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 THE MOTION TO DISMISS OF DEFENDANTS, ALLEN WEISSELBERG AND JEFFREY MCCONNEY

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The defendants, Allen Weisselberg and Jeffrey McConney, ("Defendants") hereby move to dismiss the verified complaint (the "Complaint") filed by the Office of the New York Attorney General (the "NYAG"), expressly incorporate the arguments set forth in the memorandums of law submitted by Trump Organization, Inc., Trump Organization LLC, Donald J. Trump, the Donald J. Trump Revocable Trust, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC , 40 Wall Street LLC, Seven Springs LLC, Eric Trump, Donald Trump Jr., and Ivanka Trump (collectively, all defendants are referred to as the "Defendants"), respectively, and submit this memorandum of law in support, stating as follows:

STATEMENT OF FACTS

The factual and procedural history is recited at length in the Affirmation of Alina Habba (the "Habba Aff."), annexed hereto.

ARGUMENT

POINT I

THE NYAG'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

To dismiss a cause of action pursuant to CPLR § 3211(a)(5) on the grounds that it is time-barred, "the party seeking dismissal bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Farro v. Schochet*, 190 A.D.3d 698 (2d Dep't 2021).

Here, the recent amendment to CPLR 213(9) cannot be applied retroactively and, more pointedly, cannot be utilized as a means of reviving the NYAG's claims against Defendants that had already expired. Therefore, for the reasons set forth herein, the claims raised in the Complaint are barred by the statute of limitations.

A. CPLR 213(9) Should Not Be Applied Retroactively

In 2018, the New York Court of Appeals confirmed that the statute of limitations for fraud claims arising solely under § 63(12) was three years. *See People v. Credit Suisse*, 31 N.Y.3d 622, 627 (2018). Subsequently, on August 26, 2019, the legislature created a new subsection of CPLR 213, subsection nine, which prospectively extended the statute of limitations for new § 63(12) claims to six years. *See* CPLR 213(9).

While few cases have addressed the specific issue of whether CPLR 213(9)'s six-year statute of limitations should be applied retroactively, the topic of retroactive application of newly-amended statutes of limitation has been thoroughly examined by New York courts. Indeed, it has been long settled that statutes must only be applied prospectively unless the language of the statute explicitly calls for retroactive application. *See, e.g., Matter of Regina Metro v. N.Y. State Div. of Hous.,* 35 N.Y.3d 332, 371 (2020) ("it is a bedrock rule of law that, absent an unambiguous statement of legislative intent, statutes that revive time-barred claims if applied retroactively will not be construed to have that effect.").

Notably, when passing CPLR 213(9), the legislature did include language regarding the timing of CPLR § 213(9)'s applicability—that it should become effective "immediately"—which only further emphasizes that it chose to not state any retroactive intent. *See People v. Allen*, 198 A.D.3d at 532 (noting that the legislature "instructed that [CPLR 213(9)] take effect immediately."); *see also Aguaiza v. Vantage Properties*, 69 A.D.3d 422, 423 (1st Dep't 2010) (holding that "where a statute by its terms directs that it is to take effect immediately," such language evidences a ***lack*** of intent for retroactive intent)[1].

[1] Courts have repeatedly noted that the legislature can be trusted to understand how the judiciary will interpret its language on timing and to draft legislation that triggers the intended interpretation. *See, e.g., Landgraf v USI Film Products*, 511 U.S. 244, 272-73 (1994) ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.).

To date, *People v. Allen* is the only appellate case to have discussed whether CPLR 213(9) should be applied retroactively; in incorrect dictum (and on distinguishable facts), it suggested that § 213(9) applies retroactively. But it fails to apply the on-point and binding precedent in *Regina* and *Aguaiza* by (1) ignoring that statutes reviving stale claims are subject to a different, and more stringent, test than the default standard for retroactive application in general,[2] and (2) misreading the nature of the concerns raised in those cases.

The *Allen* panel failed to articulate any reasoning for its dictum; though it did briefly cite *Matter of Gleason*, 96 N.Y.2d 117, 122-23 (2001). *Allen*, 198 A.D.3d at 532. However, *Gleason* did not involve the heightened presumption against reviving stale claims, or even the general presumption against retroactivity for statutes with substantive affect, but only the limited exception for "remedial" statutes impacting no substantive rights (in that case amending the procedure for bringing post-judgment applications). *Id.* at 122. *Gleason* therefore provides no basis to ignore the more recent—and more on point—holding in *Regina* that explicit proof of retroactive intent is necessary to overcome the strong presumption against retroactivity, and that the heightened presumption against claim-revival "may only be overcome by the legislature's unequivocal textual expression." *Regina Metro*, 35 N.Y.3d at 373. This was the rule before *Gleason* was decided (2001) and CPLR 213(9) was enacted and has since remained the rule. *See, e.g., Id.; 35 Park Ave. Corp.*, 48 N.Y.2d at 815.

