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

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Defendants submit this brief in opposition to Plaintiff's ("Plaintiff" or "NYAG") Motion for Partial Summary Judgment (NYSCEF 765).

INTRODUCTION

Donald J. Trump, the 45th President of the United States, made many billions of dollars being right about real estate and other investments. In fact, the record proves conclusively his assets and brand are worth many billions more than reflected in the very Statements of Financial Condition ("SOFCs") Letitia James, the New York Attorney General, shamelessly criticized even before seeing the numbers or actual evidence. President Trump has built a multi-billion-dollar, global corporate empire propelled by one of the most recognized and powerful brands in the world. At the center of his vast business empire sits a diverse real estate portfolio of luxury hotels, golf courses, social clubs, commercial buildings, and other real estate holdings comprised almost exclusively of prestigious, ultra-valuable, trophy properties, akin to treasured works of art. Whether it be Trump Tower on 5th Avenue in New York, the iconic Mar-a-Lago Club in Palm Beach, Florida, Doral National in Miami, Florida, the renowned Trump Turnberry Hotel and Resort in Scotland, or countless other properties, the record proves conclusively—*which notably, after reviewing the evidence, the NYAG does not dispute and has now altered her theory to justify her senseless lawsuit*—that President Trump's assets and other investments are worth many billions of dollars in excess of what the NYAG originally claimed.

To be clear, however, President Trump has not just made substantial sums of money for himself and his namesake companies. Rather, as the evidence now before this Court proves, he also made substantial sums of money for the many large, sophisticated institutions that financed and insured the real estate development projects and investments which are the subject of this lawsuit. The record also proves that throughout all of these successful business transactions with

highly sophisticated banks, President Trump's companies never missed a loan payment, never made a late payment, never defaulted on any loans, and never breached the highly complex, carefully negotiated agreements. No complaints were ever lodged by these large, highly sophisticated banks, insurers, and other institutions, which were represented by the top law firms in the country, and which were fully aware of the *powerful disclaimer clauses* highlighted in every SOFC. To the contrary, bankers responsible for reviewing, approving, and servicing the loans herein at issue have testified under oath that President Trump was a highly valued client, was never in default, and they were never "defrauded" as the NYAG claimed in her high-profile public relations lawsuit. Indeed, these bankers effectively stated, "what are we doing here?"

Yet despite same, the NYAG has maligned, demeaned, and libeled President Trump and his entire family via an opportunistic lawsuit filed for political gain. From the outset, the NYAG's specious claims that President Trump and his companies somehow misled and fraudulently induced these large, sophisticated, and well represented institutions to finance and insure his projects, have been replete with politically incendiary rhetoric but lacking in any substance whatsoever. The NYAG now wrongfully and baselessly asks this Court to ignore the evidentiary record in favor of her own, selective and unrealistic narrative, to ignore the mandate of the First Department, and to substitute her uninformed judgment for that of the sophisticated counterparties engaged in these complex, and highly successful transactions. However, the day of reckoning has arrived, and the record evidence exposes a complete lack of support, dooming her case, as her original premise failed.

The record herein establishes the NYAG has wasted millions of dollars of taxpayer money to prove what President Trump and his family have always known. That record demonstrates fully

President Trump is, without question, worth many billions of dollars, indeed billions more than what the NYAG claimed when lodging her baseless allegations.

Undeterred, the NYAG nonetheless persists, ignoring the record evidence and, importantly, ignoring the binding mandate of the unanimous Appellate Division, First Department, where the Defendants prevailed conclusively on the statute of limitations issues. The NYAG's "fact" statement[1] consists largely of mere allegations cut and pasted from her Complaint and concerns transactions well outside the applicable statute of limitations period. Moreover, last June, the First Department ruled that the NYAG's claims are "time barred if they accrued—that is, the transactions were completed—before February 6, 2016" and that "[f]or defendants bound by the tolling agreement, claims are untimely if they accrued before July 13, 2014." *People v. Trump*, 217 A.D.3d 609, 611 (1st Dep't 2023). However, instead of taking the honorable step of voluntarily dismissing those time-barred claims, the NYAG has ignored the First Department's decision—shockingly treating it as if it has absolutely no effect on this case. Simply stated, this blatant disregard of both the actual record evidence and the First Department's clear limitations mandate is inexplicable and untenable.

Equally so is her disregard for the First Department's rejection of the continuing wrong doctrine in this case. *See id.* at 611 ("The continuing wrong doctrine does not delay or extend these periods."). Despite this clear holding, the NYAG still relies, inappropriately, on continuing wrong theories to support her decision to recite pre-July 13, 2014, facts on this motion. However, the NYAG simply fails to explain (because she cannot) how conduct and transactions that pre-date July 13, 2014, are actionable.

[1] Defendants' response herein to the NYAG's statement of facts in no way concedes such facts are relevant and/or within the scope of the limitations period.

Additionally, the NYAG's Motion reveals she has now chosen to ignore her own, highly paid experts, no doubt realizing the evidence does not support her claims. The record now demonstrates the NYAG has failed to present, as she must, sufficient evidence the SOFCs had any capacity or tendency to deceive. To the contrary, the SOFC values were well supported, reflecting many billions in net worth. Moreover, each SOFC included unambiguous, powerful disclaimers making it abundantly clear the values set forth therein reflected President Trump's opinion based on an inherently subjective valuation process, and as such each user must and should conduct their own due diligence (which of course all the banks in fact did, and do).[2] This record thus proves there is no basis at all for the NYAG's cries of fraud and foul.

The NYAG also ignores, misconstrues, and misapplies GAAP, ignores the requisite materiality standard, and fails to demonstrate the necessary knowledge and participation by the various named Defendants. She presents only arguments, not admissible evidence, simply insufficient to establish any viable issue remains for trial. Finally, the NYAG avoids having to admit there is no basis under the law supporting her claim for disgorgement, sidestepping the issue by relegating its only mention to a footnote.

In sum, despite the NYAG's politically charged insults and accusations, President Trump (and all of the Defendants) has a great case centered around a phenomenal corporate empire worth billions of dollars more than the NYAG has falsely claimed, very little debt, significant cash and liquidity, powerful disclaimer clauses, paid off loans, and banks extremely pleased with highly profitable loan transactions. There was no fraud. There are no victims. Accordingly, the NYAG's

[2] Every SOFC contained numerous disclaimers, including, *inter alia*, the following statement: ***"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.,* NYSCEF 5 at 1.) (emphasis added).

Motion for Partial Summary Judgment should be denied, and summary judgment entered in favor of all Defendants.

LEGAL STANDARD

Summary judgment is only appropriate where there is no genuine issue of material fact, and the moving party has made a *prima facie* showing of entitlement to judgment as a matter of law. *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). The movant must first meet its burden of tendering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issue of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." *Id.* (collecting cases). Only then does the burden shift to the opposing party to submit evidentiary proof sufficient to create material issues of fact requiring a trial.[3] *Id.; see Di Sabato v. Soffes*, 9 A.D.2d 297, 300–01 (1st Dep't 1959) (citing *Dodwell & Co. v. Silverman*, 234 A.D. 362 (1st Dep't 1932)). Moreover, a summary judgment movant is barred from advancing new arguments in its reply papers.[4] *Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 625 (1st Dep't 1995). Therefore, to the extent the NYAG failed to raise legal issues in her primary brief, she has abandoned those arguments. *See JPMorgan Chase Bank, N.A. v. Luxor Cap., LLC*, 101 A.D.3d 575, 576 (1st Dep't 2012); *Shaw v. Bluepers Fam. Billiards*, 94

[3] To the extent there is simply competing expert testimony on any point, the Court cannot resolve such dispute at this stage. *See Krasniqi v. Korpenn LLC*, 158520/2013, 2018 WL 5309753, at *11 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 24, 2018) (collecting cases)).

[4] The NYAG cannot change course in her reply brief, pointing to new evidence to show materiality or participation and knowledge (to the extent any exist, which Defendants contend it does not). In *NexBank, SSB v. Soffer*, the court faced dueling motions for summary judgment and denied the plaintiff's request to supplement its expert disclosure with more expert reports, finding that the plaintiff had "made the calculated decision to prove damages exclusively through . . . . its lay witness testimony and documentary evidence" and "chose not to rely on expert testimony." 2018 652072/2013, 2018 WL 2282884, at *2 (N.Y. Sup. Ct. N.Y. Cnty. May 18, 2018). Here, the NYAG has not introduced expert testimony or developed other evidence to support her claims and has instead decided to regurgitate the Complaint, arguing that the alleged differences in value are so great they must be material.

A.D.3d 858, 860 (2d Dep't 2012); *O'Sullivan v. O'Sullivan*, 206 A.D.2d 960, 960 (4th Dep't 1994).

ARGUMENT

I. The First Department Statute of Limitations Decision is Binding Law of the Case

Under "the doctrine of the 'law of the case,' . . . when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned." *Tischler v. Key One Corp.*, 67 A.D.2d 886, 886–87 (1st Dep't 1979); *see People v. Evans*, 94 N.Y.2d 499, 502 (2000) ("[A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction.") (citations omitted). The doctrine applies to preclude relitigating any issue that is "judicially determined, either directly or by implication . . . in the course of the same litigation," *Holloway v. Cha Cha Laundry, Inc.*, 97 A.D.2d 385, 386 (1st Dep't 1983) (citation omitted). First Department prior rulings thus constitute the law of the case and are binding. *See Brodsky v. N.Y. City Campaign Fin. Bd.*, 107 A.D.3d 544, 545–46 (1st Dep't 2013) ("[A]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court.") (citation omitted). Such prior rulings must be followed regardless of whether this Court or the NYAG disagrees with its holding. *See* 28 N.Y. Jur. 2d Courts and Judges § 218 ("State trial courts are bound to follow existing precedent of a higher court even though they may disagree with the higher court's decision.") (collecting cases). Nor can the NYAG "avoid the preclusive effect of the prior rulings just by adding a new legal argument." *Perez v. State*, No.112317, 2011 WL 5528963, at *5 (N.Y. Ct. Cl. Aug. 5, 2011) (collecting cases).

Here, the First Department clearly defined the applicable statute of limitations periods, holding that the NYAG's claims are "time barred if they accrued—that is, ***the transactions were completed***—before February 6, 2016" and that for those Defendants "bound by the tolling

agreement, claims are untimely if they accrued before July 13, 2014." *Trump*, 217 A.D.3d at 611 (emphasis added). The First Department also rejected application of the continuing wrong doctrine in this case, holding that "[t]he continuing wrong doctrine does not delay or extend these periods." *Id*. These rulings are binding.

Yet the NYAG ignores the First Department's ruling, mentioning it only *twice* in her 61-page memorandum of law. (NYSCEF 766 at 5, 56). NYAG fully ignores that the First Department established *two* applicable cutoff periods for the transactions at issue—one for Defendants bound by the tolling agreement and one for those who are not bound—rejected the continuing wrong doctrine and held that at least one Defendant was not bound by the tolling agreement. What is worse, NYAG claims that she "reserves the right to argue at trial or in response to Defendants' submissions that an *earlier* cutoff date for timely claims applies." (NYSCEF 766 at 5 n.3) (empahasis added). But the NYAG simply cannot "now raise issues which were previously adjudicated or could have been previously adjudicated by this court in the interlocutory appeal." *KTM P'ship-I v. 160 West 86th St. Partners*, 169 A.D.2d 462, 462 (1st Dep't 1991). The NYAG's apparent attempt to "raise again the very issues previously decided against them on a prior appeal" is "barred by the doctrine of law of the case." *Ometz Realty Corp. v. Vanette Auto Supplies*, 262 A.D.2d 539, 540 (2d Dep't 1999) (internal citations omitted). "[Q]uestions of law that have been resolved by an appellate court on a prior appeal will not be reviewed upon a further appeal to that court." *Local 345 of Retail Store Employees Union v. Heinrich Motors*, 96 A.D.2d 182, 186 (4th Dep't 1983) (citing 4 N.Y. Jur. 2d Appellate Review §§ 453, 454), *rev'd on other grounds*, 63 N.Y.2d 985 (1984).

The purpose of an interlocutory appeal is to resolve disputed issues during the pendency of the underlying trial court action. Thus, when a decision is rendered both the parties and the trial

court must and should implement that decision immediately and redefine the issues for resolution. Here, the First Department provided specific guidance as to the applicable limitations periods and then further directed this Court to determine the full range of Defendants who are not bound by the tolling agreement. *See Trump*, 217 A.D.3d at 611–12. The First Department's mandate must therefore be implemented at this stage and the ruling given effect ***before*** any remaining issues are tried. Thus, this Court should, respectfully, decline the NYAG's blatant invitation to error.

A. The NYAG Is Not Entitled To Summary Judgment On Time-Barred Allegations

The NYAG boldly claims that "the cutoff date for timely claims against all Defendants is at latest July 13, 2014," (NYSCEF 766 at 5, n.3), even though the First Department established that "claims are time barred if they accrued—that is, the transactions were completed—before February 6, 2016" for Defendants who are not bound by the tolling agreement, *Trump,* 217 A.D.3d at 611. However, even if the NYAG is correct in that July 13, 2014, is the operative date for all Defendants, which she is not, she ignores the First Department's ruling that claims accrued in this case when "***the transactions were completed***." *Id.* (emphasis added). Despite this holding, the NYAG continues to base her allegations on transactions that were clearly completed prior to July 13, 2014.

The table below provides shows each transaction, its completion date, and to which Defendants (if any) claims relative to these transactions remain timely:

Transaction	Date Transaction Closed (Accrual Date)	Defendants For Which NYAG'S Claims Are Timely
Seven Springs Loan	July 17, 2000	None
Trump Park Avenue Loan	July 23, 2010	None
Ferry Point Contract	2012	None

GSA OPO Bid Selection and Approval	February 2012	None
Doral Loan	June 11, 2012	None
Chicago Loan	November 9, 2012	None
OPO Contract & Lease	August 5, 2013	None
OPO Loan	August 12, 2014	Only Defendants Bound by The Tolling Agreement.
Buffalo Bills Bid	Transaction never consummated.	None
40 Wall Street Loan	November 2015	Only Defendants Bound by The Tolling Agreement.

Each of the transactions mentioned above is addressed below:

Doral Loan. DB extended a $125 million loan in connection with Trump Endeavor 12, LLC's purchase of the property known as Trump National Doral. (Robert Aff.[5], Ex. AAR ("Defs. SOF") ¶ 103.) This transaction was completed when the "loan closed on June 11, 2012." (Defs. SOF ¶ 115.) Thus, all allegations based on the Doral Loan are time-barred as to all Defendants.

Chicago Loan. DB financed up to $107 million in debt in connection with the Trump International Hotel and Tower, Chicago, in 2012 and a $54 million loan expansion in 2014. (*See* Defs. SOF ¶¶ 124, 137.) The "Trump Chicago loan facilities" were "closed on November 9, 2012," (Defs. SOF ¶ 131), and the amended loan documents implementing the expansion were executed in May 2014. (Defs. SOF ¶ 138.) Thus, the Chicago Loan transaction was "completed," on November 9, 2012. The First Department held that the continuing wrong doctrine does not delay or extend the applicable statute of limitations, meaning the loan expansion does not constitute a separate transaction that would extend the limitations period. *See Trump,* 217 A.D.3d at 611–12. Accordingly, any allegations based on the Chicago Loan are time-barred for all Defendants.

[5] "Robert Aff." refers to the affirmation of Clifford Robert dated September 1, 2023 filed concurrently herewith.

GSA's OPO Contract and Lease. The GSA awarded Trump Old Post Office, LLC the contract to redevelop the OPO property in February 2012, (Defs. SOF ¶ 146), and that the GSA signed the associated OPO lease with Trump Old Post Office, LLC on August 5, 2013, (Defs. SOF ¶ 146.) Thus, any claims based on the OPO Contract and Lease transactions are time-barred for all Defendants.[6]

Deutsche Bank's OPO Loan. DB financed up to $170 million in funds in connection with Trump Old Post Office LLC's purchase and renovation of the OPO. (Defs. SOF ¶ 148.) The OPO Loan was closed "on August 12, 2014." (Defs. SOF ¶ 152.) Accordingly, the NYAG's purported claims based on this transaction are timely only as to Defendants subject to the Tolling Agreement.

Seven Springs Loan. "[I]n ***2000***, Seven Springs LLC took out an approximately $8 million mortgage from Royal Bank America" (later acquired by Bryn Mawr), which was "personally guaranteed" by President Trump. (Defs. SOF ¶ 161.) Despite the obvious fact this transaction was completed more than a decade prior to July 13, 2014, the NYAG contends Seven Springs LLC allegedly made fraudulent representations regarding President Trump's Statements of Financial Condition to "obtain[ ] a series of extensions of the maturity date" of the loan from Royal Bank America and Bryn Mawr Bank in 2001, 2002, 2003, 2006, 2009, 2011, 2014, and 2019. (NYSCEF 1 ¶ 658.) However, the First Department expressly held that the continuing wrong doctrine does not delay or extend the applicable statute of limitations. Accordingly, these loan extensions do not constitute separate transactions that would extend the limitations period. *See Trump*, 217 A.D.3d at 611–12.

