To Be Argued By:
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by permission of the Court
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

against

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

Defendants-Appellants.

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

Non-Party Appellants.

JOINT REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT[1]

This case involves no victims, no complaints, no misstatements, no causation, and no injuries or losses. Instead, it involves clear and unambiguous disclaimers given to sophisticated commercial parties who made decisions based on their own due diligence, a complete violation of the statute of limitations, and fatal factual errors and miscalculations. Every loan and insurance payment was made in full and either on time or early. President Trump's business partners were delighted with these transactions. They benefited enormously, making over $100 million in profits. Indeed, the actual participants to the subject transactions described President Trump and his business as "tremendous," "vision[ary]," "sensational," "superb," "a highly probable success story," and "a long and satisfactory relationship."

Supreme Court's Judgment is therefore plainly erroneous, and, in her brief ("Resp.Br."), the Attorney General provides no convincing justification for its many errors. First, contrary to the Attorney General's argument, Supreme Court disregarded this Court's instruction that "[t]he continuing wrong doctrine does not delay or extend" the limitation period. People v. Trump, 217 A.D.3d 609, 611 (1st Dep't 2023) ("Trump I"). This error opened the way for Supreme Court to conduct an unconstitutional trial with no jury. Ignoring this Court's clear decision, Supreme

[1] Unless otherwise noted, defined terms used herein have the meaning ascribed to them in Appellants' opening brief. NYSCEF Doc. No. 152.

Court erroneously applied the continuing wrong doctrine to resuscitate long-defunct claims. The Attorney General argues that "Supreme Court did not conclude that any acts prior to the July 2014 cut-off date were timely," (Resp.Br.107), but that is plainly wrong—Supreme Court repeatedly imposed liability, both disgorgement of cash and injunctive relief, based on alleged actions before 2016 and 2014. Proper application of this Court's mandate eliminates most of the Judgment for Appellants covered by the Tolling Agreement, and it eliminates all of the Judgment for Appellants not covered by the Tolling Agreement—including President Trump, the individual Appellants, and the Trust.

Next, contrary to the Attorney General's argument, Executive Law § 63(12) ("§ 63(12)" or "Section 63(12)") cannot be stretched to cover the facts of this case. No evidence supports any finding that the alleged "misstatements" were in fact misstatements or that they had any "capacity or tendency to deceive," as required to establish a § 63(12) violation. On the contrary, the evidence demonstrates that Appellants' counterparties were *not* deceived, that they performed their own due diligence and eagerly embraced highly profitable business transactions, and that the challenged statements did not affect the terms of any transaction. They were paid back in full, on time or early, incurring a prepayment charge, in stark contrast to today's loan market, where defaults are at all-time highs. The loans were a small fraction of President Trump's very underleveraged net worth. Compare People v.

Exxon Mobil Corp., 65 Misc. 3d 1233(A) (Sup. Ct. N.Y. Cty. 2019). The application of § 63(12) to these facts attempts to expand the statutory language past its breaking point, raising grave problems under both the New York and federal Constitutions, including their Free Speech, Excessive Fines, and Due Process Clauses. This approach unlawfully aggrandizes the Attorney General's power to scrutinize, *post hoc*, purely private transactions in the absence of any public interest or even theoretical private harm. If allowed to stand, it would be crushing to businesses across New York, who would be forced to flee to friendlier states where excessive punishment such as this does not exist.

Further, Supreme Court's findings of supposed "misrepresentations" are simply indefensible. Supreme Court's erroneous valuations of President Trump's properties ignored reams of unrebutted expert evidence demonstrating that each valuation decision was fully consistent with the GAAP standards that apply to personal financial disclosures. Appellants' expert witness from the prestigious NYU Stern School of Business highly praised the financial statements. Ignoring extensive expert testimony on the governing GAAP standards, Supreme Court failed to cite any objective standards to support its erroneous findings of fraud. The Attorney General likewise fails to point in her brief to any actual governing standards supporting her wild claims of "fraud" and "misrepresentation." Thus, this Judgment sows chaos by upending established industry practice and, if affirmed, will force the

commercial marketplace to guess what some future Attorney General or court might deem to be "fraudulent."

For example, Supreme Court preposterously valued Mar-a-Lago at $18 million to $27.6 million, disregarding unrebutted expert testimony that it is worth over $1.2 billion. In fact, recent disclosures demonstrate that Mar-a-Lago—which is *debt-free*—generated $56.9 million in revenue in the last year alone, and $52.3 million the year before.[2] All told, President Trump's properties, which the Attorney General and Supreme Court incorrectly claimed to be "overvalued," generated approximately $513 million in revenues in just the last year.[3] Indeed, the Statements of Financial Condition ("Statements") greatly *underestimated* the values of President Trump's assets, and his net worth is far greater than the Statements reflect. When assets were actually sold in the marketplace, their sale prices dramatically *exceeded* the Statements' estimated values. The OPO sold for about $400 million after being estimated at $130 million, and Ferry Point—which had no debt and no place in this case from the outset—sold for $60 million, with a potential escalation to $175 million, after being estimated at $22.5 million on President Trump's financial statements. As to Ferry Point, President Trump built with cash, never even bothered

[2] Giulia Carbonaro, *Donald Trump Gets Financial Boost From Mar-a-Lago, Disclosures Show*, NEWSWEEK (Aug. 16, 2024), available at https://www.newsweek.com/donald-trump-gets-financial-boost-mar-lago-disclosures-1940194.

[3] Bill Allison, *Trump Reveals $513 Million from Golf Clubs and Resorts*, BLOOMBERG (Aug. 16, 2024), available at https://www.bloomberg.com/news/articles/2024-08-16/trump-financial-filing-reveal-legal-debts-513-million-from-golf-clubs-resorts.

to use a bank, and there was no bank loan. President Trump's other properties were also very conservatively valued.

The Attorney General also offers no convincing defense of the egregious, unconstitutional award of over $464 million in supposed "disgorgement" of cash, which is a legal remedy masquerading as equitable relief. Disgorgement requires a showing of *causation*—a requirement Supreme Court ignored. Overwhelming evidence demonstrated that the challenged representations did not affect the terms of any transaction, and there were no losses or victims—just the opposite, all the counterparties profited greatly. Thus, the entire disgorgement award must be reversed.

The Attorney General also fails to provide a plausible defense of Supreme Court's myriad other errors. Supreme Court erred by enjoining plainly lawful conduct, violated the New York and federal Constitutions by granting grossly disproportional monetary relief, when none should have been granted, and entered an indefensible Judgment on the second through seventh causes of action without any evidentiary support.

President Trump is one of the most successful developers in the history of New York. He rebuilt the New York skyline, created thousands of jobs, rescued and rejuvenated historic Wollman Rink, developed the $3 billion West Side Railyards from 59th to 72nd Street in Manhattan, was deeply involved in developing the Jacob

Javits Convention Center, and so much more. The case involves no public or private harm, except for the harm caused by the unconstitutional Judgment handed down by Supreme Court. The Attorney General seeks to apply § 63(12) in a way that violates centuries of American jurisprudence and our Constitution. This Court should reverse the Judgment and cure the damage already inflicted on New York's unique standing in the business community.

ARGUMENT

I. The Statute of Limitations and the Law of the Case Doctrine Bar NYAG's Claims.

As this Court strongly held, NYAG's claims are barred by the statute of limitations, and the "continuing wrong doctrine does not delay or extend these periods." Trump I, 217 A.D.3d at 611 (citations omitted). That holding is both binding and correct, yet Supreme Court disrespectfully ignored it. NYAG barely addresses this fundamental point, burying her response after the hundredth page of her brief.

