To be Argued by:
MARC E. KASOWITZ
(Time Requested: 30 Minutes)

APL-2016-00115
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Court of Appeals

of the

State of New York

THE PEOPLE OF THE STATE OF NEW YORK BY ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner-Respondent,

– 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-Appellants.

BRIEF FOR RESPONDENTS-APPELLANTS

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Tel.: (212) 506-1700
Fax: (212) 506-1800

– and –

BELKIN BURDEN WENIG
& GOLDMAN, LLP
270 Madison Avenue
New York, New York 10016
Tel.: (212) 867-4466
Fax: (212) 297-1859

Attorneys for Respondents-Appellants

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DISCLOSURE STATEMENT PURSUANT TO SECTION 500.1(F) OF THE RULES OF THE COURT OF APPEALS

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for Respondents-Appellants states as follows:

1. The Trump Entrepreneur Initiative LLC f/k/a Trump University LLC is owned by DJT Entrepreneur Member LLC f/k/a DJT University Member LLC, and DJT Entrepreneur Managing Member LLC f/k/a DJT University Managing Member LLC.

2. 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. and Trump Organization LLC are each wholly owned by Donald J. Trump.

3. The Trump Entrepreneur Initiative LLC f/k/a Trump University LLC has no subsidiaries.

Respondents-Appellants The Trump Entrepreneur Initiative LLC f/k/a Trump University LLC ("TEI"), 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 and Donald J. Trump (collectively, the "Trump Appellants"), and Michael Sexton (together with the Trump Appellants, "Appellants") respectfully submit this brief in support of their appeal from the decision and order of the Appellate Division, First Department dated March 1, 2016 and entered May 17, 2016 (the "Decision") which: (i) reinstated the first cause of action asserted by Petitioner-Appellee Attorney General Eric T. Schneiderman (the "AG") under Executive Law § 63(12) ("§ 63(12)"); (ii) held that the § 63(12) claim is subject to the six-year common law fraud statute of limitations under CPLR § 213(1) but does not require a showing of scienter or reliance; (iii) affirmed the dismissal of seven of the Trump Appellants' affirmative defenses;[1] (iv) affirmed refusal to convert the special proceeding into a plenary action; and (v) affirmed restrictions on Appellants' discovery.

PRELIMINARY STATEMENT

This appeal arises from a case filed by the AG purporting to challenge TEI's business practices more than three years after TEI ceased doing business in

[1] Appellant Michael Sexton did not assert these affirmative defenses.

marketing educational services and more than two years after the AG commenced his politically-motivated investigation.

The Supreme Court dismissed two of the AG's six claims in their entirety and, based on the three-year statute of limitations in CPLR § 214(2) (applicable to liabilities created by statute), limited three of his claims to the period beginning on May 31, 2010. The AG did not appeal from these holdings, which are not at issue here.

At issue on this appeal is the AG's first claim, a purported fraud claim asserted under § 63(12), which authorizes the AG to seek injunctive and other relief in cases involving "repeated" or "persistent" fraud or illegality. *Id.* The Supreme Court dismissed the claim on the ground that § 63(12) did not create a new, standalone cause of action but only expanded the remedies the AG may seek for pre-existing causes of actions. Accordingly, the court held that the AG, to obtain § 63(12) relief, must plead and prove all of the elements of a common law fraud claim, including scienter and individual justifiable reliance for each TEI customer, and invited the AG to amend his petition to assert such a claim. The AG declined that invitation and appealed to the Appellate Division.

The Appellate Division reversed, holding that § 63(12) does authorize its own statutory standalone fraud claim, that the AG need not plead or prove scienter

or reliance, and that the applicable statute of limitations period is six years under the catch-all provision in CPLR § 213(1) which applies to common law fraud.

The Appellate Division's decision should be reversed. Its holding that § 63(12) authorizes a standalone fraud claim is, as shown below, contrary to controlling decisions of this Court, as well as to decisions in the Appellate Division itself. Moreover, even if § 63(12) did authorize its own standalone fraud claim separate and apart from a common law fraud claim (and it does not), such a standalone claim would be subject to the CPLR § 214(2) three-year limitations period because it would necessarily be a claim created by statute. Indeed, the Appellate Division (and the AG) cannot have it both ways. It cannot be the case that, as the Appellate Division held, the AG may assert a § 63(12) fraud claim for which he need not plead and prove all of the common law fraud elements, including scienter and reliance, and yet also have the benefit of the six-year common law fraud limitations period, rather than the three-year period for claims created by statute. Conversely, if the AG is to have the benefit of a six-year limitations period, then, as the Supreme Court held, he must plead and prove all of the elements of a common law fraud claim, which he had the opportunity but declined to do.

In holding that § 63(12) creates a standalone claim, the Appellate Division failed to follow this Court's controlling decision in *State of New York v Cortelle*,

38 NY2d 83 [1975], on the purported ground that *Cortelle* merely addressed the applicability of CPLR § 214(2)'s statute of limitations to § 63(12) claims and did not hold that § 63(12) does not create a standalone cause of action. That is not so. To the contrary, the very basis for this Court's holding in *Cortelle* that a § 63(12) claim is not subject to the three-year CPLR § 214(2) period was that § 63(12) does *not* create a standalone claim. As the Court stated, § 63(12) itself does not make "unlawful the alleged fraudulent practices, but only provide[s] standing in the Attorney-General to seek redress and additional remedies for recognized wrongs which pre-existed the statutes." *Cortelle*, 38 NY2d at 85. The Appellate Division also failed to follow its own decision in *People v Charles Schwab & Co., Inc.*, 109 AD3d 445, 449 [1st Dept 2013]. In *Schwab*, as here, the AG asserted an independent § 63(12) claim untethered to any underlying claim or violation. *Schwab*, 109 AD3d at 449. The Appellate Division, citing *Cortelle*, affirmed the dismissal of the § 63(12) claim "inasmuch as Executive Law § 63(12), upon which it is based, does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief." *Id*.