[6] The NYAG bases $100 million of its $250 million disgorgement demand on the "asserted profit on the subsequent sale of [the OPO] property." *See* NYSCEF 245 at 53. As explained below *see infra*, Part IV, disgorgement is unavailable to the NYAG as a matter of law. Yet, even if disgorgement were available to the NYAG, there can be no award for disgorgement based on the OPO contract and lease transactions. The same rationale applies to, inter alia, the Doral Loan and the Chicago Loan.

Ferry Point Contract. It is undisputed that an entity affiliated with President Trump's businesses submitted an offer "in 2010" to the City of New York to operate an 18-hole golf course and related facilities at Ferry Point Park, Bronx, NY. (Defs. SOF ¶ 211.) Because the City "grant[ed] . . . the concession" and President Trump "won the contract" in "2012," (Defs. SOF ¶ 213), this transaction was completed and the statute of limitations began to run that year. *See U.S. v. Sabin Metal Corp.*, 151 F. Supp. 683, 687 (S.D.N.Y. 1957), *aff'd,* 253 F.2d 956 (2d Cir. 1958) ("The defendant's bid constituted the offer and the government's acceptance completed the contract.") (citations omitted). Thus, claims based on the Ferry Point Contract are time-barred for all Defendants. *See Trump,* 217 A.D.3d at 611–12.[7]

40 Wall Street Loan. 40 Wall Street LLC refinanced a $160 million mortgage from Capital One Bank, on the office building at 40 Wall Street in New York, with Ladder Capital Finance "[i]n approximately November 2015." (Defs. SOF ¶ 157). Therefore, the NYAG's causes of action based on the 40 Wall Street Loan are untimely as to all Defendants not subject to the Tolling Agreement. *See Trump,* 217 A.D.3d at 611–12.

Buffalo Bills Bid. The NYAG alleges Defendants made misleading statements regarding President Trump's 2013 SOFC figures and personal liquidity as of June 30, 2014, in connection with President Trump's bid package to purchase the Buffalo Bills football team. (NYSCEF 1 ¶ 670.) President Trump's initial bid was submitted "in July 2014." (Defs. SOF ¶ 208.) However, President Trump never entered into a contract or completed a transaction to purchase the Bills such that there is no transaction upon which the NYAG can base its claim. *See S.S.I. Invs. Ltd. v. Korea*

[7] Notably, the NYAG made no mention of the Ferry Point Contract in her summary judgment papers. Thus, she has abandoned this argument, *see JPMorgan*, 101 A.D.3d at 576; *Shaw*, 94 A.D.3d at 860; *O'Sullivan*, 206 A.D.2d at 960, and this Court should grant summary judgment in favor of Defendants dismissing as untimely all of NYAG's causes of action to the extent they are based on the Ferry Point Contract, *see e.g., MLRN LLC v. U.S. Bank, N.A.*, 217 A.D.3d 576 (1st Dep't 2023); *Tesciuba v. Shapiro*, 166 A.D.2d 281, 282 (1st Dep't 1990).

Tungsten Mining Co., 80 A.D.2d 155, 161 (1st Dep't 1981) ("[A] bid is nothing more than an offer. No legal rights are created until the offer has been accepted."); *Sabin Metal*, 151 F. Supp. at 687 (noting that an "invitation to bid [is] merely a request for offers and . . . not an operative offer" while "acceptance [of the bid] complete[s] the contract"). Because the bid did not constitute a completed transaction as a matter of law, and because the bid was submitted outside the limitations period, summary judgment is proper in favor of all Defendants.[8]

***Trump Park Avenue Loan*.** Investors Bank financed a $23 million loan collateralized by Trump Park Avenue on July 23, 2010. (Defs. SOF ¶ 165.) Given the July 23, 2010, completion date, any claims related to that financing agreement are time barred against all Defendants.

Unfazed by the First Department's clear mandate, the NYAG now argues that Defendants submitting "annual financial disclosures" or "certifications" and lenders conducting "annual reviews" of the loans after they closed somehow extends the completion dates and makes these transactions timely. (*See, e.g.*, NYSCEF 766 at 5, 34). For the OPO Loan, specifically, NYAG relies on "a series of draws over time" that were made on the construction loan. (NYSCEF 766 at p.41). But this is merely a veiled attempt to rely on the continuing wrong doctrine that the First Department already rejected in this case. *See Trump*, 217 A.D.3d at 611. Indeed, ***the NYAG briefed these exact arguments before the Appellate Division***:

> Here, defendants' scheme involved . . . continuing wrongs. For example, the Deutsche Bank loans imposed an ongoing requirement to annually submit the Statements and certify their truth and accuracy, and defendants repeatedly did so despite the misrepresentations in the Statements. Such subsequent and repeated false and misleading submissions made in connection with an initial

[8] As with Ferry Point, the NYAG made no mention of the Buffalo Bills Bid in her summary judgment papers and has therefore abandoned this argument, *see JPMorgan*, 101 A.D.3d at 576; *Shaw*, 94 A.D.3d at 860; *O'Sullivan*, 206 A.D.2d at 960, and this Court should grant summary judgment in favor of Defendants dismissing as untimely all of the NYAG's causes of action to the extent they are based on the Buffalo Bills Bid. *See e.g.*, *MLRN LLC*, 217 A.D.3d 576.

> financial relationship constitute continuing wrongs. For the Old Post Office loan, defendants also repeatedly requested disbursements conditioned on their certifying the truth and accuracy of the previously submitted Statements.

Br. for Resp't, *Trump*, No. 2023-00717, 2023 WL 4552508, at *48 (citations omitted). The First Department's rejection of these arguments was unequivocal. *See Trump*, 217 A.D.3d at 611 ("The continuing wrong doctrine does not delay or extend these periods."). Moreover, when the NYAG suggested during oral argument that resubmission of the SOFCs for purposes of recertification or disbursement were additional fraudulent acts, the First Department firmly stated that that sort of conduct was "the quintessential" example of the "effects of an earlier breach," not independent wrongs. Recording of Oral Argument at 1:18:00–09, *Trump*, No. 2023-00717 (1st Dep't June 6, 2023). Simply, the First Department's rejection of the continuing wrong doctrine constitutes the law of the case and the NYAG and this Court are bound to adhere to that ruling.

B. "All" Defendants Are Not Bound By The Tolling Agreement

Without any support, the NYAG flatly "takes the position that . . . all of the Defendants are bound by the August 2021 tolling agreement." (NYSCEF 766 at 5, n.3). However, New York law and the record establish the agreement did not bind the unmentioned, non-signatory Defendants—President Trump, Donald Trump Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney (collectively, the "Unnamed Individuals"), and/or The Donald J. Trump Revocable Trust ("Trust").

First, the NYAG is judicially estopped from taking this position as (1) it directly contravenes her own express arguments that the agreement only binds the Trump Organization itself and none of the Unnamed Individuals and (2) the NYAG obtained favorable rulings in connection with those arguments in prior proceedings. (*see* NYSCEF 835 at 16–17). The doctrine of judicial estoppel "prevents a party who assumed a certain position in a prior proceeding and

secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed." *Herman v. 36 Gramercy Park Realty Assocs., LLC*, 165 A.D.3d 405, 406 (1st Dep't 2018) (citations omitted). For the doctrine to apply, there need be only "a showing that the party taking the inconsistent position had benefitted from the determination in the prior action or proceeding based upon the position it advanced there."*12 New St., LLC v. Nat'l Wine & Spirits, Inc.*, 196 A.D.3d 883, 884–85 (3d Dep't 2021) (citations omitted).

Here, the NYAG previously filed an application in *People v. The Trump Org., et al.*, No. 451685/2020, N.Y. Sup. Ct. (the "Special Proceeding"), seeking to hold President Trump in contempt for his purported failure to comply with a court order relating to subpoena compliance. *See generally,* Special Proceeding, (NYSCEF Nos. 668–75). During oral argument, counsel for NYAG stated: "[t]here is hard prejudice because Donald J. Trump is not a party to the tolling agreement, that tolling agreement *only applies to the Trump Organization.*" (*See* Defs. SOF ¶ 273 (emphasis added).) The court ultimately granted the NYAG's application to hold President Trump in civil contempt and specifically noted that "[the NYAG] correctly states that any delay causes prejudice to the 'rights or the remedies of the State acting in the public interest.' Moreover, each day that passes without compliance further prejudices [the NYAG], as the statute of limitations continues to run and may result in [the NYAG] being unable to pursue certain causes of action that it otherwise would." Special Proceeding, (NYSCEF 758).

Thereafter, the NYAG advanced the same position in writing before the First Department, arguing, "Mr. Trump's noncompliance and efforts at delay . . . prejudiced [the NYAG] given that the limitations period was continuing to run on potential enforcement claims." In putting forth this argument, NYAG stated unequivocally that "[the NYAG] and the Trump Organization entered a six-month tolling agreement, ***to which Mr. Trump was not a party***." (*See* Defs. SOF ¶ 274)

(emphasis added); (Robert Aff., Ex. AY at 39 n.13). The First Department ruled in favor of the NYAG and affirmed the lower court's finding of contempt. *See generally People v. Donald J. Trump, et al.*, 213 A.D.3d 503 (1st Dep't 2023). Given that the NYAG has twice successfully advanced the position that individuals were not bound by the Tolling Agreement, she is judicially estopped from taking a contrary position in the instant proceeding.

Alternatively, the NYAG's prior statements at least constitute a judicial admission. "As a general rule, facts admitted by the pleadings are binding on the parties throughout the entire litigation." 57 N.Y. Jur. 2d Estoppel, Etc. § 63 (collecting cases). Thus, an admission by a party "in a pleading in one action is admissible against the pleader in another suit, provided it is shown 'by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction.'" *Matter of Liquidation of Union Indem. Ins. Co. of N.Y.*, 89 N.Y.2d 94, 103 (1996) (citation omitted). Moreover, "it is irrelevant that the admissions were made in part by counsel . . . and that they were contained in affidavits or briefs." *Id.* (collecting cases). Here, the NYAG filed a signed appellate brief in the contempt proceeding containing the factual statement that "OAG and the Trump Organization entered a six-month tolling agreement, to which Mr. Trump was not a party." (Defs. SOF ¶ 274); (Robert Aff., Ex. AY at 39 n.13, 57). This constitutes a judicial admission that none of the Unnamed Individuals are bound by the Tolling Agreement.

Regardless, NYAG advances this position again without providing *any* additional case law or evidentiary proof to support it outside of the agreement itself. Indeed, the NYAG cites one case, *People v. JUUL Labs, Inc.*, 212 A.D.3d 414 (1st Dep't 2023)—the same one she cited before the First Department—to support the proposition that the First Department found a "corporate tolling agreement applied to corporate affiliates, officers, and directors under language defining the bound

parties similar to language in the tolling agreement here."[9] (NYSCEF 766 at p.5). The only other citation is to the last two paragraphs of the NYAG's statement of undisputed facts which simply state that "per the terms of the agreement, Defendants DJT, Junior, Eric Trump, Allen Weisselberg, and Jeffrey McConney are bound by the tolling agreement" and that "the tolling agreement binds all officer-members of the Trump Organization." (NYSCEF 767 ¶¶ 793–94). These paragraphs in turn cite to no record evidence outside of the tolling agreement itself. (*Id.*). These conclusory statements and arguments do nothing to address—let alone rebut—Defendants' robust legal arguments and record proof the tolling agreement did not bind the Unnamed Individuals.

A valid tolling agreement constitutes an enforceable contract subject to normal rules of interpretation. *See CMI Cap. Mkt. Invs., LLC v. Buchanan Ingersoll & Rooney P.C.*, No. 15601951/08, 2009 WL 5102795, at *3 (N.Y. Sup. Ct. N.Y. Cnty. July 30, 2009). It is a general rule of contract interpretation that a non-signatory is not usually bound to an agreement. *See Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd.*, 124 N.Y.S.3d 346, 352 (1st Dep't 2020); *Capricorn Invs. III, L.P. v. Coolbrands Int'l, Inc.*, No. 603795/06, 2009 WL 2208339, at *8 (N.Y. Sup. Ct. N.Y. Cnty. July 14, 2009) ("Generally, a party that is not a signatory to an executed agreement is not bound to the agreement."), *aff'd*, 886 N.Y.S.2d 158 (1st Dep't 2009); *Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 630 (2013)

[9] The *JUUL Labs* case is irrelevant in light of the several independent arguments advanced by Defendants concerning the non-applicability of the tolling agreement to the individual defendants, to which the NYAG has no retort. Nonetheless, it is worth noting that the *JUUL Labs* case is inapposite and certainly does not stand for the sweeping proposition that the NYAG contends. Notably, the First Department's entire discussion of the parties' tolling agreement is limited to a single, throwaway sentence in which court broadly states that "the motion court correctly concluded that defendants are bound by the tolling agreement into which JUUL entered with the People." *JUUL Labs*, 212 A.D.3d at 417. Moreover, in *JUUL*, unlike here, there was no underlying dispute as to whether the individual defendants in question—the company's two co-founders—had agreed to be bound by the tolling agreement. Indeed, as the NYAG argued in its appellate brief, the individual defendants had acquiesced to the agreement because they "participate[d] as co-founders, senior executives, and board members in JUUL's signing of the tolling agreement" and had not, at any point prior to the commencement of litigation, attempted to "disclaim the agreement." Br. of Resp't, *JUUL Labs*, No. 2022-03188, 2022 WL 18355250, at *61–62 (Oct. 21, 2022).

(noting "the general rule against binding nonsignatories"). To bind an individual to an agreement, the individual must be a direct signatory to the agreement, absent exceptions inapplicable here. *Gerschel v. Christensen*, 128 A.D.3d 455, 456 (1st Dep't 2015) ("Christensen & Barrus was not a party to either tolling agreement. Therefore, its addition as a defendant was untimely, and personal jurisdiction over it was not obtained."); *Georgia Malone & Co. v. Ralph Rieder*, 86 A.D.3d 406, 408 (1st Dep't 2011) ("It is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually."), *aff'd*, 19 N.Y.3d 511 (2012). In order to bind a non-signatory individual, "the party seeking to enforce the unsigned writing must prove the [other party] intended to be bound by the terms of that writing." *Moskowitz v. Herrmann*, No. SC 731/2018, 2018 WL 4291557, at *11 (N.Y. Sup. Ct. Orange Cnty. Sept. 6, 2018); *Freeford Ltd. v. Pendleton*, 53 A.D.3d 32, 40 (1st Dep't 2008). Here, Alan Garten is the only individual who signed the tolling agreement and he did so in his capacity as "EVP/Chief Legal Officer" of the "Trump Organization." (NYSCEF 272.) The individual Defendants—President Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney—are neither named in the agreement nor executed it. Thus, as a matter of law, under the plain language of the contract, the Tolling Agreement does not bind the Unnamed Individuals.

Further, despite calling this "a documents case," (NYSCEF 766 at 2), the NYAG produced no documents to dispute the record evidence showing that the parties did not intend to bind the Unnamed Individuals. Communications between the "Trump Organization" and the NYAG surrounding the agreement confirm this understanding. Previous drafts of the Tolling Agreement explicitly named the Unnamed Individuals and included separate signature blocks for each individual. (Defs. SOF ¶ 269). The final, executed version of the Tolling Agreement contained no

such references nor separate signature blocks.[10] The agreed and knowing removal of the Unnamed Individuals from the final Tolling Agreement itself confirms it does not apply to them. The NYAG offers no evidentiary proof to rebut this record evidence. The NYAG's causes of action involving the Unnamed Individuals are time-barred to the extent that they are based on transactions completed before February 6, 2016.

The Trust is likewise not bound by the tolling agreement. Simply as a matter of black letter trust law, only a duly authorized trustee has the authority to enter into agreements on behalf of a trust. *See* N.Y. Est. Powers & Trusts Law § 11-1.1(b)(17); *Korn v. Korn,* 206 A.D.3d 529, 530–31 (1st Dep't 2022). Thus, a trustee may only "contract as an agent . . . and directly bind the trust estate or the beneficiary" where he is specifically "authoriz[ed] by statute or by the trust instrument" to do so. *Id.*

No trustee signed the Tolling Agreement—either individually or as a trustee with authority to bind the Trust. (Defs. SOF ¶ 267). Only Mr. Garten signed the Tolling Agreement on behalf of the Trump Organization. He is neither a Trustee nor a beneficiary of the Trust. (*See* Defs. SOF ¶ 267.) The Complaint's allegations and other evidence confirm that the various Defendant entities, including "Trump Organization" and the Trust, are "separate entities." (Defs. SOF ¶ 16.) Additionally, there is no evidence showing that the "Trump Organization" or Mr. Garten had the authority to bind the Trust. Plainly therefore, the NYAG's causes of action involving the Trust are time-barred to the extent that they are based on transactions completed before February 6, 2016.