A. Supreme Court Blatantly Violated this Court's Previous Ruling on the Statute of Limitations.

Supreme Court held that "each submission of an SFC after July 13, 2014, constituted a separate fraudulent act" because it "would 'requir[e] a separate exercise of judgment and authority,' triggering a new claim." A.40, quoting Matter of Yin Shin Leung Charitable Found. v. Seng, 177 A.D.3d 463, 464 (1st Dep't 2019). That

is a textbook application of the continuing wrong doctrine, in direct contravention of this Court's ruling. See Trump I, 217 A.D.3d at 611, citing CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 195 A.D.3d 12, 19-20 (1st Dep't 2021); Henry v. Bank of Am., 147 A.D.3d 599, 601-602 (1st Dep't 2017). Both CWCapital and Henry make clear that treating each annual Statement as a "separate fraudulent act" is exactly what the continuing wrong doctrine would require. See 195 A.D.3d at 18-20; 147 A.D.3d at 600-602.

Supreme Court cited Yin Shin Leung, 177 A.D.3d at 464, to conclude that each annual Statement constitutes a distinct, actionable wrong. A.40. But that case applies the continuing wrong doctrine on the very page cited by Supreme Court. Id., citing Yin Shin Leung, 177 A.D.3d at 464. Moreover, in likening Appellants' conduct to that of respondents in Yin Shin Leung, Supreme Court held that Appellants' conduct constitutes a "*continuous series of wrongs* each of which gave rise to its own claim." Id. (emphasis added). Again, this is a clear application of the continuing wrong doctrine, disrespectfully disregarding this Court's ruling.

Supreme Court also cited CWCapital to hold that "each instance of wrongful conduct" by Appellants was supposedly "a 'separate, actionable wrong' giving 'rise to a new claim.'" A.41, quoting CWCapital, 195 A.D.3d at 19-20. But this Court cited CWCapital to support the opposite conclusion. Trump I, 217 A.D.3d at 611, citing CWCapital, 195 A.D.3d at 19-20.

NYAG ignores this glaring conflict, (Resp.Br.105-108), arguing that "Supreme Court did not conclude that any acts prior to the July 2014 cut-off date were timely." Id. at 107. But Supreme Court repeatedly held Appellants liable—and imposed both disgorgement and punitive injunctive relief—based on allegations going back to 2011. See, e.g., A.121, 123-128, 130-133, 135, 142-146, 152-153. Supreme Court's decision thus repeatedly assigns liability for pre-2016 and pre-2014 alleged actions.

Even if the continuing wrong doctrine applied—which it does not—it would only authorize Supreme Court to assign liability for Statements issued *after* the end of the limitations period. "Where applicable, the [continuing wrong] doctrine will save all claims for recovery of damages *but only to the extent of wrongs committed within the applicable statute of limitations*." Henry, 147 A.D.3d at 601 (emphasis added) (citations omitted). Thus, even if the doctrine applied, Supreme Court could not award damages arising from the original transactions, but only for the *subsequent* annual Statements and "No MAC" letters. See id. Supreme Court did the opposite—it imposed liability based on the *original transactions*. See A.65-66. That is a double violation of the statute of limitations.

NYAG also argues that this Court merely held that claims are time-barred if the "transactions were completed" before February 6, 2016, without specifying which "transactions" had to be completed by then. Resp.Br.105-106. This argument

ignores the subsequent sentence in the same paragraph of this Court's opinion holding that "[t]he continuing wrong doctrine does not delay or extend these periods." Trump I, 217 A.D.3d at 611. In so holding, this Court rejected the same argument NYAG makes again here. See Appeal No. 2023-00717, NYSCEF Doc. No. 24 at 46-49.

NYAG argues that "[t]he Court's dismissal of OAG's claims against Ivanka Trump does not show otherwise." Resp.Br.106. But in the MTD Decision, Supreme Court refused to dismiss NYAG's claims against Ms. Trump precisely because it found that "the verified complaint sufficiently alleges Ms. Trump's participation in continuing wrongs." A.26719-26720. This Court *reversed* this ruling, holding instead that "[t]he continuing wrong doctrine does not delay or extend these [limitations] periods." Trump I, 217 A.D.3d at 611. The Court held that Ms. Trump was not a party to the Tolling Agreement, and all claims against her had to be dismissed. Id. at 611-612. The same reasoning applies to all individual Appellants.

B. Supreme Court Violated the Law of the Case Doctrine.

The law of the case doctrine "bind[s] a trial court . . . to follow the mandate of an appellate court, absent new evidence or a change in the law," neither of which is present here. Matter of Part 60 RMBS Put-Back Litig., 195 A.D.3d 40, 48 (1st Dep't 2021). When it comes to "the doctrine requiring a lower court, on remand, to follow the mandate of the higher court," "there is no discretion involved; the lower

court must apply the rule laid down by the appellate court." People v. Evans, 94 N.Y.2d 499, 503 (2000) (citations omitted). NYAG does not argue that any exception to this doctrine applies. This Court's prior holding is thus binding. It is also plainly correct. See Trump I, 217 A.D.3d at 611; Joint Brief for Defendants-Appellants ("App.Br.") at 20 n.6.

C. The Tolling Agreement Does Not Apply to the Individual Appellants or the Trust.

The individual Appellants are not subject to the Tolling Agreement. App.Br.20-22. NYAG's attempt to extend the Tolling Agreement to include President Trump is particularly egregious. NYAG argues that, when the Tolling Agreement was executed in August 2021, President Trump "had returned to a high-level decision-making role at the Trump Organization." Resp.Br.98-99. But NYAG does not contend that President Trump was one of the "directors, officers, partners, employees, agents, contractors, consultants, representatives, and attorneys of" the Trump Organization ("TTO"). A.19055. He is therefore excluded by the "plain terms" of the Tolling Agreement. Resp.Br.97. Even worse, NYAG's argument contradicts her prior representations to this Court and Supreme Court that "Donald J. Trump is not a party to the tolling agreement" and that "[NYAG] and [TTO] entered a six-month tolling agreement, to which [President] Trump was not a party." A.19137, 23639; see App.Br.21-22.

The Tolling Agreement also does not bind the Trust. NYAG argues that "[a]n attorney has the authority to make litigation decisions on behalf of its client." Resp.Br.99 (citation omitted). However, only a trustee—not a litigation attorney—may bind the trust to "agreements" or "contracts." N.Y. Est. Powers & Trusts Law § 11-1.1(b)(17). Moreover, Mr. Garten, who signed the Tolling Agreement, was not an attorney for the Trust, and the Trust was separately represented. NYAG admits that Mr. Garten was "[TTO]'s chief legal officer," (Resp.Br.99)—Mr. Garten is not an attorney for the Trust and never has been. He was also not the attorney for the individual Appellants and could not bind them.

D. The Statute of Limitations Eliminates Most of the Judgment.

Proper application of the statute of limitations eliminates all of the Judgment for Appellants who are not bound by the Tolling Agreement and at least $350,980,057 for Appellants who are bound by the Tolling Agreement. See App.Br.23. It also eliminates the entire award of injunctive relief, which is based almost entirely on pre-limitations alleged conduct.

II. Section 63(12) Does Not Extend to the Facts of this Case.

This case involves no material misstatements, no victims, no complaints, no reliance, no proof of causation, no injuries or losses, and pages of clear disclaimers to sophisticated counterparties who understood to conduct their own due diligence. Every loan and insurance payment was made on time and in full, and all parties were

fully satisfied with the transactions. Appellants' business partners profited by over $100 million from the transactions. See A.21533-21534, 33413-33416. Challenging these private transactions years after the fact serves no public purpose.

