SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,	Appeal Nos: 2024-01134 2024-01135
Plaintiff-Respondent,	Sup. Ct. New York County Index No. 452564/2022
-against-	(Engoron, J.S.C.)
DONALD J. 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,	
Defendants-Appellants,	
IVANKA TRUMP,	
Defendant.	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF A STAY PENDING APPEAL PURSUANT TO CPLR 5519(c)

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should stay execution of Supreme Court's Decision and Order After Non-Jury Trial of February 16, 2024, *see* Affirmation of Urgency of Clifford S. Robert ("Robert Urgency Aff.") Ex. A (the "Judgment"). The Attorney General's leading argument—that this Court lacks authority to waive or reduce appellate bond requirements under *any* circumstances—contradicts the plain language of CPLR § 5519(c), this Court's inherent authority, and a host of New York cases. "CPLR § 5519(c) clearly gives the Court discretion with respect to such automatic stays and also *allows it to stay all proceedings to enforce a judgment or order appealed from* in a case not provided for under subdivision (b)." *Schaffer v. VSB Bancorp, Inc*., 68 Misc. 3d 827, 834 (Sup. Ct. 2020) (emphasis added).

In deciding whether to enter a stay, the Court may consider "any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party.'" *Id.* at 834. Here, Defendants' ongoing diligent efforts have proven that a bond in the judgment's full amount is "a practical impossibility." Affirmation of Gary Giulietti ("Giulietti Aff.") ¶ 18. These diligent efforts have included approaching about 30 surety companies through 4 separate brokers. Affirmation of Alan Garten ("Garten Aff."), ¶ 5. A bond requirement of this enormous magnitude—effectively requiring cash reserves approaching $1 billion, Giulietti Aff. ¶ 17—is unprecedented for a private company. Even when it comes to publicly traded companies, courts routinely waive or reduce the bond amount. Enforcing an impossible bond requirement as a condition of appeal would inflict manifest irreparable injury on Defendants, and "defeat or impair [this Court's] appellate jurisdiction." *Schwartz v. New York City Hous. Auth.*, 219 A.D.2d 47, 48 (2d Dep't 1996). By contrast, waiving the bond requirement will impose no cognizable harm on

the Attorney General. The case involves no actual victims and no award of restitution, and she is fully protected by Defendants' real-estate holdings. This factor alone warrants a stay.

The manifold errors in Supreme Court's judgment further warrant a stay. Among other errors, Supreme Court disrespectfully disregarded this Court's previous ruling in this case that the statute of limitations applies and that "[t]he continuing wrong doctrine does not delay or extend these periods." *People by James v. Trump*, 217 A.D.3d 609, 611–12 (1st Dep't 2023). Moreover, Supreme Court ridiculously valued Mar-a-Lago, in Palm Beach, Florida, as being worth "between $18 million and $27.6 million," understating its actual value by about 50 to 100 times. Supreme Court imposed a massive disgorgement award in the absence of any evidence that the alleged misrepresentations *caused* the supposedly ill-gotten proceeds, in violation of the black-letter requirement that the disgorged amount must be causally connected to the violation. Supreme Court double- and triple-counted damages, and committed elementary errors in the process, such as conflating the *proceeds* of a sale with the *profits* from that sale. Such basic mistakes would have been prevented if this case had been allowed to be adjudicated in the Commercial Division, where it belonged.

These errors establish that the disgorgement award is unconstitutional. It is "grossly disproportional" in violation of the Excessive Fines Clause of the United States Constitution and a parallel clause of the New York Constitution, as well as basic principles of due process and selective prosecution. Because the judgment is unconstitutionally excessive, the bond requirement violates the Eighth Amendment as well, because it imposes an irrational, punitive sanction.

This case has no victims, no damages, and no actual financial losses. None of Defendants' sophisticated business partners testified that they would have changed any transaction in light of the alleged "misrepresentations," and all of these sophisticated parties, along with their law firms

and other service providers, were well aware of the ironclad disclaimers present in all of the financial statements at issue. The $464 million penalty in this case has been aptly described as "using a Hellfire missile to annihilate an [alleged] shoplifter." The Editors, *Trump's $355 Million Civil Fraud Verdict*, WALL ST. J. (Feb. 17, 2024). "There was no real financial victim." *Id.* "This is choosing a target and then hunting for something to charge him with, which is an abuse of the law." *Id.* The judgment seeks to destroy a successful business that employs many hardworking New Yorkers, has contributed approximately $300 million in taxes to public coffers just during the dates in question in this case, and has made historic contributions to the State and City of New York. The Court should stay the judgment pending appeal, and put the brakes on the Attorney General's overzealous litigation crusade. If oral argument would assist the Court in coming to that conclusion, we respectfully request an opportunity for such a hearing.

ARGUMENT

I. This Court Has Discretion to Stay the Disgorgement Award.

The Attorney General argues that, under CPLR § 5519(a)(2), this Court has no authority to stay execution on any condition other than an undertaking in the full amount of the judgment. *See* Memorandum of Law in Opposition to Motion for a Stay ("Opp. Brief") at 15-20. This argument is meritless, and is a continuation of the Attorney General's consistent lack of respect for the authority, jurisdiction, and impact of this Court. This Court has both express statutory authority and inherent authority to issue unsecured or partially secured stays of execution pending appeal under § 5519(a)(2).

As relevant here, § 5519(a)(2), entitled "Stay without court order," provides that service upon an adverse party of the notice of appeal stays all proceedings to enforce the judgment pending appeal where an undertaking in the full amount of the judgment is given by the appealing party.

N.Y. CPLR § 5519(a)(2). Section 5519(c), entitled "Stay and limitation of stay by court order," provides that "[t]he court … to which an appeal is taken … *may grant a limited stay* or *may vacate, limit or modify any stay imposed by subdivision (a)* … or this subdivision." N.Y. CPLR § 5519(c) (emphasis added). As the emphasized language provides, § 5519(c) confers on this Court discretion both to *grant* unsecured stays in cases covered by (a)(2)—*i.e.*, cases involving money judgments—and to "vacate, limit or modify" preexisting stays "imposed by subdivision (a)." *Id.* Thus, the appealing party may obtain an automatic stay under (a)(2) by posting an undertaking, but he or she may also petition the appellate court for a discretionary stay under § 5519(c).

This is the uniform understanding of § 5519(c) in New York courts. "While CPLR § 5519(a) sets forth the conditions for entitlement to an automatic stay, CPLR § 5519(c) clearly gives the Court discretion with respect to such automatic stays and also *allows it to stay all proceedings to enforce a judgment or order appealed from* in a case not provided for under subdivision (b)." *Schaffer*, 68 Misc. 3d at 834 (emphasis added). "CPLR 5519(c) permits this Court … *to grant a discretionary stay of proceedings to enforce the order or judgment appealed from*, or to vacate, limit or modify any automatic stay obtained pursuant to CPLR 5519 (a) or (b)." *Schwartz*, 219 A.D.2d at 48 (emphasis added). "The scope of the stay authorized by subdivision (c) is thus *coextensive with the stay authorized by subdivision (a)*, namely, a stay of enforcement proceedings only…." *Id.* (emphasis added). Regarding the "discretionary stay … under CPLR 5519(c)," "the scope of this discretionary stay is 'coextensive' with the automatic stay" under § 5519(a), and "applies … to provide non-governmental parties with *the opportunity to stay proceedings to enforce the judgment or order appealed from pending the appeal*." *Tax Equity Now NY LLC v. City of New York*, 173 A.D.3d 464, 465 (1st Dep't 2019) (emphasis added); *see also CT Chemicals (U.S.A.) Inc. v. Vinmar Impex, Inc.*, 189 A.D.2d 727, 729 (1st Dep't 1993) (holding that

a defendant seeking a stay of execution of a money judgment may opt "either [to] seek a discretionary stay pursuant to CPLR 5519(c) or to post a[n] … undertaking" under 5519(a)); *Pickwick Int'l, Inc. v. Tomato Music Co*., 119 Misc. 2d 227, 232 (Sup. Ct. 1983) ("[T]hese grounds fully warrant this Court to exercise its discretion and dispense with the posting of any bond pending the outcome of the appeal…").

