN

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Defendants Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC (collectively, "Defendants") submit this Memorandum of Law in support of their joint motion by order to show cause for an order: (a) compelling non-party witness Michael D. Cohen ("Mr. Cohen") to appear for a deposition pursuant to a non-judicial subpoena the Defendants lawfully and properly served upon him on February 14, 2023; and (b) granting all such other and further relief as this Court may deem just, equitable, and proper.

INTRODUCTION

Letitia James has stated, on several occasions, that Mr. Cohen was the impetus for her office's investigation, and eventual prosecution, of the Defendants in this action.[1] Mr. Cohen, for his part, has publicly maintained that he has insider knowledge as to the purported conduct at issue in this action, and has even claimed that he was an active participant in the same.[2] He has also acknowledged his "participation and assistance"[3] in the New York Attorney General's ("NYAG") investigation, going so far as to claim that he provided the office with a "road map" to uncovering "countless acts of illicit activities" by the Defendants.[4]

Now that it has come time for Mr. Cohen to substantiate these claims under oath, he has refused to appear and willfully disobeyed a lawful subpoena issued by the Defendants. Indeed,

[1] *See* Transcript of Press Statement by Letitia James, September 21, 2022 (https://transcripts.cnn.com/show/ip/date/2022-09-21/segment/01) ("I will remind everyone that this investigation only started after Michael Cohen, the former lawyer, his former lawyer testified before Congress and shed light on this misconduct.").
[2] *See* NBC Meet The Press with Chuck Todd: Michael Cohen: 'They Committed Crimes' in the Trump Organization (https://bit.ly/432HxYj) "Was I involved in the inflation and deflation of his assets? The answer to that is yes.")
[3] Michael Cohen (@MichaelCohen212), Twitter (September 21, 2022) https://bit.ly/3GdWQU6.
[4] *See* Michael D. Cohen, *Revenge: How Donald Trump Weaponized the US Department of Justice Against His Critics* (2022).

rather than testify on his scheduled deposition date of March 31, 2023, Mr. Cohen opted to appear on *Good Morning America*, where he attempted to defend his "credibility" as a witnesses and proceeded to proclaim that he is "absolutely" prepared for cross-examination by President Donald J. Trump's attorneys.[5] If this is truly the case, he should have no objection to appearing before defense counsel in the instant action.

Therefore, for the reasons set forth herein, Defendants respectfully request this Court to enforce their subpoena *ad testifiandum* and to compel Mr. Cohen, under force of law, to sit for a deposition in this matter.

STATEMENT OF FACTS

On November 22, 2022, the Court issued a Preliminary Conference Order (NYSCEF No. 228) in this action (the "Preliminary Order") setting forth a truncated schedule for trial preparation which contemplated third-party fact discovery including the taking of third-party depositions. Disclosure commenced forthwith including with respect to third parties.

Pursuant to the Preliminary Order, on or about February 14, 2023, the Defendants duly served a subpoena *ad testificandum* (the "Subpoena") upon Mr. Cohen at his personal residence located at 502 Park Avenue, Unit 10A, New York, New York 10022. The Subpoena directed Mr. Cohen to appear and attend on March 10, 2023 at 10:00 a.m. as a non-party witness at a deposition in connection with the above-entitled matter to testify as to all of the facts and circumstances within his knowledge and information regarding the instant litigation. Specifically, the Subpoena notified Mr. Cohen that he was likely to have such knowledge because he provided information to the NYAG in connection with this action and included a copy of the complaint. *See* Affirmation of Alina Habba in Support of Defendants' Joint Motion to Compel the Deposition Testimony of

[5] Good Morning America http://bit.ly/3zwO8gd (March 31, 2023).

Michael D. Cohen ("Habba Aff.") at ¶ 5 and Ex. A thereto (copies of Subpoena and Affidavit of Service). The Affidavit of Service details that Mr. Cohen refused to come down to the main floor to receive the Subpoena, and instead directed the process server to leave the Subpoena with the doorman. *Id* at ¶ 6.

