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, vs. 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 IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Defendants President Donald J. Trump ("President Trump"), Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust (the "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 (collectively, "Defendants")[1] hereby submit this memorandum of law in support of Defendants' Motion for Summary Judgment.

PRELIMINARY STATEMENT

The undisputed record in this case establishes President Trump is a multi-billionaire who has for decades presided over a wildly successful international real estate and licensing empire. The undisputed record further establishes his companies timely paid hundreds of millions of dollars in interest to their lenders and never defaulted on a loan or even been late on a loan payment during the entire 15+ year time period the NYAG has sought to scrutinize in this action. Moreover, the undisputed record establishes this expansive corporate empire is fiscally conservative, carries little debt and is able to borrow at competitive market rates because of the enviable quality of its trophy assets and its proven track record of success.

Yet despite these undisputed facts, and despite herself admitting herein President Trump is a successful billionaire even by her own manipulated standards, the NYAG has spent considerable time and taxpayer dollars chasing after President Trump by wading into wholly private, and successfully consummated, commercial agreements—the provisions of which have been fully satisfied—between highly sophisticated parties. Under the guise of protecting the "public," the NYAG has sought to reach the elite and insular marketplace of complex and profitable transactions

[1] The First Department dismissed Ivanka Trump from this action, and this Court's ruling on this Motion should reflect such dismissal. (NYSCEF No. 640).

between billionaire developers and major international banks and insurers without any evidence that the purported fraud had any negative impact on anyone, public or private.

As this Court is aware, the specific conduct targeted herein by the NYAG involves the submission of financial statements by certain Defendants in connection with private, complex commercial transactions governed fully by the specific terms of extensive, bi-lateral agreements negotiated with the advice and assistance of white-shoe counsel. The undisputed evidence shows those bi-lateral agreements were never breached, and the respective private, sophisticated counterparties were never harmed. Through this action, the Attorney General seeks to supplant the role of the involved corporate titans, who themselves have not averred any breach or injury, and to conduct a *post hoc* analysis effectively rewriting the specific terms of those bi-lateral agreements according to her own commercial judgment.

The Appellate Division has now limited the reach of the NYAG's crusade against President Trump and his family, defining clearly the bar dates applicable to her various claims. As developed herein, the undisputed record establishes that ***all claims*** against the individual defendants and the Trust are time barred if they accrued before February 6, 2016. The undisputed record further establishes that all other claims are time barred if they accrued before July 13, 2014. Application of these bar dates streamlines substantially the matters at issue (if any) for trial. Indeed, ***all claims*** relative to, *inter alia*, the Doral Loan, the Chicago Loan, the General Services Administration contract award to OPO and the subsequent lease with OPO, the Trump Park Avenue Loan, the Seven Springs Loan and the Ferry Point Contract are time barred. Moreover, any claims relative to the OPO loan and/or the 40 Wall Street loan survive (if at all) only as against certain corporate defendants, and not at all as to any of the individual Defendants or the Trust.

Additionally, now that the record is developed fully, the undisputed evidence establishes the NYAG has no valid authority to maintain this action. Given that the various counterparties to the transactions at issue have never complained, and indeed have profited from their business dealings with President Trump and his corporate empire, and given further that the NYAG has failed to demonstrate any even theoretical harm to anyone, public or private, there is no longer any viable basis to maintain an Executive Law § 63(12) action. Executive Law § 63(12) cases invariably involve some actual public interest that the NYAG seeks to vindicate, which is a stark contrast to what she seeks to do here in attempting to become the *post hoc* arbiter of the marketplace by interjecting her own judgment into strictly private, profitable transactions. Unlike at the dismissal stage, where the NYAG was afforded the presumption of propriety, the record evidence now undermines fully her purported claims.[2] Indeed, that evidence establishes this is simply not the type of case § 63(12) was designed to reach. To the extent any claims exist relative to the private commercial transactions herein at issue (which they do not, as actual parties to those transactions never even attempted to allege), courts recognize § 63(12) claims involving the rights of private business entities "should be [adjudicated by] private contract litigation . . . not a law enforcement action under a statute designed to address public harm flowing from persistent or repeated fraud and deception." *See, e.g.*, *People v. Domino's Pizza*, No. 450627/2016, 2021 WL 39592, at *12 (Sup. Ct. N.Y. Cnty. Jan. 5, 2021).

Moreover, even as to those few claims which survive the bar date, the undisputed evidence establishes the NYAG has not established the requisite elements of her alleged causes of action.

[2] To be clear, the Defendants advance this argument based on the developed record, as opposed to similar arguments made at the dismissal stage. The distinction is meaningful since, as noted, the NYAG no longer enjoys the presumption of correctness as to her allegations, and the record evidence controls.

The SOFCs at issue were simply not misleading. Therefore, the Defendants are entitled to summary judgment as a matter of law.

Finally, summary judgment is proper as a matter of law on the NYAG's claim for disgorgement because that remedy is not available under § 63(12) or the underlying statutory claims.

PROCEDURAL BACKGROUND

In 2019, the NYAG commenced an investigation under Executive Law § 63(12). Over three years, the NYAG collected more than 1.7 million documents from Defendants and third parties, and conducted more than 50 depositions. The investigation concluded when the NYAG filed this lawsuit on September 21, 2022, alleging seven causes of action against Defendants. On October 31, 2022, the NYAG filed a motion for preliminary injunction (NYSCEF No. 37), which this Court granted on November 3, 2022. (NYSCEF Nos. 183, 238.)

On November 21, 2022, Defendants moved to dismiss the Complaint. (NYSCEF Nos. 195, 198, 201, 210, 220, 224.) This Court denied all Defendants' motions. (NYSCEF Nos. 459–64.) Defendants appealed, (NYSCEF Nos. 486–88), and on June 27, 2023, the First Department reversed on certain issues related to the statute of limitations (NYSCEF No. 640). The First Department held that the NYAG's claims are "time barred if they accrued – that is, the transactions were completed – before February 6, 2016" and that for those Defendants bound by the tolling agreement, "claims are untimely if they accrued before July 13, 2014." (NYSCEF No. 640 at 3.) Finding that the allegations against Ivanka Trump did not support any claim that accrued after February 6, 2016, the First Department dismissed Ms. Trump from the suit but left it to this Court to determine "the full range of defendants bound by the tolling agreement." (NYSCEF No. 640 at 4.) Finally, the First Department held that "[t]he continuing wrong doctrine does not delay or extend" the statute of limitations periods. (NYSCEF No. 640 at 3.)

All discovery concluded in this case on July 28, 2023. On July 31, 2023, the NYAG filed a note of issue with the Court confirming discovery has been "completed" and stating that "[t]he case is ready for trial." (NYSCEF No. 644 at 3.)

LEGAL STANDARD

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party has made a *prima facie* showing of entitlement to judgment as a matter of law. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Ayotte v Gervasio*, 81 N.Y.2d 1062 (1993). Once the moving party meets its burden of tendering sufficient evidence to demonstrate the absence of any material issue of fact, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "*[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient*." *Id.* (emphasis added) (collecting cases). Thus, "[i]t is incumbent upon [the party] who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his [pleading] are real and are capable of being established upon a trial." *Di Sabato v. Soffes*, 193 N.Y.S.2d 184, 188 (1st Dep't 1959) (citing *Dodwell & Co. v. Silverman*, 234 A.D. 362 (1st Dep't 1932)).

ARGUMENT

I. Defendants Are Entitled To Summary Judgment On All Causes Of Action To The Extent That They Are Time-Barred Under The Applicable Statute Of Limitations And Proper Application Of The Tolling Agreement

On June 27, 2023, the First Department issued a Decision and Order holding that "claims are time barred" as against (1) all Defendants not subject to the tolling agreement dated August 27, 2021 (the "Tolling Agreement"), "if they accrued – that is, the transactions were completed – before February 6, 2016," and (2) "for defendants bound by" the Tolling Agreement, "if they

accrued before July 13, 2014." (NYSCEF No. 640 at 3.). The following table[3] provides a visual aid to outline the latest accrual dates that a transaction could have been completed for the NYAG's claim to remain viable under the limitations period:

Claims Time-Barred If Accrued On Or Before	Defendants For Which Accrual Date Applies
July 13, 2014	Defendants Bound by the Tolling Agreement
February 6, 2016	Defendants Not Bound by the Tolling Agreement

The First Department also ruled that "the continuing wrong doctrine does not delay or extend these periods." *Id.* The panel left it to this Court to "determine, if necessary, the full range of defendants bound by the tolling agreement." *Id.* Making this determination is both necessary and appropriate on this Motion as there are no disputed material facts concerning these issues. *See, e.g.*, *MLRN LLC v. U.S. Bank, Nat'l Assoc.*, 217 A.D.3d 576 (1st Dep't 2023) (affirming partial grant of summary judgment on statute of limitations grounds); *Tesciuba v. Shapiro*, 166 A.D.2d 281, 282 (1st Dep't 1990) (proper to address "the purely legal [s]tatute of [l]imitations issue" on summary judgment).

A. Many Of The NYAG's Allegations Must Be Dismissed Because They Are Based On Transactions Completed Outside Of The Applicable Limitations Period

The NYAG's causes of action in this lawsuit are based on several financial transactions in which the NYAG alleges that Defendants "utilized the false and misleading Statements of Financial Condition" to "obtain[] real estate loans and insurance coverage" from various third parties, including lenders, banks, and insurers. (*See generally* NYSCEF No. 1 ¶¶ 559–61.) Many of these transactions fall outside the scope of the statutory period—regardless of the Tolling

[3] Exhibit AAF is a composite exhibit of the three tables referenced throughout the Memorandum of Law.

Agreement's applicability—because there is no dispute that they were completed before July 13, 2014:

- the Deutsche Bank ("DB") Loan Issued in Connection with Trump National Doral Golf Club ("Doral Loan") – June 11, 2012;
- the DB Loan Issued in Connection with Trump Chicago ("Chicago Loan") – November 9, 2012;
- the U.S. General Services Administration's ("GSA") award of a contract to Trump Old Post Office LLC to redevelop the Old Post Office in Washington, D.C. – February 2012;
- the GSA lease with OPO – August 5, 2013;
- the Seven Springs Loan Issued by Royal Bank America / Bryn Mawr Bank to Seven Springs LLC ("Seven Springs Loan") – July 17, 2000;
- the City of New York's award to operate a golf course and related facilities at Ferry Point Park, Bronx, New York ("Ferry Point Contract") – 2012;[4] and
- the Investor's Bank $23 million loan secured by Trump Park Avenue – July 23, 2010 ("Trump Park Avenue Loan").

See generally id. at ¶¶ 85–86, 562–675; NYSCEF No. 205.

Summary judgment is also proper for Defendants who are not subject to the Tolling Agreement, to the extent the NYAG's allegations are based on transactions completed by February 6, 2016:

- the DB Loan Issued in Connection with Trump Old Post Office Hotel in Washington, D.C. ("OPO Loan") – August 12, 2014;
- the 40 Wall Street Loan Issued by Ladder Capital ("40 Wall Street Loan") – November 2015; and
- Defendants President Trump and the "Trump Organization's" bid to purchase the Buffalo Bills football team ("Buffalo Bills Bid") – no date as no transaction was consummated.[5]

[4] Other than by improperly lumping all Defendants together as the "Trump Organization," the NYAG failed to allege or establish what legal entity obtained the Ferry Point Contract. (NYSCEF No. 1 ¶ 671.)

[5] Defendants submit that President Trump's bid did not constitute a "completed transaction," and therefore, the NYAG's cause of action based on this transaction fails regardless of the applicable statute of limitations. Indeed, the Complaint does not allege this transaction was completed, nor does it allege what legal entity submitted the bid other than by improperly lumping all Defendants together as the "Trump Organization." (*See* NYSCEF ¶¶ 667–70.)

(*See* NYSCEF No. 1 ¶¶ 647–53, 667–70.)

The following table provides a visual aid of each transaction, its closing/accrual date, and to which Defendants (if any) claims relative to these transactions remain viable under the limitations period:

Transaction	Date Transaction Closed (Accrual Date)	Defendants For Which NYAG'S Claims Are Timely
Seven Springs Loan	July 17, 2000	None
Trump Park Avenue Loan	July 23, 2010	None
Ferry Point Contract	2012	None
GSA OPO Bid Selection and Approval	February 2012	None
Doral Loan	June 11, 2012	None
Chicago Loan	November 9, 2012	None
OPO Contract & Lease	August 5, 2013	None
OPO Loan	August 12, 2014	Only Defendants Bound by The Tolling Agreement.
Buffalo Bills Bid	Transaction never consummated.	None
40 Wall Street Loan	November 2015	Only Defendants Bound by The Tolling Agreement.

Each of the transactions mentioned above is addressed below:

Doral Loan. DB extended a $125 million loan in connection with Trump Endeavor 12, LLC's purchase of the property known as Trump National Doral. (Defs. SOF ¶ 103.) This transaction was completed when the "loan closed on June 11, 2012." (Defs. SOF ¶ 115.) As the First Department held, the NYAG's claims accrued when "the transactions were completed," and

Defendants' argument related to the statute of limitations for the Buffalo Bills Bid is made solely in an abundance of caution.

even "[f]or defendants bound by the tolling agreement, claims are untimely if they accrued before July 13, 2014." (NYSCEF No. 640 at 3.) Thus, allegations based on the Doral Loan are time-barred as to all Defendants under the First Department's application of the proper statute of limitations and the appropriate tolling. *Id*. Accordingly, this Court should grant summary judgment in favor of all Defendants on each of the NYAG's causes of action to the extent that they are based on the Doral Loan.

Chicago Loan. DB financed up to $107 million in debt in connection with the Trump International Hotel and Tower, Chicago, in 2012 and a $54 million loan expansion in 2014. (*See* Defs. SOF ¶¶ 124, 137.) It is undisputed that the "Trump Chicago loan facilities" were "closed on November 9, 2012." (Defs. SOF ¶ 131.) It is further undisputed that the amended loan documents implementing the expansion were executed in May 2014. (Defs. SOF ¶ 138.) Thus, the Chicago Loan transaction was "completed," and claims based on this transaction began to accrue on November 9, 2012. The First Department expressly held that the continuing wrong doctrine does not delay or extend the applicable statute of limitations, and, accordingly, the loan expansion does not constitute a separate transaction that would extend the limitations period. Moreover, and in any event, any claims based on the loan expansion began to accrue in May 2014. Both dates are before the July 13, 2014, statute of limitations cutoff, even for Defendants subject to the Tolling Agreement. Accordingly, the NYAG's allegations based on the Chicago Loan are time-barred for all Defendants. This Court should therefore grant summary judgment in favor of all Defendants on each of the NYAG's causes of action to the extent that they are based on the Chicago Loan.

