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

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DONALD J. TRUMP,

Defendant.

Index No. 71543-23

**PRESIDENT DONALD J. TRUMP'S MOTION TO DISMISS AND FOR AN ADJOURNMENT BASED ON DISCOVERY VIOLATIONS**

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## I. INTRODUCTION

President Donald J. Trump respectfully submits this motion for sanctions based on the People's discovery violations.

The People have engaged in widespread misconduct as part of a desperate effort to improve their position at the potential trial on the false and unsupported charges in the Indictment. These improper and unethical actions violated the automatic discovery provisions of CPL § 245.20. Recently, this misconduct has included:

1. Attempts to suppress voluminous exculpatory evidence relating to Michael Cohen at the U.S. Attorney's Office for the Southern District of New York (the "USAO-SDNY"), which the USAO-SDNY just started to produce on March 4, 2024;

2. Untimely production on March 4, 2024, of [redacted] which contains extensive impeachment material;

3. Untimely production of separate impeachment material relating to Cohen on February 9, 2024, in the form of [redacted];

4. Insisting on improper redactions of [redacted] as well as of other internal communications involving current and former prosecutors associated with this case, and interview reports relating to other witnesses;

5. Untimely production, on February 26, 2024, of [redacted], which contains exculpatory information that undercuts the People's theory of the case; and

6. A strategically timed expert notice on March 1, 2024, relating to proffered testimony from Adav Noti, which was provided after our opposition to the People's motions in *in limine*, which exceeds the scope of the defense expert notice, and is therefore improper.

In connection with these violations, among many others, the USAO-SDNY is currently in the process of producing discoverable materials relating to Cohen. As of this morning, the productions to date have included 73,193 pages, including reports relating to statements by Cohen that are exculpatory and favorable to the defense, as expanded on below. The USAO-SDNY has agreed to make additional voluminous productions, including additional bank records and

materials that the USAO-SDNY and FBI seized as evidence of Cohen's prior crimes, which will be admissible at trial in this case. We are seeking to assess the extent of any overlap of the information with other discovery from the People. However, having previously obtained relevant materials from the USAO-SDNY, and included those documents in a June 8, 2023 production folder labeled "SDNY & FBI Materials," the People should have collected *all* of these documents long ago. Instead, they collected some materials but left others with the federal authorities, in the hope that President Trump would never get them. That approach is completely unacceptable and a blatant discovery violation, which the People further compounded more recently by opposing a request for the materials from defense counsel directly to the USAO-SDNY.

The circumstances surrounding [redacted] are, at least, equally troubling. [redacted], as well as [redacted] relating to President Trump, plainly contains witness statements subject to automatic disclosure under CPL § 245.20(1)(e) and impeachment information subject to disclosure under CPL § 245.20(1)(k), as well as the state and federal constitutions. The People did not produce any evidence relating to [redacted] until March 4, 2024. In that production, they made no mention of the fact—which they obviously were aware of—that [redacted] for a week prior to the scheduled start of jury selection, on March 18. That information was discoverable because it bears on Clifford's bias and motive to monetize her status as a witness in this case, and it is extremely problematic with respect to prejudicial pretrial publicity. We only learned of these plans yesterday from media reports and from the public release of a trailer relating to [redacted].

Also this week, in *People v. Horowitz, et al.*, Ind. No. 72426-22, the People dismissed a separate case based on a mid-trial production "of approximately 6,000 pages of material."[1] The People conceded that "[t]hese delayed disclosures revealed relevant information that the defense should have had the opportunity to explore and [use in] cross-examination of the People's witnesses."[2] Justice Curtis Farber described the disclosures as "jarringly late," "in violation of both discovery mandates and the defendants' Constitutional Right of confrontation . . . ."[3] Justice Farber found that the late disclosures revealed that complaining witnesses had invoked privilege "to shield themselves from a thorough and complete cross-examination" and to "obfuscate and hide information that they believed would be damaging to their position . . . ."[4] With regard to the People, Justice Farber concluded that they had been "passive complicity in allowing this situation to develop,"[5] that the "People should have probed" more deeply,[6] and that the People "should have recognized that they did not have a complete understanding of their case and that potential material existed upon which the defense could rely on their defense."[7] Justice Farber credited District

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[1] Kyle Schnitzer and Ben Kochman, *DA 'checks out' of 'Hotel California' lyrics case mid-trial after rocker Don Henley discloses 6,000 pages of new evidence late*, N.Y. POST (Mar. 6, 2024, 4:32 pm), https://nypost.com/2024/03/06/us-news/da-moves-to-drop-eagles-stolen-lyrics-case-after-admitting-don-henley-produced-6000-pages-of-evidence-late/.

[2] Rachel Scharf, *'Manipulated' DA Checks Out Of 'Hotel California'*, LAW360 (Mar. 6, 2024, 11:24 am), https://www.law360.com/articles/1810690/-manipulated-da-checks-out-of-hotel-california-trial [hereinafter *Manipulated DA Checks Out*].

[3] *Id*.

[4] *Id*.

[5] Molly Crane-Newman, *Manhattan DA drops 'Hotel California' lyrics case amid accusations key evidence withheld*, DAILY NEWS (Mar. 6, 2024, 11:28 am), https://www.nydailynews.com/2024/03/06/manhattan-prosecutors-drop-hotel-california-lyrics-case-don-henley-eagles/ [hereinafter *DA drops 'Hotel California' lyrics case*].

[6] Scharf, *Manipulated DA Checks Out*, *supra* note 2.

[7] Crane-Newman, *DA drops 'Hotel California' lyrics case*, *supra* note 5.

Attorney Bragg and the People with "eating a slice of humble pie" and "refusing to allow itself or the courts to be further manipulated for the benefit of anyone's personal gain."[8]

Justice Farber's findings in *Horowitz* apply forcefully to the People's misconduct and discovery violations here. The late productions consisting of more than 50,000 pages, and counting, greatly exceed the 6,000 pages in *Horowitz*. Those disclosures have revealed information that President Trump must have an opportunity to explore as he prepares his defense. Relative to the automatic disclosure provisions of CPL § 245.20(2), the People's recent productions are jarringly late. The People have been far more than passively complicit in the suppression of evidence in this case; they have actively sought to prevent President Trump from obtaining critical materials to which he is entitled. Similar to the frivolous privilege claims by witnesses in *Horowitz*, the People have improperly invoked federal law, federal immunities, and the work product privilege in this case, in a broad manner to try to shield from discovery information that is discoverable under the state and federal constitutions, because President Trump is entitled to use it to cross-examine the People's witnesses and call to the jury's attention to the lack of integrity associated with this investigation. Finally, the developing situations with the USAO-SDNY's productions and [redacted] illustrate that, as in *Horowitz*, the People should have recognized that they do not have a complete understanding of their witnesses and that material existed that they needed to collect because New York law and due process required its disclosure.

For all of these reasons, dismissal of the Indictment and severe sanctions are required. The People's Certificates of Compliance were illusory and failed to adequately explain their wrong and misleading claims of "diligence," which never truly occurred. Pursuant to CPL § 245.80, as well

[8] Scharf, *Manipulated DA Checks Out, supra* note 2.

as the additional reasons set forth in our motions *in limine*, the Court should dismiss the Indictment or, in the alternative, preclude testimony from Cohen, Clifford, and Noti. Given these facts and the developments, the People should agree that dismissal is proper. If the Indictment is not immediately dismissed, as it should be, an adjournment of the trial is necessary, "[r]egardless of a showing of prejudice," because President Trump is entitled to "reasonable time to prepare and respond to the new material." CPL § 245.80(1)(a). The Court should not set a new trial date until the USAO-SDNY has completed its productions to President Trump and the People so that all parties have a better sense of the volume of those materials, while it is impossible to estimate, due to the People's lack of candor and continued obfuscation, the length of that period, it cannot be any less than 90 days.

Finally and vitally, this motion implicates extremely serious issues relating to prosecutorial misconduct and discovery violations in a high-profile case that are specifically geared to interfere in the 2024 presidential election and deprive the American people of their First Amendment right to receive campaign advocacy from President Trump—the leading candidate in that election. At common law and under the First Amendment, the public and the press have an immediate right of access to this motion. We respectfully submit that no redactions are appropriate and that it should be filed on the public docket immediately.

## II. RELEVANT FACTS

### A. The People's Production Of "SDNY & FBI Materials"

On June 8, 2023, the People produced to the defense two hard drives that contained nearly 3 million pages of discovery. The People provided an index relating to the production, which included a "Category" labeled "Docs from Government Agencies." Ex. 1 at 4-7. Within this Category, the People produced documents from the New York Attorney General, the U.S. Office of Government Ethics, and "SDNY & FBI Materials"—a reference to the USAO-SDNY and the

FBI, which assisted both the USAO-SDNY and Special Counsel Robert Mueller. *Id.* at 7. The "SDNY & FBI Materials" included 34 documents, such as:

- [redacted] (DANYDJT00000570, DANYDJT00000573);
- [redacted] (DANYDJT00000576);
- [redacted] (DANYDJT00000797, DANYDJT00000580);
- [redacted] (DANYDJT00001091, DANYDJT00001011, DANYDJT00001139, DANYDJT00001152); and
- [redacted] (DANYDJT00098665).