A. The Representations Did Not Affect the Terms of Any Transaction.

NYAG never cites any evidence showing that the terms of any agreement would have been different if the Statements had been as NYAG contends. This omission is glaring.

1. The Representations Did Not Affect the Deutsche Bank Loans.

Deutsche Bank's witness testified that President Trump would have received loans with the same terms and the same interest rates if his net worth had been as low as $100 million. A.33281-33283, 45332; see also App.Br.27-39. Deutsche Bank conducts its own "due diligence" and "independently verif[ies] all material facts as they pertain to a credit transaction." A.33221. Deutsche Bank assessed at least nineteen factors, of which the guarantor's net worth was among the least important. A.28221-28224. There were at least "14 reasons" for Deutsche Bank to approve President Trump's loans. A.28251. Deutsche Bank recognized the value of President Trump's unique "vision," "experience," and "expertise," rendering his loans "a realistic and high[ly] probable success story." A.28250, 33466, 45485. The bank viewed President Trump as a "whale" of a client. A.33401-33402. The bank expected to "cross sell" to the entire Trump family, (A.33426), and "to be introduced

to the wealthiest people on the planet," (A.33429). President Trump was a source of "tremendous business" for them. A.33430. President Trump never missed a payment or made a late payment, (A.28295, 28302-28303, 28312, 28339-28340), and the bank had "a long and satisfactory relationship" with him, (A.28334).

Deutsche Bank conducted a multifactor analysis with respect to the loan terms, pricing, and continuing approvals and based decisions upon its own analysis. A.28130-28131, 30607-30612, 33281-33282, 33417-33418, 33426-33429, 33434-33435, 36170-36189, 36190-36216, 36217-36232, 36233-36269, 36270-36289, 36290-36316, 36317-36341, 42464-42472, 43293-43317, 45332, 45482-45484, 45485-45487, 45488-45493. The bank used adjusted values to test the strength of President Trump's financial profile based on its own due diligence. A.28234-28250, 28290-28294, 28304-28307, 33570-33573, 33684, 36242-36249, 36296-36297. Deutsche Bank well understood that there would frequently be a difference of opinion as to value. A.33214-33216, 33268-33269. President Trump met the criteria for pricing from Deutsche Bank's Private Wealth Management division ("PWM") because he had a net worth that exceeded $100 million and investible assets in excess of $10 million. A.33216-33218, 33253, 33280-33281. Thus, President Trump would have received *the same pricing* even if his net worth had been as low as $100 million. A.33280-33282.

NYAG repeatedly implies that the loan terms would have looked different if President Trump's net worth estimates had reflected NYAG's erroneous views. See, e.g., Resp.Br.1, 27, 66-67, 70. Likewise, NYAG makes vague assertions that Deutsche Bank witnesses "reviewed" the Statements and "used the information"—without stating that they affected the loans' terms. Resp.Br.25, 29, 30, 70-71, 78. The evidence cited above and in Appellants' opening brief, (App.Br.27-39), refutes these unsupported insinuations.

NYAG argues that Deutsche Bank applied a standardized deduction or "haircut" to all President Trump's assets. Resp.Br.30-31, 73. But this is false. The bank used this "ballpark" or "haircut" approach only for the *least important* assets listed in each Statement. See App.Br.35-39. The bank verified more important assets by more rigorous means. Deutsche Bank verified liquidity "by looking at brokerage statements and/or bank account statements." A.28212, 33263-33270. For collateral properties, the bank conducted its own independent, formal appraisals, as required by law. A.28144. For President Trump's "trophy" properties, the bank performed an independent assessment through its Valuation Services Group, which consists of qualified appraisers. A.28157-28158, 28161, 28240-28241, 33264-33265. These assets—*none* of which were subject to the "haircut" approach—placed President Trump far beyond the bank's threshold for PWM loan pricing. A.28244, 36222.

Moreover, even if Deutsche Bank had applied a fifty-percent "haircut" to *every* reported asset, President Trump's net worth was well over $2 billion throughout the relevant time period—twenty times higher than needed to qualify for the same loan pricing. A.33281-33282.

NYAG argues that Deutsche Bank insisted on an "iron clad" personal guaranty. Resp.Br.25, 78. But someone with a net worth of $100 million—a tiny fraction of President Trump's undisputed net worth—could provide such a guaranty and obtain PWM loans on the same terms. A.33281-33282.

2. The Representations Did Not Affect the Ladder Capital Loan.

There is no evidence that a lower net worth would have resulted in different loan terms from Ladder Capital. App.Br.39-40. Ladder Capital did its own extensive due diligence, (A.29055-29056, 29081), and obtained a formal, independent appraisal of the collateral property, (A.29170). Ladder Capital was "really paying attention to" liquidity, while the Statements were not "a key factor" in its decision. A.29165. President Trump's guaranty sufficed because he was "a strong sponsor" with "a large net worth and a lot of liquidity." A.29177-29178. Ladder Capital required only $160 million net worth and $15 million liquidity, (A.19165-19166)—far less than President Trump's assets.

3. The Representations Did Not Affect the Ferry Point License.

For the Ferry Point license, "the financial capability of the offer" was "weighted the lowest," at only "ten percent" of the City's "selection criteria," and there was no requirement to submit the Statements. A.30258. President Trump's reported "net worth in excess of $3 billion and cash on hand in excess of $200 million" made him "easily [] able to meet any and all financial obligations under this contract." A.30236. Those obligations included a mere $10 million capital investment over several years. A.30243, 44442. The City did not review the "No MAC" letters to determine whether President Trump had the financial capability to perform because that determination was made during the award process. A.30283-30284. The only penalty for a material adverse change was an increase in the refundable security deposit of $470,000. A.30271.

4. The Representations Did Not Affect Any Insurance Policy.

Zurich was "primarily concerned just with cash on hand," while President Trump's property values were "not very significant." A.44957, 44991. President Trump had over $51 million and $62 million in *undisputed* liquidity in the relevant years, (A.44981-44982), while Zurich's coverage was "quite modest," with program limits of "6 million single, 20 million aggregate," (A.45003). Zurich did not rely on the Statements for years, relying instead on publications like Forbes and USA Today to support its underwriting decisions. A.32529-32531, 45237-45240, 45241-45245,

45246-45250. The Zurich surety bond program existed as an "accommodation" to AON, TTO's broker. A.32518-32524, 45246-45250. Zurich continues to do business with TTO. See A.32525, 45004-45005; App.Br.44.

HCC considered President Trump's assets to ensure that he could "pay the retention [*i.e.*, deductible] if needed," (A.29905-29906), where "the retention was approximately $2.5 million," less than two percent of the "$192 million in cash on the balance sheet," (A.29906). NYAG cites no evidence suggesting that President Trump's liquidity or net worth was anywhere near levels that might have affected the policy's terms. Resp.Br.35-36, 80.

B. Section 63(12) Does Not Extend to the Facts of this Case.

Section 63(12)'s prohibition against "fraudulent or illegal acts" and "persistent fraud" requires, at minimum, a showing of the "capacity or tendency to deceive." Matter of People v. Northern Leasing Sys., Inc., 193 A.D.3d 67, 75 (1st Dep't 2021). Here, the statutory language does not extend to Appellants' alleged actions. See App.Br.46-52. This conclusion accords with (1) the plain language of the statute, (id. at 46-49); (2) the statutory context, which limits § 63(12) to actions implicating the public interest, (id. at 49-51); (3) the statute's "evident purpose," which is to protect vulnerable consumers, not sophisticated international banks, (id. at 51-52, quoting People v. Grasso, 54 A.D.3d 180, 194 [1st Dep't 2008]); and (4)

the "public policy concerns" underlying the statute, (id. at 52, quoting Grasso, 54 A.D.3d at 193).