Mr. Cohen publicly confirmed that he was served with the Subpoena as early as February 16, 2023. Indeed, during at least two of the occasions upon which Mr. Cohen commented on the Subpoena, he noted that he was considering filing a motion to quash. *See* Habba Aff. at ¶ 7.

Mr. Cohen did not respond to the Subpoena until March 7, 2023, three (3) days before the noticed date of March 10th, Mr. Cohen emailed Defendants and asserted that he would not appear because: (1) Defendants purportedly failed to properly serve the Subpoena; (2) the Subpoena failed to identify the basis of the Subpoena; and (3) Mr. Cohen would not be available to appear on the noticed date. On same date, counsel for certain of the Defendants, Ms. Habba, responded to Mr. Cohen with an extensive rebuttal of Mr. Cohen's claims. *See* Habba Aff. at ¶ 8 and Ex. C thereto (copies relevant email correspondence).[6]

On or about March 8, 2023, an attorney by the name of Lanny Davis emailed Ms. Habba, to discuss the scheduling of Mr. Cohen's deposition. Mr. Davis stated that he did not represent Mr. Cohen in the matter but was in contact solely for the limited purpose of facilitating Mr. Cohen's deposition, and that he was authorized to speak on Mr. Cohen's behalf. Mr. Davis represented that March 31, 2023 would be an amenable alternative date, to which the Defendants agreed. Later the same day, Mr. Davis emailed Defendants' counsel memorializing the phone call and reflecting the new March 31st date. It was thus agreed that Mr. Cohen would appear for his videotaped deposition

[6] In that email, Ms. Habba noted that Mr. Cohen's objections were unwarranted because (1) the Subpoena provided sufficient notice as to the matters Mr. Cohen was being called to testify on and (2) the CPLR permits service upon a doorman in instances where the deponent denies a process server access to the deponent's residence. *See* Habba Aff. at ¶ 8, Ex. C.

at the offices of Robert & Robert PLLX—counsel to Defendants Donald Trump Jr and Eric Trump—on Friday March 31, 2023 at 9:00 a.m. *See* Habba Aff. at ¶ 9 and Ex. D thereto (copies of the relevant email correspondence).

On Thursday, March 30, 2023, the day before Mr. Cohen was scheduled to testify, the NYAG advised Defendant's counsel that it had learned from Mr. Davis that Mr. Cohen would not be appear for his deposition on March 31st as agreed. Thereafter, Defendant's counsel emailed Mr. Cohen to confirm his attendance. Mr. Cohen replied that he would not appear citing as his basis a brief excerpt from the transcript of the proceedings that took place before this Court on March 21, 2023, which Mr. Cohen erroneously claimed constituted an order of this Court staying all non-party depositions. Responding on behalf of the Defendants, and after several phone call attempts to both Mr. Davis and Mr. Cohen were made, Michael Madaio informed Mr. Cohen that the Court had issued no such order and that his deposition would proceed as scheduled. Mr. Cohen once more stated that he would not appear. *See* Habba Aff. at ¶ 10 and Exhs. E and F thereto (copies of the relevant email correspondence and the transcript of the March 21st hearing, respectively).

On Friday morning, March 31, 2023, Defendants went on the record with Mr. Cohen's deposition as scheduled. Mr. Cohen failed to appear. After holding the record open for a brief time, Defendants noted on the record Mr. Cohen's willful disobedience of the Subpoena and his failure to appear, then closed the record. *See* Habba Aff. at ¶ 11 and Ex. G thereto (copy of the March 31st deposition transcript).

Mr. Cohen did not avail himself of any of the procedural avenues available to him to challenge his deposition; he did not move to modify or quash the subpoena; he did not move for protective order.

Rather than appear for his deposition as he was required by law to do, Mr. Cohen chose instead to give a televised interview at the time he should have been testifying.[7] *See* Good Morning America: Michael Cohen is 'absolutely' prepared to be cross-examined after Trump's indictment (https://bit.ly/3KvIIbH).

