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,

vs.

DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, IVANKA TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC,

Defendants.

Index No. 452564/2022

PROPOSED CONCLUSIONS OF LAW OF DEFENDANTS DONALD TRUMP, JR. AND ERIC TRUMP

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Defendants Donald Trump, Jr. and Eric Trump, by and through their undersigned counsel, respectfully submit the following proposed conclusion of law.

I. INTRODUCTION.

1. The Attorney General has woefully failed to prove her case and is not entitled to any of the relief sought in this action. As set forth in the Proposed Findings of Fact of Defendants Donald Trump, Jr. and Eric Trump dated January 5, 2024, not a single witness has ever testified that either Donald Trump, Jr. or Eric Trump had anything more than a peripheral knowledge or involvement in the creation, preparation, or use of any of the Statements of Financial Condition ("SFCs") which are at the center of this action. This includes the Attorney General's primary witnesses such as the company's longtime outside accountant, Donald Bender and, former employee, Michael Cohen. Instead, the record evidence and testimony adduced at trial conclusively establishes that the SFCs were prepared, in their entirety, by others at the company working in conjunction with the company's long time outside accountants.

2. Accordingly, the Court should render judgment in favor of Donald Trump, Jr. and Eric Trump, dismissing this action against them in its entirety.

II. CONCLUSIONS OF LAW, GENERALLY.

3. In the interest of judicial economy, Donald Trump, Jr. and Eric Trump expressly incorporate herein by reference Defendants' Joint Conclusions of Law dated January 5, 2024 (the "COL"), as if fully set forth herein, a copy of which is annexed hereto as **Exhibit A**.[1] Below is a summary of the conclusions of law set forth in the joint COL.

- The NYAG's Claims are Dismissed to the Extent they are Premised on a Time-Barred Transaction. *See* Joint COL, Section I.

[1] Undefined capitalized terms and names have the meaning set forth in Defendants' Joint Conclusion of Law.

- The Clear and Convincing Evidentiary Standard Applies. *See* Joint COL, Section II.

- The Court Must Have a Basis for Its Factual Findings and Cannot Disregard Unrebutted Testimony. *See* Joint COL, Section III.

- The NYAG has not Met her Burden on Materiality. *See* Joint COL, Section IV.

- The NYAG has not Met her Burden on Intent. *See* Joint COL, Section V.

- The NYAG has not Established the Existence of a Conspiracy. *See* Joint COL, Section VI.

- The Remedies the Attorney General Seeks Are Improper. *See* Joint COL, Section VII.

- There is No Record Evidence Supporting a Likelihood of Continuing Fraud Sufficient to Support the Sprawling Injunctive Relieve the NYAG Seeks. *See* Joint COL, Section VIII.

III. CONCLUSIONS OF LAW, SPECIFICALLY AS THEY PERTAIN TO DONALD TRUMP, JR. AND ERIC TRUMP.

4. In addition to the conclusions of law contained in the joint COL, set forth below are further conclusions of law as they pertain to Donald Trump, Jr. and Eric Trump. The foregoing conclusions of law are intended to supplement the conclusions of law contained in the joint COL.

5. Testimony from Donald Trump, Jr. and Eric Trump demonstrates that they never had anything more than a peripheral knowledge or involvement in the creation, preparation, or use of any of the SFCs.

6. Testimony from non-party fact witnesses demonstrates that Donald Trump, Jr. and Eric Trump never had anything more than a peripheral knowledge or involvement in the creation, preparation, or use of any of the SFCs, and that they relied on the company's internal and outside accountants in signing any documents related to the SFCs.

7. Testimony from Donald Trump, Jr. and Eric Trump demonstrate that they did not have the requisite fraudulent intent, and that they relied on the company's internal and outside accountants in signing any documents related to the SFCs.

8. Testimony from non-party fact witnesses demonstrates that Donald Trump, Jr. and Eric Trump did not have the requisite fraudulent intent, and that they relied on the company's internal and outside accountants in signing any documents related to the SFCs.

9. Testimony from Defendants' experts demonstrates that Donald Trump, Jr. and Eric Trump did not have the requisite fraudulent intent.

10. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump falsified business records.

11. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump issued a false financial statement.

12. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump have committed insurance fraud.

13. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump were personally involved in or knowingly intended to falsify business records.

14. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump were personally involved in or knowingly intended to issue a false financial statement.

15. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump were personally involved in or knowingly intended to commit insurance fraud.

16. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump were engaged in a conspiracy to falsify business records.

17. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump were engaged in a conspiracy to issue a false financial statement.

18. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump were engaged in a conspiracy to commit insurance fraud.

19. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump are engaged in any ongoing fraud or misconduct.

20. There is no clear no convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump received any "ill-gotten" gains.

21. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump were parties to the subject transactions or had an obligation to submit SFCs.

22. There is no clear and convincing evidence (or any evidence) that Donald Trump, Jr. or Eric Trump had any intent to defraud with respect to the Seven Springs Loan, the Trump Park Avenue Loan, the Ferry Point Contract, the GSA OPO BSA, the Doral Loan, the OPO Contract & Lease, the OPO Loan, the 40 Wall Street Loan, the Chicago Loan, or Zurich, or that they had any involvement with the Buffalo Bills Bid.

Dated: Uniondale, New York
January 5, 2024

Respectfully submitted,

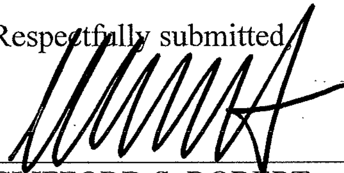

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EXHIBIT “A”

SUPREME COURT OF THE STATE OF NEW YORK
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Conclusions of Law

I. The NYAG's Claims are Dismissed to the Extent they are Premised on a Time-Barred Transaction

1. Based on the First Department's June 27, 2023, decision, the only two loans that are at issue are OPO (closing in August 2014) and 40 Wall (closing in November 2015). NYSCEF Doc. No. 641.

2. The First Department's determination is law of the case ("LOTC"). LOTC "bind[s] a trial court (and subsequent appellate courts of coordinate jurisdiction) to follow the mandate of an appellate court, absent new evidence or a change in the law." Matter of Part 60 RMBS Put-Back Litig., 195 A.D.3d 40, 48 (1st Dep't 2021); see also, e.g., Applehole v. Wyeth Ayerst Laboratories, 213 A.D.3d 611, 611 (1st Dep't 2023) ("[R]esolution of the issue on the prior appeal constitutes the law of the case and forecloses reexamination of the issue."); Magen David of Union Square v. 3 West 16th Street, LLC, 132 A.D.3d 503, 504 (1st Dep't 2015) (although prior appeal did not "specifically address" counterclaim, "the underlying issues were necessarily resolved in that appeal, and that resolution constitutes 'the law of the case'"); People v. Codina, 110 A.D.3d 401, 406 (1st Dep't 2013); Kenney v. City of New York, 74 A.D.3d 630, 630-31 (1st Dep't 2010). "[N]o discretion [is] involved; *the lower court must apply the rule laid down by the appellate court*." Matter of Part 60 RMBS Put-Back Litig., 195 A.D.3d at 48, quoting People v. Evans, 94 N.Y.2d 499, 503 (2000) (quotation marks omitted) (emphasis added).

3. The AG's novel theory of the case is that "[e]very use of a false financial statement in business starts the statute of limitations running, again, no matter when the transaction it arose out of closed." Trial Transcript ("Tr.") at 182:6-13.

4. That theory attempts impermissibly to end run the First Department's holding that the continuing-wrong doctrine does not extend the statute of limitations and effectively nullifies the First Department's finding that the applicable limitations period began in 2014 or 2016, depending on the applicability of the tolling agreement. However, this Court is powerless to revisit or countermand the First Department Decision on remittal.

5. The NYAG's claims are therefore only timely (1) with respect to the OPO and 40 Wall Loans and (2) for Defendants bound by the tolling agreement. All remaining claims arising from loans that closed prior to the statutory date are dismissed.

6. Moreover, OPO and 40 Wall Loans each closed, and thus were completed for accrual purposes, prior to February 2016. Based on the First Department's decision, the claims arising from the OPO and 40 Wall Loans are untimely as asserted against any Defendant not bound by the August 2021 tolling agreement.

II. The Clear and Convincing Evidentiary Standard Applies

7. This Court has held that "[a] standalone Executive Law § 63(12) claim is not subject to the heightened pleading standard [for fraud] because the underlying conduct is premised on deceptive acts or practices that do not include intent or reliance as an element of those claims." People v. Trump, 2023 WL 128271, at *4 (Sup. Ct., N.Y. Cty. Jan. 6, 2023).