GSA's OPO Contract and Lease. It is undisputed that the GSA awarded Trump Old Post Office, LLC the contract to redevelop the OPO property in February 2012. (Defs. SOF ¶ 146.) It is further undisputed that the GSA signed the associated OPO lease with Trump Old Post Office,

LLC on August 5, 2013. (Defs. SOF ¶ 146.) Thus, the OPO Contract and Lease transactions were both completed before July 13, 2014, and any claims based on these transactions are time-barred for all Defendants. Accordingly, this Court should grant summary judgment in favor of all Defendants on each of the NYAG's causes of action to the extent that they are based on the OPO Contract & Lease.[6]

Deutsche Bank's OPO Loan. DB financed up to $170 million in funds in connection with Trump Old Post Office LLC's purchase and renovation of the OPO. (Defs. SOF ¶ 148.) The NYAG's claims based on the OPO Loan are time-barred for all Defendants who are not subject to the Tolling Agreement. "In approximately July 2013, DB began considering whether to extend credit for the Trump Organization's redevelopment of OPO in Washington, DC," and DB and Trump Old Post Office, LLC "[u]ltimately . . . agreed on a term sheet that was executed on January 13 and 14, 2014." (Defs. SOF ¶ 152.) The OPO Loan was closed "on August 12, 2014." (Defs. SOF ¶ 152.) Accordingly, the NYAG's purported claims based on this transaction are only timely for Defendants subject to the Tolling Agreement. Accordingly, this Court should grant summary judgment in favor of all Defendants not subject to the Tolling Agreement on each of the NYAG's causes of action to the extent that they are based on the OPO Loan.

Seven Springs Loan. "[I]n 2000, Seven Springs LLC took out an approximately $8 million mortgage from Royal Bank America" (later acquired by Bryn Mawr), which was "personally guaranteed" by President Trump. (Defs. SOF ¶ 161.) Seven Springs LLC allegedly made fraudulent representations regarding President Trump's Statements of Financial Condition to

[6] The NYAG bases $100 million of its $250 million disgorgement demand on the "asserted profit on the subsequent sale of [the OPO] property." *See* NYSCEF No. 245 at 53. As explained below *see infra,* Part III, disgorgement is unavailable to the NYAG as a matter of law. Yet, even if disgorgement were available to the NYAG, any award for disgorgement would have to be reduced by at least $100 million to account for the fact that the NYAG's claims based on the OPO contract and lease transactions are time-barred. The NYAG's claim for disgorgement, even if permissible—which it is not—must be further reduced to account for the numerous other time-barred claims.

"obtain[] a series of extensions of the maturity date" of the loan from Royal Bank America and Bryn Mawr Bank in 2001, 2002, 2003, 2006, 2009, 2011, 2014, and 2019. (Compl. ¶ 658.) Specifically, the NYAG claims that President Trump, Eric Trump, Allen Weisselberg, and Jeff McConney were involved in "decid[ing] to extend the loan" in 2019. (Compl. ¶ 660.) However, the First Department expressly held that the continuing wrong doctrine does delay or extend the applicable statute of limitations, and, accordingly, these loan extensions do not constitute separate transactions that would extend the limitations period. Therefore, the Seven Springs loan transaction was completed—and the statute of limitations began to run—in 2000, upon the origination of the mortgage. Accordingly, this Court should grant summary judgment in favor of Defendants on each of the NYAG's causes of action to the extent that they are based on the Seven Springs Loan.

Ferry Point Contract. It is undisputed that an entity affiliated with President Trump's businesses submitted an offer "in 2010" to the City of New York to operate an 18-hole golf course and related facilities at Ferry Point Park, Bronx, NY. (Defs. SOF ¶ 211.) Because the City "grant[ed] . . . the concession" and President Trump "won the contract" in "2012," (Defs. SOF ¶ 213), this transaction was completed and the statute of limitations began to run that year. *See U.S. v. Sabin Metal Corp.*, 151 F. Supp. 683, 687 (S.D.N.Y. 1957), *aff'd*, 253 F.2d 956 (2d Cir. 1958) ("The defendant's bid constituted the offer and the government's acceptance completed the contract.") (citations omitted). Thus, claims based on the Ferry Point Contract are time-barred for all Defendants. (*See* NYSCEF No. 640 at 3.). Accordingly, this Court should grant summary judgment in favor of Defendants on each of the NYAG's causes of action to the extent that they are based on the Ferry Point Contract.

40 Wall Street Loan. It is undisputed that 40 Wall Street LLC refinanced a $160 million mortgage from Capital One Bank, on the office building at 40 Wall Street in New York, with Ladder Capital Finance "[i]n approximately November 2015." (Defs. SOF ¶ 157); *See* Br. for Respondent at 10, No. 2023-00717 (Doc. No. 24) (filed Apr. 26, 2023). Therefore, the NYAG's causes of action based on the 40 Wall Street Loan are untimely as to all Defendants not subject to the Tolling Agreement. (*See* NYSCEF No. 640 at 3.). Accordingly, this Court should grant summary judgment in favor of all Defendants not subject to the Tolling Agreement on each of the NYAG's causes of action to the extent that they are based on the 40 Wall Street Loan.

Buffalo Bills Bid. Defendants allegedly made misleading statements regarding President Trump's 2013 SOFC figures and personal liquidity as of June 30, 2014, in connection with President Trump's bid package to purchase the Buffalo Bills football team. (Compl. ¶ 670.) It is undisputed that President Trump's initial bid was submitted "in July 2014." (Defs. SOF ¶ 208.) The NYAG claims the bid was "partially successful, in that [President] Trump did advance further in the bid process." (Compl. ¶ 669.) However, it is also undisputed that President Trump never entered into a contract or completed a transaction to purchase the Bills such that there is no transaction upon which the NYAG can base its claim. *See S.S.I Invs. Ltd. v. Korea Tungsten Mining Co.*, 438 N.Y.S.2d 96, 101 (1st Dep't 1981) ("[A] bid is nothing more than an offer. No legal rights are created until the offer has been accepted."); *Sabin Metal Corp.*, 151 F. Supp. at 687 (noting that an "invitation to bid [is] merely a request for offers and . . . not an operative offer" while "acceptance [of the bid] complete[s] the contract").

Further, the NYAG failed to allege the specific day in July on which President Trump submitted his bid. Even assuming an unsuccessful bid can constitute a transaction on which the NYAG can base its allegations of fraud *and* that the bid was submitted after July 13, 2014—and

the NYAG has not substantiated either of these contentions—such allegations would only be timely as to those Defendants bound by the Tolling Agreement.

Because the bid did not constitute a completed transaction as a matter of law, summary judgment is proper for all Defendants to the extent that the NYAG's causes of action are based on the Buffalo Bills Bid. If the Court finds that the NYAG may properly base claims on this bid, summary judgment is still proper for all Defendants based on the NYAG's failure to substantiate the submission date.

Trump Park Avenue Loan. It is undisputed that Investors Bank financed a $23 million loan collateralized by Trump Park Avenue on July 23, 2010. (Defs. SOF ¶ 165.) Given the July 23, 2010 closing date relative to the Trump Park Avenue Loan, any claims related to that financing agreement are time barred against all Defendants, even Defendants subject to the Tolling Agreement, because the closing occurred before the July 13, 2014 statute of limitations cutoff. Accordingly, this Court should grant summary judgment in favor of Defendants on each of the NYAG's causes of action to the extent that they are based on the Trump Park Avenue Loan.

B. The Tolling Agreement Does Not Bind Any Individual Defendant or the Trust

As explained above in Section IA, the NYAG's causes of action based on transactions that were completed after July 13, 2014 are timely only as to Defendants whom this Court determines are bound by the Tolling Agreement. The Tolling Agreement, which was entered into between "The Trump Organization" and the NYAG, only binds certain Defendant corporate entities.

The following table provides a visual aid as to which Defendants are, and which Defendants are not, bound by the Tolling Agreement:

Parties Not Bound by the Tolling Agreement	Parties Bound by the Tolling Agreement
• President Trump • Donald J. Trump Jr. • Eric Trump • Ivanka Trump • Allen Weisselberg • Jeffrey McConney • The Donald J. Trump Revocable Trust	• The Trump Organization Inc. • DJT Holdings LLC • DJT Holdings Managing Member LLC • Trump Organization LLC • DJT Holdings Managing Member • Trump Endeavor 12 LLC • 401 North Wabash Venture LLC • Trump Old Post Office LLC • 40 Wall Street LLC • Seven Springs LLC

It is undisputed that, on August 27, 2021, the NYAG and "the Trump Organization" entered into the Tolling Agreement, thereby tolling the limitations period for any Executive Law § 63(12) claim "in connection with statements regarding Donald J. Trump's financial condition, representations regarding the value of assets, and potential underpayment of federal, state, and local taxes." (Defs. SOF ¶ 265.) The agreement, signed by Alan Garten, the EVP/Chief Legal Officer of the "Trump Organization," states that "the undersigned representatives of the Parties certifies that he or she is fully authorized . . . to bind such Party to this document." *Id.* The agreement also states that its execution "shall not prejudice any party's position with respect to any other defense, response, or claim" and that its "terms, meaning, and legal effect" should be "interpreted under the laws of New York State." *Id.* New York law and the record in this action demonstrate that the agreement did not bind the unmentioned, non-signatory Defendants—President Trump, Donald Trump Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, (collectively, the "Unnamed Individuals") and/or The Donald J. Trump Revocable Trust ("Trust").

1. The Tolling Agreement Cannot Bind The Unnamed, Non-Signatory Individuals

A valid tolling agreement constitutes an enforceable contract subject to normal rules of interpretation. *See CMI Cap. Mkt. Invs., LLC v. Buchanan Ingersoll & Rooney P.C.*, No.

601951/08, 2009 WL 5102795, at *3 (N.Y. Sup. Ct. N.Y. Cnty. July 30, 2009). "It is a general principle that only the parties to a contract are bound by its terms." *Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd.*, 124 N.Y.S.3d 346, 352 (1st Dep't 2020); *see Capricorn Invs. III, L.P. v. Coolbrands Int'l, Inc.*, No. 603795/06, 2009 WL 2208339, at *8 (N.Y. Sup. Ct. N.Y. Cnty. July 14, 2009) ("Generally, a party that is not a signatory to an executed agreement is not bound to the agreement."), *aff'd*, 886 N.Y.S.2d 158 (1st Dep't 2009); *Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 630 (2013) (noting "the general rule against binding nonsignatories").

To bind an individual to an agreement, the individual must be a direct signatory to the agreement, absent exceptions inapplicable here. *Gerschel v. Christensen*, 9 N.Y.S.3d 216, 217 (1st Dep't 2015) ("Christensen & Barrus was not a party to either tolling agreement. Therefore, its addition as a defendant was untimely, and personal jurisdiction over it was not obtained."); *Georgia Malone & Co. v. Ralph Rieder*, 926 N.Y.S.2d 494, 496–97 (1st Dep't 2011) ("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."), *aff'd*, 19 N.Y.3d 511 (2012); *Moskowitz v. Herrmann*, No. SC 731/2018, 2018 WL 4291557, at *11 (N.Y. Sup. Ct. Orange Cnty. Sept. 6, 2018) ("The party seeking to enforce the unsigned writing must prove the [other party] intended to be bound by the terms of that writing.").

Mr. Garten signed the tolling agreement in his capacity as "EVP/Chief Legal Officer" of the "Trump Organization." (NYSCEF No. 272.) The Unnamed Individuals are neither named in the agreement nor executed it. Thus, as a matter of law, under the plain language of the contract, the Tolling Agreement does not bind the Unnamed Individuals.

a. The NYAG Is Judicially Estopped From Arguing The Tolling Agreement Applies To Any Unnamed Individual Defendant or Has Made a Judicial Admission.

The NYAG has admitted that the "Trump Organization" is the only party bound by the Tolling Agreement. Since the NYAG obtained a favorable ruling in connection with this argument, it is precluded from now taking the contrary position in the instant action that the agreement binds the Unnamed Individuals.

The doctrine of judicial estoppel "prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed." *Herman v. 36 Gramercy Park Realty Assocs., LLC*, 165 A.D.3d 405, 406 (1st Dep't 2018) (citations omitted); *see also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895))). The doctrine "rests upon the principle that a litigant 'should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.'" *Leonia Bank v. Kouri*, 3 A.D.3d 213, 219 (1st Dep't 2004) (quoting *All Terrain Props. v. Hoy*, 265 A.D.2d 87, 93 (1st Dep't 2000)). Moreover, "[j]udicial estoppel . . . may be imposed against the government." 57 N.Y. Jur. 2d Estoppel, Etc. § 67; *see, e.g.*, *Hartsdale Fire Dist. v. Eastland Const., Inc.*, 886 N.Y.S.2d 454, 456 (2d Dep't 2009); *Town of Caroga v. Herms*, 878 N.Y.S.2d 834 (3d Dep't 2009); *City of New York v. The Black Garter*, 709 N.Y.S.2d 110 (2d Dep't 2000). Notably, the "application of the doctrine of judicial estoppel does not require entry of a judgment." *Hartsdale Fire Dist.,* 886 N.Y.S.2d at 456. Rather, for the doctrine to apply, there need be only "a showing that the party taking the inconsistent position had benefitted from the determination in the prior action or proceeding based upon the position it

advanced there." *12 New St., LLC v. Nat'l Wine & Spirits, Inc.,* 151 N.Y.S.3d 515, 518 (3d Dep't 2021).

Here, the NYAG previously filed an application in *People v. The Trump Organization, et al.*, No. 451685/2020, N.Y. Sup. Ct. (the "Special Proceeding"), seeking to hold President Trump in contempt for his purported failure to comply with a court order relating to subpoena compliance. *See generally,* Special Proceeding, (NYSCEF Nos. 668–75). At oral argument, the NYAG argued that President Trump's failure to comply with the court's directive had caused it to sustain prejudice—one of the necessary elements for a finding of civil contempt—because it inhibited the NYAG's ability to bring their claims within the relevant statute of limitations period. In so arguing, counsel for the NYAG stated: "[t]here is hard prejudice because Donald J. Trump is not a party to the tolling agreement, that tolling agreement *only applies to the Trump Organization*." (*See* Defs. SOF ¶ 273 (emphasis added).) Ultimately, the court granted the NYAG's application to hold President Trump in civil contempt and specifically noted that "[the NYAG] correctly states that any delay causes prejudice to the 'rights or the remedies of the State acting in the public interest.' Moreover, each day that passes without compliance further prejudices [the NYAG], as the statute of limitations continues to run and may result in [the NYAG] being unable to pursue certain causes of action that it otherwise would." Special Proceeding, (NYSCEF No. 758).

Thereafter, the NYAG advanced the same position in writing before the First Department, arguing "Mr. Trump's noncompliance and efforts at delay . . . prejudiced [the NYAG] given that the limitations period was continuing to run on potential enforcement claims." In putting forth this argument, the NYAG stated unequivocally that "[the NYAG] and the Trump Organization entered a six-month tolling agreement, *to which Mr. Trump was not a party*." (*See* Defs. SOF ¶ 274) (emphasis added); (Robert Aff., Ex. AY at 39 n.13). The First Department ruled in favor of the

NYAG and affirmed the lower court's finding of contempt. *See generally People v. Donald J. Trump, et al.*, 213 A.D.3d 503 (1st Dep't 2023).

