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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, Attorney General of the State of New York, *Plaintiff*, v. 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*.	Index No. 452564/2022

MEMORANDUM OF LAW OF IVANKA TRUMP
IN SUPPORT OF MOTION TO DISMISS

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PRELIMINARY STATEMENT

The Complaint fails to set forth sufficient allegations to state a claim against Ivanka Trump ("Ms. Trump") for violating New York Executive Law § 63(12). Ms. Trump left the Trump Organization in January 2017; and there is no allegation she had any responsibilities at the company thereafter. The Complaint describes Ms. Trump's efforts in 2012 and 2014 to develop the Doral and Old Post Office properties, but fails to allege facts to establish she engaged in any fraudulent or unlawful conduct in connection with those projects, or otherwise.

The Complaint does not allege that Ms. Trump made any affirmative misrepresentation to anyone. There is no allegation that she ever prepared, reviewed, approved, signed, or submitted any of her father's statements of financial condition ("SFCs") to anyone. There is no allegation she knew about the alleged use of improper methodologies to value the assets included in any SFC. There is no allegation she falsified any business record. There is no allegation she communicated with any insurer or auditor.

As a result, each of the seven Causes of Action alleging violations of § 63(12) against her must be dismissed. The First, alleging a violation of § 63(12)'s fraud prong, fails because the Complaint does not identify any specific misrepresentation she made, nor does it allege she knew about, or actively participated in, a fraudulent scheme. The Second through Seventh, alleging violations of § 63(12)'s unlawfulness prong, fail because the Complaint does not include facts sufficient to plead that she violated the New York Penal Law. And, because the loan facilities that Deutsche Bank provided to develop the Doral and Old Post Office properties closed in 2012 and 2014—more than eight years before the Complaint was filed—each § 63(12) cause of action is barred by the applicable three-year statute of limitations.

ALLEGATIONS IN THE COMPLAINT

On a motion to dismiss, the court "accept[s] the facts as alleged in the complaint as true," *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994), but does not credit "bare legal conclusions," *Summit Solomon & Feldesman v. Lacher*, 212 A.D.2d 487, 487 (1st Dep't 1995). A heightened pleading standard applies to fraud claims brought under Executive Law § 63(12)—under CPLR 3016(b), the "circumstances constituting the wrong" must be "stated in detail." *People v. Katz*, 84 A.D.2d 381, 384-85 (1st Dep't 1982). The Complaint must specify "the precise tortious conduct charged to a particular defendant." *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co*., 84 A.D.2d 736, 736 (1st Dep't 1981) (dismissing claims pled collectively against all defendants); *see also Deep v. Urbach, Kahn & Werlin LLP*, 19 Misc. 3d 1142(A), 2008 WL 2312754, at *3 (Sup. Ct. June 5, 2008).

A. Ivanka Trump's Responsibilities at the Trump Organization

Ms. Trump was the Executive Vice President for Development and Acquisitions of the Trump Organization, "direct[ing] all areas of the company's real estate and hotel management platforms," Compl. ¶ 33, including negotiating and securing financing for company properties, as well as licensing, *id.* ¶¶ 33, 553, 554. She has had no role in the Trump Organization since January 2017. *Id.* ¶ 33.

B. Doral

In November 2011, the Trump Organization executed a $150 million agreement to purchase the Doral Golf Resort and Spa ("Doral"). Compl. ¶ 571. In October 2011, Ms. Trump sent Deutsche Bank an "Investment Memo" and financial projections describing the development projections for the Doral property. *Id.* ¶ 572. On November 14, 2011, Richard Byrne, head of Deutsche Bank's Commercial Real Estate ("CRE") division, "spoke to

Mr. Trump and Ivanka Trump about the loan." *Id.* ¶ 574. The next day, "Mr. Trump sent Mr. Byrne a letter, copying" Ms. Trump and attaching his SFC. *Id.* Shortly thereafter, CRE proposed interest-rate terms that the Trump Organization rejected. *Id.* ¶¶ 575-576.

In December 2011, Ms. Trump had discussions with Rosemary Vrablic about financing for the Doral project from Deutsche Bank's Private Wealth Management ("PWM") division. *Id.* ¶ 576. Ms. Trump and her father met with Vrablic, prior to which Ms. Trump sent Vrablic an Investment Memo for the Doral project "as well as some basic information on [the Trump Organization's] golf and hotel portfolios." *Id.* On December 15, 2011, Vrablic sent Ms. Trump a term sheet for a proposed $125 million construction loan that included a personal guaranty from her father. *Id.* ¶ 577. The term sheet set out proposed interest rates, and included covenants that required him to maintain a $3 billion minimum net worth and $50 million of unencumbered liquidity. *Id.*

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." *Id.* ¶ 578. Jason Greenblatt (the Trump Organization's Chief Legal Officer) responded, expressing concern about the risks to her father from guaranteeing the financing with his personal assets. *Id.* ¶ 579. As alleged in the Complaint (¶ 580), Ms. Trump responded that "the only way to get proceeds/term and principle where we want them is to guarantee the deal." Three days later, on December 18, 2011, Ms. Trump sent a revised term sheet to Vrablic on behalf of the Trump Organization, proposing to reduce the net-worth covenant to $2 billion and limiting term payments to interest-only. *Id.* ¶ 582.

