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

THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Petitioner,

-against-

DONALD J. TRUMP, DONALD J. TRUMP JR., IVANKA TRUMP, ERIC F. TRUMP, and THE DONALD J. TRUMP FOUNDATION,

Respondents.

Index No. 451130/2018

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE VERIFIED PETITION

Motion Sequence No. 1

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PRELIMINARY STATEMENT

Petitioner, the Attorney General, brought this special proceeding against the Donald J. Trump Foundation and its directors (collectively, the "Respondents"[1]), after an investigation revealed a pattern of illegality involving the Foundation and its assets. As detailed in the Petition and supporting affirmation, Respondents broke some of the most basic laws that apply to private foundations. They failed to meet as a board, oversee grant-making, or implement policies to protect the charity's assets from misuse. In this vacuum of oversight and diligence, Mr. Trump caused the Foundation to enter repeatedly into self-dealing transactions and to coordinate unlawfully with his presidential Campaign. This proceeding seeks to hold the Respondents responsible for violating the public trust and the clear standards required of them by law.

Respondents moved to dismiss the Petition and the Court, by decision and order dated November 21, 2018, denied Respondents' motion and directed Respondents to answer.[2] (Decision and Order ("Op.") at 26.) Following the Court's decision, the parties stipulated that the Foundation would dissolve under court supervision, resolving the Fourth and Fifth Causes of Action. The claims remaining are those for waste, bars on service as fiduciaries of not-for-profit organizations, damages and restitution, including a claim against Mr. Trump for the payment of up to double the benefit obtained by Mr. Trump and his Campaign in connection with the Iowa Fundraiser in January 2016.

The substantial evidentiary record submitted by the Attorney General establishes that these claims should be granted. Together with the Petition, the Attorney General submitted a

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[1] Petitioner continues to employ the defined terms set forth in the Memorandum of Law in Support of the Verified Petition ("Moving Memo") and the Memorandum of Law in Opposition to Respondents' Motion to Dismiss ("MTD Opposition Memo").

[2] The Court dismissed the Sixth Cause of Action, which asserted a claim to preliminarily enjoin the Individual Respondents from operating the Foundation, as moot because Respondents agreed to not operate the Foundation during the pendency of the proceeding. (Op. at 26.)

detailed affirmation introducing testimonial and documentary evidence that presented a prima facie case for the Petition's claims. This evidence consists largely of Respondents' own emails, admissions under oath, documents Respondents filed with governmental agencies and signed under penalty of perjury, and photographs and videos of Mr. Trump taking the very actions, such as distributing Foundation assets at political rallies, which form the basis for the Petition's claims.

This evidence is unchallenged and unrebutted; Respondents have not submitted **any** admissible evidence to counter the substantial evidentiary record submitted by the Attorney General.[3] During the pendency of this proceeding and as provided for in CPLR § 408, Petitioner served two Notices to Admit. In their responses, Respondents admitted facts sufficient to establish the admissibility of virtually all the evidence not already in admissible form submitted in support of the Petition. Then, on February 8, 2019, Respondents submitted an unverified answer denying in conclusory fashion virtually all the allegations in the Petition and asserting ten affirmative defenses. The Individual Respondents did not submit affidavits, nor did anyone at the Trump Campaign or any other entity controlled by Mr. Trump.[4] As a result, and for the reasons more fully set forth below, Respondents have failed to raise any genuine issues of fact with respect to the claims in the First, Second and Third Causes of Action in the Petition. As such, judgment should be entered based on the current record.

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[3] For the Court's convenience, Petitioner has prepared a statement summarizing the evidentiary basis for the facts on which the Attorney General's claims are based (the "Evidence Summary"). The Evidence Summary is attached as Exhibit 1 to the March 14, 2019 Reply Affirmation of Steven Shiffman ("Reply Aff.").

[4] Respondents submitted affirmations from Alan Futerfas and Sheri Dillon, respectively, the current and former counsel for Respondents, in support of the motion to dismiss. These attorney affirmations were not based on personal knowledge (except with respect to procedural issues irrelevant to the claims in the Petition) and did not introduce any admissible documentary or testimonial evidence.

