SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART** **IAS 61EF**

Justice

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THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

- v -

LAURENCE G. ALLEN, ACP INVESTMENT GROUP, LLC, NYPPEX HOLDINGS, LLC, ACP PARTNERS X, LLC, and ACP X LP,

Defendants,

and

NYPPEX, LLC, LGA CONSULTANTS, LLC, INSTITUTIONAL INTERNET VENTURES, LLC, EQUITY OPPORTUNITY PARTNERS, LP and INSTITUTIONAL TECHNOLOGY VENTURE, LLC,

Relief Defendants.

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INDEX NO.	452378/2019
MOTION DATE	
MOTION SEQ. NO.	

DECISION AFTER TRIAL

HON. BARRY R. OSTRAGER

The New York Office of the Attorney General ("OAG") commenced this action by Summons and Verified Complaint on December 4, 2019 (NYSCEF Doc. Nos. 1 and 2). This action followed an extended investigation in a separate proceeding supervised by Special Referee Steven Liebman, during which time a preliminary injunction remained in effect pursuant to General Business Law § 354 enjoining defendant Laurence G. Allen and his related entities from engaging in "fraudulent, deceptive, and illegal acts" and other wrongful conduct (*see* Index No. 452346/18, NYSCEF Doc. No. 18). The Complaint in this action asserts five causes of action: (1) Martin Act Securities Fraud – General Business Law §§ 352 et seq (Against all Defendants); (2) Repeated and Persistent Fraud and Illegality – Executive Law § 63(12) (Against all Defendants); (3) Breach of Fiduciary Duty (Against Defendants Allen, ACP Investment Group, LLC and ACP Partners X, LLC); (4) Equitable Fraud (Against Defendants Allen, NYPPEX

Holdings, LLC, ACP Investment Group, LLC, ACP Partners X, LLC); and (5) Repeated and Persistent Fraud and Illegality – Executive Law § 63(12) (Against Defendants Allen, NYPPEX Holdings, LLC, ACP Investment Group, LLC, ACP Partners X, LLC) Equitable Fraud. The OAG seeks various remedies against the Defendants and the Relief Defendants named in the Complaint, including injunctive relief, disgorgement of funds, and the appointment of a Receiver.

Defendant ACP X, LP ("ACPX") is a limited partnership formed in 2004 with over 75 limited partners ("Limited Partners"). Defendant ACP Investment Group, LLC (the "Investment Advisor") is the investment advisor to ACPX. Defendant Laurence G. Allen ("Allen") is the managing principal of the Investment Advisor. The Investment Advisor owns 100% of Defendant ACP Partners X, LLC, which is the general partner of ACPX. Allen is the managing member and managing principal of the General Partner. Allen, the Investment Advisor, and the General Partner are each fiduciaries to the Limited Partners in ACPX.

Defendant NYPPEX Holdings, LLC ("NYPPEX") is the parent company and 100% owner of the Investment Advisor and Relief Defendant NYPPEX, LLC, a registered broker-dealer. Allen is the CEO and managing member of NYPPEX and the majority shareholder of NYPPEX through his ownership interest in Relief Defendant Institutional Internet Ventures, LLC.

In January 2020, the OAG moved for a preliminary injunction enjoining Allen and the various Allen-controlled entities from taking further actions with respect to ACPX (mot. seq. 001). The Court conducted a five-day evidentiary hearing on the OAG's motion during which the Court heard the live testimony of eleven witnesses. Thereafter, the Court issued a preliminary injunction on February 4, 2020. (*See* NYSCEF Doc. No. 94). Among the Court's findings in its February 4, 2020 decision were the following:

The evidence adduced at the preliminary injunction hearing revealed a shocking level of self-dealing, breaches of fiduciary duty, misappropriation of enormous sums of ACP capital, and outright fraud. ACP was established in 2004 pursuant to a Private Placement Memorandum ("PPM"), a Limited Partnership Agreement, and a Subscription Agreement. The ACP Partners limited partnership was capitalized with approximately $17 million and was established for the purpose of acquiring a diversified portfolio of distressed private equity limited partnership interests.

