SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application of: DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., THE TRUMP ORGANIZATION, LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC, Petitioners, For a Judgment Under Article 78 of the CPLR -against- THE HONORABLE ARTHUR F. ENGORON, J.S.C., and PEOPLE OF THE STATE OF NEW YORK by LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Respondents.	Case No. 2023-04580

AFFIRMATION OF CLIFFORD S. ROBERT IN FURTHER SUPPORT OF PETITIONERS' VERIFIED JOINT ARTICLE 78 PETITION

CLIFFORD S. ROBERT, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following statements to be true under the penalties of perjury:

1. I am admitted to practice before the Courts of the State of New York, and I am the principal of the law firm of Robert & Robert PLLC, attorneys for Defendants Donald Trump, Jr., Eric Trump, The Donald J. Trump Revocable Trust, DJT Holdings LLC, DJT Holdings

Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC. I am fully familiar with the facts and circumstances set forth herein based on the files and materials maintained by my firm.

2. This Affirmation is submitted in further support of the Verified Joint Article 78 Petition brought by Order to Show Cause of Petitioners Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., The Trump Organization, LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC (collectively, "Petitioners") for an Order: (a) on the first cause of action, directing that the Honorable Arthur F. Engoron, J.S.C. comply with this Court's June 27, 2023, decision and order and render a determination as to the scope of the claims to be tried in the underlying action pursuant to CPLR § 7803(1); (b) on the second cause of action, finding that Justice Engoron's decision to proceed to trial in the action captioned *People v. Trump, et al.,* Index No. 452564/2022 before complying with this Court's June 27, 2023, decision is in excess of Supreme Court's jurisdiction under CPLR § 7803(2); and (c) granting such other and further relief as this Court deems just, equitable and proper (the "Petition").

3. Annexed hereto as **Exhibit M** is this Court's order dated September 14, 2023, granting an interim stay of the trial pending a full panel determination of the Petition.

4. Annexed hereto as **Exhibit N** is a transcript of the parties' oral argument on their respective motions for summary judgment before Supreme Court on September 22, 2023.

5. Annexed hereto as **Exhibit O** is Plaintiff-Respondent's Brief filed in opposition to Petitioners' and Ivanka Trump's appeals filed under Appeal No. 2023-00717, dated April 26, 2023.

6. Annexed hereto as **Exhibit P** is Defendant-Appellant Ivanka Trump's Brief filed in support of appeal filed under Appeal No. 2023-00717, dated March 20, 2023.

7. Annexed hereto as **Exhibit Q** is Defendant-Appellant Ivanka Trump's Reply Brief in further support of appeal filed under Index No. 2023-00717, dated May 5, 2023.

Dated: Uniondale, New York
September 24, 2023

CLIFFORD S. ROBERT

EXHIBIT M

SUMMARY STATEMENT ON APPLICATION FOR EXPEDITED SERVICE AND/OR INTERIM RELIEF

(SUBMITTED BY MOVING PARTY)

Date: September 13, 2023 Case # 2023-04580

Title of Matter: Donald J. Trump, et al. v. Hon. Arthur F. Engoron, et al. Index/Indict/Docket # _____

Appeal by _____ from ☐ Order ☐ Judgment ☐ Decree of ☐ Supreme ☐ Surrogate's ☐ Family County _____ Court entered on _____,20_____

Name of Judge _____ Notice of Appeal filed on _____,20_____

If from administrative determination, state agency _____

Nature of action or proceeding: Original Proceeding

RECEIVED
SEP 14 2023
SUP COURT APP. DIV.
FIRST DEPT.

Provisions of ☐ order ☐ judgment ☐ decree appealed from _____

This application by ☐ appellant ☐ ~~respondent~~ is for an interim stay of proceedings pending a full panel determination of Article 78 Petition brought before this Court in nature of a writ of mandamus / prohibition.

If applying for a stay, state reason why requested This Court's decision and order of June 27, 2023, required dismissal of certain claims based on the statute of limitations. Respondents Supreme Court and Attorney General have refused to comply with this Court's decision.

Has any undertaking been posted No If "yes", state amount and type _____

Has application been made to court below for this relief Yes If "yes", state Disposition Unsigned OTSC

Has there been any prior application here in this court No If "yes", state dates and nature _____

Has adversary been advised of this application Yes Does he/she consent _____

Attorney for Movant	Attorney for Opposition
Name Clifford S. Robert and Michael Madaio	Kevin Wallace, Esq. and Colleen Faherty, Esq.
Address Robert & Robert PLLC, 526 RXR Plaza, Uniondale	People of the State of New York, by Letitia James,
NY 11566 / Habba Madaio & Associates, LLP, 112 West	Attorney General of the State of New York
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	msiudzin@nycourts.gov

(Do not write below this line)

DISPOSITION

Interim stay of trial granted w/o any determination of the merits. Submit motion to panel on an expedited basis.

DS
Justice DF

9-14-23
Date

Motion Date 9/25 Opposition 9/20 Reply 9/25 10 am

EXPEDITE ✓ PHONE ATTORNEYS ✓ DECISION BY

ALL PAPERS TO BE SERVED PERSONALLY.

EM
Court Attorney

"Revised 10/19"

EXHIBIT N

In The Matter Of:

Letitia James, Attorney General of State of New York v. Donald J. Trump & Donald Trump Jr., Et. Al.

Oral Argument
September 22, 2023

Supreme Court State of New York - Civil Term
60 Centre Street - Room 420
New York, New York 10007
(646) 386-3012
SMHarris006@gmail.com

Original File Sept-22 Trump.txt
Min-U-Script® with Word Index

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL TERM : PART 37

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PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, Attorney General of the State of New York,
Plaintiff(s).
: Index: 452564/2022

- against -

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJG HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, AND SEVEN SPRINGS, LLC,
Defendant(s).
: ORAL ARGUMENT

----------x

60 Centre Street
New York, New York 10007
September 22, 2023

B E F O R E:

HONORABLE ARTHUR F. ENGORON,
J U S T I C E

A P P E A R A N C E S:

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for the Plaintiffs
28 Liberty Street
New York, New York 10005
BY: ANDREW AMER, ESQ.,
KEVIN WALLACE, ESQ.
ERIC R. HAREN, ESQ. &
COLLEEN FAHERTY, ESQ.

(Appearances cont'd on next page)

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Allen Weisselberg & Jeffrey McConney, et al
1430 US-206 - Suite 240
Bedminster, New Jersey 07921
BY: ALINA HABBA, ESQ.

Also Present:

ALLISON GREENFIELD - Principal Law Clerk

SHAMEEKA HARRIS, CSR, RMR, CLR
KITTY ACOSTA
Senior Court Reporters

Proceedings

THE COURT: Welcome, everyone, including the press and several law students and their professor. The plaintiff in this action is the Attorney General of the State of New York and the defendants in this action are Donald John Trump and various of his associates and businesses. For the purposes of these brief remarks only, I will aggregate all of the defendants. The plaintiff claims that the defendants violated New York State Executive Law Section 6312 by submitting force financial statements to lenders and insurers.

Plaintiffs 200-plus page complaint contains seven causes of action. The first is a standalone Section 6312 claim. The other six causes of action allege that the defendants are liable under Section 6312 for violating various provisions of the New York State Penal Code. Plaintiff seeks to limit defendants ability to conduct business in New York and disgorgement of alleged ill gotten gains.

The defendants claim that the plaintiff does not have capacity or standing to sue, that the financial statements were not false, that even if they were false they contained various disclaimers which made them not misleading and that disgorgement is not an available remedy in this type of case. That's a very basic simplified outline of this case and is not meant to be technical, exact or

complete. For more details, I encourage you to consult the record which is on the New York State electronic filing system finally known as NYSCEF. There are only 1,500 entries so far.

What brings us here today are duly summary judgement motions and a motion for sanctions for frivolous litigation. The premise of a motion for summary judgement is that the movant is entitled to a favorable judgment as a matter of law based simply on the record consisting largely of documents and sworn testimony. If the papers contain any disputed issues of material fact, the Court must deny the motion. Plaintiffs' motion for summary judgement seeks a judgment only on the issue of liability and only on the first cause of action, the standalone Section 6312 claim.

Defendants' motion for summary judgement seeks a judgment dismissing all seven causes of action. Each side has submitted simultaneous moving opposition and reply papers and my staff and I have digested them all. Plaintiffs' motion for sanctions in the form of money essentially claims that defendants have made frivolous, meaning completely and obviously unavailing, arguments. Defendants vigorously oppose that motion as I'm sure you will see soon firsthand.

I will issue a single decision and order disposing of all three of the aforementioned motions by this coming

Proceedings

Tuesday, September 26, 2023. If I grant defendants' motion for summary judgement, the case is over and there will be no trial. If I grant plaintiffs' motion for summary judgement, there will still be a trial of various issues. Until a week ago, that trial was scheduled to commence this Monday, October 2nd and end by Friday, December 22nd, the Friday before Christmas and more importantly Chris Kise's birthday.

Lastly in response to a special proceeding that defendants commenced, a justice of the Appellate Division First Department stayed the trial pending expedited briefing before a full panel of five judges next week. Whenever the trial, if there is to be one, commences, it will not be here in this courtroom. It will be in room 300 what is sometimes called the ceremonial courtroom and which was reasonably dedicated to a named in honor of the late Paul Fineman a colleague of mine who was sent to the Court of Appeals.

Well, I said enough, maybe, more than enough, and I promise to listen very intently to what counsel have to say. Unless counsel have agreed otherwise, I will ask plaintiff to speak first. Please use the microphones, speak closely and directly into them, as I am now doing, and please speak loudly, slowly and clearly. If you do not, you risk a mild admonishment and the need to repeat yourself. A court reporter or two, who have the hardest jobs in this room, will be recording every word. Thank you. Plaintiff.

Please proceed.

MR. WALLACE: Good morning, Your Honor. My name is Andrew Amer. I represent the People in this case. The Attorney General commenced this action exactly one year ago yesterday against Donald Trump, a number of his associates, and his business enterprise after a lengthy investigation revealed two things.

One, that there was rampant fraud in the preparation of Mr. Trump's personal financial statements for an 11-year period from 2011 to 2021 and, two, that the defendants used those fraudulent statements repeatedly and persistently in business transactions with banks and insurance companies to gain financial benefits.

THE COURT: Are you sure your microphone is on?

MR. AMER: It is. I will try to speak closer.

THE COURT: Follow everything I said.

MR. AMER: This motion seeks judgment on the People's first cause of action for fraud and leaves for trial the remaining counts for illegalities. Those are; namely, issuing false business records, issuing false financial statements, and committing insurance fraud and conspiracy to commit those violations of law. And because there is substantial overlap between the facts underlying fraud claim and the facts underlying the other claims, we ask the Court to enter findings of fact pursuant to CPLR

3212 (g) so that the Court can then apply those facts to narrow the issues remaining for trial.

Now from 2011 to 2015, each statement contains the highlighted language Donald J. Trump is responsible for the preparation and fair presentation of the financial statement in accordance with accounting principles generally accepted in the United States of America known as GAAP for short.

Now, this is a critical representation. It tells the user of the statement that Mr. Trump and no one else bears the ultimate responsibility for preparing the statements in accordance with GAAP. So to the extent that Mr. Trump might seek to blame others or to downplay his role, he cannot do so. The statements in these years say that he bears the responsibility.

Now, for the statements from 2016 to 2021, it is the trustees of his revokable trust who bears the responsibility for the preparation of the statements in accordance with GAAP. Those trustees are Donald Trump Junior and Allen Weisselberg. Again, to the extent that they try to blame others or downplay their roles in the preparation of the statements or disclaim any knowledge of GAAP, as in the case of Donald Trump Junior at his deposition, that does not shield them from liability. The statements represent that the trustees bear the ultimate responsibility for the presentation of the statements in

accordance with GAAP during these years.

Now, each of the statements from 2011 to 2021 contains another critical representation. Each represents to the user that Mr. Trump's assets are, quote, stated at their estimated current value. That is a key term in the world of accounting and valuation, estimated current values. There are two facts about estimated current values that are undisputed in this case and they are up on the screen now. This is from our 202 -- this is from actually defendants' 202 response.

The first fact, paragraph 30, is that ASC 274, which is the GAAP standard that applies to personal financial statements, that ASC 274 requires asset values reported in personal financial statements to be based on estimated current value. Defendants' response was undisputed so that is deemed to be admitted for purposes of this case.

The second fact, paragraph 31, we stated that GAAP defines estimated current value as, quote, the amount at which the item could be exchanged between a buyer and seller each of whom is well informed and willing and neither of whom is compelled to buy or sell. Defendants' response to that was undisputed so that is now a fact that is admitted for purposes of this case.

So, under GAAP ASC 274, the financial statements of

Mr. Trump will require to state the assets at their estimated current value and, in fact, the statements all represent that that is what they do. So in that regard, they, on their face, purport to comply with GAAP. And based on the definition of estimated current value that we've just looked at and is agreed to by the parties, it means to the user that all of the assets in Mr. Trump's personal financial statements are stated at the amount that each asset could be exchanged between a willing buyer and a willing seller who are fully informed and not under duress.

But here, Your Honor, is where the defendants' case goes off the rails. The principal defense put forward by Mr. Trump and his associates to justify the inflated values in the statements completely disregards the concept of estimated current value. They say valuing assets is completely subjective. There is no true value for the assets and that Mr. Trump was free to value the assets as he saw fit from his perspective. And so that's what they contend he did.

But, his perspective, Your Honor, is light years away from what estimated current value is. As defendants put it in their brief, which is on the screen, assets are valued, quote, from Mr. Trump's perspective, the perspective of a creative and visionary real estate developer who sees the potential and value of properties that others do not, do

not, not on a year-to-year time horizon but often decades ahead.

As an indication of just how far defendants take this position that assets have no objective value, we just need to look at the response they gave to the 202 assertion of fact about the square footage of Mr. Trump's triplex which they tripled to 30,000 square feet early on to inflate the value. Here's what they say to the assertion in reality that triplex was 10,996 square feet. Their response disputed. Defendants object insofar as the calculation of square footage is a subjective process that could lead to different results or opinions based on the method employed to conduct a calculation.

In defendant's world, there is no objective truth even in the square footage of a New York City condominium where the square footage is documented in an offering plan that's on file with our office. To borrower the literary reference Your Honor put in one of your earlier decisions, defendants have clearly stepped through the looking glass. But on this side of the looking glass, Mr. Trump and his trustees represented in the statements that the values are stated at their estimated current value which is a defined term that means the amount that would be agreed to between a willing buyer and a willing seller who were fully informed an not under duress not whatever value Mr. Trump decides is

the number he wants to see in the statement.

As the Court is aware from defendants' papers, valuing an asset from Mr. Trump's perspective is what defendants and their experts refer to by the terms as if or investment value. Now, there's one more valuation term that we need to discuss and define before turning to how Mr. Trump inflated his assets that are the subject of our motion and that is the term market value. That is the term that is in many of the appraisals that were in the Trump organizations files and which defendants simply ignore.

Now, here's what defendants' expert Dr. Steven Laposa had to say about how market value relates to estimated current value.

"QUESTION: Let me go back and make sure we're clear. Is estimated current value the same as market value?

"ANSWER: Yes."

This is important because defendants own expert is saying that the basis on which appraisals are typically performed market value is the same as estimated current value which is what the statements represent Mr. Trump assets are presented to be. And here's what Dr. Laposa had to say about how those terms compared to investment value.

"QUESTION: The concepts of investment value and market value are fundamentally different do you agree with that statement?

"ANSWER: Yes."

So where does that leave us? The statements say assets are stated at their estimated current value which is the same as market value. Defendants say Mr. Trump valued his assets based on his creative and visionary perspective on an "as if" basis which Dr. Laposa tells us is a fundamentally different valuation method. What that means is there's a complete disconnect between what the statements represent the asset values are, estimated current value, and what Mr. Trump says they are "as if".

Now, could it be possible for Mr. Trump to depart from GAAP and use the "as if" methodology to value all of his assets. In theory, sure that's possible, but you would need to then disclose in the statements to the users that that is what he is doing and that's not what he told banks and insurers in his statements. He told them the values were estimated current values in accordance with GAAP and that's the lens through which the Court should assess whether the values listed in the statements were false and misleading.

Now, the People submit that representing two banks and insurers that asset values are stated at their estimated current value willing buyer, willing seller, fully informed, not under duress. But providing instead "as if" values based on Mr. Trump's creative and visionary perspective

going decades into the future, is a clear bait and switch that renders the statements false and misleading without more. But in fact, there is much more. There is undisputed evidence showing that regardless of the method used Mr. Trump and his trustees grossly inflated the value of his assets and, therefore, the statements are false and misleading and they have the capacity or tendency to deceive.

For purposes of this motion, we focus on these 12 assets that are up on the screen, and we rely on a subset of the evidence that which is undisputed which is what we must do on a summary judgement motion. That means we are not relying on the analysis done by our experts. We are not reviewing other assets that are in the statement that are also inflated. We are not considering the full compliment of deceptive practices that defendants employ to inflate Mr. Trump's net worth.

These are the four deceptive practices that we are focusing on for these 12 assets. Disregarding appraisals, disregarding legal restrictions on the properties using erroneous data as input to calculate the property values and using methods that are contrary to what the statements represent are the methods that were used. But before getting to the 12 assets, let's look at the big picture.

This graph shows vividly the effect on Mr. Trump's

net worth based on how Mr. Trump and his trustees inflated just the 12 assets and just using the four deceptive practices. This is what the undisputed evidence shows. Substantial inflation of value in every year ranging from a low of $812 million in 2020 to a high of $2.28 billion -- sorry, $2.2 billion in 2014.

Now, let's turn to the assets and discuss how they were inflated by Mr. Trump and his associates. Let's first talk about the triplex. The triplex was inflated between 114 million to $207 million between 2012 and 2016 because Mr. Trump used a figure for the square footage of his apartment that was tripled what it actually was. Here is Mr. Weisselberg testimony on the point.

"QUESTION: I think we agreed that 30,000 feet is a mistake and that the actual size of the triplex was 10,996 square feet; is that right?

"ANSWER: That is correct."

So, apparently, Mr. Weisselberg accepts that square footage is, in fact, an objective measure of the size of an apartment. Now, defendants say this mistake is immaterial but the graph we just looked at shows otherwise. They also say it was an innocent mistake. Now, that doesn't matter for purposes of the court's assessment of whether the value was false or misleading and have the capacity or tendency to deceive, but the evidence actually shows that this was an

intentional ploy to inflate the asset.

In paragraphs 44 and 45 of our 202 statement, we establish that Allen Weisselberg, Donald Trump Junior, and Eric Trump all were sent an e-mail from the Forbes reporter in March of 2017 before the 2016 financial statement was finalized and issued that pointed out the error in the square footage number. Nevertheless, as the evidence shows, Allen Weisselberg and Donald Trump Junior, days after receiving this e-mail, instructed Mazars to keep the triplex value as is based on the wrong square footage for purposes of the 2016 statement of financial condition.

THE COURT: I'm not sure everybody knows who Mazars is.

MR. AMER: Mazars was from 2011 to 2020 the outside accounting firm that was tasked with the engagement to compile the statements. Defendants failed to put in any evidence to refute these facts which shows that this error was, in fact, intentional. Seven Springs is Mr. Trump's estate in Westchester. In 2011 to 2014, this asset was inflated by over $200 million in each year based on the deceptive practice of disregarding appraisals.

Now, defendants had a number of appraisers provide values for Seven Springs during the period 2011 to 2015 all of which were less than $57 million. Defendants do not dispute that they had these values from appraisers. They

just say that they were under no obligation to pay any attention to these appraised values and could instead use the "as of" values that Mr. Trump came up with purportedly reflecting investment potential of the property from Mr. Trump's creative and visionary perspective but that's not a valid defense in this case.

Mr. Trump represented in the statements that the values were stated at their estimated current value not at their fundamentally different "as if" value. So defendants cannot justify the inflated value on a basis that conflicts with Mr. Trump's representation in the statements.

THE COURT: So is it your position that if there is an appraisal out there or that Trump people have that has to be taken into consideration and/or disclosed.

MR. AMER: Yes, Your Honor. And I would go further to say that in the absence of Mr. Trump and his trustees going out and coming up with a competing appraisal, they have no basis to disregard what a professional appraiser says is the estimated current value of the property.

THE COURT: So it has to be disclosed.

MR. AMER: Yes, Your Honor.

THE COURT: All right. We'll hear from the defendants on that.

MR. AMER: It has to be disclosed in this case because Mazars asked to be provided with any appraisals that

they had in their files. So that is a key point. Donald Bender has testified, and it hasn't been refuted by any evidence, that he requested that the company provide him, along with the rest of the backup material, each year with any appraisals that they had in their files. And so that, in our view, placed an obligation on Mr. Trump and his trustees to provide any appraisals they had.

I should point out though whether they provided the appraisals to Mazars or not we know the appraisals were in their files and this court should certainly look to those appraisals in the absence of a competing appraisal for what the estimated current value is for a property especially if the only other value they used to justify what they did is an "as if" value which is fundamentally different and doesn't consider willing buyer, willing seller fully informed not under duress.

THE COURT: Let's go back to the triplex for a second. I think most New Yorkers would call it a triplex but we'll call it triplex. I understand your position that it couldn't have been an honest mistake because there was the Forbes article or e-mail. But speaking maybe philosophically, are honest mistakes actionable? Are you liable if you make an honest mistake under 6312?

MR. AMER: The question under 6312 is was the value false and misleading. You don't need to show scienter under

6312. Whether it was an honest mistake or not, the value that was produced from using three times the actual apartment size was false and misleading.

THE COURT: Interesting to know that Justice Oliver Wendell Holmes said, "even a dog knows the difference between being kicked and being tripped over." Normally in life we think of what -- there's a difference between lies and misstatements, but I understand your position.

MR. AMER: I think, Your Honor, if you go back to the representation in the statement, the representation is that the values -- that the statement is a fair presentation of Mr. Trump's financial condition. And if they made mistakes, innocent or not, they are responsible if that representation is not true. So, they need to live by the representation. If that means they had to exercise more care in the way they calculated these values to ensure that there weren't any mistakes made, then that is what they should have done because that is the representation they made to banks and insurers and any user of these statements.

THE COURT: I don't want to belabor the point but saying that it can't be false and misleading certainly makes the world a simpler place and you don't have to try issues, well, what did you really know. It has to be true or it's either true or it's false and that's your position, okay.

MR. AMER: Yes, Your Honor. And also, of course,

under the Northern Leasing case, the question becomes when the statements -- did the statements have the capacity or tendency to deceive. If they're false due to an innocent mistake or not and they're false by a wide margin, then the answer to the question is, yes, they do have the tendency or capacity to deceive.

So, going back to Seven Springs and the appraisals, there were all of these appraisal appraised values. There were no disputes they had these appraised values. We took the conservative approach and we used the highest appraised value for the property, the market value that Cushman derived in 2015. That put the market value of the entire property at 56.5 million, way lower than Mr. Trump's "as if" values.

It is our position, and we submit, that in the absence of any competing appraisal from the defendants showing the estimated current value or market value of the property, the Court should accept the Cushman appraised value as the estimated current value of the property and on that basis find that the values in the statements that are hundreds of millions of dollars higher from 2011 to 2014 were false and misleading.

Now, on 40 Wall Street, Mr. Trump's leasehold property in lower Manhattan, Mr. Trump used the same deceptive practice to inflate the value. He disregarded

appraisals and the inflation of the value was by 195 million to 325 million depending on the year.

Now, in paragraph 114 of our 202 statement, we established that there were five appraised values for the property from 2011 to 2015. They are up on the screen. These were hundreds of millions of dollars less than Mr. Trump's "as if" values. Again, defendants do not dispute that these appraised values existed for these years in these amounts. Instead, they say that Mr. Trump, as a land developer, took optimistic values of 40 Wall Street and its future potential. Again, the statements represented the value of 40 Wall Street was stated at its estimated current value based on market conditions and willing buyer and willing seller not at the fundamentally different "as if" values Mr. Trump came up with that are divorced from what a willing buyer and willing seller would view the property to be worth.

Again, the Court should find that the appraised values reflect the estimated current value of the property and on that basis find that the values in the statements for this property in these years were false and misleading. That gets us to Mar-a-Lago, Mr. Trump's property down in Palm Beach, Florida. The inflation of Mar-a-Lago is simply staggering between 328 million to $714 million based on the year. The inflation is the result of two deceptive

practices, disregarding appraisals and disregarding the legal restriction that prevents Mr. Trump from using the property for any purpose other than a social club.

There is no dispute that appraisals were done every year on the property by Palm Beach County as set forth in paragraphs 200 of our 202 statement and it is up on the screen. Defendants argue those appraisals were for property tax assessment purposes and have nothing to do with estimated current value or market value.

Your Honor, that's simply not true. Let's look at the county appraisal. Here's a sample. This one is for 2021. It says, right on the face of the document, that it provides the market value and it gives a definition of market value. It says, it's the value -- the value is the most probable sale price for your property in a competitive open market on January 1, 2021, in the case of this appraisal. It is based on a willing buyer and a willing seller, close quote.

(Continued on next page)

MR. AMER: So this is the same definition that is used for estimated current value under ASC 274. Based on applying this definition, the county appraiser would have considered all of the restrictions that existed on the property because that is what a willing buyer and a willing seller would consider. The county appraisal should be the end of the analysis and the Court should find they reflect the estimated current value of the property. But even if the Court were to assess Mr. Trump's much larger values based on his claim that he valued the property as if it could be sold as a private residence, because that's what he claims he did, it still doesn't hold up the scrutiny because Mr. Trump is ignoring legal restrictions that exist on a property.

This is the 2002 National Trust Deed. Mr. Trump deeded away his rights to develop the property for any usage other than club usage and consistent club usage restriction, the statements, themselves, describe the property as a social club without any mention of the ability to sell the property or use the property as a private residence. This is from our 202 statement, where we said there is no discussion of the use of Mar-a-Lago as a private home or a residential component of the property in the 2012 statement. We say the same thing for the other statements, and the Defendant's response is undisputed.

Let me step back a minute so we can all fully appreciate the duplicitous nature of the Mr. Trump's position with respect to Mar-a-Lago. Mr. Trump agrees, even before 2002, but certainly as of 2002 to onerous restrictions on the property deeding away his right to use it for anything other than a social club, which includes not using it as a private residence.

Palm Beach County then assesses the market value of the property, taking into consideration all of these rights that Mr. Trump deeded away, and the result is lower assessments and lower property taxes. This is all to Mr. Trump's benefit because now he is paying lower property taxes. But when it comes to his statement of financial condition, each year while he is paying lower taxes, benefitting from the County's appraisal at a lower value because of his restrictions, he is disregarding those legal restrictions and he is throwing out the county's appraisal and valuing the property as if it were a private residence, which is exactly the right he deeded away in order to get the benefit of lower property taxes in the first place.

THE COURT: Hold on one second.

Because we keep using the terms "appraisal, assessment," I just want to make clear, and the lawyers probably understand this, I am not here to decide whether one appraisal, the OAG's or the other appraisal, the Trump

appraisal, is the right appraisal. That would probably be an issue of fact. But what I understand Mr. Amer to be saying is that there were appraisals that the Trump Organization or people knew about but did not disclose. Is that a fair statement as you understand everything?

MR. AMER: That's correct, but I go one step further.

THE COURT: Go ahead.

MR. AMER: There is no Mar-a-Lago appraisal coming from Defendants to justify Mr. Trump'S as-if value. So this is not asking Your Honor to decide between the County's appraisal and somebody else's appraisal. This is asking you to confirm that the County's appraisal is the estimated currently value that should have been used consistent with the representation in the statement. The Court should not allow Mr. Trump to play it both ways. He shouldn't be allowed to embrace the restrictions and the County's lower appraisal to benefit in the form of paying lower property taxes and, at the same time, using as-if value that is not based on any appraisal in order to inflate the value in the statements.

Let's talk about Aberdeen, which is Mr. Trump's golf course in Scotland. For Aberdeen, a huge portion of the value is attributable to developing and selling private homes on the property, but Defendants ignored the legal

restrictions on the number of private homes that were approved for development by the Scottish authorities when doing his calculation.

As we can see, the statements represent that only 500 single family residences were approved for sale. Yet, the spreadsheet, which is the bottom portion of the slide, shows that the calculation used to value the property was based on 2,500 homes, not 500. So this, in fact, is an even more egregious than the tripling of the square footage of the triplex.

THE COURT: The math is simple.

MR. AMER: It is a quintupling of the number of the approved homes.

Now, Defendants don't offer any excuse for this use of 2,500, instead of 500, and it vastly inflated the value of this property. Based on using a number of homes that was five times what had been approved, the Court should find that the Aberdeen values were false and misleading.

There are two properties that are owned by Formato Partnership Interest in which Mr. Trump has a 30 percent interest. On these properties, Defendants inflated the values based on a combination of disregarding appraisals in a number of years and in 2018 and 2019 using the wrong capitalization rate, which is one of the two components that appraisers use to calculate the value of a building. It is

capitalization rate and it is net operating income.

Now, for the Formato Properties, as established in paragraph 256 of our 202 statement, there were appraised values for one of the two properties, 1290 Avenue of the Americas, here in Midtown Manhattan ranging from $2 billion to $2.3 billion for 2012 through 2016 and for 2021. Yet, Mr. Trump valued his 30 percent interest in the building based on a value that was at least $500 million more than these appraised values. Again, there is no competing appraisal that provides the as-if value that Mr. Trump used. Defendants do not dispute that these values existed. They simply disregarded them.

The Court, again, should reject Defendants' arguments that Mr. Trump and his trustees were simply free to ignore these appraised values and should, instead, accept these appraised values as reflecting the estimated current value of the property.

Now, for 2018 and 2019, the values were inflated for a different reason. I mentioned a point about the capitalization rate or CAP rate for short, and it is based on selecting a different CAP rate than the one that they represented they were using. As represented in the statements in these years, the valuation was derived at by using a CAP rate that applies to something called a stabilized net operating income. So if you are going to do

that, you need to take the CAP rate from a comparable building, if that's the method you are using, that applies to the stabilized net operating income based on what they represented they were doing. But as established in paragraph 262 of our 202 statement, Defendants did not use the CAP rate that applied to stabilized net operating income. They used a lower CAP rate. Now, the difference between the two CAP rates is only about two percentage points, but the difference between those two percentages, while it seems small, when you plug it into the calculation, it has a very substantial impact on the value. It, in fact, inflated the value by over $300 million in 2018 and 2019.

Now Defendants do not offer any evidence to dispute that they failed to use the correct CAP rate from the source material they were relying on, that is the CAP rate that applied to stabilized net operating income, which is what they should have been done based on the representation they made in the statements because that's what users of the statement would have understood that they would have done. So the inflated values are false and misleading in those two years for that reason.

The U.S. golf clubs inflated because Defendants used a combination of disregarding appraisals and using methods that contradict the representations they made in their statements.

Let's first look at one of those representations.

Mr. Trump and his trustees represented that the financial statement does not reflect the value of Donald J. Trump's worldwide reputation. The goodwill attached to the Trump name has significant financial value that has not been reflected in the preparation of this financial statement. That's what he represented in the statements. And yet, the supporting data shows that Mr. Trump and his trustees added a brand premium for that goodwill.

Here, in this instance, for the Jupiter Golf Course, we can see that a premium for a branded facility was added of 30 percent. In later years, it is 15 percent. The values are falsely inflated by premiums because the statements represented that Goodwill associated with the Trump name was not included.

Another way of which the valuation contradicts a representation relates to membership deposit liabilities and how they are accounted for in the values. Now, membership liabilities are, essentially, initiation fees that members deposit with the club when they join and they may need to be refunded in the future under certain conditions, but those conditions may or may not come to pass.

Now, in the statements, Mr. Trump represented that he valued those liabilities at zero dollars, meaning he didn't think he would ever have to pay the deposits back.

The top portion is from the statements. It says the fact that Mr. Trump will have the use of these funds for that period without costs and that the source of repayment will, most likely, be a replacement membership has led the trustees to value this liability at zero and not its present value. That's all fine, but then he went ahead and included the value of the membership deposit liabilities at its face amount in calculating the price of the clubs, which then translated into the value of the club.

As you can see from the backup material that's below for the Jupiter Club, he baked into the value of the club over $41 million dollars in his membership liabilities that he represented in the statements he was valuing at zero because he never thought he would have to pay them back.

THE COURT: But he warned the co-parties. They could have followed up with any questions they had.

I just want to -- At the risk of repeating, the statements of the disclosure said, well, yes, I have to pay these back, but I am planning to get new members, so it won't cost me anything. Isn't that a full disclosure?

MR. AMER: I think you are misreading what the disclosure says, Your Honor. The reason he is saying he values them at zero is because he thinks he is not going to have to pay them back because if they do have to get paid back, they will be replaced by other membership deposits.

So he doesn't have to ever pay them back, which is fine, but his valuation is based on the notion that these are liabilities he does have to pay back because he is including it in the price of the club.

So, for example, if you buy a club for and you pay $5 million dollars but the club has an existing liability of a million, what Mr. Trump is saying here is he is effectively paid $6 million dollars for that club and that's the value he is listing. Why? Because he has paid out $5 million in cash and he has accrued a million dollars in liability. So he is effectively paid $6 million dollars. He can't have it both ways. He cannot say that he is valuing the liabilities at zero and then include the liabilities as part of the purchase price for the club, which he then uses as the value of the asset for the statement purposes. So he is doing the exact opposite of what he represents, and the fact that there will be new members who will replace those membership costs is just something that supports his decision to value them at zero, but he should have valued them at zero. Instead, he valued it at $41 million dollars for Jupiter. He contended right here, he paid -- it says allocation of purchase price. He paid $5 million. He incurred a liability of $41 million, which should have been zero, and he said the total purchase price is $46 million dollars. That's counting the

membership liabilities, not at zero, but at their full face amount, and he is saying, in effect, he paid $46 million for this club, so that's what it is worth, not that he paid only $5 million for the club and that it is worth $5 million.

So hopefully, I tried to clarify that for the Court.

THE COURT: I think so, but those issues are philosophical. In any event, we will hear from the Defendants at some point, I assume.

Move on.

MR. AMER: The other way in which the golf clubs are inflated are based on appraisals that they had for the Briarcliff in L A. Again, they don't dispute that these appraised values existed in these amounts. They simply argue they could ignore them and our view is the Court should accept these appraised values as the estimated current values for these golf course, both, for the golf course piece and the undeveloped land piece and should reject Mr. Trump's higher as-if values that, again, are not based on a competing appraisal.

Let's talk about Trump Park Avenue.

This asset was inflated by disregarding rent stabilization laws and using the wrong prices for the apartments.

Defendants had a 2010 Oxford appraisal calculating

the value for rent stabilized apartments at $62,500 per unit. Yet, Mr. Trump and his trustees valued these apartments at millions of dollars each. Defendants response is that, well, eventually, each apartment will lose its rent stabilized tenant, but that's no justification for pretending that those tenants don't exist and don't at the time reside in those apartments and won't be there for many years to come. Those are restrictions that any willing buyer and willing seller would take into account when purchasing a rent stabilized apartment.

THE COURT: I have to -- I want to warrant counsel on both sides. We have a New York audience here. They are experts in rent stabilization. They know all about it.

MR. AMER: Now, in valuing the units, including those subject to rent stabilization laws, Mr. Trump and his trustees ignored internal market values that the Trump Organization's real estate brokerage arms had developed in-house for internal business purposes. And, instead, went with the much higher offering plan values.

The two charts shown here, the one on the left, the unit number on the left, the middle column is the offering planned price and to the right is the market, current market value price. They literally had the equivalent of two sets of books for the prices for these apartment units. They had one set of books, which were the offering plan prices that

they used for the statements and they had the second set of books, which were the internal current market values that they used for their own internal purposes, which they not only disregarded, but they never sent to Mazars when they were provided backup information. They only sent the column with the offering plan prices.

Now, the Court should accept the internal market prices as an admission by the Defendants as to what the value should have been for the statements because those are the estimated current values, not the offering plan prices.

Now, and finally, there were two penthouse apartments set above the Trump lease that had options to purchase with purchase prices in those options. We contend that they should have used the lower option prices that were in the leases and we contend that Defendants agreed with that approach because beginning in 2015, that's the value that they used in the statements.

Now, Trump Tower was inflated in 2018 and 2019 for the same reason that the values of 1290 Avenue of the Americas were inflated. In those years, they used the wrong CAP rate. As with 1290 Avenue of the Americas, they represented that they were using the CAP rate that applied to stabilized net operating income. In fact, they used the wrong CAP rate, the one that didn't apply stabilized net operating income and the difference was substantial in the

value. It was inflated by $173 million in 2018 and inflated by $323 million in 2019.

Quickly, the cash, the cash asset item on the statement, the cash was inflated because they included cash held by Formato over which Mr. Trump had no control. The cash was represented to be Mr. Trump's cash and a measure of his liquidity. This was particularly important for banks and insurers that viewed it as a measure of Mr. Trump's liquidity. So included in this category cash that Mr. Trump actually didn't hold and didn't control inflated this asset value by the amount of the Formato cash that was included.

Now, Defendants have said, well, they could have listed it in another place on the statement. That doesn't help them because when you list it in the cash -- when you list it in the cash, you are including it in his liquidity. When you list it as a separate line item and you disclose accurately that it is cash that he has no control over, it is not part of his liquidity. The same exact argument applies to the escrow deposits, which included amounts held by Formato, again, however which Mr. Trump had no control.

Finally, the last asset, licensing developments. These were substantially inflated by including amounts that should not have been included based on the representation of what the asset included in the statement.

According to the statement, the category was

supposed to include only deals with other companies, so that means deals that were at arm's length and only deals that had been reduced to a signed contract. In fact, contrary to these representations, Mr. Trump and his trustees included management contracts that were between Trump Organization companies, some money that was just flowing from one pocket into the other and didn't reflect fees that were negotiated at arm's length and deals that were not yet signed and were actually labeled in their internal documentation as "to be determined" or TBD deals. The amounts attributable to intracompany agreements of TBD deals should not have been included because the representation in the statement said that they wouldn't have been included. And the Court should find that these -- including these values inflated them by $88 million to $225 million depending on the year.

So we have now gone through the twelve assets and we have discussed the impact in grossly inflating the statements from 2011 through 2012 based on just the undisputed evidence.

The next chapter and story is how these false and misleading statements were used by Defendants in fraudulent carrying on, conducting and transaction of business with banks and insurers all within the statute of limitations consistent with the First Department's decision.

THE COURT: Can we just stay with or go back to the

in intracompany deals?

Why doesn't that balance out if there is a Trump company on my right and a Trump company on my left, and they make a deal, aren't they all under the same financial reporting umbrella? Why does it matter?

MR. AMER: It matters, Your Honor, because the points of this asset category was to value deals with outside companies, other companies not within the Trump Enterprise. And that's relevant to the user of the statement because that reflects deals that are going to bring money into the company. A deal between two Trump Organization companies is not bringing money into the company. It is taking money out of one pocket and putting it into another pocket.

THE COURT: So why do they matter?

MR. AMER: They shouldn't matter. They should be excluded from the category, but they were included in the category, and the result was it inflated the value. They should have --

THE COURT: Wasn't there a corresponding liability?

MR. AMER: No, Your Honor. These were management contracts. So one company enters a management contract, a licensing deal, to manage a hotel. So, you know, one of the companies that owns the hotel is paying another Trump company that manages the hotel and they are paying the money

under a contract which, obviously, was not negotiated at arm's length. Now, the user is viewing that as a contract that exists with some outside company that's not part of the Trump Enterprise that is going to be generating income for the Trump Organization and that just wasn't the case.

Now, in terms of the fraudulent transactions that occurred when the statements were then used to maintain -- to obtain and maintain loans and to renew insurance, I would like to start with the First Department's decision.

The First Department has confirmed the applicable limitations period is six years, as this Court held and was affirmed, and is extended by pandemic executive orders and the tolling agreement for those bound by the tolling agreement.

Per the First Department's decision, the two limitation periods are as follows: February 6, 2016 forward for those not bound by the tolling agreement, and July 13, 2014 forward by those bound by the tolling agreement.

For the loans -- Well, here, we contend there are dozens of completed fraudulent transactions within the periods laid out by the First Department involving all five of the loans that are at issue. For these loans, there can be no serious dispute that the preparation of a new false and misleading statement and the submission and certification of that new statement to a bank constitutes a

fraudulent transaction of business in the State of New York that is completed within the meaning of the First Department's decision when the certification is delivered to the bank.

Let's look at one of the certifications. Here is an example. It is a certification that was submitted on May 10th of 2016. So within even the shorter limitations period specified by the First Department, and it relates to three Deutsch Bank loans, the Dural loan, the Chicago loan and the Old Post Office or OPO loan, Mr. Trump submits in this certification the 2015 statement of financial condition and he represents under his signature that the statement presents fairly in all material respects his financial condition. That is fraudulent conduct that is actionable under 63 (12) within the limitations period.

Now, we created a number of timelines for each loan that shows all of the fraudulent transactions completed within the limitations period. For the Dural loan, which we have up on the screen, there were seven fraudulent transactions in the gold shaded area, the shorter limitations period and one additional fraudulent transaction in the extended period, the blue shaded area. The transactions involve Mr. Trump, Donald Trump, Jr., and Eric Trump on behalf of the borrowing entity, Trump Endeavor, LLC.

Now, let me pause here to address the Defendant's statute of limitations argument. They say, as far as this loan goes, that all eight acts of fraud that occurred within the limitations period in the blue and gold shaded area are time-barred because the Dural loan closed before the limitations period began in June of 2012. That's their argument.

Your Honor, that just makes no sense. It would upend decades of law on accrual precedent. Just focusing on the preparation submission and certification of the 2021 statement of financial condition in October of 2021, which is the last flag on the timeline, it is just nonsensical, Your Honor, to say that the Attorney General's cause of action for that fraudulent transaction, the preparation of the statement, false and misleading and the submission of that statement and certification of that statement, that that cause of action is time-barred because nine years earlier, the Dural loan closed, long before anyone even had an inkling of what would be in the 2021 statement.

The effect of their position, we submit, is to say the Defendants get a license to commit fraud on any existing loan with respect to whatever they submit to the bank after the loan closes, including financial disclosure that they are required to make along with certifications that they have to make if the loan is going to be maintained and not

go into default.

It is clear under First Department cases, including recent decisions that we cite in our brief, People v. Cohen and People v. Allen, on page 26 of our reply brief, that claims or misrepresentation and fraud accrue when those acts are completed, here, when the statements are sent to the banks, even though they arise out of or relate to business arrangements entered into years earlier.

I am going to quickly go through the other loan transactions for the Chicago loan. There are five transactions within the shorter period involving Donald Trump, Donald Trump, Jr. and Eric Trump on behalf of borrowing entity 401 North Wallbash.

For the OPO loan, there were seven fraudulent transactions, including the loan closing, by the way, that fall within the limitations period. The transactions involve Mr. Trump, Donald Trump, Jr., Eric Trump and the borrowing entity, Trump Old Post Office, it is also worth pointing out here that because this loan closed on August 12, 2014, within the limitations period, it brings in without question all of the statements of financial condition going all the way back to 2011 because on this loan Deutsch Bank relied on the 2011, 2012 and 2013 statements of financial condition to approve this loan, and that's clearly set forth in Exhibit 265, which is the credit

memo for Deutsch Bank.

THE COURT: Wasn't the alleged fraud before the limitations period and outside of it?

MR. AMER: No, Your Honor, because for this loan, the closing date is within the limitations period.

THE COURT: That's the closing date. When was the fraud?

MR. AMER: Well, the fraud was on the closing date with respect to the reliance on those statements. When we close a loan, the borrower is certifying that all of the representations in the loan documentation are true and correct. Some we have a timely claim related to the 2011, 2012, 2013 statements because they were relied on and certified as of the date of the closing of this loan, which was in the limitations period.

THE COURT: I see your point. I hope you see my point.

You know, you say that the Defendants relied on the statement.

Well, we are not here about the Defendants -- I'm sorry. We are not here about the lenders. We are here about what the Defendants did.

MR. AMER: Deutsch Bank, though, relied on those false and misleading information in the statements. If the statements, those 2011, 2012 and 2013 statements, went into

a drawer in Mr. Trump's offices and never saw the light of day, they would not be part of a fraudulent transaction that would be actionable under 63 (12).

THE COURT: I understand that.

(Whereupon, there was a change in reporters.)

THE COURT: I understand that. So, does your argument essentially equate to the idea that those statements were continuing statements?

MR. AMER: No, Your Honor. Those statements were part of the bank's file that the credit memo relies on that were all part of the loan documentation that were certified as of the date of closing to be true and accurate. So we have a cause of action that is timely for that loan closing. Now, I will -- I will acknowledge that for, if we go back, for the Chicago loan the loan closing predated the limitations period. We are not asserting that we have a timely cause of action for that loan closing, but we have timely fraudulent transactions that occurred in the gold shaded area that related to that loan.

THE COURT: All right. Final question and then we'll move on. Did the defendants do anything on the date of the closing or within the limitations period?

MR. AMER: Absolutely.

THE COURT: What did they do?

MR. AMER: They went forward with the closing and represented at closing that all of the documentation -- all of loan documents that the bank had received were accurate.

THE COURT: But you say they went forward with the closing. They went forward with it passively, right? They didn't do anything.

MR. AMER: No, Your Honor.

THE COURT: What did they do.

MR. AMER: They certified at closing.

THE COURT: How did they certify?

MR. AMER: They signed loan documents.

THE COURT: Okay. That's what I am looking for. On that date, they signed documents, right?

MR. AMER: Yes.

THE COURT: All right. We all understand. Let's move on.

MR. AMER: Apologies for not getting where you needed me to go as soon as you wanted me to get there, but I'm happy to have arrived.

40 Wall Street four fraudulent transactions within a shorter limitations period and an additional two fraudulent transactions within a longer period. This transaction involves Mr. Trump, Allen Weisselberg and the borrowing entity 40 Wall Street. Finally, the fifth loan, Seven Springs, there were three fraudulent transactions within the shorter limitations period and one additional fraudulent transaction within a longer period and it involved Mr. Trump, Jeffrey McConney and Eric Trump along with the borrowing entity Seven Springs.

THE COURT: I promise to move on but one more point. You say they or the defendants on the closing date

of that earlier loan signed off or said, yes, this is all true. Which defendants? They weren't all there, obviously.

MR. AMER: We do have in the records, Your Honor, the loan closing documents. I don't have, off the top of my head, which particular individual defendants signed. But to the extent they signed, they certainly would have been signing on behalf of the borrowing entity and on behalf of the related, you know, control group that has the beneficial ownership of the assets.

I would also add, Your Honor, that as of closing the other signature was the signature of the guarantor and that we know was Donald Trump. So, a few closing remarks about what relief we seek from the Court and what is left for trial if the Court grants us relief.

Your Honor, we are asking for a judgment in the People's favor on the first cause of action for fraud and for an order under 3212(g) making detailed findings of fact and those findings are in our reply brief .4. And we are asking that you find that each statement was inflated by at least the amounts we've indicated based on a subset of the evidence that we presented which we contend is undisputed and to find that the preparation and certification of a statement is a fraudulent transaction that involves specific defendants as participants or as individuals having knowledge. We've set forth, again, in .4 the specific

findings.

In terms of the remaining claims left for trial, we think that the findings that we've asked for in .4 of our brief will allow for a streamlined trial involving evidence relating to disgorgement and evidence of intent to defraud which is a necessary element of the three illegality claims as well as evidence to support the equitable relief that we are seeking. That equitable relief, Your Honor, is in addition to disgorgement, cancelling corporate certificates, appointing a monitor, requiring that they provide audited statements of financial condition, replacing the trustees and barring individual defendants from serving in certain capacities in any New York corporation.

THE COURT: I'm not seeing that on the screen.

MR. AMER: I didn't put it on the screen but it's encompassed within the bullet that says other equitable relief. I'm happy to take the Court's questions if you have any more. Otherwise, I'd just ask for an opportunity to come back up and comment on Mr. Kise's presentation.

THE COURT: Will Mr. Kise be presenting?

