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

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

Plaintiff,

-against-

DONALD J. TRUMP, *et al.*,

Defendants.

Index No. 452564/2022

Motion Seq. No. 16

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE TO COMPEL

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL

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I. Preliminary Statement

On May 18, 2021, Mazars USA LLP ("Mazars"), the long-time accounting firm for Donald J. Trump and the Trump Organization, concluded that it had to end their long-term business relationship and withdraw the Statements of Financial Condition ("SOFC") the firm had compiled for them from 2011 to 2020. *See* NYSCEF No. 1 ¶ 58, Affirmation of Sherief Gaber ("Gaber Aff ") ¶ 8. After a frantic search, the Trump Organization settled on the firm of Whitley Penn, LLP ("Whitley Penn") based out of Fort Worth, Texas to perform audit services, compilation services and tax preparation services, including the preparation of an SOFC for the year 2021. *see* NYSCEF No. 1. ¶ 59. That SOFC was then submitted to lenders including Deutsche Bank to satisfy covenants on hundreds of millions of dollars of loans. *See id* ¶¶ 620, 644. The work was performed in New York pursuant to a Nondisclosure Agreement drafted under New York law, on companies managed out of an office at 725 Fifth Avenue in Manhattan, and included the preparation of New York State tax returns.

As a result, on February 14, 2023, The New York State Office of the Attorney General ("OAG") served a Subpoena *Duces Tecum* and *Ad Testificandum* (the "Subpoena") on nonparty Whitley Penn, LLP ("Whitley Penn") seeking (1) documents and communications that are material and relevant to the instant action, and (2) deposition of a Whitley Penn partner who was involved in transactions and occurrences relevant to this litigation. *See* Gaber Aff., Exhibit 1

Whitley Penn has substantial contacts in New York. It is licensed to do business in New York, licensed as a Certified Public Accountancy (CPA) firm in New York, and it is actively engaged in audits, compilations, financial statements and New York State and City tax filings for nearly all Defendants in this action, as well as dozens of other Trump Organization entities based

out of 725 5th Avenue. Despite those and other substantial contacts, Whitley Penn has not produced relevant documents and asserted an inapplicable Texas privilege.[1]

II. OAG is Entitled to an Order to Compel Prompt Compliance with its Subpoena.

Under CPLR, the Court can order compliance with a subpoena if the Court has jurisdiction over the recipient and the disclosure sought is material and necessary to the action. Here, there is no dispute as to the relevance of the material sought: Neither Defendants nor Whitley Penn has raised such an objection, and, in any event, their time to do so has passed. CPLR 3120. The only objections Whitley Penn has raised are service and a purported Texas privilege that New York courts have held inapplicable in New York courts. Whitley Penn's objections are meritless, and the Court should order compliance.

This Court has ample basis for exercising personal jurisdiction over Whitley Penn, which has come to New York State to do business, has purposefully availed itself of the privilege of doing business in New York, and has provided professional services regulated by the State of New York. Moreover, process here was served according to laws that Whitley Penn consented to by seeking registrations and licenses in this State. Furthermore, the accountant-client privilege Whitley Penn has raised is not recognized in New York, was waived when Defendants produced over 5,600 communications between the Trump Organization and Whitley Penn, and may be obviated by an order of this Court in any event. The Court should therefore compel compliance with OAG's Subpoena.

A. Whitley Penn Was Properly Served With The Subpoena

[1] A more detailed recitation of the facts relevant to this motion is contained in the Affirmation of Sherief Gaber accompanying this memorandum of law.

Whitley Penn was properly served. A "subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons." CPLR § 2303. Service of a summons is governed by CPLR article three. Service of a limited liability partnership is provided under CPLR § 310-a(c), which states that a limited liability partnership may be served "pursuant to section 121-1505 of the partnership law." That provision expressly provides that service on a foreign limited liability partnership may be made by service on the Secretary of State:

> Service of process on the secretary of state as agent of a … New York registered foreign limited liability partnership under this article shall be made [by]…Personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such registered limited liability partnership shall be complete when the secretary of state is so served.

Partnership Law § 121-1505.

Whitley Penn is a New York registered foreign limited liability partnership. (*See* Gaber Aff. Ex 14) governed by Article 8(b) of the Partnership Law and subject to service under §121-1502(a) of that statute. As evidenced by the affidavit of service, *see* Gaber Aff. at Ex. 2, service was effectuated according to the requirements of the statute and complete, by the provisions of law, on February 14, 2023.

Additionally, while not statutory service, OAG located email addresses for both the Managing Partner and Outside General Counsel for Whitley Penn and provided courtesy copies contemporaneously on them electronically; OAG undertook this courtesy given the pace of discovery set by the Court's November 22, 2022 Preliminary Conference Order (NYSCEF No. 228) to afford Whitley Penn, a nonparty to the action, as much time as possible to prepare a response to the Subpoena and schedule production of documents and produce the witness for deposition.

B. This Court Has Jurisdiction Over Whitley Penn For Purposes Of Compelling Compliance With The Subpoena

Whitley Penn, while a Texas partnership, is subject to the subpoena power of this Court. Assuming a full showing of personal jurisdiction were required here, such a showing is straightforward to make. Whitley Penn as the lead auditor and accountant on the Trump Organization engagements has purposefully availed itself of the privilege of Certified Public Accountancy licensure in New York—and had numerous direct contacts with New York and New York businesses during those engagements. Combining those factors, and others that may be shown, Whitley Penn is subject to the subpoena jurisdiction of this Court in this proceeding. *See, e.g.*, *Gucci America, Inc., v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014) (specific personal jurisdiction suffices for enforcement of nonparty discovery demands).