NYAG argues that Supreme Court did not require "mere falsity and nothing more." Resp.Br.49. On the contrary, the MSJ Decision held that NYAG "need only prove: (1) the SFCs were false and misleading; and (2) [Appellants] repeatedly or persistently used the SFCs to transact business." A.43; see also A.48. Likewise, the Final Decision held that "plaintiff need only prove that [Appellants] used false statements in business"—nothing more. A.66. Clearly, falsity (and repetition) is all that Supreme Court required. Id. The phrase "capacity or tendency to deceive" does not appear in Supreme Court's Final Decision. In effect, Supreme Court adopted a strict-liability standard for business representations, which is insupportable.

Next, NYAG argues that "the elements of common-law fraud" are not "incorporated into the 'capacity or tendency to deceive' standard." Resp.Br.47, 49. This argument attacks a strawman. The glaring failures of proof in this case—no material falsehoods, no complaining victims, no causation, no reliance, no injuries or losses, and clear disclaimers to sophisticated parties—demonstrate the case involves no "capacity or tendency to deceive" and, thus, no violation of § 63(12). See App.Br.46-53. "[E]vidence regarding falsity, materiality, reliance and causation plainly is *relevant* to determining whether [NYAG] has established that the challenged conduct has the capacity or tendency to deceive, or creates an atmosphere

conducive to fraud." People v. Domino's Pizza, Inc., 2021 WL 39592, at *11 (Sup. Ct. N.Y. Cty. Jan. 5, 2021) (emphasis in original) (citations omitted). Likewise, evidence of what was "understood in the relevant marketplace," (HSH Nordbank AG v. UBS AG, 95 A.D.3d 185, 193 [1st Dep't 2012]), illuminates whether Appellants' "conduct was deceptive or fraudulent," (Domino's Pizza, 2021 WL 39592, at *10). There is no violation of § 63(12) where "no evidence [was] adduced at trial that the" representations "had any market impact," and NYAG "produced no testimony . . . from any [lender] who claimed to have been misled by any disclosure." Exxon, 65 Misc. 3d 1233(A), at *5, *30.

This conclusion also undermines the second through seventh causes of action. As in Exxon, "[s]ince [NYAG] failed to establish any liability on the part of [Appellants] for causes of action that do not require proof of scienter and reliance[,] . . . the decision in this case, perforce, establishes that [Appellants] would not have been held liable on any fraud-related claims" requiring scienter or reliance. Id. at *2.

C. The Disclaimers Defeat Any Capacity or Tendency to Deceive.

NYAG argues that "the disclaimer language was not remotely specific to defendants' misrepresentations." Resp.Br.95. Not so. The clear, specific disclaimers disclaimed reliance on all the "values" and "valuation methods" reflected in the Statements. See, e.g., A.38907, 38931, 39045, 39113, 39144. The

disclaimers stated that "[c]onsiderable judgment is necessary to interpret market data and develop the related estimates of current value," that "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," and that "[t]he use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts." Id.

There is no ambiguity in these statements, especially when they are directed to sophisticated counterparties and reflect what is already "understood in the relevant marketplace." HSH Nordbank, 95 A.D.3d at 193. New York courts routinely enforce similar disclaimers to sophisticated entities. See Citibank v. Plapinger, 66 N.Y.2d 90, 95 (1985); HSH Nordbank, 95 A.D.3d at 191-194.

NYAG argues that the disclaimers did not address "facts peculiarly within [Appellants'] knowledge." Resp.Br.94. Not so. "Valuation methods" are not "peculiarly within" Appellants' knowledge. Id. at 94-95. Neither are the subjective, estimated "values." See infra Point VII. For example, Deutsche Bank acknowledged that "getting appraisals by independent apprais[er]s is a common valuation appraisal method." A.28155. Likewise, Ladder Capital obtained an independent appraisal of 40 Wall Street. A.29170. NYAG "cannot argue justifiable reliance on defendants' misrepresentation . . . where [counterparties] had the means available to ascertain" the relevant facts for themselves. Cestone v. Johnson, 179

A.D.3d 557, 558 (1st Dep't 2020) (citations omitted). "New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations . . . by investigating the details of the transactions and the business they are acquiring." Global Mins. & Metals Corp. v. Holme, 35 A.D.3d 93, 100 (1st Dep't 2006) (citation omitted), leave to appeal denied, 8 N.Y.3d 804 (2007).

D. NYAG's Interpretation Raises Grave Constitutional Problems.

The disgorgement award violates the Excessive Fines and Due Process Clauses. See infra Point IV. In fact, the disgorgement award is so egregiously excessive that NYAG cannot claim that money damages are "incidental" to equitable relief, which raises grave concerns regarding the constitutional right to a civil jury trial. See N.Y. Const. art. I, § 2; Jamaica Sav. Bank v. M. S. Inv. Co., 274 N.Y. 215, 221 (1937) (citations omitted); cf. Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc., 2021 WL 1608953, at *2 (S.D.N.Y. Apr. 26, 2021).

In addition, NYAG's interpretation raises grave concerns under the First Amendment and Article I, § 8 of the New York Constitution.[4] Both provisions prevent the government from banning "falsity alone." See United States v. Alvarez, 567 U.S. 709, 719 (2012) (plurality opinion); People v. Mitchell, 38 N.Y.3d 408, 414-415 (2022). NYAG argues that the statute does not prohibit "falsity standing

[4] Appellants' free speech argument is properly raised for the first time on appeal; a finding that § 63(12) is unconstitutional as applied would warrant reversal of Supreme Court's Judgment. See Watson v. City of New York, 157 A.D.3d 510, 511 (1st Dep't 2018).

alone" because it requires, *inter alia*, "the tendency or capacity to deceive." Resp.Br.113. But Supreme Court's interpretation does *not* require that showing. A.43, 48, 66. Likewise, Supreme Court's overbroad interpretation would provide a blank check for politically motivated, retaliatory enforcement—an area where the State is a repeat offender. See, e.g., Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 181-184, 191-194 (2024); Exxon, 65 Misc. 3d 1233(A), at *1.

Fundamentally, NYAG's interpretation violates the separation of powers and centuries of New York jurisprudence by authorizing NYAG to penalize private transactions in the absence of any public interest or loss. See App.Br.54-56, citing People v. Lowe, 117 N.Y. 175, 191 (1889); People v. O'Brien, 111 N.Y. 1, 33-34 (1888); People v. Albany & Susquehanna R.R. Co., 57 N.Y. 161, 168 (1874); Grasso, 54 A.D.3d at 196. NYAG dismisses these cases as "inapposite cases that predate § 63(12) by decades," (Resp.Br.109), but the line of authority runs from the nineteenth century through Grasso. NYAG cannot sue where her lawsuit "vindicates no public purpose." Grasso, 54 A.D.3d at 196.

Finally, NYAG argues that "this Court already . . . rejected th[e] same arguments" in Trump I, 217 A.D.3d at 610, (Resp.Br.108), but that case was decided based on bare allegations, not a fully developed trial record. NYAG argues that there is a public interest in the "honesty and integrity of the marketplace," (Resp.Br.110), but the actual market participants support the transactions and oppose her heavy-

handed, destructive intervention as the real threat to marketplace integrity. See, e.g., Brief of *Amici Curiae* Jeffrey Supinsky et al. (NYSCEF Doc. No. 175).

