To Be Argued By:
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by permission of the Court
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New York County Clerk's Index No. 452564/2022

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case Nos.
2023-04925
2024-01134
2024-01135

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, SEVEN SPRINGS LLC,

Defendants-Appellants.

ROBERT & ROBERT, PLLC, CLIFFORD S. ROBERT, MICHAEL FARINA, CONTINENTAL PLLC, CHRISTOPHER M. KISE, ARMEN MORIAN, MORIAN LAW PLLC, HABBA MADAIO & ASSOCIATES, LLP, and MICHAEL MADAIO,

Non-Party Appellants.

JOINT BRIEF FOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

<u>**TABLE OF AUTHORITIES**</u>

Page(s)

<u>**Cases**</u>

Statutes and Codes

Rules and Regulations

Constitutions

Other Authorities

PRELIMINARY STATEMENT

In this case, the New York Attorney General ("NYAG") seeks to unwind and penalize complex, highly successful transactions between Appellants[1] and sophisticated Wall Street banks that left all parties deeply satisfied and had no impact on the public interest. This unauthorized, unprecedented power-grab exceeds NYAG's statutory authority under Executive Law § 63(12). It violates centuries of New York case law holding that NYAG cannot sue to vindicate alleged violations that are purely private in nature—and, in this case, do not exist at all.

Supreme Court wrongly decided this case, even though it belonged in the Commercial Division, where it would have been dismissed. Having kept the case wrongfully, the trial judge has been overruled with alarming frequency, including multiple times in this case. Most notably, Supreme Court blatantly disrespected this Court's prior ruling on the statute of limitations, refusing to adhere to that decision and barely mentioning its reasoning.

Supreme Court's erroneous decisions, if upheld, would bestow upon NYAG limitless power to target anyone she desires, including her self-described political opponents. Based on the ruling in this case, no company will want to come to New

[1] "Appellants" as used herein includes Defendants-Appellants President Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust (the "Trust"), The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC.

York to do business, and many businesses are fleeing. The economic aspects of this decision are a disaster for New York. NYAG has used the statute in a way never seen before. The statute—a consumer-fraud statute that does not allow for a jury trial—does not apply to this victimless transaction.

To be clear, there is no evidence that the representations NYAG challenges in this case influenced any business decision. On the contrary, no party ever complained or alleged any default. Every loan payment was made on time, and all the loans were repaid in full—some before they came due. Every representation made to the lenders was accompanied by clear disclaimers that lenders may reach a different result and should do their own diligence—and indeed, the lenders did just that. There were no victims and no losses. Appellants' business partners made over one hundred million dollars in profits and reaped extensive benefits from their relationship with Appellant President Donald J. Trump ("President Trump"). They raved internally about their business with him and were eager for more. If Appellants' conduct constituted "fraud" under § 63(12), then that word has no meaning, and NYAG's power to seize and destroy private businesses is boundless—and standardless.

President Trump stands among the most visionary and iconic real estate developers in American history. As trial evidence highlighted, banks and lenders vied eagerly for his business. They acknowledged his unique "vision" and unparalleled "expertise," and they recognized that dealing with him would deliver "tremendous" value.

In negotiating these transactions, Appellants provided Statements of Financial Condition that contained estimates of value for President Trump's properties, accompanied by specific disclaimers advising his counterparties to perform their own due diligence. In fact, the Statements of Financial Condition greatly *undervalued* President Trump's assets. President Trump is worth substantially *more*, not less, than the statements reported. When those assets were sold in the marketplace, the only *objective* assessment of value—their sale prices—far exceeded Appellants' estimates. The Old Post Office ("OPO"), for example, sold for about $400 million, including taxes, on May 11, 2022. A.131.[2] On President Trump's most recent statement from 2021, OPO was valued at only $130,200,000. A.40986. Likewise, the license for the Ferry Point golf course ("Ferry Point") sold for at least $60 million, but on the most recent statement provided, it was valued at just $22.5 million. A.133, 2732. Based on unrebutted expert testimony, Mar-a-Lago is worth many hundreds of millions of dollars more than its valuation on the financial statements. Further, the statements did not reflect the inherent worth of President Trump's unique brand, which has enormous intangible value worth multiple billions

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[2] Citations denoted "A." refer to the appendix. Appeal No. 2023-04925, NYSCEF Doc. Nos. 40-151.

of dollars that could have been included on the financial statements. See A.34284-34286. In short, President Trump's estimates of his net worth were very low and conservative, not high—the exact opposite of what NYAG alleges.

In every project, President Trump delivered tremendous value for his business partners. Lenders described President Trump's performance on the development of the Trump National Doral Golf Club ("Doral Miami") as "amazing" and "really impressive." The condominiums that the bank helped finance in the Trump International Hotel & Tower Chicago ("Trump Chicago") were "selling like hotcakes." President Trump's "vision" transformed the OPO from a long-abandoned "empty shell" into "the most elite hospitality establishment in Washington, D.C.," creating enormous value. The Ferry Point project languished for years, costing New York City $120 million in fruitless efforts, until President Trump undertook it and transformed it into a resounding success. Lenders described their dealings with President Trump as "sensational" and "superb" and boasted of a "long and satisfactory relationship" with the Trump family. Indeed, a huge swath of business partners are still doing business with Appellants and benefiting greatly from that relationship to this day.

Despite the foregoing, NYAG now attempts to interfere in President Trump's business and unwind these private, successful deals. In fact, NYAG campaigned on the promise that she would "get Trump" and made this promise the single greatest point of her campaign.[3] No statute authorizes this power grab, so NYAG had to invent that power by applying Executive Law § 63(12) in a way never seen before. Yet, Supreme Court unaccountably rewarded NYAG's lawless efforts at every turn. Supreme Court's decision and order entered on September 27, 2023 (the "MSJ Decision") and decision and order entered on February 16, 2024 (the "Final Decision"), as reduced to judgment entered on February 23, 2024 (the "Judgment") are rife with errors. Among others, Supreme Court—which struggled to understand basic banking concepts like a money market account—valued the iconic Mar-a-Lago Club ("Mar-a-Lago") as worth $18 to $27.6 million—50 to 100 times below its actual value. According to trial testimony, that value is between $1.1 and $1.5 billion and is now significantly higher based on current market conditions. Similarly, Supreme Court somehow ignored the fact that NYAG's star witness, convicted perjurer Michael Cohen, *admitted* on the stand that President Trump never directed him to inflate any valuations. A.29808-29809.

Supreme Court's errors also include draconian financial sanctions and multiple awards of punitive relief against President Trump's children, Donald

[3] See, e.g., See what New York AG said while running for office about charging Trump, CNN.com (Oct. 3, 2023), available at: https://www.cnn.com/videos/politics/2023/10/03/letitia-james-prosecute-trump-2018-comments-running-office-cnntm-vpx.cnn; NowThis Impact, Why Letitia James Wants to Take on Trump as NY's Attorney General, YouTube.com (Sept. 28, 2018), available at: https://www.youtube.com/watch?app=desktop&v=D1yj0NKSsuU; MNN NYC, Race to Represent 2018: Letitia James, Democratic Attorney General Candidate Statement, YouTube.com(Aug. 27, 2018), available at: https://www.youtube.com/watch?app=desktop&v=hsnv7-y82r4.

Trump, Jr. and Eric Trump, despite their lack of any direct role in preparing the challenged statements. Indeed, not one of the 40 witnesses who testified at trial stated that either Donald Trump, Jr. or Eric Trump had anything more than a peripheral knowledge or involvement in the creation, preparation, or use of any of the statements.

Supreme Court's erroneous decisions should therefore be reversed for seven reasons.

First, Supreme Court erred and violated the law of the case doctrine by not just ignoring but rejecting this Court's directive that "[t]he continuing wrong doctrine does not delay or extend" the limitations period in this case. People v. Trump, 217 A.D.3d 609, 611 (1st Dep't 2023) ("Trump I"). Just three months after this Court instructed that the continuing wrong doctrine does *not* apply, Supreme Court shockingly ignored that decision and incorrectly held that the continuing wrong doctrine *does* apply, thus artificially resuscitating long-extinguished claims.

Second, the plain text of Executive Law § 63(12) cannot reasonably, or constitutionally, be applied to the unique facts of this case. NYAG lacks authority to dismantle purely private, highly successful, complex transactions between sophisticated parties represented by elite law firms, accountants, and other service providers that implicate no public interest. Supreme Court erred and violated blackletter law by ignoring this Court's holding that the statute's prohibition of "fraudulent" conduct requires a showing of "capacity or tendency to deceive." People v. General Elec. Co., 302 A.D.2d 314, 314 (1st Dep't 2003). Here, every Statement of Financial Condition contained clear disclaimers, and every counterparty was free to perform—and did perform—its own due diligence. There is no evidence that any challenged representation had any impact on any business decision, no evidence of causation, and no victims, injuries, or losses. Supreme Court nevertheless held that *any* alleged falsity violates the statute *per se* and opens the door to destructive, punitive sanctions. This interpretation violates the statute's plain language, ignores this Court's caselaw, and raises grave constitutional problems.

Third, Supreme Court's award of $464 million in "disgorgement" penalties is baseless and must be reversed *in toto*. Disgorgement requires a showing that the alleged misconduct *caused* the supposedly ill-gotten gains, of which there were none. Here, there is no evidence that the supposed "misrepresentations" affected the terms of any agreement. On the contrary, because the representations were accompanied by clear disclaimers and the lenders performed their own diligence, overwhelming evidence supports the opposite conclusion.

Fourth, the $464 million disgorgement award is unconstitutional under the Excessive Fines and Due Process Clauses of the New York and U.S. Constitutions. The monetary award is a punitive penalty imposed for retributive and deterrent purposes. It is both grossly disproportional under the Eighth Amendment's Excessive Fines Clause and grossly excessive under the Due Process Clauses.

Fifth, the judgment on the Second through Seventh Causes of Action must be reversed because there is no plausible showing of materiality, intent to defraud, or other necessary elements of the underlying provisions of the Penal Law.

Sixth, the sweeping, intrusive award of injunctive relief must be reversed in its entirety because there is no underlying violation of § 63(12), which does not apply in this case at all, and no reasonable likelihood of continuing violations. Moreover, Supreme Court violated blackletter law by enjoining plainly *lawful* conduct.

Seventh, Supreme Court engaged in a series of erroneous valuations of President Trump's properties, including valuing Mar-a-Lago at $18 to $27.6 million, a tiny fraction of its obvious value, and these errors infected the subsequent trial.

In sum, this politically motivated prosecution attempts to penalize purely proper and lawful conduct by illegally and unconstitutionally applying § 63(12). NYAG's assertion of boundless authority to target her political opponents would render the statute unconstitutional. The Judgment below must be reversed.

QUESTIONS PRESENTED

1. Whether Supreme Court erred and violated the law of the case doctrine by granting summary judgment on claims that this Court held to be time-barred.

Answer: Yes.

2. Whether Supreme Court erred, both as a matter of statutory interpretation and constitutional avoidance, in holding that the plain language of Executive Law § 63(12) applies to the unique facts of this case.

Answer: Yes.

3. Whether Supreme Court erred in awarding $464 million in disgorgement in the absence of specific factual findings or evidence establishing causation.

Answer: Yes.

4. Whether Supreme Court's penalty of $464 million in disgorgement violates the Excessive Fines and Due Process Clauses of the New York and U.S. Constitutions.

Answer: Yes.

5. Whether Supreme Court erred in granting judgment on the Second through Seventh Causes of Action because there was no competent evidence of materiality, intent to defraud, reliance, causation, or injury.

Answer: Yes.

6. Whether Supreme Court erred in granting sweeping and intrusive injunctive relief where there was no evidence of a reasonable likelihood of a continuing violation, and the injunctive relief prohibits plainly lawful conduct.

Answer: Yes.

7. Whether Supreme Court's award of partial summary judgment for NYAG must be reversed because Supreme Court engaged in plainly erroneous valuations of President Trump's properties.

Answer: Yes.

STATEMENT OF THE CASE

A. The Complaint.

On September 21, 2022, NYAG filed a summons and complaint (the "Complaint") following a three-year investigation of Appellants' and then-Defendant Ivanka Trump's ("Ms. Trump") business practices. See A.441-662.[4] During NYAG's pre-action investigation, certain Appellants and NYAG entered into a tolling agreement (the "Tolling Agreement"), which tolled the statute of limitations from November 5, 2020, to May 31, 2022. See A.25, 12702, 19055-19058.

[4] This case met all the criteria for assignment to the Commercial Division under 22 N.Y.C.R.R. § 202.70. Appellants requested transfer to the Commercial Division, but the request was denied on the ground that this case was "related" to a special proceeding relating to NYAG's investigation—even though the rules do not provide for such treatment of "related" cases but provide that qualifying commercial cases "will be heard" in the Commercial Division. Id. § 202.70(b); see Index No. 452564/2022, NYSCEF Doc. Nos. 32, 34, 122-123.

The Complaint alleges seven causes of action. The first cause of action is a standalone cause of action under Executive Law § 63(12). See A.645-648. The Second through Seventh Causes of Action raise claims under Executive Law § 63(12) predicated upon alleged violations of the New York Penal Law. See A.649-659. The Complaint alleges that Appellants inflated the value of various assets in Statements of Financial Condition ("SFCs" or "statements") that they submitted to lenders to obtain more favorable interest rates. See A.448-459. NYAG alleges that Appellants submitted misleading statements "to induce banks to lend money to the Trump Organization on more favorable terms." A.448-449. Certain loan contracts required Appellants to submit annual statements to lenders after the transactions had closed, during the life of the loans. See A.595-625.

B. The Ruling on the Statute of Limitations and Appeal.

On November 21, 2022, Appellants and Ms. Trump filed motions to dismiss the Complaint arguing, *inter alia*, that NYAG's claims were barred by the statute of limitations because almost all transactions closed prior to the applicable limitations period. See A.26315-26510; Index No. 452564/2022, NYSCEF Doc. Nos. 224-227. In opposition, NYAG argued that the continuing wrong doctrine tolled the limitations period, based on her theory that the post-closing submission of annual financial statements constituted continuing wrongs. See A.26553-26562.

On January 6, 2023, Supreme Court denied Appellants' and Ms. Trump's motions to dismiss (the "MTD Decision"). People v. Trump, No. 452564/2022, 2023 WL 128271 (Sup. Ct. N.Y. Cty. Jan. 6, 2023). Supreme Court held that the continuing wrong doctrine applies and extends the limitations period. Id. at *4-7. In particular, Supreme Court held that the "application of the continuing wrong doctrine [is] particularly compelling in this action . . . . [T]he verified complaint sufficiently alleges Ms. Trump's participation in continuing wrongs." Id. at *6.

Appellants timely appealed. On June 27, 2023, this Court "unanimously modified, on the law," Supreme Court's decision "to dismiss, as time-barred, the claims against defendant Ivanka Trump and the claims against the remaining defendants to the extent they accrued prior to July 2014 (with respect to those defendants subject to the August 2021 tolling agreement) and February 2016 (with respect to those defendants not subject to the August 2021 tolling agreement)." Trump I, 217 A.D.3d at 610. This Court explicitly held that "[t]he continuing wrong doctrine does not delay or extend these periods." Id. at 611. The Court left Supreme Court to determine, in the first instance, which Appellants are subject to the Tolling Agreement. Id.