Therefore, given that the NYAG has twice advanced the position that the "Trump Organization" is the only party bound by the Tolling Agreement, she is judicially estopped from taking a contrary position in the instant proceeding.

Additionally, the NYAG's prior statements constitute a judicial admission. "As a general rule, facts admitted by the pleadings are binding on the parties throughout the entire litigation." 57 N.Y. Jur. 2d Estoppel, Etc. § 63 (collecting cases). While "not conclusive," judicial admissions "are 'evidence' of the facts or facts admitted." *Matter of Liquidation of Union Indem. Ins. Co. of N.Y.*, 89 N.Y.2d 94, 103 (1996) (citation omitted); *see Baje Realty Corp. v. Cutler*, 820 N.Y.S.2d 57, 59 (1st Dep't 2006). Thus, an admission by a party "in a pleading in one action is admissible against the pleader in another suit, provided it is shown 'by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction.'" *Liquidation of Union Indem.*, 89 N.Y.2d at 103. And as the Court of Appeals has noted, "it is irrelevant that the admissions were made in part by counsel . . . and that they were contained in affidavits or briefs." *Id.* (collecting cases).

Here, it is undisputed that the NYAG filed a signed appellate brief in the contempt proceeding containing the factual statement that "OAG and the Trump Organization entered a six-month tolling agreement, to which Mr. Trump was not a party." (Defs. SOF ¶ 274); (Robert Aff., Ex. AY at 39 n.13, 57). This constitutes a judicial admission that none of the Unnamed Individuals are bound by the Tolling Agreement.

b. Record Evidence Surrounding the Agreement Shows The Parties Did Not Intend to Bind the Unnamed Individuals.

Communications between the "Trump Organization" and the NYAG surrounding the agreement confirm the parties did not intend to bind the Unnamed Individuals. Previous drafts of the Tolling Agreement explicitly named the Unnamed Individuals and included separate signature blocks for each individual. (Defs. SOF ¶ 269.) The final, executed version of the Tolling Agreement contained no such references nor separate signature blocks. The removal of the Unnamed Individuals from the final Tolling Agreement itself confirms the parties' mutual understanding that it would not apply to them. Therefore, the NYAG's causes of action involving the Unnamed Individuals are time-barred to the extent that they are based on transactions completed before February 6, 2016.

2. The Tolling Agreement Does Not Bind The Trust

Under New York law,[7] *only* a "trustee" as the "fiduciary" of the trust is "authorized . . . [t]o execute and deliver agreements . . . contracts . . . and any other instrument necessary or appropriate for the administration of the estate or trust." N.Y. Est. Powers & Trusts Law § 11-1.1(b)(17). And the trustee may only do so if authorized by law or trust agreement; otherwise, his actions are "void." *Id.* § 7-2.4. Thus, an individual other than a duly authorized trustee "ha[s] neither the right nor the duty to negotiate on behalf of the estate." *Korn v. Korn*, 172 N.Y.S.3d 4, 6 (1st Dep't 2022).

[7] It is undisputed that "The Trust is a Florida trust that was created under the laws of the state of New York." (Defs. SOF ¶ 6.) Defendants do not concede that New York law—rather than Florida law—governs whether the Trust is bound by the Tolling Agreement. However, the Tolling Agreement itself is governed by New York law, and it is clear that application of either State's law would result in the same conclusion—that the Trust is not subject to the agreement. *See* Fla Stat. § 736.0816(24) (only a "trustee" may "[s]ign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's power"); *id.* § 736.0802(2) (stating that a "transaction . . . entered into by the trustee" is "voidable" if not "authorized by the terms of the trust" or otherwise "approved by the court . . . the beneficiary . . . [or] a settlor"). Thus, for purposes of this Motion only, Defendants rely on the provisions of New York law.

It is also a "long-standing rule" of New York law "that a trustee cannot, through contract, *directly* bind the trust estate or its beneficiary." *Societe Generale v. U.S. Bank Nat'l Ass'n*, 325 F. Supp. 2d 435, 437 (S.D.N.Y. 2004) (emphasis added), *aff'd sub nom.*, 144 F. App'x 191 (2d Cir. 2005). Rather, the "general rule" is "that the trustee personally, and not the trust estate, is bound by and liable upon obligations incurred and contracts made by it in the course of administration of the trust." 106 N.Y. Jur. 2d Trusts § 356. Thus, a trustee may only "contract as an agent . . . and directly bind the trust estate or the beneficiary" where he is specifically "authoriz[ed] by statute or by the trust instrument" to do so. *Id.*

Here, it is undisputed that the only Defendants who have served as trustees of the Trust are President Trump; Donald Trump, Jr.; and Allen Weisselberg. (SOF ¶¶ 1–2, 4.) It is further undisputed that *no* trustee signed the Tolling Agreement—either individually or as a Trustee with authority to bind the Trust. (Defs. SOF ¶ 267.) Moreover, even if one of the Trustees had signed the Tolling Agreement, that would have only bound that trustee personally rather than the Trust itself. *See Societe Generale*, 325 F. Supp. 2d at 437.

Here, only Mr. Garten signed the Tolling Agreement on behalf of the Trump Organization. He is neither a Trustee nor a beneficiary of the Trust. (*See* Defs. SOF ¶ 267.) The Complaint's allegations and other evidence confirm that the various Defendant entities, including "Trump Organization" and the Trust, are "separate entities." (Defs. SOF ¶ 16.) Additionally, there is no evidence showing that the "Trump Organization" or Mr. Garten had the authority to bind the Trust. Therefore, the Tolling Agreement is not binding upon the Trust. The NYAG's causes of action involving the Trust are thus time-barred to the extent that they are based on transactions completed before February 6, 2016.

II. There Is Insufficient Record Evidence To Establish The Elements Of Each Alleged Cause Of Action

The NYAG alleges all seven of its causes of action pursuant to Executive Law § 63(12), which provides that the NYAG may apply to the Supreme Court for injunctive relief, restitution, or damages against persons who "engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." For the reasons stated in detail below, the evidence either directly refutes or is simply insufficient to support the NYAG's claims.

A. Defendants Are Entitled to Summary Judgment On The First Cause of Action[8]

The NYAG's First Cause of Action is brought under the persistent fraud prong of § 63(12). All Defendants are entitled to summary judgment dismissing the First Cause of Action because (1) the NYAG cannot properly maintain a § 63(12) action under the circumstances herein presented by the record evidence and (2) the NYAG fails to satisfy the elements of its § 63(12) persistent fraud claim.

1. The Record Is Devoid of Any Evidence of Harm

The NYAG seeks herein to advance her own *post hoc* evaluation of the SOFC and then apply her own standards of compliance, quite different from those already spelled out in complex, private, bi-lateral agreements. This unprecedented intervention into private commercial transactions is simply not supported by established law defining the scope and limits of the NYAG's authority under Executive Law § 63(12).[9] Indeed, whether pursuant to a statutory grant

[8] Defendants continue to dispute that the NYAG has met its burden on the first element of a cause of action brought under Executive § 63(12) (*i.e.*, there was an act that tends to deceive or creates an environment conducive to fraud, meaning the practice is one likely to mislead a reasonable consumer acting reasonably under the circumstances).

[9] The NYAG also seeks to backdoor several counts involving alleged violations of the Penal Law (*i.e.*, alleged insurance fraud, business records fraud, and financial statements fraud), each of which require an intent to defraud. New York Penal Law §§ 175.05, 175.45, 176.05. However, in alleging underlying criminal violations sounding in fraud, the NYAG cannot simply use § 63(12) to circumvent proving the underlying alleged illegal acts. "The

under § 63(12) or otherwise, and whether framed as an issue of standing or capacity, the scope of the NYAG's authority depends upon a public interest nexus fully lacking in this case.[10]

The record is devoid of any evidence establishing any impact on anyone, not the counterparties to the various transactions at issue and not the public marketplace. There is simply no role or authorization for the Attorney General to second-guess the considered business judgment of private parties engaged in successfully consummated and profitable commercial transactions. Executive Law § 63(12) authorizes the NYAG to apply for relief "in the name of the people of the state of New York." The authority to recover on behalf of the People depends necessarily upon a connection between the conduct the Attorney General seeks to enjoin, and some harm (or threat of harm) suffered by the People (*i.e.*, the public at large). The plain language of Executive Law § 63(12) is at once a conferral of authority and a limitation on the exercise of that authority.[11]

Legislature [] enacted a statute requiring more. The Attorney General may not circumvent that scheme, [because t]o do so would tread on the Legislature's policy-making authority." *People v. Grasso*, 11 N.Y.3d 64, 72 (2008). *Grasso* held the NYAG cannot exercise authority outside of an enforcement scheme set out by the legislature by bringing common law claims, where the common law application of causes of action sought by the NYAG are less stringent than what is required by the legislature. *See id.* at 71. This analysis applies with equal force here where the NYAG seeks to apply criminal statutes requiring an intent to defraud as a basis for § 63(12) liability without alleging and proving the requisite intent or other elements.

[10] This concept is reinforced by the doctrine of *parens patriae*, which is fully applicable to actions brought under § 63(12). The elements of the *parens patriae* analysis effectively frame the outer limits of the NYAG's authority even where, as here, she has been granted statutory powers. Indeed, the proposition that § 63(12) vests the NYAG with the "functional equivalent of *parens patriae* authority" has been expressly adopted by the NYAG. *See New York v. Intel Corp.*, No. CIV. 09-827-LPS, 2011 WL 6100446, at *6 (D. Del. Dec. 7, 2011) ("[The NYAG] submits that courts have determined that [Executive Law 63(12)] constitute[s] 'express state statutory authority [allowing the NYAG] to represent consumers in a capacity that is the functional equivalent of *parens patriae* authority.") (citation omitted). "To bring a *parens patriae* action to sue in the public interest, the Attorney General must: (1) identify a quasi-sovereign interest in the public's well-being; (2) that touches a 'substantial segment' of the population; and (3) articulate 'an interest apart from the interests of the particular private parties[.]'" *People v. H&R Block*, No. 401110/2006, 2007 WL 2330924 (N.Y. Sup. Ct. N.Y. Cnty. 2007).

[11] The plain language of § 63 itself further establishes the NYAG's power is by no means unfettered. The NYAG's authority to prosecute and defend suits applies only to "all actions and proceedings in which the state is interested" and for the purposes of "protect[ing] the interest of the state." Exec. Law § 63(1). This concept is unquestionably embedded in § 63(12). *Cf. Duguid v. B.K.*, 175 N.Y.S.3d 853 (N.Y. Sup. Ct. 2022) (explaining that when a state

The Court of Appeals has articulated that limitation in cases interpreting statutory grants of authority to sue "in the name of the People" substantially identical to that in § 63(12), going back more than two centuries. *See People v. Lowe*, 117 N.Y. 175 (1889); *People v. Brooklyn, Flatbush & Coney. Island Ry. Co.*, 89 N.Y. 75 (1882); *People v. Ingersoll*, 58 N.Y. 1 (1874); *People v Albany & S.R. Co.*, 57 N.Y. 161 (1874); *People v. Booth*, 32 N.Y. 397 (1865); *Attorney Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371 (N.Y. Ch. 1817). "While [a statute may] authorize[ ] the Attorney General, in [her] discretion, to institute suit where [she] believes the public interests require such action to be brought, [her] determination is not final for all purposes, and whether the action brought is permissible and maintainable is a matter subject to judicial review." *People v. Singer*, 85 N.Y.S. 2d 727, 731 (N.Y. Sup. Ct. N.Y. Cnty. 1949) (citing *Lowe*, 117 N.Y. at 194–95). Upon such review, "[u]nless … it appears that the matters alleged affect the public interest in the true and proper sense, rather than affecting individual private rights and interests, then the State is without legal capacity to sue." *Singer*, 85 N.Y.S.2d at 730 (citing *People v. Albany & Susquehanna R. Co.*, 57 N.Y. 161, 167 (1874); *People v. O'Brien*, 111 N.Y. 1, 33 (1888); *Lowe*, 117 N.Y. at 191. "It is not sufficient for the people to show that wrong has been done to some one; the wrong must appear to be done to the people, in order to support an action by the people for its redress." *Albany*, 57 N.Y. at 168.

Thus, whether through application of *Lowe*, 117 N.Y. at 194–95, or the elements of the *parens patriae* doctrine, the *sine qua non* for the Attorney General is to establish an interest within the public purpose of her office beyond that of the private litigants. To hold otherwise is to remove all limits on the exercise by the Attorney General of her authority under § 63(12), eliminating any,

official acts "in [her] official capacity [she is] representing the larger interests of the State to promote the health, safety, and welfare of the public").

even theoretical, possibility of judicial oversight over the initiation of actions under the statute. Such result is inconsistent with the plain language of § 63(12) and established precedent and was not (and could not have been) contemplated by the Legislature.[12]

Executive Law § 63(12) cases invariably involve some actual public interest that the NYAG seeks to vindicate, which is a stark contrast to what she seeks to do here in attempting to become the *post hoc* arbiter of the marketplace by interjecting her own judgment into strictly private transactions—thereby ignoring the public protection purpose of § 63(12). *See New York v. Feldman*, 210 F. Supp. 2d 294, 302 (S.D.N.Y. 2002) ("defendants engaged in a scheme to manipulate public stamp auctions" and "repeated acts of deception [were] directed at a broad group of individuals" including "unsophisticated individual sellers, such as the elderly and one-time participants"); *People v. MacDonald*, 330 N.Y.S.2d 85, 88–89 (Sup. Ct. 1972) (ensuring public safety via enforcement of vessel navigation laws); *State v. Cortelle Corp.*, 38 N.Y.2d 83, 85, (N.Y. 1975) ("distressed owners of residences" who "relied upon oral representations that [their] deeds were merely collateral"); *People v. Apple Health & Sports Clubs, Ltd., Inc.*, 80 N.Y.2d 803, 806, (1992) (health club members not receiving contractual services they paid for); *People v. Coventry First LLC*, 13 N.Y.3d 108, 114 (2009) (defrauded owners of life insurance policies); *People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409 (1st Dep't 2016) (programs offered to consumers such as small business owners and individual entrepreneurs); *People v. Credit Suisse*

[12] The undisputed legislative purpose behind § 63(12) is to "afford *the public and consumers* expanded protection from deceptive and misleading business practices[.]" *State v. Bevis Indus., Inc.*, 314 N.Y.S.2d 60, 64 (N.Y. Sup. Ct. N.Y. Cnty. 1970) (emphasis added); *People v. 21st Century Leisure Spa Int'l Ltd.*, 583 N.Y.S.2d 726, 729 (N.Y. Sup. Ct. N.Y. Cnty. 1991) (Section 63(12)'s purpose "is to afford *the consumer* protection from deceptive and misleading practices") (emphasis added); *Allstate Ins. Co. v. Foschio*, 462 N.Y.S.2d 44, 46–47 (2d Dep't 1983) ("the purpose of such restrictions on commercial activity is to afford the *consuming public* expanded protection from deceptive and misleading fraud") (emphasis added); *State v. Solil Mgmt. Corp.*, 491 N.Y.S.2d 243, 249 (N.Y. Sup. Ct. N.Y. Cnty. 1985) (same); *State v. ITM*, 275 N.Y.S.2d 303, 320 (N.Y. Sup. Ct. N.Y. Cnty. 1966) (Section 63(12) is "designed to protect the *consuming public* against persistent fraud and illegality") (emphasis added).

