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

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, Plaintiff, -against- Donald J. Trump, *et al*., Defendants.	Index No. 452564/2022 Hon. Arthur Engoron

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

LETITIA JAMES
Attorney General of the State of New York
28 Liberty Street
New York, NY 10005

Andrew Amer
Colleen K. Faherty
Alex Finkelstein
Sherief Gaber
Wil Handley
Eric R. Haren
Mark Ladov
Louis M. Solomon
Stephanie Torre
Kevin C. Wallace

Of Counsel

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The People of the State of New York, by Letitia James, Attorney General of the State of New York, respectfully submit this memorandum of law with Appendix, the accompanying Affirmation of Colleen K. Faherty in Opposition, dated September 1, 2023 ("Faherty Opp. Aff."), and Response to Defendants' Rule 202.8-g Statement of Material Facts ("202.8-g Response") in opposition to Defendants' motion for summary judgment (NYSCEF No. 834).

PRELIMINARY STATEMENT

Defendants' motion is unmoored from the prior rulings in this case and the evidentiary record.

As if writing on a clean slate, Defendants argue that the Attorney General has no standing or capacity to bring this Executive Law § 63(12) enforcement action absent public harm, that the disclaimer language in Donald J. Trump's Statements of Financial Condition ("SFCs") provides them with a complete defense, and that the People cannot seek disgorgement. But these arguments have been rejected by this Court (twice) and the appellate division; they have no more merit now than they did before. Defendants' conduct in raising them again is frivolous.

Defendants similarly ignore the appellate division's ruling on how the statute of limitations applies. The undisputed evidence establishes that Defendants prepared false and misleading SFCs that they then submitted and certified as true to banks and insurers in business transactions in New York well after the beginning of the limitations period in July of 2014. All of that misconduct is actionable under § 63(12). Defendants argue that claims based on such conduct are nevertheless time-barred if the loan itself closed before the start of the limitations period, even if the SFCs are prepared, submitted, or certified within the limitations period. Defendants' position cannot be squared with the appellate division's holding that Plaintiff has timely claims arising from the preparation, submission, and/or certification of a false and misleading SFC that occurred during the limitations period. Defendants' interpretation leads to the untenable outcome that a borrower

on a long-term loan with annual financial disclosure requirements – like Defendants —is free to prepare, submit, and certify false or misleading financial statements without legal consequence so long as the loan closed before the limitations period began. To the contrary, each time Defendants prepared, submitted, and certified a false or misleading SFC to a bank within the applicable limitations period – *i.e.*, on or after July 13, 2014 – they engaged in a fraudulent business transaction giving rise to a timely claim. The record establishes that each Defendant engaged in multiple fraudulent business transactions during the limitations period, including through 2021; timelines for the five loans showing the numerous fraudulent transactions engaged in by Defendants within the limitations period are attached in the accompanying Appendix to this brief. As a result, all of Plaintiff's causes of action are timely as to all Defendants.

Turning to the merits of the § 63(12) fraud claim, the People are not required to show that the victims of Defendants' fraud were materially misled by the SFCs as Defendants argue, but rather merely that the challenged conduct has "the capacity or tendency to deceive" or "creates an atmosphere conducive to fraud." *People v. Northern Leasing Systems, Inc.*, 193 A.D.3d 67, 75 (1st Dep't 2021). This standard is easily met.

As a threshold matter, Defendants assert facts in their supporting 202.8-g Statement (NYSCEF No. 836) that compel a finding that the SFCs were false and misleading. They acknowledge that assets may be valued on two very different bases, investment value ("as if") and market value or estimated current value ("as is"),[1] and that estimated current value reflects market conditions while investment value does not. They further contend that certain asset values listed

[1] Defendants' expert Dr. Steven Laposa confirmed at his deposition that "market value" is synonymous with "estimated current value." *See* Robert Aff. (NYSCEF No. 837), Ex. AAC at 90:5-91:13.

in the SFCs are stated at their *investment values,* reflecting Mr. Trump's investment requirements and divorced from market conditions. This is a fatal admission because it is undisputed that the SFCs themselves represent to users that all asset values are stated at their "estimated current value," reflecting market conditions. In other words, Defendants concede that the SFCs falsely describe the basis on which the asset values are presented – telling users the assets are "as is" values reflecting market conditions when they are (per Defendants' assertion) "as if" values. Defendants' admission that the SFCs misrepresent the asset values as something they are not is sufficient for the Court to find the SFCs are false and misleading without more.

In addition, as the People's detailed analysis of the *undisputed evidence* presented in their partial summary judgment motion establishes, regardless of the valuation methodology purportedly used, Defendants inflated many asset values by *hundreds of millions of dollars each year*. Defendants simply gloss over the deceptive practices they employed to inflate the values of the Triplex (by tripling the square footage), the Seven Springs Estate, 40 Wall Street, and Mar-a-Lago (by disregarding appraisals), the golf course in Aberdeen (by disregarding development restrictions), Vornado Partnership Properties and Trump Tower (by using the wrong capitalization rate), U.S. golf clubs (by adding an undisclosed "brand premium," including membership deposit liabilities that were represented to be valued at $0, and disregarding appraisals for TNGC LA and Briarcliff), Trump Park Avenue (by ignoring rent stabilization laws, option prices on Ivanka Trump's apartments, and internal Trump Organization current market values), cash and escrow deposits (by including amounts held by partnership interests over which Mr. Trump had no control), and real estate licensing developments (by including inchoate deals yet to be signed and management deals between Trump Organization affiliates that were not arms-length transactions).

These deceptive practices *inflated Mr. Trump's annual net worth by 17-39% at a minimum* – or between $812 million to $2.2 billion – depending on the year.

But the extent of Defendants' deception is far greater than what the People have laid out in their partial summary judgment motion relying just on the undisputed evidence. Based on the analyses of the People's valuation and accounting experts, which factor into Defendants' methodologies what market participants would consider when determining estimated current value, Mr. Trump's net worth is overstated by *billions* more. Among the factors the People's experts take into account to adjust the methodologies used by Defendants are: (i) discounting future income to present value; (ii) correcting for inconsistent methodologies; (iii) failing to account for relative risk and property-specific attributes; (iv) failing to account for development costs, (v) correcting for unsupportable market assumptions; and (vi) using income and expense information, mirroring the behavior of market participants, rather than fixed assets and a brand premium in valuing golf and club properties. After factoring in these and other fundamental considerations that any informed buyer and seller in the marketplace would take into account, Mr. Trump's net worth would be further *substantially reduced by between $1.9 billion to $3.6 billion* per year, which is still a conservative estimate of the extent of the inflation because the analysis by Plaintiff's valuation experts accepted many of the inputs and assumptions used by Defendants to derive the asset values in the SFCs that would otherwise be rejected in a full-blown appraisal review.

Based on this mountain of evidence establishing the extent to which Mr. Trump and his associates grossly and deceptively inflated his assets and net worth in the SFCs each year, and the undeniable fact that they submitted and certified the SFCs as true to banks and insurers, Plaintiff has clearly set forth evidence sufficient to establish at trial that Defendants engaged in fraudulent

business transactions with the capacity or tendency to deceive in violation of § 63(12) (if not as a matter of law based on the undisputed facts presented in Plaintiff's partial summary judgment motion, then certainly based on all of the evidence, including expert testimony, discussed here).

Similarly, Defendants' contention that all of Plaintiff's claims must fail because the counterparty banks and insurance companies were not harmed by, and did not rely upon, the SFCs is without legal support. It is settled law that the Attorney General is not required under § 63(12) to show reliance or harm. That is because the Legislature determined when enacting § 63(12) that the State is entitled to vindicate the public's strong interest in an honest marketplace without the need to show harm to, or reliance by, the victims of fraud.

But even if the People were required to show harm and reliance on a § 63(12) fraud claim (which is not the case), the notion that the banks and insurers here, each of which required financial disclosure of Mr. Trump's net worth as a condition of their continued business relationship with the Trump Organization, did not suffer any harm from, or rely upon, the false and misleading SFCs is easily refuted by the record. The SFCs were integral to the loans because of Mr. Trump's personal guarantee. The banks *required* their annual submission along with a certification as to their accuracy to obtain and maintain the loans. Indeed, Deutsche Bank's credit risk officer confirmed that the annual submission and certification of the SFCs were material to the Trump Organization's satisfaction of its continuing loan obligations. And the insurance underwriters similarly testified that they relied on financial information in the SFCs when assessing the risk presented during policy renewals. The *ipse dixit* testimony of Defendants' experts to the contrary is inadmissible as it lacks evidentiary foundation, and in all events cannot refute testimony from persons involved in the transactions and contemporaneous documents, including the governing agreements that make crystal clear the importance of the SFCs.

Finally, there is ample evidence to support the People's remaining claims under § 63(12) for making false entries in business records, falsifying financial statements, and committing insurance fraud, as well as conspiracy to commit these illegal acts. The evidence establishes beyond doubt that Defendants grossly inflated the value of many assets through deceptive practices, resulting in an overstatement of Mr. Trump's net worth by amounts that would be material to any user of the SFCs. And there is ample evidence to support a finding that Defendants had the requisite intent to defraud based on their numerous overt acts to conceal their deception from their accountants, banks, and insurers. Similarly, substantial evidence – both circumstantial and direct – establishes that each of the individual Defendants, and through their conduct the entity Defendants, engaged in numerous purposeful deceptive acts as part of a plan to (i) create false entries on business records and false financial statements by grossly inflating the value of assets listed on the SFCs in order to reverse engineer Mr. Trump's net worth to hit the target number desired by Mr. Trump, and (ii) submit the inflated SFCs to banks and insurers while attesting to their accuracy.

Copious evidence supports each of Plaintiff's claims. Accordingly, Defendants' motion should be denied.

STATEMENT OF FACTS[2]

Many of the facts material to opposing Defendants' summary judgment motion are already set forth in detail in the Statement of Facts section of the People's memorandum of law submitted

[2] The citations in this section use the following format: (i) cites to "202.8-g Statement ¶__" are to paragraphs in Plaintiff's 202.8-g Statement filed in support of Plaintiff's motion for partial summary judgment (NYSCEF No. 767); (ii) cites to "202.8-g Response ¶__" are to paragraphs in

in support of their motion for partial summary judgment (NYSCEF No. 766) and the accompanying 202.8-g Statement (NYSCEF No. 767). Plaintiff incorporates here by reference those prior filings and provides citations to Plaintiff's 202.8-g Statement rather than the underlying exhibits (unless exhibits are directly quoted) to avoid unnecessary repetition.

A. Preparation of the SFCs

Since at least 2011, Mr. Trump and Trump Organization employees have prepared an annual "Statement of Financial Condition of Donald J. Trump" that provides Mr. Trump's net worth as of June 30 for the year in question. (202.8-g Statement ¶1) The SFCs represent that "[a]ssets are stated at their estimated current values and liabilities at their estimated current amounts," consistent with GAAP. (Ex. 1 at -133; Ex. 2 at -310; Ex. 3 at -036; Ex. 4 at -716; Ex. 5 at -690; Ex. 6 at -1985; Ex. 7 at -1844; Ex. 8 at -2727; Ex. 9 at -792; Ex. 10 at -250; Ex. 11 at -420; 202.8-g Statement ¶29-35) The asset valuations for the SFCs were prepared by staff at the Trump Organization, working at the direction of Mr. Trump or the trustees of the Donald J. Trump Revocable Trust ("Trust"). (202.8-g Statement ¶5) The valuations were calculated in an Excel spreadsheet that was forwarded each year to the accounting firm preparing the SFC along with some supporting documents. (202.8-g Statement ¶6)

On May 18, 2021, Mazars, the accounting firm that had compiled the SFCs for 2011 through 2020, notified the Trump Organization that the firm was "resigning from all engagements with the Trump Organization and related entities." (Ex. 217) Subsequently on February 9, 2022,

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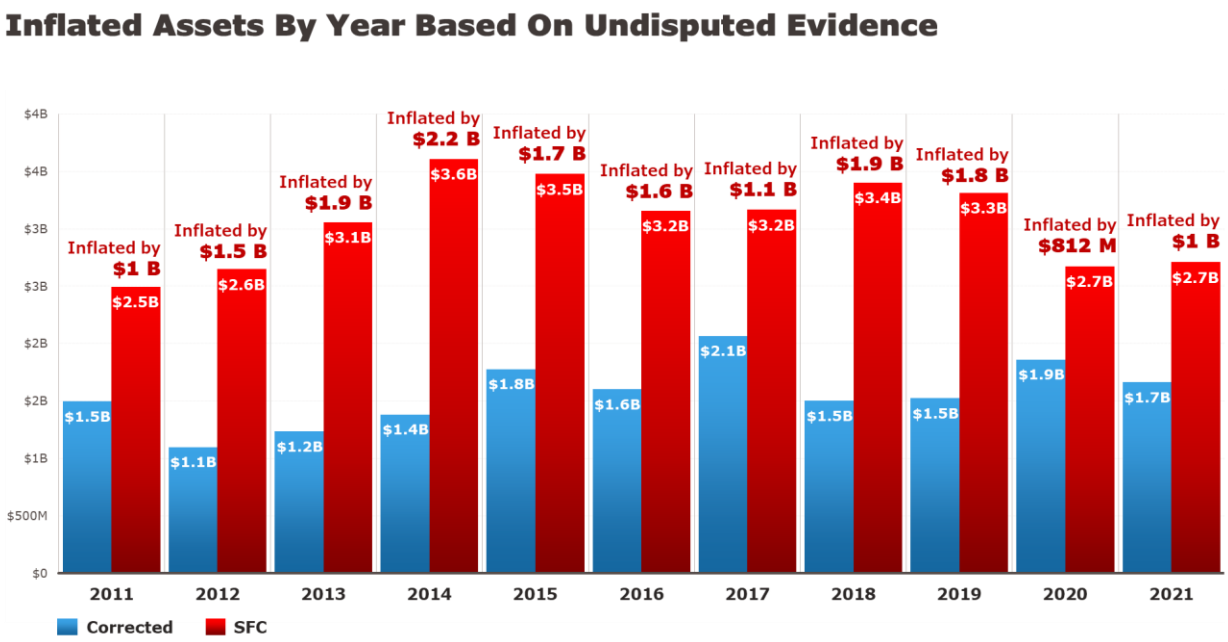
Plaintiff's Response to Defendants' 202.8-g Statement being served simultaneously with this brief; (iii) cites to "Ex. __" (from nos. 1 to 421) are to the exhibits listed and attached to the Faherty Affirmation previously filed in support of Plaintiff's motion for partial summary judgment (NYSCEF No. 768); and (iv) cites to "Ex. __" (starting with no. 1001) are to the exhibits listed and attached to the Faherty Opposition Affirmation accompanying this memorandum of law.

Mazars further informed the Trump Organization that the SFCs for the years 2011 to 2020 "should no longer be relied upon." (Ex. 218)

B. Inflation of Assets Based On The Undisputed Evidence

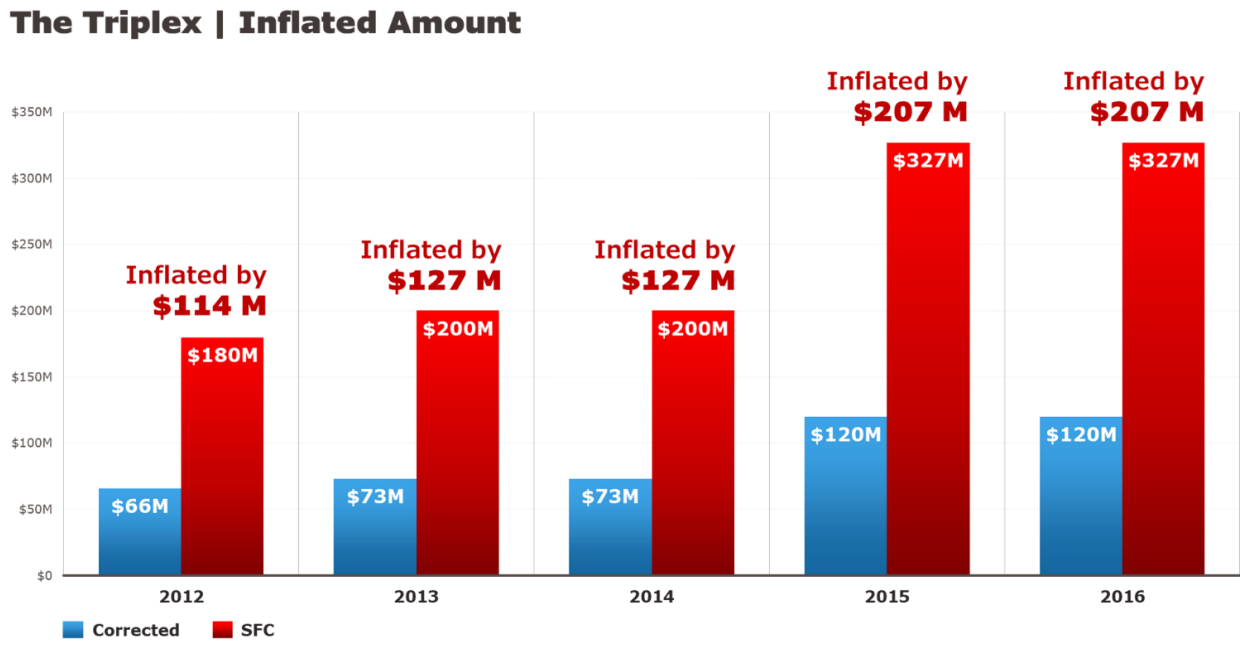
The undisputed evidence the People present in support of their motion for partial summary judgment establishes that many assets were grossly inflated by amounts that were material to any user of the SFCs, resulting in an overstatement of Mr. Trump's annual net worth by between 17-39%, or between $812 million to $2.2 billion, during the period 2011 to 2021, as shown in the graph below.[3]



[3]As discussed, *infra*, at 23-26, the People will present additional evidence at trial beyond the undisputed evidence supporting their partial summary judgment motion demonstrating Mr. Trump's net worth in any year between 2011 and 2021 would be *billions less* than stated in his SFCs based on the work done by Plaintiff's valuation experts in adjusting the Trump Organization's valuations to properly account for market factors that a willing buyer and willing seller would consider in determining "estimates of current value."

A description of each asset and the deceptive practices resulting in the inflated values established by the undisputed evidence is provided below.

The Triplex: In the years 2012 through 2016, the Triplex value was calculated based on multiplying a price per square foot as determined by the Trump International Realty Sales Office by an incorrect figure for the size of the Triplex of 30,000 square feet. (202.8-g Statement ¶37) In reality, the Triplex was 10,996 square feet. (202.8-g Statement ¶38) As a result of this error alone, the value of the Triplex reflected on each SFC from 2012 through 2016 was inflated by $114-$207 million as shown in the graph below. (202.8-g Statement ¶39)

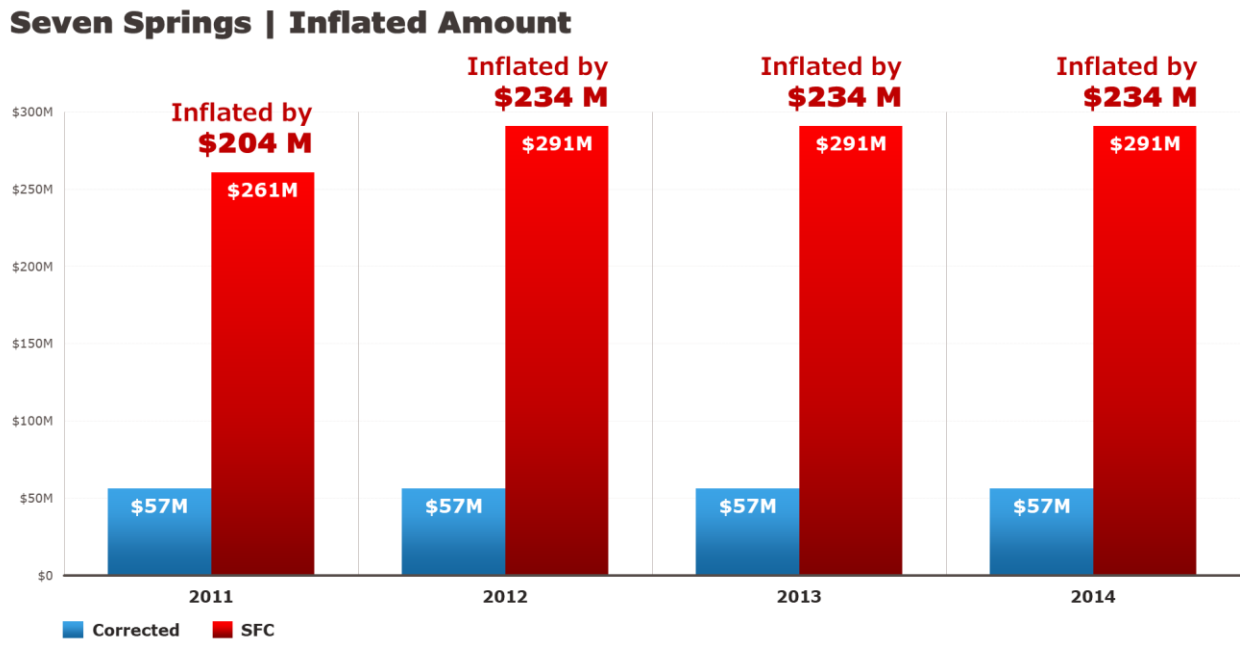


Seven Springs: Multiple appraisals of the property were prepared over the years, all of which were disregarded by the Trump Organization when valuing the property for the SFCs A 2000 appraisal prepared for the Royal Bank of Pennsylvania and sent to the Trump Organization estimated that Seven Springs had an "as-is" market value of $25 million for residential development. (202.8-g Statement ¶50) The same bank's records indicate that a 2006 appraisal showed an "as-is" market value of $30 million. (202.8-g Statement ¶51) Another appraiser retained

by Seven Springs LLC in late 2012 estimated the fair market value of a planned 6-lot subdivision on the portion of the property located in New Castle at around $700,000 per lot. (202.8-g Statement ¶55) In July 2014, an appraiser at Cushman & Wakefield ("Cushman") reached a present value for a 24-lot development plan of approximately $30 million and communicated his range to counsel for Seven Springs LLC in late August or September 2014, who then shared the range with Eric Trump months before Mazars finalized the 2014 SFC on November 7, 2014. (202.8-g Statement ¶59-63) Despite receiving values from professional appraisers in 2000, 2006, 2012, and 2014 putting the value of Seven Springs at or below $30 million, Mr. Trump wildly inflated the value of the property to $261 million in the 2011 SFC and $291 million for the SFCs from 2012 through 2014. (202.8-g Statement ¶73, 75)

In early 2016, the Trump Organization received from Cushman an appraisal of Seven Springs that valued the entire property as of December 1, 2015 at $56.5 million. (202.8-g Statement ¶67) In a concession that the appraised value was the proper amount to use as the value for the property in the SFC, Mr. Trump lowered the value of Seven Springs in the 2015 SFC to $56 million to match the Cushman appraisal. (202.8-g Statement ¶68) His trustees changed the value in subsequent years to $35.4 million for the period 2016 to 2018 and, based on another appraisal obtain by the Trump Organization, to $37.65 million for the period 2019 to 2021. (202.8-g Statement ¶69, 70)

Based on the highest appraised value of $56.5 million determined by Cushman in 2015, the property was vastly overvalued by more than $200 million in each year from 2011 through 2014 as shown in the graph below. (202.8-g Statement ¶75)