[10] Both the original draft and the final, executed version contained the same footnoted definition of the "Trump Organization" dispensing with any argument that definition somehow includes the Unnamed Individuals who were specifically and knowingly deleted from the Tolling Agreement.

II. The NYAG Fails to Present Sufficient Evidence as to the First Cause Of Action

NYAG moves for summary judgment on her First Cause of Action, a claim under Executive Law § 63(12) for repeated and persistent fraud. There are four elements of a § 63(12) fraud claim of the nature alleged in the First Cause of Action:

(1) there was an act that tends to deceive or creates an environment conducive to fraud, meaning the practice is one likely to mislead a reasonable consumer acting reasonably under the circumstances;
(2) the act was misleading in a material way;
(3) the defendant participated in the act or had actual knowledge of it; and
(4) the act was persistent and/or repeated.

See People v. N. Leasing Sys., Inc., 70 Misc. 3d 256, 267 (N.Y. Sup. Ct. N.Y. Cnty. 2020) (collecting cases). "Ultimately, 'the test for fraud' under § 63(12) 'is whether the targeted act has the capacity or tendency to deceive or creates an atmosphere conducive to fraud.'" *People v. Exxon Mobil Corp.*, No. 452044/2018, 2019 WL 6795771, at *4 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 10, 2019) (quoting *People v. Gen. Elec. Co., Inc.*, 302 A.D.2d 314 (1st Dep't 2003)). "[E]vidence regarding falsity, materiality, reliance and causation" are "plainly . . . *relevant* to determing whether the Attorney General has established that the challenged conduct has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *Domino's,* 2021 WL 39592, at *10.

The NYAG has not carried her burden on these elements of the § 63(12) claim. The NYAG misconstrues and misapplies GAAP, fails to establish that the SOFCs, the center of her case, are in fact misleading or false, presents an insufficient valuation analysis, and ignores materiality.

A. The NYAG Fails To Show That The SOFCs Were False Or Fraudulent

To succeed on her § 63(12) claims, the NYAG bears the initial burden to establish the valuations contained in the SOFCs were "false" and "fraudulent." As explained below, the SOFCs complied with GAAP, thus ending the inquiry. Moreover, even setting aside the GAAP compliance, the NYAG fails to offer evidence sufficient to support her own valuations. The purported existence of a disagreement over values does not establish a prima facie case. Put

differently, the NYAG's subjective opinion as to the values set forth in the SOFCs is, simply, irrelevant.

1. The NYAG Misconstrues And Misapplies GAAP

The NYAG alleges repeatedly that the SOFCs violated GAAP, suggesting that any departures from these established standards are significant in this Court's determination of liability. But the NYAG must show that (1) the SOFCs contained departures from GAAP, *i.e.*, either misstatements or omissions; and (2) that those departures, if they exist, were material. (Robert Aff., Ex. AK ("Bartov Aff.") at 11–12.) The NYAG fails to satisfy either burden.

The NYAG cannot declare that "the documents leave no shred of doubt that Mr. Trump's SFCs do not even remotely reflect the 'estimated current value' of his assets". It is necessary for the NYAG to first identify GAAP departures and then test each alleged misstatement or omission against GAAP. This requires the NYAG to show whether each item that it claims is misstated or omitted represents a departure from GAAP and why. The NYAG fails completely to do or show this work.

a. Misunderstandings of Valuation Concepts and Guidance Under GAAP

(a) **Objective Valuation**. The NYAG's allegations regarding the overstated valuations and insufficient disclosures contained in the SOFCs, which are central to their case, are predicated on the notion that there exists such a thing as objective value. But this notion is a fiction. There is no such thing as objective value either in GAAP, economic theory, or in the applicable laws, regulations, and principles that govern this case. (Bartov Aff. at 10-11.) Valuation is an opinion about price and therefore subjective, period. (Bartov Aff. at 10-11); (Robert Aff., Ex. AAAN ("Laposa Aff.") ¶¶ 14–15.) The valuation of an asset is a highly subjective process that depends upon several factors including the selection of a

methodology, assumptions, and benchmarks within a methodology, the discretion surrounding presentation, etc. (Bartov Aff. at 10–11.)

Which valuation methodology to choose and which assumptions to apply depends on GAAP, economic theory, and, perhaps most importantly on the perspective of the person performing the valuation, because that person picks the valuation methods and the underlying assumptions. (Bartov Aff. at 10-11.) Indeed, in order to manufacture its claims that the valuations in the SOFCs were inflated, the NYAG appears to "reverse engineer" its valuations by selecting the lowest possible valuation first, and then backing into the result by choosing the valuation method and assumptions that produces the desired valuation. (Bartov Aff. at 10–11.)

A given asset may be valued in multiple different ways depending upon who is doing the valuation and the objectives, assumptions and world view that person brings to the exercise. (Bartov Aff. at 10-11); (Laposa Aff. ¶¶ 9–12, 15.) Even an appraiser can deliver a wide range of values depending upon the objective of the client and various subjective factors. (Laposa Aff. ¶ 11–15.) A bank will seek the lowest valuation to be able to quickly liquidate the asset at fire sale prices if the borrower defaults without suffering a significant loss. That is a very different set of imperatives than Mr. Trump would have had. From Mr. Trump's perspective—the perspective of a creative and visionary real estate developer who sees the potential and value of properties that others do not, not on a year to year time horizon but often decades ahead—the valuation of those properties would have looked very different. And, he was entirely within GAAP guidance and economic theory, and therefore within the law to value the properties as he did. (Bartov Aff. at 9–10.)

(b) **Estimated Current Value and the Use of Appraisals**. FASB ASC 274, *Personal Financial Statements*, governs the preparation of compilation reports like SOFCs and affords preparers of SOFCs significant latitude to choose the valuation methods they may use to value assets and liabilities on compilation reports, and leaves it to the discretion of the preparer which method and assumptions to use. ASC 274 introduces a definition of value for investment properties, unique under GAAP, Estimated Current Value. (Bartov Aff. at 4; Defs. SOF ¶¶ 53–54.) NYAG baselessly and improperly gives primacy to appraisals as the method by which to value investment properties on the SOFCs. (*See, e.g.*, NYSCEF 766 at 10 (comparing SOFC values to appraisal values for Seven Spring property).) But there is no requirement under ASC 274 to determine the Estimated Current Value of investment properties based on professional appraisals. In fact, ASC 274 affords substantial latitude to preparers in choosing valuation methods and assumptions, and specifically guides that appraisals are only one of several inputs preparers may consider in determining Estimated Current Value of investment properties. (Bartov Aff. at 8, 12.) GAAP affords preparers substantial latitude in selecting valuation methods and underlying assumptions that may result in substantially different valuations. (Bartov Aff. at 8, 12.) Accordingly, there is no basis for the NYAG or anyone else to impose their view about what an appropriate value is for a given property, and a substantial difference between valuation in the SOFCs and appraisal, per se, is not evidence of inflated values. Where the NYAG states the proper definition of Estimated Current Value, it misapplies the definition by using it synonymously with appraised value.[11] The NYAG conflates the notion of

[11] Current market value is an entirely different measure of value than Estimated Current Value, which is the proper measure of value under ASC 274 for SOFCs.

Estimated Current Value with appraised value and of value either out of ignorance or deliberately because it is the only way they can prevail.

(c) **Valuation Using Fixed Assets Approach**. The NYAG incorrectly and improperly asserts that the fixed assets method is not a proper method to calculate Estimated Current Value. (*See* NYSCEF 766 at 26–27.) The "fixed assets approach" is consistent with both GAAP and economic theory. (*See* Bartov Aff. at 10, 28.) The assertion that "Using the fixed assets approach does not present the golf clubs at their Estimated Current Value because the approach ignores market conditions and the behavior of informed buyers and sellers," (NYSCEF 766 at 27), is unsubstantiated and false. (*See* Bartov Aff. at 10, 28.)

(d) **Inclusion of Brand Premium**. The NYAG incorrectly asserts that it was improper for President Trump to include the value of his brand in the valuation of golf clubs. (NYSCEF 766 at 19.) ASC 274GAAP specifically permits the presentation of internally developed intangibles, such as the brand premium used in the valuation of President Trump's golf clubs, in personal financial statements. (Bartov Aff. at 14, 22, 33.) This valuation method is consistent with ASC 274 and economic theory. (Bartov Aff. at 14, 22, 33.) In addition, presenting President Trump's brand value as a standalone entry in the SOFCs is distinct from including his brand value when estimating the current value of specific investment properties. (Bartov Aff. at 14, 22, 33.) The first primarily represents the value arising from President Trump's ability to capitalize on his brand value in future events such as selling his name to global real estate developers, whereas the second refers to the effect of President Trump's brand value on the value of specific, currently owned properties. (Bartov Aff. at 14, 22, 33.) It was proper for President Trump to declare that his SOFCs did not include his overall brand value. (Bartov Aff. at 14, 22, 33.)

(e) **Selection of Capitalization Rates**. The NYAG assumes there is a "correct stabilized cap rate." (NYSCEF 766 at 24.) But there is no such thing. Capitalization rates are totally subjective estimates subject to estimation error and huge variability because the facts upon which they are based are subject to multiple interpretations. (Bartov Aff. at 19, 22.) Further, the notions of stabilized capitalization rates and stabilized operating income are not GAAP terms and consequently only loosely defined (by economists or appraisers) with no fixed or standard methodology used to calculate them. (Bartov Aff. at 21–22.) Using different measurement rules and assumptions will yield widely varying capitalization rates. (Bartov Aff. at 19.) Thus, which capitalization rate to use is a matter of opinion within the acceptable boundaries of discretion. Nowhere in ASC 274 (or, for that matter, in the entire accounting literature) does it say that one should use a projected capitalization rate rather than a current capitalization rate or any capitalization rate at all. (Bartov Aff. at 21–22.)

(f) **Undiscounted Future Income**. The NYAG improperly claims President Trump "included within the value for many of his properties an amount attributable to the development and sale of residences on undeveloped land without any discount to present value, as if the residences could be immediately planned, developed, and sold," in violation of GAAP. (NYSCEF 766 at 27.) But because neither the amounts that will be collected in the future nor their timing were known, discounting to present value was impossible. (Bartov Aff. at 28.) Thus, President Trump used the only possible approach that was available to him given the data constraints, which is the Estimated Current Value of the assets as if the homes had been sold contemporaneously with when the SOFCs were prepared, which obviously does not require discounting. Given same, this valuation approach was appropriate. (Bartov Aff. at 28.)

b. Misunderstandings of the Disclosure Requirements Under GAAP

(a) **Disclosure of Alternative Valuations**. The NYAG baselessly and improperly asserts that President Trump was required to disclose the existence of alternative valuations such as appraisals in the SOFCs and to Mazars. (NYSCEF 766 at 23.) There is no requirement under GAAP for the preparer to disclose in the SOFC the alternative valuation methodologies he considered and rejected (*e.g.*, appraisals). (Bartov Aff. at 23); (Robert Aff., Ex. AI ("Flemmons Aff.") at Ex. A ¶¶ 63–68.) The existence of appraisals or alternative valuations in the files of the Trump Organization are irrelevant to the question of whether the valuations stated in the SOFCs were compliant with GAAP. Under ASC 274 the preparer may choose from among alternative valuations the valuation he believes best reflects the Estimated Current Value of the asset given his outlook and goals. Also, as GAAP does not govern the relationship between the preparer and the external accountant compiling the SOFC, GAAP do not obligate the preparer to reveal the alternative valuations he considered and rejected to the external accountant that compiled the SOFC. (Bartov Aff. at 23);(Flemmons Aff. ¶ 11.)

(b) **Disclosure of Valuation Methods**. The NYAG baselessly and improperly asserts that GAAP requires the detailed disclosure of valuation methods. (*See, e.g.*, NYSCEF 766 at 14.) ASC 274 does not require the detailed disclosure of the valuation method for each individual asset. ASC 274-10-50-2c states: "Personal financial statements disclosures shall include . . . either of the following: 1. [t]he methods used in determining the estimated current values of major assets and the estimated current amounts of major liabilities [or] 2. [t]he methods used in determining the major categories of assets and liabilities."

The SOFCs satisfied the disclosure requirements in ASC 274-10-50-2c by disclosing the method used in determining the major categories of assets and liabilities. In

addition, on a voluntary basis, the SOFCs also disclosed the valuation methodologies used for determining the Estimated Current Value of some but not all of the investment properties. Since this was done on a voluntary basis, there was no GAAP departure in disclosing the valuation methodologies for only some of the assets. Thus, no disclosure of valuation methodologies is required under ASC 274 and the NYAG attempts to hold President Trump to standards that simply do not exist under GAAP. (Bartov Aff. at 12, 18, 19.)

c. Misunderstandings of Other Issues Under GAAP

(a) **Grouping Together of Assets**. The NYAG baselessly and improperly asserts that the grouping together of assets, such as golf courses, is somehow improper under GAAP. (NYSCEF 766 at 19.) There is no requirement in ASC 274 to report each investment property separately in the SOFC. (Bartov Aff. at 20.) In fact, the accounting literature requires the grouping together of similar assets in order to keep the financial statement concise and this is a standard practice by all companies. (Bartov Aff. at 20.) The SOFCs may have stated the aggregate value of the club facilities, but the clubs were named and sophisticated users of the SOFCs who had access to President Trump and could make inquiries could have asked for a property-by-property breakdown of those assets. Both Mazars and Deutsche Bank knew which properties were included in the aggregate value reported and could have asked about them if they had any reason to be concerned. Further, Mazars did not list this as a departure from GAAP let alone a material departure. Thus, there is nothing unlawful about aggregating assets this way and the NYAG attempts to hold President Trump to standards that simply do not exist under GAAP. (Bartov Aff. at 20.)

(b) **Reporting of Cash**. The NYAG incorrectly acclaims that under GAAP, President Trump should not have included the cash held by the Vornado Partnership under cash in his

SOFCs, and that doing do falsely inflated the SOFCs. (NYSCEF 766 at 24.) The SOFCs do not say "cash" but rather cash and certain other items, clearly indicating that items other than cash were combined with cash under this entry on the SOFCs. (Faherty Aff., Ex. 3 at -37; Ex. 4 at -717; Ex. 5 at -691; Ex. 6 at -983; Ex. 7 at -842; Ex. 8 at -725; Ex. 9 at -790; Ex. 10 at -248; Ex. 11 at -418) Mazars listed as a potential GAAP departure that certain cash positions were reported separately from their related operating entities, further calling to the attention of the reader that the cash from operating entities was reported separately. Faherty Aff., Ex. 3 at -035; Ex. 4 at –715; Ex. 5 at -689; Ex. 6 at -982; Ex. 7 at -841; Ex. 8 -724; Ex. 9 at -792–93; Ex. 10 at -250; Ex. 11 at -420) Further, President Trump fully disclosed the components of "cash" in a footnote as including cash in operating entities. (Faherty Aff., Exs. 3–11 at Note 2; Flemmons Aff., Ex. B ¶¶ 44-47) In addition, the claim that the SOFCs were inflated is invalid. (Bartov Aff. at 26.) Even if the cash held in the partnership was misclassified and should have been reported elsewhere on the SOFCs as an asset (e.g., in the value of the partnership interest), it would not have inflated the total value of cash or President Trump's net worth reported on the SOFCs. (Bartov Aff. at 26.)

(c) **Recording of Escrow Amounts**. The NYAG claims that GAAP does not allow escrow amounts held by the Vornado Partnership Interests to be included on the SOFCs and that doing do falsely inflates the SOFCs. (NYSCEF 766 at 24.) This claim is false. (Bartov Aff. at 26–27.) NYAG does not identify which GAAP was violated and this would be an issue of misclassification and therefore would not have inflated the SOFCs. (Bartov Aff. at 26–27.)

(d) **Value of the Triplex**: Given President Trump's plausible explanation in his deposition testimony, this inaccuracy is inadvertent, and, in particular, is immaterial. To be sure, such

errors in financial reports are not unusual. *See, e.g.*, Bartov, Marra, and Momenté, *Corporate Social Responsibility sand the Market Reaction to Negative Events: Evidence from Inadvertent and Fraudulent Restatement Announcements*, The Accounting Review 96(2), Mar. 2021, at 81–106.

(e) **Reporting of Membership Deposit Liabilities**. The NYAG claims that President Trump was required to determine the present value of the refundable membership deposits rather than reporting the full cash value of the potential liability in the SOFCs. (NYSCEF 766 at 26–27.) Non-recognition of the assumed refundable deposits as liabilities and their disclosure in a footnote align with the FASB definition of liabilities, which requires a commitment to be probable in order to be recognized as a liability in the SOFCs. This, in turn, nullifies the question of whether the liability should have been discounted or not. (Bartov Aff. at 22, 23, 28.)

