



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL  
28 LIBERTY STREET  
NEW YORK, NY 10005

October 31, 2023

Hon. Arthur Engoron  
Supreme Court, New York County  
60 Centre Street  
New York, NY 10007

RE: *People v. Trump*, et al., No. 452564/2022

Dear Justice Engoron:

We write on behalf of the Office of the Attorney General (“OAG”), in response to the memorandum of law filed last night by Defendants seeking to preclude the expert testimony of Michiel McCarty. (NYSCEF No. 1623). Defendants’ arguments are a rehash of points they have made many times over, primarily that OAG has no basis to bring an enforcement action based on decisions involving “the sophisticated private actors that evaluated, negotiated and underwrote the complex and highly successful loan transactions herein at issue.” (NYSCEF No. 1623 at 3). This argument has been rejected time and again. *See* NYSCEF No. 1531 at 4-5. Defendants also restate their statute of limitations objections and their contention that there is no basis to seek disgorgement.<sup>1</sup> (NYSCEF No. 1623 at 1, 8-10). None of these arguments is any more availing now.

As to Defendants other points, their arguments appear to operate from the premise that OAG is obligated to prove exactly how these transactions would have proceeded if the truth about Mr. Trump’s statements of financial condition (“SFC”) had been known. OAG is under no such obligation. The burden is merely to demonstrate a “reasonable approximation of profits causally connected to the violation.” *SEC v. Fowler*, 6 F.4th 255, 267 (2d Cir. 2021) (*quoting SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013)). As New York courts have repeatedly explained, disgorgement is intended to deter wrongdoing by denying the wrongdoer all ill-gotten gains from their wrongful conduct. *See People v. Greenberg*, 27 N.Y.3d 490, 498 (2016); *People v. Applied Card Systems*, 11 N.Y.3d 105, 125-26 (2008); *People v. Ernst & Young*, 114 A.D.3d 569, 569-70 (1st Dep’t 2014); *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996). Therefore, Plaintiff is not required to prove the existence of a counterfactual world in which Defendants’ fraud occurred under different circumstances. Once the Court has found that Defendants engaged in fraud, as it has already done (NYSCEF No. 1531), it is free to craft a disgorgement remedy that will deny them the profits from that unlawful conduct.

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<sup>1</sup> Mr. McCarty has prepared an updated calculation to account for the statute of limitations determinations by this Court and the First Department. (*See* PX-3302, attached at Tab A).

As a result, Mr. McCarty's testimony is not being offered to demonstrate that the specific transactions would have occurred in a specific manner. Rather his testimony is being offered to establish the difference between the interest rates Defendants obtained by using the SFC versus the interest rate for a loan they could have obtained without utilizing a guarantee and the SFC. Whether such loans would have actually been made and whether the transactions would have proceeded in a specific manner is simply not the issue. The question is whether the difference between the two interest rates provides a reasonable approximation of the benefit to the Trump Organization, which is ultimately a decision for the Court.

It is also not the case that Mr. McCarty's testimony on this subject is speculative. Mr. McCarty has evaluated various communications and documents, including Deutsche Bank private wealth management ("PWM") group's credit approval memos and other contemporaneous term sheets and offers provided to the Trump Organization by Deutsche Bank's investment bank. Based on his evaluation of that evidence, Mr. McCarty is prepared to offer his expertise to assist the Court in an assessment of possible ways to measure the ill-gotten gains that should be disgorged by the Trump Organization. In particular, Mr. McCarty plans to offer testimony to:

- Describe the relationship between bank underwriting of credit risk and loan rates;
- Evaluate whether contemporaneous commercial real estate ("CRE") offers are valid indicators of the market rates for these transactions that would have been available without the use of a personal guaranty supported by Mr. Trump's fraudulent SFCs; and
- Explain how to consider an "apples to apples" comparison between contemporaneous CRE and PWM offers from the perspective of a lender.

None of this testimony is speculation. All of it is based on his evaluation of the record evidence, informed by over four decades of banking expertise and his research into available public sources.<sup>2</sup>

Finally, at most Defendants' argument go to the weight that the Court should afford to Mr. McCarty's expert testimony and serves no basis to preclude the testimony from being introduced into evidence in the first instance. Accordingly, Defendants' *in limine* motion to preclude Mr. McCarty's testimony should be denied in its entirety.

Respectfully submitted,



Kevin Wallace  
Senior Enforcement Counsel

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<sup>2</sup> Defendants flip the rules of evidence on their head, arguing that OAG should have asked hypothetical questions of a fact witness like Nicholas Haigh based on evidence and information that was not available to him at the time he reviewed the loans at issue. (NYSCEF No. 1623 at 2). That kind of analysis is the reason to obtain expert testimony.