MR. KISE: I will, Your Honor. I am fine with however your court pleasure is whether we do rebuttals or not do rebuttals. We could be here, as you know, until midnight if you let us keep going back and forth, but I am happy to do whatever the Court pleases to do.

THE COURT: I normally would just allow replies, sur-replies, sur-sur-replies, but I am hoping we finish by one o'clock.

MR. KISE: I am, Your Honor.

MR. AMER: I will be brief, Your Honor, but I will point out that Mr. Kise's motion is much broader in scope than my motion. So there are issues that I haven't addressed in support of my motion that may relay to other claims they are seeking to dismiss. I do have, Your Honor, a hard copy of the presentation that I thought may be useful to the Court if I could hand it up.

THE COURT: Yeah, we will like that.

MR. KISE: Your Honor, could we take five minutes just to get set up.

THE COURT: I have often said there is no such thing as a five-minute break. We can take a ten-minute break. Ten minutes, everybody. See you then.

(Whereupon, a recess was taken.)

(Whereupon, the following discussion take place on the record in open court.)

MR. AMER: I did have a quick question. Since we are submitting these to the Court, does it make sense for both sides to file them on the docket?

THE COURT: Yes.

MR. AMER: We will do that. Thank you.

THE COURT: I just want to make clear it says summary judgement hearing. Today is not a hearing which to me means facts on the record under oath. It is an argument, and I'm sure you'll argue.

MR. KISE: That is all it is, yes, Your Honor. I am going to try to do this from a technological standpoint, click these forward. I am not really that technologically capable as we may learn here painfully. If so, I will have my technology assistant help out with this.

Thank you, Judge. Christopher Kise on behalf of all of the defendants. I want to point out two things before I begin in substance. One is, Mr. Robert will be adding just a few comments after I'm done and, two, is that what we've done today, because we have these various motions, you know, they were filed simultaneously, this presentation encompasses sort of everything. It's not like designed to focus on one or the other. It is just really addressing all of the issues to try to be efficient.

I am also going to try to get through this quickly, Your Honor, and we are not going to touch on every point. So there are a lot of things, as you probably know from looking at the filing, there is a lot of things in our materials that I'm not necessarily going to touch on, but I don't want it to be construed as any waiver of those arguments.

THE COURT: Understood.

MR. KISE: I will congratulate Your Honor for summarizing what is probably 15 or 20 thousand pages worth of material at the beginning of this hearing. That is a pretty concise summary. I'm not sure how long it took you to do that, but I don't think I could have done that. That was very concise.

THE COURT: Not too long I have been living this case for a while.

MR. KISE: I also appreciate you remembering that the 23rd is my birthday so we want to try and get done by the 22nd. I certainly do. So, to borrow -- it's interesting. You are going to hear things that are similar in concept between us and the Attorney General and then you are going to hear things that are quite divergent. You know, to borrow, as Mr. Amer did, from your comment before, we do also likewise feel like we are fully, through the looking glass here, you are going to hear a very different world now than what was presented before. That's the nature of our process.

So, the nature of the Attorney General's case, from our perspective, is -- the foundation of the case is ignore everything except what they want you to focus on, ignore the First Department mandate, ignore the facts certain defendants are not parties to the tolling agreement, ignore

their own statements and filings about the tolling agreement, ignore the transactions. These are all successful profitable business transactions for all parties. The banks alone made a hundred million, 200 million in interest. Ignore the testimony of actual parties. I am going to come back to all of these points. Ignore the testimony of the actual parties to those successful profitable transactions. No defaults. You are going to hear there is no defaults. There is no fraud.

Ignore the governing accounting standards for preparation of the statements of financial condition. The only place that you'll hear agreement is that we agree on what the standard is. We just don't agree on how that standard applies here. Ignore the established principles of property valuation. These are not things that are subject to dispute. Ignore the disclosures and disclaimers in the statement of financial conditions. Ignore experts except for the Attorney General's experts and where there is any reference to our experts, as you heard Mr. Amer like the quotes from Dr. Laposa's testimony, it is sort of this selective excerpt. It's just this one line out of hundreds of pages.

Most everything you heard, most everything you heard, I would say, from Mr. Amer is taken out of context. They may be true to a point or they may be statements that

on their face are correct, but when you view them in the entire context and you understand the applicable law, you understand applicable accounting regulations or accounting principles, I'm sorry, and you understand the entire context, it's evident that they are isolating statements.

The Attorney General wants you to ignore all of their hand picked quotes from documents. Ignore materiality. That's really the point. They are asking the Court to ignore materiality. They are asking the Court to ignore the fact that there was no reliance and there were no capacity or tendency to deceive. Interestingly, Mr. Amer made an affirmative statement in his argument that the banks, in fact, relied on these statements. It's not supported by the record that they did rely.

Ignore the fact that there was no real world impact here other than positive. These were successful transactions for both sides. They're complexed sophisticated commercial transactions. The Attorney General's position is believe me; this is fraud. If you disagree with the Attorney General's valuations, that's fraud. The Attorney General knows they are fraud because she says they're fraud, not because any actual fraud took place in the context of the law.

The Attorney General is the accounting expert. Do not listen to our accounting experts. They are very

dismissive in their papers of our accounting experts, one who is a distinguished NYU Stern School professor and the other who is a Senior SEC Chief Enforcement Accountant. Those accounting experts testified about GAAP compliance, about the disclaimers, about estimated current value which you heard so much about. We are going to come back to that. Ignore all of that. Ignore the valuation experts. The Attorney General is the valuation expert. The Attorney General is the legal expert. The Attorney General is going to tell you what the law is. And, frankly, you just heard that at the end, and I am going to start where Mr. Amer left off on the limitations because they now have a very different and creative view of what the law is.

And the Attorney General is, respectfully, using hyperbole to go this court into -- to go this court into the wrong direction, moving in the wrong direction. So unlike at the preliminary injunction, the motion to dismiss phases, the Attorney General must now prove her case. This is a very different phase of the case. Before the facts were assumed, her case was assumed. She was entitled to a presumption. Anything that was unrebutted before was at the injunction phase or the facts as pled in the complaint were presumed as correct. But now she has to prove her case and we say the controlling law and the evidence simply do not support her claims.

The case comes down to prosecuting the defendants for engaging in successful business transactions. The Attorney General is supplanting sophisticated banks and insurers judgment for her own opinions. The First Department has already dismissed time barred claims. The Attorney General cannot establish, as to the remaining claims, any viable violation of Section 6212 and all of the remaining counts, counts two through seven -- which I'm not going to cover in detail today. That's in our papers -- failed for a want to prove particularly as it relates to intent. There is absolutely no evidence of intent. The only mention of intent is in their briefing when the Attorney General contends that on the one hand they don't have to prove intent under 6312 but yet you can use the evidence under 6312 that demonstrates a 6312 violation to establish the requisite intent under the remaining counts. It is a nonsecretive.

Let's start with the controlling law. The First Department mandate the best starting point is the actual First Department decision. If you look there, it states very clearly that the order is unanimously bona fide on the law to dismiss as time barred the claims against defendant Ivanka Trump and the claims against the remaining defendants. And then there's accrual, accrual prior to July 2014 or February 2016 with respect to the tolling

agreement but that is unequivocal language. That is a unanimous court dismissed as time barred certain claims.

So, the First Department is unequivocal. There's no jurisdiction remaining over those claims. There is no opportunity now or discretion now to consider alternative theories which is what are the Attorney General is advancing. It's an interlocutory decision which is designed to be implemented before we start the trial. The latest bar date is July 13, 2014, as you heard. There is another area where we are at least in agreement.

Any claims that accrued, an important word, prior to that date are time barred. And the First Department also provided very specific direction as to what accrual means. The language of the opinion makes this clear. So going back to the language of the opinion. Applying the proper Statute of Limitations and the appropriate tolling claims are time barred if they accrued; that is, the transactions were completed before February 6, 2016, for defendants bound by the tolling agreement claims are untimely if they are created before July 13, 2014.

Now, this is not, as Mr. Amer contended, this is not defendants' argument. This is the First Department's position. And one thing that hasn't gotten any attention so far today are the two cases that are cited by the First Department right after they defined what accrual means,

claims are time barred if they accrued.

So, if you look at the Boesky case, which we discussed in our papers, and the Rogal case, both of them are cases that relate to claims exactly like the Attorney General's claims have always been up until now in this case based on specific lending transactions, specific transactions, a specific date. So, the Boesky case, the cause of action for fraud accrued when the plaintiffs entered into the allegedly fraudulent transactions when they entered. Rogal --

THE COURT: Wait. I guess we will have to discuss this. There are loans that are essentially -- I'm not a financial expert but I'll speak somewhat as a layperson -- where monies transferred it's owed. Don't we have in front of us a different situation where money is transferred and then the borrower must continue to state his -- their financial condition? So these cases that you're relying on were there any followups or was that it? Let me just ask along this, the Appellate Division, the operative word is completed. It doesn't say but I think your papers, yours, generally speaking, talk about when the loan closed. But after these loans closed, there are a lot of statements which seems to me they can't be misleading.

MR. KISE: But, the First Department -- and I'll get there, Your Honor, but to answer your question directly

right now, the First Department already addressed that scenario in the Ivanka Trump decision. It is already there in the opinion. The Boesky case and the Rogal case stand for proposition that the closing date is the operative date and it is fully consistent with the Court of Appeals jurisprudence.

The Court of Appeals has repeatedly rejected accrual dates that cannot be ascertained with any degree of certainty meaning that they can be fluid. The Attorney General is espousing a fluid date concept. No, the transaction, the Court -- if you look -- if you look at their -- maybe, this will make it a little clear. Let's look at the Attorney General's theory from the outset. The Attorney General's theory from the outset is that the statements of financial conditions themselves induced loans. And I haven't cited every paragraph. I've just picked out a couple.

Look at complaint paragraph three. Mr. Trump and the Trump organization used these false and misleading statements, that be the statements of financial condition, repeatedly and persistently to induce banks to lend money. That's paragraph three.

Paragraph 560, Trump and Trump organization has obtained hundreds of millions of dollars in real estate loans in reliance on, among other things, Mr. Trump's net

worth as reported in the statements of financial condition.

Paragraph 568, by personally guaranteeing the loans and providing evidence of his liquidity and net worth through his statements, that is the statement of financial condition, Mr. Trump obtained or his company a significant improvement in the interest rate on the loans.

THE COURT: Mr. Kise, you know I am not a ha, ha got you judge. If I haven't said that before, I'll say it now. The fact that a complaint, you know, the initial pleading talks about obtaining loans, I'm not going to exclude maintaining loans because that's not the law.

(Continued on next page)

MR. KISE: Okay. Well, let's look -- That's a good point, Your Honor.

Let's look at their filings then. In the opposition to the motion to dismiss, the Attorney General then said that they presented those statements, as the statements of financial admission, to lenders and insurers licensed in New York to obtain favorable loan and insurance terms they would otherwise not have been entitled to receive. Then in their Appellate brief, long after the complaint was filed, while we are all nearing post-discovery, they described the scheme as involving this submission of these statements, submitting misleading statements to obtain significant financial benefits, such as favorable loan or insurance terms.

The Attorney General is asking you to ignore their complaint, ignore their motion to dismiss opposition, ignore the Appeal brief, ignore the core of their position because now it doesn't fit within the confines of the Appellate Division decision. This is their theory and they can't now change their theory and decide to pivot and call it something else.

THE COURT: So is your position that if the initial statements of prior to the limitations period, that after that the Defendants can submit whatever they want in regard to that loan, such as the financial statement that the loan

agreement said they had to submit, whether it is false or not; is that your position?

MR. KISE: No, Your Honor, that's not my position and I will get there in some detail. I loath to skip too far ahead, but I will reference it now. It is not my position. It is the First Department's position. It is the law's position that these are continuing effects of the initial -- You have to look at what the wrong is. The wrong is that if you obtain a loan, if you look at their entire damage -- and I am calling it damages, but if you look at their construct, it is centered around the obtaining of loan that you would not have otherwise been able to obtain. And so you can't pivot on that theory and it is not that anything that happened subsequent is irrelevant. It is just all a continuing effect of the initial wrong. That's what Boski talks about, that's what Rowe V. talks about. That's what the cases that were considered by the First Department, and as I said that we will get there --

THE COURT: By the way, I see all sorts of activity on Plaintiff counsels' table. I am sure they are going to address hose issues.

MR. KISE: Oh, I am sure they will, but applying that mandate in the appropriate accrual date, at least seven of the ten lending-based claims have been dismissed by the First Department.

The chart that is -- The next line shows you the operative dates. The Court no longer has jurisdiction over these claims. Any transaction enclosed for the July 13th, 2014. So that would be all the ones listed there, the Springs loan, the Trump Park Avenue loan, the Ferry Point contract, the GSA OPO bid selection and approval, which we didn't hear anything about, the Doral loan, the Chicago loan, Old Post Office contract and lease, all of those pre-date July 13th of 2014 and I argue are out irrespective of the subsequent event. And again, that's not our view. That's what the First Department has already determined. So the only arguable transactions that could proceed further would be the OPO loan for those Defendants bound by the tolling agreement or 40 Wall Street loan for those Defendants bound by the tolling agreement.

So the Attorney General's first response is ignore the decision. They have an interesting footnote, which I have not seen ever before -- not that that's anything, but I have been doing this awhile -- where they reserve the right to argue at trial in response to Defendants' submissions that an earlier cutoff date for timely claims applies based on tolling documents not considered by the Appellate Division or this Court and further reserves the right to challenge the First Department's holding at a later stage of this case. Well, there is no legal authority for that

position. If there is no rehearing request and there is no appeal of the decision, then the decision is the law and it is final and binding on the case and we have cited many cases. I just cite here the Kenney, K-E-N-N-E-Y case, but there isn't an opportunity to ignore the decision. There isn't an opportunity to say that we reserve our right later. No. You had your opportunity and that's over.

The second response, as you heard me mention, is to adopt a new theory. The new theory now appearing for the first time is that each of the alleged false and misleading certifications and submissions of the SOFC's statements are separate actionable wrongs, such that a new Section 63 (12) claim accrued each time any Defendants submitted or certified a financial statement representing the financial condition of Mr. Trump. The first time we see that theory is in the memorandum of law in opposition to the Defendants' motion for summary judgment. That was not argued at the First Department. That was not argued previously. That's not in the complaint. And so now this new theory they also include in their reply, that the certification and submission are separate fraudulent acts, this fundamentally alters the Attorney General's acknowledged theory of liability.

If you go back -- well, I am going to try, but if you go back to slides nine and ten, you can see that it is

inducement. It is obtaining benefits. It is obtaining improvement in the loan interest rates. Again, their expert report is constructed around this concept. But now, the new theory is that no, no, no, these are separate acts and, therefore, we are entitled to recover for those acts. So ignore what I said before, focus on this now. Don't worry about what I said before. That's the AG's approach.

Well, the First Department, as you heard me say, and I am going to go through this, has already rejected this repackaged theory. So the First Department rejected the argument that annual submission or certification of the statements can constitute independent wrongs separately actionable from the transaction to which they relate.

So in the appeal, the Attorney General argued that --

THE COURT: Wait a minute, wait a minute.

Maybe I am off on the timeline. You said the First Department already rejected these theories of the later statements, but then you said it is new in the opposition to your motion.

MR. KISE: Sorry, Judge. They rejected the concept. They didn't reject the actual articulation by the Attorney General as applied to these Defendants because they didn't argue it as applied to these Defendants. They rejected, though, the theory in addressing Ms. Trump's

arguments. They argued that because Ms. Trump had signed and submitted a draw request on the Old Post Office. This is after the loan closes. This is a subsequent submittal. It is actually not just a certification. It is a submittal to get money, actually a withdraw request.

In December of 2016 --

THE COURT: Wait, wait, wait. It is coming into focus for me.

She asked, if I am correct, she asked to withdraw money; is that correct? That's what they said that's not good enough.

MR. KISE: She submitted a certification, yes, along with -- based on the statements, yes.

THE COURT: Well, what did the certification say?

MR. KISE: It is the same certification, the same.

THE COURT: Well, did it give numbers, the borrowers are worth X dollars?

MR. KISE: There is no distinction. In other words, it is the same statements and the same certification, it is the same underlying argument that the Attorney General is presenting to you right now. It is that you are submitting the certifications to keep the loans going, that these statements --

THE COURT: Well, what did she certify? That's what I am trying to get at.

MR. KISE: Well, she certified by submitting the withdraw request along with the certifications. They relied on it, that they are accurate, that they are accurate, the accuracy of the statements.

THE COURT: The prior statements?

MR. KISE: And the ongoing statements.

THE COURT: Okay. So she says I want to take out money, and by the way, everything we said is accurate.

MR. KISE: In sum and substance, yes.

So the First Department, nonetheless, dismissed all the claims against Ms. Trump as untimely because the allegations against her do not support claims that accrued after the bar date for her, which was February of 2016. This is the same argument. The certification, itself, is actionable, the submissions of post-closing representations and requests are actionable. These are continuing effects. They are not wrong. This is a repackaging. What the Attorney General is doing is repackaging their argument about, oh, well, these are all continuing wrongs. That's how they originally tried to get in the door with the First Department and that was rejected. So we would say that the First Department has already rejected that. We would also say that the law of the case precludes them from changing this position post-discovery. This is an obvious attempt to evade the First Department position. We are changing our

fundamental theory, and I only quoted on pages nine and ten from a handful of representations about their theory, but there is many of them.

So the Attorney General cannot now advance a new theory on opposition to a motion for summary judgment and we cite in our papers the Biondi case, B-I-O-N-D-I, and then the NexBank, N-E-X-B-A-N-K, one word. Summary judgment is not for the unsuccessful movant and an opportunity to reformulate its case. So these arguments have been considered. They have been rejected. Even if they haven't been considered or rejected, they can't be advanced now for the first time post-discovery. They can't come in and fundamentally alter their theory of the case after we are a week, two weeks before trial. This is impermissible on the case law and we cite to that.

Let's briefly talk about the tolling agreement. It is undisputed that the original draft tolling agreement included the individual defendants. There was a specific provision -- and this is in our papers -- the original draft had the individuals by name. There was a signature block for them. They were all referenced. It is also undisputed that those individuals Defendants' names and signature blocks were deleted. It is also undisputed that the signed tolling agreement does not name the individual Defendants, and it is undisputed that the tolling agreement is not

signed by any individual Defendant.

THE COURT: I have a, sort of, personal question.

Does Florida have the parole evidence rule?

MR. KISE: Yes.

THE COURT: Okay. You can't introduce evidence of prior negotiations when there is a completed contract or am I missing something?

MR. KISE: Your Honor, I am just pointing out the context. If you look at the final document -- if you look at the final document, it is undisputed that the signed tolling agreement does not name the individual defendants. It is undisputed that the tolling agreement is not signed by any of individual defendant. So that is the beginning and end of it, I am with you, but they have raised, you know, arguments about it is incorporated somehow and the individuals are somehow bound up in the tolling agreement. So this is a responsive argument, not an affirmative one. I agree with you, the individuals are not in the tolling agreement. They are not named.

THE COURT: Yes, but you are trying to use it as a sword, not just a shield.

By the way, the parole evidence rule is -- you might have heard in law school if you went. It is not about parole. Is not about evidence. It is about substantive law and it is not a rule because there are exceptions, sort of

like the Holy Roman Empire was not holy, was not Roman and was not an empire, but in all seriousness, parole evidence rule, basically, says that -- and this is all off the top of my head. It has been a while since law school. You cannot rely on -- you can't even introduce it at trial evidence of prior negotiations where there is a completed contract. So you are trying to use it as a sword. You are saying, well, they weren't named, so therefore they are not part of it. That doesn't fly.

MR. KISE: So, Your Honor, parole evidence can be introduced if the other side says there is an ambiguity. They are claiming that somehow the individuals are bound. Again, I don't need to go there.

THE COURT: But for other reasons. They are not saying they are bound because they are in the signed, you know, statements. They are saying they are bound under the Jewel case, which I am sure we will hear a lot about.

MR. KISE: The signed tolling agreement does not name the individual defendants.

THE COURT: As a very broad definition of who the signatory should be considered, but let's move on.

MR. KISE: All right.

The Attorney General is asking you to ignore the fact that their names don't appear and that they were not decided individually. And in the Jewel case, we don't think

constitutes any intervening change in the law and we don't think the Jewel case -- There is no explanation in the Jewel case as to why, just simply says that they are bound, but there is no understanding as to how or why. They don't offer any analysis.

THE COURT: Okay, but that's what, the -- That is what, the First Department? That's what the First Department said. I don't tell them what reasons to give. They tell me what reasons to give. They said that's the law when they issued the Jewel decision, right?

MR. KISE: They didn't say that was the law. They said in that case on those facts those individuals were bound. That's what they said. They didn't write any legal analysis of any kind.

THE COURT: They don't have to.

MR. KISE: Well, I will leave that to you. I think you understand our position.

Let's talk about the trust.

So basic trust law, only a trustee is authorized to execute contract agreements on behalf of the trust, and we cite the Kornbook law as well as the Korn, K-O-R-N, case. It is disputed, the parole evidence, no trustees signed the tolling agreement. The trust is simply not bound. In order to get there, this Court would have to ignore 100-plus years of settled trust law.

The Attorney General's layered argument that because an individual company officer can somehow bind individuals who are not named in the trust and then one or more of those individuals happens to be a trustee, then the trust is now bound is a complete non-sequitur in the law. They don't cite any authority for it and there isn't anyway to get there.

The Attorney General also asks this Court to ignore what I said about the tolling agreement. The New York Attorney General argued explicitly to Your Honor, as well as to the First Department, that the tolling agreement did not bind the individual defendants.

On April 25, 2022, Mr. Amer said in open court, "Donald J. Trump is not a party to the tolling agreement. That tolling agreement only applies to the Trump Organization."

Then again --

THE COURT: I wouldn't say he argued it. He did say it. I am very aware of that.

MR. KISE: And then before the First Department in a brief, OAG and the Trump Organization entered a six-month tolling agreement to which Mr. Trump was not a party. So now they are arguing the exact opposite, and they are saying, as I began, ignore what I said before. Don't pay any attention to that. So for the reasons stated, we

believe that they are both judicially estopped from making that argument and that it is a judicial admission that binds them. In either event, they can't possibly succeed on that argument based on their own statements in addition to the legal propositions.

THE COURT: Now, let me ask you this, the statement or statements that the other individuals are not bound, is that a statement of fact or law?

MR. KISE: It is a statement of fact really. I mean, they are saying -- They are arguing it is a legal statement, but it is a fact. They are representing to the Court who they bound when they got -- they entered into the agreement. That is a party to an agreement stating as a matter of fact, not as a matter of law, a party to an agreement stating their position as to the parties and that position is consistent with the case law, that position is consistent with the document, itself, and that position is consistent with the interpretation of similar documents. So now to say that it is a legal conclusion somehow or another is, again, another ignore the facts, ignore the law. Listen to me. I am the Attorney General. I am going to tell you don't pay attention to what I said before. This is a judicial admission. It is judicially estopped from taking the opposite position, but don't let that trouble you because this is a legal conclusion.

THE COURT: Wouldn't you say that who is bound by an agreement is a legal conclusion?

MR. KISE: I think in the first instance, it is a factual determination. Ultimately, ultimately, you would have to decide, but have to decide based on the facts, and they are judicially estopped from countering the factual admission that they made that the individuals aren't bound.

THE COURT: But just by way of contrast, if they said someone signed the agreement, that's one thing. But to say that they are bound by it, that's -- I think you practically said it yourself. That's eventually a legal conclusion.

MR. KISE: Again, ultimately, you will make that decision, but they have already admitted to the underlying factual point.

THE COURT: How did they do that.

MR. KISE: By saying that.

THE COURT: By saying they are not bound. They didn't say what they did or didn't do.

MR. KISE: No. They said -- Let's go back and look at it.

"Donald J. Trump is not a party to the tolling agreement."

It doesn't say bound, it says he is not a party. "OAG and the Trump Organization entered into a six-month

tolling agreement to which Mr. Trump was not a party."

THE COURT: I think the ultimate question is whether someone is bound, not whether --

MR. KISE: That's the legal question.

What we are saying right now is what the Attorney General told you and what they told the First Department is the factual point, which is the judicial admission. They are judicially estopped. That's the point.

THE COURT: Judicial admission? That's doesn't sound very factual. That sounds very legal.

Any way, this is another situation. I understand you and I think you understand me.

MR. KISE: Thank you.

So just to summarize, this chart on page 20 summarizes the parties that are not bound by the tolling agreement and the parties bound by the tolling agreement. Not bound would be the individual defendants and the trust. And, again, the trust is a separate category onto itself in that regard in addition to the other arguments. And then the parties bound by the tolling agreement would be the corporate entities.

Let's talk about disgorgement not being an available remedy. I'm just going to touch briefly on this. So the first point I want to the make, not to belabor it, I have never advanced this argument before in this courtroom.

It has not been in any of our papers, so I am not sure how we can be precluded from making this argument or someone can say it was decided already since we never advanced it. But, nonetheless, I just want to point that out.

Disgorgement is simply unavailable under Section 6312 or the underlying statutory claims, counts two through seven. Under 6312, there are three enumerated remedies, enjoined continuance of purportedly fraudulent acts, restitution, which is not the same as disgorgement, and that's clear in our papers, and damages. Every single 6312 case involving disgorgement was based on another specific statutory predicate. Allowing it without that predicate amounts to an unlawful penalty.

Again, the Attorney General ignores the law, it is the law because I say so, but they don't cite a single case supporting this position. The Greenberg and Ernst and Young cases that they rely on, on there disgorgement is permissible. So we would just say disgorgement is not permissible.

Moving on to statements of financial condition.

So --

THE COURT: Wait, wait, wait.

I have the First Department decision that we have been discussing along with the -- Is it the same one with the Ivanka -- that released Ivanka. It talked a lot about

the tolling agreement.

I quote, "We have already held that the failure to allege losses does not require dismissal of a claim for disgorgement under Executive Law Section 63 (12) (see People versus Ernst and Young, LLP 114 A.D.3d 569, 569, 569 to 570 [First Department 2014])," which seems to me in black and white they said disgorgement is a possible remedy under 63 (12).

MR. KISE: It is a possible remedy if you have the statutory predicate, but what that -- that decision is addressing is our argument based on dismissal. Our only argument on dismissal was they didn't allege any damage, any actual harm, and that, therefore, disgorgement wasn't appropriate. It had nothing to do whether it was available under the statute. It just had to do with whether disgorgement was supported by the facts. And what the First Department is saying is it is not a basis for dismissal that disgorgement is not supported by damages. They don't have to establish any harm for disgorgement, but they don't at all talk about whether or not disgorgement is available in the abstract in the absence of a predicate. No one ever discussed that with the First Department. It never came up because at that moment no one was focused at all, including us, on whether the underlying predicates allowed for disgorgement. So that is not an argument that was even

addressed, Your Honor. Respectfully, I don't disagree with what you read, but it is completely beside the point, respectfully.

THE COURT: I think you are overanalyzing. The statement says what it says. My cardinal philosophy is either a sentence is either true or not true. That's what they said, and I am going to throw something back at you. Who is ignoring something here? This is what the First Department said. You are not ignoring that?

MR. KISE: No, I am not ignoring that.

THE COURT: Is there a distinction here?

MR. KISE: The distinction is is that our argument there that they are addressing and the language that you read specifically talks about whether or not the claim is subject to dismissal because damages weren't alleged -- no harm was alleged. That is a very different thing than saying that there is no statutory predicate. Those are two completely different legal positions.

THE COURT: I think you started out by saying disgorgement is not available under 63 (12). Did you say that or did you not say that?

MR. KISE: No. I said it is not available under 63 (12) unless there is an underlying statutory predicate for it. I didn't say it wasn't available at all.

THE COURT: I stand corrected.

I believe that the Defendant's briefs say "not available as a matter of law." Defendants or Mr. Kise, isn't that what the brief says?

MR. KISE: Your Honor, to the extent that there is ambiguity, I will clear it up here, but I don't think there is. But again, you have to understand the arguments being made as it is not available as a remedy in the absence of an underlying statutory predicate. That's what the section says.

Now, maybe the header -- maybe the header says disgorgement is not an available remedy, just like my header there says disgorgement is not an available remedy, but you have to understand what we mean by that.

THE COURT: Obviously, I don't rely on headers or the head notes.

I just want to read this again.

"We have already held that the failure to allege losses does not require dismissal of a claim," et cetera.

MR. KISE: Correct.

The failure to allege losses, yes, that doesn't require dismissal. We agree with that. At this point we do. We didn't agree with it. Now the First Department said it and we agree with that, but our argument is not that there is a failure to allege losses. Our argument is there is no the underlying statutory predicate for it. We did not

raise that at dismissal. It was our choice not to raise it at dismissal.

THE COURT: We are not getting into a whole back and for and discussion, it just seems that when the Attorney General changes its position or says something slightly different, no, they can't do that. It is too late. They have already taken a stand. But now you want to change your position. You argued that at the First Department. You lost, but now you want to make a different argument. Am I missing something?

MR. KISE: Respectfully, you are, Your Honor. I'm not changing my position. I never took a position in the first place. The argument was that the failure to allege harm damaged -- eliminated as a matter of law their disgorgement claim. That was the argument before. The argument now is is there is no underlying statutory predicate. It is a very different thing, whether they alleged harm or don't allege harm.

THE COURT: I know it is different. That's part of my point. You keep trying to hang the Plaintiff on the grounds that now there is a different theory, too late, but now you have a different theory. Am I right or wrong?

MR. KISE: You are. These are purely -- This is a legal argument about disgorgement. And on summary judgment we are saying that the facts now -- There is no facts in the

record to support disgorgement and we are also saying since there is no underlying statutory predicate, we are allowed to raise it. That's what the statutes provide. We are not changing position at all. That's very different than what the Attorney General is doing, which is completely changing their underlying theory of the case, totally different.

THE COURT: I am thinking about your statement that the complaint in the other documents say "obtain a loan." Now they are saying Plaintiff is saying there were fraudulent statements to maintain a loan.

MR. KISE: Right.

THE COURT: But you are saying too late, they can't do that in the opposition to summary judgment. The summary judgment is where it all comes together.

MR. KISE: I am not saying that. That's what the case law says. We have cited that case law. You can't change your theory of the case on the eve of trial and you can't change your theory of the case at the summary judgment phase.

THE COURT: Well, the opposition, I think, was September 1st or 2nd.

MR. KISE: Well post-discovery.

THE COURT: By the way, I apologize to counsel for the last-minute nature of some of this. I originally preferred and originally scheduled things to be concluded

much earlier, but various extensions were requested. I won't say by whom. I think by both sides. I always accommodated those extensions, but I wish we had more time, but we have what we ever.

MR. KISE: I do as well, Your Honor, and I appreciate that.

You will recall that we asked for a great deal more time at the outset and this was one of the reasons why, but in any event, let's move to -- I do want to be mindful of the time clock for Your Honor.

The statements had no capacity or tendency to deceive. So the governing legal standard -- This is another point where I think we agree, the Exxon case.

The test for fraud under 63 (12) is whether the targeted act has the capacity or tendency to deceive and evidence regarding falsity, materiality, reliance and causation are plainly relevant to determining whether the Attorney General has established that challenged conduct has the capacity or tendency to deceive. So the standard is do the statements have the capacity and tendency to deceive? And in order to determine that, you need to look at things like falsity, materiality, reliance and causation. That is the Exxon case and then the Dominos Pizza case.

So the statements had no capacity or tendency to deceive. They were not false or misleading. Any

valuations, disparities or errors were not material. The disclaimers were unequivocal. This agreement about valuations do not establish fraud. There was no real world impact. The banks, themselves, acknowledge there was no fraud. And so, therefore, there is simply no proof supporting those claims.

So let's talk about not false or misleading.

So all of the statements values comply -- and I am going to talk about this in a little more detail. I'm going to try not to get too grand, but it is important.

With GAAP and what's known as ASC 274 -- in ASC 274 provides preparers of statements, like the statements of financial condition. They are called compilation statements.

Wide latitude selecting valuation and methodology.

(Whereupon, there was a discussion held off the record.)

MR. KISE: But the Mar-a-Largo example, the 40 Wall and the Doral example are instructed. What the Attorney General has done is they point to issues in the record but they don't look at the whole record. They look at things sort of in isolation and they don't take sort of the overall view as to what is permissible under ASC 274 and what the full record provides.

And so, for example, before I get into the details, Mr. Amer mentioned goodwill discussion about brand value not being incorporated in the statements. Well, under ASC 274 that's a very different thing than a brand premium associated with the specific hard asset and there are specific testimony in the record that talks about that. The same with the trump Park Avenue rent controlled apartments, they want to simplify that but ASC 274, we are going to look at it next, provides a method for these valuations.

So, again, this isn't intended to be a comprehensive rebuttal of each item that's in our papers but let's look at the governing standard. The governing standard is ASC, Accounting Standard Codification, 274, personal financial statements, they're compilations, shall present assets at their estimated current value. That's another thing that we agree on that term, estimated current value. We just can't seem to agree on what that means and how it's implemented. That's really the core dispute is

estimated current value and what it means and how it's implemented.

The compilation statements are very different than audited financial statements. They are subject to a very different GAAP standard. Estimated current value is unique to personal financial statements and offers much greater latitude than the methods available to report asset values as compared to other GAAP standards. It is not fair value. It is not market value. Fair value is frequently, if not commonly, determined by an appraiser who follows specific valuation rules. But under ASC 274, there is no one generally accepted procedure for determining the estimated current value of an investment in a closely held business. It specifies multiple valuation methods.

We don't disregard those valuation methods. We apply them. And, importantly, it does not require a specific method to be used to estimate current value for a specific asset and even more importantly it doesn't require the same method to be used for all assets in the same group. So, we're not playing it both ways as Mr. Amer said. We are following, as our Professor Bartov and Mr. Flemons (Phonetic) testified, again, an NYU Stern School Professor and an SEC Chief Accountant, we are following the guidelines, the rule book that was laid out for us in preparing these statements.

So, appraisals, for example, don't need to be relied on. They are not the only methodology. There are multiple approved methods and -- and if there is an appraisal, if it's not being relied upon, then it doesn't need to be disclosed if we don't decide to rely on that appraisal because for one reason or another we think it's faulty. Mr. Flemons makes this very clear at pages 23 and 24 of his report paragraph 77.

Appraisals that aren't used aren't going to be disclosed. We have our own valuation of methodology. That's the whole point of valuations. It's not whatever we want. It's what ASC 274 provides. It isn't we are doing what we want as Mr. Amer said. We are doing what ASC 274 allows us to do.

THE COURT: So, to use the plaintiff's example, if you have a building and a certified appraiser -- Cushman and Wakefield, whomever -- says it's worth a hundred million and you want -- and you put in a financial statement it is worth 400 million, that's perfectly okay without indicating that there is this other appraisal that you bought and paid for in a sense. Is that acceptable?

MR. KISE: If we have a valuation method that is acceptable under ASC 274 and it reaches a different conclusion than an appraiser valuating under different standards, yes, it is absolutely acceptable. If you look at

the wide latitude that is accorded by ASC 274, this is listed in our papers. There are multiple basis. The discounted amount of projected cash receipts or payments related to property or importantly the net realized value of the property based on planned causes of action.

THE COURT: Let me ask you this. I'm sorry to keep interrupting you. Taking it face value what you said that you don't have to disclose an appraisal, what if the compiler, the Mazars, asks you do you have any appraisals and you say no and you do, is that false, fraudulent, misleading?

MR. KISE: I don't think those are the facts here. Number one, I don't think it is the facts. Number two, if we are not relying on it, if they ask, yes, if Mazars would have asked and said, okay, I want to see every appraisal for that property for the last 20 years, everything that's appraised, that's a different set of facts.

THE COURT: Well, let me just ask, plaintiffs, did Donald Bender ever ask about a particular statement, do you have any appraisals and they did and they said they didn't?

MR. AMER: Well, he testified at his deposition that he asked for it. It is in our 202 statement. They don't dispute it with any evidence.

THE COURT: Okay.

MR. KISE: We do dispute it. I don't have their

202 statement in front of me here, but we did not disclose appraisals that we did not rely on. You don't disclose things that you don't rely on. It just doesn't make any sense. I don't recall that Mr. Bender asked -- the testimony reflects, and you have the unfortunate task of sorting through the record, but I do not see that Mr. Bender asked about every last appraisal that we had ever done on the property.

By the way, Mr. Bender would have been familiar with almost everything we did because he wasn't just a compilation accountant. That's a whole other issue that we didn't address. But unlike most compilation engagements, this was not just a narrow compilation. The counsel comes in and does a very narrow engagement. They look at a discrete set of facts. They prepare the compilation and they leave. Here, Mazars did everything from the trust on down. So they would have access to every last piece of information. This will come out, if we go to trial, this will come out at trial. The statement that either -- what I would suggest in this regard, if you are troubled, Your Honor, is either look at the testimony or this is an issue that, you know, respectfully then you would have to determine what needs to be tried.

In relying on Mr. Amer or myself to tell you exactly what's in the record on a particular issue, it is

just important. I don't know that I would recommend that, frankly. What I am telling you is my recollection and what Amer is telling you is his.

MR. AMER: It is paragraph 92.

THE COURT: Paragraph 92 of Donald Bender's --

MR. AMER: The 202 statement, our 202 statement.

THE COURT: Can you find what you're relying on that Bender said I asked?

MR. KISE: Again, again, again, we are looking at one statement out of context. It is the whole point of their case. We are looking at one statement out of context. You have to look at the entirety of what Bender said. It's not -- It's not really just one statement.

THE COURT: How could this -- the statement I asked them and they said, no, taken out of context. What's the context?

MR. KISE: Well, is that any year? Is that every year? Is it the year in question? Are we talking about the 40 Wall Street appraisals? Are we talking about any appraisals? Are we talking about appraisals from Mar-a-Lago? Are we talking about appraisals for Old Post Office. I mean, there are so many variables, Your Honor, it would take me a half an hour to go through them all. That's my point. It is not as simple as they want you to believe. It's not.

THE COURT: Okay.

MR. KISE: So under ASC 274, the approved methods do not hinge substantially on current market conditions. They focus on a long-term prospective. Estimated current value is not intended to be a market value. Professor Bartov stated when estimating a current value under ASC 274, if you have a long-term prospective, then you will put very little weight on current market conditions.

So the Attorney General focuses on appraisals at a certain period and says that's it; you must determine that that appraisal is the valuation but those appraisals were done for different reasons. They have different perspectives. That's what the whole record reflects is that -- you are going to see here shortly that that's what even the bank knows. Even the bank knows its own valuation. Even the bank knows that there is differences in valuations. This is the nature of property valuation.

So, again, it is not whatever we want. It is what ASC 274 provides. The Seven Springs example -- I am not going to go through each one of Mr. Amer's example but that one comes to mind. The Seven Springs example, the use and the plan for property changed. Between the two years, we went from developing the property and having a long-term view with a long-term view and then to a conservation easement which is an entirely separate valuation process.

It is IRS regulations. It is completely different animals so district but legitimate valuations of the same property can exist. I am going to get to you an example of that in moment.

Because valuations are highly subjective, there is no such thing as objective value in either GAAP economic theory or in the applicable laws, regulations and principles that are in this case. That's Professor Bartov again. Valuation is an opinion about price and, therefore, subjective. Opinions are subjective, they are not facts, valuations are opinions. They are a view based on one person's view. I might think my house is worth $5 million. You might think it's worth $0.50. You might not want to live in Florida. I might not want to live here but that's my opinion. I'm not wrong for telling you that that's my opinion, and you are not wrong for saying that your opinion is a lower number.

So the valuation of an asset is highly subjective process that depends on several factors including the selection of a methodology, assumptions and benchmarks within that methodology, and the discretion surrounding the presentation. Again, that's Professor Bartov. Which valuation methodology to choose, and this is where he is speaking about ASC 274, and which assumptions to apply depends on GAAP economic theory and perhaps, most

importantly, on the perspective of the person performing the valuation because that person picks the valuation methods and the underlying assumptions.

And so Mr. Amer, in his presentation, walk you into this cap rate discussion. If there is anything that is highly subjective and complexed and not cut and dry, it is a cap rate assumption. You can get twenty different appraisers in here and you would have twenty different views on what the appropriate cap rate is to apply to a particular property depending on what the outcome is and depending on what perspective they are looking at. A bank is going to take a conservative approach. A seller or owner is going to take a more aggressive approach.

So, any of the valuations themselves are not -- just because they differ from the Attorney General doesn't mean that they are fraudulent. Their Mar-a-Lago analysis, I want to talk about that in a minute too -- their Mar-a-Lago analysis really ignores the complete record. So they take the position, astonishingly, that Mar-a-Lago is worth, I don't know. The highest number there I saw was less than $50 million on the tax roll. I will tell you right now if someone would sell it to me for that, I don't know if you have been there but for ten times that.

Tax appraisers and market values, despite what Mr. Amer cleverly pointed out on the tax assessment roll --

I am very familiar with those in Florida -- yes, it says market value but you could get, again, different appraisers you are going to have different values. It is undeniably -- it is one of only two inner coastal to ocean front property in the estate section of Palm Beach. The entirety of the covenant ease and restrictions, which the Attorney General ignores, demonstrate that it can be -- it can be used as a private residence. I mean, it's actually currently being used as a private residence.

They carve out one provision to usurp their, what I will respectfully call, an absurd valuation. To value Mar-a-Lag, this is the highest certainty at 20, 30, 40, 50 million dollars. This is an extraordinary piece of property. So the full view of the documents reveals that there is no requirement that Mar-a-Lago ultimately remain a private club. There's no prohibition on the use as a primary residence.

If you look at the declaration of use agreement, and Mr. Shobin's report that you have, Your Honor, which goes through the facts of the covenant deeds and restrictions. It lays out the facts. The club use may be intentionally abandoned at any time. The use of the land shall revert to a single family residence. These are from the declaration of use. You need to look at the entire record when it comes to Mar-a-Lago.

Also, when you look at ASC 274, their approach ignores the valuation principles and the record evidence. ASC 274 does not require us to use appraisals or tax assessed values. Tax assessed values don't bear any relationship to actual values. And we provided the Court with an opinion, an acceptable opinion, of Lawrence Moens. Mr. Moens, M-O-E-N-S, is -- well, I'll say this. He's probably the most extinguished and successful real estate broker in the country. I mean, he is certainly one of the most knowledgeable ultra high net worth brokers in Palm Beach, but his opinion is unequivocal about the valuations of Mar-a-Lago.

And so that opinion alone, which would be acceptable, an acceptable basis under ASC 274, demonstrates -- if you look at his value numbers -- that our values on the statement of financial conditions were actually low. And, you know, I'm not saying that we're right or he's right or the Attorney General is right or the bank is right. What I am saying is you can't base fraud on these disagreements amongst sophisticated professional participants in the commercial real estate marketplace. That's not fraud because they disagree.

Mr. Moens' opinion is highly relevant. His numbers are well in excess, as you could see, in 2011 he is nearly 300 million more than the statement of financial condition.

In 2016, he is 300 million more. In 2021, we're -- the statement of financial condition is at 600 million. Mr. Moens has the property valued all in at 1.2 billion. So these disparities, I mean, this is part of the valuation process.

Now, I'm sure that the Attorney General could go find someone else to come in and say, well, no, that number is a wrong number. In fact, their own expert, Mr. Hersh, has the number quite different than the tax assessed value. They've just chosen to seize on the tax assessed value, but the own expert has it yet a third number.

THE COURT: Which I assume is higher?

MR. KISE: It is higher than the tax assessed value. It is still lower than ours but what it shows is that this is all a highly subjective process and it depends on what you put in.

THE COURT: Let's talk for a moment about alienation -- restrictions on the alienation of property. I am referring in particular to the front Park Avenue apartments and Mar-a-Lago. I think you just said in your considered legal opinion there no restrictions on Mar-a-Lago development; is that correct?

MR. KISE: No, I didn't say there were no restrictions on development, no, no, no. Let me be clear, Your Honor, not at all. I said that it can be used a single

family residence and can be sold for that. That's what Mr. Moens numbers relate to. They don't relate to development, very different, no. You -- they can't put up condominiums. They can't see it and subdivide it. There are restrictions, absolutely, but you need to look at the entirety of the restrictions.

THE COURT: So somebody would pay a billion "B," billion and a half dollars just to live there?

MR. KISE: Well, I mean, don't --

THE COURT: Maybe that's so. I know --

MR. KISE: Ken Griffin, who's well known in New York circles, he paid I think 6 or $700 million to assemble a property slightly larger. I think his property might be 19 or 20 acres, Mar-a-Lago is 17 acres and change. And so -- and it is not in the estate section of Palm Beach. He is going to spend another 400 million or so building out the structure from what I told. These all published newspapers reports. Yes, there are people in the world. That's what Mr. Moens testified to.

I am certainly not going to buy it for a billion dollars. I would buy it for 27 million. I would figure out how; I can tell you that. But the point is, yes, there are those buyers. There are the Jeff Bezos in the world. There are the Ken Griffin. There are people who want to live in the estate section of Palm Beach and want an intercoastal to

ocean front property.

And, again, Your Honor, you don't have to take my word for it. You could look at these properties. I mean, that's the unique nature. Many of these properties that President Trump owns are trophy properties. They are not just like a hostel.

THE COURT: I tend to agree with you. I am sure there is somebody out there that would pay a billion point five for this property. Let's talk about the Trump Park Avenue apartments. I'm not sure we did or didn't so much. Aren't they -- isn't the rent stabilization -- it doesn't exist until the rent stabilized tenants decrease the value of those apartments current market value.

MR. KISE: Current market value but not estimated current value, two different things. I'm not playing word games with you, estimated current value under ASC 274 allows for the net realizable value of the property based on the owner's claim. So if you have -- as Professor Bartov, you don't have to take my word for this, our NYU Stern School professor says -- if you have a long-term view, your view of value is going to be different.

THE COURT: Long-term view is that what the financial statement said they are giving long-term view?

MR. KISE: It said they were giving an estimated current value which is incorporated under ASC 274. We're

not talking about a conversation between President Trump and someone on the street. We are talking about a conversation between an extraordinary sophisticated bank, an extraordinary sophisticated valuation experts who understand fully what compilations are and they understand fully what ASC 274 provides.

THE COURT: So you're bringing up one of the 800 pound elephants in the room, I guess. So, Mr. Kise, is it your position that if nobody was harmed the case should be thrown out?

MR. KISE: My position is if we complied with the statements had no capacity or tendency to deceive, okay, and if they complied with ASC 274, if there were no material departures, we are going to talk about materiality, and, yes, if there is no -- other than the private parties -- if there is no impact outside the confines of the private relationship between the bank and its customer, in this case, President Trump and the various companies, then, yes, if you put all of that together, then, yes, there's no basis for the case ultimately.

THE COURT: It's understood that the banks will pay them back. They will pay them back on time and there is no default. They made lots of money on the interest, but the -- does the law of 6312 and you having authority that in that situation if nobody was hurt, although you can argue

about whether they were hurt, that that alone is the case should be thrown out? I think that's what you argue a lot in the papers nobody was hurt.

MR. KISE: What we say in our papers is if there is no harm outside -- if the evidence establishes, this is a very different argument. I know we disagree about that too. It is a very different argument than the motion to dismiss argument. But if the evidence establishes -- nothing extends beyond the four corners of that agreement. You might disagree with me about that conclusion. That's fair. The Attorney General might disagree with me about that conclusion, but the fact remains that our view of the evidence is is that there's nothing outside the four corners of the relationship between President Trump on the one hand and the banks on the other hand, the defendants on the one hand -- I am using that term loosely but, yes, if -- because the case law says that and we have cited those cases. I mean, you have to look --

THE COURT: What case are you referring to? I didn't see that case.

MR. KISE: On our break, I'll get it for you because I don't want -- I certainly don't want to misspeak. But our cases -- the cases that we rely on, the Dominos case, the Exxon case, they talk about this context about if there is no real world impact. That's either Exxon or

Dominos. I don't know right off the top of my head which one but there is no real world impact. We are going to talk about that in a minute but, yes.

THE COURT: Even if the statement is false, misleading and has a tendency to deceive as long as they aren't hurt, no case.

MR. KISE: No, Your Honor. I already said it is not false or misleading.