C. Dueling Motions for Summary Judgment.

On August 30, 2023, NYAG filed a motion for partial summary judgment as to liability on the First Cause of Action, the standalone Executive Law § 63(12) claim. See A.1811-12726. Appellants opposed NYAG's motion. See A.12727-23143. Appellants moved for summary judgment to dismiss all time-barred claims pursuant to Trump I and all remaining claims on other grounds. See A.23512-23997. NYAG opposed the motion. See A.23998-25930.

On September 26, 2023, Supreme Court granted NYAG's motion for partial summary judgment against all Appellants and denied Appellants' motion. See A.23-58. In the MSJ Decision, Supreme Court refused to dismiss any claims as time-barred, holding that all relevant transactions were timely, insofar as they "were not 'completed' while the defendants were still obligated to, and did, annually submit current SFCs to comply with the terms of the loan agreements." A.40. Supreme Court found that "any SFC that was submitted after July 13, 2014, falls within the applicable statute of limitations" and effectively revives claims relating to the underlying transaction. A.41. Supreme Court further held that it could consider evidence of time-barred claims in evaluating NYAG's request for permanent injunctive relief. See A.45, 47.

Supreme Court determined that the sole requirement for a standalone § 63(12) claim is proof of a false statement used more than once in business; according to Supreme Court, materiality, reliance, intent, and damages are not required. See A.27-30, 41-43. Supreme Court also determined that disgorgement was available as a remedy notwithstanding a lack of causation, reliance, harm, or victims. See A.30-

31. However, Supreme Court held that "the second through seventh causes of action require[d] demonstrating some component of intent and materiality," which "require[d] a trial." A.43.

D. The Bench Trial.

From October 2, 2023, to December 13, 2023, Supreme Court conducted a bench trial on liability as to the Second through Seventh Causes of Action and the availability of disgorgement and injunctive relief for all causes of action. The three-month trial consisted of testimony from 40 witnesses, including thirteen expert witnesses (two testifying for NYAG and eleven for Appellants), and hundreds of exhibits, resulting in a 6,758-page trial transcript. See A.27010-34901. Evidence from trial is discussed in detail in the Argument section infra, including Point II.B. During trial, Supreme Court repeatedly admitted evidence of time-barred claims on the theory that it could consider them in awarding injunctive relief. See, e.g., A.27110-27113, 28037-28038, 28138, 28189, 28348. During trial, Supreme Court also imposed on President Trump an unconstitutional gag order. A.27308-27309.

E. Supreme Court's Final Decision and Judgment.

On February 16, 2024, Supreme Court issued its Final Decision. See A.61-153. The Final Decision found Appellants liable on the Second through Seventh[5]

[5] Supreme Court found only Appellants Allen Weisselberg and Jeffrey McConney liable under the Sixth Cause of Action, and all Appellants liable under the Seventh Cause of Action,

Causes of Action, awarded NYAG $464,576,230.62 in disgorgement and pre-judgment interest, and imposed expansive and punitive injunctive relief, including an extension of the court-appointed monitorship, industry bans, and bars on obtaining loans in New York. See A.152-153. Supreme Court's decision was reduced to judgment on February 23, 2024. See A.157-163.

LEGAL STANDARD

These consolidated appeals require the Court to apply two different standards of review. Points I and VII below seek review of the MSJ Decision. A decision on a motion for summary judgment is reviewed *de novo*. MPEG LA, LLC v. Samsung Elecs. Co., Ltd., 166 A.D.3d 13, 17 (1st Dep't 2018); Rothouse v. Assoc. of Lake Mohegan Park Prop. Owners, Inc., 15 A.D.2d 739 (1st Dep't 1962). Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of [a material and triable issue of fact], or where the issue is arguable." Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439, 441 (1968) (quotations omitted).

Points II through VI below seek review of the Final Decision. The decision of a fact-finding court after a non-jury trial is reviewed for abuse of discretion. Thoreson v. Penthouse Intl., 179 A.D.2d 29, 31 (1st Dep't), aff'd, 80 N.Y.2d 490

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notwithstanding that NYAG's proposed findings of fact stated that "counts six and seven do not apply to [President] Trump, Eric Trump, or Donald Trump, Jr." A.152, 49163.

(1992). However, this Court may "substitute [its] own judgment where the evidence fails to support an important element of the trial court's findings." Jossel v. Filicori, 235 A.D.2d 205, 206 (1st Dep't 1997). The fact-finding court must be reversed where "the court's conclusions could not be reached under any fair interpretation of the evidence." Thoreson, 179 A.D.2d at 31.

ARGUMENT

I. Supreme Court Violated This Court's Mandate and the Law of the Case Doctrine by Granting Judgment on Time-Barred Claims.

Supreme Court's decision on the statute of limitations directly contradicts this Court's prior holding that "[t]he continuing wrong doctrine does not delay or extend" the statute of limitations periods in this case. Trump I, 217 A.D.3d at 611. Supreme Court held that each annual statement, even for transactions completed years earlier, constituted a separate wrong that extends the limitations period. That is a textbook application of the "continuing wrong doctrine"—which this Court held does *not* extend the limitations period. See id.

A. Supreme Court Was Bound to Follow This Court's Mandate.

"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law." Carmona v. Mathisson, 92 A.D.3d 492, 492-493 (1st Dep't 2012) (alterations in original and quotations omitted); see also

Applehole v. Wyeth Ayerst Labs., 213 A.D.3d 611, 611 (1st Dep't 2023); Matter of Part 60 RMBS Put-Back Litig., 195 A.D.3d 40, 48 (1st Dep't 2021); Kenney v. City of New York, 74 A.D.3d 630, 630-631 (1st Dep't 2010).

B. In Trump I, This Court Mandated that the Continuing Wrong Doctrine Does Not Delay or Extend the Limitations Period.

On appeal from Supreme Court's MTD Decision, this Court addressed the application of the statute of limitations to the conduct alleged in the Complaint. Trump I, 217 A.D.3d at 611-612. "Applying the proper statute of limitations and the appropriate tolling," this Court held that "claims are time barred if they accrued—that is, the transactions were completed—before February 6, 2016." Id. at 611. "For [Appellants] 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); Henry v. Bank of Am., 147 A.D.3d 599, 601-602 (1st Dep't 2017).

This Court's dismissal of all claims against Ms. Trump demonstrates that the Court directly rejected treating each subsequent, annual statement as a separate transaction for statute of limitations purposes. At the pleading stage, Supreme Court sustained claims against Ms. Trump based on loan transactions with Deutsche Bank Trust Company Americas ("Deutsche Bank") completed in 2011, with terms extending past 2022 that obligated Appellants to submit annual certifications. Supreme Court did so because it found that, based on the annual certifications, "the [Complaint] sufficiently alleges Ms. Trump's participation *in continuing wrongs*." Trump, 2023 WL 128271, at *6 (emphasis added). In an unequivocal rejection of that position, this Court "dismiss[ed], as time-barred," all claims against Ms. Trump because she was not subject to the Tolling Agreement and NYAG's allegations did "not support any claims that accrued after February 6, 2016." Trump I, 217 A.D.3d at 610, 612.

C. Supreme Court Disobeyed This Court's Mandate and Held That the Continuing Wrong Doctrine Extends the Limitations Period.

Just three months later, Supreme Court disobeyed this mandate and held that the continuing wrong doctrine *does* delay or extend the limitations period for all Appellants. Supreme Court held that "the transactions were not 'completed' while [Appellants] were still obligated to, and did, annually submit current SFCs to comply with the terms of the loan agreements." A.40. Supreme Court held that "each submission of an SFC after July 13, 2014, constituted a separate fraudulent act." Id. Supreme Court held that transactions completed before the statutory cut-off date could be considered because the statements constituted a "*continuous series of wrongs each of which gave rise to its own claim*." Id., citing Matter of Yin Shin Leung Charitable Found. v. Seng, 177 A.D.3d 463, 464 (1st Dep't 2019).

Treating each statement as a separate transaction in a "continuous series of wrongs," (id.), is a textbook application of the continuing wrong doctrine. This Court cited CWCapital and Henry in support of its holding that "[t]he continuing wrong doctrine does not delay or extend these periods." Trump I, 217 A.D.3d at 611, citing 195 A.D.3d at 19-20; 147 A.D.3d at 601-602. This Court in CWCapital held that the continuing wrong doctrine applies when the allegedly wrongful acts "comprise . . . a series of individual wrongs," not a single wrong with ongoing or recurring consequences, so that each new action "constitute[s] a new wrong that gave rise to a new limitations period." 195 A.D.3d at 18. Likewise, this Court in Henry held 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.'" 147 A.D.3d at 601. That is exactly what Supreme Court erroneously did. It held that the post-closure statements constituted "a series of independent, distinct wrongs." Compare id., with A.40-41 (holding that the post-transaction statements constitute a "continuous series of wrongs each of which gave rise to its own claim").

Supreme Court's citation of Yin Shin Leung confirms that the court applied the continuing wrong doctrine to extend the limitations period. A.40, quoting 177 A.D.3d at 464. In Yin Shin Leung, this Court expressly applied the continuing wrong doctrine—on the page cited by Supreme Court. 177 A.D.3d at 464 (holding that "[t]he *continuing wrong doctrine* is applicable to respondents' use of the disputed 'special account'") (emphasis added). Supreme Court, therefore, did exactly what this Court's mandate and the law of the case doctrine forbid.[6]

D. Supreme Court Compounded Its Error by Applying the Tolling Agreement to the Trust and the Individual Appellants.

Supreme Court then compounded its error by misinterpreting the Tolling Agreement. This Court "le[ft] Supreme Court to determine, if necessary, the full range of [Appellants] bound by the tolling agreement." Trump I, 217 A.D.3d at 611. Without conducting an evidentiary hearing or any inquiry whatsoever, Supreme Court simply held that *all* Appellants, including non-signatories, were bound by the Tolling Agreement. A.37-40. This was error.

The Tolling Agreement does not bind the Trust. Under New York law, only a "trustee" as the fiduciary of the trust is "authorized . . . [t]o execute and deliver agreements[,] . . . contracts . . . and any other instrument necessary or appropriate for the administration of the estate or trust." N.Y. Est. Powers & Trusts Law § 11-

[6] Even if the law of the case doctrine did not apply—which it does—this Court's statute of limitations holding was correct on the merits. This Court cited Boesky v. Levine and Rogal v. Wechsler to support its holding. Trump I, 217 A.D.3d at 611, citing 193 A.D.3d 403, 405 (1st Dep't 2021); 135 A.D.2d 384, 385 (1st Dep't 1987). Boesky instructs that a series of subsequent communications that closely relate to a prior completed transaction does not extend the statute of limitations. 193 A.D.3d at 404-406. Rogal reinforces this conclusion by holding that "[t]he fraud cause of action accrued at the time of the agreement," not "when certain misrepresentations allegedly were made" that related to the agreement. 135 A.D.2d at 385. The logic of both cases applies here.

1.1(b)(17). The trustee may only do so if authorized by law or trust agreement; otherwise, his actions are "void." Id. § 7-2.4; cf. Matter of Korn v. Korn, 206 A.D.3d 529, 530-531 (1st Dep't 2022).

Here, the only Appellants who have served as trustees of the Trust are President Trump, Donald Trump, Jr., and Allen Weisselberg. See A.23595. No trustee signed the Tolling Agreement. A.23638. Only the Trump Organization's Chief Legal Officer, Alan Garten, signed the Tolling Agreement on behalf of the Trump Organization. See A.23637-23638. He has never served as a trustee or a beneficiary of the Trust and has no authority to bind the Trust. Therefore, NYAG's causes of action involving the Trust are time barred to the extent they are based on transactions completed before February 6, 2016.

Likewise, the Tolling Agreement does not bind the individual Appellants, including President Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney. To bind an individual, the individual must be a direct signatory to the agreement, absent exceptions inapplicable here. See Gerschel v. Christensen, 128 A.D.3d 455, 455-456 (1st Dep't 2015); Georgia Malone & Co., Inc. v. Rieder, 86 A.D.3d 406, 407-408 (1st Dep't 2011), aff'd, 19 N.Y.3d 511 (2012). The Tolling Agreement did not bind these unnamed, non-signatory individual Appellants.

This conclusion is particularly obvious with respect to President Trump. The Tolling Agreement defined the "Trump Organization" as: "The Trump Organization, Inc.;

DJT Holdings LLC; DJT Holdings Managing Member LLC; and . . . all directors, officers, partners, employees, agents, contractors, consultants, representatives, and attorneys of the foregoing." A.19055. President Trump ceased holding any role in those corporate entities on January 19, 2017. In fact, NYAG has expressly conceded that "*Donald J. Trump is not a party to the tolling agreement*, that tolling agreement only applies to the Trump Organization," (A.19137, 23639 [emphasis added]), and that "[NYAG] and the Trump Organization entered a six-month tolling agreement, *to which [President] Trump was not a party*." A.19621, 23639 (emphasis added). Supreme Court baselessly disregarded those binding judicial admissions. See Leonia Bank v. Kouri, 3 A.D.3d 213, 219-220 (1st Dep't 2004).

E. Proper Application of the Statute of Limitations Forecloses Most Claims.

Proper application of the statute of limitations forecloses liability for most of the challenged transactions, which were "completed [] before February 6, 2016," or, for "[Appellants] bound by the tolling agreement," for claims which "accrued before July 13, 2014." Trump I, 217 A.D.3d at 611. Contrary to Supreme Court's conclusions, (i) seven of the ten loan transactions at issue in the Complaint were completed (the loans closed) before July 13, 2014, (see A.48735-48736); (ii) one of the transactions was never consummated, (see A.48736); and (iii) the two remaining transactions were completed before February 6, 2016—the OPO loan from Deutsche

Bank closed on August 12, 2014, and Ladder Capital's refinancing of the 40 Wall Street loan closed in July 2015, (A.36486-36750, 38150).

Thus, the only claims that are timely are those arising out of the loans for the OPO and 40 Wall Street, and they are timely only as to Appellants bound by the Tolling Agreement. Applying the correct statute of limitations eliminates $350,980,057 of the $464,576,229 judgment for Appellants bound by the Tolling Agreement, and it eliminates all of the judgment for those not bound by the Tolling Agreement, including the Trust and the individual Appellants. Appeal No. 2024-01134, NYSCEF Doc. No. 3, Affirmation of Clifford S. Robert, Ex. X.

II. Executive Law § 63(12) Does Not Extend to the Facts of This Case.

The authority granted to NYAG under Executive Law § 63(12), while broad, is not limitless. As the trial evidence demonstrates, the facts of this case do not constitute "fraud" within the plain meaning of Executive Law § 63(12), and to punish the conduct reflected in the trial evidence as "fraud" would raise, at the very least, grave constitutional doubts. NYAG's assertion of power on these facts violates the centuries-old rule that NYAG lacks authority to sue where the suit "vindicates no public purpose," (People v. Grasso, 54 A.D.3d 180, 196 [1st Dep't 2008]), which is "a general rule running through our whole system of jurisprudence," (People v. Lowe, 117 N.Y. 175, 191 [1889]). Accordingly, § 63(12) cannot be reasonably, or constitutionally, interpreted to extend to the specific facts of this case.