Tab A:

Supplemental Disclosure of  
Michiel C. McCarty

(PX-3302)

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

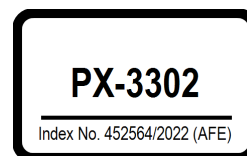
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PEOPLE OF THE STATE OF NEW YORK, :  
by LETITIA JAMES, :  
Attorney General of the State of New York, : Index No. 452564/2022  
Plaintiff, :  
-against- :  
DONALD J. TRUMP, *et al.*, : **SUPPLEMENTAL DISCLOSURE OF**  
Defendants. : **MICHEL C. McCARTY**  
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1. I have been asked by the New York State Office of the Attorney General (“OAG”) to update my calculation of the financial benefit that accrued to Defendants, including Donald J. Trump, through the use of fraudulent and misleading personal financial statements, following this Court’s finding that those statements were false and misleading in its Decision and Order on Motions filed September 26, 2023 (NYSCEF No. 1531) (the “Summary Judgment Order”).<sup>1</sup>

2. Specifically, I have updated my calculation of interest differential between certain loans that Mr. Trump received and maintained by using his Statement of Financial Condition (“SFC”) to support his personal guaranty and the loans that would have otherwise been available to Mr. Trump and the Trump Organization. In addition, I have updated the calculations previously disclosed to Defendants in the McCarty Expert Report by considering only benefits that accrued from “any SFC that was submitted after July 13, 2014” as that time period “falls

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<sup>1</sup> Unless otherwise indicated, capitalized terms used herein have the meaning ascribed to them in the Expert Report of Michiel C. McCarty dated May 26, 2023 (“McCarty Expert Report”) and the Expert Rebuttal Report of Michiel C. McCarty dated June 30, 2023 (“McCarty Rebuttal Report”).



within the applicable statute of limitations.”<sup>2</sup> I have further considered the Court’s decision that “the documents here clearly contain fraudulent valuations that defendants used in business, satisfying OAG’s burden to establish liability as a matter of law against defendants.”<sup>3</sup>

3. My opinions as submitted in the McCarty Expert Report and McCarty Rebuttal Report otherwise remain unchanged. Those opinions are consistent with the Court’s explanation that:

The subject loans made the banks lots of money; but the fraudulent SFCs cost the banks lots of money. The less collateral for a loan, the riskier it is, and a first principal of loan accounting is that as risk rises, so do interest rates. Thus, accurate SFCs would have allowed the lenders to make even more money than they did.

Summary Judgment Order, p. 25 at footnote 21.

**I. Summary of Recalculations**

4. In my Expert Report, I calculated the monetary benefit Mr. Trump obtained by means of the use of the misstated and materially misrepresented Statements to be approximately \$187 million. The Court has since determined that Mr. Trump used false and misleading SFCs to obtain the loans. To calculate the benefit to Defendants, I compared the rates received through use of the fraudulent SFCs with other contemporaneous market rates and loan offers for the same properties not relying on use of a personal guarantee supported by the SFC. While my opinion as to the interest rate differentials between stated interests and proper risk adjusted interest rates remain the same, I have updated my calculations to account for the Court’s decision regarding the Statute of Limitations and also to calculate the lost interest through the current date, which may be updated through the date, if applied, of any order and judgement relating to disgorgement

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<sup>2</sup> Summary Judgment Order, p. 18.

<sup>3</sup> Summary Judgment Order, p. 21.

of lost interest. A summary of the updated lost interest calculations, presented in Exhibit 1, is as follows:

**Table 1**  
**Summary of Interest Differentials**

<b>Borrower</b>	<b>Asset</b>	<b>Estimated Gross Interest Differential</b>
Trump Endeavor 12 LLC	Doral Golf Resort and Spa	(\$72,908,308)
Trump Old Post Office LLC	Old Post Office, Washington DC	(\$53,423,209)
401 North Wabash Venture LLC	Trump International Hotel & Tower, Chicago	(\$17,443,359)
40 Wall Street LLC	40 Wall Street	<u>(\$24,265,291)</u>
	<b>Total</b>	<b>(\$168,040,168)</b>

5. The results are a grand total of the benefit that accrued to Defendants through the use of the fraudulent SFCs. This grand total, based on contemporaneous documentation, provides a continuing confirmation of my earlier calculation of the market benefit Defendants obtained by means of the use of the Statements. In sum it is at least over \$168 million.

