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,

-against-

DONALD J. TRUMP, *et al*.,

Defendants.

Index No. 452564/2022

Hon. Arthur Engoron

Motion Sequence No. 013

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE AND MODIFY THE PRELIMINARY CONFERENCE ORDER**

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

## INTRODUCTION

Defendants' Motion to Vacate and Modify the Preliminary Conference Order ("PCO") is about delay, not "fundamental fairness" or "due process" rights. Their motion is the latest in a long line of efforts to delay this action and the preceding investigation by the Office of the Attorney General ("OAG"). Defendants admit that they have the full investigative file available to OAG for trial. That file consists of their own 1,000,000 documents, plus another 700,000 documents from third-parties, plus transcripts of testimony from 56 witnesses, including their own employees. Defendants do not dispute that they have always had access to their own documents and employees, the largest source of information in OAG's investigative file. Defendants admit that they have had the testimonial transcripts and exhibits from the investigation since November 28, 2022 and all third-party documents contained in the file since December 2, 2022. The production of those materials supplemented the extensive evidence disclosed as part of a subpoena enforcement special proceeding in August 2020 and January 2022, including OAG's extraordinarily detailed pleadings.[1] OAG provided additional evidentiary support for its claims in the form of more than 100 exhibits filed with the Complaint and Preliminary Injunction papers.

The adequacy of this enormous quantity of material available to Defendants – documents and testimony from third-parties they have had for months (and, in some instances, years) and access to their own documents and employees for years – must be viewed through the lens of the straightforward nature of this action, which is based on allegations that Defendants falsely and fraudulently inflated the value of assets listed in Donald J. Trump's Statements of Financial

[1] *People v. The Trump Organization, Inc. et al.*, Index No. 451685/2020 (Sup. Ct. N.Y. County) (the "Special Proceeding").

Condition for 11 years and used those inflated Statements to obtain favorable terms on loans and insurance.

Defendants contend, however, that the material they have is not enough to enable them to adequately defend this action; they need another six months to conduct third-party discovery. But Defendants have utterly failed to use the discovery time they were afforded under the PCO or explain why they need discovery of third-parties concerning transactions in which they were intimately involved. Defendants failed to issue a single third-party subpoena for almost three months. The first such subpoena was issued on February 16, 2023 – two days after OAG issued its two third-party subpoenas and less than two weeks before the CPLR deadline for issuing subpoenas in advance of the March 20 close of discovery. At the time of their Motion, seeking permission to depose an additional 30 witnesses, Defendants had yet to take a single deposition. At the time of the hearing on their Motion, six days from now, and after the date for the close of discovery ordered by the Court back in November, Defendants will have taken just two third-party depositions. Defendants' three-month delay in serving any subpoenas confirms the obvious – they do not need any additional information from third-parties about the business transactions that are the subject of this action because they were parties to those transactions at the time they occurred. But even if additional extensive third-party discovery really were necessary to afford Defendants a fair trial (which is not the case), any failure to obtain it rests with them.

Defendants' request to extend discovery is plainly not about obtaining evidence necessary for trial. This Motion is the latest chapter in a long saga of delay. During the investigation that preceded this action, Defendants refused to comply with multiple subpoenas, failed to complete productions for a subpoena issued in December 2019 until April 2022 (and only after OAG identified massive gaps in Trump Organization productions), refused to comply with a Court order

requiring subpoena compliance which led to contempt proceedings, twice asked appellate courts for a stay, and filed an action in the Northern District of New York to stop the investigation. Since this action was filed, Defendants have failed to produce any documents in response to discovery notices, refused to provide substantive responses to interrogatories, sought yet another stay from the Appellate Division, sought to block any action against the Donald J. Trump Revocable Trust through an action filed in Florida state court, and now seek an extension of fact and expert discovery into December 2023 without even suggesting a date for trial. When the calendar turns over into 2024, Donald J. Trump will be in the midst of a campaign for President. Defendants have used his campaign as a reason for delay in both 2016 and 2020. There is no reason to believe 2024 will be any different.

Defendants have all of the information they could reasonably need to prepare for trial given the enormous volume of material already produced by OAG and the access they have to their own documents and witnesses. They can obtain additional information from the remaining eight third-party depositions they have scheduled. Defendants have had months to conduct discovery but chose to sit on their hands and do nothing. The record Defendants have and are compiling is more than sufficient to afford them due process and prevent the trial from becoming a game of surprise. They have provided no good cause for extending discovery and the trial date further. Nevertheless, to facilitate the efficient resolution of this matter, OAG has already agreed to extend the deadline for the completion of depositions that have already been noticed to April 7, 2023 for third-party witnesses and to April 30, 2023 for party witnesses. NYSCEF No. 558. OAG is also prepared to agree to the proposal submitted to Defendants that would extend expert discovery through June 26, 2023. NYSCEF No. 529.