Because CPLR § 213(9) implicates claim-revival—as do all amendments extending statutes of limitation—it requires unequivocal proof (through statutory text) that the legislature intended retroactive application. There is none. Nor is there *any* other proof beyond the text.

[2] In *Allen*, the claims at issue were timely—*even under* a three-year limitations period; thus, the decision's discussion of retroactivity was nonbinding dictum, and the case did not involve claim-revival concerns, rendering it inapplicable to the facts here. *See People v. Allen*, 2021 WL 394821, at *5 (Sup. Ct. Feb. 4, 2021). *Allen*'s incorrect dictum thus should have no bearing here.

Retroactivity is improper under *Regina*, and *Allen* simply ignores *Regina*. Thus, given the flawed reasoning in *Allen*'s nonbinding dictum, this Court should not apply CPLR 213(9) retroactively and should apply the three-year statute of limitations for Executive Law 63(12) claims that accruing prior to the August 2019 amendment.

B. <u>The Heightened Standard for Claim Revival Has Not Been Satisfied</u>

Further counseling against retroactive application of CPLR 213(9) in the instant matter is the heightened standard that comes into play when retroactive application of a statute would have the effect of reviving previously time-barred claims—a standard applicable to any amendment extending a statute of limitations (which would always risk claim-revival if applied retroactively).

"[R]evival of extinguished rights is 'an extreme exercise of legislative power' which is not to be deduced from words of doubtful meaning and any uncertainties in this regard must be resolved 'against consequences so drastic.'" *Denkensohn v. Ridgway Apartments,* 13 Misc.2d 389, 392 (App. Term. 1958). "If retroactive application would not only impose new liability on past conduct but also revive claims that were time-barred at the time of the new legislation, we require an even clearer expression of legislative intent than that needed to effect other retroactive statutes—the statute's text must unequivocally convey the aim of reviving claims. *Regina Metro.*, 35 NY3d at 371; *see also 35 Park Ave. Corp.*, 48 N.Y.2d at 814-15 ("That section…does not revive a claim already time barred. An intent on the part of the Legislature to effect so drastic a consequence must be expressed clearly and unequivocally").

The issue of claim revival was most recently addressed by the Court of Appeals in *Regina*, which unambiguously stated that while "the general presumption against retroactive effect" may be overcome by implicit evidence of legislative intent, "the presumption against claim revival effect ***may only be overcome by the legislature's unequivocal textual expression*** that the statute

was intended not only to apply to past conduct, but specifically to revive time-barred claims." *Regina Metro.*, 35 N.Y.3d at 373 (emphasis added); *Thomas v. Bethlehem Steel*, 63 N.Y.2d 150, 154 (1984) (holding that absent clear intent, an amendment must not be read to revive stale actions).

The strong presumption against retroactively reviving stale claims is not simply an unintentional quirk of statutory interpretation but, in fact, rooted in principles of fairness and equity. "For centuries our law has harbored a singular distrust of retroactive statutes" because the "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *James Square v. Mullen*, 21 N.Y.3d 233, 246 (2013).

And under New York's Due Process Clause, claim-revival statutes are unconstitutional unless they represent a limited, reasonable response to a specific injustice. *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 399-400 (N.Y. 2017) (listing examples—all extreme and exceptional—of the sorts of specific injustices that suffice). .

In the instant case, the legislature has not identified any particular injustice against any particular victim or class of victims. Rather, if CPLR § 213(9) were to be read retroactively it would broadly apply to any possible claim under Executive Law § 63(12), regardless of its nature, and would not serve to protect any individual plaintiff from injustice but simply allow the state to bring otherwise time-barred enforcement proceedings. It is therefore inescapable that *Regina* requires the CPLR 213(9) be interpreted to, at a minimum, not revive any claim that was time-barred as of the date of its enactment. Any other interpretation creates constitutional problems and does so without any evidence (textually or otherwise) the legislature intended retroactivity.

Based on the foregoing, should this Court properly conclude that CPLR 213(9) does not apply retroactively, then the Defendants cannot be held liable for any claims that arose on or before August 26, 2019.[3] And even if the statute does apply retroactively, all claims accruing more than six years prior to this lawsuit cannot be maintained.

POINT II

THE NYAG FAILS TO STATE A CAUSE OF ACTION UNDER EXECUTIVE LAW § 63(12)

A. Under the unique circumstances at bar, the NYAG should be required to plead the heightened elements of common law fraud, including reasonable reliance and scienter.