In addition, this Court has inherent authority to issue equitable stays of judgments pending appeal. *Schwartz* held that, in addition to § 5519, "[t]here is … another broad source of authority for this Court, in the exercise of its appellate rather than original jurisdiction, to grant such a general stay of proceedings in an appropriate case." 219 A.D.2d at 48. *Schwartz* reaffirmed "this Court's inherent power to grant a stay of acts or proceedings, which, although not commanded or forbidden by the order appealed from, will disturb the status quo and tend to defeat or impair our appellate jurisdiction." *Id.* Likewise, in *Tax Equity Now*, this Court held that a stay of lower-court proceedings was not available under § 5519(a) or (c), yet the Court "exercise[d] [its] inherent authority to grant a discretionary stay of the proceeding pending appeal…." 173 A.D.3d at 465.

Moreover, CPLR § 5240 reinforces this broad equitable authority. It provides that "[t]he court may at any time, on its own initiative or the motion of any interested person … make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." N.Y. C.P.L.R. § 5240. The Court of Appeals describes § 5240 as a "general provision[] that permit[s] 'any interested person'—*including a judgment debtor*—to secure remedies for wrongs arising under the statutory scheme." *Plymouth Venture Partners, II, L.P. v. GTR Source, LLC*, 37 N.Y.3d 591, 600 (2021) (emphasis added). "Section 5240 … lays out the court's power to, 'at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating,

extending or modifying the use of any enforcement procedure.'" *Id.* "CPLR 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts'." *Id.* (quoting *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 519 (1979)). "[T]his provision 'centers in one place the pervasive judicial power to right, on a case by case basis, any wrong in connection with any of the numerous Article 52 procedures'." *Id.* at 601 (cleaned up) (quoting Siegel & Connors, NY Prac § 522 at 993 (6th ed 2018)).

This authority matches the universal practice in other jurisdictions. Federal Rule of Civil Procedure 62 authorizes the federal courts to "stay enforcement of the district court's judgment, without the posting of a bond or other condition." *In re Nassau Cnty. Strip Search Cases*, 783 F.3d 414, 417 (2d Cir. 2015); *see also Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 761 (D.C. Cir. 1980) (affirming the decision to require no bond on appeal); *N. Indiana Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986) ("[I]t is a misreading of Rule 62(d) of the Federal Rules of Civil Procedure to suggest that an appellant who wants to stay execution pending appeal must post a bond."). Other states, likewise, universally recognize an appellate court's authority to waive or modify bond requirements.[1]

In fact, courts routinely exercise this authority to waive or reduce enormous, disproportional, and unjust bond requirements. *See, e.g., Texaco Inc. v. Pennzoil Co*., 784 F.2d

[1] *See, e.g., Wallace v. Smith in and for County of Maricopa*, 532 P.3d 752, 757 (Ariz. 2023) (noting power of trial court "to reduce the amount of a supersedeas bond" in "an appropriate case"); *O'Donnell v. McGann*, 529 A.2d 372, 377 (Md. App. 1987) (noting the "authority" to modify a bond "does exist"); *Waves of Hialeah, Inc. v. Machado*, 300 So.3d 688, 691 (Fla. App. 2018) (noting trial court's authority, under appropriate circumstances and conditions, to "reduce a supersedeas bond"); *Morse v. Fed. Nat'l Mortg. Ass'n*, 2018 WL 4784585, at *1 (Tex. App. Oct. 4, 2018) (noting ability of trial court to "lower the amount of a supersedeas bond" when appropriate).

1133, 1157 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987) (reducing a $12 billion bond obligation to $1 billion); *In re Adelphia Commc'ns Corp*., 361 B.R. 337, 351 (S.D.N.Y. 2007) (imposing a $1.3 billion bond obligation to secure a judgment that required the distribution of "111 million shares of freely tradeable" stock, "more than 9.4 billion" tradable interests, "and $7.136 billion in cash"); *Int'l Distribution Centers, Inc. v. Walsh Trucking Co*., 62 B.R. 723, 732 (S.D.N.Y. 1986) (finding that defendants were not "likely to be capable of posting a bond in the full amount of the approximately $38 million judgment," and reducing the bond requirement for each to $10,000). The Attorney General's "full-undertaking-only" theory is inconsistent with these and many other cases. It would impair and defeat this Court's appellate jurisdiction in cases involving outrageous judgments—*i.e.*, the very cases where appeal is most necessary.

For this reason, the Attorney General's position raises grave constitutional concerns. As the Second Circuit recognized in *Texaco*, where posting the full amount is impracticable, an "inflexible requirement [denying] a stay of execution unless a supersedeas bond in the full amount of the judgment is posted" is "irrational, unnecessary, and self-defeating, amounting to a confiscation of the judgment debtor's property without due process." *Texaco*, 784 F.2d at 1154, *rev'd on other grounds*, 481 U.S. 1 (1987). This is reason enough to reject the Attorney General's interpretation of § 5519. *See, e.g., In re Jamie J*., 30 N.Y.3d 275, 282 (2017) ("[W]e should construe the statute, if possible, to avoid the [constitutional] infirmity…").

II. This Court Should Exercise Its Authority To Stay Execution of the Judgment.

This Court should stay execution of all portions of the Supreme Court's Decision and Order, including both disgorgement, and other forms of equitable relief. *See* Memorandum of Law in Support of Stay Pending Appeal Pursuant to CPLR 5519(c) ("Opening Brief") at 11-14.

A. The Attorney General Misstates the Governing Standard.

The Attorney General argues that "any exercise of inherent power to grant a stay … would require a showing of extraordinary circumstances." Opp. Brief at 17. That is misleading and incorrect. "Under CPLR § 5519(c), 'there is no single factor in determining whether to grant a stay, the court's discretion is the guide' and 'it will be influenced by *any relevant factor*, including *the presumptive merits of the appeal* and *any exigency or hardship confronting any party*.'" *Schaffer*, 68 Misc. 3d at 834 (cleaned up) (emphases added) (citing and quoting *Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 2016 N.Y. Slip Op. 31510(U), 2016 WL 4194201 (Sup. Ct. 2016), and Richard C. Reilly, *Practice Commentaries, McKinney's Cons Laws of NY*, CPLR C:5519:4)); *see also Navy Yard Hous. Dev. Fund, Inc. v. Carr*, No. 33936/96, 2002 WL 1174711, at *2 (N.Y. Civ. Ct. May 23, 2002) (same) (quoting Siegel, *Practice Commentaries*, *McKinney's Cons Laws of NY*, Book 7B, CPLR C5519:4); Opening Brief at 10-11.

B. The Exigency and Hardship to Defendants Warrant a Stay.

First, the Court may consider "any exigency or hardship confronting any party." *Schaffer*, 68 Misc.3d at 834. Here, this factor alone justifies a stay of the judgment.

1. Posting a Full Undertaking Is a Practical Impossibility.

In the Opening Brief, when their efforts to obtain such a bond were still ongoing, Defendants stated their expectation that it would be "impossible to secure and post a complete bond." Opening Brief at 15, 25. Diligent efforts since that time, including "countless hours negotiating with one of the largest insurance companies in the world," have proven that "obtaining an appeal bond in the full amount" of the Judgment "is not possible under the circumstances presented." Giuletti Aff. ¶¶ 3, 9-10. The amount of the judgment, with interest, exceeds $464 million, and very few bonding companies will consider a bond of anything approaching that

magnitude. *Id.* ¶ 12. The remaining handful will not "accept hard assets such as real estate as collateral," but "will only accept cash or cash equivalents (such as marketable securities)." *Id.* ¶ 13. Moreover, sureties would typically "require collateral of approximately 120% of the amount of the judgment," which "would require Defendants to hand over collateral in the form of cash or cash equivalents of approximately" $557 million. *Id.* ¶ 19. In addition, sureties would likely charge bond premiums of approximately 2 percent per year with two years in advance—an up-front cost over $18 million. *Id.* ¶ 20.

In short, "a bond of this size is rarely, if ever, seen. In the unusual circumstance that a bond of this size is issued, it is provided to the largest public companies in the world, not to individuals or privately held businesses." *Id.* ¶ 16. The actual amount of cash or cash equivalents required "to collateralize the bond and have sufficient capital to run the business and satisfy its other obligations" "approach[es] $1 billion." *Id.* ¶ 17. As a result, "obtaining a bond for $464 million is a practical impossibility." *Id.* ¶ 18.

The Attorney General claims that Defendants "fail to provide information about what steps (if any) they have taken to secure an undertaking." Opp. Brief at 18. In fact, those efforts were ongoing when Defendants' stay motion was filed, and they have since confirmed Defendants' expectation that a full undertaking is a "practical impossibility." Giuletti Aff. ¶ 18. The Attorney General speculates, without evidence and revealing her misunderstanding of basic business practices, that sureties might accept "an irrevocable letter of credit" as collateral. Opp. Brief at 18. But any such ILOC "would still typically have to be fully backed by cash or cash equivalents." Guiletti Aff. ¶ 15. Obtaining such cash through a "fire sale" of real estate holdings would inevitably result in massive, irrecoverable losses—textbook irreparable injury.

