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 OF NY ENTITY DEFENDANTS (I) DJT HOLDINGS LLC; (II) TRUMP OLD POST OFFICE LLC; (III) 40 WALL STREET LLC; AND (IV) SEVEN SPRINGS LLC IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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Defendants the DJT Holdings LLC ("Holdings") Trump Old Post Office LLC ("OPO") , 40 Wall Street LLC ("40 Wall"), and Seven Springs LLC ("Seven Springs") (collectively, the "NY Entities") hereby move to dismiss the New York Attorney General's ("NYAG") Verified Complaint ("Complaint" or "Compl.") and expressly incorporate all arguments set forth in the memorandums of law submitted by (i) Allen Weiselberg and Jeffrey McConney; (ii) Eric Trump and Donald Trump Jr.; (iii) Trump Organization, Inc., Trump Organization LLC and Donald J. Trump ("President Trump"); (iv) Ivanka Trump; and (v) The Donald J. Trump Revocable Trust (the "Trust"), DJT Holdings Managing Member ("HMM"), Trump Endeavor 12 LLC ("TE12"), 401 North Wabash Venture LLC ("401 Wabash") (collectively, the "Foreign Entities"), and submit this Memorandum of Law in support.

INTRODUCTION

The NYAG's complaint spends over 600 paragraphs clumsily attempting to recharacterize decades of business transactions between highly sophisticated parties, only to succeed in establishing that she cannot plead a claim. The Complaint establishes the Trump Organization operates a wildly successful multinational real estate and licensing empire. The Complaint also establishes the Trump Organization has not defaulted on a loan or even been late on a loan payment during the sweeping 15+ years that the NYAG has attempted to scrutinize. The Complaint also reveals the Trump Organization is fiscally conservative, does not carry much debt, and is able to borrow at competitive market rates because of the enviable quality of its trophy assets.

The NYAG's alleged claims against the NY Entities arise from a series of discrete loan transactions[1]:

[1] The NYAG also relies on two other transactions that are addressed in the Foreign Entities' Brief: (i) 2012 Doral Transaction; and (ii) 2012 Chicago Transaction). Each is described in the NY Entities' Motion to Dismiss. The NY Entities adopt and incorporate their arguments by reference.

1. **The Seven Springs Loan:** On June 22, 2000, Royal Bank of Pennsylvania – Bryn Mawr made a $8 million loan to Defendant Seven Springs, collateralized by a private estate in Westchester County, New York. Compl. ¶654. (¶¶654-661). The loan is associated with a Guaranty Agreement dated June 22, 2000. A copy of the Seven Springs Loan Agreement and related Guaranty are attached as Exhibit 1 (the "2000 Seven Springs Transaction") of the Affirmation of Alina Habba (the "Habba Aff.").

2. **The Park Avenue Loan**: On July 23, 2010, Investors Bank made a $23 million loan to Trump Park Avenue, LLC, collateralized by the Trump Park Avenue, an asset of DJT Trust. *See* Compl. ¶85 (¶¶ 82-112). A copy of the Park Avenue Consolidated Note is attached as Habba Aff., **Ex. 2** (the "2010 Park Avenue Transaction").

3. **The Old Post Office Loan:** On August 12, 2014, DeutscheBank made a $170 million loan to Defendant OPO, collateralized by its interest in the landmark Old Post Office in Washington D.C. *See* Compl. ¶633 (¶¶ 621-646). The loan is associated with a Guaranty dated August 12, 2014. A copy of the OPO Loan Agreement and the Guaranty are attached as Habba Aff., **Ex. 5** (the "2013 OPO Transaction").

4. **The 40 Wall Street Loan:** On July 2, 2015, Ladder Capital made a $160 million loan to Defendant 40 Wall, collateralized by its interests in 40 Wall Street, an iconic office tower in lower Manhattan. *See* Compl. ¶652 (¶¶ 647-653). The loan is associated with a Guaranty of Recourse Obligations dated July 2, 2015. A copy of the 40 Wall Street Loan Agreement and the Guaranty are attached as Habba Aff., **Ex. 6** (the "2015 40 Wall Transaction").

Five counts alleged in the Complaint pursuant to Executive Law § 63(12) are predicated on the participation by each Entity Defendant in the discrete transactions described above, plus vaguely described insurance applications (Compl. ¶ 678-691, describes an application to "one of those insurers", Zurich North America) and a renewal of a Directors & Officers insurance policy (Compl. ¶¶ 692-714). Not a single claim survives dismissal for numerous reasons.

First, the NYAG lacks standing to plead a claim.

Second, the NYAG lacks capacity to plead a claim.