THE COURT: I know you are saying that.

MR. KISE: I know.

THE COURT: Let's assume hypothetically the statement is false, misleading has a tendency to deceive is used in business, do you still adhere to your four corners argument?

MR. KISE: Well, Your Honor, if the statement is false, misleading and has a capacity or tendency to deceive, then by definition someone has been harmed.

THE COURT: Disagree.

MR. KISE: Okay. There lies the disagreement. 40 Wall Street, I am going to move through this quickly. This actually demonstrates, I think best, the subjective nature of the valuation process an inherent flaw in the Attorney General's analysis. And it proves conclusively there is no one right answer here. If you look in their papers, they point to -- and you heard about it here -- the 2011 and 2012

Cushman appraisals as evidence of falsity. They say that we had appraisals on 40 Wall Street and those appraisals showed a value that was lower than our value.

Number one, that argument ignores ASC 274 because there is no requirement to use appraisals. We use a different but acceptable valuation method. Number two, it ignores the flaws, which I am not going to go there here, in those appraisals, the 2011 and 2012 appraisals that are detailed in our brief. But then, here's the interesting thing, in their briefs, while the Attorney General likes the Cushman and Wakefield appraisals on 40 Wall Street from 2011 and 2012, it then pivots -- they then pivot in their brief to criticize the 2015 Cushman and Wakefield appraisal for the same property declaring it faulty and there are problems with it. The only distinction between the two is that one is $300 million higher than the other.

So, in a span of a few years, Cushman and Wakefield itself values the property in 2011 and 2012 around 200 million and all of a sudden in 2015 goes to 540 million. Now, the Attorney General is not claiming that's fraud. They pick at it, but the point is what it demonstrates even within Cushman and Wakefield, an appraisal company, is there is this wide disparity of valuations that are possible that you could have one set of valuations at one period of time looking at certain factors and certain cap rates and using

certain assumptions and then a year later the same appraisal company, or two years later, can come along and come up with a different value.

I mean, there's no way that anyone would believe that the market in New York between 2012 and 2015 more than doubled. So this is highly subjective. Doral, last example, the Attorney General ignores the Doral property and entirely and for good reason. This is what demonstrates President Trump's investment genius. This is what I want to talk about because it moves the needle in the other direction.

He purchased this property in 2011 for $150 million dollars out of a bankruptcy sale. He invested and improved that property and now it is worth north of a billion dollars. The adjustments for actual value, based on historic data -- this is very different than an appraisal looking forward. These are adjustments looking backwards -- demonstrates that our statement of financial condition values were underreported.

If you look at the table that is included in Dr. Tim's affidavit, I believe it is paragraph 86, you'll see that this historic analysis, again, taking numbers that we now know and looking backwards at comparing those to the SOF values demonstrates that we were always undervalued when it comes to Doral and that undervalue, that undervaluation

more than offsets anything that they pointed to on many of their other points including the triplex.

THE COURT: Mr. Kise, let me interrupt you a second. Sorry. Two items of bad news. One, we are going to have to be here this afternoon. We never said it would only entail the morning. Two, I have been trying, as I usually do, to keep a straight neutral face when the plaintiffs talk, when you talk. I did smile two or three times but that was for the sketch artist. I want you to know. Thank you.

MR. KISE: All right. So what Doral demonstrates -- I mean, truly, not to put too fine a point on it but I have to say this -- it demonstrates that President Trump is a master at finding value. He's a master at finding value where other see nothing. He's made billions in real estate investments. He's got a proven track record. He's paid back the lender.

All of these transactions are the subject for profitable transactions and the Attorney General just discards this exceptional success in favor of her own uneducated opinions. They are either willfully blind or they're uneducated. I'm not sure which but they just completely -- they point to minor issues and they don't take in the totality of the circumstances. I certainly know this. If I had money to invest in real estate, I am not

going to ask the Attorney General.

THE COURT: As a fire burning underneath, my law clerk would like to ask a question.

MS. GREENFIELD: I think you are getting into this territory, and I saw this was present throughout all of your memos of law and throughout the deposition testimony of Mr. Trump, there seems to be this notion that if the properties go up in value over time then that would retroactively justify having given a higher value than it was worth in the past and it seems to be this argument that the future will then go back and justify the past. So I am wondering, and Mr. Trump testifies to that at his deposition extensively, so I am wondering if you can address that.

MR. KISE: It's not the present justifies the past. It is that the present demonstrate that his valuations at the time were correct. He has a different view. If you asked him what -- if all of us walked around downtown Manhattan and looked at building after building after building, I doubt anybody in this room would be able to discern between what kind of windows are in that building, what kind of doors are in that building, how much that building is worth, what this one sold for over here.

This is the nature of expertise. This is why billionaires are billionaires. This is what makes them successful. If anyone could do it, then they would do it.

So, yes, he does have a different view. That's the whole point of ASC 274. The whole point of ASC 274 is that he gets to provide his value of the world and the banks fully and completely understand that. So it is not that the present justifies the past. It is that the present demonstrate that his values in the past based on his expertise. He would qualify as an expert in real estate in any courtroom anywhere in the country. He is an expert. He is. He has been doing this for 50 plus years. He's got an extraordinary track record of success. Has she succeeded in every deal? I don't know but he succeeded far more than he has not.

So he is entitled -- this is the point that the Attorney General is asking the Court to overlook and ignore. He's entitled to the -- to the presumption that he has a view that is a legitimate view, and he' not saying it's the only view. Unlike the Attorney General, we are not saying it's the only view.

THE COURT: Warning, three or four minutes. We have to out of here by one.

(Continued on next page)

MR. KISE: If you just add Dural and Mar-a-Lago, if you just look at that impact, then you will see, page 35, that in every year the statements, the total net worth was actually higher, not lower.

Materiality.

And, well, Your Honor, we may, if we are continuing after lunch, I would ask for about fifteen minutes. Should we just stop now?

THE COURT: Yes, we should.

2:15, everyone. Have a great lunch.

Thanks, everyone.

(Whereupon, there was a lunch recess.)

(Whereupon, the matter resumed as follows:)

COURT OFFICER: Part 37 is back in session.

The Honorable Arthur Engoron presiding.

As a reminder, all cell phones on silent, absolutely no recording or photography of any kind.

Please be seated and come to order.

THE COURT: Back on the record.

We will hear more from Mr. Kise.

MR. KISE: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. KISE: So I will try to move through these more officially than I had before.

So materiality, I just want to touch on some points on materiality. The Attorney General claims she is not required to show that the victims of Defendant's fraud were materially misled, but even the case that the Attorney General cites for this proposition, the Northern Leasing case, clearly states that materially misleading representations violate Executive Law 63 (12).

The Attorney General doesn't cite to any case holding that she exempt from proving materiality and simply ignores the applicable law in favor of her own view. The Attorney General also ignores her own pleadings, the certifications that are at the core here in GAAP.

So fraud claims have five elements generally, misrepresentation or omission, materiality, scienter or intent, reliance and damages. The Attorney General has taken the position in this case that she need establish only one of these elements at this point, a misrepresentation or omission, because materiality is out, intent is out, reliance is out, and damages is out. That's her construct. But that rather absurd construct converts 63 (12) into a strict liability statute. So then all the Attorney General need do is identify some alleged error or inaccuracy, material or otherwise, relied upon or otherwise, impactful or otherwise, and now there is a violation of 63 (12), and Mr. Amer's representation this morning alluded to this

because he noted that, even if the triplex were an innocent mistake, which we claim it was a mistake, that don't matter under liability 63 (12), you are still liable. And that is just not the law. The Attorney General's hue is all that she need do is come up with some competing valuations, point to something different, or point to some actual error, and that's a 63 (12) violation, but there is no case of any kind supporting that position.

THE COURT: Hold on.

First of all, I don't think that's their position.

Second of all, 63 (12) is not simply a codification of common law fraud, and I agree with you, five elements, falsities, scienter, materiality, reliance, damages, et cetera. There are only two in the statute. The statute is very clear. If I had written it, it would have been clearer, but, basically, it is a misstatement, false statement, and used in business. Now, let's not get all wrapped up and worked up about materiality. Every number in the law to be liable as a mistake has to be material. Okay, we've got a million dollars, we've got a million and five dollars. That's not material, but my understanding from reading cases is materiality, in a legal sense, if you will, is not a requirement. That's not what the statute says. The statute is clear. It is only a paragraph. It doesn't say material. It says misstatement use in business or

something like that.

Again, what am I missing?

MR. KISE: I think that converts then -- just like the Attorney General is trying to do -- the statute into a strict liability statute, and there is no case that has ever done that, respectfully. I don't see that. There has to be some -- Even if you look at the Dominos case, even if it is not a requirement -- which I am going to come back to the fact that I think it is, but let's go to the next line -- even if it is not a requirement, evidence regarding falsity, materiality, reliance and causation are clearly relevant to determining whether the Attorney General has established that the challenged conduct has the capacity or the tendency to deceive.

THE COURT: Dominos is a trial court decision, so it is not binding on me. It is distinguishable on its facts and it is a total outlier. Basically, Dominos treats it like a common law fraud case, which 63 (12) is not.

MR. KISE: I don't think it treats it like a common law fraud case. I think it points out -- Because it doesn't require those elements, but you have to have some foundation upon which to determine liability. And if you don't look at things like real world impact, if you don't look at things like materiality, if you don't look at things like reliance, if you don't even consider them, then what happens is is you

have what Mr. Amer said, even if there is an innocence, if it is a false statement, whether it matters or not to anyone, now you have a violation of the statute. And I just, respectfully, don't see that as the law under the 63 (12).

THE COURT: That's what the statute says, though you keep leaving out the part that it has to be used in business. As I said, materiality, we all understand what materiality is, but it is not part of the statute. It is not part of the cases, except an outlier that is distinguishable by a Court that's not binding on me.

MR. KISE: I think the Exxon case, as well, respectfully, speaks to the same concept, which is the total mix of available information. I mean, again, you have to look at the entire context. You can't look at one statement one piece at a time because if the Court is going to do that, if any Court is going to do that, then there would be 63 (12) violations all over the place for innocent mistakes, for actual inaccuracies. That's just not the purpose and intent behind 63 (12) and the language is not converted into a strict liability statute. And the statements of financial condition, themselves, are not designed to show the precise value of the reporting entity. They are to help -- They are to help serve as the beginning -- Again, this is Professor Bartov -- not the end of a complex and highly subjective

evaluation process users, such as banks and insurance companies engage in as they perform their own due diligence. Banks, like the banks involved here, know that an estimate put forth in a statement, like a statement of financial condition, even when written to follow GAAP, which these were under ASC 274, that those are truly estimates. They are opinions. They are not -- You have to look at the total mix of available information -- in Exxon -- to the user of a statement to determine whether an inaccuracy or even a misstatement or omission makes a difference in context.

As I have said, it is probative, but let's look at the Attorney General's complaint. Even in the Attorney General's complaint, they incorporate materiality. There is 48 paragraphs in the Attorney General's complaint referencing materiality. They are all listed there. There is 25 paragraphs referencing materiality in loan --

THE COURT: The fact that they claim immaterial doesn't mean they have to claim immaterial.

MR. KISE: But they have to prove what's in their complaint, Your Honor.

THE COURT: No, they don't. They have to make out a case. They don't have to prove everything in a pleading.

MR. KISE: They don't have to establish what they have alleged?

THE COURT: No, they don't.

MR. KISE: Okay. I would respectfully disagree. I think, if they have alleged it in their complaint, I would think they have to.

The compliance certificates as well, the compliance certificates which you have heard so much about, the compliance certificates, themselves, incorporate materiality.

The compliance certificates, there is an example here from 2016 compliance certificate. I will represent to the Court you can look at them all. They are all, basically, the same.

The foregoing presents fairly in all material respects the financial condition of the guarantor at the period presented. All of the representations and warranties made by the guarantor under various sections remain true and correct in all material respects.

In complex commercial settings, materiality is just an essential component of the representation analysis. I mean, it's the various compliance certificates they are seeking to enforce and say that we violated incorporate materiality. That also incorporates materiality. The GAAP Standards that govern the preparation and presentation of compilation statements, like the statements of financial condition, the GAAP makes very clear that it does not apply to immaterial items. It recognizes that not all accounting

errors, violations or departures from GAAP have a material impact on the inferences of financial statement users.

So we would submit and we think the record shows that none of the items on the statements identified by the Attorney General as misstatements or omissions are departures from GAAP and any such items were immaterial from the viewpoint of the sophisticated banks and underwriters who receive those statements. Under GAAP, you have to consider who is receiving the statements, and the Attorney General can't simply just ignore GAAP and immateriality when they have incorporated into their case.

THE COURT: The Attorney General is alleging hundreds of millions of dollars even in just one statement, even as to just one property. Now, they may or may not be able to prove that the asset was overvalued by $300 million dollars, but they are alleging it. Let's not play games here.

MR. KISE: They are alleging it, but they haven't proven it is our point. They haven't proven that that is material either.

THE COURT: They haven't proven that $200 -- $300 million dollars above $200 million dollars is material?

MR. KISE: I don't think it was material to the bank and I will show you why.

THE COURT: Go ahead.

MR. KISE: I will, I will.

So let me just touch briefly on the disclaimer issue.

So the disclaimers were contained in the notes and in the independent accountant's compilation report.

Considerable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, the estimates presented herein -- that's in the statements -- are not necessarily indicative of the amounts that could be realized upon disposition of the assets or payment of the related liabilities.

The independent accountant's compilation report also makes clear because of the significance and pervasiveness of the matters discussed above -- that's the GAAP departures. They are all identified -- make it difficult to assess their impact on the statement of financial condition. Users of this financial statement should recognize they might reach different conclusions about the financial condition of Donald J. Trump if they had access to a revised statement.

And so these statements are unequivocal, and more importantly, and this is the difference between our dismissal argument and our argument now.

At the dismissal phase at the early stage, we had to accept as true, the Court did, the Attorney General's

position about who the disclaimers applied to and why they applied, Mazars or Trump or the Defendants. Now we have un-rebutted evidence in the record that is very clear that the notes, disclosures and the independent accountant compilation reports collectively the disclaimers form one complete integrated presentation made available to any statement user, and thus, must be an and considered together. That's Professor Bartov.

Mr. Flemmings testified that the statements are not relied upon in a vacuum and must be reviewed in concert with the accountant's report. So while the Attorney General, as Mr. Flemmings put it, chief enforcement accountant seeks to separate the reporting in the accountant's compilation report from that of the statement, itself, the AICPA standards dictate they are issued together and mutually dependent, their own exhibits. Mr. Flemmings continues in his affidavit that the Attorney General's, quote, "own exhibits confirm the accountant's report and the statements were issued together, cross referenced each other and, therefore, could not reasonably have been viewed by users as separate documents that were not dependent on each other," close quote.

So this is un-rebutted and now this is what makes this argument different than before, because we now have facts in the record that are un-rebutted, that, basically,

tie the disclaimers and the notes and the independent compilation report together. So whereas before complaint paragraph thirteen, that boiler plate disclaimers in the accountant's compilation report accompanying each statement should not had been to the Defendant's benefit, well, the Court had to accept that as true, understandably, at the dismissal stage, but now we have evidence. We have evidence that says otherwise. We have GAAP. We have AICPA standards. We have an NYU Sterns Professor. We have Flemmings, an FCC enforcement accountant. That's the only evidence on the record on this. No one has rebutted that evidence. So those disclaimers alone establish that there is no capacity or tendency to deceive.

THE COURT: Let's talk about what Mazars said, am I pronouncing it correctly?

I am talking about what Mazars said and what Trump said. So Mazars, what I seem to remember from the Mazars disclaimer, I think that's what we are all calling it. Basically, we are relying on Trump. We are not saying these are true or false. Look to Trump for the accuracy. Isn't that what the Mazars disclaimer said?

MR. KISE: The entirety of the disclaimers made clear that, yes, as in all compilation engagements, under AICPA standards, under ASC 274, yes. The compilation engagement is limited to what the client provides. That's

why there is not an audit. That's what makes it different.

THE COURT: I know you want to interpret that together, but that alone would not be a disclaimer by Donald Trump that would insulate him, correct?

MR. KISE: That's not a disclaimer at all. It is just an observation by the accounting firm that we relied on the information he provided to us.

THE COURT: I think, for months you've been calling it a disclaimer, but --

MR. KISE: No, no, the statement that you identified -- the independent accountant's compilation report, which is what you are referencing --

THE COURT: Right.

MR. KISE: That report is part of the statement, just like the notes to the statement are part of it, just like the numbers in the statement are part of it. That is the impact of Professor Bartov's and Flemming's testimony. There is no escaping that. That is the record.

THE COURT: I am not trying to escape anything. I am trying to interpret what they said.

MR. KISE: What they said, if you look at this, what I have up there, they are telling folks we relied on the numbers that were provided to us. And here are all these GAAP departures. They identified them. There is a GAAP departure notification in the accountant's compilation

report for all the things that were GAAP departures. They are GAAP departures.

THE COURT: I can't speak to that.

MR. KISE: And then they sum it up by saying that users of this -- the independent compilation report -- users of this financial statement should recognize that they might reach different conclusions about the financial condition of Donald J. Trump if they had access to different information. That is a warning. According to Dr. Flemmings or Professor -- Mr. Flemmings. There are so many experts here. That's a high a warning as you can provide. And the SOFC, itself, not the independent accountant's compilation report, but the statement, itself, the notes to the statement itself that were prepared says right there, use of different market assumptions and/or estimation methodologies -- everything we have been talking about -- may have a material effect on the estimated current value amounts. That is telling recipient we are giving you our opinion.

And as Professor Bartov states, they put sophisticated users of the statements, such Deutsch Bank for whom the statements were prepared, on complete notice to perform their own due diligence, which a sophisticated user like Deutsch Bank would have performed anyhow even in the absence of such disclaimers. And, in fact, as I said I was going to get to, the banks actually did perform this

independent analysis.

So all of the GAAP departures are disclosed. There is a bright line for both the accountants and the preparer, in this case Trump, that tell the user, the recipient of the statement, this is an opinion of value, and just like all opinions of value, like all opinions, in general, it is subject to disagreement. You need to make your own determination.

THE COURT: I think one of the Deutsch Bank employee witnesses, unless it was a different bank, said, oh, really, I didn't know that. I would have taken that into account.

MR. KISE: We are going to get to that testimony.

THE COURT: Okay.

MR. KISE: We will and you are correct, Your Honor.

So this agreement over valuations and the statements does not establish fraud.

THE COURT: Okay. We all know that, but --

You know if you take your disclaimers, your worthless statements -- That's what Trump calls them -- if you take both statements into logic and the logical conclusion is those statements are nothing, they are worthless, they are nothing, why are they done if they are so worthless?

MR. KISE: They are done, as the testimony

reflects, and I will show you, they are done as a starting point.

Let's look at -- I will come back.

Look at the bank testimony.

So here is Thomas Sullivan, who was involved in the actual loan approval process -- his name is on the documents and Emily Schroder at the time. Her name is now Pierless. They explain it. They understand that compilations are opinions and are subjective. They are not audited.

Mr. Sullivan, "As a banker, again, we independently assess the risks away from what the client will tell us. So" -- And this is really the key. This is at the heart of the matter -- "a client may have a view for any number of reasons, almost an infinite number of reasons of why they value something a certain way, and we don't get into a debate on what their view is. We may question it, but at the end of the day, we are making an independent credit decision on what we view it to be. And so most of our underwritings, you will see a difference between what the value a client presents and what the bank ultimately underwrites to to a more conservative standard."

Ms. Schroder, now Pierless testifying.

"I don't think misleading is the right word because it is not misleading. I mean, the client states they think the value is X. We do our due diligence, as you saw, and

come up with our own value."

Then again, Mr. Sullivan, "Do you consider the customer to have made a false statement to you when they express an opinion about the valuation of an asset that's significantly higher than the estimate that private wealth management has reached?"

His answer, "no."

"And why not?"

"Again, because so much goes into how they view something, which is usually an emotional asset for them and how we view something as a lender. And so, again, we can question and investigate what their thinking is, but at the end of the day, we want to make our own judgment to best we can, and we tend to ere on the side of undervaluing."

Question: "Can you explain why that is?"

Mr. Sullivan's answer, which is really instructive, "As a banker, you are usually looking at the most conservative set of assumptions. And just as we would challenge or question a client's value, they would certainly question ours."

And the last question he was asked, "And that's the ordinary course of discussions with a high-network customer, correct?"

His answer, "Correct."

And this is borne out in -- I got an excerpt here

from the Deutsch Bank. This is the 2014 credit memo that would relate to the Old Post Office loan. You could see it here. You can see -- This is to your question, Your Honor, and I'm sorry I took so long to get to it and -- but I wanted to give you a specific example about the $100 million here and the $200 million there.

Just look here at the client's reported net worth in 2012. There is five columns there I am going to focus you on. This doesn't work, so I'm sorry, but it is really, like, the four right-hand columns, the first column, 2011, there is no comparison to that. It is just informational. But if you look at the line that says net worth and you go across, you will see that in 2012, Donald J. Trump reports a net worth of $4.559 billion. The bank adjusts that based on their own evaluation to $2.4 billion.

In 2013, the client, Donald J. Trump reports $4.978 billion. The bank does their own evaluation and they come to $2.645 billion. So not only is $100 million not material to the bank, roughly, $2 billion isn't material. In other words, they are making assumptions very different than what President Trump is making. They are looking at valuations in a different way.

If you look at the next page, you will see how this valuation analysis bears out. They talk about four trophy properties. They put President Trump's valuation and

Deutsch Bank's valuation and their own adjustments to these numbers. And so the total portfolio adjustments, there is a -- just for the four trophy properties, if you look at the first column and the last column, you got Donald J. Trump's valuation at $1.691 billion and you got the bank's adjusted at $1 billion. You got the total portfolio. The bottom line, $3.759 billion, and the bank is at $1.8. The point is what the bank considers material is important in this context. You can't just simply write it away. And the Attorney General wants the Court to -- this error or that error, what matters is the actual users of the financial statements, because going back to -- and I know you don't like this case. Actually, maybe it is not. Maybe I have a case. I do.

Going back to the case law, so the Temper-Pedic case, no evidence to show that retailers were misled. The Exxon Mobile, no testimony from investors who claim to have been misled. And the Dominos case, which I know you don't like, but it's the same principle. And there are other principles in our case that the members are the target. They are not actually deceived. They are conducting their own independent analysis, if they understand -- as Mr. Sullivan testified and as Ms. Pierless testified, if they understand that these are opinions, then it is, kind of, the equivalent of claiming fraud because you have a Jets

fan and a Bills fan. I could give you fifty reasons why the Jets are the best in history and someone can give you fifty reasons why the Bills are the best in history. Those are opinions, just opinions, and it is not a statement of fact and the statements of financial condition are not intended as absolute statements of fact. And that's the disconnect the Attorney General has. If you look at ASC 274, if you listen to the accounting experts, then there is no other conclusion.

THE COURT: I am surprised you didn't use the Miami Dolphins.

So on the one side we have the Deutsch Bank employees saying we, you know, put too much stock in this, you were going to do it anyway, and other side you have, the way of the statute and my interpretation of the case law --

Just give me one minute.

Going back to some of the figures you were saying that the Trump Organization gave a certain value, let's say $200 million, and the bank said, well, we only took it to mean $1 million, okay, are you trying to convince me that the banks didn't trust Donald Trump?

MR. KISE: No. I am trying to convince you that what's going on here is what happens every day in complex sophisticated commercial real estate transactions. This is the give and take that is ordinary in this process, sir.

That's what I am trying to convince you of, respectfully, I really am because they are trying to marginalize or make fraudulent things that happen every day in this city. It is the heart and soul of the commercial real estate business.

I have an opinion of value. Someone else has a different opinion of value. The bank has a third opinion of value, as you see from the record. These are all opinions. But you can't say it is fraudulent because they come up with one opinion that is different than ours. Mar-a-Lago, they have a tax appraisal value. They have the Kushman and Wakefield appraisals. For every appraisal or valuation they have, we could fifty that are different. If you look at the bank's numbers that we are talking about, look at that disparity. You are talking about --

THE COURT: Sorry. Go ahead.

MR. KISE: You are talking about billions of dollars in disparity in terms of how everyone assesses things, and what that demonstrates is that these vast disparities are normal in this process and they are legitimate because you have different people valuing things for different reasons.

The only way for the Attorney General to establish their case is to buy into the notion that there is one right answer, like Mr. Amer is saying. You must accept the property appraiser in Palm Beach County, $27 million or the

$50 million number for Mar-a-Lago because that's the right number. It is respectfully preposterous. You could get fifty different appraisers and fifty different real estate brokers. They are all going to give you different numbers. That's the nature of this business and this is how money is made and lost. This is why Donald Trump and others like him have been successful because they see value where others don't. So they come in. They find a property, like Dural, that's in distress and figure out how to rescue it. They then turn $150 million investment into over a billion dollars in value. He bought Mar-a-Lago for $8 million dollars back in 1980. It is worth six, seven, eight, I mean Mar-a-Lago is worth $1.2 billion dollars. These are not made up numbers. They may be numbers that are subject to debate, but they are not fraudulent numbers.

THE COURT: Hold on.

I assume you heard the saying "making a virtue out of a necessity." So your position is almost if there is one evaluation of $200 million, Kushman & Wakefield, whatever, some appraisal, and if the Trump Organization values it at $900 billion in a statement, oh, well, that just proves there is a difference of opinion, what?

MR. KISE: As long as they complied with ASC 274 in doing so, as long as they fit within the confines of the appropriate valuation methodologies, then my answer is yes,

and they did here. They did.

THE COURT: But do you see my point? The fact that the estimates or the values or one appraisal versus one statement are so different, oh, that just proves different people have different values, you know, evaluate it differently.

I am going to ask for the last one on that. We have limited time.

My interpretation of the statute is certainly and the case law also is reliance is not a defense. They didn't rely on it. You cannot make false statements and use them in business. That's what this statute prohibits. That's what the allegation is here. Let's move on.

MR. KISE: All right.

But again, they are not false in the context of which I am presenting.

Just to touch on a couple final points, the Attorney General is claiming that President Trump got access to rates he would have otherwise not been entitled to because of his overinflated net worth. But based on the testimony, again, of Thomas Sullivan, the total net worth requirement to be a customer of the Private Wealth Management Group was, as he said, in the range of $50 million. And then he was asked at any time did you believe President Trump had a net worth of less than $100 million?

No. At any time did you believe President Trump did not have a proven successful record.

THE COURT: This is not reliance.

MR. KISE: But they are saying --

THE COURT: It is your time to say what you want, but I am telling I am not buying anything that, basically, says, well, they didn't rely on it because reliance is not an element of the statute.

MR. KISE: It is not an element but it is relevant.

According to case law, you must consider it in determining whether or not there has been a violation when something has the capacity or tendency deceive, and I would respectfully disagree with you.

President Trump was overqualified on the subject loans. If his net worth had been at $1 billion as opposed to $2.5 or $4.3, would that have affected the rate at which these credit facilities were priced?

Probably not.

And why not?

I would say a net worth in excess of $1 billion dollars constitutes a strong borrower or guarantor.

Is it fair to say that once you are at the low end of this range, whether your net worth is a billion or 2.5 or 4.3, it is immaterial to the pricing?

The answer is yes. That's David Williams.

And if you go back, that's borne out in their credit memorandum. If you look at their credit memorandum, again, there is a $2 billion dollar disparity, again, between what President Trump says his properties are worth and the bank says the properties are worth. And by the way, the Attorney General's numbers are yet a third set of numbers that we don't have. They have a whole different set of numbers that are in some cases higher, some cases lower. All that proves is everyone has their subjective evaluation, but it doesn't establish there has been a capacity or tendency to deceive. It is not a statement in the abstract. It is statement that has a capacity or tendency to deceive. So if no one has deceived, it cannot be.

THE COURT: I will take issue with that last statement.

Reliance is not an issue.

That's my opinion. Let's move on to a non-reliance.

(Whereupon, there was a change of reporters.)

MR. KISE: There was never any violation of the loan agreements. As you sit here today, this is Rosemary Balick (Phonetic) who is the private wealth management lead banker.

"As you sit here today, do you have any reason to believe that any time between January 1, 2011, and the time you left that President Trump submitted any materially misleading statement of his personal financial condition?

"No.

"That President Trump violated any applicable net worth covenant in any loan documentation that you are familiar with?

"No.

"Did President Trump did not maintain a net worth greater than two and a half billion?

"No."

There is no violation of the loan agreements. There's no breach of the applicable net worth covenant. There is nothing materially misleading. President Trump did not make false statements. Are you aware of any false oral statements President Trump made? Any false written statements that President Trump made? Any false information that President Trump provided to Deutsche Bank? The answer to all three of those questions according to Rosemary Balick, again, the private wealth manager and banker on this

account. No.

Eric Trump, the same, the same questions, the same answers. Any false oral statements that Eric Trump made, any false written statements that Eric Trump made, any false information that Eric Trump provided, no, no, no. Donald Trump Junior, the same. Any false oral statements? No. Any false written statements? No. Any false information ever provided to Deutsch Bank? No.

And Mr. Robert is going to talk briefly about, about his clients. I am just going to point out just to close out that thought that there is just no evidence in the record that Eric Trump or Donald Trump Junior had any direct involvement in the creation or preparation of the statements of financial condition but Mr. Roberts will speak to that.

So in sum --

MS. GREENFIELD: I am sorry, Counselor, just one quick question. Donald Trump Junior was the trustee of the Donald J. Trump revocable trust for a number or years; isn't that correct?

MR. KISE: Correct.

MS. GREENFIELD: And didn't he, as the trustee, certify the accuracy of the SFC's for that period?

MR. KISE: I said the preparation of the financial statements.

MS. GREENFIELD: But you acknowledge that he

certified the accuracy for those periods?

MR. KISE: I think he signed the certifications as a trustee.

MS. GREENFIELD: As a trustee of the Donald J. Trump revocable trust.

MR. KISE: I believe he signed the certifications. So in sum, Your Honor, I know I have gone over the time and I appreciate the court's patience as always. We believe the First Department's decision mandates dismissal of certain time barred claims, that the record proves the individual defendants and the trust are not subject to the tolling agreement, that the only thing you have here is demonstrating that President Trump has made many billions of dollars being right about real estate investments, that his statements were accurate and complied with GAAP in ASC 274 which is governing standard.

If they complied with GAAP at ASC 274, then it's very difficult to conclude that there's a problem here, that the sophisticated banks and insurers executed carefully negotiated commercial agreements. The record proves those banks were never mislead about anything, that the subject transactions were highly profitable for those banks. There were never any loan defaults. The banks received 100 million plus, almost 200 million, I believe, in interest. There was no fraud. There are no victims. This is a

dispute about valuation opinions which by it very nature cannot be fraudulent conduct.

I got my opinion of value. The Attorney General has her opinion of value. The bank has its opinion of value. You might have your opinion. Everyone in this room might have different opinions, but that is what they are. They are opinions. And so for that reason and the reasons expressed in our papers, we believe that we're entitled to summary judgement dismissing all of the claims.

THE COURT: I am going give in here for a second. The square footage a subject or a subject of measurement.

MR. KISE: The square footage. The square footage is a mistake. It's in the testimony. They made a mistake.

THE COURT: But it is an object of fact at least.

MR. KISE: It is an object of fact. If the square footage -- again, you are talking about a 152, $200 million Delta and so you got the bank itself with the $2 billion Delta. It comes back to materiality which cannot be ignored under GAAP. The total mix of available information. That's Exxon. That's the case law. And so you have to take it all in context. You can't look at one point and say uh, ha, I got you on that one. I got you on this one. No, you have to look at the total mix and information available. Thank you, Judge.

THE COURT: Thank you. Please.

MR. ROBERT: Good afternoon, Your Honor. I will be extraordinary brief and I changed my notes since Mr. Kise talked. The beginning has already changed. Instead of good morning it's good afternoon, Your Honor. So I am going to start off by answering a question that Miss Greenfield just asked about the certifications. They were signed by Don Junior, some of them in his capacity as trustee. But, again, going back to the issue of materiality, if you read the language of the certification, which is contained in slide 42 -- we don't have to pull it up again -- but in it it says, quote, the foregoing presents fairly in all material respects the financial condition of guarantor at the period presented.

The same thing about whether it's the compliance certificate or any of those certifications, it has the same phraseology all material respects which, in our view, is extraordinary important. That kind of dovetails into the Attorney General's request in their motion for certain 3122(g) relief. I would share with the Court that in my experience I have never seen such a request in a complicated case such as this where there are so many facts and so many specific issues. I have seen it in very simple personal injury matters.

What I would submit is that what they had suggested at the end of their brief are the matters that this Court

could rule on pursuant to 3122(g) is the equivalent of using a hammer instead of a scaffold because they would make phraseologies such as isn't it a fact that Donald Trump Junior as trustee certified the accuracy of something.

Well, if you want to say was there a certification signed and said it was accurate in all material respects, the documents speak for themselves. Nobody is going to dispute that that's not his signature on the document but it has to do with the specificity of we can't talk in terms of grandiose theory or grandiose statements. It has to be tied specifically to whatever representation was made and whatever riveting language was contained in that representation.

I will say on behalf of my clients, Donald Trump Junior and Eric Trump, obviously, I agree with that what Mr. Kise has said. We fully support the notion that under the First Department's decision as is demonstrated -- and I am not a Power Point guy -- so I think Exhibit 12 of the Power Point was the chart which showed all the claims that we believed were time barred as to Mr. Trump Junior and as to Eric Trump. And we don't think that there's any other assessment that can be made other than these transactions that are listed are time barred.

I also think that it is clear that our clients or my clients are not signatories to the tolling agreement. To

Your Honor's point, our view is that the tolling agreement is clear and unequivocal. Under parol evidence will be used to the extent there was any ambiguity. It is our view there is no ambiguity in that -- in that it is clear that they was not signatories to it and they are not bound by it.

As far as the issue of the subsequent certifications are concerned, again, our view is based on the First Department's decision and the First Department's dismissal of the case against Ivanka Trump all of the certifications that were signed by my clients related back to the transactions that had previously been closed. The distinction, if there is one, between the Ivanka Trump situation and my clients is that in Ivanka's Trump situation you are actually increasing the loans at that point because more money was coming out.

So, if the loan was $100 and there was only $95 that had been drawn, when Ms. Trump made the request and made her recertifications, she was actually increasing the amount of exposure to the bank. And in the First Department in its decision, based on the briefs that were before it, the First Department said, no, that still is a continuing -- that continues and relates back to the original transaction. And since the First Department summarily rejected the continuing loan doctrine, it is our respectful view to this Court that any of the certifications signed by Eric Trump or

Donald Trump Junior that relate to the transactions that are time barred based on the Appellate Division decision, therefore, needs to be dismissed from this case as well.

And, finally, as it pertains to the record, there is nothing in the record to suggest that Eric Trump or Donald Trump Junior in any way were involved directly in the creation or the preparation of the statements of financial condition. Thank you, Your Honor.

MS. GREENFIELD: I apologize I don't have the exact citation, but isn't there evidence in the record that Eric Trump provided THE valuations for Seven Springs?

MR. ROBERT: There is evidence in the record that he was asked questions, but the record is also clear that he didn't know when he was giving information about the valuations that was being used for the statement of financial condition. You have Mr. Trump's testimony that he didn't know it was being used for that purpose. He got a call about it.

We'll be making a motion in limine about the use of the examinations under oath and whether or not they are admissible at purposes of the trial. But to answer your question, since we weren't present for the original interviews that the Attorney General did with its witnesses, but I will submit to you that the testimony at the examination under oath of Jeffrey McConney, who's the person

who actually was preparing the underlying spreadsheets for SOFC, said at no time did Eric Trump know why it is he called and said, hey, can you give me a value for that.

I will also share with you, based on that testimony, there is no evidence in the record that Donald Trump Junior or Eric Trump ever saw any of the spreadsheets or any of the backup that Mr. McConney prepared when putting together the statements of financial condition.

MS. GREENFIELD: Just to followup, it's your position that even if Eric Trump provided what may ultimately be found to be false overinflated valuations, he didn't know it was going to be used for the SFC, there is no liability?

MR. ROBERT: Again, I would have to respectfully disagree with the premise of the question because, again, for all the reasons Mr. Kise set forth, when Eric Trump was giving valuation, it was based on his experience as a developer, what he thought the uses of the property were. The Attorney General probably spent close to an hour or more at his deposition in this case asking him about that. That is part of the record. His testimony is consistent with what I am telling you now. But separate and apart from that, if someone ask you a question and you give an answer and you don't know what that information is being used, I don't believe no liability can attach to that, no.

THE COURT: I'm sure you have a lot to say but not a lot of time to say it so do your best.

MR. AMER: I am going to be laser focused and trying to hit the points in the order that they came up because that's the way they are on my notes. I want to first address the point that we somehow have changed the theory of our case from obtaining loans to maintaining loans. I appreciate Your Honor is not a got you judge and is going to be generous to us and allow us to pursue that, but I am going to take your generosity where I really need it and not where I don't need it.

So I'd like to put up paragraph 18 of our complaint. It says, Mr. Trump's statements of financial condition were repeatedly and persistently submitted to banks insured by the federal deposit insurance corporation for the purpose of influencing the actions of those institutions. The statements were used to obtain and maintain favorable loans over at least an 11-year period. I think I can stop reading there.

THE COURT: Yes.

MR. AMER: So, I don't know why Mr. Kise got so far over his skis but he did and they should have read the complaint before creating this argument that we are somehow changing the theory of our case. We are not and there are other paragraphs in the complaint, which I don't think we

need to go through for time, where we specifically allege each of the fraudulent transactions that are on the various timelines that we showed. So, this is absolutely a case that was and is about obtaining and then maintaining the loans throughout the course of the life of the loans.

THE COURT: Since we are talking about Mr. Kise, he must have been water skiing not snow skiing, right.

MR. AMER: Let's talk about the First Department decision. The argument that somehow the First Department has rejected our theory that each fraudulent certification was a timely completed transaction when it was submitted to the bank. The First Department not only didn't reject that theory. I would argue that the First Department rejected their theory that the closing date means that -- that if the closing date is before the limitations period any subsequent certification relating to that loan is somehow time barred.

And the reason why we know that the First Department rejected that position is because Trump Endeavor LLC, you'll recall, is the borrowing entity for the Doral loan. It's the only loan that it's involved in and the Doral loan closed in 2012. So, if the First Department agreed with the defendant's position that the closing date is when the claim accrued, then there would be no reason why the First Department would not have dismissed Trump Endeavor LLC along with Ivanka Trump because there's no transaction

that that borrowing entity is involved in that under their theory would be timely.

The same is true -- the same is true for 401 North Wabash because that's the borrowing entity for just the Chicago loan which is also another loan that closed before the limitations period and yet the Appellate Division did not dismiss that borrowing entity and it would have if the panel agreed with their theory.

Now, I've looked at the Boesky and the Rogal cases that Mr. Kise mentioned and they have nothing to do with this case. They're not cases that involve loans and they stand for the simple proposition that an allegation of fraud is completed -- that it accrues when it's completed. We know that. It has nothing to do with loan closing and subsequent certification under a loan obligation.

Mr. Kise talked about Miss Trumps draw and he told us that the draw that Miss Trump signed was no different from the certifications of the financial statements that Mr. Trump, Eric Trump, Donald Trump Junior all signed. I don't know what certification draw he's referring to, but it's not the draw document that was produced in this case. If we could put up the draw request. This is it.

There was only one of them. And it says after the long paragraph, "borrower hereby certifies as of the date hereof to the lender, that the loan is in-balance." That's

what the certification is and actually it was true. This is so different from the certifications that were submitted with respect to the statements of financial condition. I would also mention there's only one of them and we know that 6312 requires repeated and persistent fraudulent transactions. So we don't even know what the Appellate Division thought of this certification because it could be that having only seen one of them the panel determined that you don't meet the requirements of repeated and persistent under the statute.

Let's talk a little bit about the tolling agreement, a little bit about the tolling agreement. Your Honor, you are exactly right that the question of whether a tolling agreement is signed is a factual question and the question of whether somebody who hasn't signed is nevertheless legally bound by it is a question of law. And you don't get judicial estoppel for a question of law. It's also the case that the Jewel (Phonetic) decision was issued after we argued the motion to hold Mr. Trump in contempt when I made my representations about whether or not Mr. Trump, as a legal matter, was bound or not.

So we shouldn't be deprived of being able to take advantage of the Jewel decision which we think is directly on point and controlling and compels the Court to conclude, if it even needs to reach the issue which we don't think you

need to reach for purposes of this motion, that -- that all of the individual defendants, even though they didn't sign the agreement, as a legal matter, are bound because of the broad definition in the agreement. I would also add that --

THE COURT: Don't you want to read that broad definition in the agreement?

MR. AMER: It's too late for that, Your Honor. I will read this portion of it though because it relates to the trustee. The definition includes, quote, persons associated with or acting on behalf of the Trump Organization, DJT Holdings LLC, and DJT Holdings Managing Member LLC. It's our position that the trustee fits within that definition because persons associated with the trustee; namely, the trustees were acting on behalf of those entities.

I would also add that we agree and have briefed the point that you cannot rely on extrinsic evidence to alter the meaning of an unambiguous document and we argue that on page 32 of our reply brief. I'd like to put up, because Mr. Kise said that we don't get disgorgement because this is not a Martin Act claim and the cases say that you only get disgorgement in a Martin Act claim. We have a quote from the Greenberg decision.

"We further conclude that disgorgement is an available remedy under the Martin Act and the Executive

Law." So, yes, we get disgorgement under 6312. I'd like to address the argument about ASC 274. Mr. Kise spent a lot of time arguing that you can use different methods, but he misses the point that whatever methods you choose, at the end of the day under ASC 274, the results you end up with has to be estimated current value, a specifically defined term that means what a willing buyer and willing seller fully informed not under duress would agree that the property is worth.

So it's not correct to say that you could use whatever methods you want under ASC 274. No. You have to use a method that gets you to a market condition estimated current value between a willing buyer and a willing seller. Mr. Kise made the point, I think, when he said, well, two people can bid on Mar-a-Lago and if you don't want to live in Florida maybe you wouldn't pay $0.50 for it. I think that's a rough paraphrase of what he said. If you don't want to live in Florida, you are not a willing buyer of that property.

It's not based on idiosyncratic needs or wants of the person doing the valuation. It's not based on what Mr. Trump's perspective is. If it's estimated current value, then it has a meaning. And as I've said, the meaning has to take into account market conditions. Mar-a-Lago is a heavily restricted property. It is not being used currently

as Mr. Kise said as a private residence. It's being used as a social club where the owner happens to live on the property, but it's not a private residence. It's a social club. It has members.

Now, Mr. Kise mentioned that Mr. Moens valued Mar-a-Lago at this very high number as a private residence and that somehow they can revert the use of the property to a private residence. That's not true. They like to refer to the declaration of use which is a 1993 document, but they ignore the 2002 deed that I put up on the screen with the national trust. That is a later agreement and it is an agreement pursuant to which Mr. Trump conveys his right to use it for any purpose other than a social club.

There is not a stitch of evidence in the record suggesting that the national trust would agree to amend that document to allow Mr. Trump to use the club for others, for any purpose other than a social club. So the this court shouldn't speculate on what may or may not be possible in terms of future use. The Court should read the deed and should interpret it as a legal document for what it is which is a very onerous restriction on the property.

I want to talk a little bit about Doral, and I want to pick up on a comment that Miss Greenfield mentioned about whether you can use a current day valuation of the property to claim that an earlier year value was somehow justified.

The answer is no. You have to justify the value that you assign at the time based on what the information was that you had. And to their point on Doral, I think they're taking it even further. They are not saying, well, we can justify the value of property "X" back in 2012 based on what property "X" is worth today. With Doral, they are saying we can justify property X's inflated value because a different property, Doral was really worth much more than we even said it was worth in the statement and, therefore, somehow the excess value of Doral, that we can show today, compensates for all the inflation that we have in the assets for all of our other properties.

It is a ridiculous notion. There was never any disclosure of this $1.3 billion number for Doral in any of the statements that we're talking about. I would also point out that their entire argument about Doral and it's $1.3 billion value is based on an analysis that their expert Frederick Chen (Phonetic) did where the start of his analysis was a marketing pitch by New Mark that put the value at 1.3 billion in 2022, I believe.

Now, they didn't put that document in evidence but we did and it's Exhibit 502. And can you look at it. It is a Power Point marketing sales pitch. It's not an appraisal. And what is so startling about their expert's use of the New Mark sales pitch is that New Mark actually did an appraisal

of the property in 2021. And the value that New Mark came up with was $297 million and that is the figure that they used for Doral in the 2021 statement. So this whole idea that Doral somehow is a $1.3 billion agreement it is just nonsense.

Very quickly on materiality. Your Honor, the statute is very carefully worded and it says that it targets fraud or illegality in the carrying on, conducting or transacting of business that is repeated or persistent. That's it. It doesn't say anything about materiality. Now, the cases say that conduct is fraudulent if it is false or misleading. Again, nothing about materiality. And the cases say that it's false or misleading if it has the tendency or capacity to deceive. Again, nothing about materiality. It's just not an element under the statute.

Now, is it relevant to an analysis of whether it has the tendency or capacity to deceive, sure. There are a lot of factors that would go into that analysis. If, as Your Honor posited, a valuation is off by $10, nobody would say that it has the tendency or capacity to deceive but it's off by a hundred million dollars, absolutely.

The disclaimers. The statement of financial condition, I am going to quote it because Mr. Kise put it up on the screen, says use of different market assumptions and/or estimation methodologies may have a material affect

on the estimated current values.

I think that hurts them and I think it helps us. Why? Because it references different market assumptions. It's emphasizing that this is all about market value and it talks about methodologies having a material affect on estimated current values. So it's emphasizing again to the user that at the end of the day what we're talking about are estimated current values not "as if" values, estimated current values.

Now, what the bank considers material or not is, again, not relevant under this statute. They seem to view this statute as some victim's recovery act. It's not. It's a market integrity statute. That's what it's designed to do. And the legislature presumed that if you have fraud in the marketplace in business transactions you are harming the public because you know no longer have an honest marketplace.

Mr. Kise showed the credit memos from Deutsche Bank. Again, we don't think that's the least bit relevant, but it's worth pointing out that the credit memos take a haircut off of the personal statement -- personal financial statement values because they are looking at a liquidation scenario, right. The bank wants to understand what these properties could sell for on the auction block. That is the antithesis of estimated current value because if we go back

to the definition it's a willing buyer willing seller fully informed not under duress. Nobody is under more duress to sell property than a debtor in bankruptcy. And so when the bank is giving haircuts to these property values they are doing something that converts the values for their own internal analysis from estimated current value to something that is a liquidation value.

And so the question is not whether the bank would be okay with the liquidation value that they end up with. The question is whether the bank would be okay if the estimated current values that they started with were hundreds or maybe even over a billion dollars less than what were being reported in Mr. Trump's statements of financial condition.

We do have the testimony -- we do have the testimony of Nicholas Hague from Deutsche Bank which I think is something Your Honor should take note of. We saw testimony from Mr. Sullivan and Miss Piercelis (Phonetic). They weren't credit risk officers. They were on the business side of getting the clients in the door. Mr. Hague was a credit risk manager and his testimony is on the top of page 22 in our reply brief. He was a decision maker on whether to approve these loans and he absolutely was offended when we showed him what was really going on with these values.

THE COURT: That's obviously what I was referring to a while ago. And what did he say. Maybe, you should read a little bit of it. I know we're short on time.

MR. AMER: So, Mr. Hague, what we did was we showed Mr. Hague that Mr. Trump had reported values for 2011 and 2012 of 525 million and 527 million respectively for his interest in 40 Wall Street despite the fact that he possessed an appraisal showing a valuation of $200 million as of November 1, 2011. And then Mr. Trump had reported a net operating income for 40 Wall Street that was approximately four times the actual net operating income used in this appraisal.

Now, when asked how you would have responded if these discrepancies had come to his attention during the credit review, he testified that he, quote, would have treated Mr. Trump's financial disclosure with, generally, with a larger degree of skepticism and specifically he would have adjusted the equity value of that specific asset adding that if the Trump Organization could not have provided a reasonable explanation then I think I would have recommended declining the transaction. That's his deposition testimony at 177 line 25 to 178 line 19.