The Limited Partnership Agreement contains a relatively standard distribution waterfall that provides that the General Partner, while vested with substantial investment discretion, cannot receive any "carried interest" payments until the limited partners have received the return of their entire capital plus an 8% annual preferred interest return. The Limited Partnership Agreement expands the discretion of the General Partner from the description in the PPM but retains significant restrictions on the General Partner's ability to earn carried interest. It is undisputed that to the extent the PPM conflicts with the Limited Partnership Agreement, the terms of the Limited Partnership Agreement control.

Among the most significant features of both the PPM and the Limited Partnership Agreement was the disclosure that NYPPEX, LLC ("NYPPEX"), a broker dealer controlled by Allen that specializes in matching buyers and sellers of private equity interests in the secondary market, would be paid for broker dealer services it provided for the ACP partners. Other than such payments, ACP had no obligation to pay any administrative or overhead expenses. NYPPEX was, in turn, owned by NYPPEX Holdings, LLC ("NYPPEX Holdings"), another entity controlled by Allen.

ACP never returned the entirety of the original investments of any of the 75 limited partners of ACP. And the evidence established that neither NYPPEX nor NYPPEX Holdings ever earned a profit except, perhaps, during one year when these entities generated a marginal profit. During the period between the fourth quarter of 2008 and the fourth quarter of 2016, Allen invested $5 million of ACP cash in NYPPEX Holdings. Subsequent to 2016, Allen caused ACP to provide NYPPEX Holdings with an additional $1 million credit line, all of which was drawn down before an Ex Parte Order preserving the status quo was signed by Justice Lori S. Sattler on December 20, 2018 (Index No. 452346/18, NYSCEF Doc. No. 18). During the period 2008 to 2018 Allen's total compensation from NYPPEX Holdings exceeded $6 million.

Allen has offered the fanciful explanation of the suspicious circumstances described in the preceding paragraphs by testifying that ACP's investment in NYPPEX Holdings will produce windfall profits for the ACP limited partners because the value of NYPPEX Holdings exceeds $100 million. The Court does not credit any of this testimony and finds that ACP was essentially utilized as a piggy bank to fund a failing broker-dealer, its failing parent, and Allen.[Robert] Zimmel [an employee of NYPPEX] apparently made "whistleblower" complaints about the administration of ACP and NYPPEX to the Securities and Exchange

> Commission and FINRA, but no action was taken with respect to these complaints.
>
> But, there is more. In 2013, 2014, and 2015, with ACP limited partners wondering where their return on investment was, Allen secured passage of Amendments 3, 4, and 5 to the Limited Partnership Agreement. The solicitations for amendments 3, 4 and 5 included a provision falsely stating that the General Partner was entitled to 100% of his carried interest and further offering those voting in favor of the amendments immediate payment of a portion of their investments at a discounted rate, while reaffirming the General Partner's right to claim carried interest. These amendments were approved. Subsequent amendments to the Limited Partnership Agreement purported to have ACP indemnify Allen and limit legal action by the limited partners against Allen. There was no basis for the assertion that the General Partner was entitled to receive carried interest without amendments 3, 4 and 5, and after these amendments passed Allen distributed to himself (and, perhaps, others) a total of $3,404,466.87 in carried interest.

The plenary trial on the merits was delayed until January 11, 2021 largely due to a number of withdrawals by various counsel for the defendants. The defendants secured excellent counsel in early December 2020, and a plenary bench trial was conducted on Microsoft Teams on January 11, 12, 13, and 14, 2021. Direct testimony was submitted by affidavit, and each affiant whose testimony was considered by the Court was subjected to cross-examination. Prior to the commencement of the trial, defendants stipulated that the entire record of the preliminary injunction hearing would be deemed part of the trial record of the plenary trial (NYSCEF Doc. No. 294), which greatly reduced the duration of the four-day plenary trial.

Fourteen witnesses testified at the four-day plenary trial, including some of the witnesses who had testified at the preliminary injunction hearing, including Robert Zimmel (the former corporate treasurer of NYPPEX), Allen, and defendants' expert witnesses who were ostensibly called to express opinions on the value of NYPPEX. Despite truly heroic efforts by newly retained counsel for the defendants to undo the record of the preliminary injunction hearing, the four days of trial testimony confirmed all of the facts established at the preliminary injunction hearing. In short, nothing in the four days of trial in any way undercuts the factual findings made

by the Court after the five days of testimony that supported the issuance of the February 4, 2020 preliminary injunction order.

