

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,

Index No. 451685/20

Petitioner,

**Motion Seq. No.: 006**

-against-

**AFFIRMATION OF  
GEORGE J. CALCAGNINI**

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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George J. Calcagnini, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true and correct under penalty of perjury:

1. I am the attorney for respondent Charles Martabano, Esq. (“Martabano”). I make this Affirmation based upon my personal knowledge and familiarity with the facts set forth herein.

2. In the Decision dated September 23, 2020 (NYSCEF Doc. No. 255) (the “Decision”), the Court found that Martabano “has waived privilege by failing to produce, despite repeated opportunities and attempts, an adequate privilege log” and ordered him to produce, by October 2, 2020, all documents that he possesses that are responsive to the subpoena *duces tecum* (the “Subpoena”) issued by the Office of the New York State Attorney General (the “OAG”). Ex. 5 (NYSCEF Doc. No. 19)<sup>1</sup>.

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<sup>1</sup> Citations to “Ex.” are to the exhibits annexed to the First Affirmation of Matthew Colangelo dated August 21, 2020 (NYSCEF Doc. No. 14) (“Colangelo Affirmation”).

3. The purpose of this Affirmation is to call attention to the key documents and information in the record that this Court apparently overlooked or misapprehended establishing that: (a) Martabano is not TTO's<sup>2</sup> counsel in connection with the OAG's current investigation and thus could not waive any privileges asserted by TTO; and (b) Martabano engaged in extensive good faith efforts to maintain TTO's privileges and to comply with the Subpoena. As the Court may recall, I was only able to participate during a portion of the oral argument of the underling motion as I was [REDACTED]. As such, I had only a very limited opportunity to address the factual and legal arguments raised in the OAG's omnibus motion to compel.

A. Because Martabano does not represent TTO, as a matter of law he could not waive any privileges asserted by TTO.

4. Importantly, there is no dispute that Martabano has not represented TTO since in or about 2014 and does not represent TTO in connection with the OAG's investigation.<sup>3</sup> The record reflects that Martabano, a land-use attorney, provided legal services to TTO in connection with the potential development of the Seven Springs property from in or around 2011 through June of 2014. *See* Colangelo Affirmation at ¶ 112; Ex. 73 (NYSCEF Doc. No. 87).

5. The Decision, which imposes the harsh and irreparable result of requiring Martabano to produce privileged documents, misapprehended the facts and the law because only TTO can assert or waive its privileges. Martabano's compliance (or alleged lack thereof) under the Subpoena should not have been attributed to TTO, his *former client*.

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<sup>2</sup> All references to TTO include respondents The Trump Organization, Inc., DJT Holdings LLC, DJT Holdings Managing Member LLC, and Seven Springs LLC.

<sup>3</sup> Although there is no written joint defense agreement between Martabano and TTO, their communications are protected by a common interest privilege.

6. In fact, TTO, with the knowledge and consent of the OAG, conducted a painstaking review of the Martabano document production and conveyed its assertions of privilege to me before I produced Martabano's documents to the OAG. Exs. 46 (NYSCEF Doc. No. 60) and 49 (NYSCEF Doc. No. 63). Martabano then generated the privilege log (and was in the midst of revising it when the OAG filed the underlying compel motion) in order to protect his former client's assertion of privileges, *which TTO has never waived*. Ex. 166 (NYSCEF Doc. No. 180).

7. Instead of granting my request for a reasonable period of time to complete revisions to Martabano's privilege log, or performing an *in camera* review of the numerous documents for which all necessary detail was provided on the log, the Court ordered the blanket disclosure of Martabano's documents. This deprived TTO of the opportunity to demonstrate to the Court that the documents fall squarely under attorney-client communications and/or attorney work product privileges. Indeed, even the most cursory review of the privilege log indicates that a substantial number of the described documents consist of email communications between Martabano and representatives of TTO, without the presence of third parties. Ex. 80 (NYSCEF Doc. No. 94). In point of fact, there are many documents listed on the log that are clearly privileged and should not be disclosed. At the very least, the Court should review *in camera* all 344 documents listed on the log to evaluate the assertions of privilege by TTO before Martabano is required to produce *all* documents that he possesses that are responsive to the Subpoena.