ARGUMENT

I. JUDGMENT SHOULD BE GRANTED SINCE RESPONDENTS HAVE FAILED TO RAISE ANY ISSUES OF FACT.

The submission of papers in this special proceeding is now complete, and the Respondents have failed to raise any triable issues of fact. The evidentiary record before the Court demonstrates that the relief sought in the first three causes of action – the only unresolved claims – should be granted because: (i) the Individual Respondents breached their fiduciary duties, wasted charitable assets, and permitted the Foundation to be used for improper political purposes, and (ii) Mr. Trump willfully and intentionally caused the Foundation to enter into an impermissible related-party transaction by giving his Campaign control over $2.8 million donated to the Foundation. Mr. Trump's use of the Foundation's assets to benefit his Campaign demonstrated his complete disregard for two of the most basic principles governing charities, of which he was well aware: (i) that charities cannot intervene in political elections; and (ii) that charitable assets cannot be used for the benefit of those who control them. The proper remedies for these violations include bars on fiduciary service, restitution and damages.

A. The Attorney General's Claims are Established by the Uncontroverted Evidence Before the Court.

The three unresolved causes of action are for breach of fiduciary duty and waste under N-PCL §§ 717 and 720, for parallel claims under EPTL §§ 8-1.4 and 8-1.8, and for wrongful related-party transactions under N-PCL § 715(f) and EPTL § 8-1.9(c). This Court held that the Petition's allegations stated claims for these causes of action as a matter of law. (Op. at 10-22.) The substantial evidence submitted with the Petition, supplemented by Respondents' admissions, establishes that each of these claims should now be granted.

The undisputed evidence establishes that the Foundation's board breached its fiduciary duties. (*See* Mov. Memo at 11-13.) The evidence shows that the board existed in name only and that the Individual Respondents failed to exercise any oversight over the Foundation, breaching their duty of care. The Individual Respondents held no board meetings, kept no minutes, held no votes, failed to adopt required policies and procedures, failed to oversee the Foundation's grants, failed to ensure that the Foundation complied with applicable law, and failed to take any steps to ensure that its assets were not used to impermissibly further Mr. Trump's interests. (Evidence Summary ¶¶ 5-12.) These failures were not mere technicalities; they permitted Mr. Trump to use the Foundation's assets for his own benefit and the benefit of entities in which he had a financial interest. In particular, because of the lack of oversight, Mr. Trump used Foundation funds to, among other things, pay for portraits of himself, make political donations, pay for advertising for Trump hotels, settle lawsuits involving the Trump Organization, and to improperly intervene in the 2016 election. (Mov. Memo at 3-8, 11-20; MTD Opp. Memo at 14-21; Shiffman Aff. ¶¶ 15-72.)

The evidence also shows that, in 2016, Mr. Trump caused the Foundation to take part in a wrongful related-party transaction when the Trump Campaign coopted the Foundation and directed when and to whom it should make grants to advance Mr. Trump's presidential bid. (Shiffman Aff. ¶¶ 21-43; MTD Opp. Memo at 14-16.) The Court recognized that the Petition adequately alleged these claims. (Op. at 16-22.) The Petition's allegations are supported by uncontroverted evidence that: (i) Mr. Lewandowski and others at the Campaign dictated the timing and amounts of the Foundation's grants from the proceeds of the Iowa Fundraiser, with the Foundation's board playing no role whatsoever (Evidence Summary ¶¶ 19-27); (ii) $500,000 of these grants were distributed and publicized by the Campaign and Mr. Trump personally with

great fanfare at rallies in Iowa on the eve of the important Iowa caucuses (*id.* ¶¶ 28-31), and at press conferences where Mr. Trump took personal credit for the grants that the Foundation made (*id.* ¶ 32); and (iii) Mr. Trump had a financial interest in the Campaign not only because he sought and received substantial publicity from such grants without reaching into his own pockets, but also by virtue of his own large investments in the Campaign, including nearly $50 million in loans. (*Id.* ¶ 34; Mov. Mem. at 17-20; MTD Opp. Memo at 11, 15-16.)

