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

THE PEOPLE OF THE STATE OF NEW YORK, by BARBARA D. UNDERWOOD, Attorney General of the State of New York,

Petitioner,

-against-

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

Respondents.

Index No. 451130/2018
IAS Part 39
Hon. Justice Scarpulla

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND IN FURTHER SUPPORT OF THE VERIFIED PETITION

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PRELIMINARY STATEMENT

The Petition filed in this case demonstrates that respondent Donald J. Trump used his control over the Donald J. Trump Foundation for his benefit to advance his personal, business, and political interests in violation of federal and state law governing charities. He breached his fiduciary duties by engaging in political activity in violation of state and federal law, failing to comply with basic governance rules required by New York law, and directing numerous unlawful diversions and distributions of charitable assets committed to his charge. His children, who were nominally the other directors of the Foundation, ignored their responsibilities. Those responsibilities include such basic actions as holding regular meetings to discuss Foundation business, overseeing the Foundation's finances, implementing conflict of interest policies, and, most importantly, upholding the fundamental principle that the charitable assets under their care are not to be used for personal benefit.

As a result of Respondents' failures, Foundation funds – consisting primarily of money donated by persons other than Donald Trump – were used improperly, not once, but numerous times. The law is clear – private foundations cannot use their funds for the personal or business benefit of their directors, and they cannot engage in political activity. These prohibitions are absolute. As the entity charged with overseeing the activity of foundations and the proper use of charitable assets, it is the role of the Attorney General of the State of New York (the "Attorney General") to seek the appropriate remedies. As courts have long recognized, the Attorney General's role in overseeing the charitable sector is a crucial one. Foundations do not have shareholders that can hold them accountable, and their beneficiaries are often, by definition, the most vulnerable in society.

After a thorough investigation, during the course of which the Donald J. Trump Foundation (the "Foundation") sought to dissolve without acknowledging why dissolution is necessary and without its directors accepting any responsibility for the Foundation's actions, the Attorney General brought this summary proceeding to dissolve the Foundation pursuant to Article 11 of the Not-For-Profit Corporation Law ("N-PCL") and to obtain other monetary and injunctive relief. In the Petition, the Attorney General asks the Court to dissolve the Foundation, find that the Foundation conducted its affairs in a persistently illegal manner, order the Foundation's directors, Donald J. Trump ("Mr. Trump"), Donald Trump Jr., Ivanka Trump and Eric Trump (collectively the "Board" or the "Individual Respondents") to account for the damage and losses the Foundation incurred as a result of Mr. Trump's intentional conduct and the dereliction of duty by all the Individual Respondents, and to bar the Individual Respondents from serving as fiduciaries of charitable organizations.[1]

The Petition and accompanying papers provide ample evidence for the Court to grant the relief sought in the Petition. For more than a decade, the Foundation operated in persistent violation of state and federal law governing charities. The Board abdicated its fiduciary duties entirely, leaving the Foundation to operate without any oversight, and permitted Mr. Trump to use the Foundation's assets to satisfy his and his for-profit companies' legal obligations, to promote Trump hotels, to purchase personal items, and, in 2016 – at the direction of Mr. Trump

[1] As set forth in greater detail below, and contrary to Respondents' assertion, the Attorney General's claims in this action fit squarely within the enforcement cases it has brought, and the remedies it has obtained. Indeed, the Attorney General has recently resolved several enforcement matters involving breaches of fiduciary duty similar to those of Respondents here. *See, e.g., In the Matter of the Investigation of the Richenthal Foundation*, AOD No. 18-034 (trustee used Foundation asserts to settle litigation unrelated to the Foundation and agreed to permanent bar; other trustees who did not properly oversee him agreed to bar, subject to being lifted upon training); *In the Matter of the Investigation of the Homeland Foundation, Inc.*, AOD No. 15-172 (imposing bars on fiduciary service on trustees who permitted waste of charitable assets, but did not personally benefit); *In the Matter of the Investigation of the Victor E. Perley Fund*, AOD No. 15-019 (imposing bars on trustees that did not personally benefit, but who failed to exercise sufficient oversight over active wrongdoers). Submitted herewith is the Affirmation of Peggy Farber, dated October 4, 2018 ("Farber Aff."), which attaches copies of the settlement documents cited above.

and his presidential campaign – to promote Mr. Trump's candidacy for political office. Mr. Trump's use of the Foundation for his political campaign was "willful and intentional conduct" under the N-PCL and the Estates Powers and Trust Law ("EPTL"). N-PCL § 715(f)(4), EPTL § 8-1.9(c)(4)(D). Mr. Trump was aware of the limitations on political activity by not-for-profits: he signed documents under the penalty of perjury attesting that Foundation assets would not be used for the benefit of any Foundation officer or director or for political purposes, and he even campaigned for the repeal of one prohibition on using charitable assets to intervene in a political campaign. He nevertheless caused his Foundation and his Campaign[2] to work together for his political and financial benefit.

Respondents' arguments for dismissal are based on misstatements of the Attorney General's claims or are otherwise without merit. Respondents' motion to dismiss should be denied because, as set forth in detail below: (i) the Foundation's role in the Iowa Fundraiser and the distribution of proceeds from it constituted illegal participation in a political campaign; (ii) Mr. Trump intentionally caused the Foundation to engage in improper related party transactions in violation of the N-PCL and the EPTL; (iii) the Petition's claims are timely; (iv) the Petition was brought because of Respondents' extensive illegal conduct; and (v) this Court has jurisdiction over Mr. Trump. Accepting the allegations in the Petition as true, as is required on a motion to dismiss, Respondents' arguments for dismissal must be rejected.

SUMMARY OF FACTS

As the Attorney General's Petition alleges, and as the evidence shows, the Trump Foundation was a shell corporation that functioned as a checkbook from which the business

[2] This Memorandum incorporates the defined terms in the Verified Petition and the accompanying Affidavit of Steven Shiffman, to the extent not defined herein.

entity known as the Trump Organization made payments – using other people's money, as Mr. Trump did not personally contribute to the Foundation after 2008 – to charities and political committees. (Pet. ¶¶ 8, 25.) On multiple occasions, the payments were made for the personal benefit of Mr. Trump or a Trump business. (*Id.* at ¶¶33-90). For most transactions, Mr. Trump or one of his agents gave instructions to Allen Weisselberg, the Trump Organization's chief financial officer, who in turn directed Jeffrey McConney, controller and vice president of the Trump Organization, to cut a check, a direction which Mr. McConney or his staff then executed. (*See id.* ¶¶ 27-28, 64, 76.) As the Petition alleges, the Foundation's Board failed to oversee the activities of the Foundation, approve disbursements, or to establish *any* internal controls to ensure that the Foundation's assets were used appropriately. (*Id.* ¶¶ 26-32.) While the Foundation reported on its federal and state forms that the Individual Respondents served as directors, the Board existed in name only. The Individual Respondents failed to hold a meeting – ever – to discuss the Foundation's affairs once the second generation of Trumps joined the Board in 2006. (*Id.*) No meeting minutes exist after 1999, and the Foundation did not have required policies governing conflicts of interest, investments, or the issuance of grants. (*Id.*)

The transactions described in the Petition illustrate the way in which this lack of oversight was exploited to channel charitable money for Mr. Trump's benefit. In violation of federal tax and campaign finance law, state law on related party transactions, and the Foundation's own certificate of incorporation (its "Charter"), the Foundation participated in a nationally televised Trump Campaign fundraiser – a telethon of sorts – in Des Moines, Iowa, on January 28, 2016, (the "Iowa Fundraiser") to solicit charitable donations from the public, including New York residents. (*Id.* ¶¶ 33-39.) The Foundation ceded control over the $2.8 million it received from the Iowa Fundraiser to senior staff of the Campaign, which then held a

series of media events in Iowa on the eve of the caucuses at which candidate Trump presented donation checks from these funds to various charities, all for the purpose of influencing the 2016 presidential election. (*Id.* ¶¶ 39-60.) In the following months, the Foundation continued to issue grants at the Campaign's direction, culminating in a press conference on May 31, 2016 at Trump Tower at which candidate Trump announced that all funds raised through the fundraiser had been disbursed. (*Id.* ¶¶ 55-56.) Together with the press conference, the Trump Campaign – not the Trump Foundation – released the list of recipients. (*Id.* ¶ 56.) The Foundation's participation in the Fundraiser and its subsequent disbursal of proceeds constituted impermissible political activity. The grants from the proceeds of the Iowa Fundraiser were unlawful contributions to the Trump Campaign, and were also improper related party transactions. (*Id.* ¶¶ 33-60.)

The Foundation also entered into at least six additional unlawful transactions.[3] (*Id.* ¶¶ 61-90, 93, 96, 99.) In 2007, Mr. Trump's private Mar-A-Lago club was sued by the town of Palm Beach. In settlement of the lawsuit, Mr. Trump directed Mr. Weisselberg to have the Foundation pay the $100,000 settlement amount. (*Id.* ¶ 76). This was illegal self-dealing. That the money ultimately went to a charity does not change the analysis. The Foundation was not a party to the lawsuit, so it was improper for Mr. Trump to use Foundation money to settle a Trump business legal obligation. (*Id.* ¶¶ 74-77.)

