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

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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The People of the State of New York, by Letitia James, Attorney General of the State of New York ("OAG"), respectfully submit this memorandum of law and the accompanying Affirmation of Colleen K. Faherty, dated October 13, 2022 ("Faherty Aff."), in support of their motion by order to show cause for a preliminary injunction and appointment of a monitor. The order to show cause also seeks as additional relief permission to serve certain individual Defendants electronically and the scheduling of a preliminary conference to set a trial date for early October 2023. Specifically, OAG seeks: (i) the appointment of an independent monitor to oversee the submission of certain financial information to third parties, including accountants, lenders, and insurers, by Defendants the Trump Organization, Inc., the Trump Organization LLC, DJT Holdings LLC, and DJT Holdings Managing Member LLC (collectively, the "Trump Organization"); (ii) to enjoin Defendants from transferring to non-party affiliates or otherwise disposing of assets without Court approval in order to prevent further violations of Executive Law § 63(12) and maintain the status quo during the pendency of this action; (iii) permission to serve electronically Defendants Donald J. Trump and Eric Trump; and (iv) holding a preliminary conference in order to set an expedited trial schedule.

BACKGROUND

As demonstrated in exacting detail in OAG's 214-page verified complaint (NYSCEF No. 1) (the "Complaint"), Donald J. Trump and the Trump Organization, along with the other individuals named as Defendants, engaged in persistent and repeated fraud and illegality on a staggering scale in the preparation and distribution of Mr. Trump's Statements of Financial Condition ("Statements") over an 11-year period from 2011 through 2021. The fact that those Statements were false and misleading is beyond debate. The accounting firm that compiled the Statements informed the Trump Organization that the Statements for the years 2011 to 2020 "should no longer be relied upon" and withdrew from its decades-long accounting and auditing

relationship with Mr. Trump and the Trump Organization. Faherty Aff. ¶ 8. Moreover, disclosures about the misrepresentations in the Statements, and a refusal by the Trump Organization to answer basic inquiries about those disclosures, led their largest lender to execute a "managed exit" of the relationship. Faherty Aff. ¶¶ 50-55.

Even more tellingly, as OAG identified and questioned Defendants about specific fraudulent practices during the pendency of its investigation, the Trump Organization began quietly backing away from such practices, effectively acknowledging they were false and misleading. For example, when Trump Organization employees were challenged about references to consultations with "outside professionals" in the Statements during sworn testimony before OAG in 2020, that language was subsequently changed in the 2020 Statement. Compl. ¶¶ 104-05. The Trump Organization also began to pay off loans early, specifically those with personal guarantees that required the submission – and certification – of annual Statements. Faherty Aff. ¶ 76. When negotiating new loans, the Trump Organization sought to avoid the submission of the Statements or even a calculation of net worth, and instead submitted a list of real estate assets and liabilities without a representation as to value. *Id*.

But these steps merely seek to avoid the impact of the past fraudulent behavior identified over the course of the investigation and laid out in the Complaint. They do not reflect a change in the fundamental business practices of the Trump Organization to use fraud and misrepresentation to secure financial benefits it could not otherwise obtain, including through the false and misleading inflation of Mr. Trump's net worth. Indeed, in many areas, the Trump Organization has continued using practices they knew to be improper or fraudulent. For example, the 2021 Statement continues to value golf clubs using the improper "fixed assets" method, the valuation for Mar-a-Lago still does not account for restrictions on use of the property, and Mr. Trump

continues to treat $93 million held in a Vornado partnership as his own cash. Compl. ¶¶ 407, 434, 450, 458, 474 (fixed assets), ¶¶ 375-383, (Mar-a-Lago), ¶¶ 74-75 (cash). The Trump Organization is still required to submit a Statement for 2022 under the terms of a number of loans, including the Deutsche Bank loan on Trump Chicago.

Beyond just the continuation of its prior fraud, the Trump Organization now appears to be taking steps to restructure its business to avoid existing responsibilities under New York law. On September 21, 2022, the same day OAG filed this action, the Trump Organization registered a new entity with the New York Secretary of State: Trump Organization II LLC. Faherty Aff. ¶ 81. That entity is a foreign corporation, incorporated in Delaware on September 15, 2022 with the name "Trump Organization LLC." *Id*. When OAG raised its "concern that the Trump Organization may be seeking to move assets out of state," and asked counsel for "some assurance that there will be no change to the status quo ante over the coming months (or that [OAG] will at least have reasonable advance notice of asset transfers)," the Trump Organization offered no assurances.[1] Faherty Aff. ¶¶ 83-84. Counsel simply stated, "The Trump Organization has not 'taken steps to avoid the jurisdiction of the court or make it difficult to obtain relief against the corporate entities.'" Faherty Aff., Ex. 78. On the eve of this filing, counsel did offer to provide assurances and advance notice to address what were described as "purported concerns," but again offered no concrete mechanism to either effectuate or enforce that offer. Faherty Aff. ¶ 85.

