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 Hon. Arthur Engoron

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE*

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Defendants President Donald J. Trump ("President Trump"), Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust (the "Trust"), The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC (collectively, "Defendants") hereby submit this memorandum of law in support of their Motion *in Limine* to preclude the testimony of Michiel McCarty.

PRELIMINARY STATEMENT

People of the State of New York, by Letitia James, Attorney General of the State of New York ("Plaintiff" or "Attorney General") should be precluded from offering testimony from Michiel McCarty ("Mr. McCarty")[1] regarding time-barred claims and any opinions as to what actions might, theoretically, have been taken by lenders as to loan transactions within the applicable limitations period. There is no testimony in the record establishing that any of the subject loans would not have been made or that the terms and/or pricing of those loans would have in fact been different. Expert testimony is admissible to evaluate, analyze, or explain the facts in the record. Expert testimony is not admissible as a substitute for facts not existing in the record. Simply put, experts opine on the factual predicate they do not supply that factual predicate. Moreover, expert testimony is simply not admissible to speculate about how the underlying factual predicate might be altered.

[1] The Attorney General plans to have Mr. McCarty testify in support of her disgorgement claim. However, as the Court knows, Defendants continue to maintain disgorgement is not an available remedy in this purely Executive Law § 63(12) case. Thus, to the extent disgorgement is not an available remedy, Mr. McCarty's testimony would be inadmissible for this reason as well. Defendants raise this point not to belabor same or to burden the Court, but to preserve their continuing objection and the record for appeal.

Here, the Attorney General seeks by way of an expert "opinion" to substitute her own judgment for that of the sophisticated lenders involved directly in the loan transactions at issue in this case. Thus, even though those sophisticated lenders never raised any issues with the highly profitable, performing loans at issue, the Attorney General now seeks a decade post-closing to apply her own set of standards. The Attorney General has not elicited any testimony from any lender representative tasked with decision making as to what specifically they would have done with any additional information in connection with the approval or monitoring of the subject loans. For example, the Attorney General certainly could have asked Mr. Haigh whether additional information would have in fact altered the loan approvals and/or the pricing. But now, after avoiding what is no doubt unfavorable testimony from those directly responsible for approving the loans and determining the terms and pricing, she seeks to fill the factual void in her case with "expert" testimony amounting to no more than speculation as to what "might" have happened. But Mr. McCarty, like any expert, is simply not permitted to speculate as to what he thinks the *actual testifying witnesses* of the financial institutions *might have done* under the circumstances. *See Gathers v. New York City Transit Auth.*, 242 A.D.2d 506, 506-07 (1st Dep't 1997) (reversing admission of expert testimony which was "based on speculation, lacked competent factual support and was beyond the proper scope of expert testimony"). Here, as in *Gathers*, Mr. McCarty will necessarily, and impermissibly, reach "his conclusion by assuming material facts not supported by the evidence." *Id.*

Moreover, the record here establishes all the relevant Deutsche Bank approvals and decisions were based on multiple factors and, specifically, their own internal analysis. Thus, Mr. McCarty, like all experts, cannot flatly contradict the actual record evidence and substitute an "opinion" about what he might have done were he the decision maker for any of the banks

invovled. Indeed, Mr. McCarty offers not a clarification or explanation of the facts based on some technical expertise but rather merely to substitute his own speculation and opinions for those of the sophisticated private actors that evaluated, negotiated and underwrote the complex and highly successful loan transactions herein at issue.

Finally, the Attorney General now seeks to recast Mr. McCarty's expert "opinion" in an obvious effort to evade the First Department's binding decision as to the applicable limitations period. There is no dispute the terms, pricing, and approval of both the Doral and Chicago loans were all completed prior to July 13, 2014. Thus, even accepting the Court's premise that subsequent, post-closing submission of the SOFC's and related certifications could form the basis for an Executive Law § 63(12) claim (which Defendants most decidedly do not), those terms and pricing were not subject to revision post-closing, and Mr. McCarty cannot therefore manufacture some disgorgement theory which directly contravenes the record evidence.

Therefore, based on the foregoing and the following, Mr. McCarty should be precluded from offering speculation and improper supplementation of the factual record and from seeking to facilitate the evasion of the limitations period established by the First Department.