**BACKGROUND**

The aim of pre-trial disclosure under the CPLR is "to prevent litigation from becoming a game by requiring parties and witnesses to shed their light before the trial so as to prevent surprise at it. Its design is 'to advance the function of the trial to ascertain truth and to accelerate the disposition of suits.'" Siegel, N.Y. Prac. § 343 (6th ed.) (*quoting Rios v. Donovan*, 21 A.D.2d 409, 411 (1st Dep't 1964)). The history of this proceeding and the existing discovery timeline are more than sufficient to avoid any surprise at trial. Defendants have been aware of OAG's investigation for almost four years. All the causes of action in the Complaint are addressed at Defendants' own conduct, documents and business practices. And Defendants have all of the evidence from OAG's investigation that will be used to prove these causes of action at trial.

Indeed, the core of Defendants' complaint is that the discovery they have received is too voluminous. Defendants contend that they need to conduct a page-by-page linear review of each document before determining what additional discovery they should seek – i.e., that all party discovery needs to be complete and fully reviewed before third-party discovery can commence. *See* NYSCEF No. 517 at 5 ("There is simply no reasonable way under the current schedule for the Defendants to search and review over 2.6 million pages of documents and more than 50 transcripts and then determine simultaneously how to conduct depositions, seek additional third-party discovery and complete the expert process."). Even if such a deliberate and iterative process were typical in standard complex commercial litigation – and it is not – it is neither necessary nor appropriate in this straightforward case, in which Defendants have had detailed knowledge of the substance and scope of OAG's investigation for years and have had access to many of the documents they now claim to have seen for the first time this past December, not to mention access to their own employees who were involved in the financial statements and transactions at issue.

For example, Defendants were informed four years ago that OAG had subpoenaed Deutsche Bank for records concerning the Doral, Chicago, and Old Post Office transactions. Aff. ¶9. Similarly, Defendants were informed by June 2019 that OAG had subpoenaed Mazars for records concerning the financial statements at issue and held a meet-and-confer on the request. Aff. ¶10. As far back as September 2020, in papers submitted to this Court, Defendants demonstrated their extensive familiarity with the precise outline of OAG's investigation:

> More than 18 months ago, the OAG launched an investigation into the financial affairs of the President and his businesses. Pursuant to its authority under N.Y. Executive Law § 63(12) and CPLR §2302(a), the OAG issued subpoenas to multiple entities and individuals, seeking documents and information for the purpose of investigating supposed concerns relating to TTO's valuation of assets on annual statements of financial condition.
>
> To date, the OAG has obtained voluminous documents and testimony under oath from TTO's present and former employees, its banks, accountants, insurance companies, and professional consultants (including its appraisers and engineers) and, upon information and belief, numerous other third parties that provide or have provided services and/or transact(ed) business with TTO.

Special Proceeding NYSCEF No. 237 at 1. As part of that submission, Defendants highlighted the fact that they had been reviewing a portion of the documents sought from those third-parties in order to assert privilege claims, "but only after carefully reviewing the documents at issue (some on multiple occasions)."[2] *Id.* at 2. That review spanned thousands of documents. *Id.* at 20. After that review a subset, likewise consisting of thousands of documents, were logged for privilege and submitted for the Court's review. *See* Special Proceeding NYSCEF No. 302 at 1 ("Respondents timely produced thousands of documents for the aforesaid inspection . . . .")

In January 2022, as part of the motion practice to compel testimony from Donald J. Trump, Donald Trump Jr. and Ivanka Trump, Defendants received a detailed presentation of the evidence

[2] That review included email communications with their accountant Donald Bender. Special Proceeding NYSCEF No. 237 at 10.

developed in the investigation to that point. That presentation included a 113-page Supplemental Verified Petition and a supporting affidavit submitting more than 200 exhibits. *See* Special Proceeding NYSCEF Nos. 360, 630. Those filings identified the most significant third-parties that Defendants now claim they need discovery from: Mazars, Deutsche Bank, Aon, Cushman & Wakefield, Capital One and Morgan Lewis & Bockius. Of course none of those third-parties were strangers to Defendants. They were their own attorneys, banks, accountants, appraisers, and brokers. The documents they produced largely overlapped with those held by Defendants because they largely consisted of documents sent to and received from Defendants.