The Complaint does not identify any further actions by Ms. Trump in connection with this transaction, which closed six months later on June 11, 2012. *Id.* ¶¶ 587-588. Nor does it allege that she ever signed or submitted any SFCs—for this transaction or otherwise.

C. The Old Post Office

In July 2011, the Trump Organization submitted a bid to the General Services Administration ("GSA") for the right to lease and redevelop the Old Post Office ("OPO") in Washington, D.C. Compl. ¶¶ 623-625. Ms. Trump participated in that effort, working with her father "in crafting communications to the GSA . . . and in responding to deficiency comments raised by the GSA." *Id.* ¶ 625. Those communications "concerned, among other topics, Mr. Trump's" prior SFCs, "including their departures from" Generally Accepted Accounting Principles ("GAAP"), and "Mr. Trump's financial capabilities as well as his ability to perform the obligations under the lease at issue." *Id.* The Complaint does not allege that any of the SFCs submitted at that time were false or misleading. Its allegations claiming that the SFCs contained false statements begin with the 2011 SFC, *see*, *e.g.*, *id.* ¶ 1, which was not submitted to the GSA as part of the July 2011 bid, *see id.* ¶¶ 623-624 & Ex. 3 at 20. "Mr. Trump and Ivanka Trump participated in an in-person presentation to address GSA's concerns about those topics and others." *Id.* ¶ 625. In February 2012, the GSA selected the Trump Organization to develop the property. *Id.* ¶ 626. On August 5, 2013, the GSA leased the property to the Trump Organization. *Id.*

For this development project, the Trump Organization engaged in preliminary discussions with the CRE and PWM divisions of Deutsche Bank. *Id.* ¶¶ 627, 629-630. Vrablic of PWM "kept close tabs on the bank's consideration of the request . . . at the urging of Ivanka Trump." *Id.* ¶ 627. On December 2, 2013, PWM provided Ms. Trump with a draft term sheet

for a $170 million loan facility to the Trump Organization. *Id.* ¶ 630. That term sheet required that her father personally guarantee the proposed loan, and that he maintain a personal net worth of at least $2.5 billion. *Id.* ¶ 631. The Complaint does not allege that Ms. Trump had any involvement in the OPO negotiations after December 2, 2013. *See id.* ¶¶ 631-644. The Trump Organization and PWM executed a term sheet on January 13 and 14, 2014, *id.* ¶ 632, and the construction financing for $170 million closed on August 12, 2014. *Id.* ¶ 634. Ms. Trump is not alleged to have signed those loan documents. Several years later, on December 21, 2016, Ms. Trump signed a draw request for a $4,334,772.83 disbursement from that loan facility. *Id.* ¶ 645.

D. Penthouses A and B

Beginning in 2011, Ms. Trump rented a penthouse apartment ("Penthouse A") at Trump Park Avenue. Compl. ¶ 106. Her rental agreement included an option to purchase Penthouse A for $8,500,000. *Id.* ¶ 107. The 2011-2013 SFCs included a valuation of Penthouse A at a value higher than Ms. Trump's option purchase price. In June 2014, Ms. Trump was given an option to purchase another penthouse ("Penthouse B") in the same building for $14,264,000. *Id.* ¶ 108. The 2014 SFC included a valuation of Penthouse B at a value higher than Ms. Trump's option purchase price. *Id.* The Complaint does not allege that Ms. Trump knew about those valuations. It alleges that the options reduced the fair-market value of Trump Park Avenue under GAAP, *see id.* ¶ 111, but does not allege that Ms. Trump knew of or understood any such effect.

ARGUMENT

I. The Complaint Fails To Allege Ms. Trump Engaged in Any Fraud Under § 63(12).

The Complaint fails to identify any misrepresentation made by Ms. Trump. It describes Ms. Trump's communications with Deutsche Bank to discuss financing for the Doral and OPO

projects.[1] But nowhere does it allege that Ms. Trump made any misrepresentation—about the SFCs or otherwise—in connection with either transaction, much less identify any such misrepresentation with specificity (Part I.A). The Complaint also lacks allegations sufficient to state a § 63(12) claim against Ms. Trump based on any alleged misrepresentations made by others (Part I.B). Nor do the civil-conspiracy allegations state a § 63(12) claim against Ms. Trump (Part I.C). These pleading deficiencies require dismissal of the First Cause of Action.

A. The Complaint Fails To Allege That Ms. Trump Made Any Misrepresentation.

A complaint that asserts a fraud-based violation of § 63(12) must identify a fraudulent misrepresentation. *See People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 633 (2018) (§ 63(12)'s definition of "fraud" identical to that in Martin Act); *People v. Federated Radio Corp.*, 244 N.Y. 33, 41 (1926) (Martin Act fraud requires identifying misrepresentation). Because § 63(12) fraud claims are subject to the "stringent" pleading standard of CPLR 3016(b), they must be "pleaded with particularity," and "conclusory allegations are insufficient." *CIFG Assur. N. Am., Inc. v. J.P. Morgan Sec. LLC*, 146 A.D.3d 60, 63 (1st Dep't 2016). Failure to identify a specific misrepresentation made by an individual defendant requires dismissal as to that defendant. *See*, *e.g.*, *Abrahami v. UPC Constr. Co.*, 176 A.D.2d 180, 180 (1st Dep't 1991) (dismissing fraud claims based on inflated financial statements for failure to allege individual directors themselves made any false representations).

