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December 15, 2023

VIA NYSCEF
Hon. Arthur F. Engoron
Supreme Court of the State of New York
New York County
60 Centre Street
New York, New York 10007

Re: *People of the State of New York, et al. v. Donald J. Trump, et al.*,
Index No. 452564/2022 (Sup. Ct. New York County)

Dear Justice Engoron:

This firm represents Defendants Donald Trump, Jr. and Eric Trump in the above-referenced matter. We write this letter on behalf of Defendants President Donald J. Trump ("President Trump"), Donald Trump, Jr., Eric 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 (collectively, "Defendants") in support of Defendants' on the record motions for a directed verdict[1] made at the close of the defense case, and again at the close of the New York State Attorney General's ("Attorney General") rebuttal case.[2]

The evidence is simply insufficient to establish the requisite elements of the Attorney General's second through seventh causes of action or to establish any entitlement to "disgorgement." Defendants first moved for directed verdict at the close of the Attorney General's case, as the record then did not establish proof of any intent, any material misstatement, any conspiracy, any fraud, or any entitlement to "disgorgement."[3] The defense evidence and the Attorney General's rebuttal have only amplified the magnitude of these failures of proof.

[1] CPLR § 4401 provides that "[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions."

[2] As stated on the record, Defendants made oral motions for directed verdict at both junctures and the Court has permitted Defendants to file this letter in support of those motions.

[3] Defendants incorporate by reference the arguments in their November 9, 2023, motion for a directed verdict, which was made on the record (Nov. 9, 2023, Tr.) and attach and incorporate herein by reference a copy of the presentation made in open Court as **Exhibit A**.

At the close of the Attorney General's evidence, the Attorney General failed to present a *prima facie* case establishing the elements of Counts II-VII, or any entitlement to "disgorgement." The evidence introduced during the defense case, and even the Attorney General's rebuttal, served to further demonstrate that the Attorney General has no case. In sum, there was no fraud, there were no victims, there has simply been no harm or actionable misconduct, and the Court must and should follow the law of the case regarding the scope of the claims at issue.[4] The Attorney General cannot establish herein any intent, any materiality, any conspiracy, any "ill-gotten gains" or "unjust enrichment", or anything redressable under Executive Law § 63(12)[5]

A. Liability Arising from Any Transactions Other than the Old Post Office and 40 Wall Street Loans is Barred by Law of the Case.

This Court is required to comply with the law of the case and immediately dismiss claims arising from loan transactions that were consummated before the statutory period. The record evidence establishes 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 Defendants not subject to the tolling agreement, *i.e.*, February 6, 2016. Thus, the only two loans even arguably at issue are Old Post Office

[4] Defendants are of course cognizant of this Court's findings in its September 26, 2023, Decision and Order on summary judgment. However, certain issues previously addressed in that Decision and Order must be raised for purposes of preservation for the Court of Appeals. The appealability and reviewability of nonfinal orders to the Court of Appeals is circumscribed and may generally be had only if such orders "necessarily affect" a final judgment. See CPLR §§ 5501(a), 5601(d), 5602(a)(1)(ii). Recent Court of Appeals precedent provides that some orders denying a defendant's motion for summary judgment do *not* "necessarily affect" a final judgment, (Bonczar v American Multi-Cinema, Inc., 38 N.Y.3d 1023, 1026 [2022]). While Supreme Court's order denying Defendants' motion for summary judgment includes a legal finding of liability on the first cause of action, it is conceivable, under the foregoing precedent, that the Court of Appeals might conclude that this Court's rejection of Defendants' arguments at the summary judgment stage, both in opposition to the Attorney General's motion for summary judgment on the first cause of action and in support of Defendants' motion for summary judgment on all causes of action, does not "necessarily affect" a final judgment. Accordingly, Defendants interpose briefly certain arguments herein not to burden this Court, but rather for purposes of preservation for the Court of Appeals.

[5] Defendants note for purposes of preservation of the issues and arguments for the Court of Appeals, that here, the Attorney General has no standing or capacity to maintain an action based on successfully consummated private transactions between sophisticated parties represented by sophisticated counsel, governed by extensively negotiated agreements fully defining the parties' respective obligations, what conduct constituted any breach, and, importantly, the consequences of any breach. There is no evidence any of the parties to the subject transactions believed there was any fraud, any misstatements, any deception, or any harm, and all are satisfied fully with the profitable and successful transactions. The public was not involved in or affected by these transactions in any way, and no actual party has identified any wrong or lodged a complaint with the Attorney General. All contracts were fully performed, all loans were repaid in full with interest, and there were no defaults.

("OPO"), which closed in August 2014, and 40 Wall Street, which closed in November 2015.[6] The Attorney General has advanced a novel theory of the case that each submission of a statement of financial condition ("SOFC") somehow constitutes an independent wrong. However, this effectively, and impermissibly, nullifies the Appellate Division, First Department's unequivocal determination as to the applicable limitations period. The Court must therefore disregard this theory and follow the law of the case.