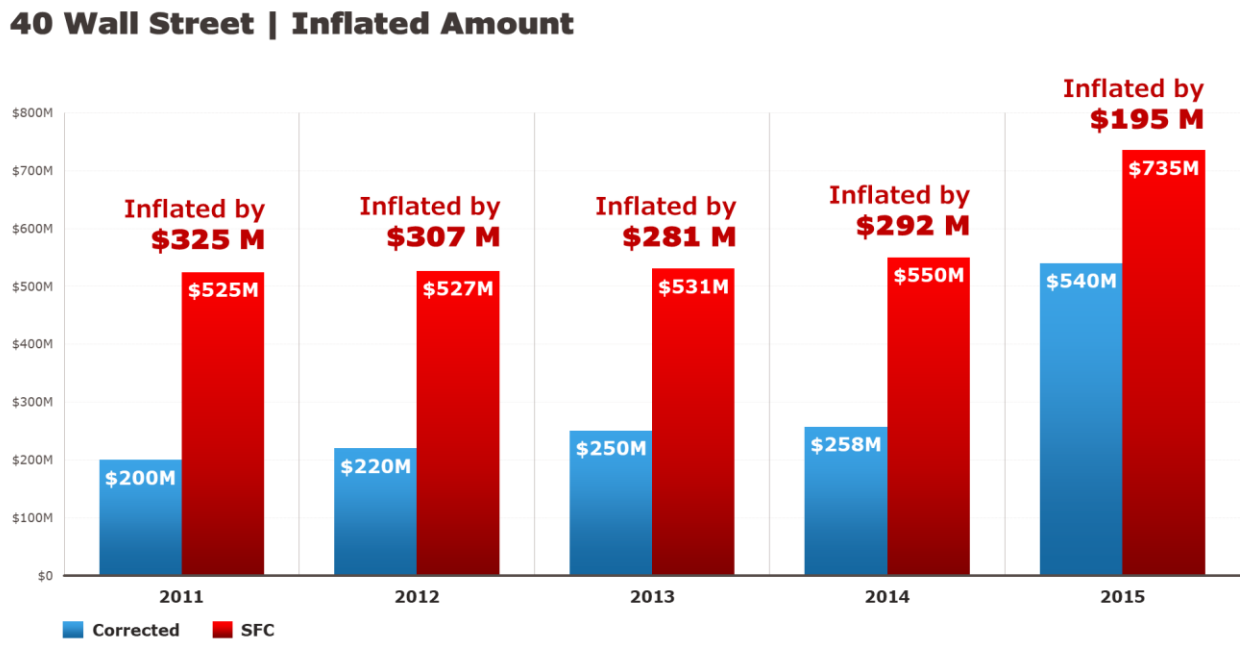
40 Wall Street: In connection with a loan modification, Cushman performed an appraisal in 2010 valuing the Trump Organization's interest in 40 Wall Street at $200 million as of August 1, 2010. (202.8-g Statement ¶78) Cushman performed similar appraisals for the bank in 2011 and 2012 reaching valuations of the Trump Organization's interest in the property of $200 million and $220 million, respectively. (202.8-g Statement ¶84, 85) Despite the values reached for 40 Wall Street in the $200-$220 million range by Cushman in its 2011 and 2012 appraisals, the 2011 SFC valued the property at $524.7 million and the 2012 SFC valued the property at $527.2 million – exceeding the appraised values by more than $300 million each year.[4] (202.8-g Statement ¶80, 88)

Cushman appraised the property again in 2015 for a different lender, reaching a value of

[4] The Trump Organization had the 2010 appraisal in its possession when Jeffrey McConney prepared the 2011 SFC, and Allen Weisselberg was specifically aware that an appraisal of 40 Wall Street from the 2010 to 2012 time period had valued the property in the $200-$220 million range prior to authorizing Mazars to issue the 2012 SFC. (202.8-g Statement ¶86, 87)

$540 million.[5] The Trump Organization was provided with a copy of the 2015 Cushman appraisal at the time it was prepared. Notwithstanding the appraised value of $540 million, the 2015 SFC valued the property at $735.4 million. (202.8-g Statement ¶104-108)

During the period 2011 to 2015, Mr. Trump valued his interest in 40 Wall Street in the SFCs at $195-$325 million more than the appraised values as shown in the graph below. (202.8-g Statement ¶114)

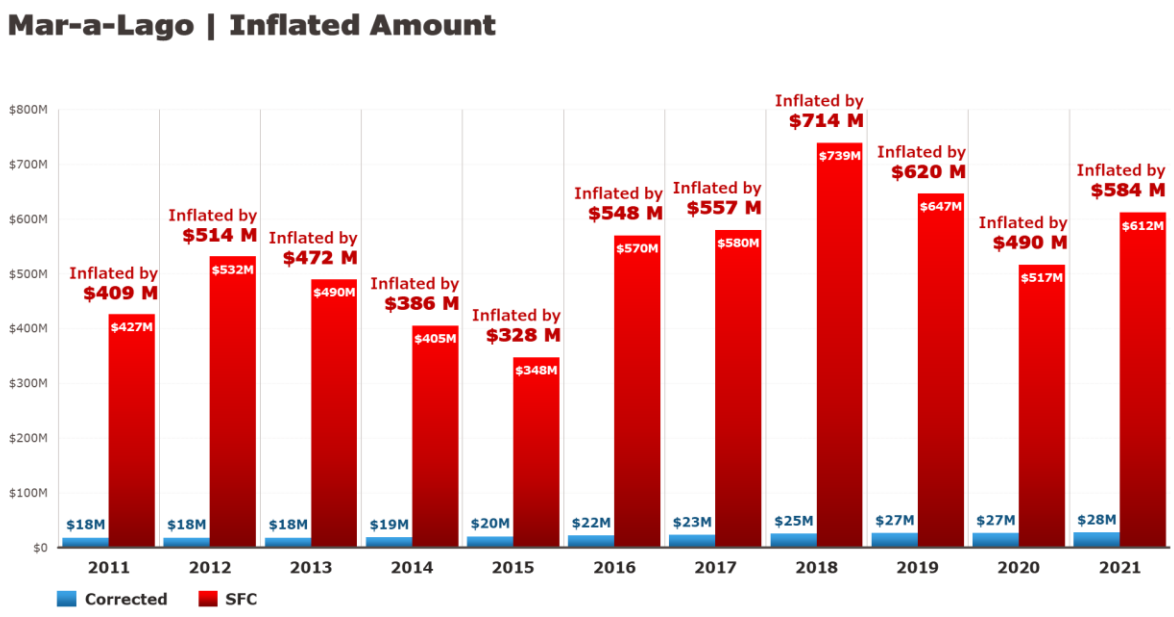


Mar-a-Lago: Mr. Trump won approval from Palm Beach to convert the property to a social club in 1993. (202.8-g Statement ¶146) Two years later he transferred the property to a wholly owned limited liability company and signed a Deed of Conservation and Preservation, giving up his rights to use the property for any purpose other than a social club ("1995 Deed"). (202.8-g

[5] This 2015 appraisal was improperly inflated, but Plaintiff does not dispute the amount of this appraisal for the purposes of this motion. Even taking the inflated value of this 2015 appraisal on its face proves that the value used by Mr. Trump for 40 Wall Street in the 2015 Statement was materially false.

Statement ¶147) Several years later, in 2002, Mr. Trump signed a deed of development rights conveying to the National Trust for Historic Preservation "any and all of [his] rights to develop the Property for any usage other than club usage" (the "2002 Deed"). (Ex. 94) As a result of that restriction, the club was taxed at a significantly lower rate. (202.8-g Statement ¶149)

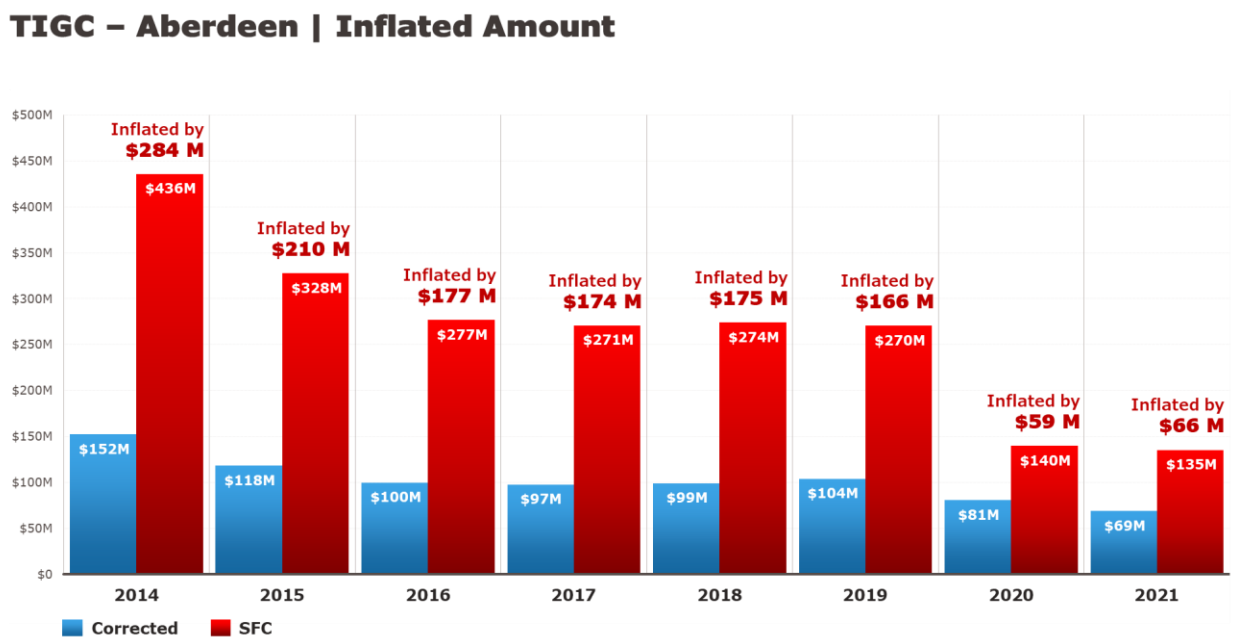
Disregarding these legal restrictions, Mr. Trump and his trustees valued the property during the period 2011 to 2021 between $347-$739 million on the basis that it was an unrestricted residential plot of land that could be sold and used as a private home. (202.8-g Statement ¶155, 159, 163, 167, 171, 175, 179, 183, 187, 191, 195, 200) In stark contrast to the wildly inflated values for Mar-a-Lago, the Palm Beach County Appraiser determined the market value of Mar-a-Lago for purposes of assessing property taxes was between $18-$27.6 million during the period 2011 to 2021. (202.8-g Statement ¶199) Property tax appraisals provide an appropriate basis under GAAP for determining estimated current value, which is the basis on which the SFCs purport to present the value of Mr. Trump's assets. (202.8-g Statement ¶198) The county appraiser's estimates of current value establish that the SFC values for Mar-a-Lago are inflated by $328-$714 million over the period 2011 to 2021 as shown in the graph below. (202.8-g Statement ¶200)



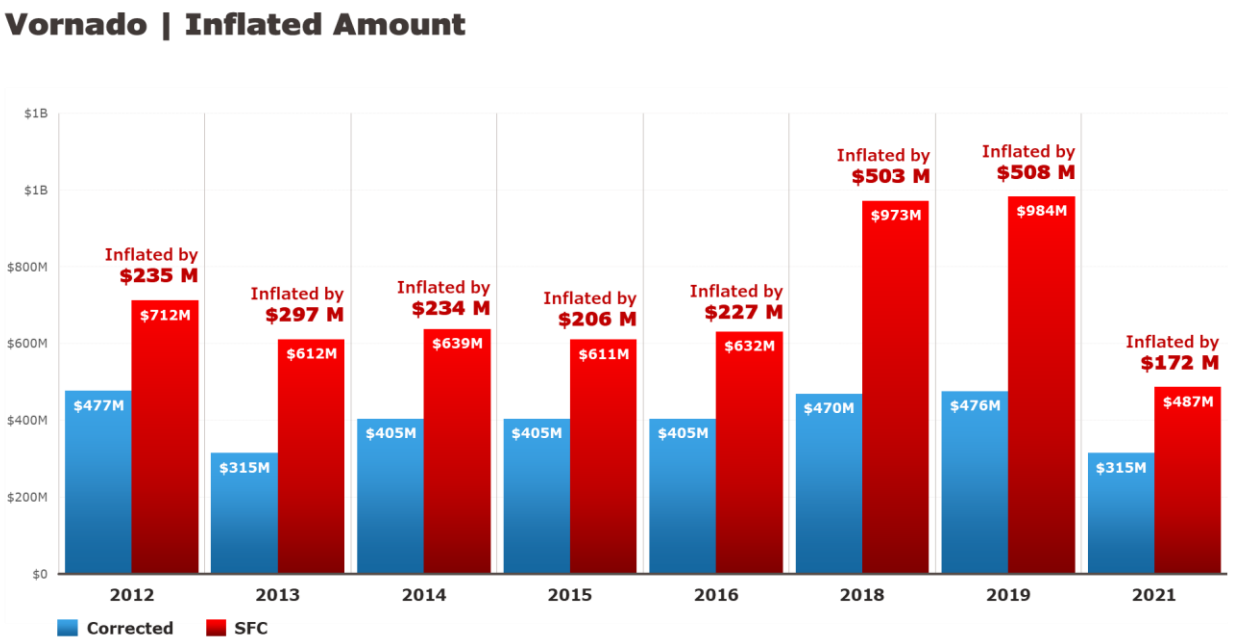
Aberdeen: The value assigned to the Trump International Golf Club in Aberdeen, Scotland in each year from 2011 to 2021 was comprised of two components: a value for the golf course and another value for the development of the non-golf course property, *i.e.*, the "undeveloped land." (202.8-g Statement ¶201) For the SFCs in 2014 through 2018, Jeffrey McConney and Allen Weisselberg valued the undeveloped land based on the assumption that 2,500 homes could be built and sold for £83,164 per home, for a value of £207,910,000. (202.8-g Statement ¶205) But the Trump Organization received planning permission under an initial proposal in December 2008 and a later revised proposal in September 2019 for only 500 unrestricted homes that could be sold. (Ex. 4 at -729; 202.8-g Statement ¶209-211, 214-17) Adjusting the values to correctly reflect the 500 private homes actually approved without restrictions, keeping all other variables constant, results in a reduction in the value of the undeveloped land component of Aberdeen of £166,328,000 in each year from 2014 to 2018, £164,196,704 for 2019, and £48,146,941 for 2020 and 2021. (202.8-g Statement ¶211, 219-20).

Applying the applicable exchange rate and accounting for an "economic downturn" reduction applied by the Trump Organization yields corrected values for Aberdeen that are $210-$284 million lower in 2014 and 2015, $166-$177 million lower in 2016 to 2019, and $59-$66 million lower in 2020 and 2021 as shown in the graph below.[6] (202.8-g Statement ¶222)

[6] For the years 2015 through 2019, the Trump Organization applied a "20% reduction due to economic downturn in the area" to the valuation of the undeveloped land component of Aberdeen. (202.8-g Statement ¶221) This same reduction was applied to the newly-calculated numbers based on using the correct number of approved homes.



Vornado Partnership Properties: Mr. Trump has a 30% limited partnership interest in entities that own office buildings in New York City and San Francisco located at 1290 Avenue of the Americas ("1290 AoA") and 555 California Street ("555 California"), respectively. (202.8-g Statement ¶223-225) For the SFCs from 2011 through 2021, Mr. Trump valued his interest in the properties by taking 30% of the values Messrs. McConney and Weisselberg calculated for 1290 AoA and 555 California that did not take into account existing appraisals for 1290 AoA prepared by outside appraisal firms in 2012 and 2021 and for two years used a cap rate taken from "comparable" buildings listed in their only cited source that was not the "stabilized" cap rate they stated they were using. (202.8-g Statement ¶239-242, 244, 246, 253-54, 258-60, 267, 270, 274, 276; Ex. 8 at -2741; Ex. 9 at -161806) The inflation of Mr. Trump's 30% interest in the properties due to disregarding the appraisals of 1290 AoA and using the wrong cap rate was between $172-508 million as shown in the graph below.



US Golf Clubs: The Clubs category of assets includes golf clubs in the United States and abroad that are owned or leased by Mr. Trump. (202.8-g Statement ¶284) The value for the golf clubs is presented in the SFCs each year from 2011 to 2021 in the aggregate, together with Mar-a-Lago. (202.8-g Statement ¶285) The undisputed evidence establishes that the aggregate value of the golf clubs was inflated as a result of three deceptive practices.

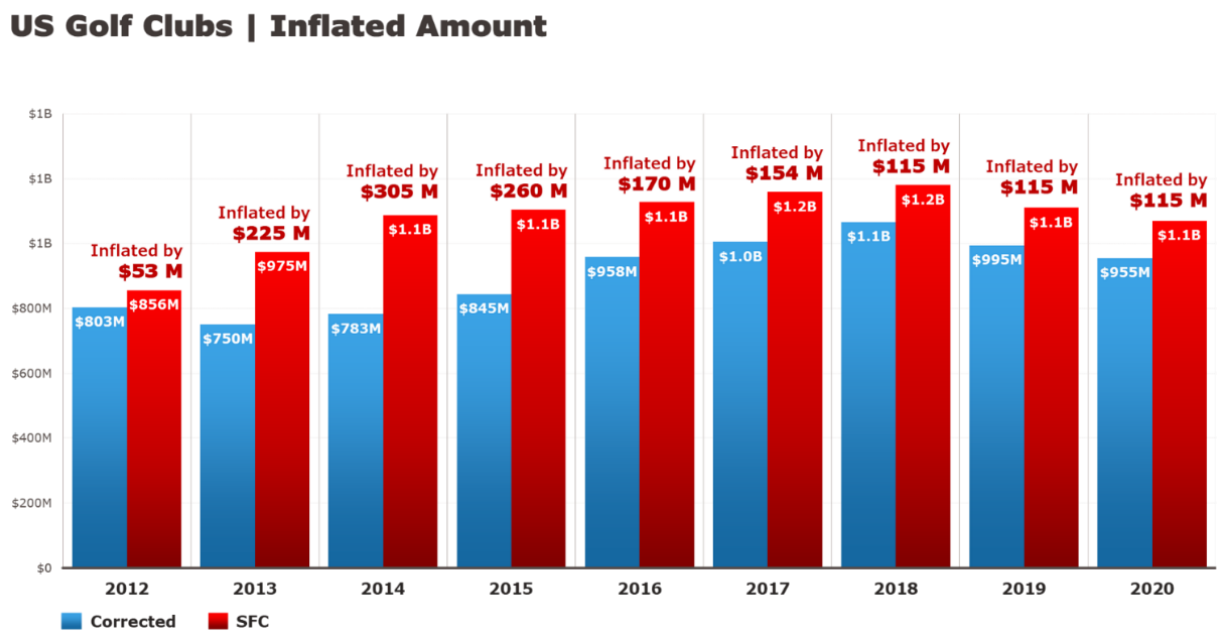
First, for many clubs in certain years, Mr. Trump added a 30% or 15% brand premium to the value – that is, the value of the club was increased by 30% or 15% because the property was completed and operating under the "Trump" brand.[7] (202.8-g Statement ¶305)

[7] Mr. Trump did not disclose in any of the SFCs that certain golf club values included a premium of 30% or 15% for the "Trump" brand. (202.8-g Statement ¶306) Rather, each SFC from 2011 to 2021 contained the following representation: "The goodwill attached to the Trump name has significant financial value that has not been reflected in the preparation of this financial statement." (Ex. 1 at -3136; Ex. 2 at -6313; Ex. 3 at -043; Ex. 4 at -723; Ex. 5 at -697; Ex. 6 at -1989; Ex. 7 at -1848; Ex. 8 at -2731; Ex. 9 at 1796; Ex. 10 at -2257; Ex. 11 at -6420)

Second, as part of the purchase of several club properties, Mr. Trump agreed to assume the obligation to pay back refundable non-interest-bearing long-term membership deposits owed to existing club members. (202.8-g Statement ¶310) These liabilities for refundable memberships would need to be paid out only decades in the future, if at all. (202.8-g Statement ¶311) The SFCs represent that the liabilities resulting from these obligations are valued at $0. (202.8-g Statement ¶312) Contrary to this representation, in each year from 2012 to 2021, the Trump Organization included the face amount of the refundable membership deposit liabilities as a component of the value for many clubs. (202.8-g Statement ¶318)

Third, the valuations of TNGC Briarcliff and TNGC LA consisted of a valuation for the golf course and a valuation for the undeveloped land. (202.8-g Statement ¶288) The Trump Organization considered donating a conservation easement over parts of both properties and during that process received values from appraisers that Mr. Trump and his associates disregarded when preparing the SFCs. (202.8-g Statement ¶298, 302) From at least 2012 to 2016, the values assigned to TNGC Briarcliff and TNGC LA far exceeded the values determined by the appraisers.

Based on these deceptive practices, the values of the golf clubs were inflated by $115 million or more in all but one year and over $150 million in five years as shown in the graph below.



