SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, Plaintiff-Respondent, -against- DONALD J. TRUMP, DONALD TRUMP, JR., ERIC TRUMP, ALLEN WEISSELBERG, JEFFREY MCCONNEY, THE DONALD J. TRUMP REVOCABLE TRUST, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DJT HOLDINGS LLC, DJT HOLDINGS MANAGING MEMBER, TRUMP ENDEAVOR 12 LLC, 401 NORTH WABASH VENTURE LLC, TRUMP OLD POST OFFICE LLC, 40 WALL STREET LLC, and SEVEN SPRINGS LLC, Defendant-Appellants, IVANKA TRUMP, Defendant.	Appeal No: 2023-04925 Sup. Ct. New York County Index No. 452564/2022 (Engoron, J.S.C.)

MEMORANDUM OF LAW IN SUPPORT OF A STAY
PENDING APPEAL PURSUANT TO CPLR 5519(c)

HABBA MADAIO & ASSOCIATES, LLP
Michael Madaio
112 West 34th Street, 17th & 18th Floors
New York, New York 10120
Phone: (908) 869-1188
Email: mmadaio@habbalaw.com

ROBERT & ROBERT PLLC
Clifford S. Robert
Michael Farina
526 RXR Plaza
Uniondale, New York 11556
Phone: (516) 832-7000
Email: crobert@robertlaw.com

Counsel for Donald J. 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 LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC and Seven Springs LLC

mfarina@robertlaw.com
Counsel for Donald Trump, Jr., Eric Trump, The Donald J. Trump Revocable Trust, 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

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Defendant-Appellants Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, Jeffrey McConney, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., The 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 (collectively, "Appellants"), through their undersigned attorneys, respectfully submit this memorandum of law in support of their motion, brought by order to show cause, pursuant to CPLR § 5519(c) and this Court's inherent discretionary powers for a stay pending appeal of the decision and order entered by the Honorable Arthur F. Engoron, J.S.C. ("Justice Engoron"), dated September 26, 2023, and duly entered by the Clerk of the Supreme Court of the State of New York, County of New York, on September 27, 2023, as supplemented by the Supplemental Order dated October 4, 2023, and duly entered on October 5, 2023, (1) denying Appellants' motion for summary judgment in its entirety, (2) granting Plaintiff-Respondent People of the State of New York by Letitia James, Attorney General of the State of New York's (the "Attorney General") motion for partial summary judgment, (3) cancelling any certificates filed under and by virtue of GBL § 130 by any of the entity Appellants or any other ***non-party*** entity controlled or beneficially owned by any of the individual Appellants, and (4) directing that the parties recommend the names of no more than three independent ***receivers to manage the dissolution of the cancelled LLCs*** (the "MSJ Decision").[1]

[1] Appellants further submit this memorandum in support of their application for a stay of the trial pending resolution of their appeal to this Court.

PRELIMINARY STATEMENT

Appellants bring this application to stay enforcement of Supreme Court's decision and order dated September 26, 2023, wherein Justice Engoron, *inter alia*, granted the Attorney General summary judgment on her first cause of action, ordered the immediate cancellation of the business certificates of any of the entity defendants or any ***non-party*** entity "controlled or beneficially owned" by any of the individual Appellants, and directed that the parties take certain steps to "manage the dissolution of the canceled LLCs."[2] As set forth herein, the MSJ Decision is clearly subject to reversal as it, *inter alia,* granted relief against parties not before Supreme Court, not authorized by statute, and not requested by the Attorney General, on claims dismissed by the Court. The consequences of enforcing the MSJ Decision are dire and, once done, cannot be undone.

Supreme Court's decision will unquestionably inflict severe and irreparable harm not only to Appellants but to innocent nonparties and employees who depend on the affected entities for their livelihoods. Terminating non-party business licenses without jurisdiction, without process, without statutory authority, without trial, and without reason renders impossible the lawful operation of multiple businesses and threatens termination of hundreds of New York employees without any jurisdiction or due process.

Supreme Court clearly does not comprehend the scope of the chaos its decision has wrought. When questioned about the outcome he envisioned, Justice Engoron would not even clarify which entities the MSJ Decision covered or define the scope of its impact. He stated,

[2] By a Supplemental Order dated October 4, 2023, filed on October 5, 2023, Supreme Court issued numerous additional directives and deadlines to the parties in furtherance of the cancellation and dissolution of all "entity defendants and any other entities controlled or beneficially owned by Donald J. Trump, Donald Trump Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney that have existing certificates filed pursuant to GBL § 130." Affirmation of Clifford Robert, Exhibit Q. Supreme Court also extended the period to provide the Court with names of potential receivers to October 26, 2023. Id.

instead, that he was "not prepared to just issue a ruling right now." Affirmation of Clifford Robert ("Robert Aff."), Exhibit O at 5:16-17. Unfortunately, however, the MSJ Decision is, by its terms, of immediate effect. Supreme Court's Supplemental Order, entered on October 5, 2023, (the "Supplemental Order") does nothing to address this problem. Instead, the Supplemental Order confirms Appellants' fears: Supreme Court intends to proceed expeditiously with the dissolution of the Appellant entities and nonparty entities, notwithstanding that it has no rationale or legal authority to do so.

Supreme Court has openly stated that it considered *all* evidence, including conduct it concedes cannot form the basis of any timely claim, in granting the Attorney General injunctive relief that is overbroad, unrequested, and unauthorized. Nonetheless, Supreme Court directed the wholesale and immediate cancellation of party and non-party business entities. Supreme Court has also directed, without authority, that all of those entities be dissolved. Supreme Court's sprawling and punitive relief is both unprecedented in a civil action in this State and indefensible under the law or any reasonable view of the facts.

The relief far exceeds what the Attorney General asked for in her complaint and/or in her summary judgment motion. Executive Law § 63(12) only authorizes a Court to grant "the relief applied for or so much thereof as it may deem proper." There is simply no statutory basis for Supreme Court to grant non-requested relief *sua sponte*. Additionally, since the Attorney General never sought such relief either in her complaint or in her motion for partial summary judgment, Appellants were never provided any notice or opportunity to be heard and to defend against the award of the MSJ Order's relief.

Additionally, Executive Law § 63(12) does not authorize the Attorney General to seek judicial dissolution as a remedy for persistent fraud; only BCL § 1101(a)(2) does that. Yet, the

Attorney General brings no claim under BCL § 1101(a)(2). Indeed, the Attorney General *does not even mention judicial dissolution* in her 213-page complaint or in any of her ten prayers for relief.

The MSJ Order also penalizes, *sua sponte*, legitimate non-party business entities whom the Attorney General neither named as Defendants nor identified in the underlying action and over which Supreme Court has no jurisdiction. These non-parties are impacted without any finding of *any* wrongdoing on the part of such businesses, as is required under Executive Law § 63(12). Perhaps worst of all, it seeks to impose the corporate death penalty with no statutory authority for such remedy.

Exacerbating Supreme Court's plain error is the fact that this Court unequivocally dismissed many of the claims upon which Supreme Court has now adjudicated liability and granted permanent relief. Supreme Court's finding that Appellants are liable under Executive Law § 63(12) for "persistent and repeated fraud" arising from loan transactions outside of the statutory limitations period contravenes this Court's unanimous June 27, 2023, decision (the "First Department Decision"). The decretal paragraph of the First Department Decision makes clear this Court did not affirm Supreme Court. Nonetheless, Supreme Court defiantly declared in the MSJ Decision that this Court "declined to dismiss…*any* causes of action." Robert Aff., Ex. A at 3 (emphasis in original). Based upon this glaring fallacy and its inexplicable invocation of the very same continuing wrong doctrine this Court said was patently inapplicable, Supreme Court refused to dismiss a single claim. Instead of complying immediately with a binding directive from this Court, Supreme Court required Appellants to re-litigate the previously decided statute of limitations issues via summary judgment, thereby evading fully the First Department Decision.

