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

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PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Petitioner,

-against-

THE TRUMP ORGANIZATION, INC., DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER LLC, SEVEN SPRINGS LLC, ERIC TRUMP, CHARLES MARTABANO, MORGAN, LEWIS & BOCKIUS, LLP, and SHERI DILLON,

Respondents.

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Index No. 451685/20

Motion Seq. No.: 006

MEMORANDUM OF LAW OF THE TRUMP ORGANIZATION, INC. DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER LLC, SEVEN SPRINGS, LLC, ERIC TRUMP AND CHARLES MARTABANO IN SUPPORT OF THEIR MOTION TO REARGUE

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Respondents The Trump Organization, Inc., DJT Holdings LLC, DJT Holdings Managing Member LLC, and Seven Springs, LLC (collectively "TTO"), and respondents Eric Trump and Charles Martabano, Esq., submit this memorandum of law in support of their application, pursuant to CPLR 2221, to reargue that portion of the Court's September 23, 2020 decision and order (the "Order") holding that Mr. Martabano "waived" privilege in response to the January 8, 2020 subpoena *duces tecum* (the "Subpoena") served on him by the Office of the New York State Attorney General (the "OAG").

PRELIMINARY STATEMENT

This Court overlooked or misapprehended established New York law when, for all intents and purposes, it sanctioned TTO for the failure of respondent Charles Martabano, Esq., TTO's former attorney, to produce an adequate privilege log in response to the Subpoena served on him by the OAG. The Court mistakenly held that Mr. Martabano, who is undeniably not the privilege holder in connection with TTO privileged communications and documents, *waived* ***TTO's*** privilege and ordered him to produce ***all*** documents in his possession responsive to the Subpoena by October 2, 2020. Because Mr. Martabano—who does ***not*** represent TTO in connection with the OAG's current investigation (and has not represented TTO for several years)—is not the "privilege holder," as a matter of law he cannot waive TTO's attorney client and work product privileges. Rather, it is only TTO, as the former client of Mr. Martabano and the lone privilege holder, that can waive privilege. Indeed, this Court's determination that TTO's privilege can be waived by its ***former attorney's*** preparation of a deficient privilege log is unprecedented in New York.

The record on the underlying motion is abundantly clear that Mr. Martabano—who was responding to his ***own*** Subpoena through his ***own*** counsel, George Calcagnini, Esq.—was solely responsible for the preparation of his privilege log in response to the Subpoena. In fact, the OAG itself expressly insisted that Mr. Martabano—***and not TTO***—prepare the privilege log "***given that [he is] responsible for compliance with the [S]ubpoena***." *NYSCEF Doc. No. 175, Ex. 161; NYSCEF Doc. Nos. 93-94, Exs. 79-80*. To be sure, the OAG ***excluded*** TTO from numerous "meet and confers" that it conducted with Mr. Martabano's counsel regarding the purported deficiencies with his privilege log. *NYSCEF Doc. Nos. 96-101, Exs. 82-87.*

It is undisputed that TTO, at all times, expressly asserted that the documents withheld by Mr. Martabano were privileged and confidential. *NYSCEF Doc. No. 69, Ex. 55; NYSCEF Doc. No. 175, Ex. 161*. For one thing, it undertook an extensive and time-consuming privilege review of Mr. Martabano's documents ***with the OAG's knowledge and consent*** and specifically identified those documents to Mr. Martabano over which it was asserting privilege prior to his preparation of his privilege log. *NYSCEF Doc. No. 63, Ex. 49*. More importantly, however, TTO prepared and produced its ***own*** privilege logs in response to the separate subpoenas served by the OAG on TTO, and expressly designated at least 123 separate communications with Mr. Martabano as privileged. *Garten Aff., ¶4, NYSCEF Doc. No. 69, Ex. 55.* Despite the fact that TTO timely and properly raised TTO's assertion of its privilege rights with respect to the Martabano documents in its own files, many of these very same documents are now threatened with disclosure based upon this Court's decision that Mr. Martabano—by his own conduct--somehow "waived" TTO's privilege.

For these reasons (and those reasons set forth below), it is respectfully requested that the Court (i) vacate its ruling that Mr. Martabano "waived" privilege in response to the Subpoena, (ii)

order that Mr. Martabano produce—with the participation and cooperation of TTO—a revised privilege log complying with the requirements of CPLR 3122(b) by a date certain to be set by the Court; and (iii) schedule an *in camera* review of any documents over which the OAG and the parties have any dispute as to privilege.