The Complaint identifies only two transactions in which Ms. Trump allegedly made statements to a third party: the purchase and development of Doral, and the lease and financing

[1] The Complaint includes a threadbare allegation that Ms. Trump "negotiated loans on Trump Organization properties" at Trump Chicago, Compl. ¶¶ 33, 721, but 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).

of OPO. The Complaint does not allege that she made a misrepresentation to anyone in either transaction, much less with the requisite specificity necessary to allege fraud. That basic pleading failure requires dismissal as to Ms. Trump.

Doral. The Complaint describes Ms. Trump's communications with Deutsche Bank in November and December 2011 to obtain financing to develop the Doral property. *See* Compl. ¶¶ 572, 574, 576, 582. During those two months, the Complaint alleges that Ms. Trump sent Deutsche Bank an "Investment Memo" with "financial projections for the Doral property." *Id.* ¶¶ 572, 576. It does not allege that the "Investment Memo" was an SFC or false or misleading in any respect. The remaining allegations about the Doral negotiations do not allege that Ms. Trump made any relevant representation, let alone allege a false representation with particularity. *Id.* ¶¶ 574 (alleging a conversation "about the loan," with no further details); 576 (same). Those communications occurred six months before the loan closed in June 2012. Ms. Trump did not sign the final loan documentation. The Complaint does not allege the valuation for the Doral property was inflated on any SFC.

OPO. The Complaint does not allege that Ms. Trump made any misrepresentation regarding the OPO lease, the proposed financing, or any SFC submitted in connection with this project. Indeed, the Complaint fails to identify *any* specific representation Ms. Trump made regarding the OPO project. It alleges that on December 21, 2016, two years after the OPO financing closed, Ms. Trump "signed a draw request" to Deutsche Bank. *Id.* ¶ 645. Signing a "draw request"—requesting project-specific disbursement on a prior credit facility—is not fraudulent. Paragraph 645 (the only allegation about Ms. Trump's draw request) does not identify a specific misrepresentation.

B. The Complaint Fails To Plead Ms. Trump Participated in or Knew of Any Alleged Misrepresentation.

As explained, there is no allegation that Ms. Trump made a misrepresentation to anyone. "Where liability for fraud is to be extended beyond the principal actors" to one who "has not made any fraudulent misrepresentation," "it is especially important that the command of CPLR 3016(b) be strictly adhered to." *Nat'l Westminster Bank v. Weksel*, 124 A.D.2d 144, 149 (1st Dep't 1987) (the circumstances of one defendant's connection to another's fraudulent misrepresentation must "be alleged in detail from the outset"). As a non-speaker, Ms. Trump has no § 63(12) liability unless she "personally participate[d] in the misrepresentation or [had] actual knowledge of it." *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 44 (1980) ("[m]ere negligent failure to acquire knowledge" is insufficient); *People v. Apple Health & Sports Clubs, Ltd.*, 80 N.Y.2d 803, 807 (1992) (applying *Midland* test to § 63(12) fraud case). The Complaint lacks allegations sufficient to state a § 63(12) claim against Ms. Trump based on any alleged misrepresentations made by others.

First, there is no allegation that Ms. Trump personally participated in the alleged fraudulent scheme. She did not directly or indirectly prepare, review, or approve the SFCs. The Complaint in fact alleges the opposite. Ms. Trump is not among the individuals identified in the Complaint who (i) were named as responsible parties on the SFCs, Compl. ¶ 6; (ii) directed Trump Organization staff to prepare valuations for the SFCs, *id.* ¶ 54; (iii) prepared supporting spreadsheets for the SFCs, *id.* ¶ 62; (iv) "certified the accuracy" of the SFCs submitted to Deutsche Bank, *id.* ¶ 595; or (v) were "key individual players" in the alleged fraud, *id.* ¶ 758. The allegations necessary to plead that Ms. Trump, as a non-speaker, could be liable for the alleged fraudulent scheme are non-existent. The Complaint thus fails to state a sufficient claim under CPLR 3016(b). *See Weksel*, 124 A.D.2d at 149.

The Complaint (¶¶ 577, 627) describes Ms. Trump's initial discussions with Deutsche Bank to finance the Trump Organization's development of Doral and OPO. It does not allege that Ms. Trump was involved in the negotiations over the final loan documentation, executed those documents, monitored compliance with representations and warranties, or confirmed the accuracy of any SFC. Accordingly, it does not sufficiently allege that she personally participated in any fraudulent scheme. *See*, *e.g.*, *RKA Film Fin., LLC v. Kavanaugh*, 56 Misc. 3d 1203(A), 2017 WL 2784999, at *4 (Sup. Ct. June 27, 2017) (allegation that director conducted diligence on a financial transaction is insufficient to support an inference that director personally participated in alleged fraud). Similarly, the allegation (¶ 574) that her father sent his SFC to Deutsche Bank in 2011, "copying Ivanka Trump," does not allege that Ms. Trump personally participated in a fraudulent scheme. *Cf. Meeker v. McLaughlin*, 2018 WL 3410014, at *8-9 (S.D.N.Y. July 13, 2018) (following *Midland* and dismissing fraud claim against director who was only "copied on email communications regarding" the misrepresentation).