III. No Showing of Causation Supports the Disgorgement Award.

The first sentence of NYAG's brief emphasizes the lack of causation. There, NYAG accuses Appellants of "inflat[ing] the net worth of defendant Donald J. Trump . . . *by as much [as] $2.2 billion a year*." Resp.Br.1 (emphasis added). This accusation is egregiously wrong. See infra Point VII. But even if it were not, from 2011 to 2021, the Statements estimated President Trump's net worth between $4.26 billion and $6.12 billion.[5] Thus, on NYAG's own estimation, President Trump's net worth was *never less than $2 billion*—which is *twenty times* more than needed to obtain loans and insurance policies on the very terms that Appellants obtained. See supra Point II.A.

A. The Government's Initial Burden Includes Showing Causation.

Disgorgement requires a showing of causation. "[T]he disgorged amount must be '*causally connected to the violation*.'" J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 91 A.D.3d 226, 232-233 (1st Dep't 2011) (emphasis added), quoting S.E.C. v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996), rev'd on other grounds, 21 N.Y.3d 324 (2013); see also S.E.C. v. Patel, 61 F.3d 137, 139 (2d Cir. 1995); S.E.C. v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1231 (D.C. Cir. 1989); S.E.C. v.

[5] A.2104, 2127, 2151, 2177, 2204, 2230, 2256, 2281, 2306, 2332, 2354.

Blatt, 583 F.2d 1325, 1335-1336 (5th Cir. 1978). Here, overwhelming evidence demonstrates that Appellants' supposed "misrepresentations" did not *cause* the terms of any transaction to change. See supra Point II.A. Thus, they did not and could not have caused any ill-gotten "profits," and the amount to be disgorged is zero. See id.

NYAG argues that "[t]hese decisions apply a burden-shifting framework" that supposedly places the burden of showing causation on Appellants. Resp.Br.115-116. But even if so, it would make no difference because Appellants easily carried that burden. See supra Point II.A. In any event, showing causation is part of the government's *initial* burden in seeking disgorgement, as NYAG's cases demonstrate. Disgorgement requires the government to "me[e]t the burden of establishing a reasonable approximation of the profits *causally related to the fraud*." S.E.C. v. Razmilovic, 738 F.3d 14, 31 (2d Cir. 2013) (emphasis added). "[T]he court may exercise its equitable power only over property causally related to the wrongdoing. . . . Therefore, the [government] generally must distinguish between legally and illegally obtained profits." First City Fin. Corp., 890 F.2d at 1231 (citation omitted).

Even if the government does so, the defendant still has the opportunity "to show that his gains 'were unaffected by his offenses.'" Razmilovic, 738 F.3d at 31, quoting S.E.C. v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996). Here, NYAG failed to meet her initial burden, and Appellants met their burden of showing that the transactions

"were unaffected by" the challenged representations. Id.; see supra Point II.A. The disgorgement award fails on both grounds.

Next, NYAG argues that the government need only show "a reasonable approximation of profits." Resp.Br.115. This overlooks that the government must demonstrate "a reasonable approximation of profits *causally connected to the violation*." First City Fin. Corp., 890 F.2d at 1231 (emphasis added). The "reasonable approximation" standard does not dispense with the government's initial burden to show *causation*. Rather, the "reasonable approximation" standard applies in cases where calculating actual profits involves "imprecision and imperfect information." Id. Here, the challenged representations did not influence the terms of any transaction at all, (see supra Point II.A), so calculation difficulties are not relevant.

NYAG's argument that "[e]stablishing a reasonable causal connection does not require proof that defendants would not have obtained the wrongful profits had they complied with the law," (Resp.Br.115), is plainly wrong. That is *exactly* what causation requires—in fact, it is the definition of causation. The cases NYAG cites provide no support for this astonishing claim. In S.E.C. v. Almagarby, the Eleventh Circuit explicitly held that the unregistered trader's "profits were causally linked to his failure to register." 92 F.4th 1306, 1312, 1320 (11th Cir. 2024).

NYAG also cites First City Financial and AUSA Life Insurance Co. v. Ernst and Young. Resp.Br.120-121, citing 890 F.2d at 1232; 206 F.3d 202, 212 (2d Cir. 2000). But First City Financial emphasized that "the court may exercise its equitable power only over property *causally related to the wrongdoing*" and that the *government* "generally must distinguish between legally and illegally obtained profits." 890 F.2d at 1231 (emphasis added). First City Financial addresses the question of *calculation*, not the threshold showing of *causation*. See id. at 1231-1232. AUSA Life requires a showing that "there was a reasonable probability that the fraud actually accomplished the result it was intended to bring about." 206 F.3d at 213 (quotation omitted). Stutman v. Chemical Bank is not a disgorgement case and addresses the distinction between reliance and causation under General Business Law § 349. See Resp.Br.116, citing 95 N.Y.2d 24, 30 (2000).

Next, NYAG argues that her damages expert, Michiel McCarty, somehow "established that defendants' misconduct *caused* them to save $168,040,168 in interest payments." Resp.Br.117 (emphasis added). But McCarty—based on information fed to him by NYAG attorneys—merely *assumed* causation, *i.e.*, that the supposed misrepresentations had influenced the transactions' terms. See A.30544, 30556-30557, 30560-30561, 44458-44461; App.Br.58-59. McCarty testified that he "can't be certain" that alternative loan terms would have ever been consummated or that a loan would have been offered on those terms, (A.30624), and

he turned a blind eye to evidence that contradicted his theory on causation, (A.30607-30613). See Matter of 91st St. Crane Collapse Litig., 154 A.D.3d 139, 151 (1st Dep't 2017); Quinn v. Artcraft Constr., 203 A.D.2d 444, 445 (2d Dep't 1994) ("An expert may not reach a conclusion by assuming material facts not supported by the evidence.").

Finally, NYAG argues that Appellants' disclaimers do not "break the causal chain" because "that is irrelevant to disgorgement." Resp.Br.121, citing S.E.C. v. Teo, 746 F.3d 90, 107 (3d Cir. 2014). On the contrary, when sophisticated parties are clearly advised to conduct their own due diligence—and do so—no injury is attributable to the disclaimed "misrepresentations." See HSH Nordbank, 95 A.D.3d at 193-195; supra Point II.C.

B. Supreme Court Miscalculated "Profits" from the OPO and Ferry Point Sales.

The proceeds of the OPO and Ferry Point sales constituted "income derived from the [supposedly] ill-gotten gains," which is not subject to disgorgement. S.E.C. v. Govil, 86 F.4th 89, 106 (2d Cir. 2023). Supreme Court ordered the disgorgement of the "interest rate differential" and *also* the proceeds generated by Appellants' investment in the OPO project. A.143-144. That is a textbook example of "profits and income earned on the proceeds" of the supposed fraud, which may not be disgorged where such an award would be inconsistent with equity. S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105 (2d Cir. 1972), abrogation recognized by

S.E.C. v. Ahmed, 72 F.4th 379, 404-405 (2d Cir. 2023); see Razmilovic, 738 F.3d at 37. The cases NYAG cites are not to the contrary. See Ahmed, 72 F.4th at 406; Teo, 746 F.3d at 106. For example, Ahmed confirms that courts do not have "blanket permission to award actual gains without limitations"; an award inconsistent with traditional principles of equity is an improper "penalty." 72 F.4th at 406.