In a Category labeled "Public Court Filings," the People's June 8, 2023 production also included [redacted] (*e.g.*, DANYDJT00021712).

**B. DANY Investigator's Improper Relationship With Cohen And His Attorney**

The People also disclosed in the June 8, 2023 production that [redacted]. Specifically, [redacted]:

- [redacted]
- [redacted]

- [redacted]
- [redacted]

Ex. 2.

Also on June 8, 2023, DANY produced [redacted], which included the following:

- [redacted] (DANYDJT00160815).
- [redacted] (DANYDJT00160021).
- [redacted] (DANYDJT00160817).
- [redacted] (DANYDJT00160025).
- [redacted] (DANYDJT00160034).
- [redacted] (DANYDJT00160048)

[redacted]. (DANYDJT00184611).

**C. [redacted] Unreliable Collection Of [redacted]**

On June 15, 2023, DANY produced [redacted]. [redacted]

[redacted]

[redacted]; and [redacted] (DANYDJT00175474).

[redacted].

### D. The People's Efforts To Withhold Communications Relating To Cohen

On July 24, 2023, DANY produced, among other things, "Email Review" materials "identified through our review of internal email messages, including materials identified by the Bates prefix[] 'DANYEMAIL.'" Ex. 3. The "Email Review" folders included with the production included a total of 769 documents. The letter accompanying the July 24, 2023 production stated that, "in some circumstances, we *may* have withheld parent emails or attachments where those documents were not subject to disclosure (on work product or other grounds) or where those documents were separately produced." *Id* (emphasis added). The production letter made no reference to redactions and did not include a privilege log.

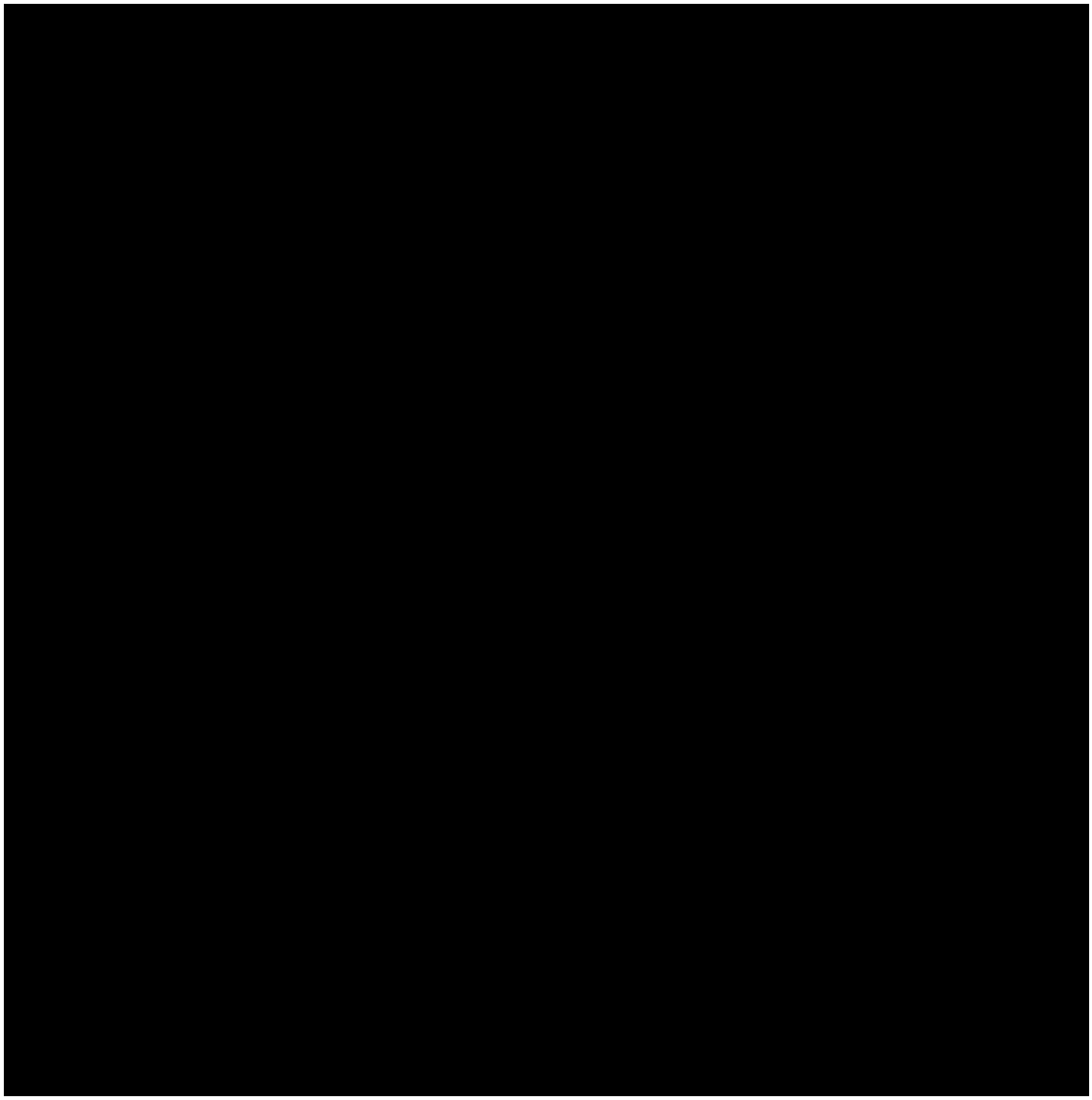
However, many of the documents in the "Email Review" folders were heavily redacted. For example, the People produced the following redacted version of [redacted]:

Ex. 4.

The People also produced [redacted] Ex. 5. In the email, [redacted] *Id.* An entire sentence of the email is redacted:

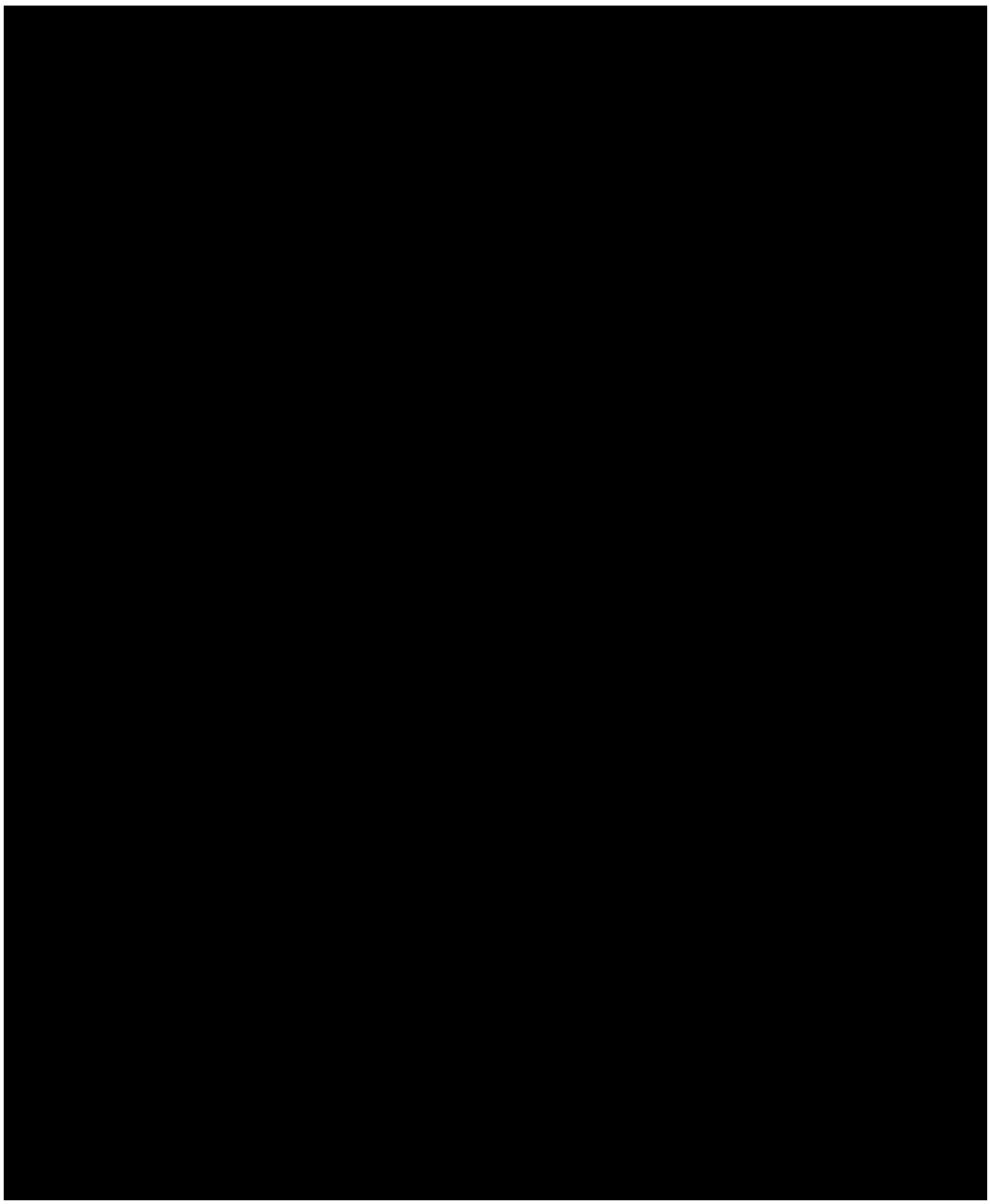
*Id*.

