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 FOREIGN ENTITY DEFENDANTS (I) THE DONALD J. TRUMP REVOCABLE TRUST; (II) DJT HOLDINGS MANAGING MEMBER; (III) TRUMP ENDEAVOR 12 LLC; AND (IV) 401 NORTH WABASH VENTURE LLC IN SUPPORT OF MOTION TO DISMISS COMPLAINT

ALINA HABBA
MICHAEL MADAIO
HABBA MADAIO & ASSOCIATES LLP
112 West 34th Street,
17th & 18th Floors
New York, New York 10120

CHRISTOPHER M. KISE
Pro Hac Vice
CONTINENTAL PLLC
101 North Monroe Street, Suite 750
Tallahassee, Florida 32301

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Defendants 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") 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; (v) DJT Holdings LLC ("Holdings"), Trump Old Post Office LLC ("OPO") , 40 Wall Street LLC ("40 Wall"), and Seven Springs LLC ("Seven Springs")(the "NY 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 Foreign Entities arise from a series of discrete loan transactions:

1. **The Doral Loan:** On June 11, 2012, DeutscheBank made a $125 million loan to Defendant TE12, collateralized by its interests in the Trump National Golf Club Doral, a luxury resort and golf club in Doral, Florida. *See* Compl. ¶587. (¶¶ 571-600). The loan is associated with a Guaranty dated June 11, 2012. A copy of the

Doral Loan Agreement and related Guaranty are attached as **Exhibit 3** (the "2012 Doral Transaction") of the Affirmation of Alina Habba (the "Habba Aff.").

2. **The Chicago Loan:** On November 9, 2012, DeutscheBank made a $98 million loan to Defendant 401 Wabash, collateralized by certain hotel, retail and condominium units that formed part of the Trump Chicago. *See* Compl. ¶¶601, 614 (¶¶601-620). The loan is associated with an Amended and Restated Guaranty dated June 2, 2014. A copy of the Chicago Loan Agreement and related Guaranty are attached as Habba Aff., **Ex. 4** (the "2012 Chicago Transaction").

Five counts alleged in the Complaint pursuant to Executive Law § 63(12) are predicated on the participation by each Foreign Entity 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) [1]. Not a single claim survives dismissal for numerous reasons.

First, the Court lacks personal jurisdiction over the Trist. HMM, TE12 and 401 Wabash.

Second, the NYAG lacks standing to plead a claim.

Third, the NYAG lacks capacity to plead a claim.

Fourth, the NYAG's claims against the Foreign Entities are time barred.

Fifth, 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.

Sixth, 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

[1] The NYAG also relies on four other transactions that are addressed in the NY Entities' Memorandum in Support of their Motion to Dismiss: (i) 2000 Seven Springs Transaction (Habba Aff., **Ex. 1**); (ii) 2010 Park Avenue Transaction (Habba Aff., **Ex. 2**); (iii) 2013 OPO Transaction (Habba Aff., **Ex. 5**); and (iv) 2015 40 Wall Transaction (Habba Aff., **Ex. 6**). The Foreign Entities adopt and incorporate their arguments by reference.

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

communications immaterial to the transactions between two private parties. Additionally, the Loan Agreements make plain the Foreign Entities were not responsible for submitting guarantors' Statements of Financial Condition ("SoFC") to their lenders. Even more, the guaranties themselves confirm that the guarantor was not in any way induced or conferred any benefit in exchange for providing the guaranty.

Seventh, even if the Court had jurisdiction over the Trust, NYAG has improperly named the Trust as a Defendant because any action against the Trust must be through its Trustee.

Eighth, the Complaint must be dismissed for a number of other reasons, including (i) a violation of the Foreign Entities' constitutional right to equal protection under the laws; (ii) failure to adequately plead that the Foreign 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 Foreign Entity or how any specific Foreign Entity has benefitted from its own alleged wrongful conduct. The Complaint therefore must be dismissed.

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 COURT LACKS PERSONAL JURISDICTION OVER THE DONALD J. TRUMP REVOCABLE TRUST,[3] DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, AND 401 NORTH WABASH VENTURE LLC.