Sec. (USA) LLC, 31 N.Y.3d 622, 627 (2018) (deceit in sale and marketing of mortgage-backed securities to the investing public); *People v. Greenberg*, No. 401720/20005, 2010 WL 4732745, at *11 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 21, 2010) (transactions "structured in such a manner as to deceive the investing public"); *State v. Ford Motor Co.*, 74 N.Y.2d 495 (1989) (consumers charged for repairs covered by extended warranties of automobiles); *People v. N. Leasing Sys., Inc.*, 193 A.D.3d 67, 70 (1st Dep't 2021) (hundreds of small business owners including seniors, disabled, and immigrants executing unconscionable equipment leases); *State v. Wolowitz*, 468 N.Y.S. 2d 131, 135 (2d Dep't 1983) (unlawful rent surcharge on residential tenants); *People v. Ernst & Young, LLP*, 980 N.Y.S.2d 456 (1st Dep't 2014) (complaint containing allegations of defendants "defrauding the investing public" (*see People v. Ernst & Young LLP*, No. 451586/2010, 2013 WL 6989308, NYSCEF No. 1, at 1, 5 (N.Y. Sup. Ct. N.Y. Cnty. 2013)).

Unlike any other case brought under § 63(12) since its inception, the record evidence establishes this case centers around a few discrete complex transactions involving only sophisticated counterparties that were represented by equally sophisticated legal counsel. This case involves specific loan transactions with Deutsche Bank (Defs. SOF ¶¶ 72–156), one loan refinance with Ladder Capital (Defs. SOF ¶¶ 157–60), one loan refinance with Bryn Mawr bank (Defs. SOF ¶¶ 161–64), and the award by the GSA of a contract to rehabilitate a historic U.S. Government property (Defs. SOF ¶¶ 143–46). Each transaction was governed by extensively negotiated agreements fully defining the parties' respective obligations, what conduct constituted any breach, and, importantly, the consequences of any breach. The parties' relationships were therefore fully defined and self-contained. Each transaction was extraordinarily profitable for the counterparties and none of the contracts were ever breached. (SOF ¶¶ 96, 142, 154). None of the parties to any of the transactions ever lodged any complaint with the NYAG or otherwise claimed any fraud,

misrepresentation, or breach. The only parties impacted by the indisputably successful transactions were the specific private parties to those transactions.

The record does not contain a scintilla of evidence of any public harm (or for that matter, private harm)—any impact on public share prices, *e.g., People v. Greenberg*, 21 N.Y.3d 439 (2013), the public financial markets, *e.g., Coventry First*, 13 N.Y.3d at 114, the public credit markets, *e.g.*, *People v. Applied Card Sys., Inc.*, 27 A.D.3d 104 (3d Dep't 2005), or members of the public at large, *e.g.*, *New York. v. Gen. Motors Corp.*, 547 F. Supp. 703, 703–704 (S.D.N.Y. 1982); *People v. Gen. Elec. Co.*, 302 A.D.2d 314 (1st Dep't 2003). Thus, the NYAG lacks the authority and capacity to now maintain this action for a lack of public impact.[13]

Unlike at the dismissal stage, where the NYAG was afforded the presumption of propriety, the record evidence now undermines fully her purported claims. Indeed, that evidence establishes this is simply not the type of case § 63(12) was designed to reach. To the extent any claims exist relative to the private commercial transactions herein at issue (which they do not as actual parties to those transactions never even attempted to allege), courts recognize § 63(12) claims involving the rights of private business entities "should be [adjudicated by] private contract litigation . . . not a law enforcement action under a statute designed to address public harm flowing from persistent or repeated fraud and deception." *See, e.g., People v. Domino's Pizza*, No. 450627/2016, 2021 WL 39592, at *12 (Sup. Ct. N.Y. Cnty. Jan. 5, 2021).

[13] Even the § 63(12) claims that have been brought to secure an "honest marketplace," deal with protecting the public at large. *See, e.g.*, *People v. Amazon.com, Inc.*, 550 F. Supp. 3d 122 (S.D.N.Y. 2021) (company acted inadequately to protect thousands of workers during the Covid-19 pandemic and AG's standing based on "the government's interest in guaranteeing a marketplace that adheres to standards of fairness, as well [as] ensuring that business transactions in the state do not injure public health"); *Gen. Motors Corp.*, 547 F. Supp. at 703–04 (action brought in reaction to "numerous complaints" by consumers alleging fraud in the "sale, warranting, and repair of automobiles" containing certain equipment); *People v. H & R Block, Inc.*, 870 N.Y.S.2d 315, 316 (1st Dep't 2009); *People v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378, 379 (1st Dep't 2008) (bid rigging); *Gen. Elec. Co.*, 302 A.D.2d 314 (misrepresentations to consumers regarding dishwashers); *People v. Orbitual Publ. Grp., Inc.*, 169 A.D.3d 564, 565 (1st Dep't 2019) (materially misleading consumer solicitations); *Applied Card Sys.*, 27 A.D.3d 104 (misleading credit card offers to consumers).

As the record demonstrates, the transactions before the Court are complex, bilateral business transactions, none of which involve an impact on the public or implicate the public market in any way. Therefore, § 63(12) simply does not extend to these transactions. *See id.*; *People v. Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771, at *30 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 10, 2019) (finding NYAG failed to prove Exxon Mobil "made any material misstatements or omissions about its practices and procedures that misled any reasonable investor"); *State v. Parkchester Apts. Co.*, 307 N.Y.S. 2d 741, 748 (N.Y. Sup. Ct. N.Y. Cnty. 1970) (dismissing claims brought by the NYAG in relation to a "private dispute" when the only basis for the Executive Law claim was a breach of contract demonstrating that claims that can be pursued by individual citizens are not actionable by the state).

In *Domino's*, the court declined to extend the NYAG's police power to disputes over "bilateral business transactions" between Domino's and its individual franchisees regarding a store management software program. *Domino's*, 2021 WL 39592, at *12. "Domino's makes a compelling argument that any disputes regarding the performance of [the store management software program] should be in the nature of private contract litigation . . . not a law enforcement action under a statute designed to address public harm flowing from persistent or repeated fraud and deception." *Id.* Likewise, here, the private, complex, bi-lateral transactions at issue are simply not the proper subject of "a law enforcement action under a statute designed to address public harm." *Id.* Indeed, had any of the sophisticated banks and insurers been financially harmed or deceived in any way, they would have long ago exercised their substantial legal rights under the operative agreements to seek redress. The NYAG cannot now stand in those sophisticated counterparties' shoes to vindicate a wrong that the counterparties never complained of and that the Defendants never perpetrated.

Moreover, the record here goes even further than in *Domino's*, establishing the respective counterparties suffered no harm or injury, and never asserted any default or breach. Indeed, at least in *Domino's*, there was at least some complaint or allegation of harm made by the actual parties to the transactions at issue. Yet here, the record is devoid of any evidence of default, breach, late payment, or any complaint of harm by anyone other than the NYAG. To the contrary, the sophisticated private parties all profited considerably from successfully consummated transactions. Thus, "fraud" cannot exist in the abstract or solely in the mind of the NYAG. Rather, under 63(12) there must be some tangible proof of conduct which has at least the capacity or tendency to deceive.[14]

Here, by way of example, DB Managing Director David Williams, a key corporate officer involved directly in the decisions relative to the DB loans at issue, testified that President Trump "had a verifiable net worth in a top tier of the regional market." (Defs. SOF ¶ 80.) Even if President Trump had a net worth of $1 billion, the pricing on the loans would have remained the same because a net worth in excess of $1 billion constitutes a strong guarantor. (Defs. SOF ¶¶ 79.) Additionally, numerous DB representatives, including Mr. Williams, Ms. Vrablic, and Mr. Sullivan, testified they did not believe there were any material misrepresentations made to the PWM division on these loans. (Defs. SOF ¶ 97.) For example, Ms. Vrablic explicitly testified under oath that she did not believe that either President Trump, Eric Trump or Donald Trump, Jr. made any materially misleading statements to Deutsche Bank. (Defs. SOF ¶ 97, Vrablic Dep.

[14] Nor is it sufficient for the Attorney General to simply invoke "honesty of the marketplace" as a predicate to satisfy the public purpose requirement. In the end, "honesty of the marketplace" is a dictum not a rule of law and its talismanic invocation cannot make up for an absence, here total, of the critical and indispensable element to the Attorney General's ability to bring claims under Executive Law §63(12) or any similar statute: public-directed conduct or public harm that is not abstract, conceptual, or theoretical, but sufficiently choate so as to have a discernable causal relationship to the conduct alleged. Bare assertions of harm to the marketplace that are abstract, conceptual, and theoretical cannot substitute for such a factual causal connection as a justification for the invocation of the Attorney General's power.

229:16-23 ("Q: And as you sit here today, do you have any reason to believe that at any time between January 1, 2011, and the time that you left Deutsche Bank, Eric Trump submitted any materially misleading statements to Deutsche Bank? A: To the best of my knowledge, no."), 229:25-230:7 ("Q: And as you sit here today, do you have any reason to believe that at any time between January 1, 2011 and the time that you left Deutsche Bank, Donald Trump, Jr. submitted any materially misleading statement to Deutsche Bank? A: To the best of my knowledge, no."), 234:17-20 ("Q. Are you aware of any false oral statements that President Trump ever made to anyone at Deutsche Bank? A. Not to the best of my knowledge.") 235:8-16 ("Q. Are you aware of any false written statements that President Trump ever made to anyone at Deutsche Bank? A. To the best of my knowledge, no. Q. Are you aware of any false information that Donald Trump, President Trump, ever provided to anyone at Deutsche Bank? A. To the best of my knowledge, no.").

Mr. Williams explicitly informed the NYAG when he was interviewed previously that he was not concerned about whether any of the SOFCs were misleading. (Defs. SOF ¶ 98.) Even now, Mr. Williams has no concern that the SOFCs were misleading. (*Id.*) DB believed President Trump had a "proven successful track record in the United States commercial real estate market" and based its loan decision on President Trump's financial profile, the client's "historical successes," the banks' due diligence, and the adjustments to President Trump's reported values. (Defs. SOF ¶ 114.) This testimony squarely refutes any notion the SOFCs had any capacity or tendency to deceive. The record demonstrates these are sophisticated counterparties that conducted their own analysis and made valid, and profitable, business risk decisions.

Additionally, there has never been any default associated with any loan associated with President Trump with the PWM division. (Defs. SOF ¶ 96.) Nor was there ever a recommendation

at any time that there was a basis to declare default based on President Trump's failure to maintain a net worth of at least $2.5 billion. (Defs. SOF ¶ 97.) Simply put, the NYAG has not established that the transactions at issue herein are (or should be) the proper subject of "a law enforcement action under a statute designed to address public harm." *Domino's Pizza*, 2022 WL 39592, at *26. Rather, as in *Domino's*, any disputes under the bi-lateral agreements at issue (there are none) must and should be resolved through private contract litigation. There is simply no role for the NYAG on this record and the Defendants are entitled to summary judgment as a matter of law.

2. The Record Cannot Support Findings On Elements Of The First Cause of Action

There are four elements of a general § 63(12) fraud claim:

(1) there was an act that tends to deceive or creates an environment conducive to fraud, meaning the practice is one likely to mislead a reasonable consumer acting reasonably under the circumstances;
(2) the act was misleading in a material way;
(3) the defendant participated in the act or had actual knowledge of it; and
(4) the act was persistent and/or repeated.

See N. Leasing Sys., Inc., 70 Misc. 3d at 267 (collecting cases). Although New York courts have held that a claim for fraud under § 63(12)—like one under the Martin Act—does not require a showing of scienter or reliance, *Greenberg*, 95 A.D.3d at 483, "evidence regarding falsity, materiality, reliance and causation plainly is *relevant* to determining whether the Attorney General has established that the challenged conduct has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *Domino's Pizza*, 2021 WL 39592, at *11 (emphasis in original) (citing *State v. Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988), *People v. Tempur-Pedic Int'l, Inc.,* 916 N.Y.S.2d 900, 906 (Sup. Ct. 2011), and *People v. Exxon Mobil Corp.,* 65 Misc. 3d 1233(A) (Sup. Ct., N.Y. Cnty. Dec. 10, 2019)).

a. The Record Shows That The SOFCs Were Not Materially Misleading

One of the four elements of a general fraud claim is that the alleged misrepresentation be misleading in a material way. *See N. Leasing Sys.,* 70 Misc. 3d at 267. New York courts' "longstanding understanding of materiality tracks that of . . . the federal courts." *City Trading Fund v. Nye*, 72 N.Y.S.3d 371, 378 (N.Y. Sup. Ct. N.Y. Cnty. 2018).

For example, in *People v. Exxon Mobil Corp.*, the NYAG sued ExxonMobil alleging the company violated the Martin Act and Executive Law § 63(12) in connection with its public disclosures concerning how ExxonMobil accounted for past, present, and future climate change risks. (No. 452044/2018, 2019 WL 6795771 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 10, 2019). There, the court turned to federal securities law for its materiality standard: the operative question was whether the alleged misrepresentation "would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available.'" *Id.* at *2 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)). As the court further explained, the "reasonable investor" standard is "an objective one," such that "a material misstatement must assume 'actual significance in the deliberations'" of the shareholders. *Id.* at *3–4 (quoting *United States v. Litvak*, 889 F.3d 56, 64 (2d Cir. 2009) and *State v. Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988)). Thus, to avoid summary judgment, the plaintiff must create a "triable issue[] of fact" by presenting "competing evidentiary submissions" showing that "a reasonable investor would have found that the information about a quantitative and qualitative impact of the transaction significantly altered the total mix of information available." *People ex rel. Cuomo v. Greenberg*, 946 N.Y.S.2d 1, 10 (1st Dep't 2012), *aff'd*, 21 N.Y.3d 439 (2013) (citation omitted). In *Exxon Mobil,* the court found that the NYAG had "failed to prove" its case where it had not "produced . . . testimony . . . from

any investor who claimed to have been misled by any [of Exxon's] disclosure[s].'" 2019 WL 6795771, at *29.[15]

Notably, in evaluating the allegations of a fraudulent misrepresentation claim, "New York takes a contextual view, focusing on the level of sophistication of the parties, the relationship between them, and the information available at the time of the operative decision." *JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 406 (S.D.N.Y. 2004). The "reasonable investor is presumed to have knowledge of information that has already been disclosed or is readily available," and "there is no requirement that information already disclosed be spoonfed to them." *Rachmani Corp*., 71 N.Y.2d at 728. Further, "[s]ophisticated business entities are held to a higher standard." *JP Morgan Chase Bank*, 350 F. Supp. 2d at 406. Such entities "have a duty to protect [themselves] from misrepresentations," which "may apply even in circumstances where the defendant had peculiar knowledge of the relevant facts." *Solutia Inc. v. FMC Corp*., 456 F. Supp. 2d 429, 450–51 (S.D.N.Y. 2006).