DANY produced [redacted] Ex. 6 (emphasis added). The email contains heavy redactions, including, inexplicably, the [redacted]:



*Id.*

The People similarly produced [redacted] which contains rather extensive redactions:



Ex. 7.

DANY produced another highly redacted [redacted]

[redacted]:

Ex. 8.

The People also produced [redacted]

[redacted] once again with heavy redactions:

Ex. 9. The email included [redacted] which the People did not produce.

**E. The People's Efforts To Obstruct President Trump's Subpoenas**

Beginning on October 17, 2023, based on open-source information and some of the documents in the People's June 8, 2023 production, President Trump issued subpoenas to collect evidence of (1) Cohen's criminal conduct, which is discoverable and admissible at trial because, *inter alia*, his prior crimes provided him with a motive to curry favor with the People by fabricating claims regarding President Trump and a corresponding bias against President Trump; (2) Cohen's writings regarding President Trump and agreements with publishers that provide financial motivations for Cohen to make things up regarding President Trump to sell more ads on his podcasts and more books; and (3) documents relating to the alleged tax crimes that the People allege are a predicate offense *in this case*, *see, e.g.*, 2/15/24 Op. at 11-13, 16-17.

The People obstructed those efforts by coordinating with Cohen to file motions to quash the subpoena that President Trump had served on Cohen's counsel. The Court granted their motions in large part on November 29, 2023, and denied reargument on February 23, 2024—even with respect to *Trump Revolution: From the Tower to the White House, Understanding Donald J. Trump*, an unpublished manuscript by Cohen in which Cohen described his relationship with President Trump in terms that contradict his current story, and which therefore has obvious and important impeachment value at trial.

Consistent with the existing strategy to hide the truth, DANY has thus far successfully obstructed President Trump's efforts to subpoena from Cohen's publishers the relevant agreements and drafts of Cohen's two published books: *Revenge: How Donald Trump Weaponized the US Department of Justice Against His Critics* and *Disloyal: A Memoir: The True Story of the Former Personal Attorney to President Donald J. Trump*. The Court granted motions to quash filed by the People and the publishers on March 1, 2024.

### F. The People's Efforts To Obstruct President Trump's *Touhy* Request To USAO-SDNY

On January 18, 2024, while President Trump's motion for reargument on the subpoena to Cohen was pending, the defense served a subpoena on the USAO-SDNY. Ex. 10. The following day, the USAO-SDNY took the position that the subpoena was unenforceable based on sovereign immunity and asked the defense to instead request the information pursuant 28 C.F.R. §§ 16.21 – 16.29, which are regulations promulgated by the Justice Department pursuant to *United States ex. rel Touhy v. Ragen*, 340 U.S. 462 (1951). Ex. 11.

Defense counsel submitted the *Touhy* request to the USAO-SDNY on January 22, 2024, and supplemented the request on January 31, 2024. Exs. 12, 13. On February 7, DANY opposed our request by relying on, *inter alia*, federal law that is not applicable and that the prosecution had

no business invoking. Ex. 14 (citing "the Privacy Act, the federal grand jury secrecy rule, the tax secrecy provisions of the Internal Revenue Code, and the substantive law concerning the federal government's privileges"). For example, DANY argued—wrongly, as proven by subsequent events—that "[e]ach demand in defendant's *Touhy* request" required "Cohen's consent." *Id.* at 7.

On February 23, 2024, the USAO-SDNY agreed to disclose certain of the records sought by President Trump. Ex. 15. The USAO-SDNY found Your Honor's rulings "instructive" and "persuasive," *id.* at 2-3, but agreed to disclose the following:

- Bank records and related emails concerning Cohen, which the USAO-SDNY agreed to produce to DANY "with the understanding that any relevant, material and/or discoverable materials will be shared with the defense." *Id.* at 7 (discussing *Touhy* Request 3).

- All documents seized in 2018 from "two Apple iPhones and three email accounts belonging to Mr. Cohen." *Id.* (discussing *Touhy* Requests 4-10).

- [redacted] *Id.* at 8 (discussing *Touhy* Request 11).

- [redacted] *Id.* (discussing *Touhy* Request 12).

To date, in a series of rolling productions that are not yet complete and ongoing, the USAO-SDNY has produced over 73,000 pages of documents. On March 4, 2024, the USAO produced approximately 182 pages of documents relating to *Touhy* Requests 11 and 12, *i.e.*, [redacted]. As discussed below, [redacted] include exculpatory information that DANY failed to timely obtain and produce.

On March 5, 2024, the USAO-SDNY produced to DANY approximately 10,778 pages of bank records in response to *Touhy* Request 3. DANY produced those documents to President Trump on March 6. We are beginning the process of reviewing those materials.

On March 7 and March 8, 2024, the USAO-SDNY produced to DANY two additional productions of bank records in response to *Touhy* Request 3, bringing the total page count for the recent USAO-SDNY productions to 73,193. The USAO-SDNY has not yet produced any materials relating to *Touhy* Requests 4 through 10, which relate to evidence seized from Cohen's accounts and emails because it is evidence of criminal conduct. Based upon representations from the USAO-SDNY, additional productions will continue next week.

**G. Untimely Production Of Additional** [redacted]

On February 9, 2024, the People produced 20 pages of [redacted]. Ex. 16. [redacted], and the communications include discoverable information that was not timely produced [redacted]:

- [redacted] *Id.* at DANYDJT00212834.
- [redacted] *Id.* at DANYDJT00212849.
- [redacted] *Id.* at DANYDJT00212836.
- [redacted] *Id.* at DANYDJT00212838.
- [redacted] *Id.* at DANYDJT00212842.

- [redacted] *Id.* at DANYDJT00212847-48.
- [redacted] *Id.* at DANYDJT00212853.

The People have not offered an adequate explanation for the untimely production, given that [redacted] appear to have been in Pomerantz's possession, and [redacted] contain improper redactions. *See id.* at DANYDJT00212843, DANYDJT00212845-46

**H. Untimely Disclosure Of** [redacted]

On February 26, 2024, DANY produced [redacted]. Ex. 17. DANY described this document as "Intake" and, once again, provided no explanation for its failure to produce this document sooner. Exs. 18, 19 at 21.

**I. Improper Rebuttal Expert Disclosure**

President Trump provided the People with notice of his intention to elicit testimony from Bradly Smith on January 22, 2024. The People moved to preclude Smith's testimony in a motion *in limine* filed on February 22. The People waited until after President Trump opposed that motion on February 29 to disclose purported expert notice relating to Adav Noti. Ex. 20. Although the notice claimed that Noti would "address the topics identified in Mr. Smith's disclosure," the People added wholly impermissible topics—addressed in President Trump's motions *in limine*—such as Cohen's guilty plea to FECA violations, AMI's non-prosecution agreement, and the FEC's findings regarding AMI and David Pecker. *See id.*

**J. Untimely Disclosure Of** [redacted]

On March 4, 2024, DANY produced a [redacted], which they described as [redacted] Ex. 21 at 1. According to the production letter, [redacted]:

> [had] not yet been released to the public and was produced to DANY with the understanding that it would be kept confidential by all parties under any and all applicable court orders and confidentiality obligations, and treated as "Limited Dissemination Materials" pursuant to the May 8, 2023 protective order. NBCUniversal did not provide a copy of [redacted] but did provide unique links and passwords for DANY and defense counsel to access [redacted]

*Id.* In response to a request from the defense, which noted that communications with NBCUniversal were subject to automatic discovery pursuant to CPL § 245.20, the People produced [redacted]

(DANYDJT00214661).

On the evening of March 7, 2024, we learned from media reports, rather than DANY, that [redacted] will not be kept "confidential" at all. Rather, NBCUniversal plans to release [redacted] on its "Peacock" streaming service, in a highly prejudicial fashion, on March 18, 2024. Ex. 22. Peacock released a 2 minute, 12 second trailer on March 7, which includes Clifford describing herself as "out of fucks" and an "idiot who can't keep her mouth shut."[9] The trailer shows excerpts of an agreement that is subject to the Court's protective order. Clifford asserts on the video trailer that "sh*t got real" when President Trump got the Republican nomination, claims

[9] Peacock, *Stormy: Official Trailer*, YOUTUBE (Mar. 7, 2024), https://www.youtube.com/watch?v=_tE7h_TJkxg.

that she was "terrified," reads highly prejudicial threats not connected to President Trump, such as a random person stating, "you just signed your death warrant." A male associate claims that unspecified "People," with no connection to President Trump, tried to bring "guns" and "knives" into Clifford's events. The trailer ends with the claim that Clifford "won't give up" because she is "telling the truth," even though her statements contradict myriad prior statements, including those in writing.