Mr. Hague also testified that he was, quote, shocked at the numbers reported on Mr. Trump's financial statement, close quote, for 40 Wall Street giving a then

existing appraised values of the property and that had he learned at the time of the discrepancies between the net operating income figures used in the appraisals for 40 Wall Street and those used for Mr. Trump's statements he would have questioned the accuracy of other information provided and would have asked whether the bank should continue doing business with Mr. Trump. That's his deposition transcript 177 lines 25 to 178 line 19, page 194 2 to 12, page 196 to 13 to 15 and page 237 line 1 to 241 line 25.

Quick point on Donald Trump Junior. He was a trustee. He certified the statements in his role as a trustee and as to the point that, oh, he had no involvement in the preparation of the statements, I'd go back to the slide I showed that pursuant to the statements as the trustee he was responsible for the fair presentation of the statements in accordance with GAAP. That's the representation that was made in the statements.

Just a final point, Your Honor, it's not enough to say, well, I have a value and you have a value and so everybody is entitled to their own value. That's not true. If your value is an "as if" value that has nothing to do with the market conditions and my value is an estimated current value that is based on market conditions and is, in fact, based on an appraisal, then it's my value that's the correct value. And your value if it's an "as if" value

that's based on, you know, your assumptions about your perspectives on investing decades into the future, it's not relevant to the statement because it's not an estimated current value and this court should understand that when we have an appraised value showing what estimated current value is to the property and the defendants have nothing, meaning no estimated current value because they are telling us that what they put in the statement is fundamentally different from an estimated current value and they have no competing appraisal, here, we are at summary judgement. They have had their opportunity to make the record. If the evidence isn't there, then they don't get the benefit of proving something at trial that there's no evidence on this record to support.

So, the Court should, in our view, when looking at these properties and seeing appraised values and no competing estimated current value on the other side in the record, should conclude that there "as of" values are false and misleading because they are way inflated beyond what the appraisal values are. Thank you, Your Honor.

(Continued on next page)

MR. KISE: So I will check off at this point, but on the change theory, you heard us on that. On the First Department decision, you heard us on that. I am not going to belabor that. You understand our position and it's, obviously, your discretion.

I would say just briefly on his point about how the First Department would have dismissed claims if they thought they should have dismissed, I would just say they did. It says, "To dismiss as time barred the claim." They didn't go through a line item because they didn't have the record in front of them, but I would take issue with what Mr. Amer is saying, that they didn't dismiss those claims. They did dismiss those claims. And to say that we don't know what the Appellate Division thought, it is right there. It is just in an application of dates to report from, but you heard us on that. The tolling agreement, you heard us on that. You understand our position on the document, as Mr. Robert mentioned.

As to the Trust again, there is no mention of the Trust in any of the documents. It is not even, like -- Their argument is a layer upon layer because it doesn't reference the individual directly, but it references them separately because of their association with the company, that, therefore, that indirect reference then means that, because they are indirectly referenced and they happened to

be a trustee, now they are bound. It flies in the face of Trust Law. There is just no way to get there.

ASC 274 and the estimated current value, Mr. Amer is testifying. What I am pointing you to is an NYU professor and a SCC chief accountant. I would direct Your Honor's attention to that testimony. I would read those affidavits and those reports carefully because they are -- Estimated current value is not what Mr. Amer is saying it is. You have to read all of the ASC 274. You have to understand the context of the opinion. There isn't one value. There isn't one estimated current value. There are a myriad of ways to get this estimated current value. And that is what Mr. Flemming says, that's exactly what Mr. Bartov said. And Mr. Amer's position -- The Attorney General's position is, sort of, turn that on its head.

THE COURT: Let me ask you this.

Let's say two estimates could both be accurate, reasonable. Is there any kind of estimate that could not be considered reasonable?

MR. KISE: If it doesn't fit within the confines of ASC 274, which provides as we noted, extraordinary latitude, extraordinary latitude. I am not going to take your time Your Honor. It is in the record that there are a myriad of ways to get the estimated current value. There is not one way. So it wouldn't be two. It could be twenty. You could

have twenty different valuations of the same property, all of which would accord with ASC 274, all of which would be GAAP compliant. They would just be based on different inputs, different perspectives, and as long as you get there that way, you are there.

As to Mar-a-Lago, again, the Attorney General was taking little pieces. If you look at the Schuman Declaration, you know, he walks through the facts of all of the documents. All of the documents are there. And if you look at the documents as a whole, they demonstrate what we said. And it is used as a private residence and Palm Beach has approved its use as a private residence, but that's all in the records. I am not going to take your time this afternoon.

On Dural, we are not using -- As I said before, we are not using current day value to justify prior numbers. Our numbers were much lower in the SOFCs. What I am saying is that we were conservative at that point. We could have been higher, we weren't. There is just great disparities. This is a highly subjective process and you heard us on that.

Materiality, I am not going back there. You heard us on that.

As to the disclaimers, again, Mr. Amer, respectfully, he is testifying. There is no actual

testimony from anyone in the record, other than Professor Bartov and Mr. Flemmings, that talk about the impact to these disclaimers, how they fit the AICPA Standards, GAAP.

The Attorney General wants to talk about GAAP when it benefits them, but then they want to ignore it when it doesn't. Again, I would encourage the Court to look at Bartov and Flemmings. There is no evidence in the record that disputes their point about those disclaimers apply fully and the impacts of those disclaimers on the transactions. It is not a situation -- moving on to his next point -- about the starting point being lower, but the bank still says okay.

The bank -- The testimony from at least one of the bankers that I showed you demonstrates -- that was involved in the transaction and was involved in the credit approval process. So they want to put all of their eggs in the Nicholas Haye basket, and I am going to get to that in a second, but the fact of the matter is there were five people that signed off on that credit approval. They are all listed right there on the credit memo. You could see them. So the idea that one has primacy over the other, we have several individuals testifying. And pointedly, Mr. Haye didn't say absolutely this would have been different. He said, if there was no explanation, then yes, I think I might have done something differently. But they are speculating

as to what might have happened. They are saying that, oh, well, Nicholas Haye is saying he would have denied the credit. He would have never approved it. He never said that. What he said is yes, if you, the, Attorney General, in a conference room with ten Attorney General lawyers, he has got nobody to defend him and he is sitting there and they are throwing his stuff in front of him and he says, and this is from the examination under oath, which we object to. I am not going there. But the bottom line is what Mr. Haye said is equivocal at best. It is not conclusive. It is certainly not sufficient to withstand the rigorous summary judgment -- the base summary judgment on what Nicholas Haye said. The statements by Williams, Sullivan, Braverman, Pierless, they were all unequivocal statements.

THE COURT: I don't know about that, but I would dispute you on that. What are we going to do, take a vote on this? Four bankers said it didn't matter to us, one banker said it did matter, I felt misled. We are going to now say it is four against one, no they weren't misled. I mean, this strikes me what we learned in high school, if a statement has any counterexamples, it is false. So if somebody was misled, doesn't that make the statement misleading?

MR. KISE: But Nicholas Haye didn't say he was misled. What he said was I didn't know this and I didn't

know that, and that might have made a difference. That's what he said. It might have made a difference if I didn't have an explanation. But there is no indication -- He didn't go actually to the due diligence visit. So Ms. Schroder now Pierless and Mr. Sullivan, I believe, went, actually, to the Trump Organization and met with them and asked questions. And so there is no telling what came up in that process. That's in the record.

THE COURT: Another minute or two. It is really about reliance anyway. We are going to take a break and then we are going to talk about sanctions.

MR. KISE: Can I just make these last two points?

THE COURT: Sure.

MR. KISE: First of all, Mr. Amer mentioned that we didn't do our statements in accordance with GAAP and because we didn't comply with GAAP, that's a problem. But they were in accordance with GAAP. That's the point, is that we did follow GAAP and that's what ASC 274 was. And that, alone, demonstrates there is no capacity or tendency to deceive because we did what we were required to do under the applicable accounting principles. And we are not saying that there is no estimated current value. This is the point I made moments ago. Where Mr. Amer posits this idea that we are saying there is no estimated current value and it can be anything we want, no. What we are saying is that our

numbers are estimated current value. They are just different than the Attorney General's numbers. They are different than the bank's numbers and all in accordance with ASC 274 and GAAP, just as Professor Bartov and Mr. Flemmings testified to. All of that is permissible. All of that is permissible. So there is really not enough substance here.

Mr. Amer made a very passionate appeal on the accounting question, but if you look at the actual testimony of the experts, it reveals the flaws in their theory.

Thank you, Judge.

THE COURT: Thank you. It is 3:41 and a half. Let's be back in ten minutes. You can use your own Apple watch.

(Whereupon, there was a short break and the matter resumed as follows:)

COURT OFFICER: All rise.

Part 37 is back in session. Please be seated and come to order.

THE COURT: Counselors, ignore that man behind the curtain. What I said before about 4:30, as long as we are out of here at 4:45, I will push it all the way there. So we have to maybe stop at 4:40. How about ten or twelve minutes on sanctions. I read the papers, of course, but you can say whatever you want to say.

MR. AMER: Thank you, Your Honor.

I actually had planned only about a minute and a half.

The first three arguments, capacity, standing and disgorgement, these are pure issues of law. Your Honor has already decided that. And, therefore, their whole argument that these are mixed questions of law and fact is just wrong, and it is not only wrong, it is contrary to what the Court has already decided.

The fourth argument, which is based on Mazars disclaimer is based on language that has been part of this case from day one. It hasn't changed with discovery. It is the same language now as it was then. And Your Honor already decided twice that the language doesn't provide any defense because what it actually says is that Mazars is placing responsibility on the shoulders of Mr. Trump. So it is no defense for Defendants. Maybe it is a defense for Mazars some day, but it is not a defense for these Defendants. So we have been over this ground. Your Honor has admonished them. Your Honor even said it was borderline frivolous. You exercised your discretion and didn't sanction them, but it, obviously, had no effect and they didn't take heed of your warning.

So to be perfectly candid, Your Honor, we felt compelled to bring this motion because Your Honor having

issued the warning and having the Defendants ignore the warning, to us, suggested that we couldn't just sit back and let their conduct go unanswered. So that's why we moved for sanctions and there is just nothing new here for the Court to decide.

Thank you.

THE COURT: Thank you.

MR. ROBERT: Good afternoon, Your Honor.

Clifford Robert on behalf of the Defendants.

Listening to Mr. Amer saying that the Attorney General felt compelled to bring this motion is an outrageous statement. It is an outrageous statement that Mr. Amer made that the Attorney General felt compelled to bring this motion. This motion was brought in an attempt to try to chill the defense in this case.

I speak on behalf of myself, my colleagues and our clients. We have acted in a professional and appropriate manner. We are doing our job in defending our clients' rights and availing our clients the rights that they are afforded in New York.

The AG's motion is simply meritless as a matter of law. In opposing the motion, we retained the services of retired Appellate Division Justice Leonard Austin, and in a twenty-plus page opinion, Judge Austin, whose reputation is beyond reproach, one of the founders of the Commercial

Division, one of the authors of the Padded Jury Instructions, and, clearly, one of the most well-respected jurists in New York made a determination that the conduct of the attorneys was not even close to being frivolous. It was actually appropriate under the standards. It was appropriate for us as a matter of CPLR practice and it was a matter of our appropriate conduct in us under the rules of professional responsibility to protect our clients' rights.

What the Attorney General is either doing recklessly, intentionally or willfully ignorantly is trying to conflate the various standards of a preliminary injunction, a motion to dismiss and a summary judgment motion.

For Mr. Amer to stand here and say that there has been nothing learned -- I will just start with the last thing he said on the disclaimer issue through discovery is -- You want to talk about materiality? It is a materially false statement. There was expert testimony that was not part of the Attorney General's complaint, was not considered by this Court during the preliminary injunction or the motion to dismiss, which makes clear who the intended user of the disclaimer was, the effect that the banks have when they read a statement of financial condition, the way the banks handle a statement of financial condition, and that sophisticated users in reading that would realize that the

statement of financial conditions is a starting point and that there are GAAP exceptions. So for them to stand here and say that we, as attorneys, should be sanctioned, which this Court knows has significant implications for us professionally, or that our clients should be sanctioned for that which we felt is appropriate, as Judge Austin said in his affirmation quote, "Forcing the Defendants to even respond, rather than simply engage in the substantive legal arguments at the summary judgment hearing is wasteful and unwarranted. That the Attorney General disagrees with certain arguments raised by Defendants does not mean that those arguments are frivolous or improperly imposed."

So what they are doing is, rather than opposing it on the merits, which they did in their reply, they are now trying to say we want to prohibit you from raising these defenses (A) to preserve your record, and (B) because we believe they are appropriate on a motion for summary judgment. The Attorney General tried the same thing at the beginning, when we made our motion to dismiss. And as it turned out, one of the grounds that the Attorney General wanted to sanction us for, ultimately, the Appellate Division reversed on. So the Attorney General's heavy handedness in dealing with us as the professionals and our clients simply has no place, and I don't believe this Court should continence that. There is nothing in their reply

papers that even comes close to refuting the twenty-three page affirmation of Judge Austin, who, in pain-staking detail goes through the status of the case, the history of the case, the appropriate law and standards, both, for a preliminary injunction, a motion to dismiss, and a motion for summary judgment, and ultimately comes to the conclusion where he says, quote, in paragraph two, "For the reasons set forth below, it is my opinion to a reasonable degree of legal certainty that the conduct of Defendants' counsel was well within the standards of civil procedure and civil practice in the New York State courts." And he goes on, "It is, therefore, my further opinion that the conduct of Defendants' counsel was not frivolous within the meaning of 22 NYCRR 130-1.1.

Now, in Mr. Amer's reply papers, he takes the position that it was improper to have Justice Retired Judge Austin give an expert affirmation in a situation like this. Well, one, I would respectfully disagree with that and I would draw the Court's attention to a First Department's decision where, actually, we have a similar fact pattern, and it is Stewart versus New York City Transit Authority 125 A.D.2d 3d 129 from 2014. And the similarity is that that case had to do with retainer agreements, and an expert lawyer was brought in to give an opinion to interpret the meaning of 22 NYCRR 603.7, which had to do with propriety of

a retainer. Part 130 is also governed by NYCRR. So there is First Department authority and the First Department embraced the fact that an expert who was an attorney came in that case to give his opinion -- and here it is a him -- as to the conduct of the lawyers and to whether that conduct was appropriate.

As far as the specifics that Mr. Amer just got up with, again, standing and capacity, the disgorgement argument and the disclaimers, the standing and capacity arguments that were made on the motion to dismiss pursued all the facts in the Attorney General's complaint were true and they were based on a writ large defense saying that the Attorney General didn't have standing and capacity.

Our position now that discovery is complete, you heard during the presentations today testimony from the representatives of Deutsch Bank where they felt there were no material misrepresentations, our position that there is no harm or injury to the public, now, again, the Court may disagree with our view of that, but at the end of day, based on the evidence now before the Court and the record, we believe that we were absolutely appropriate in re-bringing up a standing and capacity argument now based on the record before the Court.

As far as the disgorgement part is referenced, as Mr. Kise explained, our discussion now on summary judgment

has to do with the fact that under 63 (12), unless there is another independent statute that the Attorney General is relying on, disgorgement is not a proper remedy.

And finally, as I started with the issue of the disclaimers, so where I will lead with this, Your Honor, is even to the extent the Attorney General disagrees with us, even to the extent this Court feels we are not entitled to the relief we sought in the summary judgment motions, that does not make this frivolous. That does not make this reckless. That does not make this wanton. We, as the attorneys acted appropriately, and there is nothing in this record, other than Justice Austin's affirmation, and they said nothing that refutes that. And if the Court has any questions, I would be happy to answer them.

THE COURT: I have more comments than questions.

You could stand, you could sit.

MR. ROBERT: Whichever Your Honor would prefer.

THE COURT: Maybe you can stand. You may want to say something.

I have been aware of Justice Austin's renown, et cetera, for years, maybe decades, very successful and very highly regarded jurist. I think it is fair to say that.

Twenty years ago, I read in the law journal something that this judge said. I am not quoting exactly, but, basically, said I am not going to accept a memo of law

on an expert on the law. I am the expert on the law. And I did some research on this before reading the Attorney General's points on this. You are, basically, not allowed to put in an expert on the law. There is cases like crazy. I am not familiar with the one case that you mentioned, but you can't do that. It is not done because you can't do it, but I read it, you know, for what it was worth. I didn't think it was worth very much. It was, essentially, a primer on summary judgment law, motions to dismiss. I know the difference and, of course, there is a big difference. You can say anything you want in a pleading, but at summary judgment stage, you've got to come up with evidence.

I will only address, certainly in this discussion, I don't know about an opinion, standing and capacity. When I first heard those arguments, I thought that was a joke. Basically, people that don't have capacity to sue are either declared incompetent or they are infants or they are under some sort of legal disability. I don't know if that ever applies in New York. None of this applies to the Attorney General of the State of New York, just blew my mind.

Standing, and I think I have written this before in one or more decisions, it is custom-made for the Attorney General to bring a case like this. How you could possibly say she doesn't have standing -- Who doesn't have standing? Your neighbor doesn't have standing to bring your case, your

friend doesn't, your sibling doesn't. I think there is also a lot of law that the average citizen doesn't have standing to bring a case against the Government, unless they have suffered some sort of individual personalized harm. Don't quote me on that, but that's the kind of argument people make when they say "standing." That's not his claim to pursue, that's her claim. No. This is the Attorney General's claim.

What your papers do and Judge Austin, I guess these are your papers, you look at the merits and you say, well, Attorney General can't bring this case because she loses on the merits because she hasn't proved anything, therefore, she doesn't have standing. But that's totally different.

Cases are on a different posture after motions to dismiss and summary judgment, but -- and I am picking up on your point -- now you have had full disclosure, as much as I allowed you. Now we have a record. You -- I don't mean you, personally, but the Defendants have not pointed -- though I will give you a chance to dispute me -- to one thing in the record that has been developed that changes the situation. Of course, she has capacity. Of course, she has standing to sue. What did the record have to do with any of this, other than the fact that you think she loses on the merits, therefore, you are going to say she didn't have standing.

Go ahead.

MR. ROBERT: Unlike Your Honor's original hypotheticals, where, for example, there are two parties to a contract and it is clear or there is a personal injury case and, you know, someone has been injured as a result of the alleged negligence of someone else, here, the Attorney General's standing and capacity is based on her ability to be able to interject herself into these transactions. Our view has been that, because these are purely private transactions, there has been no public harm, and this Court may disagree with that view, as it did on the motion to dismiss and on the preliminary injunction, now that there is testimony in the record from the Deutsch Bank witnesses and our experts as to these other issues, it is our view that making this argument at this point is clearly not frivolous because we still believe the Attorney General's standing is inextricably linked with the fact as to whether we believe there has been a harm perpetrated to the public.

So it is not quite as simple, Your Honor, respectfully, as the traditional person's standing were you in the car accident? Were you the one that signed the contract? This is a different fact pattern, sir.

THE COURT: Mr. Amer, do you want to respond to something in particular here?

MR. AMER: Two points.

It is not just --

THE COURT: I didn't mean stand. I meant to keep your voice up.

MR. AMER: I will stand anyway and speak louder.

It is not just Your Honor who has rejected their standing and capacity arguments. They took an appeal and the First Department affirmed you on those issues.

THE COURT: I will interrupt you one second. Sorry to steal your thunder.

What I said to Mr. Kise also, what I said at the start was I thought these arguments were crazy, literally crazy. Then I wrote two decisions saying they are frivolous. I think I said in the second decision these arguments were borderline frivolous the first time they were made. Then the Appellate Division affirms me, I think, twice, twice I am told. And then, of course, the law on sanctions is if you have been warned, don't do it. You were warned. Now you are taking the position in twenty-seven pages of Leonard Austin -- say hello for me -- that the lay of the land is different. We now know more than we used to know. I had not heard one thing you said today or read one thing in your papers that made any difference, other than you think you win this case, and that's not capacity or standing.

MR. ROBERT: Your Honor --

MR. AMER: If I can make my second point.

My second point, Your Honor, was just that you don't need expert testimony to interpret the legal effect of Mazars disclaimer language. I thought I heard Mr. Robert say we now have expert testimony about the effect of the Mazars disclaimer. You looked at that language. You interpreted it. You told us what the legal effect was of it, and that is not a proper subject of expert testimony and the same law that we cited in our brief saying that you can't put in a legal expert affidavit to tell you what the law is similarly says you can't put in a legal expert affidavit to tell you, the Court, how to interpret unambiguous language.

That's all I am saying.

THE COURT: Mr. Robert, go ahead.

MR. ROBERT: First of all, we don't have a legal expert that's talking about the Mazars disclaimer. I am talking about the experts that testified in the underlying case, and I will defer to Mr. Kise on that in a moment. But the affidavit setting forth what the standard of care was in that hour-conduct was appropriate within that, I still stand by what we did, sir. The fact that you may vigorously disagree with us, which, of course, you are the Judge, you have the ability to do that, sir.

THE COURT: And the Appellate Division.

MR. ROBERT: Well, the Appellate Division, sir, dealt with it on a motion to dismiss. Our position, respectfully, today is that we believe in a non-frivolous manner, we believe based on the evidence and the record that's before you on summary judgment that the circumstances have changed based on the expert's testimony that is part of the record, as well as the Deutsch Bank witnesses, who are also -- their testimony is part of the record. So again, while you may have a difference of opinion with us, I stand firmly on the position that what we did is not frivolous. We were protecting our clients' rights.

THE COURT: Well, what the Deutsch Bank people said was that your reliance argument, and there is no reliance requirement.

Mr. Kise.

(Whereupon, there was a change of reporters.)

MR. KISE: Thanks, Judge. So, just to clarify, and if you look at our reply brief on the summary judgement, I think this may be directed to the question you're asking. The point on standing now and capacity and maybe it's a misnomer but it's -- the point is there's no real world impact. We cite the cases that we rely on. I know you don't like Domino's, I got that.

THE COURT: The pizza is okay but the case.

MR. KISE: Right. Exact. But, you know, our point is that the Attorney General said that -- that they need to prove their case. That's the check. And we are saying they haven't proved their case. Maybe, we call it standing capacity and you don't agree with that nomenclature but that's how we view it. That's the point. And if you look at our rely, this is all made pretty clear.

There's no real world impact. And we are saying because there is no real world impact there is no room for the Attorney General under the statute. And while the First Department did push us back on dismissal, I mean, I argued the case so I recall one of the judges, you can watch the video yourself, when I made this argument said, well, this is a motion to dismiss. Why don't you come back to me on summary judgement. Watch the video. I know that's not binding but, you know, when I have a statement like that, and this is really what I want to say, we're all going to

have to be here a long time now unless you grant summary judgement of course you won't be, but I would just respectfully, number one, no one is trying to usurp your authority as a judge. The lawyers make the arguments. Mr. Amer and I have had a spirited debate today. You've asked questions. You get to make the decisions. But as lawyer, I have to make the arguments. When I go to the First Department and I have even an aside comment like that well a judge, says, well, come back to me on summary judgement, I have to at least preserve my record. Otherwise, I am going to have a malpractice claim on my hands which is the last thing I want.

THE COURT: Maybe, he said come back to me on summary judgement because he was giving you the benefit of the doubt that something would change.

MR. KISE: Maybe so.

THE COURT: Nothing has changed.

MR. KISE: But there is a change, respectfully, and this is the difference between frivolous and substantive. We are having a spirited debate. We all are going to have to be here quite some period of time, and I would just say, you've heard me say this before, I think you said it's something you think your grand mom would say but I say it all the time, I've never had a crossroad with any of these folks and I don't intend to. I never had a crossroad with

you. I respect your role. I respect their role. I'm not sure why they don't respect mine I guess is the point. I have very vigorous differences of opinion about what the First Department held, you have seen it, and what applies here and they are completely ignoring the law. I use that word. But I'm not saying that it's sanctionable. I just say I vigorously disagree. It's up to you, Judge, to make those determinations.

So I would just ask as we go into a trial this is probably, respectfully, not the way we want to start out and so I would ask that whatever your opinion of our legal arguments, if you think our legal arguments are ridiculous, that's your prerogative, but we're just hear lawyers making arguments. We are not making things up. We do think that the evidence is different now. We are -- we have made points in our briefs. If they are not good points, just like if you don't think the Attorney General -- we don't think the Attorney General points are good, but you are going to ultimately decide that.

So I would just ask that the Court exercise its discretion in this regard and let's keep the temperature down while we go into what is going to be a challenging process where everyone has been getting along and needs to continue to. Thank you, Judge.

THE COURT: Considering everything, counsel have

gotten along well and I hope I've gotten along well with them.

Miss Greenfield, do you have a question for Mr. Robert.

MS. GREENFIELD: Just for either of you, do you have any case law that stand for the proposition that standing dependent upon development of a factual record?

MR. KISE: The case.

THE COURT: That's really just a yes or no question.

MR. KISE: I can't give you a yes or no question. The point is if you look at Exxon and Domino's, which I know the judge don't like, if you look at those cases, that's our view of the impact of those cases. There is no real world impact. There is no role here for 6312. This is not a 6312 kind of case. This is a private transaction, private -- if you look at the long language of those case, does it say standing and capacity and those terms, it all depends on how you look at it. I look at that as a standing or capacity question. You might look at it as a statutory authority question. They might look at it as bogus argument, but that's the argument. It's nomenclature. The point of those cases is there is no role here for the Attorney General because there is nothing that impacts the public sector.

Now you could disagree with whether it does or

doesn't, but we believe that the evidence that has been advanced now at to this point shows that there isn't any. Again, you can disagree. We got bank testimony. We have support for that. That's not really meaning disrespect. It's just that's how we view it. That's all.

THE COURT: This is somewhat beyond the sanctions question but one of the defendants main defenses all on this whole case even before Mr. Kise got involved is no one was hurt. What was arguably heard here was fairness in the marketplace, honesty in the marketplace. I am surprised that plaintiff hasn't made more of a point about that although it did come up at one point and something I said -- again, I'm in the sure Mr. Kise was here for this particular discussion -- New York is the or at least a leading financial and otherwise marketplace.

We want people to trust us. We want people to deal fairly. We want honesty. We want fairness. That's I think what this -- what the -- what 6312 is about and what this case is about. The fact that, in this particular instance, the loans are repaid, nobody got hurt. In fact, they made a lot of money, probably could have made more money if things had been a little different, if the statements had been more accurate -- I'm not reaching a conclusion -- that's maybe the next time somebody inflates, again, allegedly, inflates a financial statement they will be in default. Somebody

will be hurt.

We're not just talking about one case here. We're talking about fairness and honesty in the marketplace. So, I don't think the -- actually, not that I don't think. I am sure, in my own mind at least, that the fact that nobody was hurt doesn't mean the case gets dismissed. And I think that's the Appellate Division's decision clearly so... All right. Everybody has been here a long time and we are getting close. Mr. Robert, go ahead.

MR. ROBERT: Pursuant to your order, motions in limine were due today and they are going to be heard next Wednesday. The Attorney General had filed certain motions in limine a few days ago with a notice of motion which would then require us to put in opposition on Monday. My understanding was we were just going to file our motions and argue them before you next Wednesday without the need of putting in opposition papers.

THE COURT: Let's see if we can all agree we don't need any further papers. We are having extensive oral argument on Wednesday.

MR. WALLACE: We just wanted to give the defendants an opportunity to put in answers. If they don't need it, that's fine by us.

THE COURT: Unless anybody has anything else to say, see you Wednesday at 10 o'clock.

(Whereupon, the oral argument is adjourned until next Wednesday, September 27, 2023, at 10 o'clock.)

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EXHIBIT O

To be argued by:
JUDITH N. VALE
15 minutes requested

Supreme Court of the State of New York
Appellate Division – First Department

No. 2023-00717

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

Plaintiff-Respondent,

v.

DONALD J. TRUMP, et al.,

Defendants-Appellants.

BRIEF FOR RESPONDENT

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Dated: April 26, 2023

Supreme Court, New York County – Index No. 452564/2022

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PRELIMINARY STATEMENT

The New York State Office of the Attorney General (OAG) brought this civil enforcement action under Executive Law § 63(12) against the Trump Organization and certain of its executives. OAG's 214-page enforcement complaint provided detailed factual allegations describing defendants' decade-long scheme to misleadingly inflate the values of various holdings and interests of defendant Donald J. Trump, as reflected in his statements of financial condition (Statements). The assets whose values were inflated included some of Mr. Trump's signature properties: his own triplex residence in Trump Tower, Trump Park Avenue, the 40 Wall Street office building, Mar-a-Lago, and numerous golf clubs. Defendants then presented the false Statements to banks and insurers while certifying that they were true and accurate. Through their scheme, defendants derived significant economic benefits—such as favorable loan and insurance terms—that they would not otherwise have obtained.

Here, defendants appeal from a decision and order of Supreme Court, New York County (Engoron, J.) denying their motions to dismiss the enforcement complaint. This Court should affirm. Many of defendants'

arguments have been rejected by the Court of Appeals or this Court. And their other arguments are also meritless.

First, OAG has the authority to bring this action under § 63(12). Section 63(12) gives OAG the capacity to maintain actions, like this one, alleging that defendants committed repeated or persistent fraud or illegality in conducting business. Through § 63(12), the Legislature has empowered OAG to ensure that entities transacting business in New York—including in New York City, one of the world's most important financial centers—do so without fraud or illegality, thereby maintaining an honest marketplace. There is no basis in the statutory text for defendants' contention that OAG must show that the public or consumers at large were harmed by their scheme. Nor is there any basis for defendants' argument that OAG must satisfy the elements of parens patriae standing. That common-law doctrine has no bearing where, as here, OAG is suing under § 63(12) to vindicate the State's sovereign interests.

Second, OAG's suit is timely. This Court has held that the six-year limitations period governing claims under § 63(12) applies retroactively, foreclosing defendants' argument that a three-year period applies. The complaint contains ample allegations that fall within this six-year period,

including those detailing Ivanka Trump's involvement in the fraudulent and misleading scheme. Although the six-year limitations period alone suffices to render OAG's complaint timely, more than two years of tolling afforded by the Governor's pandemic-related executive orders and by a tolling agreement between OAG and the Trump Organization further support Supreme Court's decision. And the continuing-wrong doctrine provides an additional ground for affirmance.

Third, OAG sufficiently alleged that Ivanka Trump personally participated in defendants' scheme. Among other things, Ivanka Trump was an Executive Vice President of the Trump Organization who used the Statements to obtain hundreds of millions of dollars in reduced-rate loans to finance real-estate acquisitions. She was familiar with the true financial performance of properties owned by Mr. Trump, and the Statements misrepresented the value of an apartment that she rented and had the option buy. She also participated in communications with a federal agency about specific accounting exceptions contained in the Statements. And she oversaw the Trump Organization's real-estate licensing deals, a category of assets that was misleadingly valued in the Statements.

Finally, Supreme Court properly exercised personal jurisdiction over the Trump Organization entities that operate out of the Trump Organization's New York headquarters and that purposefully availed themselves of New York as a jurisdiction.

QUESTIONS PRESENTED

1. Whether Supreme Court correctly held that OAG has capacity and standing to sue defendants for repeated and persistent fraudulent and illegal conduct pursuant to Executive Law § 63(12), a statute that expressly authorizes OAG to bring such claims.

2. Whether Supreme Court correctly held that OAG's suit is timely.

3. Whether Supreme Court correctly held that OAG sufficiently alleged that Ivanka Trump personally participated in or had knowledge of the Trump Organization's scheme.

4. Whether Supreme Court properly exercised personal jurisdiction over various Trump Organization entities.

STATEMENT OF THE CASE

A. Statutory Background

The Legislature enacted Executive Law § 63(12) to combat fraudulent and illegal commercial conduct in New York. Under § 63(12), "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York" for disgorgement and other equitable relief. Executive Law § 63(12).

The broad nature of § 63(12) reflects the State's manifest interest in "securing an honest marketplace." *People v. Coventry First LLC*, 52 A.D.3d 345, 346 (1st Dep't 2008), *aff'd*, 13 N.Y.3d 108 (2009). The statute defines "fraud" as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Executive Law § 63(12). The statute further prohibits persistent "illegality," which authorizes OAG to sue for violations of state, federal, or local laws. *See, e.g., People v. American Motor Club*, 179 A.D.2d 277, 283 (1st Dep't 1992).

Section 63(12) addresses repeated fraud or illegality in business regardless of whether the misconduct targeted consumers, small businesses, large corporations, or other individuals or entities. *See New York v. Feldman*, 210 F. Supp. 2d 294, 300 (S.D.N.Y. 2002) (courts have broadly construed § 63(12) to apply to virtually "all business activity" (quotation marks omitted)); *Matter of People v. MacDonald*, 69 Misc. 2d 456, 458 (Sup. Ct. N.Y. County 1972). "[R]epeated" fraud or illegality includes the "repetition of any separate and distinct fraudulent or illegal act" and "conduct which affects more than one person." Executive Law § 63(12). "[P]ersistent" fraud or illegality includes the "continuance or carrying on of any fraudulent or illegal act or conduct." *Id.*

The statute of limitations for § 63(12) actions is six years. C.P.L.R. 213(9). That six-year statute of limitations took effect immediately, when the Legislature enacted it in 2019, Ch. 184, § 2, 2019 McKinney's N.Y. Laws 1082, 1082, and applies to conduct that predates its enactment, *Matter of People v. JUUL Labs, Inc.*, 212 A.D.3d 414, 416 (1st Dep't 2023).

B. Factual Background

As alleged in OAG's verified complaint, Mr. Trump controls and has beneficial ownership of around 500 entities that do business as the Trump Organization, which is headquartered in New York. Specifically, many Trump Organization entities are organized under defendant Donald J. Trump Revocable Trust (Trust), of which Mr. Trump is the sole beneficiary. (R. 1192-1193; *see* R. 1397-1421 (organization chart).) In managing the Trump Organization, Mr. Trump has relied on each of his three eldest children—defendants Donald Trump Jr., Ivanka Trump, and Eric Trump—to operate portions of the business as Executive Vice Presidents. (R. 1193-1195.)

1. The decade-long scheme to inflate Mr. Trump's net worth through his Statements of Financial Condition

From at least 2011 through 2021, Mr. Trump's annual Statements were false and misleading. (R. 1180, 1185-1187; *see* R. 1395-1396 (overview of deceptive strategies employed by defendants).) The Statements reflected Mr. Trump's supposed net worth based on inflated values of specific assets and classes of assets, minus outstanding liabilities. (R. 1182-1183.)

Defendants' scheme involved submitting (and certifying as true) Mr. Trump's false and misleading Statements in various commercial transactions to banks and lenders, insurance companies, and other entities to obtain significant financial benefits such as favorable loan or insurance terms. (*See* R. 1326-1368.) For example, defendants used the Statements to procure and maintain more than $300 million in loans from Deutsche Bank for the development of the Doral golf resort in Florida, a hotel in Chicago, and the redevelopment of the Old Post Office building in Washington, D.C. (*See* R. 1327-1350.)

Mr. Trump personally guaranteed each of these loans (R. 1328-1330), for which the guarantor's "'[f]inancial [s]trength'" or "'financial profile'" factored into the lending decision (R. 1333, 1339, 1343). As a condition of each guaranty, defendants submitted the Statements from the years prior to the loan closing and agreed to submit the Statements annually thereafter, each of which was certified as being true. (*See* R. 1336-1337 (Doral), 1340-1341 (Chicago), 1347-1349 (Old Post Office).) For the Old Post Office loan, which was not disbursed at closing but rather on an as-needed basis based on requests from the Trump Organization, the loan

required as a condition of each disbursement request that the Statements were true and accurate at the time of the request. (R. 1347-1348.)

False certifications of the Statements were expressly identified as events of default under the loan agreements. (R. 1336 (Doral), 1342 (Chicago), 1349-1350 (Old Post Office).) In 2020, in an effort to ensure that it could collect on its loans, Deutsche Bank warned defendants that false or inaccurate Statements could result in the loans being placed in default and subject to immediate collection. (*See* R. 1373-1375.)

Defendants also used the Statements in transactions and dealings with multiple insurance companies to procure favorable terms on insurance products that benefitted defendants. (R. 1358-1368.) For example, from 2007 through 2021, defendants used the Statements to secure favorable prices on surety bonds from Zurich North American. (R. 1358-1362.) Allen Weisselberg (then-CFO of the Trump Organization and a defendant here) misrepresented to Zurich that the asset values reflected in the Statements were prepared by a professional appraisal firm—even though they were not. He also failed to disclose that the values were falsely and misleadingly inflated. (R. 1359-1361.) From 2016 through 2018, defen-

dants used the Statements to secure favorable premiums on directors and officers insurance (D&O insurance). (R. 1362-1368; *see* R. 2188-2190.)

Defendants also used the Statements in several other commercial dealings. For instance, in 2015, defendants used the Statements in obtaining favorable loan terms in refinancing a mortgage for 40 Wall Street from Ladder Capital Finance. (R. 1219-1220, 1350-1351.) From at least 2011 through 2019, defendants used the false and misleading Statements to obtain, extend, and maintain a prior mortgage from Royal Bank America (later Bryn Mawr Bank). (R. 1353-1354.)

Despite the pervasive misstatements contained in the Statements, several defendants certified the Statements' accuracy when submitting the Statements to financial institutions and other companies. Mr. Trump certified the Statements from 2011 through 2015 as true and accurate. (*See* R. 1336-1337, 1344; *see also* R. 1370-1371.) As a trustee of Mr. Trump's Trust, Donald Trump Jr. was responsible for the preparation of the Statements for each year from 2016 until at least 2022. In his role as trustee, he certified the truth and accuracy of each of the Statements in 2016 through 2019. (R. 1370.) Eric Trump certified the truth and accu-

racy of the Statements from 2020 through 2021 as attorney-in-fact for Mr. Trump. (*See* R. 1336-1337, 1371.)

From 2004 until 2020, the accounting firm Mazars compiled the Statements. (R. 1202.) In February 2022, in a letter to the Trump Organization, Mazars announced that the Statements for the years ending June 30, 2011 to June 30, 2020, should no longer be relied upon, and that all recipients of the Statements should be notified of that status. (*See* R. 1187-1188, 1204.) Several examples of the false and misleading asset values reflected in the Statements follow.[1]

Trump Tower. From 2012 through 2016, the Statements valued Mr. Trump's personal triplex penthouse in Trump Tower in Manhattan based on the false premise that it was around three times its actual size. The Statements listed the apartment at 30,000 square feet, when property records show that it was actually 10,996 square feet. These misrepresentations inflated Mr. Trump's assets by anywhere from $100 to $200 million each year. (R. 1254-1262.)

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[1] The full scope of defendants' fraudulent scheme to inflate the valuations is laid out in detail in the complaint and further summarized in a chart appended to the complaint as an exhibit. (R. 1395-1396.)

Trump Park Avenue. From 2011 through 2021, the Statements valued rent-stabilized apartments at the Trump Park Avenue building in Manhattan as if those units were not under rent-stabilization restrictions. An independent appraisal in 2010 concluded that the unsold residential units in the Trump Park Avenue building had a total market value of $55 million. (R. 1210.) The appraisal valued a block of twelve rent-stabilized units at $750,000 total, noting that these units had less value because the "'current tenants cannot be forced to leave.'" (R. 1210.) Despite this appraisal, the 2011 and 2012 Statements valued the unsold residential units at $292 million, ignoring the status of the twelve rent-stabilized units. (R. 1211.) Nor did the Statements in any subsequent year through 2021 properly value the rent-stabilized units based on their restricted status. (R. 1211.)

40 Wall Street. From 2010 through 2021, the Statements included valuations of the Trump Organization's leasehold interest in the 40 Wall Street office building in Manhattan that did not reflect the appraised value of the property. For example, despite independent appraisals valuing the property at approximately $200 million from 2010 through 2012, the corresponding Statements valued the property at over $500 million.

And despite an appraisal valuing the property at $540 million in 2015, that year's Statement valued the property at over $735 million. (R. 1217, 1219-1222.) Those inflated values continued in subsequent years. (*See* R. 1223-1226.)

Cash. From 2013 through 2021, the Statements claimed that Mr. Trump had "cash" that did not belong to him. Mr. Trump has been a 30% limited partner in a partnership in which the general partner, not Mr. Trump, has sole discretion over any cash distributions. (R. 1201, 1206-1207.) Despite his lack of control over the partnership's cash, the Statements for several years included 30% of the cash held by the partnership as if it were "cash" belonging to, and under the control of, Mr. Trump. (R. 1206-1208.) These misrepresentations inflated Mr. Trump's assets by $14 to $100 million each year. (R. 1205-1210.)

Club Facilities. From 2011 through 2021, the Statements included numerous false and misleading valuations of Mr. Trump's various club facilities, which made up around one-third of the total value of his assets. (*See* R. 1277-1323.) For instance, the Statements valued the Mar-a-Lago property in Palm Beach, Florida at $350 to $750 million, based on the false premise that it could be developed and sold in an unrestricted

manner as one or more private residences. But years earlier, Mr. Trump, to obtain apparent tax benefits, had personally signed deeds that transferred to the National Trust for Historic Preservation the rights to develop Mar-a-Lago for any usage other than a social club. (R. 1280-1284.)

Several Statements also valued Mr. Trump's Aberdeen golf club property in Scotland at $135 to $435 million, based on the false premise that 2,500 homes could be constructed on the property, when in fact fewer than 1,500 homes had been approved by the Scottish government. (R. 1289-1290, 1293-1296.) And in numerous Statements, Mr. Trump added an undisclosed 15% or 30% brand premium to the value of his golf courses, even though the Statements expressly stated that the valuations did not include a brand premium and generally accepted accounting principles prohibit such premiums. (*See, e.g.*, R. 1286, 1306-1307, 1310-1311.)

2. Ivanka Trump personally participated in the fraudulent and illegal scheme

OAG's complaint describes in detail how each defendant participated in the fraudulent and illegal scheme. On appeal, no defendant except for Ivanka Trump challenges the sufficiency of those allegations. Accordingly, this subsection focuses on Ivanka Trump's role in the scheme.

Like her siblings, Ivanka Trump was aware of, and knowingly participated in, the scheme to inflate Mr. Trump's net worth as reflected in the Statements. (*See* R. 1368.) She took the lead in negotiations to obtain the favorable loan terms from Deutsche Bank that included annual submission and certification of the Statements. (*See* R. 1330-1337.) Like Donald Trump Jr. and Eric Trump, Ivanka Trump was an Executive Vice President of the Trump Organization who had familiarity with and responsibility for the Statements. (R. 1370-1371.) She was also familiar with the true financial condition of the value of Mr. Trump's assets, based on, among other things, her role in the company and updates she received from the CFO, Allen Weisselberg, about the overall performance of the Trump Organization—including the assets valued in the Statements. (R. 1368-1371.)

During 2011 and 2012, Ivanka Trump led the Trump Organization's efforts to win the right to redevelop the Old Post Office property in Washington, D.C. (R. 1344-1345.) The Statements were central to that effort and submitted as part of the bid. (R. 1345.) As part of the process, Ivanka Trump was involved in communications with a federal agency about the contents of the Statements. Those communications included

detailed discussions about whether the Statements conformed to generally accepted accounting principles. (R. 1344-1345.)

Ivanka Trump was also the lead negotiator in obtaining the loans from Deutsche Bank on favorable terms, which included the requirement that the Statements be annually submitted and certified as true. (R. 1330-1337.) She initiated the Trump Organization's relationship with the private-wealth-management group within Deutsche Bank, knowing that a demonstration of financial condition would be required to obtain loans from this group. (*See* R. 1328, 1330-1333.) For the loan used to purchase the Doral golf club, she advocated for the loan to be conditioned on Mr. Trump's personal guaranty. (R. 1329, 1332.) When she received the initial loan terms from the bank, including the terms regarding the guaranty and annual submission and certification of the Statements, she remarked that "[i]t doesn't get better than this." (R. 1329, 1331-1332.) And she pushed back on concerns from Trump Organization counsel about meeting the net worth requirements of $3 billion. (R. 1332.)

Ivanka Trump also handled the Trump Organization's real-estate licensing deals, the value of which was included and falsely inflated in the Statements. (R. 1325.) For example, from 2015 to 2018, defendants

inflated the licensing valuations by including values for deals or terms that were speculative and for which the projected fees and compensation were thus not "reasonably quantifiable"—as the Statements misrepresented. (R. 1324-1325.)

Although she formally left the Trump Organization in January 2017, Ivanka Trump retained an ongoing financial interest in the company. For example, she retained a financial interest in the performance of the licensing business and the Old Post Office building (*see* R. 21, 1194, 1325)—which the Trump Organization sold in 2022 (R. 1350).

C. Procedural Background

1. The investigation and special proceeding

In 2019, OAG began investigating the Trump Organization's operations after Michael Cohen—a former senior executive and attorney of the Trump Organization—testified before the U.S. Congress regarding the misrepresentations in the Statements. *See People v. Trump Org., Inc.*, 2022 N.Y. Slip Op. 30538(U), at 6 (Sup. Ct. N.Y. County 2022).

In August 2020, OAG commenced a special proceeding in Supreme Court, New York County (Engoron, J.), to compel production of documents and testimony, and to oversee compliance with ongoing investigatory

subpoenas. *See* Pet., *People v. Trump Org., Inc.*, Index No. 451685/2020 (Sup. Ct. N.Y. County Aug. 24, 2020). That special proceeding resulted in multiple appeals to this Court. *See Matter of People v. Trump*, 213 A.D.3d 503 (1st Dep't 2023); *Matter of People v. Trump Org., Inc.*, 205 A.D.3d 625 (1st Dep't), *appeal dismissed*, 38 N.Y.3d 1053 (2022).

During its three-year investigation, OAG reviewed millions of pages of documents and interviewed over 65 witnesses, building an evidentiary record that detailed the nature and scope of defendants' fraudulent and illegal conduct. (R. 1180.)

While OAG's investigation was pending, two events tolled the statute of limitations for more than two years (801 days). First, beginning on March 20, 2020, the Governor signed a series of executive orders that tolled the statutes of limitations in the State, on account of the COVID-19 pandemic.[2] Those orders tolled the State's limitations periods for 228 days. *See Murphy v. Harris*, 210 A.D.3d 410, 411 (1st Dep't 2022).

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[2] *See* Executive Order Nos. 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 9 N.Y.C.R.R. §§ 8.202.8, 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.55.1, 8.202.60, 8.202.67 (2020).

Second, in August 2021, OAG and the Trump Organization signed an agreement that tolled the limitations period for any Executive Law § 63(12) claim relating to Mr. Trump's financial representations. (R. 871-874.) The tolling agreement covered the Trump Organization and affiliated entities, as well as the Trump Organization's officers and directors and any persons associated with the Trump Organization. (R. 871 n.1.) The agreement initially tolled the limitations period from November 5, 2020 through October 31, 2021 (R. 871), and was later extended, first through April 30, 2022, and then through May 31, 2022 (R. 869). The agreement (as extended) tolled the limitations period for 573 days.

On September 21, 2022, based on its extensive investigation, OAG brought this action pursuant to Executive Law § 63(12). (R. 1177-1394.) Based on defendants' repeated and persistent misconduct, OAG alleged that defendants had engaged in fraud in their commercial dealings with banks and insurers (R. 1377-1380) and illegal conduct that violated Penal Law prohibitions against falsifying business records, issuing false financial statements, and submitting false information to insurance companies. (R. 1381-1391 (citing Penal Law §§ 175.05, 175.10, 175.45, 176.05).) As

relief, OAG sought disgorgement and various injunctive and equitable remedies. (R. 1392-1393.)