[3] The Respondents note that the Foundation issued approximately 700 grants from 2007 through 2015, implying that this is evidence that the Attorney General singled out the Foundation improperly. This misses the mark. The Petition alleges that throughout the Foundation's existence, the Board was derelict in its duties, and that on numerous occasions, this dereliction resulted in charitable assets being used for personal benefit. Even if other Foundation grants were made without bestowing improper benefits on Mr. Trump or his businesses, it does not excuse the wrongful conduct and improper transactions identified in the Petition. Moreover, the Attorney General does not concede that the other Foundation grants were legally proper; though the Attorney General does not believe Respondents have met their burden for demonstrating that discovery is necessary in this summary proceeding (*see infra* pp. 35-36), if the Court permits discovery, the Attorney General will review this broader universe of Foundation transactions.

In 2012, Mr. Trump again used Foundation money to pay a Trump business obligation. The Trump National Golf Club in Westchester, New York, was embroiled in a lawsuit brought by an individual who alleged that the golf club and other parties reneged on a million dollar prize the individual claimed to have won in a hole-in-one tournament. (*Id.* ¶¶ 78-83.) Mr. Trump caused the Foundation to auction off a membership to the Trump National Golf Clubs worldwide. (*Id.* ¶ 27-28, 31, 80.) Anyone bidding on the auction through the auction website would have seen the statement on the website that "Proceeds from this item benefit the Donald J. Trump Foundation." (*Id.* ¶ 80, Shiffman Aff. Ex. 37.) This statement was false, because in fact the proceeds – nearly $158,000 – paid the Trump National Golf Club's legal debt to the prize winner. (*Id.* ¶¶ 78-82.)

In 2013, the Foundation issued a $25,000 check to a political organization supporting the re-election of Pamela Bondi for Florida Attorney General. (*Id.* ¶¶ 61-71.) This contribution violated the Internal Revenue Code (the "Code") and the Foundation's certificate of incorporation. (*Id.* ¶ 93.)

Also in 2013, the Foundation paid $5,000 to the DC Preservation League, a charity that played a role in the conversion of the historic Old Post Office in Washington D.C. into what is now the Trump International Hotel. The $5,000 was used to place an advertisement in the program for DC Preservation League's annual gala, not for the Trump Foundation, but for a Trump business, this time the Trump Hotel Collection. (*Id.* ¶¶ 84-86.)

In 2014, while at a charity auction held at Mar-A-Lago, Mr. Trump bid $10,000 on a painting of himself, and then directed the Foundation to pay for it. The Trump Organization hung the painting at the Trump National Doral Miami, a Trump-owned resort. This was

improper self-dealing, since Foundation money was used to buy a painting to decorate a Trump business property. (*Id.* ¶¶ 87-88.)

In 2015, the Foundation paid $32,000 to a land preservation organization that manages part of the land owned by Seven Springs, LLC, a private property in Westchester used for recreation by the Trump family. This, again, was illegal self-dealing, since the Foundation money was used for the benefit of the Trump family. (*Id.* ¶¶ 89-90.)

After the Attorney General's investigation began, and, in the case of the Bondi payment, after press reports appeared, Mr. Trump or the Trump organization reimbursed the Foundation for each of these transactions (except those related to the Iowa Fundraiser). (*Id.* ¶¶ 77, 83, 86, 88, 90.) In addition, the Foundation filed IRS Form 4720s – which are the forms private foundations use to pay excise taxes for a variety of Code violations, including for self-dealing and political activity – and paid applicable excise taxes to the IRS for each of the transactions except those that occurred in 2012 or before and those related to the Iowa Fundraiser. (*Id.* ¶¶ 71, 86, 88.)

ARGUMENT

On a motion to dismiss, "the pleading is to be afforded a liberal construction," and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This standard applies to special proceedings. Thus, "[o]n a motion to dismiss pursuant to CPLR 404, the petition is entitled to all favorable inferences, and the motion must be denied if the petitioner states any facts upon which he is prima facie entitled to relief." *Matter of County of Niagara v. Bania*, 6 A.D.3d 1223, 1224 (4th Dep't 2004) (citation omitted). Respondents have failed to satisfy this high burden here.

I. THE FOUNDATION VIOLATED THE LAW BY INTERVENING IN THE 2016 ELECTION AND ENGAGING IN WILLFUL RELATED PARTY TRANSACTIONS WITH THE TRUMP CAMPAIGN.

As alleged in the Petition, in 2016, Mr. Trump and the Trump Campaign, with the acquiescence of the other Foundation Board members, used the Foundation and its charitable assets for the benefit of Mr. Trump's presidential bid. (Pet. ¶¶ 33-60.) From January 2016 through May 2016, the Foundation coordinated extensively with the Trump Campaign to assist Mr. Trump in the Republican primaries by, among other things: (i) working with Campaign staff to set up a website for the Foundation to accept donations from the public in connection with the Iowa Fundraiser; (ii) giving the Campaign control over the disbursement of the Foundation's $2.8 million by allowing the Campaign to determine which grants to make based on what would benefit Mr. Trump's candidacy; and (iii) permitting Mr. Trump and the Campaign to use grants made with Foundation money as a backdrop for political campaign rallies. These allegations clearly state a claim for prohibited political activity and improper related party transactions in violation of the Foundation's Charter, federal tax and campaign finance law, and New York law governing related party transactions. (*Id.* ¶¶ 93, 96, 99-100.) As a result, Respondents' motion to dismiss the claims arising out of this improper political intervention should be denied.

A. THE FOUNDATION ENGAGED IN PROHIBITED POLITICAL ACTIVITY IN CONNECTION WITH THE 2016 PRESIDENTIAL CAMPAIGN.

As set forth in the Petition, New York law, as well as the Foundation's Charter, expressly prohibit the Foundation from: (i) violating Section 501(c)(3) of the Code by "participating or intervening in (including the publication or distribution of statements) any political campaign on behalf of any candidate for public office" (Pet. ¶ 7); or (ii) making expenditures that would subject it to excise taxes under Section 4945 of the Code, which imposes excise taxes for an expenditure – i.e., "any amount paid" – to "influence the outcome of any specific public election." (Pet. ¶ 14; citing EPTL § 8-1.8(a) (5)); *see* 26 U.S.C. § 4945(a) & (d)(2). The Code's prohibition on political activity is absolute – there is no such thing as a *de minimis* violation of

this rule.[4] *See* IRS Rev. Rul. 2007-41; s*ee also* 26 U.S.C. § 501(c)(3). In addition, federal election law prohibits corporations from making contributions to a campaign from their general treasury funds in connection with the election of a candidate for federal office. 52 U.S.C. § 30118(a).

Here, the Petition alleges that, in an effort to aid Mr. Trump's candidacy, the Foundation repeatedly made grants at the direction of the Campaign, and permitted the Trump Campaign to not only select the grant recipients but also make the grants the centerpieces of campaign rallies on the eve of the Iowa Republican caucuses to gain maximum political advantage from them. (Pet. ¶¶ 40-60, 93, 100, 107-08.) As a result, these grants constitute expenditures intended to influence an election, in violation of the Code, federal election law, New York law, and the Foundation's Charter. 26 U.S.C. § 4945(a) & (d)(2); EPTL § 8-1.8(a)(5)); 52 U.S.C. § 30118(a).

Along with the grants themselves, the giant presentation copies of Foundation checks emblazoned with the Trump Campaign slogan "Make America Great Again" and "Trump Foundation" handed out by Mr. Trump at campaign rallies constituted the Foundation's express advocacy of Mr. Trump's candidacy. As such, they provide additional grounds for a determination that the Foundation violated the prohibition on political intervention by not-for-profit organizations. *See* IRS Rev. Rul. 2004-06 (A communication that "explicitly advocates the election or defeat of an individual to public office" unquestionably is political campaign activity); IRS Pub. 1828, at 7 (Rev. 8-2015) ("statements of position . . . made by or on behalf of the organization in favor of . . . any candidate for public office clearly violate the prohibition against political campaign activity"); *see also* IRS Priv. Ltr. Rul. 201224034 (June 8, 2012) (when a tax-exempt organization was founded and controlled by a political figure who recently ran for office, the organization's activities that "coincide with [the founder's] political interests"

[4] If the IRS determines that a not-for-profit organization engaged in political activity, it may revoke the organization's tax-exemption or impose excise taxes, or both. *See, e.g.*, IRS Technical Advice Memorandum ("TAM"), TAM 200437040.

were political activity); 11 C.F.R. § 100.22(a) (under the federal election law, express advocacy includes "communications of campaign slogan(s)" which in context "can have no other reasonable meaning than to urge the election or defeat of a candidate").

The Attorney General's allegations are also supported by the Federal Election Campaign Act (the federal election law), which classifies transactions such as the Foundation's as campaign contributions. Under the federal election law, an expenditure made in coordination with a candidate or authorized committee is an in-kind contribution to that candidate or committee (and must be reported as an expenditure made by that candidate or committee). 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20. An expenditure is "any payment, distribution . . . or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office," whether it is paid directly to the candidate's campaign, or indirectly to a third party. 52 U.S.C. § 30101(9). The phrase "anything of value" is construed broadly, and includes goods or services provided without charge or at less than the usual and normal charge. 11 C.F.R. §§ 100.52(d)(1), 100.11(e)(1).