THE RELEVANT RECORD ON THE UNDERLYING MOTION

A. The Subpoena

On January 8, 2020, the OAG served the Subpoena (*NYSCEF No. 19, Ex. 5*) on Mr. Martabano, a land-use attorney who last represented TTO in 2014 in connection with zoning issues relating to the potential development of the Seven Springs property. *NYSCEF Doc. No. 14 at ¶ 112; NYSCEF Doc. No. 215 at ¶¶ 16-17.* While Mr. Martabano, through his counsel George Calcagnini, initially refused to respond to the Subpoena, TTO intervened and persuaded him to comply. *NYSCEF Doc. No. 87, Ex. 73; NYSCEF Doc. No. 88, Ex. 74; NYSCEF Doc. No. 90, Ex. 76.*

Nevertheless, the OAG insisted on working directly with Mr. Martabano—and not TTO—on his response to the Subpoena. *NYSCEF Doc. No. 90, Ex. 76.* When TTO attempted to coordinate with the OAG on the timing of Mr. Martabano's subpoena response, the OAG declared that it would ***"work with [Mr. Calcagnini] directly on timing***." *Id.* (*emphasis added*).

B. Mr. Martabano Prepared the Privilege Log

Given that TTO, as the former client of Mr. Martabano from in or about 2011 through 2014, had privilege concerns regarding the documents sought under the Subpoena, it conducted an extensive privilege review of the responsive documents in Mr. Martabano's possession. *NYSCEF Doc No. 60, Ex. 46; NYSCEF Doc. No. 63, Ex. 49.* TTO communicated with the OAG throughout

the privilege review process providing updates and explaining the many technical and other challenges associated with conducting the review.[1]

Upon completing its review of Mr. Martabano's documents, TTO notified the OAG that it would directly produce responsive, non-privileged documents to the OAG within the next day. *NYSCEF Doc. No. 175, Ex. 161*. However, the OAG responded by insisting that "the subpoena recipients produce all responsive records and ***any accompanying privilege log*** identifying documents withheld or redacted, given that Mr. Martabano is ***"responsible for compliance with the subpoenas and will presumably be asserting any privileges they agree with***." *Id.* (*emphasis added*).

Consistent with the OAG's instructions, on June 3, 2020, TTO conveyed its privilege assertions to George Calcagnini, Mr. Martabano's attorney. *NYSCEF Doc. No. 63, Ex. 49*. Specifically, it provided him with a link to those documents which TTO asserted were privileged and a separate link to those documents which were not privileged. *Id.* TTO also detailed its privilege objections to Mr. Calcagnini during several telephone discussions. *NYSCEF Doc. No. 176 at p. 2, Ex. 162*.

Mr. Martabano subsequently produced his responsive documents to the OAG on June 18, 2020, along with the privilege log that he and his counsel created. *NYSCEF Doc. Nos. 93-94, Exs. 79-80.*

C. The OAG Excluded TTO from All Communications On the Privilege Log

Following his production, the OAG wrote to Mr. Martabano asserting that his privilege log was deficient. *NYSCEF Doc. No. 96, Ex. 82*. ***TTO was not copied on the letter***. *Id.* The OAG

[1] Alan Garten (Chief Legal Officer of the Trump Organization) explained the many difficulties incurred in conducting the review in a detailed email to the OAG. *NYSCEF Doc. No. 63, Ex. 49*.

and Mr. Martabano's counsel subsequently exchanged numerous letters and emails concerning the privilege log, ***none of which included TTO***. *NYSCEF Doc. Nos. 97-101, Exs. 83-87.* ***TTO was likewise excluded*** from multiple "meet and confer" telephone conversations between the OAG and Mr. Calcagnini concerning Mr. Martabano's privilege log. *NYSCEF Doc. Nos. 96-97, 99, 101, Exs. 82-83, 85, 87.*

Ignoring the fact that Mr. Martabano's privilege log was in the process of being revised and was near completion, the OAG filed its underlying application to compel Mr. Martabano's compliance with the Subpoena. *NYSCEF Doc. No. 180, Ex. 166*; *NYSCEF Doc. No. 215 at* ¶¶ *20-22.*