ARGUMENT

I. Legal Standard

CPLR 2308 provides that "if a person fails to comply with a subpoena which is not returnable in a court, the issuer … may move in the supreme court to compel compliance" and "[i]f the court finds that the subpoena was authorized, it shall order compliance and may impose costs."

A requesting party can move to compel compliance with any discovery device (except a notice to admit) where the receiving party fails to respond, responds incompletely, or objects improperly. *See* CPLR 3124 ("If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."); *see also O'Halloran v. Metro. Transportation Auth*., 169 A.D.3d 556 (1st Dep't 2019). Under the CPLR, the Court can order compliance with a subpoena if the Court has jurisdiction over the recipient and the disclosure sought is material and necessary to the action. *See* CPLR 3101(a) ("There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action[.]").

According to the Court of Appeals "[t]he words, 'material and necessary', are … to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.

[7] Together with his earlier public representations flouting the Defendants' Subpoena, this conduct would be a sufficient basis for the Court to sanction Mr. Cohen for contempt under CPLR 3126.

The test is one of usefulness and reason." *Allen v Crowell-Collier Pub. Co*., 21 N.Y.2d 403, 406 (1968); *see also* 3 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3101.07, p. 31—13. (CPLR 3101 permits discovery of testimony "which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable"). Thus, any testimony that is relevant is within the ambit of CPLR 3101. McKinney's CPLR Ch. Eight, Art. 31, Refs & Annos, CPLR 3101:5 ("Disclosure under the CPLR is, therefore, mandated if it is 'relevant.'"); *Forman v Henkin*, 30 NY3d 656, 661 (2018). This standard applies equally to deposition testimony. *See Matter of Kapon v Koch*, 23 N.Y.3d 32 (2014).

II. Defendants are Entitled to an Order Compelling Mr. Cohen to Testify because Mr. Cohen's Testimony is Material and Necessary to the Defense of this Action

There can be no reasonable dispute that Mr. Cohen's testimony is relevant, material, and necessary to the preparation by the Defendants of their defense in this case. Mr. Cohen is a percipient witness. He purports not only to have been a witness to alleged violations of law by President Trump and others in President Trump's business enterprises, but an active and prominent participant in many of the very same alleged acts that form the basis of the Complaint in this case.

On February 27, 2019, Mr. Cohen appeared before the House Committee on Oversight and Reform and during his testimony made inflammatory allegations about President Trump inflating the values of his assets for some purposes while deflating the value of his assets for other purposes. *See* Testimony before House Committee on Oversight and Reform, February 27, 2019, Transcript at 13 ("It was my experience that Mr. Trump inflated his total assets when it served his purposes, such as trying to be listed amongst the wealthiest people in Forbes and deflated his assets to reduce his real estate taxes.").

Mr. Cohen has repeated these allegations with considerable specificity in public statements too numerous to count, in print and broadcast media, in a myriad posts on his own personal social

media accounts, on his podcast, *Mea Culpa*—which he devotes primarily to attacking President Trump and the other Defendants in this case—and in a book that appeared over his byline entitled *Disloyal: A Memoir: The True Story of the Former Personal Attorney to President Donald J. Trump* ("*Disloyal*"), published in September 2020.

For example, Mr. Cohen has made, among others, the following accusations that conclusively establishes the relevance and materiality of his testimony:

> "Calculating Trump's real net worth was one of the strangest and most telling aspects of life in the Trump Organization. When Forbes and Fortune and the other publications that measured wealth were compiling the list of the richest people on earth, Trump would go into a frenzy. He would have CFO Allen Weisselberg and me concoct the highest possible number, inflating the valuation of his buildings and golf courses by using the absolute most optimistic comparable properties, and then we'd juice that number and juice it again and again until the Boss had a number that satisfied the requirements of his ego."

Disloyal, p. 93.

> "When Forbes said his net worth was "only" $4.1 billion I went ballistic. The truth, I well knew, was that Trump's net worth was ridiculously inflated and he wasn't worth nearly that much money—perhaps $2 billion, absolute tops. I'd personally pumped in the helium into his balloon-like net worth to the tune of billions by adding ridiculously high estimates to his holdings."