By this order to show cause, OAG seeks a preliminary injunction to prevent the continuation of the fraudulent valuation scheme and preserve the status quo ante pending trial,

[1] OAG raised these concerns as part of an exchange concerning service and time to respond to the Complaint. Those conversations did not resolve the issues. For the reasons set forth in the Faherty Affirmation, OAG requests that the order to show cause allow for electronic service of the summons and complaint on Donald J. Trump and Eric Trump. Faherty Aff. ¶ 88

which should be scheduled as soon as practicable. Specifically, OAG is seeking an order that (i) prohibits the Trump Organization from issuing a statement of financial condition or other asset disclosure for Mr. Trump that fails to adequately disclose the assumptions and techniques used for valuing his assets and (ii) prohibits the Trump Organization from transferring any material asset to a non-party affiliate or otherwise disposing of a material asset without Court approval. To oversee compliance with this injunction, the order to show cause also seeks the appointment of an independent monitor during the pendency of this action. That monitor would oversee: (i) the submission of financial information to any accounting firm that compiles the 2022 Statement; (ii) appropriate financial disclosures to lenders and insurers necessary to satisfy continuing obligations under loan covenants and insurance programs or to obtain new financing and insurance; and (iii) any corporate restructuring or disposition of significant assets. The order to show cause seeks to impose these restrictions in advance of a trial date to be set for early October 2023.

The People are entitled to this preliminary relief because they have a strong likelihood of success on the merits and the balance of equities and public interest weigh sharply in their favor. As detailed in the Complaint and shown in the Faherty Affirmation, over the course of at least the past 11 years, Defendants employed multiple deceptive strategies to inflate by billions of dollars the aggregate value of more than 20 assets that make up Mr. Trump's net worth reflected on his Statements. Those deceptive strategies included the following: ignoring generally accepted accounting principles ("GAAP"); ignoring legal restrictions that apply to limit property development and marketability such as rent stabilization laws and local building rules and regulations; using objectively false factual assumptions like inflated square footage; ignoring and concealing from accountants and financial institutions appraisals prepared by outside professionals; using figures for operating income that conflict with internal budget projections;

and using inappropriate valuation methods. The Trump Organization then submitted these false and fraudulent Statements to financial institutions to: (i) obtain financial benefits it would otherwise not be entitled to receive; (ii) satisfy continuing obligations under loan agreements; and (iii) obtain insurance at higher limits for lower premiums.

The balance of equities and public interest weigh decisively in favor of preventing further fraudulent and illegal conduct by the Trump Organization. As the Complaint articulates, the fraudulent and illegal conduct by the Trump Organization persisted for more than a decade—even while the Statements were under active law enforcement scrutiny. Even to this day, Mr. Trump and other Trump Organization principals extol these very Statements and the information they contain. In short, there is every reason to believe that the Defendants will continue to engage in similar fraudulent conduct right up to trial unless checked by order of this Court. The requested targeted relief is designed to mitigate further fraud and illegality during the pendency of this action because the company has present and continuing obligations under existing loan agreements to prepare and disclose Mr. Trump's Statement of Financial Condition as of June 30, 2022 and may also seek additional financing from lenders and renewal of insurance programs on the basis of that Statement.

ARGUMENT

In an action pursuant to Executive Law § 63(12) to redress persistent fraud and illegality in the conduct of business, this Court has broad power to grant, and discretion to fashion, both preliminary and permanent injunctive relief.[2] *See, e.g.*, *People v. Apple Health & Sports Club,*

[2] In general, "[t]he purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits." *Icy Splash Food & Beverage, Inc. v. Henckel*, 14 A.D.3d 595, 596 (2d Dep't 2005). The decision of whether to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court. *Arcamone–Makinano v. Britton Prop., Inc*., 83 A.D.3d 623, 625 (2d Dep't 2011).

Ltd., 80 N.Y.2d 803, 806-07 (1992). For example, this Court in a § 63(12) action may preliminarily enjoin continued unlawful conduct, halt transfers of assets, freeze bank accounts, require posting of a bond, or take similar measures in its equitable discretion. *See id.*[3] In general, a court sitting in equity in a public-interest enforcement action such as this one may fashion appropriate equitable relief under the circumstances. *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946).

