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

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Index No. 453196/2022

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

Hon. Sabrina B. Kraus

Petitioner,

-against-

Mot. Seq. No. 4
Mot. Seq. No. 6

VDARE FOUNDATION, INC.,

Respondent.

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MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE ATTORNEY GENERAL'S RENEWED CIVIL CONTEMPT MOTION AGAINST RESPONDENT VDARE FOUNDATION, INC. AND IN RESPONSE TO NON-PARTY PSEUDONYMOUS AUTHORS' MOTION FOR A PROTECTIVE ORDER

LETITIA JAMES
Attorney General of the
State of New York
28 Liberty Street
New York, NY 10005

Alexander S. Mendelson
Richard Sawyer
Assistant Attorneys General

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On behalf of the Petitioner, the People of the State of New York, the Office of Attorney General Letitia James ("OAG") respectfully submits this memorandum of law in further support of its contempt motion against Respondent VDARE Foundation, Inc., Mot. Seq. 4, and in response to the non-party pseudonymous authors' motion for a protective order. Mot. Seq. 6.

PRELIMINARY STATEMENT

This Court has already found that VDARE is in continuing, willful violation of the January 2023 Order requiring compliance with the OAG's subpoena. In December 2023, the Court gave VDARE "one last chance" to comply with its Order, and VDARE refused to do so. Every court to examine the January 2023 Order has upheld its validity and rejected VDARE's arguments. Yet, when pressed at oral argument as late as February 27, 2024, VDARE's counsel refused to commit to complying. VDARE has shown itself to be unwilling to respect the authority of this Court, and nothing short of a monetary penalty will suffice to compel compliance.

As this Court and the Appellate Division found, VDARE's concerns about confidentiality will be obviated by a confidentiality order. Since January 2023, the OAG has repeatedly proposed such an order, in a form that comports with the Office's obligations under state law—and which has been approved by this court in the past. The Court should enter that order, attached as Exhibit F, [1] to facilitate VDARE's full compliance with the January 2023 Order.

Finally, without agreeing with the substance of the intervening pseudonymous authors' arguments, the OAG consented in December 2023 to a redaction protocol that addressed their

[1] All exhibits cited herein are attached to the Reply Affirmation of Richard Sawyer

concerns. The obstacle, as it has been throughout these proceedings, was VDARE itself. VDARE insisted that any redactions apply to *all* vendors and contractors, not only pseudonymous authors, and that the redactions apply even to certain related parties. But, as this Court ruled and the Appellate Division agreed, the identities of such parties are precisely the information the OAG is entitled to seek. Because VDARE has shown itself incapable of complying with Court orders and continues to play definitional games regarding the agreed protocol, the Court should enter the attached Redaction Protocol Order and require redactions to be conducted by a neutral third-party referee.

BACKGROUND

On January 19, 2023, during oral argument on the OAG's motion to compel, the Court suggested that a confidentiality agreement would fully address VDARE's concerns about the disclosure of vendors' identities. *See* Ex. A (1/19/23 Tr.) at 30:6-16. Shortly after that conference, the OAG circulated a proposed agreement that would limit the disclosure of any confidential information. *See* Ex. B.

On January 23, 2023, this Court compelled VDARE to comply with the OAG's subpoena and specifically rejected VDARE's First Amendment objections. The Court held that VDARE failed to establish that its own First Amendment rights would be impaired by production and that precautions agreed to by the OAG—a confidentiality agreement and limited redactions to the names of certain donors and volunteers—would be sufficient to quell any legitimate confidentiality

concerns. NYSCEF 63 at 7-9.[2] The January 2023 Order has since been unanimously affirmed by the First Department, which agreed that VDARE failed to show that producing the information would have an impact on or chill its members' associational rights, and that a so-ordered confidentiality agreement would be sufficient to protect the anonymity of vendors and contributors. *See People v. VDARE Found., Inc.*, No. 2023-00672, 2024 WL 628944, at *1 (1st Dep't Feb. 15, 2024).