(f) **Accuracy of Certifications**. President Trump simply did not misrepresent that his SOFCs complied with GAAP. Rather, his certifications that they did are descriptively valid because GAAP does not apply to immaterial values, and the NYAG has failed to show that the items she claims are actionable were materially misleading because it has failed to perform any valid materiality test. (Bartov Aff. at 30–31.)

2. The SOFCs Complied With GAAP

Once the NYAG's misunderstandings of GAAP are corrected, it is apparent that the SOFCs did indeed comply with GAAP, either because the SOFCs contained no misstatements (*i.e.*, departures from GAAP) or, to the extent the SOFCs contained misstatements, those misstatements were immaterial.

The NYAG's allegations regarding the allegedly overstated valuations and insufficient disclosures contained in the SOFCs, which are central to her case, are predicated on the notion that

there exists some "true," "correct," or "objective value," but no such value exists. There is no such thing as true, correct or objective value either in GAAP, economic theory, or in the applicable laws, regulations, and principles that govern this case. (Bartov Aff. at 10–11.) At bottom, a valuation is an opinion and depends upon several factors, including the selection of a methodology, assumptions, and benchmarks within a methodology, and the discretion surrounding presentation. (Bartov Aff. at 10–11); (Laposa Aff. ¶ 12).

Indeed, ASC 274, which as noted above governs the preparation of compilation reports like the SOFCs, affords preparers of SOFCs significant latitude to choose the valuation methods they may use to value assets and liabilities on compilation reports and leaves it to the discretion of the preparer which method and assumptions to use as long as they are reasonably consistent with economic theory. Preparers may rely on methods and assumptions in formulating estimated current values that may be inherently different from those used by appraisers and lenders. (Bartov Aff. at 5, 8-9, 12-13, 18, 23-24.) "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." (Bartov Aff. at 5, 8-9, 12-13, 18, 23-24.) The NYAG refuses to accept this because it fatally undermines her case. The NYAG's allegations that President Trump used inappropriate valuation methods fail to consider the wide latitude in choosing asset valuation methods and the assumptions underlying them, or else misinterpret GAAP. (Bartov Aff. at 5, 8-9, 12-13, 18, 23-24.) The NYAG cannot substitute her own subjective judgments for that of others *ex post facto* and then claim that the Defendants have broken the law.

Second and critically, the NYAG fails to realize that GAAP need not be applied to immaterial terms. (Bartov Aff. at 8, 10, 12, 14-15, 17, 20.) Under GAAP, immaterial financial statement items do not need to comply with the detailed requirements of GAAP. Specifically, ASC

105, Generally Accepted Accounting Principles, provides, "The provisions of the Codifications need not be applied to immaterial items." GAAP guides that immaterial financial statement items do not need to comply with GAAP, and thus allow preparers a reasonable level of flexibility in applying GAAP. In other words, GAAP recognizes that not all accounting errors, violations, or departures from GAAP have a material impact on the inferences of financial statement users. Thus, GAAP only prohibits material violations. (Bartov Aff. at 8, 10, 12, 14-15, 17, 20.)

None of the items on the SOFCs identified by the NYAG as misstatements or omissions were departures from GAAP. (Bartov. Aff. at 8, 10.) To the extent the SOFCs contained departures from GAAP (which they did not), the record establishes that any such departures were immaterial from the viewpoint of the sophisticated banks and underwriters who received the SOFCs. (*See* Bartov Aff. at 14-15, 17, 26-27, 31, 34.) The NYAG fails to offer any contrary materiality analysis.

3. The NYAG Has Not Produced Evidence Sufficient To Support Her Valuation Claims

The NYAG's claims fail even if ASC 274 did not apply and did not afford wide latitude in the selection of valuation methods. Here, rather than engaging with each element of a § 63(12) claim, the NYAG loosely asserts that President Trump's assets were so greatly inflated that there must be a § 63(12) violation. NYAG claims that "[b]ased on work done by [NYAG's] valuation and accounting experts in correcting the Trump Organization's valuations to properly account for market factors that a willing buyer and willing seller would consider in determining 'estimates of current values,' Mr. Trump's net worth in any year between 2011 and 2021 would be no more than $2.6 billion, rather than the stated net worth of up to $6.1 billion." (NYSCEF 766 at 4 n.2 (emphasis omitted).) But curiously, the NYAG does not attach opinions, depositions, or affidavits

proving this "work done" by her experts.[12] Instead, the NYAG diverts attention away from these failures claiming this is a "documents case." (NYSCEF 766 ("Motion") at 2.) This simplistic approach inappropriately ignores the substance, context and reality of the very transactions herein at issue, and fails to even attempt to establish any capacity of tendency to deceive which cannot be determined in a vacuum. Worse yet, the "documents" the NYAG relies upon, and the expert "work done" she references, fall well short of establishing triable issues of fact exists as to the SOFC valuations.

To succeed on her claims, the NYAG bears the initial burden to establish the SOFC valuations were "false" and/or "fraudulent." If the NYAG does not satisfy this prerequisite, the Defendants need not rebut her claims. New York law makes clear an appraisal report is the appropriate mechanism for determining the market value of a property, and mere estimates of value, rather than a "full appraisal," are "insufficient to raise a triable issue of fact" as to the value of properties.[13] *See White Knight NYC Ventures, LLC v. 15 W. 17th St., LLC*, 110 A.D.3d 576, 577 (1st Dep't 2013)(*citing Trustco Bank v. Gardner*, 274 A.D.2d 873 (3d Dep't 2000)). For the NYAG to defeat summary judgment and then prevail at trial, New York law requires her to proffer something more than a mere estimate of value. *Id.*; *see also*, *Soffer*, 2018 N.Y. Slip Op. 30974[U]

[12] One can only surmise why the NYAG commissioned numerous experts at the cost of a small fortune in taxpayer dollars, only to decline to include their reports, testimony, or affidavits in support of its motion for summary judgment. The obvious inference is that the NYAG, after reviewing the expert reports and testimony of the defense experts, she realized the reports and opinions of her own experts are so flawed they provide no credible basis for her claims.

[13] As noted, under GAAP, there was/is no requirement to support the presentation of Estimated Current Value in the SOFCs with appraisals. Rather, ASC 274 affords substantial latitude to preparers in choosing valuation methods. (Bartov Aff. at 8.) But if the NYAG wants to challenge the valuations in the SOFCs, she must introduce current, valid expert appraisal data (not just rely on outdated "documents") to even get through the courthouse door. Moreover, even if the NYAG had done so, which she has not, same would not necessarily establish the valuations contained in the SOFCs were therefore false or fraudulent.

at *4 ("[E]xpert appraisal evidence is the method for proving the value of real property in litigation") (internal citations omitted).

Here, however, despite alleging forcefully and repeatedly the Defendants engaged in "numerous acts of fraud and misrepresentation" relative to the property values set forth in the SOFCs (*see e.g.*, NYSCEF 1 ¶¶ 1–3), the NYAG has put forward no actual evidence, referring instead only to the "work done" by her experts who admit freely they performed no appraisals.

This is simply not sufficient to raise a triable issue of fact as to the validity of the valuations contained in the SOFCs herein at issue and is alone fatal to the NYAG's claims. Indeed, the NYAG cannot accuse the Defendants of engaging in "numerous acts of fraud and misrepresentation" violative of § 63(12) without then presenting the requisite admissible evidence.

As noted, the NYAG's only reference to these insufficient expert opinions is set forth in a footnote on page four of its Memorandum. (Motion at 4 n.2.) Therein, the NYAG simply makes the conclusory observation that "work done" by her experts proves President Trump's net worth in any given year would be "*no more than $2.6 billion*" and then basically concedes no "full blown professional appraisals" were completed or presented. (Motion at 4 n.2) (emphasis in original). This startling concession establishes (1) President Trump is a billionaire and thus overqualified for any of the loans herein at issue (*See* Robert Aff., Ex. AAD ("Sullivan Dep.") 100:2–8; Robert Aff., Ex. AAE at 16), (2) there could never possibly have been any default under any of the loan agreements at issue in this action (as the minimum net worth covenant never exceeded $2.5 billion (Williams Dep. 190:25–191:10; Sullivan Dep. 81:21–82:4; Vrablic Dep. 305:21–306:16; SOF ¶¶ 116, 130, 148) and (3) the NYAG has not introduced sufficient proof.[14]

[14] The NYAG's failure to include the actual testimony and opinions of her experts concedes the points made by the Defense Experts. The NYAG cannot now supplement the record.

4. Disagreement As To The SOFC Values Does Not Establish Fraud

Property valuation is necessarily subjective. *See e.g.*, Robert Aff., Ex. AAAN at Ex. A at 12–28. Despite this undisputed[15] fact, the NYAG claims necessarily presuppose there is only one "true" or "correct" value for any given property, and deviations from that "true" or "correct" value demonstrate fraud. For example, the NYAG points to certain historical appraisals regarding the 40 Wall Street property[16] and Palm Beach County tax assessor valuations of Mar-A-Lago as essentially definitive proof of false or fraudulent valuations in the SOFCs. (Motion at Tabs 4–5.) However, "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 itself establish any specific valuation is inaccurate or inflated." (Laposa Aff. at Ex. A ¶ 22.) As Laposa opines, the subjective valuation process depends on numerous factors as well as the perspective of the proponent and the purpose of the valuation. (Laposa Aff. ¶ 12.) Thus, an owner or seller of property would have a vastly different viewpoint as to value than a bank or a buyer. (Laposa Aff. ¶ 15.); (Robert Aff., Ex. AAAT at Ex. A ¶¶ 4(e), 7.) This is indeed the essence of the commercial real estate marketplace, yet the NYAG seeks to cast such contextual reality aside in favor of her own "true" value.

At best, the record here demonstrates there is a disagreement as to the valuations presented in the SOFCs, valuations which themselves are indisputably and necessarily the product of a subjective process. But the NYAG cannot premise a § 63(12) violation on disagreements over value. The existence of such differing opinions simply does not establish fraud and/or a § 63(12) violation. This reveals further the fundamental and inherent flaw in the NYAG's efforts to apply

[15] The NYAG has not introduced any evidence sufficient to rebut this foundational premise set forth, *inter alia*, in the opinions of Dr. Steven Laposa. Indeed, this concept is so universally accepted the NYAG could not credibly disagree. Therefore, such unrebutted testimony is simply undisputed.

[16] Again, under ASC 274 there was simply no requirement to utilize or rely upon such appraisals in the SOFC valuation process.

§ 63(12) to the subject complex real estate transactions between highly sophisticated corporate parties represented by white-shoe counsel. Indeed, § 63(12) cases address ***objectively*** fraudulent conduct, conduct, *i.e.*, conduct that is demonstrably false or fraudulent. *See, e.g.*, *State v. Cortelle Corp.*, 38 N.Y.2d 83 (1975) (fraudulently inducing distressed homeowners into transfer of title); *People v. Apple Health & Sports Clubs, Ltd., Inc.*, 80 N.Y.2d 803 (1992) (fraudulent consumer health club contracts); *People v. Cohen*, 214 A.D.3d 421 (1st Dep't 2023) (fraud in collection of tenant security deposits); *N. Leasing*, 70 Misc. 3d 256 (fraudulent misrepresentations/unconscionable leases); *People v. Orbital Publ. Grp., Inc.*, 169 A.D.3d 564 (1st Dep't 2019) (false and misleading consumer solicitations); *People v. Ernst & Young LLP*, 114 A.D.3d 569 (1st Dep't 2014) (actively misleading public through accounting manipulations); *Gen. Elec. Co.*, 302 A.D.2d 314 (defective dishwashers); *People v. Am. Motor Club, Inc.*, 179 A.D.2d 277 (1st Dep't 1992) (fraudulent consumer insurance contracts); *State v. Solil Mgmt. Corp.*, 128 Misc. 2d 767 (N.Y. Sup. Ct. N.Y. Cnty. 1985), *aff'd*, 114 A.D.2d 1057 (1st Dep't 1985) (rent overcharges); *People v. Applied Card Sys., Inc.*, 27 A.D.3d 104 (3d Dep't 2005) (misleading consumer credit card solicitations); *People v. JUUL Labs, Inc.*, No. 452168/2019, 2022 WL 2757512 (N.Y. Sup. Ct. N.Y. Cnty. July 14, 2022) (failure to disclose known health risks of e-cigarettes); *People v. Coventry First LLC*, 52 A.D.3d 345 (1st Dep't 2008) (bid-rigging and anti-competitive schemes in life settlement contracts); *New York v. Feldman*, 210 F. Supp. 2d 294 (S.D.N.Y. 2002) (bid-rigging at public stamp auctions); *New York v. Gen. Motors Corp.*, 547 F. Supp. 703 (S.D.N.Y. 1982) (automobiles sold with faulty parts); *State v. Bevis Indus., Inc.*, 63 Misc. 2d 1088 (N.Y. Sup. Ct. N.Y. Cnty. 1970) (deceptive sales practices in consumer merchandise transactions); *State v. ITM, Inc.*, 52 Misc. 2d 39 (N.Y. Sup. Ct. N.Y. Cnty. 1966) (unconscionable consumer installment sales contracts).

5. The NYAG's Representations As To The Values Of Each Property Are Erroneous

Defendants address below the myriad defects in the NYAG's attempted presentation of "true" or "correct" values.

a. Mar-A-Lago

The NYAG claims in her MSJ that utilizing tax records and assessed values is the appropriate basis for determining the estimated current value of Mar-a-Lago. As such, she reports the assessed values of Mar-A-Lago as determined by the Palm Beach County Property Appraiser. But the the use of assessed values as proof the SOFC values were false or fraudulent is simply flawed. "Case law . . . clearly distinguishes between an assessment or assessed value on the one hand, and the full market value or full value of the property on the other." *Briffel v. County of Nassau*, 31 A.D.3d 79, 83 (2d Dep't 2006) (collecting cases). Moreover, it is well recognized that assessed values are not the same as market values, estimated current values, or investment values; assessments may have no correlation to market value whatsoever. Robert Aff., Ex. AO ("Chin Aff.") at 23–24. Therefore, the NYAG's reliance on the assessed value of Mar-a-Lago is inappropriate. Indeed, assessed values do not necessarily equal investment or even market values and offer "minimal value to appraisers." Mark Ratterman, MAI, SRA, *Residential Property Appraisal*, Appraisal Institute, 2020, at 41–42.

The NYAG's approach also ignores completely the opinion of Lawrence Moens, doubtless the most accomplished and knowledgeable ultra-high net worth real estate broker in Palm Beach, Florida. Moens opined that the values for Mar-A-Lago were higher than SOFC values, as reflected in the charts attached to Mr. Moens and Mr. Unell's affidavits. See Robert Aff., Ex. AAAP at Ex. A at App. A; Unell Aff., at 5.

These values establish the SOFC valuations were and are appropriate and indeed conservative. The NYAG ignores this evidence as well as the substantial latitude afforded by ASC 274 to select valuation methodologies.

The NYAG's approach likewise ignores completely the entirety of the applicable covenants, deeds and restrictions relative to Mar-A-Lago[17], choosing instead to advance her own selective and unsupported interpretation.

The NYAG contends incorrectly President Trump somehow gave up his rights to use the Property for any purpose other than a social club when he entered into a Deed of Conservation and Preservation in 1995 (the "Preservation Easement"). (Motion at 13). In doing so, Plaintiff misreads the plain language of the Preservation Easement, as well as the 1993 Declaration of Use Agreement. These documents contain no restriction that would prohibit the Property from being used as an exclusive private residence.

Moreover, the restrictions set forth in the Declaration of Use Agreement and in the Preservation Easement must be strictly construed. Florida law is clear "covenants are strictly construed in favor of the free and unrestricted use of property. Where the terms of a covenant are unambiguous, the courts will enforce such restrictions according to the intent of the parties as expressed by the clear and ordinary meaning of its terms. A covenant which is substantially ambiguous is resolved against the party claiming the right to enforce the restriction." *Norwood-Norland Homeowners' Ass'n, Inc. v. Dade County*, 511 So. 2d 1009, 1014 (Fla. Dist. Ct. App. 1987) (collecting cases); *see also 19650 NE 18th Ave. LLC v. Presidential Ests. Homeowners Ass'n, Inc.*, 103 So. 3d 191, 195 (Fla. 3d DCA 2012) (There is a "general rule of covenant

[17] A complete (and unrebutted) analysis of the applicable covenants, deeds and restrictions is set forth in the affidavit and report of John Shubin. *See* Robert Aff., Ex. AAAQ.

interpretation that requires courts to strictly construe restrictive covenants in favor of the free and unrestricted use of real property") (collecting cases).

Contrary to Plaintiff's contention, there is no requirement in any of the documents that the Property be used exclusively as a private club in perpetuity. Indeed, based on the Town of Palm Beach Zoning Code and the approved 1993 Special Exception Plan (and consistent with the recorded documents), the permitted uses of the Property include *both* its use as a private residence and its use as a private social club.