In any event, even assuming *arguendo* that § 63(12) did create a standalone cause of action (and it did not), such a cause of action would necessarily be a statutorily-created fraud claim and therefore subject to the three-year CPLR § 214(2) statute of limitations. Indeed, in erroneously holding that the AG's fraud-

like claim under § 63(12), which it concluded does not require proof of scienter or reliance, is subject to the six-year statute of limitations, the Appellate Division again failed to follow this Court's controlling authority in *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 209 [2001] ("*Gaidon II*") and *Cortelle*, 38 NY2d at 86-87. In *Gaidon II*, this Court, citing *Cortelle*, held that CPLR § 214(2) "does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability 'would not exist but for a statute' . . . Thus, CPLR § 214 (2) 'does not apply to liabilities existing at common law which have been recognized or implemented by statute.'" *Gaidon II* at 208. The *Gaidon II* court found that because the General Business Law ("GBL") § 349 claim at issue there covered conduct "akin" to but – as here – "critically different" from common law fraud, the claim was subject to the three-year CPLR § 214(2) statute of limitations. *Id.* at 209-10. The Appellate Division also ignored its own decision in *State of New York v Daicel Chem. Indus., Ltd.*, 42 AD3d 301 [1st Dept 2007], which found that because the "claims rely on allegations of conduct made illegal by statute, and *do not even allege all elements of common law fraud*," CPLR § 214(2)'s three-year limitations period applied to § 63(12) and GBL § 349 claims. 42 AD3d at 303 (emphasis added).

The Appellate Division also erred in summarily affirming the Supreme Court's decision striking seven of the Trump Appellants' affirmative defenses.

Inasmuch as the AG utterly failed to meet his high burden of showing that the defenses are without merit as a matter of law, all seven affirmative defenses must be reinstated.

Likewise, the Appellate Division abused its discretion in affirming the Supreme Court's decision denying Appellants' motion to convert this special proceeding into a plenary action. While the purpose of a special proceeding (with no automatic discovery) is to provide the AG with expedited relief to enjoin ongoing activities, that purpose is plainly not served here where the AG waited more than three years after TEI ceased operations to commence the proceeding.

Finally, the Appellate Division abused its discretion in affirming limitations on Appellants' discovery, including denying any paper discovery and denying Appellants discovery of communications between the AG and TEI's former students during the AG's investigation on the basis that such communications were protected as work product. Appellants have more than readily shown that special circumstances and ample need exist – including the need for disclosure of the basis for the AG's claims for tens of millions of dollars in purported damages – to allow discovery and prevent a trial by ambush.

QUESTIONS PRESENTED

1. Does Executive Law § 63(12) create a standalone fraud cause of action?

The Appellate Division incorrectly answered this question in the affirmative.

2. Does the six-year statute of limitations applicable to common law fraud under CPLR § 213(1) govern the AG's § 63(12) claim, even though the AG has not alleged all of the elements of common law fraud, such as scienter and reliance?

The Appellate Division incorrectly answered this question in the affirmative.

3. Can a claim under § 63(12) be established without proof of scienter and reliance even though such claim seeks the benefit of a six-year statute of limitations applicable to common law fraud under CPLR § 213(1)?

The Appellate Division incorrectly answered this question in the affirmative.

4. Did the Appellate Division incorrectly affirm the Supreme Court's dismissal of the Trump Appellants' seven well-pleaded affirmative defenses?

The Appellate Division incorrectly affirmed the Supreme Court's dismissal of the Trump Appellants' seven well-pleaded affirmative defenses.

5. Did the Appellate Division abuse its discretion by affirming the Supreme Court's decision denying Appellants' motion to convert the special proceeding into a plenary action?

The Appellate Division abused its discretion by affirming the Supreme Court's decision.

6. Did the Appellate Division abuse its discretion by affirming the Supreme Court's decision to limit discovery?

The Appellate Division abused its discretion by affirming the Supreme Court's decision.

STATEMENT OF JURISDICTION

On May 17, 2016, the Appellate Division granted Appellants' motion for leave to appeal to the Court of Appeals from the Decision. (A. 592.)[2]

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Creation And Operation Of TEI

In 2004, Appellant Michael Sexton approached Appellant Donald Trump about developing a company that would primarily use technology to provide an instructional curriculum across a broad range of business subjects, such as marketing, finance, entrepreneurship and real estate, under the "Trump" name and brand. (A. 356.)

On October 25, 2004, TEI, a New York limited liability company, was formed with the New York Department of State, Division of Corporations ("Division"), with the stated purpose of providing "education-related and

[2] Citations to the record on appeal are to "A. __" and citations to the addendum are to "Add. __."

educational products and services to individuals and businesses." The Division approved the filing using the word "University" without objection. (A. 356.)

From 2004 to 2010, TEI was a small, private company which offered quality instruction and training. At no time did TEI hold itself out as having been approved by the State of New York, licensed by the New York State Education Department ("SED"), accredited by the Board of Regents, or approved to issue diplomas. TEI explicitly stated in the "frequently-asked-questions" section of its website that "Trump University does not offer credits or degrees." (A. 356-57, A. 715, A. 722.)