Second, the Complaint fails adequately to allege that Ms. Trump actually knew of any misrepresentation. Although the Complaint alleges that the SFCs were inflated because they used improper or undisclosed valuation methodologies and relied on inaccurate data, *see*, *e.g.*, Compl. ¶¶ 136, 175, it does not allege that Ms. Trump knew they were inflated, by how much, or why. Nor does it allege that she knew her father's net worth; the extent of his control over specific assets under the complicated organizational structure identified in the Complaint, *see id.* Ex. 2; or how any SFC valued those assets.

Some allegations in the Complaint suggest that Ms. Trump had information about the value or potential value of three out of the more than 22 real estate assets included in the SFCs. *Id.* ¶¶ 106, 572, 627. But Ms. Trump's alleged knowledge about only three assets in the SFCs

does not constitute an allegation that she actually knew that any particular SFC was inflated. There is no allegation that she actually knew (i) which valuation methodology should be applied to specific assets under GAAP; (ii) that the valuation methodology was not being properly applied; or (iii) that the resulting valuations, in the aggregate, violated the representations and warranties in any loan documentation. *Cf. RKA Film. Fin., LLC v. Kavanaugh*, 162 A.D.3d 418, 419 (1st Dep't 2018) (allegation that officer knew about funds' usage was insufficient to show that he was "aware that misrepresentations had been made" about funds).

For example, the Complaint alleges that the valuation of the Trump Tower building was inflated on the 2011-2014 SFCs because (i) the building was valued "by dividing NOI by a capitalization rate," Compl. ¶ 199; (ii) the Trump Organization had excluded several "higher capitalization rates," when selecting a capitalization rate; and (iii) the NOI figures were calculated using expenses and revenues from an inappropriate "mismatch in time periods," *id.* ¶ 214. Further, the value was allegedly inflated on the 2015 SFC because it used a different valuation methodology based on "comparable sales," *id.* ¶ 224; but the comparison used was inappropriate, *id.* ¶ 232. What the Complaint does not allege, however, is that Ms. Trump actually knew any of these things with respect to Trump Tower. It similarly fails to allege that she actually knew of valuation errors with respect to any asset on the SFCs. Without such allegations, the Complaint fails to allege that she had actual knowledge of the alleged misrepresentations.

The Complaint's conclusory allegations that Ms. Trump was "aware of the true financial performance" of the entire Trump Organization, *id.* ¶ 721, and was "familiar" with the SFCs, *id.* ¶¶ 726, 728, are also insufficient to allege that she actually knew the SFCs were inflated. *See Summit*, 212 A.D.2d at 487; *Prudential-Bache Metal Co. v. Binder*, 121 A.D.2d 923, 926 (1st

Dep't 1986) (dismissing claim for lack of "substantive allegations" that an officer had "actual knowledge of the [company's] issuance of bad checks").

C. The Complaint Fails To Allege a Civil Conspiracy for Fraud Under § 63(12).

The Complaint also fails to state a claim that Ms. Trump participated in a "civil conspiracy" to defraud financial institutions by creating and submitting false SFCs. Compl. ¶ 760. It never alleges that Ms. Trump intentionally participated in any conspiracy to commit fraud, or that the alleged conspiracy caused any legally cognizable damages to any party. It also fails to allege a civil-conspiracy claim under the intracorporate conspiracy doctrine because the only alleged co-conspirators were other members of the Trump Organization.

1. The Complaint Fails To Allege That Ms. Trump Participated in a Civil Conspiracy.

The Complaint advances an untested theory of § 63(12) liability—one never endorsed by any court—based on a novel argument that § 63(12) fraud can serve as a tort underlying a claim of civil conspiracy. That theory fails because, as the Complaint concedes (¶ 760), "New York does not recognize an independent cause of action for [civil] conspiracy." *Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 474 (1st Dep't 2010). Rather, civil-conspiracy allegations can be used "only to connect the actions of separate defendants with an otherwise actionable tort." *Id.* To plead a civil conspiracy, a plaintiff "must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Id.*

Whether or not the Complaint alleges the "primary tort" of fraudulently producing and using (purportedly) inflated SFCs, it fails to allege that Ms. Trump intentionally participated in a conspiracy to further any primary tort, or that the conspiracy harmed any person.

No Intentional Participation. "[A] civil conspiracy cause of action requires a showing of intentional conduct." *Rosen v. Brown & Williamson Tobacco Corp.*, 11 A.D.3d 524, 525 (2d Dep't 2004). But the Complaint contains no specific allegations that Ms. Trump intentionally engaged in "independent culpable behavior," *Schwartz v. Soc'y of N.Y. Hosp.*, 199 A.D.2d 129, 130 (1st Dep't 1993), to further any fraud. As explained (Part I.B), the Complaint nowhere pleads that Ms. Trump had any involvement in creating or disseminating SFCs, or ever intentionally misled anyone. It therefore fails to plead "any . . . independent culpable behavior" by Ms. Trump, a fatal flaw. *See id.* ("more than a conclusory allegation of conspiracy or common purpose is required" to allege civil-conspiracy liability "against [a] nonactor").