Third, the NYAG's claims against the NY Entities are time barred.

Fourth, the Complaint must be dismissed for failure to state a claim. The NYAG attempts to lump together the alleged conduct of "all defendants" with a generic use of the term "Trump Organization" over 590 times and "defendants" over 90 times.

Fifth, documentary evidence appended to this Motion and the Complaint plainly establishes that a merger clause in the Loan Agreements[2] renders parol evidence and extraneous communications immaterial to the transactions between two private parties. Additionally, the Loan Agreements make plain the NY Entities were not responsible for submitting guarantors' Statements of Financial Condition ("SoFC") to their respective lenders. Even more, the guaranties themselves confirm the guarantor was not in any way induced or conferred any benefit in exchange for providing a guaranty.

Sixth, the Complaint must be dismissed for a number of additional reasons, including (i) a violation of the NY Entities' constitutional right to equal protection under the laws; (ii) failure to adequately plead that the NY Entities' conduct tended to deceive, or created an atmosphere conducive to fraud under Executive Law § 63(12); (iii) failure to adequately plead a claim for fraud without having submitted a statement from a qualified expert that the values on the appraisals were improperly inflated; and (iv) failure to state a civil-conspiracy claim under the intracorporate conspiracy doctrine.

Despite the NYAG's expansive Complaint, she fails to identify a single party or interest that has been harmed by any alleged conduct. She also fails to articulate a theory of liability against any Entity Defendant or how any specific Entity Defendant has benefitted from its own alleged wrongful conduct. The Complaint therefore must be dismissed.

[2] The term "Loan Agreements" generally refers to the loan documents attached to this Memorandum with respect to each of the NY Entities.

STATEMENT OF FACTS

In the interest of brevity, the relevant facts and procedural history are recited at length in the Affirmation of Alina Habba (the "Habba Aff."), annexed hereto.

ARGUMENT

I. THE NYAG LACKS STANDING TO BRING THIS ACTION.

Executive Law § 63(12) does not automatically confer the requisite standing to maintain this action. Statutes authorize particular causes of action, they do not and cannot confer the requisite standing. The NYAG, "like all other parties to actions, must show an interest in the subject-matter of the litigation to entitle [her] to prosecute a suit and demand relief." *People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 198 (1st Dep't 2008) (citing *People v. Lowe*, 117 N.Y. 175, 191 (1889)). Construction of Executive Law § 63(12) as permitting the NYAG to maintain *any* action against *any* party—without any consideration of the NYAG's standing as a party-in-interest—is constitutionally infirm since "[t]he legislature, consistent with the principles of separation of powers underlying the requirement of standing . . . cannot grant the right to sue to a plaintiff who does not have standing." *Grasso*, 54 A.D.3d at 198 (citing *Raines v. Byrd*, 521 U.S. 811, 820 (1997)); *see also Lefkowitz v. Lebensfeld,* 68 A.D.2d 488, 497 (1st Dep't 1979), *affd* 51 N.Y.2d 442 (1980) (The Attorney General's "[s]tanding to sue and supervisory powers are entirely separate legal principles."). The Complaint also contravenes New York common law and the well-developed doctrine of *parens patriae*, which applies anytime the state is acting in furtherance of a sovereign or quasi-sovereign interest. *See People v. Singer*, 193 Misc. 976, 979 (Sup. Ct. New York County 1949) (citations omitted) ("Unless [] 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 an action brought by the State fails as a matter of law); *Matter of State by Abrams*

v. New York City Conciliation and Appeals Bd., 123 Misc.2d 47, 49 (Sup. Ct. New York County 1984) (When suing *parens patriae*, the state must seek to redress "wrongs done to the interests of the people as a whole and not merely to vindicate the individual or private interests of certain citizens.").

Here, the plain language of Executive Law § 63(12) confirms the NYAG must act pursuant to its *parens patriae* authority in enforcing the statute. Executive Law § 63(12) states that "the attorney general may apply, ***in the name of the people of the state of New York***" for the sought-after relief. Exec. Law § 63(12) (emphasis added). Thus, any action commenced thereunder must be brought on behalf of the people of the State of New York, and standing must be properly derived from the NYAG's *parens patriae* authority. *See New York v. Griepp*, 991 F.3d 81, 130 (2d Cir. 2021) (quoting *Connecticut v. Physicians Health Servs. Of Connecticut, Inc.*, 287 F.3d 110, 119 (2d Cir. 2002)) ("*parens patriae* [doctrine] allows states to bring suit on behalf of their citizens . . . by asserting a quasi-sovereign interest."). *See also State of N.J. v. State of N.Y.*, 345 U.S. 369, 372-73 (1953) (quoting *Com. of Kentucky v. State of Indiana*, 281 U.S. 163,173-74 (1930) (Noting that *parens pariae* is "a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'")). Indeed, this is precisely the manner in which NYAG filed the instant action. *See* Compl. ¶ 40 ("This enforcement action is brought *on behalf of the People of the State of New York* pursuant to the New York Executive Law.") (emphasis added). Accordingly, the NYAG must establish *parens patriae* standing.