Moreover, Supreme Court's disgorgement of profits from the OPO sale imposes impermissible double recovery for the same transaction. See App.Br.61. Supreme Court awarded disgorgement of *both* "interest rate differential" damages for the OPO loan *and* "ill-gotten profits" damages for the same transaction. A.143-144. This is "forcing a defendant to pay disgorgement twice," which is impermissible. Govil, 86 F.4th at 107. NYAG argues, in conclusory terms, that these "were not mutually exclusive theories of recovery." Resp.Br.126. On the contrary, Supreme Court awarded damages from the OPO sale because there were supposedly extra proceeds available from the loan to invest in the project. A.144. Supreme Court cannot rectify this error twice—first by disgorging supposedly surplus proceeds and then by disgorging money earned from those already-disgorged surplus proceeds. See Govil, 86 F.4th at 107.

Further, Supreme Court plainly erred by conflating *proceeds* of sales with *profits* from those sales.[6] See App.Br.60. NYAG argues that "Supreme Court deducted $170 million from the total proceeds, which represents . . . the outstanding OPO loan amount and other costs," (Resp.Br.124), but overlooks Appellants' *investment of equity* in the property, which must also be deducted. "Courts may not enter disgorgement awards that exceed the gains made upon any business or investment, when both the receipts and payments are taken into the account." Liu v. S.E.C., 591 U.S. 71, 91 (2020) (quotation omitted). "[C]ourts must deduct legitimate expenses before ordering disgorgement." Id. at 91-92.

C. Allen Weisselberg's Severance Should Not Be Disgorged.

Rather than address Razmilovic, the case upon which Supreme Court relied, NYAG cites S.E.C. v. Tourre, 4 F. Supp. 3d 579, 589 (S.D.N.Y. 2014). But Tourre, like Razmilovic, underscores why disgorgement is improper. Tourre involved a bonus and Razmilovic a bonus and severance, all of which were "causally connected" to the alleged wrongdoing because they were calculated on the basis of that conduct. 4 F. Supp. 3d at 589; 738 F.3d at 32-33. No such connection has been established here, as NYAG's only record citation makes plain. NYAG's contention

[6] The distinction between proceeds and profits was properly preserved and evident in the record. For Ferry Point, for example, Donald Trump, Jr. was asked at trial how much "Trump Ferry Point LLC ma[d]e from this transaction" and responded that, while the sales price was $60 million, "we obviously have, you know, lots of costs and other things." A.30785-30786. Likewise, for the OPO sale, the evidence makes clear the nearly $135 million awarded in disgorgement was proceeds from the sale, not profits. See, e.g., A.13006, 31185-31187, 31382, 41007.

that "the severance payment was made in part as a reward for [Weisselberg's] misconduct and in exchange for Weisselberg agreeing not to cooperate with OAG's investigation," (Resp.Br.126-127), is a fabrication, wholly unsupported. Weisselberg worked at TTO for more than fifty years, and it is natural to expect he would be paid a severance of the magnitude he was paid. See A.35030-35031. The burden was on NYAG to adduce evidence to establish a causal connection—not just speculation.

IV. The Disgorgement Award Violates the New York and Federal Excessive Fines and Due Process Clauses.

A. The Disgorgement Award Constitutes a "Fine."

A civil penalty that "serves, at least in part, *deterrent and retributive purposes* . . . is thus punitive and subject to the Excessive Fines Clause." County of Nassau v. Canavan, 1 N.Y.3d 134, 139-140 (2003), citing United States v. Bajakajian, 524 U.S. 321, 328-329 (1998); Austin v. United States, 509 U.S. 602, 619-622 (1993). Supreme Court stated that "disgorgement aims to *deter* wrongdoing by preventing the wrongdoer from retaining ill-gotten gains." A.142-143 (emphasis added), quoting People v. Ernst & Young LLP, 114 A.D.3d 569, 569 (1st Dep't 2014). Supreme Court explicitly described disgorgement as a "penalty." A.143. Moreover, Supreme Court employed the language of retribution, describing its award as punishment for Appellants' supposed "venial sin[s]." A.138, 148.

NYAG repeatedly likens the disgorgement award to disgorgement granted in SEC cases. See Resp.Br.115-116. SEC disgorgement "is intended to deter, not to compensate" and, thus, constitutes punishment. Kokesh v. S.E.C., 581 U.S. 455, 465 (2017). As in Kokesh, this case alleges offenses "against the [government] rather than an aggrieved individual," and NYAG seeks "to remedy harm to the public at large, rather than . . . particular injured parties." Id. at 463. Second, "disgorgement is imposed for punitive purposes" because "[t]he primary purpose of disgorgement orders is to deter violations . . . by depriving violators of their ill-gotten gains." Id. at 464 (quotation omitted). Third, "disgorgement is not compensatory" because the award is paid to the government, not to any victim. Id.

B. The Disgorgement is Grossly Disproportional.

NYAG does not cite the governing factors from Canavan, Bajakajian, and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 418 (2003). Compare App.Br.72-77, with Resp.Br.131-132. Instead, NYAG argues that "disgorgement will always be proportional . . . to the defendant's illegal profit." Resp.Br.131, quoting S.E.C. v. O'Hagan, 901 F. Supp. 1461, 1468 (D. Minn. 1995). But here, the disgorgement is *not* "proportional" to any supposedly "illegal" profit. See supra Point III.

NYAG argues there was a "serious[] . . . offense" with great "severity of . . . harm," (Resp.Br.133), but fails to address the absence of any actual injuries, losses,

or complaining victims. NYAG argues that the Statements were "rife with blatant misrepresentations," (Resp.Br.133), but that is wrong, as discussed below. See infra Point VII. NYAG argues that "there is no statutory maximum in the context of a disgorgement award," (Resp.Br.133 [quotation omitted]), but the relevant factor considers, instead, "the maximum punishment to which defendant could have been subject for the crimes charged," (Canavan, 1 N.Y.3d at 140). Finally, NYAG argues that large disgorgement awards have been imposed on "large organization[s]," including AIG, in two other cases, (Resp.Br.133), but NYAG does not argue that those cases are remotely comparable to this case.

NYAG attempts to distinguish Canavan, Bajakajian, and Austin as involving forfeitures rather than disgorgement. Resp.Br.131. But those cases provide the governing standard for excessiveness of *any* penalty that constitutes a "fine" under the Excessive Fines Clause—which this does. See Canavan, 1 N.Y.3d at 139-140; Bajakajian, 524 U.S. at 328; Austin, 509 U.S. at 618.

NYAG's cases do not support her sweeping claim that disgorgement of profits is *never* constitutionally excessive. O'Hagan addressed whether civil disgorgement after criminal conviction violates the Double Jeopardy Clause, (see 901 F. Supp. at 1468), an analysis that has no application here. In any event, O'Hagan limited its holding to cases where the disgorgement is "proportional . . . to the defendant's illegal profit," (id.), which is not the case here. The same distinction applies to the

cursory analysis in the unpublished decisions cited by NYAG. See Resp.Br.131, citing C.F.T.C. v. Escobio, 833 F. App'x 768, 773 (11th Cir. 2020); S.E.C. v. Metter, 706 F. App'x 699, 704 (2d Cir. 2017).

V. Judgment on the Second through Seventh Causes of Action Must Be Reversed.

Because NYAG fails to satisfy the less stringent requirements of the freestanding § 63(12) violation, she also fails to meet the more stringent requirements of the criminal violations underlying the second through seventh causes of action. See Exxon, 65 Misc. 3d 1233(A), at *2. NYAG's few remaining arguments lack merit.