The Federal Election Commission has analyzed when a charitable fundraiser and donations to a charitable organization qualify as campaign contributions. In an Advisory Opinion, the FEC stated that "[i]f the event and the activities surrounding it are, in reality, for the purpose of influencing [the candidate's election], then donations for the event from individuals and businesses, both money and in-kind, may be contributions under the [Federal Election Campaign Act] and subject to its limitations and prohibitions." FEC Advisory Op. 1999-34 at 4. The FEC explained that the key questions in determining whether a charitable fundraiser was in fact a political event (meaning that donations would be in in-kind contributions) are whether the candidate's participation is related to his or her candidacy, the timing of the fundraiser in relation to an election, and whether the candidate's campaign committee plays a role in the fundraiser. *Id.* at 5. Here, the answers to each of these questions can only lead to the conclusion that the

distribution of the proceeds from the Iowa Fundraiser were donations from the Foundation to the Campaign. Mr. Trump's participation in the fundraiser was directly related to his candidacy – he organized the fundraiser as a counter-event to the debate before the Iowa caucuses, and the fundraiser had all the hallmarks of a campaign rally, with Trump Campaign staff coordinating the event, which occurred days before the Iowa election. Moreover, the Trump Campaign was given complete control over the distribution of grants from the proceeds of the Iowa Fundraiser. The Trump Campaign not only chose the recipients, but also publicized them heavily at Trump Campaign rallies, including the rallies in Iowa on the eve of the 2016 Iowa caucuses. (Pet. ¶¶ 40-57.) These contributions of the Foundation's assets to Mr. Trump's Campaign violated Section 501(c)(3), the Foundation's Charter and federal election law. (Pet. ¶¶ 93, 105-09.)

In an attempt to avoid liability for these clear violations of law, Respondents try to turn into a defense the fact that the Foundation was dominated by Mr. Trump without any controls from the other nominal directors. Respondents argue that Mr. Trump was acting in his individual capacity when he appeared at Campaign rallies to disburse the Foundation's assets and that, as a result, the Foundation cannot be held responsible for his actions. They also ask the Court to disregard the giant checks that included the Foundation's name and the Campaign's political slogan. (Memorandum of Law in Support of Respondents' Motion to Dismiss ("R. Mem.") at 18-19.) Neither argument has any merit.

The Foundation cannot conveniently distance itself from these unlawful transactions. Respondents concede, as they must, that the Iowa Fundraiser was a political event organized by the Trump Campaign. (R. Mem. at 17, citing Pet. ¶¶ 36, 113.) They also concede that the rallies at which grants were made were campaign events. (R. Mem. at 19.) As such, the participation by the Foundation in the Fundraiser and the subsequent disbursements were improper political activities.

The Petition more than adequately alleges such improper participation, contrary to Respondents' "passive recipient" argument. As the Petition lays out, Foundation staff and the Individual Respondents worked with Campaign staff to set up a website that, in its very name – www.DonaldTrumpforVets.com – promoted a political candidate; they publicized the event and solicited donations through social media; and they worked hand in glove with the Campaign to disburse grants to the recipients chosen by the Campaign. (*Id.* at ¶ 33; Shiffman Aff. Exs. 11-13, 15-21, 24-27.) Issuing a grant is not a passive activity – it is an action taken by the Foundation and, in fact, it is the primary activity undertaken by non-operating foundations such as the Trump Foundation.[5] In addition, Mr. Trump, the Foundation president, then running for President of the United States, personally presented the Foundation checks and took credit for the grants at Trump Campaign rallies. (Pet. ¶¶ 49-58); *see* Priv. Ltr. Rul. 201020021 (if appearing in individual capacity, official cannot "in any way utilize the organization's financial resources, facilities, or personnel, and [must] clearly and unambiguously indicate that the actions taken or the statements made are those of the individuals, and not of the organization"); *cf.* IRS Rev. Rul. 2007-41, at 4, Sit. 5 (Minister was not acting as a church representative where, among other things, he did not use the church's assets in connection with his appearance). As the Petition alleges, Mr. Trump was the sole decision maker for the Foundation and signed every single check it ever issued, including the checks handed out at his campaign rallies. (Pet. ¶¶ 27, 57.) The money distributed at the rallies came from the Foundation's bank account holding its charitable assets, with Trump Foundation personnel assisting in the process.[6] (*Id.* ¶¶ 40-48); *see* Priv. Ltr. Rul. 201020021 (May 21, 2010) (even if the assets of the organization were donated,

[5] Indeed, in its annual filings with the IRS and Attorney General in 2016, the Trump Foundation stated that it issued over $3 million in grants in 2016, identifying each grant made with the proceeds from the Iowa Fundraiser (as well as several other grants). (Shiffman Aff. Ex. 3 at Part XV.)

[6] The Foundation did not have paid employees. It used the services of Trump Organization personnel to carry out its activities. (Pet. ¶¶ 27-28.) The Foundation referred to these employees as "Foundation staff" in sworn documents filed with the IRS. (Shiffman Aff. Ex. 41 at 18 (in which Respondents asserted that the "Foundation staff" responsible for assisting with the grants received training after the Foundation made a political contribution to the re-election committee for Pam Bondi).)

they become the assets of the organization and cannot be used to intervene in political campaigns).

Contrary to Respondents' argument, the Petition's claims are not premised on Mr. Trump simply raising money for charity when he was a political candidate. If Mr. Trump, for example, had requested that donations be made to a recognized third-party charity and left it to that charity to disburse the funds, no laws would have been violated.[7] But Mr. Trump did something very different: he solicited donations that went directly into his Foundation and then gave his Campaign authority to control the donated funds, which were ultimately distributed in a manner designed to help Mr. Trump's presidential bid. The Trump Campaign manager and staff, not the Foundation's Board, chose the recipients of the Foundation's grants, and used the grants to garner positive media attention to the Campaign, including by having Mr. Trump disburse several $100,000 grants at Campaign events on the eve of the crucial Iowa caucuses. (*Id.* ¶¶ 40-57.) These allegations fit squarely within Section 4945's prohibition on expenditures made to influence the outcome of an election.

Moreover, the grants made from the proceeds of the Iowa Fundraiser also constituted illegal activity by the Foundation because they violated the federal election law's prohibition on corporations—including not-for-profit corporations—from making expenditures in coordination with a political campaign in order to influence an election for federal office. *See* 52 U.S.C. § 30116(a)(7)(B)(i) (coordinated expenditures are considered to be in-kind contributions); 11 C.F.R. § 109.20 (same); 52 U.S.C. § 30101(17)(B) (a disbursement is "coordinated" if it is "made in concert or cooperation with or at the request or suggestion of" the candidate or his campaign); 11 C.F.R. § 109.20(a) (same); 52 U.S.C. § 30118(a) (prohibiting corporations from making contributions from their general treasury funds); *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 153-63 (2003) (upholding prohibition on not-for-profit corporations making direct

[7] However, Mr. Trump could not have used the fundraiser, as he did here, "as an opportunity" for the speakers "to make reference to" and "discuss the campaign." FEC Advisory Opinion 1999-34, p.6 (Dec. 20, 1999).

political contributions). Here, the Petition clearly alleges that the Foundation issued grants in coordination with the Trump Campaign.

B. THE DISTRIBUTIONS FROM THE IOWA FUNDRAISER WERE RELATED PARTY TRANSACTIONS IN VIOLATION OF N-PCL SECTION 715 AND EPTL SECTION 8-1.9.

As the Petition alleges, when the Trump Foundation gave the Trump Campaign control over $2.8 million that was donated to the Foundation, it not only engaged in impermissible political activity, it also engaged in a series of improper related party transactions under New York Law. (Pet. ¶¶ 58-60, 100.) Under the N-PCL and EPTL, [8] a "related party transaction" is any transaction, agreement or other arrangement, in which a related party has a financial interest and in which the corporation is a participant. N-PCL § 102(a)(24); *see also*, EPTL § 8-1.9(a)(8). A "related party" is "any director, officer or key person of the corporation" and any relative of such a person. N-PCL § 102(a)(23); *see also* EPTL § 8-1.9(a)(6). The N-PCL and EPTL prohibit the Foundation from entering into a related party transaction without complying with N-PCL § 715 and EPTL § 8-1.9, which require that the Board take certain affirmative actions to ensure that the transaction is in the best interests of the charity. N-PCL § 715(b); EPTL § 8-1.9(c)(2).

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[8] The relevant sections of the EPTL are parallel to those in the N-PCL, with the EPTL applying to "trusts" and the "trustees" thereof, and the N-PCL applying to "corporations" and the "directors, officers, or key persons" thereof. Both sets of terms apply here. *See* EPTL § 8-1.8 (defining a private foundation as a "trust").