The practical impossibility of obtaining a bond interferes with Defendants' right to appeal and threatens this Court's appellate jurisdiction. *Schaffer*, 68 Misc.3d at 834. For this reason, courts routinely waive or reduce bond requirements when securing the bond is not "practicable." *Fed. Prescription Serv.*, 636 F.2d at 760. *See, e.g., Cayuga Indian Nation of New York v. Pataki*, 188 F. Supp. 2d 223, 256 (N.D.N.Y. 2002) (waiving the bond requirement for a $247 million judgment where "it would be almost impossible to find a bonding agency willing and able to secure a judgment of this size," and "the posting of a supersedeas bond here would be far from practicable") (cleaned up); *TWA, Inc. v. Hughes*, 515 F.2d 173, 175 (2d Cir. 1975) (granting a substantial reduction of the bond amount where, "[b]ecause of the unprecedented size of the judgment, the obtaining of a supersedeas bond was impracticable"); *Int'l Distribution Centers*, 62 B.R. at 732 (finding that defendants were not "likely to be capable of posting a bond in the full amount of the approximately $38 million judgment," and reducing the bond requirement for each to $10,000); *C. Albert Sauter Co. v. Richard S. Sauter Co*., 368 F. Supp. 501, 520-21 (E.D. Pa. 1973) (allowing $100,000 bond on $1.5 million judgment).

Other features of the Judgment, moreover, threaten to dramatically compound these punitive financial hardships. *See* Opening Brief, Point II. The provisions preventing the individual Defendants from serving as officer and directors of businesses that they have successfully helmed for decades, and preventing them from seeking loans from any bank registered in New York—which encompasses most nationwide lending institutions—radically interfere with Defendants' ability to continue to conduct profit-making activities during the pendency of appeal. *See id*.

2. A Stay Will Impose No Cognizable Hardship on Plaintiff.

By contrast, there is no significant exigency or hardship to Plaintiff. First, there are no victims, as there were no damages and no financial losses. Second, Defendants' real estate

holdings—including iconic properties like 40 Wall Street, Doral Miami, and Mar-a-Lago, *see* Garten Aff. ¶ 10—greatly exceed the amount of the judgment. Such assets are impossible to secrete or dispose of surreptitiously, leaving the plaintiff effectively secured during the pendency of an appeal. *Cf. Klingenberg v. Vulcan Ladder USA, LLC*, No. 15-CV-4012-KEM, 2017 WL 4836313, at *2 (N.D. Iowa Oct. 25, 2017). The Attorney General speculates that Defendants might try to "evade enforcement of the judgment," Opp. Brief at 20, but she does not explain how Defendants might surreptitiously conceal or sell off some of the world's most famous real estate holdings before the appeal is final. *See* Opening Brief at 11-14.

C. The Court Should Maintain the Interim Stay as to Non-Monetary Relief.

The interim stay extends to the injunction against the individual Defendants "from serving in the financial control function of any New York corporation or similar business entity registered and/or licensed in New York State, and/or serving as an officer or director of any New York corporation or other legal entity in New York," and "which enjoined certain individual and corporate defendants from applying for loans from any financial institution chartered by or registered with the New York State Department of Financial Services for three (3) years." Interim Stay Order (NYSCEF No. 6) ("Stay Order") at 2. The Court should maintain these aspects of the stay pending appeal.

The Attorney General barely addresses these aspects of the interim stay. *See* Opp. Brief at 23. Her cursory argument has no merit. The Attorney General contends that "Defendants' financial interests" are supposedly outweighed by the need to protect the public interest." *Id.* But the only authority she cites is a case involving *attorney disbarment*, which is far afield from Executive Law § 63(12) *See id.* (citing *Matter of Seiffert*, 65 N.Y.2d 278, 280-81 (1985)). It is vital to be clear that Executive Law § 63(12) is inapplicable to the facts of this case in the first

place, under both the U.S. and the New York State Constitutions, and was wrongfully relied upon by both the Attorney General and Supreme Court, an issue that will be expanded on at length in the merits briefing of the Defendants' appeal. As explained in Defendants' opening brief, Opening Brief at 38, the stayed provisions of the injunction exceed Supreme Court's statutory authority under Executive Law § 63(12). That statute authorizes the court to enjoin only *unlawful* conduct—not lawful, productive business practices. Section 63(12) provides: "Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate *persistent fraud* or *illegality in the carrying on*, *conducting or transaction of business*, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order *enjoining the continuance of such business activity or of any fraudulent or illegal acts*…." N.Y. Exec. Law § 63(12). Under the statute's plain language, the "such business activity" that courts may enjoin is business activity pervaded by "persistent fraud or illegality," *id.*—not ordinary, lawful business activity such as running profitable companies and taking out loans. "In every case where a court has granted a permanent injunction pursuant to Executive Law § 63(12), courts have limited the relief to only enjoining the specific activity from which the fraud arose." Opening Brief at 39 (citing cases). The Attorney General has no answer to this point, and in fact, she does not cite any cases involving § 63(12). *See* Opp. Brief at 23.

D. The Disgorgement Award Will Not Survive Appellate Review.

In deciding whether to stay execution, the Court may also consider "the presumptive merits of the appeal." *Schaffer*, 68 Misc. 3d at 834. Here, like the other provisions of the Judgment for which Defendants seek a stay, the disgorgement award will not survive appellate review.

1. The Judgment Contradicts This Court's Statute-of-Limitations Ruling.

First, Supreme Court's judgment clearly failed to comply with this Court's June 2023 ruling on the statute of limitations. As this Court held, "[a]pplying the proper statute of limitations and the appropriate tolling, claims are time barred if they accrued—that is, the transactions were completed—before February 6, 2016." *Trump*, 217 A.D.3d at 611–12 (citing *Boesky v. Levine*, 193 A.D.3d 403, 405 (1st Dep't 2021), and *Rogal v. Wechsler*, 135 A.D.2d 384, 385 (1st Dep't 1987)). "For defendants bound by the tolling agreement, claims are untimely if they accrued before July 13, 2014." *Id.* Critically, this Court held that *"[t]he continuing wrong doctrine does not delay or extend these periods.*" *Id.* (emphasis added) (citing *CWCapital Cobalt VR Ltd. V. CWCapital Invs. LLC*, 195 A.D.3d 12, 19-20 (1st Dep't 2021), and *Henry v. Bank of Am*., 147 A.D.3d 599, 601-602 (1st Dep't 2017)).

The Attorney General wrongfully argues that new "transactions were completed," Opp. Brief at 31, every time Defendants submitted an annual statement relating to *long-completed* loan transactions. This argument directly and disrespectfully contradicts this Court's June 2023 ruling. First, as *Boesky* makes clear, such ongoing communications that relate to a prior completed transaction do not toll the statute of limitations for alleged fraud. In *Boesky*, this Court held that a fraud claim against an attorney relating to the erection of a tax shelter was time-barred, notwithstanding the fact that the defendant maintained an ongoing representation and series of communications with the plaintiff relating to the same tax shelter that extended into the limitations period. *Boeksy*, 193 A.D.3d at 405. The Attorney General dismisses *Boesky* as a supposedly "inapposite common-law fraud case" that "did not address § 63(12) or its statute of limitations." Opp. Brief at 33. This argument is astonishing, given that *this Court* cited *Boesky* as its lead authority in holding that "claims are time barred if they accrued—that is, the transactions were

completed—before February 6, 2016." *Trump*, 217 A.D.3d at 611–12 (citing *Boesky*, 193 A.D.3d at 405). The principal case cited by this Court in its statute-of-limitations ruling is not "inapposite," Opp. Brief at 33—it is binding.

The Attorney General's argument also contradicts this Court's holding that "[t]he continuing wrong doctrine does not delay or extend these periods." *Trump*, 217 A.D.3d at 612 (citing *CWCapital*, 195 A.D.3d at 19-20). *CWCapital* describes the "continuing wrong doctrine" as applying to a course of conduct where "defendants' activities amounted to a series of wrongs, each of which gave rise to its own limitations period." *Id.* at 16. Under the doctrine, "a new claim, with a new limitations period, … accrue[s]" each time the defendant engages in a new action within the challenged course of conduct. *Id.* at 18. Under the "continuing wrong doctrine," each act in the series constitutes "a distinct violation" subject to its own limitations period. *Id.* at 18-19.