In sum, Supreme Court has directly contravened the law of the case, abused its discretion, proceeded in the absence of statutory authority, and exceeded its lawful jurisdiction. The far-reaching implications of its unprecedented directives are of staggering consequence to Appellants and innocent non-parties whose only connection is an affiliation with individuals the Attorney General has previously sworn to punish if elected. Consequently, it is respectfully submitted that an immediate stay of enforcement of Supreme Court's decision and order is necessary to prevent irreparable harm pending resolution of Appellants' application to correct a grave miscarriage of justice. Further, a stay of trial is necessary to avoid Supreme Court proceeding further on dismissed claims, to avoid an avalanche of compounding errors, and to afford Appellants any semblance of process, let alone the due process guaranteed to any litigant regardless of status or social standing.

BACKGROUND

A full recitation of the factual and procedural background relevant to this application is provided in the Affirmation of Clifford Robert annexed hereto.

ARGUMENT

APPELLANTS ARE ENTITLED TO A STAY PENDING APPEAL

A. Legal Standard

This Court has statutory authority and inherent discretion to stay "all proceedings to enforce the judgment or order appealed from pending an appeal." CPLR § 5519(c); see also Matter of Grisi v. Shainswit, 119 A.D.2d 418, 421 (1st Dep't 1986) (noting that the "granting of stays pending appeal" is "for the most part, a matter of discretion"). A stay pursuant to CPLR § 5519(c) is generally "restricted to the executory directions of the judgment or order appealed from which command a person to do an act." Mintz & Gold LLP v. Zimmerman, 17 Misc.3d

972, 976 (Sup. Ct. N.Y. Cty. 2007), aff'd, 56 A.D.3d 358 (1st Dep't 2008), quoting Matter of Pokoik v. Department of Health Servs. of County of Suffolk, 220 A.D.2d 13, 15 (2d Dep't 1996). Additionally, this Court retains broad inherent authority to grant a general discretionary stay of any proceedings in the underlying action in order to prevent acts or proceedings that will disturb the status quo and tend to defeat or impair appellate jurisdiction. See Tax Equity Now NY LLC v. City of New York, 173 A.D.3d 464, 465 (1st Dep't 2019); Schwartz v. New York City Hous. Auth., 219 A.D.2d 47, 48-49 (2d Dep't 1996); see also Matter of Schneider v. Aulisi, 307 N.Y. 376, 383-84 (1954) (noting a court's inherent power in a proper case to restrain the parties before it from taking action which threatens to defeat or impair its exercise of jurisdiction).

In exercising its discretion to impose a stay pursuant to CPLR § 5519(c), the Court may consider "'any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party.'" Deutsche Bank Nat. Trust Co. v. Royal Blue Realty Holdings, Inc., 2016 WL 4194195, at *4 (Sup. Ct. N.Y. Cty. 2016), quoting Richard C. Reilly, Practice Commentaries McKinney's Cons Laws of NY, CPLR C:5519:4.

POINT I

APPELLANTS, NONPARTIES, AND HUNDREDS OF EMPLOYEES WILL SUFFER HARDSHIP IN THE ABSENCE OF A STAY

Under New York law, irreparable injury is that which cannot be compensated by money damages. See Matter of J.O.M. Corp. v. Department of Health of State of N.Y., 173 A.D.2d 153, 154 (2d Dep't 1991), citing DeLury v. City of New York, 48 A.D.2d 595, 599 (1st Dep't 1975); c.f. Four Times Sq. Assoc. v. Cigna Invs., 306 A.D.2d 4, 6 (1st Dep't 2003) (reversing denial of preliminary injunction where, *inter alia*, "the threat to [plaintiff's] good will and creditworthiness is sufficient to establish irreparable injury"). The MSJ Decision plainly results

in irreparable injury more than sufficient to meet this standard. That Supreme Court has, *sua sponte*, ordered the immediate cancellation of the business licenses and dissolution of the entity Appellants without any statutory authority in and of itself warrants a stay. However, the impact on Appellants is only the tip of the iceberg. Supreme Court also summarily cancelled the business licenses of *any* entity "controlled or beneficially owned" by the individual Appellants and directed that a receiver be appointed to dissolve those cancelled entities forthwith.

Eschewing actual findings of wrongdoing in favor of an overinclusive guilt-by-association approach, in a single decretal paragraph, Supreme Court sounds the death knell of multiple non-party entities authorized to do business in New York without notice or due process. The consequences of that order are grave. Cancellation of these entities' certificates to conduct business under GBL § 130 prohibits them from "carrying on, conducting or transacting business." See GBL § 130(9). That means these entities are suspended in uncertainty and ostensibly can no longer pay their employees. The status of any New York bank accounts or real property they maintain is unclear. Supreme Court's order directs that all affected entities must be dissolved by a receiver. This is forfeiture and a taking, all without any authority or jurisdiction.

The MSJ Decision's relief, imposed in the context of a civil case, without a trial, does not comport with due process and principles of fundamental fairness. As set forth below, Supreme Court is without jurisdiction or power to grant any relief, let alone a sentence of death by dissolution, against non-parties. Likewise, Supreme Court's *sua sponte* decision to terminate all entities controlled or beneficially owned by Donald Trump, Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney is an abuse of authority writ large. *The Attorney General has never even requested such relief*. Nor was anyone ***ever put on notice*** that Supreme Court was considering

summarily depriving these Appellants and non-parties of their property rights without any process whatsoever. Even more unsettling is that Supreme Court ordered dissolution as a remedy at all when the Attorney General never asked for it, the statute authorizing her claims does not permit it, and there is no New York caselaw to support its application.

Perhaps most alarming is Supreme Court's incomprehension of the sweeping and significant consequences of its own ruling. At a pre-trial conference held before Supreme Court the day after the decision issued, Appellants' counsel sought clarification of Supreme Court's order. Specifically, counsel asked Supreme Court whether the entities owning assets in real property such as Trump Tower and 40 Wall Street "are now going to be sold" or "managed under the direction of the monitor or whomever we appoint for this process." Robert Aff., Ex. O at 5:11-14. Supreme Court responded: "I appreciate the concern. I understand the question. I'm not prepared to just issue a ruling right now, but, we'll take that up in various contexts, I'm sure." Id. at 5:15-18.

Counsel pressed for further clarification on which entities were actually impacted by Supreme Court's far-reaching order:

> Which of the entities are actually covered here, because you have New York entities. You have New York entities that, for example, own like, just like a house or own a townhouse or something. They're just, maybe Don, Jr. or Eric's residence. Are those covered? Because they're owned through LLCs, at least *under a technical reading of the statute or of the order, then those entities would also be surrendering their GBL 130 Certificates, even though they don't really have any connection to the proceeding per se*.

Id. at 6:6-16 (emphasis added). Again, Supreme Court would not clarify. Instead, it responded that it would "be happy to try to work this out" and then increased the number of days it had permitted for the parties to name potential receivers from 10 to 30. Id. at 7:20-24.

A week later, Supreme Court issued the Supplemental Order. Rather than resolve any of the pressing questions Appellants have raised regarding how the far-reaching MSJ Decision will be implemented, Supreme Court required Appellants to provide detailed lists of party and non-party entities with GBL § 130 certificates and third parties with ownership interests in the entities to the independent monitor. See Robert Aff., Ex. Q. Appellants are also now required to notify the independent monitor, in advance, any time one of the affected entities (1) applies for any "new business certificate" in any jurisdiction, (2) "anticipate[s]" transferring any assets or liabilities or makes any distribution, (3) assigns any rights, (4) makes any disclosures to third-parties regarding the "transfer or cancellation of the business certificates," and (5) modifies any existing contracts or obligations with any counterparty. Id. at 2-3. The Supplemental Order's extraordinary curtailment of the business activities of entities it cannot even name confirms that Supreme Court fully intends to order dissolution without jurisdiction, authority, or comprehension of the consequences.