The sections on related party transactions were revised in both statutes in 2014 to reflect the Legislature's interest in underscoring the importance of board scrutiny of such transactions, and to grant the Attorney General greater enforcement authority over improper related party transactions. *See New York State Senate Introducer's Memorandum in Support*, reprinted in Bill Jacket for ch. 549 (2013), at 11 ("This bill strengthens New York law to enhance governance and accountability by setting forth clearer expectations of board duties in key areas, such as providing financial oversight. It also includes new provisions to limit and, when necessary, remedy self-dealing."); *see also Leadership Committee for Nonprofit Revitalization*, February 16, 2012, at 26. Available at https://on.ny.gov/2O6ujHk ("Central to maintaining trust in the charitable sector is public confidence that insiders are not exploiting their positions for personal gain. … Nonprofits that operate in the public interest and act as stewards of public contributions must maintain ongoing vigilance against misappropriation of charitable assets. … Transactions that directly or indirectly benefit officers, directors or key employees may create opportunities for self-dealing and abuse. Provisions of relevant statutes should be amended to articulate board oversight responsibilities in connection with such transactions.")

The facts here fit squarely within the prohibition. First, it is undisputed that Mr. Trump was a related party because he was the president of the Foundation. *See* N-PCL § 102(a)(23)(i). Indeed, there was virtually no sense in which the Foundation had an existence independent of Mr. Trump. Second, Mr. Trump had a "financial interest" in the Campaign stemming from his role as the Campaign's principal financial backer during the relevant time period. (Pet. ¶ 59.) At the time of the Iowa Fundraiser, Mr. Trump was a substantial creditor of his Campaign; loaning it over $17 million, and contributing $250,000. (*Id.*); *see generally, First Hill Partners, LLC v. Bluecrest Capital Mgmt. Ltd.*, 52 F. Supp. 3d 625, 642 (S.D.N.Y. 2014) (secured creditor "had a clear financial interest in the business of [the debtor]"); Restatement (Second) of Torts § 769, cmt. a, illus. 1 (lender whose chance of being repaid depends on success of business has a financial interest in business of borrower). By the end of May 2016, Mr. Trump's investment in the Campaign in the form of loans was over $45 million, nearly three times the amount the Campaign had raised from all other sources.

Third, the Foundation engaged in a series of "related party transactions" when it gave the Campaign control over the $2.8 million received by the Foundation from the Iowa Fundraiser. (Pet. ¶¶ 40-57.) As set forth above, under federal law, the Foundation's grant of control to the Campaign was a "contribution" of funds to the Campaign. *See supra* p. 13. In addition, under state law, the Foundation's grant of complete authority to the Campaign to use its charitable assets to further the Campaign's interests by choosing the time, place and manner of the distribution of the proceeds from the Iowa Fundraiser constituted a gift to the Campaign. *See Randall v. McGrath*, 53 A.D.3d 736, 737 (3rd Dep't 2008) (a gift "'vest[s] the donee with control and dominion over the property'" and may involve actual or constructive delivery) (quoting *Matter of Szabo*, 10 N.Y.2d 94 (1961)); *see also Chiaro v. Chiaro*, 213 A.D.2d 369 (2d Dep't 1995) (finding constructive delivery of a gift where the recipient exercised control over property with knowledge of the donor).

Contrary to Respondents' contentions, the benefits bestowed by the Foundation on the Campaign – $2.8 million in campaign contributions and widespread and free media coverage of the Iowa Fundraiser and the Campaign rallies organized to celebrate Mr. Trump's disbursal of the Iowa Fundraiser proceeds – were by no means incidental or intangible. A gift of $2.8 million, which included at least $500,000 disbursed at campaign rallies, is indisputably significant. And the media benefits were also substantial, and quantifiable. These media benefits came in the form of free, extensive coverage of the Iowa Fundraiser itself; indeed, upon walking on the Iowa stage at the fundraiser, Mr. Trump remarked, "Look at all the cameras. Like the Academy Awards. . . . We are actually told that we have more cameras than they do [referring to the media cameras at the Iowa Republican primary debate itself] by quite a bit."[9] The Campaign then organized a series of rallies, which the media also covered, at which Mr. Trump presented oversized checks to groups in the early voting state of Iowa. Far from intangible or incidental, these events had enormous value for the Campaign. MediaQuant, a firm that tracks unpaid media coverage of national political candidates, calculated that Mr. Trump's unpaid media coverage in February 2016 – the month following the January 28 Iowa fundraiser – had a value of $400 million.[10] This free coverage was largely the result of the Foundation allowing itself to be co-opted by the Trump Campaign, which at the time was principally financed by Mr. Trump, the candidate.

C. MR. TRUMP'S PARTICIPATION WAS WILLFUL.

As set forth above, the related party transactions in the Petition involve not just the Iowa Fundraiser itself, but also – and more importantly – the Foundation's gift to the Trump Campaign of the $2.8 million raised through the Iowa Fundraiser, which directly benefitted the Campaign. This resulted in multiple related party transactions involving Mr. Trump's willful

[9] "Donald Trump Veteran Event 1/28/18," Fox 10 Phoenix, available at https://bit.ly/2zLZvmo, quoted statement at 1:42. Last visited October 2, 2018.
[10] Nicholas Confessore and Karen Yourish, *$2 Billion Worth of Free Media for Donald Trump*, N.Y. Times, Mar. 16, 2016.

and intentional conduct, for which the Court should require Mr. Trump to pay "double the amount" of the "benefit improperly obtained" by his Campaign. N-PCL § 715(f)(4); EPTL § 8-1.9(c)(4)(D).

To state a claim that Mr. Trump is liable for double penalties, the Petition must only allege that the related party transactions between the Foundation and the Campaign were the result of deliberate conduct. The N-PCL and EPTL impose a double penalty for "willful and intentional *conduct,*" not for a willful *violation* of the statute.[11] N-PCL § 715(f)(4) (emphasis added); EPTL § 8-1.9(c)(4)(D) (emphasis added) This distinction is an important one – read plainly, a penalty for willful and intentional *conduct* only requires a showing that the actions forming the basis for the violation were deliberate and voluntary, not that they were undertaken with the intent of violating the statute.[12] Indeed, this very distinction was made by the Court of Appeals in one of the cases relied upon by Respondents.

In *People v. Coe*, 71 N.Y.2d 852 (1988), the Court held that liability for "willfully violat[ing]" Public Health Law § 12-b(2) requires a showing of intent to violate the law, and not merely a showing that "the defendant acted deliberately and voluntarily, as opposed to accidentally." The Court reasoned that the statutory provision at issue imposed criminal liability on "[a] person who *willfully violates*" the health laws, thus using "willfully" to modify the word "violates," which immediately follows it. *Id.* at 854. The Court noted that in order to read "willful" as requiring only a showing that the defendant's acts were deliberate and voluntary, the

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[11] In contrast, in the New York cases relied upon by Respondents, the term "willfully" modified the word "violates" or other wrongful behavior. *See People v. Alamo Rent A Car*, 174 Misc.2d 501 (Sup. Ct. N.Y. Cty. 1997) (interpreting "knowing violation"); *People v. Coe*, 71 N.Y.2d 852 (1988) (interpreting "willfully violates"). *Mueller v. Elderwood Health Care at Oakwood*, 31 Misc.3d 1210(A), 2011 WL 1366292 (Sup. Ct. Erie Cty., Apr. 11, 2011) did not involve the interpretation of a statute but rather involved a claim for punitive damages for the "*willful* or reckless *disregard* of the lawful rights" of the plaintiff. *Id.* at *15-*18 (emphases added). The parties had stipulated to the definition of the term "willful" and that definition was not challenged in the opinion cited, in which the defendant sought to set aside the jury's award of punitive damages. *See id.*

[12] Under the other sections of the related party transaction statute, the Attorney General may obtain restitution from the party benefitting from the transaction without any showing of intentional conduct. *See* N-PCL § 715(f)(1) – (3); EPTL § 8-1.9(c)(4)(A) – (C).

statute would have to use "willful" to modify "the manner in which the underlying act was committed." *Id.*

That is this case. Here, the terms "willful and intentional" immediately precede the word "conduct" and not "violates." Thus *Coe* teaches that the drafters intended to impose the penalty if the actions at issue were undertaken deliberately, even if the wrongdoer did not intend to violate the law. This interpretation is consistent not only with the text of the statute but also with its purpose, namely to protect charitable beneficiaries from those who impermissibly benefit from related party transactions. And indeed, *Coe* recognizes that the use of civil, rather than criminal penalties, counsels against imposing the stricter standard of mental culpability that Respondents argue is required. *See id.* at 855 (imposing a high scienter threshold "would . . . be inconsistent with the legislative purpose of protecting the public" by imposing criminal penalties on crimes of a "less serious degree" than felonies). Moreover, as the Court of Appeals explained in *Coe*, even where a higher culpability standard is imposed, there is no requirement that a party show that the wrongdoer "knew she was violating a *specific* statute or regulation." *Id.* (emphasis added). "Rather, the People were required to show only that defendant was aware that her conduct was illegal." *Id.*

The federal cases relied upon by Respondents for the proposition that willfulness requires an "intent to violate a known legal duty" (R. Mem. at 10-11 (quoting *United States v. Kupfer*, 792 F.3d 1226, 1228-30 (10th Cir. 2015)) are inapposite because they all involved criminal liability, not civil penalties as is the case here.[13] The interpretation of the term "willful" in these criminal cases has no applicability to civil cases such as this one. *See Safeco Ins. Co. of America v. Burr.*, 551 U.S. 47, 60 & n. 9 (2007) (contrasting the meaning of "willfully" in civil and criminal cases). Indeed, in *Safeco*, the Supreme Court explained that in civil cases, the term "willfully" does not require the knowing violation of a statutory duty, but rather can be satisfied

[13] *See also Cheek v. United States*, 498 U.S. 192 (1991) (criminal tax evasion); *Marinello v. United States*, 138 S. Ct. 1101 (2018) (criminal interference with an IRS proceeding).

by a lesser mental state. *Id.* at 56-60 & n. 9 (pointing out that the term willful is a "word of many meanings whose construction is often dependent on the context in which it appears" (citation omitted)); *see also Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1271-72 (11th Cir. 2015).