2. Supreme Court's preliminary injunction order

In November 2022, Supreme Court, New York County (Engoron, J.), granted OAG's motion for a preliminary injunction prohibiting defendants from disposing of non-cash assets without prior notice and requiring an independent monitor to, among other things, oversee compliance with that prohibition and the preparation of any future Statement. *People v. Trump*, 2022 N.Y. Slip Op. 33771(U), at 10 (Sup. Ct. N.Y. County 2022); *see also* Suppl. Monitorship Order (Nov. 17, 2022), Sup. Ct. NYSCEF Doc. No. 194. Supreme Court held that OAG had demonstrated a likelihood of prevailing on the merits. *Trump*, 2022 N.Y. Slip Op. 33771(U), at 6-9. The court explained that, contrary to defendants' contentions, OAG has capacity and standing to bring this § 63(12) action. *Id.* at 3-4. The court rejected defendants' argument that OAG was required to establish parens patriae standing, explaining that parens patriae standing is "unnecessary where, as here, the New York legislature has specifically empowered the Attorney General to bring" suit. *Id.* at 3. The court also rejected defendants' argument that § 63(12) is limited to consumer protection. *Id.*

The court further concluded that OAG was likely to succeed on the merits given the extensive evidence regarding "persistent misrepresentations throughout every one of Mr. Trump's [Statements] between 2011 and 2021." *See id.* at 8-9.

3. The decision below

On January 9, 2023, Supreme Court issued a decision and order denying defendants' motions to dismiss. (R. 13-21.)

First, the court adhered to its reasoning in the preliminary injunction order that OAG has capacity and standing to bring this action. The court explained that § 63(12) broadly empowers OAG "to seek to remedy the deleterious effects, in both the public's perception and in reality, on truth and fairness in commercial marketplaces and the business community, of material fraudulent misstatements issued to obtain financial benefits." (R. 15.)

Second, Supreme Court held that OAG had alleged ample misconduct within the applicable statute of limitations. (R. 17-18.) In doing so, the court concluded that the applicable limitations period was six years under C.P.L.R. 213(9). (R. 17.) The court also recognized that the Governor had issued executive orders tolling the State's limitations periods and that

the Trump Organization had signed a tolling agreement, but the court did not squarely rule on these tolling events. (R. 18 n.3, 20.) As an alternative ground for finding OAG's complaint timely, the court further concluded that the continuing-wrong doctrine applied to defendants' ongoing scheme. (R. 17-19.)

Third, Supreme Court rejected Ivanka Trump's argument that she should be dismissed as a defendant, concluding that OAG sufficiently alleged her involvement in defendants' fraudulent and illegal scheme. The court explained that Ivanka Trump had substantial responsibilities within the Trump Organization and had engaged in repeated interactions with the Trump Organization's counterparties that involved the Statements. (R. 19-21.) As the court further reasoned, Ivanka Trump led negotiations to obtain a loan from Deutsche Bank that was based on Mr. Trump's personal guaranty, and she served as the "primary point of contact" for Deutsche Bank on numerous loans as subsequent Statements were submitted and certified as true and accurate. (R. 19-20.) And Ivanka Trump personally participated in obtaining a construction loan from Deutsche Bank to redevelop the Old Post Office building. (R. 20.) The court further noted that during the underlying negotiations regarding

that redevelopment project, Ivanka Trump was personally involved in addressing questions regarding the Statements and their preparation, such as the Statements' compliance with generally accepted accounting principles. (R. 20.)

Last, the court rejected defendants' argument that the court lacked personal jurisdiction over several entities that are controlled and directed by executives located in the Trump Organization's New York headquarters. (*See* R. 21; *see also* R. 971-974, 1106-1113.) As relevant to this appeal, those entities are defendants the Trust, DJT Holdings Managing Member LLC (HMM), 401 North Wabash Venture, LLC (401 Wabash), and Trump Endeavor 12 LLC (TE12).

ARGUMENT

POINT I

EXECUTIVE LAW § 63(12) AUTHORIZES OAG TO BRING THIS ENFORCEMENT ACTION AGAINST REPEATED AND PERSISTENT FRAUD AND ILLEGALITY

Defendants incorrectly argue that OAG lacks capacity and standing to bring this enforcement action under § 63(12). Defendants' arguments are contrary to both the plain language of § 63(12) and well-established precedent from the Court of Appeals and this Court.

Supreme Court correctly concluded that OAG has both capacity and standing to bring this enforcement action. Capacity "concerns a litigant's power to appear and bring its grievance before the court." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 384 (2017) (quotation marks omitted). A litigant has the capacity to sue when the "the legislature invested that party with authority to seek relief." *Id.* Capacity is therefore "a question of legislative intent and substantive state law." *Id.*

The plain language of § 63(12) establishes that the Legislature has authorized OAG to bring this action. *See Matter of Lisa T. v. King E.T.*, 30 N.Y.3d 548, 556 (2017) ("best evidence of the legislative intent is the plain language of the text"). Under § 63(12), "the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York" for compensatory or equitable relief when "any person . . . engage[s] in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." Executive Law § 63(12). Section 63(12) thus unequivocally "*authorizes* the Attorney-General to prosecute 'any person' who engages" in repeated or persistent fraud or illegality in

business—which is precisely what defendants are alleged to have done here. *See People v. Apple Health & Sports Clubs*, 80 N.Y.2d 803, 807 (1992) (emphasis added); *accord People v. Coventry First LLC*, 13 N.Y.3d 108, 114 (2009); *see also Matter of People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417-18 (1st Dep't 2016).

Section 63(12) also makes clear that OAG has standing to bring this action. As the Court of Appeals held a half a century ago, § 63(12) "provide[s] standing in the Attorney-General to seek redress and additional remedies for recognized wrongs." *State v. Cortelle Corp.*, 38 N.Y.2d 83, 85 (1975); *see People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 633 (2018) ("[I]t is undisputed that Executive Law § 63 (12) gives the Attorney General standing to redress liabilities recognized elsewhere in the law . . . ."). As relevant here, those wrongs include falsifying business records, issuing false financial statements, and committing insurance fraud, in violation of the Penal Law. (R. 1381-1391.) And as this Court has held, § 63(12) also authorizes OAG "to bring a standalone cause of action for fraudulent conduct," which need not plead all the elements of common-law fraud, and need not plead scienter or reliance. *See Trump Entrepreneur Initiative*, 137 A.D.3d at 417-18.

As a result, defendants' extended discussion of parens patriae standing is irrelevant. *See* Joint Br. for Defs.-Appellants Donald J. Trump et al. (Trump Br.) 14-22. OAG does not need parens patriae standing to bring an action under § 63(12). Parens patriae is a common-law doctrine that allows the State to protect certain "quasi-sovereign" interests by bringing causes of action that "otherwise properly can be brought only by *private* parties." *See People v. Grasso*, 42 A.D.3d 126, 141 (1st Dep't 2007) (emphasis added) (quotation marks omitted), *aff'd*, 11 N.Y.3d 64 (2008). But § 63(12) claims cannot be brought by private parties at all, let alone solely by private parties. To the contrary, the Legislature enacted § 63(12) to give OAG exclusive authority to redress the wrongs inflicted by repeated or persistent business fraud or illegality. *See Matter of State v. Ford Motor Co.*, 74 N.Y.2d 495, 502 (1989); *see also People v. Grasso*, 11 N.Y.3d 64, 68, 70 (2008) (contrasting statutory claims that OAG was "expressly authorize[d]" to bring with "nonstatutory claims" for the same relief that "rest[ed] on an assertion of parens patriae authority").[3]

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[3] In another *People v. Grasso* decision, this Court held that OAG could not maintain an action under a statute expressly enabling OAG to sue on behalf of nonprofit corporations, after the nonprofit at issue had converted into a for-profit enterprise. 54 A.D.3d 180, 190-97 (1st Dep't

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In any event, the State has a sovereign interest in enforcing its laws, both civil and criminal. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982); *People v. Mendoza*, 186 A.D.2d 458, 459 (1st Dep't 1992) (explaining "legitimate strong State interest in enforcing its own laws"), *aff'd as modified*, 82 N.Y.2d 415 (1993). This sovereign interest establishes OAG's standing to sue based on express statutory authority and makes unnecessary any showing of quasi-sovereign interests under the parens patriae doctrine. No separate standing inquiry is needed when the State pursues a prosecution in the name of the People for criminal remedies, such as imprisonment fines, asset, forfeiture, or restitution. Likewise, no separate standing inquiry is needed when the State prosecutes a statutory enforcement action in the name of the People for civil remedies, including an injunction, fines, disgorgement, restitution, or damages. *See Alfred L. Snapp*, 458 U.S. at 601-02 (distinguishing "quasi-sovereign" interests implicated by parens patriae standing from the "sovereign" interest in enforcing civil and criminal statutes).

2008). Here, there is no claim that intervening events have rendered § 63(12) textually inapplicable.

Defendants' arguments about capacity and standing improperly attempt to impose limitations on § 63(12) actions that have no grounding in the statute. For example, they argue (Trump Br. 24) that § 63(12) cannot apply if the misconduct "involves only the contractual rights of sophisticated private parties." And they argue (Trump Br. 14 n.2, 29) that § 63(12) is limited to misconduct against solely consumers. But § 63(12) broadly applies "[w]henever *any* person" engages in repeated or persistent fraudulent or illegal conduct. Executive Law § 63(12) (emphasis added). And it reaches the "carrying on of *any* fraudulent or illegal act or conduct" in the conduct of business in this State. *Id.* (emphasis added). The statute thus applies to misconduct perpetrated by individuals or business entities, and regardless of whether that misconduct targets consumers or businesses entities large or small. *See, e.g.*, *Matter of People v. Northern Leasing Sys., Inc.*, 193 A.D.3d 67, 70, 78 (1st Dep't) (affirming determination that respondents violated § 63(12) by deceiving small business owners into entering noncancelable equipment leases), *lv. dismissed*, 37 N.Y.3d 1088 (2021). And § 63(12) covers all manner of fraudulent or illegal misconduct—whether that misconduct involves contracts or other

types of business dealings. *See Feldman*, 210 F. Supp. 2d at 300 (courts broadly construe § 63(12) to apply to virtually "all business activity").

Nor does § 63(12) require that the misconduct must harm a substantial number of individuals, as defendants contend. *See* Trump Br. 20-21, 29. Section 63(12) applies to "repeated" fraud or illegality, which is defined as "repetition of any separate and distinct fraudulent or illegal act, or conduct which affects *more than one person*." Executive Law § 63(12) (emphasis added); *see State v. Wolowitz*, 96 A.D.2d 47, 61 (2d Dep't 1983) (permitting suit "when the respondent was guilty of only one act of alleged misconduct, providing it affected more than one person"). That definition is satisfied here, where OAG alleged that defendants generated at least eleven Statements replete with false and misleading asset valuations, and used these Statements to extract, among other benefits, three real-estate loans and multiple insurance renewals on more favorable terms than they otherwise would have obtained.[4] See *supra* at 7-14.

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[4] Although the Legislature has given OAG broad enforcement authority under § 63(12), *see People v. Greenberg*, 21 N.Y.3d 439, 446 (2013), that authority is not limitless, as defendants contend (*see* Trump Br. 14). OAG's authority is circumscribed by the express language of the statute: OAG may sue only those persons who have committed repeated or persistent

(*continued on the next page*)

Indeed, the Court of Appeals has already rejected arguments that are nearly identical to those defendants make here. In *People v. Greenberg*, OAG sued former insurance executives under § 63(12) for engaging in systematic accounting fraud. 21 N.Y.3d at 446. The executives moved to dismiss the case for lack of standing, arguing that OAG had to establish "*parens patriae* standing," could not sue "to protect the integrity of the securities marketplace in New York," and impermissibly sought relief "on behalf of specific private parties" who were "fully capable of obtaining appropriate relief on their own behalf." *See* Joint Br. for Defs.-Appellants at 17-25, *Greenberg*, 21 N.Y.3d 439 (No. 2013-0063), 2012 WL 9502919 (quotation marks omitted). The Court of Appeals rejected these contentions based on § 63(12)'s express grant of authority to OAG "to sue for violation[s]" and "broadly worded anti-fraud provisions, prohibiting among other things 'repeated fraudulent or illegal acts.'" *See Greenberg*, 21 N.Y.3d at 446.

Similarly, in *People v. Ernst & Young LLP*, this Court held that OAG may pursue disgorgement under § 63(12) *without* "a showing or

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fraud or illegality in the conduct of business in this State. And to obtain relief, OAG must prove its case.

allegation of direct losses to consumers or the public." 114 A.D.3d 569, 569-70 (1st Dep't 2014). Echoing defendants' arguments here, Supreme Court in *Ernst & Young* had held disgorgement unavailable under § 63(12) because OAG's "complaint fail[ed] to allege anything with respect to consumers or the public at large." *See* Hr'g Tr. at 30, *People v. Ernst & Young LLP*, Index No. 451586/2010 (Sup. Ct. N.Y. County Dec. 12, 2012), NYSCEF Doc. No. 34. But this Court rejected that argument. Unlike restitution, disgorgement "focuses on the gain to the wrongdoer as opposed to the loss to the victim," and the "source of the ill-gotten gains" is therefore "immaterial." *Ernst & Young*, 114 A.D.3d at 569-70 (quotation marks omitted). Here, because OAG seeks disgorgement (R. 1393), not restitution, it similarly need not allege that defendants' misconduct harmed consumers or the public.

Defendants fail to acknowledge *Greenberg* and instead rely (Trump Br. 12-14, 27-29) on inapposite cases. Some of those cases predate the enactment of § 63(12) by decades.[5] *See People v. North Riv. Sugar Ref.*

[5] *People v. National Rifle Association of America, Inc.*, 74 Misc. 3d 998 (Sup. Ct. N.Y. County 2022), while more recent, also does not involve § 63(12).

Co., 121 N.Y. 582 (1890)*; People v. Lowe*, 117 N.Y. 175 (1889); *People v. Ingersoll*, 58 N.Y. 1 (1874). Other cases are irrelevant because they address whether a particular § 63(12) complaint had plausibly alleged a § 63(12) violation, *e.g.*, *People v. Wells Fargo Ins. Servs., Inc.*, 62 A.D.3d 404, 405 (1st Dep't 2009), *aff'd*, 16 N.Y.3d 166 (2011), or whether the facts adduced at a particular trial had proven that the defendants had committed a § 63(12) violation, *e.g.*, *People v. Domino's Pizza, Inc.*, 2021 N.Y. Slip Op. 30015(U), at 26 (Sup. Ct. N.Y. County 2021); *People v. Exxon Mobil Corp.*, 2019 N.Y. Slip Op. 51990(U), at 29 (Sup. Ct. N.Y. County 2019).[6] Here, because OAG's detailed complaint plausibly alleged conduct that fits squarely within § 63(12), Supreme Court correctly denied defendants' motions to dismiss.

Defendants also err in relying on § 63(12)'s language that OAG's actions are brought "in the name of the people of the state of New York." *See* Trump Br. 25 (quotation marks omitted). Defendants appear to argue

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[6] The federal district-court decisions on which defendants rely support OAG; those decisions *distinguished* between common-law parens patriae standing and express statutory grants of authority like § 63(12). *See, e.g.*, *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 521 (E.D. Mich. 2003).

that there is no cognizable harm or wrong to the People of this State when fraud or illegality takes place between business entities. But they are mistaken. The language on which defendants rely vests OAG with the "statutory authority to serve the public interest." *Coventry*, 13 N.Y.3d at 114. And OAG acts in the public interest when, as here, it exercises civil enforcement authority that the Legislature has expressly and exclusively given to OAG by statute to police the marketplace in this State. In such actions, OAG "is representing the People of the State at large," rather than "the interests of a few individuals." *People v. Bunge Corp.*, 25 N.Y.2d 91, 100 (1969).

Put another way, the Legislature has already decided that persistent fraud or illegality in business harms the public interest and has authorized the Attorney General to redress such harms by bringing civil enforcement actions under § 63(12). Such actions are a "proper exercise[] of the State's regulation of businesses within its borders in the interest of securing an honest marketplace." *Coventry*, 52 A.D.3d at 346. Here, this action vindicates "New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation," *Ehrlich-Bober & Co. v. University*

of Houston, 49 N.Y.2d 574, 581 (1980), by instilling confidence "that financial transactions [in New York] are conducted truthfully, not fraudulently," *Trump*, 2022 N.Y. Slip Op. 33771(U), at 9. Defendants' contention that this action serves no public purpose assumes that unpoliced deception between large business entities has no adverse impact on the marketplace. While defendants might prefer to foster such an environment, the Legislature was entitled to take a different view, and has authorized OAG to take action to prevent it.

POINT II

THIS ACTION IS TIMELY

A. Supreme Court Properly Applied a Six-Year Limitations Period.

Supreme Court properly applied a six-year statute-of-limitations period to OAG's complaint. There is no dispute that when OAG filed the complaint on September 21, 2022, the limitations period for Executive Law § 63(12) claims was six years under C.P.L.R. 213(9). OAG's complaint alleged conduct that occurred after September 2016, and is thus within the six-year limitations period. For example, the Statements at the core of this lawsuit were prepared, certified as true and accurate, and submitted

to lenders and insurers annually from 2016 through at least 2021. (*See* R. 1202-1203, 1336-1338, 1344.) Ivanka Trump personally requested a $4.3 million disbursement from one of those loans in December 2016, and her disbursement request was conditioned on the Statements remaining true and accurate. (R. 1347-1348, 1350.) And from 2017 through at least 2020, defendants secured favorable insurance terms based at least in part on the Statements. (*See* R. 1358-1368.)

Rather than engage with these allegations, defendants contend (*see* Trump Br. 33-35; Br. for Def-Appellant Ivanka Trump (Ivanka Br.) 28-31) that a three-year limitations period applies here because C.P.L.R. 213(9)'s six-year limitations period cannot be applied retroactively to conduct that occurred prior to C.P.L.R. 213(9)'s enactment in August 2019. As an initial matter, even if defendants were correct, this action would still be timely under a three-year period because defendants prepared, certified, and submitted false Statements to lenders, insurers, and other businesses in 2019, 2020, and 2021. (*See* R. 1336-1337.)

In any event, this Court has repeatedly rejected defendants' argument, explaining that C.P.L.R. 213(9)'s six-year limitations period properly applies to conduct that predates the statute's enactment. *See JUUL*, 212

A.D.3d at 416; *People v. Allen*, 198 A.D.3d 531, 532 (1st Dep't 2021), *appeal dismissed*, 38 N.Y.3d 996, *and lv. denied & appeal dismissed*, 39 N.Y.3d 928 (2022); *Matter of People v. Cohen*, 214 A.D.3d 421, 421 (1st Dep't 2023). The Court's reasoning in those cases was not dicta, as defendants argue. *See* Trump Br. 33; Ivanka Br. 30. To the contrary, the Court addressed § 63(12) claims targeting conduct that, at least in part, occurred outside of a three-year period, and squarely held that C.P.L.R. 213(9)'s six-year limitations period properly applied.[7]

Even if the Court were to reexamine the issue yet again, it should conclude that C.P.L.R. 213(9)'s six-year limitations period properly applies to conduct that predates its enactment. As the Court of Appeals has made clear, a statutory limitations period may apply to conduct predating its enactment where the Legislature intended that result to restore a previously applicable limitations period that had been disrupted by a judicial interpretation. *Brothers v. Florence*, 95 N.Y.2d 290, 299-300 (2000) (quota-

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[7] *See Cohen*, 214 A.D.3d at 421 (suit filed in 2018 for conduct in 2012); *JUUL*, 212 A.D.3d at 414-15 (suit filed in 2019 based on conduct in 2014 and 2015); Br. for State Resp't at 12, 25, *Allen*, 198 A.D.3d 531 (No. 2020-01772 et al.), 2021 WL 4951999 (suit filed in 2019 based on conduct in 2014).

tion marks omitted); *Matter of Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122-23 (2001). That is the situation here. Before C.P.L.R. 213(9)'s enactment, a Court of Appeals decision had introduced ambiguity by holding that a three-year period applied to some § 63(12) claims but a six-year period applied to other § 63(12) claims. *See Credit Suisse*, 31 N.Y.3d at 633-34. The Legislature enacted C.P.L.R. 213(9) in swift response, stated expressly that the statute took effect immediately, and did so to restore the longstanding six-year period that applied for all § 63(12) claims. *See* Ch. 184, § 2, 2019 McKinney's N.Y. Laws at 1082; Senate Introducer's Mem., *in* Bill Jacket for ch. 184 (2019), at 5-6; *see also Allen*, 198 A.D.3d at 532. Accordingly, the six-year limitations period applies.

B. The Limitations Period Was Tolled for More Than Two Years.

The timeliness of the complaint is further confirmed by the fact that the applicable limitations period was also tolled for more than two years (specifically, 801 days) by executive orders issued by the Governor during the COVID-19 pandemic and by a tolling agreement between OAG and the Trump Organization. Although Supreme Court did not squarely address tolling, the Court may affirm on this alternative ground because this point was raised below and acknowledged by the trial court.

These tolling events mean that the complaint is timely so long as it alleged misconduct on or after July 13, 2014. In addition to the extensive allegations discussed above (see *supra* at 7-17, 34-35), the complaint alleged that defendants used the Statements in connection with the Old Post Office loan in August 2014, the refinancing of the 40 Wall Street mortgage with another lender in 2015, and the obtaining of beneficial terms on insurance renewals in and after 2015. (*See* R. 1347-1348, 1350-1351, 1355-1368.)

This tolling also forecloses Ivanka Trump's argument that the claims against her are time-barred. Although OAG need not rely on tolling to state timely claims against Ivanka Trump (see *supra* at 34-35), OAG plainly alleged misconduct committed by her after July 13, 2014. For example, she was deeply involved in the Old Post Office loan that closed in August 2014. (R. 1347.) Moreover, she was involved in and knew about assets misvalued in the Statements that were submitted and certified in 2014 through 2016, while she was a high-level officer of the Trump Organization. (*See* R. 1368-1371.)

1. COVID-19–related executive orders tolled the statute of limitations.

As Supreme Court observed (R. 18 n.3), the Governor issued a series of executive orders in response to the COVID-19 pandemic that together tolled the statute of limitations periods in this State for 228 days.[8] *See Murphy*, 210 A.D.3d at 411. That toll pushes back the start of the limitations period from September 21, 2016, to February 6, 2016.

Except for Ivanka Trump, defendants ignore the Governor's executive orders. Ivanka Trump argues (Ivanka Br. 31-32) that the executive orders did not toll the statute of limitations and that, as a result, Supreme Court should not have added 228 days to the applicable limitations period. She argues that the executive orders instead "suspended" the statute of limitations and that, as a result, OAG was merely exempted from filing suit during the pandemic without the limitations period itself having been extended. *See id.* But this Court has already rejected precisely the same argument, ruling that the executive orders did toll the statutes of limitations. *See Murphy*, 210 A.D.3d at 411. Ivanka Trump fails to provide

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[8] *See* Executive Order Nos. 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 9 N.Y.C.R.R. §§ 8.202.8, 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.55.1, 8.202.60, 8.202.67.

any plausible basis for the Court to depart from its precedent. As the Court correctly explained, the initial executive order used the word "toll," and the subsequent executive orders continued not only "suspensions" but also all of the directives and modifications of law that were made in the prior executive orders and not otherwise superseded. *See id.* And every other department of the Appellate Division has reached the same conclusion. *See, e.g.*, *Brash v. Richards*, 195 A.D.3d 582, 585 (2d Dep't 2021); *Matter of Roach v. Cornell Univ.*, 207 A.D.3d 931, 933 (3d Dep't 2022); *Matter of Larae L. (Heather L.)*, 202 A.D.3d 1454, 1455 (4th Dep't), *lv. denied*, 38 N.Y.3d 907 (2022).

There is also no merit to Ivanka Trump's argument (Ivanka Br. 32) that imposing a toll "repeals an existing statute of limitations and imposes a new one," such that a toll cannot be constitutionally imposed by the Governor through an executive order. A toll does not repeal the existing statute of limitations or enact a new one. Rather, it temporarily stops the existing statute of limitations from continuing to run during the tolling period; that statute of limitations does not go away, and instead starts running again when the tolling period ends. *See Brash*, 195 A.D.3d at 582.

Moreover, as this Court has already ruled, *Murphy*, 210 A.D.3d at 411, the Legislature has, by statute, authorized the Governor to issue not only a "suspension" but also an "alteration or modification" of statutes of limitations during a public-health emergency, such as the COVID-19 pandemic, *see* Executive Law § 29-a(2)(d). The tolling of statutes of limitations is plainly within that authority.[9] *See Murphy*, 210 A.D.3d at 411; *Brash*, 195 A.D.3d at 585. And this targeted statutory authority to offer temporary relief from legislative enactments during a public-health emergency does not unconstitutionally delegate power to enact or repeal laws to the Governor. *Cf. Delgado v. State*, 39 N.Y.3d 242, 250 (2022).

2. The tolling agreement further extended the applicable statute of limitations period.

In addition to the executive orders, a tolling agreement between OAG and the Trump Organization further tolled the limitations period here for another 573 days. (*See* R. 869-874.) When combined with the

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[9] *Eisenbach v. Metropolitan Transportation Authority*, 62 N.Y.2d 973 (1984), on which Ivanka Trump relies (Ivanka Br. 32) is thus inapposite. The Court of Appeals in *Eisenbach* did not hold that statutes of limitations can be tolled only by the Legislature. Rather, it held that it would not expand the scope of an existing statutory toll beyond its plain language. 62 N.Y.2d at 975.

executive orders, the tolling agreement pushes back the start of the limitations period from February 6, 2016 to July 13, 2014. Although Supreme Court did not rule on the agreement's application here (*see* R. 18 n.3), this Court may rely on the tolling agreement as an additional, alternative ground for affirmance because the parties briefed this legal issue below. (*See* R. 59 n.3, 108, 931-932, 1027 n.3, 1162 n.4.) *See Melgar v. Melgar*, 132 A.D.3d 1293, 1294 (4th Dep't 2015).

As this Court recently reconfirmed in *JUUL*, a corporate tolling agreement applies to corporate affiliates, officers, or directors when the agreement states that those categories of entities or individuals are covered. *See* 212 A.D.3d at 417. The Court enforces such an agreement according to its terms, the same as any other contract. *See Multibank, Inc. v. Access Global Capital LLC*, 158 A.D.3d 458, 459 (1st Dep't 2018).

Here, the tolling agreement, by its plain terms, covers each defendant. The agreement is between the Trump Organization and OAG, and it states expressly that the term "Trump Organization" includes "The Trump Organization, Inc.; DJT Holdings LLC; DJT Holdings Managing Member LLC" (R. 871 & n.1)—each a defendant here. Under the agreement, the term "Trump Organization" also includes any present or former

parent entity of the Trump Organization—i.e., the Trust (R. 1193); any subsidiaries of the Trump Organization (e.g., TE12) (R. 1192); and any of its affiliates (e.g., 401 Wabash) (R. 1192). (*See* R. 871 n.1.) The agreement also states that the term "Trump Organization" includes the officers and directors of those entities, and "any other Persons associated with or acting on behalf of" them. (R. 871 n.1.) The agreement thus plainly covers Mr. Trump, his three children, and the other individual defendants, particularly as they were all officers of the Trump Organization at the time of the relevant scheme. (*See* R. 1192-1195.) Indeed, the agreement was signed by the Trump Organization's chief legal officer, who confirmed in writing that he had the authority to sign for the "Trump Organization" as so defined. (*See* R. 873-874.)

Although Ivanka Trump left her role as Executive Vice President in 2017, prior to the tolling agreement's signing, the complaint here plausibly alleged that she remained affiliated and associated with the Trump Organization and was thus covered by the agreement. Specifically, Ivanka Trump owned corporate entities that operated from the Trump Organization's headquarters and profited from the Trump Organization's properties through at least 2021. (R. 865, 1194.) And the complaint alleged

that Ivanka Trump "agreed to participate" in the fraudulent and illegal scheme until at least 2022. (*See* R. 1368.)

Contrary to defendants' arguments in the trial court (R. 931-932), there is no rule that a business must obtain the signature of each officer or director to include them in a tolling agreement. And there is no allegation here that any defendant in fact lacked knowledge of the agreement at issue. In *JUUL*, for instance, this Court concluded that two senior corporate executives were bound by the tolling agreement into which JUUL entered with OAG because it was signed on behalf of JUUL's officers and directors, among others. *See* 212 A.D.3d at 417; *see also* Br. for Resp't at 59-62, *JUUL*, 212 A.D.3d 414 (No. 2022-03188), 2022 WL 18355250. And this Court has affirmed the application of an agreement against a non-signatory partner of a partnership, where the partnership signed on his behalf and where the non-signatory benefited from the agreement.[10] *See Johnson v. Proskauer Rose, LLP*, 2014 N.Y. Slip Op.

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[10] Defendants erred below in looking outside the four corners of the tolling agreement to ascertain its meaning, such as by noting that a non-final draft of the agreement included signature blocks for certain individuals. (*See* R. 2243-2244.) Because the terms of the agreement are not ambiguous in covering directors, officers, and other persons who are affiliated or associated with the Trump Organization, such extrinsic evidence

(*continued on the next page*)

30262(U), at 19-20 (Sup. Ct. N.Y. County 2014), *aff'd in relevant part*, 129 A.D.3d 59 (1st Dep't 2015); *see also JUUL*, 212 A.D.3d at 417 (relying on *Johnson*).

Here, as the tolling agreement recognized, the agreement was in the "mutual benefit and interest" of both OAG and the "Trump Organization" (R. 871), including all the entities and individuals encompassed within that term. Should a non-signatory wish to reject the benefits and obligations of such an agreement, that person may—as a third-party beneficiary—disclaim the agreement within a reasonable timeframe. *See Restatement (Second) of Contracts* § 306 (Oct. 2022 update) (Westlaw); *see also Matter of Part 60 Put-Back Litig.*, 146 A.D.3d 566, 567-68 (1st Dep't 2017) (considering if party is "intended third-party beneficiary" of tolling agreement). But none of the non-signatory defendants did so here.

OAG counsel's statement in a hearing—which urged against delaying the special proceeding because the "tolling agreement only applies to

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is not probative. *See Schulte Roth & Zabel LLP v. Metropolitan 919 3rd Ave. LLC*, 202 A.D.3d 641, 641 (1st Dep't 2022). In any event, the omission of the signature blocks in the final agreement supports the inference that the parties understood individualized signatures to be unnecessary, and thus does not aid defendants' motions to dismiss.

the Trump Organization" and "Donald Trump is not a party to the tolling agreement"—was not addressing whether Mr. Trump is bound as a *non-signatory*. (*See* R. 996.) Given the possibility that Mr. Trump could invoke the absence of his signature on the agreement and disclaim the agreement, *see Restatement*, *supra*, § 306, counsel properly asked Supreme Court to move the special proceeding along expeditiously so that OAG could file suit as soon as practicable.

C. The Continuing-Wrong Doctrine Also Applies.

OAG's claims are also timely under the continuing-wrong doctrine. The Court need not consider this doctrine to affirm Supreme Court's decision because, as demonstrated above, numerous allegations in OAG's complaint fall within the limitations period and render the claims timely without regard to the doctrine. But the continuing-wrong doctrine provides an independent alternative ground to find the complaint timely.[11]

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[11] As OAG argued below (*see* R. 108-110, 112-113), other common-law doctrines also tolled the statute of limitations for OAG's claims. These include fraudulent concealment, *see, e.g.*, *Zumpano v. Quinn*, 6 N.Y.3d 666, 674 (2006), as well as tolling based on the persistent, continuous nature of defendants' scheme, *see, e.g.*, *People v. Milman*, 164 A.D.3d 609, 611 (2d Dep't 2018). Because Supreme Court did not rely on these doctrines in

(*continued on the next page*)

Supreme Court properly relied on the continuing-wrong doctrine as an additional and independent reason to reject defendants' arguments about the timeliness of OAG's complaint. (*See* R. 17-20.) The continuing-wrong doctrine permits a plaintiff to sue for "a continuous series of wrongs," without regard to "'the day the original wrong was committed.'" *Capruso v. Village of Kings Point*, 23 N.Y.3d 631, 640 (2014). Such ongoing misconduct "generally give[s] rise to successive causes of action that accrue each time a wrong is committed." *Town of Oyster Bay v. Lizza Indus., Inc.*, 22 N.Y.3d 1024, 1031 (2013).

Contrary to defendants' contention (Trump Br. 37-38), the continuing-wrong doctrine "tolls the limitation period until the date of the commission of the last wrongful act" in cases involving "a series of continuing wrongs," *Palmeri v. Willkie Farr & Gallagher LLP*, 156 A.D.3d 564, 568 (1st Dep't 2017); *see also Marcal Fin. SA v. Middlegate Sec. Ltd.*, 203 A.D.3d 467, 468 (1st Dep't 2022). Although the doctrine may also be relevant to determining certain remedies, *see Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 87 (1993), the proper extent of relief has no bearing on

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denying defendants' motions to dismiss, this Court need not consider them here.

defendants' motions to dismiss and is not at issue until trial, *see Greenberg*, 21 N.Y.3d at 448; *JUUL*, 212 A.D.3d at 417.

Here, defendants' scheme involved such continuing wrongs. For example, the Deutsche Bank loans imposed an ongoing requirement to annually submit the Statements and certify their truth and accuracy, and defendants repeatedly did so despite the misrepresentations in the Statements. See *supra* at 8-11. Such subsequent and repeated false and misleading submissions made in connection with an initial financial relationship constitute continuing wrongs. *See CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC*, 195 A.D.3d 12, 19 (1st Dep't 2021) (subsequent transactions during ongoing fiduciary duty); *Sabourin v. Chodos*, 194 A.D.3d 660, 661 (1st Dep't 2021) (false documents submitted in furtherance of fraudulent scheme); *State v. 7040 Colonial Rd. Assoc. Co.*, 176 Misc. 2d 367, 374 (Sup. Ct. N.Y. County 1998) (repeated misrepresentations or omissions under Martin Act). For the Old Post Office loan, defendants also repeatedly requested disbursements conditioned on their certifying the truth and accuracy of the previously submitted Statements. See *supra* at 8-9. That ongoing conduct is also covered by the continuing-

wrong doctrine. *See Ganzi v. Ganzi*, 183 A.D.3d 433, 434 (1st Dep't 2020) (continuing-wrong doctrine covers reissuing of commercial agreements).

The statute of limitations was thus tolled during these and any of the other ongoing wrongs alleged in the complaint. *See Palmeri*, 156 A.D.3d at 568. Moreover, as explained (see *infra* at 51-56), OAG's complaint amply alleged Ivanka Trump's involvement in these continuing wrongs, disposing of her argument (Ivanka Br. 22-24) that OAG's claims against her accrued solely when the Deutsche Bank loan for the Doral golf club in Florida closed in 2012, and the Old Post Office loan closed in 2014.

POINT III

OAG'S COMPLAINT PLAUSIBLY ALLEGED IVANKA TRUMP'S PERSONAL PARTICIPATION IN AND KNOWLEDGE OF DEFENDANTS' FRAUDULENT AND ILLEGAL SCHEME

Supreme Court properly denied Ivanka Trump's motion to dismiss her as a defendant in this action. OAG's complaint plausibly alleged that Ivanka Trump participated in and had knowledge of defendants' decade-long scheme to misrepresent many of the asset values reflected in the Statements, and to use those Statements in commercial dealings with banks and lenders, insurance companies, and other entities. Ivanka

Trump's arguments to the contrary improperly dispute factual allegations in the complaint.

To sue a corporate officer or director for corporate wrongdoing, a plaintiff must allege that the individual personally participated in the wrongdoing or had knowledge of it. *See Apple Health*, 80 N.Y.2d at 807. It is not necessary to demonstrate that the corporate officer or director benefitted from the misconduct. *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 55 (2001). In determining whether the complaint plausibly asserts § 63(12) claims against Ivanka Trump, the Court must afford OAG's allegations a liberal construction and every favorable inference, and considers only whether the allegations fit within a possible legal theory. *See Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

Contrary to Ivanka Trump's contention (Ivanka Br. 33 n.3), C.P.L.R. 3016(b)'s heightened pleading standard for fraud claims does not apply here. That standard applies when a claim is premised on common-law fraud rather than when, as here, a claim is premised on statutory fraud under Executive Law § 63(12)—for which scienter and reliance are not

elements.[12] *See Trump Entrepreneur Initiative*, 137 A.D.3d at 417 (scienter and reliance not required for § 63(12) fraud claim); *see also Feinberg v. Marathon Patent Group Inc.*, 193 A.D.3d 568, 570-71 (1st Dep't 2021) (heightened pleading standard inapplicable to claim under federal Securities Act premised on misrepresentations because claim "not premised on common-law fraud"); *New York v. Debt Resolve, Inc.*, 387 F. Supp. 3d 358, 364-65 (S.D.N.Y. 2019) (same for Executive Law § 63(12) claim). In any event, under either notice or heightened pleading, OAG's complaint plausibly alleged Ivanka Trump's involvement in defendants' fraudulent and illegal scheme.

First, the complaint alleged that Ivanka Trump, like Donald Trump Jr. and Eric Trump, was an officer of the Trump Organization who had significant responsibilities and knowledge regarding the assets and transactions underlying the Statements. For example, she was an Executive

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[12] Although this Court noted in *People v. Katz*, 84 A.D.2d 381, 384-85 (1st Dep't 1982) that the heightened standard applied to certain § 63(12) fraud claims, this statement was dicta. *Katz* was not an appeal from a decision granting or denying a motion to dismiss. Instead, *Katz* was an appeal from an order granting the defendants' request for discovery, in which the pleading standard was unnecessary for the disposition of the appeal. *See id.* at 383.

Vice President "charged with the domestic and global expansion of the company's real estate interests," including that branch's "deal evaluation, pre-development planning, [and] financing." (R. 2105.) She was aware of the true financial performance of the Trump Organization and many of the assets underlying the Statements from, among other things, the reporting of other officers (R. 1369-1370), internal documents (R. 1369), and her ongoing involvement in several of the transactions at issue (R. 1371). These allegations support the plausible inference that Ivanka Trump was involved in defendants' decade-long scheme, particularly in the context of a closely held business run by a single family.[13] (*See* R. 1369.)

Second, Ivanka Trump was also deeply involved in obtaining the loans from Deutsche Bank and the rights to redevelop the Old Post Office building—and the Statements were central to those efforts. See *supra* at

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[13] Ivanka Trump misplaces her reliance (Ivanka Br. 40, 45) on inapposite cases. In *Abrahami v. UPC Construction Co.*, this Court opined that a corporate officer's involvement in "day-to-day management, operations or bookkeeping"—as is present here—*does* support an inference of involvement in specific financial statements. *See* 224 A.D.2d 231, 234 (1st Dep't 1996). And in *National Westminster Bank v. Weksel*, the transactions were "completely unobjectionable at the time they" occurred. 124 A.D.2d 144, 147 (1st Dep't 1987). Here, the Statements contained falsehoods and misrepresentations from their inception.

15-16. For example, Ivanka Trump personally negotiated a $125 million loan with Deutsche Bank, and the Statements were used during those negotiations. (R. 1330-1338.) Indeed, in one instance, the day after Ivanka Trump spoke with Deutsche Bank employees, Mr. Trump sent over his Statements to advance the ongoing negotiations. (R. 1331.)

These allegations (and others) refute Ivanka Trump's argument (Ivanka Br. 35-38, 43-44, 49-51) that she did not understand either the contents of the Statements or that they included misrepresentations. As an initial matter, § 63(12) statutory fraud claims do not require scienter. *Trump Entrepreneur Initiative*, 137 A.D.3d at 417. In any event, the fact that Ivanka Trump negotiated nine-figure transactions premised on the Statements supports the reasonable inference that she was familiar with their contents. *See People v. Greenberg*, 95 A.D.3d 474, 484-85 (1st Dep't 2012), *aff'd*, 21 N.Y.3d 439. Indeed, during the bidding process regarding the Old Post Office, Ivanka Trump was personally involved in communications that were sent to a federal agency that addressed numerous details in the Statements, including the financial status of Trump Organization entities, Mr. Trump's income taxes, and membership deposits at golf

courses, as well as the precise accounting principles under which the Statements were prepared. (R. 1345, 2170.)

Ivanka Trump argues (Ivanka Br. 35-37) that these communications were sent in 2011 and that her involvement with the Deutsche Bank loans did not extend past negotiating and procuring them in 2012 and 2014. But her engagement with the details of the Statements, including responding to inquiries about them, further supports an inference that she was knowledgeable about the Statements' contents and defendants' scheme in subsequent years. *See, e.g.*, *Greenberg*, 95 A.D.3d at 484-85 ("two relevant phone calls" and "knowledge as to the details of the transaction" supported inference that defendant "was complicit in the illicit scheme"); *Northern Leasing Sys.,* 193 A.D.3d at 76 ("respond[ing] to lessees' complaints" about fraud and illegality supported liability based on knowledge and personal participation). And given that she personally negotiated the loans, she plainly knew that they required repeated submission and certification of the Statements and played a role in causing those subsequent submissions and certifications.

Moreover, Ivanka Trump relied on the Statements and their purported accuracy in requesting a disbursement from the Old Post Office

loan in December 2016. (R. 1347-1348, 1350.) Ivanka Trump disputes (Ivanka Br. 36-37) that her disbursement request contained any misrepresentation, but the complaint alleged that each request was premised on the loan condition that the Statements remained true and accurate—which they were not (R. 1347-1348).

Third, Ivanka Trump was the Trump Organization officer who handled the company's real-estate licensing deals (R. 1325)—a category of assets that was misvalued in the Statements that defendants used from 2011 to 2018 (R. 1323-1326). These allegations contradict Ivanka Trump's argument (*see* Ivanka Br. 1-2, 21) that she had no plausible involvement in the transactions at issue after 2014. For example, from 2015 to 2018, the Statements inflated the licensing-deal valuations by including deals or deal terms that were speculative. (R. 1324.) Inclusion of these deals and terms conflicted with the Statements' express representation that the valuations included "'only situations which have evolved to the point where signed arrangements with the other parties exist and fees and other compensation which will be earned are reasonably quantifiable.'" (R. 1323.) Ivanka Trump's high-level corporate positions and day-to-day responsibility over these licensing deals support the inference that

she participated in preparing these inflated licensing deal-valuations or, at minimum, knew or should have known about them. *See Pludeman v. Northern Leasing Sys., Inc.*, 40 A.D.3d 366, 367 (1st Dep't 2007), *aff'd*, 10 N.Y.3d 486 (2008). And even after she left the Trump Organization in 2017, Ivanka Trump continued to receive monetary distributions from these deals. (R. 1325.)

Fourth, the Statements repeatedly misrepresented the value of apartments in Trump Park Avenue that Ivanka Trump had the option to purchase. (R. 1215-1216.) For example, Ivanka Trump had the option to purchase a penthouse apartment at the price of $14,264,000, but the 2014 Statements valued that apartment at $45 million—more than three times the option price. And even though the Statements in 2016 through 2020 valued the apartment at $14,264,000, Ivanka Trump had, in December 2016, obtained a lower option price of $12,264,000. (R. 1216.) It is a plausible inference that Ivanka Trump knew about and participated in defendants' fraudulent scheme when the Statements misvalued an apartment that she rented and had the option to buy.

Finally, Ivanka Trump is wrong in arguing (Ivanka Br. 48-53) that OAG failed to allege that she engaged in any "illegality" under § 63(12).

OAG adequately alleged that Ivanka Trump falsified business records (Penal Law §§ 175.05, 175.10) by pleading that she caused the Statements to include false entries, including false entries about real-estate license deals (see *supra* at 14-17, 51-56). *See People v. Murray*, 185 A.D.3d 1507, 1509 (4th Dep't 2020). OAG adequately alleged that Ivanka Trump issued false financial statements (Penal Law § 175.45) by pleading that she caused defendants' submissions and certifications of the Statements to the Trump Organization's counterparties (see *supra* at 14-17, 51-56). And OAG adequately alleged that Ivanka Trump committed insurance fraud (Penal Law § 176.05) by pleading that Ivanka Trump pushed for D&O insurance to cover her activities, and the Statements were submitted in connection with those insurance policies. (*See* R. 1366-1367, 2188-2190.)

Ivanka Trump also incorrectly contends (Ivanka Br. 51-53) that OAG's § 63(12) illegality claims must be dismissed to the extent they are based on an alleged conspiracy. As set forth in detail above (at 7-17), the complaint alleged at length the facts supporting defendants' "ongoing scheme and conspiracy." (R. 1368-1377 (capitalization omitted).) To the extent that Ivanka Trump is also arguing (*see* Ivanka Br. 52) that OAG cannot bring a claim for civil conspiracy against her, OAG clarified in its

trial court brief that it was not alleging "an independent *civil* conspiracy," but rather a civil illegality claim under § 63(12) based on a criminal conspiracy (*see* R. 2086-2087 (emphasis added)).

POINT IV

NEW YORK HAS PERSONAL JURISDICTION OVER VARIOUS TRUMP ORGANIZATION ENTITIES THAT OPERATE FROM THE TRUMP ORGANIZATION'S NEW YORK HEADQUARTERS

Supreme Court properly exercised personal jurisdiction over the Trust, HMM, 401 Wabash, and TE12. At the pleading stage, a plaintiff "need not establish that there is personal jurisdiction," but only needs to "make a sufficient start in demonstrating, prima facie, the existence of personal jurisdiction." *Matter of James v. iFinex Inc.*, 185 A.D.3d 22, 30 (1st Dep't 2020) (quotation marks omitted)

First, Supreme Court has general jurisdiction over the Trump Organization entities because each entity has its principal place of business in Trump Tower, at 725 Fifth Avenue in Manhattan—the headquarters of the Trump Organization.[14] *Cf. Chen v. Dunkin' Brands, Inc.*,

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[14] *The Trump Story*, Trump Org., https://www.trump.com/timeline (last visited Apr. 26, 2023) (stating that "Trump Tower located at 725

(*continued on the next page*)

954 F.3d 492, 500 (2d Cir. 2020). As the complaint alleged, HMM, 401 Wabash, and TE12 are among the approximately 500 entities that "collectively do business as the Trump Organization" (R. 1192), of which the Trust is the legal owner (R. 1193). The executives of the Trump Organization maintained their offices at the Trump Organization headquarters in New York at all relevant times. (R. 1193-1195.) And at those headquarters, the executives are "responsible for all aspects of management and operation of the Trump Organization" and "oversee[] the Trump Organization's property portfolio," including the properties owned by 401 Wabash and TE12. (*See* R. 1192-1194.)

OAG's supporting evidence confirms those allegations. For example, the operating agreements for HMM and 401 Wabash identifies the "principal office" for each as 725 Fifth Avenue in Manhattan. (R. 614, 787.) A 2022 Officer's Certificate similarly identifies the Trust's address as 725 Fifth Avenue in Manhattan. (*See* R. 568.) And the loan agreement between TE12 and Deutsche Bank specifies that any notices to TE12 related to

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Fifth Avenue in Manhattan" is the "headquarters of The Trump Organization").

the loan must be sent to Ivanka Trump at 725 Fifth Avenue in Manhattan. (R. 242.)

Second, and in any event, Supreme Court also has specific jurisdiction. *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000). Under New York's long-arm statute, courts may exercise specific jurisdiction over a defendant that "transacts any business within the state or contracts anywhere to supply goods or services in the state" for claims related to those acts. C.P.L.R. 302(a)(1). That provision is satisfied here because the Trump Organization entities engaged in purposeful action directed to New York that substantially relates to OAG's claims. *See Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71 (2006). Specific jurisdiction exists over the Trust because the trustees prepared several of the Statements in New York to be relied on by New York banks and insurers in New York transactions. (*See* R. 1202; *see also, e.g.*, R. 1545 ("The Trustees of [the] Trust . . . are responsible for the accompanying statement of financial condition . . . .").) For the other entities, the relevant loan agreements demonstrate that the transactions bore a substantial connection to this State. For example, the loan agreement between TE12 (a subsidiary of HMM) and Deutsche Bank states that: the lender is a

"New York State chartered bank"; the loan was "negotiated in" New York; New York "has a substantial relationship to the parties and to the underlying transaction"; New York law governs the agreement; and New York has jurisdiction for any claims "arising out of or relating to" the agreement. (R. 212, 238-239 (capitalization omitted).) The loan also directs that a substantial portion of its performance will take place in New York. (*See, e.g.*, R. 228, 241-242.) The loan agreement between 401 Wabash and Deutsche Bank has the same language. (R. 285, 317-318.)