Disloyal, p. 209.

> "Well, let me be clear. Donald would call us in and he would say … I want to be higher on the Forbes list, right? And so, what I need to do is, I'm not worth six billion, I'm worth seven, and then seven will become eight. In fact, I'm actually really worth ten. So, this guy added $4 billion dollars of net worth in a matter of eight to ten seconds. Our job, what we were tasked with was to take the assets that existed in the previous year's personal financial statement and come up with a way to get as close to that $10 billion as possible. … What we're doing is we're backing into a number[.] … [E]very single asset is overinflated."

MSNBC, All in With Chris Hayes, September 22, 2022 (https://one-news.net/all-in-with-chris-hayes-%E2%80%93-92122/) (13:22 – 14:14).

> "What would happen is at the beginning of the year when we would end up in conversation about upcoming whether it'd be Forbes 500 list, or as a result of a journalist that was going to be doing a story about Donald Trump's net worth. We would sit there we would take the year before a personal financial statement, and Donald would say let's say you'd said five

> and a half billion, all of a sudden he'd say no, it's not true, I'm worth at least seven. And then, within 10 seconds thereafter, you know what, in fact, I'm worth more than eight. You know what, I'm worth 10 billion, and he would literally add $3 billion to his net worth, simply in a matter of under 60 seconds. And our job when I say ours, I'm referring to me and Alan Weisselberg, was to go back with those documents, figure out how to increase the net worth, go back to Donald in order to show him for his approval. That's how it worked."

CNN Newsroom interview with Alisyn Camerota, January 19, 2022: "Michael Cohen on how Trump would inflate property values" (https://bit.ly/3KtxcNS).

> "Was I involved in the inflation and deflation of his assets? The answer to that is yes."

NBC Meet The Press with Chuck Todd: Michael Cohen: 'They Committed Crimes' in the Trump Organization (https://bit.ly/432HxYj).

The NYAG herself has acknowledged Mr. Cohen's critical role in initiating her investigation, on the basis of his testimony before Congress. *See* Transcript of Press Statement by Letitia James, September 21, 2022 (https://transcripts.cnn.com/show/ip/date/2022-09-21/segment/01) ("I will remind everyone that this investigation only started after Michael Cohen, the former lawyer, his former lawyer testified before Congress and shed light on this misconduct."). The NYAG has also identified Mr. Cohen as a witness that her office interviewed before or since the filing of the Complaint. *See* Habba Aff. at ¶ 5 and Ex. B thereto (copy of Plaintiff's Responses and Objections to Defendants' First Set of Interrogatories, dated December 30, 2022); *see also People v. Trump Organization*, No. 451685/2020, NYSCEF No. 644 at 13 ("The investigation was opened based on the congressional testimony of Michael Cohen alleging Mr. Trump and the Trump Organization improperly inflated asset valuations to obtain financial benefits . . . [the NYAG] did consider significant [Cohen's] testimony that the Statements of Financial Condition were inflated.").

Accordingly, the Defendants are entitled to take Mr. Cohen's deposition to learn what Mr. Cohen knows in order to make determinations about other witnesses to depose in the limited time available under the current schedule to complete fact discovery, which closes on April 30, 2023, *see* Modified Preliminary Conference Order (NYSCEF 598), to challenge Mr. Cohen's credibility, and to preserve Mr. Cohen's testimony in the event he is called as a witness at the trial and is unavailable.

III. Mr. Cohen Was Properly Served and Is Subject to the Personal Jurisdiction of the Court

The subpoena was properly served on Mr. Cohen at his residence in Manhattan. CPLR 2303 provides that a "subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons." Under CPLR 308(2), personal service of a summons upon a natural person may be made "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence."