No Damages. Pleading a civil conspiracy to engage in fraud requires allegations that the primary tort caused an "out of pocket" loss to another. The primary tort alleged in the Complaint is, in essence, that the Trump Organization fraudulently induced Deutsche Bank to enter into a financing agreement on unfavorable terms. In fraudulent inducement claims, only out of pocket damages are cognizable. *See Kumiva Grp., LLC v. Garda USA Inc.*, 146 A.D.3d 504, 506 (1st Dep't 2017) ("[A] plaintiff alleging fraudulent inducement is limited to 'out of pocket' damages, which consist solely of the actual pecuniary loss directly caused by the fraudulent inducement.").

The Complaint fails to plead civil conspiracy because there are no allegations that the conspiracy caused "damages or injury" to anyone. At most, the Complaint alleges the Trump Organization submitted SFCs with inflated asset valuations and, as a result, Deutsche Bank financed Trump Organization projects "on more favorable terms than would otherwise have been available." Compl. ¶ 3. This describes only lost business opportunities, which are not "out of pocket" damages (and thus are not cognizable) in the fraudulent-inducement context. *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 143 (2017). An alleged difference

in contract terms cannot establish damages from fraud. *See Mastro Indus., Inc. v. CBS Records*, 50 A.D.2d 783 (1st Dep't 1975) (refusing to allow such damages in fraudulent-inducement action).

2. The Intracorporate Conspiracy Doctrine Bars Any Civil-Conspiracy Claim.

The Complaint also fails to state a civil-conspiracy claim under the intracorporate conspiracy doctrine. Under that doctrine, "officers, agents and employees of a single corporate entity are legally incapable of conspiring together." *Chamberlain v. City of White Plains*, 986 F. Supp. 2d 363, 388 (S.D.N.Y. 2013). New York recognizes the intracorporate conspiracy doctrine. *See Lilley v. Greene Cent. Sch. Dist.*, 187 A.D.3d 1384, 1389-90 (3d Dep't 2020) (invoking doctrine to dismiss conspiracy claims against employees of same entity). Ms. Trump thus cannot be a member of a conspiracy comprised solely of the Trump Organization and its officers, directors, and employees.

All allegations against Ms. Trump date from the pre-2017 period when she was an officer of the Trump Organization. The Complaint does not allege that she conspired with any person unaffiliated with the Trump Organization, or that any alleged conspirator acted outside the scope of employment. Compl. ¶ 730; *see Bond v. Bd. of Educ. of City of N.Y.*, 1999 WL 151702, at *2 (E.D.N.Y. Mar. 17, 1999) (intracorporate conspiracy doctrine applies where defendants are not "pursuing personal interests wholly separate and apart from the entity"). The Complaint also does not allege that Ms. Trump (or any other defendant) agreed with any unaffiliated party to further the alleged primary tort. The Complaint therefore fails to allege a conspiracy under the intracorporate conspiracy doctrine.

II. The Court Should Dismiss the Second Through Seventh Causes of Action Because They Fail To Allege Ms. Trump Engaged in Any Unlawful Conduct.

To obtain equitable relief under § 63(12) on an illegal-act theory, the Complaint must plead persistent and repeated illegal acts. The illegal acts alleged in the Second through Seventh Causes of Action are violations of New York criminal law: falsifying business records in violation of Penal Law § 175.05; issuing false financial statements in violation of Penal Law § 175.45; and committing insurance fraud in violation of Penal Law § 176.05. The Complaint pleads these violations against Ms. Trump without alleging that she (i) falsified any business record; (ii) issued any financial statement; (iii) interacted with any insurer; or (iv) had the specific intent to commit any crime.

No Falsification or Conspiracy to Falsify Business Records. The Second and Third Causes of Action assert that Ms. Trump violated, and conspired to violate, Penal Law § 175.05. The elements of that statute include making or causing a false entry in the business records of an enterprise with an intent to defraud, which 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). But the Complaint does not allege that Ms. Trump falsified any document related to any SFC. Nor does it allege that she falsified any other business record. Dismissal is required as to Ms. Trump. *See People v. Taveras*, 12 N.Y.3d 21, 22 (2009).

Similarly, the Court should dismiss the Third Cause of Action for lack of any factual allegations that Ms. Trump conspired with anyone to post any false entry in the books and records of any specific enterprise. "The essence of the offense [of conspiracy] is an agreement to cause a specific crime to be committed together with the actual commission of an overt act by one of the conspirators in furtherance of the conspiracy." *Robinson v. Snyder*, 259 A.D.2d 280, 281 (1st Dep't 1999). The Complaint makes the conclusory allegation that the "Defendants each

agreed to participate in a scheme to use false and misleading information to increase Mr. Trump's stated net worth." Compl. ¶ 716. That bare legal conclusion is insufficient to plead that Ms. Trump agreed to create and submit false records.