As detailed in the Gaber Aff., Whitley Penn has not only registered to conduct business in New York, but it has also sought and obtained a professional license to operate as a Certified Public Accountancy from the New York State Department of Education's ("NYSED") Office of the Professions. Gaber Aff. at ¶ 33. Relatedly, one of Whitley Penn's key partners on The Trump Organization engagements personally applied for and received a CPA license from NYSED. Gaber Aff. at ¶ 34. Although OAG does not purpose to describe here the full panoply of license and registration requirements, those licensures with a New York State authority evidence a purposeful decision by the licensees to avail themselves of the privileges of New York and to subject themselves to the State's jurisdiction. Indeed, the Education Law contains numerous provisions regarding New York's disciplinary apparatus that applies to a host of licensed professions, including accountancy. *See, e.g.*, Education Law §§ 6503; 6501(2)(c). The Appellate

Division similarly has held that consent to regulatory oversight, in return for the privilege to operate in New York, confers jurisdiction on New York courts to enforce subpoenas. *Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd.,* 131 A.D.3d 259, 265 (1st Dep't 2015) (citing *Vera v Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015)).

Moreover, Whitley Penn's numerous contacts with New York and its purposeful entrance into a significant, broad accountancy arrangement with a New York-based business provides further grounds to assert personal jurisdiction over Whitley Penn for purposes of the instant subpoena.[2] CPLR § 302(a) provides that a "court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent… transacts any business within the state or contracts anywhere to supply goods or services in the state." Transacting business within the state does not require physical domicile. *Armada Supply v Wright*, 858 F.2d 842, 848 (2d Cir. 1988) (holding underwriter in Brazil clearly "transacted" business in state within meaning of CPLR § 302(a)(1), where underwriter issued insurance certificate on property located in state, appointed local firm to receive notice of claim, engaged local surveyor to attend vessel, and designated two representatives in state to investigate and adjust claim.). Here, Whitley Penn solicited business in New York State from entities operating from offices in the state or domiciled in the state (Gaber Aff. at ¶9); Whitley Penn's engagements and other communications make clear that it knew perfectly well that its counterparties were based in New York (Gaber Aff. At ¶ 20); Whitley Penn visited New York City multiple times to conduct fieldwork related to their engagements (*id.* at ¶¶19-20), submitted New York State and New York City tax filings for the Trump Organization (another regulated

[2] Notably, the Attorney General's powers to subpoena in connection with its regulatory and enforcement function is broader than that of a private litigant's ability to assert jurisdiction over a foreign entity for suit. *See La Belle Creole Intern., S. A. v Attorney-Gen.*, 10 NY2d 192, 198 (1961)

activity) and communicated directly with the New York City Department of Finance on behalf of The Trump Organization. (*id.* at ¶11, 38)

C. There Is No Applicable Privilege Under New York Law, This Court's Order Would Obviate Any Texas Privilege

Controlling precedent also forecloses any reliance by Whitley Penn rely on a Texas accountant-confidentiality statute, Texas Occupations Code § 901.457.

New York Courts have already taken up and resolved the question of the asserted Texas accountant-client privilege and whether documents of an accounting firm are protected by such a privilege in an action in a New York court: they are not. *People v PricewaterhouseCoopers LLP*, 451962/2016, 2016 WL 6330156 (Sup Ct, NY County 2016), *aff'd*, 150 A.D.3d 578 (1st Dep't 2017) ("PWC"). In *PWC,* Supreme Court concluded that, in an action pending in New York, New York privilege law applies and "New York does not recognize an accountant-client privilege." 2016 WL 6330156 at *2. The Court based this holding on New York doctrine that "The law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding is applied when deciding privilege issues[.]"*Id.*, (collecting cases).[3] Thus, notwithstanding the invocation of the same statute invoked by Whitley Penn here, Supreme Court ordered compliance with a subpoena (there, an investigative subpoena). *Id*. at *2-*3. The First Department affirmed, reiterating the point that "New York law on privilege, rather than Texas law, applies, and that New York does not recognize an accountant-client privilege." 150 A.D.3d at 579.

[3] It is worth noting that legislation has been introduced before the Texas State Legislature (H.B. 2217 of 2023) to rename § 901.457 to "Accountant-Client *Confidentiality*" instead of using the inapposite term "privilege."

Indeed, the Texas statute expressly provides that production is authorized when made pursuant to a court order. Texas Occupations Code § 901.457(b)(3). Thus, as Supreme Court noted in *PWC*, that provision "would be satisfied by an order from this Court compelling compliance." 2016 WL 6330156 at *2 (citing *In re Arnold*, 2012 WL 6085320, at *10 (Tex Ct App Nov. 30, 2012) (noting that "the existence of an accountant-client privilege based on [Texas Occupations Code] section 901.457 is doubtful.").

Finally, as in *PWC,* an order of this Court compelling compliance with the subpoena would in any case satisfy the exception enumerated in § 901.457(b)(3).[4]

[4] Given the unequivocal nature of the holding in the *PWC* case, it does not need to be argued here that The Trump Organization has had notice of the Subpoena since February 14, 2023 and has not moved to assert any privilege itself or issue any objection whatsoever to the Subpoena. (Gaber Aff. at ¶25, 30)

III. Conclusion

Wherefore, this Court should issue an Order directing Whitley Penn, LLP to comply with the February 14, 2023 Subpoena Duces Tecum and Ad Testificandum in its entirety.

Dated: New York, New York
March 20, 2023

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE
WITH UNIFORM CIVIL RULE 202.8-b

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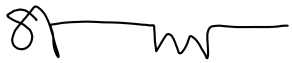

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