On December 1, 2023, following discussions with an attorney for the two unnamed Pseudonymous Authors, the OAG agreed in principle to a reasonable and practical redaction protocol to address the authors' confidentiality concerns. *See* NYSCEF 195. Specifically, the OAG agreed to a protocol that would redact the identifying information of the authors in accord with their confidentiality concerns, provided that, (i) the redactions and corresponding logging of information would be performed by an acceptable third party; (ii) counsel for the pseudonymous authors would provide a sworn statement representing, for each of his clients, that they are not a "related party" to VDARE, as that term is defined in N-PCL § 102(23); (iii) with the exception of the identity of the author, information regarding the transactions between VDARE and pseudonymous authors, including payment records, contracts, and communications, would be provided without redaction; and subject to (iv) Petitioner's reservation of all rights to seek disclosure of identifying information for the pseudonymous authors where the OAG deems it necessary to its investigation. *Id.* Counsel for the Pseudonymous Authors agreed that this protocol

[2] Indeed, in ordering that VDARE comply, the Court permitted, but did not require, that the parties enter into a confidentiality agreement, and "ordered that any relief not expressly addressed ha[d] nonetheless been considered and . . . denied." *Id.* at 10.

would address their concerns.

On December 7, 2023, the OAG and the pseudonymous authors' counsel brought the proposal to VDARE. Sawyer Aff. ¶ 11. At the conference, VDARE refused to accept the most basic terms of the proposed protocol, insisted on withholding the names of all non-related-party vendors and contractors—not just anonymous authors—and insisted on withholding the names of even certain related-parties who had not, in VDARE's unilateral determination, violated N-PCL § 715. *Id.*[3]

On December 8, 2023, this Court heard oral argument on the initial contempt motion. There, counsel for VDARE misrepresented the nature and outcome of the discussions among the parties, purporting to have "reached some common ground . . . with regard to the redaction of the [writers]." Ex. C (12/8/23 Tr.) at 5:4-8. In fact, it was VDARE's refusal to limit the conversation to writers that caused the negotiations to founder.

On December 12, 2023, this Court issued a Decision and Order finding that VDARE's continued noncompliance satisfied all the elements of contempt. NYSCEF 129. The Court ruled that VDARE intentionally failed to comply with its lawful order, impaired the remedy awarded to the OAG and delayed the OAG's investigation by nearly a year. *Id.* at 2-3. The Court elected, without objection by the OAG, to give VDARE "one final opportunity to comply with the court order." *Id.* at 3.

After VDARE once again flouted this Court's order, the OAG renewed its contempt

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[3] Contrary to the Pseudonymous Authors' representation, *see* NYSCEF 196 at 6, the OAG never suggested or implied that it would withdraw its contempt motion if VDARE agreed to the proposed protocol. The OAG's consistent position has been that VDARE is in contempt until it produces the documents required by the January 2023 Order.

motion. NYSCEF 133. On January 11, 2024, the Court entered an order to show cause. NYSCEF 173.

Two weeks later, on January 23, 2024, VDARE petitioned the Appellate Division for a stay of the enforcement of the Court's December 2023 Order, including the commencement of any contempt proceedings, and withdrawal of this Court's January 11, 2024 order to show cause. *See* D.E. 8, *People v. VDARE Found., Inc.*, No. 2024-00015 (1st Dep't Jan. 23, 2024). On February 7, VDARE's counsel requested that the Court adjourn oral argument on the renewed contempt motion due to a scheduling conflict. NYSCEF 181. VDARE then missed its February 13 deadline to oppose the renewed contempt motion, and, on February 16, filed an additional request to adjourn that elapsed due date. NYSCEF 182.

On February 20, 2024, the Court declined VDARE's request for an adjournment, stated that it would waive appearance, and would accept the contempt motion on submission. *See* Ex. D.

Three days later, VDARE's counsel declared that alternate counsel would appear at the cancelled argument. NYSCEF 198. On February 25, 2024, alternate counsel, Jay Wolman, who has been representing VDARE in collateral federal proceedings and is familiar with these proceedings, filed a notice of appearance and an untimely opposition without the consent of the OAG and in defiance of the Court, which had explicitly denied VDARE's request for more time to file. *See* NYSCEF 200-205.

On February 27, 2024, the Appellate Division, First Department denied VDARE's request for interim relief from the December 2023 and January 2024 Orders. *People v. VDARE Found., Inc*., No. 2024-00015, 2024 WL 798953 (1st Dep't Feb. 27, 2024). The same day, this Court heard oral argument on OAG's renewed contempt motion, at which VDARE repeatedly refused to commit to complying with the Court's orders. *See* Ex. E (2/27/24 Tr.) at 14:10-16:13.