Trump Park Avenue: The valuation of the building in each year was based in part on inflated values calculated for unsold residential condominium units in the building using three deceptive practices. (202.8-g Statement ¶335)

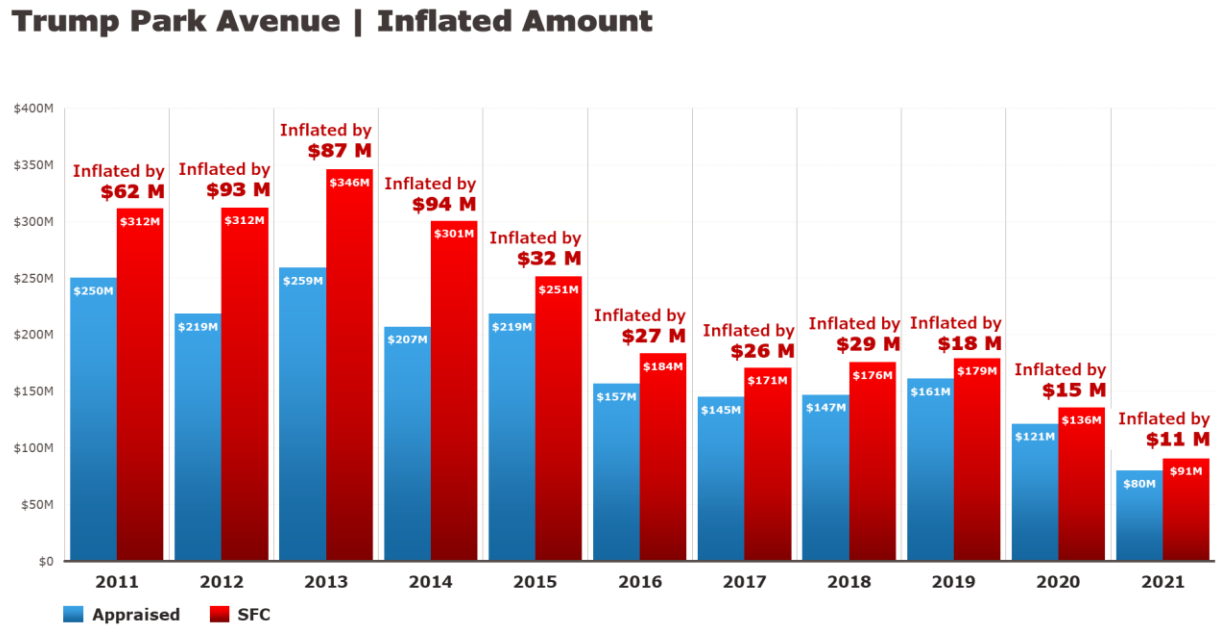
First, Mr. Trump and his trustees valued the unsold rent-stabilized units in the building (there were as many as 12 such units in 2011) as if they were freely marketable and not subject to rent stabilization laws at amounts that vastly exceeded the appraised value of $62,500 per unit. (202.8-g Statement ¶338, 341; Ex. 144 at -22)

Second, at least two of the unsold residential units not subject to rent stabilization laws were leased by Ivanka Trump and were valued at inflated amounts in the SFCs for a number of years over and above option prices agreed to by the Trump Organization in Ms. Trump's leases. (202.8-g Statement ¶364)

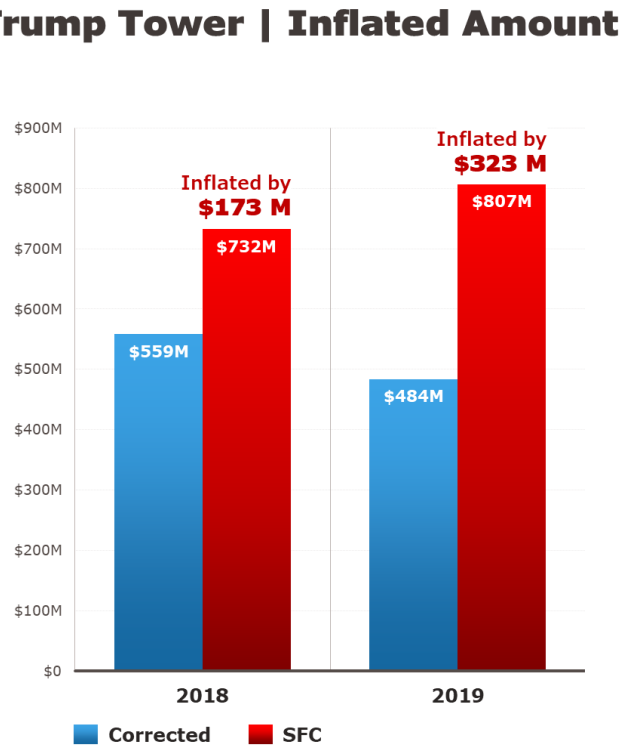
Third, in the SFCs from 2011 through 2015, the Trump Organization used the offering plan prices to value the remaining unsold residential condominium units rather than estimates of current

market value for these units developed by the Trump Organization's in-house real estate brokerage arm (Trump International Realty) for internal business purposes. (202.8-g Statement ¶372-74)

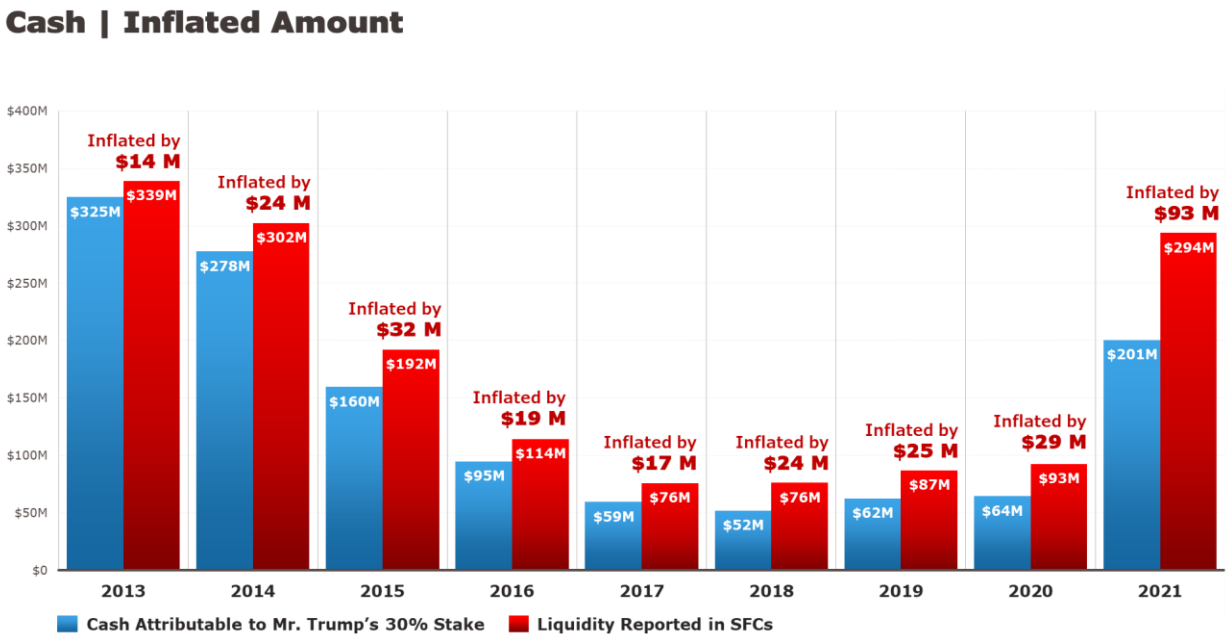
Based on these deceptive practices, the values for Park Avenue were inflated by $26-93 million in most years as shown in the graph below.



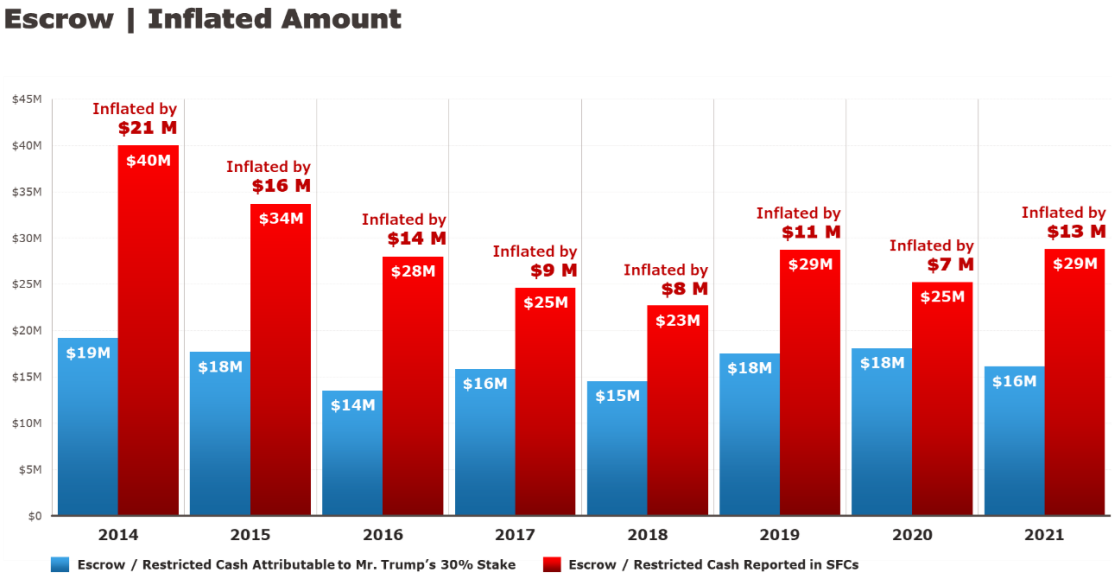
Trump Tower: In the 2018 and 2019 SFCs, the value of Trump Tower was calculated by applying a capitalization rate to the "stabilized net operating income," *i.e.*, by using a stabilized cap rate. (202.8-g Statement ¶266, 269; Ex. 8 at -729; Ex. 9 at -794) The supporting data shows that when calculating the value in both years, the Trump Organization used the wrong figure of 2.67% for the stabilized cap rate for 666 Fifth Avenue instead of the correct figure of 4.45%. (202.8-g Statement ¶260, 267, 270-71) Adjusting for this error reduces the value of Trump Tower by $173 million in 2018 and $323 million in 2019 as shown in the graph below. (202.8-g Statement ¶272)



Cash and Escrow Deposits: As a general matter, when a GAAP-compliant financial statement reports "cash," it is referring to an amount of liquid currency or demand deposits available to the person or entity whose finances are described in the SFC. (202.8-g Statement ¶384, Ex. 181) For the SFCs covering 2011 to 2021, the value of the "cash" reflected in the SFCs included cash amounts held by the Vornado Partnership Interests. (202.8-g Statement ¶386) Mr. Trump has a 30% limited partnership stake in the Vornado Partnership Interests without the right to use or withdraw funds held by the partnership. (202.8-g Statement ¶387) Under GAAP, the cash held by Vornado Partnership Interests should not have been included as Mr. Trump's cash, and falsely inflates the SFCs by $277 million in the aggregate over the period 2013 to 2021 as shown in the graph below. (202.8-g Statement ¶403)



Similarly, the SFCs from 2014 to 2021 included in the total for the "escrow and reserve deposits and prepaid expenses" category of assets 30% of the escrow deposits or restricted cash held on the balance sheets of the Vornado Partnership Interests. (202.8-g Statement ¶407) Under GAAP, the escrow and restricted cash amounts held by Vornado Partnership Interests should not have been included and falsely inflate the SFCs by $99 million in the aggregate over the period 2014 to 2021 as shown in the graph below. (202.8-g Statement ¶417, 418)

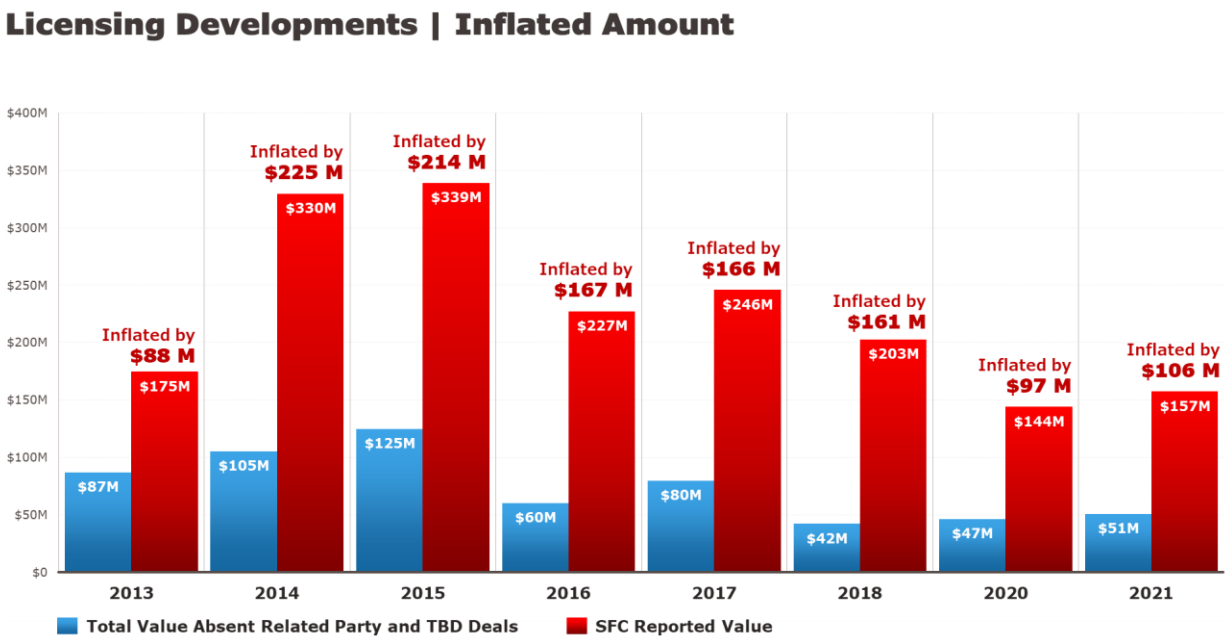


Real Estate Licensing Developments: The asset category entitled "Real Estate Licensing Developments" is represented to value "*associations with others* for the purpose of developing properties" and the cash flow that is expected to be derived from "*these associations* as their potential is realized" and to include "only situations which have evolved to the point *where signed arrangements with the other parties exist* and fees and other compensation which will be earned are reasonably quantifiable." (202.8-g Statement ¶420; *e.g.*, Ex. 1 at -3150 (emphasis added); Exs. 3-13 at n.5 (emphasis added)) However, Mr. Trump and his trustees inflated the value of this asset category employing two deceptive practices.

First, they included in this asset category from 2015 to 2018 speculative, unsigned deals as components of the value—deals expressly identified on internal Trump Organization financial records supporting the valuation as "TBD," *i.e*. to be determined. (202.8-g Statement ¶422) These TBD deals were not signed arrangements that "existed" and for which compensation was "reasonably quantifiable" as the SFCs represented was the case for deals included within this asset category. (202.8-g Statement ¶424)

Second, the Trump Organization included in this category deals between entities within the Trump Organization concerning its own properties, including Doral, OPO, and Trump Chicago—deals in accounting parlance that are known as "related party transactions" because they are not arms-length deals in the marketplace but rather deals between affiliates. (202.8-g Statement ¶426) Including these related party transactions was contrary to the representation in the SFCs that this category included only the value derived from "associations with others," not agreements among and between Trump Organization affiliates. (202.8-g Statement ¶427)

Excluding the TBD deals and internal Trump Organization agreements reduces the value of this asset category by more than $100 million in all but one year as shown on the graph below.



C. Additional Substantial Inflation of Assets

There is far more evidence beyond just what is *undisputed* that the People will present at trial, as necessary, to establish the enormous extent to which Mr. Trump's net worth was overstated in each year from 2011 to 2021. As described below, based on the work done by Plaintiff's valuation experts in adjusting the SFC valuations to properly account for market factors that a willing buyer and willing seller would consider in determining "estimates of current value," Mr. Trump's net worth in any year during the period 2011 and 2021 was inflated by *$1.9-$3.6 billion*.

Plaintiff's valuation expert Constantine Korologos analyzed the valuation methodologies used in the Defendants' "estimated current values" conclusions, and adjusted them giving consideration for inconsistencies, omissions, non-market methodologies applied, and factually incorrect assumptions, for certain real estate properties listed in Mr. Trump's SFCs for each of the years 2011 through 2021. (Ex. 1012 ¶ 1) Mr. Korologos concluded that "[t]he values of certain assets listed in the [SFCs] contain inconsistencies, omissions, and misleading information, and do not utilize methodologies and procedures used by informed buyers and sellers in the marketplace

and are therefore unreliable and misleading." (Ex. 1012 ¶ 15) By taking Defendants' valuations as a starting point and adjusting for discernable factual or methodological errors (such as Defendants' failure to discount cash flows to estimate current value, use of low unsupported cap rates, and use of incorrect square footage values), Mr. Korologos concluded that these adjustments resulted in "significant reduction in value for the assets that [he] assessed." (Ex. 1012 ¶ 15) Mr. Korologos then calculated a range of values reflecting the minimum estimated overstatement of value for each of the properties he considered. (Ex. 1012 ¶¶ 87 (40 Wall Street), 105 (Trump Tower), 119 (Niketown), 135 (Trump Park Avenue), 152 (Vornado Partnerships), 165 (Seven Springs), 177 (Triplex), 188 (TNGC-LA Subdivision), 198 (TNGC-Briarcliff Subdivision), 219 (Aberdeen Residential Development))

Plaintiff's golf course valuation expert Laurence Hirsh similarly identified significant discrepancies between the valuation methods employed by Defendants when valuing golf and club properties on Mr. Trump's SFCs and "generally accepted valuation methodology" used by buyers and sellers of such properties. Specifically, Mr. Hirsh identified that Defendants improperly:

- failed to analyze club income and expenses;
- failed to support their valuations with comparable market data;
- used inappropriate valuation methodologies that would not be used by an informed, willing buyer in the marketplace;
- improperly valued clubs based on "fixed assets" that were inflated by an improper brand premium;
- omitted management and capital reserve expenses;
- failed to acknowledge deferred maintenance or age of club infrastructure or components;
- ignored deed and easement restrictions;
- wrongly treated membership refunds as worth $0 when calculating liabilities (even while including refundable membership liabilities at full

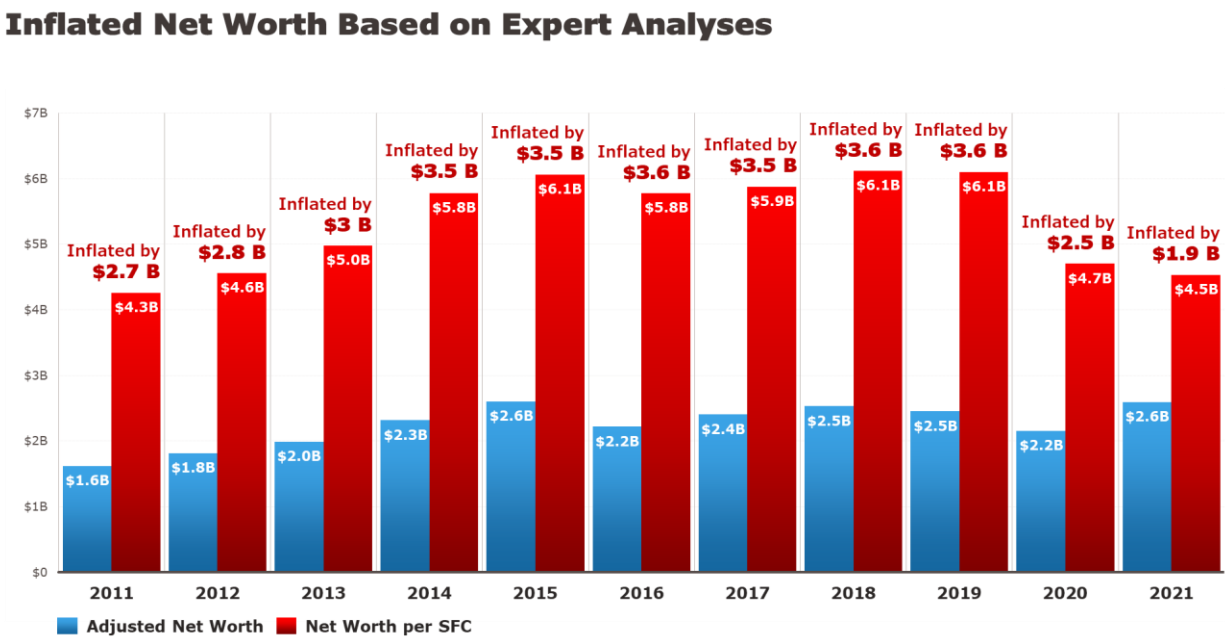
face value as a component of fixed asset value when valuing these properties);

- relied on inflated entrance fees;
- ignored the impact of leasehold values (which are likely to be significantly lower than fee simple values); and
- disregarded contemporaneous appraisals that valued the same properties at much lower values.

(Ex. 1013 at 15-24) Using the SFC valuations as a starting point and adjusting for identifiable errors, Mr. Hirsh concluded that the SFCs "contain gross overstatements of golf club property values, which would likely be greater once an analysis of membership refund liability is completed and once an analysis of deferred maintenance was done." (Ex. 1013 at 43) Mr. Hirsh then estimated a range of potential value overstatements by applying valuation methodologies accepted in the golf property marketplace to Defendants' own data, including the application of a market-based capitalization rate to net operating income for profitable courses and clubs (the Overall Rate or "OAR" method) and the application of a Gross Income Multiplier (or "GIM" method) to revenues for properties, including those with a negative cash flow. (Ex. 1013 at 9-10, 12-13) Mr. Hirsh concluded that "[c]umulative value differences for the properties range from roughly $655.3 million to $1.45 Billion (OAR) and $740.3 million to $1.3 Billion (GIM), depending on the year examined." (Ex. 1013 at 43-48)

* * *

Based on the analyses performed by Plaintiff's valuation experts, the resulting reduction to Mr. Trump's net worth is between $1.9-$3.6 billion per year over the period 2011 to 2021 as shown in the graph below, which is billions less than what Mr. Trump reported in his SFCs. (Ex. 1012 at App. Exs. 1-16; Ex. 1013 at 33-34, 39-40)



D. Other Violations of GAAP

In addition to employing the numerous quantifiable deceptive schemes discussed above that grossly and falsely inflated the value of his assets in the SFCs, Mr. Trump and his associates—notwithstanding the representation that the SFCs were GAAP-compliant—violated GAAP in the preparation of the SFCs in numerous other material ways, as detailed below based on both the undisputed evidence and the analysis performed by Prof. Lewis.

As explained by Prof. Lewis, personal financial statements are required to include sufficient disclosure of GAAP departures to make the statements adequately informative. (Ex. 1014 at ¶¶63-64) Prof. Lewis determined that the following departures from GAAP were not disclosed in the SFCs: (i) the inclusion of an internally generated brand premium in valuing golf course properties; (ii) the failure to properly record cash; (iii) the failure to properly record escrow and reserve deposits; (iii) the failure to properly disclose changes in valuation methodology for certain properties from year to year; (iv) the failure to determine present value of projected future income when including the income in a valuation; and (v) the failure to disclose the details of

related party transactions. (Ex. 1014 at ¶64, 67) The failure to disclose these GAAP deviations had a material impact on the users of the SFCs. (Ex. 1014 at ¶68)

E. Submission of the False SFCs to Banks and Insurers

1. Loans From the Deutsche Bank PWM Division

Starting in 2011, Mr. Trump and the Trump Organization initiated a relationship with bankers in the Private Wealth Management ("PWM") division of Deutsche Bank. (202.8-g Statement ¶440). Rosemary Vrablic, a Managing Director at the bank in the PWM division, confirmed the need for recourse in PWM loans in the form of a personal guarantee as part of any loan application. (202.8-g Statement ¶442) By personally guaranteeing the loans and providing evidence of his liquidity and net worth through his SFCs, Mr. Trump was able to apply to the PWM division for, and obtain for the Trump Organization, loans with significantly lower interest rates than would otherwise have been available through the Commercial Real Estate ("CRE") division at Deutsche Bank or from commercial real estate lending groups at other banks. (202.8-g Statement ¶444) Through at least 2021, Defendants used the SFCs to secure loans and satisfy annual loan obligations necessary to maintain the loans through the PWM division as described in summary below, recognizing that these facts are fully set forth in Plaintiff's 202.8-g Statement.

a. The Doral Loan

Mr. Trump first pursued a loan from Deutsche Bank for Doral through the CRE division of Deutsche Bank (202.8-g Statement ¶456-57; Ex. 244) On November 21, 2011, the CRE division offered the Trump Organization a $130 million loan at LIBOR + 800 basis points, with a LIBOR floor of 2 percent—a minimum 10% interest rate. (202.8-g Statement ¶461) The Trump Organization did not accept those terms and continued to look elsewhere for financing for Doral, including the bank's PWM division. (202.8-g Statement ¶462-63)

On December 15, 2011, in response to a request from Ivanka Trump, Ms. Vrablic sent Ms. Trump a term sheet proposing a $125 million loan with recourse through a personal guarantee by Mr. Trump of all principal and interest due on the loan and the operating expenses of the resort. (202.8-g Statement ¶465-66) The proposal also included a number of covenants, including requirements that Mr. Trump maintain a minimum net worth of $3 billion and unencumbered liquidity of $50 million. (202.8-g Statement ¶467) An internal credit report dated December 20, 2011, noted the loan will be "supported by a full and unconditional guarantee provided by DJT of (i) Principal and Interest due under the Facility, and (ii) operating shortfalls of the Resort . . . ." (Ex. 266 at -1691) The credit memo listed this guarantee as a source of repayment, and recommended approval of the loan. (202.8-g Statement ¶475)