TEI also did not promise specific results, profits, or wealth to its customers. Indeed, in addition to other disclosures that were provided, TEI's customers signed an enrollment form and a terms and conditions document, both of which contained disclaimers. (A. 546-47, A. 572, A. 732-39, A. 755-56, A. 783-800.) These documents contain specific disclaimers in size eight or larger point font. (A. 573, A. 783, A. 786, A. 788, A. 790.)

The enrollment form signed by the customers stated: (a) "[t]his Program is provided for information only;" (b) "no guarantees, promises, representations or warranties of any kind regarding specific or general benefits, monetary or otherwise, have been or will be made"; and (c) TEI is not responsible for the customers' "business success or failure." (A. 357, A. 755, A. 783.)

The terms and conditions document also signed by the customers made clear that "TEI has not made any express or implied representation[s] or assurance[s] regarding the potential profitability, chances of funding or likelihood of success of any transaction, investment, opportunity or strategy," that TEI is not "rendering legal or financial advice," and that it is the students' "sole responsibility to seek independent advice from professionals such as Real Estate Agents and Brokers, Lawyers, Accountants and Mortgage Brokers." (A. 572, A. 755-56, A. 785.) The Student Guide also made clear that the students had control over, and were responsible for, their success. (A. 670.)

On May 27, 2005, TEI received a letter from the SED concerning TEI's then use of the word "University" in its name, "Trump University LLC" (A. 357), which the Division had previously accepted. (A. 356.) TEI's then president, Mr. Sexton, had discussions with the SED as to how TEI could continue using the word "University." After implementing many of the SED's requested changes, TEI notified the SED about its efforts to comply. The SED, however, never responded, and TEI continued its operations, as modified. (A. 357.)

Over the next five years, TEI provided quality programs by experienced professionals in a variety of business subjects (including real estate investment). (A. 358.) Throughout this period, the response from customers was overwhelmingly positive. Approximately 98% of the more than 10,000 voluntary

student surveys collected during this period rated the TEI programs a "4" or "5" on a scale of 1 to 5 (with 5 being the highest). The high level of satisfaction was supported by testimonials, which were remarkable given an economic cycle that would become the worst financial/real estate crisis since the Great Depression. (A. 201, A. 358, A. 447, A. 753.)

During its operation, TEI had guidelines and procedures in place that ensured the instructors were properly trained, expected to comply with all TEI directives, policies and procedures, and prohibited from making false claims concerning the program. (A. 377-80, A. 618, A. 666-67.) For example, the Trump University Rules of Engagement set forth specific rules for instructors, including a specific prohibition against "directly or indirectly advising any client/customer of any likelihood of success." (A. 378.) In addition, all programs were recorded for compliance purposes with outside counsel reviewing the transcripts, and any issues identified being addressed with the instructors. (A. 235, A. 280, A. 377, A. 384, A. 711-13.) Starting in 2007, TEI also had annual compliance training meetings with its live-event teams to review the company's rules and policies. (A. 282.)

On March 30, 2010, the SED, in response to a single student complaint, sent a letter to TEI demanding that TEI cease using the word "University" in its name "Trump University LLC." After discussions with the SED, on May 21, 2010, TEI filed a certificate of amendment to its Articles of Organization formally changing

its name from "Trump University LLC" to "Trump Entrepreneur Initiative LLC." Shortly thereafter, TEI stopped accepting new students – effectively ceasing its operations. (A. 358-59.) The Trump Appellants even offered to stipulate with the AG that TEI would not renew the business while the action was pending. (A. 443, A. 578, A. 829.)

B. The AG's Broad Sweeping Investigation

In early 2011, shortly after assuming office, the AG commenced an investigation into for-profit universities and trade schools, with particular focus on institutions which had received state or federal funding, aid or subsidies. (A. 359.)

Even though neither TEI nor its students had ever received any public funding, on or about May 17, 2011, the AG issued a subpoena *duces tecum* ("Subpoena") to TEI seeking documents and information pertaining to its business. Within literally minutes of receiving the Subpoena, TEI's representatives received a call from *The New York Times* requesting comment. (*Id*.) The press had already been given a copy of the Subpoena. (*Id*.)

Over the next two years, Appellants fully cooperated with the AG's investigation, turning over hundreds of thousands of pages of documents and making TEI's former President, Controller, and others available for depositions, demonstrating that TEI had provided quality instructional services with which customers were overwhelmingly satisfied. In fact, the AG himself made numerous

statements regarding the lack of viability of the claims against TEI, including that his office's investigation into TEI was "very weak" and "going absolutely nowhere." (A. 189, A. 195, A. 198, A. 764, A. 772, A. 779.)

II. PROCEDURAL BACKGROUND

A. The AG's Petition

On August 24, 2013, *more than three years* after TEI effectively ceased operations, the AG filed a petition ("Petition"), accompanied by a nationwide media campaign. The Petition alleged six causes of action entitled as follows: (i) First Cause of Action, Violations of Executive Law § 63(12) Fraud; (ii) Second Cause of Action, Violations of Executive Law § 63(12) and General Business Law § 349; (iii) Third Cause of Action, Violations of Executive Law § 63(12) and General Business Law § 350; (iv) Fourth Cause of Action, Violations of Executive Law § 63(12) and Education Law § 224; (v) Fifth Cause of Action, Violations of Executive Law § 63(12), Education Law Article 101, § § 5001-5010, and Part 126 of Title 8 of the New York Codes, Rules, and Regulations; and (vi) Sixth Cause of Action, Violations of Executive Law § 63(12) and 16 C.F.R. § 429. (A. 99-104.) The Petition seeks Appellants' profits totaling tens of millions of dollars of damages. (A. 69, A. 116, A. 444.)