The Supreme Court's decision in *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement* crystallized the two categories of personal jurisdiction: general or all-purpose jurisdiction, and specific or case-linked jurisdiction. 326 U.S. 310 (1945). "The former permits a court to exercise jurisdiction over a defendant in connection with a suit arising from events occurring anywhere in the world, whereas the latter permits a court to exercise jurisdiction only where the suit arises out of or relates to the defendant's contacts with the forum state." *Aybar v. Aybar,* 37 N.Y.3d 274, 288–289 (2021).

A. The Court Lacks General Personal Jurisdiction.

The Court lacks general personal jurisdiction over the Trust, TE12, HMM, and 401 Wabash because the Complaint fails to allege general personal jurisdiction, and in any event, the entities are settled or maintain their principal places of business and are incorporated outside of New York. Plaintiff bears the ultimate burden of demonstrating "satisfaction of statutory and due process prerequisites" to the exercise of general personal jurisdiction over defendants. *Stewart v. Volkswagen of Am., Inc.,* 81 N.Y.2d 203 (1993). Under CPLR § 301, "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." This section preserves the power of the New York courts to exercise general personal jurisdiction. *See Pichardo v. Zayas*, 122 A.D.3d 699 (2d Dept. 2014). However, any exercise of such jurisdiction

[3] Although the Trust also moves to dismiss on the basis that it was improperly named a defendant in this action, the Trust also moves to dismiss for lack of personal jurisdiction because it is settled under Florida law, its Trustee is a Florida resident, and it is not otherwise subject to the jurisdiction of the Court.

over a foreign corporation under CPLR 301 must comport with due process requirements. *Fernandez v. Daimler-Chrysler, A.G.*, 143 A.D.3d 765, 766 (2d Dept. 2016). "[G]eneral personal jurisdiction over a foreign corporation exists only if the corporation is essentially 'at home' in the forum state typified by the place of incorporation and principal place of business." *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 160 (2014).

General personal jurisdiction may not be exercised solely by virtue of a company registering to do business and appointing an agent for service of process in New York. *See Aybar*, 169 A.D.3d at 152 ("asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be 'unacceptably grasping' under *Daimler*."); *Jiang v. Z & D Tour, Inc.*, 75 Misc. 3d 583, 591 (N.Y. Sup. Ct. 2022) (same). "A corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014).

Following *Daimler*, "when a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an 'exceptional case.'" *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016) (citing *Daimler*, 571 U.S. at 139 n.19). Thus, despite New York's long-arm statute, which will be addressed below, "[f]rom *Daimler*, the proposition emerged that it would be inconsistent with due process to exercise general jurisdiction where a plaintiff has not alleged that [the defendant] is headquartered or incorporated in New York, nor has it alleged facts sufficient to show that [the defendant] is otherwise at home in New York." *Minholz v. Lockheed Martin Corp.*, 227 F. Supp. 3d 249, 259 (N.D.N.Y. 2016) (quotation omitted).

Here, the NYAG's allegations illustrate why its feeble attempt to plead personal jurisdiction as to the Trust, HMM, TE12, and 401 Wabash should fail. The NYAG has not alleged facts sufficient to show they are otherwise "at home" in New York. *Motorola Credit Corp.*, 24 N.Y.3d at 160. Indeed, the NYAG properly alleges general personal jurisdiction for several of the Defendants. *See, e.g.*, Compl. ¶ 27(b) ("Defendant Trump Organization LLC, a limited liability company doing business in the State of New York with a principal place of business in New York, NY."); ¶ 27(c) ("Defendant DJT Holdings LLC, a Delaware limited liability company with a principal place of business in New York, NY."); ¶ 28(c) ("Defendant Trump Old Post Office LLC, a Delaware limited liability company with its principal place of business in New York, NY."); 28(d) ("Defendant 40 Wall Street LLC, a New York Limited Liability Corporation . . . ."); ¶ 28(e) ("Respondent Seven Springs LLC is a New York limited liability company . . . ."). But it fails to do so for HMM, TE 12 and 401 Wabash. *See, e.g.*, Compl. ¶ 27(d) ("Defendant DJT Holdings Managing Member, a Delaware limited liability company registered to do business in New York, NY"); ¶ 28(a) ("Defendant Trump Endeavor 12 LLC, a Delaware limited liability company registered to do business in New York, NY."); ¶ 28(b) ("Defendant 401 North Wabash Venture LLC, a Delaware limited liability company that operates out of the Trump Organization offices in New York, NY.").

