To: Financial Accounting Standards Board

From: Dr. Daniel Tinkelman, Professor of Accounting, Brooklyn College

Date: August 15, 2024

Request for the FASB to put reconsideration of Codification Section 274 (Personal Financial Statements) on its agenda.

Background

Codification Section 274 has never been formally considered by the Board. This section was adopted by the FASB from the pre-existing AICPA SOP 82-1 when the FASB incorporated numerous pre-existing items of official guidance into the codification.

Section 274, which requires financial statements to be presented on the basis of "estimated current value", is different from other areas of GAAP for commercial enterprises. The AICPA SOP 82-1 said, in language which has been carried into ASC 274-10-05-2

> *The primary focus of personal financial statements is a person's assets and liabilities, and the primary users of personal financial statements normally consider estimated current value information to be more relevant for their decisions than historical cost information. Lenders require estimated current value information to assess collateral, and most personal loan applications require estimated current value information. Estimated current values are required for estate, gift, and income tax planning, and estimated current value information about assets is often required in federal and state filings of candidates for public office.*

The SOP (and ASC 274) went on to define "Estimated Current Value" as follows:

> *For an asset, the amount at which the item could be exchanged between a buyer and seller, each of whom is well informed an6d willing, an3d neither of whom is compelled to buy or sell."*

There is no guidance to how "estimated current value" should be determined outside of this section.[1]

Ambiguities or disagreements over the interpretation of Section 274 were key issues in the New York State civil case brought by Attorney General Letitia James against Donald J.

[1] The only document I could find is "AICPA technical questions and answers, as of June 1, 2019
American Institute of Certified Public Accountants (AICPA), "Q&A Section 1600
Personal Financial Statements, section .04 "Presentation of Assets at Current Values and Liabilities at Current Amounts in Personal Financial Statements." The following is a quotation from this document:
"Inquiry—Are the definitions of current values (assets) and current amounts (liabilities) for personal financial statements meant to be the same as fair value, as defined in FASB ASC 820, Fair Value Measurements and Disclosures? Reply—No. FASB ASC 820 did not contemplate the reporting of personal financial statements, and FASB did not amend the definitions of estimated currenttvalues and current amounts for personal financial statements as part of its codification process."
[Issue Date: June 2009.]

Trump, the Trump Organization, and others. A verdict in the case was rendered in February 2024, and is currently under appeal.

I have written two articles, forthcoming in the *Journal of Forensic Accounting Research,* which look at various aspects of this case. I attach these articles as appendices to this memo. The articles are based on publicly available documents in the case, including expert reports and transcripts. The case is Case 452564/2022 in the NYSCEF court document system available online.

I have no other involvement with this case, or the parties in it

Ex-President Trump testified during his trial that, due to how flexible GAAP was, he considered his personal financial statements "worthless." Expert witnesses for his defense argued that GAAP was so flexible that value estimates for the same asset could differ by orders of magnitude, and still be acceptable under GAAP.

I respectfully suggest that the FASB consider whether the accounting in this area needs to be revised and clarified. GAAP statements, in my opinion, should be useful, not "worthless."

Four suggested changes to Section 274

Based on matters which arose in the case, I recommend the following four changes to ASC 274. I discuss these four in more detail below.

1. Forbid the use of the term "net worth" unless the reported figure accords with the definition, which involves subtracting estimated taxes due upon sale of the assets and payment of liabilities.
2. Replace the term "estimated current value" with "fair value" as that term has been defined elsewhere in the ASC.
3. Clarify that the implementation guidance in ASC 274 regarding methods of computing value does not supersede the overall ASC 274 requirement that assets and liabilities be reported at estimated current value (or fair value if the FASB decides to use this standard of value.)
4. Require disclosure of changes in accounting methods even if comparative statements are not presented.

Background -- Suggestion regarding the term "net worth."

ASC 274-20 (glossary) defines "net "worth" as follows:

> *The difference between total assets and total liabilities, after deducting estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases.*

Mr. Trump's Personal Financial Statements presented in the lawsuit made no provisions for estimated taxes related to differences between current values of his assets and their tax bases. The reports indicated that this was a divergence from GAAP. There was no allegation that failure to estimate these taxes was fraudulent.

His assets included real estate properties bought decades ago, such as Mar-A-Lago and Trump Tower in New York. Over the time he has owned them, property values have risen, and he has presumably taken depreciation. One would expect that estimated taxes on the difference between current value and the tax basis would be sizeable, perhaps in the hundreds of millions of dollars, but no estimate was made of such taxes.

Each year, his personal financial conditions used the term "new worth" to describe the difference between the reported assets and the reported liabilities. Without accounting for estimated taxes, this usage does not meet the definition of net worth in ASC 274.

My recommendation is that, for clarity to readers, the term "net worth" only be used when the figure meets the ASC 274 definition and has been appropriately reduced for estimated taxes. If personal financial statements do not include estimated taxes, another descriptive term, such as "net worth before considering estimated taxes" should be employed instead.

Replace the term "estimated current value" with "fair value"

As discussed above, ASC 274 owes its origin to AICPA SOP 82-1. This was written before the FASB defined "fair value". The FASB has provided guidance on how "fair value" should be applied. In contrast, "Estimated current value" is not used elsewhere in the codification, and there is no guidance on its use outside of the limited amount in ASC 274 itself. Maintaining two different value standards is a recipe for unnecessary confusion.

In the Trump case, as described in the attached articles, experts and lawyers for the two sides disagreed sharply on the meaning of "estimated current value." One side (the office of the Attorney General) interpreted it to mean something quite similar to "fair value", as a price at which a willing buyer and seller "would" actually agree to make a transaction. The other side (the defense) stressed that the definition refers to the price at which parties "could" agree, not "would" agree. The defense believed this language left the door open for "as if" values, e.g. values assuming that property restrictions were removed, or undeveloped property was developed. Experts for the defense testified that the definition was flexible enough that a preparer of financial statements could have a choice between values for the same asset that differed by orders of magnitude. The judge's decision did not try to resolve this particular dispute.

As noted above, former president Trump testified that, due to how widely values could differ under GAAP, he considered the financial statements "worthless." Legally, this would be consistent with a defense against fraud, that the parties receiving the statements could not reasonably rely upon them.

As noted above, ASC 270 says that a major purpose of using "estimated current value" personal financial statements is to provide information for lenders, especially to assess collateral., I suggest that the FASB reconsider whether the current version of ASC 274 is meeting this goal. The FASB might wish to consider explicitly indicating whether value is to be based on property in its current condition, or assuming certain changes in condition.

Clarify whether the implementation guidance in ASC 274 regarding methods of computing value supersedes the overall ASC 274 requirement that assets and liabilities be reported at estimated current value

The main body of ASC 274 requires assets to be stated at estimated current value, and defines that term. ASC 274 also contains implementation guidance. The sections containing guidance for investments in closely held businesses and in real estate read as follows:

· · > Investment in a Closely Held Business

274-10-55-4
There is no one generally accepted procedure for determining the estimated current value of an investment in a closely held business. Several procedures or combinations of procedures may be used to determine the estimated current value of a closely held business, including any of the following:

1. *a*
   A multiple of earnings
2. *b*
   Liquidation value
3. *c*
   Reproduction value
4. *d*
   Appraisals
5. *e*
   Discounted amounts of projected cash receipts and payments
6. *f*
   Adjustments of book value or cost of the person's share of the equity of the business.

The book value or cost of a person's share of the equity of a business adjusted for appraisals of specific assets, such as real estate or equipment, is sometimes used as the estimated current value.

· > Real Estate (Including Leaseholds)

274-10-55-6
Information that may be used in determining the estimated current values of investments in real estate (including leaseholds) includes any of the following:

1. *a*
   Sales of similar property in similar circumstances
2. *b*

The discounted amounts of projected cash receipts and payments relating to the property or the net realizable value of the property, based on planned courses of action, including leaseholds whose current rental value exceeds the rent in the lease

3. *c*

   Appraisals based on estimates of selling prices and selling costs obtained from independent real estate agents or brokers familiar with similar properties in similar locations

4. *d*

   Appraisals used to obtain financing

5. *e*

   Assessed value for property taxes, including consideration of the basis for such assessments and their relationship to market values in the area.

Experts for the defense argued that the specific implementation guidance in these sections overrode the general requirement of ASC 274 that values be those on which a willing buyer and seller could agree. Thus, it would be permissible to show an interest in a closely held business at historical cost even if the current value were now wildly different. An expert for the Attorney General disputed this point, using the example of a collectible baseball card, where no knowledgeable seller would sell for the original cost, when the current market value is astronomically greater.

I suggest that the FASB clarify that any methods mentioned in the implementation guidance can only be used as a means to approximate a value that a willing buyer and seller could agree on, in the absence of recent market information. They cannot be used when they would result in values clearly outside of what a buyer and seller would agree upon.

<u>Require disclosure of changes in accounting methods even if comparative statements are not presented.</u>

The lawsuit involved personal financial statements for a number of years. These were all single-year statements. None were comparative.

The Attorney General's office alleged that the methods of valuing certain assets were changed in certain years, without providing appropriate disclosure. The Attorney General's office noted that ASC 274-10-50-2 requires disclosure of changes in the methods of valuation. However, an expert for the defense argued that such disclosure is only required under GAAP when comparative statements are provided. The expert argued that any user with both the current and prior year statement would be able to compare them, and would notice the change of methods.

I suggest the FASB should clarify whether the ASC 274 requirement to disclose changes in valuation methods is applicable to single-year statements.

<u>Conclusion</u>

I urge the Board to clarify ASC 274.

I would be happy to provide the Board with specific references of materials from the case if requested.

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Appendix A --

Key Forensic Accounting Takeaways:

People ex rel. James, v. Donald J. Trump et al.

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I thank the editor and reviewers for helpful comments.

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Key Forensic Accounting Takeaways:

***People ex rel. James, v. Donald J. Trump et al*.**

ABSTRACT

On February 16, 2024, a New York court found former President Trump and others civilly liable, under a specific New York law, for up to $450 million, including interest, for providing misleading financial statements to banks and others. I explain the legal basis of the suit, which is very different from common law fraud suits. It was brought by the New York State Attorney General, not the purported victims. There are sharply divergent views on whether the suit should have been brought.

I also discuss five other issues of interest to forensic accountants pertinent to the trial: the use of "estimated current value" in personal financial statements; differing views of materiality; the protective value of disclaimers for financial statement issuers and accountants performing compilations; the impact of deferred tax liabilities to net worth; and whether personal financial statements have value.

I. INTRODUCTION

Judge Engoron's February 16th decision (NYSCEF document #1688) [2] in the New York State Attorney General's civil lawsuit against former president Donald J. Trump, his adult sons, and others over allegedly false and misleading financial statements received wide media attention. Penalties, including interest, could total over $450 million (Bromwich and Protess, 2024). The court enjoined Mr. Trump[3] and his sons Eric Trump and Donald Trump Jr., along with Allen Weisselberg (former Trump Organization CFO) and Jeffrey McConney (former Trump Organization controller) from serving as the officer or director of any New York corporation for periods of either two or three years.

Views on whether the case should have been brought, and the outcome, could hardly be more divergent. New York State Attorney General Letitia James hailed it as "a tremendous victory for this state, this nation, and for everyone who believes that we all must play by the same rules — even former presidents" (Office of Attorney General 2024). Alina Habba, an

[2] All document numbers refer to Case 452564/2022.
[3] Unless otherwise indicated, "Mr. Trump" refers to Donald J. Trump, not his sons.

attorney for Donald J. Trump, called it "a manifest injustice" and "the culmination of a multi-year, politically fueled witch hunt," and promised to appeal (Baio 2024). In his initial deposition in the case, on August 10, 2002 (NYSCEF document #42, pp. 11-12), Mr. Trump said

> This is the greatest witch hunt in the history of our country. There has never been another president or perhaps even another politician who has been persecuted harassed and in every other way unfairly treated like President Donald J. Trump.
>
> What Leticia James has tried to do the last number of years is a disgrace to the legal system, an affront to the New York State taxpayers and a violation of the solemn rights and protections afforded by the United States Constitution.

He went on to claim (p. 12) that Ms. James "made a career out of maliciously attacking me and my business."

This case is worthy of forensic accountants' attention because of the differences from normal fraud trials, the issues involved, and the prominence of the defendant. Unlike in normal fraud trials, the suit was brought by the Attorney General, not the purported victims. The extensive trial record makes the issues clear. As of June 28, 2024, the document list includes 1,789 items, from the complaint to the final order entering a judgment.[4] This list will grow when appeals are filed. The defendants have until September 2024 to file their appeals.

Exhibit 1 explains how to access the record and lists some key items of interest to accountants. The record contains the Statements of Financial Conditions (SFCs), backup schedules to the SFCs listing assets in more detail, expert reports, depositions, testimony by various parties, and motions and arguments made by both the plaintiff and defendants. It was a bench trial, and the judge issued long opinions at various stages of the case, detailing his reasoning.

[4] The earlier investigatory phase of the proceedings, case 451685/2020, had 830 documents filed with the NYSCEF system.

While the case obviously has political implications, those are beyond the scope of this article. This article concentrates on the implications of the arguments in the case, and the applicable law, for financial statement preparers, accountants performing attest and compilation services, and forensic accounting experts working on fraud engagements. The case also raises issues for the Financial Accounting Standards Board (FASB) to address.

The financial statements at issue were Mr. Trump's personal SFCs, accompanied by footnotes and an accounting firm's compilation report.[5] They are essentially balance sheets. No income statements or statements of cash flows were attached. The compilation reports for the fiscal years ended June 30, 2011, through 2020 were prepared by Mazars USA LLP (or its predecessor firms) and those for fiscal 2021 were prepared by Whitley Penn LLP. As a private company, the Trump Organization did not have to publish financial statements, but SFCs were provided to various parties, including banks and insurance companies, pursuant to borrowing and insurance agreements.[6] Mr. Trump also provided his SFCs to government agencies in connection with his bid to convert the Old Post Office in Washington D.C. and to run the Ferry Point golf course project in New York City.

The purpose of this article is to briefly describe the case, and to discuss six areas of special interest to accountants in general or to forensic accountants doing litigation support on fraud cases. Two areas are of general interest to accountants working on personal financial statements:

- Measuring "estimated current value" in personal financial statements.

[5] During the time Mr. Trump was president, the SFCs were for the revocable trust he set up to hold his assets.
[6] The term "Trump Organization" is being used here, as it was during the trial, to refer to the management structure Mr. Trump used to oversee his various interests. The actual legal structure through which Mr. Trump or his trust owned various entities is complex. An organizational chart can be found as NYSCEF Document #4.

- The need to consider deferred taxes when computing net worth in personal financial statements

Four other areas are particularly pertinent to forensic accountants, since they affect what defenses are available as defenses against fraud:

- The appropriate measure of materiality in fraud lawsuits.
- The scope of New York State Executive Law §63(12)
- The role of disclaimers in protecting accountants and financial statement issuers from liability; and
- whether compiled personal financial statements should be seen as "worthless," precluding users from saying they relied upon the statements.

II. HISTORY OF THE CASE

In February 2019 then-president Trump's former attorney, Michael Cohen, testified in a congressional hearing (Cohen 2019) that Mr. Trump had provided personal financial statements including inflated assets to banks and insurance companies, while understating them for tax purposes. This testimony sparked two investigations, one criminal and one civil. Both began in 2019, while Mr. Trump was still president.

The Manhattan District Attorney's Office, under Cyrus Vance, investigated bringing criminal fraud charges, and collected grand jury testimony. Alvin Bragg, who replaced Cyrus Vance in 2022, decided not to proceed with the case. News reports indicate he was skeptical about whether criminal intent could be proved beyond a reasonable doubt. Two senior prosecutors assigned to the case, who strongly believed that an indictment was warranted,

resigned in protest. See Barker, Bromwich, and Rothfield (2024) and Protess, Rashbaum, and Bromwich (2022). [7]

In March 2019, the month after Cohen testified, the New York State Attorney General's office began investigating the matter as a civil case and issued subpoenas (NYSCEF document #1669). There was an extensive period of investigation, including subpoenaing documents from the Trump Organization, its banks and accountants.

On September 21, 2022, the Office of the Attorney General (OAG) filed a civil complaint (NYSCEF document #1) with six causes of action, all referencing New York State Executive Law §63(12), alleging that Mr. Trump's personal SFCs from fiscal years 2011 through 2021 were false and misleading. The defendants included Mr. Trump, Donald Trump, Jr., Eric Trump, Ivanka Trump, Allen Weisselberg, Jeffrey McConney, the Donald J. Trump Revocable Trust, the Trump Organization and nine other companies controlled by Mr. Trump. The charges against Ivanka Trump were later dismissed by the First Appellate Division for statute of limitations reasons (NYSCEF document #643)

On November 3, 2022, Judge Engoron granted a request from the Attorney General for an injunction to prevent the Trump Organization from making certain asset transfers, and he appointed a monitor of its financial reporting (NYSCEF document #183). In granting this motion, Judge Engoron found preliminarily that the defendants "had a propensity to engage in persistent fraud by submitting false and misleading Statements of Financial Condition."

[7] Later, Bragg began a separate investigation into the accounting for a "hush money" payment made in 2016, which culminated in Mr. Trump's conviction on May 30, 2024, on 34 counts of falsifying business records. See Protess, Bromwich, Haberman, Christobek, McKinley, and Rashbaum (2024).