By their own account, Defendants were able to reduce the total number of third-party documents from 700,000 to 275,000 by de-duplicating the data and removing email messages that contained a "Trump" email domain.[3] But even that number overstates the total volume of new information included in the most recent productions. For example: (i) 10,000 documents consisted of litigation records exchanged between counsel for Defendants and third-parties in litigation over the restaurant space in the Old Post Office Building Aff. ¶5(a); (ii) more than 10,000 documents were from the set reviewed by counsel for Defendants as part of the privilege review during the subpoena enforcement proceeding; Aff. ¶5(b) and (iii) 276,000 documents are from Mazars, which consist primarily of audit workpapers and tax materials, including more than 6,000 pages of tax returns for Donald J. Trump, which can be requested by the client at any time. Aff. ¶5(c).

[3] Defendants dispute the calculation by OAG that "approximately 85 percent of all documents held by OAG in this action were already available to the Trump Organization." NYSCEF No. 517 at 4 n.2. Defendants note that "the Attorney General produced some 275,000 third-party (not Trump) documents." *Id.* Using Defendants' number, 275,000 documents represent 16 percent of the total 1,700,000 documents collected by OAG. Additional detail on the breakdown is contained in the Affirmation of Paige Podolny.

In short, Defendants have been aware of the details of this litigation for years. The vast majority of the documents in the record have been available to the Defendants for years. To the extent the record reflects third-party information the vast bulk of it is from "TTO's . . . banks, accountants, insurance companies, and professional consultants (including its appraisers and engineers)." Special Proceeding NYSCEF No. 237 at 1. Defendants have known about the detailed factual findings from OAG's investigation since at least January 2022, if not earlier. And OAG's theory of the case is spelled out in detail in its 200-plus page Complaint in this action. In short, Defendants have had, and will have, ample "time for reflection and preparation for trial," they have just chosen not to use it in a gambit to delay trial (apparently for years). NYSCEF No. 517 at 7 (*quoting People v. Bennett*, 29 N.Y.2d 462, 466 (1972).)

**ARGUMENT**

Pursuant to CPLR § 2004, "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." The question of whether to grant such an extension is within the sound discretion of the trial court. *See Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 11 (1989); *see also Archibald v. Asia Five Eight, LLC*, 39 A.D.3d 366, 366 (1st Dep't 2007) ("Whether to grant an adjournment is a matter within the discretion of the trial court."). In exercising its discretion, a court may consider such factors as the length of the delay, the reason or excuse for the delay, and any prejudice to the party opposing the motion. *See Tewari*, 75 N.Y.2d at 11–12 (*citing* 2A Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 2004.03). Here Defendants have failed to demonstrate sufficient good cause.

**1. Defendants Have Not Diligently Pursued Discovery During the Pendency of This Action**

Defendants' request for an additional six months to conduct discovery comes after they failed to make diligent use the first six months since the filing of this action. From the outset, Defendants were free to propound discovery to OAG upon the filing of the Complaint. *See* Siegel, N.Y. Prac. § 362 (6th ed.) ("The only stated time requirement concerning a notice of discovery is that it await commencement of the action and that it give the recipient at least 20 days to respond.") (*citing* CPLR § 3120). And as noted frequently by Defendants, the scope of the investigative file was disclosed in the first paragraph of the Complaint: "interviews with more than 65 witnesses and review of millions of pages of document produced by Defendants and others." But Defendants did not seek production of the investigative file or any discovery from OAG before those materials were produced on November 28 and December 2, 2023. Aff. ¶12. Indeed by the time Defendants finally issued 1,144 party document requests to OAG on December 9, 2022, they were already in possession of the full investigative file. By December 30, 2022, in OAG's response to those 1,144 document requests, Defendants had document citations supporting each allegation of the Complaint. Aff. ¶15.

Defendants were even slower to commence third-party discovery. By their own retelling: "Recognizing the challenges presented, the Defendants began their discovery efforts almost immediately, commencing the review of documents and the identification of witnesses." NYSCEF No. 517. But "almost immediately" in this instance meant waiting three months, until less than two weeks before the final day to serve a subpoena during the discovery period. Defendants first served third-party testimonial subpoenas on February 16, 2023. Aff. ¶16. Those subpoenas went to entities and individuals that were self-evident, not only from the face of the Complaint filed in September 2022, but from the subpoena enforcement proceeding filed in 2020: witnesses like

Donald Bender of Mazars and a corporate representative of Deutsche Bank. Aff. ¶20. Defendants also noticed the testimony of former Trump Organization lawyer Michael Cohen, whose role in the initiation of the investigation was disclosed on the face of the Verified Petition in the Special Proceeding in August 2020. Special Proceeding NYSCEF No. 181 at ¶ 52. Six days later, Defendants issued subpoenas to witnesses and entities that had been known to them for years, like Mazars, Cushman & Wakefield, Ladder Capital and the person who had been their lead relationship banker at Deutsche Bank, Rosemary Vrablic. Aff. ¶17. On February 28, 2023, the last date to timely notice a subpoena under the CLPR, Defendants issued subpoenas to nine law firms representing parties that had produced documents in the investigation. Aff. ¶18.