The specific allegations contained in each cause of action reinforce the statutory nature of the AG's claims. The first cause of action is pleaded as a

standalone, fraud-based statutory claim not tethered to any other common law or statutory violations. (A. 99-100.) Conversely, all of the AG's remaining claims (second through sixth causes of action) coupled claims under § 63(12) with other statutory violations. (A. 100-04.)

B. The Supreme Court's January 31, 2014 Decision ("*Kern I*")

In a pre-answer cross-motion dated October 31, 2013, Appellants cross-moved to dismiss or limit the claims in the Petition based upon the statute of limitations. (A. 186-87.) Appellants argued that because the six causes of action were subject to the three-year statute of limitations pursuant to CPLR § 214(2), any claims which accrued prior to May 31, 2010 were time barred. (A. 191-92, A. 205.)

Indeed, in support of the Petition, the AG submitted 28 advertisements by TEI. Notably, 27 of the advertisements expressly relate to events that occurred prior to May 31, 2010, and the one remaining advertisement is silent as to the date. Not a single advertisement relates to an event that occurred after May 31, 2010. (A. 366.)

In its January 31, 2014, *Kern I* decision, the Supreme Court ordered that the AG was bound by a three-year statute of limitations on all of the statutory claims in the Petition (second, third, fifth, and sixth causes of action), dismissed the entirety of the fourth cause of action regarding the alleged Education Law § 224 violation

(*Kern I* at 1-13 (A. 9-21)), and precluded the AG from proceeding on any facts that occurred prior to May 31, 2010 with respect to those causes of action. (*Kern I* at 7-10 (A. 15-18).)

Kern I also held that the § 63(12) claim could not proceed as a standalone cause of action. However, rather than dismiss this cause of action, the Supreme Court *sua sponte* converted it to a common law fraud claim and invited the AG to amend the Petition to allege common law fraud as the underlying violation for the § 63(12) claim. The Supreme Court correctly held that all the elements of common law fraud must be alleged. (*Kern II* at 10 (A. 38).) Despite being given an opportunity to amend its Petition to include common law fraud allegations, the AG refused to do so. (*Id*.)

C. The Supreme Court's October 8, 2014 Decision ("*Kern II*")

On February 21, 2014, the Trump Appellants answered the Petition and asserted 17 affirmative defenses and a counterclaim. (A. 340-410.) On March 5, 2014, the Trump Appellants moved: (a) to convert the proceeding to a plenary action due to no exigency warranting summary procedures; and/or (b) for leave to conduct discovery. (A. 434-35.) Appellant Michael Sexton joined in the Trump Appellants' March 5, 2014 motion. (A. 452-53.) The AG cross-moved to dismiss the Trump Appellants' affirmative defenses and for a summary determination on all remaining causes of action in the Petition. (A. 477-79, A. 538-39.)

In its October 8, 2014 *Kern II* decision, the Supreme Court dismissed the first cause of action, holding that the AG could not maintain a standalone cause of action under § 63(12), and that the AG failed to allege all the elements of a common law fraud, including scienter and reasonable reliance. (*Kern II* at 8-12 (A. 36-40).) The Supreme Court also denied the AG's request for summary determination on all of its claims except for the fifth cause of action alleging violations of Educ. L. Art. 101 (§§ 5001-5010). (*Kern II* at 35 (A. 63).)

Further, *Kern II* dismissed the following affirmative defenses of the Trump Appellants: (i) third affirmative defense (failure to establish a pattern and practice of deceptive and/or fraudulent conduct) (A. 401); (ii) fifth affirmative defense (failure to allege facts as of May 31, 2010 to establish either common law or statutory fraud) (*id.*); (iii) sixth affirmative defense (failure to allege facts as of May 31, 2010 to establish violation of GBL §§ 349, 350) (*id.*); (iv) eleventh affirmative defense (alleged acts and conduct were isolated and limited and do not establish a pattern and practice or an intention to mislead or misrepresent) (A. 402); (v) fourteenth affirmative defense (claims are barred by the enrollment forms executed by the participants) (*id.*); (vi) fifteenth affirmative defense (claims are barred by the participant surveys and video testimonials) (*id.*); and (vii) sixteenth affirmative defense ("the lack of success or claims of fraud is belatedly made due to participants' failure to put in proper effort and comply with workbooks,

homework and/or market conditions") (A. 403). (*Kern II* at 27-28 (A. 55-56).) It also dismissed the fourteenth affirmative defense (claims are barred by the enrollment forms executed by participants) on the basis that the disclaimers in the enrollment forms failed to provide a defense to the fraud claims. (*Kern II* at 28-30 (A. 56-58).)

Kern II also limited Appellants' discovery to depositions on the common law fraud claim, and denied document discovery and depositions on the remaining statutory claims. (*Kern II* at 33-35 (A. 61-63).) The Supreme Court also denied the Trump Appellants' request for communications between the AG and TEI's individual students on the ground that they were protected as work product. (*Kern II* at 35 (A. 63).)

D. The AG's Appeal Of The *Kern I* And *Kern II* Decisions

The AG appealed *Kern I* and *Kern II*. On February 19, 2015, the Supreme Court granted the AG's motion to consolidate the appeals. (A. 831.)