"To bring a *parens patriae* action, the NYAG 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 ex rel.*

Spitzer v. H & R Block, Inc., 847 N.Y.S.2d 903, 907 (Sup. Ct. New York County 2007) (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex. rel., Barez*, 458 U.S. 592, 607 (1982)). Moreover, a state has *parens patriae* standing "only when its sovereign or quasi-sovereign interests are implicated, and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). *Parens patriae* standing "does not extend to the vindication of the private interests of third parties." *People of State of N.Y. by Vacco v. Operation Rescue Nat.*, 80 F.3d 64, 71-72 (2d Cir. 1996). In other words, "[i]t is not sufficient for the People to show that wrong has been done to someone; the wrong must appear to be done to the People in order to support an action by the People for its redress." *People v. Lowe*, 117 N.Y. 175 (1889). Thus, the "State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party … [it] must express a quasi-sovereign interest." *Grasso*, 54 A.D.3d at 198.

A. <u>The Complaint Fails to Identify a Quasi-Sovereign Interest.</u>

The Complaint fails to identify any quasi-sovereign interest it seeks to vindicate on behalf of the People. All the alleged activities concern the internal affairs and management of the NY Entities and their owners/operators, and private contractual matters between the NY Entities and sophisticated corporate counter parties. Thus, even if the NY Entities had engaged in the activities alleged by the NYAG (which they did not), those would not be matters of public interest. *See e.g.*, *Domino's*, NYSCEF No. 505 at 26 (finding such commercial disputes "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.").

Indeed, all prior §63(12) cases have dealt with fraudulent activity impacting the People, not private commercial transactions between corporate titans. *See State of N.Y. v. Gen. Motors*

Corp., 547 F.Supp. 703 (S.D.N.Y. 1982) (involving fraudulent practices affecting a vast number of consumers in the automobile industry); *People ex rel. Cuomo v. Coventry First LLC*, 52 A.D.3d 345 (1st Dep't 2008) (involving bid-rigging and other anti-competitive schemes that were used to deprive policy holders of a fair marketplace in which to sell); *New York by James v. Amazon.com, Inc.*, 550 F. Supp. 122 (S.D.N.Y. 2021) (alleging that Amazon failed to protect *thousands* of workers through inadequate disinfection and contract-tracing protocols; the court found 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*.") (emphasis added).

The Complaint's allegations differ markedly from prior cases filed on behalf of the People. *See, e.g.*, *People v. General Elec. Co.*, 302 A.D.2d 314 (1st Dep't 2003) (NYAG challenging GE's widespread misrepresentations regarding consumer dishwashers); *Matter of People v. Orbitual Publ. Group, Inc.*, 169 A.D.3d 564, 565 (1st Dep't 2019) (NYAG challenging materially misleading consumer solicitations for newspaper and magazine subscriptions); *Matter of People v. Applied Card Sys., Inc.*, 27 A.D.3d 104 (3d Dept 2005) (NYAG challenging misleading consumer credit card offers). Here by contrast, the Complaint details complex, "bilateral business transactions between [the Entity Defendants] and [highly-sophisticated financial and insurance institutions]." *Domino's*, NYSCEF No. 505 at 26; *see also People v. Exxon Mobil Corp.*, 65 Misc.3d 1233(A) at *31 (finding NYAG failed to prove ExxonMobil "made any material misstatements or omissions about its practices and procedures that misled any reasonable investor").

In *Domino's*, the court was unpersuaded that the NYAG's police power extended to disputes over "bilateral business transactions" between Domino's and its individual franchisees regarding a store management software program. *Domino's*, NYSCEF No. 505 at 26. "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 NYAG cannot demonstrate the requisite quasi-sovereign interest in the complex business transactions at issue between sophisticated commercial parties represented by skilled legal counsel. These private matters are not the proper subject of "a law enforcement action under a statute designed to address public harm." *Id.* Indeed, had any of the highly sophisticated financial and insurance institutions purportedly represented by the NYAG 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. However, to date, no such action has been taken and there exists nothing in the record to suggest the Trump entities have ever even missed a single loan payment over the past decade. The NYAG cannot therefore declare a legitimate public interest in riding to the rescue of major corporations which have not themselves even been harmed. *See also Lowe*, 117 N.Y. at 195 ("[I]t could not have been intended . . . that [the Attorney General] could in [her] absolute discretion, by a suit in the name of the people and at their expense and risk, intrude into a mere private quarrel, and carry on a litigation for purely private ends, in which the people in no proper sense have a shadow of right or interest.").