A. The Case Presents an Unauthorized and Unprecedented Application of Executive Law § 63(12).

This case challenges representations that had no capacity or tendency to deceive anyone. They involved no victims, no complaints, no evidence of causation, no injuries, no losses to any business or consumer, and no impact on any public interest. Rather, the case involves highly sophisticated parties—such as Deutsche Bank and Zurich American Insurance Company ("Zurich")—represented by equally sophisticated counsel, who eagerly vied for President Trump's business and greatly valued it when they received it. See, e.g., A.28299-28300, 33401-33407, 33426-33430. These sophisticated parties were advised by Appellants' clear disclaimers—and obligated by New York law—to perform their own due diligence, and they did so, basing the terms of their deals on their own independent assessment of President Trump's resources and potential risks. See, e.g., A.28221-28250, 28332-28335, 33570-33573, 33684. It was "understood in the relevant marketplace," (HSH Nordbank AG v. UBS AG, 95 A.D.3d 185, 193 [1st Dep't 2012]), that the financial statements provided only subjective estimates of value and that the sophisticated parties should (and did) conduct their own evaluations. These parties never complained to NYAG—or testified at trial—about any supposed "fraud" or "misrepresentation" in President Trump's disclosures. Quite the contrary, they were fully satisfied and profited by more than $100 million from the business relationship. See, e.g., A.21532-21534, 33413-33416.

Even more striking, there is no competent evidence that the financial statements influenced any business decision. No evidence suggests that Appellants would have obtained any more favorable treatment had the financial statements read as NYAG insists they should have. Thus, there is no evidence that the alleged "fraud" *caused* any losses. In fact, there is no evidence that any party suffered any losses at all. As Supreme Court conceded, "the record is devoid of any evidence of default, breach, late payment, or any complaint of harm," and "none of the recipients of the subject SFCs ever lodged a complaint with [NYAG] or otherwise claimed damages." A.30 (quotation omitted). Further, NYAG has never submitted any evidence, or even articulated a theory, about how the supposed misconduct adversely affected the *public* in any way. In fact, President Trump's highly successful deals contributed greatly to the public economy in all of the cities where they occurred. There is simply no adverse impact on the public interest.[7]

[7] For example, the record does not provide any evidence of any impact on public share prices, (see, e.g., People v. Greenberg, 21 N.Y.3d 439, 446 [2013]), the public financial markets, (see, e.g., People v. Coventry First LLC, 13 N.Y.3d 108, 116 [2009]), the public credit markets, (see, e.g., Matter of People v. Applied Card Sys., Inc., 27 A.D.3d 104, 105-106 [3d Dep't 2005]), or members of the public at large, (see, e.g., People v. General Elec. Co., 302 A.D.2d 314, 314 [1st Dep't 2003]; State of New York by Abrams v. General Motors Corp., 547 F. Supp. 703, 703-704 [S.D.N.Y. 1982]). Other cases involving Executive Law § 63(12) invariably involve some actual public interest that NYAG seeks to vindicate. See, e.g., Coventry First LLC, 13 N.Y.3d at 114; State of New York v. Cortelle Corp., 38 N.Y.2d 83, 85-86 (1975); People v. Apple Health & Sports Clubs, 206 A.D.2d 266, 266-267 (1st Dep't 1994); People v. MacDonald, 69 Misc. 2d 456, 458-459 (Sup. Ct. N.Y. Cty. 1972).

Therefore, among enforcement actions under Executive Law § 63(12), this case is one-of-a-kind.[8] If these facts amount to "fraud," then that word has no meaning.

B. Evidence Demonstrates That the Statements Had No Capacity or Tendency to Deceive and Did Not Affect the Terms of Any Deal.

The trial evidence demonstrates that the representations NYAG challenges had no capacity or tendency to deceive, were not material, and caused no damages or losses. Because this evidence is central to this Point and to Points III-VI, infra, it is discussed here in some detail.

1. The Statements Contained Clear, Specific Disclaimers.

First, every Statement of Financial Condition contained a specific disclaimer advising that Appellants' values were subjective and that counterparties should conduct their own due diligence. See, e.g., A.38907, 38931, 39045, 39113, 39144. The disclaimers provided that "[a]ssets are stated at their estimated current values . . . using various valuation methods." A.39045. They noted what "valuation methods" were used, which "include, but are not limited to, the use of appraisals, capitalization of anticipated earnings, recent sales and offers, and estimates of current values as determined by [President] Trump in conjunction with his associates and, in some instances, outside professionals." Id. They specifically disclaimed

[8] Bernard Condon, Dissolving Trump's business empire would stand apart in history of NY fraud law, Associated Press (Jan. 29, 2024), available at: https://apnews.com/article/trump-fraud-business-law-courts-banks-lending-punishment-2ee9e509a28c24d0cda92da2f9a9b689.

reliance on these "values" and "valuation methods," noting that "[c]onsiderable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, the estimates presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities." Id. The disclaimers advised that "[t]he use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts." Id.

2. The Statements Had No Impact on the Deutsche Bank Loans.

No witness testified, and there is no evidence suggesting, that the statements had any impact on Appellants' three loans with Deutsche Bank: the Doral Miami loan, the Trump Chicago loan, and the OPO loan. Deutsche Bank assessed President Trump's financial strength based on its own adjusted values, not the guarantor's self-reported estimates of value, especially as to liquidity and net worth. See, e.g., A.28234-28250, 28290-28294, 28304-28305, 33570-33573, 33684, 36242-36249, 36296-36297.

a. President Trump's Net Worth Far Exceeded Deutsche Bank's Threshold for a Loan on Those Terms.

Deutsche Bank's Private Wealth Management Division classified clients as "ultrahigh net worth," and eligible for Private Wealth Management pricing, if their net worth exceeded $100 million. A.33212-33213, 33217. President Trump's net worth exceeded that by a factor of at least *twenty-four*, even on Deutsche Bank's "conservative" assessment of his net worth. See A.33215-33218, 33253. President Trump's "net worth and investable assets . . .were well in excess of [Deutsche Bank's] minimum requirements" of "a hundred million [dollars] net worth, [and] 10 million of investable assets." A.33280.

President Trump would have easily qualified for recourse loans (at the same interest rates) if his net worth had been $1 billion or less; indeed, he would have qualified at lesser net worths such as $2 billion, $1 billion, $500 million, or even $100 million. See A.33281-33282. Those figures "would have qualified him to stay within that range of 2.0 to 2.5 percent" interest rates "for commercial real estate in the Americas" on Deutsche Bank's pricing grid. A.33282-33283, 45332. By comparison, Deutsche Bank assessed President Trump's net worth as exceeding $2.5 billion "with liquidity of 100 million plus," and he was "risk rated A." A.33412, 45463.

President Trump had "an exceptionally strong financial profile," which included $230 million in "unencumbered liquidity," placing him "among the strongest personal balance sheets we have seen and totally unlike any of our major [real-estate] developer clients." A.33476-33477, 33482, 45485-45486. This was due to the "absence of personal debt, with huge asset base and diversified [cash flow]." A.45485; see also A.33476-33477, 45490-45493.

b. Deutsche Bank Evaluated Numerous Factors.

"[I]n analyzing risk, [Deutsche Bank's] credit risk management [group] considers a number of factors." A.28221-28222. These factors include, among others, (1) the "nature of the collateral associated with the loan," (2) the "quality of the collateral associated with the loan," (3) the loan-to-value ratio, (4)"[t]he bank's lending history on that type of loan," (5) "[t]he actual lending experience with the specific customer," (6) "the bank's experience in a particular industry," (7) "[t]he client's experience in a particular industry," (8) "[t]he client's performance in a particular industry," (9) "[w]hether the client has a proven track record in a particular industry," (10) "[t]he borrower's debt profile," (11) "[t]he guarantor's debt profile," (12) "[t]he primary source of repayment," (13) "the secondary source of repayment," (14) "the tertiary source of repayment," (15) "[t]he likelihood of default," (16) the "[b]orrower's liquidity," (17) "[t]he guarantor's liquidity," (18) "whether the borrower has unpledged assets," and (19) the "[g]eneral economic climate"—among "many, many things that [the bank] consider[s] when performing risk analysis." A.28221-28224. The client's "noncredit relationship" with the bank is also crucial. A.33253-33255.

Accordingly, a Deutsche Bank witness agreed there were at least "14 reasons" to approve Appellants' loans. A.28251. Deutsche Bank did so, moreover, based on its own "considerable experience in the field" and "inputs collected by other members of [its] team." A.28224; see also A.33219. In its internal credit memoranda, Deutsche Bank's assessment of these factors as to President Trump was uniformly "positive . . . [t]he commentary was positive." A.28332.

c. Deutsche Bank Weighed Other Factors Far More Heavily Than the Financial Strength of the Guarantor.

i. President Trump's "vision" and "expertise."

When assessing the Doral Miami project, its first loan to Appellants, Deutsche Bank emphasized that "[President Trump's] expertise in successfully running world class assets like [Doral Miami,] as demonstrated by his extensive hotel, condos, clubs, golf courses[,] makes this asset purchase and repositioning a realistic and high[ly] probable success story." A.45485; see also A.28250 (Deutsche Bank recognized President Trump's "extensive experience in operating private clubs" as a "significant factor in recommending approval of the loan transaction"), 33433.

Regarding the OPO project, the bank recognized President Trump's "vision" in transforming an "empty shell," to perform "a wholesale redoing of the whole thing for it to become the vision that the Trumps had for it." A.33466. Appellants "took it from a shell to a fully operational hotel and event space." Id. As the project was proceeding, Deutsche Bank anticipated that "the hotel will become the most elite hospitality establishment in Washington, D.C. once stabilized," (A.28326), and, in fact, once it had been "operational for a few months," the OPO project "ha[d] already become one of the most elite hospitality establishments in Washington, D.C." A.28330.

Deutsche Bank also emphasized that President Trump heavily invested his own money in the projects. Regarding Doral Miami, the bank noted that "[President Trump] expects to invest approximately $150-160 million on capital improvements," and, so, "the value of our Collateral will increase significantly over the term of the Facility." A.36242; see also A.28251, 33256. Likewise, regarding the OPO project, the bank highlighted that "[President] Trump[,] as the guarantor/principal owner, was putting in or investing a significant amount of his own equity and liquidity into the project, which gives us an increased level of comfort." A.33260-33261.

ii. Deutsche Bank's "broader relationship" with President Trump.

The bank avidly sought President Trump's business "as part of a broader relationship with the bank." A.33223. Deutsche Bank's "business strategy" was "[t]o develop the relationships with high net worth and ultra high net worth individuals" and "to offer them banking deposits, investment products, loans, other products as well." A.28232. Deutsche Bank's "intent was to cross sell all of our customers, so the additional other business is also an important category" in loan approval. A.33426; see also A.33427-33428. Deutsche Bank viewed "[t]he ability to cross sell to the [Trump] family" as "a great franchise opportunity." A.33432.

Moreover, "part of the objective of the private wealth management group is to bring deposits into the bank." A.28232. Accordingly, the bank required that a portion of "the guarantor's liquidity be held with Deutsche Bank," as part of the "business strategy" of making loans as "part of a broader non-credit relationship with a client." A.33247-33248. These comprised first tens, and then hundreds, of millions of dollars in deposits from President Trump and his family. See A.28321, 33250. These deposits "continue[d] to grow" until "President Trump and entities associated with him" had "deposited over $100 million in Deutsche Bank," and "those are assets under management by the private wealth group." A.28321. Internally, the bank emphasized that President Trump was one of the "top five relationships in terms of revenue" and "profitability" for his client-relationship manager in the Private Wealth Management Division. A.33415.

When first given the opportunity to do business with President Trump, the client-relationship manager gushed, "We are whale hunting." A.33401. Recruiting such ultra-high-net-worth individuals as clients was central to the business plan. A.33402-33406. The bank's CEO, Anshu Jain, asked to have lunch with President Trump to promote the relationship. A.33409-33410.

With President Trump, Deutsche Bank was eager to "[s]trategically discuss leveraging [President] Trump's personal and professional network within the real estate industry in New York for the benefit of [Deutsche Bank]." A.33416. This was a "key ask for the bank" because "[t]he primary source of customers usually is referrals from existing customers." Id. "Given the circles this family travels in," the bank "expect[ed] to be introduced to the wealthiest people on the planet" and obtain "referrals to become new clients." A.33429; see also A.33434. The bank anticipated getting "tremendous business from them" and hoped to become the Trumps' "lead bank in short order." A.33430.

iii. President Trump's track record of success.

The bank's confidence in President Trump increased as its loans proved to be highly profitable successes, and "all the expectations that were required of the borrower were met" for every loan. A.28339-28340; see also A.28324, 28334.

The Doral Miami loan had "no missed payments" and "[n]o late payments" throughout the life of the loan. A.28295; see also A.28302-28303, 28312. Likewise, the Trump Chicago loan had "no missed payments" and "[n]o late payments"; it was "a performing loan." A.28303. Appellants' repeated success on prior loans "was indicative of the growing or expansive nature of the overall relationship and our comfort with it." A.33254. The loans performed so well that the bank canceled or reduced President Trump's personal guarantee on two of the loans before they were fully repaid. A.28340; see also A.33274-33275. "[O]n two of the three loans . . . the guarantees were either reduced or eliminated." A.28340.

Internally, the bank greatly praised the loans' performance. For the Doral Miami development, the bank wrote that the rooms "look amazing" and that "it is really impressive to see what [the Trumps] have accomplished here so quickly." A.33439. For the Trump Chicago development, one lender noted that "[t]he Chicago condos are selling like hotcakes," leading to a faster-than-expected repayment of the loan. A.33408; see also A.33425. For another financed project, the lender noted that the Trumps' proposal "looks sensational," (A.33444), and, for another, that "this is a superb deal," (A.33447). In 2018, after years of profiting handsomely, the bank stated that it "has had a long and satisfactory relationship" with President Trump and his family. A.28334; see also A.36317.

d. Deutsche Bank Conducted Its Own Due Diligence on President Trump's Net Worth.

Consistent with universal industry practice, Deutsche Bank bases its lending decisions not on client information but on its own "due diligence in which . . . *we independently verify all material facts as they pertain to a credit transaction*." A.33221 (emphasis added); see also A.28151-28152, 33215-33216. In President Trump's case, this due diligence resulted in the bank's independent estimate of every category of wealth reported in his net worth. See, e.g., A.36176-36179, 36196-36199, 36221-36224. The bank's independent assessment was far more "conservative" than President Trump's, estimating his net worth around one-half the figures reported in the statements. A.33215-33216, 33253, 34471-34484.

i. Disparities in valuation are expected.

Deutsche Bank recognizes that "an individual's net worth . . . , as it's reported, is largely subjective" and "subject to the use of estimates." A.33214. There is a "reasonable expectation" that "there is a use of estimates in the client's provided financial statements." A.33268-33269.

As a result, "a difference of opinion in asset values between the client and the bank" is not "a disqualifying factor to extend credit." A.33215. "[I]t's not an industry standard that these financial statements are audited," and the bank understands that its clients "are largely relying on the use of estimates." Id. The bank's independent assessments of a client's reported net worth are "standard" and "apply to really any given high-net-worth individual or ultra-high-net-worth individual's provided financial statements." A.33262. For example, a difference in estimate of $1.4 billion on the client's reported net equity would be a "reasonably expected adjustment." A.33267. Thus, when Deutsche Bank adjusted President Trump's reported net worth from $4.9 billion to $2.6 billion, *i.e.*, "approximately 50 percent of the client's reported net worth," (A.33269), the bank viewed such an adjustment as "not unusual or atypical," (A.33271).

ii. Deutsche Bank scrutinized other, more important assets far more rigorously.

In performing due diligence, the bank applied the most rigor to assets that were most central to its decision. For assets that were less central to its decision—

such as President Trump's other real-estate holdings—the bank opted for a pragmatic, "ballpark" approach, just to get a very "broad sense" of their value.