In seeking a preliminary injunction in an action under § 63(12), OAG need demonstrate only a likelihood of success on the merits and that the equities weigh in its favor. *City of New York v. Beam Bike Corp*., 206 A.D.3d 447, 448 (1st Dep't 2022); *People v. Apple Health & Sports Clubs, Ltd. Inc*., 174 A.D.2d 438, 438–39 (1st Dep't 1991), *aff'd*, 80 N.Y.2d 803 (1992). OAG "is not required to show proof of irreparable harm" to obtain preliminary injunctive relief under § 63(12). *See Beam Bike Corp*., 206 A.D.3d at 448 (citing *Apple Health*, 174 A.D.2d at 438-39); *see also Apple Health*, 174 A.D.2d at 438-39 (expressly rejecting any requirement to show irreparable injury in awarding preliminary injunction in § 63(12) action). [4]

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[3] *See also People v. 21st Century Leisure Spa*, Int'l, 153 Misc. 2d 938, 942 (Sup. Ct. N.Y. Cnty. 1991) (enjoining owner of company through a temporary restraining order from transferring, withdrawing, or otherwise disposing of funds in bank accounts); *New York v. Abortion Info. Agency*, 323 N.Y.S.2d 597, 603 (Sup. Ct. N.Y. Cnty. 1971), *aff'd*, 37 A.D.2d 142 (1st Dep't 1971) (enjoining defendants "from transferring or otherwise disposing of corporate assets or property" and appointing receiver to preserve assets); *State of New York v. First Investors Corp.*, 156 Misc. 2d 209, 213 (Sup. Ct. N.Y. Cnty.) (imposing an asset freeze injunction on the defendants); *People v. Allen*, 2020 N.Y. Misc. LEXIS 443, *7-8, 2020 NY Slip Op 30292(U) (Sup. Ct. N.Y. Cnty., Feb. 4, 2020) (granting preliminary injunction against fund, halting distributions and freezing fund assets).

[4] *See also Village of Pelham Manor v. Crea*, 112 A.D.2d 415, 416 (2d Dep't 1985) (noting that because the ordinance sued under authorizes injunctive relief against violations, "plaintiff was not required to come forward with proof of irreparable injury" to obtain a preliminary injunction); *People v. Leasing Expenses Company, LLC*, Index No. 452357/2020 (Sup. Ct. N.Y. Cnty.), slip op. at 3 (holding in a proceeding under Executive Law 63(12), unlike in private litigation, the attorney general "need not show irreparable injury, and the 'equity' to be served is primarily the public interest"); *State v. Terry Buick, Inc*., 137 Misc. 2d 290, 294 (Sup. Ct. Dutchess Cnty. 1987) ("Traditional concepts of irreparable damage which apply to private parties do not govern this public interest field.").

I. THE PEOPLE ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR § 63(12) FRAUD CLAIMS AGAINST THE TRUMP ORGANIZATION

As established herein, and in OAG's Complaint and associated exhibits, the People have an overwhelming likelihood of success on the merits in this § 63(12) action. The Trump Organization engaged in numerous instances of fraudulent and illegal conduct in the preparation and dissemination of over a decade's worth of Mr. Trump's Statements. Moreover, the Trump Organization (along with the other Defendants) repeatedly inflated the value of Mr. Trump's assets on his Statements through fraud and misrepresentation, and then submitted those Statements to financial institutions to receive benefits that the company would not otherwise have obtained.

Executive Law § 63(12) gives OAG the power to bring an action against any person or entity that engages in "repeated fraudulent or illegal acts" or "otherwise demonstrate[s] persistent fraud or illegality in the carrying on . . . or transaction of business." N.Y. Exec. Law § 63(12). There are thus two categories of conduct that can subject a party to liability under § 63(12): acts that are "fraudulent" and acts that are "illegal." *Id.*

As to "fraud," § 63(12) broadly construes fraud "to include acts characterized as dishonest or misleading." *People v. Apple Health and Sports Clubs, Ltd.*, 206 A.D.2d 266, 267 (1st Dep't 1994), *dismissed in part, denied in part,* 84 N.Y.2d 1004 (1994). The statute proscribes any acts committed in the conduct of business that have "the capacity or tendency to deceive," or that "create[] an atmosphere conducive to fraud." *People v. Northern Leasing Systems, Inc.*, 193 A.D.3d 67, 75 (1st Dep't 2021); *State v. Gen. Elect. Co.*, 302 A.D.2d 314, 314 (1st Dep't 2003). Such acts, by the plain language of the statute, include those committed through any scheme to defraud and also through "misrepresentation, concealment, suppression," or "false pretense." N.Y. Exec. Law § 63(12). Moreover, when a failure to effectively supervise creates "an enterprise conducive to fraud," a § 63(12) violation has been established. *Northern Leasing*, 193 A.D.3d at

75-76. Neither an intent to defraud nor reliance need be shown. *Apple Health*, 206 A.D.2d at 267; *People v. Coventry First LLC*, 52 A.D.3d 345, 346 (1st Dep't 2008); *see also People v. Trump Entrepreneur Initiative,* 137 A.D.3d 409, 417 (1st Dep't 2016) (recognizing prior First Department precedent establishing that "fraud under § 63(12) may be established without proof of scienter or reliance"). In assessing whether this broad standard for fraud has been satisfied, the Court looks not only to the average recipient of fraudulent conduct, "but also the ignorant, the unthinking and the credulous." *Gen. Electric*, 302 A.D.2d at 314; *see also People v. Allen*, 198 A.D.3d 531, 533 (1st Dep't 2021) (upholding finding of fraud under § 63(12) based on fraudulent representations to investors), *leave to appeal granted*, 38 N.Y.3d 996 (2022).