Given the novel manner in which the NYAG is invoking Exec. Law § 63(12) in the instant action, practical application of the law dictates that both reliance and scienter must be shown for the NYAG to maintain a valid cause of action against the Defendants.

First, the underlying premise upon which New York courts have reasoned that reliance need not be shown—that § 63(12) claims involve practices impacting the public at large and not specific private transactions involving particular individuals or entities—is not present in the proceeding at bar. *See*, *e.g.*, *State v. Bevis Industries*, 63 Misc.2d 1088, 1090 (Sup. Ct. 1970) ("[t]o limit the ambit of section 63(12) solely to instances of intentional fraud in the strict traditional sense would be to ignore the realities of modern mass merchandising methods which extensively and impersonally utilize the communications media and mails to effect sales[.]"); *Matter of Allstate v. Foschio*, 93 A.D.2d 328, 333 (2d Dep't 1983) ("Since the purpose of [Exec. Law § 63(12)'s] restrictions on commercial activity is to afford the consuming public expanded protection from deceptive and misleading fraud, the application is ordinarily not limited to

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[3] A tolling agreement was entered into between the NYAG and the Trump Organization, but none of the other Defendants were signatories thereto and, therefore, are not bound by its terms.

instances of intentional fraud in the traditional sense."). Here, where there is no consumer to protect, the NYAG cannot argue that some policy objective under Executive Law § 63(12) ought to relieve the NYAG of the requirement for pleading reasonable reliance on the part of the specific sophisticated financial institutions that received the SoCFs.

Further, given the nature of the conduct that the NYAG seeks to deem as 'fraudulent' under Exec. Law 63(12) is centered, in large part, on the Defendant's valuation practices, the principles of New York common law dictate that the NYAG must prove scienter as to each Defendant. Indeed, "[t]he long-established rule in New York is that statements concerning the value of real property are generally not actionable under a theory of fraud or fraudulent inducement." *Potente v. Citibank*, 282 F.Supp.3d 538, 545 (E.D.N.Y. 2017). This is largely because "representations as to value alone are generally matters of opinion upon which no detrimental reliance can occur." *Id.* Appraisals concerning the estimated valuation of real estate properties, in particular, have consistently been found by New York courts to constitute statements of opinion. *See, e.g., Employees' Ret. Sys. v. J.P. Morgan,* 804 F.Supp.2d 141, 153 (S.D.N.Y.2011) ("An appraisal is a subjective opinion based on the particular methods and assumptions the appraiser uses.").

Thus, even though the NYAG is not required to prove scienter under Exec. Law 63(12) as a general proposition, it must necessarily be alleged with respect to each alleged fraudulent act that arises from the purported misuse of improper and/or inflated valuations. Without this subjective element, the NYAG is simply unable to prove that representation made by the Defendants concerning the valuation of any asset could rise to the level of fraud, since estimating a value of any asset is an inherently subjective endeavor.

Based on the foregoing, in order to state a cause of action, the NYAG should be required to plead with particularity facts establishing that each Defendant made a material misstatement or

omission of fact, that it knew to be false, with the intent to deceive, and that the alleged misrepresentation was reasonably relied upon and as a result damages were sustained. *See, e.g., Rotterdam Ventures. v. Ernst & Young*, 300 A.D.2d 963, 964, (3d Dep't 2002); *see also Lampert v. Mahoney*, 218 A.D.2d 580, 582 (1st Dep't 1995) (fraud claim based on alleged misrepresentations in a financial statement must "identify the particular manner in which an item included in the financial statement relied upon has been intentionally or recklessly misrepresented.").

B. <u>As a Matter of Law, Sophisticated Financial Institutions had an Affirmative Obligation to Obtain and Review a "Total Mix" of Information Before Relying on the SoFCs</u>.

New York law has long recognized that when evaluating reasonable reliance under common law fraud, sophisticated individuals and entities are held to a higher standard. *MBIA v. Countrywide*, 27 Misc.3d 1061, 1077 (Sup. Ct. 2010). The courts impose on sophisticated business parties, such as the financial institutions here, a duty to use their available resources to verify the truth of the documents and information upon which they rely and to use their expertise to conduct due diligence. This heightened standard of reasonableness should be equally applicable here, where the NYAG is using Executive Law § 63(12) to protect sophisticated multinational commercial enterprises and not the intended beneficiaries of the statute, "the ignorant, the unthinking, and the credulous." *See, e.g.*, *Matter of the People of the State of N.Y., by Eliot Spitzer v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 106, (3d Dep't 2005) *aff'd* 11 N.Y.3d 105 (2008).