STATEMENT OF RELEVANT FACTS

The Attorney General initiated this action following a three-year investigation into Defendants' business practices, which included interviews of more than 65 witnesses and the review of millions of pages of documents. The Attorney General's original theory of liability centered around the Defendants alleged submission of purportedly false and misleading financial statements "to induce banks to lend money to the Trump Organization on more favorable terms than would otherwise have been available to the company." *See* Verified Complaint (NYSCEF No. 1), ¶ 3. The Attorney General continued to advance this core theory until the First Department

rendered its decision in an interlocutory appeal.[2] Following that decision, the Attorney General, and the Court, now advance the view that the post-closing submissions of purportedly false and misleading financial statements are separately actionable claims.

This trial commenced on October 2, 2023. The Attorney General has called numerous witnesses in support of her case. Yet none of those witnesses have testified that the approvals, terms and/or pricing of the loans herein at issue would in fact have been any different based upon subsequently acquired information. Indeed, to the contrary, Nicholas Haigh ("Mr. Haigh"), formerly the Managing Director, serving as head of risk management for Deutsche Banks' Private Wealth Management business in the Americas, testified that the relevant approvals, terms, and pricing were based on multiple factors. *See* Trial Transcript ("Tr.") at 948:7-20; 1074:21-1078:8. Moreover, Mr. Haigh testified that Deutsche Bank's relevant approvals were based on Deutsche Bank's own internal analysis ("DB adjusted values"). *See* Tr. at 1098:9-1103:2; 1103:13-15; 1111:13-17; 1119:3-5; 1119:16-25; 1121:17-1122:1; 1126:3-22; 1129:11-14; 1132:18-24; 1132:25-1133:13; 1133:18-25; 1135:7-13; 1135:14-18; 1146:1-9; 1157:4-17; 1157:22-25.

[2] On June 27, 2023, the Appellate Division, First Department, significantly narrowed the scope of this action. The First Department held that the "Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered January 9, 2023, which denied defendants' respective motions to dismiss the complaint, [is] unanimously modified, on the law, to dismiss, as time-barred . . . the claims against the [Defendants] to the extent they accrued prior to July 2014 (with respect to those [Defendants] subject to the August 2021 tolling agreement) and February 2016 (with respect to those [Defendants] not subject to the August 2021 tolling agreement." People v. Trump, Case No. 2023-00717 (1st Dept. 2023) (NYSCEF No. 31). The First Department left to this Court "to determine, if necessary, the full range of defendants bound by the tolling agreement." *Id.* The First Department's Decision was unequivocal: the majority of the Attorney General's claims against Defendants are time-barred and must be dismissed. There is no dispute that (i) seven of the ten transactions at issue in the complaint involving lending were completed *before* July 13, 2014; (ii) one of the transactions involving lending was *never* consummated; and (iii) the two remaining transactions involving lending were completed *before* the cutoff date for timely claims against those Defendants not subject to the tolling agreement, *i.e.*, February 6, 2016. As a result of the First Department's Decision, Defendants have objected consistently to the admission of documents and testimony outside of the statute of limitations period. *See e.g.,* Tr. at 991, 1006, 1029, 1036, 1042, 1055, 1069, 1176, 1180, 1192, 1214, 1129-1130, 1980, 1988, 1994-1998, 2031. These objections have been consistently overruled resulting in the admission of a plethora of testimony and documentary exhibits related to the period preceding July 13, 2014 and February 6, 2016.

ARGUMENT

I. THE ATTORNEY GENERAL CANNOT INTRODUCE MERE SPECULATION.

A. Expert Testimony Must be Based on Record Evidence.

Expert testimony "is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *DeLong v. County of Erie*, 60 N.Y.2d 296, 307 (1983) (*citing People v. Allweiss*, 48 NY2d 40, 50 (1978)); *Selkowitz v. County of Nassau*, 45 NY2d 97 (1979). The necessary corollary is that expert testimony should be excluded where it is "based only upon speculation and in contradiction to the evidence adduced at trial." *Matter of 91st St. Crane Collapse Litig.*, 154 A.D.3d 139, 152 (1st Dep't 2017). Thus, it is black letter law in this Department that an expert witness may not "impermissibly speculat[e] about the parties' mental processes." *Bamira v. Greenberg*, 295 A.D.2d 206, 207 (1st Dep't 2002).