Here, the Petition adequately alleges that Mr. Trump engaged in willful and intentional conduct. The Petition sets forth numerous examples demonstrating that Mr. Trump acted deliberately and with full knowledge that the Foundation's assets were being donated to his presidential Campaign to use at his campaign rallies, such as his signing the checks issuing the grants and personally distributing the enlarged presentation copies of the checks at the rallies. (*See, e.g.,* Pet. ¶¶ 33, 40, 49-60, 100). The Petition's allegations would also satisfy the heightened scienter standard set forth in *Coe*, which would require allegations that Mr. Trump knew that the Foundation's assets could not be used for his benefit, but not necessarily that he knew the specific statutory section being violated. *See Coe*, 71 N.Y.2d at 855. Here, the Petition satisfies this standard because, among other things, it alleges: (i) that Mr. Trump signed documents under penalty of perjury stating that the Foundation's assets could not be used for the benefit of any officer or director and could not be used to intervene in a political election; and (ii) was aware of the prohibition against using the Foundation's assets to intervene in an election because he campaigned for the repeal of that prohibition. (Pet. ¶¶ 7, 60.)

II. THE NYAG HAS SUFFICIENTLY ALLEGED AND SUPPORTED CLAIMS FOR WASTE.

Section 720 of the N-PCL authorizes the Attorney General to bring an action against an officer or director to compel the "defendant to account for his official conduct in . . . . [t]he acquisition by himself, transfer to others, *loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties*." N-PCL § 720 (emphasis added). Contrary to Respondents' argument, this statutory language is not limited to losses arising out of self-enrichment, but covers any loss to a not-for-profit organization resulting from the failure of

an officer or director to fulfill their duties. Indeed, courts have repeatedly made clear that "[t]he essence of a waste claim is the diversion of corporate assets for improper or unnecessary purposes." *SantiEsteban v. Crowder*, 92 A.D.3d 544, 546 (1st Dep't 2012) (quoting *Aronoff v. Albanese,* 85 A.D.2d 3, 5 (2d Dep't 1982)). *See also People v. James*, 39 Misc.3d 1206(A), 2013 WL 1390877, *4-*5 (Sup. Ct. N.Y. Cty. Apr. 3, 2013) (sustaining claims of loss and waste, based on, among other things, the improper use of charitable assets to repair the charity's building in violation of the terms of a restricted fund that limited the use of those funds to other charitable purposes).

Here, the Petition alleges numerous transactions that constituted waste – i.e., "the use of charitable assets for improper or unnecessary purposes." The claims for waste arise out of the improper use of the Foundation's assets to settle debts or otherwise benefit Mr. Trump and the companies he controlled and to intervene in the presidential election. (Pet. ¶¶ 57-59, 61-90, 93-94, 96-97.) Respondents argue that these transactions do not constitute waste because – with the exception of the donation to the Pam Bondi's campaign – the funds all made their way to charitable organizations. This argument ignores the fact that in each instance the money being disbursed would not have been disbursed but for an improper purpose. For example, with respect to the Mar-A-Lago and Greenberg Transactions, the grants were made in order to settle legal obligations of Mr. Trump and for-profit companies he controlled. The real beneficiary of the transactions was Mr. Trump and his companies, who were relieved of the obligation to pay hundreds of thousands of dollars that they were legally obligated to pay.

The same logic applies to the use of the Foundation's charitable assets to aid the Trump Campaign. The fact that the distributions also benefitted charitable organizations does not change the fact that Mr. Trump, a party with complete control of the Foundation, instructed the Foundation to, essentially, convert tax-exempt charitable contributions (of other people's money) into campaign funds that the Campaign then used to make grants that were targeted to help Mr.

Trump's electoral bid. This constituted waste for two related reasons: (i) it was improper to use Foundation assets to make a contribution to the Campaign (or to any other organization that was not tax-exempt); and (ii) it was improper to use Foundation assets to intervene in an election illegally. In addition, giving control to the Campaign over the Foundation's assets deprived the Foundation of the opportunity to make grants from the proceeds of the Iowa Fundraiser to veterans groups that were chosen on the basis of independent objective criteria, untainted by improper influence of the Trump Campaign. This constituted waste because the distributions were motivated by Mr. Trump's breach of his fiduciary duty of loyalty – i.e., putting his own interests above that of the Foundation's – and the other Individual Respondents' breach of their fiduciary duty of care by failing to ensure that the Foundation's assets are used properly.

III. THE PETITION STATES A CLAIM FOR DISSOLUTION OF THE FOUNDATION AND BARS ON THE INDIVIDUAL RESPONDENTS.

A. THE PETITION STATES A CLAIM FOR DISSOLUTION BASED ON THE FOUNDATION'S PERSISTENT ILLEGALITY AND ACTING BEYOND ITS CHARTER.

The Petition clearly sets forth facts supporting its claims for dissolution under N-PCL 1101(a)(2) and 1102(a)(2).[14] NPCL §§ 1101(a)(2) authorizes a claim for judicial dissolution by the Attorney General when "the corporation has exceeded the authority conferred upon it by law, or has . . . carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to public policy of the state has become liable to be dissolved." N-PCL § 1102(a)(2). Here, as set forth in the Petition, dissolution is warranted for several reasons. (*See* Pet. ¶¶ 105-16.) First, dissolution is required because the Foundation "exceeded the authority conferred on it by law" when it impermissibly intervened in the 2016 election in violation of its Charter, the Code and federal election law. Further, dissolution is also warranted because the Foundation transacted its business in a persistently illegal manner. The

[14] Without waiver, Petitioners address Respondents' motion to dismiss the dissolution claim even though Respondents move to dismiss the claim for dissolution but do not assert that the Petition fails to state a claim for dissolution. (R. Mem. at 31.)

"persistence" standard is met in this case, where the Attorney General has alleged repeated and serious wrongful conduct, including substantial and pervasive governance failures, repeated related party transactions, and improper political intervention in violation of the Foundation's own charter, as well as state and federal law. *See, e.g. State of New York v. Princess Prestige Co.*, 42 N.Y.2d 104 (1977) (16 complaints out of 3600 transactions); *Matter of People of State of N.Y. v. Veleanu*, 89 A.D.3d 950 (2d Dep't 2011) (sale of "several items" over an approximately two year period was sufficient); *People v. CSA-Credit Solutions of America, Inc.*, 2012 N.Y. Slip Op. 31170(U), 2012 WL 1577961, at *5 (Sup. Ct. N.Y. Cty. Apr. 30, 2012) (finding that to show repeated fraudulent or illegal conduct "a large percentage of violations is not necessary"); *People v. Dell, Inc.*, 21 Misc. 3d 1110 (A), 2008 WL 4531525 (Sup. Ct. Albany Cty. May 23, 2008) (complaints representing less than .01% of total sales sufficient to establish repeated conduct). Moreover, the fact that the Foundation also made grants that were not tainted by conflicts is not a defense. *See e.g.*, S*tate of New York v. Midland Equities of N.Y.,* 117 Misc. 2d 203, 207 (Sup. Ct. N.Y. Cty. 1982) (violations are not excused by "the existence of satisfied customers"); *F.T.C. v. Crescent Pub. Group Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001) (same).

Based on the same factual predicates, the Petition clearly sets forth a claim under N-PCL § 1102(a)(2), which permits the Attorney General, assuming the rights of a director, to bring a claim for dissolution in cases where "the directors … in control of the corporation have looted or wasted the corporate assets, have perpetuated the corporation solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner." N-PCL § 1102(a)(2)(D). Here, the Attorney General has clearly alleged waste and use of the corporation for personal and political benefit. The Foundation should be dissolved under judicial supervision to ensure the proper distribution of its assets and to underscore the interest of the public in the proper administration of charitable assets. *See* N-PCL § 1109, *see generally James*, 2013 WL 1390877,

*4-*5 (Discussing the "significant public interest in the management and affairs of not-for-profit corporations.") (citations omitted)).