As relevant here, New York courts typically deem large banks, insurance companies, and multinational corporations "sophisticated parties," especially when they are engaged in "transactions concern[ing] significant amounts of money." *See St. Paul Mercury Ins. Co. v. M&T Bank Corp.,* No. 12 Civ. 6322(JFK), 2014 WL 641438, at *6 (S.D.N.Y. Feb. 19, 2014); *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.,* 949 F.2d 569, 574 (2d Cir. 1991) (designating "insurance companies" as "sophisticated business entities"); *In re Residential Cap., LLC*, No. 12-12020 (MG), 2022 WL 17836560, at *31 (Bankr. S.D.N.Y. Dec. 21, 2022) (designating "multinational corporation" as "a sophisticated party").

[15] Tellingly, the NYAG "represented she would not appeal Justice Ostrager's ruling" in the *Exxon* case. *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 391 (2d Cir. 2022) (citing *Exxon Mobil Corp.*, 2019 WL 6795771).

The NYAG has cited *People v. Domino's Pizza, Inc.,* No. 450627/2016, 2021 WL 39592, at *10 (N.Y. Sup. Ct. N.Y. Cnty. Jan. 5, 2021) for "the proposition that the Attorney General need not prove materiality," (NYSCEF No. 380 at 17, n.5). This flatly misstates the law. Materiality has always been an element of a Martin Act claim, see *People v. Federated Radio Corp*., 244 NY 33, 37 (1926), and also of a claim under the "virtually identical" standard of fraud embodied in § 63(12), see *State v. Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988). The NYAG's assertion also directly contradicts what Justice Cohen expressly stated in *Domino's Pizza*: "evidence regarding . . . materiality . . . ***plainly is relevant*** to determining whether the Attorney General has established" a § 63(12) claim. *Domino's Pizza,* 2021 WL 39592, at *11 (emphasis in original). Indeed, in *Domino's Pizza*, Justice Cohen cited no fewer than three New York cases dismissing § 63(12) claims, at least in part because of a failure to show materiality. *See id.* (citing *Rachmani Corp.*, 71 N.Y.2d at 726, and *Tempur-Pedic Int'l., Inc.,* 916 N.Y.S.2d at 906, and *Exxon Mobil,* 2019 WL 6795771). The NYAG cannot escape the gravity of that well-established authority by its misinterpretation of *Domino's Pizza*.

The record in this case, consisting of documentary evidence and expert and fact witness testimony, including the testimony of the very people whom the NYAG claims were the targets of Defendants' alleged fraud, establishes that the SOFCs were not materially misleading. No bank or underwriter would have reasonably been materially misled by the alleged misstatements or omissions in the SOFCs and other information the Defendants made available to their counterparties because no sophisticated counterparty would have considered the SOFCs and other information provided by the Defendants alone as material to extend credit or set an interest rate, or issue an insurance policy or price a risk, without doing their own diligence, and none did.

First, representatives of the actual banks and insurance companies working with the relevant Defendants in this case testified that they did not consider the alleged misrepresentations to be material.

President Trump was a customer of the Private Wealth Management ("PWM") program at DB, which allowed him to personally guarantee loans for business purposes. (Defs. SOF ¶¶ 72, 116.) As Tom Sullivan, Managing Director of DB, testified, to qualify as a customer of the PWM program at DB, an individual needs to have a minimum total net worth of about $50 million. (Defs. SOF ¶ 73.) It is undisputed that President Trump's personal net worth far exceeded that amount. For each of the three loans from DB that President Trump personally guaranteed, DB's own employees testified that they were "[c]omfortable with the level of assets" that President Trump held and as well as the "recordation of that amount of liquid assets." (Defs. SOF ¶ 85.)

DB also applied discounts to the amounts listed in President Trump's SOFCs submitted to them as a part of the three loan transactions. In other words, DB, as a highly sophisticated entity, was comfortable conducting its own analyses and making the loans at issue based on its routine application of "haircuts" to the values listed on SOFCs, discounting the clients' stated value in order to prepare for any "adverse scenario" where "the client's financial position is under stress." (Defs. SOF ¶ 86.) For example, when DB received a copy of the 2011 SOFC to secure the Trump Endeavor 12 LLC loan described in the Complaint, DB calculated its own values of President Trump's assets by applying "haircuts" to the values reported in the 2011 SOFC and used its own independent judgment "in setting the appropriate adjustments to achieve conservative valuations of concentrated assets." (Defs. SOF ¶¶ 87, 107.) DB "was focused on [its] own independent view, so [it] didn't spend a lot of time determining . . . what was disclosed." (Defs. SOF ¶ 89.)

The bank's relationship with President Trump was a profitable one for DB with Deutsche Bank earning millions of dollars in revenue from its dealings with President Trump. (Defs. SOF ¶¶ 95, 101–102.) Between 2012 and 2016, DB received over $75 million in interest on these loans. (Robert Aff., Ex. AAQ ¶ 5.) Indeed, simply by closing on these transactions, Deutsche Bank generated fees totaling approximately $3 million. (Defs. SOF ¶¶ 119, 136, 154.) Indeed, the Doral loan had "performed quite well, enough to warrant considering increasing the loan amount secured by the property." (SOF ¶ 121.) And the Chicago Loan was a "superb deal" to the bank that was "structured properly" with pricing that was "appropriate" making it a "very, very good safe deal for the bank" based on the "loan-to-values-and the guarantees involved." (Defs. SOF ¶ 133.) The Old Post Office loan was also a successful credit transaction for Deutsche Bank, as the property was "redeveloped and opened and was operating successfully" and the loan was performing such that "all interest payments and covenants were being met." (Defs. SOF ¶ 154.) At no point in the lifecycle of any credit transaction between DB's PWM division and President Trump or any entity affiliated with President Trump did a covenant or payment default ever occur. (Defs. SOF ¶ 96.) Nor did DB ever recommend that there was a basis for declaring a default based on President Trump's failure to maintain a net worth of at least $2.5 billion as required for each transaction.[16] (Defs. SOF ¶ 97.)

With respect to Defendants' dealings with Ladder Capital Finance, it is important to note that the terms of the 40 Wall Street Loan required President Trump to maintain a net worth of only

[16] As noted above, it is simply not possible to maintain a viable § 63(12) action on these facts. The NYAG's allegations regarding DB's decision not to grant President Trump a loan in 2016 are of no import. As the NYAG itself explained in its Complaint, DB declined to extend further credit to President Trump because he was running for president at the time and DB wanted to avoid the perception that DB was not politically neutral, to mitigate reputational risk. (NYSCEF No. 1 ¶ 666). There is no evidence to suggest that DB declined to make additional loans because it was concerned about President Trump's financial condition.

$160 million and liquidity of only $15 million during the term of the loan. (Defs. SOF ¶ 159.) The NYAG has produced no evidence to suggest that President Trump's net worth or liquidity were ever that low, or that Ladder Capital would have been uncomfortable allowing President Trump to guarantee the 40 Wall Street Loan if his net worth was only $1.9 billion as the NYAG contends.[17] Additionally, the loan has been successful, as Ladder Capital has received in excess of $40 million in interest and 40 Wall Street LLC has never defaulted under the Loan. (Robert Aff., Ex. AAQ ¶ 3).

Testimony of representatives from Zurich further confirms that the SOFCs were not materially misleading. As Joanne Caulfield, a project manager at Zurich, testified, it is common practice for a surety underwriter to require disclosure of financial statements, but Zurich's surety underwriter knew of no legal or contractual provision that required such disclosure from President Trump. (Defs. SOF ¶ 169.) From July 2011 to January 2017, Zurich increased its exposure to Mr. Trump by renewing and expanding the surety program at issue in this case. (Defs. SOF ¶ 172.) In 2013, 2014, and 2015, the sole basis upon which Zurich relied to support its underwriting decisions were estimates of President Trump's net worth published by Forbes. (Defs. SOF ¶ 173-5.) In fact, despite not receiving traditional disclosure of a SOFC from July 2011 to January 2017, Zurich increased its exposure and renewed bonds as an accommodation to the insurance broker. (Defs. SOF ¶ 176.) According to Caulfield, Zurich reduced the rate President Trump's businesses were paying as an accommodation to the broker and to stave off another insurance company seeking to take the surety program from Zurich, and the account rate was lowered despite Zurich not having

[17] Indeed, even at $1.9 billion President Trump's net worth would have been 10 times higher than the required minimum. At all events, all this debate surrounding President Trump's net worth is unnecessary (and pointless in the § 63(12) context) given (1) none of the counterparties to any of the transactions have ever at any time expressed any concerns or claimed any default/breach and (2) it is simply undisputed he was and is an extraordinarily successful multi-billionaire.

reviewed the updated SOFC in approximately four years. (Defs. SOF ¶ 180.) Zurich was simply not concerned with President Trump's financial health. (Defs. SOF ¶ 185.)

Similarly, in December 2016, President Trump's insurance broker reached out to Tokio Marine HCC ("HCC") seeking a quote for additional limits of $5,000,000 to sit above an already-existing Directors & Officers ("D&O") policy. (NYSCEF No. 1 ¶ 695.) *Without reviewing a SOFC*, HCC quoted a policy to sit above the existing policy through the expiration date of February 17, 2017, in exchange for a premium of $40,000, subject to reviewing financials at renewal. (NYSCEF No. 1 ¶¶ 695–96.) If a D&O carrier feels as if they have been provided materially false information by an applicant, the carrier can disclaim coverage and sue for rescission. (Defs. SOF ¶ 197.) Finally, the terms of the HCC policy required that the risk manager or general counsel of President Trump's businesses know of a potential claim before HCC was to be put on notice of said claim. (Defs. SOF ¶ 194.)

Second, in addition to the testimony of the actual individuals involved in the subject transactions, expert testimony establishes that banks and insurance companies would not consider any of the alleged misstatements or omissions in the SOFCs to be material. Robert Unell, the Managing Director at Ankura Consulting Group, provided significant testimony about how DB performed its own analyses when assessing whether to make certain loans and did not rely on SOFCs, highlighting how sophisticated lenders such as the Defendants' counterparties here would not find any misstatements of the type alleged by the NYAG to be material. When asked, "Would it be your opinion that if the allegations in the complaint are true, that DB would have reason to have concerns about the accuracy of the SOFCs," Unell flatly answered "No," explaining that "even if the net worth or any of the other . . . allegations were . . . proven true, the net worth was still sufficient to qualify for inclusion in the private wealth bank" and that "Deutsche Bank had

ample opportunity to investigate anything" it wanted to (Defs. SOF ¶ 91.) He continued, explaining that above all, liquidity was most important or "material" to the bank and that the bank "went and verified it." (Defs. SOF ¶ 92.)

According to Unell, "SOFCs provide ample information . . . for a sophisticated lender to be able to make . . . their own determination," as those documents "provide the actual amounts" and "how they were calculated" such that if any bank had concerns, it "had an opportunity to challenge those assumptions that were utilized in the preparation of the SOFC." (Defs. SOF ¶ 70.) "[L]enders are trained not to rely on" SOFCs, "which is why the independent analysis in the credit memo is done." (Defs. SOF ¶ 67.) Unell further testified that materiality "is in the eye of the beholder, not the eye of a third party, not the eye of a regulator, not the eye of, in this case, the Attorney General" and that DB "did what they were supposed to do and verified" certain items and "anything else would have been immaterial." (Defs. SOF ¶ 93.) SOFCs are not treated as perfect approximations of an individual or business' value—they are treated as a "roadmap" for banks to do their own independent analysis. (Defs. SOF ¶ 68.)

Regarding insurance underwriting, David Miller, a former Senior Vice President/Division Officer at Erie Insurance, opined that Zurich North America Insurance Company ("Zurich"), the underwriters for the surety bond program at issue in this case, "didn't rely on asset valuations at all." (Defs. SOF ¶ 182.) Or as Gary Giulietti, an Account Director at Lockton Northeast, testified, describing surety bond transactions with Zurich, liquidity is "all they're relying on, cash, all the way back in the relationship." (Defs. SOF ¶ 182.) In this case, the total exposure extended to President Trump's businesses in connection with the surety program at issue never exceeded $20 million. (Defs. SOF ¶ 182.)

Third, the NYAG alleges repeatedly that the SOFC violated accounting principles generally accepted in the United States ("GAAP"), suggesting that any departures from these established standards are significant in this Court's determination of liability. *See, e.g.*, (NYSCEF No. 1 ¶¶ 14, 136, 199). But it is well-established that GAAP permits departures from GAAP on SOFCs so long as the departures are properly disclosed. The departures on President Trump's SOFCs were properly disclosed. (Defs. SOF ¶ 51, 53, 59.) Further and critically, GAAP does not apply to immaterial items. (Defs. SOF ¶ 63.) None of the items identified by the NYAG as departures, misstatements, or omissions were material and NYAG fails to offer any proper materiality analysis to contradict this. (Defs. SOF ¶ 65.); (Robert Aff., Ex. AK ¶¶ 26–27.) Under GAAP, immaterial financial statement items do not need to comply with the detailed requirements of GAAP. Specifically, ASC 105, Generally Accepted Accounting Principles, provides, "The provisions of the Codifications need not be applied to immaterial items." GAAP guide that immaterial financial statement items do not need to comply with GAAP, and thus allow preparers a reasonable level of flexibility in applying GAAP. In other words, GAAP recognize that not all accounting errors, violations, or departures from GAAP have a significant impact on the inferences of financial statement users. Thus, GAAP only prohibit material violations. (Defs. SOF ¶ 63.)

The materiality assessment is conducted from the standpoint of the user of the financial statements. For an omission or misstatement to be material through the lens of a user, the user must rely on the information in the financial statement in his/her decision-making process. It follows that if the user is in possession of the correct information, then the financial statements are not materially misstated. (Defs. SOF ¶ 64.)

The FASB ASC 274, Personal Financial Statements, governs the preparation of compilation reports. ASC 274 affords preparers of compilation reports significant latitude to

choose the valuation methods they may use to value assets and liabilities on compilations reports and leaves it to the discretion of the preparer which method and assumptions to use as long as they are reasonably consistent with economic theory. Preparers may rely on methods and assumptions in formulating estimated current values that may be inherently different from those used by appraisers and lenders. (Defs. SOF ¶¶ 53–54.) Thus, GAAP affords preparers of SOFCs significant latitude in the valuation methods they may use to value assets and liabilities on SOFCs and leave it entirely to the discretion of the preparer which method to use. "GAAP does not require a specific method to be used to estimate current value for a particular asset for personal financial statements, nor does GAAP require the same method to be used for all assets in the same group." (Defs. SOF ¶ 54.) The NYAG's allegations that President Trump used inappropriate valuation methods fail to consider this wide latitude in choosing asset valuation methods and the assumptions underlying them, or else misinterpret GAAP. (Defs. SOF ¶¶ 53–55.)