The Attorney General has failed to establish what impact, if any, additional information would have had on the actual approval of the subject loans or the actual terms or pricing of those loans. Instead, the Attorney General now seeks to use an expert to theorize that the sophisticated lenders involved would have acted differently regarding approval of the subject loans or revised the terms or pricing of those loans in a particular way, despite not having even attempted to introduce any record evidence from those actual lenders. However, this Court simply cannot allow the Attorney General to make an end run around the factual record by using Mr. McCarty to supplant that record with speculative testimony as to what he thinks the lenders might have done. This is wholly improper as "[a]n expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion." *Quinn v. Artcraft Const., Inc.*, 203 A.D.2d 444, 445 (2d Dep't 1994) (purported expert to testify regarding

improper window installation was properly excluded where no evidence on the record supported negligent installation); *Matter of 91st St. Crane Collapse Litig.*, 154 A.D.3d at 151 ("The trial court properly precluded the proposed testimony of defense expert . . . , which not only was not based on facts in the record, but also contradicted facts in the record").

As the First Department has held, a party is "not entitled to introduce testimony from a banking expert" where "it fail[s] to demonstrate how the proposed expert testimony would clarify an issue involving professional and technical knowledge beyond the ken of the typical juror." *GMAC Commer. Credit L.L.C v. Mitchell-B.J., Ltd.*, 272 A.D.2d 51, 51 (1st Dep't 2000). *See also Ortiz v. City of New York*, 39 A.D.3d 359, 360 (1st Dep't 2007) ("trial court properly precluded the testimony of plaintiff's expert, since there was no showing that the proposed testimony would clarify an issue involving professional or technical knowledge beyond the ken of the typical juror"). The same is true where a party seeks to introduce a reconstructionist where "there were two eyewitnesses to the accident who testified at trial." *Ortiz v. Variety Poly Bags, Inc.*, 19 A.D.3d 239, 240 (1st Dep't 2005).

In *Ortiz*, the First Department held that the trial court properly precluded expert testimony reconstructing the accident where eyewitnesses to the accident testified at trial. Here, Mr. McCarty's testimony should be precluded because the Attorney General seeks to have him "reconstruct" what the banks would or would not have done in connection with the loans based on mere speculation, rather than eliciting testimony from the actual involved lenders.

Further, it is an abuse of discretion to permit expert testimony which assumes material facts not supported by the evidentiary record. *Gathers*, 242 A.D.2d at 507. Here, there is nothing in the record establishing the lenders would have denied or altered the terms/pricing of the loans in any way based on additional information *because the Attorney General never sought to elicit any such*

testimony. Thus, the true purpose of the Mr. McCarty testimony is to enable the Attorney General to backfill her case by having an expert speculate that the subject loans would not have otherwise been approved or that they were obtained at a lower rate than the banks would have otherwise agreed. However, "an expert's opinion not based on facts in the record or personally known to the witness is worthless." *Cooke v. Bernstein*, 45 A.D.2d 497, 500 (1st Dep't 1974). Here, the introduction of expert testimony about what the actual sophisticated lenders "might" have done is not only improper speculation, but also contravenes the established record.

B. The Purported Expert Testimony is Unreliable Where it is Wholly Subjective.

The Attorney General's purported expert employs no cognizable generally accepted principles or methodologies to reach his conclusions. Mr. McCarty offers only to substitute his judgment for the judgment of the sophisticated private actors that underwrote and negotiated highly successful business transactions. The *Frye* standard simply does not permit this kind of expert-by-speculation.[3] Without any factual support, Mr. McCarty plans to testify that the loan transactions relating to Doral, Chicago and OPO would have been made through Deutsche Bank's Commercial Real Estate (CRE) division and not their private bank (or at least that the CRE pricing would have applied). This abject speculation is simply not countenanced under the *Frye* standard. Moreover, Mr. McCarty cannot and does not point to any record evidence to support his conjecture as to what "would have" happened based on facts or circumstances different from those which actually governed the subject lending decisions in this case.

[3] An expert's testimony is inadmissible in New York unless it meets a "general acceptance requirement, known as the *Frye* test. The central issue for determination under *Frye* is "'whether the accepted techniques, when properly performed, generate results accepted as reliable within the [relevant] community generally'" *Sean R. ex rel. Debra R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 809 (2016) (quoting *People v Wesley*, 83 NY2d 417, 422 (1994)); *Parker v. Mobil Oil Corp*., 7 N.Y.3d 434, 449 (2006) (stating that expert testimony is "potentially acceptable" only if it "were found to be generally accepted as reliable in the scientific community"). Under *Frye*, expert testimony may be excluded based on the "reliability of novel hypotheses and theories" as well as "methodologies" where the same are not generally accepted in the relevant field. *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762 (2014) (excluding expert testimony where the expert's conclusions were only somewhat supported by relevant literature).