There is no good-faith basis to claim that the identification of these third-parties required a detailed review of the third-party productions turned over by OAG in early December 2022. These third-parties were well known to Defendants, having worked closely with them for years before this investigation began. Each of the individuals subpoenaed appears in hundreds if not thousands of emails. Aff. ¶20. Donald Bender had been the Trump Organization's accountant for decades. Aff. ¶21. Rosemary Vrablic had been their lead banker since 2011 and was invited to dinners with friends by Ivanka Trump. Aff. ¶22.

Having failed to diligently use the time allotted, Defendants cannot now seek to extend discovery and delay resolution of this action. *See Adotey v. British Airways*, 145 A.D.3d 748, 750 (2d Dep't 2016) ("It is not an improvident exercise of discretion to deny an adjournment where the need for such a request is based on the movant's failure to exercise due diligence."); *Foley v. West-Herr Automotive Group, Inc.*, 63 A.D.3d 1680, 1680 (4th Dep't 2009) ("We conclude that plaintiffs failed to demonstrate good cause for an extension of time in which to complete discovery, and they also failed to present a good excuse for the delay."); *accord Woolcott v. E.I. Dupont*

*DeNemours & Co.*, 95 Civ. 721, 1996 WL 685735, at *2 (W.D.N.Y. Nov. 25, 1996) ("The plaintiff has failed to demonstrate the requisite due diligence on his part meriting a re-opening of discovery and he has not shown any degree of bad faith on the part of DuPont. What is readily apparent from a review of the record is that a considerable amount of time has elapsed during which the plaintiff could have more vigorously and diligently pursued this action.")

**2. Defendants Fail to Specifically Identify What Additional Discovery They Will Pursue**

Compounding Defendants' failure to vigorously pursue third-party discovery for the past three months, they offer no concrete plan for what additional discovery they intend to take and why six months is a reasonable period of extension. There is no basis for OAG or the Court to assess whether the proposed schedule is reasonable because Defendants offer no detail. The sole grounds offered by Defendants in support of their assertion that the length of the extension is reasonable is the fact that the total discovery period will be less than 15 months, the "standard" length for complex commercial litigation. NYSCEF No. 517 at 11. Likewise, Defendants offer no specific detail on why they should obtain 30 additional depositions, relying on the fact that during its investigation OAG interviewed 60 witnesses and identified 80 "third-party individuals with knowledge of the facts." *Id.* at 5.

Defendants' continued reliance on the discovery timeline for "complex" commercial litigation is misplaced. As one court has explained, the discovery timelines for "expedited, standard or complex" litigation were established to "affirmatively manage" cases using "Differentiated Case Management" procedures "which require tracking of each case based on its complexity, followed by 'rigorous judicial monitoring' throughout the life of the case to ensure compliance with key milestones." *Aderemi Fujah v. V-M Auto Refinishing Corp.*, 192 Misc. 2d 170, 171 (Queens Cnty. Sup. Ct. 2002). In other words, this framework was established to promote

"rigorous" and speedy judicial oversight of litigation, and to prevent litigation from languishing for years on end.

Those concerns have no bearing on the current enforcement proceeding. At the outset of this action, both parties had been reviewing documents and talking to witnesses for years. This is not a standard civil litigation where parties start at ground zero. OAG has not only turned over all of its evidence, but it has provided Defendants with a detailed roadmap to the results of that investigation. During the investigation, counsel for Defendants sat in on 26 days of testimony and have had access to their own witnesses and documents for years. The testimony taken by OAG of third-party witnesses is locked in. While Defendants note that they did not have an opportunity to cross examine those witnesses, that means their testimony provided to OAG during the investigation will not be admissible at trial.[4]

Defendants are their own best source of information to support any defenses to the allegations that they committed fraud and indeed have a host of information and resources unavailable to OAG. Moreover, this case has already been extensively litigated. The parties have already litigated over a preliminary injunction with the Court determining that the evidence establishes a likelihood of success on the merits. *See* Order, NYSCEF No. 183 at 6-9. This is not a case that requires a "complex" 18-month schedule for additional discovery.