On February 28, 2024, the Court directed OAG to submit reply papers, to be considered and addressed in conjunction with the Pseudonymous Authors' motion for a protective order. *See* NYSCEF 192-196, NYSCEF 215.

ARGUMENT

I. VDARE Remains in Contempt and Should Be Ordered to Pay $250 Per Day Until It Complies with the Court's Orders

In December 2023, the OAG demonstrated, and this Court determined, that all of the elements of contempt have been met. NYSCEF 129. Despite receiving "one last chance" to comply, VDARE still has not produced a single document as required by the Court's orders. VDARE admits to its failure to comply with the clear and unequivocal mandate of the Court, but belatedly raises three meritless excuses for its willful disobedience. NYSCEF 201. Each excuse should be rejected.

A. Pending Appellate Review Does Not Excuse Compliance

First, VDARE argues the lawfulness of the Court's Orders remains in dispute because it is theoretically still seeking appellate review. *See* NYSCEF 201 at 3. But VDARE's appeal has been denied, mooting this argument. *People v. VDARE Found., Inc.*, 2024 WL 628944, at *1 (1st Dep't Feb. 15, 2024). Even while its appeal was pending, VDARE was required to comply because the Appellate Division had repeatedly denied its requests for a stay. *See* D.E. 7, *People v. VDARE Found., Inc.*, No. 2023-00672 (1st Dep't Mar. 9, 2023) (denying stay of January 2023 Order); D.E. 10, *People v. VDARE Found., Inc.*, No. 2024-00015 (1st Dep't Jan. 25, 2024) (denying interim relief); *People v. VDARE Found., Inc.*, No. 2024-00015, 2024 WL 798953, at *1 (1st Dep't Feb. 27, 2024) (denying stay of December 2023 Order). The mere fact of an appeal, without a stay, will not excuse a party's disobedience or preclude a finding of contempt. *See, e.g., People ex rel. Day*

v. Bergen, 53 N.Y. 404, 404-05 (1873) ("[N]or is it a defence, in proceedings to punish for contempt, that an appeal has been taken from the order disobeyed. If the proceedings have not been stayed, the party has a right to take every step for the enforcement of his civil remedy."); *Burchell v. Cimenti*, 329 N.Y.S.2d 347, 348 (1st Dep't 1972) (citations omitted) ("Not having obtained a stay, [defendant] was obligated to obey the orders until vacated or reversed on appeal. The fact that she had an appeal pending is no excuse for her failure to obey.").

B. VDARE's Proclamation that the Attorney General Has Not Suffered Prejudice Is Incorrect and Does Not Excuse Compliance

Second, VDARE attempts to excuse its violation of the Court's Orders by summarily concluding that the OAG has suffered no prejudice as a result of its disobedience. NYSCEF 201 at 5-6. But the Court already held that VDARE caused prejudice: "Respondent has impaired the remedy the Court awarded the Attorney General—subpoena compliance by February 10, 2023. The Attorney General's investigation has now been delayed by nearly a year. Courts have found prejudice from much shorter delays." NYSCEF 129 at 2-3 (citations omitted). VDARE cannot relitigate this issue, nor has it shown any basis for doing so. Worse, VDARE's persistent and willful noncompliance has only further delayed the OAG's investigation and magnified the prejudice.

C. VDARE's Belated Arguments Regarding Its Inability to Comply with the Orders Ring Hollow

Third, more than a year after this Court's initial subpoena compliance due date, and more than a month after this Court's "last chance" due date, VDARE now argues for the first time that it "has not had a clear ability to comply with the Orders" due to the absence of a confidentiality order and redaction protocol, due to the "daunting" range of 40 gigabytes of ESI to be searched,

and due to the pending motion for a protective order filed by the intervening authors on February 20, 2024. NYSCEF 201 at 3-4, 5-6; *see also* NYSCEF 202 ¶¶ 21-35, 40-45.