In *UST Private Equity Investors v. Salomon Smith Barney*, 288 A.D.2d 87, 88 (1st Dep't 2001), sophisticated investors asserted fraud and negligent misrepresentation claims against the investment banking firm that prepared an offering memorandum allegedly containing inaccurate statements. The offering memorandum, however, explicitly warned that the investment bankers

"could not guarantee the accuracy or completeness of the information set forth therein, and specifically directed plaintiffs to 'rely upon their own examination' of [the corporation] and to request from [the corporation] whatever additional information or documents they deemed necessary to make an informed investment decision." *Id.* After the trial court dismissed the investors' complaint, the First Department affirmed, holding "[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties." *Id.* at 88; *see also MAFG Art Fund, v. Gagosian*, 123 A.D.3d 458, 459 (1st Dep't 2014) (reversing order of trial court that denied defendants' motion to dismiss fraud claim where the sophisticated plaintiffs could not demonstrate justifiable reliance because they failed to engage in any due diligence); *Graham Packaging, v. Owens-Illinois.*, 67 A.D.3d 465 (1st Dep't 2009) (affirming dismissal of fraudulent concealment claim where defendants, who were sophisticated entities represented by counsel, should have inquired as to the value of their anticipated claims against the defendants).

Here, the NYAG has failed to plead that Defendants made any material misrepresentations in, or omissions to, the SoFCs that any reasonable highly sophisticated financial institution would have considered important in light of the "total mix of information" available to such institutions. Unlike the consumers and other vulnerable populations that the NYAG has traditionally used Executive Law § 63(12) to protect, the financial institutions transacting business with Defendants had the ability to employ vast resources and wield superior bargaining power investigating the weight, if any to be given to the SoFCs. The unambiguous language of the SoFCs makes it clear to any recipient that it is a compilation report based on information provided by the Trump Organization that was not independently verified by Mazars. In fact, Mazars states in the preface

to the SoFC that the objective of the compilation report is simply to "assist Donald J. Trump in presenting financial information in the form of a financial statement ***without undertaking to obtain or provide any assurance that there are no material modifications that should be made to the financial statement***." (emphasis added).

Thus, as a matter of law the NYAG has not pled, and cannot prove, that Defendants' conduct had the capacity or tendency to deceive sophisticated financial institutions because each and every institution had a duty to investigate the "total mix" of available information relating to President Trump's financial condition.

C. **The NYAG Cannot Assert a Claim For Fraud With Respect to the Submission of an Appraisal Without A Statement From a Qualified Expert That The Values Were Improperly Inflated**

As the NYAG acknowledges in its own Complaint, in valuing the Seven Springs conservation easement, the Trump Organization relied on expert appraisals conducted by Cushman & Wakefield, a large, well-respected global commercial real estate services firm. The Complaint gives no indication that Cushman & Wakefield had any interest in either the subject properties or the Trump Organization, or that Cushman & Wakefield had any incentive to skew its appraisals in order to favor the Trump Organization. Nor is there any allegation that Cushman & Wakefield lacked the requisite expertise or that it did not exercise independent professional judgment in formulating its appraisals.

Given the complex nature of the transactions at issue herein, to support a claim of fraud, the NYAG must come forward with facts supported by a ***qualified expert***, who "should possess the requisite skill, training, education knowledge or experience from which it can be assumed that the opinion rendered is reliable." *Schechter v. 3320 Holding*, 64 A.D.3d 446, 449 (2009). In the real estate context, such qualifications should include, at a minimum, that the expert is "licensed

as an appraiser in New York, … a member of a recognized appraisal organization, and … trained under the supervision of a qualified appraiser." *See Niagara Mohawk Power v. City of Cohoes,* 280 A.D.2d 724, 726-27 (3d Dep't 2001) (upholding lower court's finding that town engineer who lacked the above qualifications was not qualified to testify as an appraiser with respect to a property assessment).[4]

The NYAG's claim that Cushman & Wakefield's appraisals or Defendants' valuations are inflated is based solely on the lay opinion of the attorneys at NYAG assigned to this case. However experienced those attorneys may be in the field of law in which they practice, they are not licensed appraisers per the Department of State, Division of Licensing Services.[5] Nor has the NYAG provided a CV to establish the education, training, or other credentials of an expert to opine that the appraisals were inflated, as required by CPLR 3101(d)(1). The speculative opinion of an attorney who is not a certified real estate appraiser has no probative value. *See, e.g., In re City of New York*, 21 Misc. 3d 1127(A), *6 (Sup. Ct. Kings Cty. 2008) (finding that city's reliance upon an affirmation by counsel alleging that appraisal report did not properly value property in eminent domain proceeding was unavailing because the city made no showing that counsel was an expert qualified to offer such an opinion).