A. Section 63(12) Requires Clear and Convincing Evidence.

Violations of § 63(12) must be established by clear and convincing evidence. "This intermediate standard of proof has been deemed necessary to preserve fundamental fairness in a variety of *government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma*." People v. Wyatt, 89 A.D.3d 112, 127 (2d Dep't 2011) (emphasis added) (quotation omitted); see App.Br.78. That precisely describes the proceedings here. NYAG cannot have it both ways—she cannot assert a claim that stretches the outer limits of § 63(12) and involves no conceivable harm to the public and also get the benefit of a lower standard of proof. Supreme Court's failure to apply the correct standard of proof is

reversible error. See People v. Romualdo, 37 N.Y.3d 1091, 1094 (2021); Symbax, Inc. v. Bingaman, 219 A.D.2d 552, 553 (1st Dep't 1995).

B. The Second through Seventh Causes of Action Fail.

To establish liability for falsifying business records, issuing false financial statements, insurance fraud, or conspiracy, NYAG needed to prove intent to defraud. See N.Y. Penal Law §§ 175.05, 175.45, 176.05. The fourth cause of action also requires a showing of materiality. See id. § 175.45(1). No such showings were made.

1. There Was No Evidence of Intent to Defraud.

President Trump relied on his outside accounting firm (Mazars) to prepare the Statements. See, e.g., A.2123. Mazars was like "an extension of [TTO's] accounting department" and had complete access to all information needed to compile the Statements, including access to appraisals from outside counsel. A.27341, 27634-27635, 30014-30015, 31793, 31801-31807, 32705-32707.

The individual valuation estimates raise no inference of intent to defraud. No prohibition exists on Mar-a-Lago being used and valued as a private residence. See A.16407-16570, 23061-23120, 45513-45596, 45597-45634, 45635-45638, 45868-45887. The square footage of the triplex was an immaterial, inadvertent error that was promptly corrected. A.27939, 27945, 34387. Even convicted perjurer Michael Cohen admitted that President Trump "never directed [him] to inflate the numbers

on his personal statement." A.29808-29809. NYAG is forced to rely on an inadmissible, double-hearsay statement from Patrick Birney about what Weisselberg allegedly told him about President Trump's statements, (Resp.Br.86-87, citing A.28623), which is legally and factually insufficient. See Marine Midland Bank v. Russo Produce Co., 50 N.Y.2d 31, 44 (1980). There was no intent to defraud because the challenged representations were made under circumstances where justifiable reliance and damages were impossible or unlikely. See supra Point II.

2. There Was No Showing of Materiality.

Materiality requires a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the *'total mix'* of information made available." State v. Rachmani Corp., 71 N.Y.2d 718, 726 (1988) (emphasis in original). The fact that the challenged representations did not affect the terms of any transaction provides compelling evidence that they were not material. See supra Point II.A. So does the overwhelming evidence from Deutsche Bank, Ladder Capital, Zurich, and other counterparties that would have done the same business if President Trump's net worth had been as low as $100 million. See id.

NYAG argues that "[m]ateriality is an objective test that does not turn on Deutsche Bank's idiosyncratic goals." Resp.Br.77. On the contrary, a sophisticated international bank provides compelling evidence of what a "reasonable investor"

would find significant. See Rachmani, 71 N.Y.2d at 726. As NYU Professor Bartov pointed out, materiality is not determined in the abstract, but through the "lens of the user." A.34460. Supreme Court ignored Professor Bartov's testimony relating to the wide latitude allowed to value properties under Accounting Standards Codification ("ASC") 274—the GAAP standard that applies to personal financial statements—concluding that the "statement[s] of financial condition for all the years were not[] materially[] misstated." A.34263, 34287-34288; see Exxon, 65 Misc. 3d 1233(A), at *1-*2.

NYAG argues that "a five percent numerical threshold [is] a good starting place for assessing the materiality of a misstatement or omission." Resp.Br.68 (quotation omitted). But materiality assesses the "*total mix*" of information—not just President Trump's net worth in isolation. Rachmani, 71 N.Y.2d at 726. For the Deutsche Bank loans, President Trump's net worth was among the least important of nineteen factors considered. See supra Point II.A. For the Ferry Point transaction, it was one subpart of the guarantor's financial strength, which weighed only ten percent in the award decision. See id. The "*total mix*" of information included far more compelling factors, such as President Trump's unique "vision" and expertise, his strong track record of success on similar loans, and his undisputed liquidity and low debt, among others. See App.Br.26-45; supra Point II.A.

3. The Conspiracy Claims Fail.

Because the underlying violations fail, the conspiracy claims likewise fail. A conspiracy requires: "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 474 (1st Dep't 2010) (citations omitted). None of these elements was proven, and evidence of "resulting damage or injury" was particularly lacking. NYAG's attempt to prop up the conspiracy claims by citing Penal Law § 105.00 for the first time on appeal, (Resp.Br.92-93), is both waived and meritless.

C. All Claims Against Donald Trump, Jr. and Eric Trump Fail.

Not one of the forty witnesses who testified at trial stated that Donald Trump, Jr. or Eric Trump prepared the Statements or had anything more than peripheral knowledge in their creation or use.[7] TTO's longtime former accountant, Donald Bender of Mazars, and its current accountant, Camron Harris of Whitley Penn, confirmed that they did not discuss the Statements with Donald Trump, Jr. or Eric Trump. A.27519, 27609-27610. TTO's former CFO, Allen Weisselberg, likewise confirmed that he did not rely on Eric Trump in preparing the Statements, (A.27967),

[7] NYAG implies that the testimony of a Cushman & Wakefield appraiser, David McArdle, established that he was critical of Eric Trump's valuation of Briarcliff. Resp.Br.13-14. On the contrary, McArdle testified that an owner like Eric Trump may have his own view of the value of a property and that McArdle did not disagree with him. A.29351.

or advise his co-trustee, Donald Trump, Jr., about how values were determined in the Statements, (A.28087). Even Michael Cohen, a convicted perjurer who admitted to perjury during the trial, did not testify that Donald Trump, Jr. or Eric Trump had anything to do with the Statements. A.29692-29693. The evidence unequivocally established that Donald Trump, Jr. and Eric Trump justifiably relied upon others, including Mazars, one of the largest accounting firms in the country, which received millions of dollars for its services. A.30757-30759, 30989. NYAG's further attempt to impose draconian liability on Donald Trump, Jr. and Eric Trump for being copied on a handful of emails over the course of a decade is preposterous.

D. The Insurance Fraud Claim Fails.

The Statements were not material to Zurich or HCC, and they did not rely on them. See App.Br.43-45, 81-83. Zurich was making an accommodation at the behest of its broker, AON, and HCC was keen to get "nice, juicy" additional business from President Trump. A.29881-29882. Both companies recognized that TTO had more than sufficient cash to cover any bond needs, in the case of Zurich, or any retention, in the case of HCC. The authority NYAG cites to argue that oral statements are actionable under N.Y. Penal Law § 176.05 is inapposite. Resp.Br.90-91. General Counsel Opinion 2-24-2003 interprets "written statements" in the context of the submission of insurance claims for payment, which constitute no part of NYAG's allegations. Ops. Gen. Counsel N.Y. Ins. Dep't No. 2-24-2003(#1), 2003

WL 24312335 (Feb. 24, 2003). Further, the testimony of the insurance company witnesses about oral statements was not dispositive. Ms. Mouradian's testimony was contradicted by Weisselberg's and undermined by her own lack of understanding about the meaning of relevant terms, and Mr. Holl could not recall who made the alleged statements to him.