The Declaration of Use Agreement also provides that the "Club use" may be "intentionally abandoned at any time" and, if it is, "the use of the Land shall revert to a single family residence and the ownership of the Owner." (Faherty Aff. Ex. 107, Art. IX). Similarly, the Rules of the Mar-a-Lago Club expressly reference this language from the Declaration of Use Agreement. The Club Rules further provide that "[m]embership in the Club is acquired on a non-equity basis [and] "does not confer any vested or prescriptive right or easement to use the Club and its facilities[,]" "[m]embers acquire only a revocable license to use the Club and its facilities [and] [t]hey have no ownership or voting interest in the Mar-a-Lago Club, L.C. which operates the Club." (Robert Aff., Ex. AAAQ at Ex. A at Ex. B (Club Rules), § VII (C)).

In addition, nothing in the Preservation Easement requires the grantor (President Trump) to continue to operate a private social club on the Property. Despite the restrictions in the Preservation Easement, it expressly provides that the grantor (President Trump) still has certain rights not requiring further approval by the grantee (National Trust), such as:

(a) "the right to engage in those acts or uses permitted by governmental statute or regulation that are not expressly prohibited or regulated by this Easement;" and
(b) "the right to perform work, exercise the rights and privileges contemplated by, and engage in those uses of the Property permitted by the Plan and by the Declaration of Use Agreement . . . as the Plan and/or the Declaration may be amended from time to time, provided that (i) such uses are not specifically prohibited or regulated by this

Easement. ”

(Faherty Aff., Ex. 93 (“Preservation Easement”) § 5.1(a)(b)).

Plaintiff also misconstrues the 2002 Deed of Development Rights (the “2002 Deed”), which must be construed consistent with the Preservation Easement. The 2002 Deed does *not* prohibit the Property from continuing to be used as a private residence. As noted, the 2002 Deed must be construed consistent with the Preservation Easement, which expressly allows the grantor to engage in uses not prohibited by the Preservation Easement, as well as uses permitted by the 1993 Special Exception Plan and the Declaration of Use Agreement. (Preservation Easement, ¶ 5.1(a)(b)).

Moreover, to the extent necessary, Mar-A-Lago Club, L.L.C., President Trump, and National Trust can agree to amend the Preservation Easement, including to sell the Property as *residential* real estate subject to the preservation of Critical Features and other limitations under the Preservation Easement. (Preservation Easement, ¶ 11).

Also, the Property is currently zoned R-AA (Large Estate Residential) and thus can be used as a single-family home. Under Florida law, “[m]unicipal ordinances are subject to the same rules of construction as are state statutes.” *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 553 (Fla. 1973) (collecting cases). As with state statutes, courts “are prohibited from inserting words or phrases into municipal ordinances to express intentions that do not appear,” *Mandelstam v. City Comm'n of City of S. Miami*, 539 So. 2d 1139, 1140 (Fla. Dis. Ct. App. 1983), and must give the ordinance “the plain and ordinary meaning of the words employed by the legislative body,” here the Town of Palm Beach, *Rinker*, 286 So. 2d at 554 (citation omitted).

Relatedly, “[z]oning laws are in derogation of the common law and, as a general rule, are subject to strict construction in favor of the right of a property owner to the unrestricted use of his property.” *Mandelstam*, 539 So.2d at 1140 (citing *City of Miami Beach v. 100 Lincoln*

Rd., Inc., 214 So. 2d 39 (Fla. Dist. Ct. App. 1968)); *see also Rinker*, 286 So.2d at 553 ("Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner.").

Similarly, for these same reasons, the "landmarked" status of the Property (including its historically significant Critical Features) do not prohibit its use as an exclusive private residence.

b. 40 Wall Street

As detailed in the Chin Affidavit (*see* Chin Aff. ¶¶ 38-44), the NYAG's reliance on the 2011 and 2012 Cushman & Wakefield ("Cushman") appraisals[18] of 40 Wall Street to discredit both Cushman's 2015 appraisal and the SoFC/Compilation values is erroneous.[19] In actuality, the 2011 and 2012 Cushman appraisals made a significant and consequential series of errors that significantly underestimated the "As Is" values, driven by flawed market rental rate assumptions, an inappropriate terminal capitalization rate selection, and inconsistent per square foot results compared to market data. The 2011 and 2012 report's reliance on a discounted cash flow analysis amplified the underestimation. Cushman's subsequent reappraisal of the property in 2015 more correctly evaluated the property in the context of market rental rates, market conditions, and actual property performance. (*See* Chin Aff. ¶¶ 40-44, Ex. A at 22-24.)

The NYAG makes numerous allegations and assertions regarding the 2015 Cushman Appraisal of 40 Wall Street, calling it **"**improperly inflated." But the 2011 and 2012 Cushman

[18] As noted herein, pursuant to GAAP and ASC 274, the preparers of the SOFCs had no obligation whatsoever to utilize any appraised values or appraisals when computing the various SOFC values. To the contrary, ASC 274 provides such preparers with broad latitude to select a valuation methodology.

[19] The NYAG also utilizes marginally higher values per the 2013 and 2014 Capital One Internal Valuations to compare to 2013 and 2014 SOFC values. As with the 2011 and 2012 Cushman appraisals, the 2013 and 2014 Capital One Internal Valuations were also slow to recognize significantly improving market conditions and improving property occupancy. (Chin Aff. ¶¶ 45-46, Ex. A at 22-24.)

appraisals significantly understated the "As Is" values by using market rental rate assumptions in their discounted cash flow analysis that did not accurately reflect the actual leasing conditions at the property. Additionally, Cushman's market assumptions were unchanged between 2011 and 2012. (Chin Aff. ¶¶ 38-40, Ex. A at 22-24.)

For example, the underestimation of net effective rent in 2011 and 2012 had a magnified impact on the market value over the 15-year projection period. Moreover, the property's attainment of stabilization, which represents a sustainable and consistent occupancy level at market rents, was significantly delayed. By 2015, Cushman made appropriate adjustments to reflect actual leasing and market conditions. In addition to recognizing the need to adjust assumed rental rates to the market, Cushman also recognized the need to change the floor breakdown which increased rental rates faster for mid to higher level locations in the building. (Chin Aff. ¶ 38, Ex. A at 22-24.)

Additionally, Cushman was also slow to recognize significantly improving market conditions and improving property occupancy. A prudent and knowledgeable real estate owner active in real estate leasing would be attuned to improving market conditions as they were occurring, and the positive impact those conditions would have on long term value creation. As such, owners would build occupancy and rental rate as quickly as possible. (Chin Aff. ¶¶ 38-43, Ex. A at 22-24.)

The 2015 Cushman Appraisal reflected significant and substantial adjustments compared to the 2011 and 2012 appraisals. It was evident that Cushman's 2015 appraisal recognized the underestimation of their market rental rate assumptions and incorporated the actual improved occupancy and market conditions into their 2015 discounted cash flow leasing assumptions. While the 2011 and 2012 projections anticipated stabilized net operating income ("NOI") to be achieved by 2026, the 2015 Cushman Appraisal more accurately projected the attainment of stabilized

occupancy with significantly higher rents eight years earlier, or 2018 (vs. 2026). (Chin Aff. ¶¶ 38-44, Ex. A at 22-24.)

Also, the 2011 and 2012 Cushman appraisals also used a capitalization ("cap") rate that was inconsistent with market sales. Cushman's selected cap rate of 7.0% far exceeds the cap rate data that reflects the highest cap rate at 6.74%, approximately 175 basis points higher than the average of Downtown Manhattan cap rates, and 310 basis points higher than the average of Midtown Manhattan cap rates. The Downtown Manhattan sales data reveals that cap rates for properties either under contract or sold in 2012 were on average about 200 basis points lower than those occurring in 2011. This data is consistent with the improving market conditions and increasing property values that Cushman failed to recognize. (Chin Aff. ¶¶ 40-44, Ex. A at 22-28.)

The 2012 Cushman appraisal also misstates its own data regarding "the most recent Investor Survey." While Cushman acknowledges the noted decrease in cap rates (that evidence increasing property values), their analysis does not reflect the on-going improvements in the market. The office selling prices per square foot were also increasing, further reflective of improving market conditions. Thus, all things considered, building owners (and the Guarantor) would have sufficient justification to expect that real estate selling prices, improved property performance, and increased rental rates were reasonably expected to continue. (Chin Aff. ¶¶ 40-43, Ex. A at 24-28.)

Additionally, the Guarantor had a strong understanding of New York market conditions and used a very straightforward method of computing a stabilized NOI for the purpose of calculating their As If valuations included in the annual SoFC/Compilations. The Guarantor employed an "As If" stabilized, static valuation approach that replicated improving property and market conditions, and the lease-up of vacant spaces to stabilized occupancy at higher face rental

rates after excluding free rent and tenant improvement costs. This approach more closely simulates the actual occurrences and provides a more accurate depiction of the property's ultimate condition. (Chin Aff. ¶¶ 40-43, Ex. A at 27-28.)

The differences between how the Guarantor and Cushman evaluated the property in 2011 and 2012 are significant: Cushman used historical actuals that reflected a lower occupancy, while the Guarantor projected NOI on a future stabilized, As If basis. The Guarantor projected NOI figures from 2011 to 2015 ranging from $22,722,000 to $26,234,400, based on the expectations of improving market conditions and property occupancy. These projections were proven accurate as the market and occupancy did indeed improve.[20] (Chin Aff. ¶ 41, Ex. A at 23-28.)

Importantly, the Guarantor projections are supported by the ***actual*** NOI figures achieved at the property. Independent auditor reports provided by Mazars USA LLP, based on Consolidated Financial Statements for the property, revealed that from 2016 through 2019, the adjusted NOI (adjusted for interest attributable to operations, depreciation, amortization, bad debt expense, and loss on abandonment of tenant improvements) at the property ranged from $19,568,012 to $20,647,573. These amounts were consistent with the projected amounts upon stabilization and upon exit/reversion. Coincidentally, these figures align with the 2015 Cushman Appraisal that cited an As Is NOI of $23,203,919. (Chin Aff. ¶ 41, Ex. A at 23-29.)

Further, the 2011 and 2012 Cushman appraisals provided As Stabilized values of $270 million and $260 million, respectively. However, the 2012 Cushman appraisal explicitly stated that their prospective value analysis "Upon Reaching Stabilized Occupancy" took a conservative

[20] As noted in the attached appraisal study, Susanne Ethridge Cannon & Rebel A. Cole, *How Accurate Are Commercial Real Estate Appraisals? Evidence from 25 Years of NCREIF Sales Data*, 37 J. Portfolio Mgmt. 68 (2011), significant evidence exists that appraisals are lagged indicators of value. The study notes that appraisals appear to lag the true sales prices, falling below in hot markets with the largest deviations observed during the peaks and valleys of various real estate cycles.

approach and did not fully acknowledge the potential upside when the property reached stabilized occupancy. This differs from how an informed office building owner would evaluate the asset's value, considering market conditions and growth potential. (Chin Aff. ¶ 43, Ex. A at 24-30.)

The ***actual*** NOI figures further support this perspective. According to the 2016 Consolidated Financial Statements Independent Auditor's Report by Mazars USA LLP, the adjusted NOI was reported as $19,568,012. Using the average cap rate of 4.51% from the 2012 Downtown Manhattan data cited in the 2012 Cushman report, the value of the property is estimated at $434.4 million. This value is $174.4 million higher than the concluded 2012 Cushman stabilized value and $92.8 million less than the Guarantor's 2012 SoFC value. Alternatively, applying a capitalization rate of 4.00% (within the range of the 2012 cap rate data) yields a value of $489.2 million, which is $229.2 million higher than the concluded 2012 Cushman stabilized value and $38.0 million less than the Guarantor's 2012 SOFC value. Thus, the Guarantor's valuations are far more closely aligned with actual performance. (Chin Aff. ¶¶ 43-44, Ex. A at 27-30.)

c. Trump Tower

The NYAG analysis seizes upon a stabilized cap rate for 666 Fifth Avenue of 4.45%. But the overall cap rate based on the purchase was 2.67% whereas the cap rate of 4.45% appears to be a projection (and it is unclear how this was derived). As the projected cap rate is not an artifact of the sale but rather a projection with unsupported assumptions, and is not based on data as of the date of the analysis, it is valid to exclude this sale entirely.

The NYAG Projected Stabilized Cap Rate also fails to consider the complete capitalization rate supporting data. As noted below, utilizing the totality of the sale and capitalization rate data provides a range of cap rates from 2.35% to 4.06%, with an average of 3.22%. Excluding the questioned 666 Fifth Avenue cap rate provides a range of cap rates from 2.35% to 4.06%, with an average of 3.30%, as reflected in the charts in Mr. Chin's affidavit. (*See* Chin Aff. at 17.)

Even after excluding the 666 Fifth Avenue sale, the NYAG Projected Stabilized Cap Rate for 2018 (3.75%) is above all but two of the cap rates provided, while the cap rate for 2019 is significantly above the range of the sales data.

Given the Class A, trophy nature of Trump Tower, one would expect the cap rate to fall at the lower end of the range of sales data. As such, (excluding the 666 Fifth Avenue) a more appropriate cap rate is 2.83%, fully consistent with the cap rates utilized in 2018 and 2019 (2.86% and 2.67%) in the SOFC.

d. Trump Park Avenue

The NYAG embraces a faulty premise when considering the potential conversion of the rent stabilized units in the Trump Park Avenue property. The NYAG's valuation approach is based on an outdated 2010 appraisal conducted by the Oxford Group. But this approach considers only the then current rental state and does not consider the property's ultimate highest and best use which is to sell the individual condominium units unencumbered by rent-stabilization. An owner would, appropriately, adopt a different valuation approach.

Despite uncertainties regarding the timing of unit vacancies due to tenant rights, rent-stabilized units offer substantial investment upside potential driven by favorable market dynamics, future rental appreciation prospects, and the ability to capitalize on tenant turnover. As tenants maintain long-term occupancy in rent-stabilized units, the disparity between market rents and contract rents widens. However, the value of the condominiums underlying these units continues to increase, benefiting from limited supply, high demand for desirable locations, and the introduction of new inventory at premium prices. The owner's ultimate economic opportunity arises when units become vacant, enabling them to reset rents to market rates and realize a significant increase in rental income, or sell the unrestricted units at market prices. Renovations

and improvements can further enhance rental income and attract higher-paying tenants or facilitate the sale of units at premium prices.

Thus, the rent-stabilized units have the potential at some point in the future to be converted into unencumbered (by rent stabilization) units. This is the assumption the owner made when assessing potential asset pricing or value. In fact, 6 of the 12 rent-stabilized units were vacated from 2013-2019 thus allowing the owner to then reset rents to market rates and realize a significant increase in rental income, or sell the unrestricted units at market prices and achieve substantial returns above the noted rent stabilized valuation of $62,500.

As the owner has the latitude to adopt an As If perspective for purposes of SOFC preparation, the SOFC values are adequately presented from that perspective. Simply because the NYAG disagrees and adopts an alternative approach does not prove the SOFC values were false or fraudulent.[21]

e. Seven Springs

For the Seven Springs property, the SOFCs incorporated a commonly used profitability analysis employed by developers. This analysis presumed the development of the property, projecting revenues expected to be received, the estimated costs, and the net profits to be realized. This analysis, which evaluates the potential profitability of development, was used in the SOFCs between 2011 and 2014.

When the business plan for the property changed in 2015 (to the development or sale of a portion of the property and the donation of the remainder for conservation purposes), the property was no longer held for development and was instead reported in a category noted as Other Assets

[21] The NYAG also claims an option price (between President Trump and his daughter) to purchase the Penthouse A unit is to be utilized in the SOFC valuations. But this is not at all an arms-length price indicative of the market. (Chin Aff. at 15) By contrast, the use of an offering price would be considered more reliable. (Chin Aff. at 15.)

in the SOFCs. The SOFC values were then adjusted to reflect the change. This explains the differential.

Also, the summary analysis performed by Mr. Chin (Chin Aff. at 11-14, Ex. A 20-23) demonstrates the propriety of the SOFC valuations. This analysis demonstrates the true difference between the SOFC and 2015 appraisal was minimal as compared to the substantially overstated noted difference as presented in the NYAG's inconsistent comparison.

f. 1290 Avenue of the Americas

For 1290 Avenue of the Americas, the NYAG analysis utilizes outdated source data which fails to account for marketplace realities. (Chin Aff. at 17-20) The use of the 2012 Cushman appraisals to project values in a rapidly increasing market is not reflective of valuation principals and sound valuation methodology. (Chin Aff. at 17-20) The NYAG analysis also fails to consider the Guarantor's perspective in deployment of the valuation methodology. (Chin Aff. at 17-20) Thus, even using the outdated (and flawed) Cushman data, incorporation of the Guarantor's legitimate perspective yields results consistent with the SOFC valuations, with any differences considered immaterial. (Chin Aff. at 17-20)

First, the NYAG provides values from 2012-2019 utilizing only the 2012 Cushman & Wakefield (Faherty Aff., Ex. 112) appraisal report as the sole Independent Value source. (Chin Aff. at 17-20) This is an incomplete comparison given the NYAG's values utilize static and stale assumptions and valuation metrics from a report dated October 18, 2012. (Chin Aff. at 17-20) During this time period, the Manhattan Office Market saw significant growth. The office selling prices per square foot increased reflecting improving market conditions. (Chin Aff. at 17-20) While the NYAG values remain static from 2012-2013 and increase only 15% in 2014 and remain static until 2016, the prices per square foot for Class A commercial office buildings increased over

70 percent between 2011 and 2015, while capitalization rates decreased during this same period. (Chin Aff. at 17-20)

Moreover, the NYAG's 2018 and 2019 values utilized a stabilized cap rate from the 2012 Cushman report but the actual market data over this time period reflects decreasing cap rates. (Chin Aff. at 17-20) The decrease in cap rates seen in the market would suggest significant value appreciation, consistent with that seen in other Manhattan office properties during this timeframe. (Chin Aff. at 17-20) The NYAG analysis ignores this actual data.

