

EXHIBIT “2”

**To the Affirmation of Svetlana M. Eisenberg, dated
March 13, 2023 (NYSCEF 1537; 1560)**

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

THE PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General of the
State of New York,

Petitioner,

-against-

THE TRUMP ENTREPRENEUR INITIATIVE LLC f/k/a
TRUMP UNIVERSITY LLC, DJT ENTREPRENEUR
MEMBER LLC f/k/a DJT UNIVERSITY MEMBER LLC,
DJT ENTREPRENEUR MANAGING MEMBER LLC
f/k/a DJT UNIVERSITY MANAGING MEMBER LLC,
THE TRUMP ORGANIZATION, INC., TRUMP
ORGANIZATION LLC, DONALD J. TRUMP, and
MICHAEL SEXTON,

Respondents.

Index No. 451463/2013
IAS Part 55
Assigned to Justice Kern

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENT
MICHAEL SEXTON'S MOTION TO CONVERT THIS PROCEEDING TO A
PLENARY ACTION OR, IN THE ALTERNATIVE, FOR LEAVE TO CONDUCT
DISCOVERY, AND IN OPPOSITION TO PETITIONER'S MOTION TO STRIKE AND
FOR SUMMARY DETERMINATION**

LANKLER SIFFERT & WOHL LLP
Charles T. Spada
Neel Chopra
500 Fifth Avenue, 34th Floor
New York, NY 10110
(212) 921-8399

Attorneys for Respondent Michael Sexton

This Memorandum of Law joins in and adopts (i) the Reply Affirmation of Jeffrey L. Goldman in Further Support of Trump Respondents' Motion to Convert Proceeding into Plenary Action and for Discovery and in Opposition to Petitioner The People of the State of New York's Motion to Strike Respondents' Counterclaim and Affirmative Defenses, dated May 29, 2014, and the supporting exhibits annexed thereto, as well as (ii) Trump Respondents' Reply Memorandum of Law in Further Support of Motion to Convert Proceeding into Plenary Action and for Discovery, and in Opposition to Petitioner The People of the State of New York's Motion to Strike Respondents' Counterclaim and Affirmative Defenses, and In Opposition to Petitioner's Motion for Summary Judgment, dated May 29, 2014.

For the reasons set forth therein and set forth below, Respondent Sexton respectfully requests that this Court grant his motion to convert this summary proceeding to a plenary action, or alternatively grant him leave to conduct discovery, and deny Petitioner's motions to strike his answer and for summary determination.

1. Attorney General's Requests Completely Ignore the Court's January 30, 2014 Ruling and the Procedural History of this Case

From the outset of the filing of the Verified Petition, the Attorney General has tried to have the benefit of a six-year statute of limitation while avoiding the exacting evidentiary burden of a common law fraud claim. In the Court's decision of January 30, 2013, however, on Respondents' motions to dismiss, Your Honor made clear that the Attorney General cannot have his cake and eat it too. The Attorney General's summary determination motion completely disregards Your Honor's decision.

By way of background, on October 31, 2013, all Respondents (including Respondent Sexton) moved to dismiss all causes of action in the Petition arguing that the statutes of

limitations had lapsed. Regarding the first cause of action, fraud under Executive Law § 63(12), Respondents argued, among other things, that a three-year statute of limitations applied because, as pled, the underlying cause of action was created or imposed by statute, and the applicable three-year period had lapsed. Respondents specifically argued that the Petition did not even attempt to prove common law fraud because it did not seek to prove two essential elements, scienter and reliance, and therefore that the first cause of action was not one existing at common law. Respondents requested that, in the event that the Court did not entirely dismiss the Petition, they have an opportunity to file an answer.

On November 22, the Attorney General opposed Respondents' motions to dismiss, arguing, among other things, that a six-year statute of limitations applies to the first cause of action because the "Petition and supporting evidence plainly plead and establish the elements of common law fraud, *including intent to deceive, actual deception, and reliance.*" (Memorandum of Law in Further Support of the Verified Petition and in Opposition to Motion to Dismiss the Petition or in the Alternative, for Leave to File an Answer, Nov. 22, 2013, at 17 ("November 22 Memorandum")) (emphasis added).) Regarding Respondents' request to answer the Petition, the Attorney General argued that the request should be denied with respect only to the Petition's fourth and fifth causes of action because, in his view, "there are no factual issues in dispute which bear upon liability and no meritorious defenses." (November 22 Memorandum, at 38.)