D. TTO's Privilege Log Properly Designated Many of the Documents as Privileged

Separate and apart from the Subpoena served by the OAG on Mr. Martabano, the OAG also served subpoenas on TTO. *See the Affidavit of Alan Garten, sworn to on September 30, 2020 at ¶ 4.* In response to those subpoenas, TTO made its own independent document productions and prepared and produced its own privilege logs. Of course, TTO had numerous documents in its files containing privileged communications with Mr. Martabano (just as Mr. Martabano presumably had these same privileged communications in his possession). TTO identified these privileged documents in its own privilege logs, which included 123 specific communications with Mr. Martabano. *See e.g., NYSCEF Doc. No. 69, Ex. 55*. The OAG did not assert any objections to these entries or the adequacy of TTO's privilege logs.

E. The Court's Order Holding Mr. Martabano "Waived" Privilege

On September 23, 2020, the Court issued its Order granting, among other requests, the OAG's application to compel Mr. Martabano to comply in full with the OAG's subpoena *duces*

tecum, holding:

> ***Respondent Charles Martabano has waived privilege by failing to produce, despite repeated opportunities and attempts, an adequate privilege log***. See Anonymous v High Sch. For Envtl. Studies, 32 AD3d 353, 359 (1st Dep't 2006) (defendants' failure to supply privilege log amounts to waiver of any claim of privilege for documents sought). That Martabano is a solo practitioner is irrelevant to the rule. Accordingly, Charles Martabano is hereby ordered to produce, by October 2, 2020, all documents that he possesses that are responsive to petitioner's subpoena.

NYSCEF Doc. No. 255.

ARGUMENT

POINT I

THE COURT ERRONEOUSLY HELD THAT MR. MARTABANO "WAIVED" PRIVILEGE

Reargument is appropriate under CPLR 2221(d) where, as here, the Court "overlooked or misapprehended" matters of fact or law in reaching its prior decision. *See, e.g., Sachar v. Columbia Pictures Industries, Inc.*, 129 A.D.3d 420, 421 (1st Dep't 2015). The determination to grant leave to reargue a motion lies within the sound discretion of the court. *Id.* When appropriate, courts routinely revisit and reverse prior rulings in response to motions to reargue. *See, e.g., Kafati-Batarse v. Corcoran Group*, 101 A.D.3d 563 (1st Dep't 2012) (holding that the lower court, upon reargument, properly denied defendant's motion to compel responses to discovery concerning plaintiff's earnings); *Corporan v. Dennis*, 117 A.D.3d 601, 602 (1st Dep't 2014) (the lower court soundly exercised its discretion in granting defendant's motion for leave to reargue, and upon reargument, granting defendant's motion for summary judgment as its earlier order was based on a misapprehension of the facts).

Here, the Court perhaps overlooked the law and/or the facts when it held that Mr. Martabano "waived privilege" by submitting a purportedly deficient privilege log because (i) the

privilege over the relevant documents belonged solely to TTO, and thus Mr. Martabano (a former lawyer for TTO) cannot waive it as a matter of law, (ii) TTO could not have waived any privilege because the OAG insisted that Mr. Martabano prepare his own privilege log, and (iii) TTO, at all times, asserted its privilege objections over its communications and documents with Mr. Martabano, including in its own privilege logs.

A. As a Matter of Law, Mr. Martabano Cannot Waive TTO's Privilege

The attorney-client privilege is among the oldest of the common-law evidentiary privileges, and "fosters the open dialogue between lawyer and client that is deemed essential to effective representation." *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991). The privilege protects both communications from the client to the attorney, as well as communications from the attorney to the client. *Id*. The ***privilege belongs to the client***, and as such, only the client can waive the privilege over a particular communication that is otherwise protected from disclosure. *People v. Osorio*, 75 N.Y.2d 80, 84 (1989) (emphasis added); *see also Austin v. Purcell*, 103 A.D.2d 827 (2d Dep't 1984) (pursuant to the terms of CPLR 4503, only the client can waive privilege); *Mileski v. Locker*, 14 Misc.2d 252 (Sup. Ct. Queens Cnty. 1958) (failure on the part of the attorney to object is not a waiver of privilege where the attorney had no right to waive privilege); *In re Lanza*, 6 Misc.2d 411, 415 (Sup. Ct. N.Y. Cnty. 1957) ("[t]he attorney, even if willing to answer the questions, could not do so, for the privilege was his client's, not his own").