Supreme Court's unprecedented and unlawfully punitive directive is in excess of any remedy provided for by Executive Law § 63(12). BCL § 1101, not the Executive Law, empowers the Attorney General to seek judicial dissolution of a corporate entity, but the Attorney General's 838-paragraph complaint contains *no* reference to Article 11 of the BCL or dissolution. Supreme Court cannot convert the Attorney General's action on its own initiative.[3] Moreover, BCL § 1101 does not apply to LLCs, and the Limited Liability Company Law has no provision authorizing the Attorney General to seek dissolution.

[3] Further, as a claim for dissolution under BCL § 1101 is "triable by jury as a matter of right," Supreme Court cannot *sua sponte* amend the Attorney General's complaint and then award relief on its own.

Supreme Court has therefore issued an overbroad directive that sows confusion and chaos in its implementation. Supreme Court's willingness to "work things out" after punctuating its 35-page decision with the bombshell proclamation that non-party businesses are now to be dissolved is simply untenable. There is no precedent nor authority to justify such sweeping and punitive relief.

Compounding the injustices imposed by the MSJ Decision, Supreme Court also directed the parties to proceed to trial on claims this Court dismissed as time-barred several months ago, claims over which Supreme Court lacks jurisdiction. Moreover, in preparing for trial, Appellants rightfully relied on the First Department Decision's dismissal of most of the claims in this action. Days before the trial was set to begin, Supreme Court announced that it was trying all claims, significantly expanding the scope of trial.[4]

The MSJ Decision has thus created a morass of epic proportions. The parties, non-parties, and their employees are now plunged into uncertainty. None of the non-party entities have any connection to the successful, profitable loan transactions at issue in this case. Indeed, there has been no allegation, let alone a finding, that these non-party entities have engaged in any wrongful conduct. Nor does Supreme Court explain how these entities possibly pose a danger to any bank or individual. As discussed in further detail below, Supreme Court lacked any evidentiary basis for its extraordinarily broad conclusion that "defendants have continued to disseminate false and misleading information while conducting business" over the past year. Robert Aff., Ex. A at 34. In sum, no harm will be prevented by enforcement of the MSJ

[4] The prejudice inherent in such a last-minute ruling is further amplified by Supreme Court's inability—or unwillingness—to advise the parties at a pretrial conference last week what issues it views as triable. Consequently, Appellants have been forced to defend against a plethora of previously dismissed claims on a few days' notice. Appellants are also presumably unable to challenge at trial Supreme Court's erroneous factual determination on summary judgment that all of the SFCs were "fraudulent," even though their accuracy was contested by experts and the SFCs do not form the basis of an independent claim.

Decision.[5] A stay of enforcement would thus result in no prejudice to the Attorney General qua Attorney General or as a guardian of the public interest.

By contrast, Appellants and non-party entities are unable to engage in lawful business enterprises, upon which hundreds of non-party individuals depend for their livelihoods. Clearly, this harm cannot be corrected retroactively. The scales of equity do more than merely "tip" in favor of a stay. If Supreme Court's miscarriage of justice is to be prevented in any respect, there is no question that a stay must be granted.

POINT II

APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL

A. Supreme Court Exceeded its Jurisdiction and Abused its Discretion in Granting Sprawling and Unprecedented Injunctive Relief

Supreme Court summarily cancelled the business certificates of party and non-party entities operating lawful businesses in the State based on its finding that the international commercial banks with which Appellants transacted should have made *more* than the hundreds of millions of dollars Appellants paid them under the subject loan agreements. Stunningly, Supreme Court also ordered that those party and non-party entities be placed into receivership and dissolved. Indeed, Supreme Court's determination that non-party entities should pay the ultimate price without ever having a day in court and in the absence of any public threat, consumer-directed conduct, or actual, or even alleged, harm to the public or anyone else, plainly violates the Executive Law's prescription that cancellation be applied as a remedy only in "appropriate cases," doles out corporate death sentences that the Executive Law does not authorize in *any* respect, and is without precedent in this State. Supreme Court's application of

[5] All of the affected parties and non-parties remain subject to the oversight of the court appointed monitor, Judge Barbara Jones. Thus, there is no even theoretical harm that could result from a stay of the MSJ Order.

such punitive relief to remedy purported misconduct outside the statutory period, to non-parties, in the absence of a request from the Attorney General, and without statutory authority also violates the LOTC and bedrock principles of due process and fundamental fairness.

1. The Expansive Injunctive Relief Granted is Not Authorized by the Executive Law

Supreme Court granted permanent injunctive relief to the Attorney General pursuant to Executive Law § 63(12), which provides, in relevant part:

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

Executive Law § 63(12) begins with a focus on a specific "person," *i.e.*, the subject of an action commenced by the Attorney General, not unnamed non-parties. The grant of authority to cancel a business certificate "in an appropriate case" is not mere superfluity. The provision begins with a dependent clause joined to the rest of the sentence by the subordinating conjunction "[w]henever," which demonstrates that the Attorney General's powers are triggered to prevent "persistent fraud or illegality in the carrying on, conducting or transaction of business." The remedies the statute authorizes can therefore only be understood with reference to this stated concern.

Executive Law § 63(12) permits neither purely punitive relief nor the wholesale dissolution of a business entity whose principal business activities are legal and appropriate simply because certain discrete transactions are determined to be "fraudulent or illegal." Indeed,

the statute does not contain any reference to dissolution as a remedy for fraud. Rather, where the Attorney General demonstrates "persistent fraud or illegality in the carrying on, conducting or transaction of business," "*such* [i.e., the fraudulent] business activity" may be permanently enjoined. In cases where injunctive relief is merited—the statute uses the conjunctive—cancellation of a business certificate may also be authorized "in an appropriate case." Cancellation, then, is warranted not as matter of course but only if necessary to enjoin "such [fraudulent] business activity." This would be the case, for example, where a business entity has been formed, and exists, for the near-exclusive purpose of defrauding consumers, *i.e.,* where the entity is the instrumentality of the fraud itself.

That fundamental principles of statutory interpretation caution against frequent resort to Executive Law § 63(12)'s injunctive remedies is unsurprising. As discussed above, such extreme remedies can have devastating consequences when applied against even a single entity. Accordingly, statutory cancellation of an entity's business certificate and judicial dissolution in an action by the Attorney General are exceedingly rare.

To Appellants' knowledge, only a handful of cases in the State even discuss the issue, and all involve factual allegations orders of magnitude more severe than the Attorney General's allegations in this case. See People by James v. N. Leasing Sys., Inc., 133 N.Y.S.3d 389 (Sup. Ct. N.Y. Cty. 2020), aff'd, 193 A.D.3d 67 (1st Dep't 2021) (defendant leasing company committed acts of forgery and fraud by routinely "leasing" equipment it never delivered, delivering broken equipment it never fixed, overcharging lessees, and then attempting to collect debts purportedly owed by the lessees from their family members, who the company would threaten to, and actually did, report to credit reporting agencies); People by Abrams v. Oliver Sch., Inc., 206 A.D.2d 143 (4th Dep't 1994) (defendant, a defunct operator of business schools,

failed to return money rightfully belonging to its students to solve its own cash flow problems); People by Lefkowitz v. Therapeutic Hypnosis, Inc., 374 N.Y.S.2d 576 (Sup. Ct. Albany Cty. 1975) (defendant pretended to be a doctor, made numerous false public representations that his business oversaw the licensed practice of hypnosis, and treated members of the public who believed he had the certifications he claimed); State v. Saksniit, 332 N.Y.S.2d 343 (Sup. Ct. N.Y. Cty. 1972) (defendants "ghost wrote" term papers for college students and assisted them in cheating to the detriment of their peers); People v. Abbott Maint. Corp., 11 A.D.2d 136 (1st Dep't 1960), aff'd, 9 N.Y.2d 810 (1961) (defendant company sold a waxing machine that could not fulfill the purpose it was advertised for).

