OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK
REAL ESTATE FINANCE BUREAU

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In the Matter of the

Investigation by ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York, of

AOD No. 16-114

165 West 91st Street Holdings, LLC,

Respondent.

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ASSURANCE OF DISCONTINUANCE

Pursuant to the Martin Act, New York General Business Law ("GBL") § 352 *et seq.*, and New York Executive Law ("Executive Law") § 63(12), ERIC T. SCHNEIDERMAN, Attorney General of the State of New York ("NYAG") investigated the conduct of 165 West 91st Street Holdings, LLC ("Respondent"), in connection with an offering of real estate securities in New York State.

This Assurance of Discontinuance ("Assurance") contains the findings of NYAG's investigation and the relief agreed to by NYAG and Respondent.

FINDINGS

I. The Respondent

1. Respondent 165 West 91st Street Holdings, LLC, a Delaware limited liability company, is the named sponsor of an offering of condominium units located at 165 West 91st Street in Manhattan ("the Property").

II. Respondent's Martin Act Obligations

A. Disclosure Obligations

2. The Martin Act requires that before a sponsor (or developer) of a condominium may offer or sell units, the sponsor must submit an offering plan to NYAG. GBL § 352-e(2).

3. When a sponsor submits a proposed plan, NYAG reviews the plan to confirm that it contains the disclosures required by law. *Greenthal & Co. v. Lefkowitz*, 32 N.Y.2d 457, 462 (1973).

4. Under the Martin Act, a plan must provide an adequate factual basis with which potential purchasers may make a judgment of whether to invest and "shall not omit any material fact or contain any untrue statement of fact." GBL § 352-e(1)(b).

5. Where an occupied building is converted to cooperative or condominium ownership, the Martin Act requires that immediately after the plan is submitted, the sponsor must serve a copy of the proposed plan, which is known as a "red herring," upon tenants. GBL § 352-eeee(2)(f); 13 NYCRR § 23.1(g). While the plan is under review by NYAG, the developer is obligated to revise the plan to reflect material changes to the proposed offering, and to inform NYAG of any such material changes. *Id.* § 23.1(h).

6. If disclosures in a proposed plan appear sufficient, NYAG accepts the plan for filing and the sponsor is permitted to begin marketing and selling units. GBL §352-e(2).

7. Prior to any closings, a plan must be declared "effective." A plan may be declared effective only if purchase agreements have been executed for a certain minimum number of units. *See, e.g.* GBL § 352-eeee(1)(b).

B. Tenant Protection Obligations

8. The legislature has stated that the purpose of the Martin Act is to promote home

ownership "while at the same time, protecting tenants in possession who" do not purchase their units. *See* 1982 N.Y. Laws, ch 555, §§ 1, 9. "[It] is imperative to assure that such conversion will not result in unjust, unreasonable and oppressive rents and rental agreements affecting non-purchasing tenants." *Id.*

9. The Martin Act provides certain rights and protections for tenants who live in buildings undergoing conversion. For example, a conversion can take place under an "eviction plan" or under a "non-eviction plan." GBL § 352-eeee(1)(b) and (c). Under a non-eviction plan, like the one here, a tenant may not be evicted on the basis that they failed to purchase under the plan. *Id.* at § 352-eeee(2)(c)(ii).

10. In addition, a tenant who occupies a unit at the time the plan is accepted for filing by NYAG has an exclusive right to purchase the unit they occupy for a period of ninety days from the date the plan is accepted. *See* 13 NYCRR § 23.3(n)(1)(i).

11. Further, if a tenant remains in the building on the date that a plan is declared effective and does not purchase a unit, the tenant becomes a "non-purchasing tenant." *See* GBL 352-eeee(1)(e). Where a non-purchasing tenant resides in a rent-regulated unit, the statute ensures that the protections of rent regulation remain in place post-conversion. *Id.* at § 352-eeee(2)(c)(iii). If a non-purchasing tenant is in a market-rate unit, they are protected from unconscionable rent increases for as long as they reside in the unit. *Id.* at § 352-eeee(2)(c)(iv).

C. Limitations on Removing Tenants

12. To assure that tenants residing in buildings slated for conversion are able to make a fully-informed choice between the housing alternatives available to them, i.e., whether to buy their unit, remain as renters, or move, NYAG regulates buy-out agreements during the conversion process. A buy-out occurs where a sponsor "buys out" the remaining rights and

interests in a tenant's lease; in exchange for a lump sum, the tenant agrees to surrender their lease and vacate the unit.