On March 1, 2016, the Appellate Division issued the Decision by which it: (i) reinstated the AG's first cause of action under § 63(12) finding it to be a standalone action; (ii) held that a fraud claim under § 63(12) did not require a showing of scienter or reliance; (iii) held that the fraud claim under § 63(12) is subject to a six-year statute of limitations under CPLR § 213(1); (iv) affirmed the Supreme Court's dismissal of seven of the Trump Appellants' affirmative

defenses; (v) affirmed the Supreme Court's decision to limit discovery; and (vi) affirmed the Supreme Court's denial of Appellants' motion to convert the special proceeding into a plenary action. (Decision at 35-40 (A. 611-16).)

On March 21, 2016, Appellants filed a motion for leave to appeal the Decision pursuant to CPLR § 5602(b)(1), which, on May 17, 2016, the Appellate Division granted. (A. 592.) On August 18, 2016, the Appellate Division issued a corrected order granting the Motion (A. 593-96), and the Appellants filed a Notice of Entry accordingly. (A. 597.)

ARGUMENT

I. THE APPELLATE DIVISION ERRED IN HOLDING THAT § 63(12) CREATES A STANDALONE CAUSE OF ACTION

The Appellate Division erred in holding that § 63(12) allows for the AG to bring a standalone claim – a holding contrary to this Court's binding decision in *Cortelle*. (Decision at 35-38 (A. 611-14).) The Appellate Division claimed that this Court in *Cortelle* did not hold that § 63(12) does not create a standalone cause of action because *Cortelle* merely addressed the applicability of CPLR § 214(2)'s statute of limitations to a § 63(12) claim. (Decision at 35 (A. 611).) However, as discussed below, *Cortelle* specifically and necessarily interpreted § 63(12) in reaching its decision, and that decision therefore is controlling authority as to the proper interpretation of § 63(12).

A. The Appellate Division Failed To Follow Controlling Precedent That Recognizes § 63(12) Does Not Create A Standalone Cause Of Action

In *Cortelle*, this Court held that § 63(12) does not create a standalone claim. Section 63(12) states in relevant part:

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney-general may apply … for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution ….

Exec. Law § 63(12).

In *Cortelle*, the Attorney General brought an action asserting, among others, a claim under § 63(12), to enjoin allegedly fraudulent practices and to obtain redress for the defrauded persons. *Cortelle*, 38 NY2d at 86. The *Cortelle* court addressed whether the § 63(12) claim sought to recover upon, in the words of CPLR § 214(2), a "liability, penalty or forfeiture created or imposed by statute" and therefore was subject to the three-year statute of limitations under CPLR § 214(2). *Id.* *Cortelle* recognized that § 63(12) itself does not make "unlawful the alleged fraudulent practices, but only provide[s] standing in the Attorney-General to seek redress and additional remedies for recognized wrongs which pre-existed the statutes," *Cortelle*, 38 NY2d at 85, and that "[s]tatutory provisions which provide only additional remedies or standing do not create or impose new

obligations." *Id*. Accordingly, the court held § 63(12) did not create a standalone claim subject to CPLR § 214(2)'s three-year statute of limitations.

Instead, *Cortelle* held that since defendants' alleged actions "were wrongful prior to and independent of [§ 63(12)]," and amounted to "a classic wrong on a common-law theory of promissory fraud," the § 63(12) claim was tethered to a common law fraud claim and therefore subject to the six-year common law fraud statute of limitations. *Id*. at 87.

In sum, contrary to the Appellate Division's attempt to distinguish *Cortelle* (Decision at 33-34 (A. 609-10)), the *Cortelle* Court expressly recognized that it was essential that it determine whether § 63(12) created standalone claims in order to rule on whether CPLR § 214(2) applied to the § 63(12) claim.

As numerous court have recognized, *Cortelle*'s holding that § 63(12) does not provide for a standalone cause of action is binding authority. *See e.g. People v Frink Am., Inc.*, 2 AD3d 1379, 1380 [4th Dept 2003]; *People v Orbital Publ. Grp., Inc.*, 21 NYS3d 573, 579 [Sup Ct, NY County 2015]; *People v Barclays Capital Inc.*, 1 NYS3d 910, 917 [Sup Ct, NY County 2015]; *see also Pauk v Bd. of Trustees of City Univ. of New York*, 654 F2d 856, 861 [2d Cir 1981]; *City of New York v Fedex Ground Package Sys., Inc.*, 314 FRD 348, 362 [SDNY 2016].

Indeed, in a previous decision, the Appellate Division itself followed *Cortelle* in explicitly holding that § 63(12) does not create a standalone cause of

action. *See Schwab*, 109 AD3d at 449. Nevertheless, the Appellate Division in its Decision below outright rejected its earlier holding in *Schwab*, on the ground that *Schwab* incorrectly followed *Cortelle* as *Cortelle* did not hold that § 63(12) could not be a standalone claim. (Decision at 32 (A. 608).) As shown, that is contrary to *Cortelle*. The Decision below was also flatly wrong in claiming that the parties in *Schwab* never raised the standalone issue on appeal.[3] (Decision at 32 (A. 608).)

Under *Cortelle*, therefore, and as the Supreme Court correctly held, because the AG's first cause of action under § 63(12) here is not tethered to any statutory or common law violation (the AG having declined to amend to assert common law fraud) and § 63(12) forecloses a standalone claim, the Decision must be reversed and the § 63(12) claim must be dismissed. *Cortelle*, 38 NY2d at 85-86.

It is telling that the Appellate Division, rather than following itself, cited cases that ignore *Cortelle* and/or do not expressly address whether § 63(12) creates a standalone cause of action.[4] (Decision at 35-37 (A. 611-13).)