Additionally, SOFCs are not designed to show the value of a reporting entity, but serve only as the beginning, not the end, of the complex and highly subjective valuation process users such as banks and insurance companies engage in as they perform their own diligence. Banks know that an estimate put forth in a SOFC, even when written to follow GAAP, is "truly an estimate." (Defs. SOF ¶ 67.)

President Trump's SOFCs for 2011 through 2021 were prepared in a personal financial statement format in accordance with ASC 274. (Defs. SOF ¶ 51.). ASC 274 requires preparers of compilation reports to include sufficient disclosures to make the statements informative in light of all the information available to the user, including information apart from the financial report that the user may require and receive from the preparer (as Deutsche Bank did from President Trump). (Robert Aff., Ex. AK ¶ 16.)

Each of President Trump's SOFCs for 2011 through 2021 contains notes, which are an integral part of the SOFC, that provide information (including potential departures from GAAP) to help the user interpret the numbers reported, along with a sweeping disclaimer expressly stating: "Considerable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, the estimates presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities. The use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts." *See, e.g.,* Compl. at Ex. 3 at 1.

In addition, each SOFC was accompanied by an "Independent Accountants' Compilation Report" letter from the accountants who compiled the SOFCs that noted that the SOFCS contained numerous departures from GAAP and provided a litany of those departures along with a description of each departure. These compilation letters also expressly warned users that "[w]e have not audited or reviewed the accompanying financial statement and, accordingly, do not express an opinion or provide any assurance about whether the financial statement is in accordance with the accounting principles generally accepted in the United States of America" and stated that "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 a revised statement of financial condition without the above referenced exceptions to accounting principles generally accepted in the United States of America." (Defs. SOF ¶ 58.)

These disclaimers together with the notes to the SOFCs identify and describe the numerous departures from GAAP as well as the subjective nature of the property valuations. Thus, they put sophisticated users of the SOFCs, such as Deutsche Bank, for whom the SOFCs were prepared,

on complete notice to perform their own diligence, which a sophisticated user like Deutsche Bank would have performed anyhow even in the absence of such disclaimers. (Defs. SOF ¶ 62, 67–70.)

The compilation letters accompanying each SOFC are incorporated by reference in each SOFC and are thus an integral part of each SOFC. From the standpoint of the user (i.e., Deutsche Bank), both documents must be and are considered together, because both were made available to the user together, and because the SOFCs incorporated the letters by reference. (Robert Aff, Ex. AK ¶ 18.).

These disclaimers read together with the extensive notes in the SOFCs identifying and describing the numerous departures from GAAP, put sophisticated users of the SOFCs for whom the SOFCs were prepared on complete notice not to rely upon them.[18] (Defs. SOF ¶ 61.) Indeed, in its Source Selection Evaluation Report and Recommendation related to the Old Post Office property, the GSA acknowledged that the "[f]inancial statements provided by Mr. Trump were qualified by his accountants as not complying with GAAP." (Defs. SOF ¶ 146.) The SOCFs had little or no effect either on the lenders' decisions to extend loans to the Defendants or to set the terms of those loans, or on the insurers' decisions to write coverage for the Defendants and price the risk. (Defs. SOF ¶¶ 87–90.)

In sum, the record is devoid of evidence demonstrating that any of the alleged GAAP departures, misstatements, or omissions were material, or that the recipients of the SOFCs found the alleged misstatements to be material. Indeed, expert testimony in the record provides that sophisticated banks and underwriters conduct their own independent assessment of whether to make a loan or underwrite a policy, focusing on liquidity and using the SOFC as a roadmap in

[18] Again, no possible capacity or tendency to deceive.

their own evaluation. Accordingly, the NYAG's First Cause of Action fails as a matter of law, and all Defendants are entitled to summary judgment.

b. The First Cause of Action Fails As To Most Defendants For The Additional Reason That They Neither Participated In The Alleged Fraud Nor Had Actual Knowledge Of It

As explained above, to prevail on a claim for persistent and repeated fraud under § 63(12), the NYAG must show that each defendant participated in the act or had actual knowledge of it. *See N. Leasing Sys.*, 70 Misc. 3d at 267; *Abrahami v. UPC Constr. Co*., 224 A.D.2d 231, 233–34 (1st Dep't 1996). The participation element is satisfied where the defendant "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). Merely providing copies of purportedly false financial statements is insufficient. *See Abrahami,* 224 A.D.2d at 233–34. Similarly, brokering a loan transaction where others allegedly committed fraud does not by itself create an inference of participation in the fraud. *Frawley v. Dawson*, No. 6697/07, 2011 WL 2586369, at *8 (N.Y. Sup. Ct. Nassau Cnty. May 20, 2011).

If the NYAG cannot show that a particular Defendant participated in a persistent and repeated fraud, she must show that such Defendant had actual knowledge of the fraud. *See N. Leasing Sys.*, 70 Misc. 3d at 267; *Abrahami*, 224 A.D.2d at 233–34. Where, as here, actual knowledge is required under New York law, "[m]ere negligent failure to acquire knowledge of the falsehood is insufficient." *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 44 (1980). Likewise, showing that a Defendant "had access to the information by which it could have discovered the fraud is not sufficient." *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 75–77 (S.D.N.Y. 2010), *aff'd*, 485 F. App'x 461 (2d Cir. 2012) (citations omitted).

Thus, in order to show that a particular Defendant had "actual knowledge", the NYAG must put forth facts sufficient to support a finding of at least grossly negligent conduct on the part

of that Defendant. New York courts define gross negligence as conduct that "smack[s] of intentional wrongdoing or evince[s] a reckless indifference to the rights of others." *Gallagher v. Ruzzine*, 46 N.Y.S.3d 323, 328 (4th Dep't 2017) (citation omitted). An officer may also be deemed grossly negligent if "the totality of the circumstances" show that the officer acted with "willful blindness or conscious avoidance." *State v. United Parcel Serv., Inc*., 253 F. Supp. 3d 583, 666–67 (S.D.N.Y. 2017), *aff'd*, 942 F.3d 554 (2d Cir. 2019) (citations omitted). But "[t]here must be evidence capable of supporting a finding that the defendant was aware of a high probability of the [incriminating] fact in dispute and consciously avoided confirmation of that fact." *Id.* at 667 (citation omitted) (alteration in original).

The NYAG must also show actual knowledge for *all* Defendants, including the corporate entities named in the Complaint. Usually, "[w]hen corporate agents act within the scope of their authority, 'everything they know or do is imputed to their principals.'" *People v. Gross*, 169 A.D.3d 159, 169 (2d Dep't 2019) (citations omitted). However, there are "exception[s] to the rule of imputed knowledge." *Id.* at 170. Notably, "imputation of knowledge may not apply where there is a specific statutory requirement of actual knowledge, and imputing knowledge would effectively negate the purpose of the actual knowledge requirement." Robert L. Haig, *Imputed Knowledge*, 4D N.Y. Prac., Com. Litig. in N.Y. State Courts § 102:46 (5th ed., 2022). As the Court of Appeals has explained, if "knowledge of any [employee] may be imputed to a corporate [ ] employer, then the statutory distinction becomes significantly blurred and uneven. We have noted that strict construction of this statutory scheme is essential to insure that the legislative policy of punishing only those with actual knowledge is properly effectuated." *Roberts Real Est., Inc. v. N.Y. State Dep't of State, Div. of Licensing Servs.*, 80 N.Y.2d 116, 122 (1992). Allowing the NYAG to impute

actual knowledge here, "would contradict that interpretation by arrogating to itself instead an expansive new power not granted by the Legislature." *Id.*

For each transaction at issue in the Complaint, the Defendants have either: (1) put forth undisputed evidence that a given Defendant did not participate in and lacked actual knowledge of the transaction, sufficient to defeat the NYAG's allegation; or (2) shown that the record is devoid of documentary or testimonial evidence that may be available to the NYAG to substantiate its allegation. For the sake of brevity, Defendants focus herein on the transactions executed or conduct arguably performed within the statute of limitations, or for which the Tolling Agreement allows the transaction or conduct to serve as the basis for a claim.

Preparation of the SOFC. The NYAG's entire case revolves around the SOFC. Deposition testimony demonstrates that Eric Trump was not involved in preparing the SOFCs. (Defs. SOF ¶¶ 199, 200.) Eric Trump testified, "I never saw or ever even remotely worked on the Statement of Financial Condition. Th[at] was not my purview. Th[at] was not what I did." (Defs. SOF ¶ 200.) He further testified that he knew "just about nothing about the Statement of Financial Condition" and had "never seen" or "worked on" the SOFCs. (Defs. SOF ¶ 200.) He also had no role in the "valuation process in the company." (Defs. SOF ¶ 200.) Donald Bender, the engagement partner at Mazars, testified that he had no conversations with Eric Trump concerning the preparation of the SOFCs. (Defs. SOF ¶ 200.) Eric Trump also disclaimed any knowledge of the alleged falsities in the SOFC, stating that he relied on the accounting team to prepare the SOFCs. (Defs. SOF ¶ 201.) The record is devoid of any contrary evidence.

Donald Trump, Jr. also did not participate in the preparation of the SOFCs. (Defs. SOF ¶ 199.) Bender testified that in preparing the SOFCs, he did not discuss with Donald Trump, Jr. the

preparation of the SOFCs. (Defs. SOF ¶ 202.) The NYAG has not introduced any evidence that Donald Trump, Jr., participated in the preparation or submission of the SOFCs.

The record is also devoid of any evidence that the following Defendants were involved in the preparation of the SOFC or had actual knowledge of the alleged misrepresentations in the SOFC: Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC. While the NYAG alleges that this "host of entities" are incorporated within the "Trump Organization," the Complaint alleges nothing concerning these entities beyond that they owned properties mentioned in the Complaint or received loans at issue in the Complaint. No record evidence establishes these entities were involved in creating or submitting the SOFCs.

Thus, to the extent that the NYAG asserts any claims against Eric Trump, Donald Trump, Jr., Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, Seven Springs LLC, The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, or DJT Holdings Managing Member based on their participation in the creation of the SOFCs or their actual knowledge of the alleged falsities in the SOFCs under the First Cause of Action, those claims fail. And for these Defendants, the Court's analysis on the First Cause of Action can stop there. Given the SOFCs and their alleged falsity is the backbone of the NYAG's entire case, if the undisputed facts demonstrate these Defendants had no involvement in or knowledge of any alleged falsities in the SOFCs, then there is simply no liability without participation or actual knowledge, and these Defendants are entitled to summary judgment on the First Cause of Action.

Surety Bond Program. The NYAG alleges that from 2007 through 2021, Zurich underwrote a surety bond program for the "Trump Organization" and that the SOFC were used in

this process. (NYSCEF No. 1 ¶¶ 678–91.) Zurich representatives testified that they had no communications with Eric Trump or Donald Trump, Jr. in relation to the surety bond program. (Defs. SOF ¶ 187.) The NYAG has not rebutted this evidence, nor has she offered any evidence to suggest that any of these individuals had any knowledge of the submission of the SOFCs to Zurich. Further, the record lacks any evidence that The Trump Organization, Inc., Trump Organization, LLC, 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 obtained surety bonds from Zurich. Nor is there any evidence to establish that any actions taken by Mr. Weisselberg were taken in his capacity as trustee on behalf of the Trust. To the extent the NYAG's claims concerning the First Cause of Action are related to transactions with Zurich and the surety bond program, they fail as to Defendants Eric Trump, Donald Trump, Jr., the Trust, The Trump Organization, Inc., Trump Organization, LLC, 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.

Directors & Officers Liability Insurance. Finally, the NYAG alleges that in December 2016, the "Trump Organization's" insurance broker reached out to an underwriter at HCC regarding a D&O policy to sit on top of an already-existing $5 million policy with Everest and that the 2015 SOFC was submitted to HCC as a part of this process. (NYSCEF No. 1. ¶¶ 692, 698.) The HCC policy was renewed several times. (Defs. SOF ¶¶ 189, 192.) There is no evidence in the record to suggest that any Defendants other than the Trust and Mr. Weisselberg were involved in or had knowledge of this transaction.

B. Defendants Are Entitled To Summary Judgment On The Second, Fourth, And Sixth Causes Of Action

The NYAG's Second, Fourth, and Sixth Causes of Action are brought under the predicate illegality prong of § 63(12) and allege as predicate illegalities violations of several provisions of the New York Penal Law, *viz*., N.Y. Penal Law §§ 175.05 and 175.10 for falsification of business records in the second and first degree (Second Cause of Action); N.Y. Penal Law § 175.45 for issuance of a false financial statement (Fourth Cause of Action); and N.Y. Penal Law § 176.05 for insurance fraud (Sixth Cause of Action). [19] To prevail on these claims, the NYAG must show the Defendants violated these statutes by proving each element of the underlying crime. *See People v. World Interactive Gaming Corp.*, 185 Misc. 2d. 852, 856 (N.Y. Sup. Ct., N.Y. Cnty. 1999) (explaining that "conduct which violates State or Federal law or regulation is actionable under" § 63(12)).

The elements of a claim for falsification of business records in the second degree include making or causing a false entry in the business records of an enterprise or the making or causing of the omission of true entries in the business records of an enterprise with an "intent to defraud." N.Y. Penal Law § 175.05. Falsification of business records in the first degree requires the additional element that the defendant intends to commit another crime or "to aid or conceal the commission thereof." *Id.* § 175.10; *see also People v. Reyes*, 69 A.D.3d 537, 538 (1st Dep't 2010).

[19] In alleging underlying criminal violations sounding in fraud, the NYAG cannot simply use § 63(12) to circumvent proving the underlying alleged illegal acts. "The Legislature [] enacted a statute requiring more. The Attorney General may not circumvent that scheme, [because t]o do so would tread on the Legislature's policy-making authority." *People v. Grasso*, 11 N.Y.3d 64, 72 (2008). *Grasso* held the NYAG cannot exercise authority outside of an enforcement scheme set out by the legislature by bringing common law claims, where the common law application of causes of action sought by the NYAG are less stringent than what is required by the legislature. *See id.* at 71. This analysis applies with equal force here where the NYAG seeks to apply criminal statutes requiring an intent to defraud as a basis for § 63(12) liability without alleging and proving the requisite intent or other elements.

Issuance of a false financial statement occurs when an individual, with intent to defraud, "knowingly makes or utters a written instrument which purports to describe the financial condition . . . which is inaccurate in some material respect" or "represents in writing that a written instrument purporting to describe a person's financial condition . . . is accurate . . . whereas he knows it is materially inaccurate in that respect." N.Y. Penal Law § 175.45.

An individual is liable for insurance fraud when he "causes to be presented" a "written statement as part of, or in support of, an application for the issuance of" a "commercial insurance policy," which he "knows" to "contain materially false information" with an intent to defraud. *Id.* § 176.05.