This is another effort to re-litigate issues that this Court has already decided. In January 2023, this Court issued clear instructions concerning redactions and confidentiality—only a narrow, agreed-upon set of redactions may be applied (with an appropriate log) and confidentiality may be assured through a confidentiality agreement. NYSCEF 63 at 8-10. VDARE ignored the January 20, 2023 confidentiality stipulation that OAG proposed at the Court's request. *See* Ex. B. VDARE has never responded by accepting, rejecting or proposing modifications to that stipulation. VDARE's unilateral refusal to cooperate is not an excuse for its ongoing contempt.

Likewise, as the Court recognized at oral argument, VDARE's burden assertions are unconvincing. *See* Ex. E at 10:2-6 ("THE COURT: I think it's a little late for [a keyword list]. I do. Especially given, again, the representations by the previous attorneys that were claiming their clients had no problem complying quickly. I'm not inclined to start with limiting the amount of material for ESI."). VDARE previously represented that it had conducted the bulk of its review and repeatedly promised productions in short order. *See* NYSECF 141 (promising responsive emails would be produced by November 21, 2022); NYSCEF 143 (promising email production by December 12, 2022); NYSECF 147 (promising, on March 20, 2023, production "no later than a week after any denial of requested injunctive relief" in federal court). Over more than a year of litigation, VDARE has never previously raised burden as a basis for challenging the subpoena and has never made any showing to support a burden argument. Its attempts to artificially narrow the

OAG's subpoena with a newly proposed "Keyword Order List" should be rejected as untimely, unjustified, and improper.[4]

Finally, two pseudonymous authors' motion for a protective order does not excuse VDARE's disobedience with the Court's orders. NYSCEF 201 at 3-4. These authors sought a protective order to redact their personal identifying information long after VDARE disregarded multiple Court-imposed deadlines to produce. The service of a notice of motion for a protective order does not prevent the court from imposing sanctions on parties who disobey court orders. *See Henry Rosenfeld, Inc. v. Bower & Gardner*, 555 N.Y.S.2d 320, 321 (1st Dep't 1990) (citing *Laverne v. Inc. Village of Laurel Hollow*, 18 N.Y.2d 635, 637-638 (1966)) (imposing sanctions for willful discovery violations and disobedience of court orders despite pending motion for a protective order suspending disclosure). Nor does CPLR 3103(b) "function as an automatic discovery deadline extension device." *Singh v. New York City Hous. Auth.,* 198 A.D.3d 550, 550 (1st Dep't 2021)) (citing *Vandashield Ltd. v. Isaacson*, 146 A.D.3d 552, 556 (1st Dep't 2017)). Rather, "[s]ervice of a notice of motion for a protective order shall suspend *disclosure of the particular matter in dispute*." CPLR 3103(b) (emphasis added).

Here, the Court ordered compliance by February 24, 2023, and gave VDARE a final chance to avoid contempt if it did so by January 3, 2024. *See* NYSCEF 63; NYSCEF 129. On February 20, 2024, after both deadlines had passed, the pseudonymous authors moved for a protective order. NYSCEF 192. Contrary to VDARE's assertions, the February 20, 2024 motion by the

[4] VDARE's proposed keywords are restricted to certain purported related parties, which improperly assumes that the OAG's investigation is limited to related-party transactions. Not so. At this late stage, VDARE cannot artificially limit the scope of the OAG's investigation.

pseudonymous authors did not render VDARE's compliance with the Court's orders "impossible." NYSCEF 201 at 3. VDARE was directed to comply, and should have complied, with the Court's orders to produce responsive documents long before the pseudonymous authors sought a protective order. And the filing of the motion does not preclude VDARE from producing those documents that do not relate to the pseudonymous authors' request for relief—i.e., documents that do not contain identifying information of those pseudonymous authors. *See Kim & Bae, P.C. v. Lee*, 173 A.D.3d 990, 992 (2d Dep't 2019) ("by filing the motion for a protective order as to certain information, the plaintiffs were not relieved of the obligation to otherwise comply with the court's August 21, 2015, order").