Specifically, the testimonial and documentary evidence adduced during nine days of testimony in this case established that, through a maze of entities owned and /or controlled by defendant Allen, a significant portion of the capital contributed to the ACPX limited partnership was substantially diverted by a hopelessly conflicted Allen toward funding NYPPEX – the broker-dealer entity controlled by Allen. NYPPEX, in turn, utilized these funds to pay Allen exorbitant NYPPEX annual salaries totaling approximately $6 million, as well as to pay the salaries of his staff. ACPX capital was also used to pay NYPPEX operating expenses. NYPPEX itself is not, as Allen claims, a technology startup with either a present or potential centi-million dollar valuation. Rather, based upon the Court's assessment of the credibility of witnesses and a review of relevant documents, NYPPEX is, and always has been, a failing broker-dealer that has a $44,000 software package purchased from a third-party vendor that supposedly allows NYPPEX to execute secondary market trades of private equity interests. ACPX's investment in NYPPEX is in no way consistent with the investment thesis contained in the ACPX Private Placement Memorandum and in the ACPX Limited Partnership Agreement.

The OAG has Stated Martin Act and Executive Law Claims

Throughout the trial, defendants stridently argued both that the acts complained of by the OAG are not actionable either under the Martin Act or Executive Law § 63(12) and that, in all events, any Martin Act claim would be time-barred. Specifically, defendants argued that the 2004 Private Placement Memorandum and the ACPX Limited Partnership Agreement contained no false and misleading statements and that anything that occurred a decade or more later constitutes "fraud by hindsight" and is non-actionable for both of the aforementioned reasons.

Defendants also argue that the OAG's claims, if anything, state a claim for breach of contract rather than Martin Act and Executive Law violations.

One of defendants' principal arguments is that the specific claims alleged by the OAG constitute non-actionable "fraud by hindsight." In support of this argument, defendants cite *People ex rel. Cuomo v. Charles Schwab & Co*., 33 Misc. 3d 1221(A), 939 N.Y.S.2d 742 (Sup. Ct. N.Y. Cnty. 2011), *aff'd in part, modified in part,* 109 A.D.3d 445, 971 (First Dept. 2013). In *Schwab*, the trial court dismissed Martin Act claims because it found the alleged misrepresentations were true when made and the complaint alleged "fraud by hindsight." But, on appeal, the First Department reversed and reinstated the Martin Act claims, holding that the trial court had erred by addressing the merits of the complaint on a motion to dismiss and that the trial court should have only looked at the sufficiency of the pleading.

Defendants misinterpret the *Schwab* case as a holding by the First Department that the Martin Act cannot cover representations that were true when made but rendered untrue by fraudulent conduct that takes place after the expiration of a statute of limitations. However, that is not a fair reading of the *Schwab* decision because the First Department reversed the dismissal of the case. In any event, *Schwab* is inapposite. The present action is not based on offering documents which may have been true when issued. As discussed below, the present action is based on conduct that violated the representations made in the offering documents (and subsequent amendments) as well as other fraudulent conduct within the statute of limitations period. Moreover, in *Schwab*, the statements in the offering documents were later rendered misleading by changes to the market, not due to changes in the conduct of the defendants, as alleged here.

Defendants also rely upon this Court's decision in *Exxon Mobil Corp.*, 65 Misc. 3d 1233 A) (N.Y. Cnty. 2019) at *20 for the proposition that a Martin Act claim only lies where a

statement is false when made. *Exxon* made no such finding. *Exxon* held that the alleged misstatements were not misrepresentations because they were not sufficiently definite, and the defendant had provided only general, forward-looking information about the overall state of affairs of its business.

While the zealousness with which counsel has advocated for his client is both refreshing and commendable, a review of the case law demonstrates that future conduct that renders prior representations false **can** serve as the basis for a Martin Act claim **and** that a Martin Act violation accrues <u>at the time of the wrongful conduct</u>. *See State v. 7040 Colonial Rd. Assocs. Co.,* 176 Misc. 2d 367, 372-74 (Sup. Ct. N.Y. Cnty. 1998) (a new cause of action under the Martin Act accrues each time a defendant engages in a fraudulent practice). *See also People v. Merkin,* 26 Misc. 3d 1237(A), 2010 N.Y. Misc. LEXIS 523, *8-12, *24-27, *33-34 (Sup. Ct. N.Y. Cnty. 2010). In *Merkin*, as here, the alleged Martin Act violations did not occur until years after the offering documents were issued, and the offering documents were not "misleading" until the defendant engaged in conduct that contradicted them. *Cf., SEC v. Pittsford Capital Income Partners, L.L.C.,* No. 06 Civ 6353 T(P), 2007 U.S. Dist. LEXIS 62338 (W.D.N.Y. Aug. 23, 2007) (granting summary judgment to the SEC when a fund invested in an affiliate in a manner contrary to its investment thesis).