Liquidity. Liquidity is a key factor in assessing the guarantor's ability to pay any default on the loan. The bank had liquidity covenants "to have that protection that the client would always have a substantial amount of cash on hand, that he could use to either meet the obligations under the bank's loan or potentially pay down the loan." A.28195. Because of liquidity's importance, "[i]t was part of the private wealth management business['s] standard operating process to validate liquidity." A.28205. The bank "validated any liquidity . . . by looking at brokerage statements and/or bank account statements." A.28212. As to President Trump, in 2011, Deutsche Bank's lenders "visited the offices of the guarantor and reviewed bank and brokerage statements" that "confirmed 178 million in cash balances and 51.8 million [in] marketable securities . . . held in the name of the guarantor." A.33226, 36220; see also A.33341. "[T]his was simply part of the process of verifying the amounts of those accounts." A.33227; see also A.36176, 36196, 36221.

The bank's internal assessment of President Trump's liquidity included *only* those amounts verified by reviewing bank and brokerage statements. See A.33263-33264. "[Deutsche Bank]-adjusted liquidity represents the amount of liquidity that was verified via statements by [Deutsche Bank's structured lending team]."

A.33263. "The sales and lending team confirmed all amounts via a review of the account statements." A.33480.

Collateral properties. As the bank acknowledged, "getting appraisals by independent apprais[er]s is a common valuation appraisal method." A.28155. For collateral properties, "[a]ll loans secured on real estate require an independent appraisal commissioned by the bank." A.28144; see also A.28178-28179. Moreover, "[c]ertain members of Deutsche Bank . . . were clearly familiar with the collateral and . . . became more familiar with the collateral as they did their due diligence." A.28288. Deutsche Bank also obtained independent appraisals of such properties from other sources. See, e.g., A.33427, 45483.

"Trophy" properties. For non-collateral properties, "appraisals are not required by regulation in all cases; but sometimes by bank policy, they are required." A.28145. Here, Deutsche Bank described President Trump's "trophy properties" as the "four significantly sized assets that we believed we could get a better understanding by ourselves of their potential market value." A.28157. "[T]he wealth management business engaged Deutsche Bank's Valuation Services Group[,] which is a group of appraisers" that "has access to various databases and market information," to perform an independent assessment of the "trophy properties." A.28161. The group has "substantial experience valuing real estate assets." A.28241; see also A.33265.

Deutsche Bank's Valuation Services Group independently evaluated those four trophy properties—Trump Tower, Niketown, 40 Wall Street, and Trump Park Avenue—as being worth $380.2 million, $197 million, $438 million, and $206.3 million, respectively. See A.28240-28241, 33264. As a result, Deutsche Bank downward-adjusted the client-reported net equity of those properties "from $1.326[] [b]illion to $957.9 million." A.28244, 36222. Notably, even under the bank's conservative approach, President Trump's net worth was approximately $1 billion based on these properties alone—even setting aside all other assets—which easily sufficed for Private Wealth Management loan pricing. See supra, Point II.B.2.a.

Other assets. For President Trump's other assets, such as club facilities, the bank used very rough "ballpark" estimates, reflecting these assets' relative unimportance to the bank's overall calculus. See, e.g., A.28247-28248. For these low-priority assets, the bank did not seek a specific valuation but wanted "to just have a broad sense of what those assets might be worth." A.28163; see also A.28247-28248. These "ballpark" estimates recognized that such assets "potentially have a large range of outcomes of their value." A.28188, 28247. For these assets, which reflect the vast majority of disputed assets in this case, the estimated values were "[b]all-parked, indeed." A.28247.

Thus, the value of non-collateral, non-trophy assets was the least important factor in Deutsche Bank's assessment of the guarantor's net worth, which was itself only a subpart of one of the least important factors the bank considered.[9]

3. The Statements Had No Impact on the Ladder Capital Loan.

When it refinanced the loan for 40 Wall Street, Ladder Capital did its own extensive due diligence on the loan, verifying the most critical financial factors by independent analysis. This included obtaining and reviewing the building income for 40 Wall Street from the "rent roll and operating statements." A.29055-29056, 29081. Ladder Capital would typically calculate the capitalization rate and loan-to-value ratio for a deal. See A.29059-29060. Ladder Capital "reviewed the actual ground lease" for the property. A.29084-29085. It obtained and reviewed "the personal tax returns for [President] Trump." A.29117. It reviewed an independent,

[9] This factual testimony was further corroborated at trial by Appellants' experts, Eli Bartov and Robert Unell. Mr. Bartov, an expert in accounting, credit analysis, and valuation, testified that Deutsche Bank, in accordance with Financial Accounting Standards Board, Federal Reserve, and accounting literature, conducted its own analysis and made its decision to extend the loans to President Trump based on its own adjusted values derived from its own valuation model and assumptions. See, e.g., A.34240, 34297, 34308-34309, 34332-34333, 34339; see also A.34248. Mr. Unell, an expert in banking, likewise testified that the statements serve as a roadmap for the lender to do its own analysis, and the credit memoranda established that Deutsche Bank performed and relied upon its own analysis to adjust the values in the statements, thereby complying with Office of the Comptroller of the Currency underwriting guidelines. See, e.g., A.33569-33571, 33574-33581, 33590-33591, 36176-36179, 36196-36199, 36221-36224, 36246-36249, 36279-36281, 36304-36307, 36325-36329, 37767-37772, 37918-37923, 37984-37989; 42467-42470, 43303-43306; see also A.33565. Moreover, unlike NYAG's expert—who drew conclusions based on factual assumptions provided by NYAG—Appellants' experts based their conclusions on their own review of the evidence. See A.33538-33716, 34430-34557.

formal appraisal of 40 Wall Street from Cushman & Wakefield, Inc., which appraised the property at $540 million. See A.29170.

For Ladder Capital, "liquidity" and the cash flow generated by the financed property were critical factors in approving the deal. See A.29034-29035, 29165. "For the 40 Wall[,] loan liquidity is what we were really paying attention to . . . . [W]e wanted to make sure there was enough liquidity to cover the obligations." A.29165. By contrast, President Trump's "net worth statement" was not "a key factor" in the decision. Id. Regarding President Trump's net worth, Ladder Capital did not focus on details, but merely commented that he was "a strong sponsor that has a large net worth and a lot of liquidity." A.29177-29178.

Ultimately, Ladder Capital's loan agreement required only that President Trump "must maintain a net worth equal to at least $160 million and a liquidity of at least $15 million," a small fraction of his actual net worth and liquidity. A.19166.

4. The Statements Had No Impact on the Ferry Point License.

Regarding the Ferry Point license, New York City Parks and Recreation (the "City") had previously invested $120 million in the project but had been unable to get the project—a specialty development of building a golf course—off the ground. See A.30229. Ferry Point "was a tough one to . . . accomplish[]," (A.30234-30235), but President Trump undertook the project and delivered tremendous value.

In requiring a net-worth disclosure, the City merely "wanted to be sure that whoever [the City] had operating the course had the financial capability to deliver on their obligations including making sure the course was operating and working every day." A.30235; see also A.30239.[10] President Trump's bid reported "a net worth in excess of $3 billion and cash on hand in excess of $200 million," and, thus, the bidder would "easily be able to meet any and all financial obligations under this contract." A.30236. The City "consider[ed]" President Trump's self-reported financials "in reviewing the request for offers," (A.30235-30236, 40901-40916), but its witness, Mr. Cerron, never testified that a somewhat lesser net worth—*e.g.*, $1 billion—would have been insufficient to obtain the project.

In fact, "the financial capability of the offer" was "weighted the lowest" at only "ten percent" of the City's "selection criteria." A.30258. Other factors—where President Trump was uniquely qualified—dominated the City's decision, including "the planned operations and operating experience" in developing and running a golf course, which was weighed at "60 percent." Id. The selection process focused heavily on "the experience of the operator in running high-end golf courses." A.30259.

[10] As discussed above, David Cerron's testimony should not have been considered at all because these transactions were completed outside of the limitations period.

Once the contract was in place, the City's requirement of $10 million in capital improvements constituted only a tiny fraction of President Trump's net worth: "[T]he biggest part of the obligation was the clubhouse and the concessionaire was obligated to design and construct [a] clubhouse for the golf course . . . in the [minimum] amount [] of $10 million." A.30243, 44442; see also A.30261-30262. Appellants met and exceeded every financial obligation under the contract, in full and on time. See A.30262-30269. "President Trump's guaranty was never invoked under these agreements" "[b]ecause Trump Ferry Point LLC met all of their financial obligations under the contracts." A.30269.

Once the license issued, the City required only annual "no material adverse change" or "No MAC" letters. See A.30270. The requirement "was an annual letter that was to be sent to the [C]ity to just reaffirm that the initial financial statements that were shared with the [C]ity during the award process were in material respects the same." A.30244. The "No MAC" letters merely stated that "we are not aware of any matters that would indicate a significant change in [President] Trump's net worth as of this date." See, e.g., A.30251. Appellants were not required to submit Statements of Financial Condition to the City under the contract, and Mr. Cerron "never reviewed President Trump's [SFC] in connection with the Ferry Point agreements." A.30270. The City "did not review" the "No MAC" letters "to determine whether President Trump had the financial capability to perform the contract." A.30283.

Moreover, the Ferry Point license provided that "in no event shall guarantor be required to pay any additional security deposit after the security deposit has been increased to $470,000 pursuant to this Section B regardless of any additional guarantor MAC failures," and, thus, "the sole remedy for failure" to maintain the required net worth was "to submit the No MAC letter with an increase of the security deposit to a maximum of $470,000." A.30271.

After the development, "Bally's paid Trump Ferry Point, LLC approximately $60 million for the assignment of this concession." A.30289.

5. The Statements Had No Impact on Any Insurance Contract.

a. Zurich.

Liquidity was an "important" factor for Zurich in approving insurance terms for Appellants because any recovery from the customer is "coming from their cash on hand." A.44956; see also A.44971. Therefore, "cash on hand" "has great bearing" on Zurich's analysis. A.44956. By contrast, "the hard assets are not very significant [to Zurich] because most likely . . . . any repayment would be coming from the cash that they have on hand. It's not going to be coming from the hard assets." A.44957. Thus, Zurich was "primarily concerned just with cash on hand." A.44991. Liquidity was "far more important" than "hard assets." A.44999.

Zurich concluded that "[t]he Trump Organization is in very good financial shape" because "[i]t has high liquidity, very low debt compared to its peers, and little cap[ital] ex[penditure] requirements for the next year," and "the asset quality in the portfolio is very good and sustainable." A.44962. Zurich emphasized that there is "substantial liquidity within the company to cover any bond need should there be an issue." A.44964.

In 2018 and 2019, the Trump Organization reported $76.2 million in cash on hand, of which only $24.4 million is disputed, and $87 million in cash on hand, of which only $24.7 million is disputed, respectively. See A.44981-44982. This left over $51 million and $62 million in undisputed liquidity in the relevant years. See id. By comparison, Zurich noted internally that "our program size is quite modest for the [Trump Organization] with no real issues," with program limits of "6 million single, 20 million aggregate." A.45003. Thus, Zurich felt it was "merited" to "continue supporting the surety program" even after NYAG's allegations became public. A.45004-45005. Zurich agreed that "all three parties in this case -- the surety, the broker and the client -- were pleased" because "[i]t was a good-standing relationship." A.44987. Zurich maintains a growing relationship with the Trump Organization to this very day.

b. HCC Global.

After President Trump was elected, Appellants sought an additional $5 million in Director & Officer coverage from HCC Global ("HCC"). See A.29882. The premium for the new coverage was $295,000. See A.29893-29894. From 2017 to 2019, this policy was adopted for one year and extended for one year; that was the extent of the coverage—at a total cost of under $600,000. See A.29903.

HCC reviewed "very few financials." A.29889-29890. Its interest in seeing financials was primarily targeted at assessing the "bankruptcy risk," (A.29884-29885), and ensuring "that [t]he Trump Organization could meet its requirements to pay the retention if needed," *i.e.*, the equivalent of the deductible on the policy. A.29905-29906. Covering the retention was the "primary concern" and "the purpose of [the] insurance underwriter's review of financials." A.29905-29906. Here, "the retention was approximately $2.5 million throughout the life of . . . the policy and the extension"—a tiny fraction of the "$192 million in cash on the balance sheet." A.29906. HCC focused on the reported liquidity of $192 million as "a meaningful, useful figure," which far exceeded both the premium and the total coverage limit. A.29890. Indeed, if the Trump Organization identified even a small fraction of that liquidity, such as "25 million" dollars not offset by debt, "there would be enough on the balance sheet to cover their retention." A.29907.

C. Because the Alleged Conduct Had No "Capacity or Tendency to Deceive," Executive Law § 63(12) Does Not Apply to This Case.

Four basic principles of statutory interpretation confirm that the statute does not apply to this case.

1. The Plain Language of § 63(12) Does Not Apply to These Facts.

Executive Law § 63(12) provides that "[w]henever 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," NYAG may file suit "in the name of the people of the state of New York." Exec. Law § 63(12). As used in the statute, "[t]he word 'fraud' or 'fraudulent' . . . shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." Id.

"Under [Executive Law §] 63 (12), the test for fraud is whether the targeted act *has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud*." General Elec. Co., 302 A.D.2d at 314 (emphasis added); see also Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 272-273 (1977) (interpreting Executive Law § 63(12) to require the court to "weigh[] a statement's capacity, tendency or effect in deceiving or misleading customers"). Critically, this Court's interpretation requires a showing of not just falsity, but objective *deceptiveness*, *i.e.*, "the capacity or tendency to deceive" or the creation of "an atmosphere conducive to fraud." General Elec. Co., 302 A.D.2d at 314.

Supreme Court disregarded this requirement of the "capacity or tendency to deceive." Instead, Supreme Court required only two things: (1) falsity and (2) repetition of a false statement at least once. In the MSJ Decision, Supreme Court held that "[NYAG] need only prove: (1) the SFCs were false and misleading; and (2) the [Appellants] repeatedly or persistently used the SFCs to transact business." A.43; see also A.48. Likewise, the Final Decision holds that "*plaintiff need only prove that [Appellants] used false statements in business*"—nothing more. A.66 (emphasis added). On Supreme Court's view, falsity is all that is required—not even the capacity or tendency to deceive.

That was error, and it was dispositive. Representations that were expressly disclaimed, involved no *scienter*, were not material, induced no reliance, caused no damages, and were made in circumstances where all parties understood that they would conduct their own due diligence have no "capacity or tendency to deceive" and do not create any "atmosphere conducive to fraud." General Elec. Co., 302 A.D.2d at 314. In fact, the provision of specific disclaimers to sophisticated counterparties is alone sufficient to negate any "capacity or tendency to deceive" as a matter of law. See Cestone v. Johnson, 179 A.D.3d 557, 558 (1st Dep't 2020).

Indeed, all the evidence, discussed above in detail, fatally undermines any inference of capacity or tendency to deceive. See supra, Point II.B. "[E]vidence regarding falsity, materiality, reliance and causation plainly is *relevant* to determining whether [NYAG] has established that the challenged conduct has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." People v. Domino's Pizza, Inc., 2021 WL 39592, at *11 (Sup. Ct. N.Y. Cty. Jan. 5, 2021) (emphasis in original). "In determining whether certain conduct was deceptive, surely it is relevant whether members of the target audience . . . were actually deceived. Similarly, if the evidence showed that the alleged false statements had no real-world impact (that is, no reliance or causation)," that absence "speak[s] to the question of whether the challenged conduct was unlawfully deceptive or fraudulent." Id.