On January 30, 2014, with respect to the first cause of action, Your Honor ruled that the Petition adequately alleges common law fraud and that this claim is therefore subject to a six-year statute of limitations, and is not time barred. (Decision/Order, January 30, 2014, at 5.) Your Honor's opinion expressly held that "[t]o sufficiently plead a claim for common-law fraud, a petitioner must allege misrepresentation of a material fact, falsity, scienter, reliance, and

injury.” (*Id.* at 5-6.) Your Honor also ruled that the Attorney General is not entitled to the provisions in Executive Law § 63(12) that “expand the definition of fraud so as to create new liability in some instances.” (*Id.* at 5.)

Your Honor dismissed the claims brought pursuant to General Business Law §§ 349 and 350, and Education Law §§ 5001-5010 and 16 C.F.R. § 429, that accrued before May 31, 2010, and dismissed the entirety of the claim brought pursuant to Education Law § 224 as untimely. (*Id.* at 13.) Your Honor directed Respondents to answer the remainder of the Petition within thirty days. (*Id.*)

After the Attorney General prevailed on the argument that the Petition had sufficiently pled all elements of common law fraud, the Attorney General now argues that he is exempt from proving an essential element of common law fraud *that Your Honor held is required* – reasonable reliance. In contravention of the Court’s ruling, the Attorney General is doing an about-face and is now seeking to be exempt from the reliance element that he previously argued that he had pled. With the six-year common law fraud statute of limitations in hand, he now wants to proceed as if he is bringing a statutory fraud claim. He now seeks summary determination without even attempting to demonstrate reasonable reliance for each allegedly aggrieved individual. The Attorney General should not be permitted to have it both ways. For the reasons laid out in Trump Respondents’ brief, which Respondent Sexton joins herein, the Attorney General must prove reliance for each allegedly defrauded individual in order to prevail on his common law fraud claims. As such, this proceeding requires discovery and resolution of complicated issues of fact not appropriate for summary determination.

Furthermore, the Attorney General's motion for a summary determination is wholly without merit in light of the deficiencies in its evidence, including but not limited to the reasonable reliance element. As Trump Respondents lay out in detail, the Petition does not establish sufficient facts for summary determination. Trump Respondents also lay out in detail the manner in which Respondents' verified answers raise numerous disputed issues of material fact.

The Attorney General's summary determination motion is all the more puzzling because his November 22 Memorandum essentially conceded that there are issues of material fact with respect to causes of action one, two, three, and six. In his Memorandum, the Attorney General objected to Respondents right to answer only fourth and fifth causes of action. The Memorandum made clear that those are the only counts for which, in the Attorney General's estimation, there were no issues of material fact. (November 22 Memorandum, at 38-39.)

The motion is particularly inexplicable in light of the procedural history of this matter. Pursuant to Your Honor's January 30 directive, Respondents submitted a verified answer denying the allegations in the Petition. Additionally, in response to Your Honor's ruling that the Petition alleges a common law fraud requiring clear and convincing proof of, among other things, scienter and reliance, Respondents also made a motion to convert the proceeding into a plenary action or, in the alternative, for leave to conduct discovery. Respondents sought this relief for numerous reasons, including because summary determination is not appropriate for common law fraud claims, and because there are numerous factual issues in dispute in this matter.

The Attorney General's motion also seeks to avoid providing Respondents with discovery of facts of which the Attorney General is in complete control, for example the identities of the individuals that were allegedly injured and the basis for their allegedly reasonable reliance. In light of the Court's January 30 ruling that the Petition alleges common law fraud and that the Attorney General is not entitled to the expanded definition of fraud in Executive Law § 63(12), it would be manifestly unfair to order summary determination without giving Respondents an opportunity to discover the relevant facts in this matter.

2. Attorney General's Allegations Regarding Respondent Sexton Are Insufficient for Summary Determination

The Attorney General's request for summary determination for individual liability regarding Respondent Sexton is unsupported by the record. Respondent Sexton adopts and joins in arguments made by Trump Respondents regarding the Petition's deficiencies. However, there are additional reasons why the Petition is deficient with respect to Respondent Sexton.

First, there are issues of fact with respect to whether Respondent Sexton personally participated in or had actual knowledge of the alleged misconduct. Respondent Sexton cannot be held individually liable for the conduct of others where he neither personally participated, nor had actual knowledge. *See People ex rel. Schneiderman v. Sangamon Mills, Inc.*, 42 Misc. 3d 1225(A), at *2 (N.Y. Sup. Ct. 2014). The Attorney General's allegations regarding Respondent Sexton have almost entirely to do with his position at the company and not with his specific participation in or knowledge of alleged wrongdoings. Respondent Sexton's verified answer denies participation in or knowledge of many of the allegations, and the Attorney General has no basis for alleging his knowledge or involvement beyond broad allegations related to his position in the company. In light of Respondent Sexton's answer, the Petition's allegations are

insufficient for summary determination. *Id.* at *3 (“Given the dispute as to Mr. Scott’s actual role in the corporation, as well as his participation in and actual knowledge of the fraudulent conduct described above, an issue of fact has been raised as to his culpability.”).