Like Supreme Court's judgment, the Attorney General's argument merely reasserts the continuing wrong doctrine expounded in *CWCapital* and rejected by this Court in its ruling in this case. *See* Opp. Brief at 31. The Attorney General contends that new "transactions were completed" every time Defendants "submitted new [allegedly] fraudulent and illegal statements after July 2014 if the Statements were submitted in connection with a loan initiated prior to July 2014." *Id.* The Attorney General contends that "defendants' activities amounted to a series of wrongs, each of which gave rise to its own limitations period." *CWCapital*, 195 A.D.3d at 16. She incorrectly argues that "a new claim, with a new limitations period, … accrued" for each new statement. *Id.* at 18. She contends that each act in the series constituted "a distinct violation" that re-starts the limitations period. *Id.* at 18-19; *compare* Opp. Brief at 31-32. This is a straightforward assertion of the continuing wrong doctrine, which this Court ruled does not apply in this case.

The other case that this Court cited in its ruling, *Henry v. Bank of America*, makes this conclusion equally clear. *Henry* describes the "continuing wrong doctrine" as applicable "where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act." 147 A.D.3d at 601. Again, that is exactly what the Attorney General wrongfully contends—that the subsequent statements relating to the pre-July 2014 loans and insurance policies constitute "a series of continuing wrongs." *Id.* *Henry* emphasizes that the continuing wrong doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs." *Id.* Again, that is what the Attorney General contends—that the subsequent statements constituted "continuing unlawful acts" and "a series of independent, distinct wrongs." *Id.*; *compare* Opp. Brief at 31-33.

By holding that the continuing wrong doctrine does *not* apply here, this Court has already considered and rejected the Attorney General's position. The Court held, correctly, that "plaintiff asserts a single breach" to which the subsequent statements were merely ancillary, and thus "the continuing wrong doctrine does not apply." *Henry*, 147 A.D.3d at 601-02.

The Attorney General's argument, therefore, is directly foreclosed by this Court's previous ruling, which held that "[t]he continuing wrong doctrine ***does not delay or extend these periods***." *Trump*, 217 A.D.3d at 612 (emphasis added). This Court's holding on the statute of limitations is the law of the case, which "bind[s] a trial court (and subsequent appellate courts of coordinate jurisdiction) to follow the mandate of an appellate court...." *Matter of Part 60 RMBS Put-Back Litig.*, 195 A.D.3d 40, 48 (1st Dep't 2021); *see also, e.g., Applehole v. Wyeth Ayerst Labs.*, 213

A.D.3d 611, 611 (1st Dep't 2023). "[T]here is no discretion involved; the lower court must apply the rule laid down by the appellate court." *People v. Evans*, 94 N.Y.2d 499, 503 (2000).[2]

The proper application of this Court's previous ruling forecloses over 75 percent of the judgment. Under that ruling, the only timely claims are those with respect to the Old Post Office Loan and 40 Wall Loan, and only for Defendants bound by the tolling agreement. All claims based on the following transactions are time barred:

- The Trump Doral loan closed on June 11, 2012, with a loan to Trump Endeavor 12 LLC. *See* Affirmation of Clifford S. Robert in Further Support of Stay Pending Appeal ("Robert Reply Aff.") Ex. CC, ¶ 115.
- The Ferry Point contract was awarded on February 21, 2012. *See* Robert Reply Aff. Ex. DD.
- The loan for 401 North Wabash Venture LLC closed on November 9, 2012. *See* Robert Reply Aff. Ex. CC, ¶ 131.
- Trump Old Post Office LLC was ultimately selected by the GSA in 2012 to redevelop the OPO property and signed a lease for that purpose on August 5, 2013. *Id.* ¶ 146.

As set forth in Appellants' demonstrative exhibit, Robert Urgency Aff. Ex. X, this error alone accounts for about $351 million of the overall award, since correctly applying the statute of limitations eliminates any damages associated with the Old Post Office Award, Ferry Point, the Doral Loan, and the Chicago Loan, eliminating $285 million in damages before pre-judgment interest, and $351 million including pre-judgment interest. *See id.*

[2] For the same reasons, the Attorney General's lengthy argument that the continuing wrong doctrine *should* apply here—*see* Opp. Brief at 31-33—is beside the point. *See, e.g.,* Opp. Brief at 32 (arguing that "[t]his Court has … reinstated § 63(12) claims as timely where OAG brought the claims based on misrepresentations that occurred during a limitations period that started prior to the limitations period"). The Attorney General *admits* that the subsequent statements on which she relies all relate directly to loan and insurance transactions completed before the limitations period, and thus they fall in the heartland of the continuing wrong doctrine, which has been rejected by this Court in this case. Opp. Brief at 33.

2. Disgorgement Requires a Showing of Causation.

There is no evidence, and no finding by Supreme Court, that the relevant lenders and insurers would not have given Defendants loans and policies on the same terms in the absence of the supposed "misrepresentations." Opening Brief at 30. The Attorney General argues that this glaring omission in the trial record makes no difference, because "[a]ctual reliance on the misrepresentations is not required under § 63(12) to establish fraud," Opp. Brief at 26, and she "does not need to demonstrate direct losses to victims," Opp. Brief at 27. This argument overlooks a basic principle of the law of disgorgement—the element of causation.

Disgorgement requires a showing of *causation* between the alleged misconduct and supposedly ill-gotten gains, neither of which exists here. Opening Brief at 30. "[T]he disgorged amount must be '*causally connected to the violation*.'" *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) (emphasis added) (quoting *SEC v. First Jersey Sec., Inc*., 101 F.3d 1450, 1475 (2d Cir. 1996)). "The amount of disgorgement ordered" must "be a reasonable approximation of profits causally connected to the violation." *First Jersey Securities*, 101 F.3d at 1475; *see also SEC v. First City Fin. Corp*., 890 F.2d 1215, 1231 (D.C. Cir. 1989); *SEC v. Patel*, 61 F.3d 137, 139 (2d Cir. 1995). Thus, "disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum [constitutes] a penalty assessment." *SEC v. Blatt*, 583 F.2d 1325, 1336 (5th Cir. 1978); *see also, e.g.*, *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2007) (same); *SEC v. MacDonald*, 699 F.2d 47, 54 (1st Cir. 1983) (same); *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993) (reversing so-called "disgorgement" exceeding actual gain from fraud); *Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 734 F. Supp. 1071, 1076 (S.D.N.Y. 1990). Disgorgement must be based on a showing of "gain causation"—*i.e.*, proof that the amount to be

disgorged was *caused* by the (alleged) wrongdoing. *See, e.g.*, *SEC v. Razmilovic*, 822 F. Supp. 2d 234, 260 n.22 (E.D.N.Y. 2011) (government is "required to prove a causal connection between the fraud and [defendant's] ill-gotten gains for the purposes of disgorgement ... or, in essence, gain causation"); *SEC v. Huff*, 758 F. Supp. 2d 1288, 1355 (S.D. Fla. 2010) (disgorgement requires showing of "gain causation"); *see also SEC v. Global Express Capital Real Estate Inv. Fund*, 289 F. App'x 183, 190 (9th Cir. 2008) (disgorgement order must be limited to "the profits causally connected to the violation").

The Attorney General incorrectly argues that "reliance … is not required" to demonstrate a violation of Executive Law § 63(12). Opp. Brief at 26. Even if reliance is not required to show a *violation*, which it is, causation is required to justify the particular *remedy* of disgorgement—*i.e.*, evidence that the alleged misrepresentations *actually induced the banks and insurers to agree to less favorable terms*. Here, there is no evidence of that critical point. Indeed, not one witness testified that any bank or insurer would have altered the terms or pricing of any loan or policy due to any alleged misrepresentation in the SFCs. On the contrary, every witness agreed that their business decisions were based on their own analysis, thus defeating any showing of causation.