13. Specifically, NYAG prohibits sponsors from buying out tenants prior to the plan's acceptance (during the "red-herring" period) unless the buy-out offers are explicitly disclosed in the offering plan. In addition, NYAG prohibits tenants from accepting offers until the plan is accepted for filing by NYAG. *See* July 9, 1986 Policy Memo, "Buyout Offers" and subsequent July 9, 2015 Policy Memo, "Tenant Buyouts." *See also State v. Herzog*, Sup. Ct. N.Y. Cnty., Index No. 43106/87, *aff'd* 164 A.D.2d 793 (1st Dep't 1990); *Abrams v. Long Beach Oceanfront Assocs.*, 136 Misc. 2d 137, 141 (Sup. Ct. N.Y. Cnty. 1987) (noting that the Appellate Division, First Department upheld NYAG authority to prohibit buy-outs during the red herring period) (*citing 490 Ocean Assocs. v. Abrams*, Sup. Ct. N.Y. Cnty., Index No. 16351/86, *aff'd* 128 A.D.2d 1027 (1st Dep't 1987)).

III. Respondent' Obligations under the New York City Building Code

A. PW1 Form Section 26 Requires Disclosure of Whether the Building Undergoing Alteration is Occupied

14. When a developer intends to renovate a tenanted building in order to obtain a building permit, the New York City Building Code requires that the developer disclose on a PW1 Plan/Work Application whether there are any tenants in the building and whether there are any rent stabilized tenants in the building.

15. Section 26 of the PW1, entitled "Property Owner's Statements and Signature," provides a box next to preprinted language requiring the developer to indicate whether the apartments in the building are to remain occupied during construction. Section 26 requires the developer to check "yes" or "no" to indicate whether "the site of the building to be altered or

demolished, or the site of the new building to be constructed, contains one or more occupied dwelling units that will remain occupied during construction."

B. Tenant Protection Plan ("TPP") Must Be Submitted To DOB Prior To Construction

16. A TPP must be submitted to the New York City Department of Buildings (the "DOB") "for alterations of buildings in which any dwelling unit will be occupied during construction." *See* N.Y.C. Admin. Code § 28-104.8.4.

17. The Building Code requires that a TPP outline the means and methods to protect occupants' health and safety during construction, and must address a wide range of issues including temporary fire protection measures, dust containment procedures, maintenance of egresses, pest control, limitation of noise, lead and asbestos abatement, and structural safety. *Id.*

IV. Respondent' Offering and NYAG's Investigation

18. Respondent purchased the Property in a transaction that closed on March 30, 2012.

19. On May 18, 2012, Respondent submitted to NYAG an offering plan to convert the Property to condominium ownership (the "165 West 91st Street Plan").

20. The 165 West 91st Street Plan represented that the offering was a non-eviction plan in which no tenants would be evicted for failure to purchase a unit under the plan.

21. The 165 West 91st Street Plan represented that 41 of the 111 units at the Property were subject to the Rent Stabilization Law and that 16 units were subject to the laws governing rent control. The 165 West 91st Street Plan represented that 4 units were vacant and one was occupied by the super, which would leave 49 units as occupied and not subject to rent regulation.

22. In the 165 West 91st Street Plan, Respondent certified that it understood that it has primary responsibility for compliance with the Martin Act and related regulations.

23. On May 6, 2013, the 165 West 91st Street Plan was accepted for filing by NYAG.

A. Improper Buy-Outs During "Red Herring" Period

24. On December 18, 2012, and December 19, 2012, during the red-herring period (between the filing of the plan with NYAG on May 18, 2012, and the acceptance of the plan for filing by NYAG on May 6, 2013), non-payment proceedings were brought, on behalf of Respondent, against two rent controlled tenants residing in apartments 14G and 14D, respectively. The non-payment proceedings were brought seeking the outstanding rent amount for December 2012, $1,678.13 and $1,708.77 respectively; no other rent was due and owing.

25. Stipulations of Settlement were entered into with the rent controlled tenants in apartments 14G and 14D on December 21, 2012. The rent controlled tenants agreed to vacate their apartments in exchange for the payment of $200,000 and $155,000 respectively.

26. NYAG finds that these settlements were not settlements to bona fide non-payment proceedings. Rather, the non-payment proceedings were brought solely in order to facilitate settlements that would in practice amount to improper red-herring tenant buy-outs with the purpose of avoiding being classified as such.

27. NYAG's investigation determined that the two rent controlled tenants had approached Respondent about potential buy-outs, not the reverse. Nonetheless, because the buy-out offers were not disclosed in the plan and were consummated prior to the plan's acceptance for filing, they were prohibited by applicable law.

B. False PW1 Filings

28. On September 30, 2014, the New York City Department of Buildings issued nine (9) Notices of Violation for nine PW1 job filings – 122022676, 121960271, 12193206, 121839822, 121583161, 121338267, 12121357, 121030482 – where Respondent's principal

certified, in Section 26 on the PW1 that no apartments in the premises were occupied during construction or occupied by rent controlled/stabilized tenants.

29. On June 22, 2015, the Environmental Control Board (the "ECB") issued a decision sustaining the nine Notices of Violation.