A corporation is not subject to personal jurisdiction solely by virtue of being registered to do business in New York. *See Aybar*, 169 A.D.3d at 152. Moreover, the allegation that 401 Wabash "operates out of the Trump Organization offices in New York" does not overcome the plaintiff's burden to plead personal jurisdiction, because it lacks the "satisfaction of statutory and due process prerequisites" to the exercise of general personal jurisdiction over defendants. *Stewart,* 81 N.Y.2d at 203; *see also Eng. v. Avon Prod., Inc.*, 206 A.D.3d 404, 405 (2022) (no

general personal jurisdiction alleged where defendant "maintained a New York office from which it conducted its marketing activities," which was also its "headquarters for its International Division," despite its principal place of business being in New Jersey); *cf*. *Jiang*, 75 Misc. 3d at 589 (New Jersey corporation with brick-and-mortar office in New York subject to general personal jurisdiction because it had "entrenched itself so deeply" in New York that it engaged with the local municipality to obtain rights and privileges like advertising and it maintained a "major hub" for bus transport). The analysis is no different if viewed through the lens of a parent-subsidiary relationship. *See, e.g.*, *Yousef v. Al Jazeera Media Network*, 2018 WL 1665239, at *6 (S.D.N.Y. Mar. 22, 2018) (holding foreign parent corporation of New York subsidiary was not "at home"). The Trust, HMM, TE12, and 401 Wabash are thus not "engaged in such a continuous and systematic course of doing business [] as to warrant a finding of [their] presence in this jurisdiction." *McGowan v. Smith*, 52 NY2d, 268, 272 (1981) (quotations omitted).

Specific to the Trust, the NYAG alleges it is a "trust created under the laws of New York." Compl. ¶ 30. Exhibit 2 to the Complaint further identifies the Trust as a "New York grantor trust." *See* Compl. at Ex. 2. The Complaint, however, conveniently fails to note the Trust was re-settled in Florida in 2017. *See* Certificate of Trust attached as Habba Aff., **Ex. 7**. Moreover, its sole Trustee, Donald Trump, Jr., is a Florida resident and is thus, not "at home" in New York, despite the Complaint not alleging where the Trustee is domiciled. Thus, the Complaint fails to properly allege a *prima facie* case of general personal jurisdiction over the Trust. Indeed, the Complaint's allegations vis-à-vis the Trust lack any nexus to the state of New York. Accordingly, the Court lacks general jurisdiction over the Trust, HMM, TE12, and 401 Wabash.

B. The Court Lacks Specific Personal Jurisdiction.

The Court lacks specific personal jurisdiction over the Trust, HMM, TE12, and 401 Wabash because they have not transacted business in New York or committed a tortious act affecting New York; indeed, the Complaint does not allege a tort was committed. "[A] New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: the action is permissible under the long-arm statute (CPLR 302) and the exercise of jurisdiction comports with due process." *Williams v. Beemiller, Inc.*, 33 N.Y.3d 523, 528 (2019). "If either the statutory or constitutional prerequisite is lacking, the action may not proceed." *Id*. To satisfy the New York long-arm statute, one of three criteria pursuant to CPLR 302 must be met. *See* CPLR 302(a)(1)-(3).

1. CPLR 302(a)(1) – Transacting Business

Under CPLR 302(a)(1), New York courts can exercise personal jurisdiction over any non-domiciliary who in person or through his agent "transacts any business within the state or contracts anywhere to supply goods or services in the state." "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Whitcraft v. Runyon*, 123 A.D.3d 811, 812 (2014) (quotations omitted) (finding no personal jurisdiction because Colorado defendant did not purposefully transact business in New York by e-mailing with New York plaintiff). Notably, "Mere relatedness and common ownership i[s] not sufficient for finding agency for jurisdictional purposes." *Powers v. Centr. Therapeutics Mgmt., LLLP*, Index No. 652844/2016 (N.Y. Sup. Ct. 2018), NYSCEF No. 163 at 19.