The loan was approved through the PWM division and closed on June 11, 2012, with a loan to Trump Endeavor 12 LLC personally guaranteed by Mr. Trump. (202.8-g Statement ¶477) Interest on the loan was set for LIBOR + 2.25 during a renovation period, and LIBOR + 2.0 thereafter. (202.8-g Statement ¶478) The loan agreement, signed by Mr. Trump, recited that Mr. Trump's June 30, 2011 SFC had to be provided to the bank as a precondition of lending. (202.8-g Statement ¶479) In multiple instances, the loan agreement required that Mr. Trump certify the accuracy of the financial information in his SFC. (202.8-g Statement ¶480) Similarly, issuance of the loan was subject to several conditions precedent, including that "[t]he representations and warranties of Borrower contained in this Agreement and in all certificates, documents and instruments delivered pursuant to this Agreement and the Loan Documents shall be true and correct on and as of the Closing Date." (202.8-g Statement ¶482; Ex. 254 at -5911)

Pursuant to the guarantee, Mr. Trump was required to maintain $50 million in unencumbered liquidity, and a minimum net worth of $2.5 billion to be "tested and certified to on

an annual basis based upon the Statement of Financial Condition delivered to Lender during each year." (202.8-g Statement ¶486; Ex. 232 at -4180) Mr. Trump was required to deliver to the bank his annual SFC with a compliance certificate certifying the statement "presents fairly in all material respects the financial condition of Guarantor at the period presented." (202.8-g Statement ¶489; Ex. 232 at -4180-81, 4189-90) False certifications were expressly identified as events of default under the loan agreement. (202.8-g Statement ¶490)

In connection with the Doral Loan, Mr. Trump submitted SFCs to Deutsche Bank accompanied by the required certifications for the years 2014 through 2021 (executed either by him personally or, for years 2016 and later, by Donald Trump, Jr. or Eric Trump, as attorney-in-fact for Mr. Trump). (202.8-g Statement ¶493) Deutsche Bank conducted annual reviews of the Doral loan in July 2013, May 2014, July 2015, July 2016, July 2017, July 2018, September 2019, July 2020, and July 2021. (202.8-g Statement ¶494) The loan remained outstanding until May 2022, when the Trump Organization refinanced the loan through Axos Bank, repaying the $125 million of principal outstanding to Deutsche Bank. (202.8-g Statement ¶495)

b. The Chicago Loan

Roughly contemporaneously with the Doral loan's closing in June 2012, the Trump Organization sought another loan from the PWM division at Deutsche Bank in connection with the Trump Chicago property—in essence, a refinancing of an existing $130 million from the CRE division at Deutsche Bank on that property. (202.8-g Statement ¶499) Dueling proposals for the Trump Chicago property within Deutsche Bank were under discussion in March 2012. (202.8-g Statement ¶500) One proposal from the CRE division was for a non-recourse (meaning, no personal guarantee) loan facility with a two-year term and an interest rate of LIBOR plus 800 basis points. (202.8-g Statement ¶501) The other proposal from the PWM division was for a loan facility

with a two-year term and *a personal guarantee* at LIBOR plus 400 basis points—so, at an interest rate that was four percentage points lower. (202.8-g Statement ¶502)

In October 2012, the PWM division recommended approval of a loan of up to $107 million to 401 North Wabash Venture LLC, guaranteed personally by Mr. Trump. (202.8-g Statement ¶504) Given the mixed nature of the hotel-condo property, the loan was broken down into two facilities: (i) Facility A for the residential portion was for up to $62 million, for a 4-year term, at a rate of LIBOR plus 3.35%; and (ii) Facility B for the hotel portion was for up to $45 million, for a 5-year term, at a rate of LIBOR plus 2.25%. (202.8-g Statement ¶505) For both facilities, a source of repayment was "[f]ull and unconditional guarantee of DJT which eliminates any shortfall associated with operating and liquidation of the Collateral." (202.8-g Statement ¶506; Ex. 228 at -68524)

The PWM division credit memo for the loan assessed Mr. Trump's 2011 and 2012 SFCs, stating: "Although Facilities are secured by the Collateral, given its unique nature, the credit exposure is being recommended based on the financial profile of the Guarantor." (202.8-g Statement ¶508; Ex. 228 at -68526) The loans under the two facilities closed on November 9, 2012, and both included personal guarantees by Mr. Trump supported by his 2011 and 2012 SFCs. (202.8-g Statement ¶509) The terms of each facility's personal guarantees were materially identical to the Doral guarantee, including the requirement that Mr. Trump maintain a minimum net worth, based upon his SFC, of $2.5 billion, and provide an annual SFC to the bank accompanied by an executed compliance certificate certifying that the SFC "presents fairly in all material respects the financial condition of Guarantor at the period presented." (202.8-g Statement ¶515; Ex. 277 at -38880-81; Ex. 276 at -3232-33)

Deutsche Bank conducted annual reviews of the Trump Chicago facilities in May 2014, July 2015, July 2016, July 2017, July 2018, September 2019, July 2020, and July 2021. (202.8-g Statement ¶520) Based upon the purported strength of Mr. Trump's financial profile, the Trump Organization requested an additional $54 million in loan funds from Deutsche Bank to be "fully guaranteed by Mr. Trump for all principal, interest and operating shortfalls until the balance of the facility is less than $45 million (34% LTV)." (202.8-g Statement ¶522; Ex. 265 at -1741) The credit memo recommending approval of this increase in loan funds did so, in part, based on the "Financial Strength of the Guarantor." (202.8-g Statement ¶523) Amended loan documents advancing the additional requested funds closed on June 2, 2014. (202.8-g Statement ¶524)

As with earlier credit memos, this 2014 credit memo (which also recommended approval for the $170 million loan in connection with the Old Post Office discussed below) evaluated Mr. Trump's SFCs. (202.8-g Statement ¶525) In particular, this credit memo incorporated figures from the 2011, 2012, and 2013 SFCs, stating: "Although Facilities are secured by Collateral, given the unique nature of these credits, the credit exposure is being recommended based on the financial profile of the Guarantor." (202.8-g Statement ¶526; Ex. 265 at -1752)

These new loan documents contained terms and conditions governing submission, certification, and misrepresentation of Mr. Trump's SFCs that were substantially similar to those described above for the Doral and 2012 Trump Chicago loan facilities. (202.8-g Statement ¶528) In the amended Trump Chicago guarantee, Mr. Trump certified that his 2013 SFC was true and correct in all material respects and that the SFC "presents fairly Guarantor's financial condition as of June 30, 2013." (202.8-g Statement ¶528; Ex. 281 at -3191) Either Mr. Trump, Eric Trump, or the trustees of the Trust (depending on the year) certified the accuracy of the SFCs submitted in connection with the Trump Chicago loan facilities between 2013 through 2021, either through the

execution of an amended guarantee or through the submission of a compliance certificate. (202.8-g Statement ¶530)

c. The OPO Loan

In approximately July 2013, Deutsche Bank began considering whether to extend credit for the Trump Organization's redevelopment of The Old Post Office in Washington, DC after the Trump Organization was selected by the U.S. General Services Administration in February 2012 to redevelop the property and signed a lease for that purpose on August 5, 2013. (202.8-g Statement ¶533, 534, 542)

In advance of executing the lease, the Trump Organization reached out to the CRE division at Deutsche Bank about potential financing for the project. (202.8-g Statement ¶543) By October 2013, the CRE division had proposed a term sheet offering the Trump Organization a $140 million loan at LIBOR + 400 basis points. (202.8-g Statement ¶545) The next month, in November 2013, employees at the Trump Organization took that offer to the PWM division to see if that division could offer more favorable terms. (202.8-g Statement ¶546) Ultimately the Trump Organization and the PWM division agreed on a term sheet that was executed on January 13 and 14, 2014 providing for a $170 million loan with a 10-year term, 100% personal guarantee by Mr. Trump, interest rates of LIBOR + 2% or 1.75% (depending on the period), and covenants including $2.5 billion in net worth, $50 million in unencumbered liquidity, and no additional indebtedness in excess of $500 million. (202.8-g Statement ¶549) Mr. Trump, as guarantor, would be required to provide his annual SFC to the bank. (202.8-g Statement ¶550)

A May 2014 Deutsche Bank credit memo approved the $170 million loan to Trump Old Post Office LLC. (202.8-g Statement ¶551) This credit memo incorporated information from Mr. Trump's 2011, 2012, and 2013 SFCs. (202.8-g Statement ¶552) Mr. Trump's net worth and his

SFCs were critical to the bank's approval of the final terms of the loan, which closed on August 12, 2014. (202.8-g Statement ¶553)

As with the Doral and Trump Chicago loans, the loan agreement for the OPO loan required that Mr. Trump's most recent SFC (which was his 2013 SFC) be provided to the bank as a condition of the loan. (202.8-g Statement ¶554) The loan agreement required that Mr. Trump certify to the accuracy of the 2013 SFC and represent that no information contained in any loan document or in "any written statement furnished by or on behalf of Borrower or any other party pursuant to the terms of the" loan or associated documents "contains any untrue statement of material fact or omits to state a material fact necessary to make any material statements contained herein or therein not misleading in light of the circumstances under which they were made." (202.8-g Statement ¶555; Ex. 233 at -4991) Mr. Trump's personal guarantee on the OPO loan, which he signed, is dated August 12, 2014 – the same date that the loan closed. (202.8-g Statement ¶559)

Mr. Trump's personal guarantee contained the same financial representations included in the guarantees for the prior PWM loans, including that Mr. Trump's submitted personal financial statement (here the 2013 SFC) "presents fairly Guarantor's financial condition" as of the date indicated, and required Mr. Trump to maintain $50 million in unencumbered liquidity and a minimum net worth of $2.5 billion to be "tested and certified to on an annual basis based upon the Statement of Financial Condition delivered to Lender during each year." (202.8-g Statement ¶560-61) The bank conducted annual reviews of the OPO loan in July 2015, July 2016, July 2017, July 2018, September 2019, July 2020, and July 2021. (202.8-g Statement ¶565)

2. 40 Wall Street Loan From Ladder Capital

In approximately November 2015, the Trump Organization (through Defendant 40 Wall Street LLC), working with Mr. Weisselberg's son, a Director at Ladder Capital Finance ("Ladder

Capital"), refinanced a $160 million mortgage with Capital One Bank on the office building property at 40 Wall Street. (202.8-g Statement ¶579-80, 583) The Ladder Capital loan required Mr. Trump to maintain a net worth of at least $160 million and liquidity of at least $15 million. (202.8-g Statement ¶593) In connection with those covenants, Mr. Trump was required to provide his annual financial statements "prepared in accordance with GAAP in all material respects (except as disclosed therein), including a balance sheet, and certified by Guarantor as being true, correct and complete and fairly presenting the financial condition and results of such Guarantor." (202.8-g Statement ¶597; Ex. 328 at 3076-77) Internal documents indicate that Ladder Capital underwrote the $160 million loan based in part on Mr. Trump's reported net worth of $5.8 billion as set forth in the 2014 SFC. (202.8-g Statement ¶589-92)

3. Seven Springs Loan from RBA/Bryn Mawr

In 2000, Seven Springs LLC took out an approximately $8 million mortgage from Royal Bank America ("RBA"), later acquired by Bryn Mawr Bank in 2017. (202.8-g Statement ¶599) Mr. Trump personally guaranteed the mortgage. (202.8-g Statement ¶600) As a result of the personal guarantee, Mr. Trump's SFCs were submitted to RBA/Bryn Mawr on multiple occasions in connection with the Seven Springs mortgage. (202.8-g Statement ¶601) A 2014 credit memo from Bryn Mawr contains data drawn from Mr. Trump's 2011 and 2013 SFCs. (202.8-g Statement ¶603) Bryn Mawr retained in its files Mr. Trump's SFCs for 2010 through 2016. (202.8-g Statement ¶605)

Typically, the SFCs were sent under the cover of a letter from Mr. McConney, stating that Mr. Trump's SFC was being provided pursuant to the mortgage. (202.8-g Statement ¶606) Submission of the SFCs was required in order to maintain the loan and to obtain a series of extensions. (202.8-g Statement ¶607) For example, the bank approved extensions of the maturity date of the loan in 2011, 2014, and 2019 in reliance upon Mr. Trump's SFCs submitted pursuant

to Mr. Trump's personal guarantee. (202.8-g Statement ¶608) In connection with seeking these extensions, Mr. Trump re-affirmed his personal guarantee in 2011 and 2014, and in 2019 the guarantee was re-affirmed in a certification signed by Eric Trump "as attorney in fact" for Donald J. Trump. (202.8-g Statement ¶609) The personal guarantee for this loan was described by Bryn Mawr in internal records as a positive component of the loan for the bank. (202.8-g Statement ¶610-12)

4. Surety Insurance from Zurich

From 2007 through 2021, Zurich North America ("Zurich") underwrote a surety bond program (the "Surety Program") for the Trump Organization through insurance broker AON Risk Solutions ("AON"). (202.8-g Statement ¶617) Under the Surety Program, Zurich issued surety bonds on behalf of the Trump Organization within specified dollar limits in exchange for a premium calculated based on a rate times the face amount of the bonds. (202.8-g Statement ¶618) Over the course of the relationship, in accordance with its standard underwriting guidelines for surety business, Zurich required the Trump Organization to provide an indemnification against any loss should Zurich be required to pay under a bond. (202.8-g Statement ¶621) From the inception of the Surety Program, the Trump Organization met this indemnification requirement through a General Indemnity Agreement ("GIA") executed by Mr. Trump, pursuant to which (similar to a personal guarantee on a loan) he personally agreed to indemnify Zurich for claims under the Surety Program. (202.8-g Statement ¶622, 679) As specified in the term sheet Zurich provided to AON, the indemnity arrangement included as a condition of coverage an annual requirement that Mr. Trump disclose to Zurich's underwriter his personal financial statements, which was through an on-site review of the SFC at Trump Tower. (202.8-g Statement ¶623)

During the on-site reviews for the 2019 and 2020 renewals, Zurich's underwriter Claudia Markarian was shown the then-current SFC, which listed as assets real estate holdings with

valuations that Mr. Weisselberg represented to her had been determined each year by a professional appraisal firm. (202.8-g Statement ¶626, 638-39) Ms. Markarian considered the valuations to be reliable based on this representation, which factored favorably into her analysis leading to her recommendation that Zurich renew the Surety Program each year on the existing terms, which it did. (202.8-g Statement ¶627-28, 640-41) During her on-site reviews of the SFCs, Ms. Markarian also relied on the amount of cash on hand listed in the SFCs as an indication of Mr. Trump's liquidity, which was important to her underwriting analysis as it represented the funds available to repay Zurich in the event Zurich had to pay on a surety bond issued under the program. (202.8-g Statement ¶631, 644) She also considered favorably Mr. Weisselberg's representations during her on-site reviews that the property values in the SFCs did not significantly vary year over year as that indicated stability. (202.8-g Statement ¶634-35, 647-48)

Contrary to Mr. Weisselberg's representations, the Trump Organization did not retain any professional appraisal firm to prepare any of the valuations used for the SFCs, and the property values did vary significantly year over year for certain properties. (202.8-g Statement ¶629, 636, 649) Moreover, unbeknownst to Ms. Markarian, the amount of cash listed in the SFCs was inflated because it included cash held by Vornado Partnership Interests that was not within Mr. Trump's control. (202.8-g Statement ¶403) The Trump Organization also failed to disclose to any of the Zurich underwriters that the valuation for many of the golf courses listed on Mr. Trump's SFCs within the "Clubs" category included a Trump brand premium, which under Zurich's underwriting guidelines would have to be excluded as an intangible asset. (202.8-g Statement ¶651-52)

5. D&O Insurance from HCC

As of December 2016, the Trump Organization had in place Directors & Officers ("D&O") liability coverage consisting of a single primary policy providing a limit of $5,000,000 at a premium of $125,000, expiring on February 17, 2017. (202.8-g Statement ¶653) To obtain that

coverage, similar to the process for obtaining surety coverage from Zurich, the Trump Organization provided D&O underwriters access to Mr. Trump's SFCs through a monitored in-person review at Trump Tower. (202.8-g Statement ¶654)

In advance of the February 2017 policy expiration, the broker scheduled a "D&O Underwriting Meeting" at Trump Tower on January 10, 2017 between Trump Organization personnel (including Mr. Weisselberg) and various insurers, including Tokio Marine HCC ("HCC"). (202.8-g Statement ¶655) The Trump Organization was looking to cancel the existing policies and rewrite the program on the day of Mr. Trump's presidential inauguration with significantly higher limits of $50,000,000—a tenfold increase. (202.8-g Statement ¶656) The underwriters at the meeting, including HCC's underwriter Michael Holl, were provided very few financials but did see the balance sheet for year-end 2015, which showed total assets of $6.6 billion, cash of $192 million and total debt of $519 million—all as reported in the 2015 SFC. (202.8-g Statement ¶657) The Trump Organization representatives assured the underwriters that the balance sheet for year-end 2016 that would be completed in a few weeks would be even better than the year-end 2015 balance sheet. (202.8-g Statement ¶658) The representation that Mr. Trump had $192 million in cash was material to Mr. Holl's assessment of Mr. Trump's liquidity because it had bearing on his ability to meet the retention obligation under the HCC policy. (202.8-g Statement ¶659)

In response to specific questioning from the underwriters, the Trump Organization personnel at the meeting, including Mr. Weisselberg, represented that there was no material litigation or inquiry from anyone that could potentially lead to a claim under the D&O coverage. (202.8-g Statement ¶660) This representation was material to Mr. Holl's assessment that there were no investigations by law enforcement agencies that could potentially trigger coverage.

(202.8-g Statement ¶661) On January 20, 2017, after considering the information conveyed during the January 10 meeting, HCC offered terms for a primary $10,000,000 policy with a $2,500,000 retention for an annual premium of $295,000 subject to certain conditions. (202.8-g Statement ¶662) Coverage per these terms was bound on January 31, 2017, with effective dates of January 30, 2017 to January 30, 2018. (202.8-g Statement ¶663)

Despite the representations made to underwriters during the January 10 meeting that there was no material litigation or inquiry from anyone that could potentially lead to a claim, there was at the time of the meeting an ongoing investigation by OAG into the Trump Foundation and Trump family members Donald J. Trump, Donald Trump, Jr., Ivanka Trump, and Eric Trump, all of whom were at the time directors and officers of the Trump Organization—an investigation of which Mr. Weisselberg was well aware. (202.8-g Statement ¶664; Ex. 375; Ex. 376; Ex. 377) Moreover, it is evident that the Trump Organization believed the OAG investigation could potentially give rise to a claim because on January 17, 2019, the Trump Organization submitted a claim notice to the D&O insurers, including HCC, seeking coverage for OAG's enforcement action resulting from the investigation. (202.8-g Statement ¶667)

F. Each Defendant was Involved in the Fraudulent Conduct

1. Donald J. Trump

Mr. Trump was the president of the Trump Organization and beneficial owner, including through the Trust, of all the assets listed in the SFCs. (202.8-g Statement ¶673) As expressly represented in the SFCs, Mr. Trump was responsible for the content of the SFCs from 2011 through 2015, the date covered by last SFC issued prior to Mr. Trump assuming public office. (202.8-g Statement ¶672) For the SFCs from 2011 to 2015, Mr. Trump had "final review" over each SFC's contents. (Ex. 54 at 98:5-16) In March 2017, Mr. Trump appointed his sons Donald Trump, Jr. and Eric Trump as his agents to act with power of attorney over banking and real estate transactions,

and exercising that power of attorney they signed guarantor compliance certificates pertaining to the SFCs during the period 2016 to 2021 as his attorney-in-fact, certifying on his behalf that the SFCs present fairly his financial condition in all material respects. (202.8-g Statement ¶674-75)

2. Donald Trump, Jr.

Donald Trump, Jr. is an Executive Vice President of the Trump Organization and has also served as an officer in each of the other entity Defendants named in this action. (202.8-g Statement ¶680-81, 695) He has also served as a trustee of the Trust from January 19, 2017 to the present, except for the seven-month period from January 19-July 7, 2021, during which period Donald J. Trump was the sole trustee of the Trust. (202.8-g Statement ¶681, 755-56) Donald Trump, Jr. signed the representation letters for the SFCs from 2016 through 2019 in his capacity as an executive officer of the Trump Organization and as trustee of the Trust. (202.8-g Statement ¶682-85) He signed the representation letters for the 2020 and 2021 SFCs as trustee of the Trust. (202.8-g Statement ¶686-87) He also signed numerous guarantor compliance certificates in connection with loans that are the subject of this action from 2017 through 2019 as attorney-in-fact for Mr. Trump variously certifying that the 2016, 2017, 2018, and 2019 SFCs each "presents fairly in all material respects the financial condition of Guarantor at the period presented." (202.8-g Statement ¶688-694)

3. Eric Trump

Eric Trump is an Executive Vice President of the Trump Organization, served as an officer in each of the other entity Defendants named in this action, and from 2016 through at least 2021 was the "chief decision maker" at the company. (202.8-g Statement ¶696, 709; Ex. 391 at 29:10-13, 77:11-21; Ex. 50 at 19:7-17) He participated in the preparation of SFCs by providing values to Mr. McConney for Seven Springs (for 2012 to 2014) and TNGC Briarcliff (for 2013 to 2018) that were used in the SFCs. (202.8-g Statement ¶74, 296)

In his capacity as President of Seven Springs LLC, in June 2019 he signed a loan modification agreement in connection with the loan transaction with the Bryn Mawr restating and reaffirming the representations in all prior loan documents, and on the same date signed an agreement as attorney-in-fact for Mr. Trump reaffirming Mr. Trump's obligation as guarantor on the loan. (202.8-g Statement ¶698-99) Eric Trump also signed multiple guarantor compliance certificates in connection with loans that are the subject of this action in October 2020 as attorney-in-fact for Mr. Trump, certifying that to the best of their knowledge Mr. Trump's net worth was over $2.5 million. (202.8-g Statement ¶700-02)

For the 2021 SFC, Eric Trump signed the engagement letter with Whitley Penn on behalf of the Trump Organization and participated in discussions with others at the company concerning valuation methodologies for the 2021 SFC. (202.8-g Statement ¶703-04) In October 2021, he signed multiple guarantor compliance certificates in connection with loans that are the subject of this action as attorney-in-fact for Mr. Trump certifying that the 2021 SFC "presents fairly in all material respects the financial condition of Guarantor at the period presented." (202.8-g Statement ¶706-08)

4. Allen Weisselberg

Allen Weisselberg was Chief Financial Officer of the Trump Organization from at least 2011 until he resigned from that position and became a Senior Advisor to the company in August of 2022 after pleading guilty to charges of tax fraud. (202.8-g Statement ¶710) Prior to Mr. Trump assuming public office, Mr. Weisselberg reported directly to Mr. Trump. (202.8-g Statement ¶711) In his role as CFO, Mr. Weisselberg was in charge of the accounting department at the Trump Organization. (202.8-g Statement ¶712)

Mr. Weisselberg had a primary role in preparing the SFCs together with Mr. McConney and Trump Organization employee Patrick Birney, both of whom reported to him. (202.8-g

Statement ¶713-14) Mr. Weisselberg signed the SFC engagement and representation letters for 2011 through 2015 as an executive officer of the Trump Organization and for 2016 through 2020 as an executive officer of the Trump Organization and as trustee of the Trust. (202.8-g Statement ¶716-35) He also certified summaries of the SFCs for 2016 to 2019 as trustee. (Exs. 1041-1045)

5. Jeffrey McConney

Jeffrey McConney was Controller of the Trump Organization from the early 2000s through at least 2022 and led the process of preparing Mr. Trump's SFCs since the 1990s. (202.8-g Statement ¶736-37) Working under Mr. Weisselberg's supervision, he was responsible for assembling the SFC documentation and sending it to the outside accounting firm along with his supporting data spreadsheets. (202.8-g Statement ¶738) In May 2016, Mr. McConney sent a compliance certificate pertaining to the 2015 SFC to Deutsche Bank, and the following year submitted to the bank another compliance certificate pertaining to the 2016 SFC. (202.8-g Statement ¶741-42) He also sent summaries of the SFCs for 2016 to 2019 to the servicing bank for the 40 Wall Street loan. (Exs. 1041-1045).