8. However, the NYAG's second through seventh causes of action allege violations of Executive Law § 63(12) based on underlying violations of the New York Penal Law.

9. This Court's September 26, 2023, summary judgment decision recognized that those causes of action require some component of intent and/or materiality. While there is no binding caselaw in this State regarding the standard of review for violation of Executive Law §

63(12) with penal law predicates, jurisprudence on the applicability of the clear and convincing standard and common-law fraud is instructive.

10. Executive Law § 63(12) requires courts to ""look through" Executive Law § 63(12)" to apply the statute of limitations for the underlying predicate. See People v. Credit Suisse Sec. (USA) LLC, 31 N.Y.3d 622, 634 (2018).

11. Application of the clear and convincing standard is warranted given that the NYAG seeks to impose civil liability for violations of criminal statutes.

12. "[T]he 'clear and convincing evidence' standard [is] an 'intermediate standard' between the high standard of 'beyond a reasonable doubt' used in criminal proceedings and 'fair preponderance' used in ordinary civil proceedings." People v. Wyatt, 89 A.D.3d 112, 126-27 (2d Dep't 2011) (citations omitted).

13. The clear and convincing standard is "deemed necessary 'to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma.'" Id. at 127, citing Santosky v. Kramer, 455 U.S. 745, 756 (1982); see also Addington v. Texas, 441 U.S. 418, 424 (1979) (emphasizing that "clear and convincing" standard is necessary to "reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.").

14. The Supreme Court of the United States has "mandated" that the "clear and convincing evidence" standard be applied "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" Santosky, 455 U.S. at 756 (internal citations omitted); see also People v. Sumpter, 177 Misc.2d 492 (Crim. Ct. Queens Cty. June 26, 1998); Murray v. Roedel, 196 Misc. 233, 236 (Sup. Ct. Albany Cty. 1949).

15. Here, the NYAG seeks to deprive the Defendants from engaging in any and all even lawful business activity. This is far more substantial than the mere loss of money.

16. Moreover, the Supreme Court has expressly stated that the "clear and convincing' standard must be applied to "civil cases *involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant*." Addington, 441 U.S. at 424 (emphasis added).

17. It is beyond dispute that the instant matter is based in "allegations of fraud." Id.

18. Further, since the NYAG is attempting to impose civil liability for violations of criminal statutes, the second through seventh causes of action can be aptly described as "quasi-criminal." Id.

19. Additionally, common-law fraud must be established by clear and convincing evidence. See Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 349-50 (1999) ("The elements of fraud are narrowly defined, requiring proof by clear and convincing evidence."); Vermeer Owners, Inc. v. Guterman, 78 N.Y.2d 1114, 1116 (1991) ("[Plaintiffs] were required to prove by clear and convincing evidence a representation of material fact, falsity, scienter, reliance and injury."). This standard also applies when the "bulk of the [NYAG's] allegations sound in fraud." See People v. Jamail, 51 Misc.3d 940, 952 (Sup. Ct., Bronx Cty. 2016) ("To the extent that the bulk of the Attorney General's [Executive Law § 63(12)] allegations sound in fraud and the standard of proof for common-law fraud is clear and convincing evidence, the court accordingly applies that heightened standard of proof, a standard favorable to the respondent."); see also People v. Trump Entrepreneur Initiative LLC, 2014 N.Y. Slip Op. 32685[U], 2014 WL 5241483, *14 (Sup. Ct. N.Y. Cty. Oct. 8, 2014), aff'd in relevant part, 137 A.D.3d 409 (1st Dep't 2016) (In the context of an Executive Law § 63(12) claim for common-law fraud, "scienter is established upon clear and convincing proof of a misrepresentation or a

material omission of fact which was false and known to be false and made for the purpose of inducing the other party to rely upon it."); Sterling Ins. Co. v. Chase, 287 A.D.2d 892, 893-94 (3d Dep't 2001); People v. Nationwide, 26 Misc.3d 258, 278 (Sup. Ct., Erie Cty. 2009) ("Insofar as the petition might be construed to allege common-law fraud [under Executive Law § 63(12) and General Business Law article 22-a], the court concludes that this record is lacking in clear and convincing evidence from which this court could infer that respondents harbored the specific intent to defraud or cheat New York consumers.").

III. The Court Must Have a Basis for Its Factual Findings and Cannot Disregard Unrebutted Testimony

20. When Supreme Court's findings are unjustified or clearly erroneous, *i.e.,* "when they lack evidentiary basis in the record," the Appellate Division has a duty "to substitute the [Appellate Division's] own findings on credibility." People v. Butler, 27 A.D.3d 365, 368 (1st Dep't 2006) (internal citations omitted). While deference is afforded to Supreme Court's findings of fact based on the credibility of witnesses, the Appellate Division may disturb those findings where they cannot be reached under any fair interpretation of the evidence. See Thoreson v. Penthouse Intl., Ltd., 179 A.D.2d 29, 31 (1st Dep't 1992), aff'd, 80 N.Y.2d 490 (1992) (internal citations omitted).

21. Supreme Court must have actual evidence to support its conclusions, or the findings of fact will be reversed as "contrary to the evidence." People v. Silinsky, 217 A.D. 247, 248-49 (2d Dep't 1926) (reversing finding of fact but not judgment in action brought by the Attorney General under the General Business Law).

22. The Court may not disregard unrebutted testimony. See generally Ober v. Rogers-Ober, 287 A.D.2d 282, 283 (1st Dep't 2001) (Saxe, J. dissenting); O'Malley v. Campione, 70 A.D.3d 595, 595 (1st Dep't 2010). Therefore, where the Court has received

unrebutted testimony, including from the Attorney General's own witnesses, it cannot simply substitute its own judgment for that of the witnesses.

23. For example, the testimony of Williams, a current Deutsche Bank ("DB") employee, that DB understood the Statements of Financial Condition ("SFCs") to be estimates, that DB was not concerned about the difference between its adjusted valuations and the valuations contained in the SFCs, and that such discrepancies are common, is unrebutted. This testimony cannot be disregarded and negates the requisite materiality and reliance elements.

24. The unequivocal and unrebutted evidence contained in the DB credit memos and the associated testimony from Haigh and Williams establishes that DB conducted its own independent valuation analysis and, importantly, relied on that analysis and not the SFCs when making determinations regarding the terms and pricing of the subject loans. This unrebutted testimony and evidence cannot be disregarded by the Court and the Court is simply not free to substitute its own judgment.

25. Moreover, DB witnesses confirmed that there were no missed payments, late payments, or defaults relative to the Doral, Chicago, and OPO loans.

26. Additionally, the unrebutted testimony of Flemmons, Bartov and others at trial establishes that the notes to the SFCs form an integral part of the statements, must be considered as one document, and are intended for the ***users*** of the SFCs, not the preparer and not Mazars or Whitley Penn. This unrebutted testimony cannot be disregarded by the Court and the Court is simply not free to contravene same "as a matter of law" or otherwise.

27. Also, the very first note to the SFCs, which was prepared by President Trump or the Trust ***not*** Mazars, provides in pertinent part: "Considerable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, the estimates

presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities. The use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts." *See, e.g.,* PX-787. Professor Bartov describes this disclaimer language as the equivalent of the "surgeon general's warning." Tr. 6259:2-6260:9. His testimony is unrebutted. The Court cannot disregard this testimony.

28. Further, this language from the preparer of the statements, here President Trump or the Trust, informs the user, here DB, Ladder Capital, etc., of the fact the statements contain estimated values and discloses the limitations of those estimates in clear, unequivocal language. This is language contained in the SFCs, not in the Independent Accountants' Compilation Report. Thus again, the Court is not free to ignore the impact of this unrebutted evidence "as a matter of law" or otherwise.

29. This unrebutted evidence regarding the disclaimers is alone sufficient to negate the requisite intent element.

30. Also, Professor Bartov's testimony regarding materiality is likewise unrebutted. Professor Bartov testified that, based on the governing accounting standards, that materiality must be determined through the lens of the user (here, DB, Ladder Capital, etc.) and that user must rely on the relevant information. This is unrebutted and cannot be ignored by the Court. Since as noted above it is likewise unrebutted that, for example, DB relied on its own valuation analysis and not the SFCs, then based on the applicable standard, the NYAG has failed to establish the requisite materiality.

IV. The NYAG has not Met her Burden on Materiality.

31. The NYAG must demonstrate "some component of intent and materiality" to prevail on the second through seventh causes of action. See NYSCEF Doc. No. 1531, citing People v. Alamo Rent A Car, Inc., 174 Misc. 2d 501, 505 (Sup. Ct. N.Y. Cty. 1997).

32. New York Penal Law §175.45, the predicate for the fourth cause of action, requires the NYAG to demonstrate materiality.