B. The Court overlooked facts evidencing Martabano's compliance with the Subpoena.

8. The OAG has taken the position that Martabano bore the sole responsibility for preparing his privilege log. In fact, the OAG itself insisted in writing that Martabano—*and not TTO*—prepare the privilege log “*given that [he is] responsible for compliance with the*

*subpoena.*” Ex. 161 (NYSCEF Doc. No. 175). The OAG has ignored the fact that Martabano had advised the OAG that he lacked the manpower and technical expertise to prepare the required privilege log, yet now attempts to use the lack of manpower and technical resources by TTO’s former land use attorney against the privilege holder.

9. There is no evidence in the record that Martabano engaged in any misconduct or that any delay in producing a revised privilege log was willful, contumacious, or in bad faith. In fact, the evidence in the record shows that Martabano and the IT consultant he retained for the specific purpose of complying with the Subpoena spent many hours preparing and then later revising the privilege log to address the OAG’s objections. *See e.g.*, Exs. 86 (NYSCEF Doc. No. 100) and 89 (NYSCEF Doc. No. 103).

10. With respect to privilege log that Martabano produced to the OAG on June 18, 2020, a substantial number of the entries clearly identify (a) the sender and recipient of the documents, (b) any persons copied, (c) the date the document was sent, (d) the subject line of the correspondence, (e) the reason for the privilege (i.e., attorney-client privilege and/or work product doctrine), and (f) whether the document has been redacted or withheld in full. Ex. 80 (NYSCEF Doc. No. 94).

11. Shortly after receiving the privilege log, the OAG advised me that certain of the entries on the log do not give the level of detail desired by the OAG. While I subsequently participated in numerous “meet and confer” discussions with the OAG regarding the purported deficiencies in the log, the OAG excluded TTO from all our discussions and correspondence. *See e.g.*, Exs. 81 – 87 (NYSCEF Doc. No. 95-101), and 166 (NYSCEF Doc. No. 180).

12. In order to respond to objections raised by the OAG, Martabano and his IT consultant once again spent many more hours manually reviewing TTO’s assertions of privilege and the underlying documents at issue in order to provide the OAG with supplemental

descriptions where possible. Exs. 86 (NYSCEF Doc. No. 100), 89 (NYSCEF Doc. No. 103), and 166 (NYSCEF Doc. No. 180).

13. The OAG was aware that this work was on-going. Indeed, on July 6, 2020, I advised Colleen Flaherty that “[w]e are currently working on the issues of the privilege log and might be able to use software to automatically fill in the criteria you are requesting for the privilege log. If the technical problems of doing that are worked out, we should be able to get you the privilege log with more information fairly soon. If not, the process will take longer.” Ex. 86 (NYSCEF Doc. No. 100).

14. On July 13, 2020, I updated Ms. Flaherty, informing her that “the IT people are still working on the technical issues which need to get resolved before we do anything with the privilege log.” Ex. 86 (NYSCEF Doc. No. 100).

15. As recently as August 18, 2020, I discussed the status of the revised privilege log with the OAG. Indeed, Austin Thompson later confirmed that although I did not give him a date for when I would produce another privilege log, I “may have one in about two weeks.” Ex. 166 (NYSCEF Doc. No. 180). Mr. Thompson did not advise me that my estimated time frame for completing the revised privilege was unacceptable. *Id.* More importantly, at no time prior to filing its compel motion did the OAG contend that Martabano’s alleged failure to cure any deficiencies in the privilege log constituted a waiver by Martabano or TTO of any privilege assertions.

16. Ignoring the fact that the Martabano privilege log was in the process of being revised and was near completion,<sup>4</sup> the OAG filed the compel motion. In doing so, the OAG not only mischaracterize Martabano’s on-going efforts to comply with the Subpoena, but it sought to

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<sup>4</sup> [REDACTED] However, it is my understanding that TTO is willing to complete the revised privilege log should the within motion be granted.

create “new law” (i.e., that a client can be sanctioned for the alleged discovery failures of its *former lawyer*) in order to circumvent the well-grounded privileges asserted by TTO, the true privilege holder.

17. Given Martabano’s good faith efforts, and the fact that he did not willfully disobey the Subpoena, the Court’s sanction of directing Martabano to disclose TTO’s privileged communications was unjust and unwarranted.

Dated: New York, New York  
September 29, 2020

  
George J. Calcagnini