To the extent Defendants contend that they need the additional six months to take 30 more third-party depositions, they offer almost no support for that request. The closest they come is a footnote arguing that they "may be required" to take 17 more corporate entity depositions.

[4] Defendants complain that there "is no way to predict which witnesses may prove unavailable at trial; the only way to introduce that testimony will be through depositions." NYSCED No. 517 at 19. The PCO provides the Parties may conduct trial depositions for witnesses who will be unavailable at trial until June 5, 2023.

NYSCEF No. 517 at 20 n.15. But Defendants offer no explanation of why those depositions are specifically needed, why the information they are seeking is not contained in the discovery collected to date, or why the information could not have been obtained through other means. *See People v. Northern Leasing Systems, Inc.*, 193 A.D.3d 67, 74 (1st Dep't 2021) (affirming denial of requests to depose affiants in investigation when affidavits were supported by documentary evidence and when respondent in action possessed direct access to its own business records). But in any event, 17 depositions are not 30 and Defendants offer no detail on the additional 13 depositions they are seeking. Beyond that, Defendants also fail to explain why an additional six months is necessary to compete either 17 or 30 depositions. The parties are currently scheduled to take 15 depositions between March 7 and April 7. Aff. ¶19. If Defendants had begun noticing depositions in the days and weeks after the Preliminary Conference, the parties could have completed 45 depositions within the discovery period allotted. Defendants' failure to timely pursue noticing depositions does not now merit an extension of discovery. *See, e.g., Kaba v. Delight Const. Corp.*, 2008 Civ. 2594, 2009 WL 2929235, at *1 (E.D.N.Y. Sept. 9, 2009) (finding insufficient cause to reopen discovery where moving party had relevant information for five months prior to the application and had not articulated a satisfactory explanation as to its lack of diligence).

The cases cited by Defendants do not suggest otherwise. To the contrary, they demonstrate that a court should find good cause for a limited extension of discovery only where necessary to complete certain specified tasks, or to address a specific gap in the evidence available to a party. *See, e.g., Lipson v. Dime Sav. Bank of N.Y., FSB*, 203 A.D.2d 161, 162 (1st Dep't 1994) (ordering extension of discovery beyond the allotted three-month period, where plaintiff needed one additional month to complete scheduled depositions, and where delays had been caused by

defendants' failure to respond to interrogatories and document requests); *Schecter v. 210 E. 90th St. Owners, Inc.*, 271 A.D.2d 224, 225 (1st Dep't 2000) (granting defendants' request for discovery of plaintiff's medical and psychological records, and therefore also granting defendants' request to strike the note of issue to permit for that discovery); *Oliver v. Town of Hempstead*, 68 A.D.3d 1079, 1080 (2d Dep't 2009) (finding plaintiff showed good cause to extend 90-day period for filing a note of issue "given the infant plaintiff's detention in a juvenile detention facility, which caused her to be unable to attend [a] physical examination"). Defendants have not identified any specific gap in the evidence they need to fill in order to assert their defenses at trial. And they have provided no authority to suggest that their desire to embark on an open-ended fishing expedition constitutes "good cause" for extending court-ordered discovery deadlines.

**3. The Discovery Requests Defendants Have Propounded at This Point are Duplicative or Irrelevant**

The third-party subpoenas issued thus far by Defendants do not suggest that additional discovery will produce new or meaningful information. Defendants argue that – despite the extensive record available to all parties in this action – additional discovery from third-parties in necessary because "the Attorney General certainly had no incentive to develop any evidence or testimony favorable to Defendants." NYSCEF No. 517 at 3. That assertion is baseless and belied by the requests issued by OAG during its investigation and Defendants' repetition of them in this action. Defendants' subpoena to Mazars, for example, explicitly calls for all documents "produced in response to any NYAG subpoena" from the investigation. Aff. ¶24. Similarly, Defendants offer no reason to believe that their own accountants maintained work papers in easily segregable sets that would aid or detract a potential fraud claim—and then turned over only those sets that would aid the Attorney General. Defendants' belief in that respect is belied by OAG's first subpoena to Mazars in May 2019, which in a straightforward manner sought the Statements of Financial

Condition, all drafts of the same, documents and communications relating to the same, and communications such as engagement letters. Aff. ¶25.

The repetitive nature of the requests is even more starkly evident in the responses from third-parties. Deutsche Bank, for example, noted that its original searches in responses to OAG subpoenas had been "reasonably calibrated to the events, individuals, and transactions relevant to this proceeding." Aff. ¶28. As a result, the Defendants' requests were "unnecessarily duplicative" of documents already produced. *Id.* Defendants cannot establish "good cause" for extending discovery to allow for additional repetitive requests to even more third-parties. *See, e.g., Kimmel v. Paul, Weiss, Rifkind, Wharton & Garrison*, 214 A.D.2d 453, 453 (1st Dep't 1995) ("As to the interrogatories at issue, it is clear that they improperly request information which is mainly duplicative of information already obtained through earlier discovery.").