On September 26, 2023, Judge Engoron granted a motion of partial summary judgment (NYSCEF document # 1531) on one of the six counts in favor of the Attorney General, finding the defendants liable for "persistent violations of Executive Law §63(12)."[8] No summary judgment was granted on the other five causes of action. Judge Engoron determined that the financial statements were materially false. The purpose of the trial that began in October 2023 was partly to determine liability for these remaining matters, and partly to determine the appropriate monetary penalty that should be disgorged related to the first cause of action. In the trial, the OAG relied on the Court's determination that the statements were materially false and did not introduce new evidence or expert witness testimony to re-prove these points. The defense, as part of its effort to establish a record for appeal, did introduce experts at trial to argue either that the statements were not false, or that misstatements were not material.

A non-jury trial began October 2 and ran until December 13, 2023. Closing arguments were held January 11, 2024. Judge Engoron rendered his decision (NYSCEF document # 1688) on February 16, 2024. He found Donald J. Trump, Donald Trump Jr., Eric Trump, Allen Weisselberg (the CFO), and Jeffrey McConney (the controller) liable for causes of action related to making misleading statements, repeatedly falsifying business records and issuing false financial statements. He found McConney and Weisselberg liable for insurance fraud and found all five individual defendants liable for conspiracy to commit insurance fraud. Judge Engoron ordered disgorgement of benefits that had flowed to defendants from the use of misleading financial statements.

[8] He ordered the business certificates of several entities to be cancelled, but this action has been stayed pending appeals, and the judge's final verdict (NYSCEF document # 1688) rescinded this action.

Without considering interest, Mr. Trump (together with various entities he owns) was liable for $355 million. The Court ordered payments (before interest) of $1 million from Allen Weisselberg and $4 million each from Eric Trump and Donald Trump Jr. The Court also banned various defendants from serving as officers or directors of New York corporations for various periods of time. To prevent further misconduct, he extended the appointment of a retired judge, Barbara Jones, as a monitor of the Trump Organization, and required the Trump Organization to hire an Independent Director of Compliance.

The case is being appealed. Likely grounds for appeal include issues related to the statute of limitations and issues related to whether Judge Engoron has properly interpreted the requirements for proof under Executive Law §63(12), including issues of materiality and reliance. Most recently, defense lawyers have charged that Judge Engoron had improper *ex parte* discussions and should be removed from the case (Scannell 2024).

III. NEW YORK STATE EXECUTIVE LAW §63(12)

It is noteworthy that this suit was not brought by any of the purported victims of the misrepresentation and was not brought under the normal civil or criminal fraud statutes with which most accountants are familiar.[9] For example, the Fraud Examiners Manual (ACFE 2022) says that specific elements of a claim for Misrepresentation of Material Facts "normally include…

i. A material false statement;

[9] There could be a variety of reasons that the purported bank and insurance company victims did not bring suit. The most obvious is that, since the loans were repaid, they would have difficulty proving damages for the extra interest they would have charged with a different assessment of Mr. Trump's net worth. Also, the burden of proof in a normal fraud action would include showing intent. Other factors might include the banks' commercial interest in continuing to lend to Mr. Trump, or perceived reputational risks in suing him. Litigation is of course costly, and the various lenders may have rejected the idea of suing on cost-benefit grounds.

ii. Knowledge of its falsity;

iii. Reliance on the false statement by the victim;

iv. Damages suffered"

This means that defendants have multiple ways to contest a normal fraud claim.

Here, the OAG brought suit under a special provision of the law, dating from the 1950s, which gives the Attorney General powers to bring suit "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." See Exhibit 2 for the full text of the law.

The law was enacted to help the Attorney General police fraud, especially consumer fraud. Judge Engoron's decision (NYSCEF document # 1688) approvingly cited prior cases holding that the state has a valid interest in protecting the integrity of the marketplace. Judge Engoron wrote:

> Timely and total repayment of loans does not extinguish the harm that false statements inflict on the marketplace. Indeed, the common excuse that "everybody does it" is all the more reason to strive for honesty and transparency and to be vigilant in enforcing the rules. Here, despite the false financial statements, it is undisputed that defendants have made all required payments on time; the next group of lenders to receive bogus statements might not be so lucky. New York means business in combating business fraud.

The importance of the ability of lenders to rely on borrowers' applications was, ironically, stressed in deposition testimony by one of the defendants' expert witnesses, Robert Unell (NYSCEF document #1030, pp. 180.)

> Q. So, again, I hear you saying that your opinion is that a lender approaches underwriting with an assumption that it can believe its clients, correct?

> A. Well, you have to. I mean, otherwise, there would be no lending. If you had to go through and do the level of diligence -- I mean, we wouldn't have housing market. We wouldn't have anything. We wouldn't -- I mean, this is a post-mortem, you know, autopsy audit of a loan that was performing. And to sit here and say that, you know, I would have to -- that you would go into or any lender would ever go into a transaction believing that anything was false and **not** take it at fast [sic] value is incorrect. And that's not the way the markets operate and it's not -- you know, if it were to operate that way, then we would be surrounded by mountains of paperwork and a slower process than it already is to get certain things done due to regulatory environment. So, no, I mean, I look at things and you have to trust your client.

Thus, the OAG's position was that, to protect the proper working of the credit markets, it is important to stop misrepresentations, and to force those who misstate their financial condition to disgorge any resulting profits.

The defendants strongly argue that this law was not meant to apply to loan transactions between sophisticated parties and sought summary judgment on that basis. However, both Judge Engoron and the First Appellate Division ruled that §63(12) is applicable to this case and is not limited to consumer fraud cases (NYSCEF document # 1531). An article in CNN (Dale, 2023) noted that the law "has been used for decades by New York attorneys general against a wide range of entities, ranging from an e-cigarette company to school bus companies to oil and gas giant ExxonMobil (which won its case). In fact, it had also been used against Trump University and the Trump Foundation."

This law is very different from normal fraud statutes. First, suits can only be brought by the Attorney General, not the parties to a transaction. Second, under Judge Engoron's interpretation of relevant case law (NYSCEF document # 1531), for the first cause of action the Attorney General needed only to prove that false and deceptive information was repeatedly produced in order to hold defendants liable. It was not necessary to prove that any person relied on these false statements or suffered damages. Indeed, it was not necessary to prove either intent

to defraud or scienter. This means many defenses normally available in a fraud case are not available in a §63(12) case.

The case law allows a judge to order the defendants to disgorge any ill-gotten gains. In this case, Judge Engoron, after considering testimony from both the OAG and the defendants' experts, determined (NYSCEF document # 1688) that the Trump Organization gained lower interest rates on certain loans, as well as the opportunity to profit from projects involving the Old Post Office in Washington and a golf course in New York. The fines levied represented Judge Engoron's estimate of these benefits. His decision cited a total of approximately $168 million in saved interest, $134 million in profits on the sale of the interest in the Old Post Office (including $4 million each for Donald Trump Jr. and Eric Trump), and $60 million in profits related to the sale of the Ferry Point project.[10]

The defendants' arguments and their proposed rules of law (NYSCEF Documents #1663, #1664 and #1675) could have been helpful in a normal fraud trial. They note that the bank loans were paid, and that the bank witnesses had not complained of any defaults under the loan agreements. The banks did not bring suit for fraud. Defendants also argued that the banks had done their own due diligence, and thus had not relied on the financial statements. Similarly, the relevant government authorities had not complained about the Old Post Office or Ferry Point projects.

In his February 16th decision (NYSCEF document # 1688), Judge Engoron wrote that "Defendants' argument is to no avail, as none of plaintiff's causes of action requires that it

[10] The estimate of saved interest was influenced by the difference between the interest rate Deutsche Bank's real estate lending division was willing to offer based simply on the value of certain properties, and the significantly lower rates offered by the bank's Personal Wealth Management Group, which insisted on Mr. Trump's personal guarantee and on certain net asset covenants.

demonstrate reliance. Instead, plaintiff must merely show that defendants intended to commit the fraud."[11] This was consistent with his summary judgment (NYSCEF document #1531), in which he found that all that needed to be proved was that the SFCs were false and misleading, and that the defendants repeatedly or persistently used them to conduct business. Also, whether or not the properties listed in the statements subsequently rose in value was not relevant.

A key question for accountants and financial executives is to what extent this law will be used in the future against other financial statement preparers. It is beyond the scope of this article to survey the laws of the fifty states. Accountants outside New York should try to ascertain if similar laws in their states give prosecutors equivalent tools. An issue for professional associations is whether to support such laws, as appropriate tools to combat fraud, or whether to support legislation to limit the possibility of prosecutorial overreach or discriminatory prosecution.

IV. "ESTIMATED CURRENT VALUE"

The SFCs claimed to follow GAAP. GAAP for personal financial statements is codified in ASC Section 274 (FASB 2024). Exhibit 3 contains excerpts from ASC 274. This section was carried over by the FASB from AICPA Statement of Position 82-10 (AICPA 1982). In 1982, the AICPA changed the guidance from its prior position, which called for historical cost accounting, to require assets be stated at "estimated current value." See Robbins and Austin (1984). Obviously, this is very different from normal GAAP for business. Mr. Trump's SFCs explicitly said they presented assets at their estimated current value.

[11] The judge found that the banks and other recipients of the SFCs did in fact rely on them.

"Estimated current value" is not used elsewhere in the FASB codification. A 2019 AICPA publication titled "AICPA technical questions and answers, as of June 1, 2019" notes in "Q&A Section 1600" that "estimated current value" is not the same as "fair value" under ASC Section 820. However, the publication does not discuss the nature of the differences, if any, between the definitions. I was not able to find any published articles that discussed differences between this definition and "fair value," and no witness in the case referred to any such articles.

ASC 274 defines "estimated current value" as "the amount at which the item could be exchanged between a buyer and seller, each of whom is well informed and willing, and neither of whom is compelled to buy or sell." It later, in its implementation guidance, says "Information that may be used in determining the estimated current values of investments in real estate (including leaseholds) includes any of the following" and lists sales of similar items, appraisals, discounted amounts of projected receipts net of expenditures, and tax assessments.

The definition of estimated current value was hotly contested in the Trump case because evidence showed that various assets, especially real estate, were presented at values very different from what they would have sold for "as is" on the balance sheet date. The OAG cited such differences as evidence of fraudulent inflation of asset values.

The defendants' experts made two basic arguments in rebuttal. First, they claimed that estimated current value was defined as an amount that "could be received" in a transaction, not the amount that "would be received." They argued that the "could be" language meant that "estimated current value" need not be what the property would sell for "as is" now, but what it might sell for later, after the property had been developed, or after legal restrictions were removed. Frederick Chin, in his affidavit (NYSCEF document #1033), wrote that the SFCs

> appropriately include As If, pro-forma, or anticipated or projected estimates based on President Trump's or The Donald J. Trump Revocable Trust's … knowledge and perspective of the valued assets. The NYAG's lawsuit ignores and disregards these As If, pro-forma, or projected valuations and incorrectly insists that an "As ls" definition is the applicable standard.

In his trial testimony (Testimony page 6276) Eli Bartov, a second defense expert, endorsed this view that "as if "values were acceptable. He testified

> Estimated current value is not the value today. It's the value of the asset someday…. So what is "someday." Someday is based on the plan course of action. So the "someday" will be when you complete your all your plans. This will be when you make the valuation call.
>
> So let's say you have a lot today that you bought it for a million dollars today. And you plan to build a hotel that will take you five years to build. But, after five years you believe that once you complete the building of the hotel you can sell the hotel for fifty million dollars. So the value of the -- after expenses. So the value today of this lot is not one million dollar, it's fifty million. But fifty million is what you're going to get five years from now. So, what you have to do, you have to compute the present value, the current value is the present value of the fifty million dollars; meaning, you have to discount the future value to the present.

One problem with Bartov's example is that, if the real estate market is competitive, any vacant lot capable of producing value of $50 million in five years is unlikely to have a current value as low as $1 million – competition among developers will bid its price up. The fact that a current price is as low as $1 million would, in fact, cast doubt on the feasibility of the possible $50 million future value.

The second argument defense experts made is that GAAP allows a financial statement issuer a free choice of any of the real estate valuation methods listed in ASC 274-10-55-6. In trial testimony (page 6512), Eli Bartov testified that the specific discussion of methods that could be used to value real estate "trumps" the general definition of estimated current value.[12] A

[12] From the trial transcript, page 6512, lines 3 to 12
Q Can we please pull up -- is it your testimony that the specific section with respect to real estate trumps 55-1 when it comes to valuing real estate assets for estimated current value?
A That's my opinion, yes.

third expert, Jason Flemmons, in trial testimony (page 4502), said such values could differ by an order of magnitude, and that any of them could be acceptable under GAAP. In the defendants' proposed findings of fact and law (NYSCEF document #1663) they claim that "The methods listed under ASC-274 can generate wildly different results, by many orders of magnitude…. For example, using a conservative assessed value approach to reach an ECV [estimated current value] of $18 million would not preclude an ECV of $800-900 million derived from a different method..." The defendants resist the idea that any value chosen must still be compared to the basic definition of estimated current value. In NYSCEF document #1663, the defendants' counsel argues "There is no requirement in ASC-274 that a preparer re-evaluate compliance with the ECV definition after selecting and appropriately applying an approved methodology."

In rebuttal, Dr. Eric Lewis, an accounting expert hired by the OAG, argued that whatever method was used, a value could only be "estimated current value" if a willing buyer and seller would actually make a deal at that price. Thus, it would be impossible for two different values, differing by orders of magnitude, to both be estimated current values. In his testimony (trial testimony pages 6693-97), he used the hypothetical example of a Derek Jeter rookie baseball card, which someone originally bought for less than a dollar but could now be sold for tens of thousands of dollars. In his view, historic cost could not be considered current estimated value in this situation since no informed person would sell the card for a dollar.

Q And is that because you have to ensure, when looking at [ASC] 274, that all of the guidance is considered when reaching a conclusion?
A No, because in accounting when a specific provision about the transaction, this specific provision trumps general provision. That's the rule in accounting.

During the trial, Nicholas Haigh, an executive with Deutsche Bank who was involved in making loans to the Trump Organization, was asked “Do you have an understanding of what is meant by the term "estimated current values?" He replied, “My understanding of that term would be that it is estimated in the sense of they don't necessarily have appraisals or market evidence for the value of all of those assets, but it's estimating what they're worth as of the date of the financial statement, June 30, 2011.” Thus, a key financial statement user understood the term to be an “as is” value (NYSCEF document #1637, trial testimony pages 1008-1009).

Judge Engoron’s decision does not resolve the difference in expert testimony, because he found the dispute largely beside the point. He wrote (NYSCEF document #1688, page 49) “the plaintiff has not alleged that defendants used an impermissible method, but that they have inputted and used patently false data with a permissible method.” In both his summary judgment and in his final decision (NYSCEF documents #1531 and #1688), he cited several examples of what he considered the use of false data. As one example, for several years, Trump’s “triplex” space in Trump Tower was valued as if it were 30,000 square feet, not the 10,996 that it actually was. In an earlier decision (NYSCEF document #1653) denying a defense request for a directed verdict, he wrote

> Valuations, as elucidated *ad nauseum* in this trial, can be based on different criteria analyzed in different ways. But a lie is still a lie. Valuing occupied residences as if vacant, valuing restricted land as if unrestricted, valuing an apartment as if it were triple its actual size, valuing property many times the amount of concealed appraisals, valuing planned buildings as if completed and ready to rent, valuing golf courses with brand premium while claiming not to, and valuing restricted funds as cash, are not subjective differences of opinion, they are misstatements at best and fraud at worst.

I believe the FASB should step in to resolve any ambiguity over how assets should be valued in personal financial statements. A situation where reputable experts can disagree so fundamentally over the allowable values is not tenable for the profession.

V. MATERIALITY

Four different views of materiality were proposed during the trial. The engagement partner for Mazars, Donald Bender, testified that materiality is not an issue in compilations. A second view, that materiality can be determined by reference to some benchmark, was mentioned by Allen Weisselberg, the former CFO of the Trump Organization, and seemingly endorsed by Judge Engoron. Experts for the defense cited FASB and Supreme Court statements that related materiality to decision-makers' likely actions. The Office of the Attorney General cited particular case or statutory definitions that related to causes of action under New York laws regarding business records and issuing false financial statements.

Donald Bender testified (NYSCEF document #1060, p. 58) that "Materiality is not a concept in a compilation." He said that, to his knowledge, the relevant standards for compilations do not discuss materiality. He later testified (NYSCEF document #1060, p. 174) that "there's no threshold for materiality on a compilation." He is correct in that, unlike auditing standards, which discuss materiality extensively (AICPA 2012), the standards for compilations (AICPA 2023) do not. They assume that an accountant will prepare financial statements from data given by the client. On the other hand, the compilation standards call for the accountant to report any significant GAAP departures identified during the engagement, and that requirement implies that the accountant will treat material and immaterial departures differently.

A common method of judging materiality is by reference to a benchmark. In his trial testimony (Transcript page 807, line 7-9), Allen Weisselberg, the former Trump Organization CFO, said "We were always taught -- our accounting firm always told us if it is less than five percent, five percent or less, that's considered non-material." The relevant auditing standards for setting planning materiality in audits (AICPA AU-C Section 320) allow auditors to use

benchmarks. Research shows that common thresholds may be a bit higher than 5% of net income but are often less than 10%. See, for example, Vance's (2022) meta-analysis of 48 studies. See also DeZoort, Holt, and Stanley (2019) for a discussion of how accountants and investors view materiality.

