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 SANCTIONS

The People of the State of New York, by Letitia James, Attorney General of the State of New York, respectfully submit this memorandum of law in support of their motion for sanctions pursuant to 22 N.Y.C.R.R. § 130-1.1 based on frivolous conduct by Defendants and their counsel in asserting legal arguments in connection with the parties' pending dispositive motions that were previously rejected by this Court and the First Department in this action.

PROCEDURAL HISTORY

A. Plaintiff's Preliminary Injunction Motion

By Order to Show Cause entered on October 13, 2022, Plaintiff moved for a preliminary injunction and expedited preliminary conference (NYSCEF No. 119) ("PI Motion"). In opposing Plaintiff's PI Motion, Defendants argued that the Attorney General had no standing or capacity to maintain this action under Executive Law §63(12) because there was no harm, and in particular no harm to the public, relying on cases brought under the *parens patriae* doctrine and the decision in *People v. Domino's Pizza, Inc*, Index No. 450627/2016, 2021 WL 39592 (Sup. Ct. N.Y. Cty. Jan.

5, 2021). *See* Memorandum of Law in Opposition to Plaintiffs Application for a Preliminary Injunction and Expedited Preliminary Conference (NYSCEF No. 126) ("PI Opp. Br.") at 8-11 (arguing that the Attorney General "has no right to intervene" in the Defendants' "internal affairs and management . . . and private contractual rights between [Defendants] and corporate counter parties" as "those are private matters between sophisticated commercial parties, not matters of public interest.").

Defendants also contended in the same brief that Donald J. Trump's Statements of Financial Condition ("SFCs"), "and the disclaimers explicitly set forth therein, conclusively establish a defense as a matter of law to the Executive Law § 63(12) fraud claim alleged in the Complaint" because it "forecloses Plaintiff from claiming any corporate counter party reasonably relied in any material way on the information contained in the SoFCs." *Id*. at 13.

This Court soundly rejected these three arguments in its decision granting Plaintiff's PI Motion. *People of the State of New York v. Trump*, No. 452564/2022, 2022 WL 16699216, at *2 (Sup. Ct. N.Y. Cty. Nov. 03, 2022) ("*Trump I*") (NYSCEF No. 183) (rejecting Defendants' positions "that OAG has neither standing nor legal capacity to bring this action," OAG must "meet the elements required to bring a *parens patriae* action to sue" under § 63(12), and § 63(12) actions are limited to cases involving consumer protection). As the Court explained, there is no need for the Attorney General to show any public harm or the quasi-sovereign interest required under *parens patriae* because "the New York legislature has specifically empowered the Attorney General to bring [an Executive Law § 63(12)] action in a New York state court," and Defendants' attempt to restrict § 63(12) to consumer fraud cases "is wholly without merit." *Id*.

Further, the Court held that the disclaimer language in the SFCs did not provide any defense at all to Defendants because the language "makes abundantly clear that Mr. Trump was fully

responsible for the information contained within the SFCs" and that "allowing blanket disclaimers to insulate liars from liability would completely undercut" the "important function" that SFCs serve "in the real world." *Id*. at *3. Indeed, the Court noted that even under the cases Defendants cited, they could not use the disclaimer as a defense because "the SFCs were unquestionably based on information peculiarly within" their knowledge. *Id*. The Court also noted that even if there were a "public harm" requirement, this case would satisfy that requirement because the People have articulated "a quasi-sovereign interest that touches a substantial segment of the population and is distinct from the interests of private parties." *Trump I*, 2022 WL 16699216, at *2 (citing cases).

B. Defendants' Motions to Dismiss

On November 21, 2022, Defendants filed motions to dismiss (NYSCEF Nos. 195, 198, 201, 210, 220, 224) ("Motions to Dismiss"). Defendants again raised these same three arguments in support of their Motions to Dismiss. *See, e.g.*, Memorandum of Law in Support of the motion to Dismiss of Defendants, The Trump Organization, Inc., Trump Organization LLC, and Donald J. Trump (NYSCEF No. 197) ("MTD Moving Br.") at 3-11 (Point I – "The NYAG Lacks Standing to Bring This Action"), 11-13 (Point II – "The NYAG Is Without Capacity to Bring the Suit"), 21-22 (Point III – "Plaintiff's Fraud Claims are Barred by Documentary Evidence and Fail to State a Claim").