Specific to contracts under CPLR 302(a)(1), the Complaint does not allege any of the agreements were negotiated, executed, or delivered in New York. *Cf. Taxi Medallion Loan Tr. III*

v. Brown Eyes Cab Corp., 206 A.D.3d 486, 487 (2022). Moreover, if any contract(s) were negotiated outside New York, to base jurisdiction on such a contract would require that the contract "send goods [or services] specifically into New York." *MDG Real Est. Glob. Ltd. v. Berkshire Place Assocs., LP*, 513 F. Supp. 3d 301, 307 (E.D.N.Y. 2021). The Complaint is devoid of any such allegation.

Further, the Complaint does not allege the Trust, HMM, TE12, or 401 Wabash transacted business in New York. *See* Compl. ¶¶ 571-601 (TE12); ¶¶ 601-620 (401 Wabash). Indeed, there are no substantive allegations against HMM. TE12 and 401 Wabash should not be subject to personal jurisdiction in this Court solely because they "received loans at issue in this action," Compl. ¶ 27(d), especially given there is no allegation the loans have any relation to the state of New York. In any event, "[t]he mere receipt by a nonresident of a benefit or profit from a contract performed by others in New York is clearly not an act by the recipient in this State sufficient to confer jurisdiction under our long-arm statute." *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 511 (2007); *Courtroom Tel. Network v. Focus Media,* 264 A.D.2d 351, 353 (1st Dept. 1999) ("[A] passive buyer of a New York . . . service" would not be subject to this State's jurisdiction). As far as the Trust, as the Complaint recognizes, it merely owns an interest in entities that own property all over the world. *See* Compl. ¶ 30.

The NYAG asks the Court to make a litany of assumptions in its favor to establish personal jurisdiction. Accordingly, personal jurisdiction under CPLR 302(a)(1) is inappropriate.

2. <u>CPLR 302(a)(2) and (a)(3) – Tortious Act(s)</u>

"Section 302(a)(2) requires that the tort be committed in New York and defendant must actually be in New York when the tort is committed." *Roth v. El Al Israel Airlines, Ltd.*, 709 F. Supp. 487, 490 (S.D.N.Y. 1989). Because there is no allegation the Trust, HMM, TE12, or 401

Wabash were physically present in New York when a tort was committed, specific personal jurisdiction under 302(a)(2) fails. Regarding tortious acts committed outside New York under CPLR 302(a)(3), a court can exercise personal jurisdiction over a nondomiciliary when the nondomiciliary commits a tortious act outside of New York which causes injury to person or property in New York.

The Trust (settled in Florida), HMM, TE12, and 401 Wabash do not regularly do business in New York; indeed, the Trust owns an interest in entities that own property all over the world; TE12 and 401 Wabash operate resorts *outside* New York; and there are no substantive allegations against HMM. Moreover, there is no allegation that any of these entities committed a tortious act at all, much less one that touched and concerned New York.

3. CPLR § 302(a)(4) – Real Property in New York

CPLR 302(a)(4) provides for jurisdiction where a defendant owns, uses, or possesses real property within New York. There must also be "a relationship between the property and the cause of action sued upon." *Lancaster v. Colonial Motor Freight Line, Inc.*, 177 A.D.2d 152, 159 (1st Dep't 1992). Here, there is no allegation HMM, TE12, or 401 Wabash owned, used, or possessed real property in New York. Indeed, the real properly owned by these entities is in Florida (TE12) and Illinois (401 Wabash). *See* Compl. ¶ 587 (TE12 obtained loan for purchase of Doral, FL property); ¶ 606 (401 Wabash obtained loan for purchase of Chicago, IL property). There is no allegation that HMM owns any real property whatsoever.

As to the Trust, the Complaint is entirely devoid of any allegation that any of it or its Trustees' actions occurred in or had any effect on the state of New York. For instance, the Complaint alleges the trustees "certified the accuracy of the Statement of Financial Condition in connection with the Trump Chicago loans . . . ." Compl. ¶ 620. It further describes purported

insurance fraud in connection with political undertakings in Washington, D.C. *See* Compl. ¶ 705. None of these allegations are tied to actions in New York.

C. Due Process Clause of the Fourteenth Amendment

Due process requires "that the maintenance of the suit not offend traditional notions of fair play and substantial justice," *Williams,* 33 N.Y.3d at 528, and the exercise of jurisdiction must be "reasonable under the particular circumstances of the case." *Blockchain Luxembourg S.A. v. Paymium, SAS*, 2019 WL 4199902, *4 (S.D.N.Y. 2019); *State v. First Abu Dhabi Bank PJSC, 75 Misc*. 3d 462, 465–66 (N.Y. Sup. Ct. 2022) (finding that due process was violated where defendant corporation did not conduct business in New York, operate offices in New York, or have any employees in New York).