In the version of [redacted] produced to the defense, [redacted] makes additional extremely prejudicial claims. For example, [redacted]:

> [redacted]

[redacted] added:

> [redacted]

As discussed below, Clifford is the People's witness. By at least December 19, 2023, they were aware of [redacted] (DANYDJT00201899). The People had an obligation to collect [redacted] and disclose it at the outset of this case, along with any other videotaped statements by Clifford relating to the false testimony the People seek to elicit from her. Clifford's work with NBCUniversal to further monetize her untrue testimony by releasing [redacted] a week before the scheduled trial date reflects an egregious effort to prejudice the venue, which the People were undoubtedly aware of but failed to disclose, and which requires a dismissal and, if not granted, at the very last, an adjournment of the trial date.

### K. The Certificates of Purported Compliance

The People issued their first certificate of compliance ("COC") to the defense on July 24, 2023. Ex. 23. In the COC, ADA Colangelo claimed that DANY, having "exercise[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery under CPL § 245.20(1)," had disclosed and made available to the defense "all known material and information that is subject to discovery." *Id.* at 1. We now know that this was false.

In omnibus pretrial motions filed on September 29, 2023, President Trump argued that DANY was "not in compliance with their discovery obligations under C.P.L. § 245.50." Def. Omnibus Mot. at 46. In a November 9, 2023 submission, the People falsely characterized the motion as "frivolous." DANY Omnibus Oppn. at 80. The Court recently denied the motion. 2/15/24 Op. at 28-29.

On March 6, 2024, the People filed a Supplemental Certificate of Compliance. The document offered only scant explanation concerning the People's actions to obstruct and delay President Trump's efforts to obtain discoverable information from the USAO-SDNY and the People's untimely production of materials relating to [redacted], [redacted] and [redacted] Based on the sequence of events, including events on March 7, we now know that this certification was also false.

By letter dated March 6, 2024, President Trump provided the People with notice of discovery deficiencies pursuant to CPL §§ 245.50(4)(b) and 245.60. Ex. 24. The People responded with a brief and dismissive letter on the night of March 7. Ex. 25.

## III. APPLICABLE LAW

### A. Automatic Discovery Pursuant To CPL § 245.20

#### 1. Open-File Discovery

The People's obligations to provide discovery under CPL § 245.20 are "so broad as to virtually constitute 'open file' discovery, or at least make 'open file' discovery the far better course of action to assure compliance." Hon. William C. Donnino, *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Statutory discovery, in general). "That intent is found throughout article 245." *People v. Edwards*, 74 Misc. 3d 433, 439 (Crim. Ct. N.Y. Cnty. 2021). Thus, "a prosecutor who fails to engage in 'open file' discovery (except for 'work product' and information subject to a protective mandate of a statute or court order) may do so at his or her professional peril while also jeopardizing the viability of a prosecution." *Practice Commentaries,* CPL § 245.10 (Prosecutor's Obligations: Statutory discovery, in general).

The opening language of CPL § 245.20(1) itself points towards an "open file" discovery policy. Under CPL 245.20(1),

> If something is in the prosecutor's file (or that of the police investigating agency) that does not fall within one of the defined items of disclosure, but is information that "relate[s] to the subject matter of the case," it will need to be disclosed, unless it constitutes "work product" [CPL 245.65] or material subject to a protective mandate by statute or court order [CPL 245.70].

*Practice Commentaries,* CPL § 245.10 (Prosecutor's Obligations: Statutory discovery, in general).

CPL § 245.20(1) provides a non-exhaustive list of the items the People must disclose through "automatic" disclosure. *See People v. Williams*, 2024 WL 479408, at *2 (3d Dep't Feb. 8, 2024) ("[T]he disclosure obligations of CPL article 245 are now automatic and obviate the need to file a demand."); *People ex rel. Ferro v. Brann*, 197 A.D.3d 787, 788 (2d Dep't 2021) ("[D]iscovery demands are now defunct."). "This list is not to be interpreted narrowly, as CPL § 245.20(7) mandates, '[t]here shall be a presumption in favor of disclosure when interpreting

sections 245.10 and 245.25, and subdivision one of section 245.20, of this article.'" *People v. Pennant*, 73 Misc. 3d 753, 756 (Dist. Ct. Nassau Cnty. 2021); *see also People v. Randolph*, 69 Misc. 3d 770, 772 (Sup. Ct. Suffolk Cnty. 2020) ("[T]he decision in this case must respect the legislative intent that there shall be a presumption in favor of disclosure." (cleaned up)).

Further, "[t]here is a strong incentive for the prosecutor to provide discovery expeditiously." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Statutory discovery, in general) (Prosecutor's Obligations: Timing of disclosure). In addition, "notwithstanding a statutory limitation on the disclosure of information," "federal due process may yet require disclosure." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Constitutional Requirements). "It is a well settled principle in this State, that the People's duty to disclose exculpatory material in their control 'arises out of considerations of elemental fairness to the defendant and as a matter of professional responsibility.'" *People v. Vasquez*, 214 A.D.2d 93, 99 (1st Dep't 1995) (quoting *People v. Simmons*, 36 N.Y.2d 126 (1975)).

**2. Witness Statements**

"The People must disclose 'all statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information' 'that relate to the subject matter of the case.'" *People v. Ballard*, 202 N.Y.S.3d 683, 693 (Crim. Ct. Queens Cnty. 2023) (quoting CPL § 245.20(1), (1)(e)). This provision reflects "another significant expansion of a prosecutor's obligation for early 'automatic' disclosure." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Items of 'automatic' disclosure). "The discovery statute does not limit the type of writing that the People must disclose." *Ballard*, 202 N.Y.S.3d at 694. "There is no requirement that the 'person' with 'information' must be a person whom the prosecutor intends to call as a witness at trial; nor is there a general requirement that 'automatic' disclosure of evidence

or information is limited to evidence or information to be introduced at trial." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Items of 'automatic' disclosure). "[T]he People cannot decline to provide particular items because they believe they are duplicative." *Ballard*, 202 N.Y.S.3d at 697 n.13.

**3. Recordings**

CPL § 245.20(1)(g) requires the People to disclose "[a]ll tapes or other electronic recordings, . . . and a designation by the prosecutor as to which of the recordings under this paragraph the prosecution intends to introduce at trial or a pre-trial hearing." "There are many types of included recordings, such as . . . relevant surveillance videos supplied by private citizens . . . ." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Items of 'automatic' disclosure). Relatedly, CPL § 245.20(1)(o) requires disclosure of "tangible property that relates to the subject matter of the case."

**4. Expert Disclosures**

CPL § 245.20(1)(f) requires the People to disclose "[e]xpert opinion evidence." The items of disclosure, aside from the expert witness's curriculum vitae, include a list of, and the results of, proficiency tests (within the past ten years) and either a report from the expert or a written statement containing in effect what the expert will testify to. *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Items of 'automatic' disclosure). CPL § 245.20(1)(f) also includes the following obligation of the Court:

> When the prosecution's expert witness is being called in response to disclosure of an expert witness by the defendant, the court shall alter a scheduled trial date, if necessary, to allow the prosecution thirty calendar days to make the disclosure and the defendant thirty calendar days to prepare and respond to the new materials.

CPL § 245.20(1)(f).

### 5. Electronically Stored Information

CPL § 245.20(1)(u) requires disclosure of "[a] copy of all electronically created or stored information seized or obtained by or on behalf of law enforcement from: (A) the defendant . . . ; or (B) a source other than the defendant which relates to the subject matter of the case." This obligation "requires the disclosure of a 'complete copy' of the stored information [subparagraph (ii)]." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Items of 'automatic' disclosure).

### 6. Exculpatory and Impeachment Information

CPL § 245.20(1)(k) "contains a listing of information favorable to the defendant that must be disclosed (whether in 'tangible' form or not) drawn from *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and their progeny, as well as New York State Rules of Professional Conduct, Rule 3.8(b); and the New York State Unified Court System's Administrative Order of Disclosure." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Items of 'automatic' disclosure). CPL § 245.20(1)(l) specifically requires disclosure of "rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement."

"[I]n the pretrial setting, *Brady* requires disclosure of any information 'favorable to the accused' . . . without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial." *United States v. Singhal*, 876 F. Supp. 2d 82, 103 (D.D.C. 2012) (quoting *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005)). The issue of whether evidence is "favorable" under *Brady* is a "relatively low hurdle." *United States v. Wasserman*, 2024 WL 130807, at *6 (M.D. Fla. Jan. 11, 2024).