A review of the relevant caselaw thus makes clear that there is a method to when any injunctive relief is available in an action by the Attorney General. In every instance, the Attorney General alleged defendants engaged in fraudulent conduct directed at the public that resulted in serious economic and other harm to consumers. Further, the dissolved entities were themselves the corporate fronts for the fraudulent schemes, and their business operations were predominantly, if not exclusively, dedicated to engaging in "fraudulent or illegal acts." Thus, the forced dissolution of the entities was deemed "appropriate" to shut down the schemes and prevent further exploitation of the public.

Moreover, in virtually all[6] of the foregoing cases where dissolution was authorized, the Attorney General brought a parallel BCL § 1101 claim. ***None of the cases granted dissolution pursuant to Executive Law § 63(12) alone.*** In People by James v. N. Leasing Systems, the Attorney General brought two distinct causes of action: one under Executive Law § 63(12) for

[6] The Court in Abbott ordered dissolution pursuant to General Corporation Law § 91, a defunct provision no longer in effect, as BCL § 1101 was enacted in 1961. 11 A.D.2d at 138, 140-41.

"fraud" and one under BCL § 1101(a)(2) for "dissolution." Index No. 450460/2016, NYSCEF Doc. No. 1. Supreme Court specifically analyzed the request for dissolution under BCL § 1101(a) and ordered that "respondent Northern Leasing Systems, Inc., shall [be] dissolve[d]," citing BCL § 1101(a)(2). 133 N.Y.S.3d at 411-412. This Court, in affirming Supreme Court in its entirety, likewise characterized the relief sought as follows: "[t]he State brought this special proceeding against respondents under Executive Law § 63(12) for engaging in repeated and persistent fraud and under Business Corporation Law (BCL) § 1102(a)(2) to have Northern Leasing System dissolved." 193 A.D.3d at 72. In People v. Oliver Schools, the Attorney General specifically commenced an action for dissolution pursuant to Article 11 of the BCL, and the Court granted relief exclusively on that basis, with no reference at all to Executive Law § 63(12). 206 A.D.2d 143, 145 (4th Dep't 1994). Similarly, in People by Lefkowitz v. Therapeutic Hypnosis, Inc., the proceeding was brought pursuant to, *inter alia*, BCL §§ 1101(a)(1), (a)(2), and the Court "order[ed] dissolution of THI [pursuant to] (s 63(12) of Executive Law; sections 1101(a)(1), (2) and 109(a)(5) of the Business Corporation Law)." 374 N.Y.S.2d at 579. Finally, in People v. Saskniit, the Court stated that "[t]he Attorney General has brought an action to dissolve the corporate defendant and to enjoin all defendants from engaging in certain allegedly fraudulent acts (Exec. Law, s 63(12); Bus. Corp. Law, s 1101)" and granted the Attorney's General's motion "in all respects." 332 N.Y.S.2d at 344, 350.

The instant case bears no resemblance to any precedent wherein a court decided cancellation and dissolution were authorized remedies. Here, Supreme Court has decided that Appellants are liable because the individuals "repeatedly submitted fraudulent financial documents to obtain financial benefits which otherwise they would not have received." Robert Aff., Ex. A at 5. The "fraudulent financial documents" consist of SFCs that the Attorney

General contends inflated the valuation of Appellants' businesses, thus obtaining the "financial benefits" of loans with interest rates lower than the Attorney General believes Appellants deserved. There has never been any allegation of consumer-directed conduct or of economic or other harm to anyone. Moreover, it is uncontested that the subject loan transactions were extraordinarily profitable for the lenders and that Appellants never had a late payment, never missed a loan payment, and did not default on a single loan. Indeed, many of the subject loans were repaid prior to maturity and no longer exist.

While Supreme Court admits the foregoing in footnotes, it nonetheless conjures out of thin air the speculative harm that could possibly arise in the event of a future default as a sufficient concern to warrant the imposition of vast injunctive relief:

> The defendant borrowers did not default on any loans; but we only know that with hindsight. Markets are volatile, and borrowers come in all shapes and sizes. The next borrower, or the one after that, might default, and if its SFCs are false, the lender might unfairly be left holding the bag. This will distort the lending marketplace and deprive other potential borrowers of the opportunity to obtain loans and create wealth.

Robert Aff., Ex. A at 25 n.20. Supreme Court further suggests that, even if default were *not* a concern, the international commercial banks to which Appellants paid millions in interest *might* have been harmed because they could have made more money:

> The subject loans made the banks lots of money; but the fraudulent SFCs cost the banks lots of money. The less collateral for a loan, the riskier it is, and a first principal [sic] of loan accounting is that as risk rises, so do interest rates. Thus, accurate SFCs would have allowed the lenders to make even more money than they did.

Id. at 25 n.21. Without any basis in the record, Supreme Court's explanations contradict one another and make little business sense. If the problem with Appellants' conduct was that there "might" be a future default that Appellants "might" be unable to cover, then higher interest rates are not a solution. If Appellants actually borrowed at interest rates higher than they could repay,

they would default. The banks would not make "more" money off of a default because interest rates were higher. The default would simply happen sooner. Here, however, there was never any default. Supreme Court's equivocating concerns that the banks could both "be left holding the bag" and could have made "even more money than they did" are nothing more than a *post hoc* fallacy. Id. at 25 n.20, 21

In sum, Supreme Court is unable to identify any actual harm that its injunctive relief is aimed at preventing. It does not, and cannot, invoke any statute authorizing judicial dissolution. Nonetheless, Supreme Court announces that cancelling the certificates and dissolving the entities is a "necessity" because "defendants have continued to disseminate false and misleading information while conducting business." Id. at 34-35. Supreme Court's view that business entities can be destroyed wholesale whenever it concludes that some related entities used "false and misleading information" in any aspect of "conducting business" ignores the inherent limiting principles of the Executive Law and constitutes a denial of fundamental due process.