The defense counsel and experts argued that materiality should be judged based on whether misstatements were so large that they would have affected the decisions of the banks and insurers who dealt with the Trump Organization. They claimed that, given the relatively small size of the loans compared to Mr. Trump's net worth, even as adjusted by plaintiff's expert, none of the misstatements were large enough to have affected the granting of the loans. They also argued that under Deutsche Bank standard procedures, the misstatements would not have affected the interest rates offered. See for example the defense's motion for a directed verdict, NYSCEF document #1653 and their proposed statement of law and facts, NYSCEF document #1663. See also Eli Bartov's trial testimony, pages 6283-85.

This view of materiality is fairly standard among accountants, and generally is consistent with FASB pronouncements. However, the FASB changed its definition in 2010 and again in 2018, so differing FASB definitions would apply to the 2011-2017 and 2018-2021 SFCs.[13] The FASB definition between 1973 and 2010, from Statement of Financial Accounting Concepts No. 2, required that, for something to be material, it had to be *probable* that it *would* have changed the judgment of a reasonable person relying on it. From 2010 to 2018, the requirement was loosened in Statement of Financial Concepts No. 8 so that an item would be deemed material if it "*could i*nfluence decisions" of users. In 2018, with the issuance of Statement of Financial

[13] AICPA (2018) provides a summary of changing definitions of materiality used by the FASB at different periods of time, as well as definitions used by the Supreme Court and the IASB.

Accounting Standards No. 10, the FASB stated that something is material if "it is probable that the judgment of a reasonable person relying upon the report *would* have been changed or influenced by the inclusion or correction of the item."

The OAG pointed out that particular New York laws applied to some of the causes of action. As discussed earlier, this was not a standard fraud action where the prosecution or plaintiff must prove the victim relied on a materially and intentionally false statement. The requirements under Executive Law §63(12) are different.[14] In his summary judgement decision (NYSCEF document # 1531), Judge Engoron cited a prior case as holding that "It is settled that a standalone cause of action under Executive Law§ 63(12) does not require a demonstration of materiality but merely that an "act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." He held that the law did not require a finding that misstatements were material to particular users. In his decision (NYSCEF Document # 1688), Judge Engoron noted, with regard to Executive Law §63(12)

> Indeed, materiality under this statute is judged not by reference to reliance by or materiality to a particular victim, but rather on whether the financial statement "properly reflected the financial condition" of the person to which the statement pertains. People v Essner, 124 Misc 2d 830, 835 (Sup Ct, NY County 1984) ("there need be no 'victim,' ergo, reliance is neither an element of the crime nor a valid yardstick with which to test the materiality of a false statement").

In his summary judgment opinion (NYSCEF document #1531), Judge Engoron had already ruled that the SFCs were materially misstated based on their absolute dollar size and their size as a percent of total assets.

> Further, defendants' assertion that the discrepancies between their valuations and the OAG's are immaterial is nonsense. What OAG has established, in many cases by clear, indisputable documentary evidence (as discussed *infra),* is not a matter of rounding errors

[14] The plaintiff's counsel also noted that materiality is not an issue in the law regarding falsified business records, and the standard of materiality on the law against issuing false financial statements is different than for fraud actions. See NYSCEF document #1667 and Trial testimony page 3919.

> or reasonable experts disagreeing. OAG has submitted conclusive evidence that between 2014 and 2021, defendants overvalued the assets reported in the SFCs between 17.27-38.51%; this amounts to a discrepancy of between $812 million and $2.2 billion dollars. NYSCEF Doc. No. 766 at 70.
>
> Even in the world of high finance, this Court cannot endorse a proposition that finds a misstatement of at least $812 million dollars to be " immaterial. " Defendants have failed to identify any authority for the notion that discrepancies of the magnitude demonstrated here could be considered immaterial.

Judge Engoron clearly was exasperated with a defense built on arguments about materiality. He wrote in his final decision (NYSCEF Document # 1688) “Materiality has been one of the great red herrings of this case all along. Faced with clear evidence of a misstatement, a person can always shout that ‘it’s immaterial.’” In his decision, he showed sympathy for using benchmarks to judge materiality. He indicated that any difference of more than 10% “could be deemed material” and any difference of over 50% “would likely be deemed material.”

Judge Engoron clearly knew that materiality was a highly disputed issue. In the trial, at pages 3968-69, he said (emphasis added in bold font):

> Well, I think I've said before, to me, if something is immaterial, it basically means *de minimis*.
>
> Okay, you could argue whether something is worth 200 million or 220 million, maybe arguably that's not material, but [differences between] 200 million and 375 million are fraudulent. And [differences between] 25 million or 500 million, that is clearly material, and I don't need an expert to tell me that.
>
> **If you want to take me up on appeal on the grounds that Judge Engoron doesn't understand material** because it's all about how somebody views it, no, at a certain point – I think these are the words I used in the summary judgment motion, at a certain point it's not material; it's not immaterial. It's fraud.

If Judge Engoron’s interpretation is upheld, this will have implications for accountants performing attest services. Judgments about what size of error is material are at the heart of audit planning and the evaluation of results.

VI. THE IGNORED ISSUE – DEFERRED TAXES

ASC Section 274-20-20 defines "Net Worth" in personal financial statements as:

> The difference between total assets and total liabilities, after deducting estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases. (ASC 274-20-20)

ASC 274-10-35-15 requires estimation of taxes. The relevant section is:

> A provision shall be made for estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases, including consideration of negative tax bases of tax shelters, if any. The provision shall be computed as if the estimated current values of all assets had been realized and the estimated current amounts of all liabilities had been liquidated on the statement date,[15] using applicable income tax laws and regulations, considering recapture provisions and available carryovers….

No such deferred tax provision was made in any of the SFCs. Each accountant's compilation report noted the departure from GAAP. There was also footnote disclosure of this departure from GAAP. See Exhibits 4 and 5 for examples.

The failure to accrue estimated taxes was never brought up as an issue in the trial. There are two likely explanations for this. First, the accountants' compilation reports clearly noted that estimated taxes had not been computed. Therefore, even though the treatment was wrong, it was disclosed. Second, evidence produced in the trial indicated that the definition of "net worth" in the applicable Deutsche Bank loans did not include any reduction for estimated taxes. Deutsche Bank documents of periodic credit reviews were silent on the topic of estimated topics. Thus, it appears neither party expected estimated taxes to be computed.

However, if such taxes had been measured, my computations indicate they would have had significant effects on Mr. Trump's total reported net worth. As one example, the June 2018 SFC lists total assets of approximately $6.6 billion. The vast bulk of this figure relates to

[15] This language on how to compute estimated taxes seems consistent with a definition of "estimated current value" based on a sale at the statement date "as is," not based on future "as if" values.

property like office and residential property or investments in golf clubs, which presumably have appreciated in value over time, while depreciation reduced their tax bases. There is no way to estimate from outside the company how large the gap is between the $6.6 billion in assets and their tax bases, but it is likely to be quite large. A similar situation held true in each of the 2011 through 2021 SFCs.

If Mr. Trump had to sell appreciated assets to raise funds to pay back debt, or to pay fines, then he would not be able to shelter the gains through a Section 1031 exchange. Assuming that his properties are owned through flow-through entities, taxation would be on an individual, not a corporate, basis. In this case, applicable federal taxes would include 25% taxes on depreciation recapture and federal capital gains taxes at the 20% maximum rate. His overseas properties, e.g., his property in Scotland, would have been subject to applicable foreign tax rates. Florida, where Mar-A-Lago is located, has no state income tax, but many other states do.[16] My analysis of the supporting schedules to Mr. Trump's 2021 SFC (NYS document #26) indicated that approximately 56% of the stated assets of $4.97 billion were located in New York, New Jersey, or California.[17] Applicable 2021 state tax rates, per Ahmed (2021), included California at 13.3%, New Jersey at 10.75%, and New York at 8.82%. New York City properties would have been subject to a top local tax rate of 3.876% in 2021. After offsetting top individual federal taxes of 37%, the net New York state and local tax effect would be approximately 8%.

[16] Since the 2017 Tax Cuts and Jobs Act, the federal income tax deductibility of state and local taxes has been limited to $10,000. However, various states, including New York, New Jersey, and California, have enacted work-arounds of this limitation for income earned by pass-through entities (Dadayan and Buhl 2023).
[17] These assets include six golf clubs, partnership interests in 1260 Avenue of the Americas in New York and 555 California Street in San Francisco, and various real estate holdings at Trump Tower, "Niketown", 40 Wall Street, Trump Park Avenue, Trump World Tower, and others.

As one example showing the possibility of a large deferred tax liability, consider Trump Tower in New York City. The 2018 SFC shows its value as $732 million. Trump Tower opened in 1983. Its cost has been estimated as roughly $200 million (Rubin and Mandell 1984). After 35 years, presumably the original building cost has been largely depreciated. Depending on what capital additions have been made since then, and what depreciation has been taken, the difference between the $732 million SFC value in 2018 and its tax basis could easily be $500 or $600 million dollars. The sum of the federal 20% capital tax gain rate and New York State and New York City taxes (after a federal tax offset) of 8% would be roughly 28%. This suggests the tax on a potential sale of Mr. Trump's $732 million stake in Trump Tower could approach $150 million.

The aggregate estimated taxes on all Mr. Trump's holdings would likely have been sizeable related to Mr. Trump's commitment to maintain a minimum of $2.5 billion in net worth in connection with certain loan agreements.[18] In his expert report (NYSCEF document #1297, p. 10) Michiel McCarty, an expert for the OAG, estimated that if certain purported overstatements were corrected, Mr. Trump's net worth in the period from 2011 through 2021 would have been between $1.943 and $3.226 billion, including three years (2011, 2012, and 2013) when it was under the $2.5 billion threshold. He did not discuss deferred taxes at all.

While the Accountants' Compilation Reports indicated a GAAP departure for the failure to accrue estimated taxes on the differences between the accounting and tax bases of assets, there was no effort to quantify the effect. This disclosure does not seem to have been enough to cause

[18] Based on testimony, the figure of $2.5 billion net worth was the result of bargaining on a loan related to the Doral property. Deutsche Bank asked for a commitment to maintain $3 billion in net worth, the Trump Organization countered with $2 billion, and the parties agreed on $2.5 billion. See testimony of Ivanka Trump, pages 3703 and following.

the users to investigate the issue. There is no testimony that any banker or other user tried to estimate tax liabilities.

One possible step the FASB could take to increase the visibility of the issue would be to forbid using the term "net worth" unless the issuer deducts such tax liabilities. As noted above, the ASC 274 definition of "net worth" includes consideration of estimated taxes. Indeed, most of the words in the definition relate to taxes. An alternative term, such as "difference between assets and liabilities without estimating tax liabilities" might be considered to avoid misleading readers.

VII. THE ROLES OF DISCLAIMERS IN PERSONAL FINANCIAL STATEMENTS

A key issue in the case was the degree to which language in the accountants' compilation reports and in the financial statements served to protect the accountants and the issuers of the financial statements from accusations that the financial statements were false.

The accountants

The SFCs for the years ended June 30, 2011, through 2020 were compiled by Mazars USA (or a predecessor firm) and those for June 30, 2021, were compiled by Whitley Penn LLP. Exhibit 4 shows the 2015 Mazars compilation report. As is standard, the reports state that in a compilation the accountants do not undertake to provide any assurance on whether the financial statements contain material misstatements. The reports indicate that the issuer (either Mr. Trump, in this case, or the trustees of his revocable trust while he was president) is responsible for the fair presentation of financial information and for maintaining appropriate internal controls. The reports also state that the accountants noted several departures from GAAP. The 2015 report notes seven different departures from GAAP, including a failure to record estimated taxes on the

difference between assets stated values and their tax bases, and states that the impact of these departures has not been quantified. The concluding paragraph says:

> Because the significance and pervasiveness of the matters discussed above make it difficult to assess their impact on the statement of financial condition, users of this financial statement should recognize that they might reach different conclusions about the financial condition of Donald J. Trump if they had access to a revised statement of financial condition prepared in conformity with accounting principles generally accepted in the United States of America.

The trial evidence indicates that each year there was language in both the engagement letters and in the management representation letters clearly indicating the limits of compilation engagements and stating that the Trump Organization was responsible for the fair presentation of financial results and for maintaining internal controls.

Mazars wrote to the Trump Organization on February 9, 2022 (NYSCEF document #40) to advise it that the SFCs for fiscal years 2011 through 2020 should no longer be relied upon. Mazars indicated that it took this action after considering information in a January 2022 filing by the Attorney General, its own investigation, and other sources. Mazars also stated that, due to a nonwaivable conflict of interest, it would not undertake any new work for the Trump Organization.

So far, these various disclaimers seem to have worked. The accountants were not defendants in the suit. Judge Engoron's decision (NYSCEF document #1688) noted that they were not engaged to perform reviews or audits, and that the accountants had a right to rely on the Trump Organization to be truthful and accurate in supplying supporting data.[19]

The Trump Organization

Various defendants argued that anyone receiving the financial statements would be put on guard not to rely on them by both the accountants' compilation reports and footnotes in the financial

[19] To date, there has been no suit by the Trump Organization against Mazars in connection with this matter.

statements. Exhibit 5 contains excerpts from the 2015 Statement of Financial Condition. A key footnote is:

> Accordingly, the estimates presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities. The use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts.

The defendants, and their experts, claim that this language should lead any reader to, essentially, perform their own valuations of key properties. Donald Trump, in his April 13, 2023, deposition (NYSCEF document #1363, p. 67) referred to it as a "worthless clause."

> Many lawyers have come to me and said, you have the greatest worthless clause I've ever seen. How can they be using this statement against you? I say, because of politics, that's I have a clause in there that says, don't believe the statement, go out and do your own work. This statement is "worthless." It means nothing.

Judge Engoron, in his September partial summary judgment decision (NYSCEF document #1531), adamantly rejected this position.

> However, defendants' reliance on these "worthless" disclaimers is worthless. The clause does not use the words "worthless" or " useless" or " ignore" or " disregard" or any similar words. It does not say, "the values herein are what I think the properties will be worth in ten or more years." Indeed, the quoted language uses the word "current" no less than five times, and the word "future" zero times.
>
> Additionally, as discussed *supra,* a defendant may not rely on a disclaimer for misrepresentation of facts peculiarly within the defendant's knowledge [Citation omitted]. Here, as the valuations of the subject properties are, obviously, peculiarly within defendants' knowledge, their reliance on them is to no avail.
>
> Furthermore, "[t]his ' special facts doctrine' applies *regardless of the level of sophistication of the parties."* [emphasis in original, but citation omitted] ...
>
> Thus, the "worthless clause" does not say what defendants say it says, does not rise to the level of an enforceable disclaimer, and cannot be used to insulate fraud as to facts peculiarly within defendants' knowledge, even vis-a-vis sophisticated recipients.

Judge Engoron also rejected any argument that the defendants could avoid liability by blaming the accountants. In his summary judgment (NYSCEF document #1531) he said "the Mazars disclaimers put the onus for accuracy squarely on defendants' shoulders." In his final decision

(NYSCEF document #1688) he found "There is overwhelming evidence from both interested and non-interested witnesses, corroborated by documentary evidence, that the buck for being truthful in the supporting data valuations stopped with the Trump Organization, not the accountants."

VIII. ARE COMPILED STATEMENTS OF FINANCIAL CONDITION WORTHLESS?

The case raises the question of whether there is any value in personal financial statements. If they are, no user would be able to reasonably rely upon them. A lack of reasonable reliance is, of course, a defense against a fraud claim.

In his expert report (NYSCEF document #872), Jason Flemmons, hired by the defense, argued that financial statement users would rely very little on compiled statements, especially those noting departures from GAAP. In his April 13, 2023, deposition (NYSCEF document #1363, p. 68) Donald J. Trump testified:

> You know, I never felt that these statements would be taken very seriously, because you open it up and right at the beginning of the statement, you read a page and a half of stuff saying, go get your own accounting, go get your own this, go get your own that.
>
> Q. So why did you get these statements prepared?
>
> A. I would say more for maybe myself just to see the list of properties. I think more for myself than anything else. Sometimes an institution would like to see.
>
> I don't think they were given credence, because of the worthless clause. I don't think they were -- or the disclaimer, whichever you want to use. I don't think they were given much credence the statements. But it's really -- it's a compilation. It's a fairly good compilation of properties.
>
> But when you open it up, the first thing you see and the first thing you read is this clause that goes on to tell you that – that you shouldn't rely on the statement. I mean, look -- you read it. It's a page and a half.

In an affidavit (NYSCEF document #1378), defense expert Eli Bartov argued that GAAP is not designed to reflect underlying economic reality and financial statements "may provide

distorted and incomplete information about a firm's performance and value." He wrote that GAAP principles are often at odds with economic theory and rely heavily on subjective estimates or forecasts of future events. In his view, financial statements "serve only as the beginning, not the end, of the complex and highly subjective valuation process users such as banks and insurance companies engage in as they perform their own diligence."