The Trust, HMM, TE12, and 401 Wabash have not availed themselves of New York law for any purpose. Indeed, the allegations against them do not reflect a "continuous and systematic nature of . . . conduct within the state." *Jiang*, 75 Misc. 3d 583, 590. Unlike the bus operator that held itself out as a New York corporation in *Jiang*, the Trust, HMM, TE12, and 401 Wabash do not conduct business in New York. TE12 and 401 Wabash are responsible for the management of real property in states *other than* New York. *See* Compl. ¶ 28(a) (TE12 owns resort property in Doral, FL); ¶ 28(b) (401 Wabash owns Trump International Hotel and Tower in Chicago, IL). TE12 and 401 Wabash lack any contact—let alone minimum contacts—with the state of New York.

II. 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). 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)).

The Complaint fails to identify any quasi-sovereign interest it seeks to vindicate on behalf of the People. All of the alleged activities concern the internal affairs and management of the Foreign Entities and their owners/operators, and private contractual matters between the Foreign Entities and sophisticated corporate counter parties. Thus, even if the Foreign 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.*, *People v. Domino's Pizza, Inc, et al*, Index No. 450627/2016, NYSCEF No. 505 at 26 (Sup. Ct. New York County Jan. 5, 2021)(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.").

III. THE NYAG LACKS CAPACITY TO BRING 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); *see also Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001) ("Standing and capacity to sue are related, but distinguishable, legal concepts."). 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 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).

IV. 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).

V. THE NYAG FAILS TO PLEAD 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). This applies with even greater force where a complaint 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).

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

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 Plaintiff defines to include President Trump, Trump Organization LLC and the Trump Organization, Inc. and "other named entities." Compl. ¶ 1. Notably, HMM is identified only once in the Complaint (¶ 27) as a defendant.

VI. PLAINTIFF'S CLAIMS ARE BARRED BY DOCUMENTARY EVIDENCE.

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. Each lending transaction was made based on due diligence conducted by the lender and professional appraisals ordered by each lender prior to making the loan. As a result, a claim against the Foreign 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. Additionally, the Loan Agreements make plain the Foreign Entities were not responsible for submitting a guarantor's SoFC to their lender. Even more, the guaranties themselves confirm that the guarantor was not in any way induced or conferred any benefit in exchange for providing the guaranty. Pursuant to CPLR 3211(a)(1) "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence." The court may grant a dismissal pursuant to CPLR 3211(a)(1) when the defendant introduces documentary evidence that flatly contradicts the allegations in the complaint.

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).

To qualify as documentary evidence, the evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable. *VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 A.D.3d 189, 193(2019).

A. <u>The Loan Agreements Establish the Foreign Entities Were Not Required to Submit SoFC.</u>

The NYAG's claims against the Foreign Entities are premised on their role as borrowers in the 2012 Doral Transaction and the 2012 Chicago Transaction (*See* Loan Agreements at Habba Aff., **Exs. 3 & 4**). The Loan Agreements are unambiguous, of undisputed authenticity, and are an undeniable record of the transactions at the center of this case. The Court should accept the attached Loan Agreements as documentary evidence which show:

First, Defendants Trust, Holdings and HMM are not a party to any of the Loan Agreements, either as borrower or guarantor. The Trust, Holdings and HMM did not author any SoFC, nor does Plaintiff allege that they submitted any financial information themselves to any insurance carrier or bonding company. As such, Plaintiff cannot plead or prove any conduct by the Trust, Holdings or HMM that could give rise to liability under Executive Law §63(12).

Second, TE12 and 401 Wabash were not the authors of any SoFC nor guarantor of any obligation. Plaintiff alleges – at most –TE 12 was the borrower in the 2012 Doral Transaction and 401 Wabash in 2012 Chicago Transaction. Each Loan Agreement conclusively demonstrates that TE12 and 401 Wasbash did not provide a SoFC in connection with the loan. Each Loan Agreement loan has a merger clause. Doral Loan Agreement Page 63 § 8.2. ("This Agreement and the other Loan Documents or other documents referred to herein constitute the entire agreement ... and shall supersede any prior expressions of intent or understandings with respect to this transaction.");

Chicago Loan Page 79 § 8.2 ("This Agreement and the other Loan Documents or other documents referred to herein constitute the entire agreement ... and shall supersede any prior expressions of intent or understandings with respect to this transaction.").