6. The Entity Defendants

The Trust was established in April 2014. (202.8-g Statement ¶745) The trustees of the Trust were responsible for the SFCs from 2016 through 2021. (202.8-g Statement ¶743)

DJT Holdings LLC and DJT Holdings Managing Member LLC are entities that sit at the top of the Trump Organization's organizational chart and together own many of the Trump-affiliated entities that comprise the Trump Organization. (202.8-g Statement ¶760, 762, 764, 766) Trump Organization Inc. is owned 100% by DJT Holdings Managing Member LLC and Trump Organization LLC is owned 100% by DJT Holdings LLC. (202.8-g Statement ¶746)

Trump Endeavor 12 LLC is the owner of the Doral Property and was the borrower on the Doral loan for which Mr. Trump was the guarantor. (202.8-g Statement ¶767-68) 401 North

Wabash Venture LLC is the owner of the Trump International Hotel & Tower in Chicago and was the borrower on the Trump Chicago loan, for which Mr. Trump was the guarantor. (202.8-g Statement ¶777-78) Trump Old Post Office LLC held the ground lease for Trump International Hotel in Washington, D.C. and was the borrower on the OPO loan, for which Mr. Trump was the guarantor. (202.8-g Statement ¶782-83) 40 Wall Street LLC holds the ground lease for the office building located at 40 Wall Street and was the borrower on the loan with Ladder Capital, for which Mr. Trump was the guarantor. (202.8-g Statement ¶785-86) Seven Springs LLC owns the Seven Springs estate and was the borrower on the mortgage from RBS/Bryn Mawr, for which Mr. Trump was the guarantor. (202.8-g Statement ¶787-78)

STANDARD OF REVIEW

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Where the moving party relies on expert opinion evidence to meet this initial burden, it is well settled that such evidence "must be based on facts in the record or personally known to the [expert] witness," and that where the moving party relies on an expert's conclusion that "assum[es] material facts not supported by record evidence," the movant fails to establish a *prima facie* entitlement to summary judgment. *Roques v. Noble*, 73 A.D.3d 204, 206 (1st Dep't 2010); *see also* 6B Carmody-Wait 2d §39:138 (noting that where an expert witness's assertions "are speculative or unsupported by any evidentiary foundation, the expert's opinion should be given no probative force").

Once the moving party makes a *prima facie* showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 N.Y.2d at 562; *Alvarez v. Prospect Hosp*., 68 N.Y.2d 320, 324–25 (1986).

ARGUMENT

I. DEFENDANTS' STANDING, CAPACITY, DISCLAIMER, AND DISGORGEMENT ARGUMENTS ARE FRIVOLOUS

Defendants contend that, "whether framed as an issue of standing or capacity, the scope of NYAG's authority depends upon a public interest nexus" requiring "some harm (or threat of harm) suffered by the People (*i.e*., the public at large)." *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgement (NYSCEF No. 835) ("Defs. MOL") at 22. They add that this "public interest" concept "is reinforced by the doctrine of *parens patriae*," which they urge "is fully applicable to actions brought under 63(12)." *Id*. at 22 n.10. Defendants further argue that the accountant's letter inserted at the beginning of each SFC has disclaimer language that puts users "on complete notice not to rely upon them," effectively insulating them from any liability for false and misleading statements and values in the SFCs. *Id*. at 42

Defendants have plowed this same field twice before without success.

The first time was in opposing Plaintiff's motion for a preliminary injunction, where Defendants argued that the Attorney General had no standing or capacity to maintain this action under Executive Law § 63(12) because there was no harm, and in particular no harm to the public, relying on cases brought under the *parens patriae* doctrine and the decision in *People v. Domino's Pizza, Inc*, Index No. 450627/2016, 2021 WL 39592 (Sup. Ct. N.Y. Cty. Jan. 5, 2021),[8] a case

[8] Defendants' continued heavy reliance on the trial court's decision in *Domino's* for a "public harm" requirement is misplaced for two reasons. First, the *Domino's* holding was not based on the

Defendants again rely upon heavily here. *See* Memorandum of Law in Opposition to Plaintiffs Application for a Preliminary Injunction and Expedited Preliminary Conference (NYSCEF No. 126) at 8-11 (arguing, in language that parrots their arguments here, that the Attorney General "has no right to intervene" in Defendants' "internal affairs and management . . . and private contractual rights between [Defendants] and corporate counter parties" as "those are private matters between sophisticated commercial parties, not matters of public interest."). They also contended in the same brief that the SFCs, "and the disclaimers explicitly set forth therein, conclusively establish a defense as a matter of law to the Executive Law § 63(12) fraud claim alleged in the Complaint" because it "forecloses Plaintiff from claiming any corporate counter party reasonably relied in any material way on the information contained in the SoFCs." *Id*. at 13.

The Court soundly rejected these arguments in its decision granting Plaintiff's motion for a preliminary injunction. *People of the State of New York v. Trump,* No. 452564/2022, 2022 WL 16699216, at *2 (Sup. Ct. N.Y. Cty. Nov. 03, 2022) ("*Trump I*"). As the Court explained, there is no need for the Attorney General to show any public harm[9] or the quasi-sovereign interest required

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absence of public harm but rather on the absence at trial of evidence establishing fraudulent conduct, *see* 2021 WL 39592, at *1, which is not the case here. Second, to the extent *Domino's* can be construed to hold that private business transactions fall outside the scope of § 63(12), that holding cannot be squared with the First Department's decision in this case. *See People v. Trump,* 217 A.D.3d 609, 610–11 (1st Dep't 2023).

[9] Even if there was a "public harm" requirement (which is not the case), as the Court has already held, this case satisfies that requirement because the People have articulated "a quasi-sovereign interest that touches a substantial segment of the population and is distinct from the interests of private parties." *Trump I*, 2022 WL 16699216, at *2 (citing cases); *see also Trump*, 217 A.D.3d at 610 (noting this case "is vindicating the state's sovereign interest in enforcing its legal code – including its civil legal code – within its jurisdiction"); *People v. Coventry First LLC*, 52 A.D. 3d 345, 346 (1st Dep't 2008) (finding claim under § 63(12) "constituted proper exercise[] of the State's regulation of businesses within its borders in the interest of securing an honest marketplace"), *aff'd*, 13 N.Y.3d 108 (2009).

under *parens patriae* because "the New York legislature has specifically empowered the Attorney General to bring [an Executive Law § 63(12)] action in a New York state court," and Defendants' attempt to restrict § 63(12) to consumer fraud cases "is wholly without merit." *Id*. Further, the Court held that the disclaimer language in the SFCs did not provide any defense at all to Defendants because the language "makes abundantly clear that Mr. Trump was fully responsible for the information contained within the SFCs" and that "allowing blanket disclaimers to insulate liars from liability would completely undercut" the "important function" that SFCs serve "in the real world." *Id*. at *3. Indeed, the Court noted that even under the cases Defendants cited, they could not use the disclaimer as a defense because "the SFCs were unquestionably based on information peculiarly within" their knowledge. *Id*.

Undeterred by the Court's decision on Plaintiff's preliminary injunction motion, Defendants raised these same three arguments for a second time in support of their motions to dismiss. *See, e.g.*, Memorandum of Law in Support of the Motion to Dismiss of Defendants, The Trump Organization, Inc., Trump Organization LLC, and Donald J. Trump (NYSCEF No. 197) ("MTD Moving Br.") at 3-11 (Point I – "The NYAG Lacks Standing to Bring This Action"), 11-13 (Point II – "The NYAG Is Without Capacity to Bring the Suit"), at 21-22 (Point III – "Plaintiff's Fraud Claims are Barred by Documentary Evidence and Fail to State a Claim").

The Court rejected these arguments again, noting that they "were borderline frivolous even the first time defendants made them," and that reading Defendants' brief "was, to quote the baseball sage Lawrence Peter ('Yogi') Berra, 'Deja vu all over again.'" *People v. Trump*, No. 452564/2022, 2023 WL 128271, at *2 (N.Y. Sup. Ct. Jan. 06, 2023) ("*Trump II*") (holding that Executive Law § 63(12) "is tailor-made for Attorney General Enforcement actions such as the instant one, foreclosing any rational arguments against capacity and standing" and that the

disclaimers "shifted responsibility directly on to certain defendants"), *aff'd in part and rev'd in part*, 217 A.D.3d 609 (1st Dep't 2023) ("*Trump III*"). The Court went further to admonish Defendants' counsel for raising these arguments again, noting that "sophisticated defense counsel should have known better." *Trump II*, 2023 WL 128271, at *4. After observing that such conduct may warrant an "award [of] costs and financial sanctions against an attorney or party," the Court exercised its discretion and declined to do so, concluding they were unnecessary in light of the Court "having made its point." *Id*. While the point was made, it went unheeded.

Despite the Court's admonition, Defendants are pursuing their standing, capacity, and disclaimer arguments for a *third time* in their summary judgment motion. Defs. MOL at 22, 42. Moreover, Defendants have added to the list of previously-rejected positions yet another argument—that Plaintiff has no valid claim for disgorgement under § 63(12). *Id.* at 58-62. But the Court of Appeals has held that "disgorgement is an available remedy under . . . the Executive Law." *People v. Greenberg*, 27 N.Y.3d 490, 497 (2016). And the Court rejected this argument when Defendants raised it the first time in their motion to dismiss, holding that "disgorgement of profits is a form of damages" available in this § 63(12) action. *See Trump II*, 2023 WL 128271, at *5.

Defendants suggest that their standing and capacity arguments deserve consideration anew because "at the dismissal stage" when these arguments were considered and rejected, Plaintiff "was afforded the presumption of propriety" as to the allegations in the complaint. Defs. MOL at 26. But even this procedural excuse for rehashing previously-rejected arguments was *itself* previously rejected by the Court. When Defendants raised their standing and capacity arguments for a second time on their motion to dismiss, they argued the Court's prior rejection of these arguments was not determinative because it came in the context of deciding a preliminary

injunction motion. *See* Consolidated Reply Memorandum in Support of Defendants' Motions to Dismiss (NYSCEF No. 410) at 3. The Court held otherwise:

> OAG's legal standing and capacity to sue *are threshold litigation questions of justiciability*; they do not change whether in the context of a motion for a preliminary injunction or to dismiss . . . . The Court rejected such arguments as a matter of law, and defendants' reiteration of them, scattered across five different motions to dismiss, was frivolous.

Trump II, 2023 WL 128271, at *2 (emphasis added). Similarly, the arguments are no different now that they are being raised in the context of a summary judgment motion.

To make matters worse, Defendants rehash their standing, capacity, and disgorgement arguments after they have already been *rejected by the First Department in this case*:

> The New York Legislature enacted Executive Law § 63 (12) to combat fraudulent and illegal commercial conduct in New York. Under this provision, "[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, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York" *for disgorgement* and other equitable relief. The Attorney General is not suing on behalf of a private individual, but is vindicating the state's sovereign interest in enforcing its legal code—including its civil legal code—within its jurisdiction. We have already held that the failure to allege losses does not require dismissal of a claim *for disgorgement* under Executive Law § 63(12).

Trump III, 217 A.D.3d at 610–11 (internal citations omitted) (emphasis added).

For these reasons, the Court should summarily reject yet again Defendants' threshold justiciability arguments based on lack of standing and capacity, reliance on the "disclaimer" language in the SFCs, and challenge to Plaintiff's entitlement to disgorgement. These positions are meritless, as this Court and the First Department have previously held, and the conduct of Defendants and their counsel in raising them yet again is frivolous.

II. PLAINTIFF'S CAUSES OF ACTION ARE TIMELY FILED AS AGAINST ALL DEFENDANTS

Rejecting Defendants' argument, the First Department recently ruled that Plaintiff's claims under Executive Law § 63(12) are governed by the six-year statute of limitations under CPLR 213(9) and that executive orders issued during the pandemic tolled the limitations period. *Trump III*, 217 A.D.3d at 611. Based on these rulings, the appellate court held that "claims are time barred if they accrued – that is, the transactions were completed – before February 6, 2016" for any Defendant not bound by the August 21, 2021, tolling agreement (Ex. 419) ("Tolling Agreement"), and "before July 13, 2014" for any Defendant bound by the Tolling Agreement. *Id*. The court concluded that only Ivanka Trump had engaged in conduct that fell altogether outside of those timeframes, but otherwise rejected the remaining Defendants' arguments for dismissal based on the limitations period. *Id.*

Defendants offer no basis to revisit the First Department's conclusion that Defendants engaged in wrongful conduct within the governing limitations period. This Court therefore does not need to reach any of Defendants' statute-of-limitations arguments, as the People need to demonstrate that only some amount of wrongful conduct occurred within the limitations period and "need not prove all of the [instances] in order to obtain the relief sought." *See People v. Boyajian Law Offs., P.C.*, 17 Misc.3d 1119(A), at *6 (Sup. Ct., N.Y. Cty. 2007). For similar reasons, there is no need to resolve the full scope of the Tolling Agreement on summary judgment—which the First Department instructed this Court to address "as necessary," *Trump III*, 317 A.D.3d at 611—because Defendants concede that the entity Defendants are bound (Defs. MOL at 13-14) and because the individual Defendants participated in multiple fraudulent

transactions on or after February 6, 2016, the date the limitations period begins in the absence of the Tolling Agreement.[10]

In all events, Plaintiff has brought claims that accrued within the limitations period, even if the period began in February 2016. And if this Court decides to reach the issue, all Defendants are bound by the Tolling Agreement, under which the limitations period began in July 2014.

A. Plaintiff's Claims Accrued Within The Limitations Period

Statutory causes of action such as those established under § 63(12) "accrue[] . . . when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief," as determined by the elements of any claim in the statute. *Gaidon v. Guardian Life Ins. Co.*, 96 N.Y.2d 201, 210 (2001); *see also Aetna Life & Cas. Co. v. Nelson*, 67 N.Y.2d 169, 175 (1986) (holding a claim accrues "when all of the facts necessary to the cause of action have" occurred) (citing 1 Weinstein-Korn-Miller, N.Y.Civ.Prac. ¶ 201.02, at 2-9)). Here, § 63(12) prohibits (1) "repeated" or "persistent" (2) "fraudulent or illegal" acts (3) "in the carrying on, conducting or transaction of business."

As the First Department has confirmed, under CPLR 213(9)'s six-year limitations period, § 63(12) claims accrue with each instance of fraud or illegality violative of the statute that occurs within the period going back six years from the filing of OAG's enforcement complaint (plus any applicable tolling). *See People v. Cohen*, 214 A.D.3d 421, 422 (1st Dep't 2023). As a trial court explained in a case regarding misleadingly inflated price information, the § 63(12) claims accrued each time that the defendant, within the limitations period, caused false and inflated price

[10] The Court can defer ruling on the effect of the Tolling Agreement until trial, when it may be necessary to determine for purposes of disgorgement whether the Tolling Agreement extends the statute-of-limitations period for calculating ill-gotten gains to be disgorged from February 6, 2016 to July 13, 2014 for particular Defendants.

information to be published, and each such inflated price report constituted the accrual of a separate wrong. *People Pharmacia Corp*., 27 Misc. 3d 368, 374 (Sup. Ct., Albany Cty. 2010).

Indeed, the First Department has repeatedly applied these fundamental accrual principles. In *People v. Cohen*, for example, the defendants made repeated, annual misrepresentations to tenants and a state agency relating to the rent-stabilized status of defendants' apartments. 214 A.D.3d at 422-23; *see Cohen*, OAG Br., 2022 WL 19039982, at *34-10 (1st Dep't Aug. 8, 2022). After concluding that a six-year statute of limitations applied, the First Department ruled that OAG's § 63(12) claims were timely as to *all* of these alleged misrepresentations (and illegal conduct) within the limitations period (between 2012 and 2018), *Cohen*, 214 A.D.3d at 422—though the defendants had completed construction and submitted an offering plan far earlier (in 2009), *see Cohen*, OAG Br., 2022 WL 19039982, at *10-13. Similarly, in *People v. Allen*, the First Department affirmed a post-trial judgment concluding that Martin Act and § 63(12) claims accrued and were timely each time that the defendants made misrepresentations or engaged in other fraudulent conduct within the six-year limitation period (between 2013 and 2019)—even though the underlying investments occurred based on investment memoranda issued far earlier (in 2004 and 2005). *See* 198 A.D.3d 531, 532-33 (1st Dep't 2021); *People v. Allen*, No. 452378/2019, 2021 WL 394821, at *4 (Sup. Ct., N.Y. Cty. 2021). And that understanding accords with cases outside of the § 63(12) context, which have repeatedly concluded that each instance of wrongful conduct is a "separate, actionable wrong" that "g[ives] rise to a new claim." *CWCapital Cobalt VR Ltd. v. CWCapital Invs., LLC*, 195 A.D.3d 12, 19-20 (1st Dep't 2021); *see also Manipal Educ. Americas, LLC v. Taufiq*, 203 A.D.3d 662, 663 (1st Dep't 2022) (holding "a separate exercise of judgment, and thus a separate wrong, was committed" with each hiring decision made by defendant); *State v. 7040 Colonial Rd. Assocs. Co.*, 176 Misc. 2d 367, 374 (Sup. Ct., N.Y. Cty. 1998) (holding that

each wrongful act is a separate accrual under the Martin Act, "even if the new act or practice simply repeated the misrepresentations or omissions made previously"); *U.S. Bank Nat'l Ass'n v. KeyBank, Nat'l Ass'n*, No. 20-cv-3577, 2023 WL 2745210, at *11 (S.D.N.Y. Mar. 31, 2023) (holding defendants "continuous failure to act" based on a contract "amounted to separate, actionable wrongs rather than a single breach with new instances of damage").

1. Claims For Fraud And Illegality Under § 63(12) Accrued With Each Fraudulent Certification or Submission Of A False And Misleading SFC Or Misrepresentation Concerning Mr. Trump's Financial Condition

Applying these principles here, Executive Law § 63(12) fraud and illegality claims accrued each time any Defendant submitted a new false and misleading SFC to a bank or insurer or certified the SFC as fairly and accurately representing the financial condition of Mr. Trump or made other misrepresentations about Mr. Trump's financial condition in the course of satisfying loan obligations or renewing insurance policies. And there is no question that such actions were integral to the transaction of business, as they were necessary, continuing obligations imposed on Mr. Trump as guarantor and the borrowing entity Defendant under loan covenants or required by underwriters as part of the policy renewal process.

Overwhelming evidence establishes that each individual Defendant and the Trust (through trustees Donald Trump, Jr. and Allen Weisselberg) participated in multiple acts of fraud and illegality in the transaction of business by submitting and/or certifying false and misleading SFCs to banks and insurers on or after February 6, 2016, and that each entity Defendant (admittedly bound by the Tolling Agreement) did the same on or after July 13, 2014, giving rise to separate and actionable wrongs against them that accrued within the limitations period, as detailed in the timelines provided in the Appendix to this brief and described below:

- Mr. Trump approved the SFC for 2015, which was issued after February 6, 2016, personally submitted and certified his 2015 SFC to Deutsche Bank for the Doral, Chicago, and OPO loans, and submitted and certified through an

"attorney in fact" to Deutsche Bank for the Doral, Chicago, and OPO loans that each of his SFCs for 2016 to 2019 and 2021 fairly presents his financial condition as of June 30 in those years and for 2020 that his net worth was no less than $2.5 billion as of June 30, 2020. *See, supra*, at 38-39; Appendix timelines.

- Donald Trump, Jr. signed the representation letters after February 6, 2016 for the 2016 to 2020 SFCs in his capacity as trustee of the Trust and officer of the Trump Organization and for the 2021 SFC in his capacity as trustee of the Trust, and submitted and certified as Mr. Trump's "attorney in fact" to Deutsche Bank for the Doral, Chicago, and OPO loans after February 2016 that each of the SFCs for 2016 to 2019 fairly presents Mr. Trump's financial condition in those years and Mr. Trump's net worth as of June 30 in each year is not less than $2.5 billion. *See, supra*, at 39; Appendix timelines.

- Eric Trump supervised the preparation of the 2021 SFC, approved the inflated valuation of undeveloped land at TNGC Briarcliff in November 2015 that was used for the 2015 to 2018 SFCs, provided the inflated valuations for Seven Springs used for 2012 to 2014 SFCs, signed a loan modification agreement on behalf of Seven Springs LLC and a related consent and joinder of guarantor as Mr. Trump's "attorney in fact" in 2019, and submitted and certified as Mr. Trump's "attorney in fact" to Deutsche Bank for the Doral, Chicago, and OPO loans that the 2021 SFC fairly presents Mr. Trump's financial condition and in 2020 that Mr. Trump's net worth as of June 30, 2020 is not less than $2.5 billion. *See, supra*, at 39-40; Appendix timelines.

- Allen Weisselberg supervised the preparation of all of the SFCs, including those issued after February 6, 2016, signed the representation letters after February 2016 for the 2016 to 2020 SFCs in his capacity as trustee of the Trust and officer of the Trump Organization, certified a summary of Mr. Trump's net worth to the servicing bank on the 40 Wall Street loan based on the SFCs from 2016 through 2019, submitted and misrepresented the 2018 and 2019 SFCs to Zurich's underwriter for the surety program renewal in 2019 and 2020, and submitted the 2015 SFC to the D&O insurers during the renewal in 2017, while failing to disclose an ongoing investigation into the company's officers that was likely to lead to a claim. *See, supra*, at 40-41; Appendix timelines.

- Jeffrey McConney had primary responsibility for preparing all of the SFCs issued after February 6, 2016 under Mr. Weisselberg's supervision and submitted the certified summary of Mr. Trump's net worth to the servicing bank on the 40 Wall Street loan in 2016 through 2019 based on the SFCs. *See, supra*, at 41; Appendix timelines.

- The Donald J. Trump Revocable Trust participated in the preparation, submission, and certification of the SFCs after February 6, 2016 through the acts of its trustees Allen Weisselberg and Donald Trump Jr. as described above. *See, supra*, at 41; Appendix timelines.

- Each of the borrowing entity Defendants—Trump Endeavor 12 LLC (Doral loan), 401 North Wabash Venture LLC (Chicago loan), Trump Old Post Office LLC (OPO loan), 40 Wall Street LLC (40 Wall Street loan), and Seven Springs LLC (Seven Springs loan)—submitted and certified the SFCs on multiple occasions after July 13, 2014 in compliance with the continuing obligations under their respective loans (including for Seven Springs LLC loan modifications on July 28, 2014 and in 2019) through the acts of the individual Defendants undertaken within the scope of their employment, including those described above that occurred after February 6, 2016. *See, supra*, at 41-42; Appendix timelines.

- The remaining entity Defendants—the Trump Organization, Inc., the Trump Organization LLC, DJT Holdings LLC, and DJT Holdings Managing Member, and the Donald J. Trump Revocable Trust—each participated in the preparation, submission, and certification of the SFCs after July 13, 2014 through the acts of the individual Defendants described above, as well as Patrick Birney and other Trump Organization employees, undertaken within the scope of their employment. *See, supra*, at 41; Appendix timelines.

Based on these acts by Defendants, each of Plaintiff's seven causes of action are timely even based on a limitations period that begins on February 6, 2016.