The defense elsewhere argued that the definition of estimated current value was so flexible that different measurement techniques could differ by an order of magnitude. Under these circumstances, the defense argued it was incumbent on any user to, essentially, do their own valuations or to request additional information from the Trump Organization. In their proposed statement of law and facts (NYSCEF document #1663, paragraph 155) defense counsel argue "no sophisticated counterparty would have considered the SOFCs and other information provided by the Defendants alone as material to extend credit or set an interest rate, or issue an insurance policy or price a risk, without doing their own due diligence."

The counterargument to Bartov's view that GAAP financial statements are not meant to represent economic reality is that personal financial statements are different. The language in the AICPA's (1982) Statement of Position, which carried over into ASC 274, explains that estimated current value, rather than historical cost, was consciously adopted to provide information that was assumed to be more relevant to user needs. Section 274-10-05-2 reads, in part

> …The primary focus of personal financial statements is a person's assets and liabilities, and the primary users of personal financial statements normally consider estimated current value information to be more relevant for their decisions than historical cost information. Lenders require estimated current value information to assess collateral, and most personal loan applications require estimated current value information.
>
> Clearly, the AICPA and FASB intended the statements to be meaningful to lenders.

The evidence in this case is that the statements were in fact used. Deutsche Bank eventually extended several loans to the Trump Organization (See NYSCEF document #1688) which were backed by Mr. Trump's personal guarantee. These loans had covenants requiring the Trump Organization to provide SFCs showing a minimum net worth of $2.5 billion. As discussed above, the $2.5 billion figure was arrived at through a bargaining process. Nicholas Haigh of Deutsche Bank testified (trial testimony pages 1009-1010) that in deciding to grant a 2011 loan for the Doral project, Haigh relied on the 2011 SFC and assumed it was "broadly accurate." While the bank applied standard "haircuts" to the values shown in the SFCs to account for the possibility of adverse market conditions, it relied on the SFC values as its starting point (Haigh trial testimony 1013-1016).

In his February 16, 2024, decision, Judge Engoron wrote (NYSCEF document #1688):

> However, the Court notes that, although not required, there is ample documentary and testimonial evidence that the banks, insurance companies, and the City of New York did, in fact, rely on defendants to be truthful and accurate in their financial submissions. The testimony in this case makes abundantly clear that most, if not all, loans began life based on numbers on an SFC, which the lenders interpreted in their own unique way. The testimony confirmed, rather than refuted, the overriding importance of SFCs in lending decisions.

Unless the FASB clarifies the definition of estimated current value and eliminates the possibility of different GAAP-compliant statements differing by an order of magnitude, it is hard to see why users would put much faith in personal financial statements.

IX. IMPLICATIONS FOR ACCOUNTANTS

In considering the implications of this case, it may be well to keep in mind this quotation from Supreme Court Justice Oliver Wendell Holmes (1904):

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgement.

Matters involving ex-president Trump clearly are of "immediate overwhelming interest" to many, may appeal to their feelings, and may distort their judgements. As noted above, Mr. Trump has claimed the case represents politically motivated persecution of him and his business. It could be that the Attorney General James would not have brought suit against defendants who were less prominent or had less of a reputation for exaggerating assets. Similarly, the judgment might have been less severe against other defendants.[20]

Regardless of whether it will be used against less prominent targets, auditors and forensic accountants need to understand that the Attorney General has a powerful tool in Executive Law §63(12). The defense rightly claims that this law can be used against others who are accused of repeated fraudulent acts. The possible penalties are severe, as the decision in this case shows, and there are fewer defenses than in a normal fraud proceeding. Defenses of materiality and lack of reliance, or even lack of damages, which might have succeeded in common law fraud cases are not helpful here. The defense has predicted (NYSCEF document #1675) that, if this verdict is upheld, companies will flee the state. It is, of course, possible that attorneys general in other states will seek similar powers if they do not already have them.

Accountants performing compilations can take some comfort in the fact that neither accounting firm that provided compilation reports has been charged. Both firms used protective language in their reports, engagement letters, and management representation letters. Both firms noted GAAP departures in their reports. Judge Engoron clearly noted the limited nature of duties

[20] Some of many articles claiming that Donald Trump had a history of overstating his assets include Greenberg (2018), Haberman (2022), and Peterson-Withorn (2017). See also Kessler, Rizzo, and Kelly. (2021), for the claim by the Washington Post that Donald Trump's misstatements during four years as president totaled over 30,000. In his February 16, 2024, decision, Judge Engoron wrote "In considering the need for ongoing injunctive relief, this Court is mindful that this action is not the first time the Trump Organization or its related entities has been found to have engaged in corporate malfeasance. Of course, the more evidence there is of defendants' ongoing propensity to engage in fraud, the more need there is for the Court to impose stricter injunctive relief. This is not defendants' first rodeo."

of accountants performing compilations. In contrast, it is clear Judge Engoron did not accept the defense's arguments that either the disclaimer in the accountants' compilation reports or the footnotes indicating valuations were subjective would shield an issuer from charges of making false statements.

The FASB should clarify the meaning of "estimated current value." This term carried over into the Accounting Standards Codification from a 1982 AICPA Statement of Position, and the FASB has never addressed it. No authoritative guidance discusses how it relates to "fair value" as that term is used in the ASC. Experts for the two sides disagreed agree on whether it could encompass valuations based on future, "as if" assumptions, or whether it restricted valuations to what would happen today in a transaction between willing, informed buyers and sellers. In this case, the different views of "estimated current value" related to hundreds of millions of dollars of difference in the reported assets and net worth.

The FASB should also bar the use of the term "net worth" in personal financial statements when estimated taxes are not computed. It is likely that any computation of net worth that omits tax effects will be misleading.

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Exhibit 1 –
List of Key Documents in Index NO. 452564/2022

Item	Filing Date	Description
1	9/21/2022	Summons and Complaint
5-15	9/21/2022	2011-2021 Statements of Financial Condition
16-26	9/21/2022	2011-2021 Supporting Data Spreadsheets
183	11/4/2022	Ruling appointing a monitor of Trump organization, and enjoining certain sales or transfers of assets
457	1/9/2023	Ruling denying defendants' motion to dismiss
641	7/6/2023	Appellate decision clarifying applicable statute of limitations and dismissing charges against Ivanka Trump.
1531	9/27/2023	Summary judgment rendered 9/26/23
1663/4	1/5/2024	Defendants proposed findings of fact and law
1667	1/5/2023	Plaintiff's proposed findings of fact and law
1688	2/16/2024	Decision after Trial
Experts hired by defense		
872	8/30/2023	Jason Flemmons (accounting expert)
1029	8/30/2023	Eli Bartov (accounting expert)
1033	8/30/2023	Frederick Chin (appraisal expert)
Experts hired by Office of Attorney General		
1484/5	9/22/2023	Eric E. Lewis (accounting expert)
1523/4	9/22/2023	Michiel C. McCarty (expert on improper profits)

These documents can be found by searching the NYSCEF system as a guest, at https://iapps.courts.state.ny.us/nyscef/CaseSearch

Exhibit 2 –
Text of §63(12) of Executive Law 63 specifying the Duties of the Attorney General
https://www.nysenate.gov/legislation/laws/EXC/63

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 four hundred forty of the former penal law or 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. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person. Notwithstanding any law to the contrary, all monies recovered or obtained under this subdivision by a state agency or state official or employee acting in their official capacity shall be subject to subdivision eleven of section four of the state finance law.

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.

Exhibit 3 **Excerpts from ASC 274 Personal Financial Statements** **Originally Issued as AICPA SOP 82-1**
274-10-05-2 The primary focus of personal financial statements is a person's assets and liabilities, and the primary users of personal financial statements normally consider estimated current value information to be more relevant for their decisions than historical cost information. Lenders require estimated current value information to assess collateral, and most personal loan applications require estimated current value information. Estimated current values are required for estate, gift, and income tax planning, and estimated current value information about assets is often required in federal and state filings of candidates for public office.
274-10-20 Glossary Estimated Current Value For an asset, the amount at which the item could be exchanged between a buyer and seller, each of whom is well informed and willing, and neither of whom is compelled to buy or sell.
274-20-20 Glossary Net Worth The difference between total assets and total liabilities, after deducting estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases.
274-10-35-1 Personal financial statements shall present assets at their estimated current values and liabilities at their estimated current amounts at the date of the financial statements.
274-10-35-15 A provision shall be made for estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases, including consideration of negative tax bases of tax shelters, if any. The provision shall be computed as if the estimated current values of all assets had been realized and the estimated current amounts of all liabilities had been liquidated on the statement date, using applicable income tax laws and regulations, considering recapture provisions and available carryovers. For related implementation guidance, see paragraph 274-10-55-1.
274-10-55-6 Information that may be used in determining the estimated current values of investments in real estate (including leaseholds) includes **any of the following**: a. Sales of similar property in similar circumstances b. The discounted amounts of projected cash receipts and payments relating to the property or the net realizable value of the property, based on planned courses of action, including leaseholds whose current rental value exceeds the rent in the lease c. Appraisals based on estimates of selling prices and selling costs obtained from independent real estate agents or brokers familiar with similar properties in similar locations d. Appraisals used to obtain financing e. Assessed value for property taxes, including consideration of the basis for such assessments and their relationship to market values in the area.

Exhibit 4
WeiserMazars LLP Compilation Report for the Year Ended June 30, 2015
NYSCEF Document # 9

INDEPENDENT ACCOUNTANTS' COMPILATION REPORT

To Donald J. Trump:

We have compiled the accompanying statement of financial condition of Donald J. Trump as of June 30, 2015. We have not audited or reviewed the accompanying financial statement and, accordingly, do not express an opinion or provide any assurance about whether the financial statement is in accordance with accounting principles generally accepted in the United States of America.

Donald J. Trump is responsible for the preparation and fair presentation of the financial statement in accordance with accounting principles generally accepted in the United States of America and for designing, implementing, and maintaining internal control relevant to the preparation and fair presentation of the financial statement.

Our responsibility is to conduct the compilation in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. The objective of a compilation is to assist Donald J. Trump in presenting financial information in the form of a financial statement without undertaking to obtain or provide any assurance that there are no material modifications that should be made to the financial statement.

We did become aware of departures from accounting principles generally accepted in the United States of America that are described in the following paragraphs.

Accounting principles generally accepted in the United States of America require that in order to reflect amounts to be received in the future at estimated current values the rights must be nonforfeitable, fixed and determinable and not require any future services. As discussed in the notes, several of the values expressed have been based on future interests that, in some instances, are not for fixed or determinable amounts, and, in some instances, are based on performance of future services.

Accounting principles generally accepted in the United States of America require that with respect to each closely held and other business entities, summarized information about assets and liabilities of each entity be disclosed in the financial statement. In addition, the current estimated value of each closely held business should be recorded as a net investment (assets net of liabilities). The accompanying statement of financial condition reports some closely held business entities in a manner that separately states gross assets and liabilities and states certain cash positions separately from their related operating entity.

Accounting principles generally accepted in the United States of America require that the receipt of non-interest bearing deposits in exchange for rights or privileges be recorded at the present value of the liability. As discussed in the notes, the present value of the liability for non-interest bearing deposits received as a condition of membership in club facilities has not been included in the accompanying statement of financial condition, other than in the case where the valuation of the asset is subject to the refunding of said deposit.

Accounting principles generally accepted in the United States of America require that personal financial statements include a provision for current income taxes, as well as estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases. The accompanying statement of financial condition does not include such provisions.

Accounting principles generally accepted in the United States of America require that personal financial statements report cash as a separate amount. The accompanying statement of financial condition reports cash, marketable securities and hedge funds as a single amount.

Accounting principles generally accepted in the United States of America require that personal financial statements include all assets and liabilities of the individual whose financial statements are presented. The accompanying statement of financial condition does not include the following (A) for Trump International Hotel & Tower Chicago: (1) real property and related assets, (2) mortgages and loans payable, and (3) guarantees which Donald J. Trump may have provided; and, (B) the goodwill attached to Mr. Trump's name.

The effects of the departures from accounting principles generally accepted in the United States of America, as described above, have not been determined.

Because the significance and pervasiveness of the matters discussed above make it difficult to assess their impact on the statement of financial condition, users of this financial statement should recognize that they might reach different conclusions about the financial condition of Donald J. Trump if they had access to a revised statement of financial condition prepared in conformity with accounting principles generally accepted in the United States of America.

March 18, 2016

Exhibit B

Will Courts Accept or Dismiss Expert Accounting Testimony? The Case of *James v. Trump*

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Brooklyn, New York, U.S.A.

I thank the editor and reviewers for helpful comments**.**

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Will Courts Accept or Dismiss Expert Accounting Testimony? The Case of *James v. Trump*

ABSTRACT

This paper uses the court records in the recent civil litigation in New York over Donald Trump's personal financial statements to consider factors that affect how courts view expert accounting testimony. It also discusses common approaches attorneys use to try to limit or discredit expert testimony and suggests critical factors for forensic accountants to consider.

I. INTRODUCTION

On February 16, 2024, Judge Arthur Engoron released a decision (NYSCEF Doc. 688) in a civil suit brought by the Attorney General of New York, Letitia James, against Donald J. Trump (and others) related to Mr. Trump's Statements of Financial Condition (SFCs) prepared from 2011 through 2021.[21] The case was brought under New York State Executive Law §63(12), which empowers the Attorney General to sue persons that engage "in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business." The Office of the Attorney General (OAG) contended that providing misleading statements to banks and insurance companies over a period of years represented repeated "fraudulent or illegal acts." The Court assessed a penalty of over $450 million, including interest (Bromwich and Protess, 2024).

The First Appellate Division, in a March 25 decision, stayed the penalties pending the filing of an appeal, which is due in the Court's September 2024 term. This article is based on information in the case as of the date of writing, June 2024. Further information may arise in the appeals process.

A close examination of the role of accounting experts in this case is interesting to both practicing forensic accountants and instructors of forensic accounting for several reasons. First, this is a high profile case, involving a past president who is currently a leading contender for the presidency. Second, the case is about accounting – a key issue is whether financial statements were false and misleading. Third, there was extensive use of experts by both sides. The witness lists provided by the two sides (NYSCEF Doc. 1542 and 1543) had six experts for the Office of Attorney General ("OAG") and twelve for the defense. News reports estimated that Mr. Trump spent about $2.5 million on experts (Charalambous and Kim 2023).

There is plentiful data for a case study. Court records include the expert reports, deposition testimony, trial testimony and sometimes rebuttal reports from other experts. Judge Engoron's February 16, 2024 decision discussed each expert's testimony. His September 2023 summary judgment (NYSCEF Doc. 1531) and December 18, 2023 decision denying a directed verdict (NYSCEF Doc. 1655) also discussed experts.

[21] All references to NYSCEF are to Case Number 452564/2022 in the New York State Court Electronic Filing system. The system is searchable by guests at https://iapps.courts.state.ny.us/nyscef/CaseSearch.
Unless otherwise noted, all references to "Mr. Trump" refer to ex-president Donald J. Trump, not Eric Trump or Donald Trump, Jr.

This was a hard fought case. The contending attorneys strove to build up their own experts and to attack the other sides' experts. In the end, while Judge Engoron relied on some witnesses, he dismissed others harshly. As an example, Judge Engoron wrote in his decision denying a directed verdict (NYSCEF Doc. 1655):

The most glaring flaw is to assume that the testimony of defendants' experts, notably Messrs. Jason Flemmons and Eli Bartov, is true and accurate, or at least that the Court, as the trier of fact, will accept it as true and accurate.

Section II provides a brief history of the case and discusses the relevant law. Section III describes the qualifications of six accounting witnesses in the case. Section IV discusses the dispute over whether the SFCs were misstated. Sections V, VI, VII and VIII present the arguments over questions of materiality, reasonableness of reliance by lenders, responsibilities of accountants providing compilation services, and how to measure any penalty. Section IX summarizes the way attorneys tried to prevent or discredit the various experts' testimony. Section X draws lessons for forensic accountants.

II. THE CASE AND NEW YORK EXECUTIVE LAW §63(12)

The case had its genesis in the February 27, 2019, testimony of Michael Cohen before the House Oversight Committee and Reform Committee (Cohen, 2019). Cohen had long worked as a lawyer for Mr. Trump and had been an executive in the Trump Organization. Cohen testified (Cohen, 2019, p. 19) that "Mr. Trump inflated his total assets when it served his purposes...and deflated his assets to reduce his real estate taxes." When asked if Mr. Trump had ever given "inflated assets to a bank in order to help him obtain a loan," Cohen cited one instance when inflated financial information was given to Deutsche Bank (Cohen, 2019, p. 39).

The OAG investigation began shortly thereafter, in March 2019. In August 2020, the OAG filed a formal petition for court authority to subpoena evidence and take depositions.[22] Over the next two and a half years, the OAG obtained evidence from the Trump Organization, its employees, accountants, bankers, and insurers, Mr. Trump, Eric Trump, Ivanka Trump, Donald Trump Jr., and others. The investigation involved "interviews with more than 65 witnesses and review of millions of pages of documents produced by Defendants and others" (NYSCEF Doc. 1).