Here, the absence of any complained-of injuries or losses is very telling. "[W]hile causation is not a distinct element of a claim under [§] 63(12), its absence is relevant to the question [of] whether there was a violation," especially where "there was no concrete evidence" that the alleged misrepresentations "had any adverse real-world impact" on any party. Id. at *12. Thus, evidence of how the statements were "understood in the relevant marketplace," (HSH Nordbank AG, 95 A.D.3d at 193), compels the conclusion that NYAG's evidence "do[es] not support a finding that [Appellants'] prior conduct was deceptive or fraudulent," (Domino's Pizza, Inc., 2021 WL 39592, at *10).

This is especially true where, as here, NYAG seeks to unwind "bilateral business transactions between" sophisticated parties. Domino's Pizza, Inc., 2021 WL 39592, at *12. "[A]ny disputes regarding" such representations "should be in the nature of private *contract* litigation[,] . . . not a law enforcement action under a statute designed to address public harm." Id. (emphasis in original); see also People v. Exxon Mobil Corp., 65 Misc. 3d 1233(A), at *29 (Sup. Ct. N.Y. Cty. Dec. 10, 2019) (finding no violation of the Executive Law and Martin Act because, among other things, NYAG "produced no testimony . . . from any investor who claimed to have been misled by any disclosure").

2. The Statutory Context Confirms that § 63(12) Does Not Apply.

The statutory context confirms this conclusion. Executive Law § 63(12) explicitly provides that NYAG must bring an enforcement action "in the name of the people of the state of New York." Exec. Law § 63(12). This language incorporates New York's longstanding requirement that "[u]nless . . . it appears that the matters alleged affect the public interest in the true and proper sense, rather than affecting individual private rights and interests, then the State is without legal capacity to sue." People v. Singer, 193 Misc. 976, 979 (Sup. Ct. N.Y. Cty. 1949), citing People v. Albany & Susquehanna R.R. Co., 57 N.Y. 161, 167 (1874); People v. O'Brien, 111

N.Y. 1, 33 (1888); Lowe, 117 N.Y. at 191. As discussed above, there is no articulable public interest in unwinding successful commercial transactions among sophisticated private parties that resulted in no complaints or losses.

Likewise, the very first sentence of Executive Law § 63 provides that NYAG shall "[p]rosecute and defend all actions and proceedings *in which the state is interested*," and shall do so "in order to protect *the interest of the state*." Exec. Law § 63(1) (emphases added). Again, this language confirms that § 63(12) does not authorize NYAG to bring an enforcement action that serves no public interest.[11] See O'Brien, 111 N.Y. at 33-34. "The suit now before [the Court] . . . sets forth various acts as wrongful, which, if wrongful, affect no public right. These wrongs are wrongs to individual citizens and not to the State, and are remediable at the suit of the parties injured only." Albany & Susquehanna R.R. Co., 57 N.Y. at 168. Such language has been interpreted for over two centuries to impose restraints on NYAG's ability to sue to vindicate private interests. See, e.g., People v. Brooklyn Flatbush & Coney Is. Ry. Co., 89 N.Y. 75, 93-94 (1882); People v. Ingersoll, 58 N.Y. 1, 14

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[11] Section 63(12) claims that have been brought to secure an "honest marketplace" deal with protecting the public at large. See, e.g., Matter of People v. Orbital Publ. Group, Inc., 169 A.D.3d 564, 565 (1st Dep't 2019); People v. H & R Block, Inc., 58 A.D.3d 415, 416-417 (1st Dep't 2009); People v. Liberty Mut. Ins. Co., 52 A.D.3d 378, 379-380 (1st Dep't 2008); General Elec. Co., 302 A.D.2d at 314; Applied Card Sys., Inc., 27 A.D.3d at 105; State of New York by James v. Amazon.com, Inc., 550 F. Supp. 3d 122, 126-127 (S.D.N.Y. 2021); General Motors Corp., 547 F. Supp. at 703-704.

(1874); People v. Booth, 32 N.Y. 397, 398 (1865); Attorney General v. Utica Ins. Co., 2 Johns. Ch. 371 (N.Y. Ch. 1817).

3. The Statute's "Evident Purpose" Supports This Conclusion.

Further, the Court must construe § 63(12) "in light of its evident purpose." Grasso, 54 A.D.3d at 194. Here, the "evident purpose" of § 63(12) is to protect ordinary consumers. "Executive Law § 63 (12) was meant to protect not only the average consumer, but also 'the ignorant, the unthinking and the credulous.'" General Elec. Co., 302 A.D.2d at 314, quoting Guggenheimer, 43 N.Y.2d at 273. Further, the statute's evident purpose is to prevent, and provide relief for, *actual* harms. "'A special proceeding, as authorized by Executive Law § 63 (12), is intended as an expeditious means for [NYAG] *to prevent further injury and seek relief for the victims* of business fraud.'" Matter of People v. Northern Leasing Sys., Inc., 193 A.D.3d 67, 73 (1st Dep't 2021) (emphasis added), quoting Apple Health & Sports Clubs, 206 A.D.2d at 268; see also Matter of State of New York v. Bel Fior Hotel, 74 A.D.2d 692, 693 (3d Dep't 1980). Thus, the undisputed legislative purpose behind § 63(12) is to "afford the *public and consumers* expanded protection from deceptive and misleading business practices." Matter of State of New York v. Bevis Indus., 63 Misc. 2d 1088, 1090 (Sup. Ct. N.Y. Cty. 1970) (emphasis added).

Applying § 63(12) here flips that statutory purpose on its head. Sophisticated banks and insurance companies, represented by elite counsel, are the opposite of "average consumer[s]" and "the ignorant, the unthinking and the credulous." General Elec. Co., 302 A.D.2d at 314 (internal quotations omitted). Likewise, where there is no complaint of injury, the action bears no relation to the statutory purpose of "prevent[ing] further injury and seek[ing] relief for the victims of business fraud." Northern Leasing Sys., Inc., 193 A.D.3d at 73 (internal quotations omitted).

4. "Public Policy Concerns" Support the Same Conclusion.

Moreover, the statute should not be applied where "public policy concerns supporting that authority and the right to bring certain actions . . . no longer exist." Grasso, 54 A.D.3d at 193. Here, "there is no substantial public interest in most if not all" commercial transactions among sophisticated businesses. Id. at 209. This is especially true where the parties involved would "unquestionably have powerful financial incentives to prosecute an action . . . seeking recovery of tens of millions of dollars" if any "fraud" had actually occurred—which it did not. Id. at 194. As with the statute at issue in Grasso, Executive Law § 63(12) "should not be construed to permit [NYAG] to continue prosecuting a cause of action" that "would vindicate only the interests of private parties, not any public interest." Id. at 194-195.

D. Interpreting the Statute to Apply to This Conduct Would Raise Grave Constitutional Doubts.

In addition, Executive Law § 63(12) must be interpreted "in accordance with [the Court's] obligation to construe a statute whenever reasonably possible so as to avoid serious constitutional questions." Id. at 183. Here, as this Court ruled with respect to a different statute in Grasso, Supreme Court's contrary interpretation raises a series of "grave and doubtful constitutional questions," which "are appropriately avoided by construing" § 63(12) "not to authorize the continued prosecution of these causes of action by [NYAG] under the circumstances presented here." Id. at 207 (internal citations and quotations omitted).

1. The Excessive Fines and Due Process Clauses.

Supreme Court's application of the statute raises grave constitutional doubts under the Excessive Fines and Due Process Clauses of both the U.S. and New York Constitutions. See infra Point IV. In fact, it violates them. Id.

2. The First Amendment and Article I, § 8 of the New York Constitution.

Supreme Court held that, to establish a § 63(12) violation, "plaintiff need only prove that defendants used false statements in business" and nothing else. A.66. So interpreted, the statute constitutes an unqualified prohibition against "falsity alone." United States v. Alvarez, 567 U.S. 709, 719 (2012) (plurality opinion). A statute that "targets falsity and nothing more" violates the First Amendment; "falsity alone may not suffice to bring the speech outside the First Amendment." Id.; see also People v. Burwell, 183 A.D.3d 173, 181 (3d Dep't 2020) ("[E]ven false speech is considered protected."). As the Court of Appeals has recognized, an anti-fraud statute that prohibits falsity alone suffers, at the very least, from "potential constitutional infirmity." People v. Mitchell, 38 N.Y.3d 408, 414-415 (2022).

Moreover, interpreting § 63(12) to authorize NYAG to pursue virtually any individual or business transforms the statute into a vehicle for arbitrary and standardless enforcement, which raises grave constitutional concerns. See, e.g., Kolender v. Lawson, 461 U.S. 352, 357-358 (1983); Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). This interpretation also raises grave constitutional problems by authorizing NYAG to violate the First Amendment through targeted or retaliatory enforcement on the basis of political viewpoint—a tactic to which the State is no stranger. See, e.g., Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 181-184, 191-194 (2024). These First Amendment injuries were exacerbated by Supreme Court's imposition of an unconstitutional gag order on President Trump during trial. See A.27308-27309.

3. Separation of Powers Under the New York State Constitution.

Most fundamentally, Supreme Court's interpretation of the statute raises grave constitutional problems under the separation of powers guaranteed by the New York Constitution because it would authorize NYAG to sue in the absence of any discernible public interest. On the facts of this case, NYAG's lawsuit "vindicates no public purpose." Grasso, 54 A.D.3d at 196. Rather, "serious constitutional questions would be raised if [the statute] were construed to permit the continued prosecution of these causes of action by [NYAG]," and this Court is "obligated whenever possible to construe a statute so as to avoid those questions." Id. at 197.

"The Legislature, consistent with the principles of separation of powers . . . cannot grant the right to sue to a plaintiff who does not have standing." Id. "[NYAG], 'like all other parties to actions, must show an interest in the subject-matter of the litigation to entitle [her] to prosecute a suit and demand relief.'" Id. at 198, quoting Lowe, 117 N.Y. at 191. Where the factual record demonstrates that the alleged "wrongs are wrongs to individual citizens [if at all] and not to the State," those supposed wrongs "are remediable at the suit of the parties injured only," not by the State. Albany & Susquehanna R.R. Co., 57 N.Y. at 168. "[T]he state has no such interest and has no greater authority to intervene in the litigation of controversies between individuals and corporations than any other indifferent party." O'Brien, 111 N.Y. at 33-34. "It is a general rule running through our whole system of jurisprudence that no person shall bring a suit, or even be a party to one, unless he has some interest therein . . . and the same rule, in reason certainly, applies to actions commenced by the People." Lowe, 117 N.Y. at 191. "The attorney-general, in an action brought by [her], represents the whole People and a public interest, and not merely individuals and private rights." Id. at 192 (internal quotations and citation omitted).

Thus, "[a]nother significant constitutional question would be avoided by construing [the statute] not to authorize the continued prosecution of a cause of action by [NYAG] under the circumstance presented here," where the factual record raises "grave and doubtful constitutional questions" about her standing to do so. Grasso, 54 A.D.3d at 197, 200 (quotations and citation omitted). Because "nothing in the text of" Executive Law § 63(12) "purports to grant continued authority to sue to [NYAG]," the statute "should not be construed, 'by a species of judicial legislation,' to grant such authority." Id. at 200 (citation omitted). "To do so would invite rather than avoid 'grave and doubtful constitutional questions' about the authority of the Legislature, consistent with separation of powers, to grant standing to [NYAG] to prosecute an action . . . to redress an alleged wrong that was not 'perpetrated directly against the State.'" Id. (citations omitted).

III. The Disgorgement Award Is Unsupported by a Showing of Causation.

In its Final Decision, Supreme Court glibly assumed that the disputed representations in the Statements of Financial Condition *caused* the lenders to offer more favorable terms: "No false SFCs, no deal." A.144. Supreme Court made no factual findings and cited no evidence to support this *ipse dixit*, and none exists. See supra, Point II.B. Absent any showing that the alleged misconduct caused the supposedly ill-gotten gains, the disgorgement award must be reversed.[12]

[12] In addition, the text of § 63(12) provides for other forms of equitable relief without specifying disgorgement, and § 63(12) cases awarding disgorgement all involve parallel claims under the Martin Act or other statutes that authorize broader equitable remedies than § 63(12).

A. Disgorgement Requires a Showing of Causation.

Disgorgement requires a showing of causation. "[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, 232-233 (1st Dep't 2011), rev'd on other grounds, 21 N.Y.3d 324 (2013), quoting S.E.C. v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996); see also, e.g., Zimmerman v. Kohn, 125 A.D.3d 413, 414 (1st Dep't 2015). Disgorgement cannot be awarded where "there [was] no causal link" to any ill-gotten "profits." Jim Beam Brands Co. v. Tequila Cuervo La Rojena S.A. de C.V., 2011 WL 12711463 (Sup. Ct. N.Y. Cty. July 12, 2011); see also RXR WWP Owner LLC v. WWP Sponsor, LLC, 44 Misc. 3d 1221(A), at *8 (Sup. Ct. N.Y. Cty. Aug. 12, 2014). "The amount of disgorgement ordered" must "'be a reasonable approximation of profits *causally connected to the violation*.'" First Jersey Sec., Inc., 101 F.3d at 1475 (emphasis added), quoting S.E.C. v. Patel, 61 F.3d 137, 139 (2d Cir. 1995); see also S.E.C. v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1231-1232 (D.C. Cir. 1989).

B. The Alleged Misconduct Did Not Cause Any Ill-Gotten Gains.

In awarding disgorgement, Supreme Court made no factual findings that the alleged misrepresentations caused any supposedly "ill-gotten gains." A.142-145. In fact, the evidence demonstrates that the supposedly fraudulent statements did not influence any business decision. See supra, Point II.B.

1. The Statements Did Not Influence Any Business Decision.

Instead of testimony of fact witnesses to support the supposed "personal guarantee interest rate differential" for the Deutsche Bank and Ladder Capital loans, Supreme Court cited only the testimony of "[NYAG's] expert, Michiel McCarty." A.143. Supreme Court cited no other evidence supporting any inference of causation. See A.142-145. But McCarty did not, and was not qualified to, testify that the statements *caused* the two banks to grant more favorable interest rates; instead, he simply posited that conclusion—based on assumptions fed to him by NYAG attorneys—and "calculat[ed] the [supposed] interest rate differentials." A.107-109; see also A.143.

Thus, McCarty merely *assumed* causation. See, e.g., A.30544, 30556-30557, 30560-30561, 44458-44461. This assumption is not evidence, and it contradicts overwhelming evidence demonstrating that the challenged representations did not influence any business decision. See supra, Point II.B; see also, e.g., A.28130-28131, 30607-30612, 33281-33282, 33417-33418, 33426-33429, 33434-33435, 36170-36189, 36190-36216, 36217-36232, 36233-36269, 36270-36289, 36290-36316, 36317-36341, 42464-42472, 43293-43317, 45332, 45482-45484, 45485-45487, 45488-45493. In fact, McCarty explicitly admitted that he "can't be certain" about this fundamental factual assumption, (A.30624), and that, in forming his opinions, he did not consider extensive evidence contradicting causation. See

A.30607-30613. McCarty's testimony could not, and did not, establish causation in fact. See Quinn v. Artcraft Constr., 203 A.D.2d 444, 445 (2d Dep't 1994); Matter of 91st St. Crane Collapse Litig., 154 A.D.3d 139, 151-152, 159 (1st Dep't 2017).