A plaintiff bringing an action under one statute predicated on violations of another statute must prove the elements of the predicate offense. For example, 42 U.S.C. § 1983 claims may be "based on purely statutory violations of federal law," *Maine v. Thiboutot*, 448 U.S. 1, 3 (1980). But, in such cases, the plaintiff must prove that the government actor's conduct "violate[d] . . . rights secured by the [statute]," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989); *see Legal Aid Soc'y v. City of New York*, 242 A.D.2d 423, 424 (1st Dep't 1997) (sufficiently alleging violation of NLRA gave rise to action under § 1983). Similarly, a plaintiff bringing a Racketeer Influenced and Corrupt Organizations Act ("RICO") action alleging a violation of a mail or wire fraud statute must prove the "essential element[s] of each of the statutory violations of the mail [or wire] fraud statute underlying plaintiff's RICO action." *236 Cannon Realty, LLC v. Ziss*, No. 02 CIV.6683(WHP), 2005 WL 289752, at *4 (S.D.N.Y. Feb. 8, 2005) (citation omitted); *Worldwide Directories, S.A. De C.V. v. Yahoo! Inc.,* No. 14-cv-7349(AJN), 2016 WL 1298987, at *6–7 (S.D.N.Y. Mar. 31, 2016) (dismissing RICO claims, in part, where plaintiffs failed to adequately allege "violations of the mail fraud statute . . . the wire fraud statute

. . . and the Travel Act"). And if the plaintiff fails to "establish the predicate act[s]," defendants will be "entitled to summary judgment." *Ziss,* 2005 WL 289752, at *6. Additionally, where courts have allowed plaintiffs to use the False Claims Act as a vehicle to assert a violation of the anti-kickback statute, they have required plaintiffs to "prove first that defendant violated the anti-kickback statute." *See* Lisa M. Phelps, *Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions*, 51 Vand. L. Rev. 1003, 1025 (1998) (collecting cases).

Thus, in order to defeat summary judgment on these claims of predicate illegality, the NYAG must, with respect to each predicate illegality alleged, "establish[] each element of its case with respect to those causes of action," *City Dental Servs., P.C. v. N.Y. Cent. Mut*., No. 2010-2225, 2011 WL 6440755, at *1 (2d Dep't Dec. 16, 2011), by "producing evidentiary proof in admissible form . . . sufficient to require a trial of material questions of fact," *Zuckerman*, 49 N.Y.2d at 562; *see Smith v. City of New York,* 733 N.Y.S.2d 474, 475 (2d Dep't 2001) (denial of summary judgment proper where "plaintiffs' General Municipal Law § 205–a causes of action were predicated upon numerous statutes, rules, regulations, and ordinances" and movant "fail[ed] to specifically address each separate claim with proof sufficient to meet their burden of establishing their right to judgment as a matter of law"); *Reyes v. Sligo Constr. Corp.,* 186 N.Y.S.3d 321, 325 (2d Dep't 2023) (affirming grant of summary judgment dismissing "so much of [plainitff's] Labor Law § 241(6) cause of action as was predicated on violations of 12 NYCRR 23-1.7(a)(1), 23-3.3(b)(3), and 23.3(c)" because "plaintiff failed to raise a triable issue of fact" regarding the underlying elements of those statutory claims).

1. The Fourth And Sixth Causes Of Action Fail Because The Record Shows There Were No Material Misrepresentations[20]

Materiality is an element of both the NYAG's Fourth Cause of Action for issuance of false financial statements and Sixth Causes of Action for insurance fraud.

The issuance of a false financial statement occurs when an individual, with intent to defraud, "knowingly makes or utters a written instrument which purports to describe the financial condition . . . which is inaccurate in some *material* respect" or "represents in writing that a written instrument purporting to describe a person's financial condition . . . is accurate . . . whereas he knows it is *materially* inaccurate in that respect." N.Y. Penal Law § 175.45 (emphasis added). Thus, materiality is an element of the NYAG's Fourth Cause of Action.

The standard for materiality under a false financial statement claim is the same one that applies to a § 63(12) claim, *viz.*, the familiar one borrowed from federal securities law. See *People v. Essner*, 124 Misc. 2d 830 (N.Y. Sup. Ct., N.Y. Cnty. 1984). "[A] fact is deemed 'material' if its disclosure would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available," and that materiality requires a showing "that in all probability the omitted or misrepresented facts would, in view of the circumstances, have assumed actual significance in the deliberations of a reasonable shareholder." *Id.* (quoting *SEC v. Paro*, 468 F. Supp. 635, 646 (N.D.N.Y. 1979)). In making a materiality determination the Court must view the question from the perspective of the victim. *People v. Essner*, 124 Misc. 2d 830. Here, the alleged victims are the insurers to whom the SOFCs were provided, so materiality must be weighed from their perspective.

[20] Again, Defendants do not concede that they made any misrepresentations.

An individual is liable for insurance fraud when he "causes to be presented" a "written statement as part of, or in support of, an application for the issuance of" a "commercial insurance property," which he "knows" to "contain *materially* false information" with an intent to defraud. N.Y. Penal Law § 176.05 (emphasis added). Accordingly, materiality is also an element the NYAG is required to prove in its Sixth Cause of Action.

Under an insurance fraud claim, "[a] misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented." *Nabatov v. Union Mut. Fire Ins. Co.*, 164 N.Y.S.3d 667, 669 (2d Dep't 2022) (citation omitted). On summary judgment, "an insurer must present clear and substantially uncontradicted documentation concerning its underwriting practice, such as underwriting manuals, bulletins, or rules pertaining to similar risks, which show that it would not have issued the same policy if the correct information had been disclosed in the application." *Id.* at 670; *see Lema v. Tower Ins. Co. of New York,* 990 N.Y.S.2d 231 (2d Dep't 2014). Thus, "[c]onclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law." *IPA Asset Mgmt., LLC v. Certain Underwriters at Lloyd's London*, 39 N.Y.S.3d 198, 200 (2d Dep't 2016).

As discussed in detail in section II.A *supra*, there is no evidence in the record supporting a finding that the SOFCs as submitted to Deutsche Bank, Ladder Capital, Bryn Mawr Bank, Zurich, or HCC were materially misleading. Thus, Defendants are entitled to summary judgment on the NYAG's Fourth and Sixth Cause of Action.

2. The Second, Fourth and Sixth Causes of Action Also Fail Because the Record Does Not Support A Contention That Defendants Intended To Defraud Anyone

The Second, Fourth, and Sixth Causes of Action also contain a specific intent element: the NYAG must show that the Defendants performed the allegedly improper conduct with an "intent to defraud." The intent to defraud is "commonly understood to mean" to act with intent "to cheat

someone out of money, other property or something of value." *People v. Hankin*, 175 Misc. 2d 83, 89 (N.Y. Crim. Ct. Kings Cnty. 1997) (citing *People v. Saporita*, 132 A.D.2d 713, 715 (2d Dep't 1987)). It involves "frustrat[ing] the legal rights of another," *see S. Indus. v. Jeremias*, 66 A.D.2d 178, 181 (2d Dep't 1978), or misleading with the purpose of "leading another into error or to disadvantage," *People v. Briggins*, 50 N.Y.2d 302, 309 (1980) (Jones, J., concurring). Thus, it is more than an intent to deceive. *See Hankin*, 175 Misc. 2d at 89. The end result of the deception must be to dispossess the target of the deception of something of value or frustrate their legal rights.

Moreover, New York courts have held that plaintiffs failed to produce credible evidence of intent to defraud where there was no evidence to suggest that defendants' reliance on accounting professionals "was other than in good faith." *Abrahami*, 224 A.D.2d at233–34; *see also People v. Dillard*, 271 N.Y. 403, 414 (1936) (finding defendant had a "right to rely" on agreement drafted by subordinate employees and the facts disclosed to him and that plaintiff had not shown he "knowingly made a false statement or a statement intended to deceive the public"). This is consistent with New York corporate law, which provides, in relevant part, that "[i]n performing his duties, an officer shall be entitled to rely on information, opinions, reports or statements *including financial statements* and other financial data, in each case prepared or presented by . . . counsel, public accountants or other persons as to matters which the officer believes to be within such person's professional or expert competence, so long as in so relying he shall be acting in good faith." N.Y. Bus. Corp. § 715(h)(2) (emphasis added).

As asserted in Section II.B *supra*, the evidence in the record does not support a finding that any Defendants had the requisite intent. Accordingly, they are entitled to summary judgment on the Second, Fourth, and Sixth Causes of Action.

Indeed, the available evidence does not establish that any Defendants at all involved in any way in the preparation of the SOFC—President Trump, Mr. Weisselberg, and Mr. McConney—had an intent to deceive, let alone to defraud anyone. *See Hankin*, 175 Misc. 2d at 89 (noting difference between intent to deceive and intent to defraud where defendant was untruthful but evidence did not show that he made the misrepresentation in order to deprive another of something of value). As discussed above, GAAP permits departures from GAAP on SOFCs so long as the departures are properly disclosed. The departures on President Trump's SOFCs were properly disclosed. (Defs. SOF ¶ 59.) Further and critically, GAAP does not apply to immaterial items. (Defs. SOF ¶ 63.) None of the items identified by the NYAG as departures, misstatements, or omissions were material and NYAG fails to offer any proper materiality analysis to contradict this. (Defs. SOF ¶ 65.); (Robert Aff., Ex. AK ¶¶ 26–27.) Moreover, GAAP affords preparers of SOFCs significant latitude in the valuation methods they may use to value assets and liabilities on SOFCs and leave it entirely to the discretion of the preparer which method to use. "GAAP does not require a specific method to be used to estimate current value for a particular asset for personal financial statements, nor does GAAP require the same method to be used for all assets in the same group." (Defs. SOF ¶ 54.) The NYAG's allegations that President Trump used inappropriate valuation methods fail to consider this wide latitude in choosing asset valuation methods and the assumptions underlying them, or else misinterpret GAAP. (Defs. SOF ¶¶ 53–55.) Additionally, SOFCs are not designed to show the value of a reporting entity, but serve only as the beginning, not the end, of the complex and highly subjective valuation process users such as banks and insurance companies engage in as they perform their own diligence. Banks know that an estimate put forth in SOFCs, even when written to follow GAAP, are "truly an estimate." (Defs. SOF ¶ 67.)

Further, each SOFC also contained numerous, elaborate notes identifying departures in the SOFCs from GAAP along with a sweeping disclaimer expressly stating: "Considerable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, the estimates presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities. The use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts." In addition, each SOFC was accompanied by an "Independent Accountants' Compilation Report" letter from the accountants who compiled the SOFCs that noted that the SOFCS contained numerous departures from GAAP and provided a litany of those departures along with a description of each departure.

These compilation letters also expressly warned users that "[w]e have not audited or reviewed the accompanying financial statement and, accordingly, do not express an opinion or provide any assurance about whether the financial statement is in accordance with the accounting principles generally accepted in the United States of America" and stated that "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 a revised statement of financial condition without the above referenced exceptions to accounting principles generally accepted in the United States of America." (Compl. at Ex. 3, p.1.) The accountant's compilation letters accompanied each SOFC, were incorporated by reference in each SOFC, and were thus an integral part of each SOFC. These disclaimers read together with the extensive notes in the SOFCs identifying and describing the numerous departures from GAAP, put sophisticated users of the SOFCs for whom the SOFCs were prepared on complete notice not to rely upon them. (Defs. SOF ¶¶ 59–62.)

Indeed, in its Source Selection Evaluation Report and Recommendation related to the Old Post Office property, the GSA acknowledged that the "[f]inancial statements provided by Mr. Trump were qualified by his accountants as not complying with GAAP." (Defs. SOF ¶ 146.) Defendants never claimed perfect compliance. (Defs. SOF ¶ 145.) The existence of these disclaimers is undisputed, and undercuts any claim that Defendants intended to defraud anyone. Thus, all Defendants are entitled to summary judgment dismissing the Second, Fourth, and Sixth Causes of Action.

C. The Defendants Are Entitled to Summary Judgment On The Third, Fifth, And Seventh Causes of Action

Finally, the Third, Fifth, and Seventh Causes of Action allege civil conspiracy claims based on these same underlying criminal acts as Second, Fourth, and Sixth Causes of Action. Thus, to succeed on these claims, the NYAG must show not only the elements of each underlying statute but also the basic elements of conspiracy: "(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." *Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 474 (1st Dep't 2010) (quoting *World Wrestling Fed. Ent. v. Bozell*, 142 F. Supp. 2d 514, 532 (S.D.N.Y. 2001)). The NYAG's claims under the Third, Fifth, and Seventh Causes of Action fail for all the reasons discussed in detail in section II.B above, as the NYAG cannot prove all elements of the underlying criminal statutes to prevail on a conspiracy claim. *Id.* Additionally, the record does not support a finding on the part of any of the Defendants, a required element of a conspiracy claim, of "intentional participation".[21]

[21] Further, although this Court previously rejected the application of the intracorporate conspiracy doctrine at an earlier stage of this litigation, Defendants continue to maintain that it prevents liability under New York law and ask the Court to reconsider the issue with a more fully developed record. New York courts have applied some form of the intracorporate conspiracy doctrine in civil cases. *See, e.g.*, *Bereswill v. Yablon*, 6 N.Y.2d 301, 305 (1959) (holding

A "bare allegation" that "two defendants were acting in concert . . . without any allegation of independent culpable behavior on their part" is "clearly insufficient" to establish a conspiracy. *Schwartz v. Soc'y of N.Y. Hosp.*, 199 A.D.2d 129, 130 (1st Dep't 1993). A "plaintiff must establish facts which 'support an inference that defendants knowingly agreed to cooperate in a fraudulent scheme, or shared a perfidious purpose.'" *Snyder v. Puente De Brooklyn Realty Corp.*, 297 A.D.2d 432, 435 (3d Dep't 2002) (quoting *LeFebvre v. N.Y. Life Ins. & Annuit Corp.*, 214 A.D.2d 911, 912–13 (3d Dep't 1995)).

Eric Trump explicitly disclaimed any participation in the creation of the SOFCs and any knowledge of the alleged falsities contained in the SOFCs. (Defs. SOF ¶ 199.) And the NYAG has not provided any evidence that he was involved in the Old Post Office Loan, the 40 Wall Street Loan, Buffalo Bills Bid, and 2016 DB Loan Request. *See supra* § II.A.2. Donald Trump, Jr. also was not involved in the creation of the SOFCs. (Defs. SOF ¶ 202.) Zurich representatives further testified that they did not interact with Eric Trump in relation to the Surety Bond Program (Zurich). (Defs. SOF ¶¶ 187.) Further, the NYAG has not put forth any evidence that he was involved in any of the relevant transactions. *See supra* § II.A. Zurich representatives also stated that they did not interact with Donald Trump, Jr. in dealings related to the insurance policies. (Defs. SOF ¶¶

corporation could not be liable for conspiracy, noting that "[w]hile it is entirely possible for an individual and a corporation to conspire, it is basic that the persons and entities must be separate"); *Lilley v. Greene Cent. Sch. Dist.*, 187 A.D.3d 1384, 1389 (3d Dep't 2020) (holding intracorporate conspiracy doctrine applied to prevent claim for conspiracy between officials, employees, and agents of a school district); *Ahrenberg v. Liotard-Vogt*, No. 653687/2015, 2017 WL 1281818, at *5 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 29, 2017) ("[A] corporation cannot conspire with its wholly owned subsidiary."). And the doctrine may apply even where a subsidiary is "not a wholly owned subsidiary." *Shaw v. Rolex Watch*, U.S.A., Inc., 673 F. Supp. 674, 678 (S.D.N.Y. 1987). According to the law above, none of the individuals and entities operating within the Trump Organization are capable of conspiring with one another. *See* Compl. at Ex. 2 at 1; Plaintiff's Consolidated Mem. In. Opp. to Certain Defs.' Mot. to Dismiss at 49 (Dec. 9, 2022), ("The entity Defendants are all run under the aegis and control of the Trump Organization and its principals, sharing officers and employees, out of Trump Tower, and all of them were publicly linked to the Trump brand as a single enterprise."). And the record is devoid of any evidence that any individual or entity was acting outside his, her, or its normal course of business activities such that an exception to the intracorporate conspiracy rule should apply.