Indeed, this principle holds true even in the case of joint privilege holders or where parties are asserting a common interest privilege. *See, e.g., 21st Century Diamond, LLC v. Allfield Trading, LLC*, 142 A.D.3d 913 (1st Dep't 2016) (where privilege holder claimed documents were protected from disclosure by the common-interest privilege, nonparty joint privilege holder could

not unilaterally waive the privilege); *Arkin Kaplan Rice LLP v. Kaplan*, 107 A.D.3d 502, 503 (1st Dep't 2013) ("the privilege belongs to the client" and a joint holder of the privilege cannot waive it on behalf of the other joint privilege holders).

Here, Mr. Martabano does not currently represent TTO (and has not represented TTO for more than 6 years)—a critical fact which this Court perhaps overlooked. This is evidenced by the Court's singular reliance on the *Anonymous* case, which, unlike the facts at issue here, involved an allegedly deficient privilege log produced by the then ***current attorney of record for the privilege holder***, i.e. not by a ***former attorney*** responding to a subpoena served on him in his individual capacity. *See Anonymous v High Sch. for Envtl. Studies*, 32 AD3d 353, 357-59 (1st Dep't 2006) ("following receipt of a copy of plaintiff's … letter demanding the production of [the subject] documents, ***chambers spoke with counsel*** by telephone … ***and granted an extension … for defendants to comply***" and thereafter "***defendants*** failed to assert anything more than boilerplate claims of privilege"). (*emphasis supplied*).

The record is clear that Mr. Martabano was solely responsible for the production of his own privilege log. The OAG itself insisted that Mr. Martabano—and not TTO—produce the privilege log in response to the Subpoena. This is further evidenced by the fact that the OAG engaged in direct communications, including multiple meet and confers with Mr. Martabano's counsel, regarding the purported deficiencies with Mr. Martabano's privilege log, ***excluding TTO from that process***.

By contrast, here it is undisputed that TTO asserted its privilege rights as to the subject documents at all times, both by identifying the documents on its own privilege logs in response to the subpoenas that the OAG served on TTO, and by providing Mr. Martabano with a link to the documents over which it claimed privilege. TTO engaged in no conduct (implied or otherwise)

that could possibly result in the extraordinary finding and sanction of having waived its privilege objections. It engaged in an exhaustive privilege analysis of its own documents and the documents in Mr. Martabano's possession, and consistently communicated to both the OAG and Mr. Martabano that it was asserting privilege objections over the documents withheld by Mr. Martabano. *NYSCEF Doc. No. 176 at p. 2., Ex. 162; NYSCEF Doc. No. 63, Ex. 49*. *See, e.g., Austin v. Purcell,* 103 A.D.2d at 829 (client did not waive privilege where it was not responsible for public disclosure of the substance of a report prepared by outside counsel); *Schnell v. Schnall,* 550 F.Supp. 650, 653 (S.D.N.Y. 1982) (no waiver of attorney-client privilege where attorney testified at SEC hearing without presence or authorization of client). There simply is no legal authority to support any finding that a client can waive its privilege rights as a result of the independent failure of a former attorney to produce an adequate privilege log.

For these reasons, it is respectfully submitted that this Court overlooked or misapprehended the law and the facts in finding that Mr. Martabano waived TTO's privilege rights and this portion of its Order should be vacated.

B. <u>The Proper Remedy is the Resubmission of a Privilege Log and *In Camera* Review</u>

Even where a client's ***current*** attorney has failed to submit an adequate privilege log (which is not the case here), the New York courts have been loath to order the extraordinary sanction of a deemed waiver of privilege. *See, e.g., Stephen v. State of NY*, 117 A.D.3d 820, 821, 985 N.Y.S.2d 698, 699 (2d Dep't 2014) ("appropriate remedy for the defendant's failure to produce an adequate privilege log is to allow the defendant to produce an adequate privilege log and, thereafter, for the court to review *in camera* the allegedly privileged documents, along with the privilege log"); *Rickard v. New York Central Mutual Fire Ins. Co.*, 164 A.D.3d 1590, 1592 (4th Dep't 2018) ("[lower] court abused its discretion by ordering the production of allegedly