Supreme Court's separate discussion of the OPO loan fares no better. See A.144. Here, Supreme Court cited no evidence but simply recited the slogan, "[N]o false SFCs, no deal." Id. Supreme Court speculated that "the interest rate savings from [Appellants'] use of the fraudulent SFCs . . . allowed them to preserve capital to invest in other projects," including the OPO. Id. But there is no evidence that the statements caused any "interest rate savings." Id. Appellants would have obtained exactly the same deal on the OPO loan from Deutsche Bank if the statements stated what Supreme Court thinks they should have. See supra, Point II.B.

Likewise, Supreme Court awarded disgorgement of "profits" from the Ferry Point sale without citing any evidence or making any findings as to causation. But the trial evidence makes clear that the statements played no role in shaping the terms of the Ferry Point deal. See supra, Point II.B.

2. Supreme Court Overcounted Damages.

Supreme Court's award of "profits" from the sales of the OPO and the Ferry Point license suffers from three additional, fatal errors. See A.144-145.

First, disgorgement is limited to ill-gotten proceeds and does not extend to "income derived from the ill-gotten proceeds." S.E.C. v. Govil, 86 F.4th 89, 107 (2d

Cir. 2023). Yet, that is exactly what Supreme Court did in awarding "profits" from the sales of the OPO and Ferry Point—it awarded disgorgement of income derived from supposed ill-gotten gains. See A.144-145.

Second, the "profits" award erroneously conflates *proceeds* with *profits*. For the OPO, Supreme Court ordered disgorgement of the entire proceeds of the sale, *i.e.*, over $126 million against President Trump, the Trust, and other entity Appellants; and over $4 million each against Donald Trump, Jr. and Eric Trump. See A.144, 152. But it is elementary that *proceeds* are not *profits*. The approximately $139 million distributed from the sale constituted the proceeds after repaying the mortgage and other associated costs. See A.31382, 31185-31187. To calculate the *profits* of the sale, Supreme Court should have deducted from the proceeds Appellants' net equity in the project, *i.e.*, their net investment in the OPO up to that point. These errors fatally undermine the disgorgement award of $126,828,600 against President Trump and entity Appellants, as well as the individual disgorgement awards of $4,013,024 each against President Trump's children, Donald Trump, Jr. and Eric Trump. A.144, 152.

Supreme Court likewise ordered "disgorgement of the windfall profits of $60 million attributable to selling Ferry Point to Bally's." A.145. But $60 million was the *proceeds* of the sale, not the profits. Again, net equity would have to be deducted to calculate profits. For example, undisputed evidence shows that Appellants invested at least $10 million in Ferry Point. See A.30262. Thus, at least that much, if not more, would have to be deducted to calculate "profits."

Third, the award of "profits" for the OPO sale double-counts damages in another way. Supreme Court improperly awarded disgorgement in the sum of both (1) the supposed "Interest-Rate Differential" savings in initially obtaining the OPO loan and (2) the "profits" from the sale of the OPO. A.143-144. If Appellants improperly "gain[ed]" more than $53 million in purported "Interest-Rate Differential" savings on the OPO loan between 2015 and 2022, that differential alone would offset most of the $134.8 million in proceeds. A.143-144. This is impermissible double recovery. See State of New York v. Solil Mgt. Corp., 128 Misc. 2d 767, 773 (Sup. Ct. N.Y. Cty.), aff'd, 114 A.D.2d 1057 (1st Dep't 1985) (holding that petitioner was "not entitled to punitive damages or treble damages" under § 63[12]).

C. Appellants' Disclaimers Defeat Causation as a Matter of Law.

Moreover, Appellants' inclusion of clear, specific disclaimers in every financial statement defeats any inference of causation as a matter of law.

Under New York law, a "disclaimer of reliance [] preclude[s] a claim of justifiable reliance on . . . misrepresentations or omissions" if "(1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the [disclaiming party's] knowledge." Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 A.D.3d 128, 137 (1st Dep't 2014), citing Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 323 (1959). Thus, "where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying upon representations or omissions as to the specific matter," then "a plaintiff [is] precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter." Id. "In other words, in view of the disclaimer, no representations exist and that being so, there can be no reliance." Id.

Thus, "a specific disclaimer of reliance on representations as to the condition of real property will ordinarily bar a fraud claim." TIAA Global Invs., LLC v. One Astoria Sq. LLC, 127 A.D.3d 75, 87 (1st Dep't 2015). "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." HSH Nordbank AG, 95 A.D.3d at 194-195 (quotation omitted).

Accordingly, "New York law imposes an affirmative duty on sophisticated [parties] to protect themselves from misrepresentations." Global Mins. & Metals Corp. v. Holme, 35 A.D.3d 93, 100 (1st Dep't 2006). Thus, in a transaction "between sophisticated parties," the allegedly misrepresenting party has "no obligation to disclose internal analyses." HSH Nordbank AG, 95 A.D.3d at 197-198. Moreover, a claim of fraud due to "inaccurate" and "unaudited financial statement[s]" fails when the complaining party "neglected to seek examination" of records in the other party's possession. Permasteelisa, S.p.A. v. Lincolnshire Mgt., Inc., 16 A.D.3d 352, 352 (1st Dep't 2005).

The statements in this case contain lengthy, specific, and detailed disclaimers, provided to extremely sophisticated parties. See, e.g., A.39045. These disclaimers reflect the understanding of the relevant marketplace, and they satisfy both requirements of New York law—they are (1) "sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the [disclaiming party's] knowledge." Basis Yield Alpha Fund (Master), 115 A.D.3d at 137.

1. The Disclaimers Are Sufficiently Specific.

First, Supreme Court held, without further analysis, that the disclaimers in the financial statements "did not particularize the type of fact misrepresented or undisclosed." A.29. That is incorrect. The disclaimers clearly state that they apply to the "values" and the "valuation methods" provided in the statements—*i.e.*, exactly what NYAG contends were misrepresented. See, e.g., A.39045. The disclaimers provide that "[a]ssets are stated at their estimated current values . . . using various valuation methods." Id. They state which "valuation methods" were used, "includ[ing], but [] not limited to, the use of appraisals, capitalization of anticipated earnings, recent sales and offers, and estimates of current values as determined by [President] Trump in conjunction with his associates and, in some instances, outside professionals." Id. They specifically disclaim reliance on these "values" and "valuation methods," noting that "[c]onsiderable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, the estimates presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities." Id. They advise that "[t]he use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts." Id.

This language put any sophisticated party on clear notice that the "values" and "valuation methods" used in the statements were disclaimed and that they should rely on their own "market assumptions and/or estimation methodologies" to draw their own conclusions. Id. It is hard to see how any sophisticated party could view these disclaimers as insufficiently specific. They are at least as clear and specific as other disclaimers that have been held enforceable. See, e.g., Citibank v. Plapinger, 66 N.Y.2d 90, 95 (1985); HSH Nordbank AG, 95 A.D.3d at 193; Barnes v. Gould, 83 A.D.2d 900, 900-901 (2d Dep't 1981) (finding a disclaimer "sufficiently specific" as to representations made as to the physical condition of premises).

Further, the disclaimers specifically state that the individual property values "presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities" and that the "use of different . . . methodologies may have a material effect on" the values presented. A.39045. Further, the statements expressly state "several of the values expressed have been based on future interests" and "performance of future services." A.39041. Thus, the disclaimers "track[] the substance of the alleged misrepresentation" and are "enforceable." FIH, LLC v. Found. Cap. Partners LLC, 920 F.3d 134, 142 (2d Cir. 2019) (quotations omitted).

2. The Disclaimers Do Not Address Matters Peculiarly Within Appellants' Knowledge.

Supreme Court asserted, without analysis, that it is "obvious[]" that the representations in the statements were "peculiarly within [Appellants'] knowledge." A.37. In fact, the opposite is true. Real estate "valuation methodologies" do not lie within Appellants' unique knowledge, and applying those methodologies to generate "values" also does not lie within their unique knowledge. Moreover, in a transaction among "sophisticated parties," there is "no obligation to disclose internal analyses"; instead, each counterparty must seek examination of such materials for itself. HSH Nordbank AG, 95 A.D.3d at 197-198.

Here, the highly sophisticated institutions performed their own independent analyses, using independent judgment to develop their own conservative valuations.

See supra, Point II.B. They conducted or obtained their own appraisals and utilized their own methods of evaluating the properties reported on the statements. Id. The ability of these highly sophisticated institutions to produce their own independent valuations belies the notion that the valuations were "peculiarly within [Appellants'] knowledge." Basis Yield Alpha Fund, 115 A.D.3d at 137.

Indeed, under New York law, the institutions have an "affirmative duty" to protect themselves from alleged misrepresentations, (Global Mins. & Metals Corp., 35 A.D.3d at 100), and they did so here by conducting their own due diligence. Therefore, the companies involved would be unable to complain of any fraudulent "induce[ment] to enter into the transaction[s] by misrepresentations," and New York courts disfavor such claims of reliance on alleged misrepresentations. Danann Realty Corp., 5 N.Y.2d at 322. To the extent that there were any facts arguably within Appellants' unique knowledge, the counterparties had both the right to inquire and ability to examine, and did inquire and examine, about those facts as part of the diligence they performed—including, for example, reviewing bank and brokerage statements to verify liquidity.

3. The Disclaimers Reflect the Understanding of the Relevant Marketplace.

Furthermore, the disclaimers reflect practices that are widely "understood in the relevant marketplace." HSH Nordbank AG, 95 A.D.3d at 193. This Court's reasoning in HSH Nordbank AG is instructive. In that case, HSH Nordbank AG

("HSH") relied on a prospectus "replete with detailed disclosures" regarding the risks attached to securities. Id. at 191. HSH later claimed that the securities ratings therein "were not entirely reliable," but this Court rejected the fraud claim. Id. at 193. This Court explained that "the potential for a discrepancy" between ratings and actual risk "was understood in the relevant marketplace" and that "the unreliability of credit ratings was sufficiently well known." Id.

Thus, a fraud claim relying on "a feature of the relevant . . . market that was common knowledge among participants in that market" did not "constitute a legally sufficient cause of action for fraud." Id. In so holding, this Court focused on the disclaimers involved in the deal, noting the "duty" of "sophisticated parties" "to exercise ordinary diligence and conduct an independent appraisal of the risk they [are] assuming" and emphasizing that, "as a matter of law," such parties could not raise such reliance claims if they "failed to make use of the means of verification that were available" to them. Id. at 194-195 (quotations omitted). This Court observed that the disclaimers "relate[d] to the very matter as to which [HSH] now claims it was defrauded," warning HSH that "it must rely on [its] own examination of . . . the terms of the offering." Id. at 199 (quotations omitted).

Here, the statements contained detailed, specific disclaimers directly related to the alleged factual misrepresentations. See, e.g., A.39045. Moreover, as discussed in detail above, (supra, Point II.B), "the potential for a discrepancy" between the statements' valuations and valuations produced by other methods "was understood in the relevant marketplace." HSH Nordbank AG, 95 A.D.3d at 193. For example, the evidence shows that Deutsche Bank performed its own independent analyses—a factor this Court in HSH Nordbank AG held "cannot be overemphasized"—and arrived at its own conservative valuations in entering the deals, thereby demonstrating knowledge of the "potential for a discrepancy" in various valuation methods, as commonly understood in the relevant market. Id. at 193, 196-197.

D. The Disgorgement of Weisselberg's Severance Must Be Reversed.

Even if there were substantial evidence to support it, which there is not, the separate disgorgement award of Allen Weisselberg's severance lacks the requisite causal connection between the severance payment and the conduct that Supreme Court found to be unlawful. A severance payment that was not determined with reference to the alleged fraudulent conduct cannot form a proper basis for a disgorgement award. The very case Supreme Court cited to support its award, S.E.C. v. Razmilovic, 738 F.3d 14 (2d Cir. 2013), makes this plain. In Razmilovic, the severance ordered to be disgorged was tied to the financial performance of the company, which was allegedly manipulated by the defendant's fraud and, thus, causally connected to the alleged wrongdoing. Id. There is no such connection here.

Furthermore, the amount of disgorgement must be a reasonable approximation of the alleged profits. First Jersey Sec., Inc., 101 F.3d at 1475. Here, the amount ordered to be disgorged is no approximation at all—only an arbitrary, blunderbuss forfeiture of the amount Weisselberg was paid. Because it plainly exceeds the amount of any ill-gotten gain, the disgorgement is an unlawful penalty not authorized by statute, (see Thoreson, 179 A.D.2d at 34-36), exceeds the "bounds of traditional equitable principles," (Liu v. S.E.C., 591 U.S. 71, 85 [2020]), and raises grave constitutional problems.

IV. The Disgorgement Awards Violate the Excessive Fines and Due Process Clauses of the New York and U.S. Constitutions.

A. The Disgorgement Awards Violate the Excessive Fines Clauses.

"Both the Federal and State Constitutions prohibit the imposition of excessive fines." County of Nassau v. Canavan, 1 N.Y.3d 134, 139 (2003), citing U.S. CONST. amend. VIII; N.Y. CONST. art. I, § 5. "The Excessive Fines Clause" of the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, as 'punishment for some offense.'" Id. (emphasis omitted), quoting Austin v. United States, 509 U.S. 602, 609-610 (1993). Judicially mandated payments "are 'fines' if they constitute punishment for an offense." Id., citing United States v. Bajakajian, 524 U.S. 321, 328 (1998). A "fine" is "excessive" if it is "'grossly disproportional to the gravity of a defendant's offense.'" Id. at 140, quoting Bajakajian, 524 U.S. at 334.

1. The Disgorgement Award Is a "Fine."

A civil penalty that "serves, at least in part, deterrent and retributive purposes [] is thus punitive and subject to the Excessive Fines Clause." Id. at 139-140. Likewise, under federal law, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." Austin, 509 U.S. at 610 (quotations omitted). "Deterrence," in particular, "has traditionally been viewed as a goal of punishment." Bajakajian, 524 U.S. at 329; see also Matter of Prince v. City of New York, 108 A.D.3d 114, 120-121 (1st Dep't 2013).

Here, Supreme Court's disgorgement award serves both deterrent and retributive purposes. First, Supreme Court expressly held that its award of "disgorgement aims to *deter* wrongdoing by preventing the wrongdoer from retaining ill-gotten gains." A.142-143 (emphasis added), quoting People v. Ernst & Young LLP, 114 A.D.3d 569, 569 (1st Dep't 2014). Supreme Court also explicitly described disgorgement as a "penalty." A.143.

Second, the award is retributive, as Supreme Court's opinions are littered with retributive language and punitive rhetoric—including theologically loaded terms more befitting a medieval inquisitor than a civil justice. See, e.g., A.138, 148 (discussing the alleged misconduct in terms of "venial sin" and "mortal sin" and arguing that "[Appellants'] complete lack of contrition and remorse borders on pathological"). The award "focus[es] . . . on the [alleged] culpability of [Appellants] in a way that makes [it] look more like punishment, not less." Austin, 509 U.S. at 619. This award is clearly "designed to punish the offender." Bajakajian, 524 U.S. at 332.