As to illegality, an "illegal act" under § 63(12) includes any violation of a federal, state, or local law, including as relevant here, the falsification of business records, issuance of a false financial statement, and insurance fraud.[5]

Under § 63(12), conduct may be the subject of an enforcement action if it is either "repeated" or "persistent." Such conduct is "repeated" if it involves either "any separate and distinct fraudulent or illegal act, or conduct which affects more than one person." N.Y. Exec. Law § 63(12). Thus, "the Attorney-General [may] bring a proceeding when the respondent was guilty of only one act of alleged misconduct, providing it affected more than one person." *State of New York v. Wolowitz*, 96 A.D.2d 47, 61 (2d Dep't 1983). The term "persistent" includes the "continuance or carrying on of any fraudulent or illegal act or conduct." N.Y. Exec. Law § 63(12)

[5] Because the likelihood of success on OAG's Executive Law § 63(12) fraud claim is substantial, and plainly sufficient to grant preliminary relief, OAG has not here separately briefed OAG's likelihood of success on OAG's Executive Law § 63(12) illegality claims. Suffice it to say, however, OAG has demonstrated through verified allegations numerous instances of falsified business records, false financial statements, and acts of insurance fraud in violation of the Penal Law provisions cited in the Complaint to establish a clear likelihood of success on its illegality claims as well. *See* Compl. ¶¶ 761-838.

The evidence of the Trump Organization's fraud in deriving and presenting the asset valuations reflected in the Statements over the course of a decade-plus is overwhelming. An array of fraudulent schemes, representations, misleading conduct, and omissions are detailed herein, in the Complaint and its associated exhibits, and in the accompanying Faherty Affirmation and exhibits. OAG's verified allegations amply demonstrate the clear likelihood of success on the merits of all of OAG's claims, and a few examples are highlighted below.

First, the Trump Organization's long-term accounting firm has acknowledged that the Statements it compiled from 2011 to 2020—ten years' worth of Statements including dozens upon dozens of valuations—can no longer be relied upon. Faherty Aff. ¶ 8. That fact alone indicates that OAG is likely to succeed on the merits of its claims—particularly under § 63(12), which does not require a showing of scienter or reliance for OAG to prevail. *Cf. In re BISYS Securities Litigation*, 397 F. Supp.2d 430, 437 (S.D.N.Y. 2005) (noting that "mere fact" of financial restatement is sufficient to plead falsity); *In re Atlas Air Worldwide Holdings, Inc. Securities Litigation*, 324 F. Supp. 2d 474, 487 (S.D.N.Y. 2004) (same); *Lowry v. RTI Surgical Holdings*, 532 F. Supp. 3d 652, 660 (N.D. Ill. 2021) (five years' worth of inaccurate financial results, combined with GAAP violations and accounting restatements, held to be "likely enough by itself to show materiality" of misstatements). Indeed, this Court emphasized the significance of the accounting firm's "red flag" retraction in its February 17, 2022 Order compelling Mr. Trump and other Defendants to testify. Moreover, Mr. Trump's lead accountant testified that his firm was misled by the Trump Organization's concealment of information pertinent to the Statements. Faherty Aff. ¶ 9.

Second, the fact that Mr. Trump, Eric Trump and the former Chief Financial Officer of the Trump Organization, Allen Weisselberg, all invoked their privilege against self-incrimination when questioned about the Statements similarly supports OAG's likelihood of success on the

merits of its claims. Faherty Aff. ¶¶ 10-27. The privilege may only be invoked "when there is reasonable cause to apprehend danger" in the form of self-incrimination "from a direct answer." *Chase Manhattan Bank, National Ass'n v. Federal Chandros, Inc.*, 148 A.D.2d 567, 568 (2d Dep't 1989). And, as the Court of Appeals has explained, such an invocation may be considered "in assessing the strength of evidence offered by the opposite party." *Marine Midland Bank v. John E. Russo Produce Co., Inc.*, 50 N.Y.2d 31, 42-43 (1980) (analogizing invocation of privilege in civil case to failure to produce material witness).