B. The Complaint Fails to Identify Any Effect on a Substantial Segment of Population.

Next, the Complaint makes clear the only purported "victims" are a select few major corporations who engaged in a discrete number of complex transactions with certain of the Trump business entities. This is simply not a "substantial segment of the population," nor can any alleged wrongdoing against a limited subset of sophisticated private parties to complex commercial agreements possibly implicate the public interest. *See, e.g.*, *People v. Singer*, 193 Misc. at 979.

Executive Law § 63(12), at its core, is a consumer-protection statute designed to protect the public at large, and more pointedly, the "ignorant, the unthinking and the credulous." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273 (1977). New York courts have consistently recognized that Executive Law § 63(12) functions as a consumer protection statute. *See State v. ITM*, 52 Misc. 2d 39, 52 (Sup. Ct. 1966) (Exec. Law § 63(12) is "designed to protect the consuming public against persistent fraud and illegality.").[3]

Here only narrow private interests of "lenders, employees who worked for those lenders and insurers, and the accounting firm that compiled the Statements, and personnel of that firm" (Compl. ¶ 757) are at issue.[4] This is simply not a "substantial segment" of the population.

C. The Complaint Fails to Identify an Interest of the People.

Finally, there are no interests here distinct from those of the involved private corporations. These corporate titans were fully capable of negotiating the complex agreements at the core of the issues presented by the Complaint. They are also fully capable of exercising their considerable rights under those complex agreements and, if they "feel aggrieved in such cases [they] have ample remedies to redress their wrongs by proceedings in their own names . . . ." *Lowe*, 117 N.Y. at 195. That they have chosen not to avail themselves of those rights demonstrates the NYAG is truly out

[3] The driving force behind the original enactment of Executive Law § 63(12) was the need to protect consumers and other vulnerable persons. *State Dept. of Law Mem, Bill Jacket*, *L 1956, ch.* 592 at 92-94.

[4] Additionally, and importantly, the Complaint fails to allege that even these private parties were actually damaged. Indeed, the Complaint does not, because it cannot, seek damages at all on behalf of anyone, most notably the People upon whose behalf the NYAG purports to have commenced this action. The NYAG merely asserts, without any foundation whatsoever in the Complaint, entitlement to the equitable remedy of disgorgement.

of place in this context.[5] The NYAG simply does not have standing to vindicate these private interests. *See New York City Conciliation and Appeals Bd.*, 123 Misc. 2d at 50 ("[A]rguments for standing become less compelling when private suits by the aggrieved parties are feasible and would provide complete relief") (citation omitted); *People v. 11 Cornwell Co*., 695 F.2d 34, 40 (2d Cir. 1982) (A state lacks standing unless it can show "that individuals could not obtain complete relief through a private suit"), vacated, in part, on other grounds, 718 F.2d 22 (2d Cir. 1983); *State by Abrams v. N.Y.C. Conciliation & Appeals Bd.*, 123 Misc.2d 47, 49 (Sup. Ct. New York County 1984) ("If the aggrieved individual has an adequate remedy at law, then the state is merely a nominal party with no real interest of its own. As a nominal party the state would not have capacity to sue as *parens patriae*.").

II. THE NYAG LACKS CAPACITY TO BRING THIS ACTION.

Since the Complaint fails to articulate a quasi-sovereign interest affecting a substantial segment of the population involving interests separate from those of the involved corporate titans, the NYAG simply lacks the requisite standing to maintain this action. The NYAG also lacks the requisite capacity to maintain this action. "Although courts often use the terms interchangeably, the concepts of capacity to sue and standing are distinct." *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). Standing is "designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome" so as to cast the controversy "in

[5] That these corporate titans have never chosen to exercise their private rights demonstrates there is simply no real-world impact of the conduct at issue and no basis for the NYAG to proceed. The NYAG asserts she need not prove any actual fraud or reliance. However, the NYAG may not just ignore the realities of these transactions because "[i]n determining whether certain conduct was deceptive, surely it is relevant whether members of the target audience . . . were actually deceived." *People v. Domino's Pizza, Inc, et al*, Index No. 450627/2016, NYSCEF No. 505 at 24 (Sup. Ct. New York County Jan. 5, 2021). If the alleged misconduct "had no real-world impact (that is, no reliance or causation)" it would "speak to the question of whether the challenged conduct was unlawfully deceptive or fraudulent." *Id*.

a form traditionally capable of judicial resolution." *Id.* (quoting *Society of Plastics Indus. v County of Suffolk*, 77 N.Y.2d 761, 772 (1991)). Capacity to sue is a "a threshold question involving the authority of a litigant to present a grievance for judicial review." *Matter of Town of Riverhead v. New York State Bd. of Real Prop. Servs.*, 5 N.Y.3d 36, 41 (2005).