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[3] The record in *Schwab* shows that the AG did raise the standalone issue in its motion to reargue. *See* the AG's Memorandum of Law in Support of Motion to Reargue, *People v Charles Schwab & Co., Inc.* (Add. 54-72); Reply Memorandum of Law in Support of Motion to Reargue. (Add. 73-88.) The *Schwab* Court denied the reargument motion and adhered to its holding that § 63(12) does not create a standalone claim. *People v Charles Schwab & Co., Inc.*, 2013 NY Slip Op 95413[U] [1st Dept 2013].

[4] *See People ex rel. Cuomo v Coventry First LLC*, 52 AD3d 345, 346 [1st Dept 2008] (finding § 63(12) claim does not need to allege all elements of fraud without addressing *Cortelle*), *affd* 13 NY3d 108 [2009]; *People ex rel. Cuomo v Wells Fargo Ins. Servs., Inc.*, 62 AD3d 404, 405 [1st Dept 2009] (dismissing a claim under § 63(12) because the alleged conduct was not illegal within the meaning of the statute and failing to address *Cortelle*), *affd* 16 NY3d 166 [2011]; *State v Grecco*, 21 AD3d 470, 478 [2d Dept 2005] (dismissing a claim under § 63(12) for failing to allege conduct that is illegal under the statute and failing to address *Cortelle*); *People v Apple*

The Appellate Division also incorrectly claimed that *People ex rel. Cuomo v Greenberg*, 21 NY3d 439 [2013] allowed a standalone cause of action under § 63(12). (Decision at 35 (A. 611).) That case is entirely inapposite. Critically, in *Greenberg*, this Court did not and had no reason to determine the standalone cause of action issue because the AG there – unlike here, where the AG declined to amend – pleaded common law fraud as the underlying § 63(12) violation. *See Greenberg*, 21 NY3d at 446.

B. The Appellate Division Incorrectly Equated The Martin Act With § 63(12) In Finding § 63(12) Allows For A Standalone Claim

The Appellate Division incorrectly concluded that the AG has authority to bring a standalone § 63(12) claim because the language of § 63(12) parallels the language of the Martin Act, which allows the AG to bring a standalone securities fraud claim, because both statutes define the fraudulent conduct that is prohibited, authorize the AG to commence an action, and specify the relief that can be sought. (Decision at 37-38 (A. 613-14).) This is wrong for several reasons.

First, the legislative history of § 63(12) directly contradicts this interpretation. Section 63(12) was explicitly premised upon what was then New

Health Sports Clubs, Ltd., 206 AD2d 266, 267 [1st Dept 1994] (finding individual liable for fraudulent and illegal conduct within the scope of §63(12) and failing to address *Cortelle*), *lv dismissed in part and denied in part* 84 NY2d 1004 [1994]; *People v JAG NY, LLC*, 18 AD3d 950, 951-52 [3d Dept 2005] (finding violations under various statutes including § 63(12) and failing to address *Cortelle*).

York General Corporation Law ("GCL") Article 8,[5] which did not create a new cause of action or rule of liability.[6] Mem. to the Governor, *reprinted in* Bill Jacket for Ch. 592 [1956], at 4. (Add. 5.) According to the drafters, § 63(12) was intended to expand the scope of GCL to allow for actions against unincorporated entities. State Dept of Law Mem., Ch 592, L 1956, *reprinted in* NY State Legis Ann 92-94 [1956]. (Add. 24-26.) Because § 63(12) was intended to model GCL, it was clearly intended to be a procedural statute that provided standing and remedies in the AG to enforce existing claims, but did not create a standalone cause of action.

Second, while the Martin Act had a broad definition of fraud when enacted in 1921, § 63(12), conversely, did not have any definition for the word "fraud" when originally enacted in 1956. *See* McKinney's 1956 Session Laws of New York § 63(12) [Executive Law § 63(12), as added L 1956 ch 592 § 1]; *see also Application of People by Lefkowitz*, 24 Misc 2d 83, 83-84 [Sup Ct, NY County

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[5] NY Gen Corp Law §§ 90-92 (incorporated into and replaced by Business Corporation Law § 1101 (McKinney)).

[6] Section 91 of the former General Corporation Law "does not establish or pretend to establish any rule of liability, but simply to fix and enumerate the classes of cases in which, if liability does exist, the attorney-general may move, having first obtained the assent of the court. That section relates, therefore, merely to procedure, and does not determine, much less enlarge, existing rules of corporate liability." *People v Atl. Ave. R.R. Co.*, 125 NY 513, 516-17 [1891]. *See also Manix v Fantl*, 209 AD 756, 759 [1st Dept 1924] ("The statute does not create a new cause of action. It qualifies and grants permission to certain officers to enforce an existing one."); *Bailey v Colleen Prods. Corp.*, 120 Misc 297, 299 [Sup Ct, St Lawrence County 1923].

1960] (quoting § 63(12) as it appeared in 1960). Although § 63(12) was subsequently amended in 1965 to add such a definition, the legislature made clear that the amendment was intended to equate § 63(12)'s definition not just with the Martin Act but with UCC § 2-302, which does not create a standalone claim.[7] *See* Amended L 2014, ch 55, § 3; Mem. to the Governor [June 30, 1965], *reprinted in* Bill Jacket for Ch. 666 [1965], at 3 (Add. 19) (stating that definition was meant "to equate § 63 with the provisions of Uniform Commercial Code, § 2-302, which permits Courts for the first time expressly to refuse to enforce an unconscionable contract or clause"). Thus, the fact that § 63(12) parallels the Martin Act is not dispositive of the fact that § 63(12) is a standalone claim because § 63(12) also parallels UCC § 2-302, which is not a standalone claim.