187.) As for the business entities who held property at issue in the various transactions at issue in this case, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC, there is no evidence to establish these entities were aware of any fraudulent conduct related to the SOFC and, but for the transaction in which they were the beneficiaries of the relevant loans, they cannot be said to have participated in any of the relevant conduct. There are also no allegations or evidence that they had any connection to the insurance policies at issue in this case.

In sum, all the Defendants are entitled to summary judgment on the Third, Fifth, and Seventh Causes of Action because, among other reasons, the record establishes that any alleged misstatements in the SOFC were immaterial and the record is devoid of evidence that any Defendant acted with an intent to defraud. The claims in the Third, Fifth, and Seventh Causes of Action also fail as to Eric Trump, Donald Trump, Jr., Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, Seven Springs LLC, The Trump Organization, Inc., Trump Organization, LLC, DJT Holdings LLC, and DJT Holdings Managing Member for the additional reason that the intentional participation element cannot be met.

III. Disgorgement Is Unavailable As A Matter of Law

A. Disgorgement Is Unavailable, As It Is Not Provided As A Remedy Under § 63(12), Nor The Penal Laws Serving As Predicates For The Second Through Seventh Causes Of Action

Summary judgment is proper as a matter of law on the NYAG's claim for disgorgement because that remedy is not available under § 63(12) or the underlying statutory claims. Eliminating this claim at the summary judgment stage is in accord with New York law and comports with an interest to narrow the issues as it will significantly narrow the issues for trial. *See Di Sabato*, 193 N.Y.S.2d at 188 ("One of the recognized purposes of summary judgment is to expedite the disposition of civil cases where no issue of material fact is presented to justify a trial.").

The NYAG's requested relief includes an award of "disgorgement of all financial benefits obtained by each Defendant from the fraudulent scheme, including all financial benefits from lenders and insurers through repeated and persistent fraudulent practices of an amount to be determined at trial but estimated to be $250,000,000, plus prejudgment interest." (NYSCEF No. 1 ¶ 25(i).) The NYAG seeks "disgorgement in this action under Executive Law § 63(12)." (NYSCEF No. 1 ¶ 23.) In any § 63(12) case, "the AG can seek penalties available under both § 63(12) and the underlying statute being enforced." *City of New York v. FedEx Ground Package Sys., Inc.,* 314 F.R.D. 348, 362 (S.D.N.Y. 2016). But "[i]t is an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, 'courts must be especially reluctant to provide additional remedies.'" *Grochowski v. Phx. Const*., 318 F.3d 80, 85 (2d Cir. 2003) (quoting *Karahalios v. Nat'l Fed'n of Emps., Local 1263,* 489 U.S. 527, 533 (1989)). Unless there is a "strong indicia of contrary [legislative] intent," the courts "are compelled to conclude that [the legislature] provided precisely the remedies it considered appropriate." *Id.* (citing *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 15 (1981)). Otherwise allowing a plaintiff to pursue an unenumerated remedy would "be inconsistent with the underlying purpose of the legislative scheme" and amount to an "end-run" around the statute. *Id.* at 86 (citing *Davis v. United Air Lines, Inc.,* 575 F. Supp. 677, 680 (E.D.N.Y. 1983) (internal quotations omitted). Neither the NYAG as plaintiff nor § 63(12) itself are exempt from this general rule. *People v. Direct Revenue, LLC,* No. 401325/06, 2008 WL 1849855, *7 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 12, 2008); *see also People v. Romero,* 91 N.Y.2d 750, 754 (1998) ("Attorney General . . . is without any prosecutorial power except when specifically authorized by statute.") (citations omitted). And the Court may properly grant partial summary judgment as to a disgorgement claim where it is not an appropriate remedy. *See, e.g., Topps Co. v. Cadbury Stani S.A.I.C*., 380 F. Supp. 2d 250, 268

(S.D.N.Y. 2005) ("[I]nsofar as [plaintiff] requests disgorgement for breach of contract, as an independent claim sounding in contract law, disgorgement is not an appropriate remedy and [Defendant's] motion for summary judgment in that regard is granted.").

Regarding § 63(12), "the text . . . makes clear [that] the State is generally limited to the three enumerated remedies when bringing actions under that provision—injunctive relief, restitution, and damages[.]" *FedEx*, 314 F.R.D. at 361. In *Direct Revenue*, the court directly addressed whether disgorgement is available as a remedy to the NYAG in a § 63(12) action and held that it is not. *See* 2008 WL 1849855, at *7. The court found that "while the Executive Law and the GBL permit monetary relief in the form of restitution and damages to consumers, the statutes do no[t] authorize the general disgorgement of profits received from sources other than the public. And even where restitution may be awarded to consumers, it may only be granted in an amount *related to the actual damages caused by the misconduct*." *Id.* (emphasis added). Thus, the court concluded that the NYAG is "strictly limited to recovery as specifically authorized by statute." Because disgorgement is not one of the authorized remedies under § 63(12), allowing "[d]isgorgement of [defendants'] profits to the state would effectively constitute punitive damages not authorized by statute." *Id.* at *8. Similarly, in *Fedex*, the Southern District held that while "the [NY]AG has long had the authority to institute a civil *action* under N.Y. Exec. Law § 63(12) to restrain violations of [another statute]," the NYAG could not be "awarded civil penalties via a § 63(12) action to enforce an underlying statute that does not itself empower the AG to collect civil penalties." *Fedex,* 314 F.R.D. at 361–62. That is because "civil penalties are not included" in the list of "the three enumerated remedies" available under § 63(12). *Id.* at 361. Disgorgement, likewise, is not included in that list. And the availability of "restitution" in § 63(12) does not save the NYAG's disgorgement claim as "[d]isgorgement is distinct from the remedy of restitution

because it focuses on the gain to the wrongdoer as opposed to the loss of the victim." *People v. Ernst & Young LLP,* 980 N.Y.S.2d 456, 456 (1st Dep't 2014). Thus, disgorgement is only available as a remedy to the NYAG if one of the underlying statutes empowers the NYAG to seek that remedy. They do not.

Here, the NYAG alleges violations of the following underlying statutes: "New York Penal Law § 175.10 (Falsifying Business Records); Penal Law § 175.45 (Issuing a False Financial Statement); and Penal Law § 176.05 (Insurance Fraud)." (NYSCEF No. 1 ¶ 5.) None of these statutes provides that disgorgement as an available remedy for a violation. Rather, they provide that a violation constitutes a misdemeanor or felony in varying degrees, thereby subjecting a violator to fines up to certain amounts and jail or prison time. *See* N.Y. Penal Law § 175.10 ("class E felony"); *id.* § 175.45 ("class A misdemeanor"); *id.* § 176.30 ("class B felony" if fraud in the first degree). Therefore, disgorgement is unavailable as a remedy to the NYAG as a matter of law in this case and Defendants are entitled to summary judgment as to the NYAG's claim for disgorgement.

The NYAG cites one case for the proposition that "[a]mong the equitable remedies available to the Attorney General under Executive Law § 63(12) is disgorgement." (NYSCEF No. 1 ¶ 47 (citing *Ernst & Young, LLP,* 980 N.Y.S.2d at 457).) However, in that case, the NYAG brought an action "under New York's Executive Law [§ 63(12)] *and* the Martin Act [General Business Law § 353]." *Ernst & Young, LLP,* 980 N.Y.S.2d at 456 (emphasis added). The First Department held that "the equitable remedy of disgorgement [was] available in [that] action," *id.,* but this is merely consistent with the principle that "the AG can seek penalties available under both § 63(12) and the underlying statute being enforced," *FedEx*, 314 F.R.D. at 362; *see People v. Frink Am., Inc.,* 770 N.Y.S.2d 225, 226 (4th Dep't 2003) ("Section 63(12) does not create any new

causes of action, but does provide the Attorney General with standing to seek redress and additional remedies for recognized wrongs based on the violation of other statutes.") (citation omitted). This is because disgorgement "is an available remedy under the Martin Act" due to its "broad, residual relief clause, providing courts with the authority, in any action brought under the act to 'grant such other and further relief as may be proper.'" *People v. Greenberg,* 27 N.Y.3d 490, 497 (2016) (quoting Gen. Bus. Law § 353-a). The NYAG has not similarly alleged a violation of the Martin Act in this case. New York courts have consistently allowed the Attorney General to obtain disgorgement in § 63(12) actions only where allegedly violated underlying statutes provided for disgorgement as a remedy. *See, e.g., FTC v. Vyera Pharm., LLC,* No. 20-cv-00796 (DLC), 2021 WL 4392481, at *4 (S.D.N.Y. Sept. 24, 2021) ("Accordingly, the New York Attorney General, should it succeed to proving a violation of the Donnelly Act *and* Executive Law . . . may obtain disgorgement[.]") (emphasis added); *New York v. Amazon.com, Inc.,* 550 F. Supp. 3d 122, 126 (S.D.N.Y. 2021) (disgorgement available where AG alleged violations § 63(12) and New York Labor Laws); *FTC v. Shkreli*, 581 F. Supp. 3d 579, 640–41 (S.D.N.Y. 2022) (same available under § 63(12) claim for violations of the FTC Act and the Sherman Act). Because § 63(12) itself and the underlying statutes at issue here do not provide for disgorgement as an available remedy, summary judgment in favor of the Defendants is proper as a matter of law on the NYAG's disgorgement claim.

B. Disgorgement Is Unavailable Because There Is No Causal Link

Even if this Court determines that disgorgement is an available remedy under the statutes at issue here, summary judgment is still proper on the NYAG's claim for disgorgement of profits because the NYAG has not shown any tie between any "gains" to the Defendants and the relevant alleged "fraudulent" conduct. There needs to be "a 'reasonable approximation of profits causally connected to the violation.'" *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 91 A.D.3d 226, 233 (1st

Dep't 2011) (quoting *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998)), *rev'd on other grounds*, 21 N.Y.3d 324 (2013); *S.E.C. v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013) (same); *see also* Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. Rev. 851, 857 (2011). ("A basic limit to a fiduciary's liability to disgorge ill-gotten gains is causal—the liability does not extend to assets acquired in a manner unrelated to the breach of duty."). For example, in *Jim Bean Brands Co. v. Tequila Cuervo La Rojenas S.A. de C.V.*, No. 600122/208, 2011 WL 12711463 (N.Y. Sup. Ct. N.Y. Cnty. July 12, 2011), the plaintiff alleged breach of contract, and the court found that its disgorgement theory failed "because there [was] no causal link between any increase in profits during the period of the breach." Similarly, in *Estate of Sylvan Lawrence*, 2005 NYLJ LEXIS 1215, at *4 (N.Y. Surr. Ct. N.Y. Cnty. Mar. 30, 2005), the court affirmed the decision of a "referee" who recommended dismissal of a claim for a 20% stake in a company acquired by the defendant "in the absence of proof of a causal link between [the defendant's] alleged bad faith and his acquisition of such stake." And in *RXR WWP Owner LLC v. WWP Sponsor, LLC*, No. 653553/2013, 2014 WL 3970295, at *7 (N.Y. Sup. Ct. N.Y. Cnty. Aug. 12, 2014), the court found a plaintiff's claim for disgorgement of profits was "not legally viable" because the plaintiff could not claim that the defendant was the "legal cause of its loss" of a transaction with another company.

As explained in detail in Section II.A.1 *supra*, there is no dispute of fact regarding the materiality of the alleged misstatements in the SOFC. Testimony from experts as well as representatives of the actual banks and insurance underwriters who executed the financial transactions with the Defendants that are at issue in this case establishes that the banks and insurance companies did not consider the SOFCs and the estimates they contained to be material to their decisions to make certain loans or underwrite particular polices. *See supra* § II.A.1. If the

SOFCs and any alleged misrepresentations made in the SOFCs did not affect these financial institutions in their decision-making, there is no basis to disgorge any "ill-gotten" gains. The NYAG cannot therefore recover disgorgement of profits as a matter of law.

CONCLUSION

Defendants are entitled to summary judgment and dismissal of the Complaint.

Dated: New York, New York
August 4, 2023

s/ *Michael Madaio*
MICHAEL MADAIO
HABBA MADAIO & ASSOCIATES, LLP
112 West 34th Street, 17th & 18th Floors
New York, New York 10120
Phone: (908) 869-1188
Email: ahabba@habbalaw.com
mmadaio@habbalaw.com
Counsel for Donald J. 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 LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC and Seven Springs LLC

-and-

CHRISTOPHER M. KISE
(*Admitted Pro Hac Vice*)
JESUS M. SUAREZ
(*Admitted Pro Hac Vice*)
LAZARO P. FIELDS
(*Admitted Pro Hac Vice*)
CONTINENTAL PLLC
101 North Monroe Street, Suite 750
Tallahassee, Florida 32301

Dated: Uniondale, New York
August 4, 2023

s/ *Clifford S. Robert*
CLIFFORD S. ROBERT
MICHAEL FARINA
ROBERT & ROBERT PLLC
526 RXR Plaza
Uniondale, New York 11556
Phone: (516) 832-7000
Email: crobert@robertlaw.com
mfarina@robertlaw.com
Counsel for Donald Trump, Jr., and Eric Trump

Phone: (850) 332-0702
Email: ckise@continentalpllc.com
jsuarez@continentalpllc.com
lfields@continentalpllc.com
Counsel for The Donald J. Trump 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

-and-

ARMEN MORIAN
MORIAN LAW PLLC
60 East 42nd Street, Suite 4600
New York, New York 10165
Phone: (212) 787-3300
Email: armenmorian@morianlaw.com
Counsel for Donald J. Trump, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., Trump Organization LLC, 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

CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court and the Order, dated June 21, 2023 (NYSCEF Doc. No. 638), I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 21,759 words. The foregoing word counts were calculated using Microsoft® Word®.

Dated: Uniondale, New York
August 4, 2023

Respectfully submitted,

s/ *Clifford S. Robert*
CLIFFORD S. ROBERT
MICHAEL FARINA
ROBERT & ROBERT PLLC
526 RXR Plaza
Uniondale, New York 11556
(516) 832-7000
Counsel for Donald Trump, Jr. and Eric Trump