Moreover, the OAG's claims are not just about misrepresentations, but are also about defendants' independent fraudulent conduct (unrelated to any specific representation). For example, defendants provided fraudulent investment advice to ACPX by advising ACPX to invest in NYPPEX, Allen's failing broker-dealer. In addition, defendants caused NYPPEX to merge with the Investment Advisor in a clear conflict of interest pursuant to which ACPX's investment advisor was directing ACPX to, in essence, invest in itself.

Finally, defendants argue that their alleged conduct at most constitutes a breach of contract but not Martin Act and Executive Law violations. However, nothing precludes defendants from being liable for both breach of contract and other violations, including Martin Act fraud and breaches of fiduciary duty. *See Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc*., 18 N.Y.3d 341, 353 (2011) ("[m]ere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies," and both types of claims can proceed on "independent" legal bases to "further the same goal—combating fraud and deception in securities transactions"); *See Merkin ,* 2010 N.Y. Misc. LEXIS 523, *28 ("that some private investors may choose to pursue or not to pursue claims on their own behalf does not detract from the substantial public interest at stake" in OAG's breach of fiduciary duty claim). In the latter connection, the OAG may assert common law claims under its *parens patriae* authority. *See id* at 25. Courts have upheld claims brought under *parens patriae* to protect investors in a fund, because New York "has a quasi-sovereign interest in protecting the integrity of the marketplace," [*People v. Grasso*, 11 N.Y.3d 64, 69, n. 4 (2008)[1]] and ensuring that "financial markets . . . operate honestly and transparently" (*Merkin,* 2010 N.Y. Misc. LEXIS 523, *25). *See also People v. H&R Block, Inc*., 16 Misc 3d 1124(A) (Sup. Ct. N.Y. Cnty. 2007) (upholding *parens patriae* claim for breach of fiduciary duty), *aff'd in relevant part,* 58 A.D.3d 415, 416-17 (1st Dept. 2009).

[1] Defendants' objections to the OAG's assertion of *parens patriae* authority lack merit. First, the OAG was not obligated to plead this authority. To the extent defendants cite the First Department's decision in *People v Grasso,* 54 AD3d 180 (2008), the OAG correctly notes that the appellate court there recognized the State's "quasi-sovereign interest in protecting the integrity of the marketplace." Although the court found no such interest in the *Grasso* case, the case is distinguishable because the OAG was relying there on the Not-For-Profit Corporation Law to prosecute claims on behalf of a not-for-profit corporation that had been converted into a for-profit entity. Thus, *Grasso,* where the OAG was acting only on behalf of private interests, stands in contrast to this case where the OAG is acting to promote the public purpose of the Martin Act to ensure that financial markets operate honestly and transparently. The 1874 decision by the Court of Appeals in *People v Ingersoll,* 58 NY 1, involving claims on behalf of a municipal corporation, does not provide otherwise.

The Action is Not Barred by the Statute of Limitations

As indicated earlier, this action was commenced on December 4, 2019 following an extended investigation. A six-year statute of limitations applies to claims brought under the Martin Act under CPLR § 213(9), which became law in August 2019. CPLR § 213(9) was an amendment to the CPLR that directly responded to the decision by the Court of Appeals in *People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622 (2018), which overturned long-standing First Department precedent holding that a three-year statute of limitations applied to Martin Act claims. Accordingly, conduct from December 4, 2013 onward is within the statute of limitations period.[2]