Furthermore, Respondent Sexton has affirmed that he worked to continuously improve Trump Entrepreneur Initiative LLC’s (“TEI”) programs and services to ensure that the company developed robust compliance procedures designed to prevent improper and deceptive conduct. These efforts by Respondent Sexton fatally undermine any attempt to impose personal liability. Petitioner’s inability to offer specific proof of Mr. Sexton’s participation in or knowledge of wrongdoing renders summary determination inappropriate.

Second, Respondent Sexton’s verified answer states that he relied on the advice of the company’s counsel regarding several of the allegations. (E.g., Verified Answer of Respondent Michael Sexton, March 24, 2014, at 37, 38, 40, 41, 42, 43.) Individual liability is not appropriate where the individual relied on counsel in good faith, and summary determination is not appropriate in this matter when there are issues of material fact concerning advice of counsel.

Third, several of the allegations concern conduct that occurred after Respondent Sexton’s employment with TEI was terminated on July 31, 2010. The Attorney General has made no effort to cabin the claims against Respondent Sexton to the time of his employment with TEI. The Attorney General’s attempt to hold Respondent Sexton personally liable for fraud on summary determination on only general allegations as to conduct by him – which includes seeking to hold him liable for actions that occurred after his employment with TEI had ceased – and seeking to deny him discovery and trial before a jury of his peers is an attempt to completely abrogate Respondent Sexton’s due process rights.

3. Respondent Sexton Entitled to Affirmative Defenses

We join Trump Respondents' arguments regarding the affirmative defenses. We address here only those arguments that pertain to Respondent Sexton's affirmative defenses.

Respondent Sexton's second and third affirmative defenses regard statute of limitations violations. Respondent Sexton maintains that the Attorney General cannot establish sufficient facts within the relevant periods regarding Respondent Sexton. Your Honor's January 30 ruling did not address this specific issue, and we contend that the issue is not ripe until Respondent Sexton has filed his summary determination memorandum, which is premature until the Court rules on the pending motion to convert.

Respondent Sexton's fifth affirmative defense states that he may not be held responsible for the acts, conduct, or failures of others, and that he reasonably relied on the advice of counsel and others in performing his duties as President of TEI. Respondent Sexton's sixth affirmative defense is that he may not be held liable for acts or conduct occurring after he left TEI on July 31, 2010. The Attorney General challenges these defenses by relying on the same broad and non-specific allegations regarding Respondent Sexton that we addressed above. Furthermore, with regard to the advice of counsel defense, the Attorney General attempts to waive it away by calling it "conclusory." Falsely labeling this argument is not a substitute for addressing it. Respondent Sexton has submitted a verified answer in which he identified the specific issues on which he asserted that he consulted counsel. This is far from conclusory. Further, at this stage of the litigation, with open questions about whether this will be converted to a plenary action and whether the parties will be afforded discovery, it is entirely premature to rule in the AG's favor on the validity of this defense.

Conclusion

For the reasons set forth above and in (i) the Reply Affirmation of Jeffrey L. Goldman in Further Support of Trump Respondents' Motion to Convert Proceeding into Plenary Action and for Discovery and in Opposition to Petitioner The People of the State of New York's Motion to Strike Respondents' Counterclaim and Affirmative Defenses, dated May 29, 2014, and the supporting exhibits annexed thereto, as well as (ii) Trump Respondents' Reply Memorandum of Law in Further Support of Motion to Convert Proceeding into Plenary Action and for Discovery, and in Opposition to Petitioner The People of the State of New York's Motion to Strike Respondents' Counterclaim and Affirmative Defenses, and In Opposition to Petitioner's Motion for Summary Judgment, dated May 29, 2014, which Respondent Sexton expressly joins and adopts herein, Respondent Sexton respectfully requests that this Court grant his motion to convert this summary proceeding to a plenary action, or alternatively grant him leave to conduct discovery, and deny Petitioner's motions to strike his answer and for summary determination.

Dated: New York, New York
May 30, 2014

Respectfully submitted,

LANGLER SIFFERT & WOHL LLP

By: 

Charles T. Spada

Neel Chopra

500 Fifth Avenue, 34th Floor

New York, NY 10110

(212) 921-8399

Attorneys for Respondent Michael Sexton