On September 21, 2022, the OAG filed a summons and complaint (NYSCEF Doc. 1), naming as defendants Mr. Trump, Eric Trump, Ivanka Trump, Donald Trump Jr., Allen Weisselberg, Jeffrey McConney, and various business entities under Mr. Trump's control.[23] The complaint claimed false and misleading financial statements had been given to banks and insurance companies from at least 2011 through 2021. The first cause of action, brought pursuant to Executive Law §63(12); was "persistent and repeated fraud." The five other causes of action, each brought in relation to Executive Law §63(12), were: falsifying business records under NYS penal laws; conspiracy to falsify business records; issuing false financial statements under NYS

[22] The documents of this special investigatory proceeding are in the NYSCEF system, under case 451685/2020.
[23] An appellate court (NYSCEF Doc. 641) removed Ivanka Trump from the case on statute of limitations grounds.

penal laws; conspiracy to issue false financial statements; and insurance fraud under NYS penal laws. The Trump Organization's outside accountants were not charged.

Executive Law §63(12), enacted in 1956 (NYSCEF Doc. 1688), gives the Attorney General the authority to bring actions "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 OAG's position was that repeatedly issuing false financial statements met the statutory condition of repeated "fraudulent" acts and that violating NYS laws related to issuing false financial statements, keeping false business records, and supplying false information to insurers all constituted repeated "illegal acts," even though there had been no criminal trial of these charges. Note that a common element in the five penal code provisions is the falsity of the information. The defendants tried to get the case dismissed, claiming this law was meant to apply to consumer fraud cases, not to loan transactions between sophisticated parties. The Court and the Appellate Division rejected those arguments (NYSCEF Doc. 1531).

Executive Law §63(12) helps the OAG punish wrongful acts in the marketplace.[24] Only the OAG can bring action under it. Defendants have fewer defenses than in a civil fraud proceeding. The law does not permit a jury trial. Plaintiffs need to show that false statements had repeatedly been used in business, and that this practice would "tend to deceive "or "creates an environment conducive to fraud." Plaintiffs need not show: that defendants acted with scienter; that the banks and insurance companies relied on the financial statements; that such reliance was reasonable, or that banks and insurance companies were damaged. Materiality was also not a stand-alone defense to the first cause of action.

In November 2022, Judge Engoron made a preliminary finding (NYSCEF Doc. 1531) that defendants "had a propensity to engage in persistent fraud by submitting false and misleading statements of financial condition" and appointed a retired judge as monitor to oversee the preparation of the Trump Organization's financial statements and to review any major asset transfers.

In 2023, both sides moved for summary judgment. On September 26, 2023, Judge Engoron (Doc. 1531) denied the defendants' motions to dismiss the case and ruled for the OAG on the first cause of action, persistent fraud in violation of Executive Law §63(12). His decision cited no expert reports. Instead, he pointed to specific instances where documents contradicted the bases of valuation used in the SFCs. For example, Mr. Trump's "triplex" apartment in Trump Tower was valued assuming it was 30,000 square feet, while records showed it was 10,996 square feet. Mar-a-Lago was valued assuming it could be sold as a private residence, or subdivided, but case documents included a conservation easement forbidding such use. Judge Engoron found that the 2011 through 2021 financial statements were misstated by amounts

[24] The Appellate Division decision (People v Trump 2023 NY Slip Op 03440 Decided on June 27, 2023, Appellate Division, First Department, June 27, 2023) said "The New York Legislature enacted Executive Law § 63(12) to combat fraudulent and illegal commercial conduct in New York."

ranging from $812 million to $2.2 billion. He wrote "This court cannot endorse a proposition that finds a misstatement of at least $812 million dollars to be immaterial."[25]

The trial that commenced on October 2, 2023, took place in the shadow of the summary judgment ruling. Two issues Judge Engoron had left to be decided were intent and materiality under the final five causes of action (related to keeping false records, issuing false financial statements, and insurance fraud). Another issue to be resolved was the nature of the penalty that should be imposed. Executive Law §63(12) allows the Court to impose penalties including disgorgement of any improperly obtained gains, even though the banks and insurance companies involved had made no claims for damages.

The OAG did not present experts to demonstrate the falsity of the financial statements as part of their main case at trial, since the issue had already been decided in their favor. The OAG presented one expert, Michiel McCarty, to estimate the appropriate disgorgement penalty. The defense, which vehemently disagreed with the summary judgment ruling, said it wanted to preserve a record for appeal, and presented experts arguing that the financial statements were not false, that defendants were entitled to rely on the work of their outside accountants, that banks and others did not rely upon the SFCs, and that the banks were not damaged. The OAG presented one rebuttal expert, Eric Lewis, to dispute defense arguments about GAAP and the role of outside accountants.

Judge Engoron rendered a 92-page decision on February 16, 2024 (NYS Doc. 1688). He discussed each witness. He found for the OAG on all six causes of action. He found that Mr. Trump and the Trump Organization benefitted from issuing false financial statements by obtaining lower interest rates than they would otherwise have been able to obtain, and by having the opportunity to obtain contracts related to the Old Post Office in Washington and the Ferry Point golf course in New York,

Judge Engoron ordered Mr. Trump (together with entities he controls) to pay approximately $355 million, plus interest (NYSCEF Doc. 1688). News reports cited the total, with pretrial interest, at over $450 million (Bromwich and Protess, 2024). Should the verdict be upheld after appeal, further interest will accrue. Mr. Trump was "enjoined from serving as an officer or director of any New York corporation or other legal entity in New York for a period of three years." He and the Trump Organization were forbidden to apply for new loans from financial institutions licensed or registered in New York State. His sons Eric and Donald Trump, Jr. were ordered to pay slightly over $4 million each and were forbidden to serve as officers or directors of New York corporations or other legal entities for two years. Allen Weisselberg, the former CFO of the Trump Organization, was ordered to pay $1 million. Both Allen Weisselberg and Jeffrey McConney, the former Trump Organization controller, were "permanently enjoined from

[25] Judge Engoron ordered that various key companies owned by Trump should be dissolved, but this order never took effect. It was stayed during the subsequent trial. In his decision after trial, Judge Engoron removed this requirement.

serving in the financial control function of any New York corporation or similar business entity registered and/or licensed in New York State." [26]

III. KEY EXPERT WITNESSES AND THEIR QUALIFICATIONS

In the interest of brevity, this article focuses on the accounting experts offered at the trial. Both sides also engaged valuation experts, but the prosecution did not see a need to offer these experts at trial.[27] The defense presented valuation experts to make a record to support an appeal.[28] As a general matter, the expert testimony was not focused on particular causes of action, e.g. specific penal code violations, but instead on issues such as allowable methods of valuation and accounting.

The OAG offered only one expert, Michiel McCarty, in its main case. He testified on November 1. According to his expert report (NYSCEF Doc. 1523), he had an MBA in finance and extensive experience in investment banking, dating back to 1975. The purpose of his testimony was to quantify the amount of "ill-gotten gains" which should be disgorged.

Jason Flemmons was the first accounting expert called by the defense, testifying on November 14th and 15th. Per his LinkedIn page, he is a CPA, a Certified Fraud Examiner, and has an AICPA certification in Financial Forensics (Flemmons 2024). He has a long record of experience in accounting and forensic accounting. His expert report (NYSCEF Doc. 872) said his over 25 years of experience included work at PWC, the SEC Chief Accountant's Office Division of Enforcement, FTI Consulting, and, most recently, at Ankura Consulting Group. He also did extensive work with the AICPA, including helping to write the Statement on Standards of Forensic Services No.1.

Robert Unell testified on November 30 and December 1st, as an expert on real estate. Per his expert report (NYSCEF Doc. 1031), he received a BBA in Real Estate from the University of Georgia. His professional experience dates from 2000, when he started work in the real estate division of Wachovia Bank. In 2002, he began work on commercial real estate lending for Bank of America. In 2015, he joined the Alvarez & Marsal Real Estate Advisory Services, and in 2019 he left that company to become a managing director in the Real Estate Advisory Practice at

[26] After Judge Engoron's decision was issued, Allen Weisselberg admitted to committing perjury with regard to his testimony in this case related to the valuation of the triplex and was sentenced to five months' imprisonment. See Christobek, Bromwich and Protess (2024).

[27] Constantine Korologos and Laurence Hirsh rendered expert reports on valuation for the OAG. Korologos expressed opinions about the valuation methods used for properties including golf courses, 40 Wall Street, Trump Tower, and interests in partnerships with Vornado (NYSCEF Doc. 1490). Hirsh opined about valuations of 15 golf course properties, including Mar-A-Lago (NYSCEF Doc. 1295).

[28] The defense experts who testified solely on appraisals and values of particular properties were Lawrence Moens, John Shubin, Steven Laposa, and Steven Witkoff. Moens, a real estate broker, testified about the value of Mar-A-Lago. Judge Engoron (NYSCEF 1688) criticized his testimony as not being based on an objective method, and as disregarding legal restrictions on the use of the property. Shubin attempted to testify about the legal restrictions on Mar-A-Lago, but most of his testimony was disallowed, as witnesses may not testify as to legal conclusions. Judge Engoron (NYSCEF 1688) saw "no evidentiary value to Mr. Shubin's testimony." Laposa testified in general terms about methods that could be used to value property. Witkoff was offered as an expert in real estate development.

Ankura Consulting Group. Neither his report nor his testimony indicated any professional certifications.

Frederick Chin testified on December 3rd and 4th, 2023. His expert report (NYSCEF Doc. 1033) claimed "44 years of experience as a real estate professional and advisor in valuation, operations, ownership, financing, restructuring, capital markets, and development." He cited extensive experience, both as an adviser and as an officer of companies involved in real estate transactions. He holds the MAI certification as an appraiser. He is also a Certified Insolvency & Restructuring Advisor (of the Association of Insolvency and Restructuring); a Certified Turnaround Professional (of the Turnaround Management Association); and a Counselor of Real Estate (of the Counselors of Real Estate). He is not an accountant.

Eli Bartov was the final witness for the defense, testifying on December 7, 8, and 12. He is a distinguished accounting scholar. His Google Scholar profile (accessed June 27, 2024) showed many articles, with a total of over 15,000 citations.[29] His c.v. (NYSCEF Doc. 1029) listed 33 academic articles. It noted he received the 2022 AAA/AICPA Notable Contributions to Accounting Literature Award. He received B.A. degrees in accounting and economics in 1977 from Tel-Aviv University and worked as a CPA in Israel from 1979 to 1985. He received a doctorate in accounting from the University of California at Berkeley, and then worked as a professor, first at the University of Rochester and, since 1992, at New York University's Stern School of Business. He has taught courses "in financial accounting and reporting, financial statement analysis, international accounting and financial statement analysis, and empirical research in financial accounting." His research "focuses on financial accounting, capital markets' use of accounting information, accounting irregularities, securities regulation, executive compensation, and valuation." His c.v. listed 18 prior expert witness engagements, only one of which included testimony at a trial.

Eric Lewis was called as a rebuttal witness by the OAG on December 13th. His expert report (NYSCEF Doc. 1484) states that he received an MBA in Accounting and a "Ph. D. in Administrative and Engineering Systems with a concentration in Accounting" both from Union College in Schenectady, New York. Starting in 1996, he taught at various schools in New York State (Skidmore College, Ithaca College, Union College Graduate Program, Siena College, and Cornell). Since 2016, he has been a Professor of Practice at Cornell. He has taught financial accounting, advanced accounting, and auditing. He served as an expert witness four times previously, including once in New York (TT 6633 and 6647-48).[30] He is not a CPA and never worked in banking or public accounting.

IV. WERE THE SFCs DECEPTIVE?

Why this matters

Five causes of action in the complaint related to "illegal actions" covered by New York State's penal code: falsifying business records; conspiracy to falsify business records; issuing false

[29] https://scholar.google.com/citations?user=yr_ubo0AAAAJ&hl=en&oi=ao
[30] "TT" refers to trial testimony and provides the page on which the testimony occurs.

financial statements; conspiracy to issue false financial statements; and insurance fraud. An essential element in proving violations of each of these codes is that the statements were false.

The standards of materiality under New York law vary. Materiality is not an issue in the law regarding falsified business records. The standard of materiality on the law against issuing false financial statements is different than for fraud actions. See NYSCEF document #1667 and OAG counsel's statements on TT 3919.

What did the SFCs show?

Table 1 summarizes the major assets included in the 2011 through 2021 SFC's, drawn from the SFC's or supporting schedules. Some of these assets were shown on the face of the SFC, while others were included in larger groups, e.g., "club properties" or "other assets." The statements were accompanied by accountants' compilation reports, which note various departures from GAAP. One of the more significant is that no attempt was made to estimate taxes which would be due upon sale of the properties.

The statements all included footnotes similar to the following,[31] from the June 2012 statement (NYSCEF Doc. 6)

Assets are stated at their estimated current values and liabilities at their estimated current amounts using various valuation methods. Such valuation methods include, but are not limited to, the use of appraisals, capitalization of anticipated earnings, recent sales and offers, and estimates of current values as determined by Mr. Trump in conjunction with his associates and, in some instances, outside professionals. Considerable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, the estimates presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities. The use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts.

The term "estimated current value" in the footnote is defined in the relevant authoritative GAAP standard for personal financial statements, ASC 274. ASC 274 defines "estimated current value" as follows: "For an asset, the amount at which the item could be exchanged between a buyer and seller, each of whom is well informed and willing, and neither of whom is compelled to buy or sell." The statement gives implementation guidance for estimating the current value of several types of assets. Per ASC 274-10-55-6, some methods that might be applicable to real estate include:

- sales prices for similar assets.

[31] In some years, references to Mr. Trump were replaced by references to the trustees of his revocable trust. Starting in 2019 (NYSCEF Doc. 13), the phrase "capitalization of anticipated earnings" was changed to "capitalization of historical and anticipated earnings" In 2020 (NYSCEF Doc. 14) the word "recent" was deleted from the phrase "recent sales and offers."

- “discounted amounts of projected cash receipts and payments relating to the property or the net realizable value of the property, based on planned courses of action.”

- “appraisals based on estimates of selling prices and selling costs obtained from independent real estate agents or brokers familiar with similar properties in similar locations.”

- appraisals used to obtain financing; and assessed values for tax purposes.

“Estimated current value” is not used elsewhere in GAAP. This section of the FASB codification was originally issued by the AICPA as Statement of Position 82-1 (AICPA 1982) and was incorporated into the codification without amendment in 2009 when the codification was established. In 1982, the AICPA (1982) decided to change the basis for recording assets in personal financial statements from historical cost to “estimated current value” because “the primary users of personal financial statements normally consider estimated current value information to be more relevant for their decisions than historical cost information. Lenders require estimated current value information to assess collateral, and most personal loan applications require estimated current value information.” The same language appears in ASC 274.

OAG position

The OAG’s Summons and Complaint (NYSCEF Doc. 1) claimed the defendants were liable for “fraudulent conduct” because they had performed acts that have the ““capacity or tendency to deceive or creates an atmosphere conducive to fraud.” They argued “Executive Law § 63(12) covers frauds committed by overtly false or fraudulent statements, by omission, or as part of a scheme to defraud.” Paragraph 10 of the Summons and Complaint stated:

Mr. Trump’s Statements of Financial Condition for the period 2011 through 2021 were fraudulent and misleading in both their composition and presentation. The number of grossly inflated asset values is staggering, affecting most if not all of the real estate holdings in any given year. All told, Mr. Trump, the Trump Organization, and the other Defendants, as part of a repeated pattern and common scheme, derived *more than 200 false and misleading valuations* of assets included in the 11 Statements covering 2011 through 2021. [Emphasis in original]

The complaint alleged (paragraph 12) that the misleading valuations were not the result of the subjectivity of valuation, or innocent errors. Instead:

The inflated asset valuations…are the result of the Defendants utilizing objectively false assumptions and blatantly improper methodologies with the intent and purpose of falsely and fraudulently inflating Mr. Trump’s net worth to obtain beneficial financial terms from lenders and insurers.

The OAG’s office compiled a long list of what it saw as false assumptions and improper methodologies. NYSCEF Doc. 3 used a table to summarize which assets were misstated, for which year, using one or more of 16 allegedly improper methods. These methods included ignoring the legal restrictions affecting the use of Mar-a-Lago and other properties, using 30,000 square feet rather than 10,996 in valuing the Trump Tower “triplex” apartment used by Mr.

Trump for his residence and office, failing to discount funds that would be received in the future to present value, and adding a brand premium into the valuations of golf courses.

The OAG hired two experts, Laurence Hirsh and Constantine Korologos, to evaluate the methods used to value property in the SFC's. They prepared reports (NYSCEF Doc. 1496 and 1490) strongly critical of the valuations in the SFCs, but the OAG did not rely upon them in its summary judgment pleadings. Since Judge Engoron decided at the summary judgment stage that the SFCs were misleading, these witnesses were not called to testify at trial.

When the OAG filed for summary judgment on its stand-alone claim under §63(12), its supporting Memorandum of Law (NYSCEF Doc. 766) repeated the claims in its original summons and complaint. The OAG argued that the documentary evidence clearly showed a variety of "deceptive schemes."

Notwithstanding Defendants' horde of 13 experts, at the end of the day this is a *documents case*, and the documents leave no shred of doubt that Mr. Trump's SFCs do not even remotely reflect the "estimated current value" of his assets as they would trade between well-informed market participants.