"The question of capacity to sue often arises when governmental entities, which are creatures of statute, attempt to sue." *City of New York v. State of New York*, 86 N.Y.2d 286, 297 (1995) (citation omitted). This is because entities created by legislative enactment, such as the OAG, "have neither an inherent nor a common-law right to sue." *Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 384 (2017) (citing *Community Bd. 7 of Borough of Manhattan,* 84 N.Y.2d at 155). "[T]heir right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate." *Id.* The NYAG brings this action pursuant to Executive Law § 63(12). To have the requisite capacity to sue, the NYAG must be acting with express authorization to bring an action under that statute. Yet, based on the plain language of the statute, its legislative history, and the manner in which it has historically been utilized, it is clear that Executive Law § 63(12) does not authorize the NYAG to commence this type of proceeding, which involves only the contractual rights of sophisticated private parties.

Although expansive, the NYAG's powers under Executive Law § 63(12) are not unfettered, and courts historically have not been reluctant to dismiss claims, or deny remedies, that would exceed the NYAG's regulatory authority. *See State by Lefkowitz v. Parkchester Apts. Co.*, 61 Misc. 2d 1020 (Sup. Ct. N.Y. Cnty 1970) (dismissing action brought under Executive Law § 63(12) where the NYAG based its action on breach of contract); *People by Cuomo v. Wells Fargo Ins Servs.*, 62 A.D.3d 404 (1st Dep't 2009) (dismissing action brought under Executive Law §

63(12) based on alleged breaches of fiduciary duty and fraud); *State v. Wal-Mart Stores Inc*., 1993 WL 649275 (Sup. Ct. Fulton Cnty. Dec. 16, 1993) (dismissing certain causes of action brought under Executive Law § 63(12) based on the defendant's dating policies that the attorney general claimed violated the Labor Law). Similarly, here, the Complaint is founded on conduct between private parties. Executive Law § 63(12) does not authorize action by the NYAG for the conduct between contracting parties described in this Complaint. The NYAG is therefore acting without statutory authority and lacks the legal capacity to maintain this action pursuant to CPLR 3211(3).

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

Claims outside the statute of limitations should be dismissed. For years, the statute of limitations on fraud claims arising under § 63 (12) was three years. The court in *People v. Credit Suisse* explained that the statute of limitations for an action under § 63(12) could potentially reach six years for claims based on common law fraud, but not for claims based on statutory fraud. 31 N.Y. 3d 622, 633 (2018). In August 2019, the legislature amended CPLR 213—adding a new subsection, 213(9)—In 2018, the Court of Appeals confirmed that where, as here, a §63(12) fraud claim does not allege every element of common-law fraud, a three-year statute of limitations applies. *Credit Suisse*, 31 N.Y.3d at 632-33. In August 2019, the legislature amended CPLR 213—adding a new subsection, 213(9)—to create a new six-year period for § 63(12) claims. *See* S.B. S6536, 2019-2020 Leg. Sess.

Here it is undisputable the NYAG's claims are not at all based on common law fraud elements, as no such elements are pled in the Complaint. "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages.'" *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 957 (2d Dept. 2011). None of these elements are pled in the Complaint. *See* NYSCEF No. 38 at 13 ("Neither an intent to defraud nor

reliance need be shown."); NYSCEF No. 183 at 6-7 ("Good faith or lack of fraudulent intent is not an issue.").

CPLR § 213(9) does not apply retroactively. Nothing in the August 2019 amendment's text "unequivocally convey[s] the aim of reviving claims." *Id.* The legislature provided that the amendment was to "take effect immediately," S.B. S6536 § 2, and courts routinely recognize that this precatory language does not support retroactivity. *See*, *e.g.*, *State v. Daicel Chem. Indus., Ltd.*, 42 A.D.3d 301, 302 (1st Dep't 2007) ("Language in [a] statute that it shall 'take effect immediately' does not support retroactive application."). Construing CPLR 213(9) to apply retroactively to the Defendants would violate federal and state Due Process Clauses. Therefore, the three-year statute of limitations applies to non-common law claims that accrued before enactment of CPLR 213(9).