Defendants argue that although the six-year statute of limitations is now codified, it does not apply retroactively to capture conduct before the enactment of the legislation in 2019. The Court disagrees. Where an amendment to the law is "remedial legislation" it "should be given retroactive effect in order to effectuate its beneficial purpose." *See Gleason v. Michael Vee, Ltd.*, 96 N.Y.2d 117, 122-23 (2001). The Court of Appeals has held that, where the Legislature "conveyed a sense of immediacy" because it "acted swiftly" after a Court of Appeals decision and "directed that the amendment was to take effect immediately" and "the purpose of the amendment was to clarify what the law was always meant to do and say", the legislation should be applied retroactively. *Id.* That is precisely the case here. The Court of Appeals decided *Credit Suisse* in 2018 and the Legislature codified CPLR § 213(9) in 2019 in direct response to the ruling. Accordingly, a six-year statute of limitations applies to the Martin Act claims brought in this action. And, even if a three-year statute of limitations applies, defendants continuing wrongdoing, including the undisclosed 2017 merger of NYPPEX and ACPX's Investment

[2] A Tolling Agreement was entered for a short period of time before December 2019. The Tolling Agreement was offered at trial as Ex. 203 and objected to by Defendants. However, the Tolling Agreement has no bearing on the Court's decision here.

Advisor, would bring all of defendants' conduct within a three-year statute of limitations. *See 7040 Colonial Rd. Assocs. Co*., 176 Misc. 2d 367 (N.Y. Cnty.1998) (holding that "a new cause of action accrued" under the Martin Act "each time" the defendant engaged in fraudulent practices, "even if the new act or practice simply repeated the misrepresentations or omissions made previously").

In short, in the context of limited partnership interests marketed as long-term investments, the general partner cannot make disclosures calculated to attract investors, wait six years, and then defraud the limited partners. Indeed, because the Martin Act is remedial legislation, accrual of a Martin Act claim must begin when the wrongful conduct occurs, and continued wrongful conduct tolls the statute of limitations. *See 7040 Colonial Rd. Assocs. Co*., 176 Misc. 2d 367 (N.Y. Cnty. 1998); *Butler v. Gibbons*, 173 A.D.2d 352, 353 (1st Dep't 1991); *see also Merine ex rel. Prudential-Bache Util. Fund v. Prudential-Bache Util. Fund*, 859 F. Supp. 715, 725 (S.D.N.Y. 1994). Here, the OAG demonstrated that false and misleading statements were made in connection with the 3rd, 4th, and 5th amendments to the Limited Partnership Agreement in, respectively, November 2013, June 2015, and March 2017. At a minimum, the 4th and 5th amendments, as well as other instances of defendants' fraudulent conduct (*e.g.* the 2017 merger of NYPPEX and the Investment Advisor) are within the statute of limitations period.

Additionally, the Martin Act explicitly prohibits providing fraudulent or misleading investment advice and, as discussed above and below, defendants, through the thoroughly conflicted Investment Advisor, advised the ACPX limited partnership to make indefensible investments which is an independent Martin Act violation. These acts, including the improper taking of carried interest by reason of the successful solicitation of amendments to the ACPX

limited partnership agreement by means of patently misleading statements, establishes that the OAG's Martin Act claims are both appropriate and timely.

The OAG has Established its Right to Relief

The Martin Act prohibits fraudulent practices relating to the "purchase, exchange, investment advice or sale of securities," GBL § 352. As stated above, defendants' fraudulent conduct concerned the purchase and sale of securities, the misappropriation of carried interest, as well as fraudulent and self-serving investment advice.

The Court finds that the OAG has proven by a preponderance of the evidence that Defendants: (1) made frequent, material misrepresentations and misleading omissions in communications to the limited partners of ACPX; (2) fraudulently caused ACPX to make oversized investments in NYPPEX; (3) gave false and misleading investment advice to ACPX to purchase NYPPEX stock; (4) made false and misleading reports on the value ACPX's interest in NYPPEX to the limited partners and caused ACPX to purchase NYPPEX stock at a wildly inflated prices; (5) made false and misleading statements concerning the wind-down of ACPX; (6) concealed the merger of NYPPEX and ACPX's Investment Advisor to the ACPX limited partners; (7) fraudulently took carried interest to which they were not entitled, pursuant to amendments to the limited partnership agreement that were procured by means of material misrepresentations; and (8) fraudulently caused ACPX to cover significant NYPPEX operating expenses, without fairly disclosing any of these wrongdoings to ACPX's investors.