The Court rejected these arguments for a second time, noting that they "were borderline frivolous even the first time defendants made them," and observed that reading Defendants' brief "was, to quote the baseball sage Lawrence Peter ("Yogi") Berra, 'Deja vu all over again.'" *People v. Trump*, No. 452564/2022, 2023 WL 128271, at *2 (N.Y. Sup. Ct. Jan. 06, 2023) ("*Trump II*") (NYSCEF Nos 453-458) (holding that Executive Law § 63(12) "is tailor-made for Attorney General Enforcement actions such as the instant one, foreclosing any rational arguments against capacity and standing" and that the disclaimers "shifted responsibility directly on to certain

defendants"), *aff'd in part and rev'd in part on other grounds*, 217 A.D.3d 609 (1st Dep't 2023) ("*Trump III*"). The Court went further to admonish Defendants' counsel for raising these arguments for a second time, noting that "sophisticated defense counsel should have known better." *Trump II*, 2023 WL 128271, at *4. After noting that such conduct may warrant an "award [of] costs and financial sanctions against an attorney or party," the Court exercised its discretion and declined to do so, concluding they were unnecessary in light of the Court "having made its point." *Id.* In its decision denying the Defendants' Motions to Dismiss, the Court also rejected Defendants' additional argument that Plaintiff has no valid claim for disgorgement under § 63(12), holding that "disgorgement of profits is a form of damages" available in this § 63(12) action. *See Trump II*, 2023 WL 128271, at *5.

On appeal from the Court's decision denying their Motions to Dismiss, Defendants raised, among other points, their standing, capacity, and disgorgement arguments, all of which were unanimously rejected by the First Department:

> The New York Legislature enacted Executive Law § 63 (12) to combat fraudulent and illegal commercial conduct in New York. Under this provision, "[w]henever 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" *for disgorgement* and other equitable relief. The Attorney General is not suing on behalf of a private individual, but is vindicating the state's sovereign interest in enforcing its legal code—including its civil legal code—within its jurisdiction. We have already held that the failure to allege losses does not require dismissal of a claim *for disgorgement* under Executive Law § 63(12).

Trump III, 217 A.D.3d at 610–11 (internal citations omitted) (emphasis added). Defendants did not seek leave to appeal the decision by the First Department.

C. The Parties' Pending Dispositive Motions

On August 4, 2023, Defendants moved for summary judgment (NYSCEF No. 834) and Plaintiff moved for partial summary judgment (NYSCEF No. 765). Despite the Court's prior rulings and admonition, Defendants exhume their previously-rejected standing, capacity, disclaimer, and disgorgement arguments in support of their motion and in opposition to Plaintiff's motion.

In their summary judgment brief, Defendants contend that, "whether framed as an issue of standing or capacity, the scope of NYAG's authority depends upon a public interest nexus" requiring "some harm (or threat of harm) suffered by the People (*i.e.*, the public at large)." Memorandum of Law in Support of Defendants' Motion for Summary Judgment, dated August 4, 2023 (NYSCEF No. 835) ("Defs. MOL"), at 22. They add that this "public interest" concept "is reinforced by the doctrine of *parens patriae*," which they contend "is fully applicable to actions brought under 63(12)." *Id.* at 22 n.10. Defendants further argue in the same brief that the accountant's letter inserted at the beginning of each SFC has disclaimer language that puts users "on complete notice not to rely upon them," *id.* at 42, effectively insulating them from any liability for false and misleading statements and values in the SFCs, and that disgorgement "is not available under §63(12) or the underlying statutory claims," *id.* at 58.