Simply put, a professional appraisal of a 212-acre parcel comprising dozens of potentially developable lots spread out over three townships is beyond the ken of a layperson, such that any claim as to inflated value requires support from an expert in the field of appraisals. Cushman & Wakefield's 2015 appraisal of the Seven Springs property, at over 50 pages (plus 50 pages of

[4] Other cases in the tax assessment context support the need for testimony from an expert appraiser. *See, e.g., Gibson v. Gleason*, 20 A.D.3d 623, 625 (3d Dep't 2005) (considering both parties' expert appraisal reports in finding value of property in question was reduced by conservation easement); *Adirondack Mountain Reserve v. Board of Assessors*, 99 A.D.2d 600 (3d Dep't 1984) (affirming denial of petition for tax reassessment where town's assessment was more than amply substantiated and supported by a detailed appraisal report and expert testimony which fully considered impact conservation easement had on market value of parcels in question).

[5] https://www.dos.ny.gov/licensing/re_appraiser/re_appraiser.html

addenda), employs a detailed and highly sophisticated analysis of the property itself, the local area, comparable sales, development potential, and the effect of the easement on the value of the property. After aggregating the date, Cushman & Wakefield employs a sales comparison approach combined with a "sellout analysis" to arrive at valuations before and after placement of the easement, from which the overall value of the easement can be calculated. Given this complexity, whether and to what extent the valuations in the appraisal were in any sense "inflated" cannot be determined without a qualified expert capable of evaluating the data and methods employed by Cushman & Wakefield.

The court in *Lehman Bros. Holdings v. Wall Street Mortg. Bankers*, 2012 WL 5842889 (Sup. Ct. N.Y. Cnty. Nov. 15, 2012), rejected an attempt by the defendant to create a fact issue with respect to the appraisal of property without supplying expert affidavits. In support of its motion for summary judgment, the plaintiff presented two expert affidavits, which concluded that the appraisal had overstated the value of the Southampton property by $6 million. The defendant submitted no expert testimony evidence rebutting the expert affidavits, so the Court granted summary judgment to the plaintiff.

Likewise, in *In re Lehman Bros. Securities and ERISA Litigation*, 799 F. Supp. 2d 258 (S.D.N.Y. 2011) the court held that "to make out loss causation, a plaintiff must allege . . . that the subject of the fraudulent statement or omission was the cause of the actual loss suffered." *Id*. In so holding, the Court recognized that the allegations that Lehman's valuation models were based on assumptions or inputs different than those used by third parties, or those plaintiffs would have used, is not sufficient to state a claim that Lehman's valuation methods did not comply with Standards Board of the United States issued Statement of Financial Accounting Standards 157's fair value requirement or that the valuation statements based on those models otherwise were

misleading. *Id.*; *see also Trump v. Cheng*, 2006 WL 6484047 (Sup. Ct. N.Y. Cty. July 24, 2006) (noting that plaintiff failed to satisfy his claim without appraisals to contradict defendants' position that the properties were sold at or above fair market value).

Here, similarly, the NYAG here cannot proceed with its claim that the appraisal relied by Defendants used "inflated" values without support from an expert witness knowledgeable in the field of appraising commercial real estate to contradict the professional appraisal submitted by Cushman & Wakefield and appended to NYAG's Complaint. *See Bank of New York v. Cherico*, 209 A.D.2d 914, 915 (3d Dep't 1994) (granting summary judgment to plaintiff where defendants failed to submit an appraisal of the property to refute the market value determined by plaintiff's appraisal).

POINT III

THE NYAG'S § 63(12) FRAUD CLAIM IS BARRED BY THE DOCUMENATRY EVIDENCE OF THE STATEMENT OF FINANCIAL CONDITION

Under CPLR 3211(a)(1), courts are required to dismiss an action or proceeding "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life*, 98 N.Y.2d 314, 326 (2002).

Here, the documentary evidence of the Statements of Financial Condition (the "SoFCs") and the disclaimers explicitly set forth therein, utterly refute and conclusively establish a defense as a matter of law to the Executive Law § 63(12) fraud claim alleged in the Complaint. *See, e.g.*, *Natoli v. NYC Partnership Housing*, 103 A.D.3d 611 (2d Dep't 2013) (dismissing fraud and negligent misrepresentation claims pursuant to CPLR 3211(a)(1) where purchase agreement contained specific disclaimer provisions by which plaintiff disavowed reliance conclusively establishing defense to claims); *Ryan v. Pascale*, 58 A.D.3d 711 (2d Dep't 2009) (granting

defendants' motion to dismiss plaintiff's fraudulent inducement action pursuant to CPLR 3211(a)(1) and (7) where causes of action were barred by specific disclaimer provisions in contract of sale); *Roland v. McGraime*, 22 A.D.3d 824 (2d Dep't 2005) (dismissing plaintiffs' fraud cause of action to the extent it was predicated on alleged oral representations made by defendant as such cause of action was barred by the specific disclaimer provisions contained in contract of sale).