The Court finds that Allen fraudulently caused ACPX to purchase equity in NYPPEX in each of 2014, 2015, 2016, and 2017-18, including a $1 million investment on August 29, 2016, and a $1 million convertible note in December 2017. These investments were contrary to defendant Allen's repeated statements that ACPX was in "wind-down" mode, and that any new investments would be for specific, limited purposes, such as to meet capital calls.

In all, Allen caused ACPX to invest approximately $4 million in NYPPEX during the wind-down period. This conduct concerned the "purchase" of securities, as defendant Allen caused ACPX to purchase NYPPEX equity. It also concerned "investment advice" to invest in NYPPEX by ACP Investment Group, ACPX's conflicted investment advisor, which Allen controlled and ultimately merged into NYPPEX Holdings. The 2017 merger of ACPX's investment advisor with NYPPEX Holdings, which was never disclosed to the ACPX Limited Partners, resulted in Allen - wearing his investment advisor hat - directing ACPX capital into NYPPEX with no independent controls. In the latter connection, Zimmel, whose testimony the Court credited, testified that he and others working for Allen blindly signed each and every "certification" Allen required to effect transfers from ACPX to NYPPEX. These certifications are required to confirm that duly constituted committees have signed off on the appropriateness of investments.

Further, while the ACPX limited partnership agreement allows a non-conflicted general partner to make investments in affiliates, during the entire 2013-2018 period, Allen's reports to investors grossly overstated the value of the NYPPEX investment.[3] Those reports stated that investments in affiliates would generally total "15% or less" of ACPX assets "measured at the time such investments were made." However, NYPPEX constituted approximately 28% of ACPX's portfolio after an August 2016 investment, and ultimately reached approximately 40%

[3] At the trial defendants produced experts who provided valuations of NYPPEX that expressly accepted as true fanciful forecasts of NYPPEX's future income which were higher by multiples of 25 times than any actual results NYPPEX ever achieved or likely could ever achieve. The Court completely rejects as entirely nonprobative the testimony of defendants' expert witnesses that was explicitly and exclusively based on the assumptions provided to them by Allen. For example, an opinion based on the assumption that NYPPEX's 2019 base case income would rise to $34 million when it was in fact a tiny fraction of that sum can hardly support the assertion that it was proper for Allen to advance millions of dollars of ACPX's assets to ongoing investments in NYPPEX, virtually all of which were used to pay Allen and his staff.

of ACPX's total investments. *See* Ex. 85 (NYSCEF Doc. No. 461) (summary exhibit identifying each investment ACPX made into NYPPEX).

Defendants also made material misrepresentations during the limitations period in connection with amendments permitting "early withdrawals" (at a severe discount)—which are "sales" of investor interests under the Martin Act—even as ACPX failed to make the regular distributions Defendants had promised. In November 2013, the General Partner sent a Notice of Proposal for the Third Amendment to the Limited Partnership Agreement which stated: "Note: The General Partner is currently permitted to distribute up to 100% of its Carried Interest balance…." Ex. 3 (NYSCEF Doc. No. 129) at 3-4. In June 2015, the General Partner sent an identical representation with the Fourth Amendment to the Limited Partnership Agreement. Ex. 4 (NYSCEF Doc. No. 130) at 3. A month later on a July 2015 conference call with ACPX investors, Allen stated: [W]e (the General Partner and Investment Advisor) will take a sliver of whatever the carried interest balance is and be able to pay that out to certain parties of the general partner. We're able to do that now…" Exs. 12 (audio recording), 288 (NYSCEF Doc. No. 203) (transcript) at 5:13-25.

Following those amendments and the Fifth Amendment in 2017, Allen distributed to himself and the related defendants approximately $3.4 million in carried interest, including over $1.6 million on May 2, 2017. As this Court found in its February, 4, 2020 opinion, Allen's appropriation of $3.4 of carried interest was procured by the fraudulent representation to ACPX investors that Allen was always entitled to carried interest when in reality the controlling provisions of the Private Placement Memorandum and the original Limited Partnership Agreement provide that the ACPX general partner - Allen - was not entitled to receive carried interest until the Limited Partners had received a return of their capital and a preferred 8% return on their investment.

Additionally, Allen caused ACPX to pay approximately $750,000 in NYPPEX's operating expenses in August-October 2018, even though such expenses were the General Partner's responsibility. In short, as the Court found after the preliminary injunction hearing, Allen used ACPX as his private piggy bank.