Defendants raise these same arguments in their recently-served joint brief opposing Plaintiff's partial summary motion. *See* Defendants' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated September 1, 2023, at 52-57 (Point III.A—"The NYAG Lacks Authority To Maintain Suit"), 58-59 (arguing Mazars disclaimer, among other language in the SFC, put users of the SFCs "on complete notice to seek additional information"), 69-72 (Point IV—"The NYAG Is Not Entitled To Disgorgement As A Matter Of Law").

ARGUMENT

I. SANCTIONS ARE WARRANTED AGAINST DEFENDANTS AND THEIR COUNSEL FOR FRIVOLOUS CONDUCT

The Court has the discretion to "impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct," and may impose sanctions "against both." 22 N.Y.C.R.R. § 130-1.1(a) and (b). Conduct is frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." 22 N.Y.C.R.R. § 130-1.1(c). In determining whether conduct is frivolous, the Court shall consider, among other things, "whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." *Id.*

Here, the lack of legal bases for Defendants' standing, capacity, disclaimer, and disgorgement arguments should have been readily apparent to Defendants and their counsel from the prior rulings of this Court and the First Department. Indeed, as to the standing, capacity, and disclaimer arguments, this Court already "brought to the attention of counsel [and] the part[ies]" *id*., that these arguments were "borderline frivolous" and sanctionable when raised for the second time on Defendants' Motions to Dismiss, *Trump II*, 2023 WL 128271, at *4. Under these circumstances, the Court should impose sanctions against Defendants and their counsel. *See Levy v. Carol Mgmt. Corp.,* 260 A.D.2d 27, 34 (1st Dep't 1999) (affirming an award of sanctions where record was "replete" with circumstances where frivolous nature of the conduct was brought to the attention of the parties or counsel); *Gassab v. R.T.R.L.L.C.*, 69 A.D.3d 511, 513 (1st Dep't 2010) (affirming trial court's imposition of costs and sanctions against plaintiff "after having been

warned by the motion court that his motion to vacate barely escaped the imposition of costs and sanctions").

Further, because Defendants and their counsel were previously admonished by the Court that their conduct in raising previously-rejected arguments was frivolous and sanctionable, and because "sophisticated defense counsel should have known better," *Trump II*, 2023 WL 128271, at *4, the Court should impose sanctions against Defendants and their counsel in the maximum allowable sum as follows: (i) against all Defendant collectively in the total amount of $10,000, to be deposited with the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance; and (ii) against all attorneys on Defendants' briefs in support of, and opposition to, the pending dispositive motions collectively in the total amount of $10,000, to be deposited with the Lawyers' Fund for Client Protection. *See* 22 N.Y.C.R.R. §§ 130-1.2, 130-1.3; *Leventritt v. Exkstein*, 206 A.D.2d 313, 314 (1st Dep't 1994) (holding trial court "properly imposed monetary sanctions of $10,000 each upon plaintiff and her counsel" for frivolous conduct); *Cattani v. Marfuggi*, 26 Misc.3d 1053, 1060 (Sup. Ct. N.Y. Cty. 2009) (imposing sanctions on "both plaintiff and his counsel" where "the lack of merit" of plaintiff's arguments "was brought to plaintiff's and his counsel's attention, and they persisted"); *cf. Entm't Ptns. Group, Inc. v. Davis*, 198 A.D.2d 63, 64 (1st Dep't 1993) (sanctions of $10,000 imposed against "each of the individual defendants" pursuant to statutory analogue CPLR 8303–a).

CONCLUSION

Based on the foregoing, the People respectfully request that the Court grant Plaintiff's motion for sanctions against Defendants and their counsel, along with such other and further relief the Court deems necessary and appropriate.

Dated: New York, New York
September 5, 2023

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court ("Uniform Rules"), I certify that, excluding the caption, signature block, and this certification, the foregoing Memorandum of Law contains 2,070 words, calculated using Microsoft Word, which complies with the Court's rules.

Dated: New York, New York
September 1, 2023

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