Third, Donald Trump, Jr.—although he did not assert his Fifth Amendment protection—incredibly disclaimed all responsibility for the Statements and their contents in sworn testimony. Faherty Aff. ¶ 28. Donald Trump, Jr. was a senior executive at the Trump Organization. He was *the trustee* of the Donald J. Trump Revocable Trust, was responsible for certifying the Statements' accuracy to banks, and in fact signed such certifications. He personally signed representation letters to Mazars on each Statement engagement when he was a trustee, and those letters outlined his duties as trustee. Faherty Aff. ¶ 32. The Statements themselves repeatedly credit him, as trustee, with the information they contain. *See, e.g.,* NYSCEF No. 17 at 1. That he testified he has no knowledge of GAAP accounting (with which the Statements expressly state they comply) and had nothing to do with the preparation of the Statements lends strong support to OAG's position that the Statements were fraudulent. Faherty Aff. ¶¶ 30-35; *See Employees' Retirement System of Government of Virgin Islands v. Blanford*, 794 F.3d 297, 306 (2d Cir. 2015) (factors supporting scienter in securities fraud action include that defendant "failed to check information they had a duty to monitor").

Fourth, there is abundant evidence of objective falsity repeated year after year on the Statements and in the data supporting them. *See, e.g.*, *Flandera v. AFA Am. Inc.*, 78 A.D.3d 1639,

1640 (4th Dep't 2010) ("An assessment of market value that is based upon misrepresentations concerning existing facts" supports common law fraud action); *Polish & Slavic Federal Credit Union v. Saar*, 39 Misc.3d 850 (Sup. Ct. Kings Cnty. Apr. 3, 2013). Indeed, Mr. Weisselberg admitted that the Statements overvalued Mr. Trump's apartment by "give or take" $200 million—and evidence later revealed he was provided with the true facts regarding the apartment's square footage *before* certifying as accurate the inflated apartment value based on false information. Faherty Aff. ¶ 36. Similarly, the Statements included as cash belonging to Mr. Trump cash that was *not* Mr. Trump's—even to the tune of more than $90 million in the 2021 Statement. Faherty Aff. ¶ 49. There were instances in which the Trump Organization had copies of professional appraisals in its files that contradicted the stated value of 40 Wall Street by $200 to $300 million—even though the Trump Organization professed to rely on the very same appraiser for its inflated values. Faherty Aff. ¶¶ 38-40.

Fifth, there were instances in which the valuation techniques actually used to prepare the Statements were directly (and falsely) contradicted by the descriptions in the Statements. Those examples included the fact that the valuation of golf clubs padded an additional 15-30% for the value of the Trump brand despite (a) an express claim in the Statements that they do not include "the goodwill attached to the Trump name" and (b) an express representation of compliance with GAAP, even though GAAP prohibits inclusion of an internally generated intangible brand premium. Faherty Aff. ¶ 45. Moreover, those examples include the fact that Mr. Trump valued certain membership deposit liabilities at full face value to increase the purchase price of golf clubs, thereby increasing valuations in the Statements, despite an express claim in the Statements that Mr. Trump and his trustees "value this liability at zero." Faherty Aff. ¶ 47.

Sixth, there were repeated instances of the Trump Organization both failing to disclose, and omitting from their valuation methods, legal restrictions on properties known to Mr. Trump and his agents. Faherty Aff. ¶¶ 41-44. There were restrictive documents that Mr. Trump himself signed—but which were then ignored when valuing the properties and not disclosed in the Statements. Faherty Aff. ¶ 43. Particularly in the context of a formal financial statement prepared by the Trump Organization but then compiled and presented by an independent public accounting firm, it was false or misleading to wholly ignore contradictory facts known to the Trump Organization but withheld from its own accountants and recipients of the Statements. *See West Side Fed. Sav. & Loan Ass'n of New York City v. Hirschfeld*, 101 A.D.2d 380, 385 (1st Dept 1984) (statement of market value by party with superior knowledge implies that the "declarant knows facts which support that opinion and that he knows nothing which contradicts the statement"); *see also Omnicare, Inc. v. Laborers District Council*, 575 U.S. 175, 191 (2015) ("[I]f the real facts are otherwise, but not provided, the opinion statement will mislead its audience.").

Seventh, further supporting OAG's likelihood of success on the merits is the fact that Deutsche Bank—the Trump Organization's principal lender for nearly all of the last ten years—decided to exit its relationship with the Trump Organization. Faherty Aff. ¶¶ 50-55. The accuracy of the Statements as certified by Mr. Trump, one of his trustees, or Eric Trump was an important component of loans obtained and maintained by the Trump Organization over the last ten years. Faherty Aff. ¶¶ 50, 53. But when Deutsche Bank learned in 2020 of OAG's allegations of misrepresentations in the Statements from the pendency of OAG's subpoena enforcement action, it asked the Trump Organization a series of questions about those Statements. Faherty Aff. ¶ 51. The Trump Organization refused to respond. Faherty Aff. ¶¶ 52, 54. As a result, Deutsche Bank decided – just like Mazars – to exit its relationship with the company. Faherty Aff. ¶ 55. The bank's

communications to the Trump Organization respecting the Statements in that context stressed that material misrepresentations on the Statements could be events of default. Faherty Aff. ¶ 53.