The Guaranty associated with each loan has a no-inducement clause which states flatly and conclusively that it "is not relying upon" borrower for any "representation, warranty, agreement or condition, whether express or implied or written or oral." Doral Guaranty Page 5, ¶ 8; Chicago Guaranty Page 11, ¶ 8.. As such, Plaintiff cannot plead or prove any conduct by TE12 or 401 Wabash that 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 Plaintiff'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. Doral Loan Agreement Page 63 § 8.2; Chicago Loan Page 79 § 8.2.

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. Doral Guaranty Page 5, ¶ 8; Chicago Guaranty Page 11, ¶ 8.

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 Foreign Entities. As a result, documentary evidence plainly refutes Plaintiff'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 Plaintiff'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"). 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 Disclaimer Language in the SoFC are Documentary Evidence that Foreclose Plaintiff's Claims.

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 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.

VII. THE TRUST IS AN IMPROPER PARTY AND MUST BE DISMISSED.

In addition to the personal jurisdiction arguments made above, all claims against the Trust must be dismissed because the Trust itself was incorrectly named as a defendant in the Complaint. Under New York law, "a trust may not sue or be sued in its own name, but instead, must act and appear only by its duly qualified trustees." *BAC Home Loan Servicing, L.P. v. Berardi*, 46 Misc. 3d 1225(A) (N.Y. Sup. Ct. 2015); *see also Liveo v. Hausman*, 61 Misc. 3d 1043, 1044 (N.Y. Sup. Ct. 2018) (citing *Natixis Real Estate Capital Tr. 2007-HE2 v. Natixis Real Estate Holdings, LLC*, 149 A.D.3d 127, 132 (1st Dep't 2017) ("A trust, however, is a legal fiction, and cannot sue or be sued itself . . . [i]nstead, trustees, as representatives of the trust, act on behalf of the trust to bring legal action."); *The Tides at Charleston Homeowners Ass'n, Inc. v. Masucci*, No. 151743/2017, 2018 WL 3396691, at * 1 (Sup. Ct. Richmond County Jun. 18, 2018) (granting motion to dismiss without prejudice to renew naming the proper parties as defendants; "Litigation including a trust as a party must be brought by or against the trustee in his capacity as such."). Accordingly, the Trust should be dismissed as a defendant.

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

First, the NYAG has violated the Foreign 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 Foreign 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 Foreign 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 Foreign Entities. The NYAG cannot plead and prove that Foreign 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, Plaintiff's Complaint should be dismissed in its entirety.

Dated: November 21, 2022
New York, New York

__/s/ Christopher M. Kise__
CHRISTOPHER M. KISE
Pro Hac Vice
CONTINENTAL PLLC
101 North Monroe Street, Suite 750
Tallahassee, Florida 32301
(305) 677-2707
Counsel for The Donald J. Trump Revocable Trust, DJT Holdings Managing Member LLC, Trump Endeavor 12 LLC and 401 North Wabash Venture LLC,

-and-

ALINA HABBA
MICHAEL MADAIO
HABBA MADAIO & ASSOCIATES LLP
112 West 34th Street,
17th & 18th Floors
New York, New York 10120
(908) 869-1188
Counsel for The Donald J. Trump Revocable Trust, DJT Holdings Managing Member LLC, Trump Endeavor 12 LLC and 401 North Wabash Venture LLC

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 6,949 words. The foregoing word counts were calculated using Microsoft® Word®.

Dated: November 21, 2022
New York, New York

__/s/ Christopher M. Kise __
CHRISTOPHER M. KISE
Pro Hac Vice
CONTINENTAL PLLC
101 North Monroe Street, Suite 750
Tallahassee, Florida 32301
(305) 677-2707
Counsel for The Donald J. Trump Revocable Trust, DJT Holdings Managing Member LLC, Trump Endeavor 12 LLC and 401 North Wabash Venture LLC,