Moreover, Supreme Court's conclusion is based solely on its mischaracterization of the observations of an independent monitor it appointed last year to review financial and accounting information submitted to lenders by the Trump Organization. As set forth in the MSJ Decision, (1) "information regarding certain material liabilities provided to lenders . . . has been incomplete," (2) the "[t]rust also has not consistently provided all required annual and quarterly certifications attesting to the accuracy of certain financial statements," and (3) externally prepared "annual audited financial statements for certain entities . . . list depreciation expenses," while "interim internally prepared financial statements" report the same expenses "inconsistently." Id. at 33-34. Even though this issue (and the issue of remedies in general) was not raised at all in the Attorney General's Motion for Partial Summary Judgment, Supreme

Court, *sua sponte*, took the foregoing and inflated it to "continued [] disseminat[ion of] false and misleading information." Id. at 34. Thus, Supreme Court never afforded Appellants (or the non-parties) any notice or opportunity to respond. Moreover, granular and isolated examples of incompleteness and inconsistency do not equate to widespread, willful misrepresentation. Simply put, Judge Jones' observations do not, by any stretch of the imagination, justify "the necessity of cancelling the certificates filed under GBL § 130," even with respect to the Appellant entities.[7]

Supreme Court hardly considers that there may be even a question as to the propriety and legality of the relief it has granted. Having anointed the Attorney General's case as "conclusive," "indisputable," and "unquestionabl[e]," Supreme Court dismisses out of hand every one of Appellants' challenges to it and, for good measure, sanctions Appellants' attorneys for preserving objections to the Attorney General's ability to bring this suit. Robert Aff., Ex. P at 19, 22. In the end, Supreme Court justifies the attempted destruction of a multi-billion-dollar New York real-estate empire with the observation that, in recent months, an independent monitor has said some information one Appellant submitted to lenders was "incomplete." Supreme Court's grant of injunctive relief is a clear abuse of its discretion under Executive Law § 63(12). At the very least, there is a triable issue as to whether the relief is justifiable. See People v. Greenberg, 27 N.Y.3d 490, 497 (2016); see also BCL § 1101(b).[8]

[7] Indeed, Supreme Court's Supplemental Monitorship Order requires the monitor to report to the Court "any unusual and/or suspicious and/or suspected or actual fraudulent activity." Index No. 452564/2022, NYSCEF Doc. No. 194. The monitor has never reported any such activity.

[8] Even BCL § 1101, the statute that authorizes judicial dissolution of a corporation, is construed narrowly. See People by James v Natl. Rifle Assn. of Am., Inc., 74 Misc. 3d 998, 1018-19 (Sup. Ct. N.Y. Cty. 2022) (internal citations and quotations omitted).

2. The Attorney General Did Not Assert a Claim for Dissolution and Supreme Court Exceeded its Jurisdiction in Awarding Such Relief *Sua Sponte*

As set forth above, Executive Law § 63(12) does not authorize judicial dissolution. In order to impose such a remedy for repeated fraud, the Attorney General must seek relief pursuant to BCL §1101. Nonetheless, ***the Attorney General does not bring any claim pursuant to BCL §1101 against Appellants.*** Nor has she requested that any entity be dissolved in her complaint or at any other point in this action. Even Supreme Court does not so much as *reference* dissolution in its multi-page discussion of "injunctive relief." It quotes the relevant portion of Executive Law § 63(12), which authorizes cancellation of business certificates, and proceeds to hold as follows:

> [T]he Attorney General is entitled to the first two prayers for relief sought in her complaint: (1) canceling any certificate filed under and by virtue of the provisions of New York General Business Law § 130 for all the entity defendants found liable, as well as any other entity controlled or beneficially owned by the individual defendants found liable herein, which and who participated in or benefitted from the foregoing fraudulent schemes; and (2) appointing an independent monitor to oversee compliance, financial reporting, valuation, and disclosures to lenders, insurers, and tax authorities at the Trump Organization.

Robert Aff., Ex. A at 34. Thus, Supreme Court appears to have recognized that the Attorney General sought an independent monitor, not dissolution. Nonetheless, Supreme Court announces in a single decretal paragraph that, for reasons known only to Supreme Court, party and non-party entities should receive a sentence of corporate death in the form of judicial dissolution.

BCL § 1101 delineates specific grounds upon which the Attorney General can bring an action for dissolution of a corporation, including that the corporation "carried on, conducted or transacted its business in a persistently fraudulent or illegal manner." While BCL § 1101(c)

provides that these grounds are not exclusive,[9] it lacks any provision sufficient to permit Supreme Court to transform a cause of action under Executive Law § 63(12) into one under BCL § 1101 *sua sponte*. Even if it could, the provisions of the BCL would preclude the relief granted. First, any claim for dissolution under BCL § 1101 (not asserted herein) is "*triable by jury as a matter of right*." \ (emphasis added). A jury trial is not available to Appellants in this strictly Executive Law § 63(12) action.

Further, BCL § 1111(b)(1) mandates that "[i]n an action brought by the attorney-general, the interest of the public is of paramount importance." Other than vague, footnoted allusions to "distort[ion] [of] the lending marketplace," Supreme Court identifies no preeminent public interest that its summary cessation of lawful business enterprises effectuates. Robert Aff., Ex. A at 25 n. 20. As discussed, it does not identify any public harm. It is well-settled that "corporate death in the form of judicial dissolution represents the extreme rigor of the law," and "its infliction must rest upon grave cause, and be warranted by material misconduct." People by James v Natl. Rifle Assn. of Am., Inc., 74 Misc. 3d 998, 1018-19 (Sup. Ct. N.Y. Cty. 2022) (internal citations and quotations omitted). The Attorney General "does not allege the type of *public* harm that is the legal linchpin for imposing the 'corporate death penalty.'" Id. at 1004. "State-imposed dissolution…should be the last option, not the first." Id.

Additionally, all of the Attorney General's claims arise under the Executive Law, not the BCL. See Coucounas v. Coucounas, 33 Misc. 2d 559, 560 (Sup. Ct. Special Term Kings Cty. 1962) ("The jurisdiction of the court with respect to an action for the dissolution of a corporation under the circumstances is derived solely from the statute and unless the complaint shows the

[9] BCL § 1101(c) specifically provides that "[t]he enumeration in paragraph (a) of grounds for dissolution shall not exclude actions or special proceedings by the attorney-general or other state officials for the annulment or dissolution of a corporation for other causes as provided in this chapter or in any other statute of this state."

jurisdictional facts the court has no power to act."). Nothing in the Attorney General's prayer for relief, in her complaint, in her motion for summary judgment, or in any other brief makes even an oblique reference to dissolution. Supreme Court is not empowered to grant such relief, which is legally and factually distinct from cancellation, based on a general relief clause. Hyman v Able & Ready Appliance Repair Corp., 193 A.D.3d 509, 510 (1st Dep't 2021) ("The presence of a general relief clause enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced."). Appellants and the affected nonparties also had no ability to defend against a remedy that has never been mentioned in this action. Supreme Court's wholesale grant of dissolution by fiat absent a BCL § 1101 claim, *any* prior request for such relief, or notice that it was considering granting such relief is an egregious violation of Appellants' due process rights and in clear excess of Supreme Court's lawful jurisdiction.

3. Supreme Court Expressly Relied on Time-Barred Claims in Granting Injunctive Relief

Supreme Court expressly relies on claims and transactions unquestionably outside of the statutory period in granting expansive injunctive relief: "Although any liability arising out of the submission of the 2011 and 2012 SFCs is time barred; as previously discussed, these submissions may be considered as evidence in support of [the Attorney General]'s request for injunctive relief." Robert Aff., Ex. A at 24 n.17. Supreme Court further explains, in another footnote, that "although not actionable by themselves, evidence of fraud that predates July 13, 2014, may still be used as evidence in evaluating [the Attorney General]'s request for permanent injunctive relief, wherein the Court must determine whether there has been 'a showing of a reasonable likelihood of a continuing violation based upon the totality of the circumstances.' People v Greenberg, 27 NY3d 490, 496-97 (2016)." Id. at 22 n.14.

People v. Greenberg, which summarizes the standard for permanent injunctive relief under the Martin Act and Executive Law § 63(12), does not stand for the proposition that time-barred claims can be considered in determining whether relief can be granted. See 27 N.Y.3d 490 (2016). That conclusion is Supreme Court's own. In Supreme Court's view, that certain claims are time-barred is a minor and irrelevant detail. Such claims can still be assessed, and liability thereon can still be imposed, if Supreme Court christens a connection between the statutorily barred claims and timely conduct. Once again, Supreme Court applies its own twisted version of the continuing wrong doctrine in direct defiance of this Court's ruling. There is no basis in existing law for the notion that a claim a defendant cannot be, and has never been, held liable for constitutes evidence of a prior bad act sufficient to justify permanent injunctive relief. Supreme Court effectively imposes liability on claims it admits are time-barred and, in doing so, nullifies the entire concept of a statutory period.