Many of the requests that are not duplicative are either improper or irrelevant.[5] The requests to Mazars include all documents relating to communications with "any banking regulators regarding any Defendants" and "any governmental agency regarding any of these Defendants." Aff. ¶26. The Deutsche Bank subpoena includes identical requests.[6] Aff. ¶27. Each of these requests is a transparent and improper attempt by Defendants to use civil discovery in this action to identify other investigations into other potential legal violations. The Court is certainly under no obligation to allow an extension of discovery to permit further exploration of investigations by other regulators and prosecutors. *See, e.g., Statewide Medical Acupuncture, P.C. v. Travelers Ins. Co.*, 2006 WL 2167175, at *1 (1st Dep't Aug. 2, 2006) ("Plaintiff's motion for a protective order

[5] In the letter filed March 13, 2023, OAG raised this issue for resolution at the hearing on this motion scheduled for March 21, 2023. *See* NYSCEF No. 547.

[6] In its response, Deutsche Bank notes that the request for communications with banking regulators "calls for the production of information subject to the Bank Examination Privilege." Aff. ¶27.

with regard to defendant's remaining discovery demands was properly granted even if the motion was not timely made, as the disclosure sought was palpably improper because it was duplicative, unduly burdensome, irrelevant, and pertained to defenses not at issue in this case.")

**4. The Preliminary Conference Order Does Not Violate Defendants' Due Process Rights**

As OAG noted previously, Defendants' invocation of due process is a red herring. Pursuant to Executive Law § 63(12), it is common for the Attorney General to bring an enforcement action as a special proceeding following an extensive investigation. In such circumstances, discovery is "disfavored" and only permitted based on a showing of "ample need" or "unusual circumstances," in part because the target of investigation already has access to their own business files and the materials supporting the petition. *See Matter of People of the State of N.Y. v. N. Leasing Sys., Inc.*, 193 A.D.3d 67, 74 (1st Dep't 2021) (denying Respondents' request for discovery where they already had "direct access" to their own business files); *see also People v. Bestline Prod. Inc.*, 41 N.Y.2d 887, 888 (1977) (holding that denial of discovery request was appropriate when the "record provides ample detail and definition of the alleged practice attacked as fraudulent by the Attorney-General," including from respondents' own files).

Defendants go to great lengths to explain that this action is a "civil enforcement action" and not a special proceeding and hence they are "entitled to the full panoply of discovery." NYSCEF No. 517 at 17. But, again, what is the appropriate amount of discovery for a given case is entrusted to the sound discretion of the trial court supervising that case. *Rodney v. City of New York*, 192 A.D.3d 606, 606 (1st Dep't 2021). So, too, is this Court granted broad discretion to examine the reasonableness of Defendants' delays. *Whittemore v. Yeo*, 99 A.D.3d 496, 496 (1st Dep't 2012). And, this Court has "broad discretion in supervising discovery in order to prevent harassment and abuse." *Stambovsky v. Reiner*, 145 A.D.2d 309, 310 (1st Dep't 1988). Here,

Defendants have had ample discovery—obtaining the full OAG investigative file, issuing interrogatories, document requests and subpoenas and taking witness testimony. They have not been denied the use of discovery tools – but instead have delayed their use until the eleventh hour or used them in a blunderbuss, duplicative, and improper or otherwise abusive fashion.[7] Given the circumstances here, this Court ought not exercise its discretion to extend the time permitted for Defendants to conduct further discovery.

Lastly, although this proceeding was not brought as a special proceeding, the form of proceeding does not necessarily dictate what amount of discovery is appropriate for the facts and circumstances of this case, an action that was preceded by a lengthy investigation and largely involves Defendants' own business records and transactions. OAG cited *Northern Leasing* for the basic point that, in a case (such as this one) involving fraud allegations developed from a business entity's own files and transactions, New York courts have held that minimal discovery (or no discovery) need be undertaken. Indeed, the respondents in that case raised due-process arguments similar to those the Defendants raise here, seeking both discovery and an evidentiary hearing—but those requests were denied and the First Department affirmed. *See People v. Northern Leasing Systems, Inc.*, Index No. 450460/2016, NYSCEF Nos. 515, 520, 937; *Northern Leasing*, 193 A.D.3d at 74. And, as the Court may be aware, civil enforcement proceedings brought by OAG will often go to trial within one year or less. *See People v. The Exxon Mobil Corp*, Index No. 452044/2018 (Sup. Ct. N.Y. County) (Complaint filed October 24, 2018, trial commenced October

[7] For example, in addition to the issues identified in the letter filed by OAG on March 13, 2023 (NYSCEF No. 547), Defendants issued a series absurd party discovery requests, including 1,144 individual document requests and 396 separate requests to admit. Aff. ¶[X]. OAG is nevertheless responding to these requests in due course.