Eighth, the insurance-related fraud committed in connection with the Statements further confirms OAG's likelihood of success here. The Trump Organization only permitted a particular insurer to review the Statements in hard copy at the Trump Organization's offices in on-site reviews; and then, in years when he was a trustee, Mr. Weisselberg made additional, affirmative misrepresentations about the Statements' contents—namely that the valuations contained in the Statements were derived by a professional appraisal firm rather than by the Trump Organization itself. Faherty Aff. ¶¶ 56-68.

To the extent any further evidence of the repeated or persistent nature of the Trump Organization's fraudulent use of the Statements were required, the Complaint likewise alleges through verified allegations that Mr. Trump's Statements were employed in a variety of other transactions, attempted transactions, and public contracts. *See* Compl. ¶¶ 647-675.

II. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING OAG'S REQUESTED PRELIMINARY RELIEF

The balance of equities, including the substantial public interest in curbing fraudulent and unlawful conduct, strongly favors the issuance of the requested preliminary relief.

A § 63(12) action is "not a 'run of the mill' action for an injunction, but rather one authorized by remedial legislation, brought by the Attorney General on behalf of the People of the State and for the purposes of preventing fraud and defeating exploitation." *People v. Greenberg*, 27 N.Y.3d 490, 496-97 (2016) (quoting *People v. Lexington Sixty-First Assoc.*, 38 N.Y.2d 588, 598 (1976)). In such an action, "the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief." *Id.* at 497 (citing *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975)). Moreover, where, as here, an

agency is granted by the Legislature the power to seek injunctive relief to curb unlawful conduct, those "formidable powers" weigh heavily in favor of injunctive relief. *Adirondack Park Agency v. Hunt Bros. Contrs.*, 234 A.D.2d 737, 738 (3d Dep't 1996) (reversing for abuse of discretion denial of preliminary injunction); *see also FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989) (public interest receives "greater weight" in equities analysis).

Here, the equities strongly favor preliminary relief. Indeed, Defendants here can have no possible interest in continued issuance of financial statements containing fraudulent and misleading valuations and verbiage. There is "no vested interest in a business activity found to be illegal." *United States v. Diapulse Corp. of America*, 457 F.2d 25, 29 (2d Cir. 1972). As New York courts similarly have articulated, for example, when a business operation is illegal, "the equities lie in favor of shutting [it] down," "rather than in allowing said business to continue to operate (to defendants' presumed financial advantage)." *New York v. Smart Apts. LLC*, 959 N.Y.S.2d 890, 898 (Sup. Ct. N.Y. Cnty. 2013); *see also First Investors Corp.,* 156 Misc. 2d at 214-215 (granting preliminary injunction and finding that the equities balance in favor of plaintiff, where it appears likely that defendants violated the Martin Act, and plaintiff is attempting to protect public interest). Indeed, given the wide range of market participants and governmental entities to which Defendants have disseminated the fraudulent information, there is a strong market-protective interest in ensuring such conduct is curbed.

Moreover, to the extent likelihood of recurrence is a pertinent factor, it plainly supports granting preliminary relief here. *See, e.g., Greenberg*, 27 N.Y.3d at 496-97 (likelihood of continuing violation sufficient to support permanent injunction). The conduct at issue was repeated, and persisted, for a decade or more under the direction and control of the same insular group of top executives, including Mr. Trump before January 2017. That same group (except for

Mr. Weisselberg, perhaps, due to his indictment) controls the Trump Organization today. The conduct persisted even under an ostensible change in management from January 2017 through January 2021 pursuant to a revocable trust regime in which Donald Trump, Jr. and Mr. Weisselberg served as trustees; today, Donald Trump, Jr. continues to serve as the only trustee. In light of the longtime misconduct at issue here by this group of executives running a closely held company, the likelihood that the same or similar conduct will continue is substantial. "[T]he commission of past illegal conduct is highly suggestive of the likelihood of future violations." *Management Dynamics*, 515 F.2d at 807; *see also City of New York v. Golden Feather Smoke Shop, Inc.*, Civ. No. 08-3966, 2009 WL 2612345, at *41-42 (E.D.N.Y. Aug. 25, 2009) ("long history" of unlawful conduct supports award of injunctive relief).[6]

That logic is particularly compelling here, because the Trump Organization has repeatedly pursued its fraudulent practices despite possessing (and even commissioning the creation of) information that should have led it to change course. For example, when presented with true facts regarding Mr. Trump's triplex, Mr. Weisselberg opted to "leave" it "alone" and within days falsely certify a financial statement contrary to those true facts. Faherty Aff. ¶ 73. Similarly, the Trump Organization repeatedly commissioned or otherwise obtained valuation work using legitimate methods—but then disregarded it when preparing numbers for the Statements. *Id*.

