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

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

Petitioner,

-against-

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

Respondents.

Index No. 451685/2020

Motion Sequence 006: Stay

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO STAY

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INTRODUCTION

Having declined to present *any* argument in opposition to the Attorney General's motion to compel production of Mr. Martabano's records for failure to produce an adequate privilege log, the Trump Organization and Eric Trump now seek to delay production of those records in order to present a meritless motion to reargue. The Court should deny the stay request because Respondents had ample opportunity to prevent the waiver of these privilege assertions and did not do so, and because a stay is both unwarranted and unnecessary. The entire purpose of this special proceeding was to compel long-delayed compliance with investigative subpoenas regarding potential financial fraud and illegality; Respondents' last-minute attempt to *further* delay compliance should be rejected.

ARGUMENT

I. The Court should deny Respondents' motion to stay.

Respondents' proposed Order to Show Cause requests that "the portion of the Order compelling Mr. Martabano to produce all documents responsive to the Subpoena by October 2, 2020 be stayed pending the hearing and determination of this application by TTO, Eric Trump and Mr. Martabano." Proposed Order to Show Cause 2 (NYSCEF Doc. 257). This request should be rejected because it is procedurally flawed and is not justified on the merits.

C.P.L.R. 2201 provides that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." When considering a stay request, courts are "duty-bound to consider the relative hardships that would result from granting (or denying) a stay." *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990). "As a general matter, the party seeking a stay must establish that it is necessary to prevent some serious harm, injustice, prejudice, loss, etc." *Bovis Lend Lease LMB, Inc. v. Garito Contr., Inc.*, No. 103616/05, 2008 WL 4685291 (Sup. Ct. N.Y. Cty. Oct. 14, 2008)

(citing *Merola v. Bell*, 47 N.Y.2d 985, 987-88 (1979)). Respondents do not meet this standard.

1. Respondents present the Court with *no* argument whatsoever in support of their request for a stay: it is mentioned in a single sentence in the Proposed Order to Show Cause, and again only—without any citation to law—in counsel's affirmation of support.[1] *See* Respondents' Mem. (NYSCEF Docs. 261, 262 at ¶¶ 2, 5). The Court is not required to guess at the bases for Respondents' request, and the motion for stay should be denied on this ground alone. 22 N.Y.C.R.R. § 208.11(b)(1) ("[a]ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law."); *Chrome Corporate Mgmt. Group, LLC v. Pfeil*, 2009 N.Y. Misc. LEXIS 5750 *20; 2009 N.Y. Slip Op. 31217(U) * *14 (Sup. Ct. N.Y. Cty. 2009) ("[C]ourts strongly disapprove of legal arguments contained in affidavits.").

2. If the Court does consider the motion, it should be denied on the merits. Respondents apparently contend that they will be harmed by the disclosure of purportedly privileged materials. Respondents' Mem. 11. Setting aside that any injury is of their own making—since the Trump Organization offered no argument at all regarding Mr. Martabano's privilege log in their opposition to the Attorney General's motion to compel, as will be argued in opposition to Respondents' motion to reargue—that harm could be cured in the event this Court later reconsiders its ruling. As is typical in § 63(12) investigations and in civil discovery, Respondents could simply claw back any materials disclosed in response to the Court's order if the Court later revisits its ruling and concludes any documents were protected by privilege.

By contrast, the Attorney General *is* harmed by a stay; this investigation has already been considerably delayed by Respondents' failure to comply with the subpoenas, and a stay would

[1] To the extent the Court construes Respondents' argument in support of a "temporary restraining order," Respondents' Mem. 11, as going to their request for a stay, it should be rejected for the reasons stated *infra* pp.4-7.

further impede the progress of this investigation. *See, e.g., People v. Ackerman McQueen*, 67 Misc. 3d 1206(A), at *6-7 (Sup. Ct. N.Y. Cty. 2020) (rejecting agreement that would delay Attorney General's investigation); *People v. Thain*, 874 N.Y.S.2d 896, 901 (Sup. Ct. N.Y. Cty. 2009) (rejecting motion to intervene and confidentiality order where it would "would delay the investigation"); *Virag v. Hynes*, 54 N.Y.2d 437 (1981) (noting, in the grand-jury context, that "[c]onstant delays occasioned by unmeritorious motions to quash followed by routine appeals can lead not only to the loss of evidence and the fading of witnesses' memories, but also may completely frustrate the course of legitimate investigation").

This injury is heightened by the fact that Eric Trump's court-ordered examination has been scheduled for Monday, October 5, and the documents Mr. Martabano was ordered to produce include materials related to Seven Springs and other communications to or from Eric Trump. Any delay in the October 2 production deadline will burden the Attorney General by requiring that Mr. Trump be examined more than once in order to permit reasonable investigation of all potentially pertinent information. And delay past the October 7 deadline for Mr. Trump to comply with the subpoena would enable him to evade the Court's order through delay in the production of Mr. Martabano's records.

3. The motion to say should also be denied because of Respondents' unreasonable delay in presenting this application to the Court. On September 23, the Court ordered disclosure of the Mr. Martabano's documents by October 2, nine days later. *See* Decision & Order on Motion 2 (NYSCEF Doc. 254). Respondents waited a full week—until the seventh day of a nine day compliance period—to seek this stay and to file their motion for leave to reargue. There would have been no need for a stay if Respondents had filed their motion for leave to reargue promptly; having waited until day seven of a nine-day compliance period, they should not now be heard to

complain of the shortness of time.

4. Nor is there any basis for the Court to enter a temporary restraining order in this matter. *See* Respondents' Mem. 11. Indeed, if the Court denies the motion to reargue, as it should for the reasons stated below, the request for a temporary restraining order pending resolution of that motion would be moot.