For example, the OAG recomputed a value for the Trump Tower "triplex" using the actual 10,996 square feet, rather than the 30,000 square feet used by the Trump Organization. It substituted the tax appraisal of Mar-a-Lago, which reflected the restrictions on its use, for the Trump Organization figure, which valued it as if it could be sold as a private residence. Using such procedures, the OAG claimed the overstatements ranged from $812 million to $2.2 billion (17% to 39% of reported net worth) per year.[32]

Defendants' position

The defense claimed that, given the flexibility allowed under GAAP, there were no material misstatements, and that disclosure was adequate. Flemmons testified (TT 4435) that he did not identify any GAAP departures not covered by the exceptions noted in the compilation report or mentioned in the notes. Similarly, Unell testified that there were no material misstatements in the SFCs (TT 5672-5673, 5819). Bartov testified (TT6221) "my main finding is that there is no evidence, whatsoever, for any accounting fraud. And on the other hand, my analysis show [sic] that the financial -- statement of financial condition for all the years were not, materially, misstated." Judge Engoron immediately asked for clarification: (TT 6222)

THE COURT: So I just want to understand. So, your expert opinion is that, from an accounting perspective, the Attorney General's complaint had no merit?

THE WITNESS: That is, absolutely, my opinion. Absolutely.[33]

[32] A footnote indicated the OAG's experts had come up with a higher figure for the overstatements. By these estimates, "Mr. Trump's net worth in any year between 2011 and 2021 would be *no more than $2.6 billion*, rather than the stated net worth of up to $6.1 billion, and likely considerably less if his properties were actually valued in full blown professional appraisals. "

[33] Mr. Trump attended this part of Bartov's testimony (Peltz and Sisak, 2023).

Bartov went on to say he couldn't find a single GAAP rule that was violated (TT 6223). When asked about the disclosures in the statement, Bartov testified (TT 6216) "I never seen a statement that provide so much details [sic] and it is so transparent as this statement. It doesn't exist." Bartov's statement that there was no fraud made headlines in various media outlets. See, for example, reporting by the AP (Peltz and Sisak, 2023), Bloomberg, (Larson and Hurtado, 2023) and National Public Radio (Bernstein, 2023). As discussed below, AICPA Statement on Standards for Forensic Services No. 1 (AICPA 2019) expressly forbids members from concluding on intent to defraud. However, Bartov is neither a CPA nor bound by AICPA standards.

Mr. Trump testified (TT 3493 and elsewhere) that in his opinion, his net worth was higher than the statements showed. Chin testified (TT 5939-5944) that the appraisals in the SFC's failed to consider either synergies among the properties or "enterprise value." Similarly, Bartov claimed (TT 6243) that omitting Trump's brand value from the SFCs caused them to be understated, by perhaps $3 billion based on other evidence in the case.[34]

To reply specifically to points raised by the OAG, the defense's starting point was to argue that the definition of "estimated current value" under ASC 27 is extraordinarily flexible. The key expert witnesses on this point were Flemmons, Chin and Bartov.

Flemmons' testimony spread over three days. As in his expert reports (NYSCEF Doc. 872, Exhibits A and B), he testified (TT 4255-56) that estimated current value was very different from "fair value" as defined in GAAP. In contrast to "fair value," which relates to what market participants would do, "estimated current value is premised on more of a management or personal individual perspective of what they deem the value to be" (TT 4257). Statement preparers could factor into their estimates their planned course of action with regard to an asset, and that planned course of action could be open-ended (TT 4278-79). Appraisals that include hypothetical conditions may be used (TT 4261 and 4409-10). Thus, it was permissible for the Trump Organization to base the valuation of Mar-a-Lago on an assumption it could be sold to an individual (TT 4352 and 4430), ignoring current legal restrictions on such sales. Valuing golf clubs based on fixed asset value was permissible, including a brand premium (TT 4355 and 4358). Different valuation methods are allowed, which can lead to "widely different" results. It is a "judgment call" for preparers to decide which method to use (TT 4263). Valuations differing by factors of 20 or even 100 could all be acceptable (TT 4276).

However, Flemmons did not testify as to whether the actual computations underlying the SFCs were accurate or based on appropriate data (TT 4364, 4365). In fact, he said a lack of discounting of future expected sums on the Seven Springs property was a "red flag" (TT 4371-72) which Mazars should have noticed. He also noted a failure to discount on various other properties (TT 4414-4415).

[34] On March 26, 2024, after the periods covered by the SFCs in this case and after Judge Engoron's decision, Trump Media & Technology Group had its initial public offering. Based on his ownership percentage and the initial stock price, his stake in this company was worth approximately $5.2 billion on March 27, 2024. (Picchi, 2024) This valuation largely reflects the value of Mr. Trump's brand. The value is also more than any asset in the SFCs covered in this case.

Chin testified on December 4th and 5th, 2023. He testified (TT 5884) that appraisals frequently were "grossly inaccurate" in predicting the selling price of an asset. Consistent with both his expert reports (NYSCEF Doc. 1675) and Flemmons' view, Chin distinguished (TT 5912) between "as is" and "as if" valuations. He saw both types of valuations as permissible. He claimed (TT 5912, 5913) that the SFCs often used "as if" values, while appraisers and the OAG were applying "as is" values. Per Chin (TT 5913), "as if" valuations rely on "a condition that will be expected to be -- expected to be completed or expected to be received either kind of a hypothetical condition that might exist in the future." Developers often seek to get land restrictions removed (TT 5951), so he did not object to "as if" values which assumed the use of the land was unrestricted.

Bartov testified (TT 6244-6245) that there are no objective measures of value, and therefore all valuations are subjective. Valuations are subject to considerable variation (TT 6246). Consistent with his expert report (NYSCEF Doc. 1029), Bartov affirmed that "GAAP is not designed to give you the true economic value of an asset (TT 6240)." He claimed that as long as the SFCs followed GAAP, any divergence from economic reality was legally irrelevant. Under cross-examination (TT 6512) he reaffirmed that he believed that as long as one followed the specific guidance for real estate, or the other methods mentioned generally in ASC 274-10-55-5, one need not refer back to the overall definition of estimated current value.

He claimed that "estimated current value" is "completely different" from the term "fair value" as it is used in GAAP (TT 6246). Consistent with his expert reports (NYSCEF Doc. 1029 Exhibits A and B), he opined that the word "could" in the definition of estimated current value allows a preparer to use values based on hypothetical assumptions about future use. An example from his testimony (TT. 6276-6277) gives the flavor of this argument. To paraphrase, he argued that if someone bought a vacant lot today for $1 million, with the plan to develop it over five years into a hotel, which could be sold for $50 million, after expenses, the "estimated current value" would be the present discounted value of $50 million, not the lot's cost of $1 million. In his view, the "current" in "estimated current value" refers to the discounting of the future value of the hotel, not to what the land is worth today, as a vacant lot.[35]

Lewis's rebuttal testimony

Lewis argued (TT 6686) it was not enough for a valuation to simply use one of the techniques listed in the implementation guidance of ASC 274. Any valuation needed to meet the definition of estimated current value, i.e. a value at which a trade between informed buyers and sellers could happen. To illustrate his point, he said (TT 6694-96) that someone might have bought a Derek Jeter rookie baseball card as a child, as part of a pack of gum, for ten cents. That card might now be worth tens of thousands of dollars to collectors. While the card's historical cost might satisfy one of the methods listed in the ASC 274 implementation guidance, it could not be considered "estimated current value" because no informed person would sell that card for ten

[35] The weakness with this example is that in competitive markets where other developers could also build hotels on the land, it would not sell for $1 million today. Indeed, a market price of $1 million casts doubt on the plausibility of the projected $50 million value.

cents. Lewis also cited various methods used to value property in the SFCs which departed from GAAP, such as by not discounting future values.

Judge Engoron's decision (NYSCEF Doc. 1688)

Nothing in the trial caused Judge Engeron to alter his summary judgment that the SFCs were misstated. The summary to his decision after trial said

… In order to borrow more and at lower rates, defendants submitted blatantly false financial data to the accountants, resulting in fraudulent financial statements. When confronted at trial with the statements, defendants' fact and expert witnesses simply denied reality, and defendants failed to accept responsibility or to impose internal controls to prevent future recurrences.

His decision cited the failure of valuations to consider deed restrictions at Mar-A-Lago and the rent-stabilized status of apartments at Trump Park Avenue as examples of intentional misstatements. Rather than agreeing that Mar-A-Lago could be valued on an "as if" basis, assuming it could be sold as a private residence, Judge Engoron saw such a valuation as misrepresentation. His summary judgment ruling (NYSCEF Doc. 1531) says:

Exacerbating defendants' obstreperous conduct is their continued reliance on bogus arguments, in papers and oral argument. In defendants' world: rent regulated apartments are worth the same as unregulated apartments; restricted land is worth the same as unrestricted land; restrictions can evaporate into thin air… and square footage [is] subjective. That is a fantasy world, not the real world.

However, the decision did not directly address the question of what methods are permitted under ASC 274's definition of estimated current value. Instead, he focused on whether fraud had been used in applying the methods. He wrote:

Yet another great red herring in this case has been that different appraisers can legitimately and in good faith appraise the same property at different amounts. True enough, appraising is an art as well as a science. However, the science part cannot be fraudulent. When two appraisals rely on starkly different assumptions, that is not evidence of a difference of opinion, that is evidence of deceit.

Based on this view of the case, Judge Engoron saw "no evidentiary value" to Flemmons' testimony that GAAP permitted various methods of establishing value, since Flemmons was not testifying to the correctness of the computations and data underlying the valuations. He indicated that witnesses' attempts to defend or dismiss misstatements damaged their credibility.

V. HOW SHOULD MATERIALITY BE ASSESSED?

The Defense position

The defense argued the appropriate gauge of materiality is whether the misstatement would have caused Deutsche Bank to decide the Trump Organization was not eligible for loans under its Private Wealth Management guidelines. Since these guidelines allowed for net worth as low as $100 million (NYSCEF Doc. 1675), and Mr. Trump's stated net worth was always in the

billions, the defense argued that none of the OAG's purported misstatements were large enough to matter. Employees of Deutsche Bank testified about lending criteria as fact witnesses. Bartov was the key expert witness on materiality for the defense. The defense's closing argument presentation (NYSCEF Doc. 1675) stressed the importance of materiality and claimed the OAG had failed to meet its burden of proof.

At trial (TT 6386), Bartov cited the definition of materiality in the FASB's Statements of Financial Accounting Concepts (QC-11)

The omission or misstatement of an item in a financial report is material if, in light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.

Based on this guidance, he argued that materiality depends on the users, and that anything that would not have affected Deutsche Bank's lending decisions was immaterial. His affidavit (NYSCEF Doc. 1378) accompanying his expert reports claimed that, to the extent any misstatements existed in the SFCs, they were immaterial. Later, when asked by Judge Engoron whether relative size of a misstatement was a factor in judging materiality, he said it was not (TT 6450).

Under cross-examination, he made two concessions. The first related to whether, under professional standards, it was permissible to intentionally make small misstatements. He agreed that the SEC had said it was not permissible to intentionally misstate financial statements, even by immaterial amounts (TT 6462). The second related to whether materiality of misstatements should be judged on an item by item basis, or in aggregate. He agreed (TT 6522) that if several items are misstated, one should consider all the misstatements when judging materiality.

OAG's position

The OAG did not try to establish a materiality standard. Instead, they argued that the misstatements were obviously large enough to be deceptive under Executive Law 63(12). The OAG memorandum of law supporting their motion for summary judgment (NYSCEF Doc. 766) listed various misstatements, and indicated the impact of making simple adjustments to correct for incorrect assumptions would be between $812 and $2.2 billion each year.

Judge's decisions

Judge Engoron's summary judgment (NYSCEF Doc.1531) noted that legally "a standalone cause of action under Executive Law§ 63(12) does not require a demonstration of materiality but merely that an 'act has the capacity or tendency to deceive or creates an atmosphere conducive to fraud'." Thus, at the summary judgment level, he did not need to deal explicitly with materiality. He decided the misstatements were too large to ignore.

Further, defendants' assertion that the discrepancies between their valuations and the OAG's are immaterial is nonsense. What OAG has established, in many cases by clear, indisputable documentary evidence …, is not a matter of rounding errors or reasonable experts disagreeing.

OAG has submitted conclusive evidence that between 2014 and 2021, defendants overvalued the assets reported in the SFCs between 17.27-38.51 %; this amounts to a discrepancy of between $812 million and $2.2 billion dollars….

Even in the world of high finance, this Court cannot endorse a proposition that finds a misstatement of at least $812 million dollars to be "immaterial." Defendants have failed to identify any authority for the notion that discrepancies of the magnitude demonstrated here could be considered immaterial.

Judge Engoron also dismissed the following defense arguments:

(1) "(t]here is no such thing as objective value"; (2) "a substantial difference between valuation in the SOFCs and appraisal, per se, is not evidence of inflated values"; (3) there is nothing improper about using "fixed assets" valuations as opposed to using the current market valuation approach; and (4) it was proper to include "internally developed intangibles, such as the brand premium used in the valuation of President Trump's golf clubs, in personal financial statements."

Judge Engoron said that courts had long called for property valuations to be judged objectively and had generally considered market value the most reliable valuation method for assessment purposes. “Accepting defendants' premise would require ignoring decades of controlling authority holding that financial statements and real property valuations are to be judged objectively, not subjectively….”

In his decision after trial (NYSCEF Doc. 1688) Judge Engoron remained unconvinced by the defense’s materiality arguments. He wrote “Materiality has been one of the great red herrings of this case all along.” He said that the misstatements were material, whether viewed objectively (in relative or absolute dollar terms), or as the lenders viewed them. In his words “The frauds found here leap off the page and shock the conscience.” While he noted the experts in the case would not give a firm definition of materiality, he was confident the misstatements were material.[36]

VI. DID LENDERS REASONABLY RELY ON THE SFCs?

Defense’s position

The defense made two major arguments. First, defense counsel argued that the SFCs contained such cautionary language that any reliance by the banks would have been unreasonable. Second, they claimed that the other parties were not, in fact, relying on the SFCs. Instead, the banks and others were relying on other analyses, other data they could get from the Trump Organization, and other factors in making their business decisions. In addition to fact witnesses, the defense called Bartov and Unell as expert witnesses.

[36] In discussion with attorneys during the trial (TT 3968-69) Judge Engoron indicated that he knew the defense might appeal on the issue of materiality. “If you want to take me up on appeal on the grounds that Judge Engoron doesn't understand material because it's all about how somebody views it, no, at a certain point – I think these are the words I used in the summary judgment motion, at a certain point it's not material; it's not immaterial. It's fraud.”

The defense pointed to footnote language cited in Section III above, which cautioned that the use of different assumptions or valuation techniques could materially impact on the amounts shown. Mr. Trump, in testimony (TT 3478-79), referred to it as a "worthless statement clause" and "disclaimer that was very, very powerful." He later (TT 3551) said

And some people call it a "worthless statement clause." They call it lots of different things. And as you will be hearing in testimony, they always hold up in court, except maybe in this court. They always hold up in court, always. It's a disclaimer.

It says, very strongly, do your own due diligence. Do your own work. Do your own study. Don't take anything from this statement for granted. You could look at the statement, but you must do your own analysis and due diligence.

The defense called Unell as an expert on banking. He testified (TT 5634-35) that in his experience banks typically regard SFCs simply as a roadmap so they can do their own analysis. The cautionary words in the compilation report would put users on notice that "things could change." In this case (TT 5636) his review of evidence showed that Deutsche Bank and Ladder Capital did their own reviews before approving loans.[37]

Bartov testified (TT 6295) that his interpretation of the Deutsche Bank credit review documents was that

They did not rely at all on their reported number, the valuation in the financial statement. They rely on the notes. They collected additional information about the net operating income, about cash flows. And based on their own analysis, they come up with a conclusion about the riskiness of or the financial health of the Trump Organization.

Bartov noted that there were some figures in the Deutsche Bank review memos that were not in the SFCs, such as the net operating income for one property, and he inferred that these showed the bank had the ability to get more information from the Trump Organization when they wanted it. He argued that the bank did not mechanically apply standard "haircuts" to the reported figures. As discussed below, this point was strongly challenged on cross-examination.

OAG's position

The Summons and Complaint (NYSCEF Doc. 1) said the Trump Organization sent various SFCs to: Deutsche Bank in connection with three separate loan transactions; Ladder Capital in connection with financing for 40 Wall Street; Royal Bank of America; underwriters of surety and directors and officer insurance; New York City in connection with the Ferry Point

[37] Interestingly, in his deposition testimony (NYSCEF Doc. 1030) Unell repeatedly admitted that lenders generally trust what they receive from borrowers to be accurate. See page 181, for example:
Q. So, again, I hear you saying that your opinion is that a lender approaches underwriting with an assumption that it can believe its clients, correct?
A. Well, you have to. I mean, otherwise, there would be no lending. If you had to go through and do the level of diligence -- I mean, we wouldn't have housing market. We wouldn't have anything…. [Answer continues.]

He was not cross-examined on this topic at trial.

project; and the Federal General Services Administration in connection with the Old Post Office project. The OAG's position was that these various entities asked for, and used, the SFCs as part of their processes for setting transaction terms. The OAG pointed out that the Deutsche Bank loan terms required annual SFCs to be submitted, and had covenants tied to Trump's reported net worth and cash on hand. The OAG elicited evidence from fact witnesses and documents that SFCs and related certifications were required under the agreements, were delivered, and that numbers from them were used in internal bank documents.

Judge's summary judgment decision (NYSCEF Doc. 1531)

Judge Engoron rejected defense arguments (including Mr. Trump's deposition testimony and Unell's pretrial expert report) that the "worthless clause" and the GAAP exceptions noted in the accountants' compilation reports served to protect the defendants. Judge Engoron wrote:

Thus, the "worthless clause" does not say what defendants say it says, does not rise to the level of an enforceable disclaimer, and cannot be used to insulate fraud as to facts peculiarly within defendants' knowledge, even vis-a-vis sophisticated recipients.