In addition, as to both the Second and Third Causes of Action, the Complaint does not include allegations that Ms. Trump acted with specific intent to violate Penal Law § 175.05—that is, to mislead "another into error or to disadvantage." *People v. Briggins*, 50 N.Y.2d 302, 309 (1980) (Jones, J., concurring); *see Hankin*, 175 Misc. 2d at 89 (dismissing criminal information that lacked "even a suggestion . . . that there was an intent . . . to defraud any person, group or institution"). The Complaint alleges only that Ms. Trump "was aware" that financing from PWM for the Doral and Old Post Office projects would "include[ ] a personal guaranty from Mr. Trump." Compl. ¶ 33. Ms. Trump's awareness that the loan agreements included a personal guaranty does not show that she intended to mislead Deutsche Bank by submitting a false business record.

No Issuance of a False Financial Statement. The Court also must dismiss the Fourth and Fifth Causes of Action, which allege a violation of, and conspiracy to violate, Penal Law § 175.45. The elements of § 175.45 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 again, the Complaint fails to allege Ms. Trump had any involvement in preparing the SFCs. *See supra* Part I.B. Nor does it allege that she ever knew which assets were included on a particular SFC or that SFCs allegedly used improper valuation methodologies to inflate the value of those assets. *Id*.

The Complaint alleges only that "Ms. Trump was familiar with the financial performance of the properties incorporated in the [SFC]." Compl. ¶ 728. Alleged knowledge of the *financial*

performance of an underlying real estate asset does not show that Ms. Trump knew its value was overstated on an SFC. Indeed, the Complaint fails to allege that Ms. Trump "inten[ded] to defraud" anyone. *Essner*, 124 Misc. 2d at 833. In addition, the Court also should dismiss the Fifth Cause of Action because the Complaint does not allege that Ms. Trump conspired with anyone to issue a false SFC.

No Insurance Fraud. The Court should dismiss the Sixth and Seventh Causes of Action because the Complaint fails to allege that Ms. Trump violated, or conspired to violate, Penal Law § 176.05. The elements of a § 176.05 violation require that Ms. Trump "knowingly and with intent to defraud" presented or prepared a written statement to mislead an insurance company. In New York, every degree of insurance fraud contains "the core requirement that the defendant 'commit a fraudulent insurance act.'" *People v. Boothe*, 16 N.Y.3d 195, 198 (2011).

The Complaint never alleges that Ms. Trump communicated with any insurer, much less that she intentionally submitted a false financial statement to obtain anything from any insurer. *See* Compl. ¶¶ 676-714. Accordingly, the Sixth Cause of Action must be dismissed. And because it likewise fails to allege that she agreed with anyone to interact with any insurer, the Seventh Cause of Action fails as well.

III. The Complaint's § 63(12) Claims Are Time-Barred.

Each of the seven § 63(12) claims alleged against Ms. Trump is subject to a three-year statute of limitations. The Complaint was filed in September 2022. The Doral loan closed in June 2012, the OPO loan closed in August 2014, and the last act Ms. Trump is alleged to have taken before leaving the Trump Organization occurred in December 2016. All seven claims are therefore untimely and should be dismissed under CPLR 3211(a)(5). Further, nothing in the legislature's August 2019 amendment—creating a new six-year limitations period for future § 63(12) claims—changes this result.

A. All Claims Are Untimely.

In 2018, the Court of Appeals confirmed that where, as here, a § 63(12) fraud claim does not allege every element of common-law fraud, a three-year statute of limitations applies. *Credit Suisse*, 31 N.Y.3d at 632-33. In August 2019, the legislature amended CPLR 213—adding a new subsection, 213(9)—to create a new six-year period for § 63(12) claims. *See* S.B. S6536, 2019-2020 Leg. Sess. CPLR 213(9) does not apply retroactively, as explained *infra* Part III.B. All seven claims against Ms. Trump are barred under that three-year limitations period. But even if a six-year period applied, the claims still would be untimely.

A limitations period runs from the date on which a claim "accrues." CPLR 203(a). 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) (claim based on fraudulent inducement "accrue[d]" "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"); *see also State v. Cortelle Corp.*, 38 N.Y.2d 83, 86-87 (1975) (courts must look to "essence of" underlying claim when assessing § 63(12) limitations issues). The Doral financing closed on June 12, 2012; the OPO financing on August 12, 2014. Compl. ¶¶ 587, 634. Both closed more than six years before this case was filed on September 21, 2022. Therefore, § 63(12) fraud claims based on Ms. Trump's involvement in those financings are time-barred.

The analysis is no different for the six claims asserting violations of New York Penal Law. These claims are based on liabilities or "penalt[ies]" "created or imposed by statute," and thus are subject to a three-year limitations period under *Credit Suisse* and CPLR 214(2). And even if CPLR 213(9)'s six-year period applied retroactively, those claims would remain untimely

because, as to Ms. Trump, they are based on conduct that occurred (at the latest) in August 2014—far more than six years before this lawsuit was filed.