A. The SoFCs are "Compilation Reports" Which Contain Clear Disclaimers.

As a threshold matter, the explicit disclaimer language set forth in the SoFCs forecloses the NYAG from claiming that the financial institutions reasonably relied in any material way on the information contained in the SoFCs. *See e.g., HSH Nordbank v. UBS,* 95 A.D.3d 185 (1st Dep't 2012) (sophisticated bank failed to state fraud related claims as it could not have justifiably relied on the recommendation by defendant investment bank in light of a disclaimer in the extensively negotiated governing documents and because it had a duty, as a sophisticated party, to exercise ordinary diligence and to conduct an independent appraisal of risk); *MBIA Ins. Corp. v. Merrill Lynch*, 81 A..D.3d 419, 419 (1st Dep't 2011) ("Plaintiffs' fraud-related claims failed to state a cause of action in light of the specific disclaimers in the contracts, executed following negotiations between the parties, all sophisticated business entities, providing that plaintiff … would not rely on defendants' advice, that it had the capacity to evaluate the transactions, and that it understood and accepted the risks").

The plain language of the SoFCs makes it crystal clear to any recipient, let alone sophisticated loan officers, loan committees, underwriters, and their financially astute expert advisors, that the SoFCs are not audited reports, and as such the support for the valuations set forth therein have not been independently verified. Specifically, each SoFC is prominently identified as a "compilation report," which, under standard accounting practice means that it is an unaudited

statement that relies on information presented by Defendants without any assurance from Mazars regarding the accuracy of the financial statements or their conformity with generally accepted accounting principles.

As courts have noted, there is a marked difference between a compilation report, a review, and an audited financial statement, in ascending order of reliability. *See e.g., Otto v. Pennsylvania*. 330 F.3d 125, 133 (3d Cir. 2003) ("A compilation is the lowest level of assurance regarding an entity's financial statements."). A review provides a higher level of assurance, while an audit entails "obtaining an understanding of the internal control structure or assessing control risk; tests of accounting records and of responses to inquiries by obtaining corroborating evidential matter through inspection, observation or confirmation; and certain other procedures." *Id.* at 134.

Indeed, by way of example, Mazars unequivocally states in the preface of the 2015 SoFC, "[w]e have not audited or reviewed the accompanying financial statement and, accordingly, do not express an opinion or provide assurance about whether the financial statement is in accordance with accounting principles generally accepted in the United States of America." Mazars then sets forth a multitude of generally accepted accounting principles that would typically apply when preparing a financial statement (including the tax consequences on President Trump's holdings), before going on to warn, "[t]he accompanying statement of financial condition does not reflect the above noted items. The effects of these departures from accounting principles generally accepted in the United States of America have not been determined." Mazars then concludes with a final disclaimer, stating "Because the significance and pervasiveness of the matters discussed above make it difficult to assess their impact on the statement of financial condition, ***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 prepared in conformity with accounting principles generally accepted in the United States." (emphasis added).

The court's decision in *Ris v. Finkle*, 148 Misc.2d 773 (Sup. Ct. N.Y. Cnty 1989) is instructive on the issue of whether compilation reports containing clear disclaimers can be justifiably relied upon as a matter of law. In *Ris*, a trustee in bankruptcy of a pension investment management company asserted fraud and breach of contract claims against an accounting firm. The trustee alleged that the accounting firm made fraudulent misrepresentations overvaluing real estate assets in their client's financial statements, which the pension investment management company then relied upon in deciding to extend credit to the client. The accounting firm moved move for summary judgment on the grounds that the reports were mere "compilations," rather than formal audited statements, and as such could not be reasonably relied on without undertaking further due diligence.

Using disclaimer language which, in sum, is strikingly similar to the disclaimer language set forth in the SoFCs at issue in the proceeding at bar, the cover letter that accompanied the financial statements in *Ris v. Finkle* stated:

> A compilation is limited to presenting in the form of financial statements information that is the representation of management […] Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position. Accordingly, these financial statements are not designed for those who are not informed about such matters.

Id. at 776.

The court granted summary judgment to the accounting firm, finding that the pension investment management company could not have justifiably relied on the compilation report so as to support a claim of fraud, stating:

> In view of the express language of the last paragraph, [the pension investment management company] ***cannot have justifiably relied on any representations by [the accounting firm] (and its members) on the financial condition of [the accounting firm's client]***. Moreover, in view of the express statement therein that the information contained in the financial statements "is the representation of management", and that [the accounting firm] and its members "do not express an opinion or any other form of assurance on them", ***plaintiff cannot even demonstrate that the compilation was a representation of material existing fact made by [the accounting firm] (and its members)***.