> The meaning of the term "favorable" under *Brady* is not difficult to discern. It is any information in the possession of the government—broadly defined to include all Executive Branch agencies—that relates to guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses. It covers both exculpatory and impeachment evidence.

*United States v. Safavian*, 233 F.R.D. 12, 16-17 (D.D.C. 2005); *see also United States v. Chansley*, 2023 WL 4637312, at *8 (D.D.C. July 20, 2023) ("Favorable evidence tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses." (cleaned up)). "It is . . . clear that *Brady* and its progeny may require disclosure of exculpatory and/or impeachment materials whether those materials concern a testifying witness or a hearsay declarant." *United States v. Jackson*, 345 F.3d 59, 71 (2d Cir. 2003). "A contrary conclusion would permit the government to avoid disclosure of exculpatory or impeachment material simply by not calling the relevant witness to testify." *Id.*

"[B]ecause the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976).

> It is demonstrably not the responsibility of a prosecutor to test the credibility or trustworthiness of an exculpatory statement given by a witness or to weigh that statement against their assessment of the inculpatory evidence in the case. It is their responsibility to disclose exculpatory evidence promptly no matter what they may think of its reliability or trustworthiness."

*United States v. Sutton*, 2022 WL 2383974, at *7 (D.D.C. July 1, 2022).

CPL § 245.20(1)(k) is even broader than *Brady*. *See People v. Hamizane*, 80 Misc. 3d 7, 10-11 (2d Dep't 2023); *see also Pennant*, 73 Misc. 3d at 756 ("Contrary to the People's argument, this obligation is not merely a codification of their *Brady* and *Giglio* obligations, as they existed prior to the enactment of Article 245."). CPL § 245.20(1)(k) requires disclosure of, for example, "*All evidence and information*" that "tends" to "mitigate the defendant's culpability as to a charged

offense" or "impeach the credibility of a testifying prosecution witness." CPL § 245.20(1)(k)(ii), (iv) (emphasis added). Subsection (1)(k)(iv), in particular, "broadly requires disclosure of *all* impeachment evidence." *Matter of Jayson C.*, 200 A.D.3d 447 (1st Dep't 2021) (ordering disclosure of all impeachment evidence in juvenile delinquency case (emphasis added)); *see also People v. Rodriguez*, 77 Misc. 3d 23, 25 (1st Dep't 2022) (dismissing information on statutory speedy trial grounds where "[t]he People failed to provide relevant records to defendant, including *underlying* impeachment materials pursuant to CPL 245.20(1)(k)" (emphasis added)). This obligation "goes beyond what *Brady* required." *Hamizane*, 80 Misc. 3d at 11 (citing six cases); *see also People v. Best*, 2022 WL 4231146, at *3 (Crim. Ct. Queens Cnty. Sept. 13, 2022) ("CPL 245.20(1)(k) goes beyond what *Brady* required. For example, this provision jettisons the 'materiality' requirement. Furthermore, 'impeachment evidence and information is not limited to that which is related to the subject matter of the underlying case.'" (cleaned up)); *see also Pennant*, 73 Misc. 3d at 756.

As to "information that impeaches the credibility of a 'testifying prosecution witness,' the New York State Unified Court System's Administrative Order of Disclosure specifies that such information includes," *inter alia*, "benefits, promises, or inducements," "prior inconsistent statements," and "information that tends to show that a witness has a motive to lie to inculpate the defendant, or a bias against the defendant or in favor of the complainant or the prosecution." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Items of 'automatic' disclosure). Critically, whether something is potential impeachment material "is not for the People to determine, but rather for defense counsel":

> As the Court of Appeals has long recognized, the best judge of the impeachment value of evidence is the "single-minded counsel for the accused" (*People v. Rosario*, 9 N.Y.2d 286, 290, *cert denied* 368 U.S. 866 (1961) . . . . To permit the single-minded counsel for the accused to be permitted only to see filtered allegations of misconduct impinges on counsel's ability to represent the accused. That is not what the Legislature intended (*People v. Edwards*, 74 Misc. 3d 433, 443-44 (Crim. Ct. N.Y. Cnty. 2021)).

*Best*, 2022 WL 4231146, at *6; *see also People v. Goggins*, 76 Misc. 3d 898, 901 (Crim. Ct. Bronx Cnty. 2022) (reasoning that discovery "should not be filtered through the prosecution"); *People v. Cooper*, 71 Misc. 3d 559, 566 (Erie Cnty. Ct. 2021) (reasoning that the law does not allow discoverable material to be selectively disclosed based on "the People's assessment of its credibility or usefulness"); *see also* CPL § 245.20(k) ("Information under this subdivision shall be disclosed . . . irrespective of whether the prosecutor credits the information.").

"[D]isclosure of all 'evidence and information' tending to impeach the credibility of a testifying prosecution witness cannot be untethered from a recognition that the prosecutorial failure to disclose information favorable to the defense has been recognized as one of the principal causes of wrongful convictions." *People v. Barralaga*, 153 N.Y.S.3d 808, 815 (Crim. Ct. N.Y. Cnty. 2021) (citing New York State Justice Task Force, Report on Attorney Responsibility in Criminal Cases (2017)). "Permitting the prosecutor to be the arbiter of 'essential information' is antithetical to that principal." *Id.* "Anything short of full disclosure without a protective order would amount to a subjective determination by the parties as to what should be turned over. This is contrary to the automatic disclosure requirements and the purpose of the reformed discovery statute." *Best*, 2022 WL 4231146, at *4; *see also People v. Rugerio-Rivera*, 2023 WL 1426817, at *2 (Crim. Ct. Queens Cnty. Jan. 24, 2023) (noting that the First Department has consistently viewed the required disclosures "through a lens of open disclosure and mandate[d] that underlying impeachment material is discoverable").

### B. Search "Duties": CPL 245.10(2)

"[T]he law requires the prosecutor to make a 'diligent, good faith effort' to ascertain the existence of information subject to 'automatic discovery' and to 'cause' that information to be disclosed 'where it exists but is not within the prosecutor's possession, custody or control.'" *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Obligation to obtain discoverable items) (quoting CPL § 245.20(2). This is a "fundamental tenet" of the new discovery laws and "cannot be read out of the statute because it is inconvenient or burdensome for the People to meet their obligation." *Barralaga*, 153 N.Y.S.3d at 812.

The statutory framework mandates that all law enforcement files be openly accessible to prosecutors. CPL §§ 245.20(2), 245.55(2). Moreover, "[b]y way of emphasis, CPL 245.55(1) requires the prosecution 'to endeavor' to ensure that a 'flow of information' is maintained between the 'police and other investigative personnel' and the prosecutor's office sufficient to place within the prosecutor's possession or control all material and information pertinent to the defendant and the offense(s) charged." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Obligation to obtain discoverable items). "The legislative intent is clear: as far as law enforcement evidence, very little stands in the way of open disclosure and given these laws, only an 'individualized finding of special circumstances' can excuse withholding police evidence." *Ballard*, 202 N.Y.S.3d at 700.

The People are "not relieved" of their obligation to disclose discoverable materials "simply because they were not in actual possession of those items." *People v. Santos*, 2023 WL 4833769, at *4 (Crim. Ct. Bronx Cnty. Jul. 26, 2023); *see also People v. Edwards*, 77 Misc 3d 740, 746 (Crim. Ct. Bronx Cnty. 2022) ("[I]t is no defense that the People did not have these reports in their actual possession as the law is clear that all documents related to the prosecution of a charge that

are possessed by law enforcement are considered in the custody of the People."); *People v Georgiopoulos*, 2021 WL 1727831, at *4 (Sup. Ct. Queens Cnty. Apr. 29, 2021) ("[T]he assertion that known discovery materials are not in [the People's] physical possession does not in any way excuse their failure to provide them.").

The obligations of CPL § 245.10(2) are not limited to law enforcement evidence deemed to be in the constructive possession of the People. *See id*. (requiring identification of laboratories having contact with evidence and addressing potential need for subpoena duces tecum); *see also People v. Bracy*, 2024 WL 413529, at *1 (Crim. Ct. Queens Cnty. Feb. 5, 2024) (emphasizing need for prosecutors to determine whether law enforcement evidence may exist in other jurisdictions); *cf. Safavian*, 233 F.R.D. at 17 ("Under *Brady*, the prosecutors have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf . . . and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government 'closely aligned with the prosecution.'" (first citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); and then citing *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992))).

"An analysis of whether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented." *People v. Bay*, 2023 WL 8629188, at *6 (Dec. 14, 2023) (citations omitted); *see also People v. Barrios*, 202 N.Y.S.3d 912, 917 (Crim. Ct. Bronx Cnty. 2024) (citing *Bay*, 2023 WL 8629188, at *6).

### C. Continuing Disclosure Obligations: CPL § 245.60

"Once the prosecution provides the required discovery, it may thereafter learn of additional information which it would have been under a duty to disclose." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Continuing duty to disclose). CPL § 245.60 imposes a continuing duty to disclose discoverable evidence:

> If . . . the prosecution . . . learns of additional material or information which it would have been under a duty to disclose pursuant to any provisions of this article had it known of it at the time of a previous discovery obligation or discovery order, it *shall expeditiously* notify the other party and disclose the additional material and information as required for initial discovery under this article.