With respect to Deutsche Bank, Nicholas Haigh, head of risk management for the Americas Private Wealth Management business, testified that all decisions were made based on the bank's own internal analysis. *See* Robert Urgency Aff. Ex. Q, ¶¶ 31-74, citing PX-290; PX-291; PX-293; PX-294; PX-298; PX-300; PX302; PX-2960; PX-3137 (Robert Reply Aff. Exs. MM-UU). For example, for the Doral loan, Mr. Haigh testified that President Trump's financial strength was assessed on the basis of Deutsche Bank's own adjusted values, not the guarantor's self-reported estimates, especially as to liquidity and net worth. *See* Robert Urgency Aff. Ex. Q, ¶ 39. David Williams, a current Deutsche Bank employee, similarly testified that an individual's reported net

worth is largely subjective or subject to the use of estimates and in underwriting a loan, the bank would make adjustments to client-reported numbers to account for this subjectivity. *Id.* ¶ 77, 80.

Likewise, Jack Weisselberg of Ladder Capital also testified that net worth was not a key factor in refinancing the 40 Wall Street loan. *Id.* ¶ 124. He testified that, while the stated net worth on the SFC was something that Ladder Capital "would look at in the underwriting process," it was not a "key factor" in the ultimate underwriting decision. Robert Reply Aff. Ex. BB, 1877:11-24. Rather, liquidity played a primary role over the importance of certain contingent liabilities. *See id.* 1877:11-18.

Similarly, David Cerron of the New York City Parks Department stated that the License Agreement did not require that President Trump submit his SFCs to the Parks Department, and he personally never reviewed the SFC in connection with the Ferry Point agreements. *See* Robert Urgency Aff. Ex. Q, ¶¶ 141-142. The Parks Department did not rely on President Trump's Statements of Financial Condition. First, in the award criteria for the concession, the financial capability of the offeror was weighted the lowest—it was only 10% of the selection criteria. *See* Robert Reply Aff. Exs. BB, 2819:2-23 and VV, PX-3290 (Request for Offers). Second, during the term of the license, the Parks Department never received any of President Trump's Statements of Financial Condition, which itself takes the Ferry Point agreements out of this case completely. See Robert Reply Aff. Ex. BB, 2844:15-21. Under the Guaranty Agreement, President Trump was required to submit No Material Adverse Change Letters ("No MAC Letters") which were to "reaffirm the initial financial statements that were shared with the city during the award process were in material respects the same." *Id.* 2804:20-2805:7. Mr. Cerron admitted that when he reviewed the No MAC Letters, he "was *not* reviewing them to determine whether President Trump had the financial capability to perform the contract." *Id.* 2844:22-25 (emphasis added). The

determination of whether someone has the financial capability to perform under the contract is made during the award process (which concluded in February of 2012). *Id.* 2845:1-13; Robert Reply Aff. Exs. EE, PX-3291; DD, DX-981. The *sole* remedy for failure to submit No MAC Letters under the Guaranty was to increase the security deposit to a maximum of $470,000. *See* Robert Reply Aff. Ex. BB, 2832:18-21.

In sum, no witness ever stated that any business decision would have changed, given additional information about the SFCs. Accordingly, the alleged misstatements are not "causally connected to" the supposedly ill-gotten gains, *J.P. Morgan Securities*, 91 A.D.3d at 232-33; *First Jersey Securities*, 101 F.3d at 1475, and disgorgement is unavailable as a remedy. The Attorney General has no answer to this fundamental point. Nowhere does she cite any evidence that the SFCs *caused* the banks or insurers to enter into any transactions that they would not otherwise have entered into—especially not when confronted with ironclad disclaimers.

3. Supreme Court's Valuation of Mar-a-Lago Is Indefensible.

In its summary judgment order, Supreme Court relied on a *tax assessment* to value Mar-a-Lago at "between $18 million and $27.6 million," and thus accused Defendants of "an overvaluation of *at least 2,300%*, compared with the [tax] assessor's appraisal." Robert Urgency Aff. Ex. L at 26 (italics in original). This reliance on a tax assessment "is based on a misunderstanding of basic real estate practice," and the Palm Beach County Appraiser's Office confirmed that its assessment does "not [reflect] the market value."[3] The chief property appraiser for Palm Beach County stated that its assessments were "for tax purposes only and not for

[3] *See, e.g.,* A.R. Hoffman, *Error in New York's Civil Fraud Case Against Trump Is Flagged by Industry Insiders, Who Say Valuation of Mar-a-Lago Cited by Judge Is Based on a Misunderstanding of Basic Real Estate Practice*, N.Y. SUN (Oct. 2, 2023) (quoting an expert saying that "any real estate professional would say that market value and county appraisal are not the same thing," and real estate professionals "don't even look at county appraisal data").

financing or … for a lending institution."[4] Yet in its post-trial decision and order, Supreme Court doubled down on this erroneous determination, holding that Defendants overvalued Mar-a-Lago by "possibly a billion dollars or more." Robert Urgency Aff. Ex. R at 77. This holding is indefensible.

Supreme Court disregarded unrebutted evidence that Mar-a-Lago's market value was higher than the price listed on the supporting data to the SFC every year from 2011-2021. *See* Robert Reply Aff. Ex. BB, 6121:11-6126:9. Trial evidence established that Mar-A-Lago could have sold for $705 million in 2011 to $1.215 billion in 2021 (including membership sales), which greatly exceeds the values listed in the supporting data to the SFCs—which ranged from $347,761,431 to $739,452,519. *See id.*, 6121:11-6126:9; Robert Reply Aff. Exs. WW-GGG, PX-708, PX-719, PX-731, PX-742, PX-758, PX-774, PX-788, PX-793, PX-843, PX-857, PX-1501. Supreme Court also did not consider that Mar-A-Lago is a property in a league of its own because of its history, architecture, finishes, characteristics, as well as the prime and unique location in Palm Beach spanning from the lake, the intracoastal waterway, to the Atlantic Ocean, *see* Robert Reply Aff. Ex. BB, 6111:10-14. *See id.*, 6106:18-6108:9, 6116:4-12, 6133:5-13, 6134:7-6135:1, 6135:21-6136:10, 6140:10-17.[5]

Supreme Court and the Attorney General contend that Mar-a-Lago should not have been valued as a private residence, but only as a club. *See* Robert Urgency Aff. Ex. R at 66-67, 78; Opp.

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[4] Aleks Phillips, *How Much Is Mar-a-Lago Worth? Valuation of Trump Property Raises Questions*, NEWSWEEK (Sept. 23, 2023).

[5] Supreme Court's failure to grasp Mar-a-Lago's unique value reflects a broader trend in the court's analysis of failing to understand the economic realities of real estate business. For example, Supreme Court persistently assumed that such businesspeople have an incentive to overstate their net worth to obtain more favorable credit. This overlooks that overstatements can result in adverse estate tax consequences that could easily outweigh any such advantages. The Commercial Division would likely not have made these clear errors.

Brief at 5, 25. That is their *sole* basis for arguing that Mar-a-Lago was overvalued. *See id.* This holding is hard to square with the fact that President Trump is *currently using Mar-a-Lago as his permanent private residence*, and has been doing so for years. In any event, the Attorney General disregards unrebutted evidence that no prohibition exists on Mar-A-Lago being used and valued as a single-family residence, or the fact that its use as a club adds to its value. *See* Robert Reply Aff. Exs. FF-LL, DX-478, DX-359, DX-360, PX-1013, DX-427, DX-429, DX-484. As explained by a preeminent Florida land use lawyer, when read together as they must be, the Deed of Conservation and Presentation Easement to the National Trust for Historic Preservation, dated March 26, 1995, the Deed of Development Rights, recorded on October 17, 2002, the Rules of The Mar-A-Lago Club, the Town of Palm Beach's zoning code, and the Town of Palm Beach's decision to allow President Trump to actually use Mar-A-Lago as a residence, all support the unrebutted conclusion that no prohibition exists on Mar-A-Lago being used and valued as a private residence.[6] *See id.* Ex. BB, 6060:24-6061:3, 6061:16-21; 6062:14-24; 6066:12-17; 6068:7-13; 6068:14-10; 6075:10-6076:20; 6077:2-11; 6078:4-6082:8; 6083:6-19 and Exs. HH, JJ-KK, FF, LL, DX-360, DX-427, DX-429, DX-478; DX-484; *see also* Robert Urgency Aff. Ex. Q, ¶¶ 570-572, *citing* DX.478, DX-359, DX-360, PX-1013, DX-427, DX-429, DX-484 (Robert Reply Aff. Exs. FF-LL).