6. The forgoing sets forth my calculations as of the date hereof.

Dated: Oct. 27, 2023



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MICHIEL C. McCARTY

**Supplemental Disclosure of Michiel C. McCarty**  
**Exhibit 1 - Lost Interest Calculation (Updated)**

<u>Doral</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>	<u>2021</u>	<u>2022</u>	<u>2023</u>	<u>Grand Total</u>
Actual Int %	1.9035%	1.9354%	2.1953%	2.8671%	3.7964%	4.1616%	1.9348%	1.8318%	1.8042%		
CRE Int %	10.0000%	10.0000%	10.0000%	10.0000%	10.0000%	10.0000%	10.0000%	10.0000%	10.0000%		
Term	08/11/23	08/11/23	08/11/23	08/11/23	08/11/23	08/11/23	08/11/23	08/11/23	08/11/23		
Loan Amt Adj	\$ 125,000,000	\$ 125,000,000	\$ 125,000,000	\$ 125,000,000	\$ 125,000,000	\$ 125,000,000	\$ 125,000,000	\$ 125,000,000	\$ 125,000,000		
Interest Delta	\$ (4,741,443)	\$ (10,080,750)	\$ (9,755,875)	\$ (8,916,113)	\$ (7,754,525)	\$ (7,297,963)	\$ (10,081,500)	\$ (10,210,313)	\$ (4,069,827)	\$ -	\$ (72,908,308)
<b><u>OPO</u></b>											
Actual Int %		2.1854%	2.4453%	2.8671%	3.7964%	4.1616%	1.9348%	1.8318%	1.8042%		
CRE Int %		8.0000%	8.0000%	8.0000%	8.0000%	8.0000%	8.0000%	8.0000%	8.0000%		
Term		08/11/24	08/11/24	08/11/24	08/11/24	08/11/24	08/11/24	08/11/24	08/11/24		
Loan Amt Adj		\$ 6,012,851	\$ 112,922,728	\$ 170,000,000	\$ 170,000,000	\$ 170,000,000	\$ 170,000,000	\$ 170,000,000	\$ 170,000,000		
Interest Delta		\$ (176,248)	\$ (6,272,519)	\$ (8,725,913)	\$ (7,146,154)	\$ (6,525,229)	\$ (10,310,840)	\$ (10,486,025)	\$ (3,780,281)	\$ -	\$ (53,423,209)
<b><u>Chicago</u></b>											
Actual Int %	2.1535%	2.1854%	2.4453%	3.1171%	4.0464%	4.4116%	2.1848%	2.0818%	2.0542%	7.2177%	
CRE Int %	7.5000%	7.5000%	7.5000%	7.5000%	7.5000%	7.5000%	7.5000%	7.5000%	7.5000%	7.5000%	
Term	06/01/24	06/01/24	06/01/24	06/01/24	06/01/24	06/01/24	06/01/24	06/01/24	06/01/24	06/01/24	
Loan Amt Adj	\$ 19,000,000	\$ 45,000,000	\$ 45,000,000	\$ 45,000,000	\$ 45,000,000	\$ 45,000,000	\$ 45,000,000	\$ 45,000,000	\$ 45,000,000	\$ 45,000,000	
Interest Delta	\$ (475,912)	\$ (2,391,570)	\$ (2,274,615)	\$ (1,972,301)	\$ (1,554,129)	\$ (1,389,767)	\$ (2,391,840)	\$ (2,438,213)	\$ (2,450,606)	\$ (104,409)	\$ (17,443,359)
<b><u>40 Wall</u></b>											
Actual Int %		3.6650%	3.6650%	3.6650%	3.6650%	3.6650%	3.6650%	3.6650%	3.6650%	3.6650%	
Cap 1%		5.7100%	5.7100%	5.7100%	5.7100%	5.7100%	5.7100%	5.7100%	5.7100%	5.7100%	
Term		7/6/2025	07/06/25	07/06/25	07/06/25	07/06/25	07/06/25	07/06/25	07/06/25	07/06/25	
Loan Amt Adj		\$ 160,000,000	\$ 156,451,072	\$ 152,413,916	\$ 148,224,162	\$ 143,876,042	\$ 139,378,051	\$ 134,695,562	\$ 129,480,568	\$ 124,424,392	
Interest Delta		\$ (1,631,518)	\$ (3,199,424)	\$ (3,116,865)	\$ (3,031,184)	\$ (2,942,265)	\$ (2,850,281)	\$ (2,754,524)	\$ (2,647,878)	\$ (2,091,352)	\$ (24,265,291)
										<b>Grand Total of Lost Interest</b>	<b>\$ (168,040,168)</b>