Mr. McCarty opines that in order "[t]o calculate the improper gain obtained by Mr. Trump and the loss to the banks and lenders, [he] looked at the proposed prices and terms offered by DB CRE in the case of Doral, Trump Chicago and OPO and at contemporaneous evidence and indications of market pricing to both confirm DB CRE's pricing." Expert Report of Michiel C. McCarty (May 26, 2023) ("McCarty Report") at ¶ 60. This subjective opinion does not follow any generally accepted principle or methodology, and cannot substitute for factual testimony from the bank witnesses involved as to how the loans would have been handled.

To support this opinion, Mr. McCarty ignores Mr. Haigh's testimony and then assumes an alternate universe of facts where the subject loans would have closed on the terms proposed by CRE. *See* McCarty Report, Appx. C. This is rank speculation. There is no basis in the record to assume that any of the counterparties would have accepted or closed the loans on those terms, or that more marketable rates from other lenders were not otherwise available to each respective borrower. The CRE terms were mere offers, not terms that were agreed to or that bound any party. The respective borrowers could have sought financing from another banking institution, renegotiated the terms of existing loans, abstained from entering the deals altogether, or explored a variety of other plausible alternatives. An expert opinion cannot be credited as an outcome where there are no facts of record that support it.

II. TIME BARRED CLAIMS DO NOT FORM A BASIS FOR DISGORGEMENT.

The NYAG must lay a sufficient foundation for proposed "expert" testimony to be admissible. *See Guzman ex rel. Jones v. 4030 Bronx Blvd. Assocs. L.L.C.*, 54 A.D.3d 42, 47 (1st Dep't 2008). The Court must exclude expert testimony—even if it concludes the opinions are otherwise admissible—if they are not relevant to the claims and defenses asserted at trial. Evidence is relevant only if it has "any tendency to make the existence of any act *that is of*

consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v. Davis*, 43 N.Y.2d 17, 27 (1977), *cert. denied* 435 U.S. 998 (1978) (quoting Uniform Rules of Evidence, Rule 401 (1974)) (emphasis added); *see People v. Galletti*, 55 A.D.2d 154, 156 (1st Dep't 1976) ("Evidence is relevant if it is legally probative of some matter to be proved."). Evidence that is irrelevant, *i.e.*, that fails to meet this standard, is inadmissible. *See People v. Fisher*, 73 A.D.2d 886, 891 (1st Dep't 1980) (quoting Fisch, New York Evidence (2d Ed.) § 3) ("irrelevant evidence is inadmissible").

As noted above, there is no dispute that (i) seven of the ten transactions at issue in the complaint involving lending were completed *before* July 13, 2014; (ii) one of the transactions involving lending was *never* consummated; and (iii) the two remaining transactions involving lending were completed *before* the cutoff date for timely claims against those Defendants not subject to the tolling agreement, *i.e.*, February 6, 2016. Thus, while the Court may have (over objection) allowed the introduction of evidence pre-dating the respective limitations period, doing so has not and cannot itself now form the basis for an otherwise non-existent disgorgement claim.

Mr. McCarty should therefore also be precluded from testifying to any of the transactions deemed time-barred by the Appellate Division, First Department. While this Court has consistently ruled that "*the statute of limitations limits claims*, not evidence" (Tr. 1803)—a ruling with which Defendants have consistently disagreed—there is absolutely no basis for the Attorney General to now offer an expert opinion on her theory of disgorgement for time barred claims.

Given that to be actionable in this case, any transaction must have closed on or after July 13, 2014, any disgorgement calculations relative to loans closing before July 13, 2014, are simply inadmissible. As the trial evidence has established, the loan terms and pricing were set at the time the respective loans closed. The subsequent submission of an SOFC had no impact on those terms

or pricing, and the Attorney General cannot use Mr. McCarty's opinions to alter the established evidence. Accordingly, all of Mr. McCarty's opinions relating to conduct outside the statute of limitations are not relevant and must be excluded.

CONCLUSION

For the reasons stated herein, Defendants respectfully request that this Court preclude Mr. McCarty from offering speculative trial testimony and/or any trial testimony based on time-barred claims.

Dated: New York, New York
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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 3,249 words. The foregoing word counts were calculated using Microsoft® Word®.

Dated: Uniondale, New York
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Respectfully submitted,

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