The Complaint, with respect to the NY Entities, is premised on transactions that are thus time barred because they took place between 2000 and 2015, and the applicable limitations period expired well before the adoption of CPLR § 213(9) in 2019. *See* Compl. ¶¶ 654-661 (the 2000 Seven Springs Transaction); ¶¶ 82-112 (the 2010 Park Avenue Transaction); ¶¶ 621-646 (the 2013 OPO Transaction); ¶¶ 647-653 (the 2015 40 Wall Transaction).

IV. THE NYAG FAILS TO STATE A CAUSE OF ACTION.

Where a complaint fails to give notice of the "material elements of [a] cause of action" supported by statements that are "sufficiently particular to give the court and the parties notice," it should be dismissed. *Mid-Hudson Valley Fed. Credit Union v. Quartararo & Lois, PLLC*, 155 A.D.3d 1218, 1220 (3d Dep't 2017).

A. The Complaint Fails to Give Notice to Each Defendant of the Claims Against It.

A complaint fails when it names multiple defendants without alleging "the precise" conduct charged to a particular defendant and pleads all of its "causes of action . . . against all defendants collectively." *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co*., 84 A.D.2d 736 (1st Dep't 1981).

When a plaintiff's fraud allegations are asserted collectively as to all defendants, such as here, New York courts have found this to be impermissible group pleading. *Abdale v. N. Shore Long Island Jewish Health Sys., Inc*., 49 Misc.3d 1027 (N.Y. Sup. Ct. 2015). Where multiple defendants are involved, the complaint must specify which allegations relate to which defendants, if necessary to avoid confusion. *Aetna Cas. & Sur. Co*., 84 A.D.2d 736 (rejecting fraud claim where "pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant."). At a minimum, the NYAG must be required to amend her complaint and identify the specific conduct applying to each Defendant.

Given the particularity requirement for pleading fraud under rules of civil procedure, a plaintiff may not merely assert, in general terms, that all defendants engaged in all of the alleged conduct. *State v. Skanska*, 72 Misc. 3d 935 (Sup 2021). "The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages.'" *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 957, 931 N.Y.S.2d 377 (2d Dept.2011).

CPLR 3016(b) requires that the circumstances of the fraud must be "stated in detail," including specific dates and items. *See Moore v. Liberty Power Corp., LLC*, 72 A.D.3d 660, 661, 897 N.Y.S.2d 723 (2d Dept. 2010). In addition, a cause of action to recover damages for fraudulent concealment requires, in addition to allegations of scienter, reliance, and damages, an allegation

that the defendant had a duty to disclose material information and that it failed to do so. *Manti's Transp., Inc. v. C.T. Lines, Inc*., 68 A.D.3d 937, 940 (2d Dept. 2009). The NYAG's failure to adhere to the pleading requirements in circumstances such as these requires dismissal.

The Complaint makes no effort to differentiate between the sixteen defendants in the Complaint, leaving each defendant incapable of responding to its allegations. By way of example, the Complaint pleads the generic term "Defendants" over 90 times. Each of the Complaint's seven counts are directed to "All Defendants." Perhaps most troubling – the Complaint makes over 593 references to "Trump Organization," which the NYAG defines to include President Trump, Trump Organization LLC and the Trump Organization, Inc. and "other named entities." Compl. ¶ 1. Notably, Holdings is identified once in the Complaint (¶ 27) as a defendant and appears only once more (¶ 683).

This is exactly the type of trial-by-ambush that is simply not permitted, even under New York's liberal pleading standards. Here, the Complaint asserts seven counts each pleading some version of "repeated fraud and illegality" by the collective "Defendants." Compl. ¶¶ 755, 756, 760, 770, 773, 783, 787, 796, 799, 810, 813, 822, 825, 835, 838. However, the Complaint makes no effort to differentiate what conduct each individual defendant is alleged to have committed, what theory of liability applies to the alleged conduct, or how the elements of each claim apply to the alleged conduct.

V. THE NYAG'S CLAIMS ARE BARRED BY DOCUMENTARY EVIDENCE.

The Court should dismiss the complaint where, as here, the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." S*ee Golia v. Vieira,* 162 A.D.3d 865, 867 (2d Dep't 2018). Dismissal is appropriate when, as here, documentary evidence "utterly refutes" the allegations in plaintiff's complaint, "conclusively

establishing a defense as a matter of law." *Himmelstein, et al. v. Matthew Bender & Co., Inc.*, 34 N.Y.3d 908(2021).

The Loan Agreements and related Guaranties are unambiguous, of undisputed authenticity, and are an undeniable record of the transactions at the center of this case, and the Court should accept these documents as documentary evidence.