Defendants err in arguing (Trump Br. 46) that OAG cannot rely on the loan agreements to establish personal jurisdiction when Deutsche Bank has not alleged a breach of the agreements. Under the long-arm statute, the test is whether there is a "substantial relationship between the transaction and the claim asserted." *Deutsche Bank*, 7 N.Y.3d at 71 (quotation marks omitted). That standard is amply met here, where OAG's claims are based on fraud and illegality committed in procuring and maintaining the loans. *See D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 299 (2017).

For similar reasons, Supreme Court's exercise of specific jurisdiction comports with due process. It is rare for due process to prohibit an

exercise of personal jurisdiction permitted under the long-arm statute. *See id.* at 299-300. No such exceptional circumstances exist here. The Statements and loans demonstrate that defendants "purposefully avail[ed] [themselves] of the privilege of conducting activities within" New York. *See LaMarca*, 95 N.Y.2d at 216 (quotation marks omitted). Moreover, OAG's claims relate to defendants' contacts within the New York lending community and insurance market. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). Finally, defendants have not come close to presenting a compelling case that jurisdiction in New York would be unreasonable in these circumstances.[15] *See D&R*, 29 N.Y.3d at 300.

[15] Defendants argue in a footnote (Trump Br. 45 n.12) that claims against the Trust should also be dismissed because trusts are not proper defendants. But this Court has recognized that trusts may be held liable under § 63(12). *Matter of People v. Leasing Expenses Co. LLC*, 199 A.D.3d 521, 522-23 (1st Dep't 2021).

CONCLUSION

For the foregoing reasons, this Court should affirm the January 9, 2023 decision and order of Supreme Court.

Dated: New York, New York
April 26, 2023

Respectfully submitted,

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EXHIBIT P

To be Argued by:
REID M. FIGEL
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

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

Plaintiff-Respondent,

– against –

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC,

Defendants-Appellants.

Appellate Case No.: 2023-00717

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New York County Clerk's Index No. 452564/22

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PRELIMINARY STATEMENT

The Court should reverse the order of the Supreme Court (Engoron, J.) denying Defendant-Appellant Ivanka Trump's motion to dismiss the Complaint as to her. This case arises out of an Executive Law § 63(12) enforcement action brought by the Office of the New York Attorney General ("OAG"). The OAG's 838-paragraph Complaint says nothing about Ms. Trump for more than 800 paragraphs. The few remaining allegations describe only lawful (and successful) efforts by Ms. Trump to redevelop the Doral Golf Resort and Spa and Washington, D.C.'s Old Post Office. Those paragraphs fail to plead any facts suggesting that Ms. Trump had any involvement in the fraud alleged in the Complaint: that certain assets on her father's "Statements of Financial Condition" were materially inflated between 2011 and 2021. There is no allegation that Ms. Trump ever signed, prepared, reviewed, approved, or submitted any of her father's personal financial statements. And there is no allegation she knew about the alleged use of improper methodologies to value the assets included in those statements. Indeed, there are no allegations that Ms. Trump ever made any misrepresentations to anyone. The Complaint should be dismissed in its entirety as to Ms. Trump.

In concluding otherwise, the trial court committed at least three reversible errors. *First*, the court incorrectly concluded that the case against Ms. Trump, filed in September 2022, is timely. The Doral and Old Post Office loans closed in 2012

and 2014. The Complaint identifies two acts that Ms. Trump undertook in 2016, but it fails to allege that either was unlawful. Ms. Trump resigned from the Trump Organization in January 2017. Her actions therefore occurred well outside the applicable three-year statute of limitations, or even the six-year (plus 228 days) limitations period urged by the OAG and incorrectly adopted by the trial court. The trial court held that the OAG's claims were timely under New York's "continuing wrongs" doctrine, but it did so in error. To apply the continuing wrongs doctrine, a court must identify "separate, actionable" conduct within the relevant limitations period. *CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC*, 195 A.D.3d 12, 19 (1st Dep't 2021). The Complaint contains no such allegations, and the court did not identify any such conduct.

Second, the trial court incorrectly found that the Complaint states a claim for "persistent fraud" under § 63(12). It reached this conclusion because Ms. Trump "participated . . . in securing the loans" used to redevelop Doral and the Old Post Office. R. 19. But the Complaint does not allege that anything about the structured credit facilities, each of which was collateralized by commercial real estate assets, was in any way fraudulent. Rather, the scheme to defraud alleged in the Complaint focuses exclusively on allegations that Defendants fraudulently inflated the value of certain assets listed on the statements of financial condition of Ms. Trump's father. The trial court simply ignored that the Complaint does not

allege any role for Ms. Trump in preparing, reviewing or submitting those statements. It likewise ignored that the Complaint pleads no facts sufficient to infer that Ms. Trump actually knew of any allegedly fraudulent misstatements.

Third, the trial court erred in concluding that the Complaint adequately pleads six counts of "illegality" under § 63(12). The second through seventh causes of action allege that Ms. Trump falsified business records (causes of action two and three), issued false financial statements (causes of action four and five), and defrauded insurers (causes of action six and seven). The trial court did not engage in any analysis of these alleged violations of New York Penal Law, let alone identify their elements or identify allegations in the Complaint sufficient to plead that Ms. Trump committed these violations. Its sole discussion of the sufficiency of these causes of action came in a single conclusory sentence—stating that the "OAG has alleged liability on behalf of Ms. Trump sufficiently to survive a motion to dismiss." R. 20. That conclusion is unsupportable as a matter of law. This Court should reverse the trial court and remand with instructions to dismiss.

QUESTIONS PRESENTED

(1) Are the seven causes of action brought against Ms. Trump barred by the applicable statute of limitations?

Trial Court's Answer: No.

(2) Does the Complaint adequately state a claim against Ms. Trump for § 63(12) fraud?

Trial Court's Answer: Yes.

(3) Does the Complaint sufficiently allege that Ms. Trump engaged in violations of New York Penal Law in a manner that stated a claim under § 63(12)?

Trial Court's Answer: Yes.

ALLEGATIONS IN THE COMPLAINT

The Complaint does not allege that Ms. Trump had any direct or indirect role in the alleged scheme: using improper accounting methodologies to inflate certain assets on her father's statements of financial condition. Nor does the Complaint even allege that Ms. Trump was aware of the supposed misrepresentations. The Complaint merely alleges that Ms. Trump negotiated with Deutsche Bank to obtain secured credit facilities for two real estate development projects that proved to be successful—conduct that is perfectly legal.

A. The Fraud Alleged In The Complaint

The Complaint alleges that, from 2011 to 2021, Defendants used fraudulent valuation methodologies to inflate the value of certain assets on Donald J. Trump's "Statements of Financial Condition." R. 1180, 1198-1326, ¶¶ 1, 50-558. Defendants allegedly "used" those inflated statements "to induce" Deutsche Bank "to lend money to the Trump Organization on more favorable terms than would otherwise have been available." R. 1180-81, ¶ 3. The Complaint further alleges that Defendants "used" the statements "to satisfy continuing loan covenants, and to induce insurers to provide insurance coverage for higher limits and at lower

premiums." *Id.* The Complaint does not allege that Ms. Trump had any role in the preparation or dissemination of any statement of financial condition.

Defendants' loans with Deutsche Bank were secured lending facilities that financed the redevelopment of the Doral and Old Post Office ("OPO") properties. R. 1330, 1346-47, ¶¶ 571, 632. The Complaint alleges an additional transaction to refinance an existing Deutsche Bank credit facility for the Trump International Hotel in Chicago. R. 1339, ¶ 603. Each loan was fully collateralized by the underlying asset—meaning the appraised values of Doral, Trump Chicago, and OPO were greater than the funds made available to improve the value of those properties. *See* R. 1326-27, ¶ 560. Defendants never missed a loan payment on any facility. Last year, the Doral and OPO loans were repaid in full. R. 1375, ¶ 743.

Each of these credit facilities was also made subject to a personal guaranty provided by Donald J. Trump. R. 1328, ¶ 563. Under the terms of those guaranties, the Guarantor was initially required to maintain a net worth of $2.5 billion and unencumbered liquidity of $50 million. R. 1373, ¶ 735. By 2015, those covenants were eliminated for the Trump Chicago loan, R. 1344, ¶ 619, and reduced by 90% for the Doral loan, R. 1338, ¶ 598, because the appraised values of both properties had increased substantially. The guaranty also required the

Guarantor to submit personal statements of financial condition to establish his compliance with the net-worth covenants. *Id.*

The OAG alleges that certain assets on the "Statements of Financial Condition" were inflated, such that Defendants obtained and satisfied the Deutsche Bank loans by fraud.

B. Ms. Trump's Alleged Role In This Case

The Complaint does not allege that Ms. Trump ever made any representation about her father's net worth or his personal financial statements, much less a materially false one. Indeed, the Complaint affirmatively excludes Ms. Trump from the list of individuals who allegedly prepared, reviewed, or transmitted those statements. R. 1181-82, 1202-03, 1204, 1336-37, 1379, ¶¶ 6, 54, 62, 595, 758 (excluding Ms. Trump from list of "key individual players" responsible for these activities). Nor is there any allegation that Ms. Trump had any role in any of the purported valuation errors at the core of the alleged fraud, or that she actually knew of any allegedly fraudulent valuations. R. 1198-1326, ¶¶ 50-558.

Instead, the asserted basis for the claims against Ms. Trump stems exclusively from her involvement in negotiating two secured loans with Deutsche Bank that closed in 2012 and 2014.

1. Ms. Trump's Responsibilities At The Trump Organization

Ms. Trump was the Executive Vice President for Development and Acquisitions of the Trump Organization. R. 1194, ¶ 33. Among her many responsibilities, Ms. Trump participated in negotiating and securing financing for company properties. R. 1194, 1325, ¶¶ 33, 553, 554. Ms. Trump has had no role in the Trump Organization since January 2017. R. 1194.

2. The Doral Loan

In November 2011, a Trump-affiliated entity (Trump Endeavor 12 LLC) executed a $150 million agreement to purchase the Doral Golf Resort and Spa ("Doral"). R. 1330, ¶ 571. In October 2011, Ms. Trump sent the Commercial Real Estate Division ("CRE") at Deutsche Bank an "Investment Memo" that set forth the financial projections for the redevelopment of the Doral property. R. 1330, ¶ 572. There is no allegation that the Investment Memo attached or referenced her father's personal financial statement—nor that it was misleading in any way.

On November 14, 2011, Richard Byrne, head of the CRE division, "spoke to Mr. Trump and Ivanka Trump about the loan." R. 1331, ¶ 574. The next day, "Mr. Trump sent Mr. Byrne a letter, copying" Ms. Trump and attaching his personal statement of financial condition. *Id*. Shortly thereafter, CRE proposed credit-facility terms that the Trump Organization rejected. R. 1331, ¶¶ 575-576.

There is no allegation that Ms. Trump discussed her father's personal financial statements with anyone from CRE.

In December 2011, Ms. Trump had discussions with Rosemary Vrablic—a relationship officer in Deutsche Bank's Private Wealth Management ("PWM") division—regarding a potential credit facility from PWM to redevelop Doral. R. 1331, ¶ 576. Ms. Trump sent Ms. Vrablic the Investment Memo for the Doral project, "as well as some basic information on [the Trump Organization's] golf and hotel portfolios." *Id.* There is no allegation that this memo included her father's statement of financial condition. In response, Ms. Vrablic sent Ms. Trump a term sheet on December 15, 2011 for a $125 million credit facility to finance a portion of the purchase price of the Doral property, with provisions that the facility would require a recourse guaranty from her father. R. 1331-32, ¶ 577. The term sheet set out proposed interest rates and a covenant that required the Guarantor to maintain a $3 billion net worth and $50 million of unencumbered liquidity. *Id*.

After receiving this proposal, Ms. Trump forwarded the term sheet to other Trump Organization executives, observing: "It doesn't get better than this . . . I am tempted not to negotiate this though." R. 1332, ¶ 578. Jason Greenblatt (the Trump Organization's Chief Legal Officer) responded, expressing concern about the risks of a recourse guaranty. R. 1332, ¶ 579. As alleged in the Complaint (R. 1332, ¶ 580), Ms. Trump responded that "the only way to get proceeds/term

and principle [*sic*] where we want them is to guarantee the deal." Three days later, on December 18, 2011, Ms. Trump sent a revised term sheet to Ms. Vrablic on behalf of the Trump Organization, proposing to reduce the net-worth covenant to $2 billion and making the facility interest-only for five years. R. 1332-33, ¶ 582. There is no allegation that Deutsche Bank had any concern about Ms. Trump's father's ability to qualify as a guarantor, or that Deutsche Bank expressed any concern about her father's net worth. The Complaint also does not identify any further actions by Ms. Trump in connection with this transaction, which closed six months later on June 11, 2012. R. 1334, ¶¶ 587-588. There is no allegation that Ms. Trump ever signed, submitted, or made any representation about any statement of her father's personal wealth—for the Doral transaction or otherwise.

Separately, the Complaint alleges that, on February 11, 2016, Ms. Trump had a preliminary communication with Ms. Vrablic to explore an additional $50 million credit facility secured by Doral, for improvements to her father's Turnberry golf course in Scotland. R. 1355, ¶¶ 662-664. The loan never materialized. R. 1355, ¶ 666. The Complaint does not allege that Ms. Trump said anything false or misleading in connection with this conversation; nor does it allege that she said anything at all regarding her father's net worth. There is also no allegation that any statements of financial condition were discussed—let alone submitted—by any Defendant in connection with this unmaterialized loan transaction.

3. Old Post Office

The allegations about Ms. Trump's participation in the OPO redevelopment project are similarly innocuous: nowhere does the Complaint allege she ever participated in any fraudulent conduct or made a false statement to anyone.

In July 2011, the Trump Organization responded to a request from the General Services Administration ("GSA") for proposals to acquire a leasehold and redevelopment rights for the OPO in Washington, D.C. R. 1345, ¶¶ 623-625. Ms. Trump was involved in responding to this RFP—working with other employees of the Trump Organization "in crafting communications to the GSA . . . and in responding to deficiency comments raised by the GSA." R. 1345, ¶ 625. The Complaint states these communications "concerned, among other topics," a request for clarification about her father's personal financial statements, "including their departures from Generally Accepted Accounting Principles ("GAAP")." *Id*. The Complaint does not allege that the statements submitted at that time were false or misleading. The personal financial statements of Ms. Trump's father allegedly contained misrepresentations beginning with the 2011 statement, R. 1180, ¶ 1, which was not prepared until October 2011 and so was not submitted to the GSA as part of the July 2011 bid, *see* R. 1345, 1443, ¶¶ 623-624 & Ex. 3 at 20. In February 2012, the GSA selected the Trump Organization's development bid.

R. 1345, ¶ 626. On August 5, 2013, the GSA leased the property to the Trump Organization. *Id.*

In December 2013, the Trump Organization had preliminary discussions with the CRE and PWM divisions of Deutsche Bank to obtain a loan for the OPO development project. R. 1345, 1346, ¶¶ 627, 629-630. The Complaint alleges that Ms. Vrablic of PWM "kept close tabs on the bank's consideration of the request . . . at the urging of Ivanka Trump." R. 1345, ¶ 627.

On December 2, 2013, PWM provided Ms. Trump with a term sheet for a $170 million credit facility to finance the redevelopment of the OPO. R. 1346, ¶ 630. This term sheet required, among other terms, that her father guarantee the proposed facility and maintain a personal net worth of at least $2.5 billion. R. 1346, ¶ 631. The deal was structured as a construction loan—which meant, among other things, that the full loan amount would be disbursed over time through a series of "draw" requests to pay construction expenses, pursuant to a pre-established process set out in the loan agreement. R. 1350, ¶ 645.

The Complaint does not describe any statements or actions by Ms. Trump in the OPO negotiations after December 2, 2013. R. 1346-50, ¶¶ 631-644. The $170 million loan agreement closed on August 12, 2014. R. 1347, ¶ 634. Ms. Trump is not alleged to have signed the loan documents for this facility and, as with Doral, is not alleged to have ever submitted, prepared, or even discussed her father's

personal financial statements or net worth. Several years later, on December 21, 2016, the Complaint alleges that Ms. Trump signed a routine draw request for a $4,334,772.83 disbursement from that loan facility for construction expenses. R. 1350, ¶ 645. This action, too, was not alleged to be misleading in any way.

PROCEDURAL HISTORY

1. In 2019, the OAG commenced an investigation of Defendants under Executive Law § 63(12) for "repeated fraudulent or illegal acts . . . in the carrying on, conducting or transaction of business." Over three years, the OAG collected more than 1.7 million documents from Defendants and third parties, and conducted at least 55 investigative depositions, including a deposition of Ms. Trump. The investigation concluded when the OAG filed this plenary action on September 21, 2022. The Complaint pleads seven causes of action under § 63(12) against each Defendant. The first cause of action alleges "persistent and repeated fraud"; the second through seventh causes of action plead three violations of New York Penal Law, and three conspiracies to violate those substantive criminal provisions.

2. On October 13, 2022, the OAG moved for a preliminary injunction against certain Defendants and the appointment of an independent monitor. The OAG did not seek preliminary relief against Ms. Trump, *see* Proposed Order to Show Cause, NYSCEF No. 37, who has had no association with the Trump Organization since early January 2017, when she resigned to commence

government service. Nor did the trial court direct Ms. Trump to respond to the OAG's motion. *See* Order to Show Cause, NYSCEF No. 119. Nonetheless, the court issued a preliminary injunction against all Defendants, including Ms. Trump. NYSCEF No. 183. The court made no factual findings, and it failed to address the governing legal standards to support the issuance of the injunction against Ms. Trump. The OAG recognized the court's manifest error and moved by stipulation to exclude her from the court's order. The court released Ms. Trump from its injunctive order on December 2, 2022. NYSCEF No. 238.

3. In parallel with the preliminary-injunction briefing, Defendants moved to transfer this action to the Commercial Division. Previously, Administrative Law Judge Silvera had denied Defendants' request for reassignment, holding that "Judge Engoron may make a request to transfer this action to the Commercial Division." NYSCEF No. 123, at 3. Accordingly, Defendants (including Ms. Trump, in a separate filing) moved the trial court for reassignment. The OAG conceded that "this action meets the jurisdictional standards and subject-matter criteria for assignment to the Commercial Division." NYSCEF No. 33, at 1 (citation omitted). Yet, inexplicably, the trial court found that Judge Silvera had "already denied defendants' request to have the instant case transferred," and concluded that Judge Silvera's decision was "law of the case." NYSCEF No. 181,

at 4. The trial court ignored that Judge Silvera explicitly invited it to decide Defendants' pending motions to transfer this case to the Commercial Division.

4. On November 21, 2022, Defendants moved to dismiss the Complaint. R. 1140. Ms. Trump filed an individual motion arguing that the OAG had failed to state a claim against her and that any claims against her were barred by the statute of limitations. R. 2030. The OAG filed its opposition on December 9, 2022, R. 2067, and Ms. Trump filed her reply on December 23, 2022, R. 2192.

On January 4, 2023, the Court contacted the parties by email stating that it was considering litigation sanctions against certain counsel for Defendants—but not counsel for Ms. Trump—for repeating arguments in their motions to dismiss that the court had held were unlikely to succeed on the merits in its decision on the preliminary injunction. The court opined that its prior order "appear[ed] to be . . . law of the case." R. 1009, Email from Engoron, J. to Counsel (Jan. 4, 2023). Controlling case law states precisely the opposite. *See*, *e.g.*, *J.A. Preston Corp. v. Fabrication Enters., Inc.*, 68 N.Y.2d 397, 402 (1986) ("The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for."); *London Paint & Wallpaper Co. v. Kesselman*, 158 A.D.3d 423, 423 (1st Dep't 2018) ("[T]he granting of the preliminary injunction does not constitute the law of the case.").

On January 6, 2023, the court issued a nine-page order denying Defendants' motions to dismiss. The first four pages of that order addressed whether to impose sanctions on certain Defendants. The court ultimately declined to impose sanctions. The court briefly addressed arguments by other Defendants, then denied Ms. Trump's motion in the final two-and-a-half pages of its order.

Statute of Limitations. In her briefing, Ms. Trump argued that the Complaint is subject to the three-year statute of limitations set forth in *People v. Credit Suisse Securities (USA) LLC*, 31 N.Y.3d 622, 633 (2018), rather than the statutory six-year limitations period, *see* CPLR 213(9), which was enacted in August 2019 and does not apply retroactively. R. 2056-58; R. 2218-21. Ms. Trump also explained that the Complaint is untimely even under a six-year limitations period. The claims against her arise from transactions that closed in 2012 and 2014, and the "continuing wrongs" doctrine does not apply because the Complaint does not allege that she undertook any relevant act during the limitations period. R. 2053-58; R. 2217-24.

The trial court failed to address any of Ms. Trump's arguments. Instead, it held (R. 17) that a six-year statute of limitations applies in light of *People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409 (1st Dep't 2016)—a decision overruled five years ago that relied on a different statutory provision, *see* CPLR 213(1), which *Credit Suisse* expressly held does not apply to § 63(12) claims like

the ones here, *see* 31 N.Y.3d at 633. The trial court also declined to identify any act Ms. Trump committed within the limitations period, or to explain why adequately pleaded misconduct within the limitations period was unnecessary. The court merely summarized Ms. Trump's alleged conduct in October and December 2011, quoting from documents in the preliminary-injunction record. R. 17-18.

Section 63(12) Fraud. In her briefing, Ms. Trump argued that dismissal on the first cause of action was required because the Complaint does not allege that she made any misstatement regarding her father's net worth; that she had any role in preparing her father's personal financial statements; or that she even knew which assets on those statements were allegedly inflated, or why. R. 2042-48; R. 2202-12. The trial court failed to address these arguments, too. It observed that Ms. Trump "participated . . . in securing the loans" for Doral and OPO, R. 20, but offered no explanation why participation in negotiations over two structured credit transactions could support claims against Ms. Trump for the alleged inflation of assets on her father's personal financial statements. The Court never found that the Complaint adequately alleged Ms. Trump's knowledge of these purported errors. Rather, the Court assumed that Ms. Trump was required to establish that she *lacked* knowledge, and then observed that Ms. Trump's investigative deposition was not admissible evidence to carry that burden. *See id*. The Court's invocation of Ms. Trump's investigative testimony was bizarre not only because Ms. Trump

bears no burden to disprove anything on a motion to dismiss, but also because Ms. Trump never asked the Court to consider her testimony as grounds for dismissal.

Section 63(12) Illegality. Finally, Ms. Trump argued that the remaining causes of action, which plead criminal violations, should be dismissed. Ms. Trump identified the elements for each violation and explained why they were not satisfied. R. 2051-53; R. 2213-17. The trial court ignored all of this. It did not identify a single element of any of the pleaded criminal violations, much less explain how Ms. Trump satisfied those elements. For example, the court sustained causes of action that Ms. Trump committed insurance fraud, N.Y. Penal Law § 176.05, without identifying any allegation that Ms. Trump prepared for submission or actually submitted any document to an insurer, or even that she communicated in any capacity with any insurer.[1]

5. Ms. Trump, along with other Defendants, filed timely notices of appeal. Defendants since have answered the OAG's Complaint, and nearly have concluded the discovery process. The Court has observed that, "come hell or high water," trial will commence on October 2, 2023. NYSCEF No. 527, at 1.

[1] Ms. Trump requested oral argument, in part, to highlight all of these deficiencies. The court declined to hold oral argument before issuing its decision in early January, fourteen days after briefing closed in late December.

SUMMARY OF ARGUMENT

I. The trial court erred in finding the claims against Ms. Trump timely. All claims are time-barred. The Court found that Ms. Trump's conduct between 2011 to 2014—well outside the statute of limitations—could be actionable under the "continuing wrongs" doctrine. But that doctrine cannot rescue claims that accrued outside the limitations period. The lower court's suggestion to the contrary—and its failure to recognize that the claims against Ms. Trump accrued (at the latest) in 2014—constitute reversible error.

II. The trial court also erred in finding that the Complaint states a claim for fraud against Ms. Trump under § 63(12). The Complaint alleges "repeated and persistent fraud by preparing and certifying false and misleading valuations made in financial statements presented to lenders and insurers." R. 14. But the Complaint does not allege that Ms. Trump made any misrepresentation about her father's financial resources, that she participated in the preparation of her father's personal financial statements, or even that she knew which assets were included in those statements or how they were allegedly inflated. Given these pleading defects, the trial court's decision to permit the case to proceed was reversible error.

III. Finally, the trial court erred in finding that the six § 63(12) causes of action based on alleged violations of the New York Penal Law and conspiracy to violate the New York Penal Law were sufficiently alleged in the Complaint. The

Court permitted claims for falsification of business records, issuance of false financial statements, and insurance fraud to proceed despite a lack of any well-pleaded allegations supporting these claims against Ms. Trump. The Court also sustained the claims for conspiracy to commit each of these crimes, despite the fact that the OAG did not even attempt to defend the conspiracy counts below.

STANDARD OF REVIEW

This Court reviews a decision on a motion to dismiss *de novo*, applying the same standard as the trial court. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The Court asks whether, accepting the allegations as true, the facts alleged "giv[e] rise to a cause of action." *Chen v. Romona Keveza Collection LLC*, 208 A.D.3d 152, 157 (1st Dep't 2022). "Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the narrow question presented for review is not whether the plaintiff should ultimately prevail in this litigation, but whether the complaint states cognizable causes of action, the allegations in the complaint cannot be vague and conclusory." *Washington Ave. Assocs., Inc. v. Euclid Equip., Inc.*, 229 A.D.2d 486, 487 (2d Dep't 1996) (cleaned up). "Bare legal conclusions will not suffice." *Rios v. Tiny Giants Daycare, Inc.*, 135 A.D.3d 845 (2d Dep't 2016) (cleaned up).

ARGUMENT

I. The Claims Against Ms. Trump Are Untimely

As explained below, a three-year statute of limitations applied to the § 63(12) claims against Ms. Trump. *See infra* Part I.E. Neither the OAG nor the Court below has disputed that those claims are time-barred if the three-year statute of limitations applies. But even under the six-year (plus 228 days) limitations period urged by the OAG and applied, incorrectly, by the lower court, the claims against Ms. Trump are still barred. Those claims arise out of loan negotiations she carried out in 2011 and 2013, for loans that closed in 2012 and 2014. The OAG's case is thus, at best, eight years old and two years late.

The trial court nonetheless found the case timely by misapplying the "continuing wrongs" doctrine. That doctrine requires a court to identify a separate, actionable claim within the limitations period—but the trial court never did. The doctrine also does not rescue claims that are based on time-barred conduct—but the trial court assumed it could. This misapplication of the law—which allowed plainly time-barred claims to proceed—requires reversal. And because the Complaint does not allege any actionable conduct within the last three (or six) years, this Court should reverse and remand with instructions to dismiss.

A. The Claims Against Ms. Trump Accrued More Than Eight Years Ago

To calculate "[t]he time within which an action must be commenced," a court must identify the precise "time the cause of action accrued." CPLR 203(a). "The policies underlying a Statute of Limitations . . . demand a precise accrual date." *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 542 (1994). The trial court, however, failed to identify any accrual date for the claims against Ms. Trump.

The claims against Ms. Trump accrued (at the latest) in 2014. At bottom, the OAG claims that Ms. Trump is liable for fraud because she was "involved in multiple transactions procured [with] fraudulent financial statements." R. 2078. Where, as here, a claim rests on allegations that a transaction was fraudulently induced, the claim accrues when the transaction closes. *See Rogal v. Wechsler*, 135 A.D.2d 384, 385 (1st Dep't 1987) (fraudulent-inducement claim accrued "at the time of the execution of the contract"); *Boesky v. Levine*, 193 A.D.3d 403, 405 (1st Dep't 2021) (claim accrued when plaintiffs "entered into" "allegedly fraudulent transactions"); *Hamrick v. Schain Leifer Guralnick*, 146 A.D.3d 606, 607 (1st Dep't 2017) ("These claims accrued upon plaintiffs' making their investments."). The Doral loan closed on June 11, 2012; the OPO loan on August 12, 2014. R. 1334, 1347, ¶¶ 587, 634. Therefore, the § 63(12) claims based on Ms. Trump's role in procuring those loans accrued more than eight years ago.

B. The Lower Court Misapplied The Continuing Wrongs Doctrine

Claims that accrued eight years ago are untimely even under a six-year statute of limitations. The trial court sustained the Complaint against Ms. Trump, however, because it found that the OAG "demonstrated the potential applicability of the 'continuing wrong' doctrine," and the Complaint "sufficiently alleges Ms. Trump's participation in continuing wrongs." R. 17, 20. The court misconstrued the "continuing wrongs" doctrine and misapplied it to Ms. Trump's case.

Under New York law, a plaintiff cannot bring suit merely because it suffers "continuing *effects* of earlier unlawful conduct" committed outside the limitations period. *Selkirk v. State*, 249 A.D.2d 818, 819 (3d Dep't 1998) (emphasis added). Rather, a plaintiff must allege a "continuing *wrong*." *CWCapital Cobalt VR Ltd.*, 195 A.D.3d at 17 (emphasis added). That is, when the complaint pleads "a new set of facts that forms part of a series with the original wrong," the plaintiff must show that the new facts, on their own, give rise to "a separate, actionable wrong." *Id.* at 18-19. A court then evaluates the "separate" wrong as "a new claim, with a new limitations period." *Id.* at 18.

Below, the trial court found "the application of the continuing wrong doctrine [to be] particularly compelling," in part because the Doral and OPO credit facilities "continued in effect for many years." R. 19. Binding case law from the Court of Appeals squarely forecloses the court's analysis. In *35 Park Ave. Corp. v.*

Campagna, 48 N.Y.2d 813 (1979), the Court of Appeals rejected the plaintiff's "theory that an unconscionable lease constitutes a continuing wrong." *Id.* at 815. Only "[t]he execution of the unconscionable lease is the event giving rise to a claim," the Court of Appeals held, "notwithstanding that its effect may last the life of the lease." *Id.* Similarly here, the "execution" of the Doral and OPO loans is what arguably gives rise to the OAG's § 63(12) claims against Ms. Trump. It is irrelevant that the "loans . . . continued in effect for many years" thereafter. R. 19; *see also*, *e.g.*, *Pike v. N.Y. Life Ins. Co.*, 72 A.D.3d 1043, 1048 (2d Dep't 2010) (fraudulent-inducement claim accrued at execution even though agreement's terms extended into limitations period); *Goldberg v. Mfrs. Life Ins. Co.*, 242 A.D.2d 175, 177, 180 (1st Dep't 1998) (same for 1988 contract with terms "through 2019").

The trial court also observed that "[e]ach of the loans required annual submissions of Mr. Trump's SFC and a certification that the Statements were true and accurate." R. 19. But the court identified no allegation in the Complaint that Ms. Trump ever submitted or certified her father's personal financial statements at any time, much less during the six years before the OAG filed suit. *See infra* at 27-28. Instead, the court merely remarked that Ms. Trump "spearheaded the acquisition" of Doral and had "repeated interaction with employees from Deutsch [*sic*] Bank" in 2011 to secure financing for the project. R. 19. Ms. Trump's efforts in acquiring Doral—now more than a decade old—do not support any inference

that she had any role in certifying her father's net worth in the six years before the OAG filed suit. Indeed, Ms. Trump left the Trump Organization in January 2017. The trial court plainly misapplied the continuing wrongs doctrine to her case.

C. The OAG's "Scheme" Allegations Do Not Render The Claims Against Ms. Trump Timely

Elsewhere in its order, the trial court separately concluded that the continuing wrongs doctrine applies because "the verified complaint alleges an ongoing scheme by defendants that extends up until at least 2021." R. 18. The court did not explain whether its "scheme" theory subjected any Defendant to liability for acts committed outside the (incorrect) six-year limitations period, nor did it state whether its analysis applied to Ms. Trump individually. To the extent the court implicitly allowed claims to proceed against Ms. Trump based on time-barred conduct because she participated in a "scheme" that allegedly persisted into 2021, the court's order twice violates settled New York law.

First, "the continuing wrong doctrine only avails [the OAG] of claims that arose within six years of the commencement of the action." *CWCapital*, 195 A.D.3d at 20. It "does not toll the statute of limitations for any claims outside of [the limitations] period." *Id.* The doctrine reflects "the principle that continuous injuries create separate causes of action barred only by the running of the statute of limitations against each," *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631, 639 (2014) (citation omitted), not that later-accruing claims revive earlier ones, *see*

Jensen v. Gen. Elec. Co., 82 N.Y.2d 77, 87 (1993) (under continuing wrongs doctrine, "that portion of damages for injuries sustained more than three years prior also became continuously barred each day"). The same rule applies in the context of a "scheme" or conspiracy. *See Singleton v. City of New York*, 632 F.2d 185, 192 (2d Cir. 1980) ("The existence of a conspiracy does not postpone the accrual of causes of action arising out of the conspirators' separate wrongs."); *Henry v. Bank of Am.*, 147 A.D.3d 599, 601-02 (1st Dep't 2017) (declining to revive untimely fraudulent-inducement claim because plaintiff alleged an "ongoing 'scheme'"); *Boesky*, 193 A.D.3d at 405-06 ("[S]ince the fraud claim is time-barred, the claim for conspiracy to commit fraud . . . is not viable."). Thus, alleging fraudulent acts during and after 2016 does not revive claims against Ms. Trump for any conduct she undertook before that time.

The trial court's citation (R. 18) to *Palmeri v. Willkie Farr & Gallagher LLP*, 156 A.D.3d 564, 568 (1st Dep't 2017), which describes the continuing wrongs doctrine as "toll[ing] the limitation period until the date of the commission of the last wrongful act," is not to the contrary. There, unlike here, the defendant committed separate, actionable conduct within the limitations period. *See id.* at 567-68. Further, despite using the word "toll," *Palmeri* did not uphold claims arising outside the limitations period. Again, New York law does not allow such claims to proceed, as this Court reiterated just last year. *See Manipal Educ.*

Americas, LLC v. Taufiq, 203 A.D.3d 662, 663 (1st Dep't 2022) (continuing wrongs doctrine "limit[s] [the plaintiff's] damages to losses arising from the transactions occurring within six years of the filing of the complaint").

Second, in civil cases, courts dismiss claims against defendants who are alleged to have committed conduct only outside the limitations period—even if co-conspirators committed acts within the limitations period. *See*, *e.g.*, *Transp. Workers Union of Am. Loc. 100 AFL-CIO v. Schwartz*, 17 A.D.3d 218, 218-19 (1st Dep't 2005); *Werbelovsky v. Rosen*, 260 A.D. 222, 223-24 (2d Dep't 1940); *Scholes v. Am. Kennel Club, Inc.*, 1999 WL 799532, at *6 (S.D.N.Y. Oct. 7, 1999). Thus, the trial court erred to the extent it decided that the claims against Ms. Trump can proceed based on alleged, timely conduct undertaken by others.

People v. Katz, 16 Misc. 3d 1104(A), 2007 WL 1814652 (Sup. Ct. June 4, 2007), illustrates this point. There, the OAG sued several defendants for a real-estate-related "conspiracy to defraud" that involved, among other things, "submitting false documents" with "inflated . . . financial assets" to "various lending institutions." *Id.* at *1. One defendant moved to dismiss because the only claims against him arose from transactions that closed before the limitations window opened. *Id.* at *2. The court ordered dismissal, and rejected as insufficient the OAG's generalized allegations that the defendant participated in an

ongoing scheme where others allegedly committed actions in the limitations period. *Id.*

The same follows here. Any statute-of-limitations analysis must always focus on when a specific defendant committed a specific act. The trial court's failure to engage in that accrual analysis is reversible error. *See Singleton*, 632 F.2d at 192 ("Characterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as 'a single series of interlocking events' does not postpone accrual of claims based on individual wrongful acts.").

D. No Claims Against Ms. Trump Accrued In The Six Years Before This Lawsuit

The OAG argued below that two actions by Ms. Trump in 2016 sufficed to render all claims against her timely: (1) a "draw request" she signed in December 2016 under the OPO loan and (2) a February 11, 2016 communication seeking an additional loan secured by Doral (which never materialized). The trial court did not adopt either ground, and neither saves the OAG's claims from dismissal.

OPO Draw. The OPO draw does not trigger a new limitations period under the continuing wrongs doctrine because it does not constitute a newly accruing "wrong." A "draw" simply requests payment under an agreement allegedly procured by fraud. Requests for payment under an allegedly fraudulently induced agreement are "continuing effects," not "new wrongs." *E.g.*, *Henry*, 147 A.D.3d at

601; *Pike*, 72 A.D.3d at 1048 (same); *DuBuisson v. Nat'l Union Fire Ins. of Pittsburgh*, 2021 WL 3141672, at *8-9 (S.D.N.Y. July 26, 2021) (collecting cases).

February 2016 Communication. Below, the OAG briefly pointed (R. 2089) to a single communication between Ms. Trump and Deutsche Bank on February 11, 2016, where Ms. Trump asked about obtaining additional financing secured by the Doral property. That financing never occurred. R. 1355, ¶¶ 662-666. Nor is there any allegation that this conversation contained *any* misrepresentations—or any discussion of financial statements. The OAG has yet to explain how this single conversation (which is not alleged to be misleading in any way) could constitute an independently actionable violation of § 63(12).

E. A Three-Year Period Applies In Any Event

Even if the OPO draw request or February 2016 communication were separately actionable, any claim against Ms. Trump remains untimely under the three-year limitations period that applies to the OAG's case. The trial court incorrectly concluded that the OAG's case is subject to a six-year statute of limitations, tolled for an additional 228 days by executive order.

1. Before the trial court, Ms. Trump explained at length why a three-year limitations period applies. R. 2053-58; R. 2218-19. In 2018, the Court of Appeals confirmed that where, as here, the OAG asserts a § 63(12) fraud claim without alleging all common-law elements of fraud, the claim is subject to a three-year

limitations period. *See Credit Suisse*, 31 N.Y.3d at 633-34. The legislature abrogated *Credit Suisse* in August 2019 and enacted a six-year limitations period, *see* CPLR 213(9); S.B. S6536, 2019-2020 Leg. Sess., but the August 2019 Amendment did not apply to claims that accrued years earlier. "For centuries [New York] law has harbored a singular distrust of retroactive statutes." *James Square Assocs. LP v. Mullen*, 970 N.Y.3d 233, 246 (2013). Thus, a "statute's text must unequivocally convey the aim of reviving claims." *Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 370 (2020). The 2019 Amendment did not do so. It did not "provid[e] a limited window when stale claims may be pursued." *Id.* at 371. Nor does the Amendment's instruction that it shall "take effect immediately," S.B. S6536 § 2, "support retroactive application," *e.g.*, *State v. Daicel Chem. Indus., Ltd.*, 42 A.D.3d 301, 302 (1st Dep't 2007).

The trial court ignored *Credit Suisse*, the 2019 Amendment, and the retroactivity question. Instead, the court held that a six-year statute of limitations applies in light of *People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409 (1st Dep't 2016). R. 17. But *Trump Entrepreneur* was overruled five years ago—by *Credit Suisse*, a Court of Appeals decision Ms. Trump discussed at length before the trial court. R. 2043, 2054. *Trump Entrepreneur* held that CPLR 213(1) governs all § 63(12) claims, *see* 137 A.D.3d at 418, which *Credit Suisse* expressly rejected, *see* 31 N.Y.3d at 633. None of the parties—not even the OAG—asked

the court to apply CPLR 213(1) or relied on *Trump Entrepreneur* for this point, because it is obvious that neither is relevant. The trial court thus failed to apply the actual, binding authority to the legal question before it.

The court's manifest error warrants reversal. Although two recent First Department decisions—which the trial court did not cite—have remarked that the 2019 Amendment applies retroactively, neither decision applied the required retroactivity analysis, and this Court's observation was dictum in both cases. *See People v. Allen*, 198 A.D.3d 531, 532 (1st Dep't 2021); *People v. JUUL Labs, Inc.*, 212 A.D.3d 414, 416 (1st Dep't 2023). In each case, the defendants committed actionable violations within three years of the OAG's Complaint. *See People v. Allen*, 2021 WL 394821, at *5 (N.Y. Sup. Ct. Feb. 4, 2021); *Allen*, 198 A.D.3d at 532; *JUUL*, 212 A.D.3d at 417; *People v. Juul Labs, Inc.*, 2022 WL 2757512, at *2-4 (N.Y. Sup. Ct. July 14, 2022). Here, there are no similar allegations as to Ms. Trump. This Court should not sustain the trial court's unreasoned opinion if it grapples, for the first time, with this important question. Nor does the dictum in *Allen* and *JUUL* provide any guidance.

What is more, construing CPLR 213(9) to apply to the claims against Ms. Trump would violate New York's Due Process Clause. The legislature may "constitutionally revive . . . cause[s] of action" only where the "circumstances are exceptional." *Gallewski v. H. Hentz & Co.*, 301 N.Y. 164, 174 (1950). The 2019

Amendment does not, as the Court of Appeals requires, revive claims "for a limited period of time" in response to an "identifiable injustice." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 399-400 (2017) (injustices include "occupation of the plaintiffs' countries of residence during World War II" and "latent injuries caused by harmful exposure"). Indeed, the OAG concedes that no one in this case has suffered any "financial loss." R. 1190, ¶ 24. There is no "exceptional" need to revive any claims against Ms. Trump.

2. In addition to a six-year limitations period, the trial court tacked on 228 days because "other tolls . . . may apply here." R. 18 n.3. Specifically, the court identified "a series of Executive Orders that the Governor issued in response to the COVID-19 pandemic." *Id.*[2] In her briefing below, Ms. Trump explained why those orders did not "toll" the statute of limitations. The Executive Orders temporarily suspended the statute of limitations, and so plaintiffs in New York did not enjoy an *additional* 228 days to file their claims once the Orders expired. R. 2220-21. Ms. Trump objected to an extra 228 days because, if the court found the February 2016 communication to be actionable, it would fall within the (incorrect) six-year statute of limitations only if tolling were available. R. 2221.

[2] *See* Exec. Order Nos. 202.8, 202.21, 202.27, 202.28, 202.29, 202.30, 202.38, 202.39, 202.40, 202.48, 202.49, 202.50, 202.55, 202.55.1, 202.60.

The trial court ignored Ms. Trump's arguments and offered no analysis. While initially surmising that "other tolls . . . *may* apply," R. 18 n.3 (emphasis added), the court later concluded, without any discussion, that supposed COVID tolls *did* apply against Ms. Trump, R. 21. The trial court did so in error. The Governor's COVID orders were not tolls, for the reasons given in *McLaughlin v. Snowlift Inc.*, 71 Misc. 3d 1226(A), 2021 WL 2173276 (Sup. Ct. May 20, 2021). While this Court concluded otherwise in *Murphy v. Harris*, 210 A.D.3d 410, 411 (1st Dep't 2022)—another case the trial court did not cite—that does not end the matter. This Court should depart from its prior, flawed decisions. *See*, *e.g.*, *Sport Rock Int'l, Inc. v. Am. Cas. Co. of Reading*, 65 A.D.3d 12, 27 (1st Dep't 2009).

Additionally, Ms. Trump raised below a constitutional issue of first impression that neither *Murphy* nor any other court has addressed: if the COVID Orders are tolls, they are unconstitutional. R. 2221. The trial court ignored this issue entirely. Under New York's nondelegation doctrine, the "Legislature may not . . . grant the power to repeal general statutes." *Delgado v. State*, --- N.E.3d ---, 2022 WL 16973193, at *4 (N.Y. Nov. 17, 2022). A "toll" repeals an existing statute of limitations and imposes a new one. That is a legislative act. *Eisenbach v. Metro. Transp. Auth.*, 62 N.Y.2d 973, 975 (1984) ("expansion of . . . statute[s] [of limitations] . . . should be accomplished, if at all, by legislative action."). If Governor Cuomo's orders were "tolls," they are unconstitutional and of no effect.

II. The Complaint Fails To Allege That Ms. Trump Engaged In Fraud Under § 63(12)

On the merits, the trial court erred when it held that the Complaint adequately pleads a § 63(12) claim for fraud against Ms. Trump. To state a claim for § 63(12) fraud, the OAG must allege either that the defendant made a misrepresentation, *see Credit Suisse*, 31 N.Y.3d at 633 (§ 63(12)'s definition of "fraud" is identical to that in Martin Act); *People v. Federated Radio Corp*., 244 N.Y. 33, 41 (1926) (Martin Act fraud requires identifying misrepresentation), or that the defendant actively participated in a misrepresentation made by others, *see*, *e.g.*, *Abrahami v. UPC Constr. Co*., 176 A.D.2d 180, 180 (1st Dep't 1991). Because § 63(12) fraud claims are subject to the "stringent" pleading standard of CPLR 3016(b), each defendant's misstatement or act of participation must be "pleaded with particularity." *CIFG Assur. N. Am., Inc. v. J.P. Morgan Sec. LLC*, 146 A.D.3d 60, 63 (1st Dep't 2016).[3]

[3] The trial court faulted "Defendants"—and therefore Ms. Trump—for arguing that CPLR 3016(b) applies in § 63(12) fraud cases "without citing any authority in support thereof." R. 18. The court's observation is plainly untrue. Ms. Trump cited several cases applying CPLR 3016(b) in § 63(12) fraud cases, R. 2204 n.2, including binding First Department precedent, *see People v. Katz*, 84 A.D.2d 381, 384-385 (1st Dep't 1982). The lower court ignored that case law and instead cited one inapposite case from the Southern District of New York applying Rule 9(b) of the Federal Rules of Civil Procedure.

The Complaint does not allege—with particularity or otherwise—that Ms. Trump ever made any misrepresentation to anyone. Nor does it allege she participated in alleged misrepresentations made by others. The Complaint alleges that Defendants "inflated Mr. Trump's personal net worth . . . to induce banks to lend money to the Trump Organization on more favorable terms." R. 1180-81, ¶ 3; R. 14 (Defendants allegedly "prepar[ed] and certif[ied] false and misleading valuations made in financial statements presented to lenders and insurers"). While the Complaint describes Ms. Trump's communications with Deutsche Bank to obtain secured financing for the Doral and OPO development projects, nowhere does it allege that Ms. Trump made any misrepresentation about her father's statements of financial condition. The Complaint also fails to allege that Ms. Trump participated in, or even knew of, the alleged falsification of her father's personal financial statements. The Complaint alleges only Ms. Trump's lawful actions: that she participated in negotiating secured credit transactions (which have been fully repaid) for two real estate development projects (which have succeeded). The complete absence of Ms. Trump's direct or indirect participation in preparing, reviewing, or disseminating her father's statements of financial condition is fatal to the OAG's claim.

A. The Complaint Fails To Allege That Ms. Trump Made Any Misrepresentation

The Complaint identifies only two transactions in which Ms. Trump allegedly made statements to Deutsche Bank: the purchase and development of Doral, and the lease and development of OPO.[4] The Complaint does not allege that Ms. Trump made a misrepresentation to anyone in either transaction, much less with the requisite specificity to allege fraud.

Doral. The Complaint describes Ms. Trump's interactions with Deutsche Bank in November and December 2011 to obtain a secured credit facility to finance the acquisition of the Doral property. R. 1330, 1331, 1332-33, ¶¶ 572, 574, 576, 582. During those two months, the Complaint alleges that Ms. Trump sent Deutsche Bank an "Investment Memo" that set out the "financial projections for the Doral property." R. 1330, 1331, ¶¶ 572, 576. The Complaint does not allege that the "Investment Memo" was at all misleading, or even that it referenced her father's statements of financial condition. The remaining allegations about Ms. Trump's involvement in obtaining the acquisition financing for the Doral project do not suggest that Ms. Trump made any representation about her father's net

[4] The Complaint includes a threadbare allegation that Ms. Trump "negotiated loans on Trump Organization properties" at Trump Chicago, R. 1194, 1369, ¶¶ 33, 721, but offers no additional allegations about these negotiations. An allegation "devoid of specific factual instances of fraud" does not satisfy the CPLR 3016(b) pleading requirement. *Electron Trading, LLC v. Morgan Stanley & Co.*, 157 A.D.3d 579, 581 (1st Dep't 2018).

worth, much less with the particularity necessary to allege fraud. R. 1331, ¶ 574 (alleging a conversation "about the loan"), ¶ 576 (same).