"A preliminary injunction is a drastic remedy that should not be granted unless a clear legal right thereto is shown." *McGuinn v. City of New York*, 219 A.D.2d 489, 489 (1st Dep't 1995). Indeed, "[a] preliminary injunction substantially limits a [party's] rights and is thus an extraordinary provisional remedy requiring a special showing." *1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011). "[A] preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party." *Id.*

Respondents have no likelihood of success on the merits. The time for raising any argument, or putting forth any evidence, regarding privileges potentially applicable to materials in Mr. Martabano's possession, or the adequacy of Mr. Calcagnini's privilege logs, was in the round of briefing carefully set forth by this Court's order that also set argument for September 23, 2020. It is baseless for Respondents to now come before the Court with a series of new positions and affirmations, and to seek the extraordinary relief of a temporary restraining order to boot. *See DeSoignies v Cornasesk House Tenants' Corp*., 21 A.D.3d 715, 718 (1st Dep't 2005) ("Reargument is not available where the movant seeks only to argue 'a new theory of liability not previously advanced'"); *Pryor v Commonwealth Land Tit. Ins. Co*., 17 A.D.3d 434, 435-36 (2d Dep't 2005).

The irreparable harm and balance of the equities factors also sharply tilt against Respondents here. It's plain from the face of the record that Mr. Martabano, Mr. Calcagnini, and the Trump Organization worked hand in hand in a joint defense agreement in connection with Mr. Martabano's production over many months, as OAG previously demonstrated (First Colangelo Aff. ¶ 151). Respondents now openly admit as much in their papers (*see, e.g.*, Mem. at 3-4, noting "extensive privilege review" by Trump Organization of materials in Martabano's possession). There thus is nothing inequitable about laying the consequences of Mr. Martabano's and Mr. Calcagnini's dilatory conduct at the feet of the Trump Organization. Indeed, those consequences (and any associated harm Respondents may suffer) are "very much the result of their own procrastination" and obstruction. *Quince Orchard Val. Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 79 (4th Cir. 1989).

Respondents' new papers reflect an essential defiance of the Court's scheduling order—further demonstrating that equity does not favor them on the present motion. The Court was clear, in response to Respondents' prior requests to alter the schedule in connection with Mr. Martabano in particular, that it carefully considered the appropriate briefing schedule for the issues presented by OAG's application. Respondents' position now—that they should be permitted to re-brief (or brief for the first time, with evidence not previously submitted, in violation of C.P.L.R. 2221)[2] the issues raised by OAG's application to compel is in stark conflict with the Court's prior setting of a clear and definite schedule on that application.

And Respondents' delay—in asserting their purported privileges promptly and with specificity, in failing to address these issues in the court-ordered round of briefing that already

[2] "A motion for leave to reargue . . . shall not include any matters of fact not offered on the prior motion." C.P.L.R. 2221(d)(2).

concluded with oral argument, and in waiting still a further week to seek the relief now requested—further tips the balance of equities against them and indicates a lack of irreparable harm. *See, e.g.*, *AIU Ins. Co. v Robert Plan Corp.*, 17 Misc. 3d 1104(A) (Sup. Ct. N.Y. Cty. 2007) ("Plaintiffs have failed the 'balance of the equities' test because they were dilatory in seeking relief"); *United for Peace and Justice v Bloomberg*, 5 Misc. 3d 845, 849 (Sup. Ct. N.Y. Cty. 2004) ("In balancing the equities, the court should consider various factors, including the interests of the general public, whether plaintiff was guilty of unreasonable delay, and whether plaintiff has unclean hands.") (collecting Appellate Division authority); *see also Nassau Blvd. Shell Serv. Sta., Inc. v Shell Oil Co*., 869 F.2d 23, 24 (2d Cir. 1989) (stay pending appeal may be denied when harm is the result of movant's own delay).

Indeed, any injury the Trump Organization suffers is a consequence of their failure to present any opposition to this part of the Attorney General's motion to compel at any time after it was filed on August 24 until today. The Court should not grant "'eleventh hour motions for preliminary relief' where [a party's] own delay 'is the very source of the irreparable harm or imbalance of hardships claimed by [them].'" *Lazar's Auto Sales, Inc. v. Chrysler Fin. Corp.*, 99 CIV. 0213 (CM), 1999 WL 123501, at *4 (SDNY Mar. 2, 1999) (quoting *Nassau Boulevard Shell Service Station, Inc. v. Shell Oil Co.*, 869 F.2d 23, 24 (2d Cir.1989)).

On the other side of the ledger, the impact on OAG from granting the requested temporary restraining order in this matter—seven days after the court ruled on the prior application, stated its ruling on the record, and invited the parties to comment on it—has all the hallmarks of respondents' prior attempts to delay lawful investigative steps. Respondent Eric Trump, subpoenaed for testimony in May, did not agree to appear for months, before finally agreeing to appear on July 22. But then he backed out, invoking his constitutional rights. First

Colangelo Aff. ¶¶ 106-111. And then he informed this Court that he "at no time indicated that he was refusing to comply with the OAG subpoena" and would appear after the November election. Trump Org. Mem. on Application to Compel, at 40-41. But now that the Court has ordered him to appear by October 7, and the parties have agreed on a date for him to appear on October 5, the Trump Organization a mere two days before a court-ordered document production pertinent to that examination has urged that the production be delayed. The harm to OAG's investigation is self-evident.

5. In any event, no stay or TRO are necessary for the Court's consideration of Respondents' facially meritless motion to reargue. The Attorney General intends to oppose that motion today, and the Court will be able to reach its conclusion without the need to alter any deadlines.

CONCLUSION

The Attorney Generally respectfully requests that the Court deny Respondents' motion to stay.

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Respectfully submitted,

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