4. Supreme Court Triple-Counted Damages on the Old Post Office Sale.

In 2012, the U.S. General Services Administration ("GSA") awarded the Trump Old Post Office, LLC ("OPO"), a contract to redevelop the Old Post Office property. *See* Robert Urgency Aff. Ex. Q, ¶ 6. On August 12, 2014, OPO closed on a loan with Deutsche Bank in connection with the Old Post Office. ("OPO Loan"). *See id.*, ¶ 8. On May 11, 2022, nearly ten years after the

[6] Supreme Court excluded this expert's opinion as an inadmissible legal opinion, but then failed to explain how his legal analysis was incorrect.

original loan, President Trump sold the redeveloped Old Post Office for $375 million and used $170 million of those proceeds to repay the Deutsche Bank loan. *See* Robert Reply Aff. Ex. III, ¶¶ 570-571. Supreme Court awarded disgorgement of the "profits" from the Old Post Office in the total amount of nearly $220 million. *See* Robert Urgency Aff. Ex. R at 83. This award reflects three elementary errors.

a. Supreme Court conflates proceeds with profits from sale.

First, with respect to the Old Post Office sale, Supreme Court conflated the *proceeds* of the sale with actual *profits* from the transaction. Supreme Court held that certain Defendants "are jointly and severally liable, in the amount of $126,828,600, for the ill-gotten ***profits*** Donald Trump netted from the sale of the Old Post Office." *Id.* at 83. However, the testimony and exhibit the Attorney General cited make clear that that figure was the amount of *proceeds* from the transaction. *See* Robert Urgency Aff. Ex. P, ¶ 221, *citing* 3626:1-24 and PX-1373 (Robert Reply Aff. Exs. BB, HHH). That figure is the sale *proceeds* distributed to President Trump and his children after repaying the mortgage and other associated costs, not the profit. To calculate *profits* from a sale, one must deduct *equity* from the proceeds of the sale, *i.e.*, the value of the seller's cumulative investment in the property prior to the sale. Neither Supreme Court nor the Attorney General bothered to do so—nor presented any evidence of that figure. Thus, Supreme Court's conclusion that the nearly $135 million proceeds of the Old Post Office sale constituted "net profits received on its sale" overstates the amount of disgorgement by at least tens of millions of dollars.

b. Supreme Court double-counts disgorgement from OPO sale.

Second, Supreme Court punished Defendants for entering into the Old Post Office loan by awarding disgorgement in the sum of *both* (1) their purported interest-rate savings in obtaining that loan and (2) their alleged "profits" from the sale of Old Post Office. *See* Robert Urgency Aff.

Ex. A. This is manifest double-counting. If Appellants improperly "gained" interest-rate savings, which they did not, then the amount of the interest-rate differential alone would serve to make any purportedly aggrieved party whole. To also order disgorgement of "profits" for the sale of the same property, *in addition to* alleged interest-differential "gains," is duplicative, and thus purely, wrongfully punitive. The Attorney General is "not entitled to punitive damages or treble damages, or both, from respondent," as "Executive Law Section 63(12) does not provide for either of these extraordinary remedies and petitioner is limited to obtaining restitution or compensatory damages" alongside an injunction. *See State by Abrams v. Solil Mgt. Corp.*, 128 Misc. 2d 767, 773 (Sup. Ct. N.Y. Cty. 1985), *aff'd*, 114 A.D.2d 1057 (1st Dep't 1985); *see also State by Lefkowitz v. Hotel Waldorf-Astoria Corp.*, 67 Misc. 2d 90, 92 (Sup. Ct. N.Y. Cty. 1971). Any award of disgorgement in excess of actual damages caused by Appellants' alleged misconduct is impermissibly punitive. *See People ex rel. Spitzer v. Direct Revenue, LLC*, 19 Misc. 3d 1124(A) at *7-8 (Sup. Ct. N.Y. Cty. 2008) (finding disgorgement only available "in an amount related to the actual damages caused by the misconduct," since "[d]isgorgement of respondents' profits to the state would effectively constitute punitive damages not authorized by statute.").

c. Courts do not disgorge income derived from ill-gotten proceeds.

Third, even in cases where disgorgement of the proceeds of fraud is applied, as it is not here, "a court cannot order disgorgement of *income derived from the ill-gotten proceeds*." *SEC v. Govil*, 86 F.4th 89, 107 (2d Cir. 2023) (emphasis added); *SEC v. Hallam*, 42 F.4th 316, 329 (5th Cir. 2022) ("disgorgement could not include 'income earned on ill-gotten profits'"); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) (holding that the lower "court erred in ordering appellants to [disgorge] profits and income *earned on such proceeds*"). Here, included in the $464 million judgment, was approximately $186 million, plus interest, representing profits

Supreme Court found Defendants to have made from the sale of the Old Post Office and Ferry Point. *See* Robert Urgency Aff. Ex. R at 83-84. Thus, Supreme Court ordered Defendants not merely to disgorge allegedly ill-gotten gains from more favorable loan terms, but also to disgorge profits and income earned on the loan proceeds. This was improper. "[O]rdering the disgorging of profits and income earned on the proceeds is in fact a penalty assessment," not disgorgement. *Manor Nursing Centers,* 458 F.2d at 1104.

5. The Award Is Grossly Disproportionate and Unconstitutional.

Both the United States and New York Constitutions prohibit "excessive fines." U.S. CONST. Amend. VIII; N.Y. CONST. Art. I, § 5; *see* Opening Brief at 29-33. A fine is constitutionally excessive if it is "grossly disproportional to the gravity of [the defendant's] offense." *United States v. Bajakajian,* 524 U.S. 321, 324 (1998); *County of Nassau v. Canavan***,** 1 N.Y.3d 134, 140 (2003).

Supreme Court's disgorgement award clearly qualifies as a "fine." The Excessive Fines Clause applies to all "payments, whether in cash or in kind," ordered to be paid to the state, including in "civil proceeding," if the payment is a "penalty" or assessed "in part" for a "punitive" purpose such as "deterrence." *Austin v. United States*, 509 U.S. 602, 609-610 (1993); *see Canavan*, 1 N.Y.3d at 139-40 (quoting *Austin*); *United States v. Viloski*, 814 F.3d 104, 108-09 (2d Cir. 2016). Here, Supreme Court explicitly stated that disgorgement under Exec. Law § 63(12) was intended "to deter wrongdoing." Robert Urgency Aff. Ex. R at 81 (quoting *People v. Ernst & Young, LLP*, 114 A.D.3d 569 (1st Dep't 2014)). Indeed, Supreme Court went so far as to erroneously state that *Ernst & Young* authorized disgorgement as a "penalty." *Id.* at 82. Moreover, in *Kokesh v. SEC*, 581 U.S. 455 (2017), the U.S. Supreme Court held that "disgorgement is imposed for punitive purposes" and that whenever "an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Id.* at 463–

64; *see also SEC v. Metter*, 706 F. App'x 699, 703 (2d Cir. 2017) (assuming that "in light of the Supreme Court's recent decision in *Kokesh* . . . disgorgement [is] essentially punitive in nature and thus [is] a fine within the meaning of the Excessive Fines Clause of the Eighth Amendment").

The $464 million penalty is also "grossly disproportional." To determine whether an ordered payment is "grossly disproportionate to the gravity of the offense," both this Court and federal courts consider (1) the "essence" and "seriousness" of the (alleged) offense; (2) the "maximum . . . fine that could have been imposed" under penal statutes prohibiting the conduct at issue; and (3) the "severity of the harm" caused by the defendant's conduct. *Canavan*, 1 N.Y.2d at 140; *Viloski*, 814 F.3d at 110. All these factors dictate that the award is grossly disproportional.

The first factor—seriousness of the alleged offenses—overwhelmingly favors the Defendants. In its rulings on the Attorney General's Second through Seventh Causes of Action, Supreme Court identified the Penal Law provisions that Defendants allegedly violated. *See* Robert Urgency Aff. Ex. R at 77-81. Under these provisions, the offenses that Defendants supposedly committed are mere misdemeanors. *See id.* A $464 million penalty for misdemeanor offenses is, on its face, grotesquely disproportionate. Indeed, this Court has struck down a fine of only $2,000 as excessive punishment for a misdemeanor offense. *See Prince v. City of New York*, 108 A.D.3d 114 (1st Dept. 2013).

Second, the Penal Law provisions that the Attorney General incorrectly alleges that the Defendants violated authorize fines in the thousands of dollars, ranging from $1,000 for the Class A misdemeanors, to $5,000 for the Class B misdemeanors, to $10,000 for corporate offenses—though fines up to "double the amount of the defendant's gain from the commission of the offense" N.Y. Penal Law §80.05(5), or "the corporation's gain," *id.* §80.10(1)(e), are allowed. On its face, a $464 million sanction is wildly disproportional to these figures. *See Bajakajian,* 524 U.S. at

324 (forfeiture of $357,144 violated the Eighth Amendment where maximum fine for offense at issue, misreporting how much currency defendant was taking out of country, was $5,000).