33. Specifically, it provides that a defendant is guilty of issuing a false financial statement when, with intent to defraud, when:

> (1) [h]e knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of some person and which is inaccurate in some ***material*** respect; or (2) [h]e represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to such person's current financial condition or ability to pay, whereas he knows it is ***materially inaccurate*** in that respect.

Id. (emphasis added).

34. New York Penal Law §176.05, the predicate for the sixth cause of action, also requires the NYAG to demonstrate materiality.

35. It provides, in relevant part, that:

> [a] fraudulent insurance act is committed by any person who, knowingly and with intent to defraud presents, causes to be presented, or prepares with knowledge or belief that is will be presented to or by an insurer, self insurer, or purported insurer, or purported self insurer, or any agent thereof: (1) any written statement as part of, or in support of, an application for the issuance of, or the rating of a commercial insurance policy, or certificate or evidence of self insurance for commercial insurance or commercial self insurance, or a claim for payment or other benefit pursuant to an insurance policy or self insurance program for commercial or personal insurance that he or she knows to: (a) contain ***materially false*** information concerning any fact material thereto; or (b) conceal, for the purpose of misleading, information concerning any fact ***material thereto***.

Id. (emphasis added).

36. The Court of Appeals has articulated the standard for materiality in an Executive Law §63(12) action as whether there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the *'total mix'* of information made available." See State v. Rachmani Corp., 71 N.Y.2d 718, 726 (1988) (emphasis in original) (internal citations omitted).

37. The First Department has framed the standard as "whether a reasonable investor would have found that the information about a quantitative and qualitative impact of the transaction significantly altered the total mix of information available." People v. Greenberg, 95 A.D.3d 474, 485 (1st Dep't 2012) (internal citations omitted); see also Schwartz v. Genfit, S.A., 212 A.D.3d 96, 99-100 (1st Dep't 2022). Where the method of valuation "would not have been viewed by the reasonable investor as a significant part of the total mix of information," it is not material. See Cohen v. Calloway, 246 A.D.2d 473, 473 (1st Dep't 1998).

38. In the context of securities fraud, the First Department has deemed a misstatement material where "knowledge [thereof] would [] have influenced the[] decision" of investors. Roni LLC v. Arfa, 74 A.D.3d 442, 445 (1st Dep't 2010) (internal citations omitted).

39. The First Department permits investors to "speak from first-hand knowledge as to the nature of the misrepresentations" in assessing materiality. Slavin v. Victor, 168 A.D.2d 399, 399 (1st Dep't 1990) (internal citations omitted).

40. Additionally, under the reasonable investor standard, an omission is actionable only if "there is an affirmative duty to disclose or the omission rendered the actual disclosure made materially misleading." Schwartz, 212 A.D.3d at 99-100.

41. The NYAG cannot, and did not, demonstrate materiality, as she failed to elicit any testimony reflecting that the banks would have pursued a different course of action had they known of the alleged inaccuracies in the SFCs.

42. Fundamentally, the onus is on the lender to determine what is material based on its own risk rating, risk profile, underwriting, and analysis.

43. No bank or underwriter was, or would have been, materially misled by the alleged misstatements because the unrebutted evidence establishes they did their own extensive due diligence on the values in the SFCs and relied on that due diligence.

44. The testimony from bank representatives, including Haigh, Williams, and Vrablic, demonstrates that the alleged inaccuracies in the SFCs were not material to DB, as the unrebutted evidence establishes that the relevant approvals, terms, pricing, etc., were based on DB's own independent analyses and valuations as well as a multitude of internal business considerations.

45. DB independently verified all material facts and specifically engaged their valuation services group for trophy assets. It was "atypical, but not entirely unusual" for stated liquidity to be reduced by 50%. Tr. 5343:18-21. Moreover, the unrebutted evidence demonstrated that DB adhered to its own credit lending guidelines.

46. The unrebutted evidence established that DB gave significant weight to President Trump and the Trump Organization's experience in real estate, operating private clubs, and repositioning assets in deciding to extend the loans.

47. The unrebutted evidence established that DB sought to increase assets and deposits under management from President Trump, to continue to grow the relationship in all asset categories, and to create other income opportunities for the bank.

48. The unrebutted evidence established that DB openly pursued a continuing banking relationship with President Trump and his family because of their objectively high net worth, business expertise, and connections.

49. The unrebutted evidence established that DB's banking relationship with President Trump and the Trump Organization was, by every account, extremely profitable.

50. There is no evidence in the record to suggest that DB would have foregone lucrative transactions with President Trump and the Trump Organization, or that the terms and/or pricing of those transactions would have been different if the lower valuations the NYAG claims are accurate were disclosed in the SFCs.

51. Simply put, the NYAG has failed to establish by clear and convincing evidence (really any evidence) that any person or entity associated with the subject transactions claimed to have been misled by the SFCs, relied on the SFCs, and/or lost any money or was otherwise harmed. The NYAG there has the same issue as she faced in the Exxon case. People by James v. Exxon Mobil Corp., 119 N.Y.S.3d 829 (N.Y. Sup. Ct. 2019).

52. J. Weisselberg's testimony demonstrates that Ladder Capital did not consider net worth in an SFC to be a key factor and was focusing on liquidity. This testimony is unrebutted.

53. Further, Unell's testimony demonstrates that Ladder Capital performed its own independent analysis of the collateral in accordance with OCC guidelines.

54. McCarty's testimony confirms that the Ladder Capital net-worth minimum was only $160 million. There is simply no record evidence that President Trump ever fell below this figure, even if the NYAG's allegations regarding values are credited.

55. There is no evidence in the record to suggest that Ladder Capital would have foregone lucrative transactions with President Trump and the Trump Organization, or that the

terms and/or pricing of those transactions would have been different if the lower valuations the NYAG claims are accurate were disclosed in the SFCs.

56. David Cerron's testimony demonstrated that the City neither requested nor received an SFC during the term of the license of Trump Ferry Point. This testimony is unrebutted.

57. Moreover, the sole remedy for failure to submit the required "No MAC" letter was an increase in the security deposit.

58. There is no evidence in the record to suggest that the City would have foregone its transaction with President Trump and the Trump Organization if the valuations the NYAG claims are accurate were disclosed.

59. Defendants' expert witnesses, including Bartov, Flemmons, and Giulietti further confirmed that the banks and insurance carriers did their own independent valuation analyses in transacting business with President Trump and the Trump Organization.

60. The information Defendants provided to DB and Ladder Capital was not misleading and was consistent with accounting and industry standards, lender credit policies, and OCC guidance. The NYAG has failed to establish to the contrary by clear and convincing evidence.

61. The SFCs put the lenders on notice of the subjective nature of the valuations, the notes to the SFCs included specific disclaimers, and the compilation reports attached thereto included disclaimers suggested by the AICPA, all of which provided the highest-level warning to users/lenders that the valuations were estimates and included deviations from GAAP. The unrebutted evidence established that the lenders were aware that they were required to do their own diligence and make their own decisions.

62. The unrebutted evidence established that the lenders did not rely on the SFCs but rather on their own independent valuations and analysis.

63. Zurich did little detailed underwriting during the program, as testimony demonstrates the program functioned as an accommodation for different reasons at different times.

64. In fact, in some years, Zurich made underwriting decisions based on no information presented by any Trump businesses.

65. There is no evidence in the record to suggest that Zurich would have foregone transactions with President Trump and the Trump Organization if the valuations the NYAG claims are accurate were disclosed in the SFCs.

66. There is no evidence in the record to suggest that Tokio Marine (HCC) would have foregone writing the D&O insurance for the Trump Organization if the valuations the NYAG claims are accurate were disclosed in the SFCs. The evidence in the record is clear that HCC would have written the D&O policy even if the cash on the balance sheet was lower because the retention was only $2.5 million. Further, any alleged representations made about knowledge of circumstances that could potentially lead to a claim under the D&O policy were not made in writing, which is required to prove insurance fraud.

67. The NYAG has not adduced clear and convincing evidence that any Defendant has issued a false financial statement.

68. The NYAG has not adduced clear and convincing evidence that any Defendant has committed insurance fraud.

V. The NYAG has not Met her Burden on Intent

69. New York Penal Law § 175.10 incorporates § 175.05, which is the predicate for the second cause of action and requires that the NYAG demonstrate an intent to defraud.

70. New York Penal Law § 175.05 provides, in relevant part, that:

> A person is guilty of falsifying business records in the second degree when, with ***intent to defraud***, he: (1) [m]akes or causes a false entry in the business records of an enterprise; or (2) [a]lters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or (3) [o]mits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or (4) [p]revents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Id. (emphasis added).