The unrefuted evidence also establishes that in using the Foundation's charitable assets, Mr. Trump's conduct was "willful and intentional." (Evidence Summary ¶ 35; Mov. Memo at 18-20; MTD Opp. Memo at 16-19.) The evidence shows that Mr. Trump was aware that directors of charities may not use charitable assets for a director's benefit and that a Foundation is absolutely prohibited from using its assets to intervene in public elections, but that he nevertheless used money donated to the Foundation to benefit his Campaign. (Evidence Summary ¶ 35.) Mr. Trump does not offer any evidence – such as an affidavit explaining why his violations of the law were purportedly accidental – to create an issue of fact on the willfulness of his conduct. As such, a summary determination that his conduct was willful and intentional may be made. *See, e.g.*, *Kreisler Borg Florman Gen. Const. Co. v. Tower 56, LLC*, 58 A.D.3d 694, 696 (2nd Dep't 2009) (summary judgment appropriate where circumstances warranted conclusion that there was actual intent to defraud and defendants' "cryptic and conclusory" explanation of transaction was insufficient to create issue of fact); *see Pell Street Nineteen Corp. v. Mah*, 243 A.D.2d 121, 125 (1st Dep't 1998).

The appropriate remedy for this willful and intentional conduct is damages of "an amount up to double the amount of any benefit improperly obtained." N-PCL § 715(f)(4). Here, Mr. Trump and the Campaign benefited from the highly valuable media coverage of the Iowa

Fundraiser and of the political rallies at which grants were disbursed, and from the $2.8 million that they did not have to pay in order to garner that coverage. (Op. at 21; MTD Opp. Memo at 15-16.)

The statute provides for a penalty based on the *benefit* obtained by the related party to deter such wrongdoing, and to address the fact that the misuse of charitable funds for the benefit of insiders is prevalent, seriously compromises the ability of an organization to carry out its charitable mission and undermines public confidence in the sector. (*See* MTD Opp. Memo at 14, n.8, explaining the intent behind the amendments to the N-PCL.)[5] This case showcases the type of conduct the statute was intended to address. Here, Mr. Trump, the candidate, exhorted the public to donate to his Foundation and then gave his Campaign full control over the disbursement of the donations, from choosing the identity of the recipients to the amounts and timing of the grants. This arrangement not only violated New York law, but also ran afoul of federal campaign finance law, turning a charity fundraiser into a campaign fundraiser and campaign rallies into opportunities for the candidate to dole out money the public had donated to a charity. As a result of his willful and intentional conduct, the Court should require Mr. Trump to pay restitution of $2.8 million, plus a penalty in an amount up to $5.6 million.

B. Respondents Have Failed to Raise Any Issues of Fact

Respondents' Answer fails to raise any issues of fact warranting a hearing or trial. Special proceedings are governed by the same evidentiary standard of proof as a motion for summary judgment. *Karr v. Black*, 55 A.D.3d 82, 86 (1st Dep't 2008). After the petitioner

[5] The penalty for self-dealing, added in 2013 to N-PCL § 715, is similar to the penalties imposed by Sections 4941 and 4958 of the IRS Code, which were added to punish the parties that engaged in self-dealing, rather than the charities or their intended beneficiaries. Robert C. Degaudenzi, *Tax-Exempt Public Charities: Increasing Accountability and Compliance*, 36 Cath. Law. 203, 208-09 (Fall 1995) (citing Congressional hearings).

provides admissible evidence to establish the cause of action, the burden then shifts to respondents to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980). An evidentiary hearing is unnecessary where the party opposing the motion does not submit evidence sufficient to raise a material issue of fact. *See 22 Park Place Coop. v. Bd. of Assessors*, 102 A.D.2d 893, 893-94 (2nd Dep't 1984). Here, no hearing is necessary because Respondents have not introduced **any** evidence to create an issue of fact, submitting only an unverified answer with general denials and conclusory defenses.