*Id.* (emphasis added).

### D. Certificates of Compliance: CPL § 245.50(1)

CPL § 245.50(1) requires the People to submit a Certificate of Compliance upon completing the automatic disclosures required by CPL § 245.20(1). "The certificate of compliance shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery." CPL § 245.50(1).

A "proper" certificate of compliance, therefore, requires the People to satisfy three elements: "(1) that they have exercised 'due diligence;' (2) made 'reasonable inquiries' to ascertain the existence of discoverable material; and (3) the prosecutor 'has disclosed' all known material subject to discovery." *Ballard*, 202 N.Y.S.3d at 697 (cleaned up); *see also Bay*, 2023 WL 8629188, at *5 (reasoning that the "key" question in determining if a certificate of compliance was properly filed is "whether the prosecution has exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery"); *People v. Buenaventura*, 2024 WL 563294, at *3 (Crim. Ct. Kings Cnty. Jan. 29, 2024) (noting that it is the People's obligation to "exercise due diligence" and make "reasonable inquires" prior to filing a

Certificate of Compliance" and "[s]imply stating that they acted diligently or that omissions were due to inadvertent error are not enough to meet their burden of showing due diligence.").

"If additional discovery is subsequently provided prior to trial pursuant to section 245.60 of this article, a supplemental certificate shall be served . . . ." CPL § 245.50(1). "Any supplemental certificate of compliance shall detail the basis for the delayed disclosure so that the court may determine whether the delayed disclosure impacts the propriety of the certificate of compliance." CPL § 245.50(1-a). "Although belated disclosure will not necessarily establish a lack of due diligence or render an initial [certificate of compliance] improper, post-filing disclosure and a supplemental [certificate] cannot compensate for a failure to exercise diligence before the initial [certificate of compliance] is filed." *Bay*, 2023 WL 8629188, at *6 (cleaned up). Although CPL § 245.50(1) directs that "[n]o adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith and reasonable under the circumstances," it clarifies that a trial court may nonetheless grant discovery sanctions and remedies as provided in CPL 245.80. *Id*. at *4.

**E. Prosecutorial Ethics**

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." N.Y. RULES OF PROF. CONDUCT R. 3.8 cmt. 1. "This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." *Id.* A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *People v. Bailey*, 121 A.D.2d 189, 192 (1st Dep't 1986) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The prosecution must act with "a heightened duty to ensure the fairness of the process by which a criminal conviction is obtained as well as a duty to avoid the public perception

that criminal proceedings are unfair." *People v. Waters*, 35 Misc. 3d 855, 859 (Sup. Ct. Bronx Cnty. 2012).

**F. Discovery Sanctions: CPL § 245.80**

CPL § 245.80 sets forth additional remedies for late productions and other discovery violations. "When material or information is discoverable under [CPL article 245] but is disclosed belatedly, the court shall impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure." CPL § 245.80(1)(a); *see also* CPL § 245.50(1) ("[T]he court may grant a remedy or sanction for a discovery violation as provided in section 245.80 of this article."); *People v. Mercano*, 2024 WL 698345, at *4 (Crim. Ct. Bronx Cnty. Feb. 15, 2024) (stating that "pursuant to CPL § 245.80, a court may impose *a remedy or sanction* where discoverable information is belatedly disclosed which is *appropriate and proportionate* to the prejudice suffered by the party entitled to the discovery."). "The court does not need to find that the People acted in bad faith to impose an appropriate remedy or sanction." *People v. Carey*, 2023 WL 8858731, at *13 (Sup. Ct. Nassau Cnty. Dec. 11, 2023).

CPL § 245.80(2), in particular, "sets forth a litany of remedies and sanctions a court may impose for failure to comply with any discovery order 'imposed or issued' pursuant to CPL art. 245." *Practice Commentaries*, CPL § 245.10 (Remedies and Sanctions); *see also People v. Bruni*, 71 Misc. 3d 913, 920 (Albany Cnty. Ct. 2021) ("Several permissible sanctions/remedies exist under CPL 245.80 for delayed, missing, or destroyed discovery material."). These remedies include dismissal and an adjournment and decisions to "preclude or strike a witness's testimony or a portion of a witness's testimony." CPL § 245.80(2); *see also Bruni*, 71 Misc. 3d at 920 ("The court has the ability to . . . grant a continuance . . . preclude or strike a witness's testimony or a portion of the witness's testimony, admit or exclude evidence, order a mistrial, order the dismissal

of all or some of the charges." (cleaned up)). "[A] defendant's constitutional right to present a defense bears on any sanction a court may consider." *Practice Commentaries,* CPL § 245.10 (Remedies and Sanctions). However, "[r]egardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material." CPL § 245.80(1)(a); *see also People v. Pardo,* 81 Misc. 3d 858, 860 (Crim. Ct. Bronx. Cnty. 2023).

## IV. DISCUSSION

The People have withheld discoverable evidence from President Trump, and have sought to obstruct his access to discoverable evidence which they should have collected from third parties at the outset of this case, at their "professional peril" in a manner that has "jeopardize[ed] the viability" of this procession. *Practice Commentaries,* CPL § 245.10. The People's discovery violations have violated not only CPL § 245.20, but also President Trump's federal due process rights under *Brady* and *Giglio*. *Id.*

Severe remedies are appropriate, including dismissal of the Indictment, preclusion of testimony from Cohen and Clifford based on discovery violations relating to their prior statements, and an adjournment in light of all of the foregoing as well as the ongoing and voluminous production of materials from the USAO-SDNY that the People failed to timely obtain and produce.

### A. The People Violated CPL § 245.20(1)

The People have violated their automatic discovery obligations under CPL § 245.20 in at least the following ways:

#### 1. Exculpatory and Impeachment Information.

The People failed to timely produce, as required by CPL § 245.20(1)(k) and federal authorities such as *Brady* and *Giglio*, exculpatory and impeaching statements in (1) [redacted], which President Trump obtained from the

USAO-SDNY on March 4, 2024; and (2) [redacted] produced in February 2024.

[redacted] is core impeachment material with respect to benefits to Cohen from that special treatment and the lack of integrity in the investigation demonstrated by [redacted]. *See, e.g.*, *Kyles*, 514 U.S. at 442 n.13 (1995) ("There was a considerable amount of . . . *Brady* evidence on which the defense could have attacked the investigation as shoddy."); *see also* Def. MILs Oppn. at 12-14 (citing additional authorities).

The People's failure to produce [redacted]—which we obtained from the USAO-SDNY over strenuous and meritless objections by the People—is deeply problematic. For example, the People have repeatedly claimed that Cohen was part of an agreement to "help" President Trump's "campaign" in 2016. People's Omnibus Oppn. at 3. However, [redacted]. Ex. 26 at 1. [redacted] *Id.* at 4. [redacted]

[redacted] *Id.* at 7. These statements directly contradict the People's theory of the case and are core *Brady* material that they tried to suppress because the statements demonstrate that Cohen did not seek to be, and was not, acting for the benefit of President Trump's campaign.

In motions *in limine*, the People argued that the *Access Hollywood* recording is "central" to the so-called "conspiracy to influence the election." People's MILs at 46. However, [redacted] Ex. 26 at 18. [redacted] *Id.* These statements are also exculpatory, and they further support President Trump's *in limine* argument that the *Access Hollywood* recording is inadmissible at trial on relevance and undue-prejudice grounds.

The People have also argued consistently that Cohen did not provide legal services to President Trump in 2017. *See, e.g.*, People's Mot. to Quash at 15 (arguing that 2017 payments to Cohen "were not for legal services"). [redacted] Ex. 26 at 19. [redacted] . *Id.* [redacted] Ex. 27 at 2. [redacted]

[redacted] *Id.* [redacted]. Ex. 28 at 3.

All of these statements by Cohen undercut the People's theory regarding the basis for the 2017 payments to Cohen and Cohen's alleged work on a scheme to assist the campaign, [redacted] Having had demonstrable access to "SDNY & FBI Materials" by virtue of the People's June 8, 2023 production, the People had an affirmative obligation to collect these additional materials and to produce them. It is easy to see the wrongful motives that drove the People to attempt to make sure that these reports never saw the light of day, and to try to prevent President Trump from obtaining them. Those motives are deeply unethical and require sanctions.

**2. Statements Of Potential Witnesses**

Separate from the exculpatory nature of certain of the statements by Cohen, Pomerantz, and Davis, the People's failure to timely produce these materials also violated CPL § 245.20(1)(e). It is of no moment that Pomerantz and Davis are not on the People's witness list. *See Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Items of 'automatic' disclosure). ("There is no requirement that the 'person' with 'information' must be a person whom the prosecutor intends to call as a witness at trial."). These additional violations further support President Trump's applications for dismissal and other sanctions.