Since the OAG did not need to prove reliance in a separate §63(12) proceeding, Judge Engoron did not address it in his summary judgment.

Judge's decision after trial (NYSCEF Doc. 1688)

Judge Engoron reaffirmed his summary judgment decision that the disclaimers and the "worthless clause" were not adequate defenses. He noted "Donald Trump testified that he knew Deutsche Bank would rely on these certifications to determine if he was complying with his loan covenants. TT 3620-3623, 3630." Judge Engoron rejected reliance as a defense both for legal reasons and based on the evidence:

Defendants have argued vociferously throughout the trial that there can be no fraud as, they assert, that none of the banks or insurance companies relied on any of the alleged misrepresentations. The proponents of this theory posit that lenders demand complex statements of financial condition but then ignore them.

Defendants' argument is to no avail, as none of plaintiff's causes of action requires that it demonstrate reliance. Instead, plaintiff must merely show that defendants intended to commit the fraud. Reliance is not a requisite element of either Executive Law § 63(12) or of any of the alleged Penal Law violations….

However, the Court notes that, although not required, there is ample documentary and testimonial evidence that the banks, insurance companies, and the City of New York did, in fact, rely on defendants to be truthful and accurate in their financial submissions. The testimony in this case makes abundantly clear that most, if not all, loans began life based on numbers on an SFC, which the lenders interpreted in their own unique way. The testimony confirmed, rather than refuted, the overriding importance of SFCs in lending decisions.

It appears Judge Engoron chose to credit the statements of fact witnesses with regard to actual reliance, rather than the views of experts as to whether the banks should have relied on the SFCs.

VII. WHAT WERE THE OUTSIDE ACCOUNTANTS' RESPONSIBILITIES?

Background

The SFCs were all accompanied by accountants' compilation reports. Mazars USA LLP ("Mazars"), or its predecessor firms, reported on the SFCs through June 30, 2020. Mazars resigned from working with the Trump Organization in a letter dated February 22, 2022 (NYSCEF Doc. 40), before the June 30, 2021, SFC was complete. Whitley Penn reported on the June 30, 2021, compilation.

For many years, Donald Bender supervised the Mazars work for the Trump Organization. Per his deposition testimony (NYSCEF Doc. 1020), he graduated from Queens College in 1979 with a BA in accounting and had worked on Mr. Trump's account since the 1980s.[38] Per his trial testimony (TT 104) he worked for Mazars or its predecessor firms for 41 years before retiring in 2023. As lead partner on the Trump Organization account, he devoted from 45% to 55% of his time to this account (TT106-107). He was involved in both accounting and tax work (TT 61, 63). Some years he was involved in hundreds of Trump-related tax returns (TT 277). He estimated (TT 107) that he spent 50 to 60 hours per year specifically on the SFCs, or about 2% of his time. Typically, between one to three staff assisted with the SFCs (TT 113).

Mazar engagements were to perform compilations, which require far less work than reviews or audits. According to Bender, most of what Mazars did was to make sure that figures on the SFCs agreed with supporting schedules supplied by the Trump Organization (TT 117). Bender did not read every schedule but had overall supervisory responsibility (TT 158). Bender said (TT 117) that "I would look at it at high level. If I saw something that bothered me or something that didn't make sense to me, I'd ask him [a Trump Organization accountant] about it, generally." He remembered (TT 141) bringing up some issues, e.g., that it was improper to include figures for the Trump Foundation in the SFCs, and that an incorrect value was proposed for Ivanka Trump's apartment.

Documentary evidence showed both Mazars and Whitley Penn included language in their compilation reports, client engagement letters, and management representation letters which clearly indicated compilation reports provide no assurance, and that management was responsible for fair presentation of financial position in accordance with GAAP. Both firms also noted various GAAP departures in their compilation reports, including a failure to accrue estimated tax liabilities that would be incurred upon sale of properties.

Defense Position

The defense attorneys argued that the individual defendants (Mr. Trump, Donald Trump Jr., Eric Trump, Allen Weisselberg, and Jeffrey McConney) relied in good faith on the outside

[38] I am using the term "Mr. Trump's account" loosely here. Per his deposition testimony, (NYSCEF Doc. 1020), Bender and his firm did a variety of work for members of the Trump family, including personal tax returns and tax and accounting work for a variety of businesses they owned.

accountants to alert them of any departures from GAAP. None of these defendants were CPAs, and thus did not understand the intricacies of GAAP.

This defense rested on the assumption that Mazars and Whitley Penn were provided with accurate and complete information. This led the defense to challenge fact witnesses who indicated that some information was concealed. A particular issue for the defense was that Bender had said that, starting in 2013, he asked McConney for copies of appraisals of property, and was repeatedly told there weren't any. Such appraisals did exist, and showed values much lower than were being reported on the SFCs.

Flemmons was the key defense expert. He testified (TT 4283-86) that, although professional standards do not require accountants performing compilations to do the types of tests required for reviews or audits, the standards do require the accountants to get an understanding of the methods the client is using to value properties, and to report obvious departures from GAAP to their clients. He then argued that, when accountants do not report a GAAP departure, the client is entitled to believe that none exist. (See also his expert report, NYSCEF Doc. 872).

This argument was in tension with other defense arguments. Elsewhere, the defense argued that banks and others should not rely on the SFCs in part because of the low level of assurance provided by compilations. Here, the defense was arguing that Mr. Trump was entitled to place reliance on them. Second, Flemmons testified that, in several cases, the materials provided to Mazars should have been "red flags" of likely GAAP departures. His implication that Mazars should have followed up was inconsistent with the defense position that the SFCs were not misstated.[39] Flemmons also testified (TT 4325) that he considered Bender's statement that he had requested copies of appraisals to be "not professionally plausible", given the normal scope of work on a compilation. However, Flemmons' argued elsewhere that Mazars had a duty to follow up on matters that seemed incorrect.[40]

OAG's position

The OAG's position was that Trump Organization management was responsible for fair presentation in the SFCs. They argued that, in accordance with normal professional standards, the accountants doing compilations were not expected to do significant work verifying client figures. In addition, the OAG argued that the Trump Organization misled the accountants, and concealed information from them. The OAG relied on documentary evidence (including the compilation reports, the engagement letters, and the management representation letters) and testimony by the accountants and Trump Organization employees to establish what the accountants' contractual duty was. The OAG used fact witnesses and documents to show various instances where information was withheld or altered before being sent to Mazars.[41]

The OAG called Lewis as a rebuttal witness. Lewis disagreed with Flemmons and said (TT 6706) that the fact that an accountant doing a compilation failed to notice or report a GAAP

[39] Flemmons was challenged on this point in cross-examination. See TT 44412-43.
[40] While no one made the point during the trial, Bender, who did both tax compliance and tax planning work, might have been interested in property appraisals for client service reasons other than the compilation engagement.
[41] Cf. McConney testimony at TT 711-712 and Bender testimony at TT 245.

departure should give issuers and financial statement readers absolutely no comfort that the statements were correctly presented.

Judge's decision after trial (NYSCEF Doc. 1688)

Judge Engoron rejected the defense arguments. He cited documentary evidence and the testimony of the Mazars and Whitley Penn engagement partners as making it clear that the client, not the accountants, bore the responsibility for correct presentation of the financial statements. Judge Engoron said Lewis's expert testimony "convincingly demonstrated that, according to the operative standards, an accountant creating a compilation will not verify the accuracy of the supporting information." Overall, Judge Engoron found:

There is overwhelming evidence from both interested and non-interested witnesses, corroborated by documentary evidence, that the buck for being truthful in the supporting data valuations stopped with the Trump Organization, not the accountants. Moreover, the Trump Organization intentionally engaged their accountants to perform compilations, as opposed to reviews or audits, which provided the lowest level of scrutiny and rely on the representations and information provided by the client; compilation engagements make clear that the accountants will not inquire, assess fraud risk, or test the accounting records.

In other words, if the Trump Organization wanted to hold the accountants to audit-level standards, they should have paid for audits.

VIII. HOW MUCH ILL-GOTTEN GAINS SHOULD BE DISGORGED?

Background

One remedy under Executive Law §63(12) is the "disgorgement" of moneys that the defendant obtained by virtue of their deceptive practices. This remedy exists even when, as in this case, the banks and insurance companies involved did not sue for damages or testify that they had been damaged. The summary judgment left for trial the quantification of any sums to be disgorged. The Summons and Complaint (NYSCEF Doc. 1) estimated the amount to be disgorged as $250 million plus pretrial interest.

OAG position

McCarty prepared expert reports (NYSCEF Doc. 1523 Exhibit A and 1524 Exhibit B), computing how much the Trump Organization had benefited from deceptive practices. He then modified his report to reduce the number of years included, following the Summary Judgment decision in September 2023.

McCarty assumed that, but for misrepresentation, Mr. Trump would not have been able to borrow at the low rates offered by Deutsch Bank's Personal Wealth Management Group. These rates benefited from bankers' trust in the net worth that backed his personal guarantee. He would, instead, have had to borrow at rates similar to those being offered by Deutsche Bank's real estate group at the same time for non-recourse loans that were secured only by the property,

not by a personal guarantee. In making his computations, McCarty used the actual offers that the two different parts of Deutsche Bank had devloped, and made assumptions about later interest rate changes. He estimated total interest savings of about $168 million (as summarized by the decision in NYSCEF Doc. 1688).

The OAG estimated in its proposed statement of facts and conclusions of law (NYSCEF Doc. 1667) that the Trump Organization made profits of about $60 million from its assignment of its rights to the Ferry Point project and about $139 million on the Old Post Office Project. The figure for Ferry Point was referenced to testimony by Donald Trump Jr., and the figure for the Old Post Office to documents introduced during Mr. Trump's testimony.

Defense Position

Unell argued (in trial testimony starting on TT 5743) that Mr. Trump's personal guarantee only saved him 25 basis points on certain loans. He estimated (TT 5747) total interest savings of only about $9 million.

In cross-examination (TT 5759-60), the OAG challenged his reliance on a 25 basis point impact of the personal guarantee for the Deutsche Bank loans. The documents indicated that the 25 basis points were the difference between a guarantee of only 10% of the loan balance (rather than the full loan balance) and no guarantee. Unell admitted, in cross-examination (TT 5762) that he had not come up with an estimate of what the difference in interest rates would have been between a loan with a guarantee and a non-recourse loan at the times the loans were originated. In cross-examination (TT 5766), he was asked why, if the interest rate saving was only 25 basis points, Mr. Trump would take the risk of giving a personal guarantee. His answer was:

That's a great question. I am happy you asked it. Because real estate developers that believe in their projects, that place a tremendous amount of equity in their projects, it gives credence to their plan. Especially when you are a redevelopment and repositioning assets. That's what President Trump does. And that is part of what makes his success, is his ability to stand behind his deals, place his name behind it, place extremely large amounts of capital into the deal. And therefore it is looked upon by banks, in my experience, as Deutsche Bank did in their experience, as a well-sounded loan. And guaranties for people that stick behind their deals goes a really long way in a bank. And as we have already said, bank love billionaires because billionaires repay loans. Billionaires that repay loans with a guaranty makes it more secure.

Unell's testimony did not address the OAG's arguments for disgorging profits related to the Old Post Office and Ferry Point projects. The defense's closing statement (NYSCEF 1675) said no such disgorgement was warranted.

Judge's decision (NYSCEF Doc. 1688)

Judge Engoron called McCarty's methodology "air-tight," and checked his computations, finding them to be correct. "The expert defendants called to the stand to challenge McCarty's methodology, Robert Unell, left McCarty unscathed." His decision said Unell's view that the personal guaranty was worth only 25 basis points was "belied by the documentary evidence originating from Deutsche Bank, as well as the testimony of former and current Deutsche Bank

employees." Judge Engoron noted Unell did not provide any other estimate of what the interest rate should have been for loans on property like Doral without a personal guarantee. "On the whole, the Court was unable to ascribe any reliability to Unell's "expert" opinions, finding them unresearched, unsupported, inconsistent, and contradicted by ample other documentary and testimonial evidence."

IX. ATTEMPTS TO LIMIT OR DISCREDIT EXPERTS' TESTIMONY

General

This case provided a host of examples of how attorneys attack opposing experts. As an initial step, they can seek to prevent the experts from testifying at all. If the opposing experts do testify, attorneys seek to discredit them or limit their work through a variety of techniques. This section provides salient examples of each technique.

Casting doubt on qualifications:

The defense tried hard to prevent Lewis from being qualified as an accounting expert. The defense argued (TT starting at 6629)

Mr. Lewis does not possess the requisite qualifications. He's not a certified public accountant. He's never sat for the certified public accounting exam. His accounting degree is -- his accounting degree, in quotes, his Ph.D. is from an engineering school. His Ph.D. is actually in engineering not accounting. He doesn't even have an undergraduate degree in accounting. He has no experience at all practicing accounting, none. He's got no experience preparing, reviewing or using compilation statements. He has got no experience auditing financial statements. He's got no experience preparing or using personal financial statements.

He's a professor of practice with no experience in the practice of accounting. He has no lectures that we can uncover that he's identified relative to compilations of personal financial statements or any of the other issues at issue herein. He has no publications or research relative to compilation personal financial statements or any of the other issues here.

The Defense's *voir dire* examination of Lewis's qualifications took 18 pages of trial transcript (TT 6652-6670). The OAG successfully argued that Lewis had an appropriate educational background, had taught relevant courses, and had been qualified as an expert previously in a New York court (TT 6633). Judge Engoron deemed him an expert on accounting (TT 6670). His decision after trial made no mention of doubts about Lewis's qualifications.

Bartov was a key witness for the defense, especially regarding the interpretation of ASC 274. The OAG did not challenge Bartov's overall expertise in accounting but did question his credentials for opining on key matters at issue. In cross-examination (TT 6444-45) they established that he had not prepared a personal financial statement since around 1985 and hadn't valued real property for inclusion in a financial statement for over 30 years. He had not attempted to value any of Mr. Trump's assets. He had never been a banker or made credit decisions for a bank. They noted his trial testimony (TT 6186) that no one at New York University taught ASC 274 (the section of GAAP dealing with personal financial statements).

His research papers dealt with public companies, not the personal financial statements at issue in this case.

During cross-examination, OAG counsel brought out the unfavorable opinion that a judge had given about Bartov's testimony in a prior case.[42] In that case, Bartov had been hired by the OAG, and an attorney on that case was also working on the Trump case. Judge Engoron's decision (NYSCEF Doc. 1688) mentioned this prior criticism of Bartov's testimony.

Bartov also attempted to testify that the defendants had no intent to commit fraud. The court struck this testimony, saying that the question of intent was one for the court, not for experts. It should also be noted that Statement of Standards for Forensic Accounting Services No. 1 (AICPA 2019), paragraph 10, bars experts from testifying on the ultimate issue of fraud, although "A member may provide expert opinions relating to whether evidence is consistent with certain elements of fraud or other laws based on objective evaluation." Bartov is not a member of the AICPA (NYSCEF Doc. 1377).

A major part of Flemmons' testimony related to what Mazars should have done during their compilations. In cross-examination (TT 4476) OAG counsel established that Flemmons had performed fewer than five compilations in his career, all of which were done before the year 2000. He had never prepared a personal SFC pursuant to ASC 274.

Limiting the scope of trial testimony to what was in the expert reports

The rules governing New York civil trials are meant to provide each side with timely notice of what experts are going to testify about. In this case, the two sides' expert reports were generally dated May 26, 2023, and their rebuttal reports were dated June 30, 2023. This allowed time for depositions before trial.

Whenever, during trial, an expert attempted to introduce conclusions beyond those in their reports, opposing counsel objected. For example, the defense tried to ask Bartov about models for finding fraud in financial statements (TT 6336), but the OAG attorneys successfully objected on the basis that this matter was beyond his expert reports (TT 6337-39).

Showing personal or financial bias

Expert testimony is supposed to be objective.[43] Attorneys can undermine experts' credibility by showing they are biased through financial incentives or relations with the parties. All these techniques were used here.

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[42] TT 6541-42. The OAG counsel read from the decision as follows:
Q. "As with Dr. Bartov's testimony about the alleged materiality of an alleged impairment in 2015 of an ExxonMobil facility, in Mobile Bay, in the golf [sic] of Mexico, discussed infra, the Court rejects Dr. Bartov's expert testimony as unpersuasive." "And, in the case of his testimony about the mobile facility, finds Dr. Bartov's testimony to be flatly contradicted by the weight of the evidence."
Before I put this up on the screen, were you aware of Justice Ostrager's holding in that case with respect to your testimony?
A. No.

[43] See AICPA (2020) for standards for forensic services.

Judge Engoron's decision (NYSCEF Doc. 1688), said that in listening to testimony "The Court has also considered the simple touchstones of self-interest and other motives, common sense, and overall veracity." He carefully footnoted the compensation each expert had testified to receiving.

Bartov had one of the highest hourly billing rates of all the experts ($1,350 per hour), and had worked about 650 hours, meaning he had earned fees of $877,000 (See also TT 6443). These fees were widely reported in the media.[44] An OAG (TT 6268) attorney called Bartov "someone that they've hired to say just whatever it is they want in this case." Judge Engoron obviously agreed, writing in his December 2023 decision denying the defendants' request for a directed verdict (NYSCEF Doc. 1655) that "Bartov is a tenured professor, but all that his testimony proves is that for a million or so dollars, some experts will say whatever you want them to say."