2. The Closing Dates Of The Loans Are Not Relevant To Determining Accrual Dates For Post-Closing Fraudulent Transactions

Defendants err in arguing that § 63(12) claims based on fraud or illegality alleged in connection with the Doral, Chicago, and Seven Springs loans are untimely because those loans closed before July 13, 2014, even for the entity Defendants they concede are bound by the Tolling Agreement. Defs. MOL at 6-7. Defendants do not seriously dispute that they participated in the certification or submission of SFCs *within the limitations period* for the Doral, Chicago, and Seven Springs transactions. Each of those false and misleading certifications and submissions are separate, actionable wrongs under § 63(12) that accrued within the limitations period. There is no plausible basis for Defendants' incongruous position they should be immunized from § 63(12) liability for repeated or persistent fraudulent conduct committed within the limitations period on the ground that they also committed separate, earlier wrongful conduct (here closing the loans using fraudulent and misleading SFCs) outside of the limitations period. To state the obvious, prior

to July 2014, OAG could not have enforced § 63(12) claims for fraud or illegality in the transaction of business based on SFCs prepared, certified, and submitted in late 2014 to 2021—which had not yet been prepared, certified, or submitted to any financial institution. And Defendants' argument contravenes the plain language and fundamental purpose of § 63(12), which makes it unlawful to engage in *any* repeated or persistent fraudulent or illegal conduct in the carrying on or transacting of any business—regardless of whether that fraud or illegal conduct happens at the initial stage of a business deal or during subsequent stages based on newly-created documents.

Defendants hinge their argument on the First Department's observation in this case that the § 63(12) fraud claims accrued when "the transactions were completed." 217 A.D.3d at 611. But the First Department did not, by using that language, casually upend longstanding precedents on § 63(12) claims or accrual principles (such as *Cohen* and *Allen*), in which fraudulent or illegal conduct subsequent to an initial business deal or event gives rise to a separate, actionable claim. *See Ezrasons, Inc. v. Rudd*, 217 A.D.3d 406, 407 (1st Dep't 2023) (declining to find that a decision "silently overruled [a] longstanding principle"). Rather, the First Department was merely underscoring that § 63(12) targets fraudulent and illegal conduct in the "transaction of business," Exec. Law § 63(12), and the court's statement is best understood as shorthand for when a claim arising from conduct that violates the statute accrues, namely, when each repeated or persistent fraudulent or illegal act in the conduct of business is completed. Indeed, a "transaction" is not limited to an initial loan closing or a sale, but rather is an "extremely broad" concept. *In re Enron Creditors Recovery Corp.*, 422 B.R. 423, 436 (S.D.N.Y. 2009), *aff'd*, 651 F.3d 329 (2d Cir. 2011); *see also Ray-Roseman v. Lippes Mathias Wexler Friedman, LLP*, 197 A.D.3d 944, 946 (4th Dep't 2021) (describing "loan transaction" to include origination as well as ongoing enforcement of a loan until it "was paid in full and the transaction completed"); Black's Law Dictionary (11th ed.

2019) definition of Transaction ("an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract"). Here, the relevant "transactions" for purposes of § 63(12) include each time Defendants engaged in fraudulent or illegal commercial conduct with another party, including but not limited to certifying or submitting false SFCs to meet obligations under existing loans or renew insurance.

Moreover, the People's § 63(12) claims for illegality based on violations of the Penal Law under the second, fourth, and sixth causes of action require the application of additional accrual principles. As to these claims, each does not accrue until "the claim becomes enforceable," *Kronos, Inc. v. AVX Corp*., 81 N.Y.2d 90, 94 (1993), which does not occur until the necessary elements of the underlying crime have been committed. Illegality based on falsifying business records in violation of New York Penal Law §175.05 (second cause of action) requires the making of a false entry in the business records of an enterprise or preventing the making of a true entry with the intent to defraud. N.Y. Penal Law §175.05. Defendants caused false entries to be made and prevented the making of true entries in the business records of the Trump Organization – the SFCs and certifications – with the requisite intent within the limitations period. *See, supra*, at 7-27. Illegality based on issuing a false financial statement in violation of New York Penal Law §175.45 (fourth cause of action) requires, with the intent to defraud, making a written instrument purporting to describe the financial condition of a person which is inaccurate in some material respect or representing in a writing that a written statement describing a person's financial condition is accurate knowing that it is materially inaccurate. N.Y. Penal Law §175.45. Defendants created false and misleading SFCs describing the financial condition of Mr. Trump and falsely represented in certifications that the SFCs were accurate with the requisite intent within the limitations period. *See, supra*, at 7-27, 38-42. And illegality based on committing insurance fraud in violation of New

York Penal Law §176.05 (sixth cause of action) requires, knowingly and with the intent to defraud, presenting or preparing, with knowledge or belief that it will be presented to an insurer, any written statement as part of an insurance application that is known to contain materially false information or to conceal for the purpose of misleading information concerning any material fact. N.Y. Penal Law §176.05. Defendants prepared and submitted knowingly false and misleading SFCs to insurers with the requisite intent within the limitations period.[11] *See, supra*, at 35-38.

With respect to Plaintiff's remaining third, fifth, and seventh causes of action under § 63(12) for conspiracy to commit the illegal acts enumerated above, a claim accrues when there is an "agreement to cause a specific crime to be committed together with the actual commission of an overt act by one of the conspirators in furtherance of the conspiracy." *Robinson v. Snyder*, 259 A.D.2d 280, 281 (1st Dep't 1999). For each of the illegal acts alleged in the second, fourth, and sixth causes of action, there was an agreement among Defendants to prepare and submit false and misleading SFCs together with participation in the preparation and submission of the SFCs to banks and insurers, all within the limitations period. *See, supra*, at 7-38. Moreover, a defendant is not excused from their wrongdoing simply because some of their conduct occurred prior to a limitations period. Where the conspiracy offense consists of an agreement and a range of overt acts over time, some within and some outside the limitations period, the prosecution is timely if at least one of the overt acts occurs within the limitations period. *See People v. Leisner*, 73 N.Y.2d 140, 146 (1989). It is plain from the record that there are a large number of overt acts in furtherance

[11] Specifically in the context of insurance fraud, the crime is completed upon the submission of the fraudulent application or proof of loss to the insurer. *See People v. O'Boyle*, 136 Misc. 2d 1010, 1013-14 (Sup. Ct. N.Y. Cty 1987).

of the alleged conspiracies that occurred within limitations period, making the illegality counts based on those conspiracies timely.

B. If The Court Reaches The Issue, The Tolling Agreement Binds All Defendants

1. JUUL Held That Individual Corporate Officers May Be Bound By A Tolling Agreement Signed By The Corporation

In the event the Court decides to address the binding effect of the Tolling Agreement at this time, the Court should find that the Tolling Agreement binds all the individual Defendants and the Trust, in addition to the entity Defendants (as Defendants concede), and therefore the lookback period for disgorgement as to all Defendants extends to at least July 13, 2014.

Pursuant to the terms of the Tolling Agreement, the "Parties"—defined to be OAG and the "Trump Organization"—agreed to extend the six-year limitations period for any claim brought by OAG under Executive Law § 63(12). Ex. 419 at pdf 3. The "Trump Organization" is defined to include "The Trump Organization, Inc.; DJT Holdings LLC; DJT Holdings Managing Member LLC; and any predecessors, successors, present or former parents, subsidiaries, and affiliates, whether direct or indirect; and all directors, officers, partners, employees, agents, contractors, consultants, representatives, and attorneys of the foregoing, and any other Persons associated with or acting on behalf of the foregoing, or acting on behalf of any predecessors, successors, or affiliates of the foregoing." *Id*. at n.1. The Tolling Agreement was executed on behalf of the Trump Organization by its Executive Vice President and Chief Legal Officer, Alan Garten, the company's "duly authorized representative" who represented in writing that he had authority to sign on behalf of the Trump Organization as defined in that manner. *Id*. at pdf 6.

The Court must enforce a tolling agreement according to its plain terms, the same as any other contract. *See Multibank, Inc. v. Access Global Capital LLC*, 158 A.D.3d 458, 459 (1st Dep't 2018). And the extremely broad definition of "The Trump Organization" easily encompasses all

of the individual Defendants (each of whom was a director, officer, employee, and/or person associated with or acting on behalf of the Trump Organization when the Tolling Agreement was executed in August 2021), the Trust (through its binding effect on the trustees, Mr. Weisselberg and Donald Trump, Jr.), and all of the entity Defendants (each of which is either expressly named in the definition or was, and still is, a subsidiary or affiliate of the Trump Organization).

Although Defendants argue that each individual Defendant "must be a direct signatory" to the Tolling Agreement to be bound by its terms, Defs. MOL at 15, that position is contrary to *People v. JUUL*, which is controlling law. In *JUUL*, the First Department held that the *two individual corporate officers*, neither of whom were signatories, "are bound by the tolling agreement into which [the corporation] entered with the People" that specified officers were bound. *People v. JUUL Labs, Inc.*, 212 A.D.3d 414, 417 (1st Dep't 2023). Indeed, the Tolling Agreement here is not materially distinguishable from the one in *JUUL*, which covered a similar range of individuals and entities, and so the same result should follow. *Id.* (tolling agreement's definition of "JUUL" included JUUL's "parents, subsidiaries, affiliates, predecessors, shareholders, officers, directors . . . and all other persons or entities acting on their behalf or under their control.").[12] Such corporate non-signatories are bound unless they have disclaimed the agreement within a reasonable timeframe, which the non-signatories here did not do. *See* Restatement (Second) of Contracts § 306 (1981).

[12] The JUUL tolling agreement is part of the record on appeal in that case and can be found at NYSCEF Doc. No. 176 (Exhibit QQQ to Popp Affirmation), Index No. 452168/2019 (Sup. Ct. New York Cty).

2. Judicial Estoppel Does Not Apply Here

Defendants' argument based on judicial estoppel is without merit. The doctrine of judicial estoppel "prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed." *Becerril v. City of N.Y. Dept. of Health & Mental Hygiene*, 110 A.D.3d 517, 519 (1st Dept. 2013), *lv. denied*, 23 N.Y.3d 905 (2014); *see also Herman v. 36 Gramercy Park Realty Assocs., LLC*, 165 A.D.3d 405, 406 (1st Dep't 2018). Judicial estoppel does not apply for three independent reasons.

First, judicial estoppel applies only to assertions of "*factual issue*[*s*]," not legal positions. *PL Diamond LLC v. Becker-Paramount LLC*, 16 Misc. 3d 1105(A), 2007 WL 1865044, at *10 (Sup. Ct. N.Y. Cty 2007) (emphasis added); *see also Bates v Long Island Railroad*, 997 F. 2d 1028, 1037 (2d Cir.) ("The doctrine of judicial estoppel prevents a party from asserting a *factual position* in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding.") (emphasis added), *cert. denied* 510 U.S. 992 (1993)); *Zemel v. Horowitz*, 11 Misc. 3d 1058(A), 2006 WL 516798, at *4 (Sup. Ct. N.Y. Cty 2006) (same). As courts have observed, "[t]here is no legal authority" to support "extend[ing] the doctrine of judicial estoppel to include seemingly inconsistent legal positions." *Seneca Nation of Indians v. New York.*, 26 F. Supp. 2d 555, 565 (W.D.N.Y. 1998), *aff'd*, 178 F.3d 95 (2d Cir. 1999). Here, Plaintiff's prior assertion about the binding effect of the Tolling Agreement on non-signatories is a legal position rather than a factual position, and therefore judicial estoppel does not apply.

Second, even if the doctrine did apply to a legal position (which is not the case), it still does not apply here because the Court's prior determination was not based on Plaintiff's prior assertion. For the doctrine to apply, the party taking the inconsistent position must have benefitted

from the determination in the prior action based on the assertion it advanced in that matter; in other words, the doctrine does not require simply a prior determination rendered in favor of the party against whom estoppel is asserted, it also requires that the prior determination "endors[e] the party's inconsistent position in the prior proceeding." *Ghatani v. AGH Realty, LLC*, 181 A.D.3d 909, 911 (2nd Dep't 2020); *see also 35 W. Realty Co., LLC v. Booston LLC*, 171 A.D.3d 545, 545 (1st Dep't 2019) (declining to apply judicial estoppel because the court in the prior proceeding did not rely on the party's inconsistent position in its determination). In the Court's decision granting the People's contempt motion in the Special Proceeding, the Court did not base its decision on the legal position that Mr. Trump was not bound by the Tolling Agreement, nor did it otherwise "endors[e]" that legal position. *Ghatani*, 181 A.D.3d at 911. Rather, the Court, after noting that Mr. Trump had submitted a "woefully inadequate" compliance affidavit, agreed with Plaintiff's statement that "any delay causes prejudice to 'the rights or remedies of the State acting in the public interest.'" *People v. The Trump Organization, Inc.*, No. 451685/2020, 2022 WL 1222708, at *2 (Sup. Ct. N.Y. Cty. Apr. 26, 2022), *aff'd*, 213 A.D.3d 503 (1st Dep't 2023) (quoting *State v. Stalling*, 183 A.D.2d 574, 575 (1st Dep't 1992)). The Court further noted, without singling out Mr. Trump or holding that he was not bound by the Tolling Agreement, that "the statutes of limitations continue to run and *may result* in OAG being unable to pursue certain causes of action that it otherwise would." 2022 WL 1222708, at *2 (emphasis added). The Court neither based its decision to hold Mr. Trump in contempt on the legal position that Mr. Trump was not bound by the Tolling Agreement, nor endorsed that legal position.

Third, courts do not apply estoppel doctrines where there has been an intervening "'change in [the] applicable legal context.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments § 28, cmt. c (1980)); *see Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019)

(noting that "lower federal courts have long applied the change-in-law exception in a variety of contexts" in rejecting the application of estoppel doctrines). This change-in-law exception recognizes that applying equitable preclusion doctrines in changed circumstances may not "advance the equitable administration of the law." *Bobby*, 556 U.S. at 836–837; *see Herrera*, 139 S. Ct. at 1697. Such is the case here based on the timing of the First Department's controlling decision in *JUUL*. That decision, definitively establishing that an individual corporate officer who did not sign a tolling agreement is nevertheless bound by its terms under contractual language materially indistinguishable from the "Trump Organization" definition in the Tolling Agreement here, was issued on January 5, 2023 – more than seven months *after* the hearing before this Court on the contempt motion in the Special Proceeding and nearly one month *after* OAG's appellate brief was filed in the appeal from this Court's contempt order. *Compare JUUL*, 212 AD.3d at 414 *with* Defs. 202.8-g Statement ¶¶273-74. Precluding Plaintiff from relying on the *JUUL* holding, which controls the legal issue of whether Mr. Trump and other individual Defendants are bound by the terms of the Tolling Agreement, would not "advance the equitable administration of the law," and warrants applying the change-in-law exception to judicial estoppel. *Bobby*, 556 U.S. at 836–837.

III. OVERWHELMING EVIDENCE SUPPORTS EACH ELEMENT OF PLAINTIFF'S FIRST CAUSE OF ACTION FOR FRAUD

Executive Law § 63(12) gives OAG the power to bring an action against any person or entity that engages in "repeated fraudulent or illegal acts" or "otherwise demonstrate[s] persistent fraud or illegality in the carrying on . . . or transaction of business." N.Y. Exec. Law § 63(12). As to "fraud," the basis for Plaintiff's First Cause of Action, the statute broadly construes fraud "to include acts characterized as dishonest or misleading." *People v. Apple Health and Sports Clubs, Ltd.*, 206 A.D.2d 266, 267 (1st Dep't 1994), *dismissed in part, denied in part,* 84 N.Y.2d 1004

(1994). The standard requires a showing that the challenged conduct has "the capacity or tendency to deceive," or that "creates an atmosphere conducive to fraud." *People v. Northern Leasing Systems, Inc.*, 193 A.D.3d 67, 75 (1st Dep't 2021); *State v. Gen. Elect. Co.*, 302 A.D.2d 314, 314 (1st Dep't 2003).

Moreover, when a failure to effectively supervise creates "an enterprise conducive to fraud," a § 63(12) violation has been established. *Northern Leasing*, 193 A.D.3d at 75-76. Neither an intent to defraud nor reliance need be shown. *Apple Health*, 206 A.D.2d at 267; *People v. Coventry First LLC*, 52 A.D.3d 345, 346 (1st Dep't 2008); *see also People v. Trump Entrepreneur Initiative*, 137 A.D.3d 409, 417 (1st Dep't 2016) (recognizing prior First Department precedent establishing that "fraud under § 63(12) may be established without proof of scienter or reliance"). In assessing whether this broad standard for fraud has been satisfied, courts look not only to the average recipient of fraudulent conduct, "but also the ignorant, the unthinking and the credulous." *Gen. Electric*, 302 A.D.2d at 314; *see also People v. Allen*, 198 A.D.3d 531, 533 (1st Dep't 2021) (upholding finding of fraud under § 63(12) based on fraudulent representations to investors), *leave to appeal granted*, 38 N.Y.3d 996 (2022). While courts *may* consider evidence of falsity, materiality, reliance, and causation as bearing on the capacity or tendency of the challenged conduct to deceive, *see Domino's*, 2021 WL 39592, at *11, these are not required elements of proof on a § 63(12) fraud claim, *Gen. Elect. Co.*, 302 A.D.2d at 314.

For the reasons discussed below, overwhelming evidence establishes that the SFCs were false and misleading, and therefore had the capacity or tendency to deceive.

A. The SFCs Were False And Misleading

As a threshold matter, Defendants' summary judgment motion effectively concedes that the SFCs are false and misleading. In support of their motion, Defendants assert the following four facts: (1) assets may be appraised on the basis of their market value ("As Is") or investment value

("As If"), *see* Defendants' Statement of Undisputed Material Facts (NYSCEF No. 836) ("Defs. 202.8-g Statement") at ¶ 215; (2) market value reflects the "price a willing buyer and seller would agree upon in an open and competitive market," *id*. at ¶ 216; (3) investment value reflects the value of the property to a particular investor based on "that person's (or entity's) investment requirements rather than market norms" and includes "anticipated future market and property conditions from the vantage point" of the investor, *id*. at ¶¶ 217-18 (emphasis added); and (4) many of the assets listed in the SFCs reflect "As If" investment values based on various "As If" assumptions, as opposed to "As Is" market values, *id*. at ¶¶ 226-27.

These assertions, coupled with the fact that the assets in the SFCs are represented to be "stated at their estimated current values," *see, e.g.*, Ex. 1 at -3136, which Defendants' expert acknowledged is synonymous with "market values,"[13] is tantamount to conceding the SFCs are false and misleading; the SFCs represent to users that the assets are stated at their "estimated current values," or "As Is" market values, reflecting what a willing buyer and seller would pay in an open and competitive market, which is false because according to Defendants they are stated on a completely different basis – at their "As If" investment values reflecting Mr. Trump's "investment requirements rather than market norms." Without more, Defendants' affirmative assertion that the SFCs present "As If" values, when the SFCs represent to users the values are "As Is," is sufficient for the Court to find that the SFCs are false and misleading.

[13] Defendants' expert Steven Laposa agreed that "estimated current value" was the same as "market value," and that estimated current value is what governs personal financial statements. Robert Aff., Ex. AAC at 90:5-91:133; *see also id.* at 136:22-137:3 (stating that well-informed and willing buyers and sellers are a "common theme in market valuation"). Dr. Laposa also confirmed that the concepts of investment value and market value are fundamentally different. *Id*. at 76:9-19, 137:7-138:6; 139:22-140:25.

Beyond the admitted conflict between what Defendants contend the SFC asset values are and what the SFCs themselves expressly represent the asset values to be, the SFCs are false and misleadingly because Defendants inflated asset values by employing multiple deceptive schemes. Based on undisputed evidence, Defendants inflated the value of more than a dozen assets in each year by 17-39%, including the following examples:

- For Mr. Trump's triplex, Defendants used a fictitious number for the square footage of the apartment that was triple the actual size.
- For many properties (Seven Springs, 40 Wall Street, Mar-a-Lago, 1290 AoA, TNGC Briarcliff, TNGC LA, and Trump Tower), Defendants failed to consider existing appraisals, including appraisals that the Trump Organization itself relied on to challenge tax assessments.
- For many of the clubs, Defendants added an undisclosed brand premium and included the value of membership deposit liabilities despite representing that it valued those liabilities at $0.
- For unsold condominium units at Trump Park Avenue, Defendants valued rent stabilized units as if they were unrestricted at 65 times their appraised value, used original offering plan prices instead of option prices and current market values developed by the Trump Organization's real estate brokerage arm for internal business purposes.
- For Mr. Trump's cash—an important measure of his liquidity—and escrow deposits, Defendants included amounts held by separate partnerships over which Mr. Trump exercised no control.
- For real estate licensing developments, Defendants included speculative income from deals yet to be reduced to writing and intercompany agreements despite representing that only income from signed agreements with other developers would be included.

See, *supra*, at 7-23.

But these are just the deceptive schemes that can be quantified based on *undisputed evidence*. Additional evidence that the People will present at trial (as necessary), including expert opinion testimony, will establish Defendants inflated Mr. Trump's assets to a far greater extent by employing other deceptions such as including projected future income expected years out without

any discount to present value, cherry-picking only the most favorable capitalization rates from marketing reports, and ignoring internal budget projections when calculating net operating income, to name just a few. Based on the work performed by Plaintiff's valuation experts in correcting the Trump Organization's valuations to properly account for market factors that a willing buyer and willing seller would consider in determining "estimates of current value," Mr. Trump's net worth in any year between 2011 and 2021 would be *billions less* than stated in his SFCs. *See, supra*, at 23-26.

Accordingly, Plaintiff have presented sufficient evidence to establish that each SFC is false and misleading.

B. The SFCs Had The Capacity Or Tendency To Deceive Banks And Insurers

Defendants argue at length that the SFCs "were not materially misleading" to the banks and insurers involved in the transactions at issue, assuming a "materiality" standard applies here as if this enforcement action was instead an action alleging general common law fraud. Defs. MOL at 33. Their argument misses the mark because materiality is not a required element of a fraud claim under § 63(12). In this regard, § 63(12) stands "[i]n contrast" to statutes that require a showing that a misstatement was material. *Gen. Elec. Co.*, 302 A.D.2d at 314-15. Under § 63(12), the focus is on promoting a fair and functioning marketplace: § 63(12) targets "repeated" or "persistent" misstatements that distort the flow of commerce for "not only the average consumer"—let alone for reasonable counterparties—"but also 'the ignorant, the unthinking and the credulous.'" *Id.* at 314 (quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273 (1977)).

The relevant inquiry is thus whether the SFCs had "the capacity or tendency to deceive" the banks and insurers. *Northern Leasing*, 193 A.D.3d at 75. The answer is a resounding "yes" given the sheer magnitude of the inflated asset values in the SFCs each year, whether based on the

assessments by Plaintiff's valuation experts or just on the undisputed evidence presented in Plaintiff's partial summary judgment motion. *See, supra,* at Point III.A.

Additionally, beyond the gross inflation of asset values, the nature and extent of the GAAP departures also render the SFCs deceptive. As determined by Plaintiff's accounting expert Prof. Lewis, several departures from GAAP were not disclosed in the SFCs, including the addition of an internally-generated brand premium in valuing golf course properties, the failure to properly record cash, the failure to properly record escrow and reserve deposits, the failure to properly disclose changes in valuation methodology for certain properties from year to year, the failure to determine present value of projected future income when including the income in a valuation, and the failure to disclose the details of related party transactions. *See, supra*, at 26-27.

Moreover, while the People are not required to present proof that any bank or insurance executive was deceived by or relied on the SFCs, the evidence establishes that is what happened. *See People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417 (1st Dep't 2016) (holding that "reliance" is not an element of the statute).