VI. The Award of Injunctive Relief Must Be Reversed.

NYAG failed to show any violation of § 63(12), let alone the "reasonable likelihood of a continuing violation." People v. Greenberg, 27 N.Y.3d 490, 496-497 (2016); see App.Br.85-88. Further, the injunction impermissibly forbids *lawful* conduct, such as the "industry bans," applying for loans from New York financial institutions, and the monitor and compliance director. A.151-153; see App.Br.86-87.

NYAG argues that § 63(12) authorizes the court "to enjoin business activity *beyond* fraudulent or illegal acts," *i.e.*, purely lawful activity. Resp.Br.138. On the contrary, § 63(12) authorizes injunctions only against "such business activity," immediately after referring to "repeated fraudulent or illegal acts" and "persistent fraud or illegality in the carrying on, conducting or transaction of business." As this context makes clear, "such business activity" refers only to *illegal* activity. Id.

Matter of State of New York v. Magley held that "where the act sought to be enjoined is not a violation of law, [§ 63(12)] does not confer the required authority

for an inquiry as to such act." 105 A.D.2d 208, 210 (3d Dep't 1984); see also Matter of People of State of N.Y. v. Ashil Hyde Park, 298 A.D.2d 393, 395 (2d Dep't 2002) ("Supreme Court may not enjoin" defendants from performing acts that "are, in and of themselves, neither illegal nor fraudulent."). The monitorship and independent compliance director, which provide for intrusive oversight of Appellants' *lawful* activities, (A.149-150), violate these holdings.

VII. Supreme Court's Valuation Decisions Contradict Overwhelming, Unrebutted Expert Evidence.

This case presents a clear choice: either (1) confirm the validity and application of GAAP in the context of sophisticated commercial lending transactions or (2) permit current (and future) Attorneys General to substitute *post hoc* "standards" fully dependent upon their own subjective viewpoint. NYAG recites a litany of what she deems "misstatements" in the Statements, (Resp.Br.9-19), but, like Supreme Court, conspicuously omits any meaningful reference to governing accounting standards. However, a "misstatement" is not defined based on the opinions of NYAG or Supreme Court. A "misstatement" is the difference between what is reported and what is required under GAAP. A.34389-34390. Therefore, any finding of a "misstatement" must be made with reference to a specific GAAP violation. See A.34280-34281. Unrebutted testimony established the governing GAAP standards and explained why the Statements' valuations satisfied them, but none of Supreme Court's findings of misstatement cited any governing standard.

NYAG likewise fails to cite any such standards in her brief. See Resp.Br.7-19. The failure to apply governing standards upends long-established industry practices, leaving the marketplace guessing as to what some future Attorney General or court might deem "fraudulent."

Under GAAP, valuation is an opinion on price, making it necessarily subjective. A.34286-34287. There are a variety of definitions of value, different valuation models, and different assumptions to choose from. A.34287-34290. Differences of opinions in value do not indicate that the values in the Statements were inaccurate under GAAP. A.34290-34292.

ASC 274 uses a unique definition of value, Estimated Current Value ("ECV"), which is only applicable to personal financial statements and affords preparers broad latitude in choosing methodologies and assumptions to derive value, including forward-looking, hypothetical estimates of future value. A.34287-34289. ECV is derived from the perspective of the statement's preparer based on planned courses of action or the long-term vision for the asset. A.34321-34325. "GAAP does not require a specific method to be used to estimate current value for a particular asset for personal financial statements, nor does GAAP require the same method to be used for all assets in the same group." A.17379; see also A.23652-23789. The Statements correctly reflect the standard that financial institutions will do their own

due diligence. A.13865, 14270-14271, 14327-14328, 18255, 18275-18276, 20103-20104.

Under these unrebutted principles, Supreme Court's valuation decisions fail. *First*, Supreme Court's determination that Mar-a-Lago is worth $18 million to $27.6 million is preposterous. A.49. Mar-a-Lago, which is debt free, generated *$56.9 million* in revenue in the last year alone and $52.3 million the year before.[8] Unrebutted evidence refutes NYAG's reliance on the covenants, deeds, and restrictions. A.16407-16575. Moens, a prominent ultra-high-net-worth real estate broker in Palm Beach, stated in his affidavit that the values for Mar-a-Lago were "reasonable and, in many cases, conservative for years 2011 through 2021." A.23035. As of 2021, Mar-a-Lago would be worth more than $1.2 billion. A.23051. No prohibition exists on Mar-a-Lago being used and valued as a private residence—as President Trump's *current* use of the property demonstrates. See A.16407-16570, 23061-23120, 45513-45596, 45597-45634, 45635-45638, 45868-45887.

Second, the existence of competing appraisals for properties like 40 Wall Street and Seven Springs does not establish any misrepresentation. Laposa's unrebutted affidavit illustrated that "[a]ppraisals are highly subjective." A.22882. Thus, "disparate but legitimate valuations of a specific property may co-exist," and "the mere existence of such disparate valuations for a given property does not in

[8] Carbonaro, supra note 2.

itself establish any specific valuation is inaccurate or inflated." A.22896. Chin's affidavit pointed to numerous errors in the 40 Wall Street appraisals that significantly underestimated its value and concluded that the Statements were more closely aligned with the property's ultimate value. A.18864-18867.

ASC 274 "does not require the use of or reliance on appraisals in determining [ECV]." A.17933. Under ASC 274, "[i]t is completely irrelevant whether [TTO] had these appraisals in its files. . . . They could have had the appraisals open on their desks at the time they prepared the [Statements], and it still wouldn't have made a difference under GAAP." A.17934.

As to Seven Springs, Chin demonstrated that the Statements' values were appropriate. A.18867-18871. "[A] substantial difference between valuation in the [SFCs] and an appraisal, *per se*, is not evidence of an inflated value." A.17933.

Third, the alleged restrictions on property usage do not undermine the Statements' estimates. As to Trump Park Avenue, "[ECV] affords preparers of [SFCs] significant latitude to choose the valuation methods they may use to value assets," and, "[b]ased on planned courses of action[,] . . . [President] Trump was entitled to take the long view during which vacancy decontrol would have eventually released the stabilized units from those restrictions." A.17920, 17938. Likewise, regarding Aberdeen, "[t]he assumption that 2,500 homes could be built was a forecast based upon [President] Trump's business plan and belief that he could

convince the local authorities to approve a development of that magnitude." A.17936. Such forecasts are "completely consistent with the guidance in ASC 274 and other accounting pronouncements." A.17936.

Fourth, under ASC 274, a preparer may present "internally developed intangibles, such as the brand premium used in the valuation of [President] Trump's golf clubs, in personal financial statements." A.17929. Thus, it was "entirely proper under GAAP for [President] Trump to declare that his [SFCs] did not include his overall brand value, while at the same time including the intangible value of his brand as part of the value of individual investment properties (tangible assets)." A.17929.

CONCLUSION

This case represents a clear violation of the statute of limitations and a disrespectful disregard by Supreme Court for this Court's unambiguous decision, as well as an unconstitutional application of § 63(12) in the absence of any public interest. Supreme Court violated numerous New York and federal constitutional doctrines, including the right to a jury trial. It wrongfully granted a baseless award of "disgorgement" of cash unsupported by any showing of causation and imposed an unlawful injunction against plainly lawful behavior, among many other errors—such as ludicrously valuing Mar-a-Lago as worth $18 million to $27.6 million, fifty to one hundred times below its actual value. The Judgment below should be reversed.

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