This Court should put an end to VDARE's campaign of delay, reject its belated, procedurally improper and groundless challenges to the OAG's subpoena, and award contempt sanctions sufficient to compel that compliance.[5]

II. The Attorney General's Confidentiality Agreement and Redaction Protocol Should Be Adopted

A. The OAG's Confidentiality Agreement Conforms with State Law Requirements While Protecting Confidentiality

[5] As noted in the OAG's opening brief, the Court has statutory and inherent authority to impose a daily fine to coerce compliance. *See* NYSCEF 135 at 14-15; *see also Arm Internet Inv. I Ltd. v. C Media Ltd.*, No. 655844/2016, 2022 WL 228035, at *4 (Sup. Ct. N.Y. Cnty. Jan. 26, 2022) (Kraus, J.) ("[T]he most effective way to encourage defendants to comply with . . . this court's prior orders is to issue a prospective per diem fine until the contempt is purged."); *People v. Trump*, 213 A.D.3d 503, 504 (1st Dep't 2023) (affirming $10,000 per day "financial sanction to compel compliance"). Contrary to VDARE's contentions, Judiciary Law § 773 does not preclude a daily fine. *See* NYSCEF 201 at 6. The Court may rely upon other sources of authority to impose a sufficient coercive remedy, including Judiciary Law § 753(A), CPLR 5104, and its inherent power to "enforce[e] respect for, and obedience to, its judgments" independent of "fixed precedents or statute law." *De Lancey v. Piepgras*, 141 N.Y. 88, 96 (1894).

The Court has already determined, and the First Department has affirmed, that a so-ordered confidentiality agreement would sufficiently protect the privacy of VDARE's vendors and contributors. Accordingly, the OAG submits the attached proposed Stipulation and Proposed Order for the Production of Confidential Information, Exhibit F, which would limit the disclosure of confidential information contained in any responsive production, while accounting for the OAG's obligations under the New York Public Officers Law and the New York Criminal Procedure Law.[6] Those obligations are binding on the OAG, and a confidentiality order that does not account for them will put the OAG in the impossible position of adhering to either the order or state law.

Without pledging to produce anything, VDARE has offered to enter a standard confidentiality order drawn verbatim from the commercial division rules. NYSCEF 206 at 2. That order fails to account for the unique role that the OAG occupies as a state actor subject to unique obligations under state law. VDARE failed even to acknowledge the OAG's proposed agreement, or to identify any objections to its provisions. But, as other judges of this Court have previously recognized, confidentiality agreements in the form presented by the OAG are sufficient, and the Court should enter the OAG's order with or without VDARE's consent.

B. The Court Should Enter the OAG's Proposed Redaction Protocol

Without conceding the propriety of the pseudonymous authors' intervention in this proceeding or the substance of their claims, the OAG broadly consents to entry of a protocol

[6] Other than an updated signature block, the attached proposed confidentiality order is identical in substance to the proposed order shared with VDARE and submitted to the Court on January 20, 2023.

designed to address their concerns. The pseudonymous authors' counsel has previously indicated that his clients do not object to the OAG's proposal.[7]

To the extent that VDARE has other identically situated pseudonymous or anonymous authors—that is, other writers who have published works under a pseudonym at VDARE.com or received payments from VDARE for such written work—and VDARE, through its counsel, is likewise willing to certify that they are not related parties as that term is defined by N-PCL § 102(23), the OAG agrees that the same redaction protocol, attached as Exhibit G, may apply.

Consistent with its December 2023 negotiating position, VDARE asks that the redaction protocol apply not just to writers but also to a vast swath of its vendors and contractors—so-called "content creators." This request is both procedurally deficient and inconsistent with the Court's prior orders concerning the discoverability of VDARE's vendors' identities. VDARE should not be permitted to use the OAG's agreement with third parties to bootstrap subpoena restrictions this Court has already denied. *See* NYSCEF 63 at 8 ("Although Respondent argues that redactions are required to protect the identities of contractors—including writers who contribute to the website—these are precisely the records the Petitioner seeks to examine in its investigation of Respondent's alleged organizational misconduct. . . . [T]he Attorney General may seek the identities of other contributors to determine whether further conflicts of interest may exist."). If VDARE had

[7] The nonparty Pseudonymous Authors' brief misstates relevant facts, NYSCEF 196, and the level of constitutional scrutiny that should be applied to the OAG's subpoena. The OAG does not concede that the movants have properly intervened, or otherwise have standing to seek the requested relief in this special proceeding. Nor does the OAG concede that CPLR 3103 applies to a government enforcement agency's investigative subpoena or that the movants' motion is free from other substantive or procedural defects. However, since OAG will agree to the redaction protocol to which the Authors' previously agreed, the Court can so order a stipulation without resolving those objections.

followed the proper channels and moved (or cross-moved) for this relief on its own, that motion would have been denied under the law of the case doctrine.