71. Falsification of business records in the first degree requires the additional element that the defendant intends to "commit another crime or to aid or conceal the commission thereof." New York Penal Law §175.10; see also People v. Reyes, 69 A.D.3d 537, 538 (1st Dep't 2010).

72. New York Penal Law §176.05, the predicate for the sixth cause of action, also requires that the NYAG demonstrate an intent to defraud.

73. It provides, in relevant part, that:

> [a] fraudulent insurance act is committed by any person who, ***knowingly and with intent to defraud*** presents, causes to be presented, or prepares with knowledge or belief that it will be presented to or by an insurer, self insurer, or purported insurer, or purported self insurer, or any agent thereof: (1) any written statement as part of, or in support of, an application for the issuance of, or the rating of a commercial insurance policy, or certificate or evidence of self insurance for commercial insurance or commercial self insurance, or a claim for payment or other benefit pursuant to an insurance policy or self insurance program for commercial or personal insurance that he or she knows to: (a) contain

> materially false information concerning any fact material thereto; or (b) conceal, for the purpose of misleading, information concerning any fact material thereto.

Id. (emphasis added).

74. New York Penal Law §175.45, the predicate for the fourth cause of action, also requires that the NYAG demonstrate an intent to defraud.

75. Specifically, it provides that a defendant is guilty of issuing a false financial statement when, with intent to defraud, "(1) [h]e knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of some person and which is inaccurate in some material respect; or (2) [h]e represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to such person's current financial condition or ability to pay, whereas he knows it is materially inaccurate in that respect." Id. (emphasis added).

76. To demonstrate an intent to commit fraud, a plaintiff "must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 421 (1996); see also Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 406-407 (1958) ("To maintain an action based on fraudulent representations . . . it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged.").

77. The NYAG introduced no evidence that anyone relied (justifiably or otherwise) on any alleged misrepresentation and/or that anyone was injured. To the contrary, the unrebutted

evidence established that DB and Ladder Capital relied on their own independent valuations and analysis, had no issues with the values presented in the SFCs, and suffered no harm or injury.

78. Therefore, the NYAG is required to prove "by clear and convincing evidence, that defendant possessed the requisite fraudulent intent in that [defendants] knew, personally, that the various financial statements overstated [defendants'] assets, profits, retained earnings and capital." Abrahami v. UPC Constr. Co, 224 A.D.2d 231, 233 (1st Dep't 1996); People v. Lurie, 249 A.D.2d 119, 122-23 (1st Dep't 1998).

79. The NYAG cannot rely on the summary judgment decision to prove intent. Fraudulent intent cannot be merely inferred; it must be definitively proven. Abacus Fed. Sav. Bank v. Lim, 8 A.D.3d 12, 13 (1st Dep't 2004); see also Eaton Factors Co. v. Double Eagle Corp., 17 A.D.2d 135, 136 (1st Dep't 1962) ("Fraud cannot be inferred; it must be proved…it must appear that such fraudulent intent really existed in the mind of the defendants, and not merely in the ingenuity of the plaintiffs.") (internal citations and quotations omitted).

80. The NYAG is not permitted to conflate Defendants and ascribe conduct relating to one Defendant to others, effectively piercing the corporate form without a showing of entitlement to such relief. See Abrahami, 224 A.D.2d at 233-234.

81. The Attorney General must show that each Defendant personally participated in the alleged misrepresentation or had actual knowledge of it. Marine Midland Bank v. Russo Produce Co., 50 N.Y.2d 31, 44 (1980) ("Mere negligent failure to acquire knowledge of the falsehood is insufficient.").

82. There is no clear and convincing evidence (or any evidence) that DJT Holdings LLC, DJT Holdings Managing Member, Trump Organization, Inc., Trump Organization LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40

Wall Street LLC, and Seven Springs LLC were even involved in the preparation of the SFCs, let alone that any proof that these entities had the requisite intent to defraud as established by clear and convincing evidence.

83. There is no specificity in the record as to which Defendants, if any, are responsible for which conduct.

84. There is no clear and convincing evidence (or any evidence) that President Trump intentionally filed a misleading SFC.

85. In fact, witnesses have testified that President Trump was only nominally involved in the preparation of the SFCs and relied on Trump Organization staff and his outside accountants, Mazars and Whitley Penn, to ensure compliance with GAAP.

86. Testimony from President Trump demonstrates that he did not have the requisite fraudulent intent. There is no clear and convincing evidence to the contrary.

87. The evidence is insufficient to establish that Weisselberg and McConney intentionally overvalued assets in the SFCs.

88. Testimony from McConney demonstrates he was confident in the SFCs he prepared and never intended to mislead anyone, and any errors were inadvertent. There is no clear and convincing evidence to the contrary.

89. Testimony from Weisselberg demonstrates that he did not possess the requisite intent to defraud and that he relied on others in the Trump Organization and its outside accountants to ensure compliance with GAAP. There is no clear and convincing evidence to the contrary.

90. Testimony from Defendants' experts further demonstrates that there was no intent to defraud.

91. The valuations underlying the statements were prepared according to methods permitted by ASC-274. To the extent there were departures from GAAP, all such departures were disclosed and/or glaringly apparent in the supporting documentation provided to Mazars and Whitley Penn. There is no record evidence of any GAAP departure that would not have been immediately apparent to the accountants.

92. Professional accounting standards required the accountants to vet the valuation methodologies provided and to raise any issues.

93. Flemmons confirmed that it was reasonable for Defendants to rely on their outside accountants to confirm compliance with GAAP and/or address any deviations from GAAP. This testimony is not rebutted.

94. The SFCs therefore complied with GAAP or the deviations from GAAP were disclosed.

95. The disclaimers contained in the SFCs likewise cautioned lenders to do their own analysis and that the valuations contained therein were estimates.

96. The disclaimers included were the highest-level warnings permitted by the AICPA guidance to alert the user of deviations from GAAP.

97. Testimony from Defendants' experts further demonstrates that appraisals are retrospective and conservative, whereas developers consider possible future uses for the property. Consequently, a valuation reached through an appraisal and another approved valuation method can differ by orders of magnitude and still both be appropriate.

98. Even appraisals can vary significantly based on appraiser judgment and inputs.

99. Defendants were not obligated to use appraisal methodologies in valuing assets in the SFCs. As Flemmons, the only licensed fraud examiner and forensic accountant to testify,

stated, failure to provide existing appraisal reports to Mazars is not indicative of fraud. This testimony was unrebutted. Indeed, not a single witness testified that any fraud occurred or that any indicia of fraud was identified.

100. The NYAG has not adduced clear and convincing evidence any Defendant was personally involved in or knowingly intended to falsify business records.

101. The NYAG has not adduced clear and convincing evidence that any Defendant was personally involved in or knowingly intended to issue a false financial statement.

102. The NYAG has not established by clear and convincing sufficient evidence that any Defendant was personally involved in or knowingly intended to commit insurance fraud.

103. The Lewis testimony was not properly admitted.

104. The NYAG's failure to both set forth the governing accounting standards and elicit expert testimony that there were violations thereof in her case-in-chief does not entitle her to backfill her case with rebuttal testimony on those topics. People v. Harris, 98 N.Y.2d 452, 489 (2002); Matter of Yudelka A. M. v. Jose A. R., 72 A.D.3d 622, 623 (1st Dep't 2010); 6477:24-6478:5.

105. "Rebuttal evidence is evidence which overcomes some affirmative fact." People v. Alvino, 71 N.Y.2d 233, 248 (1987). "The opportunity to present rebuttal, however, does not permit a party to hold back evidence properly part of the case-in-chief and then submit that evidence to bolster the direct case after the opponent has rested." Harris, 98 N.Y.2d at 489 (2002). Rebuttal evidence "is not merely evidence which contradicts defendant's evidence and corroborates that of" the plaintiff. Alvino, 71 N.Y.2d at 248. Given this black-letter law, the defense's objections to Lewis' testimony were well-founded.

106. Lewis also cannot testify outside of the scope of his expert report, as an expert's testimony may not "transcend[] the scope of information set forth in the applicable expert disclosure form or the previously exchanged" expert reports. Moreno v. Fabre, 46 A.D.3d 254, 255 (1st Dep't 2007) (internal citations omitted). For example, Lewis repeatedly opined that for a valuation to be proper, it must be compared to the definition of ECV, a conclusion notably absent from both his initial expert report and rebuttal report. 6695:3-7; DX-1778; DX-1783. Any admission of this testimony or other opinion as to the interpretation of ECV and the relevant governing standards would be improper as it was never disclosed, and it is therefore excluded.