Plaintiff cannot invoke the "discovery" rule to save these claims because that rule does not apply to government enforcement agencies. *See*, *e.g.*, *Gabelli v. SEC*, 568 U.S. 442, 449-52 (2013). Even if it applied, the claims would remain untimely. The discovery rule opens a two-year window from the date an individual reasonably could have discovered the alleged fraud. CPLR 203(g)(1). The NYAG admitted in a verified judicial pleading that it had notice of the alleged fraud by February 27, 2019, when Michael Cohen testified before Congress that the asset values in the SFCs were inflated and produced copies of the 2011-2013 SFCs. Verified Pet. at 11, ¶ 52, *People v. Trump Org., Inc.*, Index No. 451685/2020, NYSCEF 181 (N.Y. Sup. Ct. Aug. 24, 2020); *cf. All. Network LLC v. Sidley Austin LLP*, 43 Misc. 3d 848, 852 n.1 (Sup. Ct. 2014) (courts can take notice of judicial filings). Two years from February 27, 2019 is February 27, 2021—more than one year before this lawsuit was filed. Under any conceivable limitations period, the claims against Ms. Trump are untimely.

B. There Are No Claims Against Ms. Trump Accruing Within the Six Years Preceding This Lawsuit.

After three years of "comprehensive" investigation, the 838-paragraph Complaint includes only *one* paragraph describing any action Ms. Trump took after September 21, 2016—in the six years before filing. Paragraph 645 alleges that Ms. Trump signed a disbursement request under the OPO loan on December 21, 2016. This allegation does not save the § 63(12) claims from a statute of limitations dismissal, for two reasons.

First, the OPO draw does not trigger a new limitations period. The statute of limitations generally runs from when the initial "wrong" accrues. *Henry v. Bank of Am.*, 147 A.D.3d 599, 601 (1st Dep't 2017). An exception exists for a series of "independent, distinct" wrongs that

occur after an initial tort; but only if the subsequent conduct is a distinct, actionable wrong—capable (standing alone) of giving rise to a separate cause of action. *Id.* In such circumstances, a new limitations period starts when this later wrong "accrues." *Id.* But where the later wrong is a "continuing effect[ ] of earlier [allegedly] unlawful conduct," the limitations period begins at the time of the initial wrongful act. *Id.*

Paragraph 645 does not allege a distinct, actionable violation of § 63(12). The Complaint does not identify any misrepresentation that Ms. Trump made in connection with the OPO draw request. The draw request seeks a disbursement from a prior credit facility. Fraud claims based on fraudulently induced agreements accrue when the agreement closes. *See supra* Part III.A (citing cases). Subsequent payments under those agreements are not new "wrongs"; they are "continuing effects" of the initial wrong (the alleged fraudulently induced agreement). *See*, *e.g.*, *Henry*, 147 A.D.3d at 601 (claim accrued when plaintiff signed fraudulently induced agreement; defendant's subsequent monthly requests for payment were not separately accruable "wrongs," but continuing effects); *Pike v. N.Y. Life Ins. Co.*, 72 A.D.3d 1043, 1048 (2d Dep't 2010) (new wrong did not accrue for each payment under fraudulently induced insurance contract; instead, "any wrong accrued at the time of purchase of the policies"); *DuBuisson v. Nat'l Union Fire Ins. of Pittsburgh*, 2021 WL 3141672, at *8-9 (S.D.N.Y. July 26, 2021) (applying New York law; collecting cases).

Second, even if the draw request could give rise to a new claim that accrued in December 2016, that claim would remain untimely under a three-year statute of limitations, because the August 2019 amendment does not apply retroactively.

Retroactive application of statutes implicates important state and federal constitutional rights, including due process rights. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266-67

(1994); *Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 370-71 (2020). "Retroactive legislation is viewed with 'great suspicion,'" and thus courts require an unambiguous statement that the legislature expressly "contemplated" and intended "th[e] extraordinary result" of retroactivity. *Regina*, 35 N.Y.3d at 370-71. When a law's retroactive application could revive time-barred claims—as with any limitations extension—the "statute's text must unequivocally convey the aim of reviving claims." *Id.* at 371.[2]

Nothing in the August 2019 amendment's text "unequivocally convey[s] the aim of reviving claims." *Id.* The amendment is silent on retroactivity. The statute provides only that the amendment will "take effect immediately," S.B. S6536 § 2, and courts routinely recognize that this precatory language does not support retroactivity. *See*, *e.g.*, *State v. Daicel Chem. Indus., Ltd.*, 42 A.D.3d 301, 302 (1st Dep't 2007) ("Language in [a] statute that it shall 'take effect immediately' does not support retroactive application."); *Landgraf*, 511 U.S. at 257-58 (phrase "shall take effect upon enactment" "does not even arguably suggest that it has any application to conduct that occurred at an earlier date"). Further, when the legislature seeks to revive time-barred claims, "it has typically said so unambiguously, providing a limited window when stale claims may be pursued." *Regina*, 35 N.Y.3d at 371 (collecting examples). The August 2019 amendment makes no such statement and therefore provides no basis to impose retroactive application.