Finally, as demonstrated below, even if § 63(12) creates a standalone cause of action (and it does not), it would necessarily be a statutory fraud claim subject to the three-year statute of limitations pursuant to CPLR § 214(2).

II. THE APPELLATE DIVISION ERRONEOUSLY HELD THAT THE SIX-YEAR STATUTE OF LIMITATIONS UNDER CPLR § 213(1) GOVERNS THE AG'S § 63(12) CLAIM

The Appellate Division erroneously held that the AG's fraud-like claim under § 63(12) – which it concluded did not require proof of scienter or reliance –

[7] *See Pearson v Natl. Budgeting Sys., Inc.*, 31 AD2d 792, 792-93 [1st Dept 1969] ("Section 2-302 of the Uniform Commercial Code does not provide any damages to a party who enters into an unconscionable contract. This section gives the court the power to refuse to enforce such an unconscionable contract. . .")

"is not subject to the three-year statute of limitations imposed by CPLR § 214(2), but rather is subject to the residual six-year statute of limitations in CPLR § 213(1)." (Decision at 38 (A. 614).) The Appellate Division concluded that the three-year statute of limitations under CPLR § 214(2), which applies to "an action to recover upon liability, penalty or forfeiture created or imposed by statute," does not apply to the AG's § 63(12) claim because it "does not create any liability nonexistent at common law, at least under the Court's equitable powers," and "does not encompass a significantly wider range of fraudulent activities than were legally cognizable before the section's enactment." (Decision at 39 (A. 615).)

A. The Appellate Division Failed To Follow Controlling Authority When It Held The Six-Year Statute Of Limitations Governs The § 63(12) Claim

In reaching its decision, the Appellate Division, however, erroneously failed to follow this Court's controlling decision in *Gaidon II*.[8] In *Gaidon II*, the AG brought an action against the defendant under GBL § 349(h) for allegedly

[8] The Appellate Division cited to *Gaidon II* with the Bluebook signal "cf," (Decision at 39 (A. 615)), which is used for authority that "is different from the main proposition but sufficiently analogous to lend support." *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Assn. et al. eds., 19th ed. 2010 at p. 5). However, *Gaidon II* is not "sufficiently analogous" to the Appellate Division's decision but is directly contrary to it. The Appellate Division's attempt to circumvent *Gaidon II* stands in stark contrast to other courts that have followed *Gaidon II* when determining which statute of limitations period governs a § 63(12) claim. *See United States ex rel. Bilotta v Novartis Pharm. Corp.*, 50 F Supp 3d 497, 550-51 [SDNY 2014]; *People ex rel. Spitzer v Pharmacia Corp.*, 27 Misc 3d 368, 372-73 [Sup Ct, Albany County 2010]; *People ex rel. Cuomo v City Model & Talent Dev., Inc.*, 29 Misc 3d 1205[A], 2010 NY Slip Op 51704[U], *3 [Sup Ct, Suffolk County 2010]; *Cuomo v Empire Prop. Solutions, LLC*, 2011 NY Slip Op 33040[U], *16-17 [Sup Ct, Nassau County 2011].

engaging in deceptive marketing and sales practices in promoting the sale of certain life insurance policies. *Gaidon II*, 96 NY2d at 206. *Gaidon II* addressed whether the CPLR § 214(2) three-year statute of limitations rather than the CPLR § 213(1) six-year limitations period applied.

The *Gaidon II* court explained the circumstances in which CPLR § 214(2) applies to statutory claims:

> CPLR 214(2) does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability 'would not exist but for a statute' (*Aetna Life & Cas. Co. v Nelson*, 67 N.Y.2d 169, 174). Thus, CPLR 214(2) 'does not apply to liabilities existing at common law which have been recognized or implemented by statute' (*id*.). When this is the case, the Statute of Limitations for the statutory claim is that for the common-law cause of action which the statute codified or implemented (*see State of New York v Cortelle Corp*, 38 N.Y.2d 83, 86-87).

96 NY2d at 208.

Applying this framework and relying upon its earlier decision in *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330 [1999] ("*Gaidon I*"), the *Gaidon II* court found that the GBL § 349 claim covered conduct "akin" to but "critically different" from common law fraud and therefore was subject to the three-year statute of limitations under CPLR § 214(2):

> The substantive differences between the claims under General Business Law § 349 here and common-law fraud were most pointedly demonstrated by our disposition of those respective causes of action in *Gaidon I*. There, we held that, because of the disclaimers in the promotional illustrations Guardian Life used in selling its vanishing premium policies, the *misrepresentations* in those materials and by

> sales agents *did not rise to the level necessary to establish a common-law fraud claim*. Yet we also held that the disclaimers were not sufficient to dispel the deceptiveness of Guardian Life's sales practices with respect to the same illustrations for purposes of alleging violation of General Business Law § 349. Thus, despite plaintiffs' and the Attorney General's contentions to the contrary, it is not merely the absence of scienter that distinguishes a violation of section 349 from common-law fraud; section 349 encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law.