Two of the defense's non-accounting expert witnesses had other relations with the parties. Judge Engoron noted in his decision (NYSCEF Doc. 1688) that Steven Witkoff had been a friend of Mr. Trump's for over 20 years, and that Witkoff was neither an appraiser nor an accounting expert, and also was not familiar with the SFC's in this case. Judge Engoron wrote "Accordingly, his testimony was irrelevant to the issues before the Court." Judge Engoron noted another defense witness, Gary Giulietti, was both a personal friend and had ongoing business relationships with Mr. Trump.

Failure to consider unfavorable evidence

Attorneys also try to show bias by showing that experts intentionally either failed to look for, or disregarded, evidence at odds with their conclusions. During his deposition (NYSCEF Doc. 1377, pp. 84-85), when Bartov was asked if he had looked at additional depositions or testimony between preparing his initial expert report and his rebuttal report, he replied:

So I didn't -- but I got a lot of stuff, too much stuff. They made everything available, I think, a lot of stuff available for me that I didn't need, because as I explain to you the process, once I have enough evidence to support my analysis and conclusion, I stop looking.

At trial, OAG counsel asked him specifically (TT 6539-6540) if the reason why he had not looked at Mazars working papers was "because once you have enough evidence to support your analysis and conclusion you stop looking?" Bartov replied "That's true, yeah, that was my argument in the deposition, yes." While defense counsel tried to reduce the impact of this admission during redirect (TT 6571-72), the OAG considered it so damaging that they featured it in one of the PowerPoint slides in their closing argument presentation (NYSCEF Doc. 1669).

A second example involving Bartov related to his testimony that Deutsche Bank did its own thorough review of Mr. Trump's assets and did not either rely on the SFCs or apply a mechanical 50% "haircut" to the stated figures. OAG counsel, in cross-examination (6485-90), confronted him with bank memoranda that repeatedly showed figures that were exactly half of the SFC figures, as well as testimony by one of the bankers that they used standard "haircuts."

[44] See for example CBS News (Kaufman, 2023).

As shown in the excerpt below, Bartov's insistence that Deutsche Bank did not rely on the SFC figures caught Judge Engoron's attention (TT 6489-90)

Q. So you are aware of Mr. Haigh's testimony that DB, Deutsche Bank, reduced certain of the categories, by fifty percent, from the amounts reported on the Statements of Financial Condition, yet you testified, on direct, that Deutsche Bank, at no time, relied upon the amounts in the Statements of Financial Condition.

A. Absolutely, there is no contradiction here at all.

THE COURT: "There is no contradiction at all," is that what you said?

THE WITNESS: Yes, there is no contradiction at all between these two statements.

Later (TT 6633), Judge Engoron asked Bartov why, if the banks did not use the figures from the SFCs, the banks bothered to get them in the first place.

Bartov had testified (TT 6240) that GAAP is not designed to accurately value assets. While this may be true in general, Bartov failed to acknowledge that when the AICPA in 1982 (and later the FASB in ASC 274) required that personal financial statements use "estimated current value" rather than historic cost as a basis for valuation, they did so precisely to give economically meaningful information to lenders and other users. Judge Engoron's decision after trial (NYSCEF Doc. 1688) noted that

Bartov opined that "GAAP is not designed to give you the true economic value of an asset." TT 6240. However, it is undisputed that the SFCs required, and Donald Trump represented, that the assets be presented at their estimated current value and be GAAP compliant, so Bartov's statement is of no consequence.

As another example, Judge Engoron's decision after trial noted that when Unell asserted that McCarty had no basis for his interest rate calculation, Unell was "disregarding entirely the term sheet that the commercial real estate group offered Donald Trump for a non-recourse loan." Unell tried to argue that the commercial real estate division had not understood the properties involved, and therefore had not come up with a proper interest rate for a potential loan. However, Judge Engoron noted "However, on cross-examination he was confronted with emails between Deutsche Bank and the Trump Organization indicating that Deutsche Bank had, in fact, conducted due diligence on the properties and considered itself to be "very familiar" with them." As noted above, Judge Engoron did not place any value on Unell's testimony.

Showing errors or lack of foundation for conclusions

Experts who made broad statements were subject to challenge. For example, Bartov testified that Mr. Trump could have self-financed both the Doral and the Chicago projects. On cross-examination, OAG counsel challenged whether he had done adequate work to support this statement (TT 6528-6536). They asked if he had computed the taxes which would have been payable upon selling marketable securities, and if he knew how much cash the various properties needed to keep on hand to operate. OAG counsel asked how Mr. Trump would have come up with the cash needed to renovate the Doral property, absent the loans.

Showing opinions defy common sense

The OAG counsel repeatedly attacked the defense position that ASC 274 was so flexible that estimates of current value which differed by orders of magnitude could all be GAAP-compliant. This position disregards the basic purpose of ASC 274. According to 274-10-05-1,

Users of personal financial statements rely on them in determining whether to grant credit, in assessing the financial activities of individuals, in assessing the financial affairs of public officials and candidates for public office, and for similar purposes.

The AICPA (and later the FASB) deliberately chose to require estimated current value as a basis of accounting. Per 274-10-05-2

The primary focus of personal financial statements is a person's assets and liabilities, and the primary users of personal financial statements normally consider estimated current value information to be more relevant for their decisions than historical cost information. Lenders require estimated current value information to assess collateral, and most personal loan applications require estimated current value information. Estimated current values are required for estate, gift, and income tax planning, and estimated current value information about assets is often required in federal and state filings of candidates for public office.

It defies common sense to assume that standard-setters meant to allow widely divergent current value estimates, yet Flemmon, Chin, and Bartov all affirmed they did.[45] This excerpt from the OAG's cross-examination of Flemmons (TT 4478) shows how extreme this position was:

Q So in your view it is appropriate for a client to potentially conduct 12 different valuations, pick the one that is the highest, share with its accountants the exact basis for that one calculation, and not tell them anything else about all of the other valuations that they ran?

A That's correct.

Lewis, in rebuttal (TT 6393-96) illustrated how far original cost values could be from current values using the difference between the original cost and the current value of a Derek Jeter rookie baseball card.

The OAG's complaint (NYSCEF Doc. 1) cited the valuation of rent-stabilized apartments at Trump Plaza as if they were free of such restrictions. While Chin had originally testified that there were no material problems with the SFCs, he was challenged in cross-examination about these apartments. In cross-examination (TT 6014), Chin was asked

Q And would you agree that by using offering plan pricing of the units without deducting the cost to remove the legal restrictions that exist under rent stabilization laws, Mr. McConney and Mr. Weisselberg inflated the value of those units, yes?

A No, they provided a perspective of value that was based upon their analysis that was shared with Mazars.

[45] For example, see Flemmons testimony at TT 4495-4502.

To any New Yorker, it makes no sense to ignore rent regulation. In cross-examination, OAG counsel brought out the fact that Chin had, prior to this case, been personally involved in managing a company that had acquired another property which contained a rent-stabilized apartment and had incurred costs in buying out the tenants before the apartment could be sold. However, when asked specifically (TT 6016) if the failure to disclose that some apartments in this case were rent-stabilized was problematic, Chin said "no." OAG counsel then (TT 6016-17) cited his deposition testimony, which conceded that the failure to disclose the rent-regulated status of 10 out of 20 apartments in a hypothetical situation would be a "significant omission." The Court's decision after trial (NYSCEF Doc. 1688) noted this concession.

The use of rebuttal experts

A common way to fight the conclusions of one expert is to hire another expert. In this case there were several dueling groups of experts. Flemmons, Chin, and Bartov argued that ASC 274 allowed wide latitude in the choice of valuations, while Lewis argued that all valuations were constrained by the definition of estimated current value, of a price on which both a willing buyer and willing seller could agree. McCarty claimed that the interest savings to Mr. Trump by borrowing through Deutsche Bank's Personal Wealth Management group, with a personal guarantee, was one figure, while Unell argued it was much lower. Flemmons argued that Mazars was at fault for not noticing several GAAP violations and bringing them to Mr. Trump's attention, while Lewis claimed that Mazars' duties were far more limited.

As discussed above, the OAG's experts were more persuasive to Judge Engoron. He rejected defense claims that the asset valuations were acceptable, accepted McCarty's rather than Unell's interest computations, and rejected any defense based on relying on Mazars,

X. LESSONS FOR FORENSIC ACCOUNTANTS

Care should be taken in generalizing from any one case, and this case is unusual for multiple reasons. It was a bench trial, with issues specific to New York State law and rules of evidence. Mr. Trump's status as a past and potentially future president is singular. Few other cases that forensic accountants encounter will have the same publicity and political implications.

Nevertheless, this case serves as an object lesson of both good and bad practices for testifying experts. Some experts (e.g., Lewis and McCarty) were cited favorably by the Court, some were seen as irrelevant, and some were considered not credible.

Listed below are the lessons I draw from this case.

First, it is critical for experts to follow rules related to deadlines and the content of their reports. Judge Engoron was receptive to motions to stop experts from testifying on matters that went beyond their reports, and he also considered closely motions to stop experts from being introduced at the rebuttal stage, if they should have been introduced earlier in the trial.

Next, experts must avoid the appearance of bias. Judge Engoron was sensitive to how either personal friendship with the defendants or outsized fees could impact the objectivity of expert witnesses.

Third, an expert's prior testifying experience is important both in being qualified and in maintaining credibility. When attorneys tried to qualify people as experts, they stressed that they had been previously admitted to New York courts as experts. In attacking Bartov, the OAG pointed out that a judge in a prior New York trial found fault with his work. Judge Engoron mentioned that point in his decision (NYSCEF Doc. 1688). This means that experts who wish to have a lengthy career of testifying have to be very careful each time they testify.

Fourth, experts must confine their testimony to matters within the scope of their expertise. Opposing counsel were quick to try to strike testimony that went beyond the witness's expertise. Judge Engoron was alert to this issue. For example, the Court's decision (NYSCEF Doc. 1688) discussed Chin's testimony regarding whether the SFCs were misstated, then noted that Chin was not an accountant.

Fifth, taking extreme positions, and denying facts that are in evidence, destroys credibility. In his decision after trial, Judge Engoron summarized testimony from Bartov as follows: "Bartov's overarching point was that the subject statements of financial condition were accurate in every respect and that they were '100 percent consistent with GAAP.'" Judge Engoron wrote "By doggedly attempting to justify every misstatement, Professor Bartov lost all credibility in the eyes of the Court." As another example, the OAG counsel questioned Unell, who had testified that a personal guarantee only saved Mr. Trump 25 basis points, why any developer would put themselves at risk for such a low benefit.[46] Based on other testimony in the case, it was simply not credible that Mr. Trump's guarantee would be worth so little to a lender, or that Mr. Trump would make a guarantee for so little benefit.

Sixth, experts who fail to consider all relevant fact testimony and documents are likely to be confronted with those items in cross-examination or by rebuttal experts. It is also damaging for an expert to admit that he or she had not wanted to look at all relevant information. See the discussion above of Bartov's statement that once he had the information needed to support his conclusions, he stopped looking.

Seventh, experts should avoid testifying on intent in fraud cases. In this case, as discussed above, Bartov testified that there was no evidence of accounting fraud, and that the OAG's case had no merit. Mr. Trump attended that testimony, and immediately publicly trumpeted Bartov's conclusions as part of his characterization of the case as politically motivated and unfounded. Such testimony is clearly at odds with the relevant professional standard, Statement on Standards for Forensic Services No. 1 (AICPA 2019). New York law is also specific that experts may not opine on the ultimate question of whether fraud exists.

Eighth, experts are more likely to be relied upon if they provide testimony that addresses questions the Court needs to deal with. In this case, the Court needed to compute the profits to be disgorged. McCarty provided testimony and a report that clearly showed his computations and grounded his analysis in documentary evidence from the case. Judge Engoron noted in his decision (NYSCEF Doc. 1688) that he had rechecked several of McCarty's computations. In

[46] As a counter-example, Judge Engoron commented favorably (NYSCEF Doc. 1688) on the fact that McCarty "used conservative measures" in computing amounts for disgorgement.

contrast, Unell failed to provide the judge with a plausible alternative interest rate to use in computing disgorgement. In his decision, Judge Engoron noted he had asked Unell to estimate an appropriate rate as follows:

Let me jump in. Are you testifying that with your experience, your expertise, your knowledge of the facts in this case, you could not possibly estimate what Deutsche Bank would have charged as an interest rate in any particular situation, because it is all up to them?

Unell gave the Court no alternative besides the 25 basis point difference he had testified to before.

Flemmons' testimony is an example of work that Judge Engoron found unhelpful. In his decision after trial (NYSCEF Doc. 1688), Judge Engoron decided that Flemmons was simply describing which methods were permissible, not whether they had been applied properly. "Accordingly, Flemmons's testimony is of no evidentiary value, as the plaintiff has not alleged that defendants used an impermissible method, but that they have inputted and used patently false data with a permissible method."

Finally, and perhaps most important, sometimes the best service experts can do for the attorneys that engage them is to advise settling the case on the best terms possible. If evidence is weak, and the expert cannot give credible helpful testimony, then it may be best for the client to cut their losses. Litigating this case over more than four years involved large legal fees, as well as expert witness fees estimated at $2.5 million (Charalambous and Kim (2023). After a full trial, the Court assessed a massive penalty, of approximately $450 million (Bromwich and Protess, 2024), including interest, on Mr. Trump, as well as barring him from various business activities. Perhaps a less damaging result could have been achieved by settling the case earlier.

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Table 1

Key Assets included in Donald J. Trump's Statements of Financial Condition ($ millions)

Fiscal Years ended June 30

		2011	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020(d)**	**2021(e)**
Vornado joint ventures	721	823	746	817	946	980	1,196	1,212	1,308	883	646	
40 Wall St.	525	527	531	550	735	796	702	720	724	664	664	
Trump Tower --5th Ave	490	501	527	707	881	631	639	723	807	548	525	
Trump Park Avenue	312	312	346	301	251	184	171	176	179	136	91	
Seven Springs	261	291	291	291	(a) 56	35	35	35	38	38	38	
Old Post Office (D.C.)				11	48	154	121	122	130	91	130	
Triplex - Trump Tower	80	180	200	200	327	327	(b) 117	117	114	106	131	
Vegas Joint Ventures	NR	NR	124	106	107	104	103	100	85	77	81	
Mar-a-Lago	427	532	490	405	348	570	580	740	647	517	612	
L.A. undeveloped lots	310	283	152	139	(c) 84	83	69	62	62	53	64	

Scotland -- land	121	118	115	361	267	226	221	223	221	101	114
Doral	NA	150	174	272	366	382	410	430	360	345	297
Bedminster Golf Club	103	115	120	122	123	125	129	132	133	133	53
Briarcliff land	25	25	102	102	102	102	102	102	106	90	87
Other Golf Clubs	329	348	504	608	584	620	649	661	654	642	532
Cash & Escrow	258	181	354	342	226	140	101	99	116	118	323
Real estate licensing	110	85	175	330	339	227	246	203	182	144	157
Various not listed here	526	540	561	637	791	702	751	732	705	473	431
Total Assets	4,597	5,010	5,510	6,301	6,580	6,389	6,341	6,588	6,570	5,159	4,974
Total Liabilities	335	452	532	523	519	609	464	467	468	456	439
Net Worth	4,262	4,559	4,978	5,778	6,061	5,779	5,876	6,121	6,102	4,702	4,535
NYSCEF Doc. Nos.	5; 16	6; 17	7; 18	8; 19	9; 20	10; 21	11;22	12; 23	13; 24	14; 25	15; 26

Information was extracted from the SFCs and supporting worksheets at the document numbers shown. (a) A conservation easement was obtained in 2015 for the Seven Springs Property. (b) A Forbes article in 2017 revealed the Triplex was only around 11,000

Square feet. (c) A conservation easement on the land in L.A. was obtained in 2015. (d) Pandemic shutdowns began in March 2020. The OAG investigation also began in 2020. (e) A court-appointed monitor was in place before the release of the 2021 SFCs.

Exhibit 5
Excerpts from Donald J. Trump June 30, 2015, Statement of Financial Condition
[emphasis added]

1. BASIS OF PRESENTATION:
The accompanying statement of financial condition consists of the assets and liabilities of Donald J. Trump. Assets are stated at their **estimated current values** and liabilities at their estimated current amounts using various valuation methods.

Such valuation methods include, but are not limited to, the use of appraisals, capitalization of anticipated earnings, recent sales and offers, and estimates of current values as determined by Mr. Trump in conjunction with his associates and, in some instances, outside professionals. Considerable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, **the estimates presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities. The use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts**.

Accounting principles generally accepted in the United States of America ("GAAP") **require that personal financial statements include a provision for current income taxes, as well as estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases. The accompanying statement of financial condition does not include such provisions.**

Pursuant to GAAP, **this financial statement does not reflect the value of Donald J. Trump's worldwide reputation;** however, the brand value has afforded Mr. Trump the opportunity to participate in licensing deals around the globe as reflected on the balance sheet herein.…The goodwill attached to the Trump name has significant financial value that has not been reflected in the preparation of this financial statement.