B. THE PETITION'S CLAIMS ARE NOT MOOT.

Respondents announced in December 2016 their intention to dissolve the Foundation, without acknowledging or accepting any responsibility for their conduct. But this public pronouncement and the alleged cessation of the wrongful conduct, which came months after this investigation was initiated, does not permit Respondents to evade judgment. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e. does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of challenged practices. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.") (citations omitted); *see also, Mhany Mgmt. v. County of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) ("party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.") (quotation marks and citations omitted); *Matter of Puerto v. Doar*, 142 A.D.3d 34 (1st Dep't 2016) (case is not rendered moot by defendants' remedial actions after the action was commenced); *People v. ELRAC*, 192 Misc. 2d 78 (Sup. Ct. N.Y. Cty. 2002) ("voluntary cessation of unlawful activity does not obviate the need for, or propriety of, an injunction"); *Matter of People v. Therapeutic Hypnosis*, 83 Misc. 2d 1068, 1070 (Sup. Ct. Albany Cty. 1975) ("A petition does not fail to state a cause of action because the respondent may have discontinued the practices complained of...."); *Matter of State of New York v. Hotel Waldorf-Astoria Corp.*, 67 Misc. 2d 90, 91-92 (Sup. Ct. N.Y. Cty. 1971) (Attorney General entitled to relief for respondent's persistently fraudulent and illegal conduct even though respondent discontinued the conduct after an inquiry by the Attorney General).[15]

[15] The Respondents make a related argument, that all causes of action related to six self-dealing transactions (*see* Pet. ¶¶ 61-90, defined by Respondents as the "Individual Donations") should be dismissed as moot on the ground

Respondents' argument that the claims for injunctive relief should be dismissed because the Foundation has already been reimbursed for the Individual Donations is similarly lacking in merit. The Respondents have not cited any cases holding that injunctive claims should be dismissed if monetary reimbursements have been paid. *SOS Oil Corp. v. Norstar Bank of Long Island*, the only case Respondents cite, stands for the unremarkable conclusion that plaintiffs are entitled to but a single recovery of an unpaid liability. *SOS Oil Corp. v. Norstar Bank of Long Island*, 152 A.D.2d 223, 228 (2d Dep't 1989). But courts routinely permit plaintiffs' claims for injunctive relief to continue even after defendants voluntarily make amends monetarily, especially where questions of public importance and significance are raised. *Matter of Jones v. Berman*, 37 N.Y.2d 42, 57 (1975) (claim for declaratory judgment not rendered moot by defendant's payment of benefits sought by plaintiffs); *ELRAC,* 192 Misc. 2d at 84 (insurer's voluntary agreement to cease denying insurance benefits does not obviate need for, and propriety of, an injunction.); *Martin A. v. Gross*, 153 A.D.2d 812 (1st Dep't 1989) (dismissal for mootness not appropriate where injunction was sought against social service agencies that denied benefits though agencies had begun providing services). Respondents' reimbursements do not afford complete remedies – they do not obviate the need for bars on future service by the Individual Respondents or for dissolution of the Foundation – and therefore do not render moot the relief sought by the Attorney General in this proceeding.

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that the Attorney General "fails to state a claim for monetary relief because, in an abundance of caution, the Foundation was reimbursed and all excise taxes were already paid." This argument rests on a misrepresentation of the Attorney General's claims, because the Attorney General does not seek money damages or restitution already paid by the Respondents. The Petition expressly states that Mr. Trump is liable "*to the extent not already paid,* [to] pay the Foundation the value of charitable assets used in such transactions; [and to] return assets lost to the Foundation as a result of the transactions, *to the extent not already returned.*" (Pet. ¶ 101.) Rather, the Attorney General seeks restitution for the $2.8 million in charitable assets disbursed by the Foundation for the benefit of the Trump Campaign, and, in addition, the Attorney General seeks, under N-PCL § 715(f) and EPTL § 8-1.9(c), both in effect since July 1, 2014, an order requiring Mr. Trump to pay a penalty for willful and intentional conduct, in an amount up to double the value of transactions that occurred after July 1, 2014 – the Seven Springs Transaction and the expenditures on behalf of the Trump Campaign.

IV. THE PETITION'S CLAIMS FOR BARS ON FIDUCIARY SERVICE BASED ON WASTE, IMPROPER RELATED PARTY TRANSACTIONS, AND FAILURE TO PERFORM FIDUCIARY RESPONSIBILITIES ARE SUPPORTED BY EXISTING LAW.

In seeking dismissal, Respondents acknowledge that the injunctive relief of a bar on service as a fiduciary is appropriate where a director "has demonstrated that 'he does not understand, and is likely not to follow, the obligations required of a director of a not-for-profit corporation and cannot be trusted with those obligations in any future role." (R. Mem. at 31 (quoting *Schneiderman v. Lower Esopus River Watch, Inc.*, 39 Misc.3d 1241(A), 2013 WL 3014915, at *27 (Sup. Ct. Ulster Cty. April 8, 2013) ("LERW").) As the *LERW* case makes clear, the injunctive relief of a bar is appropriate where, as here, directors do not understand their fiduciary duties and cannot be trusted to fulfill those duties in the future, and does not, as Respondents assert, solely apply where they use charitable funds to buy luxury items. *See LERW*, 2013 WL 3014915 at *27. Moreover, although it is not a prerequisite to a bar, contrary to Respondents' argument, the Petition here does allege personal enrichment – i.e., the use of the Foundation's assets to benefit Mr. Trump and entities in which he had a financial interest. Finally, as set forth in more detail below, there is no merit to the argument that the Foundation is being singled out for political reasons; the Respondents' conduct here fits squarely within the types of cases for which injunctive relief is required and with respect to which the Attorney General has obtained such relief in the past.[16]

The EPTL and N-PCL Provide Grounds for Bars On Individual Respondents' Future Service As Fiduciaries.

Included in the relief available to the Attorney General pursuant to EPTL § 8-1.4(m) is injunctive relief against trustees, such as the Individual Respondents, who fail to administer not-for-profit entities and their assets properly. *See, e.g.*, *People v. Westchester County S.P.C.C.*, 198

[16] As is exemplified by the matters cited in the text below, cases such as this one are typically settled with the trustees paying restitution, taking responsibility for their actions by admitting their wrongdoing and agreeing to bars on future board service. Litigation was necessary here because Respondents made clear that they would never voluntarily agree to take responsibility for their actions, make anything other than token restitution or agree to bars.

A.D.2d 484, 486 (2d Dep't 1993) (affirming decision enjoining defendant from serving as officer, director, or agent of any society for prevention of cruelty to children); *LERW*, 2013 WL 3014915, *27 (issuing injunction on future service as fiduciary pursuant to EPTL § 8-1.4). A bar is also appropriate pursuant to the N-PCL. *See* N-PCL § 112(10) (Attorney General may seek "other appropriate remedies, in law or equity" for violations of the prohibition on related party transactions); *see also* N-PCL § 706(d) (authorizing the removal and bar of directors from an organization).

A ten-year bar is appropriate for Mr. Trump who, as set forth in detail above and in the Petition, ignored the legal requirements applicable to not-for-profit organizations and not only used the Foundation for his own personal benefit, but also caused it to violate state and federal law and put its tax-exempt status in jeopardy. The violations alleged in the Petition were numerous and flagrant: (i) the Foundation's Board went almost two decades without meeting; (ii) the Foundation solicited contributions without registering to do so; (iii) the Foundation entered into related party transactions without any evaluation by anyone other than Mr. Trump (who benefitted from the transactions through entities he controlled), let alone any disinterested directors; and (iv) the Foundation engaged in impermissible political activity, in violation of the Code and federal election law, as well as its own Charter and state law, making millions of dollars of expenditures to aid Mr. Trump in his presidential bid.

Although Mr. Trump directed these activities, there was no check on his decisions because the remaining Board members completely abdicated their duties to oversee the Foundation's affairs. Because they have demonstrated that they neither understood nor made any attempt to fulfill their fiduciary duties as directors, the remaining Individual Respondents should be barred from future service as fiduciaries of not-for-profit organizations operating in New

York for a period of one-year, subject to suspension of the bar upon completion of training on board service approved by the Attorney General.[17]

There is ample precedent for the injunctive remedy sought by the Attorney General. The Individual Respondents' conduct here is analogous to the conduct of other fiduciaries that received bars either after litigation or in Assurances of Discontinuance ("AODs") and other settlements obtained by the Attorney General in lieu of proceeding with litigation.

The Attorney General's recent settlement with the trustees of the Richenthal Foundation, a private foundation, is particularly comparable. (Farber Aff., Ex. 1.) In that case, David Richenthal, the foundation's executive director, caused the foundation to enter into a number of impermissible related-party transactions, including, as Mr. Trump did here, by using the foundation's assets to settle litigation having nothing to do with the foundation. (Richenthal AOD ¶¶ 19-20.) Mr. Richenthal was able to misuse the foundation's assets because, as also happened here, the foundation did not have adequate controls in place and the other members of its board failed to exercise sufficient oversight over him. (*Id.* ¶¶ 21-22.) In the AOD reached with Mr. Richenthal and the foundation, the Respondents admitted the Attorney General's findings and Mr. Richenthal was permanently barred from serving as an officer, director, trustee or in any position where he has fiduciary responsibility over charitable assets. (*Id.* ¶¶ 23, 25(b).) The other trustees, one of whom failed to adequately oversee Mr. Richenthal but in other respects (such as in overseeing the investment of the Foundation's assets) did take his responsibilities seriously, were permitted to continue as trustees only if they completed a training program on their fiduciary duties. (*Id.* ¶ 26(a)(i); *see also id.* ¶ 26(a)(ii) (imposing other injunctive relief).)