In Kokesh v. S.E.C., the U.S. Supreme Court held that disgorgement in SEC proceedings is punitive and "constitutes a penalty" for three reasons. 581 U.S. 455, 461 (2017). First, where the government, "rather than an aggrieved individual," is seeking the penalty—and does so "even if victims do not support or are not parties to" the enforcement action—the penalty is a "fine." Id. at 463-464. That is the case here. Second, "a pecuniary sanction operates as a penalty" when it serves "'to deter others from offending in [a] like manner'—as opposed to compensating a victim for his loss." Id. at 462 (citation omitted). Here, as in Kokesh, where no losses to the public were alleged or proven, "'[t]he primary purpose of [this] disgorgement order[] is to deter violations'" of the law "'by depriving violators of their ill-gotten gains.'" Id. at 464, quoting S.E.C. v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997). Third, where "disgorgement is not compensatory" because the funds are paid exclusively to the government, not to victims, "the payment operates as a penalty." Id. at 464-465. That is also the case here.

2. The Award is "Grossly Disproportional" to the Alleged Offense.

Because the disgorgement award constitutes a "fine," it "'violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.'" Canavan, 1 N.Y.3d at 140, quoting Bajakajian, 524 U.S. at 334. "In determining gross disproportionality," New York courts "consider such factors as the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged." Id.; see also Matter of Prince, 108 A.D.3d at 121. Federal courts consider similar factors. See United States v. Viloski, 814 F.3d 104, 110 (2d Cir. 2016).

a. The Seriousness of the Alleged Conduct.

The alleged misconduct has no victims, provoked no complaints, generated no evidence of reliance or causation, and inflicted no losses; instead, every payment was made in full and on time, allowing the "victims" to generate more than $100 million in profits, and every financial statement was fully consistent with the understanding of the relevant marketplace. See supra, Point II.B. The imposition of the massive disgorgement award is thus like "using a Hellfire missile to annihilate a shoplifter." The Editorial Board, Trump's $355 Million Civil Fraud Verdict, Wall St. J. (Feb. 16, 2024), available at: https://www.wsj.com/articles/donald-trump-355-million-civil-fraud-verdict-arthur-engoron-trump-organization-dde7e87b. The award is comparable to "the forfeiture of an automobile for a minor traffic infraction such as driving with a broken taillight or failing to signal." Canavan, 1 N.Y.3d at 140. It outstrips the excesses of Bajakajian, which invalidated a penalty of $357,144 for a failure to report currency in excess of $10,000. 524 U.S. at 324, 337.

b. The Severity of the Harm.

The supposed misconduct here consists, in essence, of alleged disclosure violations that caused no harm. See supra, Point II. Likewise, there is virtually no risk of *potential* harm from the alleged conduct because there were clear disclaimers, and it was "understood in the relevant marketplace" that each side would do its own due diligence. HSH Nordbank AG, 95 A.D.3d at 193. Thus, "[t]here was no significant harm caused by [Appellants'] conduct," (Matter of Prince, 108 A.D.3d at 121), and "[t]he harm that [Appellants] caused was . . . minimal," at most, (Bajakajian, 524 U.S. at 339). The award exceeds any actual or potential injury "by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government." Bajakajian, 524 U.S. at 340.

c. The Purpose of the Statute.

The central purpose of Executive Law § 63(12) is to protect "the average consumer" from *actual* harm. General Elec. Co., 302 A.D.2d at 314. Punishing successful deals among sophisticated parties that left all parties satisfied falls outside this statutory purpose. As in Prince, the facts of this case bear no relation to the

Legislature's "intent in passing the statute," especially where there is no articulable consumer harm or public interest. 108 A.D.3d at 118. This case resembles Bajakajian, where the relevant conduct lay far outside the statute's heartland because the "crime was solely a reporting offense," (524 U.S. at 337), and "[t]here was no fraud on the United States, and respondent caused no loss to the public fisc," (id. at 339).

d. The Maximum Fine for Purported Misconduct.

Executive Law § 63(12), a civil enforcement law, provides for no "maximum sentence and fine that could have been imposed." Viloski, 814 F.3d at 110 (quotation omitted). Rather, it provides only for *remedial* relief—injunctions, civil damages, restitution, and business certificate cancellation. Exec. Law § 63(12). Moreover, even if one were to consider the alleged criminal violations underlying the Second through Seventh Causes of Action, the supposed "crimes" are no more than class A misdemeanors, which carry a maximum fine of $1,000 for individuals or $5,000 for corporations. N.Y. Penal Law §§ 80.05(1), 80.10(1)(b). Yet, based on these claims, Supreme Court assessed financial penalties of $363,894,816 plus pre-judgment interest, for a total of approximately $464 million. See A.152, 156-163.

In Bajakajian, the U.S. Supreme Court invalidated a $357,144 award that exceeded the $5,000 maximum statutory penalty by a factor of about 71. 524 U.S. at 338-340. Here, the $464 million punishment exceeds the maximum statutory penalties by a factor of almost 464,000 for the individual Appellants, and a factor of 92,800 for the corporate Appellants. If that is not "excessive," nothing is.

B. The Disgorgement Award Violates the Due Process Clauses.

"The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003). Thus, a "grossly excessive" damages award also "violates the Due Process Clause of the Fourteenth Amendment." BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

Federal courts reviewing "grossly excessive" punitive awards consider "three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." State Farm Mut. Auto Ins. Co., 538 U.S. at 418, citing Gore, 517 U.S. at 575-585. New York courts consider the same factors. Matter of 91st St. Crane Collapse Litig., 154 A.D.3d at 157-158.

1. The Challenged Conduct is Not Reprehensible.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Gore, 517 U.S. at 575; see also State Farm Mut. Auto Ins. Co., 538 U.S. at 419. Only a "high degree of culpability [] warrants a substantial punitive damages award." Gore, 517 U.S. at 580. As in Gore, "[i]n this case, none of the aggravating factors associated with particularly reprehensible conduct is present." Id. at 576. "The harm [Appellants supposedly] inflicted," if it existed at all, would have been "purely economic in nature." Id. The statements "had no effect" on the underlying loans and insurance contracts. Id. Appellants' "conduct evinced no indifference to or reckless disregard for the health and safety of others." Id.

State Farm's reprehensibility factors are not met here. (1) Any risk of harm was not "physical," but merely "economic." State Farm Mut. Auto. Ins. Co., 538 U.S. at 419. (2) There was no "reckless disregard of the health or safety of others," and none is alleged. Id. (3) The "target[s] of the conduct" did not have "financial vulnerability," (id.), but were some of the least "vulnerable" institutions in the world. (4) There was no "intentional malice, trickery, or deceit," (id.), because the disclaimers clearly stated, and all parties understood, that the sophisticated counterparties would do their own due diligence—which they did.

This Court declined to find reprehensibility where, as here, "what is involved here is an ordinary commercial dispute between essentially two parties, with no widespread impact." Sawtelle v. Waddell & Reed, 304 A.D.2d 103, 111-113 (1st Dep't 2003); see also, e.g., Maskantz v. Hayes, 39 A.D.3d 211, 215 (1st Dep't 2007).

2. The Ratio of the Award to Actual Harm is Astronomical.

"The second . . . indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." Gore, 517 U.S. at 580. "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." State Farm Mut. Auto. Ins. Co., 538 U.S. at 425; see also Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 165-168 (2d Cir. 2014).

Here, the "actual harm inflicted" is nil. Gore, 517 U.S. at 580. Thus, *any* punitive award would result in a ratio that is virtually infinite. The award of $464 million in a case with no victims, no proven injuries, and no losses is not remotely defensible. See, e.g., id. at 583 ("When the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'" [quotation omitted]); State Farm Mut. Auto. Ins. Co., 538 U.S. at 426 ("In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio."); Sawtelle, 304 A.D.2d at 111-112 (invalidating a $25 million award that "dwarf[ed] the total compensatory damages by a factor of 23").

3. Statutory Penalties Comprise a Tiny Fraction of the Award.

"Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." Gore, 517 U.S. at 583. "[T]he reviewing court should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." Sawtelle, 304 A.D.2d at 112 (quotations marks omitted), quoting Gore, 517 U.S. at 583. Here, the $464 million "economic sanction imposed on [Appellants] is substantially greater than the statutory fines available in [New York] . . . for similar malfeasance." Gore, 517 U.S. at 584. In fact, it exceeds the maximum statutory fines for the relevant misdemeanors—which are $1,000 for individuals and $5,000 for corporations—by factors of about 464,000 and 92,800.

V. Judgment on the Second Through Seventh Causes of Action Is Not Supported by Record Evidence.

Judgment on the Second through Seventh Causes of Action must be reversed. On all Causes of Action, Supreme Court committed reversible error by failing to require NYAG to prove her claims by clear and convincing evidence. The clear and convincing standard is "deemed necessary 'to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma.'" People v. Wyatt, 89 A.D.3d 112, 127 (2d Dep't 2011) (citation omitted). By analogy to § 63(12), common-law fraud must also be established by clear and convincing evidence. Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 349-50 (1999).

A. The Second Cause of Action Fails.

The Second Cause of Action sought recovery under § 63(12) for falsifying business records under New York Penal Law § 175.05. Here, NYAG must show Appellants violated the predicate statute by proving each element of the underlying crime. See People v. World Interactive Gaming Corp., 185 Misc. 2d 852, 861 (Sup. Ct. N.Y. Cty. 1999). Falsifying business records in the second degree requires that a person make false entries or omit to make true entries in the records of a business enterprise, with intent to defraud. N.Y. Penal Law § 175.05.

To demonstrate fraud, a plaintiff "must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 421 (1996), citing Channel Master Corp. v. Aluminum Ltd. Sales, 4 N.Y.2d 403, 406-407 (1958). Here, the record is devoid of evidence to support any of these components of intent to defraud—especially in light of comprehensive disclaimers that made plain that counterparties should do their own due diligence. See supra, Point II.B. Among other things, there is no materiality, no justifiable reliance, and no damages. See supra, Point II.B; see also, e.g., A.30768-30770, 31981, 31983-31984, 32102, 32151-32152, 32258, 32261-32262.

Supreme Court also cannot ascribe conduct relating to one Appellant to others. See Abrahami v. UPC Constr. Co., 224 A.D.2d 231, 233-234 (1st Dep't 1996). The evidence must establish each Appellant *personally* participated in the alleged conduct or had actual knowledge of it. Id. at 234. Here, Supreme Court made no findings, and there is no evidence, detailing the individual Appellants' participation in or knowledge of the specific alleged defects in the statements. This is especially true for Donald Trump, Jr. and Eric Trump, who had no direct role in preparing the challenged statements. The record evidence and testimony adduced at trial conclusively established that the statements were prepared by employees at the company working in conjunction with the company's long-time outside accountants.

B. The Fourth Cause of Action Fails.

The Fourth Cause of Action alleged liability under § 63(12) for issuing false financial statements under New York Penal Law § 175.45. That statute is violated when a person, with the intent to defraud, "knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of some person and which is inaccurate in some material respect." N.Y. Penal Law § 175.45(1). Here, as discussed above, there is no evidence to support a finding of either intent to defraud or materiality. See supra, Point II.B.

Regarding materiality, Supreme Court cited no legal standard and held that courts "have refused to define 'material' in a 'one size fits all' fashion." A.138. This contradicts blackletter law, and the error undermines Supreme Court's analysis, not just for this cause of action, but for the case as a whole. The standard for materiality under § 63(12) 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." State of New York v. Rachmani Corp., 71 N.Y.2d 718, 726 (1988) (emphasis in original) (citation omitted); see also Schwartz v. Genfit, S.A., 212 A.D.3d 96, 99 (1st Dep't 2022); People v. Greenberg, 95 A.D.3d 474, 485 (1st Dep't 2012); Cohen v. Calloway, 246 A.D.2d 473, 473 (1st Dep't 1998). As recounted above in Point II.B, the alleged misrepresentations had no impact on the deals offered by "reasonable" counterparties.

C. The Sixth Cause of Action Fails.

The Sixth Cause of Action—which applies only to Appellants Weisselberg and McConney, supra, note 4—alleged liability under § 63(12) for insurance fraud under New York Penal Law § 176.05. Like the other statutes, New York Penal Law § 176.05 requires a showing of "intent to defraud" and the provision of "materially false information" or concealment of a "material" fact. N.Y. Penal Law § 176.05. For the reasons stated above, no evidence supports these requirements of intent to defraud and materiality. See supra, Point II.B.

Moreover, Zurich did not rely on the financial statements for numerous years, relying instead on media publications like Forbes and USA Today to support its underwriting decisions. See A.45237-45240, 45241-45245, 45246-45250, 45251-45255. In fact, the Zurich surety bond program existed as an "accommodation" to AON, the Trump Organization's broker. A.45247; see also A.32518-32519. Zurich did not do a lot of "technical underwriting," which would include "ordering clue reports, past claim reports . . . analyzing different reports that are available in the industry. None of that was really done in this case." A.32612-32613. From reviewing the underwriting memoranda, no underwriting was done because "there [wa]s nothing filled in." A.32624. In 2019, the year NYAG alleges Zurich was defrauded when Claudia Mouradian was the responsible underwriter, there "doesn't [sic] look like little or no underwriting was done." A.32638. Ms. Mouradian's testimony that Weisselberg told her *verbally* that the valuations were based on appraisals, which Supreme Court seemed to find important, (see A.134), is contradicted by both Weisselberg's testimony and Ms. Mouradian's own testimony regarding the degree to which she understood the meaning of the relevant concepts (*i.e.*, valuation and appraisal) and, more importantly, goes to a point that is not material—the valuations were ultimately irrelevant to the underwriting decision.

Likewise, there is no evidence of intent to defraud HCC by any specific Appellant. HCC's witness, Michael Holl, testified that he was verbally informed that there was "[n]o material litigation or communications from anyone." A.29890-29892. Mr. Holl does not recall "who made the statement about" no "material litigation or communication from anyone." A.29909-29910. Thus, there is no evidence attributable to any specific Appellant.

Further, there is no evidence in the record with respect to either Zurich or HCC that any of the alleged statements were written, which is required to prove insurance fraud. N.Y. Penal Law § 176.05. Alleged *oral* statements cannot be a basis for liability under the insurance-fraud statute.

D. The Conspiracy Claims in the Third, Fifth, and Seventh Causes of Action Fail.

The Third, Fifth, and Seventh Causes of Action sought recovery under Executive Law § 63(12) for conspiracy. To find liability, Supreme Court had to find not only that the substantive violations in these causes of action were proven—which they were not—but also that a conspiracy existed, based on clear and convincing evidence. A 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 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) (quotations omitted); see also Matter of Robinson v. Snyder, 259 A.D.2d 280, 281 (1st Dep't 1999). There is simply no evidence of any agreement, no evidence of intentional participation, and, importantly, no evidence of any resulting damage or injury to anyone. Unlike in cases where there was sufficient evidence of conspiracy, (see People v. Flanagan, 28 N.Y.3d 644, 662-663 [2017]), there is no evidence as to when the alleged conspiracy began, the date(s) on which any agreement was reached, the specifics of any agreement, the participants, or the date(s) on which each member joined any alleged conspiracy.

E. There Is No Basis for Joint and Several Liability.

Supreme Court's imposition of joint and several liability on Appellants was erroneous. See A.143-144, 152-153. Joint and several liability on disgorgement awards is "at odds with the common-law rule requiring individual liability for wrongful profits" where it "transform[s] [an] equitable profits-focused remedy into a penalty." Liu, 591 U.S. at 90. "Equity courts . . . generally awarded profits-based remedies against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory." Id. at 82-83. "The rule against joint-and-several liability for profits that have accrued to another appears throughout equity cases awarding profits." Id. at 83; see also id. at 90.