A former Head of Credit Risk Management for Deutsche Bank's PWM Americas division, Nicholas Haigh, whose approval was required for the bank's loans to the Trump Organization, reviewed evidence obtained during OAG's investigation showing that Mr. Trump reported the values for 2011 and 2012 of $525 million and $527 million, respectively, for his interest in 40 Wall Street despite possessing an appraisal showing a valuation of $200 million as of November 1, 2011, and that Mr. Trump had reported a Net Operating Income ("NOI") for 40 Wall Street that was approximately four times the actual NOI used in this same appraisal. (Ex. 1017 at 140:8-143:9, 172:2-177:24) When asked how he would have responded if these discrepancies had come to his attention during the credit review, he testified that he "would have treated [Mr. Trump's] financial

disclosure with – generally with a larger degree of skepticism and specifically [he] would have adjusted the equity value of that specific asset," adding that "if The Trump Organization could not have provided a reasonable explanation then I think I would have recommended declining the transaction." (*Id*. at 177:25-178:19)

Mr. Haigh also testified he was "shocked at the numbers reported on Mr. Trump's financial statement" for 40 Wall Street given the then-existing appraised values of that property, and that had he learned of discrepancies between NOI figures used in appraisals of 40 Wall Street and those used for Mr. Trump's SFCs he would have questioned the accuracy of other information provided and would have asked whether the bank should continue doing business with Mr. Trump. (*Id*. at 177:25-178:19; 194:2-12; 196:13-15, 237:1-241:25; 202.8-g Statement ¶632-33, 637, 646, 650-52, 657-659)

The insurance underwriters were similarly deceived by the SFCs. Zurich's underwriter, Claudia Markarian, testified that she viewed the valuations in the 2018 and 2019 SFCs to be reliable and assessed them favorably based on Allen Weisselberg's misrepresentation that they were prepared by a professional appraisal firm. (202.8-g Statement at ¶627-28, 640-41) She also relied on the cash on hand figure listed under the "cash and cash equivalents" asset category as an indication of Mr. Trump's liquidity—an important consideration in her underwriting analysis and a figure that was inflated in the 2018 and 2019 SFCs by including cash that belonged to the Vornado Partnership Interests over which Mr. Trump had no control. (*Id*. at ¶631-33, 643-45) When pressed at her deposition by Defendants' counsel on why it would have been material to her if the cash on hand was one-third lower than stated in the SFC (after excluding the amount alleged in the complaint to be Vornado cash), given that the maximum exposure on the surety program was $20 million, Ms. Markarian explained: (i) it would be a "major concern" to her if the SFCs

she reviewed were "not actually accurate," which would have "call[ed] into question the whole account," (Ex. 348 at 140:10-25); and (ii) it means there was "materially less liquidity" that may not have been sufficient for approval from management, (*id*. at 142:18-144:2).[14]

HCC's underwriter Michael Holl similarly testified that for the 2017 D&O renewal he relied on the cash on hand figure in the 2015 SFC when considering Mr. Trump's liquidity, which had bearing on Mr. Trump's ability to meet the retention obligation under the HCC policy, as well as the misrepresentation by Trump Organization personnel that there was no material litigation or inquiry from anyone that could potentially lead to a claim under the policy.[15] (202.8-g Statement at ¶659-60)

And if further evidence were needed on whether the grossly inflated SFCs had the capacity or tendency to deceive, such evidence abounds. Where circumstances forced Defendants to abandon schemes that inflated certain asset values, Defendants hid the resulting lower values from SFC users so as not to alert them to the deception that had been going on in prior years. For example:

- When Mr. Trump donated a conservation easement over Seven Springs in 2015 and switched to the appraised value of the easement donation for Seven Springs, lowering the value from the 2014 SOFC by $234 million, he moved Seven Springs into the "Other Assets" category, which showed only an aggregate value for all assets in the category. Simultaneously, Mr. Trump dramatically increased the value of the Triplex in the "Other Assets" category in that year, which effectively masked from the user the decrease due to lowering the Seven Springs value that otherwise would have been

[14] Notably, Defendants ignore entirely the testimony of Ms. Markarian, focusing instead on the Zurich underwriter who handled the account prior to mid-2017, Joanne Caulfield. Defs. MOL at 36-37.

[15] Defendants' observation that HCC agreed in December 2016 to provide a $5 million excess policy to sit above the existing primary policy through February 17, 2017, without reviewing Mr. Trump's SFC, Defs. MOL at 37, is without import. HCC's quote was for a 2-month stub period that was, as Defendants concede, "subject to reviewing financials at renewal." *Id*.

evident.[16] (202.8-g Statement at ¶68-69, 73)

- Mr. Trump concealed the hugely-inflated value of Mar-a-Lago by including it within the "Club Facilities and Related Real Estate" category, which shows values only in the aggregate rather than providing the value of each club individually. (202.8-g Statement at ¶153-196, 285)

- Mr. McConney concealed from Mazars the internally-generated current market values for unsold units at Trump Park Avenue by deleting the column with that information from the supporting material he provided, leaving only offering prices. (202.8-g Statement at ¶92, 382-83)

Even if materiality were a required element of a § 63(12) fraud claim (which is not the case), this Court should reject Defendants' contention that the banks and insurers considered the SFCs to be immaterial. Defs. MOL at 34-38. The loan documents expressly state that the lender is relying upon the guarantee of Mr. Trump and the required certifications, including the representations they contain, to extend credit, and the guaranties require the submission of true and accurate financials. (202.8-g Statement ¶484-85, 514-16, 556, 560) Additionally bank underwriting documents cite the guarantee and the financial strength of the guarantor as support for the loans. (202.8-g Statement ¶475-76, 494, 503, 507-08, 511, 516, 520, 526, 551-53, 565, 587-96) The insurers required disclosure of Mr. Trump's SFC at renewal. (202.8-g Statement ¶623, 654) And testimony from bank and insurance company executives establish they relied on the SFCs when deciding to lend or offer insurance. *See, supra,* at 66-68.

Viewed against the backdrop of this volume of evidence, Defendants' contention has zero factual basis. Defendants cite the testimony of Tom Sullivan of Deutsche Bank stating that he was "[c]omfortable with the level of assets" reflected in Mr. Trump's SFCs. *Id*. at 34. That says nothing about whether he would have remained "comfortable" had he learned at the time that Mr. Trump's

[16] The value of the Triplex in 2014 was $200,000,000 but increased to $327,000,000 in 2015. (202.8-g Statement ¶37-40, 48)

asset values were grossly inflated through deceptive practices. Nor does Deutsche Bank's practice of applying "haircuts" to the values in a personal financial statement suggest that the enormous degree to which Defendants inflated the asset values was not material. As Mr. Haigh confirmed, and Defendants concede, Deutsche Bank applied "haircuts" to asset values as a matter of standard practice to reflect what the assets would be worth *in a liquidation scenario*. *See* Defs. 202.8-g Statement at ¶86; Ex. 1017 at 75:11-77:10; 79:7-24; 148:6-149:21. It was not intended to adjust values to account for deceptive practices by a borrower.

Defendants' reliance on the testimony of bank employees that they are unaware of any misrepresentations in the SFCs as evidence that they were not deceived by the SFCs, *see* Defs. MOL at 28-29, is similarly unavailing. The bank witnesses did not conduct any investigation to determine whether the SFCs contained false information (as OAG has done), never read the People's detailed complaint in this action, *see* Robert Aff. Ex. P at 16:16-22, Ex. AAD at 18:9-25, Ex. S at 14:10-19, and they were responding only "to the best of [their] knowledge," Ex. AAB at 229:16-230:7. The fact that these bank employees were at the time of the challenged transactions, and are now, unaware of any material misrepresentations by Defendants is simply proof that Defendants succeeded in their goal of using the SFCs to deceive.

Additionally, the fact that Deutsche Bank earned fees and interest on the loans, Defs. MOL at 35, is irrelevant to whether the bank was deceived. The undisputed facts surrounding the Doral loan application process illustrates how the bank was defrauded into offering a lower interest rate. When the bank's CRE division considered loaning funds to Trump Endeavor LLC without any personal guarantee from Mr. Trump backed by his SFC, the bank proposed a loan at a higher interest rate than what the PWM division proposed based on Mr. Trump's guarantee that was

supported by his SFC. *See, supra*, at 27-29. Mr. Trump's SFC was obviously material to the bank's consideration of the appropriate interest rate to charge.

Finally, the materiality of the annual submission of Mr. Trump's SFC to Deutsche Bank was confirmed in two exchanges between the Trump Organization and the bank. First, in September 2020, the Trump Organization advised Deutsche Bank that it would not be providing a financial statement for Mr. Trump as required by its loan documents. Following discussions between the bank's legal counsel and the Trump Organization, the bank advised that the request would be "modified to a request for an extension of time, from October 28, 2020 to December 31, 2020." (Ex. 1021 at 5) In other words, the bank insisted that Mr. Trump provide his SFC for 2020, which he did on January 12, 2021. (*Id*.) Second, when the bank became aware of the alleged misrepresentations in Mr. Trump's SFCs from OAG's public court filings and news reporting, the bank sent a letter to the Trump Organization on October 29, 2020 asking a series of questions about the SFCs. (202.8-g Statement ¶447-48) The Trump Organization refused to answer the questions, even after the bank pointed out that the company was required to provide accurate information about Mr. Trump's financial condition pursuant to various loan agreements and guaranties. (202.8-g Statement ¶449-50) As a result, the bank decided to exit its relationship with the Trump Organization once all of its outstanding loans had matured or been repaid "in light of the failure and/or refusal of the covered client organization to respond" to the bank's questions about the SFCs. (Ex. 237) Deutsche Bank would not have made the decision to exit the relationship based on the company's refusal to provide additional information about the SFCs if it did not consider the SFCs to be material.

C. Each Defendant Participated In Multiple Fraudulent Transactions

Defendants' assertion that there is no evidence showing *any* Defendant participated in or had knowledge of the fraudulent transactions here is wrong for multiple reasons. Such individuals

are liable for corporate conduct under § 63(12) if "they personally participated in the misrepresentation or had actual knowledge of the misrepresentation." *People v. Apple Health & Sports Clubs, Ltd.*, 206 A.D.2d 266, 267 (1st Dep't 1994).

First, their argument is largely based on their erroneous "loan closing date" theory for applying the six-year statute of limitations. Relying on this theory, Defendants exclude from their analysis "for the sake of brevity" any participation by or knowledge of any Defendant in the preparation and submission of false and misleading SFCs on the Doral, Chicago, and Seven Springs loans. Defs. MOL at 45. That glaring omission, while convenient for Defendants, renders their entire analysis fatally flawed.

Second, Defendants' analysis focuses on the "[p]reparation of the SOFCS" without any mention of the role any Defendant played in submitting and certifying the SFCs to the banks and insurers. Defs. MOL at 45. That is another glaring omission that renders their analysis flawed because each Defendant who submits an SFC to a bank or insurer while representing that the SFC fairly presents Mr. Trump's financial condition in all material respects, even if he had no involvement in preparing the SFC, is nevertheless participating in the fraud because he either knows that the SFC is false or misleading and is affirmatively misrepresenting otherwise, or knows nothing about the veracity of the SFC and is acting with "willful blindness or conscious avoidance," which as Defendants concede establishes knowledge of fraud under the applicable standard. Defs. MOL at 44 (quoting *State v. United Parcel Serv., Inc.*, 253 F. Supp. 3d 583, 666-67 (S.D.N.Y. 2017), *aff'd*, 942 F.3d 554 (2d Cir. 2019)).

Third, the undisputed evidence surrounding all of the fraudulent transactions that occurred within the limitations period, including transactions relating to *all five loans* and the insurance renewals—even using the later date of February 6, 2016 as the start of the limitations period—

establishes beyond any doubt that each Defendant participated in, and/or had actual knowledge of, multiple fraudulent acts that are the focus of Plaintiff's first cause of action. Defendants cannot dispute that Donald Trump, Allen Weisselberg, and Jeffrey McConney participated in the preparation, submission, and/or certification of SFCs or summaries of SFCs to banks, which is undeniable based on their own sworn testimony and the certifications and transmittals themselves. *See, supra*, at 38-41; Appendix timelines. As to the remaining Defendants, their participation in multiple fraudulent acts is similarly established by the undisputed evidence—including signed certifications—reviewed in detail in the fact section above and the timelines. *See, supra*, at 39-42; Appendix timelines.

D. Defendants' "No Harm – No Foul" Defense Is Legally And Factually Without Basis

Defendants argue that fraud under § 63(12) requires a showing that the defrauded banks and insurers suffered "harm or injury." Defs. MOL at 28. And they claim there is no harm or injury here because there was no "default, breach, [or] late payment" under the loans or insurance policies and no "complaint of harm" by the banks or insurers, each of which they claim "profited considerably from successfully consummated transactions." *Id*. These assertions are without merit.

First, § 63(12) does not require any showing of harm to the business counterparties to Defendants' fraudulent and illegal transactions. The First Department held *in this case* that OAG is not required to prove any losses were sustained to obtain disgorgement under § 63(12). *See Trump III*, 217 A.D.3d at 610. Similarly, in *People v. Ernst & Young LLP*, the First Department held that OAG may pursue disgorgement under § 63(12) without "a showing or allegation of direct losses to consumers or the public." 114 A.D.3d 569, 569-70 (1st Dep't 2014). As the court noted in *Ernst & Young*, unlike restitution, disgorgement "focuses on the gain to the wrongdoer as opposed to the loss to the victim," and the "source of the ill-gotten gains" is therefore "immaterial."

Ernst & Young, 114 A.D.3d at 569-70 (quotation marks omitted); *see Gen. Elec.*, 302 A.D.2d at 316-17 (requiring an approximation of "actual damages" for restitution). As the Court succinctly stated during a status conference: "You can't submit false financial statements. Period. That's what the Executive Law is all about and what this case is all about. So all this stuff about what the lenders thought . . . I don't think they're relevant at all." (Ex. 1049 at 44:4-9)

Here, because the People seek disgorgement and not restitution, they similarly need not allege or prove that Defendants' fraudulent and illegal conduct in connection with the transaction of business resulted in "losses" to any banks or insurers. *Trump III*, 217 A.D.3d at 610. Put another way, the Legislature has already decided that persistent fraud or illegality in business harms the public interest and has authorized the Attorney General to redress such harms by bringing civil enforcement actions under § 63(12) without any showing of additional harm suffered by the victims of Defendants' fraudulent and illegal conduct; such actions are a "proper exercise[] of the State's regulation of businesses within its borders in the interest of securing an honest marketplace," *Coventry*, 52 A.D.3d at 346, and vindicate "New York's recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation," *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 581 (1980). *See also J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Limited*, 37 N.Y.2d 220, 227 (1975) (recognizing New York's "overriding and paramount interest" as "a financial capital of the world, serving as an international clearinghouse and marketplace for a plethora of international transactions").

Second, it is beyond dispute that the banks offered the Trump Organization lower interest rates than the company otherwise would have received because of Mr. Trump's personal guarantee backed by the false and misleading SFCs. (202.8-g Statement ¶ 440-44, 462-70, 499-504, 543-50) As explained by the People's banking expert Michiel McCarty, this means the banks were harmed because they took on more risk with less profit due to Defendants' fraud. Ex. 1015 at . Based on

the differential between the interest rates that the Trump Organization paid on loans that were personally guaranteed by Mr. Trump and the market-based interest rates that would have applied to non-recourse loans secured only by the same commercial properties as collateral, Mr. McCarty calculated that "Mr. Trump obtained an improper benefit" of over $187 million between 2012 and 2022. (Ex. 1015 at ¶¶ 48-61, 79, 87, 98, 102 & App. C, Ex. 2) The insurers were also harmed because, as explained by the People's insurance expert Professor Tom Baker, they took on greater risk for lower premium. (Ex. 1047 at ¶¶ 15-20, 26)

E. The Opinion Testimony of Defendants' Experts Fails To Satisfy Defendants' *Prima Facie* Burden

Defendants offer the testimony and reports of several of their experts in support of their motion. But where the moving party relies on an expert's conclusion that "assum[es] material facts not supported by record evidence," the movant fails to establish a *prima facie* entitlement to summary judgment. *Roques v. Noble*, 73 A.D.3d 204, 206 (1st Dep't 2010); *see also Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002) ("Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment."); *Amaya v. Denihan Ownership Co., LLC*, 30 A.D.3d 327, 327 (1st Dep't 2006) (finding that expert affidavit has no probative value on summary judgment where it "contained speculative, conclusory assertions" and "cited to various broad or inapt . . . rules, regulations and standards"); *Measom v. Greenwich & Perry St. Hous. Corp.*, 268 A.D.2d 156, 159 (1st Dep't 2000) ("Expert testimony as to a legal conclusion is impermissible."). That is the case here.

The opinion testimony offered by Defendants' expert Robert Unell that Deutsche Bank would not consider the inflated asset values to be material directly conflicts with testimony given by Mr. Haigh. *See, supra*, at 66-67. Indeed, Mr. Unell's testimony that Deutsche Bank would have

no "reason to have concerns about the accuracy of the SOFCs" should OAG prove "the allegations in the complaint are true," Defs. MOL at 37, is exactly the opposite of what Mr. Haigh testified to under oath and conflicts with Deutsche Bank's decision to exit the relationship when the Trump Organization refused to provide additional information to the bank about the SFCs in light of OAG's allegations of fraud, *see, supra,* at 71.

Similarly, Mr. Unell's "opinion" that the SFCs provide "ample information," including how the asset values "were calculated," Defs. MOL at 38, is without record support. (202.8-g Response ¶70) The Court need only review the SFCs to confirm that they provide woefully incomplete and misleading information, shedding almost no light on how the values were calculated. At most, the notes in the SFCs describe a variety of methods that may have been used to calculate the value of assets within a group, but they contain no information about which particular method was used for any specific asset, and the descriptions of the methods are vague, substantially inaccurate, highly misleading, and fail to note the many ways that the calculations violate GAAP. (Ex. 1014 at ¶¶ 61-137)

Likewise, Defendants' insurance expert David Miller offered an "opinion" that Zurich's underwriter "didn't rely on asset valuations at all." Defs. MOL at 38. This directly conflicts with the testimony of Zurich's underwriter, Claudia Markarian, who testified that she relied on the information contained in the SFC when preparing her Underwriters Annual Review and making the recommendation to renew the Surety program. *See, supra,* at 35-36, 67-68. Nor is there any evidentiary support for the opinion offered by Defendants' other insurance expert, Gary Giulietti, that the amount of "cash" listed in the SFCs was immaterial to Zurich's underwriter because the exposure to Zurich never exceeded $20 million. Defs. MOL at 38. As Ms. Markarian testified, the

Vornado cash that was improperly included was absolutely material to her assessment. *See*, *supra*, at 67-68.

IV. SUBSTANTIAL EVIDENCE SUPPORTS EACH ELEMENT OF PLAINTIFF'S ILLEGALITY CAUSES OF ACTION BASED ON INDIVIDUAL PENAL LAW VIOLATIONS

Defendants argue they are entitled to summary judgment on Plaintiff's second, fourth, and sixth causes of action predicated on violations of New York's Penal Law proscribing falsification of business records, issuance of false financial statements, and insurance fraud, respectively – the illegality claims – because: (i) there is no evidence to support "a finding that the SOFCs were materially misleading" (Defs. MOL at 52); and (ii) there is no evidence to support "a finding that any Defendants had the requisite intent" to defraud the banks and insurers (Defs. MOL at 53).

The elements of each illegality claim are as follows: (i) falsifying business records requires, with the intent to defraud, the making of a false entry in the business records of an enterprise or preventing the making of a true entry; (ii) making a false financial statement requires, with the intent to defraud, making a written instrument purporting to describe the financial condition of a person which is inaccurate in some material respect or representing in a writing that a written statement describing a person's financial condition is accurate knowing that it is materially inaccurate; and (iii) committing insurance fraud requires, knowingly and with the intent to defraud, presenting or preparing, with knowledge or belief that it will be presented to an insurer, any written statement as part of an insurance application that is known to contain materially false information or to conceal for the purpose of misleading information concerning any material fact. *See*, *supra*, at 55-56.

As to falsification of business records, there are any number of false entries made out in the undisputed record before the Court--such as the misstated square footage of Mr. Trump's apartment, the inclusion of cash he did not control, the misstatement of golf club liabilities, and

many others—with evidence confirming the false entries were done with the intent to defraud.[17] Moreover, the SFCs are replete with omissions of true entries, such as entries that would describe, disclose, and take account of binding legal restrictions on assets, also with evidence confirming the omissions were done with the intent to defraud.[18] Similarly, there is little doubt that the elements are established for the issuance of false financial statements and committing insurance fraud, including the intent to defraud. These offenses apply to any person who participated in preparing the SFCs, transmitted them to any third party (or an insurer for insurance fraud), or represented their accuracy in writing to a third party (or insurer for insurance fraud). *See People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 617 (1995) ("common techniques, misrepresentations and omissions of material" and "constant nucleus" of personnel suffices to support scheme to defraud charge). Moreover, Defendants' intent to defraud is further evident from their numerous overt acts to conceal from Mazars critical information (such as appraisals and internal market prices for Trump Park Avenue unsold units) and from SFC users wild swings in asset values as circumstances forced them to abandon certain deceptive practices. *See, supra*, at 68-69.

V. SUBSTANTIAL EVIDENCE SUPPORTS EACH ELEMENT OF PLAINTIFF'S ILLEGALITY CAUSES OF ACTION BASED ON PENAL LAW CONSPIRACY VIOLATIONS

In support of their motion for summary judgment as to Plaintiff's illegality causes of action alleging conspiracy to commit each of the illegal acts discussed above—falsification of business

[17] For example, Mr. Weisselberg and Donald Trump, Jr. refused to reduce the value for the Triplex in the 2016 SFC even after learning that the square footage of the apartment was inflated by a factor of three. (202.8-g Statement ¶44-46)

[18] For example, Trump Organization employees were aware at least as of 2010 that many of the unsold units at Trump Park Avenue were subject to rent stabilization laws yet disregarded that fact when valuing those apartments for the SFCs from 2011 to 2021. (202.8-g Statement ¶338-41)

records, issuance of false financial statements, and insurance fraud—Defendants rely on the same contentions they raise as to the illegality claims, namely that there is no evidence to support a finding that the SFCs were materially misleading or that any of Defendants had the requisite intent to defraud. Defs. MOL at 56. Because these contentions have no merit for the reasons discussed above, *see, supra*, at Point IV, they provide no basis for granting Defendants summary judgment on Plaintiff's conspiracy counts.

Defendants argue in the alternative that the illegality counts based on a conspiracy fail as a matter of law because there is no evidence of any Defendant's intentional participation in the furtherance of a plan or purpose to commit any of the illegal acts. Defs. MOL at 56. As the Court of Appeals has recognized, evidence of a conspiracy is often circumstantial and rarely direct. *People v. Flanagan*, 28 N.Y.3d 644, 663 (2017) (noting that "[i]n prosecutions for the crime of conspiracy the People'' case must usually rest upon circumstantial evidence," as defendants "with the education, training and experience of the defendants in this case, do not conduct criminal conspiracies by making written records of their acts") (quoting *People v. Seely*, 253 N.Y. 330, 339 (1930)); *see also Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975) ("The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case."). A tacit understanding will suffice to show agreement for purposes of a conspiracy conviction. *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 6.4, at 71 (1986). Furthermore, the participants in a conspiracy need not be fully aware of the details of the venture so long as they agree on the "essential nature of the plan." *United States v. Stavroulakis*, 952 F.2d 686, 690 (2d Cir. 1992). Finally, evidence sufficient to link a particular defendant to a conspiracy "'need not be overwhelming.'" *United States v. Atehortva*, 17 F.3d 546, 550 (2d Cir.1994) (quoting *United States v. Rivera*, 971 F.2d 876, 891 (2d Cir.1992)).