In *F.I. duPont, Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794 (1977), the Court of Appeals held that, in appropriate circumstances, an apartment house doorman may be a person of suitable age and discretion to whom a summons properly may be delivered under the provisions of CPLR 308(2), such that delivery to the doorman in the apartment lobby would qualify as delivery at the defendants' actual dwelling place. *See also.*, *Bank of Am., N.A. v. Grufferman*, 117 A.D.3d 508, 508 (1st Dep't 2014) ("Service upon the doorman of defendants' apartment building was proper under CPLR 308(2), given that the process server was denied access to defendants' apartment.) (citing *F.I. duPont, Glore Forgan & Co. v. Chen,* 41 N.Y.2d 794, 797–798 (1977)); *Charnin v*

Cogan, 250 A.D.2d 513, 517 (1st Dep't 1998) ("On numerous occasions, in circumstances similar to those before us, where a process server has not been permitted access to the specified apartment or is advised that the intended party is not home, a doorman has been found to be such a person of suitable age and discretion within the contemplation of CPLR 308(2)."") (citing *Braun v. St. Vincent's Hospital & Medical Center,* 57 N.Y.2d 909 (1982); *State Street Bank and Trust Co. v. Broadway/St. Nicholas Associates,* 214 A.D.2d 474 (1st Dep't 1995); *Rosenberg v. Haddad,* 208 A.D.2d 468 (1st Dep't 1994); *Costine v. St. Vincent's Hospital & Medical Center,* 173 A.D.2d 422 (1st Dep't 1991)); *Rattner v. Fessler*, 202 A.D.3d 1011, 1017 (2d Dep't 2022) ("[I]f a process server is not permitted to proceed to the actual apartment by the doorman or some other employee, the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested.") (citing *F.I. duPont,* 41 N.Y.2d at 797); Siegel, N.Y. Prac § 72 (6th ed 2021); *Bank of Am., N.A. v. Grufferman,* 117 A.D.3d 508 (1st Dep't 2014)).

Here, the Defendant's process server appeared at the apartment building where Mr. Cohen resides and asked the doorman to call Mr. Cohen's residence. A women answered the phone who identified herself to the process server as Laura Cohen ("Ms. Cohen"). Ms. Cohen then handed the phone to Mr. Cohen, who identified himself as Michael Cohen. Mr. Cohen then requested that the process server leave the documents with the doorman. *See* Habba Aff. Ex. B (affidavit of service). In all events, Mr. Cohen, by allowing Mr. Davis to negotiate the March 31, 2023 date for his deposition in lieu of the date specified on the original Subpoena, on his behalf, waived any objections he may have had to the service of the Subpoena. Mr. Davis acted as Mr. Cohen's attorney in fact for purposes of arranging compliance with the Subpoena, even Mr. Davis did not represent Mr. Cohen in this litigation.

The Court indisputably has personal jurisdiction over Mr. Cohen, who resides in Manhattan.

IV. Mr. Cohen Had No Valid Basis to Disobey the Defendants' Subpoena and Did Not Avail Himself of Any of the Procedural Remedies Available to Him Under the CPLR

Mr. Cohen's asserted basis for refusing to appear for his deposition was that this Court had ruled on the record that third-party discovery had been stayed until further action by the Court. As this Court issued no such order, the excuse Mr. Cohen offered is without foundation. Further and in all events, Mr. Cohen did not avail himself of any of the procedural avenues available to him under New York law to properly challenge the Subpoena. CPLR § 2304 states in pertinent part, "A motion to quash, fix conditions or modify a subpoena shall be made ***promptly*** in the court in which the subpoena is returnable." CPLR § 2304 (emphasis added). Mr. Cohen neither moved to modify nor quash the Subpoena nor did he apply for a protective order. Thus, Mr. Cohen had no valid basis not to appear for his deposition as agreed.

CONCLUSION

For the reasons stated above, this Court should grant the relief prayed for on this motion and enter an Order compelling Mr. Cohen to sit for his deposition forthwith.

Dated: April 3, 2023
New York, New York

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CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court, I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 3,880 words. The foregoing word counts were calculated using Microsoft® Word®.

Dated: New York, New York
April 3, 2023

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