Construing CPLR 213(9) to apply retroactively to Ms. Trump would violate the Due Process Clauses of the New York Constitution and the U.S. Constitution. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 149 (1983) (statutes must be "construed

[2] In cases lacking claim-revival concerns, courts sometimes invoke a separate canon—that so-called "remedial" statutes should apply retroactively, *see*, *e.g.*, *In re Gleason*, 96 N.Y.2d 117, 122 (2001). The Court of Appeals, however, has recognized that *Landgraf* "limit[ed] the continued utility of [this] tenet." *Regina*, 35 N.Y.3d at 365. The canon (and *Gleason*) thus do not apply here.

so as to sustain [their] constitutionality"). Under the New York Constitution, the legislature may "constitutionally revive . . . cause[s] of action"—as any retroactive limitations extension would—only "where the circumstances are exceptional." *Gallewski v. H. Hentz & Co.*, 301 N.Y. 164, 175 (1950). The legislature must reasonably respond to an "identifiable injustice," and its response must be tailored to "reviving claims . . . for a limited period of time." *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 399-400 (2017) (listing examples of sufficient "identifiable injustices"). The August 2019 amendment did not respond to any "identifiable injustice"; nor is there a "limited period of time" for revived claims. Retroactive application of the August 2019 amendment would also violate federal due process. *See Landgraf*, 511 U.S. at 266 ("[A] justification sufficient to validate a statute's prospective application under the [federal Due Process] Clause 'may not suffice' to warrant its retroactive application.").

In sum, CPLR 213(9) does not apply retroactively. Thus, *even if* conduct from December 2016 could give rise to a new claim, any such claim would remain time-barred under the three-year limitations period.[3]

IV. There Are No Allegations Sufficient for the Equitable Relief of Disgorgement or a Permanent Officer-and-Director Bar Against Ms. Trump.

The Complaint (¶ 25(i), (g)) seeks an order for the "disgorgement of all financial benefits" Ms. Trump obtained from the allegedly fraudulent scheme, as well as a lifetime officer-and-director bar, but fails to allege facts to support an order for such relief. A complaint "must allege the basic facts to establish the elements of the cause of action," including the relief sought.

[3] *People v. Allen*, 198 A.D.3d 531, 532 (1st Dep't 2021), does not compel a contrary result. *Allen* suggested, in dicta, that CPLR 213(9) may have retroactive application to Martin Act claims. But the claims in *Allen*—unlike those against Ms. Trump—would have been timely *even under a three-year* limitations period. *See People v. Allen*, 2021 WL 394821, at *5 (N.Y. Sup. Ct. Feb. 4, 2021); *Allen*, 198 A.D.3d at 532 (same). *Allen*'s discussion of the retroactivity of CPLR 213(9) was unnecessary to the outcome and is therefore nonbinding dictum.

Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 559 (2009) (cleaned up) (affirming dismissal of fraud claim); *Vigoda v. DCA Prods. Plus Inc.*, 293 A.D.2d 265, 266 (1st Dep't 2002) ("insufficient allegation of damages to support cause of action" requires dismissal). The Complaint alleges no facts to support the specific equitable relief sought against Ms. Trump.

First, the Complaint alleges no facts to support the requested order of disgorgement against Ms. Trump. "[I]n New York, the term 'disgorgement' typically refers only to 'the return of wrongfully obtained profits.'" *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552, 567 (2021). And "[i]f a well-pleaded complaint alleges unjust enrichment, it must be a proper answer (and not an affirmative defense) to plead 'no unjust enrichment.'" Restatement (Third) of Restitution and Unjust Enrichment § 62 cmt. a (2011). Here, the Complaint includes no allegations identifying what, if any, "wrongfully obtained profits" Ms. Trump obtained. The Complaint alleges that Ms. Trump has "a financial interest" in several Trump Organization projects. Compl. ¶ 34. But holding an unspecified "financial interest" in various businesses is not sufficient to allege Ms. Trump directly obtained "profits" from the alleged fraudulent scheme. Without allegations that Ms. Trump personally received unlawful profits, the Complaint fails at the threshold—there is no basis for disgorgement.

Second, the Complaint alleges no facts to support the requested bar that would prevent Ms. Trump permanently from "serving as an officer or director in any New York Corporation." *Id.* ¶ 25(g). In New York, a court may not order permanent equitable relief absent sufficient showing of "a reasonable likelihood of a continuing violation." *People v. Greenberg*, 27 N.Y.3d 490, 496-97 (2016). Ms. Trump is not alleged to have drafted, reviewed, approved, or signed any fraudulent SFC; she has not worked at the Trump Organization for nearly six years; Compl. ¶ 33; and there is no allegation she has engaged in any misconduct since then. There are thus no

allegations that Ms. Trump is "engaged in an ongoing violation," nor are there allegations of any "reasonable likelihood that [any] wrong will be repeated." *SEC v. Am. Bd. of Trade, Inc.*, 751 F.2d 529, 537 (2d Cir. 1984). Absent such allegations, the Complaint does not support a permanent officer-and-director bar.

CONCLUSION

The Court should dismiss all claims against Ms. Trump and include her in any relief awarded to other Defendants to the extent applicable to her.

Dated: Uniondale, New York
November 21, 2022

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court, I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 6961 words. The foregoing word counts were calculated using Microsoft® Word®.

Dated: Uniondale, New York
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