4. Supreme Court Ordered the Unasked-For Dissolution of Nonparty Entities Without Process

Supreme Court granted the injunctive relief described herein against Appellants and non-parties who had no notice that the relief was even being considered. In addition to the fact that the Attorney General never sought dissolution, as discussed above, the Attorney General's request for cancellation of business certificates was circumscribed. The Complaint's prayer for relief, in relevant part, requests an order and judgment: "Cancelling any certificate filed under and by virtue of the provisions of section one hundred thirty of the General Business Law for the corporate entities named as defendants and *any other entity controlled by or beneficially owned by Donald J. Trump* ***which participated in or benefitted from the foregoing fraudulent scheme***." Robert Aff., Ex. B at 213. The Attorney General does not even mention this ultimate relief in her Notice of Motion, instead restricting her request to "Finding in Plaintiff's favor

judgment as a matter of law on Plaintiff's First Cause of Action for fraud under Executive Law § 63(12) and limiting the contested issues of fact for trial, by specifying such facts deemed established for all purposes in this action." Robert Aff., Ex. M. Moreover, only once in the 176-page transcript of oral argument on the motions for summary judgment is cancellation of business certificates even mentioned. That single allusion to this drastic remedy by the Attorney General comes in the context of "remaining claims left for trial." Robert Aff., Ex. N at 46:2-13.

Nonetheless, the MSJ Decision orders as follows:

> ORDERED that any certificates filed under and by virtue of GBL § 130 by any of the entity defendants or *by any other entity controlled or beneficially owned by Donald J. Trump, Donald Trump, Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney* are canceled; and it is further
>
> ORDERED that within 10 days of the date of this order, the parties are directed to recommend the names of no more than three potential independent receivers to manage the dissolution of the canceled LLCs.

Robert Aff., Ex. A at 35.

Supreme Court thus directed the cancellation and dissolution of entities (1) controlled or beneficially owned by individuals and entities other than Donald J. Trump, including, inexplicably, Donald Trump, Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney, (2) without regard to whether the entity "participated in or benefitted from" any fraudulent scheme, and (3) despite the fact that Attorney General did not ask for any such relief against Donald Trump, Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney, or *any* relief against entities who unquestionably had no involvement in, and unquestionably did not benefit from, the underlying allegations, in either the Complaint or the Notice of Motion. See Bos. Nat. Bank v. Armour, 3 N.Y.S. 22, 23 (Gen. Term 1st Dep't 1888) ("Relief of this character is so distinct from that asked for, that under the general prayer for relief such relief should not have been granted. Under a general prayer for relief upon a motion every possible relief should not be granted, but it

should be allied to what is asked for, and not entirely distinct therefrom."); see also Datwani v. Datwani, 102 A.D.3d 616 (1st Dep't 2013) ("It was error for the IAS court to sua sponte impose a stay of this action, as no party requested that relief, and defendant, who would have benefited from the stay, did not even make a motion, cross motion or other application for relief."). Supreme Court's grant of broad, un-demanded relief, without notice it was considering doing so and or an opportunity for Appellants to oppose it, severely prejudices Appellants, especially those against whom the Attorney General never sought cancellation and is patently improper and unconstitutional. Cf. Saint Robert v. Azoulay Realty Corp., 209 A.D.3d 781 (2d Dep't 2022); Berle v. Buckley, 57 A.D.3d 1276 (3d Dep't 2008).

Finally, Supreme Court's election to order the dissolution of non-party entities, over which Supreme Court has no jurisdiction, is impermissible. Weiner v. Weiner, 107 A.D.3d 976, 977 (2d Dep't 2013) ("A court has no power to grant relief against an entity not named as a party and not properly summoned before the court.") Since the entities affected by Supreme Court's permanent injunction have never been properly summoned before the court, Supreme Court has no power to award any relief against them.

B. The MSJ Decision Grants Judgment on Time-Barred Claims in Contravention of the Law of the Case

On June 27, 2023, this Court "unanimously modified, on the law," Justice Engoron's January 9, 2023, order denying Appellants' and Ms. Trump's motions to dismiss. The Court's decretal paragraph provides, in relevant part:

> Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered January 9, 2023, which denied defendants' respective motions to dismiss the complaint, *unanimously modified, on the law, to dismiss, as time-barred*, the claims against defendant Ivanka Trump and *the claims against the remaining defendants to the extent they accrued prior to July 2014 (with respect to those defendants subject to the August 2021 tolling*

> *agreement) and February 2016 (with respect to those defendants not subject to the August 2021 tolling agreement)...*

Robert Aff., Ex. G. at 1 (emphasis added). The Court defined the accrual date for each claim as follows:

> Applying the proper statute of limitations and the appropriate tolling, *claims are time barred if they accrued - that is, the transactions were completed* - before February 6, 2016 (*see Boesky v Levine*, 193 AD3d 403, 405 [lst Dept 2021]; *Rogal v Wechsler*, 135 AD2d 384, 385 [1st Dept 1987]). For defendants bound by the tolling agreement, claims are untimely if they accrued before July 13, 2014.

Id. at 3 (emphasis added). The Court then "le[ft to] Supreme Court to determine, if necessary, the full range of defendants bound by the tolling agreement." Id. at 4.

This Court thus made an unambiguous determination that certain claims are time-barred. Specifically, it held that the Attorney General's claims are time-barred where they are premised on transactions—here, loan agreements with commercial entities—completed outside of the statutory limitations period. The *only* discretionary act left with respect to these time-barred claims was for Supreme Court to decide which of the defendants were bound by the tolling agreement in order to apply the proper cut-off date. Based on this clear ruling, eight of the ten lending-based claims in the Complaint are time-barred.

This Court's determination is law of the case ("LOTC"). LOTC "bind[s] a trial court (and subsequent appellate courts of coordinate jurisdiction) to follow the mandate of an appellate court, absent new evidence or a change in the law." Matter of Part 60 RMBS Put-Back Litig., 195 A.D.3d 40, 48 (1st Dep't 2021) (Gische, J.S.C.); see also, e.g., Applehole v. Wyeth Ayerst Laboratories, 213 A.D.3d 611, 611 (1st Dep't 2023) ("[R]esolution of the issue on the prior appeal constitutes the law of the case and forecloses reexamination of the issue."); Magen David of Union Square v. 3 West 16th Street, LLC, 132 A.D.3d 503, 504 (1st Dep't 2015) (although

prior appeal did not "specifically address" counterclaim, "the underlying issues were necessarily resolved in that appeal, and that resolution constitutes 'the law of the case'"); People v. Codina, 110 A.D.3d 401, 406 (1st Dep't 2013); Kenney v. City of New York, 74 A.D.3d 630, 630-31 (1st Dep't 2010). "[N]o discretion [is] involved; *the lower court must apply the rule laid down by the appellate court*." Matter of Part 60 RMBS Put-Back Litig., 195 A.D.3d at 48 (quoting People v. Evans, 94 N.Y.2d 499, 503 (2000) (quotation marks omitted)) (emphasis added). Accordingly, Supreme Court was powerless to revisit or countermand the First Department Decision on remittal.