The trial court never attempted to identify any specific misrepresentation that Ms. Trump allegedly made. Instead, it noted that Ms. Trump negotiated to reduce her father's "net worth covenant from $3 billion to $2 billion." R. 19. The court also remarked that Ms. Trump "advocated for a guaranteed transaction over the objections of Trump Organization in-house counsel." *Id.* (citing R. 1330-33, ¶¶ 571-582). But neither statement is alleged to be false, and the latter was not even made to Deutsche Bank or any third party. The court also referred to "emails in evidence [*sic*] that indicate Ms. Trump's repeated interaction with employees from Deutsch [*sic*] Bank," but the only document it cited was an email Deutsche Bank sent to Ms. Trump with the proposed terms of a credit facility for Doral that included a guaranty from her father. *Id.* (citing R. 2124). The court identified no statement Ms. Trump made to Deutsche Bank, much less a false one.

OPO. The Complaint does not allege that Ms. Trump made any misrepresentation in connection with obtaining the OPO lease or the negotiations over the secured financing. The Complaint alleges only a single statement that Ms. Trump made to Deutsche Bank about the OPO project. On December 21, 2016, two years after the OPO financing closed, Ms. Trump allegedly "signed a draw request." R. 1350, ¶ 645. Signing a "draw request"—*i.e.*, submitting trade and

other construction-related receipts to obtain disbursements of funds based on a pre-approved work plan—is not fraudulent. The Complaint does not allege that Ms. Trump made any misrepresentation in connection with this draw request, much less one involving her father's statements of financial condition.

Again, the court's order does not identify any misrepresentation Ms. Trump made to Deutsche Bank. Instead, the court observed that Ms. Trump "led the charge" to secure the development rights from GSA for the OPO renovation project. R. 20. That is irrelevant. The OAG does not allege any fraud against GSA. The alleged scheme to defraud focused on certain "lenders and insurers." R. 14. Even the one paragraph of the Complaint alleging that Ms. Trump was involved "in crafting communications to the GSA," including communications about "Mr. Trump's Statements of Financial Condition," does not allege any misrepresentation. R. 1345, ¶ 625. That Ms. Trump negotiated development rights does not imply that she made any misstatements regarding her father's net worth.

That is particularly true because the Complaint does not even allege that an inflated personal financial statement was submitted to GSA. Rather, as the Complaint makes clear, the OPO bid was submitted in July 2011, and the first allegedly fraudulent personal financial statement, R. 1180, ¶ 1, was not issued until October 2011, R. 1443, Ex. 3 at 20. That was well after Ms. Trump's vague and non-specific role in "crafting communications" with GSA. There is simply no

allegation in the Complaint that Ms. Trump ever made any misrepresentation regarding OPO to GSA, Deutsche Bank, or anyone else.

B. The Complaint Fails To Plead That Ms. Trump Participated In Or Knew Of Any Alleged Misrepresentation

The Complaint also fails to plead Ms. Trump's § 63(12) liability, as a corporate officer, for misrepresentations made by others. "[C]orporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it." *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 44 (1980); *People v. Apple Health & Sports Clubs, Ltd.*, 80 N.Y.2d 803, 807 (1992) (applying *Midland* test to § 63(12) fraud case). More recently, this Court has recognized "that a director may be held individually liable to third parties for a corporate tort if he either participated in the tort or else 'directed, controlled, approved, or ratified the decision that led to the plaintiff's injury.'" *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 49 (1st Dep't 2012) (quoting 3A *Fletcher Cyclopedia of Corporations* § 1135); *see also* 3A *Fletcher Cyclopedia of Corporations* § 1137 (requiring "personal participation in tortious acts" or "knowing consent or approval"). The Complaint lacks allegations sufficient to state a § 63(12) claim against Ms. Trump based on her responsibility as a corporate officer for alleged misrepresentations made by others.

1. The Complaint Does Not Plead That Ms. Trump Actively Participated In The Alleged Fraud

To plead her active participation in a § 63(12) fraud, the Complaint must allege Ms. Trump's personal involvement in the "misrepresentation at issue." *Reynolds v. Lifewatch, Inc.*, 136 F. Supp. 3d 503, 521 (S.D.N.Y. 2015); *see Marine Midland Bank*, 50 N.Y.2d at 44 ("participat[ion] in the misrepresentation"). The Complaint lacks any allegations that Ms. Trump had any involvement in the specific fraud alleged in the Complaint: inflating the value of assets on her father's statements of financial condition. As set forth above, *see supra* at 4-6, nowhere does the Complaint allege that Ms. Trump directly or indirectly prepared, reviewed, or approved any aspect of her father's personal financial statements. The Complaint in fact alleges the opposite. Ms. Trump is not among the individuals who allegedly (i) were responsible for the statements, R. 1181-82, ¶ 6; (ii) directed other employees to prepare valuations, R. 1202-03, ¶ 54; (iii) prepared supporting spreadsheets, R. 1204, ¶ 62; (iv) "certified the accuracy" of the statements submitted, R. 1336-37, ¶ 595; or (v) were "key individual players" in the alleged fraud, R. 1379, ¶ 758. The allegations necessary to plead that Ms. Trump, as a non-speaker, could be liable for the alleged scheme are non-existent.

The trial court yet again misapprehended controlling law when it nonetheless declined to dismiss the Complaint. The court allowed the § 63(12) fraud claim to proceed because "Ms. Trump participated far more in securing the

loans than just passively receiving emails." R. 20; R. 19 (Ms. Trump "was responsible for negotiating the terms of the [Doral] loan"). "Securing the loans," however, is not the alleged fraud. "[P]reparing and certifying false and misleading valuations made in financial statements" is the alleged fraud. R. 14. That Ms. Trump negotiated secured credit facilities does not imply that she had any role in preparing the alleged misrepresentations in her father's statement of financial condition. *See*, *e.g.*, *Abrahami v. UPC Constr. Co.*, 224 A.D.2d 231, 233-34 (1st Dep't 1996) (no participation where director—despite providing investors with inflated financial statements—had no role in preparing the statements); *Frawley v. Dawson*, 32 Misc. 3d 1207(A), 2011 WL 2586369, at *9 (Sup. Ct. May 20, 2011) (that a party "may have brokered a loan transaction" where others allegedly committed fraud "does not by itself create an inference" that the party assisted the fraud); *RKA Film Fin., LLC v. Kavanaugh*, 56 Misc. 3d 1203(A), 2017 WL 2784999, at *4 (Sup. Ct. June 27, 2017) (defendant conducting diligence on a financial transaction did not support inference that he participated in fraud); *Deleskiewicz v. Pitcher*, 60 A.D.2d 660, 660-61 (3d Dep't 1977) (dismissing fraud claims against real estate brokers despite involvement in transaction where *others* made misstatements). The court erred when it held otherwise.

The court also relied on *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486 (2008), to support its determination that Ms. Trump's involvement in

lawful negotiations over a credit facility constituted "participation" in the alleged fraud. Again, the court misapprehended governing law. In *Pludeman*, the Court of Appeals did not require the plaintiffs to plead specific allegations connecting each corporate officer defendant to the alleged scheme, because the "concrete facts '[were] peculiarly within the knowledge of the part[ies]' charged with the fraud." *Id.* at 491. It was enough, in that case, for the plaintiffs to plead allegations "sufficient to permit a reasonable inference" that the defendants participated in the identified misrepresentations. *Id.* at 491-92. Specifically, "[t]he very nature of the scheme"—"systematic[ally]" employing parallel tactics to hock deceptive leases "nationwide"—supported the inference that the defendant corporate officers had participated in the fraudulent conduct. *Id.* at 493.

Pludeman does not support any § 63(12) claim against Ms. Trump. After three years of investigation, the OAG "has direct access to specific information regarding the parties involved in the communications" at issue. *RKA Film Fin., LLC v. Kavanaugh*, 60 Misc. 3d 1223(A), 2018 WL 3973391, at *4 (Sup. Ct. Mar. 5, 2018). Any "reliance on [*Pludeman*] to argue that specific details need not be alleged . . . is therefore unavailing." *Id.* at *4-5. Further, the Complaint does not allege a scheme that, by its "nature," required Ms. Trump's participation. *See Sargiss v. Magarelli*, 12 N.Y.3d 527, 531 (2009) (defendant liable because "it would have been impossible" to commit the fraud without his participation); *In*

Touch Concepts, Inc. v. Cellco P'ship, 2013 WL 6182949, at *6 (S.D.N.Y. Nov. 18, 2013) ("nature of the scheme" did not "give rise to an inference" that defendant "was necessarily involved"), *aff'd*, 788 F.3d 98 (2d Cir. 2015). Ms. Trump is alleged only to have participated in discussions regarding the terms for financing two redevelopment projects. She is not alleged to have participated in the preparation or endorsement of the statements of financial condition submitted on behalf of her father to support the recourse guaranty on the relevant credit facilities. Indeed, the Complaint names other Defendants who are alleged to have prepared or certified the statements of financial condition, but it does not include Ms. Trump in those allegations. *See supra* at 33-38. It would not be a "reasonable inference" under *Pludeman*, to say the least, to infer that Ms. Trump participated in a scheme from which the Complaint excludes her.

2. The Complaint Does Not Plead That Ms. Trump Had Actual Knowledge Of The Alleged Fraud

To plead "actual knowledge," the Complaint must allege that Ms. Trump had "knowledge of the deceptive nature" of the alleged scheme. *FTC v. Quincy Bioscience Holding Co.*, 389 F. Supp. 3d 211, 220 (S.D.N.Y. 2019). Thus, the Complaint must allege that Ms. Trump knew her father's statements of his personal wealth were inflated in a manner that would "misle[a]d a reasonable investor about the nature of the investment"—here, fully collateralized real estate loans. *People*

v. Barclays Cap. Inc., 47 Misc. 3d 862, 869 (Sup. Ct. 2015) (cleaned up); R. 17 (noting that § 63(12) requires "material fraudulent misstatements").

The Complaint fails to plead that Ms. Trump actually knew of any alleged inflation in the value of assets included on her father's statements of financial condition, material or otherwise. While the Complaint alleges that those statements were based on improper or undisclosed valuation methodologies, and relied on inaccurate data, R. 1223, 1231, ¶¶ 136, 175, it completely fails to allege that Ms. Trump actually knew about these purported issues. There is no allegation that Ms. Trump knew (i) which assets were included on her father's personal financial statements; (ii) which valuation methodologies needed to be applied to specific assets; (iii) whether GAAP applied to personal statements of financial condition; (iv) that the valuation methodologies were not being properly applied; or (v) that the resulting valuations, either individually or in the aggregate, violated (or were material to) any minimum net-worth covenant. *See RKA Film Fin., LLC v. Kavanaugh*, 162 A.D.3d 418, 419 (1st Dep't 2018) (knowledge about funds' usage was insufficient to show "aware[ness] that misrepresentations had been made" about funds). Without such allegations, the Complaint fails to allege that Ms. Trump had actual knowledge of the alleged misstatements.

The trial court failed to make any finding of Ms. Trump's actual knowledge. It asserted that Ms. Trump had "communications with Deutsche Bank about

SFCs," R. 20, and recounted that the Doral and OPO loans "required annual submissions of Mr. Trump's SFC," R. 19. But nowhere does the Complaint allege that Ms. Trump discussed her father's statements of financial condition with Deutsche Bank—or anyone else. Nor did the OAG ever argue that Ms. Trump had "communications with Deutsche Bank about SFCs." The trial court manufactured that allegation out of whole cloth. Its order cites precisely nothing for its assertion.

Regardless, even if Ms. Trump knew that, under the relevant loan documentation, her father was required to submit and certify information about his net worth, that is not an allegation that she knew his statements of financial condition were allegedly fraudulent. Again, to state a fraud claim under § 63(12), the Complaint must allege Ms. Trump's "knowledge of the *deceptive nature*" of the financial statements. *Quincy Bioscience*, 389 F. Supp. 3d at 220-21 (emphasis added) (no knowledge of deceptive marketing where officer merely "reviewed the corporate defendants' advertising"). Allegations that Ms. Trump negotiated terms for secured real estate credit facilities say nothing about her knowledge of the accuracy of asset valuations on her father's personal financial statements. *See People v. Greenberg*, 95 A.D.3d 474, 493 (1st Dep't 2012) (Catterson, J., concurring in part and dissenting in part) ("New York law clearly provides that a corporate officer's knowledge of just the transaction itself is insufficient."); *Hubbard v. BankAtlantic Bancorp, Inc.*, 625 F. Supp. 2d 1267, 1273, 1286-88

(S.D. Fla. 2008) (alleged "involve[ment] in the management" of "commercial real estate" loans did not plead knowledge of fraudulent "lending practices").

The court's observations about OPO specifically were even more misguided. The court noted the Complaint's allegation that Ms. Trump engaged in "communications" to GSA regarding departures from GAAP on her father's statements of financial condition. R. 20. That observation is irrelevant under the proper legal standard. The OAG does not allege that any such statement submitted to GSA was fraudulent, *see supra* at 10-12, and Ms. Trump's "knowledge" of "transactions . . . completely unobjectionable at the time they were agreed to" does not imply she had knowledge of "subsequent alleged misrepresentation[s]," *Nat'l Westminster Bank USA v. Weksel*, 124 A.D.2d 144, 147 (1st Dep't 1987). If anything, alerting a counterparty to a GAAP departure on an SFC is a sign of good faith, not fraud. *See In re Ambac Fin. Grp., Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 280 (S.D.N.Y. 2010) (departures from GAAP are not fraudulent, particularly if "disclos[ed]" or explained with "cautionary language").

Finally, and inexplicably, the court referenced Ms. Trump's investigative testimony as a basis for denying her motion to dismiss. The court observed that Ms. Trump testified that she "does not understand statements of financial condition and that she does not even know if they would include all assets and liabilities." R. 20. That testimony was not included in the Complaint, nor did Ms. Trump

invoke it in her motion to dismiss. Nonetheless, the court denied Ms. Trump's motion to dismiss because it was unwilling to make a "credibility determination" about Ms. Trump's testimony, observing "such . . . determination[s]" are "premature on a motion to dismiss." *Id.*[5]

The court's analysis grossly misapplied the legal standard on a motion to dismiss. Ms. Trump's "credibility" as a witness provides no basis whatsoever for adjudicating a motion for dismissal of the Complaint under CPLR 3211(a)(7). *See Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38 (2d Dep't 2006) ("[W]hether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss."). Ms. Trump does not have to prove her lack of knowledge at the motion-to-dismiss stage. Rather, the sole question is whether the Complaint sufficiently states all of the required elements of a § 63(12) claim. The court's confusion on this basic point only underscores the significant errors in the court's adjudication of Ms. Trump's motion to dismiss.

[5] This (confusing) point was first made in the OAG's opposition to Ms. Trump's opening brief. R. 2082. Ms. Trump's reply brief pointed out that she was not relying on her testimony, and so the argument was irrelevant. R. 2211 n.6. The trial court's order parrots the OAG's brief, and never mention's Ms. Trump's reply. R. 20.

III. The Complaint Fails To Allege That Ms. Trump Engaged In "Illegal Acts" In Violation Of § 63(12)

Finally, the court erred in failing to dismiss the remaining six causes of action, which allege certain criminal violations. The alleged criminal violations include (1) falsifying business records in violation of New York Penal Law § 175.05 (second cause of action); (2) issuing false financial statements in violation of New York Penal Law § 175.45 (fourth cause of action); and (3) insurance fraud in violation of New York Penal Law § 176.05 (sixth cause of action). The Complaint also alleges separate conspiracies to violate each of these substantive provisions (third, fifth, and seventh causes of action, respectively).

The trial court sustained each of these claims without discussion. In so doing, it committed at least two reversible errors. *First*, the court failed to identify any allegations to support any of the criminal counts. No such allegations exist. *Second*, the court permitted the conspiracy counts to proceed despite stating in its order that the OAG was not advancing conspiracy claims, and despite the OAG's decision to abandon those claims in its briefing. This Court should reverse and remand the second through seventh causes of action against Ms. Trump with instructions to dismiss.

A. The Allegations Against Ms. Trump Do Not State A Claim For Illegality Under § 63(12)

Ms. Trump argued at length in her opening motion-to-dismiss brief (R. 2051-53), and in her reply brief (R. 2213-17), that the Complaint fails to plead any facts, much less sufficient facts, to support the second through seventh causes of action. The trial court not only ignored every argument Ms. Trump made; it also sustained three substantive criminal counts, and three related conspiracy counts, without identifying a single allegation that supported such a claim. The court plainly committed reversible error.

1. The Second Cause Of Action Does Not State A Claim That Ms. Trump Violated Penal Law § 175.05 (Falsification Of Business Records)

As relevant here, to state a violation of § 175.05, the Complaint must include particularized allegations that Ms. Trump personally "ma[de] or cause[d] a false entry in the business records of an enterprise," N.Y. Penal Law § 175.05(1), or "omit[ted] to make a true entry in the business records of an enterprise in violation of a duty to do so," *id.* § 175.05(3). The Complaint also must allege that Ms. Trump violated the statute with the intent to defraud a third party, an element that is "commonly understood to mean to cheat someone out of money, other property or something of value." *People v. Hankin*, 175 Misc. 2d 83, 89 (Crim. Ct. 1997).

Neither the trial court in its order, nor the OAG in its opposition to Ms. Trump's motion to dismiss, identified any allegation in the Complaint that Ms.

Trump personally participated in the creation, review, or approval of any statement of financial condition; that she personally falsified any business record; or that she caused anyone to falsify any business record. *See supra* at 35-38. Nor is there any allegation that Ms. Trump intended to cheat anyone out of anything.

Instead, the court denied Ms. Trump's motion to dismiss in a two-sentence paragraph, in which it observed that a defendant could be held liable for "causing" the submission of false business record, even if she did not "personally draft" it. R. 21. But, again, the court never explained how Ms. Trump "caused" the entry of a false statement—nor did it identify any allegations suggesting that she did.[6]

2. The Fourth Cause Of Action Does Not State A Claim That Ms. Trump Violated Penal Law § 175.45 (Issuing A False Financial Statement)

The trial court likewise erred by upholding the fourth cause of action for issuing false financial statements. The elements of a § 175.45 violation include "the act of issuing a false financial statement" with "the requisite intent to defraud." *People v. Essner*, 124 Misc. 2d 830, 833 (Sup. Ct. 1984). But the

[6] The court cited (R. 21) *People v. Murray*, 185 A.D.3d 1507 (4th Dep't 2020), where the Fourth Department found a defendant liable for causing the submission of a false business record based on well-pleaded allegations that the defendant "[met] with the insurance company's representative and submit[ed] to him the forms that were to be filed." *Id.* at 1509. There is no comparable allegation here with respect to Ms. Trump; in fact, there is no allegation that Ms. Trump ever submitted any allegedly false financial statement to anyone.

Complaint fails to allege that Ms. Trump had any involvement in preparing her father's allegedly fraudulent statements of financial condition, much less that she ever transmitted or "issued" the statements to anyone. Nor are there allegations that Ms. Trump engaged in any actions with the specific intent to defraud.

The court denied Ms. Trump's motion on the fourth cause of action without mentioning it in its order—let alone identifying allegations in the Complaint that support the claim. It did so even though the OAG conceded that Ms. Trump "had no involvement in preparing" her father's personal financial statements, but argued that § 175.45 could nonetheless be violated by "issuing—or 'uttering'—[a] Statement." R. 2085. Neither the OAG nor the court identified any allegation in the Complaint that Ms. Trump "issued" or "uttered" any financial statement, inaccurate or otherwise. There is none. *See supra* at 33-46. Given the absence of any supporting allegation, the fourth cause of action against Ms. Trump should be dismissed.

3. The Sixth Cause Of Action Does Not State A Claim That Ms. Trump Violated Penal Law § 176.05 (Insurance Fraud)

The trial court also erred in allowing the sixth cause of action for insurance fraud in violation of New York Penal Law § 176.05 to proceed. "Under Penal Law § 176.05, the crime of insurance fraud is committed upon the filing of a false 'written statement as part of, or in support of, . . . a [fraudulent insurance] claim for

payment." *People v. Aksoy*, 84 N.Y.2d 912, 914 (1994). The violation must be made "knowingly and with intent to defraud." N.Y. Penal Law § 176.05.

Yet again, the court's order never mentions this cause of action, nor does it identify the elements of this offense or explain how the allegations of the Complaint against Ms. Trump satisfy them. In its brief below, the OAG pointed to an allegation that *other employees* submitted a misleading claim under a Director & Officers insurance policy. R. 2085. And that occurred in February 2019, more than two years after Ms. Trump left the Trump Organization. R. 1366-67, ¶ 712. The OAG also maintained that a defendant violates § 176.05 if she "causes" a false insurance claim to be submitted, R. 2085, but, much as before, the Complaint includes no allegation that Ms. Trump had any role in preparing or submitting any claim (false or otherwise) to an insurer. In the absence of any supporting allegations, the sixth cause of action should be dismissed.

B. The Criminal-Conspiracy Claims (Causes Of Action Three, Five, And Seven) Lack Merit And Were Abandoned Below

As Ms. Trump explained in her opening motion-to-dismiss brief (R. 2051-53), there is no allegation that Ms. Trump conspired to commit any crime discussed above. The Complaint pleads only the unspecific conclusion that the "Defendants each agreed to participate in a scheme to use false and misleading information to increase Mr. Trump's stated net worth." R. 1368, ¶ 716. The Complaint does not allege any facts to support the supposed "agreement." Such

threadbare allegations of conspiracy fail as a matter of law. *See*, *e.g.*, *D. Penguin Bros. Ltd. v. Nat'l Black United Fund, Inc.*, 137 A.D.3d 460, 461 (1st Dep't 2016) (rejecting "conclusory allegations concerning defendant's involvement in the fraud scheme"); *Nocro, Ltd. v. Russell*, 94 A.D.3d 894, 895 (2d Dep't 2012) ("contentions regarding conspiracy [were] vague and conclusory, and fail[ed] to offer sufficient factual details regarding an agreement among the respondents/defendants").

Tellingly, in its opposition brief, the OAG chose not to respond to Ms. Trump's arguments or defend its criminal-conspiracy claims. Ms. Trump identified that failure (R. 2213) in her reply brief, explaining that the OAG had abandoned its conspiracy claims. *See R.K. ex rel. Fatmir K. v. City of New York*, 200 A.D.3d 584, 585 (1st Dep't 2021) ("fail[ure] to oppose" a motion to dismiss a particular claim "abandon[s] the[ ] claim[ ]"). That should have ended the matter, and the trial court should have dismissed the conspiracy causes of action.

Inexplicably, the trial court permitted the conspiracy claims to proceed nonetheless. Without identifying the elements of a civil conspiracy, or discussing any of the allegations in the Complaint against Ms. Trump regarding any conspiracy, the court summarily concluded that "the OAG has alleged liability on behalf of Ms. Trump sufficiently to survive a motion to dismiss pursuant to CPLR 3211." R. 21. The court did so despite recognizing, three pages earlier, that the

"OAG has not pleaded a cause of action for conspiracy (and, in fact, no such cause of action exists under New York state law)." R. 18. This Court should reverse and remand with instructions to dismiss causes of action three, five, and seven from the Complaint.

CONCLUSION

For the foregoing reasons, the Appellate Division should reverse the judgment of the Supreme Court and remand the case with instructions to dismiss the Complaint against Ms. Trump.

Dated: March 20, 2023

Respectfully submitted,

By: 

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STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

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

Plaintiff-Respondent,

– against –

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC,

Defendants-Appellants.

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1. The index number of the case in the court below is 452564/22.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about September 21, 2022, by filing of a Summons and Verified Complaint.

Issue was joined by Defendants or about January 26, 2023, by service of Verified Answers.

5. The nature and object of the action is Executive Law § 63 (12).

6. This appeal is from the Decision and Order of the Honorable Arthur F. Engoron, dated January 6, 2023, which denied Defendants' respective motions to dismiss the Complaint.

7. This appeal is on the full reproduced joint record.

EXHIBIT Q

To be Argued by:
BENNET J. MOSKOWITZ
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

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

Plaintiff-Respondent,

– against –

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC,

Defendants-Appellants.

Appellate Case No.: 2023-00717

REPLY BRIEF FOR DEFENDANT-APPELLANT IVANKA TRUMP

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New York County Clerk's Index No. 452564/22

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INTRODUCTION

In her Opening Brief, Ivanka Trump establishes that this Court should reverse the Supreme Court's Order denying her Motion to Dismiss the Complaint because the case against her is at least two years too late and, separately, because the OAG fails to adequately plead a claim for "persistent fraud" or "illegality" under § 63(12). In its Response Brief, the OAG again shifts its argument on the statute of limitations and, separately, avoids directly addressing its core pleading failures as to Ms. Trump.

The OAG's Opposition Brief does nothing to refute the explanation in Ms. Trump's Opening Brief that the statute of limitations (whether three or six years)[1] bars all claims against her because those claims arose, at the latest, from loans that closed on August 12, 2014. Instead, the OAG attempts a new argument regarding tolling that it never made to the trial court and which fails in any event. After arguing to the trial court that the statute of limitations extended to February 5, 2016, the OAG now argues that the statute of limitations must be stretched back to July 13, 2014, because of a tolling agreement between the OAG and the Trump Organization. That desperate argument does not save the OAG because, as the OAG tacitly conceded before changing course, Ms. Trump is not a party to that agreement and is not bound by it.

[1] In her Opening Brief, Ms. Trump explains, based on legal authorities, why the proper statute of limitations is three years. She will not repeat those arguments in this Reply Brief, because the OAG's causes of action against her are untimely regardless of whether a three- or six-year statute of limitations applies.

The OAG's failure and inability to sufficiently state any claims against Ms. Trump derives from its flawed premise for suing her in the first place. The OAG's position, boiled to its essence, is that because Ms. Trump served as an Executive Vice President of the Trump Organization until January 2017, there is necessarily a plausible inference that she was involved in conduct allegedly committed by other people. That is not enough to state a claim under New York law, which requires that claims alleging fraud be pled with particularity, whether or not they are brought under § 63(12).

The OAG's core allegation in its Complaint is that Ms. Trump's father inflated the value of certain assets in his individual Statements of Financial Condition. But the OAG never alleges that Ms. Trump had anything to do with creating her father's Statements of Financial Condition and consistently excludes Ms. Trump from the list of individuals allegedly responsible for preparing, reviewing, or annually certifying those Statements. Indeed, the OAG did not even allege that Ms. Trump knew what those assets were listed for on the Statements. Thus, even if there were some "true" value that could be assigned to these assets, there is no allegation that Ms. Trump knew what those assets were listed for on the Statements such that she would have known there was an inconsistency between the allegedly "true" value and the value listed. Without actual knowledge of the values assigned to assets on those Statements, Ms. Trump cannot plausibly have engaged in any fraud relating to the alleged inflation of the valuations.

ARGUMENT

I. The OAG's Opposition Brief Fails to Overcome That All Claims Against Ms. Trump Are Time-Barred No Matter How Framed

A. The Tolling Agreement Signed by the Trump Organization in 2021 Does Not Apply to Ms. Trump, Who Left in 2017

1. The OAG Waived Its New Tolling Agreement Argument

The OAG waived its new argument, which attempts to avoid that its claims against Ms. Trump are time-barred. In its Opposition Brief, the OAG argues for the first time that Ms. Trump is subject to a tolling agreement between the Trump Organization and the OAG, even though she did not sign it and is not even alleged to have known about it.

Because the OAG did not raise this issue below, it has waived this argument. *See* David D. Siegel & Patrick M. Connors, N.Y. Prac. § 530 (6th ed. 2022) ("There is a broad and general rule of preservation that the court will not review on appeal any points not raised in the court below, a wholesome requirement designed to avoid waste." (citing *Kolmer-Marcus, Inc. v. Winer*, 32 A.D.2d 763 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 795 (1970))). Indeed, as further explained in section I(A)(2) below, the OAG previously took positions directly contrary to this new argument. The Court should not countenance the OAG's last-minute about-face.[2]

[2] At a minimum, because Ms. Trump did not have an opportunity to address this issue in the trial court, the issue should not be decided against her without remand, allowing Ms. Trump to submit an affidavit and other evidence.

2. The OAG's Argument Fails as A Matter of Law As Ms. Trump Left the Trump Organization in 2017 and Did Not Sign the 2021 Tolling Agreement

Even if the OAG had not waived its new tolling agreement argument—which it did—the argument fails as a matter of law.

The "fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . , and the best evidence of what parties to a written agreement intend is what they say in their writing." *Banco Espirito Santo, S.A. v. Concessionaria Do Rodoanel Oeste S.A.*, 100 A.D.3d 100, 106 (1st Dep't 2012) (internal quotation marks omitted and citations). "The most obvious indicator of intent is the form of the signature." *Israel v. Chabra*, 537 F.3d 86, 97 (2d Cir. 2008). Accordingly, this Court has refused to hold even current "signing officers" individually bound to an agreement between a plaintiff and defendants in their corporate capacities or the corporate entity "without some direct and explicit evidence of actual intent." *Am. Media Concepts, Inc. v. Atkins Pictures, Inc*¸179 A.D.2d 446, 448 (1st Dep't 1992) (quoting *Salzman Sign Co., Inc. v. Beck*, 10 N.Y.2d 63, 67 (1961)). Indeed, "where individual responsibility is demanded the nearly universal practice is that the officer signs twice—once as an officer and again as an individual. There is great danger in allowing a single sentence in a long contract to bind individually a person who signs only as a corporate officer." *Beck*, 10 N.Y.2d at 67 (emphasis added); *Georgia Malone & Co., Inc. v. Ralph Rieder*¸ 86 A.D.3d 406, 408 (1st Dep't 2011) (citations omitted) ("It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually.").

The tolling agreement invoked by the OAG was signed by the Chief Legal Officer ("Trump Organization CLO") for the Trump Organization on behalf of the Trump Organization. R. 874. It is undisputed that the Trump Organization CLO did not represent Ms. Trump individually when he signed the tolling agreement and that he could not have represented her officially since she was not with the Trump Organization then. Nothing the OAG alleges in the Complaint supports—plausibly or otherwise—that the Trump Organization CLO had actual or apparent authority to bind Ms. Trump individually. Instead, the OAG makes the conclusory claim that even though Ms. Trump was not with the Trump Organization at the time of the agreement, the OAG "plausibly alleged that she remained affiliated and associated with the Trump Organization and was thus covered by the agreement." Resp't's Br. at 43. But the OAG makes no allegations in its Complaint to support this conclusion. Rather, as the OAG acknowledges in the Complaint, Ms. Trump was not an employee, officer, or director of the Trump Organization on the date the agreement was signed, August 27, 2021. There is no allegation in the Complaint that Ms. Trump signed the tolling agreement—in any capacity, let alone twice—or that the Trump Organization CLO purported to represent her when he did so. Accordingly, even if the OAG were correct that counsel for an entity could bind some of its current employees, officers, or directors to a tolling agreement in their individual capacity, that principle has no application here.

Furthermore, the OAG has consistently represented that it did not intend for the tolling agreement to cover Ms. Trump and did not believe that it did so. Indeed, the OAG previously attempted to include other individual defendants as parties to

the tolling agreement but ultimately relented and signed the tolling agreement with only the Trump Organization. R. 931–32. When the OAG circulated that draft, it included signature blocks for other individuals but not Ms. Trump. R. 2240–44. Thus, even if the court were to find that the tolling agreement might somehow apply to other individual defendants—which it should not—there is even more reason it should not apply to Ms. Trump.

And there is even more evidence that the OAG did not intend for the tolling agreement to cover any individuals, including Ms. Trump, as the OAG fully acknowledged this point during the Special Proceeding when it argued:

> Donald Trump is not a party to the tolling agreement, that tolling agreement only applies to the Trump Organization.

R. 932. If the OAG did not even believe the tolling agreement applied to Donald Trump, it could not have believed it applied to Ms. Trump. In fact, in its Opposition to Ms. Trump's Motion to Dismiss below, the OAG did not even mention the tolling agreement. Instead, it said twice that the "Statute of Limitations is Six Years (Plus 228 Days)," providing February 5, 2016, as the operative date for the statute of limitations. R. 2068, 2088. Those 228 days account only for the Governor's COVID orders. Nowhere in its Complaint or Opposition to Ms. Trump's Motion to Dismiss does the OAG allege that Ms. Trump was in any way involved in the discussions surrounding the tolling agreement—let alone that she purported to bind herself individually to it.

3. A Careful Review of the *JUUL* Case Filings Shows that the OAG's reliance on that Decision Is Misplaced

The OAG relies heavily on *Matter of People v. JUUL Labs, Inc.*, 212 A.D.3d 414 (1st Dep't 2023) to argue that "a corporate tolling agreement applies to corporate affiliates, officers, or directors when the agreement states that those categories of entities or individuals are covered." Resp't's Br. at 42. The OAG's assertion mischaracterizes *JUUL*'s holding. The entirety of the discussion in *JUUL* regarding the tolling agreement at issue is the following single statement: "Regarding the General Business Law §§ 349 and 350 claims, the motion court correctly concluded that defendants are bound by the tolling agreement into which JUUL entered with the People." *JUUL Labs, Inc.,* 212 A.D.3d at 417. The *JUUL* Court does not provide any reasoning for why it held that the tolling agreement there applied to the company's two founders, who were current officers. Nor does the decision discuss whether the founders even contested the point. The fact pattern in JUUL is thus entirely different from the one here in which a former employee is contesting the application of an agreement executed by her former employer without her authority, consent, or involvement.

B. The OAG Has Not Presented Any Compelling Reason to Ignore That, Under New York Law, Its Claims Against Ms. Trump Accrued—At the Latest—in 2014

As established in the Opening Brief, the claims against Ms. Trump accrued—at the latest—in 2014 because N.Y. Exec. Law § 63(12) claims alleging a fraudulent transaction accrue for the parties to the subject transaction when it closes. *See Rogal v. Wechsler*, 135 A.D.2d 384, 385 (1st Dep't 1987); *Boesky v. Levine*, 193 A.D.3d 403, 405 (1st Dep't 2021); *Hamrick v. Schain Leifer*

Guralnick, 146 A.D.3d 606, 607 (1st Dep't 2017). It is undisputed that the Doral loan closed on June 11, 2012, and the OPO loan on August 12, 2014. Accordingly, any § 63(12) fraud claims based on Ms. Trump's role in those transactions (i.e., assisting with procuring those loans) accrued, at the latest,[3] upon their completion (i.e., when the loans closed)—more than eight years before this action was filed. R. 1334, 1347, ¶¶ 587, 634. Even if a six-year limitations period were applied and 228 days were added for tolling, the statute of limitations would bar claims before February 6, 2016.[4] Thus, all claims alleged against Ms. Trump are time-barred.

C. The OAG Fails to Explain How the Continuing-Wrong Doctrine Extends the Statute of Limitations Against Ms. Trump; It Does Not

The only allegations articulating anything Ms. Trump did after August 12, 2014, concern two immaterial—and in any event entirely lawful—occurrences. And even those allegations are threadbare.

First, the OAG alleges Ms. Trump requested a disbursement from the Old Post Office loan in December 2016. Resp't's Br. at 54–55. Second, the OAG alleges that someone testified that Ms. Trump was involved in licensing deals from 2014 to 2016 and received distributions relating to those deals. Resp't's Br. at 55. Notably, there is no allegation those licensing deals involved loans or in any way relied on her father's Statements of Financial Condition. Attempting to muddy the

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[3] Because the allegations relating to Ms. Trump's conduct ended in December 2013 and she was not a party to the loans, the claims against her arguably accrued then. But, in any event, they could not have accrued any later than the date of closing.

[4] As other defendants argue, C.P.LR. § 213(9)'s retroactivity cannot revive claims that accrued before August 26, 2016. Ms. Trump prevails for that reason as well.

waters and avoid the clear statute of limitations, the OAG argues that the "continuing-wrong doctrine" allows these two occurrences to extend the statute of limitations and allow it to pursue all of its alleged claims against Ms. Trump. However, these allegations are a weak, last-minute attempt by the OAG to find any conduct by Ms. Trump tangentially related to the Trump Organization after the statute of limitation has run. That is contrary to New York law because the OAG is not pointing to any post-2014 wrongful acts by Ms. Trump.

The continuing-wrong doctrine tolls the statute of limitations to the date of commission of the last wrongful act in situations involving a series of unlawful acts. *Selkirk v. State of New York*, 249 A.D.2d 818, 819 (3d Dep't 1998). Invocation of the doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct." *Id.* (emphasis added).

The OAG expends little effort explaining how this doctrine applies to Ms. Trump—likely because it does not apply—instead making only the following two statements:

> "Moreover, she was involved in and knew about assets misvalued in the Statements that were submitted and certified in 2014 through 2016, while she was a high-level officer of the Trump Organization." Resp't's Br. at 38.

> "Moreover, as explained (see *infra* at 51–56), OAG's complaint amply alleged Ivanka Trump's involvement in these continuing wrongs, disposing of her argument (Ivanka Br. 22–24) that OAG's claims against her accrued solely when the Deutsche Bank loan for the Doral golf club in Florida closed in 2012, and the Old Post Office loan closed in 2014." Resp't's Br. at 49.

The OAG does not explain specifically how the allegations on pages 51 to 56 of its brief somehow fit within the contours of the continuing-wrong doctrine. This is because those pages do no such thing. The only conduct alleged relating to Ms. Trump after August 12, 2014, is as follows:

> "Ivanka Trump relied on the Statements and their purported accuracy in requesting a disbursement from the Old Post Office loan in December 2016." Resp't's Br. at 54–55 (citing R. 1347–48, 1350).[5]
>
> "Ivanka Trump was the Trump Organization officer who handled the company's real-estate licensing deals (R. 1325)—a category of assets that was misvalued in the Statements that defendants used from 2011 to 2018." Resp't's Br. at 55 (citing R. 1323–26).[6]

Accordingly, the entirety of the allegations relating to Ms. Trump that occurred after any plausible statute of limitations is that (1) she requested a disbursement from the Old Post Office loan in December 2016, and (2) she was involved in real-estate licensing deals (without alleging any fraudulent activity) and received distributions relating to licensing deals through 2018. Neither of these actions are—or even are alleged to be—fraudulent. Indeed, neither allegation has anything to do with submitting a statement of financial condition with allegedly inflated real estate valuations.

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[5] That section of the record contains the following relevant quote, "On December 21, 2016, Ivanka Trump signed a draw request in the amount of $4,334,772.83."

[6] That section of the record contains only the following allegations regarding Ms. Trump, "According to Allen Weisselberg: 'Licensing generally was handled by Ivanka in what I'll call it twenty-fifth floor, that's where they're located, it was a whole licensing department down there, and they worked on those deals'. . . . Each child owned 33.3% of [TTT Consulting, LLC] and they received regular distributions, including Ivanka Trump after she left the company in January 2017.").

The first allegation regarding a "draw" is immaterial because a "draw" at most is a request for a payment under an agreement allegedly procured by fraud. As explained in the Opening Brief at 27–28, requests for payment under an allegedly fraudulently induced agreement constitute, if anything, "continuing effects," not "new wrongs." *Henry v Bank of Am.*, 147 A.D.3d 599, 601 (1st Dep't 2017); *compare Pike v New York Life Ins. Co.*, 72 A.D.3d 1043, 1048 (2d Dep't 2010) (where insurance contract procured by fraud, "any wrong accrued at the time of purchase of the polices, not at the time of payment of each premium") and *DuBuisson v Nat'l Union Fire Ins. of Pittsburgh, P.A.*, 15 CIV. 2259 (PGG), 2021 WL 3141672, at *8–9 (S.D.N.Y. July 26, 2021) (collecting cases), *with Sabourin v. Chodos*, 194 A.D.3d 660, 661 (1st Dep't 2021) (series of false documents submitted under fraudulent scheme), *and CWCapital Cobalt VR Ltd. v. CWCaptial Invs. LLC*, 195 A.D.3d 12, 19 (1st Dep't 2021) (repeated failure to exercise fiduciary duties in management of funds in separate transactions), *and State of New York v. 7040 Colonial Rd. Assoc. Co.*, 176 Misc. 2d 367, 374 (Sup. Ct. N.Y. Cnty. 1998) (finding "new cause of action accrue[d]" with each dissemination of the fraudulent document).

Further, although the OAG implies that it is reasonable to infer from Ms. Trump's position that she had knowledge of the financial statements, the "Statements" in question were the individual financial statements of Donald J. Trump—they were not company documents. And it is not a reasonable inference that a corporate officer simply by her position is somehow imbued with intimate knowledge of other corporate officers' personal finances.

The second allegation relates to licensing—something not even mentioned in the OAG's causes of action. As an initial matter, the OAG cannot use its appellate brief to make new arguments. *See* Siegel & Connors, *supra*, at § 530. Moreover, the OAG only alleges that the values of licensing deals were inflated in Ms. Trump's father's Statements of Financial Condition. The OAG has not alleged that Ms. Trump knew the values listed on her father's Statements of Financial Condition. Indeed, the OAG does not allege that Ms. Trump had anything to do with creating her father's Statements of Financial Condition, consistently excluding her from the list of individuals responsible for preparing, reviewing, or annually certifying her father's Statements of Financial Condition. R. 1177 at ¶¶ 6, 62, 595, 620, 643, 758.

Even if true, though, these allegations only articulate that Ms. Trump was previously involved with the Trump Organization's business affairs, not that she had any knowledge of the values in her father's Statements of Financial Condition. As explained in the Opening Brief, courts routinely dismiss claims against defendants alleged to have committed conduct only outside the limitations period, regardless of any allegations about other defendants within the limitations period. Appellant's Br. at 26.

II. The OAG Fails to Present a Cohesive (Let Alone Legally Sufficient) Argument Why Any of the § 63(12) Claims Against Ms. Trump Should Be Sustained; There Is None

Ms. Trump's Opening Brief firmly established that the OAG's § 63(12) claims against her fail for two independent reasons. First, the claim alleging a violation of § 63(12) for fraud against Ms. Trump failed to state a claim because

the OAG failed to plead them with the requisite particularity as to Ms. Trump. Second, the claims alleging violations of § 63(12) for illegality are not supported by sufficient factual allegations to sustain them. In its Opposition Brief, the OAG deals with these issues by conflating the law regarding these two types of § 63(12) claims, picking and choosing which standard it thinks might be more helpful at each turn.

A. The OAG's First Cause of Action, Which Alleges Persistent and Repeated Fraud, Should Be Dismissed as to Ms. Trump Because It Is Not Pled with Particularity

1. The OAG Is Incorrect When It Argues That § 63(12) Claims Alleging Fraud Need Not Be Pled with Particularity and When It Asks This Court To Ignore *Katz*

In her Opening Brief, Ms. Trump conclusively shows that claims brought under § 63(12) for fraud must be pled with particularity, citing *People v. Katz,* 84 A.D.2d 381, 384–85 (1st Dep't 1982), and that, accordingly, the OAG's First Cause of Action, titled "Executive Law § 63(12) – Persistent and Repeated Fraud" must be dismissed because it fails to do so. Unable to avoid *Katz*, the OAG instead asks this Court to ignore the case, stating:

> Although this Court noted in *People v. Katz*, 84 A.D.2d 381, 384–85 (1st Dep't 1982) that the heightened standard applied to certain § 63(12) fraud claims, this statement was *dicta*. *Katz* was not an appeal from a decision granting or denying a motion to dismiss. Instead, *Katz* was an appeal from an order granting the defendants' request for discovery, in which the pleading standard was unnecessary for the disposition of the appeal. *See id.* at 383.

Resp't's Br. at 51 n.12.

The OAG also ignores the First Department's decision *People ex rel. Cuomo v. Wells Fargo Ins. Servs., Inc.*, 62 A.D.3d 404, 405 (1st Dep't 2009), *aff'd*, 16 N.Y.3d 166 (2011), which followed the holding in *Katz* and stated that the "court also appropriately determined that the complaint failed to state a cause of action for fraud under Executive Law § 63(12) with sufficient particularity."

The OAG likewise ignores a swath of New York state cases confirming the view expressed in *Katz* and *Wells Fargo*. *See, e.g., Matter of People v Condor Pontiac, Cadillac, Buick & GMC Trucks, Inc.,* No. 02-1020/19-0-0497, 2003 WL 21649689, at *4–5 (Sup. Ct. Greene Cnty. July 2, 2003) (citations omitted) (confirming that where a plaintiff asserts that "acts constitute repeated and persistent fraudulent and illegal conduct pursuant to Executive Law § 63(12) . . . . [t]hose elements must be asserted in detail, not merely as conclusory allegations."); *People ex rel. Spitzer v. H & R Block, Inc*., 16 Misc. 3d 1124(A) (Sup. Ct. N.Y. Cnty. 2007) ("Because the underlying facts of the complaint [alleging a violation of Executive Law Section 63(12)] here are based on fraud, CPLR 3016(b) applies to each of the asserted causes of action."). These cases reflect the general rule of New York law that claims of fraud must be pled with particularity, including where they are tied to a fraud-related statute. *See, e.g., People ex rel. Schneiderman v. Barclays Cap. Inc.,* 47 Misc. 3d 862, 869 n.7 (Sup. Ct. N.Y. Cnty. 2015) (citation omitted) ("It should be noted that CPLR 3016(b)'s specificity requirements apply to Martin Act claims because CPLR 3016(b) applies to all causes of action 'based upon fraud, misrepresentation, mistake, [and] willful default.'").

2. The OAG Attempts to Distract from the Fact That Its First Cause of Action, Which Alleges Persistent and Repeated Fraud, Is a Fraud-Based § 63(12) Claim

Attempting to distinguish the clear line of authority explaining that all claims brought under § 63(12) alleging fraud must be pled with particularity, the OAG argues that:

> The heightened pleading standard for fraud claims does not apply here. That standard applies when a claim is premised on common-law fraud rather than when, as here, a claim is premised on statutory fraud under Executive Law § 63(12)—for which scienter and reliance are not elements.

Resp't's Br. at 50–51.

The OAG seeks to confuse the issue by using the phrase "statutory fraud" in an attempt to blur the distinction between § 63(12) claims alleging common-law fraud and § 63(12) claims alleging violations of a statute, which can be fraud or non-fraud based. It is true that non-fraud statutory claims brought under § 63(12) do not need to be pled with particularity. It is also true—as the OAG concedes that—fraud claims generally, including claims of statutory fraud, must be pled with particularity. The OAG conflates these non-objectionable propositions to argue that § 63(12) is, itself, a non-fraud statute and that the OAG, therefore, does not have to plead its First Cause of Action based on "Persistent and Repeated Fraud" with particularity. That is incorrect.

Section 63(12) allows claims based on either common-law fraud or statutes. What is important, though, is that the statutory claims can be based on either fraud-based or non-fraud-based statutes. It is, of course, obvious that § 63(12) claims brought under statutes that do not allege fraud need not be pled with particularity.

Section 63(12) does not impose a burden of particularity where a § 63(12) claim is based on a statute whose elements need not be pled with particularly. But neither does § 63(12) remove the particularity requirements when a § 63(12) claim is based on a fraud-based statute whose elements do require that fraud be pled with particularity.

In short,

(1) a §63(12) claim alleging common law fraud must be pled with particularity;

(2) a §63(12) claim relying on a fraud-based statute must also pled with particularity; and

(3) it is only a §63(12) claim relying on a non-fraud-based statute that need not be pled with particularity.

Regarding the OAG's First Cause of Action, which alleges common law fraud through §63(12), there is no separate statute to consider when determining whether fraud needs to be pled with particularity. The First Cause of Action does not rely on other statutes but instead alleges common law fraud through § 63(12). Thus, the First Cause of Action needed to be pled with particularity and was not.

3. The Cases Cited by the OAG Confirm that Claims Brought Under § 63(12) Alleging Fraud—Whether Statutory or Common Law—Must Be Pled with Particularity

The cases cited by the OAG support and clarify that a heightened pleading standard applies to the OAG's First Cause of Action, alleging "Persistent and Repeated Fraud" in violation of § 63(12).