23, 2019); *People v. Allen, et al.*, Index No. 452044/2018 (Sup. Ct. N.Y. County) (Complaint filed December 4, 2019, trial commenced January 11, 2020).

**5. Defendants' Ongoing Efforts to Delay the Resolution of This Matter Are Improper and Will Prejudice the People**

A swift trial in this action is necessary to protect the People of the State of New York. The Court previously installed an independent monitor and granted preliminary injunctive relief to protect the People from the prejudicial impact of further fraud by Defendants. *See* NYSCEF No. 183 at 9 ("[G]iven defendants' demonstrated propensity to engage in persistent fraud, failure to grant such an injunction could result in extreme prejudice to the people of New York."). The same considerations necessitate a timely resolution of this case. The People of New York are entitled to the speedy adjudication of this public enforcement action so they can receive the benefits of a permanent injunction against Defendants, as well as the financial relief sought by the Complaint. *See Schneiderman v. Eichner*, No. 451536/2014, 2016 WL 3745566, at *5 (Sup. Ct. N.Y. Cnty. July 13, 2016) ("[A]ny delay of the [NYAG's] investigation harms . . . the public's interest in a prompt resolution of any civil action brought by the Attorney General."); *accord Long Island Hous. Servs., Inc. v. Nassau Cty. Indus. Dev. Agency*, 14 Civ. 3307, 2015 WL 7756122, at *4 (E.D.N.Y. Dec. 1, 2015) ("any further delay will also be against the public interest in preventing the Agency from engaging in the encouragement and enforcement of discriminatory housing practices"); *S.E.C. v. Constantin,* 11 Civ. 4642, 2012 WL 1195700, at *4 (S.D.N.Y. Apr. 9, 2012) ("[F]raudulent investment schemes such as the type alleged in this case can have serious negative effects on the public's confidence in our financial markets. The SEC's interest in its ability to vindicate the rights of shareholders thus carries substantial weight and strongly supports the denial of a stay and an expeditious resolution of the civil proceedings." (citation omitted)); *S.E.C. v. Wheeler*, 11 Civ. 6169, 2011 WL 4745048, at *5 (W.D.N.Y. Oct. 7, 2011) (denying defendant's

motion to stay proceedings due to the Court's "interest in the prompt disposition of civil cases" and the public's interest in stopping fraud and obtaining "disgorgement of allegedly wrongfully obtained profits").

Defendants disingenuously claim they are seeking a "modest" extension, *see* NYSCEF No. 517 at 12, when their proposal would delay the trial indefinitely. But as their papers acknowledge, OAG has negotiated in good faith to permit additional time for discovery. *See* NYSCEF No. 518. Where OAG has stood firm is in its refusal to agree to a schedule that would delay the start of trial, which would directly contradict the Court's instructions and prejudice the public interest. By contrast, Defendants suffer no prejudice from the Court-ordered schedule (and certainly not when modified by the compromises offered by OAG) because they already have all the time, resources and access to information they need to mount their defense. As the Court has observed, Defendants at the preliminary injunction stage "failed to submit an iota of evidence, or an affidavit from anyone with personal knowledge, rebutting OAG's comprehensive demonstration of persistent fraud." NYSCEF No. 183 at 6. Nothing in their papers or pre-trial conduct suggests that they have used their time since then diligently to develop such evidence, or that further delays are warranted for them to attempt to do so.

Indeed, Defendants' conduct in this and other proceedings suggests that their goal is delay. As Judge Kaplan in the Southern District noted late last year, "Mr. Trump has litigated this case since it began in 2019 with the effect and probably the purpose of delaying it." *Carroll v. Trump*, 20 Civ. 7311, 2022 WL 6897075, at *1 (S.D.N.Y. Oct. 12, 2022). To cite another example, counsel for plaintiffs in a pending proceeding against Mr. Trump, his children and his business in the Southern District (*McKoy, et al. v. The Trump Corporation, et al.*, S.D.N.Y. 18 Civ. 9936) just submitted a letter to the judge highlighting the delay tactics used by the Trump defendants. The

judge was told the trial date in this action was firm and used it to move the trial date in *McKoy* case. *See* NYSCEF No. 546. Now Defendants are seeking to delay the close of discovery in this action to the end of the year, after which their time will be occupied with the *McKoy* trial. *Id.*