[6] Although there is no need to show irreparable harm when seeking a preliminary injunction to prevent further acts of fraud or illegality *pendent lite* pursuant to § 63(12), clearly such harm will occur absent the requested injunction because lenders and insurers will continue to make business decisions in reliance upon Defendants' continued false and misleading asset valuations that cannot be retroactively undone. Lenders will continue to rely on the Trump Organization's assertions concerning Mr. Trump's assets and net worth in determining whether loan covenants have been met and whether additional credit should be extended, and if so, on what terms; insurers will similarly continue to rely on the Trump Organization's assertions concerning Mr. Trump's assets and net worth in determining whether policies should be renewed, and if so, on what terms. *See, infra*, at 2-3, 5.

Even when the Trump Organization was aware of OAG's investigation relating to the Statements, it persisted in its unlawful conduct. For example, in March and June of 2020, as part of its investigation, OAG conducted lengthy examinations of Mr. McConney regarding issues with the valuation approaches taken in the Statements. Faherty Aff. ¶ 74. Similarly, in July and September 2020, OAG interviewed Mr. Weisselberg and asked him about the strategies used to inflate valuations on numerous properties. *Id.* Indeed, by the start of October 2021, OAG had taken 14 days of testimony from 9 employees at the Trump Organization. *Id.* Nevertheless, the Trump Organization continued to engage in fraudulent conduct by inflating asset valuations even on the 2021 Statement issued on October 29, 2021. Faherty Aff. ¶ 75.

Mr. Trump's public statements quell any doubt about whether the challenged conduct at Mr. Trump's "namesake" company is likely to continue. In a press release on February 15, 2022 – more than a month after OAG filed a supplemental petition in its enforcement proceeding – Mr. Trump praised the Statements and issued the 2014 Statement publicly. He insisted that the Trump Organization's assets were "in many cases, far more valuable than what was listed in" the Statements. Faherty Aff. ¶ 78. He further stated that the asset values do not include "estimated brand value," which he professed would increase his net worth to "approximately $8 to $9 billion," *id*., even though the valuations for many of his golf clubs did include a premium for brand value, *see supra* at 11. Since the filing of the Complaint, too, Mr. Trump has stood by the Statements despite invoking the Fifth Amendment when placed under oath and asked about them. Publicly, he has insisted he made no misrepresentations to banks, but instead had warned them that his Statements were unreliable, and has relied upon the "very big" "very powerful" disclaimer accompanying his Statements, suggesting he and his namesake company feel perfectly entitled to

commit fraud in a formal financial statement as long as they include a large disclaimer (which they actually do not include). Faherty Aff. ¶ 79

Lastly, the Trump Organization continues to have financial disclosure obligations on existing loans. In particular, the Trump Organization has obligations that will require the company to submit to lenders Mr. Trump's Statement of Financial Condition as of June 30, 2022, which is likely to be issued soon.[7] Relatedly, the Trump Organization also has obligations on other new loans to provide banks with information regarding Mr. Trump's assets, though perhaps not in the same form as the Statement of Financial Condition. For example, two new loans require "a schedule of material real estate assets and material related liabilities, including material contingent liabilities, and a calculation of Liquidity."[8] Faherty Aff. ¶ 71. Regardless of the form of the disclosure, though, the Trump Organization's long history of misconduct warrants the imposition of an injunction.

III. THE RELIEF SOUGHT HERE IS APPROPRIATELY TAILORED TO CURBING UNLAWFUL CONDUCT AND ENSURING FUNDS ARE AVAILABLE FOR ANY DISGORGEMENT AWARD AT THE TERMINATION OF THIS ACTION

The preliminary relief sought by OAG has two principal components: (i) the appointment of an independent monitor with targeted duties, and (ii) an injunction prohibiting transfer of funds or assets without Court approval, for the purpose of ensuring the ability of OAG to obtain satisfaction of the large sum OAG will seek as disgorgement at this conclusion of this action. The relief sought here is tailored directly to curbing the long history of persistent and repeated

[7] Typically, each Statement is issued sometime on or after October of the year it covers, so the 2022 Statement is likely to be issued soon. *See, e.g.*, NYSCEF Nos. 15 (2021 Statement issued October 29, 2021) 14 (2020 Statement issued January 11, 2021), and 13 (2019 Statement issued October 31, 2019).

[8] The Trump Organization attempted unsuccessfully to water down these disclosure requirements during negotiations. Compl. at ¶¶ 744-45.

fraudulent conduct by the Trump Organization and is an appropriate exercise of the Court's broad general equitable jurisdiction.