107. Further, based on this testimony, it is now apparent that Lewis lacks the required skill, knowledge, training, and experience to opine on the application of GAAP, procedures relating to compilation engagements, or valuation to be qualified as an accounting expert. See, e.g., Schechter v. 3320 Holding LLC, 64 A.D.3d 446, 450 (1st Dep't 2009) (deeming unqualified an expert where defendant failed to adduce evidence of any formal training in inspecting, maintaining, or repairing elevators or certifications or licenses with respect to elevator maintenance or repair, despite working for elevator maintenance companies for 20 years.)

108. Where a purported expert is only "generally familiar" but does not possess any training or experience in the specifics pertaining to that subject area, that expert lacks the requisite skill, knowledge, training, education, or experience from which it can be assumed that the information is reliable. Lessard v. Caterpillar, Inc., 291 A.D.2d 825, 825 (4th Dep't 2002) (affirming that the trial court did not abuse its discretion in precluding a putative expert witness that took several mechanical engineering courses in college, and was "generally familiar" with heavy construction vehicles, but lacked the necessary qualifications to opine on the defectiveness

of a lock on a vehicle because he had no training in the design of those specific vehicles or their individual parts); Beeley v. Spencer, 309 A.D.2d 1303, 1305 (2003) (affirming preclusion of accident reconstruction specialist as lacking qualifications to testify about the functions of brakes); Fortich v. Ky-Miyasaka, 102 A.D.3d 610 (1st Dep't 2013) (affirming preclusion of opinion by general surgical resident regarding plastic surgery procedures outside his field of practice as lacking "sufficient knowledge or expertise to testify outside his or her specialty").

109. Moreover, given the conflicting and compelling testimony of Flemmons and Bartov, both exceptionally qualified accounting experts, the NYAG cannot possibly establish her claims are supported by clear and convincing evidence.

VI. The NYAG has not Established the Existence of a Conspiracy

110. The third, fifth and seventh causes of action allege civil conspiracy claims based on the same underlying criminal acts as the second, fourth and sixth causes of action. The NYAG must show not only the same elements of each underlying statute, including intent, but also the elements of conspiracy based on clear and convincing evidence.

111. Conspiracy requires "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 474 (1st Dep't 2010) (internal citations and quotations omitted); see also Robinson v. Snyder, 259 A.D.2d 280, 281 (1st Dep't 1999) ("[A]greement to cause a specific crime to be committed [] together with the actual commission of an overt act by one of the conspirators in furtherance of the conspiracy.").

112. Testimony from Michael Cohen should be disregarded, as he admitted to committing perjury on several occasions, including at his plea hearing after being warned by

U.S. District Judge Pauly about the penalties of perjury. Notably, it recently became public that Cohen relied on Artificial Intelligence generated citations to non-existent cases in his federal court filings. United States v. Michael Cohen, No. 18-cr-602 (S.D.N.Y. 2018) at ECF No. 104; see also Benjamin Weiser, Michael Cohen Used Artificial Intelligence in Feeding Lawyer Bogus Cases, N.Y. Times, Dec. 29, 2023, https://www.nytimes.com/2023/12/29/nyregion/michael-cohen-ai-fake-cases.html.

113. The testimony from Patrick Birney is inadmissible. Specifically, the Court cannot rely on the testimony that Alan Weisselberg told him "Trump wanted his net worth on the Statement of Financial Condition to go up."

114. The statement has two layers of hearsay: President Trump's purported statement and Weisselberg's statement.

115. Weisselberg's statement is not admissible for its truth as a party admission because it is a recitation without adoption or indorsement rather than a plain admission of a pertinent fact or material element of a cause of action. Reed v. McCord, 160 N.Y. 330, 341 (1899). It is also not admissible as state of mind or motive because it is irrelevant for any non-hearsay purpose, *i.e.*, only useful for its truth.

116. It is also not admissible as a co-conspirator statement because such statements are admissible only "when a prima facie case of conspiracy has been established . . . without recourse to the declarations sought to be introduced." People v. Caban, 5 N.Y.3d 143, 148 (2005) (internal citations and quotations omitted).

117. While statements can be conditionally admitted on the assumption that a *prima facie* case will be demonstrated later, here there is no other clear and convincing evidence of any conspiracy.

118. The statement also provides no information as to when the conspiracy began or when the statement was made. See People v. Flanagan, 28 N.Y.3d 644, 663-64 (2017).

119. The statement also did not come up during Weisselberg's own testimony.

120. The record is devoid of any evidence relating to the participants of the conspiracy or the respective role of each participant.

121. The NYAG has not adduced clear and convincing evidence to demonstrate a conspiracy to falsify business records under New York Penal Law §§175.05, 175.10.

122. The NYAG has not adduced clear and convincing evidence to demonstrate a conspiracy to issue false financial statements under New York Penal Law §175.45.

123. The NYAG has not adduced clear and convincing evidence to demonstrate a conspiracy to commit insurance fraud under New York Penal Law §176.05.

VII. The Remedies the Attorney General Seeks Are Improper

1. Executive Law §63(12) Does Not Authorize Disgorgement or the Other Remedies the NYAG Seeks

124. The NYAG seeks an award of disgorgement in the amount of $250 million.

125. The NYAG also seeks to (1) replace the current trustees of the Trust with independent trustees, (2) require the Trump Organization to prepare GAAP-compliant, audited SFCs for the next five years, (3) bar President Trump and the Trump Organization from entering into commercial real-estate acquisitions in New York for five years, (4) bar President Trump and the Trump Organization from applying for loans from any financial institution chartered by or registered with the New York Department of Financial Services for five years, (5) permanently bar President Trump, Donald Trump, Jr., and Eric Trump from serving as an officer or director in any New York corporation or similar business entity registered and/or licensed in New York State, (6) permanently bar Messrs. Weisselberg and McConney from serving in the financial

control function of any New York corporation or similar business entity registered and/or licensed in New York State.

126. This is an unprecedented extension of §63(12) into a sophisticated commercial context. Seeking to penalize profitable commercial transactions without evidentiary support and impose sweeping and punitive relief without providing Defendants access to a jury constitutes an expansion of the law and creates constitutional concerns.

127. The NYAG is "without any prosecutorial power except when specifically authorized by statute." People v. Romero, 91 N.Y.2d 750, 754 (1998), citing Della Pietra v. State of New York, 71 N.Y.2d 792, 796-797 (1988).

128. Executive Law §63(12) provides, in relevant part:

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of … section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper.

129. Thus, Executive Law §63(12) does not expressly authorize disgorgement or any of the other remedies the NYAG seeks.

130. Principles of statutory construction likewise militate against the availability of these remedies under Executive Law §63(12).

131. The provision begins with a dependent clause joined to the rest of the sentence by the subordinating conjunction "[w]henever." The NYAG's powers are triggered to prevent "persistent fraud or illegality in the carrying on, conducting or transaction of business."

132. The remedies the statute authorizes can therefore only be understood with reference to this stated concern. The remedies are also limited to an order enjoining the specific conduct at issue or of any fraudulent or illegal acts. The statute therefore does not, and cannot, possibly authorize enjoining any and all ***lawful*** business activity by any or all of the defendants. Thus, barring President Trump or any of the other individual Defendants from entering into ***lawful*** real-estate transactions or ***lawful*** loan transactions exceeds the statutory scope of relief. Indeed, any construction of the statute to authorize such an extraordinary, confiscatory, and punitive remedy would present significant constitutional violations (takings, commerce clause, due process, etc.) and would simply be untethered to the authority granted under the express language of the statute. This is especially true where, as here, the unrebutted evidence establishes there are no complainants, no victims, no losses, and no harm.

133. Caselaw reinforces the principle that the NYAG is limited to the remedies prescribed in Executive Law §63(12) or the underlying penal law predicates. People v. Romero, 91 N.Y.2d 750, 754-755 (1998).

134. At base, Executive Law §63(12) does not create new claims but, rather, "provides particular remedies and standing in a public officer to seek redress on behalf of the State and others." People ex rel. Spitzer v. Frink Am., Inc., 2 A.D.3d 1379, 1380 (4th Dep't 2003) (internal citations and quotations omitted); see also People v. Gilmour, 284 A.D.2d 341 (2d Dep't 2001).

135. The Court of Appeals in People ex rel. Schneiderman v. Greenberg, in holding that "disgorgement is an available remedy under the Martin Act and the Executive Law," analyzed the Martin Act's "broad, residual relief clause," *i.e.,* that a Court is permitted to redress a violation of the Martin Act with "such other and further relief as may be proper." 27 N.Y.3d 490, 497 (2016), citing GBL § 353-a. The Court thus concluded that "in *an appropriate case*,

disgorgement may be an available equitable remedy distinct from restitution under this State's anti-fraud legislation." Id. 498 (emphasis added) (internal citations and quotations omitted). However, based on the unrebutted evidence, this is hardly "an appropriate case". Even if statutorily authorized there can simply be no disgorgement where there is no actual evidence in the record that the subject transactions would not have been approved or the terms or pricing would have been altered. The Court is simply not free to accept the invitation of the NYAG to ignore the actual facts, the unrebutted evidence, and the testimony of the actual transaction participants and substitute the *post-hoc* judgment of the NYAG.