These delays appear calculated to generate conflict with Mr. Trump's campaign schedule as he seeks the Republican nomination for president in the 2024 national election. This is evident from Defendants' prior actions. In addition to the instances identified above:

- In 2016, Mr. Trump successfully obtained a delay until after the election in the trial of the consumer class action against him for fraud involving Trump University, arguing "Mr. Trump must devote all of his full-time efforts and energies to running his campaign and running for office, and I don't believe that it would be fair to him – in fact, I think it would be a virtually impossible burden on him to have to defend himself at trial between now and November." *Low v. Trump University, LLC*, No. 10 Civ. 940, Dkt. No. 481, Hearing Tr. at 10-19 (S.D. Cal. May 13, 2016) Aff. ¶29.

- Also in 2016, Mr. Trump sought to delay his testimony in an action *he filed* against restauranters who backed out of the Old Post Office hotel by asserting: "that as Mr. Trump is the President-Elect, 'he is extremely busy handling matters of very significant public importance' and requests that the Court adjust case scheduling and testimonial obligations accordingly." *Trump Old Post Office, LLC v. Topo Atrio LLC*, No. 2015 CA 006624, 2016 WL 11478086, at *2 (D.C. Sup. Ct. Dec. 14, 2016).

- In 2020, before this Court, Eric Trump argued that he should not have to testify before the election, citing his own "extreme travel schedule and related unavailability between now and the election, and to avoid the use of his deposition attendance for political purposes. It is well known that most, if not all, law enforcement and regulatory agencies studiously avoid certain actions within the 60-day period prior to a major election." *See, e.g.,* Special Proceeding NYSCEF No. 237 at 41.

And fighting off investigations by citing to his candidacy is a tactic Mr. Trump engaged in *earlier this week*. One of Mr. Trump's lawyers from outside this proceeding claimed that the New York County District Attorney's reported investigations of Mr. Trump "are a blatant and unconstitutional attempt to interfere with a Federal election," and asked for an investigation by the New York City Department of Investigation. Aff. ¶30. Indeed, Defendants recently added an attorney to their team who explicitly advanced that strategy in the press: "He will raise money on it, and he will campaign on it," Mr. Morian predicted of this lawsuit. "He doesn't want this resolved

before the 2024 election, in case it goes against him."[8] Defendants have shown no prejudice from the current schedule for discovery and trial. But they have made clear that acceding to their requests for delay now will only fuel their additional demands for delay later in order to push the trial into late 2024 or beyond.

## CONCLUSION

Based on the foregoing, OAG respectfully requests that the Court deny Defendants' Motion to Vacate and Modify the Preliminary Conference Order. OAG has no objection to a modification of the PCO that would modify interim dates as follows:

| | |
|---|---|
| **Expert Identification** | April 24, 2023 |
| **Expert Reports Due** | May 5, 2023 |
| **Rebuttal Expert Identification** | May 19, 2023 |
| **Rebuttal Expert Reports Due** | May 26, 2023 |
| **Expert Discovery Completed** | June 23, 2023 |
| **Note of Issue** | June 26, 2023 |

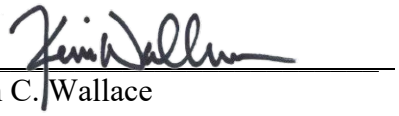
But OAG opposes any other change to the PCO, including any change to the trial date.

[8] *See* Laura Italiano, "NY AG Letitia James v. Donald Trump will be a slow-motion, 'eye-glazing' slog, ex-AG insiders say," *Business Insider* (Sept. 25, 2022), https://www.businessinsider.com/letitia-james-has-sued-donald-trump-now-what-2022-9. In addition, Mr. Morian wrongly informed the press that "Trump is entitled to drag this case out as long as he can. This will play out over years." *Id.* But Defendants have shown neither good cause nor any risk of prejudice sufficient to justify prolonging this litigation for "years," much less the six months they now seek.

Dated: New York, New York
March 15, 2023

Respectfully submitted,

LETITIA JAMES
*Attorney General of the State of New York*

By: 
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**CERTIFICATION**

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court ("Uniform Rules"), I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 6,627 words, calculated using Microsoft Word, which complies with the Court's oral order on the record on November 22, 2022, granting leave to the parties to file oversize submissions pursuant to Rule 202.8-b(f) of the Uniform Rules.

Dated: New York, New York
March 15, 2023

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