First, the OAG cites *People ex rel. Schneiderman v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409 (1st Dept 2016). That case, however, does not

address whether allegations of fraud brought under Executive Law § 63(12) must be pled with particularly. Instead, the case deals with whether the OAG's § 63(12) claim in that case was subject to a three- or six-year statute of limitations. Notably, it found that the § 63(12) claim was subject to a six-year statute because the particular claim was based upon fraud liability created at common law. To the extent that the case does discuss whether fraud must be pled with particularity, it cites two cases. First, it cites *Wells Fargo Ins. Servs., Inc.*, 62 A.D.3d 404, explaining that the court in that case "dismiss[ed] cause of action for fraud under § 63 (12) because complaint failed to state it with sufficient particularity, not because no such claim is allowed." *Trump Entrepreneur*, 137 A.D.3d at 417. Next, it cites *People ex rel. Cuomo v. Coventry First LLC*, 52 A.D.3d 345, 346 (1st Dep't 2008), explaining that the court in that case found "that a 'cause of action' under § 63 (12) was 'sufficiently stated' even though the elements of common-law fraud 'need not be alleged,' where case also involved a separate common law fraud claim." In other words, the court in *Coventry First LLC* held that the § 63(12) claim did not need to be re-plead with particularity because the alleged fraud had been pled with particularity in another count.

Next, the OAG cites *Feinberg v. Marathon Patent Group Inc.*, 193 A.D.3d 568, 570–71 (1st Dep't 2021), describing the case as holding that "heightened pleading standard inapplicable to claim under federal Securities Act premised on misrepresentations because claim 'not premised on common-law fraud.'" Resp't's Br. at 51. But that case is similarly unhelpful to the OAG as it confirms that the heightened pleading standard was only unnecessary because the claim was not

premised on fraud but was instead premised on a violation of the federal Securities Act.

The OAG then cites *New York v. Debt Resolve, Inc.*, 387 F. Supp. 3d 358, 364–65 (S.D.N.Y. 2019). But that case is no more helpful to the OAG. Like the other cases, *Debt Resolve* confirms that fraud need not be pled with particularity when the claims brought under § 63(12) are not fraud-based but instead based on statutory claims alleging only "deception" or "illegality." In that case, the OAG brought § 63(12) claims, alleging that the defendants engaged in deceptive acts violating New York consumer protection statutes. Significantly, the *Debt Resolve* Court only concluded that the OAG's complaint was not subject to a heightened pleading standard because the defendants there "ha[d] not argued that any claims brought by Plaintiff require[d] a showing of intent." *Id.* at 365. This is entirely distinguishable from the instant case where Ms. Trump has explicitly and repeatedly argued that the OAG has failed to allege that she acted with "the intent to defraud." *See* Resp't's. Br. at 48–51. The *Debt Resolve* Court relied on another Southern District case, *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018), for the proposition that certain § 63(12) claims are not subject to heightened pleading standards. However, as *RD Legal* explained, "while a claim under Section 63(12) may allege fraud and necessitate a showing of knowledge or reliance as an element of the claim, the NYAG may equally assert a cause of action under Section 63(12) that alleges "deception" or some other non-fraudulent conduct that does not include scienter as an element." *Id.* at 769. Again, this proposition is distinguishable from the instant case where the OAG's § 63(12)

cause of action specifically alleges that Ms. Trump committed "persistent and repeated fraud" and engaged in "fraudulent conduct" as opposed to mere "deception" or "illegality." R. 1378–80.

A heightened pleading standard applies to the OAG's First Cause of Action (Executive Law § 63(12) – Persistent and Repeated Fraud). As the OAG has not pled that claim with particularity regarding Ms. Trump, it must be dismissed.

4. The OAG's Minimal Allegations Relating to Ms. Trump's Non-Fraudulent Conduct Are Insufficient

Rather than plead specific facts relating to how it allegedly believes Ms. Trump engaged in any specific actions constituting fraud, the OAG instead argues that it "plausibly alleged that Ivanka Trump participated in and had knowledge of defendants' decade-long scheme to misrepresent many of the asset values reflected in her father's Statements of Financial Condition, and to use those Statements in commercial dealings with banks and lenders, insurance companies, and other entities." Resp't's Br. at 49. In place of specific allegations, the OAG effectively says that Ms. Trump worked at the Trump Organization, was involved in its affairs, and therefore must somehow have been involved in something nefarious. In support of that assumption, the OAG makes four arguments.

First, the OAG argues that Ms. Trump "was an officer of the Trump Organization," "had responsibilities and knowledge regarding the assets and transactions underlying the Statements," and, therefore, was "aware of the true financial performance of the Trump Organization and many of the assets underlying the Statements." Resp't Brief at 51–52. The OAG claims "[t]hese

allegations support the plausible inference that Ivanka Trump was involved in defendants' decade-long scheme, particularly in the context of a closely held business run by a single family." *Id.* But these are not specific allegations of any fraud, nor do they support a reasonable inference of fraud. If these allegations were sufficient to support a company officer's individual liability, every officer would be liable for all actions of their companies, effectively imposing strict liability on all officers for any actions by anyone at their company. That is not the law. *See Barlow v. Skroupa,* 76 Misc. 3d 587, 591 (Sup. Ct. N.Y. Cnty. 2022) (citations omitted) ("By pleading the fraud claim against all defendants collectively, without any specification of the conduct charged to particular defendants, plaintiffs deprive defendants of the notice regarding 'the material elements of each cause of action' to which defendants are entitled under C.P.L.R. § 3013. By referring to all defendants together, plaintiffs also fail to plead their fraud claim with the particularly required by C.P.L.R. § 3016(b).").

Second, the OAG alleges "Ivanka Trump was also deeply involved in obtaining the loans from Deutsche Bank and the rights to redevelop the Old Post Office building—and the Statements were central to those efforts." Resp't's Br. at 52–55. But that allegation merely claims that Ms. Trump was involved in a successful real estate transaction where her father's Statements of Financial Condition were submitted by someone else as part of the process; it says nothing about her involvement in making any false statement. Indeed, the OAG does not even allege that Ms. Trump ever discussed the statements of financial condition with anyone relating to the Old Post Office building. Additionally, as explained

above, all of the conduct relating to the loans from Deutsche Bank occurred in December 2013 or earlier—before the statute of limitations ran.[7]

Third, the OAG alleges "Ivanka Trump was the Trump Organization officer who handled the company's real-estate licensing deals (R. 1325)—a category of assets that were misvalued in the Statements that defendants used from 2011 to 2018 (R. 1323–26)," "from 2015 to 2018, the Statements inflated the licensing-deal valuations by including deals or deal terms that were speculative. (R. 1324.)," and "even after she left the Trump Organization in 2017, Ivanka Trump continued to receive monetary distributions from these deals. (R. 1325.)" Resp't's Br. at 55. But like her involvement with the Deutsche Bank loans, that allegation merely claims that Ms. Trump was involved in transactions that may have—without her knowledge or involvement—been valued on her father's Statements.

Fourth, the OAG alleges "the Statements repeatedly misrepresented the value of apartments in Trump Park Avenue that Ivanka Trump had the option to purchase. (R. 1215–16.) . . . . It is a plausible inference that Ivanka Trump knew about and participated in defendants' fraudulent scheme when the Statements misvalued an apartment she rented and had the option to buy." Resp't's Br. at 56. But again, that says nothing about Ms. Trump's involvement in making any false statement or about her actual knowledge of the Statements of Financial Condition.

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[7] The OAG does make one allegation about conduct in 2016, stating "Ivanka Trump relied on the Statements and their purported accuracy in requesting a disbursement from the Old Post Office loan in December 2016. (R. 1347–48, 1350.)" But Ms. Trump simply requesting a disbursement from a loan, which she did not ultimately take, is not fraud. At most, it is a continuing *effect* of a previous, allegedly fraudulent action (i.e., securing the loan).

It simply argues—without evidence—that it is possible that Ms. Trump knew about or participated in some fraud somewhere, but that could be said about virtually anyone at any time. Such general allegations are insufficient to support a fraud claim.

B. The OAG Barely Even Attempts to Respond to Ms. Trump's Arguments that the Complaint Did Not Sufficiently Allege She Violated New York Penal Law in a Manner that Stated a Claim Under § 63(12)

Causes of Action Two to Seven insufficiently allege various, predicate criminal violations, as follows: (1) falsifying business records in violation of New York Penal Law §§ 175.05 and 175.10 (second cause of action); (2) issuing false financial statements in violation of New York Penal Law § 175.45 (fourth cause of action); and (3) insurance fraud in violation of New York Penal Law § 176.05 (sixth cause of action). The Complaint also alleges separate conspiracies to violate these substantive provisions (third, fifth, and seventh causes of action, respectively). The OAG gives short shrift to the arguments in the Opening Brief, which firmly establish that these claims fail.

1. The OAG Does Not Meaningful Defend Its Second, Fourth, and Sixth Causes of Actions; Instead, Making General Allegations that Ms. Trump Must Somehow Be Liable

Regarding the second, fourth, and sixth causes of action, the OAG makes no specific allegations about how Ms. Trump allegedly violated these statutes through her own actions. Instead, it makes conclusory allegations that she violated the statutes somehow, and then cites its allegations about other defendants. That is not sufficient.

To defend its second cause of action, the OAG offers a single sentence: "OAG adequately alleged that Ivanka Trump falsified business records (Penal Law §§ 175.05, 175.10) by pleading that she caused the Statements to include false entries, including false entries about real-estate license deals (*see supra* at 14–17, 51–56)." Resp't's Br. at 57. As explained in Ms. Trump's Opening Brief, the OAG needed—and failed—to provide the particularized allegations needed for this claim. Moreover, despite its assertion in its Response Brief that Ms. Trump "caused the Statements to include false entries," the OAG did not allege that in the Complaint. Instead, it carefully avoided pleading that Ms. Trump had any involvement in creating the Statements because it is undisputed that she was not involved and had no knowledge of the contents of the Statements, which were not company documents, but rather her father's financial statements.

To defend its fourth cause of action, the OAG again offers one sentence: "OAG adequately alleged that Ivanka Trump issued false financial statements (Penal Law § 175.45) by pleading that she caused defendants' submissions and certifications of the Statements to the Trump Organization's counterparties (*see supra* at 14–17, 51–56)." Resp't's Br. at 57. As explained in Ms. Trump's Opening Brief, the OAG needed—and failed—to provide the particularized allegations needed for this claim. The OAG fails to defend this claim in its Opposition Brief because, despite this conclusory allegation, the OAG has not pled that Ms. Trump sent the Statements to anyone who relied on them.

To defend its sixth cause of action, the OAG offers the single sentence, "OAG adequately alleged that Ivanka Trump committed insurance fraud (Penal

Law § 176.05) by pleading that Ivanka Trump pushed for D&O insurance to cover her activities, and the Statements were submitted in connection with those insurance policies. (*See* R. 1366–67, 2188–90.)" Resp't's Br. at 57. As explained in Ms. Trump's Opening Brief, the OAG needed—and failed—to provide the particularized allegations needed for this claim. In addition to generally failing to plead this fraud claim with particularity, the OAG specifically fails to plead that Ms. Trump did anything fraudulent concerning the D&O insurance. Instead, it says that Ms. Trump sought insurance, and someone else submitted a document with information unknown to her when she did. That is not sufficient.

2. The OAG Does Virtually Nothing to Respond to Ms. Trump's Arguments that the OAG Abandoned Its Conspiracy Claims or that the Claims Fail as a Matter of Law

As explained in the Opening Brief, the OAG abandoned the third, fifth, and seventh causes of actions relating to the conspiracy by failing to defend those claims in its Opposition to Ms. Trump's Motion to Dismiss. Appellant's Br. at. 51–53. Therefore, it was error for the trial court not to dismiss at least those causes of action. *See R.K. ex rel. Fatmir K. v. City of New York*, 200 A.D.3d 584, 585 (1st Dep't 2021) ("fail[ure] to oppose" a motion to dismiss a particular claim "abandon[s] the[] claim[]"). Indeed, the OAG does not meaningfully oppose the Opening Brief's arguments regarding the failure of the third, fifth, and seventh causes of actions relating to the conspiracy. Instead, the OAG offers only two short sentences:

> Ivanka Trump also incorrectly contends (Ivanka Br. 51–53) that OAG's § 63(12) illegality claims must be dismissed to the

> extent they are based on an alleged conspiracy. As set forth in detail above (at 7–17), the complaint alleged at length the facts supporting defendants' "ongoing scheme and conspiracy." (R. 1368–1377 (capitalization omitted).)

Resp't's Br. at 57.

The OAG purposefully does not specifically explain how it alleged that Ms. Trump's actions sustain the three causes of action alleging a criminal conspiracy. This is because it cannot do so. Instead, it directs this Court to the section of the Complaint where it made allegations regarding other defendants but no specific allegations regarding Ms. Trump that could be considered actions engaging in a conspiracy. The allegations in that section—to the extent they discuss Ms. Trump—are entirely conclusory or state that she must have had knowledge of the true value of certain assets on her father's Statements of Financial Condition, but no allegation that she even knew what was listed on her father's Statements of Financial Condition such that she would know there was an inconsistency—even if one were to assume that there was some objective metric for valuing property from which no one could deviate. *See generally* R. 1368–77.

CONCLUSION

For the foregoing reasons, the Appellate Division should reverse the judgment of the Supreme Court and remand the case with instructions to dismiss the Complaint against Ms. Trump.

Dated: May 5, 2023

Respectfully submitted.

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: May 5, 2023

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

In the Matter of the Application of: DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., THE TRUMP ORGANIZATION, LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC, Petitioners, For a Judgment Under Article 78 of the CPLR -against- THE HONORABLE ARTHUR F. ENGORON, J.S.C., and PEOPLE OF THE STATE OF NEW YORK by LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Respondents.	Case No. 2023-04580

PETITIONERS' MEMORANDUM OF LAW
IN FURTHER SUPPORT OF VERIFIED JOINT ARTICLE 78 PETITION

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Revocable Trust, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC and Seven Springs LLC

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Petitioners Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey Mcconney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., The Trump Organization, LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC (collectively, "Petitioners"), through their undersigned attorneys, respectfully submit this memorandum of law in further support of their Verified Joint Article 78 Petition (hereinafter referred to as the "Petition") against The Honorable Arthur F. Engoron, J.S.C. ("Justice Engoron") and the People of the State of New York by Letitia James, Attorney General of the State of New York (the "Attorney General" and, together with Justice Engoron, "Respondents").

PRELIMINARY STATEMENT

Respondents' opposition confirms the validity of the concerns identified in the Petition. Petitioners seek to compel Respondents to comply with the clear directives set forth in this Court's decision and order issued on June 27, 2023 (the "Decision"), and to preclude Supreme Court from acting in excess of its lawful jurisdiction. The Decision unequivocally mandated that Supreme Court dismiss all time-barred claims, applying cut-off dates defined specifically by this Court, and determine the full range of defendants bound by the tolling agreement. Incredibly, Respondents have now admitted the central premise of the Petition: notwithstanding that the Decision was issued nearly three months ago, and trial was slated to begin next week, "Supreme Court has not yet made *any* decision about which claims will proceed to trial," (Affirmation of Judith N. Vale in Opposition to Motion for a Stay of Trial ["Vale Aff."] [NYSCEF Doc. No. 6] ¶ 57 [emphasis in original], ¶ 59 ["Supreme Court has not yet decided which claims are proceeding to trial."]).

The Decision "unanimously modified, on the law" Justice Engoron's January 9, 2023, order denying Petitioners' and co-defendant Ivanka Trump's ("Ivanka") motions "***to dismiss, as time-barred,***" claims that accrued prior to July 2014 for defendants subject to the August 2021 tolling agreement and prior to February 2016 for defendants not subject to the tolling agreement. Verified Joint Article 78 Petition ("Petition") (NYSCEF Doc. No. 2), Exhibit C at 1 (emphasis added). Claims accrued on the date "the transactions were completed." Id. at 3. The plain language of the Decision left no room for interpretation.[1]

The plain language of the Decision also did not authorize any delay in Supreme Court's implementation of the unequivocal mandate of dismissal. Rather, the Decision plainly contemplated Supreme Court would implement this Court's mandate and eliminate all dismissed claims well in advance of any trial and without further litigation. Thus, contrary to the Attorney General's strawman argument, the Decision did not countenance Supreme Court forcing Petitioners to re-litigate via summary judgment motions the issues already decided by this Court. Doing so here effectively mocks the Decision and runs squarely counter to established jurisprudence. Petitioners therefore now stand one week before the planned start of a complex trial with extraordinary personal, fiscal, and operative ramifications, and yet still do not know if the Decision will be followed, what claims will be tried, and/or whether Supreme Court will proceed in excess of its jurisdiction.

None of this has stopped the Attorney General from proclaiming the Decision "does not decide 'the extent' to which any of OAG's claims 'accrued' prior to either July 2014 or February

[1] As noted in the Petition, (i) seven of the ten transactions at issue in the complaint involving lending were completed *before* July 13, 2014; (ii) one of the transactions involving lending was *never* consummated; and (iii) the two remaining transactions involving lending were completed *before* the cutoff date for timely claims against those Petitioners not subject to the tolling agreement, *i.e.*, February 6, 2016. Even so, the Decision has been ignored and Petitioners have been forced to re-litigate issues decided fully by this Court.

2016," (Vale Aff. ¶ 55). Indeed, without any respect for this Court's primacy, the Attorney General now claims the Decision does not require her to modify her case *at all*. In fact, she declares: (1) that Justice Engoron's application of the Decision will "not materially limit the evidence presented at trial," (2) that she is in all events free to present "evidence outside the limitations period," (3) that "the statute of limitations has no bearing on the injunctive relief the OAG may obtain," and (4) that the prospect of reduced monetary relief is "a speculative eventuality." Vale Aff. ¶ 75. The Attorney General even advances, both herein and before Supreme Court, novel theories of liability and new arguments on the eve of trial all crafted to evade the Decision.

The Attorney General also argues, remarkably, that Supreme Court's authority is somehow in danger of being "usurp[ed]," (Vale Aff. ¶ 35), because the prospect of finally complying with the Decision might upend briefly Supreme Court's plan to proceed to trial on October 2, 2023. Yet again, the Attorney General misses the mark. ***There simply was and is no valid basis for Respondents to usurp this Court's authority by ignoring the Decision!*** As noted, the Decision did not authorize interjection of an additional summary judgment process prior to implementation. Had Supreme Court been truly concerned about any impact on the trial date there should have been no delay in complying with the Decision and Petitioners' Order to Show Cause should not have been rejected as "completely without merit."[2]

Therefore, Respondents' baseless insistence on an arbitrary trial date at the expense of fundamental fairness, due process, and adherence to the rule of law cannot be countenanced. To be sure, this Court granted Petitioners' application for an emergency stay of trial pending

[2] The Attorney General also frets about the purported scheduling impacts of any delay on other cases in other courts, (see Vale Aff. ¶ 77), but this is simply not a legitimate consideration. Additionally, once the Decision is implemented the scope and length of the trial will be reduced substantially, thus negating any scheduling concerns.

resolution of the Petition on its merits, implicitly acknowledging that the claims in the Petition override any "scheduling" concerns. See Affirmation of Clifford Robert in Further Support of Petition ("Robert Reply Aff."), Exhibit M. The Attorney General's crude attempt to devalue that ruling by repeating, *ad nauseum*, that it was made by a "single justice," (Vale Aff. ¶¶ 2, 5, 33-34), falls flat.

In sum, the Attorney General has now advised this Court directly that she considers herself above its rulings. Absent a further directive from this Court, the Attorney General will proceed next week to a trial of every one of her claims. While Supreme Court has now indicated a plan to issue a ruling on September 26, 2023,[3] it (i) signaled endorsement of the Attorney General's baseless position by telling Petitioners that their earlier request for compliance with the Decision before the start of trial was "completely without merit", (ii) allowed re-litigation of issues decided by this Court, and (iii) cleared the calendar until Christmas to ensure the Attorney General is free to present whatever evidence she chooses in her attempt to prove even untimely claims. Therefore, in the absence of this Petition, there is no means to prohibit Supreme Court from exceeding its jurisdiction by proceeding to trial on dismissed claims.

Respondents, in effect, ask this Court to undermine its own appellate jurisdiction and vacate its prior unequivocal directive that time-barred claims be dismissed prior to trial. But this latest page in the Attorney General's playbook endangers the appellate jurisdiction of this Court. Petitioners will also undoubtably suffer substantial, and irreparable, prejudice from being forced to proceed to trial on any dismissed claims over which Supreme Court lacks jurisdiction. Moreover, manifest uncertainty as to the scope of the claims to be tried in this complex case

[3] At the start of the summary judgment arguments held on September 22, 2023, Justice Engoron announced his intention to issue an order on September 26, 2023, one day before the scheduled final pre-trial conference and less than one week before the originally planned commencement of trial. See Robert Reply Aff., Exhibit N at 4-5.

denies Petitioners a fair opportunity to prepare and present a defense which cannot be retroactively mitigated.

Therefore, if this Court's jurisdiction is to be respected, and the Decision is to have any meaning at all, the Petition must be granted, and Supreme Court must be compelled to dismiss time-barred claims and prohibited from proceeding in excess of its jurisdiction. Moreover, the stay of any trial must remain in effect for at least one week following Supreme Court's implementation of the Decision such that the parties may be adequately prepared to address only those issues remaining for trial.

ARGUMENT

RESPONDENTS MUST COMPLY WITH THE DECISION

A. This Court Mandated Immediate Dismissal of Time-Barred Claims

On June 27, 2023, after reviewing over 200 pages of briefing and presiding over vigorous oral argument, this Court "unanimously modified, on the law," Justice Engoron's January 9, 2023, order denying Petitioners' and Ivanka's motions to dismiss. The Court's decretal paragraph provides, in relevant part:

> Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered January 9, 2023, which denied defendants' respective motions to dismiss the complaint, ***unanimously modified, on the law, to dismiss, as time barred***, the claims against defendant Ivanka Trump and ***the claims against the remaining defendants to the extent they accrued prior to July 2014 (with respect to those defendants subject to the August 2021 tolling agreement) and February 2016 (with respect to those defendants not subject to the August 2021 tolling agreement)***...

Petition, Exhibit C at 1. (emphasis added). The Court also defined the accrual date for each claim on the third page of its Decision:

> Applying the proper statute of limitations and the appropriate tolling, ***claims are time barred if they accrued - that is, the transactions were completed*** - before February 6, 2016 (*see Boesky v Levine*, 193 AD3d 403, 405 [lst Dept 2021]; *Rogal v Wechsler*, 135

> AD2d 384, 385 [1st Dept 1987]). For defendants bound by the tolling agreement, claims are untimely if they accrued before July 13, 2014.

Id. at 3 (emphasis added). In the absence of a record sufficient to determine the full scope of the tolling agreement, the Court then directed: "We leave Supreme Court to determine, if necessary, the full range of defendants bound by the tolling agreement." Id.

The Decision is unambiguous: certain of the Attorney General's claims are unequivocally time-barred. Specifically, the Attorney General's claims are time-barred where they are premised on transactions completed outside of the statutory limitations period. Thus, the Decision divested Supreme Court of jurisdiction over such claims and expressly required that Supreme Court dismiss them upon remand.

The Court's mandate upon remand could not be plainer: (1) dismiss all claims against Ivanka, (2) determine which defendants were bound by the tolling agreement, and (3) dismiss all claims against all defendants that accrued prior to July 13, 2014, and prior to February 6, 2016, for defendants not bound by the tolling agreement.

B. Supreme Court Has Not Dismissed Any of the Attorney General's Claims

As the Attorney General acknowledges, notwithstanding the Decision's directive that time-barred claims be dismissed, months later, and now *mere days* before trial, "Supreme Court has not yet made *any* decision about which claims will proceed to trial." Vale Aff. ¶ 57 (emphasis in original). The Attorney General's admission thus confirms the central allegation of the Petition: Supreme Court has yet to comply in any respect with the Decision.[4] Instead, Petitioners have been forced to re-litigate via summary judgment motions issues already resolved by the Decision and to prepare for a complex and consequential three-month trial on claims this Court dismissed. The Decision was self-executing. There was no authorization for Supreme

[4] Supreme Court has not even dismissed the Complaint against Ivanka Trump. See Vale Aff. ¶ 26 n.3.

Court to allow the Attorney General to present new and repackaged arguments on summary judgment to evade that Decision.

C. There Are No Grounds to Delay Dismissal of the Time-Barred Claims

Forcing a defendant to trial without any assurance as to what specific claims he will be made to defend against is in excess of Supreme Court's authority and constitutes a grave harm. Incredibly, Respondents dismiss this harm because Supreme Court set a briefing schedule on the parties' competing motions for summary judgment. But as noted, the Decision did not contemplate or authorize this additional step. While Supreme Court now advises it will issue a ruling on the summary judgment motions on September 26, there is no indication the time-barred claims will be dismissed. Indeed, Supreme Court already told Petitioners that their argument for strict compliance with the Decision was "completely without merit." See Petition, Exhibit L. Supreme Court has also essentially confirmed, by setting a trial schedule that will extend until Christmas, that it intends to allow the Attorney General to try *all* of her claims. Thus, Petitioners' need for writs from this Court prior to the start of trial is manifest.

a. "Deadlines and Scheduling" Do Not Excuse Compliance with an Interlocutory Appellate Order on Remand

The Attorney General frames this proceeding as an attempt to interfere with Justice Engoron's discretionary management of "deadlines and scheduling" in his courtroom. See Vale Aff. ¶¶ 3, 15-20, 35, 42-47. This false construct ignores fully the obvious, namely, that any actual concerns about the trial schedule could, and indeed should, have long ago been alleviated through Supreme Court's prompt and strict compliance with the Decision's unequivocal mandate of dismissal. Thus, it is the Decision of this Court that has been thwarted and usurped by Respondents and neither may now be heard to complain about the consequences of their own conduct. The adherence to an arbitrary trial date, set by Supreme Court before any discovery

was exchanged, before motions to dismiss were decided, before any answers were filed, before this Court's Decision issued, and before it became clear that the Attorney General had no intention of respecting the appellate jurisdiction of this Court, must now yield to the fair and orderly administration of justice.

Nor does Supreme Court's right to "schedule" distract from the fact there appears no intention to conform the Attorney General's claims with the Decision. Irrespective of whether Supreme Court renders a decision on the motions for summary judgment on September 26, the Decision, which was issued three months ago, never required Petitioners to make a motion to compel compliance therewith. The Decision, as set forth below, is law of the case and required immediate adherence upon remittal. That Supreme Court has now allowed the Attorney General to re-litigate issues addressed fully in the Decision underscores the urgent need for this Court to act.

b. Appeal of a Hypothetical Decision on Summary Judgment is Not Required to Compel Compliance with an Interlocutory Appellate Order on Remand

According to the Attorney General, should Justice Engoron issue a decision on the pending motions for summary judgment, Petitioners' sole means of redressing any continuing failure to adhere to the Decision is an appeal of such decision in the ordinary course. See Vale Aff. ¶¶ 48-49, 51, 58. This rule should apply, in the Attorney General's view, "regardless of what the court decides." Id. ¶ 58. Thus, whether the eventual summary judgment ruling declines to address the Decision, refuses to dismiss a single one of the Attorney General's claims, or openly rejects the appellate jurisdiction of this Court, "such a decision would amount only to a purported legal error that petitioners may appeal through this Court's ordinary appellate process," (id.). This would then reward Supreme Court for refusing to follow the Decision,

undermine the jurisdiction of this Court and the rule of law, and result in Petitioners' appealing the same issues already decided in the first appeal.

The Attorney General is profoundly wrong. As set forth in the Petition, a proceeding against a Supreme Court Justice under Article 78 in the nature of mandamus is appropriate to compel any acts that the Justice is "duty-bound to perform, regardless of whether [he] may exercise [his] discretion in doing so." Klostermann v. Cuomo, 61 N.Y.2d 525, 540 (1984). Thus, a writ of mandamus under Article 78 may be "addressed to subordinate judicial tribunals, to compel them to exercise their functions." Id (quoting People ex rel. Francis v. Common Council of City of Troy, 78 N.Y. 33 [1879]); see Grant v. Cuomo, 130 A.D.2d 154, 167 (1st Dep't 1987). Likewise, a proceeding in the nature of prohibition is available "both to restrain an unwarranted assumption of jurisdiction and to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction." La Rocca v. Lane, 37 N.Y.2d 575, 578-79 (1975); see Matter of Soares v. Carter, 25 N.Y.3d 1011, 1013 (2015); Matter of Johnson v. Sackett, 109 A.D.3d 427, 428-29 (1st Dep't 2013).

The Petition seeks to compel compliance with a binding interlocutory appellate decision requiring Supreme Court to dismiss time-barred claims on remand. This Court's determination is law of the case ("LOTC") and cannot be revisited on remittal. There is no authorization for Supreme Court to make implementation of the Decision the subject of a subsequent summary judgment order which grants the Attorney General an opportunity to re-litigate the LOTC. There is also no jurisdiction for Supreme Court to then proceed forward to trial on dismissed claims unless and until Petitioners file yet another appeal. This eviscerates established LOTC jurisprudence. LOTC "bind[s] a trial court (and subsequent appellate courts of coordinate jurisdiction) to follow the mandate of an appellate court, absent new evidence or a change in the

law." See Matter of Part 60 RMBS Put-Back Litig., 195 A.D.3d 40, 48 (1st Dep't 2021) (Gische, J.). "[N]o discretion [is] involved; ***the lower court must apply the rule laid down by the appellate court***." Matter of Part 60 RMBS Put-Back Litig., 195 A.D.3d at 48 (quoting People v. Evans, 94 N.Y.2d 499, 503 (2000) [quotation marks omitted]) (emphasis added).

The doctrine of LOTC ensures that when Appellate Division exercises its broad authority to review questions of law and fact, (CPLR § 5501[c]), its determinations mean something to the parties and the court below. Here, the Court unequivocally required Supreme Court to dismiss certain claims. The Attorney General's assertion that Petitioners are constrained to await another ruling and then pursue ordinary appellate remedies ignores the extraordinary nature of their injury where Respondents have refused to acknowledge and comply with the LOTC days before trial is set to begin.[5] It also perversely requires Petitioners to pursue a second appeal to obtain the relief they were granted on their first appeal. The writs Petitioners seeks are therefore authorized, warranted, and indispensable in the face of Respondents' recalcitrance.

c. Appeal of a Hypothetical Decision on Summary Judgment is Not an Adequate Remedy

Even if an appeal in the ordinary course were available to Petitioners, it is not an adequate remedy for the harm Petitioners will suffer if they are forced to defend against time-barred claims. The Attorney General, erroneously conflating the standard for Article 78 relief with the standard for a preliminary injunction, claims no "irreparable harm" will come to Petitioners "from simply doing the work to prepare for and start a trial that has been scheduled for many months," (Vale Aff. ¶ 8). According to the Attorney General, Petitioners cannot

[5] Given any ruling by Supreme Court is to be issued just one day before the final pre-trial conference and six days before the scheduled start of the trial, the Attorney General's approach also seeks to conveniently (and knowingly) construct a procedural checkmate which both evades this Court's Decision and eliminates any possibility of review prior to commencement of trial. Such blatant disregard for this Court's jurisdiction and flagrant manipulation of the legal process by a public officer cannot and should not be permitted.

"credibly complain" they have not had sufficient time to prepare for trial because they should have started preparing ten months ago. Id. ¶ 73. Of course, the Attorney General ignores the fact that Petitioners had not even filed answers or exchanged any discovery ten months ago, that trial was scheduled months before issue was joined, that the Note of Issue was filed under two months ago, and that motions for summary judgment, spanning nearly 700 docket entries, will not be decided until one day before the final pre-trial conference and six days before the originally scheduled trial date. She also overlooks that the Decision, rendered months ago and which narrows substantially the triable issues, has not yet been implemented. Instead, she cites her production of *1.7 million* documents at the end of last year as some sort of evidence of the ease with which Petitioners could "simply do[] the work" of preparing for a massive and complex trial of national significance. Id. ¶ 8.

The Attorney General's eagerness to tell this Court just how harmless trial would be enters increasingly bizarre territory when she attempts to explain why it is of no consequence if Petitioners face a few claims that this Court has dismissed, since "OAG has timely claims regardless of the outcome of this proceeding," (id. ¶ 74). Here, the Attorney General cannot seriously claim that a trial on ten allegedly fraudulent transactions presents the same dangers as a trial on two or fewer.

For example, despite her insistence to the contrary, a reduction in the scope of her case will necessarily limit the scope of monetary relief; it is not a "speculative eventuality" but an absolute certainty. The Attorney General points this Court to a chart purportedly showing "$187 million in ill-gotten gains from the submission of misleading Statements as to just four loans." Vale Aff. ¶ 14 (citing Vale Aff., Exhibit 5). What the Attorney General cleverly fails to reveal however, is that two of those claims (Doral and Chicago) ***are based on loans that closed well***

prior to July 13, 2014, and were dismissed by this Court! Thus, even assuming there is any entitlement to any monetary relief, approximately $117 million of the stated $187 million (62.5%) is no longer part of the case. Moreover, the Decision's dismissal of the majority of the Attorney General's lending-based claims will impact necessarily and substantially the scope of any available injunctive relief.

The Attorney General's assertions that she will call all Petitioners as witnesses at trial "even if some claims against them were dismissed as untimely," and that she will present "supplemental evidence outside the limitations period" regardless of whether the bulk of her claims are dismissed, are likewise absurd. Id. ¶ 75. The Attorney General cannot simply present whatever evidence she wants without regard to its relevance to the triable claims. But the Attorney General knows this; indeed, it is the reason why she is so insistent on trying her case before there is full compliance with the Decision. Established jurisprudence and this Court's Decision require that certain claims be dismissed and the nature and scope of the issues be identified sufficiently in advance of trial. Otherwise, Supreme Court will proceed in excess of its lawful jurisdiction and the Attorney General will openly disregard the authority of this Court. The Attorney General should simply not be permitted to convert a short trial into a three-month spectacle where she is allowed to repeat the words "fraud and illegality" thousands of times and present evidence regarding dismissed claims.

The Attorney General's characterization of what will happen if this Petition is denied, and Petitioners are constrained to appeal a subsequent disposition, is wholly untethered from reality. Petitioners cannot "simply" prepare for a complex, three-month trial of unclear scope in six days. Moreover, the introduction of evidence relevant only to time-barred claims would irreparably taint any trial and dramatically increase the likelihood that Petitioners will face

penalties that are orders of magnitude more severe than they would have been had the Decision been implemented. Finally, Supreme Court is simply not permitted to exceed its jurisdiction and proceed to trial on dismissed claims. Petitioners, like any other litigants, face obvious irreparable injury if they are forced to defend at trial against claims over which Supreme Court has no jurisdiction. Indeed, the resulting systemic insult to this Court's authority cannot and should not be minimized, and Respondents must and should be compelled to abide by the unequivocal Decision.

D. The Decision Forecloses the Attorney General's Attempt to Revive Time-Barred Claims through a Newly Constructed Legal Theory

Notwithstanding the plain language of the Decision, the clarity of its holdings and directives, and the absence of a shred of new evidence or change in law since its issuance, the Attorney General denies the Decision has had *any* practical effect on the claims in her case. Instead, she pretends that, by wave of her prosecutorial credentials, she can make the unfavorable ruling of this Court simply disappear. Thus, the Attorney General contends that this Court did not require any of her claims to be dismissed on remand. In her view, even a decision on the tolling agreement is superfluous because, whichever statutory period applies, *all* of her claims survive. See id. ¶ 56 (stating that "it might not even be necessary to decide the application of the tolling agreement" if all claims are deemed timely).

The Attorney General's nascent "solution" to the Decision is premised on a legal theory she first debuted over the past month in briefing on summary judgment. As set forth below, however, the Decision conclusively forecloses her artless repackaging of the continuing wrong claim this Court rejected.

a. The Attorney General's Newly Constructed Legal Theory Merely Repurposes the "Continuing Wrongs" Rejected by this Court as Bases to Extend the Statute of Limitations

Prior to summary judgment, the Attorney General's well-established position was that the Petitioners' improper procurement of certain loans themselves constituted the actionable wrongs. In her Complaint, which has never been amended, the Attorney General alleges that her claims are premised upon the defendants' submission of purportedly false and misleading financial statements "***to induce banks to lend money to the Trump Organization*** on more favorable terms than would otherwise have been available to the company." Petition, Exhibit A ¶ 3 (emphasis added).

Thereafter, in opposition to Petitioners' Motion to Dismiss, the Attorney General was unequivocal about her theory of recovery: "[O]n September 21, 2022, OAG commenced this enforcement action pursuant to New York Executive Law § 63(12) alleging that Defendants (plus Ivanka Trump) engaged in repeated and persistent fraud and illegality by inflating asset values on Mr. Trump's annual statements of financial condition ('Statements') covering at least the years 2011 through 2021 and presenting those Statements to lenders and insurers licensed in New York ***to obtain favorable loan and insurance terms they would otherwise not have been entitled to receive***. *See People by James v. Donald J. Trump*, No. 452562/2022 (Sup. Ct. N.Y. Cnty. Nov. 3, 2022) (NYSCEF No. 183), slip op. at 1-2." Petition, Exhibit H at 8-9 (emphasis added).

Yet again, before this Court, the Attorney General asserted: "Defendants' scheme involved submitting (and certifying as true) Mr. Trump's false and misleading Statements in various commercial transactions to banks and lenders, insurance companies, and other entities ***to***

obtain significant financial benefits such as favorable loan or insurance terms." Petition, Exhibit I at 8 (emphasis added).

Thus, the Attorney General has maintained until just now that the use of allegedly fraudulent statements to obtain financial benefit (in the form of loans from the banks, etc.) is the wrong she seeks to redress.

Additionally, under her previous theory, subsequent, post-closing certifications as to the veracity of the statements of financial condition, as required by the loan documents, simply constituted continuing wrongs which extended the applicable limitations period. There are many examples but the following quote from the Attorney General's brief before this Court is both succinct and revealing:

> Here, defendants' scheme involved such continuing wrongs. For example, the Deutsche Bank loans imposed an ongoing requirement to annually submit the Statements and certify their truth and accuracy, and defendants repeatedly did so despite the misrepresentations in the Statements. . . . ***Such subsequent and repeated false and misleading submissions made in connection with an initial financial relationship constitute continuing wrongs.***[6] . . . . For the Old Post Office Loan, defendants also repeatedly requested disbursements conditioned on their certifying the truth and accuracy of the previously submitted Statements. . . . That ongoing conduct ***is also covered by the continuing-wrong doctrine***.

Robert Reply Aff., Exhibit O at 48-49 (emphasis added).

Further, in his decision denying Petitioners and Ivanka's motions to dismiss, Justice Engoron demonstrated this understanding in explaining why he believed claims could be sustained against Ivanka:

> As OAG persuasively argues, ***the nature of the loan contracts at issue renders application of the continuing wrong doctrine particularly compelling*** in this

[6] In direct contravention of this clear statement, the Attorney General now asserts that "[f]or these loans, there can be no serious dispute that the preparation of a new false and misleading statement and the submission and certification of that new statement to a bank constitutes a fraudulent transaction of business in the State of New York that is completed within the meaning of the First Department's decision when the certification is delivered to the bank." Robert Reply Aff., Exhibit N 37:22-38:4. The Attorney General has simply manufactured a way to evade the Decision, and Supreme Court is openly allowing re-litigation of issues already decided by this Court.

> action. The loans, ***obtained through the use of allegedly inflated [Statements of Financial Condition]***, continued in effect for many years after the loan was issued and required annual performance by defendants. For example, each of the Deutsche Bank loans had terms extending past 2022, and each had continuing obligations to maintain a net worth of at least $2.5 billion and unencumbered liquidity of $50 million. ***Each of the loans required annual submissions of Mr. Trump's [Statement of Financial Condition] and a certification that the Statements were true and accurate and that there had been no material change in Mr. Trump's net worth or his liquidity***…Ms. Trump's own biography from 2014 indicated that she "spearheaded the acquisition of [Trump National Doral] and was responsible for overseeing the 250 million dollar renovation of the 800 acre property."
>
> …
>
> Accordingly, ***as the verified complaint sufficiently alleges Ms. Trump's participation in continuing wrongs***…Ms. Trump is not entitled to dismissal pursuant to the statute of limitations.

Petition, Exhibit B at 7-8 (emphasis added).

However, in unanimously modifying Justice Engoron's decision, this Court rejected the argument that annual certifications or other post-closing submissions could support the timeliness of the Attorney General's claims under the continuing wrong doctrine. This Court concluded the claims are absolutely time-barred insofar as they are premised on transactions that were completed outside of the applicable statutory periods: "***The continuing wrong doctrine does not delay or extend these periods*** *(see CWCapital Cobalt VR Ltd. v CWCapital Inus. LLC*, 195 AD3d 12, 19-20 [1st Dept 2021]; *Henry v. Bank of Am.*, 147 AD3d 599, 601-602 [1st Dept 2017])." Petition, Exhibit C at 3-4 (emphasis added).

Notwithstanding the Decision, the Attorney General now pivots to claim that the post-closing submissions of the Statements of Financial Condition are no longer "continuing wrongs" but separately actionable claims that bring loan agreements that were indisputably entered into before the statutory cut-off back into play. Accordingly, she now asserts that each annual certification of the statements of financial condition underlying the loan transactions constitutes

an "instance of actionable fraud or illegality" independent of the issuance of the loans. Vale Aff. ¶ 65. This is an obvious attempt to re-litigate issues decided by this Court and evade the the Decision. Indeed, the Attorney General declares, as if announcing some profound insight:

> Petitioners miss the mark in relying…on this Court's statement that "[t]he continuing wrong doctrine does not delay or extend" the statute of limitations. *Trump*, 217 A.D.3d at 611. OAG has explained in its summary-judgment papers that it is not asking Supreme Court to delay or extend the limitations period beyond the July 2014 or February 2016 cutoff dates…Rather, OAG has argued that wrongful conduct committed *within the limitations period* is not immunized merely because earlier conduct was committed outside the limitations period.

Vale Aff. ¶ 68 (emphasis in original). This repackaged argument is familiar, and for good reason: ***it paraphrases the continuing wrong doctrine***. "The doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs." Henry v. Bank of Am., 147 A.D.3d 599, 601 (1st Dep't 2017) (internal quotation marks and citation omitted). Thus, "[i]n contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party." Id.; see CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 195 A.D.3d 12, 19-20 (1st Dep't 2021). Indeed, this is precisely the distinction raised by Ivanka Trump and ultimately accepted by this Court in the Decision.

The NYAG argued to this Court that Ms. Trump's involvement in submitting disbursement requests on the Old Post Office Loan (i.e., "continuing wrongs") "dispos[es] of her argument (Ivanka Br. 22-24) that OAG's claims against her accrued solely when the Deutsche Bank loan for the Doral golf club in Florida closed in 2012, and the Old Post Office loan closed in 2014." Robert Reply Aff., Exhibit O at 49.

In response, Ms. Trump argued, successfully, those submissions did "not trigger a new limitations period . . . because it does not constitute a newly accruing 'wrong.'" Robert Reply Aff., Exhibit P at 27. Rather, the submissions constituted "a continuing effect of a previous, allegedly fraudulent action (i.e. securing the loan)." Robert Reply Aff., Exhibit Q at 33 n.7.

This Court agreed, dismissing Ms. Trump and holding that the continuing wrong doctrine did not apply. In other words, the Court concluded that Petitioners' purported independent, "wrongful conduct committed *within the limitations period*" was not independent, wrongful conduct at all. The Attorney General's claims are therefore untimely as to all defendants to the extent they are premised on transactions that accrued—that is, loans that closed—outside of the limitations period. Subsequent certifications/submissions do not form the basis for separate claims.

b. The Decision Leaves No Doubt as to when the Attorney General's Claims Accrued

The Attorney General disingenuously suggests that the Court's use of "completed" rather than "closed" indicates that the Court meant the operative accrual date for the claims (based on the Attorney General's then-established, but now discarded, inducement theory) was not the closing date of the subject loans. However, the Court referred to the date "the transactions were completed" as the accrual date because the "completion" of a loan transaction is the date when the transaction is actually entered into, and a benefit is conferred (i.e., the closing date).

The Decision's citation to this Court's precedent resolves any doubt. In Boesky v. Levine, this Court found that a cause of action for fraud accrued "when plaintiffs ***entered into*** the allegedly fraudulent transactions." 193 A.D.3d 403, 405 (lst Dep't 2021). In Boesky, the plaintiffs contended that the defendants fraudulently advised them to invest in tax shelters of questionable legitimacy. Notwithstanding that the plaintiffs alleged the defendants "continued to

provide flawed and erroneous advice" through 2016, (2018 WL 6262059 at *13 [Sup. Ct. N.Y. Cty. Nov. 27, 2018]), this Court determined that the claim for fraud accrued between 2002 and 2004, when the plaintiffs actually invested in the tax shelters. In Rogal v Wechsler, this Court similarly held: "The cause of action for fraud accrues and the Statute of Limitations commences to run at the time of the execution of the contract", finding that Supreme Court "erroneously fixed the accrual" of the plaintiffs' fraud claim on the date "when certain misrepresentations allegedly were made." 135 A.D.2d 384, 385 (1st Dep't 1987). Thus, Boesky and Rogal foreclose the Attorney General's argument.

The Decision's citation to Boesky and Rogal is also not mere "dicta" that the Attorney General is free to ignore. Thus, the Decision did not leave "unresolved many issues regarding when the OAG's claims accrued," (Vale Aff. ¶ 27). The Attorney General's belated attempt to inject uncertainty into the Decision, and Supreme Court's allowance of re-litigation of decided issues, must and should be rejected.

E. The Attorney General's Newly Constructed Theory is an Impermissible Attempt to Amend the Complaint After the Close of Discovery

On July 31, 2023, the Attorney General filed a Note of Issue and Certificate of Readiness affirming, in relevant part, (1) that "[d]iscovery known to be necessary [was] completed," (2) that "[t]here has been a reasonable opportunity to complete [discovery] proceedings," and (3) that "[t]he case is ready for trial." Vale Aff., Exhibit 10. The Note of Issue has never been vacated. Moreover, the Attorney General has never amended her Complaint, wherein as detailed above she claimed throughout the course of this case that she sued upon loan transactions that closed outside of the statutory period. The Attorney General nonetheless now seeks to introduce a newly constructed theory, that would renew all of her time-barred claims, dramatically expand the scope of trial, and ambush Petitioners, mere days before trial is scheduled to begin. The

Attorney General is bound by the case she pleaded in her Complaint and the theories of recovery advanced therein and during the course of the litigation. There is simply no lawful means for the Attorney General to introduce new theories of recovery inconsistent with positions she has heretofore advanced.

The Attorney General's "belated injection of a new theory into the case, completely foreign [to the defendants], without notice and without opportunity to prepare to meet it and refute it" is "obviously unfair and prejudicial to defendant[s]." Forman v. Davidson, 74 A.D.2d 505, 506 (1st Dep't 1980). "A trial is manifestly unfair when a party is suddenly called upon to defend on a theory belatedly brought into the case." Id. Moreover, the Attorney General's attempt to introduce an untested theory of liability on the eve of trial, in the absence of any application to amend its pleading, is procedurally improper. See Jean-Baptiste v. 153 Manhattan Ave. Hous. Dev. Fund Corp., 124 A.D.3d 476, 476 (1st Dep't 2015). Nor could leave be granted, at this juncture, inasmuch as the Attorney General's delay in revealing her theory of the case is "both prejudicial and inexcusable." Boland v. Koppelman, 251 A.D.2d 176, 176 (1st Dep't 1998); see Videobox Networks v. Durst, 259 A.D.2d 429, 430 (1st Dep't 1999).

***

The directives of this Court, which constitute LOTC, are binding, even on the Attorney General. This principle is ignored, and the power of this Court irreparably diminished, if a different set of rules applies. The rule of law requires a robust defense of this Court's jurisdiction over appellate issues and its authority to bind the courts below and the executive branch when it speaks. Petitioners respectfully implore the Court to aid in this defense by granting their application, confirming that Respondents are bound by Decision, and prohibiting

Respondents from proceedings to trial on claims which have been dismissed and over which there is no jurisdiction.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court issue a directive that Supreme Court implement the Decision and a prohibition on Respondents from proceeding to trial on claims dismissed by this Court as time-barred and over which Supreme Court lacks jurisdiction, continue the stay of the trial until at least one week following implementation of the Decision, and grant any other such and further relief it may think proper.

Dated: New York, New York
September 24, 2023
Respectfully submitted,

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