A. Loan and Guaranty Agreements Establish Lack of Benefit to NY Entities.

The Loan Agreements show Holdings, OPO, 40 Wall and Seven Springs did not author any SoFC nor guarantee any obligation. The NYAG alleges – at most – that OPO, 40 Wall, and Seven Springs were borrowers in the 2013 OPO, 2015 40 Wall, and 2000 Seven Springs Transactions. The Loan Agreements conclusively demonstrate that the NY Entities did not provide SoFCs in connection with the loans. As such, documentary evidence utterly refutes any allegation by the NYAG that the NY Entities' conduct could give rise to liability under Executive Law § 63(12).

Documentary evidence appended to this Motion and the Complaint plainly establishes that a merger clause in the Loan Agreements renders parol evidence and extraneous communications immaterial to the transactions between two private parties. OPO Loan Agreement, Page 91 § 8.2; 40 Wall Loan Agreement Page 114 § 11.23; Seven Springs Loan Agreement, Page 17 § 8.16. Each lending transaction was made based on due diligence conducted by the lenders and professional appraisals ordered by each lender prior to making the loans. As a result, a claim against the NY Entities simply does not exist because they could not have made representations to the lender *after* entering their respective loan transactions that would have resulted in a "better interest rate" or below market terms. Further, the hundreds of pages describing alleged communications regarding

the loans, are merely parol evidence, and even if any are true, they are of no consequence to the loan agreements as finalized.

Additionally, the Loan Agreements make plain the NY Entities were not responsible for submitting guarantors' SoFCs to their lenders. The Guaranty associated with each loan has a no-inducement clause which states flatly and conclusively that it "is not relying upon" on the respective borrowers, Defendants OPO, 40 Wall and Seven Springs, for any "representation, warranty, agreement or condition, whether express or implied or written or oral." OPO Guaranty Page 9, ¶ 8; 40 Wall Guaranty Page 12 § 3.2. Seven Springs Guaranty Agreement, Page 1, ¶5. As such, The NYAG cannot plead or prove any conduct by OPO, 40 Wall, or Seven Springs could give rise to liability under Executive Law § 63(12).

Each Loan Agreement and the associated Guaranty make no mention of any "better interest rate" or other favorable terms. Since the transactions at issue are governed exclusively by these documents, it is not possible for the NYAG to proceed forward as her claims are contravened directly by their express terms.

B. <u>The Documentary Evidence Refutes NYAG'S Claim for Damages.</u>

The NYAG, in perhaps her most egregious pleading hyperbole, seeks damages by way of disgorgement of "all financial benefits obtained by each Defendant," which she estimates to be "$250,000,000." Compl. ¶ 25(i). Although the NYAG does not explain how she reaches this headline-grabbing sum, the Complaint does summarily posit that (i) "Mr. Trump and his operating companies obtained additional benefits from banks other than loan proceeds in the form of favorable interest rates that likely saved them more than $150 million;" and (ii) that the "Trump Organization" benefitted from the sale of its interests in the Old Post Office Hotel (Washington D.C.) in the amount of $100 million. Compl. ¶¶ 21-22.

This theory of damages is fatally flawed for two independent reasons. First, the documentary evidence plainly establishes that a benefit was not derived from the submission of the SoFCs. The Loan Agreements themselves do not require the submission of a SoFC as a condition precedent to the loan, and each contains a merger provision that vitiates the consideration of any considerations not encapsulated within the loan itself. OPO Loan Agreement, Page 91 § 8.2; 40 Wall Loan Agreement Page 114 § 11.23; Seven Springs Loan Agreement, Page 17 § 8.16.

The loan transactions were independently underwritten by each bank and based on appraisals commissioned by each lender. The guaranties, which themselves are in certain instances conditions precedent to the execution of each respective loan transaction, in turn disclaim that any benefit was received by the guarantor in exchange for executing the guaranty. OPO Guaranty Page 9, ¶ 8; 40 Wall Guaranty Page 12 § 3.2; Seven Springs Guaranty Agreement, Page 1, ¶5.

Nothing in the operative documents provides for a reduction in the interest rate or extension of "more favorable" loan terms because the guarantor subsequently provided a SoFC. Simply stated, the SoFCs were not part of the negotiated loan terms and do not form the basis for any benefit conferred on any of the NY Entities. As a result, documentary evidence plainly refutes the NYAG's sole basis for seeking disgorgement from any defendant.