The appointment of an independent monitor is especially appropriate here. *See, e.g., SEC v. Trabulse*, 526 F. Supp. 2d 1008, 1019 (N.D. Cal. 2007) (appointing monitor due to "need for an objective party to oversee [defendant's] conduct as he continues to manage funds"). Given the centrality of a particular cast of characters in the fraudulent conduct—including Mr. Trump, Mr. Weisselberg, Mr. McConney, Donald Trump, Jr. (as trustee), and Eric Trump—and the continued role of many of them in the closely held Trump Organization, the company's leadership cannot be relied upon to ensure that financial submissions regarding Mr. Trump's assets and net worth are truthful, are not misleading (including by omission of important facts), and are compliant with applicable accounting principles. That Mr. Trump—the person with beneficial ownership of the Trump Organization's assets and effective control over them—continues to extol the Statements is confirmation that appointment of an independent monitor is warranted and appropriate.

In terms of the monitor's duties, OAG urges the Court to ensure the monitor oversees any material submitted by the Trump Organization to any accounting firm compiling the 2022 Statement and any lenders and insurers that will receive the 2022 Statement in satisfaction of Mr. Trump's continuing financial disclosure obligations to insure full and complete disclosure of all relevant information. The monitor should similarly oversee the contents of any submissions regarding Mr. Trump's assets or net worth to any financial counterparty of the Trump Organization—including any schedule of assets and liabilities, any statement of net worth, or any similar submission. The purpose of such supervision would be to mitigate any further fraud and illegality in violation of § 63(12).

First, the oversight by the independent monitor should focus on ensuring that the accountants, lenders, and insurers[9] receive from the Trump Organization all of the necessary and relevant information relating to the valuations in the Statement or similar submission – which, at a minimum, should include: (i) the company's supporting data spreadsheet: (ii) any documents (including emails, articles, and market reports) cited in the supporting data spreadsheet; (iii) appraisals of any of the valued properties done in the past five years in the company's possession; (iv) any filing made by or on behalf of any Defendant or affiliated entity with a government authority in the past five years that takes a position on the value of any property included in the Statement or similar submission, whether for tax purposes or otherwise; and (v) any and all documentation indicating the precise property interest owned, and any development limitations known or agreed to by the Trump Organization (including Mr. Trump and his trustees).

Second, the Court should use its equitable powers to ensure that the Trump Organization does not remove assets from the Court's power during the pendency of this action. The Court's broad equitable power in a § 63(12) action entails the authority to award disgorgement—based on the principle that no wrongdoer should retain ill-gotten gains. *Greenberg*, 27 N.Y.3d at 497-98. Indeed, disgorgement in civil fraud actions often includes an award of prejudgment interest as well—since a wrongdoer similarly ought not be permitted to retain the time-value of the funds she retained during the course of misconduct. *See, e.g.*, *S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996); *Hynes v. Iadarola*, 221 A.D.2d 131, 135 (2d Dep't 1996) (reversing

[9] Unlike with lenders, the Trump Organization provided insurers with only a relatively fleeting glance at the Statements in a conference room at Trump Tower during annual renewal meetings. Faherty Aff. ¶ 64. The monitor can make certain that insurers receive for their files not only copies of the 2022 Statement if presented, but also the supporting material.

denial of prejudgment interest in civil forfeiture action, noting that "fundamental fairness" accords with awarding prejudgment interest to deprive wrongdoer of ill-gotten gains).

The sums involved here are substantial because they are principally derived from substantial differences in interest rates on loans totaling in the hundreds of millions of dollars over a lengthy period of time (as well as profits earned on disposition of significant properties funded by such debt). *See* Compl. ¶¶ 21-22.

Given "the large sums of money involved" in OAG's request for disgorgement, *First Investors Corp.*, 156 Misc. 2d at 220, and the very recent creation of "Trump Organization II LLC," the Court should enjoin the Trump Organization from transferring assets to any non-party affiliates or disposing of any assets without review by the monitor and approval by the Court during the pendency of this action to maintain the status quo. *State v. Kozak*, 91 Misc. 2d 394, 396 (Sup. Ct. N.Y. Cty. 1977) (granting Attorney General's motion for preliminary injunction barring defendants from transferring or disposing of assets or property under their control, derived from the practices alleged in the verified complaint to be fraudulent).

For purposes of appointing an independent monitor, if the Court grants that relief, OAG will vet and propose two to three candidates for final selection by the Court. OAG will then work with the monitor and the Trump Organization to prepare a proposed order formally appointing the monitor and setting the terms of the monitor's retention.

CONCLUSION

Based on the foregoing, OAG respectfully requests that the Court grant Plaintiff's request for a preliminary injunction in its entirety, along with such other and further relief the Court deems necessary and appropriate.

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Respectfully submitted,

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