The law is clear that in an Article 4 proceeding, "bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion [for a summary determination]." *In re Fin. Guar. Ins. Co.,* 39 Misc.3d 208, 210 (Sup. Ct. N.Y. Cty. 2013) (citing *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978)); *see American Sav. Bank v. Imperato*, 159 A.D.2d 444, 444 (1st Dep't 1990) ("shadowy semblance of an issue is insufficient to defeat summary judgment"). As the First Department has explained:

> [i]t is incumbent upon a defendant who opposes a motion for summary judgment **to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial**.

Cabrera v. Ferranti, 89 A.D.2d 546, 547 (1st Dep't 1982) (attorney's affidavit unsupported by evidence cannot defeat summary judgment) (emphasis added). An unverified answer, such as the one submitted here, has no evidentiary value and is insufficient to meet this standard. *See North Shore Univ. Hosp. v. Muller*, 19 Misc.3d 143(A), 2008 WL 2285877, *1 (App. Term 2nd Dep't May 27, 2008) (unverified answer "cannot be utilized in lieu of a sworn affidavit to raise a triable issue of fact to defeat" summary judgment). Moreover, even if it had been verified, the answer

would be insufficient to raise a genuine issue because it consists solely of general denials and conclusory allegations. *See, e.g.*, *Arcadian Painting and Decorating Corp. v. Helmer Cronin Const.*, 229 A.D.2d 896, 897 (3rd Dep't 1996) ("broad and conclusory" denials in a **verified** answer "have no evidentiary value"); *Tucciarone v. Automobile Club*, 175 A.D.2d 616, 617 (4th Dep't 1991) ("general denial" without evidentiary facts insufficient to defeat summary judgment).

Thus, judgment is appropriate because Respondents have failed to submit any admissible evidence to raise an issue of fact[6] with respect to the prima facie case established by the Attorney General's evidence.

C. This Action Is a Straightforward Application of New York Law to the Facts Presented by Respondents' Extensive Pattern of Illegal Conduct

1. The Respondents Repeatedly Misused Charitable Assets

The evidence shows that the Foundation's charitable assets were repeatedly used for the personal benefit of Mr. Trump and entities in which he had a financial interest. This misuse of charitable assets is precisely what New York not-for-profit law is intended to address, and the remedies sought are completely consistent with the Attorney General's authority and practice in this area. Respondents' argument that this action is "unprecedented" because the organization allegedly donated all its money to charities (Ans. ¶¶ 1, 4), is based on a fundamental mischaracterization of the wrongdoing. When the Foundation made disbursements to satisfy the debts of Mr. Trump and entities he controlled, such as when Mr. Trump caused the Foundation to make a $100,000 disbursement to satisfy a legal obligation of his Mar-a-Lago club, the

[6] The attorney affirmations Respondents submitted in support of their Motion to Dismiss were not made on personal knowledge and did not otherwise introduce admissible evidence. As such, they are of "no probative value and should be disregarded" on this motion. *See Cabrera*, 89 A.D.2d at 547.

disbursements were self-dealing transactions that benefited Mr. Trump and entities in which he had a financial interest. (*See* Op. at 13.) Similarly, when the Foundation ceded control over its assets to the Trump Campaign and let the Campaign distribute funds to further Mr. Trump's political interests, the Campaign received an in-kind contribution that is a gift under New York law. (Moving Memo at 16-17; MTD Opp. Memo at 15-16; *see* Op. at 20-21.)

As this Court noted, that the money "ultimately went to charitable organizations does not, by itself, refute a claim" that the funds were used improperly to benefit Mr. Trump. (Op. at 21.) In reality, there were two distinct transactions in each instance: (i) a distribution by the Foundation of money, or control over that money, to a non-charitable entity Mr. Trump controlled (such as Mar-a-Lago or the Campaign); and (ii) a subsequent distribution by that non-charitable entity to a charity. That the second distribution went to a charity does not cleanse the first distribution, which was non-charitable and constituted waste as well as an impermissible related-party transaction. (*See* MTD Opp. Memo at 20-21, 28-29.)

2. The Injunctive Relief Sought Is Appropriate and Consistent With The Relief The Attorney General Seeks and Obtains in Similar Cases

The Petition seeks a 10-year bar on Mr. Trump from serving as the fiduciary of any charitable corporation operating in New York and a 1-year bar on the remaining Individual Respondents, the latter subject to being lifted upon adequate training. (Verified Petition ("Pet.") at 39.) This relief is, contrary to the Respondents' conclusory assertion, in line with the relief the Attorney General routinely seeks and obtains in similar cases.