Moreover, the NYAG's claim for damages fails to meet the most elementary pleading standard for giving notice to a defendant for the damages sought against them. Since the NYAG's claims under Executive Law §63 (12) are all based on fraud or deceit, she is required to plead her claim for damage independently against each defendant. The NYAG does not even attempt to plead her alleged disgorgement damages in any discernable manner. Under New York Law, "an action in deceit is based on fraud and damage, and both must concur for the action to lie, a classic statement of the rule being that neither fraud without damage nor damage without fraud is

sufficient to support such an action." See 60A N.Y. Jur. 2d Fraud and Deceit § 173; *see also Adelaide Productions, Inc. v. BKN Intern. AG*, 38 A.D.3d 221 (1st Dep't 2007) (finding plaintiff would be unable to prove damages in part because fraud allegations were too vague).

Accordingly, damage is an essential element of a cause of action pleaded based on fraud or deceit. *Starr Foundation v. AIG*, 76 A.D.3d 25(1st Dept. 2010). An action for "fraud must set forth the actual, out of pocket, pecuniary loss allegedly sustained because of its justifiable reliance on the defendants' purported misrepresentations." *Nager Electric Co., Inc. v. E.J. Electric Installation Co., Inc.*, 128 A.D.2d 846, 847(2d Dep't 1987)

Additionally, where a valid contract exists between the parties, equitable remedies such as disgorgement are not permitted. *See, e.g., IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142, 907 N.E.2d 268, 274 (2009) (barring disgorgement based on unjust enrichment "where the parties executed a valid and enforceable written contract governing a particular subject matter"); *People ex rel. Spitzer v. Applied Card Sys., Inc.,* 11 N.Y.3d 105, 125 (2008) (only suggesting Attorney General might seek disgorgement where ill-gotten gains had been derived from "all New York consumers"). Here, the underlying relationships giving rise to the alleged claim for disgorgement are all governed by complex, detailed agreements *(i.e.*, Loan Agreements). The NYAG cannot possibly recover equitable damages under this circumstance.

C. Explicit Disclaimers in the SOFCs Utterly Refute Possibility of Reliance by the Sophisticated Lenders.

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 AG v. UBS AG,* 95 A.D.3d 185 (1st Dep't 2012).

The plain language of the SoFCs makes it clear to any recipient, especially 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.

VI. THE COMPLAINT MUST BE DISMISSED FOR A NUMBER OF OTHER REASONS.

First, the NYAG has violated the NY Entities' constitutional right to equal protection of the laws. Defendants have been singled out and subject to selective treatment by the NYAG, and the NYAG's selective treatment of the NY Entities is a byproduct of her personal and political animus towards them. The NYAG's violation of the Equal Protection Clause is so pervasive that it warrants the dismissal of an enforcement action "[e]ven though the party raising the unequal protection claim may well have been guilty of violating the law." *Matter 303 West 42nd v. Klein*, 46 N.Y.2d 686, 694 (N.Y. 1979) (citations omitted).

Second, the NYAG has failed to adequately plead that NY Entities' conduct tended to deceive or created an atmosphere conducive to fraud under Executive Law § 63(12). Given the novel way 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 NY Entities. The NYAG cannot plead and prove that NY Entities' 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 relative to the transactions at issue.

Third, the NYAG has failed to adequately plead a claim for fraud without having submitted a statement from a qualified expert that the values on the SoFCs were improperly inflated. To adequately plead a claim, 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 LLC*, 64 A.D.3d 446, 449 (citation omitted).

Fourth, even if the Court determines the NYAG is empowered to intervene in private transactions, documentary evidence shows that the Executive Law § 63(12) fraud claim is precluded. 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 guaranties 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 over-secured—by the value of the property underlying each of the individual Loans. These guaranties 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 (loan-to-value ratio) of each of the subject loans. Such a non-material breach cannot form the basis of a viable fraud claim.

Fifth, the Complaint also fails to state a civil-conspiracy claim under the intracorporate conspiracy doctrine. The Foreign Entities cannot be a member of a conspiracy comprised solely of the Trump Organization and its officers, directors, and employees. Under the intracorporate conspiracy doctrine, "officers, agents and employees of a single corporate entity are legally incapable of conspiring together." *Chamberlain v. City of White Plains*, 986 F. Supp. 2d 363, 388 (S.D.N.Y. 2013). New York recognizes the intracorporate conspiracy doctrine. *See Lilley v.*

Green Cent. Sch. Dist., 187 A.D.3d 1384, 1389 (2d Dep't 2020) (invoking doctrine to dismiss conspiracy claims against employees of same entity).

CONCLUSION

For the reasons set forth above, the NYAG's Complaint should be dismissed in its entirety.

Dated: November 21, 2022
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CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court, I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 6,887 words. The foregoing word counts were calculated using Microsoft® Word®.

Dated: November 21, 2022
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