The bars imposed on the trustees of the Perley Foundation and the Homeland Foundation are similarly instructive. (Farber Aff., Exs. 2-3.) Perley was a private foundation of a similar

[17] Despite the Court's urging at the June 26, 2018 conference, Mr. Trump's children have refused to agree to a bar of any length, nor have they made any reasonable proposal with respect to completing board service training.

size to the Foundation here and, during the relevant time period, had five trustees, including a rabbi, a priest and a minister. (Perley AOD ¶¶ 2, 4-8.) The two trustees who were not ordained caused the foundation to enter into a series of impermissible transactions from which they benefitted. (*Id.* ¶¶ 3, 11-15.) The clergy trustees did not benefit in any way from the impermissible transactions, but failed to exercise adequate oversight over the foundation by, among other things, failing to ensure that meetings were held regularly and minutes were kept. (*Id.* ¶¶ 16, 20-21.) In the AOD with the foundation, the trustee who personally benefited from the related party transactions was permanently barred from board service,[18] while the clergy trustees were each barred for three years (and could only serve on a board after three years if they obtained training). (*Id.* ¶¶ 26 - 28.)

In the Homeland Foundation matter, the board of trustees were barred from future fiduciary service and paid restitution for grants that went to bona fide charities and did not, for the most part, financially benefit the trustees. The grants were nevertheless impermissible because they violated the terms of a restricted fund and, like here, the decision-making process was tainted by conflicts of interest. (Homeland AOD ¶¶ 14-19.) Unlike the Trump Foundation, Homeland's board met regularly. Although Homeland's chairman, who had the most significant conflicts, had died by the time the AOD was entered into, his widow, who succeeded him as the Board chair and personally engaged in wrongdoing, received a five-year bar on future service as a fiduciary. (*Id.* ¶¶ 23-35, 45). The other trustees, whose liability was primarily based on their breach of the duty of care, received bars ranging from permanent bars that could be lifted after three years if the trustee received training to the same bars sought for the Trump children here – bars of one year to be suspended if the trustees received training. (*Id.* ¶ 46-48.) As a condition of the settlement, each of the trustees also admitted the Attorney General's findings. (*Id.* at p. 11.) And instructive for this case, the Homeland trustees were also required to pay restitution for

[18] One of the trustees that benefitted personally from the transactions died before the settlement was reached.

the grants made by improperly invading the restricted funds despite the fact that the grants went to bona fide charitable institutions. (*Id.* ¶¶ 18-19, 36.)

As these recent examples demonstrate, the injunctive relief sought by the Attorney General here is the same type of relief sought from directors and officers who did not have high profiles. *See also* Farber Aff. Ex. 4, *In the Matter of the Investigation of Rivington House Health Care Facility*, AOD No. 17-209, ¶¶ 13, 21-28, 36 (imposing a five-year ban on directors that failed to understand or perform their duties to oversee the organization). Indeed, the bars sought here fit squarely within the relief obtained in similar cases where the trustees have failed to fulfill their responsibility to oversee the proper administration of charitable assets entrusted to their care. Here, the combination of improper related party transactions, complete and total governance failures and illegal political intervention reveals that the Board not only failed to understand their duties in administering the charitable assets entrusted to their care but also that, at least until they obtain training, the Individual Respondents cannot be trusted to fulfill those duties in the future. As a result, the motion to dismiss the claims for injunctive relief should be denied in its entirety.

V. THE PETITION'S CLAIMS ARE WITHIN THE LIMITATIONS PERIOD ESTABLISHED BY LAW.

The Attorney General has set forth well-pled allegations of continuous misconduct and repeated self-dealing transactions that fall well within the applicable statutes of limitation. The Attorney General seeks equitable relief, including an injunction on fiduciary service by the Individual Respondents, restitution and a declaration that the Foundation transacted its business in a persistently fraudulent or illegal manner and abused its powers contrary to the public policy of this state, and judicial dissolution under N-PCL Article 11. As Respondents acknowledge, claims for equitable relief arising out of Respondents' misconduct, self-dealing and breaches of fiduciary duty are governed by the six-year limitations period of CPLR § 213(1). *Loengard v. Santa Fe Indus.*, 70 N.Y.2d 262, 267 (1987).

The allegations in the Petition principally focus on conduct occurring in the six years prior to filing, but also refer to continuous conduct that began before the six-year period, as well as two self-dealing transactions that occurred before the start of the period and that came about because of the Respondents' wrongful conduct. All of the allegations are timely for several reasons. First, under the continuing wrong doctrine, where a party's wrongful conduct is continuous, injunctive relief is not barred because six years have lapsed since the first instance of wrongdoing (or, in the case of monetary relief, because three years have lapsed). *Garron v. Bristol House, Inc.*162 A.D.3d 857, 858-59 (2d Dep't 2018) (continuing wrong doctrine tolls limitations period to the date of last wrongful act.). The doctrine applies to violations of fiduciary duties and to statutory violations. *Butler v. Gibbons*, 173 A.D.2d 352 (1st Dep't 1991) (corporate director's statute of limitations defense rejected because breach of fiduciary duties constituted a continuing wrong); *Samuelsen v. New York City Tr. Auth.*, N.Y. Slip Op. 31343 (U), 2011 WL 2138250 (Sup. Ct. N.Y. Cty. May 16, 2011) (tolling the limitation period on claims under Public Authorities Law § 1201 *et seq.*), *rev'd on other grounds*, 101 A.D.3d 537 (1st Dep't 2012); *Matter of Levy v. State*, 18 Misc. 3d 519, 521-22 (Sup. Ct. Alb. Cty. 2007) (continuing violation of Civil Service Law); *State v. New York Movers Tariff Bureau, Inc.*, 48 Misc. 2d 225, 250 (Sup. Ct. N.Y. Cty. 1965) (continuing violations of Donnelly Act).

Here, the Respondents were in continuing violation of Article 7 of the N-PCL and provisions of the EPTL because the Individual Respondents were in breach of their fiduciary duties throughout the period dating back at least to September 11, 2007, the date of the Mar-A-Lago Transaction, the earliest self-dealing transaction alleged in the Petition. The Individual Respondents' continuing dereliction of duty includes Mr. Trump's arrogation to himself from the Board all decision-making authority and control of finances, his use of the Foundation for his own benefit, the Individual Respondents' continuous failure to hold Board meetings to review

and direct the Foundation's operations and finances over nearly two decades, and the Board's failure to institute controls or policies for the management of the Foundation's assets.

Second, the statute of limitations on a breach of fiduciary duty claim does not begin to run until the fiduciary has openly repudiated the fiduciary relationship or it has been otherwise terminated. *In re Estate of Barabash*, 31 N.Y.2d 76, 80 (1972). This rule applies to actions by the Attorney General acting on behalf of charitable beneficiaries against fiduciaries of not-for-profit corporations. *People ex. rel. Spitzer ex. rel. Ultimate Charitable Beneficiaries v. Ben*, 55 A.D.3d 1306, 1308 (4th Dep't 2008) (rejecting the "contention that the tolling rule with respect to breach of fiduciary duty does not apply to the benefit of the Attorney General (*see* N–PCL §§ 112, 720)"); *Westchester Religious Institute v. Kamerman*, 262 A.D.2d 131, 132 (1st Dep't 1999) (applying tolling rule to breach of fiduciary duty by officers of a non-for-profit corporation); *see also Matter of Therm, Inc.* 132 A.D.3d 1137, 1138 (3d Dep't 2015) (tolling statute of limitations on a breach of fiduciary duty claim against corporate officer).

Respondents also err in asserting that the Attorney General's claims for monetary relief are barred by the statute of limitations. To the extent the Attorney General seeks monetary relief, it is for conduct that occurred within three years of the start of this action. (Pet. ¶ 101 (seeking restitution "to the extent not already paid," and penalties for benefits improperly bestowed on Mr. Trump from transactions occurring after July 1, 2014).) The Attorney General's claims for monetary relief thus fall within the limitations period established by New York law. *See* N.Y. Civil Practice Law and Rules ("CPLR") § 214(4).

VI. THIS COURT HAS JURISDICTION OVER CLAIMS AGAINST RESPONDENT MR. TRUMP.

Respondents contend that this court's jurisdiction over the Attorney General's claims against Mr. Trump is barred by the Supremacy Clause of the U.S. Constitution. Respondents are unable to cite a single case in which a court has dismissed a civil suit against a sitting U.S. president for unofficial acts on the ground that the court's jurisdiction would be unconstitutional.

That is because the law is otherwise. The concerns raised by Respondents were fully addressed in *Zervos v. Trump*, 59 Misc. 3d 790 (Sup. Ct. N.Y. Cty. 2018), *appeal docketed*, No. 150522/17, a case in which Mr. Trump put forth the same arguments that are offered here by the Respondents. The court rejected Mr. Trump's arguments and held that nothing in the Supremacy Clause or other prudential factors prevents a state court from holding a sitting president to account for wrongful conduct unrelated to official duties. *Id.* at 796. This Court should do the same.

When a state court holds an official accountable for unofficial conduct, there is no bar on state court action. As the court concluded in *Zervos*, "[W]hen unofficial conduct it at issue, there is no risk that a state will improperly encroach on powers given to the federal government by interfering with the manner in which the President performs federal functions. There is no possibility that a state court will compel the President to take any official action or that it will compel the President to refrain from taking any official action." *Id.* at 796.