The final factor—the "severity of the harm" caused by Defendants' conduct—also proves the unconstitutionality of the $464 million order, because no actual harm was ever alleged or shown here. As Supreme Court acknowledged, Defendants made full and timely payments to the multi-billion-dollar financial institutions and insurance companies that eagerly extended credit and underwrote insurance policies for Defendants. *See* Robert Urgency Aff. Ex. R at 4 ("undisputed that defendants have made all required payments on time"). Indeed, Supreme Court expressly held that no "showing or allegation of direct losses" to any party, whether "consumers or the public" or the financial institutions involved, was required here. *Id*. at 81. Without any actual harm, an astronomical $464 million forfeiture plainly violates the Excessive Fines Clause, of both the New York and federal Constitutions. *Bajakajian,* 524 U.S. at 324 (forfeiture of $357,144 violated the Eighth Amendment where harm shown was "minimal").

In addition, a "grossly excessive" damages award also "violates the Due Process Clause of the Fourteenth Amendment." *BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *see Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) ("devastatingly large" damage award "out of all reasonable proportion to the actual harm suffered" violates due process); *see also St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (states cannot impose penalties "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"). Although the U.S. Supreme Court has "decline[d] . . . to impose a bright-line ratio," it has indicated that a monetary sanction exceeding a "single digit" multiplier of actual, compensatory damages will in most cases violate Due Process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Here, no actual, compensatory damage of any kind was

shown; the "actual, compensatory damages" are $0.00. The $464 million order, far from applying a "single digit" multiplier, applies an *infinite* multiplier and is hence on its face "grossly excessive."

For closely related reasons, the Attorney General's conduct is unconstitutional because it constitutes selective prosecution of the worst sort, as her conduct during her campaign, and after her election, unequivocally proves. Opening Brief at 22-24. In her campaign for Attorney General, Ms. James called then-President Trump "an illegitimate president" and pledged to deploy the full might of her Office against him if elected.[7] In one campaign video, she described him as "illegitimate," "incompetent," "ill-equipped to serve in the highest office of the land," and someone who should "be indicted for criminal offenses" by "attorneys general across the land."[8] In another campaign video, Ms. James promised "to take on President Donald Trump."[9] In her election acceptance speech, she called President Trump someone who "stands as an affront to all that I believe in and all that this country and this state represents, and someone who we must keep in check by the long arm of the law."[10] As the Washington Post put it, "On the night of her victory, she stood in front of supporters in Brooklyn and all but declared a war against Trump."[11] The Attorney General has no convincing response to this point.

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[7] *See what New York AG said while running for office about charging Trump*, CNN.com Oct. 3, 2023, https://www.cnn.com/videos/politics/2023/10/03/letitia-james-prosecute-trump-2018-comments-running-office-cnntm-vpx.cnn.

[8] *Why Letitia James Wants to Take on Trump as NY's Attorney General*, YouTube.com (Sept. 28, 2018), https://www.youtube.com/watch?app=desktop&v=D1yj0NKSsuU.

[9] *Race to Represent 2018: Letitia James, Democratic Attorney General Candidate Statement*, YouTube.com (Aug. 27, 2018), https://www.youtube.com/watch?app=desktop&v=hsnv7-y82r4.

[10] Spectrum News NY1, *Letitia James promises to be a legal check on President Donald Trump as NY attorney general*, Facebook (Nov. 6, 2018), https://www.facebook.com/watch/?v=475134182893178.

[11] Washington Post, *New York's next attorney general targeted slumlords. Now she's going after Trump*, Dec. 19, 2018, https://www.washingtonpost.com/politics/2018/12/19/new-yorks-next-attorney-general-targeted-slumlords-now-shes-going-after-trump (emphasis added).

CONCLUSION

For the reasons stated, this Court should stay the execution of the monetary portion of the judgment without requiring the posting of an undertaking, and maintain all other aspects of the interim stay granted on February 28, 2024. If the Court considers denying a stay on any issue, Defendants respectfully request that this Court schedule this stay motion for oral argument at a time of the Court's convenience. In the event that this Court declines to grant a stay, Defendants respectfully request that the Court grant Defendants permission to appeal to the Court of Appeals and enter a temporary stay to allow them to seek relief from the Court of Appeals.[12]

[12] This Court should reject the Attorney General's alternative request for expedited briefing and hearing. Opp. Brief, Point III. She cites no authority to support this request, and it makes little sense in a case of this complexity, which involves a detailed factual record and a 40-day trial transcript. The merits of Defendants' appeals should be considered in the ordinary course and on an ordinary schedule. "'Haste makes waste' is an old adage. It has survived because it is right so often." *Kusay v. United States*, 62 F.3d 192, 195 (7th Cir. 1995).

Dated: New York, New York
March 17, 2024

Respectfully submitted,

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Dated: New York, New York
March 17, 2024

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----------X

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Plaintiff-Respondent,

-against-

DONALD J. 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,

Defendants-Appellants,

IVANKA TRUMP,

Defendant.

----------X

Appeal No.: 2024-01134, 2024-01135

Sup. Ct. New York County
Index No. 452564/2022
(Engoron, J.S.C.)

AFFIRMATION OF GARY GIULIETTI

I, GARY GIULIETTI, affirm this 15th day of March, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law:

1. I am the President of the Northeast for the Lockton Companies ("**Lockton**"), the largest privately held insurance brokerage firm in the world.

2. I have been engaged by defendants Donald J. Trump, Donald Trump, Jr., Eric Trump, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., The Trump

Organization, LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, and 40 Wall Street LLC (collectively, "**Defendants**") to assist them in obtaining a bond in connection with the above-captioned appeals.

3. Based upon my more than 50 years in the insurance industry as well as my actual experience over the past several weeks during which I have been in contact with some of the largest insurance carriers in the world in an effort to try and obtain a bond for Defendants, it is my opinion that obtaining an appeal bond for $464 million (the "**Judgment Amount**") is not possible under the circumstances presented.

Background

4. Lockton is the largest privately held insurance brokerage firm in the world with nearly 10,000 associates representing the interests of some 65,000 clients across more than 135 offices and annual revenues in excess of $3 billion.

5. Prior to joining Lockton in August of 2000, I was the Vice-Chairman of Willis, one of the largest insurance brokers in the world. At Willis, I was responsible for managing the company's real estate and construction portfolio.

6. During the course of my career, I have worked closely with virtually every major insurance company on almost every type of insurance product.

7. I also have extensive surety risk experience, having placed surety for numerous Fortune 1000 companies as well as some of the largest private-equity funds and real-estate developers in the United States. This includes multi-billion-dollar construction and development projects, such as the "Big-Dig" in Boston and the Port Authority in New York. Indeed, Lockton

has an entire department devoted to surety and underwrites thousands of bonds a year, including numerous appeal bonds.

8. As a result, I have substantial personal knowledge of and experience with the underwriting process and criteria associated with the issuance of surety bonds in a wide variety of commercial contexts.

Obtaining A Bond for $464 Million Is Impossible Under the Circumstances

9. Over the last several weeks, my team and I, along with others engaged by Defendants, have been diligently working to obtain an appeal bond for Defendants for the Judgment Amount.

10. Among other things, these efforts, which began before the judgment was issued and have continued through the date of my Affirmation, have included reaching out to virtually every major surety in the market and spending countless hours negotiating with one of the largest insurance companies in the world.

11. Despite scouring the market, we have been unsuccessful in our effort to obtain a bond for the Judgment Amount for Defendants for the simple reason that obtaining an appeal bond for $464 million is a practical impossibility under the circumstances presented.

12. As an initial matter, only a handful of sureties are approved by the U.S. Department of Treasury to underwrite bonds for a sum as high as the Judgment Amount. *See* https://fiscal.treasury.gov/surety-bonds/list-certified-companies.html. Of those sureties, many have internal policies which significantly limit the amount of a bond they will write for a single obligation; indeed, it is my understanding that they will generally only issue a single bond up to $100 million.

13. Furthermore, none of these sureties will accept hard assets such as real estate as collateral. Instead, they will only accept cash or cash equivalents (such as marketable securities). Among the companies that will not accept real estate as collateral are AXA XL, Hartford, Nationwide, Sompo, Travelers, Berkshire Hathaway, CNA Casualty, Liberty Mutual and many others.