B. The Attorney General Is Not Entitled to Disgorgement.

The bank witnesses (*i.e.*, Williams, Vrablic) called during the defense case amplified further what Defendants presented in their initial directed verdict motion, namely, that the Attorney General failed to establish a *prima facie* case as to any entitlement to disgorgement. The testimony of the actual bankers involved in the loan transactions at issue establishes conclusively that Deutsche Bank had no issues with the value estimates in the SOFCs, that it conducted and relied on its own financial analysis in determining loan approvals and pricing, that there were never any defaults, that the loan transactions were highly profitable for the bank, and that the bank viewed President Trump as a premier client. The record is devoid of any factual evidence that the subject loans would not have been issued or the terms or pricing would have in fact been different. This eviscerates any argument that the Defendants obtained any benefit to which they were not otherwise entitled.[7] The Attorney General's "evidence" as to entitlement to disgorgement simply presumes, contrary to the record evidence, that the banks were misled and then proceeds to simply manufacture a purported measurement of purely hypothetical harm. Thus, there is no plausible basis for the award of any "disgorgement," and any such award would have serious legal and constitutional defects.[8]

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[6] Note also that the OPO contract award and the Ferry Point contract were likewise completed well prior to July 13, 2014, barring any claims or recovery (including any purported "disgorgement") based on these transactions.

[7] Consequently, Michiel McCarty's "expert" testimony must be given no weight, as it merely backfills the Attorney General's case with testimony she should have elicited from fact witnesses. 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"). Indeed, even Mr. McCarty conceded he could not testify with any reasonable degree of certainty that the banks would have in fact acted differently. See Tr. at 3137 ("THE COURT: It is a yes-or-no question. Are you certain that they would or [would] not have, whatever, offered a loan on those terms? Are you certain? THE WITNESS: It is a hypothetical question. I can't be certain.").

[8] Defendants note here for purposes of preservation in the Court of Appeals, that disgorgement is unavailable in *this* action because the Attorney General did not bring claims under any statute, including Executive Law § 63(12), that independently authorizes disgorgement as a remedy, and the record evidence cannot possibly, or constitutionally, support any such award. Each case cited by this Court and the Attorney General for the proposition that Executive Law § 63(12) authorizes disgorgement *also* includes a request for relief under the Martin Act or the Consumer Protection Act. See, e.g., People v. Greenberg, 27 N.Y.3d 490 (2016); People v. Ernst & Young LLP, 114 A.D.3d 569

C. The Attorney General Has Not Demonstrated Materiality.

The defense evidence established the SOFCs included values that were conservative and incorporated comprehensive disclaimers, and the SOFCs complied with governing accounting standards. Mr. Flemmons and Professor Bartov both testified as to the applicable accounting standards and the SOFC's compliance with those standards. Such compliance alone renders it impossible for the Attorney General to establish the SOFCs contained any ***material*** misstatement, an essential element of the claims presented in Counts II-VII.[9]

Moreover, materiality requires a showing "that in all probability the omitted or misrepresented facts would, in view of the circumstances, have assumed ***actual significance*** in the deliberations of" the bank. People v Essner, 124 Misc. 2d 830, 835 (Sup. Ct., N.Y. Cnty. 1984) (emphasis added and internal citations omitted). The Court of Appeals has articulated the materiality in an Executive Law § 63(12) action as for materiality is whether there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the '*total mix*' of information made available." See State v. Rachmani Corp., 71 N.Y.2d 718, 726-727 (1988). Here, the testimony in the defense case from the bank officers involved in the subject loan transactions establishes the alleged omitted or misrepresented facts took on ***no actual significance!*** The defense banking expert, Robert Unell, also described in detail the process Deutsche Bank used to independently value the SOFC assets, to verify liquidity, and to otherwise determine materiality based on their own criteria, risk rating, risk analysis and underwriting judgment. The Court cannot simply ignore the actual testimony of the actual participants to the transaction about what actually took place in favor of some hypothetical construct manufactured by the Attorney General to support claims lacking any evidentiary foundation. Claims of "fraud" cannot exist only the mind of the Attorney General, untethered to the actual transactions at issue and the testimony of the actual participants. To hold otherwise is to grant unfettered license to the Attorney General to maintain, as here, wholly unsubstantiated claims of "fraud" against a political opponent devoid of any connection to reality or any real-world impact.

Additionally, the testimony of the defense witnesses established property valuation is necessarily subjective, such that there is not only one true or correct legitimate value for any given property. Defense testimony from premier accounting experts (i.e., Flemmons, Bartov)

(1st Dep't 2014). Additionally, the Attorney General has not been able to demonstrate any purported gains that were ill-gotten, *i.e.*, a causal link between the alleged gains to Defendants and the purported fraudulent conduct. J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 91 A.D.3d 226, 232-33 (1st Dep't 2011), rev'd on other grounds, 21 N.Y.3d 324 (2013); but see People v. Richmond Capital Group LLC, et al., 80 Misc.3d 1213(A) (Sup. Ct. N.Y. Cty. Sept. 15, 2023).