The result in *Zervos* is consistent with *Clinton v. Jones*, 520 U.S. 681 (1997), in which the Supreme Court confirmed the long-standing principle that the President of the United States is "subject to the laws for his purely private acts." *Id.* at 696. In *Jones*, the Court held unanimously that a sitting president may be subjected to suit under state law in federal court based on unofficial conduct. *Id.* at 694-95. The Respondents argue that the Court in *Jones* "cautioned that *state* court suits may 'present a more compelling case for immunity' on Supremacy Clause grounds." (R. Mem. at 36) (emphasis in original). This is not an accurate portrayal of the Court's analysis. The Court noted in a footnote that proceedings in state court might require a different inquiry because the Supremacy Clause, not the separation of powers, would be at issue, but the Court did not issue a warning about state court proceedings and it specifically declined to address whether state court proceedings would present a more compelling case for immunity. *Jones*, 520 U.S. at 691 n. 13. Indeed, the court in *Zervos*

concluded that "[t]he rule is no different for suits commenced in state court related to the President's unofficial conduct." *Zervos*, 59 Misc. 3d at 796.

The Respondents argue that certain prudential factors also require state courts to refrain from asserting jurisdiction. They cite the problem of local prejudice against federal officials, and the difficulty of managing actions to avoid interference with the president's duties. Mr. Trump presented these same points to the court in *Zervos*, and the court addressed them directly. With respect to local prejudice against federal officials, the court found that there was no "legitimate fear of local prejudice in state court when the actions under review bear no relationship to federal duties," *Zervos*, 59 Misc. 3d at 796-97, citing *Mesa v. California*, 489 U.S. 121, 139 (1989), which explained that where "true state hostility may have existed, it was specifically directed against federal officers' efforts to carry out their federally mandated duties." With respect to the efficient management of cases involving the president, the court in *Zervos* noted that state courts are as well-equipped as federal courts to "accommodate the President's needs [and] be faithful to the tradition . . . of giving utmost deference to Presidential responsibilities." *Zervos*, 59 Misc. 3d at 797 (quoting *Jones*, 520 U.S. at 709). "In the end, there is absolutely no authority for dismissing or staying a civil action related purely to unofficial conduct because defendant is the President of the United States. Resolution of an action unrelated to the President's official conduct is the responsibility of a state court and is not impermissible 'direct control . . . over the President.'" *Zervos*, 59 Misc. 3d at 797, (quoting *Jones*, 520 U.S. at 691 n 13). Respondents do not address *Zervos*, let alone explain why its holding should not be applied here.

VII. THE PETITION WAS BROUGHT BECAUSE OF RESPONDENTS' EXTENSIVE ILLEGAL CONDUCT, NOT ANY ALLEGED BIAS.

Respondents' argument that the Petition should be dismissed because of alleged bias is wholly without merit and should be rejected. Contrary to Respondents' attempt at distraction, the Attorney General's Petition was brought exclusively because an investigation by the Office's

Charities Bureau revealed persistent illegality by the Foundation and its directors.[19] The Attorney General is charged with bringing action to preserve the public interest in charitable assets and the proper management of charities in just such cases. *See, e.g. Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) ("We agree with the importance of the government's interests in ensuring organizations that receive special tax treatment do not abuse that privilege and of its interest in preventing those organizations from using donations for purposes other than those they represent to their donors and the public.") The evidence of that illegality is detailed in the Petition and the supporting affirmation.

As a matter of law, claims of selective prosecution rarely succeed, as Respondents concede (R. Mem. at 25), because the standard is a high one, requiring "actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence." *Schumer v. Holtzman,* 60 N.Y.2d 46, 55 (1983); see *United States v. Wallach*, 935 F.2d 445, 460 (2d Cir. 1991). Respondents do not even attempt to argue actual prejudice because there can be no prejudice where the grounds for the relief sought are established by the substantial and incontrovertible evidence submitted in support of the Petition. Rather, they argue that this is one of the rare cases in which "the appearance of impropriety itself is a ground for disqualification." (R. Mem. at 25.) None of the cases cited by Respondents presents an even remotely analogous fact pattern.[20] Moreover, as discussed above, contrary to Respondents' protestations, the claims alleged and remedies sought in this action are wholly consistent with the practice of the Attorney

[19] Respondents' claim of bias is further refuted here because the only individual actually accused of bias – former Attorney General Eric Schneiderman – left office before this action was filed. Respondents point to one statement by the current Attorney General as evidence of potential bias, but they misquote the Attorney General. She did not state that "she considers her battles with the President 'the most important work [she] has ever done,'" (Futerfas Aff. ¶ 8), but rather said, upon her appointment by the New York State Legislature, that "I've served in many roles in government throughout my career. But I believe this job,"—meaning the job of Attorney General—"at this moment in history, is the most important job I have ever had." Statement by Attorney General Barbara D. Underwood Upon Appointment by the Legislature, May 22, 2018, available at https://ag.ny.gov/press-release/statement-attorney-general-barbara-d-underwood-upon-appointment-legislature. (last visited October 3, 2018.)

[20] In any case, were the Respondents to have adequately proven bias—a burden they have not come close to meeting—the proper remedy for bias is recusal of the biased person, not dismissal of the action.

General's Charities Bureau when regulating charities with absentee boards that failed to oversee grant-making and prevent improper use of charitable asserts. (*See supra* p. 2 n.1, pp. 27-29.)

VIII. RESPONDENTS ARE NOT ENTITLED TO CONDUCT DISCOVERY.

Respondents' request for discovery should be denied. Discovery is disfavored in special proceedings under CPLR Article 4 and may only be permitted upon a showing of "ample need" or "unusual circumstances." *See State v. Bridgehampton Rd. Races Corp.*, 44 A.D.2d 725, 726 (2d Dep't 1974) (denying discovery in a special proceeding where respondents failed to show any "special or unusual circumstances to warrant the disclosure"); *In re Shore*, 109 A.D.2d 842, 843-44 (2d Dep't 1985) (denying discovery in a special proceeding where respondents failed to show "ample need" for discovery). A heavy burden is placed on the party seeking discovery to justify its use. *See People v. Condor Pontiac, Cadillac, Buick & GMC Trucks,* No. 02-1020, 2003 N.Y. Slip Op. 51082 (U), 2003 WL 21649689, at *4 (Sup. Ct. Greene Cty. July 3, 2003) (citing *People v. Bestline Prods. Inc.*, 41 N.Y.2d 887, 888 (1977)). Indeed, in case after case, trial courts have refused to grant such discovery in special proceedings. *See, e.g., Bestline Prods.*, 41 N.Y.2d at 888; *Condor Pontiac* 2003 WL 21649689, at *4; *Lefkowitz v. Raymond Lee Org.*, 94 Misc. 2d 875, 878 (Sup. Ct. N.Y. Cty. 1978).

Respondents have not met their burden to demonstrate the "ample need" or "special or unusual circumstances" necessary for the Court to grant discovery because they do not even attempt to explain how any of the requested discovery is necessary for them to respond to the Petition. This is not surprising, considering that they have easy access to the vast majority of information submitted in support of the Petition, most of which are documents or information in their possession. For example, "[t]he facts surrounding the donations and transactions that the NYAG claims to be improper," (*see* R. Mem. at 38) are facts that are within Respondents' unique knowledge and control. If they are aware of facts that differ from those asserted in the Petition and accompanying papers, they may of course try to introduce them at the appropriate

time. But there is simply no information relevant to these transactions that Respondents do not already possess. Similarly, "whether the Foundation 'intervened or participated' in the [Iowa] Fundraiser" (*id.*) is a question that the Respondents are uniquely positioned to answer. Unless they are referring to a need to seek discovery from the Trump Campaign, which seems highly unlikely, it is hard to conceive of what discovery Respondents need on that subject that they do not already know. Some of the items they claim to need discovery on are primarily legal questions for the Court's determination, for example "[w]hether there is a pattern of waste and lost assets warranting equitable remedies, including a ban, with respect to each of the Individual Respondents." (*Id.*) Respondents do not even attempt to explain what additional discovery is needed to assist the Court in making this determination, which is one of the central allegations of the Petition. They certainly have not met the high standard of showing ample need. *In re Shore*, 109 A.D.2d at 843; CPLR § 408. Finally, regarding Respondents' assertion that they need discovery regarding the alleged bias of the former New York State Attorney General, for reasons stated on page 33-35, *supra*, those allegations of bias are entirely irrelevant and without merit, and therefore Respondents cannot make the strong showing of need required under CPLR § 408.

Furthermore, Respondents' request for discovery is premature given that their motion to dismiss is still pending before the Court. *See Arnot-Ogden Mem'l Hosp. v. Blue Cross of Cent. N.Y.*, 122 Misc. 2d 639, 641 (Sup. Ct. Chemung Cty. Jan. 9, 1984) ("[T]he entire concept of a special proceeding . . . dictates that a motion for discovery under CPLR 408 be made at the time that such proceeding comes before the court for a decision on its merits."). As the Court indicated during the parties' September 4, 2018 phone call, if Respondents' motion to dismiss is denied, they will have an opportunity to answer the Petition. But Respondents would still need to separately move for discovery pursuant to CPLR § 408 at that time. *Id.; see also* CPLR §§ 406, 408.

CONCLUSION

For all of the reasons set forth above, the Court should deny Respondents' motion to dismiss the Petition and for discovery and grant a summary determination for the State on all causes of action.

Dated: New York, New York
October 4, 2018

Respectfully submitted,

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