As detailed in the MTD Opposition Memo, the injunctive relief of fiduciary bars sought here is consistent with the relief obtained in many recent settlements and cases. (*See* MTD Opp. Mem. at 25-29). In addition to the matters cited in the MTD Opposition Memo, the Attorney

General respectfully draws the Court's attention to the permanent bars imposed by other recent settlements. In the settlement of the *Investigation of the Breast Cancer Research Foundation, Inc.*, the charity's founder and board member, who, unlike Mr. Trump did not obtain any financial benefit from the charity, was permanently banned from fiduciary service because his abdication of fiduciary duty permitted a third party to coopt the charity. (Reply Aff. Ex. 5 at 19.) In *People v. National Children's Leukemia Foundation*, the court approved a settlement under which the founder of a charity and his son both received permanent bans on fiduciary service. (*Id.* Ex. 6 ¶ 2.) The founder personally benefitted from the wrongdoing, while his son did not benefit financially but rubber stamped his father's decisions, to the detriment of the charity. (*Id.* Ex. 6 at Annex A ¶ 4.)

II. RESPONDENTS' AFFIRMATIVE DEFENSES FAIL TO RAISE ISSUES TO DEFEAT SUMMARY JUDGMENT.

In their answer, Respondents assert ten affirmative defenses, not one of which presents a legitimate basis for denying the relief sought in the Petition. It is well settled that the respondent bears the burden of pleading and proving affirmative defenses. CPLR § 3018(b); *Manion v. Pan American World Airways*, 55 N.Y.2d 398, 405 (1982). Affirmative defenses that merely plead conclusions of law without supporting facts are insufficient as a matter of law and are fatally deficient. *Robbins v. Growney*, 229 A.D.2d 356, 358 (1st Dep't 1996); *Haygood v. Prince Holdings 2012, LLC*, 60 Misc.3d 1220(A), 2018 WL 3765205 (Table) at *8 (Sup. Ct. N.Y. Cty. July 30, 2018) ("one sentence legal conclusions … are insufficient to make out an affirmative defense" and should be dismissed).

The First Affirmative Defense is that the Petition fails to state a cause of action. This single sentence conclusory defense must be rejected since the Court has already determined that the Attorney General has stated claims on which relief can be granted. (Op. at 15-16, 22.)

The Second Affirmative Defense of laches, waiver and estoppel should be rejected because Respondents do not set forth any facts – nor could they – to support these defenses. *See Robbins*, 229 A.D.2d at 358, *Haygood*, 2018 WL 3765205 at *8. Moreover, these equitable defenses are not available against the government where, as here, the governmental entity is acting to enforce public rights. *See City of New York v. City Civ. Serv. Comm'n*, 60 N.Y.2d 436, 449 (1983); *Matter of Hamptons Hosp. & Med. Ctr. v. Moore*, 52 N.Y.2d 88, 93 (1981); *Matter of Jamestown Lodge 1681 Loyal Order of Moose (Catherwood)*, 31 A.D.2d 981, 982 (3rd Dep't 1969).

The third affirmative defense, that the Petition is barred by the business judgment rule, should be rejected because Respondents do not, and could not, provide any factual support for it. *See, e.g., Robbins*, 229 A.D.2d at 358. In addition, the business judgment rule is inapplicable here because it requires that the board exercise its judgment prudently and without conflicts, where here the Foundation board did not act, let alone act prudently or independently. *See, e.g.*, *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274 (2nd Cir. 1986) (business judgment rule is inapplicable to decisions made in breach of fiduciary duties); *Macnish-Lenox, LLC v. Simpson*, 17 Misc.3d 1118(A), 2007 WL 3086028, *10–*12 (Sup Ct Kings Cty. Oct. 23, 2007) (business judgment rule only applies to the decisions of independent directors).