Finally, the NYAG and Cushman fail to acknowledge the potential upside when the property reached stabilized occupancy. (Chin Aff. at 17-20) An informed office building owner would evaluate the asset's value to consider market conditions and growth potential. (Chin Aff. at 17-20)

Next, the SOFC/Compilations include various investment value estimates that are based on certain reasonable assumptions made by the Guarantor (i.e., As If stabilized, As If Projected or Anticipated, and As If earned). (Chin Aff. at 17-20) The SoFC valuations for 1290 Avenue of the Americas property consistently adhere to this premise, thus it is essential to distinguish that these estimates are specific to the Guarantor's perspective of its assets and differ materially from the views of the NYAG.

Although there are numerous issues noted above regarding the use of the outdated 2012 Cushman appraisal, even if one were required to use this one data source, the rational and logical use and of this report to project future values similar to the SOFCs noted As If stabilized or As If Projected values is detailed below. Applying the 4.50% capitalization rate per the 2012 Cushman report provides a value of $3,200,000. This value would be consistent with the SoFC investment value estimates on an As If Projected or Anticipated / As If earned basis. (Chin Aff. at 17-20)

While immaterial variations in the yearly figures are present, the average implied cap rate from the Cushman projections over this time period is consistent with that utilized in the SoFC. (Chin Aff. at 17-20) Doing so then yields the revised Independent Values of the DJT Share presented below. While there are both increases and decreases from the noted SOFC values, the total difference over time is immaterial. (Chin Aff. at 17-20) Moreover, such fluctuations represent the impacts of varying legitimate inputs as part of an inherently subjective valuation process. as reflected in the chart in Mr. Chin's affidavit. (Chin Aff. at 19)

g. Doral

Notably, the NYAG fails to even mention the extraordinary success achieved through the Doral investment and the impact of that success on the SOFC valuations. The property was purchased in 2011 for $150 million. Defs. SOF ¶ 102. Thereafter, investments and improvements were made by the Trump team which resulted in a physical and financial transformation of the property. Today, the property is worth, conservatively, more than one billion dollars. *See* Chin Aff. at 19–21 (citing the 2022 Newmark Doral presentation).

When considering this value, it becomes apparent the SOFC values were over time always under-reported. This, contrary to the NYAG's core claims regarding value inflation, the SOFCs employed a conservative approach. When adjusting for actual value based on historic data, the values for each year (2014–2021) are as set forth in Mr. Chin's charts. (*See* Chin Aff. at 22.)

As illustrated by Mr. Unell's analysis and reflected in the charts therein, once these values are incorporated into the SOFCs, it is equally apparent that the reported net worth numbers were actually lower, not higher. *See* Unell Aff. at 4.

Of course, none of this is reflected in the NYAG's alleged proof, and all her experts conveniently ignored any mention of the Doral property.

B. NYAG Fails to Address Materiality, A Key Element Of Her § 63(12) Claim

As this Court's prior Order stated, Executive Law § 63(12) empowers the NYAG "to seek to remedy the deleterious effects . . . of *material* fraudulent misstatements issued to obtain financial benefits." (NYSCEF 458 at 5) (emphasis added). Materiality is a key element of the alleged offense.[22] Yet, in her 61-page memorandum of law, the NYAG never discusses materiality.

With respect to materiality, New York law tracks that of the federal courts. *City Trading Fund v. Nye*, 72 N.Y.S3d 371, 378 (N.Y. Sup. Ct. N.Y. Cnty. 2018); *see also Exxon Mobil*, 2019 WL 6795771 (turning to federal securities law for its materiality standard). To define materiality in the securities law context federal courts utilize a "reasonable investor" standard, asking whether such "reasonable investor would have found that the information about a quantitative and qualitative impact of the transactions significantly altered the total mix of information available." *People v. Greenberg*, 95 A.D.3d 474, 485 (1st Dep't 2012) (citation omitted). When evaluating the allegations of a fraudulent misrepresentation claim, "New York takes a contextual view, focusing on the level of sophistication of the parties, the relationship between them, and the information available at the time of the operative decision," *JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 406 (S.D.N.Y. 2004). Thus, "[s]ophisticated business entities are held to a higher standard," *id.* at 406, and they are expected "to protect [themselves] from misrepresentations," *Solutia Inc. v. FMC Corp.*, 456 F. Supp. 2d 429, 450–51 (S.D.N.Y. 2006). Sophisticated parties include large banks, insurance companies, and multinational corporations—exactly the types of entities relevant to these proceedings. *See, e.g.*, *St. Paul Mercury Ins. Co. v.*

[22] At the motion to dismiss stage in these proceedings, the NYAG asserted that she does not in fact need to prove materiality, (*see* NYSCEF 380 at 17, n.5), but does not repeat such argument at this stage. Further, the case on which the NYAG relied for this statement clearly does not stand for the proposition the NYAG claimed. *See Domino's*, 2021 WL 39592, at *10 (finding evidence regarding materiality "plainly *relevant* to determining whether the Attorney General has established" a § 63(12) claim).

M&T Bank Corp., No. 12 Civ. 6322(JFK), 2014 WL 641438, at *6 (S.D.N.Y. Feb. 19, 2014); *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 949 F.2d 569, 574 (2d Cir. 1991) (designating "insurance companies" as "sophisticated business entities"); *In re Residential Cap., LLC*, No. 12-12020 (MG), 2022 WL 17836560, at *31 (Bankr. S.D.N.Y. Dec. 21, 2022) (designating "multinational corporation" as "a sophisticated party").

Further, in assessing this issue, the Court's inquiry should be focused on the "real-world impact" of the alleged misrepresentations. *Domino's*, 2021 WL 39592, at *24. As explained by the *Domino's* court:

> [E]vidence regarding falsity, materiality, reliance and causation plainly is *relevant* to determining whether the Attorney General has established that the challenged conduct has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud . . . . ***In determining whether certain conduct was deceptive, surely it is relevant whether members of the target audience . . . were actually deceived. Similarly, if the evidence showed that the alleged false statements had no real-world impact (that is, no reliance or causation), that would speak to the question of whether the challenged conduct was unlawfully deceptive or fraudulent.***

Id.(emphasis added); *see also People v. Tempur-Pedic Intern., Inc.*, 30 Misc.3d 986, 993 (N.Y. Sup. Ct. N.Y. Cnty. 2011) (finding no violation of § 63(12) where NYAG had "submitted no evidence to show that retailers were misled or deceived in any way"); *Exxon Mobil*, 2019 WL 6795771, at *2 (finding no violation of § 63(12) where the NYAG had "produced no testimony . . . from any investor who claimed to have been misled by any disclosure").

Thus, materiality is not determined in this context from the perspective of "any user" as the NYAG falsely claims, but from the perspective of the ***actual users*** of the SOFCs as same is necessary to evaluate the "total mix of information" available to each user. *Exxon Mobil*, 2019 WL 6795771, at *24. By reducing the standard to "any user," the NYAG attempts to relegate the materiality analysis to a meaningless formality, something completely unsupported under GAAP or by any legal authority. Here, the SOFCs were prepared expressly for and presented only to

highly sophisticated counterparties engaged in complex transactions. The total mix of information made available to them, and, critically, how they actually used the information are essential components in conducting a materiality analysis through the lens of those actual users. (Bartov Aff. at 14-15, 17, 26-27, 31, 34.)

Instead of facing this burden head on, the NYAG focuses only on the misrepresentation aspect of a § 63(12) claim and sprinkles the word "material" throughout the brief to describe alleged misrepresentations. Indeed, under the section entitled "Gross Inflation of Assets" the NYAG asserts that "objective evidence establishes beyond dispute that many assets were grossly inflated by amounts that were ***material*** to any user of the SFCs," (NYSCEF 766 at 9). However, the text that follows that statement does not discuss how this is true and focuses on the nature of the alleged misrepresentations rather than why they are material. Further, despite her clear burden to establish the charged conduct was misleading in a material way, *N. Leasing*, 70 Misc. 3d at 267, and repeated references in the Complaint to "material misrepresentations" (*i.e.*, NYSCEF ¶ 19), the word "material" does not appear even once in the argument section of the NYAG's brief, (NYSCEF 766 at 53–60). The NYAG's claims fail as she has not even attempted to explain or show how the alleged misrepresentations at issue in this case were material to the actual recipients of the SOFCs. Furthermore, the testimony of DB's own witnesses demonstrate that neither President Trump, Donald Trump, Jr. or Eric Trump made any materially misleading statements to the Bank.[23]

[23] For example, DB Managing Director David Williams, a key corporate officer involved in the decisions relative to the loans at issue, testified that President Trump "had a verifiable net worth in a top tier of the regional market." (Defs. SOF ¶ 80.) Even if President Trump had a net worth of $1 billion, the pricing on the loans would have remained the same because a net worth in excess of $1 billion constitutes a strong guarantor. (Defs. SOF ¶¶ 79.) Numerous DB representatives, including Mr. Williams, Ms. Vrablic, and Mr. Sullivan, testified they did not believe there were any material misrepresentations made to the PWM division on these loans. (Defs. SOF ¶ 97.) For example, Ms. Vrablic explicitly testified under oath that she did not believe that either President Trump, Eric Trump or Donald Trump, Jr. made any materially misleading statements to Deutsche Bank. (Defs. SOF ¶ 97; Robert Aff., Ex. AAB, Vrablic Dep.

III. Defendants Are Entitled To Summary Judgment On The First Cause Of Action

In addition to the foregoing, the record herein is devoid of any evidence of harm, leaving the NYAG without authority to prosecute this case. Further, unlike the NYAG, the Defendants have put forth a sufficient record of undisputed evidence consisting of documents, expert affidavits and reports, and testimony of experts and fact witnesses—***including testimony of the very individuals the NYAG claims were targets of the Defendants' alleged fraud***—that establish (1) the NYAG lacks authority to maintain this action, (2) there is no record evidence of any harm and the SOFCs had no capacity or tendency to deceive[24] and (3) that several Defendants were in no way involved in the preparation of the SOFCs nor had actual knowledge of any misrepresentations within them.

A. The NYAG Lacks Authority To Maintain Suit

The record is devoid of any evidence establishing any impact on anyone, not the

229:16-23, 229:25-230:7, 234:17-20, 235:8-16. Mr. Williams explicitly informed the NYAG when he was interviewed previously that he was not concerned about whether any of the SOFCs were misleading. (Defs. SOF ¶ 98.) Even now, Mr. Williams has no concern that the SOFCs were misleading. (*Id.*) DB believed President Trump had a "proven successful track record in the United States commercial real estate market" and based its loan decision on President Trump's financial profile, the client's "historical successes," the banks' due diligence, and the adjustments to President Trump's reported values. (Defs. SOF ¶ 114.) This testimony squarely refutes any notion the SOFCs had any capacity or tendency to deceive. The record demonstrates these are sophisticated counterparties that conducted their own analysis and made valid, and profitable, business risk decisions.

[24] The NYAG makes much of Mazars' withdrawal letter advising the Defendants that the SOFCs should no longer be relied upon, citing it to support their allegation that the SOFCs contained misstatements and omissions. (NYSCEF 766 at 8.) But the letter provided no explanation or evidence whatsoever for that assertion. In fact, Mazars performed no audit, a necessary condition for opining on the SOFCs, so Mazars was in no position to release this statement. It thus follows that the letter provides no credible basis for the NYAG's allegation that the letter "in and of itself supports a finding that the SFCs were false." (*Id.*)

Moreover, Mazars' assertion that the SOFCs should no longer be relied upon constitutes a severe violation of the AICPA guidance to external accountants performing a compilation engagement. Specifically, Section.A42 of AR-C 80 provides: "The accountant is precluded from including a statement that the financial statements are not in conformity with the applicable financial reporting framework because such a statement would be tantamount to expressing an adverse opinion on the financial statements as a whole. Such an opinion can be expressed only in the context of an audit engagement."

counterparties to the various transactions at issue and not the public marketplace. In such case there is simply no role or authorization for the NYAG to second-guess the considered business judgment of private parties engaged in successfully consummated and profitable commercial transactions. Executive Law § 63(12) authorizes the NYAG to apply for relief "in the name of the people of the state of New York." The authority to recover on behalf of the People depends necessarily upon a connection between the conduct the NYAG seeks to enjoin, and some harm (or threat of harm) suffered by the People (*i.e.*, the public at large). The plain language of Executive Law § 63(12) is at once a conferral of authority and a limitation on the exercise of that authority.[25]

The Court of Appeals has articulated that limitation in cases interpreting statutory grants of authority to sue "in the name of the People" substantially identical to that in § 63(12), going back more than two centuries. *See People v. Lowe*, 117 N.Y. 175 (1889); *People v. Brooklyn, Flatbush & Coney. Island Ry. Co.*, 89 N.Y. 75 (1882); *People v. Ingersoll*, 58 N.Y. 1 (1874); *People v. Albany & S.R. Co.*, 57 N.Y. 161 (1874); *People v. Booth*, 32 N.Y. 397 (1865); *Attorney Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371 (N.Y. Ch. 1817). "While [a statute may] authorize[ ] the Attorney General, in [her] discretion, to institute suit where [she] believes the public interests require such action to be brought, [her] determination is not final for all purposes, and whether the action brought is permissible and maintainable is a matter subject to judicial review." *People v. Singer*, 85 N.Y.S. 2d 727, 731 (N.Y. Sup. Ct. N.Y. Cnty. 1949) (citing *Lowe*, 117 N.Y. at 194–95). Upon such review, "[u]nless … it appears that the matters alleged affect the public interest in the true and proper sense, rather than affecting individual private rights and interests, then the State

[25] The plain language of § 63 itself further establishes the NYAG's power is by no means unfettered. The NYAG's authority to prosecute and defend suits applies only to "all actions and proceedings in which the state is interested" and for the purposes of "protect[ing] the interest of the state." Exec. Law § 63(1). *Cf. Duguid v. B.K.*, 175 N.Y.S.3d 853, 859–60 (N.Y. Sup. Ct. Saratoga Cnty. 2022).

is without legal capacity to sue." *Singer*, 85 N.Y.S.2d at 730 (citing *People v. Albany & Susquehanna R. Co.*, 57 N.Y. 161, 167 (1874); *People v. O'Brien*, 111 N.Y. 1, 33 (1888); *Lowe*, 117 N.Y. at 191.

Thus, the *sine qua non* for the NYAG is to establish an interest within the public purpose of her office beyond that of the private litigants. To hold otherwise is to eliminate any, even theoretical, possibility of judicial oversight over the maintenance of actions under the statute. Such result is inconsistent with the plain language of § 63(12) and established precedent and was not (and could not have been) contemplated by the Legislature.[26]

Executive Law § 63(12) cases invariably involve some actual public interest that the NYAG seeks to vindicate, which is a stark contrast to what she seeks to do here in attempting to become the *post hoc* arbiter of the marketplace by interjecting her own judgment into strictly private transactions. *See Feldman*, 210 F. Supp. 2d at 302 ("repeated acts of deception [were] directed at a broad group of individuals" including "unsophisticated individual sellers, such as the elderly and one-time participants").[27]

In contrast, this case centers around a few discrete complex transactions involving only

[26] The undisputed legislative purpose behind § 63(12) is to "afford *the public and consumers* expanded protection from deceptive and misleading business practices[.]" *State v. Bevis Indus., Inc.*, 314 N.Y.S.2d 60, 64 (N.Y. Sup. Ct. N.Y. Cnty. 1970) (emphasis added); *People v. 21st Century Leisure Spa Int'l Ltd.*, 583 N.Y.S.2d 726, 729 (N.Y. Sup. Ct. N.Y. Cnty. 1991) (Section 63(12)'s purpose "is to afford *the consumer* protection") (emphasis added); *Allstate Ins. Co. v. Foschio*, 462 N.Y.S.2d 44, 46–47 (2d Dep't 1983) (purpose "is to afford the *consuming public* expanded protection") (emphasis added).