[9] As this Court decided on summary judgment, the Attorney General must demonstrate "some component of intent and materiality" to prevail on the second through seventh causes of action. People v. Alamo Rent A Car, Inc., 174 Misc 2d 501, 505 (Sup. Ct. N.Y. Cty. 1997). Indeed, the Attorney General's suggestion that she need only prove a bare misrepresentation or omission unlawfully converts Executive Law § 63(12) into a strict liability statute.

established that under the governing accounting standard, FASB Accounting Standards Codification ("ASC") 274, which governs the preparation of SOFCs, preparers have significant latitude in determining estimated current value and there was no evidence of material misstatement. Given this testimony, there is no room for the Attorney General to simply substitute her own judgment and arbitrarily declare valuation differences "material."

D. The Attorney General Has Not Demonstrated Intent to Defraud.

The intent to defraud is "commonly understood to mean" to act with intent "to cheat someone out of money, other property or something of value." People v. Hankin, 175 Misc. 2d 83, 89 (N.Y. Crim. Ct. Kings Cty. 1997), citing People v. Saporita, 132 A.D.2d 713, 715 (2d Dep't 1987). It involves "frustrat[ing] the legal rights of another," (see S. Indus. v. Jeremias, 66 A.D.2d 178, 181 [2d Dep't 1978]), or misleading with the purpose of "leading another into error or to disadvantage," (People v. Briggins, 50 N.Y.2d 302, 309 [1980] [Jones, J., concurring]). Thus, it is more than an intent to deceive. See Hankin, 175 Misc. 2d at 89. The Attorney General failed to present any evidence of intent during her case in chief.

Now, the testimony from the defense experts (*i.e.*, Flemmons, Bartov) as to the governing accounting standards and the SOFCs compliance with such standards negates fully any even theoretical assertion of intentional misconduct.[10] Likewise, the testimony (*i.e.*, LaPosa, Chin, Moens, Shubin) as to the subjective nature of property valuation, the specific values as to Mar-A-Lago and other properties, and the documents governing the use of the Mar-A-Lago property also negates any notion of intentional misstatement.[11]

E. The Attorney General Has Not Demonstrated a Conspiracy.

The Attorney General has not demonstrated the existence of a conspiracy among the Defendants. Conspiracy requires "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a

[10] New York courts have also held that plaintiffs failed to produce credible evidence of intent to defraud where there was no evidence to suggest that defendants' reliance on accounting professionals "was other than in good faith." See Abrahami v. UPC Constr. Co., 224 A.D.2d 231, 233–34 (1st Dep't 1996); see also People v. Dillard, 271 N.Y. 403, 414 (1936) (finding defendant had a "right to rely" on agreement drafted by subordinate employees and the facts disclosed to him and that plaintiff had not shown he "knowingly made a false statement or a statement intended to deceive the public.").

[11] Additionally, the Attorney General is not permitted to ascribe the conduct of one Defendant to all others, effectively piercing the corporate veil. Abrahami, 224 A.D.2d at 233–34. The Attorney General must show that each Defendant personally participated in the alleged misrepresentation or had actual knowledge of it. Marine Midland Bank v. Russo Produce Co., 50 N.Y.2d 31, 44 (1980) ("Mere negligent failure to acquire knowledge of the falsehood is insufficient."). There is a complete failure of proof in this regard, as there has been no even attempt to assign responsibility as to each Defendant.

plan or purpose; and (4) resulting damage or injury." Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 474 (1st Dep't 2010) (internal citations omitted); see also Robinson v. Snyder, 259 A.D.2d 280, 281 (1st Dep't 1999) ("[A]greement to cause a specific crime to be committed together with the actual commission of an overt act by one of the conspirators in furtherance of the conspiracy."). Therefore, Defendants are entitled to judgment as a matter of law on the claims of (1) conspiracy to issue false financial statements under New York Penal Law § 175.45, (2) conspiracy to falsify business records under New York Penal Law, and (3) conspiracy to commit insurance fraud under New York Penal Law. Not a single defense witness supported the notion of any alleged conspiracy, and in fact such testimony refuted fully the existence of same. The only witness called by the Attorney General to attempt to support her conspiracy allegations (1) conceded at trial he was never actually instructed to inflate the values in the SOFCs and (2) is a demonstrable, perpetual, and serial liar.[12] Indeed, the testimony from Michael Cohen, the linchpin of the Attorney General's case, must be disregarded, as he admitted to perjury on the stand. Since there is no evidence of any conspiracy, the conspiracy counts must be dismissed.

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For the foregoing reasons, Defendants respectfully request that the Court grant their motion for a directed verdict, terminate immediately all remaining causes of action, and reject the Attorney General's claim for disgorgement relief.

Respectfully submitted,

ROBERT & ROBERT PLLC

Clifford S. Robert

CLIFFORD S. ROBERT

cc: All Counsel of Record (via NYSCEF)

[12] House Republican Conference Chair Rep. Elise Stefanik and House Intelligence Committee Chairman Rep. Mike Turner have demanded the Attorney General Merrick Garland launch a criminal investigation into Mr. Cohen over whether he committed perjury and knowingly made false statements while testifying under oath before Congress on February 28, 2019.