The Fourth Affirmative Defense, that the Attorney General lacks standing to bring this action, is frivolous. In addition to being unsupported by any factual support or other explanation, it is inconsistent with black letter law giving the Attorney General standing to bring these claims.

N-PCL § 112 and EPTL § 8-1.4(m) expressly authorize the Attorney General to bring proceedings to enforce the laws applicable to charitable organizations. *See, e.g.*, *People v. James*, 39 Misc.3d 1206(A), 2013 WL 1390877, *5 (Sup. Ct. N.Y. Cty. Apr. 3, 2013).

The Fifth Affirmative Defense, statute of limitations, was addressed in the decision on the Motion to Dismiss, in which this Court held that the statute of limitations was tolled by Respondents' continuing conduct and that, in any event, "many of the allegations are within" the applicable statute. (Op. at 6-9.) Respondents have not submitted any evidence to create an issue of fact to support this defense and, accordingly, it should be rejected for the same reasons set forth in the Court's prior decision.

The Sixth Affirmative Defense, that the Petition is barred by documentary evidence, should be dismissed because Respondents have not introduced any admissible evidence or offered an explanation of how the documentary evidence submitted by the Attorney General supports Respondents' defenses. *See, e.g.*, *Robbins*, 229 A.D.2d at 358.

The Seventh Affirmative Defense of bias has no merit and was rejected by the Court in the decision on the Motion to Dismiss. (Op. at 9-10.) In its decision, the Court rejected this defense because it found that "given the very serious allegations set forth in the petition, … there is no basis for finding that animus and bias were the sole motivating factors for initiating the investigation and pursuing this proceeding." (*Id.*[7])

The Eighth Affirmative Defense, that the Petition is barred because reimbursement has been made, should be dismissed because it is a bare legal assertion, is factually incorrect, and ignores the claims for equitable relief. *See, e.g.*, *Robbins*, 229 A.D.2d at 358. The Attorney

[7] Respondents' additional allegations of bias against Attorney General James are not only meritless, they cannot logically support Respondents' claim that the Petition was "filed for improper, biased and political

General is seeking equitable relief, such as fiduciary bans, based on the improper transactions for which reimbursement was made after the Attorney General commenced its investigation and is seeking reimbursement for the millions of dollars, particularly relating to the disbursements from the Iowa Fundraiser, that have not been reimbursed. (*See* MTD Opp. Memo at 23-24 & n.15.) In addition, reimbursement has not been sufficient in all cases. For example, Mr. Trump reimbursed the Foundation approximately $215 for the $10,000 portrait of himself that he bid on personally, but paid for with the Foundation's assets. (Pet. ¶¶ 87-88.) The justification for the minimal reimbursement is that it represents the rental value of the portrait. But, the Foundation should not have paid for the portrait and should be reimbursed for the full $10,000 it spent, plus interest.

The Ninth Affirmative Defense does not specify any legal grounds on which it is based and is merely a placeholder and, as such, does not provide any basis for not granting the Petition's relief.

Finally, the Tenth Affirmative Defense, that the Court lacks jurisdiction over Mr. Trump, has already been rejected by this Court in its decision on the Motion to Dismiss (Op. at 3-6), based on reasoning that was recently upheld by the Appellate Division. *See Zervos v. Trump*, No. 150522/17, slip op. (1st Dep't Mar. 14, 2019) (attached to the Reply Aff. as Exhibit 7).

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant judgment to Petitioner for the relief requested.

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reasons" (Ans. at 20), because the Petition was filed many months before she was elected or took office. (*See* MTD Opp. Memo at 33-35.)

Dated: New York, New York
March 14, 2019

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CERTIFICATION

YAEL FUCHS, an attorney duly admitted to practice before the Courts of this State, hereby certifies the following under the penalty of perjury pursuant to CPLR § 2106:

The foregoing Reply Memorandum of Law in Further Support of the Verified Petition complies with Rule 17 of the Rules of the Commercial Division of the Supreme Court of New York County. According to Microsoft Word, the word-processing software used to prepare the memorandum of law, the word count of the document, exclusive of the caption, table of contents, table of authorities and signature block, is 4151 words.

Dated: New York, New York
March 14, 2019

YAEL FUCHS