30. On November 19, 2015, the Board of Standards and Appeals (the "BSA") issued a decision, affirming the ECB decision, finding that Respondent's principal made statements in the PW1s that it knew or should have known to be false as the premises was occupied despite the written indication that the building was not occupied on its PW1 Section 26. The BSA also found that this false filing was material insofar as it notifies the DOB that the building is occupied during construction and a TPP must be in place in occupied buildings. The BSA upheld a total civil penalty of $43,200, which has been paid.

31. A TPP was not filed for construction activities in the building until January 21, 2015, meaning that the construction work pursuant to nine job applications filed with the DOB from June 25, 2012 to January 21, 2015, was done without a TPP.

32. On June 9, 2015, Respondent's principal once again filed an inaccurate PW1 indicating the building was unoccupied.

33. NYAG finds that Respondent's foregoing conduct in paragraphs 1 through 32 above violates the Martin Act, Part 23 of Title 13 of the New York Codes, Rules and Regulations, the New York City Building Code and Executive Law § 63(12).

PROSPECTIVE RELIEF

WHEREAS the Respondent neither admits nor denies NYAG's Findings set forth above;

WHEREAS the Respondent has cooperated with NYAG's investigation of this matter;

WHEREAS NYAG is willing to accept the terms of this Assurance pursuant to the Martin Act and Executive Law Section § 63(15) and to discontinue its investigation; and

WHEREAS the Respondent is willing to accept the obligations imposed by this Assurance;

THEREFORE, IT IS HEREBY UNDERSTOOD AND AGREED by and between the Respondent and NYAG that:

A. Respondent shall pay the sum of four hundred-ninety thousand dollars and zero cents ($490,000.00) by wire, payable to the New York City Department of Finance (the "City"), or such other entity as may be designated in writing by the City, acting through its Department of Housing Preservation and Development ("HPD"), as restitution (the "Restitution Funds") for the improper buy-outs and resulting loss of two rent regulated units at the Property;

B. Respondent shall deliver the Restitution Funds to the City within fifteen (15) business days of the execution of this Assurance; the undersigned Assistant Attorney General shall provide wiring instructions. The City, acting by and through HPD, shall use the Restitution Funds to finance projects for "persons of low income" and "families of low income," as defined in New York Private Housing Finance Law Section 2(19);

C. Within fifteen (15) business days of the execution of this Assurance, Respondent shall pay NYAG by wire transfer the sum of fifty thousand dollars and zero cents ($50,000.00) for NYAG's expenses; the undersigned Assistant Attorney General shall provide wiring instructions;

MISCELLANEOUS

D. NYAG has agreed to the terms of this Assurance based on, among other things, the representations made to NYAG by Respondent and their counsel and NYAG's own factual investigation as set forth in the Findings above. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by NYAG in its sole discretion.

E. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Respondent in agreeing to this Assurance.

F. Respondent represents and warrants, through the signature below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. Respondent shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects Respondent's (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which NYAG is not a party.

G. This Assurance may not be amended except by an instrument in writing signed on behalf of all the parties to this Assurance, and any purported amendment of this Assurance that is not memorialized in a writing signed by all parties shall be deemed null and void.

H. This Assurance shall be binding on and inure to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than NYAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of NYAG.

I. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of NYAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

J. To the extent not already provided under this Assurance, Respondent shall, upon request by NYAG, provide reasonable documentation and information necessary for NYAG to verify compliance with this Assurance.

K. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing and shall be directed as follows:

If to the Respondent:

James L. Bernard
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038-4982
(212) 806-5684

If to NYAG:

Bureau Chief
Real Estate Finance Bureau
Office of the Attorney General
120 Broadway, 23rd Floor
New York, New York 10271
(212) 416-8100

L. All correspondence related to this Assurance must reference Assurance No. 16-114;

M. Acceptance of this Assurance by NYAG shall not be deemed approval by NYAG of any of the practices or procedures referenced herein, and Respondent shall make no representation to the contrary.

N. Pursuant to New York Executive Law Section 63(15), evidence of a violation of this Assurance shall constitute *prima facie* proof of violation of the applicable law in any action or proceeding thereafter commenced by NYAG.

O. If a court of competent jurisdiction finally determines that any Respondent has breached this Assurance, then Respondent shall pay to NYAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

P. NYAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. NYAG is willing to accept this Assurance pursuant to New York Executive Law Section 63(15), in lieu of commencing a statutory or any other proceeding. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

Q. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

R. This Assurance may be executed in one or more counterparts, by either original signature or signature transmitted by facsimile transmission or electronic mail, and each copy so executed shall be deemed an original.

IN WITNESS WHEREOF, this Assurance is executed by the Respondent and NYAG as of June 1, 2016.

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York

By: _____
Manisha Sheth
Executive Deputy Attorney General for
Economic Justice

By: _____
Richard J. Shore
Assistant Attorney General
Real Estate Finance Bureau

165 West 91st Street Holdings, LLC
a Delaware limited liability company

By: _____
Authorized Signatory