136. Likewise, the First Department in People v. Ernst & Young LLP held that "it was error to dismiss a claim for the equitable remedy of disgorgement at the pleading stage" in an action "brought under New York's Executive Law *and* Martin Act." 114 A.D.3d 569, 569 (1st Dep't 2014) (emphasis added). The Court thus concluded that "while the Attorney General d[id] not allege direct injury to the public or consumers as a result of defendant's alleged . . . the equitable remedy of disgorgement is available *in this action*, and it was premature to categorically preclude it at the pleading stage." Id. at 570 (emphasis added).

137. Also, as noted, although the NYAG can seek a permanent injunction under Executive Law § 63(12), the Court is only permitted to enjoin the specific activity from which the fraud arose. See, e.g., People by James v. N. Leasing Sys., Inc., 70 Misc. 3d 256, 279-280 (Sup. Ct. N.Y. Cty. 2020) (permanently enjoining respondents "from conducting the business of equipment finance leasing or collection of debts under equipment finance leases and from purchasing, financing, transferring, servicing, or enforcing equipment finance leases"), aff'd, 193 A.D.3d 67 (1st Dep't 2021); Matter of People v. Imported Quality Guard Dogs, Inc., 88 A.D.3d 800, 801-802 (2d Dep't 2011) (permanently enjoining defendant from "selling, breeding,

or training dogs, or advertising or soliciting the sale, breeding, or training of dogs"); Matter of People v. Veleanu, 89 A.D.3d 950, 950 (2d Dep't 2011) (permanently enjoining defendant from "doing business as Objets D'Art Uniques [and] from materially misrepresenting any item he offers for sale."). At issue herein is the purported submission of allegedly inflated SFCs. The statutory relief is thus limited to enjoining that conduct, not all otherwise lawful conduct. There is therefore no basis to enjoin lawful business activity and or to interfere with the fiduciary operations of a Florida Trust, the interstate commerce between lawful business entities, or to otherwise confiscate the property rights of individuals.

138. Also, the requested disgorgement amount is, based on the unrebutted evidence in the record, simply punitive. There has been no factual demonstration of any loss or harm, actual or theoretical. The actual transaction participants did not testify as to the existence of any misrepresentation, material or otherwise, reliance, detrimental or otherwise, or harm or loss of any amount. The Court is therefore not free to simply adopt the NYAG's unsupported calculations of "disgorgement".

139. A Justice of this Court, in State by Abrams v. Solil Mgt. Corp., concluded that the plaintiff was "not entitled to punitive damages or treble damages, or both…Executive Law § 63 (12) does not provide for either of these extraordinary remedies and petitioner is limited to obtaining restitution or compensatory damages." 128 Misc. 2d 767, 773 (Sup. Ct. N.Y. Cty. 1985), aff'd, 114 A.D.2d 1057 (1st Dep't 1985); see also State by Lefkowitz v. Hotel Waldorf-Astoria Corp., 67 Misc. 2d 90, 92 (Sup. Ct. N.Y. Cty. 1971) (denying a demand for treble damages because "[t]he Executive Law provides for restitution only").

140. Awarding relief outside that prescribed by Executive Law §63(12) and the underlying statutes is punitive. A Justice of this Court in People ex rel. Spitzer v. Direct

Revenue, LLC, in a special proceeding brought pursuant to Executive Law §63(12), General Business Law §§ 349 and 350, Penal Law § 156.20 and New York common law, held that the state was "strictly limited to recovery as specifically authorized by statute." 19 Misc. 3d 1124(A) at *7-8 (Sup. Ct. N.Y. Cty. 2008). The Court further held that to the extent disgorgement was even available, "it may only be granted in an amount related to the actual damages caused by the misconduct," since "[d]isgorgement of respondents' profits to the state would effectively constitute punitive damages not authorized by statute." Id. at 8.

141. Here, the NYAG's requested relief is not authorized by Executive Law §63(12) and is punitive. The relief sought is only tangentially related to the purportedly fraudulent conduct, *i.e.,* procurement of loans on more favorable terms than Defendants would have otherwise obtained. Instead, the NYAG seeks to effectively ban President Trump's companies from operating in the state of New York for five years. Worse even, she seeks to permanently ban President Trump and his children from being an officer or director of a New York corporation indefinitely, despite their extremely limited involvement with the conduct at issue.

2. The Constitution does not Permit the NYAG to Recover Excessive Fines or Interfere with Defendants' Power of Disposition over their Own Property

142. Both the Federal and State Constitutions prohibit the imposition of excessive fines. See U.S. Const. 8th Amend.; N.Y. Const., art. I, §5.

143. The Eighth Amendment (applicable to the States under the Fourteenth Amendment's Due Process Clause) provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. 8th Amend.

144. The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" Austin v. United

States, 509 U.S. 602, 609-610 (1993) (citation omitted); United States v. Bajakajian, 524 U.S. 321, 334 (1998).

145. A fine should not deprive any person of his livelihood. See Bajakajian, 524 U.S. at 335; see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 269-71 (1989).

146. If a fine or penalty constitutes punishment, in either the civil or criminal context, it falls under the protections of the Eighth Amendment. See Austin, 509 U.S. at 609-610; Prince v. City of New York, 108 A.D.3d 114, 119 (1st Dep't 2013). Although civil penalties serving "solely remedial purposes" do not fall under the rubric of the Eighth Amendment (see Austin, 509 U.S. at 621–622), where a civil fine "serves, at least in part, deterrent and retributive purposes," it is considered punitive and subject to the Excessive Fines Clause. County of Nassau v. Canavan, 1 N.Y.3d 134, 139-140 (2003); see Austin, 509 U.S. 621; Bajakajian, 524 U.S. at 329.

147. The form of the fine is irrelevant and may be a "payment in kind," *i.e.,* a forfeiture or a payment in cash. See von Hofe v. United States, 492 F.3d 175, 178 (2d Cir. 2007); see Austin, 509 U.S. at 609-610; Bajakajian, 524 U.S. at 328. Civil forfeiture serves, at least in part, deterrent and retributive purposes and is thus punitive and subject to the Excessive Fines Clause. See Austin, 509 U.S. at 619-622; Bajakajian, 524 U.S. at 328-329).

148. A fine against a defendant mandating forfeiture of his interest in his business is clearly a form of monetary punishment no different from a traditional fine. See Austin, 509 U.S. at 621; Bajakajian, 524 U.S. at 328; United States v. Ambrosio, 575 F.Supp. 546 (E.D.N.Y. 1983) see also United States v. Viloski, 814 F.3d 104, 110 (2d Cir. 2016).

149. Where, as here, the fine constitutes punishment, the Excessive Fines Clause is violated where the fine is "grossly disproportional to the gravity of [the] offense." Bajakajian, 524 U.S. at 334; Canavan, 1 N.Y.3d at 140. A fine is unconstitutionally excessive if it "notably exceeds in amount that which is reasonable, usual, proper or just." People v. Saffore, 18 N.Y.2d 101, 104 (1966).

150. "The touchstone of [this] constitutional inquiry ... is the principle of proportionality: The amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish." Bajakajian, 524 U.S. at 334.

> In determining whether a civil penalty is grossly disproportionate, courts look to factors such as (1) the essence of [the violation for which the civil penalty is imposed] and its relation to other [violations], (2) whether the [violator] fits into the class of persons for whom the statute was principally designed, (3) the maximum [penalty] that could have been imposed, and (4) the nature of the harm caused by the [violator's] conduct.

Union Square Supply Inc. v. De Blasio, 572 F.Supp.3d 15, 25 (S.D.N.Y. 2021) (alterations in original) (citing Viloski, 814 F.3d at 110). See Canavan, 1 N.Y.3d at 140; Bajakajian, 524 U.S. at 334.

151. Here, many of the penalties sought by the NYAG are excessive fines, including seeking to bar President Trump and the Trump Organization from entering into any New York State commercial real estate acquisitions, applying for loans, and from serving as an officer or director in any New York corporation or similar business entity registered and/or licensed in New York State.