Id. (emphasis added).

As in *Ris*, the SoFCs here, which include prominent and clear disclaimer language, cannot serve as the basis for a fraud claim among sophisticated parties. The documents and allegations relied on by the NYAG in its Complaint amply show that the financial institutions were fully capable of evaluating the accuracy and the weight to be given to the SoFCs, and whether it was in their business interests to enter into, or extend their business relationships with the Trump Organization. Indeed, "[w]here a party has means available to him for discovery by the exercise of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." *Abrahami v. UPC Construction*, 224 A.D.2d 231 (1st Dep't 1996); *Salomon Smith Barney,* 288 A.D.2d at 87 (holding that sophisticated investors could not justifiably rely on alleged misrepresentations in offering memorandum that advised investors to do their own due diligence); *Evans v. Israeloff*, 208 A.D.2d 891, 892 (2d Dep't 1994) (investor in corporation could not establish justifiable reliance upon compilations which contained disclaimer language indicating that accountants were simply passing on financial information provided by corporation, without doing any auditing, and investor did not request certified financial report or copy of tax returns).

Accordingly, based on the documentary evidence of the clear and unequivocal disclaimers set forth in the SoFCs, the NYAG's § 63(12) fraud claim must be dismissed as a matter of law.

B. Documentary Evidence Establishes That Any Alleged Breach Was Immaterial

The NYAG's entire fraud theory is based on conduct that at best, amounts to nothing more than a non-material breach of financial reporting obligations under the ***limited guarantees*** executed in connection with the subject Loan Agreements. At the outset, it is paramount to understand that the subject Loans were mortgage loans and were secured—and, in fact, greatly ***oversecured***—by the value of the property underlying each of the individual Loans. These guarantees merely provided the lender with limited rights against the guarantor under limited circumstances, which rights were virtually meaningless in terms of the security and value of the loan given the underlying LTV of each of the subject loans.

By way of example, the 40 Wall Loan in the amount of $160 million was secured by the underlying 40 Wall Property, which the lender's own appraisers, Cushman & Wakefield, valued at $200 million, i.e. 1.25 times the amount of the 40 Wall Loan with a LTV at origination of approximately 125% (i.e. loan amount of $160 million divided by the property value of $200 million).[6] Suffice it to say, the 40 Wall Loan was exceptionally oversecured.[7] In this light, the financial reporting required under the 40 Wall Recourse Guaranty was nothing more than a *pro forma* requirement. The 40 Wall Property was the security and the lender—being a sophisticated party—had loaned only a fraction of the value of the 40 Wall Property and, thus, did not need or require any unconditional guaranty on the part of the guarantor for the 40 Wall Loan. Needless to say, while the lender prudently had reporting requirements for the guarantor, it did not treat these

[6] The 40 Wall Loan was even further secured by the 40 Wall Assignment Agreement entitling the lender to lease and rental income from the property in the event of a loan default.
[7] The other subject loans and properties were similarly oversecured with virtually identical guarantees, as further described for the 40 Wall Loan as well.

requirements as material to ensuring the security of the loan.

The documentary evidence further establishes that the financial reporting requirements called for nothing more than "compilations," which, as a matter of law, cannot be relied upon by sophisticated parties. *See Evans*, 208 A.D.2d at 892. More fundamentally, however, the lender ***never*** demanded the compilations themselves. The reason for this is simple: the 40 Wall Loan was secured by property worth hundreds of million dollars over and above the loan amounts, and the lender was being fully paid on the loan and was receiving the full benefit of its bargain.

Ultimately, the only purported "wrongdoing" here was, at best, a simple breach of failing to provide the required financial statements, which were not even material to the value and security of the loans (and, in any event, could not be reasonably relied upon by any sophisticated lender as a matter of law as discussed below in Point III(D)). Such a non-material breach cannot form the basis of a viable fraud claim. *See e.g. Krantz v. Chateau*, 256 A.D.2d 186, 187 (1st Dep't 1998) (cannot assert fraud claim where "the only fraud charged relates to a breach of contract"); *MBW Advertising Network v. Century Business*, 173 A.D.2d 306 (1st Dep't 1991) ("a cause of action for fraud will not arise if the alleged fraud merely relates to the breach of contract"); *Remora Capital v. Dukan*, 175 A.D.3d 1219, 1120–1121 (1st Dep't 2019) (affirming dismissal of fraud claims that "rest[ed] on allegations that the family defendants did not intend to meet their contractual obligations").