[27] *See also People v. MacDonald*, 330 N.Y.S.2d 85, 88–89 (Sup. Ct. 1972) (ensuring public safety via enforcement of vessel navigation laws); *Cortelle Corp.*, 38 N.Y.2d at 85; *Apple Health & Sports Clubs*, 80 N.Y.2d at 806; *People v. Coventry First LLC*, 13 N.Y.3d 108, 114 (2009); *People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409 (1st Dep't 2016); *People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 627 (2018); *People v. Greenberg*, No. 401720/20005, 2010 WL 4732745, at *11 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 21, 2010); *State v. Ford Motor Co.*, 74 N.Y.2d 495 (1989); *People v. N. Leasing Sys., Inc.*, 193 A.D.3d 67, 70 (1st Dep't 2021); *State v. Wolowitz*, 468 N.Y.S. 2d 131, 135 (2d Dep't 1983); *Ernst & Young*, 114 A.D.3d 569 (complaint containing allegations of defendants "defrauding the investing public" (*Ernst & Young LLP*, No. 451586/2010, NYSCEF No. 1 at 1, 5 (N.Y. Sup. Ct. N.Y. Cnty. 2013)).

sophisticated counterparties that were represented by equally sophisticated legal counsel.[28] Each transaction was governed by extensively negotiated agreements fully defining the parties' respective obligations, what conduct constituted any breach, and, importantly, the consequences of any breach. The parties' relationships were therefore fully defined and self-contained. Each transaction was extraordinarily profitable for the counterparties and none of the contracts were ever breached. (Defs. SOF ¶¶ 96, 142, 154). None of the parties to any of these transactions ever lodged any complaint with the NYAG or otherwise claimed any fraud, misrepresentation, or breach.

The record does not contain a scintilla of evidence of any public harm (or for that matter, private harm).[29] Thus, the NYAG lacks the authority and capacity to now maintain this action for a lack of public impact.[30] And unlike at the dismissal stage, where the NYAG was afforded the presumption of propriety, the record evidence now undermines fully her purported claims. Courts recognize § 63(12) claims involving the rights of private business entities "should be [adjudicated by] private contract litigation . . . not a law enforcement action under a statute designed to address public harm flowing from persistent or repeated fraud and deception." *See, e.g.*, *Domino's*, 2021 WL 39592, at *12. Section 63(12) simply does not extend to the complex, "bilateral business

[28] The Complaint and Motion make clear the NYAG simply seeks to insert herself and her own business /risk judgment into private transactions and enforce the terms of complex, private agreements when the actual counterparties to those agreements have not claimed any fraud or breach.

[29] For example, the record does not provide any evidence of any impact on public share prices, *e.g., People v. Greenberg*, 21 N.Y.3d 439 (2013), the public financial markets, *e.g., Coventry First*, 13 N.Y.3d at 114, the public credit markets, *e.g.*, *People v. Applied Card Sys., Inc.*, 27 A.D.3d 104 (3d Dep't 2005), or members of the public at large, *e.g.*, *Gen. Motors Corp.*, 547 F. Supp. at 703–704; *Gen. Elec. Co.*, 302 A.D.2d 314.

[30] Nor can the NYAG invoke "honesty of the marketplace" as a predicate. Even the § 63(12) claims that have been brought to secure an "honest marketplace," deal with protecting the public at large. *See, e.g., People v. Amazon.com, Inc.*, 550 F. Supp. 3d 122 (S.D.N.Y. 2021); *Gen. Motors Corp.*, 547 F. Supp. at 703–04; *People v. H & R Block, Inc.*, 870 N.Y.S.2d 315, 316 (1st Dep't 2009); *People v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378, 379 (1st Dep't 2008) (bid rigging); *Gen. Elec. Co.*, 302 A.D.2d 314; *Orbital Publ. Grp.*, 169 A.D.3d at 565 (1st Dep't 2019); *Applied Card Sys.*, 27 A.D.3d 104.

transactions" herein at issue. *See id*.; *Exxon Mobil*, 2019 WL 6795771, at *30 (finding NYAG failed to prove Exxon Mobil "made any material misstatements or omissions about its practices and procedures that misled any reasonable investor"); *State v. Parkchester Apts. Co.*, 307 N.Y.S. 2d 741, 748 (N.Y. Sup. Ct. N.Y. Cnty. 1970) (dismissing claims brought by the NYAG in relation to a "private dispute" when the only basis for the Executive Law claim was a breach of contract demonstrating that claims that can be pursued by individual citizens are not actionable by the state). Indeed, had any of the sophisticated banks and insurers been financially harmed or deceived in any way, they would have long ago exercised their substantial legal rights under the operative agreements to seek redress. The NYAG cannot now stand in those sophisticated counterparties' shoes to vindicate a wrong that the counterparties never complained of and that the Defendants never perpetrated.

Here the record establishes conclusively the respective counterparties suffered no harm or injury, and never asserted any default or breach.[31] The record evidence indeed squarely refutes any notion the SOFCs had any capacity or tendency to deceive. The record demonstrates these are sophisticated counterparties that conducted their own analysis and made valid, and profitable, business risk decisions.

Additionally, there has never been any default associated with any loan herein at issue. (Defs. SOF ¶ 96.) Nor was there ever a recommendation at any time that there was a basis to declare default based on President Trump's failure to maintain a net worth of at least $2.5 billion.[32] (Defs. SOF ¶ 97.) Simply put, the NYAG has not established that the transactions at issue herein

[31] *See e.g., supra* at n. 23.

[32] Even according to the NYAG's flawed analysis President Trump's net worth was never below $2.6 billion, rendering impossible any default.

are (or should be) the proper subject of "a law enforcement action under a statute designed to address public harm." *Domino's*, 2021 WL 39592, at *26. In sum, there is simply no role for the NYAG on this record.

B. The SOFCs Were Not Materially Misleading

As noted above, the caselaw provides that the standard for materiality for a § 63(12) claim involves asking whether the recipients of the allegedly false information would have found the information to have an impact on their decision-making process or "significantly altered the 'total mix of information made available.'" *See Exxon Mobil*, 2019 WL 6795771, at *2; *see also Greenberg*, 95 A.D.3d at 485; *JP Morgan*, 350 F. Supp. 2d at 406. This analysis takes into consideration the sophistication of the parties, such that sophisticated entities like large banks and insurance companies "are held to a higher standard." *JP Morgan*, 350 F. Supp. 2d at 406. Such entities "have a duty to protect [themselves] from misrepresentations," which "may apply even in circumstances where the defendant had peculiar knowledge of the relevant facts." *Solutia Inc.*, 456 F. Supp. 2d at 450–51. In this context, evidence—or lack thereof—concerning "falsity, materiality, reliance and causation"; whether the "target audience [was] actually deceived"; and whether the "alleged false statements had real-world impact" "plainly is relevant to determining whether the Attorney General has established that the challenged conduct has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *Domino's*, 2021 WL 39592, at *24.

The record in this case, consisting of documentary evidence and expert and fact witness testimony, including the testimony of the very people whom the NYAG claims were the targets of Defendants' alleged fraud, establishes that the SOFCs were not materially misleading and had no capacity or tendency to deceive. No sophisticated counterparty would have considered the SOFCs without doing their own diligence—and none did.

1. The SOFCs Present the Guarantor's Valuations

SOFCs are not designed to establish the precise value of a reporting entity, but serve only as the beginning, not the end, of the complex and highly subjective valuation process users such as banks and insurance companies engage in as they perform their own diligence. Banks know that an estimate put forth in a SOFC, even when written to follow GAAP, is "truly an estimate." (Defs. SOF ¶ 67.)

President Trump's SOFCs for 2011 through 2021 were prepared in a personal financial statement format in accordance with GAAP, specifically ASC 274, which applies to the preparation of SOFCs. (Defs. SOF ¶ 51; Bartov Aff., ¶¶ 15-17) ASC 274 requires preparers of compilation reports to include sufficient disclosures to make the statements informative in light of all the information available to the user, including information apart from the financial report that the user may require and receive from the preparer (as DB did from President Trump, addressed below). (Bartov Aff., ¶ 16) Each of President Trump's SOFCs for 2011 through 2021 contains notes, which are an integral part of the SOFC, that provide information (including potential departures from GAAP) to help the user interpret the numbers reported, along with a sweeping disclaimer expressly stating: ***"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.*, NYSCEF 5 at 1.) (emphasis added).

In addition, each SOFC was accompanied by an "Independent Accountants' Compilation Report" letter from the accountants who compiled the SOFCs that noted that the SOFCS contained numerous departures from GAAP and provided a litany of those departures along with a

description of each departure. These compilation letters also expressly informed users that "[w]e have not audited or reviewed the accompanying financial statement and, accordingly, do not express an opinion or provide any assurance about whether the financial statement is in accordance with the accounting principles generally accepted in the United States of America" and stated that "users of this financial statement should recognize that they might reach different conclusions about the financial condition of Donald J. Trump if they had access to a revised statement of financial condition without the above referenced exceptions to accounting principles generally accepted in the United States of America." (Defs. SOF ¶ 58.)

These disclaimers together with the notes to the SOFCs identify and describe the numerous departures from GAAP as well as the subjective nature of the property valuations. Thus, they put sophisticated users of the SOFCs, such as DB, for whom the SOFCs were prepared, on complete notice to seek additional information from President Trump as they deemed necessary, and to perform their own diligence (which DB in fact did). (Defs. SOF ¶¶ 62, 67–70.) From the standpoint of the user (i.e., DB), both documents must be and are considered together, because both were made available to the user together, and because the SOFCs incorporated the letters by reference. (Bartov Aff., ¶ 18.). As such, the SOFCs had little or no effect either on the lenders' decisions to extend loans to the Defendants or to set the terms of those loans, or on the insurers' decisions to write coverage for the Defendants and price the risk. (Defs. SOF ¶¶ 87–90.)

2. The Actual Users of The SOFCs Agree Any Mistatements Were Immaterial

Representatives of the actual banks and insurance companies testified they did not consider the SOFCs misleading.[33] President Trump was a customer of the Private Wealth Management ("PWM") program at DB, which allowed him to personally guarantee loans for business purposes.

[33] *See e.g., supra* at n. 23.

(Defs. SOF ¶¶ 72, 116.) As Tom Sullivan, Managing Director of DB, testified, to qualify as a customer of the PWM program at DB, an individual needs to have a minimum total net worth of about $50 million. (Defs. SOF ¶ 73.) There is no dispute President Trump's net worth exceeded $50 million, and he was therefore exceedingly qualified for participation in the PWM. Further, for each of the three loans from DB that President Trump personally guaranteed, DB's own employees testified that they were "[c]omfortable with the level of assets" that President Trump held and as well as the "recordation of that amount of liquid assets." (Defs. SOF ¶ 85.)

DB also conducted its own due diligence and applied discounts to the amounts listed in President Trump's SOFCs, thus "protect[ing] [themselves] from" any possible "misrepresentations," just as New York courts have anticipated. *See Solutia Inc.*, 456 F. Supp. 2d at 450–51. DB, a highly sophisticated entity, was comfortable conducting its own analyses and making the loans at issue based on its routine application of "haircuts" to the values listed on SOFCs in order to prepare for any "adverse scenario" where "the client's financial position is under stress." (Defs. SOF ¶ 86.) For example, when DB received a copy of the 2011 SOFC to secure the Trump Endeavor 12 LLC loan described in the Complaint, DB calculated its own values of President Trump's assets by applying "haircuts" to the values reported in the 2011 SOFC and used its own independent judgment "in setting the appropriate adjustments to achieve conservative valuations of concentrated assets." (Defs. SOF ¶¶ 87, 107.) DB "was focused on [its] own independent view, so [it] didn't spend a lot of time determining . . . what was disclosed." (Defs. SOF ¶ 89.) DB's independent, rigorous, and subjective valuation process—which involves models employing a multitude of variables from several data sources, independent appraisals, and a variety of validity checks—demonstrates that DB's reliance on the information in the SOFCs was

marginal in deciding whether to extent the subject loans and what interest rates to require. (Bartov Aff. ¶ 25) This alone establishes the SOFCs had no capacity or tendency to deceive.

DB's relationship with President Trump was also profitable. (Defs. SOF ¶¶ 95, 101–102.) Between 2012 and 2016, DB received over $75 million in interest on these loans. (Robert Aff., Ex. AAQ ¶ 5.) Indeed, simply by closing on these transactions, DB generated fees totaling approximately $3 million. (Defs. SOF ¶¶ 119, 136, 154.) As a bank representative described, the Doral loan had "performed quite well, enough to warrant considering increasing the loan amount secured by the property." (Defs. SOF ¶ 121.) And the Chicago Loan was a "superb deal" to the bank that was "structured properly" with pricing that was "appropriate" making it a "very, very good safe deal for the bank" based on the "loan-to-values-and the guarantees involved." (Defs. SOF ¶ 133.) The Old Post Office loan was also a successful credit transaction for DB, as the property was "redeveloped and opened and was operating successfully" and the loan was performing such that "all interest payments and covenants were being met." (Defs. SOF ¶ 154.) At no point in the lifecycle of any credit transaction between DB's PWM division and President Trump or any entity affiliated with President Trump did a covenant or payment default ever occur. (Defs. SOF ¶ 96.) Nor did DB ever recommend that there was a basis for declaring a default based on President Trump's failure to maintain a net worth of at least $2.5 billion as required for each transaction. (Defs. SOF ¶ 97.) The NYAG has put forth no evidence that DB ever believed President Trump's net worth was lower than the $2.5 billion required to maintain any DB loans. Moreover, even the NYAG's flawed analysis concludes President Trump's net worth did not go below $2.6 billion.

As to Ladder Capital Finance, the terms of the 40 Wall Street Loan required President Trump to maintain a net worth of only $160 million and liquidity of only $15 million during the

term of the loan. (Defs. SOF ¶ 159.) Again, there is no dispute that President Trump's net worth and liquidity vastly exceeded these amounts. Additionally, the loan has been successful, as Ladder Capital has received in excess of $40 million in interest, and there has never been any default. (Robert Aff., Ex. AAQ ¶ 3).

Testimony of representatives from Zurich further confirms that the SOFCs were not materially misleading. As Joanne Caulfield, a project manager at Zurich, testified, it is common practice for a surety underwriter to require disclosure of financial statements, but Zurich's surety underwriter knew of no legal or contractual provision that required such disclosure from President Trump. (Defs. SOF ¶ 169.) From July 2011 to January 2017, Zurich increased its exposure to President Trump by renewing and expanding the surety program at issue in this case. (Defs. SOF ¶ 172.) ***In 2013, 2014, and 2015, the sole basis upon which Zurich relied to support its underwriting decisions were estimates of President Trump's net worth published by Forbes!*** (Defs. SOF ¶ 173-5.) In fact, despite not receiving traditional disclosure of a SOFC from July 2011 to January 2017, Zurich increased its exposure and renewed bonds as an accommodation to the insurance broker. (Defs. SOF ¶ 176.) According to Caulfield, Zurich reduced the rate President Trump's businesses were paying as an accommodation to the broker and to stave off another insurance company seeking to take the surety program from Zurich, and the account rate was lowered despite Zurich not having reviewed the updated SOFC in approximately four years. (Defs. SOF ¶ 180.) Zurich was simply not concerned with President Trump's financial health. (Defs. SOF ¶ 185.)

Similarly, in December 2016, President Trump's insurance broker reached out to Tokio Marine HCC ("HCC") seeking a quote for additional limits of $5,000,000 to sit above an already-existing Directors & Officers ("D&O") policy. (NYSCEF 1 ¶ 695.) ***Without reviewing any SOFC***,

HCC quoted a policy to sit above the existing policy through the expiration date of February 17, 2017, in exchange for a premium of $40,000, subject to reviewing financials at renewal. (NYSCEF 1 ¶¶ 695–96.)

Further, in addition to the testimony of the actual individuals involved in the subject transactions, expert testimony establishes that banks and insurance companies would not consider any of the alleged misstatements or omissions in the SOFCs to be material. Robert Unell, the Managing Director at Ankura Consulting Group, provided significant testimony about how DB performed its own analyses when assessing whether to make certain loans and did not rely on SOFCs, highlighting how sophisticated lenders such as the Defendants' counterparties here would not find any misstatements of the type alleged by the NYAG to be material. When asked, "Would it be your opinion that if the allegations in the complaint are true, that DB would have reason to have concerns about the accuracy of the SOFCs," Unell flatly answered "No," explaining that "even if the net worth or any of the other . . . allegations were . . . proven true, the net worth was still sufficient to qualify for inclusion in the private wealth bank" and that "Deutsche Bank had ample opportunity to investigate anything" it wanted to (Defs. SOF ¶ 91.) He continued, explaining that above all, liquidity was most important or "material" to the bank and that the bank "went and verified it." (Defs. SOF ¶ 92.)