The doctrine of LOTC ensures that when Appellate Division exercises its broad authority to review questions of law and fact, (CPLR § 5501(c)), its determinations have a legal and practical effect on the parties and the court below. This Court unequivocally required Supreme Court to dismiss certain claims upon remand. Nonetheless, Supreme Court failed to even acknowledge the First Department Decision for months, forcing Appellants to relitigate the issues. Then, days before trial was set to begin, Supreme Court issued a decision wherein it proclaimed that (1) ***this Court had "affirmed" its "dismissal decision,"*** (Robert Aff., Ex. A at 4, 8, 11), (2) this Court ***did not dismiss "any causes of action***," (id. at 3 (emphasis added)), and (3) "any SFC that was submitted after July 13, 2014, falls within the applicable statute of limitations" because each is "a distinct fraudulent act," (id. at 18). Supreme Court has resorted to accusing Appellants of living in "a fantasy world, not the real world," sweepingly characterizing their arguments throughout the entire action as "bogus." Id. at 10. But the decretal paragraph of this Court's decision is unequivocal in that it was a modification, not an affirmance. Ultimately, it is Supreme Court's own interpretation of the First Department Decision that is simply untenable.

1. Supreme Court Entered Judgment Upon the Same "Continuing Wrongs" Previously Rejected by this Court as Bases to Extend the Statute of Limitations

The Attorney General's theory of the case as articulated in the Complaint, which has never been amended, is that Appellants' improper procurement of certain discrete loans constituted actionable wrongs under Executive Law § 63(12), *i.e.,* the submission of purportedly false and misleading financial statements "***to induce banks to lend money to the Trump Organization on more favorable terms than would otherwise have been available to the company***." Robert Aff., Ex. B ¶ 3 (emphasis added). Thereafter, prior to summary judgment, the Attorney General consistently maintained that Appellants' use of the SFCs to obtain favorable loan or insurance terms were the wrongs she sought to redress.[10] Under this original theory, the Attorney General argued that subsequent, post-closing certifications as to the veracity of the SFCs, as required by the loan documents, simply constituted continuing wrongs extending the applicable limitations period.[11] In its decision denying Appellants' and Ms. Trump's motions

[10] For example, in opposition to Appellants' Motion to Dismiss, the Attorney General was unequivocal about her theory of recovery: "[O]n September 21, 2022, OAG commenced this enforcement action pursuant to New York Executive Law § 63(12) alleging that Defendants (plus Ivanka Trump) engaged in repeated and persistent fraud and illegality by inflating asset values on Mr. Trump's annual statements of financial condition ("Statements") covering at least the years 2011 through 2021 and presenting those Statements to lenders and insurers licensed in New York to obtain favorable loan and insurance terms they would otherwise not have been entitled to receive. See People by James v. Donald J. Trump, Index No. 452564/2022, NYSCEF No. 183, slip. Op. at 1-2. On appeal before this Court, the Attorney General likewise asserted: "Defendants scheme involved submitting (and certifying as true) Mr. Trump's false and misleading Statements in various commercial transactions to banks and lenders, insurance companies, and other entities ***to obtain significant financial benefits*** *such as favorable loan or insurance terms*." People v. Trump, et al., Appeal No. 2023-00717, NYSCEF Doc. No. 24 (emphasis added)

[11] The following quote is but one example of the Attorney General's invocation of the continuing wrong theory on appeal:

> Here, defendants' scheme involved such 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 financial relationship constitute continuing wrongs.*[11] . . . . For the Old Post Office Loan, defendants also repeatedly requested disbursements conditioned on their certifying the truth and accuracy of the previously submitted Statements. . . . That ongoing conduct *is also covered by the continuing-wrong doctrine.*

People v. Trump, et al., Appeal No. 2023-00717, NYSCEF Doc. No. 24 at 48-49 (emphasis added)].

to dismiss, Supreme Court likewise invoked the continuing wrong doctrine to explain why it believed the Attorney General's claims could be sustained against Ms. Trump.[12] This Court disagreed.

In unanimously modifying Supreme Court's decision, this Court assessed and rejected the argument that annual certifications themselves could support the timeliness of the Attorney General's claims under the continuing wrong doctrine. In a simple declaratory sentence, the Court thus concluded that the Attorney General's claims are time-barred insofar as they are premised on transactions completed outside of the applicable statutory periods: "*The continuing wrong doctrine does not delay or extend these periods (see CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC*, 195 AD3d 12, 19-20 [1st Dept 2021]; *Henry v. Bank of Am.*, 147 AD3d 599, 601-602 [1st Dept 2017])." Robert Aff., Ex. G at 3 (emphasis added).

This Court's citations elucidate its point: "The doctrine may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs." Henry v. Bank of Am., 147 A.D.3d 599, 601 (1st Dep't 2017) (internal

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[12] Supreme Court wrote:

> As OAG persuasively argues, ***the nature of the loan contracts at issue renders application of the continuing wrong doctrine particularly compelling*** in this action. The loans, ***obtained through the use of allegedly inflated [Statements of Financial Condition]***, continued in effect for many years after the loan was issued and required annual performance by defendants. For example, each of the Deutsche Bank loans had terms extending past 2022, and each had continuing obligations to maintain a net worth of at least $2.5 billion and unencumbered liquidity of $50 million. *Each of the loans required annual submissions of Mr. Trump's [Statement of Financial Condition] and a certification that the Statements were true and accurate and that there had been no material change in Mr. Trump's net worth or his liquidity*…Ms. Trump's own biography from 2014 indicated that she "spearheaded the acquisition of [Trump National Doral] and was responsible for overseeing the 250 million dollar renovation of the 800 acre property."
> …
> Accordingly, *as the verified complaint sufficiently alleges Ms. Trump's participation in continuing wrongs*…Ms. Trump is not entitled to dismissal pursuant to the statute of limitations.

Robert Aff., Ex. G.

quotation marks and citation omitted). Thus, "[i]n contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party." Id.; see CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 195 A.D.3d 12, 19-20 (1st Dep't 2021). By rejecting the continuing wrong doctrine in this case, the Court concluded that Appellants' submissions of purported "separate fraudulent SFC[s]" pursuant to time-barred contracts were *not* separate, fraudulent acts at all. Rather, they were the continuing effects of the original loan transactions.

Notwithstanding the First Department Decision, Supreme Court now adopts the view that the post-closing submissions of the SFCs are not "continuing wrongs" but, rather, separately actionable claims. Supreme Court has thus decided that the performance of a contractual covenant brings loan agreements indisputably entered into before the statutory cut-off back into play. Supreme Court explained:

> As a general rule, statutes of limitation start running when a claim accrues, that is, when it can be sued upon. In arguing that [the Attorney General]'s causes of action are untimely, defendants incorrectly assert that the statute of limitations starts running on the date the parties entered into the subject agreements, or when the loans closed. However, the First Department did not use the word "closed," it used the word "completed." Trump, 217 AD3d at 611. Obviously, *the transactions were not "completed" while the defendants were still obligated to, and did, annually submit current SFCs to comply with the terms of the loan agreements*.

Robert Aff., Ex. A at 17. Thus, Supreme Court justified its refusal to dismiss any of the Attorney General's claims because all of the loan transactions, no matter when entered, entailed continuing contractual obligations to submit annual certification of the original SFCs. Supreme Court concluded: "Indeed, each submission of a financial document to a third-party lender or insurer would 'requir[e] a separate exercise of judgment and authority,' triggering a new claim.

Yin Shin Leung Charitable Found. v Seng, 177 AD3d 463, 464 (1st Dept 2019) (finding continuous series of wrongs each of which gave rise to its own claim)." Id. at 17.

Supreme Court derides Appellants' argument for dismissal of time-barred claims as demanding that it "apply a bizarre, invented, inverted form of the 'relation back' doctrine." Id. But the only "bizarre, invented, inverted" legal doctrine apparent in these passages, though never actually named, is *the continuing wrong doctrine*. Supreme Court's citations, including to one of the cases cited in the First Department Decision, make clear that Supreme Court believes it may cherry-pick portions of the doctrine to sustain dismissed claims despite this Court's ruling.