In sum, the Court finds: the testimony of defendants' valuation experts to be based on incredible assumptions supplied by Allen that bear no relationship to reality; the testimony by the defendants' experts about the general provisions of private equity funds is irrelevant; Zimmel's testimony about defendants' various defalcations is entirely credible; and the defendants' other witnesses were either incompetent to offer the testimony they offered or, in Mr. Allen's case, unworthy of belief.

Executive Law § 63(12) prohibits "repeated fraudulent or illegal acts or . . . persistent fraud or illegality." Because the Court has found that defendants repeatedly violated the Martin Act, it also finds that defendants have violated Executive Law § 63(12).

Conclusion

The OAG has proven its case by a preponderance of the evidence and a permanent injunction shall be issued identical to the preliminary injunction as follows: Defendants and Relief Defendants, together with their employees, representatives, agents and all others acting under their direction or authority, are permanently enjoined from directly or indirectly:

1. Taking any action pursuant to the Seventh Amendment to the Amended and Restated Agreement of the Limited Partnership Agreement of ACP X, LP;

2. Making distributions from ACP X, LP, except to limited partners of ACP X, LP on a pro-rata basis to their limited partnership interest in ACP X, LP, which distributions must first be approved by the Court;

3. Making any investments, extending any loans or lines of credit or entering into any agreements on behalf of ACP X, LP to or with Laurence G. Allen, NYPPEX Holdings, LLC, ACP Partners X, LLC, or any other entity in which Allen directly or indirectly exercises control or has an ownership interest;

4. Facilitating, allowing or participating in the purchase, sale or transfer of any limited partnership interest in ACP X, LP;

5. Making any payments or distributions from ACP X, LP, ACP Investment Group, LLC or ACP Partners X, LLC, to Defendants, Relief Defendants, Tyler Allen, Michelle Allen, and/or LGA Investments Family Limited Partnership;

6. Withdrawing, converting, transferring, selling or otherwise disposing of funds and assets held by ACP Investment Group, LLC, ACP X, LP, and ACP Partners X, LLC, wherever they may be situated, for purposes other than that provided for in Paragraph 2, *supra*;

7. Violating Article 23-A of the GBL, and from engaging in fraudulent, deceptive and illegal acts, and further employing any device, scheme or artifice to defraud or to obtain money or property by means of false pretense, representation or promise

The Court is reluctant to appoint a receiver to liquidate ACPX's remaining assets if, as the parties intimated, they can agree on the appropriate allocation of those assets. Nevertheless, the Court appoints Hon. Melanie L. Cyganowski (Ret.) as the provisional receiver subject to the preparation of a proposed order narrowly prescribing the powers and responsibilities of the receiver.

Defendants must disgorge the fraudulent investment of limited partners' funds into NYPPEX. The total investment into NYPPEX was $6,000,146.00 ($5,00,146.00 plus a $1M convertible note). However, the Court excludes early and pre-limitations period investments in NYPPEX totaling $2,287,708.00. Accordingly, defendants must disgorge $2,712,438.00.

Defendants must also disgorge the fraudulent payment of $3,404,466.87 in carried interest from ACPX to its general partner that was distributed to Allen and others.

Defendants must also disgorge $755,000 in additional fraudulent transfers from ACPX to NYPPEX (via ACP Investment Group) in 2018. As the OAG's accounting expert Joseph Pope concluded, these funds were used to pay NYPPEX's operating expenses such as compensation and rent. The receiver shall allocate disgorged funds equitably among the ACPX limited partners and subject to the Court's approval.

The Court declines to impose prejudgment interest on any of the sums Allen and the other defendants must disgorge. Under CPLR 5001, the Court, in its discretion, may decline to award prejudgment interest in circumstances such as these. The Court further declines the OAG's request to bar Allen from the securities industry. The various entities that Allen controls are all highly regulated by FINRA and other regulators which are better suited than the Court to address the future status of those entities and Allen's future role in those entities.

Accordingly, defendants are directed, jointly and severally, to disgorge the following sums: $2,712,438.00; $3,404,466.87; and $755,000, and the OAG is further granted the injunctive relief and the appointment of a receiver in accordance with the terms of this decision.

Dated: February 4, 2021

BARRY R. OSTRAGER, J.S.C.