152. First, the sanctions, mandating President Trump's forfeiture of his businesses and directing other improper payments in kind, constitute punishment against President Trump and Defendants that cannot fairly be viewed as solely remedial. The sanctions are explicitly intended to deter Defendants' future conduct, not to compensate the People of New York for any of the

purported acts of Defendants, and they bear no relationship to any actual loss sustained by the People of New York. See Prince, 108 A.D.3d at 120; Bajakajian, 524 U.S. at 329; Towers v. City of Chicago, 173 F.3d 619, 624 (7th Cir. 1999). Because the proposed §63(12) sanctions here, "at least in part, serve[] a deterrent purpose, [they] cannot be considered solely remedial and thus [are] subject to Eighth Amendment analysis." Prince, supra; State of New York v. Town of Wallkill, 170 A.D.2d 8, 11 (3d Dep't 1991); see also United States v. Mackby, 261 F.3d 821, 830 (9th Cir. 2001).

153. Second, the sanctions at issue are clearly grossly disproportionate to the gravity of the purported offenses. Even if the NYAG had proven Defendants' alleged conduct, which it did not, it caused no harm to the public. The transactions at issue were complex, bilateral business transactions between Defendants and their banks, none of which involved an impact on the public or implicated the public market in any way. It is undisputed that the lenders profited from the transactions. No entity has identified any wrong or lodged a complaint with the NYAG. All loans were repaid in full, and there were no defaults. Nor do any witnesses from a single financial institution testify that the institution would have done anything different if it knew what it knows now.

154. Therefore, nothing would support a finding that the proposed sanctions are commensurate with the purported offenses. Compare People by James v. Orbital Publ. Grp., Inc., 193 A.D.3d 661 (1st Dep't 2021) ("[The defendant] was at the heart of a years'-long scheme that deceptively wrested tens of millions of dollars from consumers across the country, including tens of thousands of New Yorkers. The total monetary judgment, while significant, is commensurate with the offense.").

155. Third, the arms-length transactions in this case do not involve the type of deceptive and fraudulent conduct that §63(12) was enacted to prevent. Compare Union Square Supply, 572 F.Supp.3d 15, 25 (S.D.N.Y. 2021) ("Union Square Supply's conduct fell squarely into the heartland of what the Rule was enacted to prevent -- price gouging with respect to products necessary to protect health during the COVID-19 pandemic.").

156. The Supreme Court has also provided a framework for punitive damages analysis. In BMW of North Am. Inc., v. Gore, the Court held that while "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," a "grossly excessive" award "violates the Due Process Clause of the Fourteenth Amendment." 517 U.S. 559, 568 (1996) (internal citations omitted).

157. In determining whether an award is grossly excessive, a Court should consider (1) "the degree of reprehensibility of the [conduct];" (2) the "disparity between the harm or potential harm suffered by [plaintiff] and [the] punitive damages award;" and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." Id. at 574-575.

158. First, as Defendants have repeatedly argued, there was no harm to the public caused by Defendants' alleged conduct. The transactions at issue were complex, bilateral business transactions between Defendants and their banks, none of which involved an impact on the public or implicated the public market in any way.

159. Second, McCarty's $187 million interest rate differential (which directly contravenes the only fact evidence upon which it could possibly be based) is grossly disproportionate to any alleged harm suffered. PX-1780. Again, the banks were repaid in full, no harm has inhered to them, and there has also been no cognizable harm to the public. No bank witness testified that any approvals, terms, or pricing would have been altered by the

misstatements alleged by the NYAG.[1] The absence of such testimony is fatal to any claim for disgorgement. McCarty cannot simply presume harm or loss without a factual predicate.[2]

160. Third, a disgorgement penalty of hundreds of millions of dollars is far beyond that awarded in other cases. While binding caselaw in this state addresses the applicability, rather than the magnitude, of a disgorgement penalty, the Southern District of New York awarded $64.6 million in disgorgement against Martin Shkreli in 2022, a quarter of the award sought by the NYAG. FTC v. Shkreli, 581 F. Supp. 3d 579 (S.D.N.Y. 2022).

161. By seeking to bar President Trump, any of the other individual Defendants, and the Trump Organization from entering any New York State commercial real estate acquisitions of any kind for a period of five years, the NYAG is also requesting that this Court "interfere with an owner's power of disposition of the property," which amounts to an unconstitutional taking. C.f. City of Buffalo v. J. W. Clement Co., 28 N.Y.2d 241, 255 (1971) ("[A] de facto taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property.").

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[1] To the contrary, Mr. Haigh testified that Deutsche Bank's relevant approvals were based on Deutsche Bank's own internal analysis ("DB adjusted values"). See Tr. at 1098:9-1103:2; 1103:13-15; 1111:13-17; 1119:3-5; 1119:16-25; 1121:17-1122:1; 1126:3-22; 1129:11-14; 1132:18-24; 1132:25-1133:13; 1133:18-25; 1135:7-13; 1135:14-18; 1146:1-9; 1157:4-17; 1157:22-25.

[2] The Attorney General did not elicit any testimony from any lender representative tasked with decision making as to what specifically they would have done with any additional information in connection with the approval, terms, pricing and/or monitoring of the subject loans. McCarty, like any expert, is simply not permitted to speculate as to what he thinks the *actual testifying witnesses* of the financial institutions *might have done* under the circumstances. See Gathers v. New York City Transit Auth., 242 A.D.2d 506, 506-07 (1st Dep't 1997) (reversing admission of expert testimony which was "based on speculation, lacked competent factual support and was beyond the proper scope of expert testimony"). "An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion." Quinn v. Artcraft Const., Inc., 203 A.D.2d 444, 445 (2d Dep't 1994) (purported expert to testify regarding improper window installation was properly excluded where no evidence on the record supported negligent installation); Matter of 91st St. Crane Collapse Litig., 154 A.D.3d 139, 159 (1st Dep't 2017) ("The trial court properly precluded the proposed testimony of defense expert . . . , which not only was not based on facts in the record, but also contradicted facts in the record"). See also, Ortiz v. Variety Poly Bags, Inc., 19 A.D.3d 239, 240 (1st Dep't 2005).

162. §63(12) was designed to address conduct that is demonstrably and *objectively* misleading, false or fraudulent and harmful the public, not subjective valuations in transactions between private, sophisticated parties represented by sophisticated lawyers, as here. See, e.g., People by James v. JUUL Labs, Inc., 212 A.D.3d 414 (1st Dep't 2023) (holding that marketing and sales of JUULs' electronic cigarettes constitutes deceptive and illegal practices and contributed to a statewide public health crisis); People by James v. Image Plastic Surgery, LLC, 210 A.D.3d 444 (1st Dep't 2022) (holding that advertising of a stem cell treatment misrepresented its efficacy in treating various medical conditions and falsely stated that the treatment was part of a study authorized or overseen by the FDA).

163. There is no connection between the purported statements Defendants provided to their private lending banks and any public interest in securing an honest marketplace. Defendants' activities in no way affected the marketplace. Nothing indicates that the non-party banks were defrauded by Defendants or that they would have structured the loans differently.

164. While the NYAG seeks the maximum penalties under §63(12), there is no proportionality between the offenses charged and the penalties she seeks to impose.

165. Based on the foregoing, the sweeping penalties sought by the NYAG against Defendants violate the Excessive Fines Clause, the Commerce Clause, the Takings Clause and the Due Process Clause.

VIII. There is No Record Evidence Supporting a Likelihood of Continuing Fraud Sufficient to Support the Sprawling Injunctive Relieve the NYAG Seeks

166. Moreover, the NYAG is not entitled to the remedies she seeks on a theory of continuing violations, as Defendants have complied in good faith with the Monitor.

167. The Court appointed the Monitor and directed that Monitor to report any financial reporting misconduct, suspicious activity or any suspected or actual fraudulent activity. NYSCEF Doc. Nos. 193, 194. Pursuant to her appointment, the Monitor has submitted reports dated December 19, 2022, February 3, 2023, April 11, 2023, August 3, 2023, and November 29, 2023 (the "Reports"). NYSCEF Doc. Nos. 441, 489, 617, 647, 1641. There is no mention whatsoever in any of the Reports of any suspicious activity, suspected or actual fraud. Indeed, the word "fraud" does not appear in any of the Reports. The absence of any such reference in the Reports demonstrates the Monitor has not in fact identified any suspicious activity, suspected or actual fraud. As noted above, the Court is not free to "interpret" non-existent evidence. That is, where the Monitor has not identified any fraud, the Court cannot determine any exists.

168. The Reports, along with testimony from Hawthorn demonstrates that the Monitor has not identified any fraud. Hawthorn's testimony (and the actual language of the Reports) establishes Defendants have been consistently cooperating with the Monitor and have resolved all issues presented other than the provision of follow-up information relating to intercompany loans.

169. Hawthorn’s testimony demonstrated that to the extent the Monitor identified certain discrepancies, there were explanations for those discrepancies and the company worked with the Monitor to resolve the issue to her satisfaction.