According to Unell, "SOFCs provide ample information . . . for a sophisticated lender to be able to make . . . their own determination," as those documents "provide the actual amounts" and "how they were calculated" such that if any bank had concerns, it "had an opportunity to challenge those assumptions that were utilized in the preparation of the SOFC." (Defs. SOF ¶ 70.) "[L]enders are trained not to rely on" SOFCs, "which is why the independent analysis in the credit

memo is done." (Defs. SOF ¶ 67.) Unell further testified DB "did what they were supposed to do and verified" certain items and "anything else would have been immaterial." (Defs. SOF ¶ 93.)

Regarding insurance underwriting, David Miller, a former Senior Vice President/Division Officer at Erie Insurance, opined that Zurich, the underwriters for the surety bond program at issue in this case, "didn't rely on asset valuations at all." (Defs. SOF ¶ 182.) Or as Gary Giulietti, an Account Director at Lockton Northeast, testified, describing surety bond transactions with Zurich, liquidity is "all they're relying on, cash, all the way back in the relationship." (Defs. SOF ¶ 182.) In this case, the total exposure extended to President Trump's businesses in connection with the surety program at issue never exceeded $20 million. (Defs. SOF ¶ 182.)

In sum, the NYAG's First Cause of Action fails as a matter of law, and all Defendants are entitled to summary judgment.

C. The Record Shows Defendants Neither Participated In Any Alleged Fraud Nor Had Actual Knowledge Of It

To prevail on a claim for persistent and repeated fraud under § 63(12), the NYAG must show that ***each defendant*** participated in the act or had actual knowledge of it. *See N. Leasing*, 70 Misc. 3d at 267; *Abrahami v. UPC Constr. Co.*, 224 A.D.2d 231, 233–34 (1st Dep't 1996). The participation element is satisfied where the defendant "directed, controlled, approved, or ratified the decision that led to the plaintiff's injury." *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 49 (1st Dep't 2012). Merely providing copies of purportedly false financial statements is insufficient. *See Abrahami*, 224 A.D.2d at 233–34. Similarly, brokering a loan transaction where others allegedly committed fraud does not by itself create an inference of participation in the fraud. *Frawley v. Dawson*, No. 6697/07, 2011 WL 2586369, at *8 (N.Y. Sup. Ct. Nassau Cnty. May 20, 2011).

If the NYAG cannot show that a particular Defendant participated in a persistent and repeated fraud, she must show such Defendant had actual knowledge of the fraud. *See N. Leasing*,

70 Misc. 3d at 267; *Abrahami*, 224 A.D.2d at 233–34. Where, as here, actual knowledge is required under New York law, "[m]ere negligent failure to acquire knowledge of the falsehood is insufficient." *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 44 (1980). Likewise, showing that a Defendant "had access to the information by which it could have discovered the fraud is not sufficient." *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 75–77 (S.D.N.Y. 2010), *aff'd*, 485 F. App'x 461 (2d Cir. 2012) (citations omitted).

Thus, in order to show that a particular Defendant had "actual knowledge," the NYAG must put forth facts sufficient to support a finding of at least grossly negligent conduct on the part of that Defendant. New York courts define gross negligence as conduct that "smack[s] of intentional wrongdoing or evince[s] a reckless indifference to the rights of others." *Gallagher v. Ruzzine*, 46 N.Y.S.3d 323, 328 (4th Dep't 2017) (citation omitted). An officer may also be deemed grossly negligent if "the totality of the circumstances" show that the officer acted with "willful blindness or conscious avoidance." *State v. United Parcel Serv., Inc.*, 253 F. Supp. 3d 583, 666–67 (S.D.N.Y. 2017), *aff'd*, 942 F.3d 554 (2d Cir. 2019) (citations omitted). But "[t]here must be evidence capable of supporting a finding that the defendant was aware of a high probability of the [incriminating] fact in dispute and consciously avoided confirmation of that fact." *Id.* at 667 (citation omitted) (alteration in original).

The NYAG must also show actual knowledge for *all* Defendants, including the corporate entities named in the Complaint. Usually, "[w]hen corporate agents act within the scope of their authority, 'everything they know or do is imputed to their principals.'" *People v. Gross*, 169 A.D.3d 159, 169 (2d Dep't 2019) (citations omitted). However, there are "exception[s] to the rule of imputed knowledge." *Id.* at 170. Notably, "imputation of knowledge may not apply where there is a specific statutory requirement of actual knowledge, and imputing knowledge would effectively

negate the purpose of the actual knowledge requirement." Robert L. Haig, *Imputed Knowledge*, 4D N.Y. Prac., Com. Litig. in N.Y. State Courts § 102:46 (5th ed., 2022). As the Court of Appeals has explained, if "knowledge of any [employee] may be imputed to a corporate [ ] employer, then the statutory distinction becomes significantly blurred and uneven. We have noted that strict construction of this statutory scheme is essential to ensure that the legislative policy of punishing only those with actual knowledge is properly effectuated." *Roberts Real Est., Inc. v. N.Y. State Dep't of State, Div. of Licensing Servs.*, 80 N.Y.2d 116, 122 (1992). Allowing the NYAG to impute actual knowledge here, "would contradict that interpretation by arrogating to itself instead an expansive new power not granted by the Legislature." *Id.*

Here, the NYAG has casually lumped together all Defendants as the "Trump Organization", asserting that all Defendants should be liable for each transaction at issue in this case. She has not explained, for example, how the Defendant corporate entities that held property at issue in the various transactions—Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC—had *anything* to do with transactions other than those applicable to their relevant properties. Defendant Trump Old Post Office LLC cannot be liable for any alleged fraud that occurred in the 40 Wall Street Loan and vice versa.

Meanwhile, the Defendants have put forth undisputed evidence that certain Defendants did not participate in and lacked actual knowledge of any alleged misstatements or omissions contained in the SOFCs, or shown that the record is devoid of any evidence to substantiate the NYAG's allegations. The Defendants have also shown certain Defendants played no role in securing the insurance policies at issue in this case, or that the record is devoid of any evidence to the contrary.

Preparation of the SOFC. Unrebutted deposition testimony demonstrates Eric Trump was not involved in preparing the SOFCs. (Defs. SOF ¶¶ 199, 200.) Eric Trump testified, "I never saw or ever even remotely worked on the Statement of Financial Condition. Th[at] was not my purview. Th[at] was not what I did." (Defs. SOF ¶ 200.) He further testified that he knew "just about nothing about the Statement of Financial Condition" and had "never seen" or "worked on" the SOFCs. (Defs. SOF ¶ 200.) He also had no role in the "valuation process in the company." (Defs. SOF ¶ 200.) Donald Bender, the engagement partner at Mazars, testified that he had no conversations with Eric Trump concerning the preparation of the SOFCs. (Defs. SOF ¶ 200.) Eric Trump also disclaimed any knowledge of the alleged falsities in the SOFC, stating that he relied on the accounting team to prepare the SOFCs. (Defs. SOF ¶ 201.)

Donald Trump, Jr. also did not participate in the preparation of the SOFCs. (Defs. SOF ¶ 199.) Bender testified that in preparing the SOFCs, he did not discuss with Donald Trump, Jr. the preparation of the SOFCs. (Defs. SOF ¶ 202.) The NYAG has not introduced any evidence that Donald Trump, Jr., participated in the preparation or submission of the SOFCs.

The record is also devoid of any evidence that the following Defendants were at all involved in the preparation of the SOFC or had actual knowledge of any alleged misrepresentations: Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC. While the NYAG alleges that this "host of entities" are incorporated within the "Trump Organization," the Complaint alleges nothing concerning these entities beyond that they owned properties mentioned in the Complaint or received loans at issue in the Complaint. No record evidence establishes these entities were involved in creating or submitting the SOFCs.

Thus, to the extent that the NYAG asserts any claims against Eric Trump, Donald Trump, Jr., Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, Seven Springs LLC, The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, or DJT Holdings Managing Member based on their participation in the creation of the SOFCs or their actual knowledge of the alleged falsities in the SOFCs under the First Cause of Action, those claims fail. For for these Defendants, the Court's analysis on the First Cause of Action can stop there. The undisputed facts demonstrate these Defendants had no involvement in or knowledge of any alleged falsities in the SOFCs.

Surety Bond Program. The NYAG alleges that from 2007 through 2021, Zurich underwrote a surety bond program for the "Trump Organization" and that the SOFC were used in this process. (NYSCEF 1 ¶¶ 678–91.) Zurich representatives testified that they had no communications with Eric Trump or Donald Trump, Jr. in relation to the surety bond program. (Defs. SOF ¶ 187.) The NYAG has not rebutted this evidence, nor has she offered any evidence to suggest that any of these individuals had any knowledge of the submission of the SOFCs to Zurich. Further, the record lacks any evidence that The Trump Organization, Inc., Trump Organization, LLC, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC obtained surety bonds from Zurich. Nor is there any evidence to establish that any actions taken by Mr. Weisselberg were taken in his capacity as trustee on behalf of the Trust. To the extent the NYAG's claims concerning the First Cause of Action are related to transactions with Zurich and the surety bond program, they fail as to Defendants Eric Trump, Donald Trump, Jr., the Trust, The Trump Organization, Inc., Trump Organization, LLC, DJT Holdings LLC, DJT Holdings

Managing Member LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC.

Directors & Officers Liability Insurance. Finally, the NYAG alleges that in December 2016, the "Trump Organization's" insurance broker reached out to an underwriter at HCC regarding a D&O policy to sit on top of an already-existing $5 million policy with Everest and that the 2015 SOFC was submitted to HCC as a part of this process. (NYSCEF 1. ¶¶ 692, 698.) The HCC policy was renewed several times. (Defs. SOF ¶¶ 189, 192.) There is no evidence in the record to suggest that any Defendants other than the Trust and Mr. Weisselberg were involved in or had knowledge of this transaction.

IV. The NYAG Is Not Entitled To Disgorgement As A Matter Of Law.

Even if this Court were to find that the NYAG is entitled to partial summary judgment on the First Cause of Action, the NYAG is not entitled to disgorgement as a remedy for any violation of § 63(12) as a matter of law.

Notably, the NYAG only mentions disgorgement once in her summary judgment memorandum, explaining in a footnote:

> While the focus of this motion is only on the People's First Cause of Action for the sake of expediency, these same predicate findings – that the SFCs were false and were used repeatedly and persistently by Defendants to commit fraud in connection with business transactions – are equally applicable to the People's remaining causes of action and will necessarily narrow the scope of matters to be addressed at trial, including at a minimum the People's claims for relief in the form of disgorgement, bans, and other equitable remedies.[34]

[34] The NYAG's decision to spend no effort on developing its arguments with respect to the Second through Seventh Causes of Action is reflective of her overall strategy in this case, which has been to focus solely on the First Cause of Action without ever specifying the exact conduct she believes subjects any particular Defendants to liability under the other provisions. For the reasons asserted in the Defendants' Motion for Summary Judgment, several Defendants are entitled to summary judgment on the Second through Seventh Causes of Action.

(NYSCEF 766 at 1 n.1.) The NYAG is wrong. Disgorgement is simply unavailable under § 63(12) or the underlying statutory claims in the Second through Seventh Cause of Action, and, thus, it is unavailable in this case.

In any § 63(12) case, "the AG can seek penalties available under both § 63(12) and the underlying statute being enforced." *City of New York v. FedEx Ground Package Sys., Inc.*, 314 F.R.D. 348, 362 (S.D.N.Y. 2016). But "[i]t is an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, 'courts must be especially reluctant to provide additional remedies.'" *Grochowski v. Phx. Const.*, 318 F.3d 80, 85 (2d Cir. 2003) (quoting *Karahalios v. Nat'l Fed'n of Emps., Local 1263,* 489 U.S. 527, 533 (1989)). Allowing a plaintiff to pursue an unenumerated remedy would "be inconsistent with the underlying purpose of the legislative scheme" and amount to an "end-run" around the statute. *Id.* at 86 (citing *Davis v. United Air Lines, Inc.*, 575 F. Supp. 677, 680 (E.D.N.Y. 1983) (internal quotations omitted). Neither the NYAG as plaintiff nor § 63(12) itself are exempt from this general rule. *People v. Direct Revenue, LLC*, No. 401325/06, 2008 WL 1849855, *7 (N.Y. Sup. Ct. N.Y. Cnty. Mar. 12, 2008); *see also People v. Romero*, 91 N.Y.2d 750, 754 (1998) ("Attorney General . . . is without any prosecutorial power except when specifically authorized by statute.") (citations omitted).

A plain reading of the text of § 63(12) reveals that disgorgement is not an available remedy under the statute. Section 63(12) specifically instructs that the NYAG may "apply, in the name of the people of the state of New York . . . for an order enjoining the continuance" of the purportedly fraudulent "business activity or any fraudulent or illegal acts, directing restitution and damages." Therefore, the NYAG is limited to these "three enumerated remedies": "injunctive relief, restitution, and damages." *FedEx*, 314 F.R.D. at 361. Disgorgement is not restitution: "[d]isgorgement is distinct from the remedy of restitution because it focuses on the gain to the

wrongdoer as opposed to the loss of the victim." *Ernst & Young LLP*, 114 A.D.3d at 569. And while it may be available under the Martin Act, one of the alleged violations at issue in *Ernst & Young*, it is simply not an enumerated remedy available under § 63(12).

Caselaw confirms this conclusion. Addressing whether disgorgement was an available remedy in light of this plain reading, the court in *Direct Revenue* found that "while the Executive Law and the GBL permit monetary relief in the form of restitution and damages to consumers, the statutes do no[t] authorize the general disgorgement of profits received from sources other than the public. And even where restitution may be awarded to consumers, it may only be granted in an amount *related to the actual damages caused by the misconduct*." *Id.* (emphasis added). The court concluded that the NYAG is "strictly limited to recovery as specifically authorized by statute," and because disgorgement is not one of the authorized remedies under § 63(12), allowing "[d]isgorgement of [defendants'] profits to the state would effectively constitute punitive damages not authorized by statute." *Id.* at *8.

Disgorgement is unavailable under the Second through Seventh Causes of Action as well. Here, the NYAG alleges violations of the following underlying statutes: "New York Penal Law § 175.10 (Falsifying Business Records); Penal Law § 175.45 (Issuing a False Financial Statement); and Penal Law § 176.05 (Insurance Fraud)." (NYSCEF 1 ¶ 5.) None of these statutes provides that disgorgement as an available remedy for a violation. Rather, they provide that a violation constitutes a misdemeanor or felony in varying degrees, thereby subjecting a violator to fines up to certain amounts and jail or prison time. *See* N.Y. Penal Law § 175.10 ("class E felony"); *id.* § 175.45 ("class A misdemeanor"); *id.* § 176.30 ("class B felony" if fraud in the first degree). Therefore, disgorgement is unavailable as a remedy to the NYAG as a matter of law in this case.

Moreover, even if this Court were to find that disgorgement is an available remedy, which it should not, the NYAG has never even attempted to show any tie between the alleged "gains" made by the Defendants and the alleged fraudulent conduct. There needs to be "a 'reasonable approximation of profits causally connected to the violation.'" *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 91 A.D.3d 226, 233 (1st Dep't 2011) (quoting *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1192 n.6 (9th Cir. 1998)), *rev'd on other grounds*, 21 N.Y.3d 324 (2013); *S.E.C. v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013) (same); *see also* Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. Rev. 851, 857 (2011). ("A basic limit to a fiduciary's liability to disgorge ill-gotten gains is causal—the liability does not extend to assets acquired in a manner unrelated to the breach of duty."). Given the NYAG has put forth absolutely no evidence of the materiality of the alleged misstatements contained in the SOFCs, she has not shown (and cannot show based on Defendants' expert and witness testimony) that such misstatements actually *caused* the Defendants to make any profits. If the SOFCs and any alleged misrepresentations made in the SOFCs did not affect these financial institutions in their decision-making, there is no basis to disgorge any "ill-gotten" gains. The NYAG cannot therefore recover disgorgement of profits as a matter of law.

The NYAG's motion for partial summary judgment must be denied to the extent that the NYAG seeks disgorgement because that remedy is not available under the NYAG's causes of action in this case.

CONCLUSION

As set forth above, the First Department's clear limitations mandate eviscerates a substantial portion of this action and requires the dismissal of many of the NYAG's claims as time-barred. Notwithstanding the procedural infirmities, this action also must be dismissed because the NYAG lacks authority to maintain this action and fails to show that the SOFCs were false or fraudulent. In addition, the record shows that the SOFCs were not materially misleading and that

Defendants neither participated in any alleged fraud nor had actual knowledge of it. In the NYAG's obsessive, compulsive attempt to "get" President Trump, she even continues to unfairly drag his children Eric Trump and Donald Trump, Jr. along for the ride, despite their having had no direct involvement in the creation, preparation, or use of the SOFCs. It's time for the Court to put an end to this crusade by dismissing this action in its entirety.

Dated: New York, New York
September 1, 2023

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CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court and the Order, dated June 21, 2023 (NYSCEF Doc. No. 638), I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Memorandum of Law contains 24,580 words. The foregoing word counts were calculated using Microsoft® Word®.

Dated: Uniondale, New York
September 1, 2023

Respectfully submitted,

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