In Yin Shin Leung, this Court addressed the timeliness of various claims for breaches of fiduciary duty. 177 A.D.3d 463, 463 (1st Dep't 2019). Supreme Court avers in a parenthetical that the Court in Yin Shin Leung found a "continuous series of wrongs each of which gave rise to its own claim." Robert Aff., Ex. A at 17. Supreme Court couples that inaccurate summary with an inaccurate partial quotation used to support Supreme Court's contention that every act that "'requir[es] a separate exercise of judgment and authority,' trigger[s] a new claim." Id. The full quote is revealing:

> *The continuing wrong doctrine is applicable* to respondents' use of the disputed "special account." While respondents disclosed the formation of the special account and their intent to use corporate funds diverted thereto to pay expenses in related litigation in Hong Kong, those disbursements were not automatic consequences of the initial decision. *Each payment of litigation expenses required a separate exercise of judgment and authority*.

Id. at 464. In other words, Yin Shin Leung does *not* stand for the proposition that every exercise of judgment and authority gives rise to a "new claim" separate and apart from a previous wrong. Rather, it stands for the proposition that independent exercises of judgment and authority in connection with the same transaction can revive time-barred claims *through the continuing wrong doctrine*.

As set forth above, CWCapital also applies the continuing wrong doctrine. Nonetheless, Supreme Court cites to it for the bare concept that "each instance of wrongful conduct [is] a 'separate, actionable wrong' giving 'rise to a new claim'" and again uses partial quotations to misleading effect. Robert Aff., Ex. A at 18. The quoted passage actually begins as follows: "We find that *the continuing wrong doctrine does apply to this case*." 195 A.D.3d at 19. Thus, this Court explained in CWCapital that the plaintiff's claims were timely because each instance of defendant's wrongdoing under the same contract was found to constitute a "new claim" *triggering the continuing wrong doctrine*.

Each of Supreme Court's cases thus describes instances where this Court applied the continuing wrong doctrine. As such, each is inapposite to the premise that a plaintiff—or a Court—can simply declare as "independent claims" what LOTC has determined are continuing effects to avoid the impact of an appellate ruling. This Court ruled unequivocally that the continuing wrong doctrine did not apply to the Attorney General's claims. Supreme Court ignores that ruling and relies on the continuing wrong doctrine, in all but name, to support its entry of a judgment that contravenes the LOTC.

If there were any lingering doubt that the First Department Decision rejected the concept of the annual certifications serving as separate claims, its treatment of the claims against Ms. Trump conclusively resolves the matter. At the pleading stage, Supreme Court sustained claims against Ms. Trump based on Deutsche Bank loan transactions entered into in 2011, with terms extending past 2022, wherein Appellants were obligated to submit annual certifications. Supreme Court did so because it found that, *based on the annual certifications*, "the verified complaint sufficiently alleges Ms. Trump's participation in continuing wrongs." Robert Aff., Ex. F.

In a clear rejection of that position, the First Department Decision "dismiss[ed], as time-barred" all claims against Ms. Trump because the record was sufficiently clear that she was not subject to the tolling agreement and the Attorney General's allegations did "not support any claims that accrued after February 6, 2016." Robert Aff., Ex. G at 1, 4 (emphasis added). Thus, this Court held that "*all claims against [Ms. Trump] should have been dismissed as untimely*." Id. at 4. The implications of the First Department Decision could not be clearer: the Attorney General's claims are untimely as to all Appellants to the extent they are premised on transactions that accrued—that is, loans that closed—outside of the statutory period. The question of whether certifications form the bases for separate claims is not up for debate.

2. Most of the Attorney General's Claims Accrued Prior to July 13, 2014, and are Subject to Dismissal as Untimely

The First Department Decision holds that the Attorney General's claims "accrued" when "transactions were completed." Supreme Court suggests that this Court's use of "completed" rather than "closed" indicates that it rejected Appellants (and Ms. Trump's) contention that the accrual date for each loan was its closing date. Robert Aff., Ex. A at 17. Supreme Court then proceeds to reject this Court's definition of accrual in favor of "controlling case law," which it avers "holds that a cause of action accrues at the time 'when one misrepresents a material fact.' Graubard Mollen Dannett & Horowitz v Moskovitz, 86 NY2d 112, 12[2] (1995)." Id. at 18.

Notably, Supreme Court's substituted definition of accrual includes neither the word "completed" nor the word "transaction." It is also followed by yet another partial quotation from an inapposite case that does not contain the word "accrual." The full quotation is as follows: "A cause of action for fraud may arise when one misrepresents a material fact, knowing it is false, which another relies on to its injury." Graubard Mollen Dannett & Horowitz v. Moskovitz, 86

N.Y.2d 112, 122 (1995). It is plain that this Court referred to the date "the transactions were completed" as the accrual date because the "completion" of a loan transaction is the date when the transaction is actually entered into, a benefit is conferred, and an "injury" arises.

The cases cited in the First Department Decision are dispositive. In Boesky v. Levine, this Court found that a cause of action for fraud accrued "when plaintiffs ***entered into*** the allegedly fraudulent transactions." 193 A.D.3d 403, 405 (1st Dep't 2021) (emphasis added). In Boesky, this Court determined that the fraud claim accrued between 2002 and 2004, when the plaintiffs actually invested in tax shelters of questionable legitimacy, notwithstanding that the plaintiffs alleged the defendants continued to provide flawed and erroneous advice through 2016. Id. at 404-05. In Rogal v. Wechsler, this Court similarly held: "The cause of action for fraud accrues and the Statute of Limitations commences to run ***at the time of execution of the contract***." 135 A.D.2d 384, 385 (1st Dep't 1987). The Rogal Court thus found that Supreme Court "erroneously fixed the accrual" of the plaintiffs' fraud claim on the date "when certain misrepresentations allegedly were made." Id. In other words, Rogal expressly forecloses Supreme Court's stated definition of the accrual date for a fraud claim.

Contrary to Supreme Court's conclusions, (i) seven of the ten loan transactions at issue in the Complaint involving lending were completed *before* July 13, 2014; (ii) one of the transactions was *never* consummated; and (iii) the two remaining transactions were completed *before* February 6, 2016. Thus, even assuming, *arguendo*, that Supreme Court properly determined that all of the non-signatory Appellants are bound by the tolling agreement, most of the Attorney General's claims are nonetheless untimely as a matter of law. Consequently, it was plain error for Supreme Court to refuse to dismiss such claims and to grant the Attorney General judgment thereupon. Moreover, forcing Appellants to defend against time-barred claims at trial

exceeds Supreme Court's jurisdiction and ensures chaos and a continuing compounding of error.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant a stay of enforcement of Supreme Court's Decision and Order dated September 26, 2023, pursuant to CPLR § 5519(c) pending appeal, a stay of the trial, and grant any other such and further relief it may think proper.

Dated: New York, New York
October 6, 2023

Respectfully submitted,

HABBA MADAIO & ASSOCIATES, LLP
Michael Madaio
112 West 34th Street, 17th & 18th Floors
New York, New York 10120
Phone: (908) 869-1188
Email: mmadaio@habbalaw.com
Counsel for Donald J. 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 LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC and Seven Springs LLC

Dated: New York, New York
October 6, 2023

Respectfully submitted,

ROBERT & ROBERT PLLC
Clifford S. Robert
Michael Farina
526 RXR Plaza
Uniondale, New York 11556
Phone: (516) 832-7000
Email: crobert@robertlaw.com
mfarina@robertlaw.com
Counsel for Donald Trump, Jr., Eric Trump, The Donald J. Trump Revocable Trust, 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