170. Therefore, as this record evidence is unrebutted, and the NYAG has presented no evidence whatsoever of any ongoing fraud or misconduct, the Court cannot simply conclude otherwise and impose sweeping, punitive relief.

IX. The Attorney General Has Adduced No Record Evidence of Ill-Gotten Gains

171. Even assuming, *arguendo,* an award of disgorgement was permitted, the NYAG must demonstrate a nexus between the alleged ill-gotten gains and the purported wrongful conduct.

172. The First Department has held that "the disgorged amount must be causally connected to the violation." J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 91 A.D.3d 226, 232-33 (1st Dep't 2011), rev'd on other grounds, 21 N.Y.3d 324 (2013) (internal citations and quotations omitted).

173. The NYAG has been woefully unable to make a "reasonable approximation of profits causally connected to the violation" because there is no record evidence that the purported violation, *i.e.,* the alleged misstatements in the statements of financial condition, resulted in any gain to Appellants. Id. at 233 (citation omitted); see also Jim Beam Brands Co. v. Tequila Cuervo La Rojena S.A. de C.V., 2011 N.Y. Misc. LEXIS 7257, at *11 (Sup. Ct. N.Y. Cty. 2011) (unpublished) ("Jim Beam's expert's reliance on a disgorgement theory also fails because there is no causal link between any increase in profits during the period of the breach.").

174. The NYAG's theory of disgorgement, *i.e.*, "the difference between the interest rates the Trump Organization could have obtained, if their loans were treated as regular commercial real estate loans, and the interest rates they actually obtained, using the false financial statements with the private wealth management groups," is fundamentally flawed. 29:3-9.

175. Here, there is no record evidence of "ill-gotten" gains, *i.e.,* that any lender would have declined to extend the loan or extended it on different terms had it been provided additional information.

176. The Attorney General did not elicit any testimony from any lender representative tasked with decision making as to what specifically they would have done with any additional information in connection with the approval, terms, pricing and/or monitoring of the subject loans. The NYAG's expert, McCarty, is simply not permitted to speculate as to what he thinks the *actual testifying witnesses* of the financial institutions *might have done* under the circumstances. See Gathers, 242 A.D.2d at 506-07 (reversing admission of expert testimony which was "based on speculation, lacked competent factual support and was beyond the proper scope of expert testimony"). "An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion." Quinn v. Artcraft Const., Inc., 203 A.D.2d 444, 445 (2d Dep't 1994) (purported expert to testify regarding improper window installation was properly excluded where no evidence on the record supported negligent installation); Matter of 91st St. Crane Collapse Litig., 154 A.D.3d at 159 ("The trial court properly precluded the proposed testimony of defense expert . . . , which not only was not based on facts in the record, but also contradicted facts in the record"). See also, Ortiz v. Variety Poly Bags, Inc., 19 A.D.3d 239, 240 (1st Dep't 2005).

177. Once again, Nicholas Haigh, former Managing Director of DB, was never asked in the NYAG's prima facie or rebuttal case whether DB would have done anything differently had it been provided additional information. Indeed, as noted, Mr. Haigh testified that Deutsche Bank's relevant approvals, terms, pricing were based on Deutsche Bank's own internal analysis ("DB adjusted values"). *See* Tr. at 1098:9-1103:2; 1103:13-15; 1111:13-17; 1119:3-5; 1119:16-

25; 1121:17-1122:1; 1126:3-22; 1129:11-14; 1132:18-24; 1132:25-1133:13; 1133:18-25; 1135:7-13; 1135:14-18; 1146:1-9; 1157:4-17; 1157:22-25. This is supported fully by the DB credit memos. PX-290; PX-291; PX-293; PX-294; PX-298; PX-300; PX-302; PX-2960; PX-3137; PX-498, PX-519, PX-561. This unrebutted evidence cannot simply be ignored by the Court. Therefore, there is no basis on this record for the Court to conclude the NYAG's requested disgorgement amount is appropriate.

178. Additionally, Vrablic and Williams of DB testified that DB relied on many factors in electing to extend the loans, including President Trump's track record and ability to refer other high-net worth individuals. 5326:11-5327:2; 5329:18-5331:18; 5487:24-5493:6; 5491:10-21; 5492:8-21; 5520:12-22; 5526:13-25; DX62; DX-66 at 17-18; DX-298 at 2; DX-300 at 3-4; DX-313 at 4. Williams further testified that the valuation differentials (some $2 billion or more) between the DB independent valuation analysis and the SFC values were expected and not at all problematic. 5327:19-5328:6; 5365:1-5366:16; 5382:15-5384:6. Also, Williams testified DB viewed the SFC values as estimates. 5327:24-25. Moreover, Williams testified that President Trump would have qualified for the PWM loan pricing even if his net worth was $1 billion, an amount never in dispute in this action. 5392:13-5396:4. This testimony is unrebutted. The Court cannot therefore substitute the NYAG's judgment, that of the NYAG's expert, or its own judgment in the face of unrebutted evidence.

179. Similarly, J. Weisselberg, Executive Director at Ladder Capital, was never asked by the NYAG whether Ladder Capital would have done anything differently had it been provided additional information.

180. Michiel McCarty's testimony should be accorded no weight, as the NYAG attempted to backfill her case with testimony she should have elicited from fact witnesses as part

of her prima facie case. See Gathers, 242 A.D.2d at 506-507 (reversing admission of expert testimony which was "based on speculation, lacked competent factual support and was beyond the proper scope of expert testimony").

181. "[A]n expert's opinion not based on facts in the record or personally known to the witness is worthless." Cooke v. Bernstein, 45 A.D.2d 497, 500 (1st Dep't 1974) (citations omitted). Experts opine on the factual predicate; they do not supply the factual predicate. This is a fundamental flaw in the NYAG's prima facie case.

182. A party is "not entitled to introduce testimony from a banking expert" where "it fail[s] to demonstrate how the proposed expert testimony would clarify an issue involving professional and technical knowledge beyond the ken of the typical" factfinder. GMAC Commer. Credit L.L.C v. Mitchell-B.J., Ltd., 272 A.D.2d 51, 51 (1st Dep't 2000); see also Ortiz v. City of New York, 39 A.D.3d 359, 360 (1st Dep't 2007) (affirming trial court's preclusion of expert testimony where "there was no showing that the proposed testimony would clarify an issue involving professional or technical knowledge beyond the ken of the typical juror").

183. McCarty seeks to substitute his judgment for the judgment of the sophisticated private actors that underwrote and negotiated highly successful business transactions. Quinn v. Artcraft Const.., 203 A.D.2d at 445 ("[A]n expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion."). McCarty's testimony cannot be used to supplant the factual record with speculative testimony as to what he thought the lenders might have done.

184. McCarty's disgorgement calculation is premised on the assumption that the Private Wealth Management Group at DB would not have extended the loans to President Trump at those interest rates had they been provided different or additional information. This

assumption has no basis in the record and is, in fact, rebutted by the factual record, as well as Defendants' expert witnesses.

185. McCarty adopted the Court's position on summary judgment that the SFCs contained misstatements. But the Court expressly did not determine any alleged misstatements were either intentional or material. NYSCEF Doc. No. 1531. Since the unrebutted evidence establishes any alleged misstatements were not material and not relied upon, McCarty's assumption and adoption of the Court's is further flawed.

186. Based on this assumption, McCarty used higher interest rates from reports prepared by the CRE group.

187. However, McCarty could not be certain that the CRE group would have extended the loans on the terms in the report or that President Trump would have accepted those terms. 3134:16-3137:19.

188. He did not account for the possibility of additional financing sources, the possibility of pledging other assets as collateral, or the possibility of choosing to forego the loans entirely. 3137:22-3141:5.

189. He did not consider that President Trump had sufficient liquid assets to self-finance the Doral and Chicago loans. 6313:6-10; PX-787 at 4; PX-815 at 5.

190. His analysis ignored testimony from bank witnesses that the lenders made decisions based on their own analyses and were based on other factors, including developing relationships with ultra-high-net-worth individuals and the PWM price grid.

191. Nonetheless, even McCarty agreed that banks have historically been very willing to lend to high-net worth individuals at low interest rates because they get repaid, and that the lenders here were repaid in full. 3055:21-24.

192. Disgorgement also cannot be awarded for any transactions that closed after July 13, 2014.

193. While the interest rates fluctuated over the course of the loan terms, any fluctuations were a result of LIBOR or a step-down in guaranty.

194. Based on the foregoing, the NYAG has failed to demonstrate her entitlement to disgorgement as a matter of law.

195. Finally, to the extent the Court intends to issue a decision adverse to any Defendant(s), it should be stayed pursuant to CPLR § 5519(c) to permit Defendants to perfect their appeal.

Dated: New York, New York
January 5, 2024

Respectfully submitted,

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