protected documents and instead should have granted the alternative relief requested by defendant, i.e. allowing it to create a privilege log…followed by an *in camera* review of the subject documents by the court"); *Algu v. Rasiawan*, 48 Misc.3d 1216(A) 1, 3 (Sup. Ct., Queens Cnty. 2015) ("[s]hould this Court order production of all documents immediately to plaintiff's counsel, based upon the insurer's counsel's failure to provide the [privilege] log requested by Chambers' staff, and should among the 2,000 documents be buried even one document that would be clearly privileged, such as under the attorney-client doctrine, then insurer's counsel will likely appeal this Court's decision based on plain error"); *U.S. v. Stewart*, 287 F.Supp.2d 461 (S.D.N.Y. 2003) (holding that privilege log deficiencies did not merit a finding that Martha Stewart waived work product privilege).

Rather, the proper remedy has been to require that the attorney and the client resubmit a proper privilege log by a date certain, following which the court can undertake an *in camera* review of any documents over which there is an actual dispute over privilege. *See, e.g., Stephen v. State of NY*, 117 A.D.3d at 821; *see also Rickard v. New York Central Mutual Fire Ins. Co.*, 164 A.D.3d at 1590; *Barta v. Wolf*, 32 Misc.3d 456, 460 (1st Dep't 2010). Consistent with this law—and in consideration of the fact that TTO was not responsible for any deficiencies with respect to Mr. Martabano's privilege log—the proper remedy here is an Order requiring Mr. Martabano to produce a revised privilege log in coordination with TTO complying with the requirements of CPLR 3122(b) by a date certain and the scheduling of an *in camera* review of any documents over which the OAG and the parties have any dispute as to privilege.

POINT II

A TEMPORARY RESTRAINING ORDER SHOULD BE ISSUED PENDING THIS COURT'S RULING ON THE MOTION TO REARGUE

Under New York law, a party seeking a temporary restraining order without notice must establish: (i) a likelihood of success on the merits, (ii) that in the absence of injunctive relief, the moving party will suffer immediate and irreparable harm, and (iii) that a balancing of the equities favors the party seeking relief. *See Manhattan Real Estate Equities Group LLC v. Pine Equity, NY, Inc.*, 16 A.D.3d 292 (1st Dep't 2005); *see also Silvestre v. De Loaiza*, 12 Misc. 3d 492, 493 (Sup. Ct. N.Y. Cnty. 2006) (citing CPLR 6301 and 6313).

As demonstrated in Point I above, the likelihood of success weighs heavily in favor of a stay pending a determination on the merits.[2] More importantly, there can be no doubt that TTO will suffer immediate and irreparable harm absent a stay pending reargument. Once produced, the content of TTO's privileged documents cannot be "undisclosed" and TTO's right to protect the disclosure of materials covered by attorney-client and work product privileges will be irrevocably damaged. Consequently, a balancing of the equities also clearly favors TTO as the injury it will sustain is far more immediate and burdensome than any harm that the OAG could possibly suffer due to a brief delay in its investigation. *See e.g. Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d at 432 (finding that "the harm to plaintiff and its employees outweighs any potential harm to defendant resulting from delays to its redevelopment scheme"); *Data-Track Account Servs., Inc. v. Lee*, 291 A.D.2d 827 (4th Dep't 2002) (clients established irreparable harm by demonstrating that attorney had made repeated disclosures of confidential information to their detriment).

[2] A *prima facie* showing of a reasonable probability of success is all that is necessary to demonstrate a "likelihood of success on the merits." *See Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 431 (1st Dep't 2016). As such, TTO need not demonstrate a certainty of success. *See Doe v. Dinkins*, 192 A.D.2d 270, 275–76 (1st Dep't 1993). Actual proof should be left to further proceedings. *Id.*at 277.

CONCLUSION

Based on the foregoing, TTO, Eric Trump, and Charles Martabano respectfully request that the Court (i) grant leave to reargue the portion of the Order holding that Mr. Martabano "waived" privilege in response to the Subpoena served on him by the OAG, and, upon reconsideration, (ii) vacate its ruling that Mr. Martabano "waived" privilege in response to the Subpoena, (iii) order that Mr. Martabano produce in coordination with TTO a revised privilege log complying with the requirements of CPLR 3122(b) by a date certain to be set by the Court; and (iv) schedule an *in camera* review of any documents over which the OAG and the parties have any dispute as to privilege.

Dated: New York, New York
September 30, 2020

/s/ *Amy Carlin*

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