### 3. Inducements

The People failed to obtain and timely produce, as required by CPL § 245.20(1)(l), [redacted]. The People produced [redacted] on February 26, 2024, despite the fact that the People's June 8, 2023 production of "SDNY & FBI Materials" included [redacted].

[redacted], moreover, draws a distinction between [redacted] alleged role in payments relating to Clifford and McDougal, which [redacted] Ex. 17 at 1. This distinction is exculpatory with respect to the People's position that AMI's alleged compensation to Sajudin is part of the same "scheme" as alleged compensation to Clifford and McDougal. *See, e.g.*, People's MILs Oppn. at 8 (arguing that the "scheme ultimately led to a series of transactions involving Dino Sajudin, Karen McDougal, and finally Stormy Daniels"). Therefore, the untimely production of [redacted] constitutes yet another *Brady* violation.

### 4. Relevant Records

The People failed to timely produce "items . . . that relate to the subject matter of the case," CPL § 245.20(1), in the form of almost 50,000 pages of Cohen's bank records that are the subject of ongoing productions by the USAO-SDNY that President Trump and defense counsel have not yet had an opportunity to review. Banking practices in connection with Cohen, including payments from the Trump Organization relating to President Trump, are central to the People's theory of this case and the defense efforts to cross-examine Cohen.

### 5. Electronically Stored Information

The People failed to ensure proper preservation and production of ESI, as required by CPL § 245.20(1)(k), in the form of data seized from Cohen's phones and email accounts by federal authorities, which the USAO-SDNY agreed to provide in response to President Trump's *Touhy* request.

The People's conduct relating to data from Cohen's phones is particularly suspect. The People collected [redacted], which included a [redacted]. Then, in February 2024, the People claimed to the USAO-SDNY—implausibly—that they had produced the same data to President Trump that the federal prosecutors seized pursuant to a 2018 search warrant, except that it was "filtered" for unspecified "privilege[s]" despite the People and Cohen having run roughshod over President Trump's privilege during this investigation. Ex. 14.

### 6. Recordings

The People violated their obligation to obtain and produce recordings, *see* CPL § 245.20(1)(g), as well as the "tangible property" requirement of CPL § 245.20(1)(o), by failing to timely produce [redacted] produced on March 4, 2024. *See, e.g.*, *People v. Branch*, 80 N.Y.2d 610, 615 (1992) (reaffirming the "fundamental precept of this State's criminal jurisprudence that the People are obligated to give to the defendant, for use during cross-examination, any nonconfidential written or recorded statements of a prosecution witness that relate to the subject matter of the witness' testimony."). The People were on notice that [redacted] existed as of at least December 2023, but they apparently refrained from collecting

it from Clifford until this month. Moreover, because [redacted] allows her to monetize her efforts to manufacture and publicize false claims against President Trump, the People's failure to disclose [redacted] sooner violated their obligation to produce impeachment information pursuant to CPL § 245.20(1)(k), *Brady*, and *Giglio*.

Moreover, the People plainly knew that NBCUniversal and Clifford planned to release [redacted] on March 18, 2024, in a manner that is enormously prejudicial to jury selection on the current schedule. That prejudice is in addition to the existing prejudice resulting from Clifford's inflammatory and false comments in the trailer released yesterday. The People's failure to disclose these details to President Trump in connection with the March 4 production, and to instead allow defense counsel to learn of these facts from the press, is further indicative of their bad faith and unethical behavior in connection with discovery.

**7. Improper Rebuttal Expert Notice**

The People violated CPL § 245.20(1)(f) by providing untimely expert notice relating to Noti, which exceeds the topics set forth in the defense notice relating to Smith and is not an appropriate rebuttal to those topics. *See* Ex. 20. The People provided the notice five weeks after President Trump's notice regarding Smith, and the day after President Trump filed his opposition to the People's motion to preclude Smith's testimony. The Notice makes clear that the People are seeking to offer facts and opinions that we do not propose to address during Smith's testimony.

**8. Improper Redactions**

The People violated CPL § 245.20 by withholding discoverable information through improper redactions of: (1) [redacted] in the "SDNY & FBI Materials" from the June 8, 2023 production (DANYDJT00098665), which relate to the People's witnesses;

(2) the July 24, 2023 "DANYEMAIL" production"; and (3) the February 9, 2024 production of [redacted].

CPL § 245.20(6), entitled "Redactions permitted," only authorizes redactions of "social security numbers and tax numbers." The People have claimed that their redactions are intended to withhold "work product." *See* CPL § 245.65. However, the People's redactions appear to obscure, *inter alia*, [redacted]. That is not "work product." In any event, the qualified work product privilege must give way where prosecutors seek to withhold obvious impeachment material that is discoverable under CPL § 245.20(1) and the state and federal constitutions. *See United States v. Nobles*, 422 U.S. 225, 239 (1975) ("The privilege derived from the work-product doctrine is not absolute."); *United States v. Armstrong*, 517 U.S. 456, 474-75 (1996) (Breyer, J., concurring) (reasoning that "work-product immunity" under Federal Rules of Criminal Procedure "does not alter the prosecutor's duty to disclose material that is within *Brady*," which is "based on the Constitution"). "For example, where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government." *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (cleaned up).

Thus, the People must disclose all of the details of their handling of requests for benefits and favors by Cohen, Clifford, any other witness. *See* CPL § 245.20(1)(l) (requiring disclosure of, *inter alia*, "requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement"). Nor is there any basis for the People to continue withholding [redacted] *See* Ex. 9. [redacted] is plainly "relevant" to [redacted]

[redacted]. CPL § 245.20(1)(l). Accordingly, the People should be required to either remove all redactions, or submit the redacted documents for *in camera* review by the Court. *See, e.g.*, *People v. Kozlowski*, 11 N.Y.3d 223, 244 n.12 (2008) ("A trial court may conduct an in camera review of subpoenaed materials to assess an opposing party's privilege claims.").

**B. The People Violated Their Obligations To Obtain Discoverable Evidence**

The People have made numerous untimely and inexplicably delayed disclosures, and actively obstructed efforts by President Trump to obtain discoverable materials from the USAO-SDNY, Cohen, and Cohen's publishers, among others. This misconduct weighs in favor of a severe remedy.

Article 245 "demand[s]" that "the People use diligence, act in good faith, and take reasonable steps to ensure that discoverable material is turned over before filing a COC." *People v. Weiss*, 79 Misc. 3d 931, 938 (Crim. Ct. Queens Cnty. 2023) (cleaned up); *see also Bruni*, 71 Misc. 3d at 919 ("[T]he People have a duty to make good faith efforts to ascertain the existence of impeachment material by making reasonable inquiries into the existence of such evidence or information."). "This obligation is true even when such impeachment material is physically in the hands of a law enforcement witness or law enforcement agency." *Bruni*, 71 Misc. 3d at 919. None of the People's COCs, including the most recent one filed on March 6, 2024, offers an adequate explanation for their lack of diligence and failure to obtain and timely produce the materials at issue.

It is inexcusable for the People to have failed to turn over [redacted] until February 9, 2024; [redacted] until February 26, 2024; and [redacted] until March 4, 2024. The People have

unquestionable access to each of these witnesses and were required by CPL 245.20(1) to produce these materials before filing their first COC.

The People were on notice of [redacted]. (DANYDJT00201899). The defense was in no position based on [redacted] to understand the nature, extent, and substance of [redacted] that DANY produced on March 4, 2024, and the People would have improperly quashed any efforts that we took to obtain it as they have in other instances. Clifford has acknowledged that she was "asked to kind of behave" by DANY, and claimed that she was "biting [her] tongue so fucking hard right now."[10] What she meant, apparently, is that she and the People were working to hide the upcoming release of [redacted] to maximize its prejudicial effect on the venire *just a week before the scheduled start of jury selection*.

The People's handling of discovery with respect to the USAO-SDNY, which has resulted in ongoing and voluminous untimely productions, is further troubling. In light of the overlapping state and federal investigations and the fact that ADA Colangelo left DOJ to work on this prosecution, the People's good-faith and due-diligence obligations required coordination with "independent stakeholders," including the USAO-SDNY and the FBI. *People v. Godfred*, 77 Misc. 3d 1119, 1124 (Crim. Ct. Bronx Cnty. 2022). CPL § 245.55(1) places "emphasis" on the People's obligation "to ensure that a 'flow of information' is maintained" with "'other investigative personnel,'"—such as investigators at the USAO-SDNY and the FBI—so that the People obtain and produce "all material and information pertinent to the defendant and the

[10] Alison Durkee, *Stormy Daniels Wants To Testify At Trump's Trial*, FORBES (Apr. 6, 2023, 8:27 am), https://www.forbes.com/sites/alisondurkee/2023/04/06/stormy-daniels-wants-to-testify-at-trumps-trial/?sh=189ead7235aa; Stormy Daniels, *Stormy and Kathy Griffin Are Not Sorry* (Feb. 6, 2024), https://audioboom.com/posts/8453426-stormy-kathy-griffin-are-not-sorry.

offense(s) charged." *Practice Commentaries*, CPL § 245.10 (Prosecutor's Obligations: Obligation to obtain discoverable items).