C. VDARE's Conduct in These Proceedings Is Grounds for Appointing an Independent Entity to Apply Redactions and Compile a Corresponding Redaction Log

The protocol that the OAG proposes requires that redactions be made by an independent third party because VDARE and its counsel have demonstrated that they cannot be entrusted to handle that process, given VDARE's protracted and flagrant disregard for its obligations under the subpoena and this Court's orders. VDARE's failure to properly apply and identify the basis for redactions was, in fact, an impetus for this special proceeding in the first place. Since then, at least three different lawyers representing VDARE have each flouted clear court orders and deadlines, justifying the need for outside third-party review. VDARE's newest lawyer to appear in this action was previously warned against "invoking the rules of professional conduct as a weapon in his filings" in connection with a recent disciplinary proceeding imposing sanctions for his violation of those rules. *See Matter of Wolman*, 203 N.Y.S.3d 408, 412 (2d Dep't 2024).

VDARE's objection that transmitting its documents to a third party for redaction would cause "the harm . . . that the Redaction Protocol and movants would seek to avoid" NYSCEF 206 at 2-3, rings hollow. The movants—the only authors who have come forward with any confidentiality concerns—do not object to an appropriate third party making the redactions. *See* NYSCEF 196 at 2, 6 ("The authors are agnostic as to the mechanism by which their First Amendment rights would be secured. They trust . . . an appropriate, responsible third party tasked by this Court and subject to its jurisdiction to maintain their anonymity. . . . Movants take no position on Petitioner's request for third party review."). Thus, VDARE's speculative concerns on

behalf of the authors are belied by the position that the authors have themselves taken in this proceeding.

Under CPLR 3104(a) and CPLR 4001, the Court has the authority to appoint a referee to receive VDARE's documents and apply the redactions. *See, e.g.*, *Llorente v. City of New York*, 60 A.D.3d 1003, 1003-04 (2d Dep't 2009) (holding the court had authority under CPLR 3104(a) to refer discovery review to a referee without the parties' consent); *Danco Lab'ys, Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 10 (1st Dep't 2000) (remanding to Supreme Court to appoint a referee to redact confidential information). The Court should exercise that authority here and resolve the intervening pseudonymous authors' motion by entering the OAG's proposed protocol.

CONCLUSION

For the above reasons, the Attorney General respectfully requests that the Court:

(i) hold Respondent VDARE in civil contempt for violating the Court's January 23, 2023 and December 11, 2023 Orders requiring VDARE to comply in full with Attorney General's subpoena seeking documents and information;

(ii) assess a daily fine against VDARE of $ 250.00 or an amount deemed by the Court to be otherwise sufficient to coerce compliance with the Court's January and December Orders;

(iii) compensate the Attorney General for VDARE's disobedience in the form of an award of Attorney General's costs and fees in connection with filing this motion;

(iv) direct VDARE's counsel to serve a copy of the contempt motion and order on each member of VDARE's Board of Directors and confirm compliance in writing to the Court;

(v) direct VDARE's Board of Directors to ensure compliance with the January and December Orders upon penalty of further contempt of the directors, individually;

(vi) so-order the attached Confidentiality Order and Redaction Protocol; and

(vii) award such other and further relief the Court deems necessary and appropriate.

Dated: New York, New York
March 12, 2024

LETITIA JAMES
Attorney General of the State of New York

By: /s/ *Alexander Mendelson*
Alexander Mendelson
Richard Sawyer
Assistant Attorneys General
28 Liberty Street
New York, New York 10005
(212) 416-8990
Alexander.Mendelson@ag.ny.gov

JAMES SHEEHAN, *Chief of the Charities Bureau*
EMILY STERN, *Chief of the Enforcement Section, Charities Bureau*
Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Alexander S. Mendelson, an attorney duly admitted to practice law before the courts of the State of New York, certify that this Affirmation complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the affirmation contains 4,195 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affirmation.

Dated: March 12, 2024
New York, New York

/s/ *Alexander Mendelson*
Alexander S. Mendelson