POINT IV

THE NYAG LACKS STANDING TO MAINTAIN THE INSTANT ACTION

Defendants adopts and incorporates the arguments set forth in the memorandum of law filed by Defendants Trump and Trump Organization (*See* NYSCEF No. 197) as they relate to the NYAG's lack of standing.

Where, as here, the NYAG brings suit on behalf of the People of the State New York, standing must be properly derived from its *parens patriae* authority. *See People v. Grasso*, 54 A.D.3d 180, 198 (1st Dep't 2008). "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[.]'" *Alfred L. Snapp & Son. v. Puerto Rico,* 458 U.S. 592, 607 (1982).

Here, the Complaint fails to articulate a quasi-sovereign interest affecting a substantial segment of the population involving interests separate from those of the private sophisticated parties involved. The claims set forth by the NYAG do not affect the public interest or touch upon any segment of the public but, rather, solely involve *private* contractual rights between Defendants and a few select corporate counter-parties. Therefore, the NYAG lack standing under the *parens patriae* doctrine.

POINT V

<u>THE NYAG DOES NOT HAVE THE CAPACITY TO BRING THIS SUIT</u>

Defendants adopt and incorporate the arguments set forth in the memorandum of law filed by Defendants Trump and Trump Organization (*See* NYSCEF No. 196) as they relate to the NYAG's lack of capacity.

For governmental entities, such as the NYAG, the "right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate." *In re World Trade Ctr.*, 30 N.Y.3d 377, 384 (2017). Here, based on the plain language of Executive Law 63(12), its legislative history, and the manner in which it has historically been utilized, it is clear that Executive Law § 63(12) does not authorize Plaintiff to commence this type of

proceeding, which involves only the contractual rights of sophisticated private parties. Plaintiff is therefore acting without statutory authority and lacks the legal capacity to maintain this action pursuant to CPLR § 3211(3).

POINT VI

THE NYAG HAS VIOLATED DEFENDANTS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS

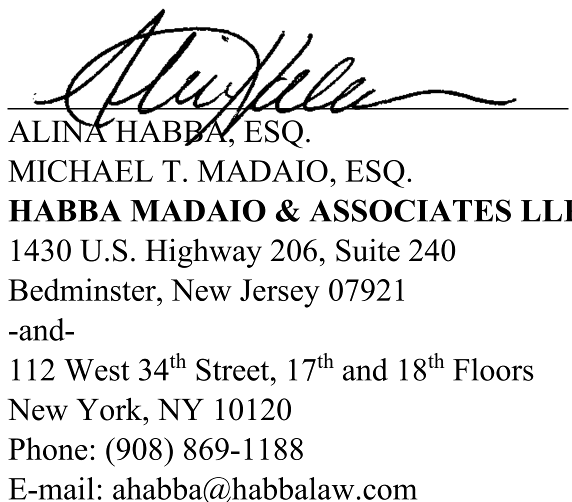
Defendants adopt and incorporate the arguments set forth in the memorandum of law filed by Defendants Trump and Trump Organization (*See* NYSCEF No. 196) as they relate to the violation of Defendants' constitutional right to equal protection of the laws.

To establish an Equal Protection violation, a defendant must prove that he has been "singled out with an "evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances." *Bower,* 2 N.Y.3d at 631.

Here, the multitude of statements issued by Letitia James make clear that both the prior investigation and the instant action are fueled solely by her personal and political animus in direct violation of the Equal Protection Clause, satisfying the 'evil eye' prong. *See generally,* Habba Aff. Further, the NYAG's anomalous use of Executive Law 63(12) unequivocally demonstrates that Defendants are being singled out and treated differently than those similarly situated, satisfying the 'unequal hand' prong. Therefore, Defendants have been subject to selective enforcement and/or 'class of one' discrimination in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Complaint must be dismissed, with prejudice, pursuant to CPLR 3211(a)(1),(2),(3),(5),(7) and/or (8), and such further relief as the Court deems just and proper.



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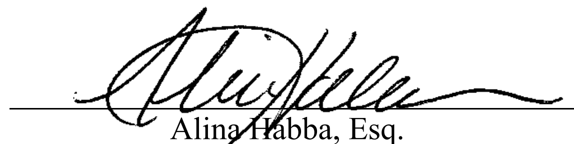
CERTIFICATION OF COUNSEL

I hereby state, pursuant to NYCRR 202.70.17, that the foregoing Memorandum of Law was prepared with Microsoft Word. Pursuant to Microsoft Word's word count feature, the total number of words in the foregoing brief (excluding the caption, table of contents, table of authorities, signature block, and this certification) is 6,967.

Dated: November 21, 2022
New York, New York



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