The People's June 8, 2023 production of "SDNY & FBI Materials" demonstrates that they had access to the files of these federal authorities. *See People v. DaGata*, 86 N.Y.2d 40, 45 (1995) ("[T]he People specified no good reason to deny defendant access to the [FBI] notes other than their reluctance to seek the notes themselves."); *see also Santos*, 2023 WL 4833769, at *4 ("The People's efforts can hardly be described as 'diligent' and 'reasonable' when, outside of a single, generalized request, they made no additional efforts to get from the NYPD discoverable material within the time in which they were statutorily required to complete their initial discovery obligations."); c*f. United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995) ("Included [in discovery] were publicly available court documents such as the transcript of Wilkerson's plea allocution. A defendant receiving such documents from the government could reasonably assume that the court files did not include other undisclosed exculpatory and impeachment documents pertaining to Wilkerson, and certainly not an affidavit in which she outright contradicted the testimony she was certain to give at the trial of Payne."). Fundamentally, "prosecutor may no longer turn a blind eye." *Bracy*, 2024 WL 413529, at *1 (cleaned up). They may not "speculate[] that such disclosure items [do] not exist and [have] not been created. *Bay*, 2023 WL 8629188, at *8. And they may not avoid disclosure where the existence of discoverable material is *demonstrably known*. *See Ballard*, 202 N.Y.S.3d at 698 ("The facts here show that the People knew or should have known about the underlying [] records and the audit trails. The People provided a letter summary . . . and therefore were aware that underlying records existed.").

The People attempted that exact maneuver of avoiding disclosure by improperly selecting materials they hoped to use while leaving other materials behind at the USAO-SDNY in the hope

that President Trump would not obtain them. *See, e.g.*, *United States v. McGowan*, 552 F. App'x 950, 953 (11th Cir. 2014) ("[T]the government may not leave evidence in the hands of a third party to avoid disclosure."); *United States v. Libby*, 429 F. Supp. 2d 1, 11 (D.D.C. 2006) (reasoning that where prosecutors "sought and received a variety of documents" from an agency, it would "clearly conflict with the purpose and spirit" of the discovery rules to allow the prosecutors to "leave other documents with these entities that . . . are material to the preparation of the defense").

It is equally clear that the People were aware that the USAO-SDNY possessed additional discoverable materials, including extrinsic evidence of criminal conduct by Cohen that is admissible in connection with defense cross-examination. Specifically, the People produced to President Trump on June 8, 2023 [redacted]. Under these circumstances, the People cannot escape their discovery obligations through the meritless claim that they lacked "possession, custody or control" under CPL § 245.20(1).

> Even where documents are beyond the prosecutor's control under *Rosario* and constructive possession under CPL 245.20, the presumption of openness, (CPL 245.20[7]), the duty to maintain the flow of information (CPL 245.55), the continuing duty to disclose (CPL 245.60), and, perhaps most importantly, the goals of article 245 require that when the prosecutor becomes aware after making the requisite reasonable inquiries that an agency outside their control holds information that relates to the subject matter of the case, best practice dictates that the People take steps . . . to obtain those records notwithstanding the fact that the information may be available to the defendant by equivalent process.

*People v. Heverly*, 2024 WL 396077, *3 (4th Dep't Feb. 2, 2024) (cleaned up); *see also Ballard*, 202 N.Y.S.3d at 698 (failure to exercise reasonable diligence under § 245.20(2) where facts show that the People knew or should have known about discoverable materials).

Finally, the same "right sense of justice" described by the Court of Appeals in *Rosario* required the People to refrain from making frivolous and inaccurate arguments to the USAO-SDNY in an effort to prevent President Trump from obtaining exculpatory and impeachment

material relating to Cohen. It is difficult to conceive of a good faith explanation for the People's conduct, as it was simply an attempt to prevent President Trump from obtaining relevant and exculpatory evidence. As noted above, the People made the misleading and inaccurate suggestion that [redacted] was duplicative of data the FBI seized in 2018. *See* Ex. 14. That is not true. In addition, the People misrepresented to the USAO-SDNY, based on federal authorities the People had no authority to invoke, that USAO-SDNY could not disclose discoverable evidence to President Trump without Cohen's consent. The USAO-SDNY rejected that position as legally incorrect, as did Judge Furman. These unlawful and desperate efforts to prevent President Trump from obtaining evidence that the People were obligated to collect at the outset of this case support the imposition of substantial sanctions for the People's non-compliance.

**C. Severe Sanctions Are Necessary**

"[T]he court shall impose a remedy or sanction that is appropriate and proportionate to the prejudice suffered by the party entitled to disclosure." CPL § 245.80(1)(a).

Dismissal of the Indictment is appropriate because President Trump has been prejudiced substantially by the People's discovery violations. For example, timely disclosure of [redacted], would have supported President Trump's pretrial motion to dismiss and motion *in limine* to preclude evidence relating to Sajudin because that story is not part of a cohesive "scheme" as the People have suggested. There are numerous intricate and discoverable details in [redacted] which we are still reviewing following the People's late disclosure, and which would have facilitated defense investigation of Clifford in the event we are required to cross-examine her (should the Court deny our motion *in limine* to preclude her inflammatory and inadmissible testimony).

The additional disclosures relating to [redacted] provided further insights into Cohen's inclination to disclose communications by President Trump that constitute official acts and support his presidential immunity defense. Timely production of those documents would have informed the defense's understanding of the People's vaguely articulated "pressure campaign" argument and led to the earlier filing of the immunity-related motion. *See, e.g., People v. Rodriguez*, 152 N.Y.S.3d 879, 886 (Sup. Ct. Queens Cnty. 2021) (precluding the People from using "all fruits of the search warrant" as evidence at trial because the People's belated disclosure of search warrant materials prevented defendant from moving to controvert the warrant during motion practice). In addition, as explained above, [redacted] that are wholly inconsistent with the People's theory of the case and are therefore exculpatory.

If the Court does not dismiss the Indictment, as it should, under § 245.80, another of the "[a]vailable remedies or sanctions" is to "preclude or strike a witness's testimony or a portion of the witness's testimony." CPL § 245.80(2). The Court should preclude testimony on the aspects of Noti's expert notice that are not a direct rebuttal of the defense notice relating to Smith. Moreover, President Trump has a pending motion *in limine* to preclude testimony from Cohen, and the facts set forth herein provide further support for it. Faced with a star witness who is necessary to their case, but who committed obvious perjury in *People by James v. Trump*, the People have actively obstructed our access to materials that fit squarely within their disclosure obligations relating to impeachment material. Therefore, a corresponding and proportionate sanction under these circumstances, which include the arguments regarding admissibility in the defense motions *in limine*, is to preclude Cohen's false testimony at the trial.

The Court should also preclude Clifford's testimony. As explained in our motions *in limine*, the probative value of Clifford's testimony is at best minimal. The risk of prejudice is manifest and underscored by [redacted] itself, in which [redacted] that the People—remarkably—seek to present from hearsay declarants at trial. *See* Def. MILs Oppn. at 26-28. In light of the First Amendment, neither the Court nor the defense is in a position to prevent Clifford from working with NBCUniversal and Peacock to enrich herself based on these proceedings. However, the People should not be able to capitalize on those efforts by presenting testimony from a witness who is actively prejudicing potential jurors in the week prior to the scheduled start of the trial. Accordingly, the Court should preclude Clifford's testimony as well.

**D. At Least A 90-Day Adjournment Is Necessary**

Over the last two weeks, the People have produced more than 10,000 pages of documents, [redacted], and an expert notice. The USAO-SDNY has produced approximately 63,000 more pages to the People, which they have not yet provided to President Trump. All of these untimely disclosures were avoidable through the exercise of diligence that the People chose not to undertake, and all of these materials should have been disclosed much earlier.

"Regardless of a showing of prejudice the party entitled to disclosure shall be given reasonable time to prepare and respond to the new material." CPL § 245.80(1)(a). Such an adjournment is the "typical remedy" for "late disclosures." *People v. Chavers*, 2023 WL 6333556, *4 (Sup. Ct. Kings Cnty. Sept. 28, 2023). Justice requires an adjournment of the trial date to permit President Trump to review the new materials, file additional motions relating to these late-and-ongoing productions, and to prepare his defense based on the complete discovery contemplated by

CPL Article 245. We respectfully submit that at least 90 days is necessary, and the Court should not set a new trial date until the USAO-SDNY has completed its productions to President Trump and the People so that all parties have a better sense of the volume of those materials.

## V. CONCLUSION

For the reasons described above, President Trump respectfully submits that the Court should dismiss the Indictment following a hearing, preclude any testimony from Cohen and Clifford, and adjourn the trial for at least 90 days to permit President Trump a reasonable period of time to review new discovery that the People failed to timely produce and for prejudicial publicity relating to [redacted] to dissipate.

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