Here, there is both direct and circumstantial evidence of a conspiracy to commit the illegal acts of falsifying business records, issuing false financial statements, and committing insurance fraud. As discussed in detail above, documents and testimony establish that each of the individual Defendants, and through their conduct the entity Defendants, engaged in numerous purposeful deceptive acts as part of a plan to: (i) create false entries on business records and false financial statements by grossly inflating the value of assets listed on the SFCs; and (ii) submit the inflated SFCs to banks and insurers while attesting to their accuracy. Indeed, there is direct evidence that Mr. Weisselberg and Mr. Trump worked together as part of an orchestrated plan year after year to inflate the asset values listed in the SFCs in order to reverse engineer Mr. Trump's net worth to hit the target number desired by Mr. Trump. (Ex. 1048 at 90:9-92:17 ("[S]o Mr. Trump would call Allen [Weisselberg] and I into the office, and let's say it said he was worth $6 billion. Well, he wanted to be higher on the Forbes list, and he then said, 'I'm actually not worth 6 billion. I'm worth 7. In fact, I think it's actually now worth 8 with everything that's going on.' Allen and I were tasked with taking the assets, increasing each of those asset classes in order to accommodate that $8 billion number."), Ex. 1046 at 960:11-963:5 (confirming Mr. Weisselberg told Patrick Birney that between mid-2017 to late-2019 Mr. Trump instructed that he "likes to see [his net worth] go up" on the SFC))

Finally, in a footnote, Defendants ask the Court to reconsider their previously-rejected defense based on the "intra-corporate conspiracy doctrine." Defs. MOL at 56 n.21. They cite no new law or facts that would justify reconsideration of the Court's prior ruling that the doctrine "is irrelevant." *Trump II*, 2023 WL 128271, at *5. The Court properly determined the argument was without merit the first time for all of the reasons set forth in Plaintiff's opposition to Defendants' motions to dismiss. *See* NYSCEF No. 245 at 47-49.

VI. DISGORGEMENT IS AVAILABLE BASED ON THE NEXUS BETWEEN THE FAVORABLE LOAN AND INSURANCE TERMS AND DEFENDANTS' FRAUDULENT USE OF THE FALSE AND MISLEADING SFCs

Disgorgement is meant to deter wrongdoing by denying the wrongdoer all ill-gotten gains from wrongful conduct. *See People v. Greenberg*, 27 N.Y.3d 490, 498 (2016); *People v. Applied Card Systems*, 11 N.Y.3d 105, 125-26 (2008); *People v. Ernst & Young LLP*, 114 A.D.3d 569, 569-70 (1st Dep't 2014); *S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996). The amount awarded for disgorgement need only be a "reasonable approximation of profits causally connected to the violation." *First Jersey*, 101 F.3d at 1474-5.

In addition to advancing their frivolous argument that disgorgement is unavailable in a § 63(12) action, *see, supra*, at Point I, Defendants assert that disgorgement is not available here because there is purportedly no causal connection between any financial benefit obtained by them and their use of the SFCs in procuring and maintaining loans and renewing insurance. Defs. MOL at 62. This argument rests entirely on Defendants' meritless contention that there is a total absence in the record of any evidence "regarding the materiality of the alleged misstatements in the SOFC." *Id*. at 63. However, as demonstrated above and in Plaintiff's 202.8-g Statement and 202.8-g Response, copious evidence establishes that the false and misleading SFCs were material to the loan decisions made by the banks' credit risk officers and the renewal decisions made by the insurers' underwriters.

In contrast to this record evidence, expert opinions directly conflicting with what the bank and insurance company decision-makers wrote in contemporaneous communications and testified to under oath are without any probative weight. *Roques*, 73 A.D.3d at 206 (noting it is well settled that expert opinion evidence that "assum[es] material facts not supported by record evidence" fails to establish a *prima facie* entitlement to summary judgment); *see also* 6B Carmody-Wait 2d

§39:138 (noting that where an expert witness's assertions "are speculative or unsupported by any evidentiary foundation, the expert's opinion should be given no probative force").

Accordingly, the Court should reject Defendants' attempt to defeat the People's disgorgement claim on summary judgment.

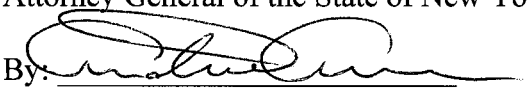
CONCLUSION

Based on the foregoing, the People respectfully request that the Court deny Defendants' motion for summary judgment in its entirety, along with such other and further relief the Court deems necessary and appropriate.

Dated: New York, New York
September 1, 2023

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

By: 
Andrew Amer
Colleen K. Faherty
Alex Finkelstein
Sherief Gaber
Wil Handley
Eric R. Haren
Mark Ladov
Louis M. Solomon
Stephanie Torre
Kevin C. Wallace

Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6127
andrew.amer@ag.ny.gov

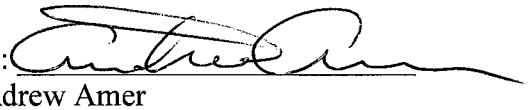
Attorney for the People of the State of New York

CERTIFICATION

With leave of Court entered on June 21, 2023, NYSCEF No. 638, Plaintiff is filing this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment with an enlarged word count not to exceed 25,000 words. Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court ("Uniform Rules"), I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 24,668 words, calculated using Microsoft Word, which complies with the Court's order granting leave to file an oversize submission.

Dated: New York, New York
September 1, 2023

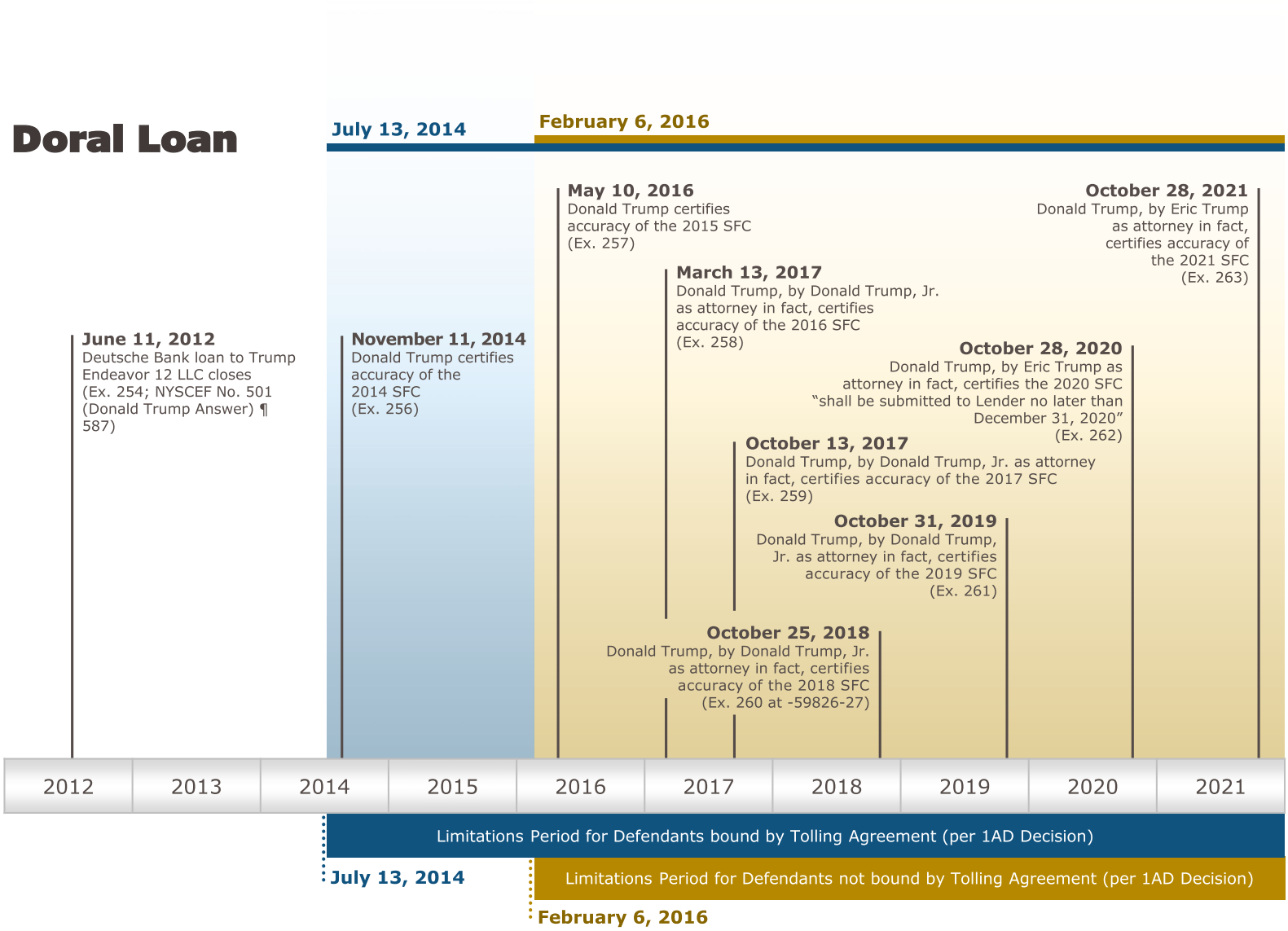
LETITIA JAMES
Attorney General of the State of New York

By: 
Andrew Amer
Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
Phone: (212) 416-6127
andrew.amer@ag.ny.gov

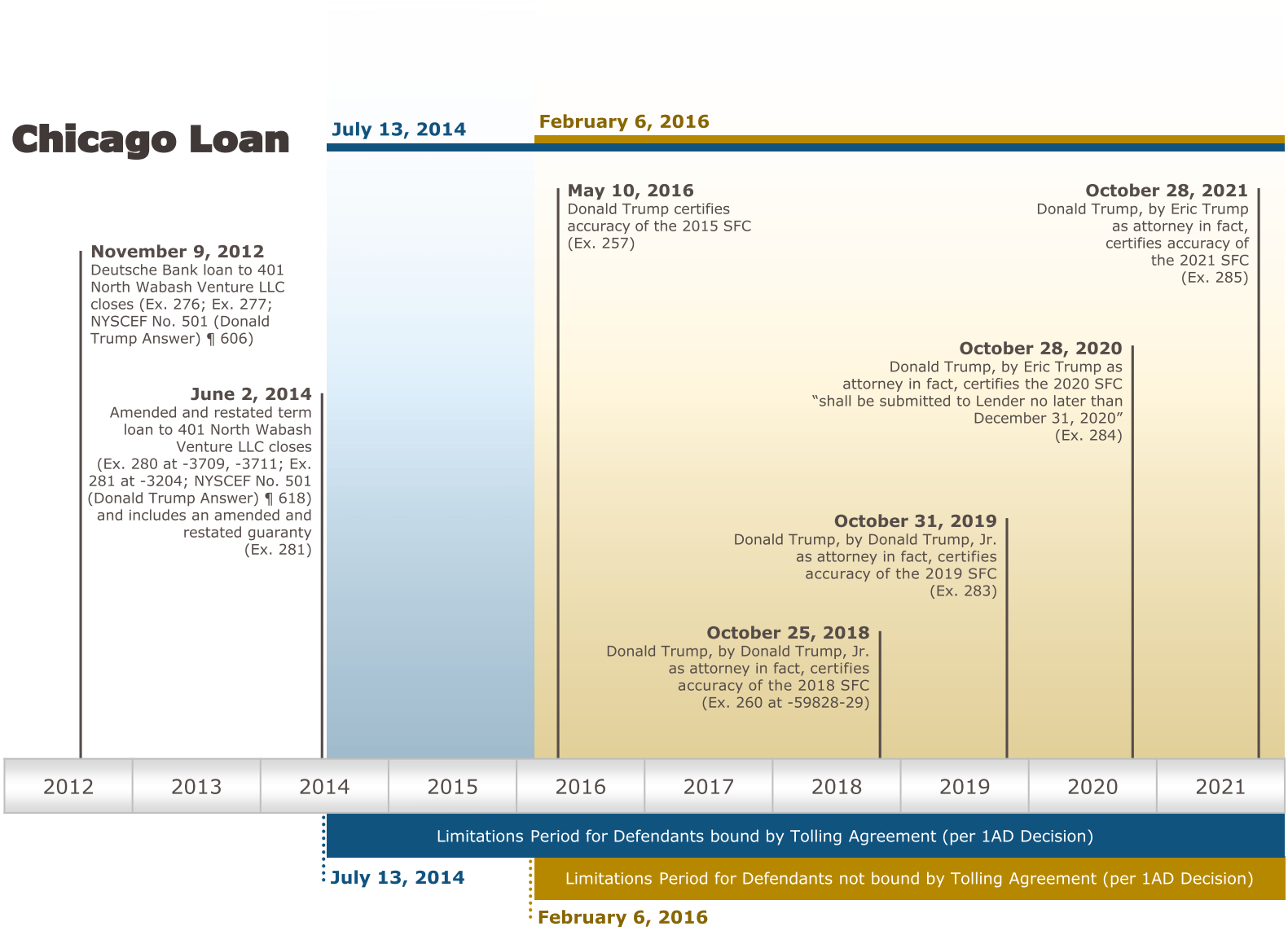
Attorney for the People of the State of New York

Appendix

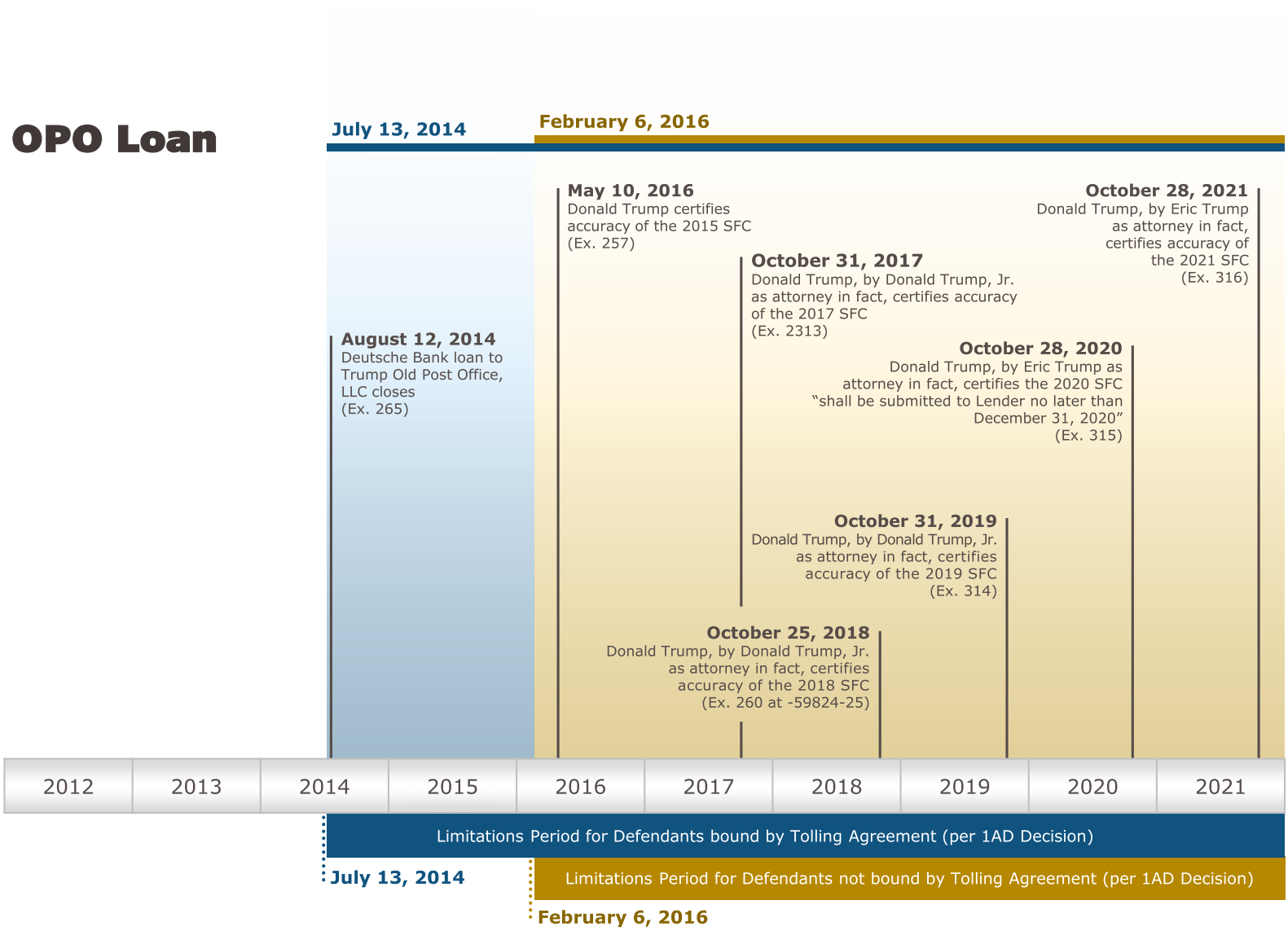
Doral Loan


July 13, 2014
February 6, 2016
June 11, 2012
Deutsche Bank loan to Trump Endeavor 12 LLC closes (Ex. 254; NYSCEF No. 501 (Donald Trump Answer) ¶ 587)
November 11, 2014
Donald Trump certifies accuracy of the 2014 SFC (Ex. 256)
May 10, 2016
Donald Trump certifies accuracy of the 2015 SFC (Ex. 257)
March 13, 2017
Donald Trump, by Donald Trump, Jr. as attorney in fact, certifies accuracy of the 2016 SFC (Ex. 258)
October 28, 2020
Donald Trump, by Eric Trump as attorney in fact, certifies the 2020 SFC "shall be submitted to Lender no later than December 31, 2020" (Ex. 262)
October 13, 2017
Donald Trump, by Donald Trump, Jr. as attorney in fact, certifies accuracy of the 2017 SFC (Ex. 259)
October 31, 2019
Donald Trump, by Donald Trump, Jr. as attorney in fact, certifies accuracy of the 2019 SFC (Ex. 261)
October 25, 2018
Donald Trump, by Donald Trump, Jr. as attorney in fact, certifies accuracy of the 2018 SFC (Ex. 260 at -59826-27)
October 28, 2021
Donald Trump, by Eric Trump as attorney in fact, certifies accuracy of the 2021 SFC (Ex. 263)
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
Limitations Period for Defendants bound by Tolling Agreement (per 1AD Decision)
July 13, 2014
Limitations Period for Defendants not bound by Tolling Agreement (per 1AD Decision)
February 6, 2016

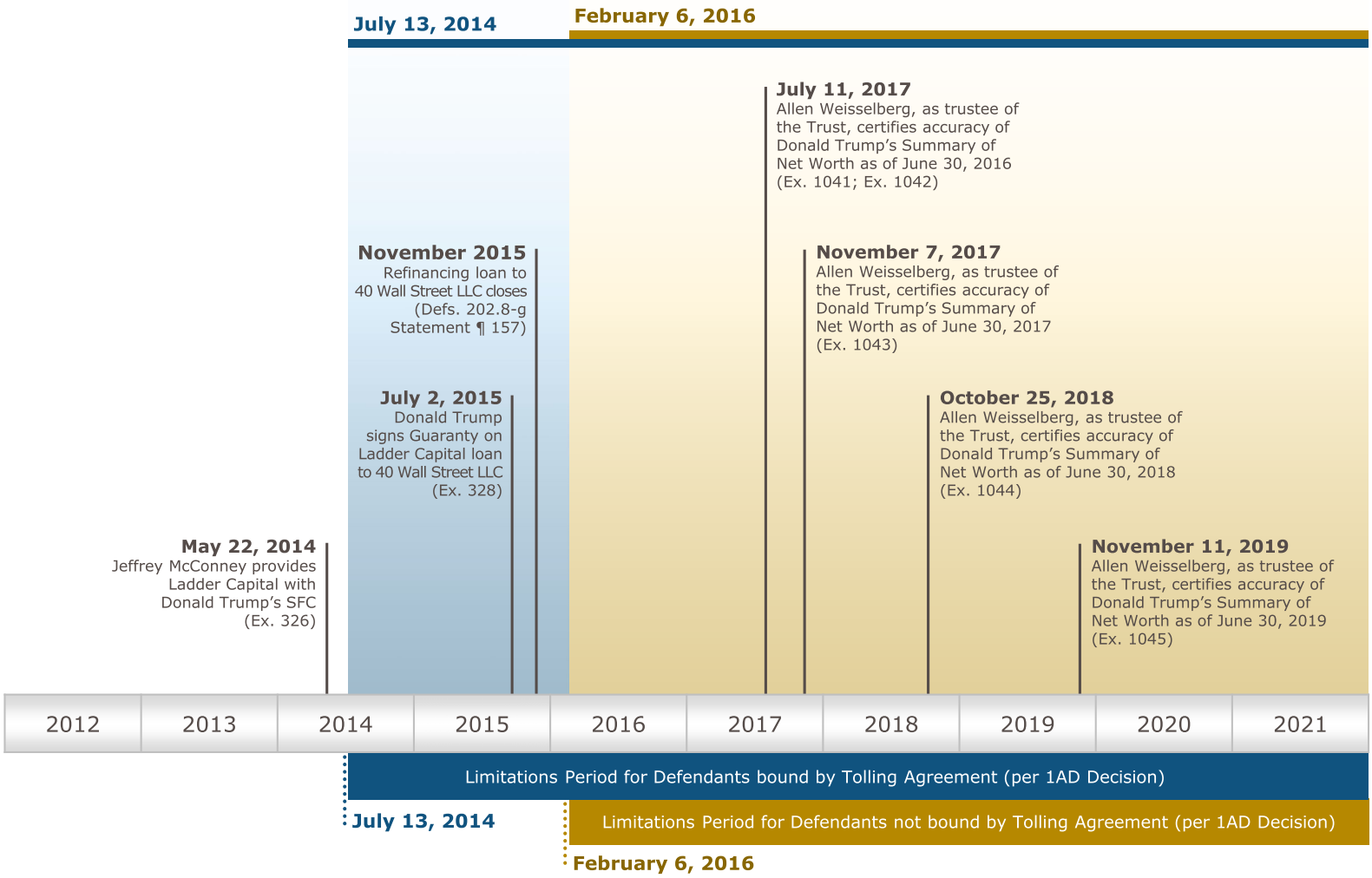
Chicago Loan



OPO Loan


July 13, 2014
February 6, 2016
August 12, 2014
Deutsche Bank loan to Trump Old Post Office, LLC closes
(Ex. 265)
May 10, 2016
Donald Trump certifies accuracy of the 2015 SFC
(Ex. 257)
October 31, 2017
Donald Trump, by Donald Trump, Jr. as attorney in fact, certifies accuracy of the 2017 SFC
(Ex. 2313)
October 28, 2021
Donald Trump, by Eric Trump as attorney in fact, certifies accuracy of the 2021 SFC
(Ex. 316)
October 28, 2020
Donald Trump, by Eric Trump as attorney in fact, certifies the 2020 SFC "shall be submitted to Lender no later than December 31, 2020"
(Ex. 315)
October 31, 2019
Donald Trump, by Donald Trump, Jr. as attorney in fact, certifies accuracy of the 2019 SFC
(Ex. 314)
October 25, 2018
Donald Trump, by Donald Trump, Jr. as attorney in fact, certifies accuracy of the 2018 SFC
(Ex. 260 at -59824-25)
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
Limitations Period for Defendants bound by Tolling Agreement (per 1AD Decision)
July 13, 2014
Limitations Period for Defendants not bound by Tolling Agreement (per 1AD Decision)
February 6, 2016

40 Wall Street Loan



Seven Springs Loan