Even if it applied to disgorgement awards, "[j]oint and several liability . . . imposes on each wrongdoer responsibility for the entire damages awarded, even though a particular wrongdoer's conduct may have caused only a portion of the loss." Matter of Seagroatt Floral Co. (Riccardi), 78 N.Y.2d 439, 448 (1991). Thus, "[w]hen two or more tort-feasors act concurrently or in concert to produce a *single injury*, they may be held jointly and severally liable." Ravo v. Rogatnick, 70 N.Y.2d 305, 309 (1987) (emphasis added). In contrast, "where multiple tort-feasors 'neither act in concert nor contribute concurrently to the same wrong, they are not joint tort-feasors; rather, their wrongs are independent and successive.'" Id. at 310, quoting Suria v. Shiffman, 67 N.Y.2d 87, 98 (1986).

Here, the law does not support Supreme Court's *blanket* imposition of joint and several liability on Appellants across all alleged injuries. See A.143-144, 152-153. To impose joint and several liability, Supreme Court should have made specific factual findings as to which Appellants were supposedly involved in inflicting each "single injury." Ravo, 70 N.Y.2d at 309. Instead, Supreme Court imposed *blanket* joint and several liability on Appellants across all transactions, without any specific findings. See A.143-145, 152-153. This was clear error.

VI. The Award of Injunctive Relief Must Be Reversed.

An award of injunctive relief under Executive Law § 63(12) requires, at minimum, NYAG demonstrating "a reasonable likelihood of a continuing violation based upon the totality of the circumstances." People v. Greenberg, 27 N.Y.3d 490, 496-497 (2016). For the reasons discussed above, there was no showing of any violation—let alone a "continuing" violation. See supra, Point II. Further, "the totality of the circumstances" indicates that Appellants' conduct is lawful, ethical, and harmless. See id. This undermines the entire award of injunctive relief—including the continuation of the independent monitor, (A.149-150), the appointment of the independent director of compliance, (A.150), the "industry bans" on President Trump and others serving as officers or directors of New York entities, including the baseless and egregious bans on Eric Trump and Donald Trump, Jr., (A.150-153), and the astonishing and destructive injunction against applying for loans from any financial institution chartered or registered in New York, (A.151, 153).

In addition, the plain language of Executive Law § 63(12) authorizes the court to enjoin only *unlawful* acts. The statute provides that NYAG "may apply . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts." Exec. Law § 63(12). "[S]uch business activity" refers to activity involving "persistent fraud or illegality in the carrying on, conducting or transaction of business." Id. Thus, the statute authorizes injunctions only against *unlawful* conduct, not lawful business activity. See Matter of State of New York v. Magley, 105 A.D.2d 208, 210 (3d Dep't 1984) ("[Executive Law § 63(12)] limits what may be enjoined to the business activity or the fraudulent or illegal acts . . . . [W]here the act sought to be enjoined is not a violation of law, [§ 63(12)] does not confer the required authority for an inquiry as to such act."); see also Matter of People of State of N.Y. v. Ashil Hyde Park, 298 A.D.2d 393, 395 (2d Dep't 2002) (modifying injunction under § 63(12) to prevent it from enjoining activities that are, "in and of themselves, neither illegal nor fraudulent"). Yet here, the Final Decision, as reduced to Judgment, "enjoins [President] Trump and the Trump Organization and its affiliates from applying for loans from any financial institution chartered by or registered with the New York State Department of Financial Services for a period of three years." A.151. The statute does not authorize this blanket prohibition on plainly lawful conduct.

Moreover, the scope of this injunction is both vague and breathtakingly overbroad. It proscribes loans from institutions "chartered by" or "registered with" this State. Id. While there is no statutory requirement of "registration" under the Banking Law, a foreign bank must be "licensed in this [S]tate as a prerequisite for transacting business here so as to protect the public interest and the interests of depositors." See Animalfeeds Intl. v. Banco Espirito Santo e Comercial de Lisboa, 101 Misc. 2d 379, 385 (Sup. Ct. N.Y. Cty. 1979); see also Banking Law § 200. Consequently, as written, the injunction would arguably prevent Appellants from obtaining financing from any bank that does business in this State, regardless of whether it is headquartered or even has an office in this State. Even certain properties with existing loans could not seek refinancing, creating a default scenario.

Additionally, while the loans at issue before Supreme Court were for tens or hundreds of millions of dollars, the Final Decision, by its terms, would ostensibly cover even *de minimis* loans or leases of basic equipment (*e.g.*, copy machines, golf carts, lawn maintenance equipment), resulting in an inability to operate lawful businesses—which threatens to needlessly grind to a halt Appellants' day-to-day operations for three years. See A.151, 153.

Supreme Court also imposed (1) a three-year ban on President Trump "serving as an officer or director of any New York corporation or other legal entity in New York," (2) a two-year ban on Donald Trump, Jr. and Eric Trump "serving as an officer or director of any New York corporation or other legal entity," despite their extremely limited involvement in the alleged conduct, and (3) permanent bans against Weisselberg and McConney from serving in financial-control functions of any New York corporation or similar business entity registered and/or licensed in New York and a three-year ban from serving as an officer or director of any New York corporation or other legal entity in New York. A.151-153. These bans unlawfully deprive Appellants of the ability to engage in *lawful* business activity and force the entities to operate without leadership. Such blanket prohibitions on otherwise lawful conduct far exceed the scope of any statutory authorization under Executive Law § 63(12).

VII. The Judgment Must Be Reversed Due to Supreme Court's Plainly Erroneous Property Valuations.

Supreme Court committed reversible error in rejecting Appellants' overwhelming and unrebutted expert evidence submitted in opposition to NYAG's summary judgment motion—an error it replicated at trial. This error affected every valuation decision, since all were effectively controverted by Appellants' expert witnesses, and it fatally infected the trial as well.[13]

"The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned." Glick & Dolleck, 22 N.Y.2d at 441. The court is bound to make all inferences in the non-movant's favor. See Cruz v. American Export Lines, 67 N.Y.2d 1, 13 (1986).

In moving for summary judgment, NYAG did not submit any expert testimony. By contrast, Appellants submitted deposition testimony and/or affidavits from twelve accomplished experts: Eli Bartov, Steven Collins, Frederick Chin, Greg Christovich, Jason Flemmons, Gary Giulietti, Steven Laposa, David Miller, Lawrence Moens, John Shubin, Robert Unell, and Steven Witkoff. See A.17472-18079 (Bartov); A.22830-22854 (Collins); A.18560-18856, 23898-23996 (Chin); A.16576-16973, 22749-22829 (Christovich); A.16974-17471 (Flemmons); A.15915-16107, 22855-22878 (Giulietti); A. 19752-20019, 22879-22995 (Laposa); A.16108-16305, 22996-23031 (Miller); A.23032-23060, 22153-22461 (Moens); A.16407-16575, 23061-23120 (Shubin); A.18080-18559 (Unell); A.23128-23143

[13] The trial was beset by a waterfall of erroneous evidentiary rulings that were not harmless. These include, but are not limited to, the trial court's preclusion of defense expert testimony while letting NYAG's experts testify with no evidentiary foundation whatsoever. Further, the trial court rejected wholly unrebutted defense expert testimony as incredible based on nothing more that the court's *ipse dixit*.

(Witkoff). These experts controverted NYAG's claims on every disputed valuation in the financial statements. See id.

Supreme Court's 35-page MSJ Decision failed to even mention ten of those twelve experts. Supreme Court then proceeded to substitute its own judgment and make improper credibility determinations at summary judgment, entirely rejecting the testimony of the two experts it did mention. It then carried these same errors forward throughout the bench trial.

For example, Supreme Court characterized the affidavit of Mr. Bartov, an NYU accounting professor, as "wholly conclusory" and "incorrect" based on the court's own interpretation of what the financial statements "emphatically declare." A.52. Notably, Supreme Court failed to expressly reject the vast majority of Mr. Bartov's testimony, but merely concluded that President Trump was "obligated to disclose [] exceptions when he represented that the SFCs did not reflect his brand value." Id. Supreme Court thus ignored the balance of Mr. Bartov's affidavit and expert reports, which explicated that generally accepted accounting principles ("GAAP") permit preparers to choose from a variety of asset valuation methods in determining estimated current value ("ECV") and applied those principles to the valuations contained in the financial statements. A.17472-18079. Supreme Court rejected the actual accounting standards, adopting instead its own subjective views, without citing any governing authority.

Likewise, Supreme Court egregiously mischaracterized the expert testimony of Lawrence Moens, a Palm Beach real-estate broker, as "conclusory" and further denigrated it for failing to specifically opine "*at what price* [Mr. Moens] is 'confident' he could find a buyer" for Mar-a-Lago. A.49 (emphasis in original). Supreme Court declared that Mr. Moens did not "rely[] on any objective evidence" in reaching his own valuations for Mar-a-Lago. Id. In fact, it is clear from Mr. Moens' expert report that he relied on his considerable experience as a high-end real-estate broker in Palm Beach, as well as the particular features and location of Mar-a-Lago, in coming to his conclusion that, as of 2022, Mar-a-Lago would be worth more than $1.2 billion. See A.23039-23044. Rather than engage with the merits of Mr. Moens' analysis, Supreme Court cherry-picked four lines from a 240-page deposition, wherein Mr. Moens stated that he could find a buyer with a net worth of more than $10 billion, to summarily conclude that "[o]bviously, [Supreme] Court cannot consider an 'expert affidavit' that is based on unexplained and unsubstantiated 'dream[s].'" A.49.

Appellants also submitted overwhelming, unrebutted expert evidence on the scope of permissible approaches to property valuation, appraisal, and reporting of ECV under GAAP, including affirmations from Eli Bartov, Jason Flemmons, Steven Laposa, Steven Witkoff, and Frederick Chin. See A.17376-17471 (Flemmons), 17915-18079 (Bartov), 18857-18971 (Chin), 22879-22995 (Laposa), 23128-23143

(Witkoff). Appellants even adduced evidence specific to Mar-a-Lago, addressing in detail NYAG's baseless assertions as to the purported impact on valuation of certain covenants, deeds, and restrictions and providing a comprehensive presentation of all the applicable governing documents. See A.23062-23120, 45513-45596, 45597-45634, 45635-45638; see also A.16407-16570. Each of these affidavits, at the bare minimum, raises genuine issues of fact about the accuracy and fairness of Appellants' valuation estimates, and Supreme Court's conclusion that these experts were incredible on the written summary judgment record contravenes settled law. See Glick & Dolleck, 22 N.Y.2d at 441; see also Cruz, 67 N.Y.2d at 13.

The court should have considered this testimony as creating genuine disputes of material fact on every challenged valuation. See, e.g., People v. Diaz, 20 N.Y.3d 569, 575 (2013) ("Expert testimony is properly admitted if it helps to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." [quotations omitted]); Pickard v. Pickard, 33 A.D.3d 202, 205-208 (1st Dep't 2006) (remanding for further evaluation after motion court rejected expert valuation as erroneous). In Supreme Court's view, the statements "clearly contain[ed] fraudulent valuations that [Appellants] used in business, satisfying [NYAG's] burden to establish liability as a matter of law against [Appellants]." A.44. However, Appellants' unrebutted experts, including Mr. Flemmons and Mr. Bartov, made clear that "GAAP does not require a specific method to be used to estimate current value for a particular asset for personal financial statements, nor does GAAP require the same method to be used for all assets in the same group." A.17379; see also A.23652-23789.

In one particularly egregious example of uninformed judgment, Supreme Court valued Mar-a-Lago as worth between $18 million and $27.6 million. See A.49. As with every valuation decision, Supreme Court replicated this error in the Final Decision, thus infecting the Judgment. See A.101-102, 138. Supreme Court misinterpreted documentary evidence that it believed limited the property to "club use" to contend that Appellants' values—which, in fact, greatly *undervalue* the property—constituted "an overvaluation of *at least 2,300%*, compared to the assessor's appraisal." A.49 (emphasis in original).

By contrast, Mr. Moens testified that the values for Mar-a-Lago were "reasonable and, in many cases, conservative for years 2011 through 2021." A.23035. As noted above, Mr. Moens, who makes his living selling elite properties in the relevant market, opined without contradiction that Mar-a-Lago could be sold for over $1.2 billion—around 50 times Supreme Court's absurd valuation. A.23043-23044.

Moreover, in finding Mar-a-Lago could not be valued as a private residence, Supreme Court again disregarded unrebutted evidence that no prohibition exists on Mar-a-Lago being used and valued as a single-family residence. As Appellants' expert John Shubin's unrebutted testimony shows, when read together and *in conjunction with local practices*—which raise *factual* questions subject to expert analysis, not purely legal questions—(1) the Deed of Conservation and Preservation Easement to the National Trust for Historic Preservation, dated March 26, 1995; (2) the Deed of Development Rights, recorded on October 17, 2002; (3) the Rules of The Mar-a-Lago Club; (4) the Town of Palm Beach's Zoning Code; and (5) the fact that the Town of Palm Beach has not taken any action against President Trump residing at the property despite contrary complaints—support the unrebutted conclusion that no prohibition exists on Mar-a-Lago being used and valued as a private residence. See A.16407-16570, 23061-23120, 45513-45596, 45597-45634, 45635-45638, 45868-45887.

In Supreme Court's estimation, appraisals are "clear, indisputable documentary evidence" that cannot be a matter of "reasonable experts disagreeing." A.42. That is simply not the law. See, e.g., Matter of New York Title & Mtge. Co., 277 N.Y. 66, 81 (1938) ("[F]air play requires also that an opportunity should be afforded to test by cross-examination the validity of any appraisal entering into the allowance of a claim."). Appellants' experts further make clear that appraisals themselves can vary significantly depending on inputs and methodologies and, consequently, are not "objective." See, e.g., A.18863-18881, 22881-22883.

Finally, the evidence adduced by Appellants also makes clear that the challenged statements were intended and treated as the beginning of a complex and highly subjective valuation process that requires financial institutions to perform their own due diligence. See, e.g., A.14158-14164, 18275-18279.

CONCLUSION

For the reasons stated, the Judgment should be reversed.

Dated: New York, New York
July 22, 2024

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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

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, SEVEN SPRINGS LLC,

Defendants-Appellants.

ROBERT & ROBERT, PLLC, CLIFFORD S. ROBERT, MICHAEL FARINA, CONTINENTAL PLLC, CHRISTOPHER M. KISE, ARMEN MORIAN, MORIAN LAW PLLC, HABBA MADAIO & ASSOCIATES, LLP, and MICHAEL MADAIO,

Non-Party Appellants.

1. The index number of the case in the Court below is 452564/2022.

2. The full names of the remaining parties are set forth above. Defendant Ivanka Trump was discontinued from the action by Decision and Order of this Court dated June 27, 2023.

3. The action was commenced in the Supreme Court, New York County.

4. This action was commenced on or about September 21, 2022, by the filing of a Summons and Verified Complaint. Issue was joined by service of Verified Answers on or about January 26, 2023, followed by Amended Verified Answers on or about February 21, 2023.

5. The nature and object of the action is Executive Law § 63 (12).

6. These appeals are from the Decision and Order of the Honorable Arthur F. Engoron, dated September 26, 2023, the Decision After Non-Jury Trial of the Honorable Arthur F. Engoron, entered February 16, 2024, and the Judgment of the Supreme Court of the State of New York, County of New York, entered February 23, 2024.

7. These appeals are being perfected with the use of a Joint Appendix.