14. This is because sureties are generally (i) not in the business and therefore not equipped to manage, control, or dispose of real property; (ii) not willing to take the risk of having to sell off real estate quickly should a claim be made under a bond; and (iii) unable to offset the risk associated with underwriting a bond collateralized by real property because reinsurers are unwilling to insure such a bond.

15. While it is possible that Defendants could provide a surety with an irrevocable letter of credit ("**ILOC**") as collateral, that ILOC would still typically have to be fully backed by cash or cash equivalents.

16. Simply put, a bond of this size is rarely, if ever, seen. In the unusual circumstance that a bond of this size is issued, it is provided to the largest public companies in the world, not to individuals or privately held businesses.

17. In the surety world, a bond of $100 million is considered large; an appeal bond of $464 million is commercially unattainable for a privately owned company. Such would be the case even for a company with billions of dollars in real estate unless they have cash or cash equivalents approaching $1 billion so as to collateralize the bond and have sufficient capital to run the business and satisfy its other obligations. While it is my understanding that the Trump Organization is in a strong liquidity position, it does not have $1 billion in cash or cash equivalents.

18. As a result, for a company such as The Trump Organization, which has most of its assets invested in real estate, obtaining a bond for $464 million is a practical impossibility.

Even if it Were Possible, the Cost of Obtaining a Bond for the Entire Judgment Amount Would Be Punitive

19. Based on my experience, most sureties also require collateral of approximately 120% of the amount of the judgment. In this case, the Judgment Amount is $464,576,430.62. As a result, even assuming there was a surety capable of writing a bond for the full Judgment Amount, that surety would require Defendants to hand over collateral in the form of cash or cash equivalents of approximately $557,491,716.

20. Further, most sureties typically charge a premium in the range of 2% per year and require that the premium for the first two years be paid up front. This means that on a $464,576,430.62 bond, the upfront premium would be approximately $18,583,057, payable immediately upon issuance of the bond. In the event that the appeal process was to take longer than two years, an additional upfront premium would be due in the same amount of $18,583,057.

21. As a result, even if it were possible to obtain a bond for the Judgment Amount (and based on my experience, it is not), the cost associated with obtaining such a bond would be so astronomical as to render it both crippling and punitive.

Conclusion

22. Over the course of my career, during which I have been directly or indirectly involved in the issuance of thousands of bonds, I have never heard of nor seen an appeal bond of this size for a private company or individual. This is why, I understand, most states cap the amount that an appellant is required to post in order to obtain an appeal bond.

23. For all of the foregoing reasons and after substantial good-faith effort over the last several weeks, obtaining an appeal bond for the Judgment Amount of over $464 million is just not possible under these circumstances.

Dated: Palm Beach Gardens, Florida
March 15, 2024

GARY GIULIETTI

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Plaintiff-Respondent,

-against-

DONALD J. 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,

Defendants-Appellants,

IVANKA TRUMP,

Defendant.

----------X

Appeal No.: 2024-01134,
2024-01135

Sup. Ct. New York County
Index No. 452564/2022
(Engoron, J.S.C.)

AFFIRMATION OF
ALAN GARTEN

ALAN GARTEN, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following statements to be true under the penalty of perjury:

1. I am General Counsel to defendants-appellants 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 and 40 Wall Street LLC ("**Defendants**").

2. I respectfully submit this Affirmation in further support of Defendants' motion requesting a discretionary stay pending appeal relieving Defendants of their obligation to secure

an appeal bond in the full amount of the judgment entered in this case by the Supreme Court on February 23, 2024 (the "**Judgment**").

3. The Judgment awards purported "disgorgement" damages, directing the Defendants to pay the unprecedented sum of $464,576,430.62. While Defendants are financially stable companies and individuals with substantial assets, given the magnitude of the award and accrued interest, Defendants' only recourse is the utilization of their vast real estate holdings to collateralize a bond for the full amount of the Judgment.

4. Defendants have devoted a substantial amount of time, money, and effort toward obtaining a bond for the Judgment. Despite the foregoing, Defendants have faced what have proven to be insurmountable difficulties in obtaining an appeal bond for the full $464 million. Critical among these challenges is not just the inability and reluctance of the vast majority of sureties to underwrite a bond for this unprecedented sum, but, even more significantly, the unwillingness of **every** surety bond provider approached by Defendants to accept real estate as collateral.

5. Defendants, through four separate brokers, including Lockton, the largest privately held insurance broker in the world, have approached more than 30 surety companies, proposing to pledge as collateral a combination of cash or cash equivalents and unencumbered real estate holdings.[1]

6. Unfortunately, we have been advised that there are only a handful of sureties in the market that have both the financial capability and willingness to underwrite a bond of this

[1] Some of the sureties contacted by Defendants' brokers include Applied Underwriters (SiriusPoint), Allianz, Amynta, Arch, Argo, Ascot, AXA XL, Berkley, Berkshire Hathaway, CAP Specialty, Chubb, Cincinnati, CNA Surety, DUAL/Axis, Everest Re, Frankenmuth, Hartford, Hudson, IAT (Harco), Intact, Liberty, Munich Re, Philadelphia Indemnity, MainStreet (NGM), Markel, Nationwide, RLI, Skyward (Great Midwest), Sompo, Swiss Re, Tokyo Marine HCC, Travelers and Zurich.

magnitude. According to Defendants' brokers, the vast majority simply do not have the financial strength to handle a bond of this size. Of those that do, the vast majority are unwilling to accept the risk associated with such a large bond.

7. Of even greater import, we are advised that *none* of the sureties approached by Defendants' brokers are willing to accept hard assets such as real estate as collateral for appeal bonds.

8. While Defendants had been actively negotiating a bond collateralized by both liquid assets and real property with Chubb, one of the largest insurance companies in the world, within the past week, Chubb notified Defendants that it could not accept real property as collateral. Though disappointing, this decision was not surprising given that Chubb was the only surety willing to even consider accepting real estate as collateral.

9. For Defendants, this presents a major obstacle.

10. Defendants' primary business is the ownership, development, and management of commercial and residential real estate. Three of the Defendants, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC and 40 Wall Street LLC, are special purpose entities whose sole assets are real estate.[2] Defendants DJT Holdings LLC and DJT Holdings Managing Member are primarily holding companies whose main assets are real estate.[3]

11. As a result, there is simply no way for Defendants to tap into the substantial equity in these properties needed to collateralize a bond for $464 million without causing irreparable harm.

[2] Defendant Trump Endeavor 12 LLC is the owner of Trump National Doral Miami, defendant 401 North Wabash Venture LLC is the owner of Trump International Hotel & Tower Chicago and defendant 40 Wall Street LLC is the owner of The Trump Building at 40 Wall Street.

[3] Defendants DJT Holdings LLC and DJT Holdings Managing Member are the owners of the Mar-a-Lago Club as well as other hotels, golf courses and other real estate.

12. Even assuming sureties were willing to accept real estate (they are not), the requirement to post a bond for the full amount of the Judgment would be extremely costly and unfairly punitive, potentially impacting Defendants' ability to sustain their business, retain employees and satisfy their other financial obligations. As shown in the accompanying Affirmation of Gary Giulietti, President of the Northeast for Lockton, most sureties typically require 120% collateral and charge a premium in the range of 2% per year with the first two years paid up front.

13. This means that on a $464 million bond, Defendants would have to post collateral in excess of $557 million. It also means that the upfront premium for the bond would be more than $18 million, payable immediately. In the event the appeal process went more than two years, I am advised that Defendants would then be obligated to pay an additional $18 million upfront premium.

14. Given these exceptional circumstances, Defendants respectfully request that the Court exercise its discretion and relieve Defendants of their obligation to secure an appeal bond in the full amount of the Judgment.

15. For more than one year prior to the Judgment, Defendants have been prohibited from disposing, transferring or otherwise conveying material assets without the approval of the Independent Monitor. The Judgment directs that the Monitor will remain in her oversight role during the pendency of the appeal.

16. Though Defendants strongly disagree with the Judgment, they have not requested a stay of that aspect of the relief. As a result, there is simply no risk that any of Defendants' material assets will be disposed, transferred, or otherwise conveyed without the approval of the Independent Monitor during the pendency of the appeal.

17. Together with a reduced bond, the Attorney General thus has more than enough certainty that the *status quo* will be maintained during the pendency of the appeal and that any judgment affirmed would be satisfied.

Dated: New York, New York
March 17, 2024

ALAN GARTEN