96 NY2d at 209-10 (emphasis added).

As *Gaidon II* involves the interpretation of CPLR § 214(2), its holding does not apply just to GBL § 349 claims but to other statutory claims as well. Indeed, *Gaidon II* relied upon this Court's decisions applying CPLR § 214(2) to other statutory claims, such as Insurance Law §§ 5105 and 5221(b)(6).[9]

Gaidon II is entirely consistent with this Court's earlier decision in *Cortelle*, 38 NY2d 83 [1975], which held that the CPLR § 213(1) six-year fraud statute of limitations applied to the AG's § 63(12) claim because the AG had alleged all elements of the pre-existing "common-law theory of promissory fraud," independent of § 63(12).[10] *Cortelle*, 38 NY2d at 86. Promissory fraud, which pre-

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[9] *Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169 [1986] (finding CPLR § 214(2) applies to Insurance Law §§ 5105 and 5221(b)(6) and explaining "we have consistently held that the statute, like its predecessor, only governs liabilities which would not exist but for a statute"); *Motor Vehicle Acc. Indemnification Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996] (finding CPLR § 214(2) applies to Insurance Law §§ 5105, 5104(b) and 5221(b)(6) even though plaintiff stepped into the shoes of insurer).

[10] The Appellate Division's decision is also directly at odds with its own decision in *State of New York v Daicel Chemical Industries, Ltd.*, 42 AD3d 301 [1st Dept 2007], which found, based upon *Gaidon II*, that CPLR § 214(2)'s three-year limitations period applies to the claims at issue

existed § 63(12), requires proof of both intent and reliance at common law. *See also Farrell v LGS Realty Partners LLC*, 2011 NY Slip Op 32274[U], *1 [Sup Ct, NY County 2011] (applying CPLR § 213(1)'s six-year statute of limitations to an equitable fraud which pre-existed § 63(12)).

Here, inasmuch as the AG declined to amend his petition, the only conceivable § 63(12) claim is one that, as the Appellate Division held, does not require proof of scienter and reliance. That claim therefore asserts a new liability created by statute, rather than asserting a pre-existing common law fraud claim. The Appellate Division therefore erred in failing to apply the CPLR § 214(2) three-year statute of limitations. In other words, the AG is seeking relief under the broader definition of fraud under § 63(12) – the invocation of which "create[s] a new liability." *See Cortelle*, 38 NY2d at 87.

B. The Appellate Division Improperly Relied Upon Inapposite Lower Court Decisions In Rendering Its Erroneous Decision

The Appellate Division improperly relied upon two inapposite lower court decisions that pre-date *Gaidon II – Morelli v Weider Nutrition Group, Inc.*, 275 AD2d 607 [1st Dept 2000] and *State v Bronxville Glen I Assoc.*, 181 AD2d 516 [1st Dept 1992] – when it incorrectly held that the six-year statute of limitations governs the AG's § 63(12) claim. (Decision at 38-39 (A. 614-15).)

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under § 63(12) and GBL § 349, because the "claims rely on allegations of conduct made illegal by statute, and do not even *allege all elements of common law fraud.*" *Id.* at 303 (emphasis added).

Morelli – which involved whether GBL §§ 349 and 350 claims, as opposed to a § 63(12) claim, were time-barred by the three-year limitations period – is unavailing for several reasons. *First*, *Morelli* merely stated in *dicta* – as § 63(12) was not at issue – that "[c]laims for fraud and those brought pursuant to Executive Law § 63(12), governed by a six-year limitations period, are distinguishable from those brought pursuant to GBL § 349." Not only is this language non-binding, but *Morelli* acknowledges what is widely established: a six-year limitations period governs when a § 63(12) claim is tethered to an underlying fraud claim.[11]

Second, *Morelli* never stated that every § 63(12) claim – regardless of whether it is based on conduct made illegal by statute – is governed by a six-year statute of limitations. Indeed, recent case law demonstrates otherwise. *See Daicel*, 42 AD3d at 303-04; *Novartis Pharms. Corp.*, 50 F Supp 3d at 550-51; *Pharmacia Corp.*, 27 Misc 3d at 373; *City Model & Talent Dev., Inc.*, 29 Misc 3d 1205[A],

[11] This interpretation is consistent with the grammatical rule of subject-complement agreement in which the complement must agree with the subject. As the subject is plural here, (*i.e.* "[c]laims for fraud and those brought pursuant to Executive Law § 63(12)), the complement must remain singular (*i.e.* "a" six-year limitations period). Here, the fact that the complement is singular shows that six-year limitations period only applies when both a § 63(12) claim and underlying fraud claim are coupled together. If the six-year period governs when those claims are brought independently, the court would have used the complement "their" six-year limitations periods. *See* Oxford Dictionary of English Grammar, agreement [Oxford University Press 2d ed 2014] [http://www.oxfordreference.com/view/10.1093/acref/9780192800879.001.0001/acref-9780192800879-e-53?rskey=iWuJWM&result=54] [Note: online subscription version].

2010 NY Slip Op 51704[U] at *4; *Empire Prop. Solutions, LLC*, 2011 NY Slip Op 33040[U] at *16-17.

Third, even assuming *arguendo* that *Morelli*'s statement regarding § 63(12) is binding, it is superseded by the subsequent decisions of *Daicel* and *Gaidon II*, which apply a three-year statute of limitations, as opposed to a six-year statute of limitations, when § 63(12) claims are premised upon conduct made illegal by statute, rather than common law fraud.

The Appellate Division's reliance on *Bronxville* is also misplaced as the AG in that case had brought an investor fraud claim under the Martin Act, which is unlike the AG's § 63(12) claim here. 181 AD2d at 516. *Bronxville* found "investor fraud was not created by the Martin Act, but is recognized in case law predating that legislation" and therefore properly applied a six-year statute of limitations to the Martin Act claim.[12] *Id.* at 516-17. However, here, insofar as the AG is pursuing a § 63(12) claim that does not require proof of all the elements of a common law fraud claim, such as reliance and scienter, the AG's § 63(12) claim is

[12] Indeed, certain investor fraud statutes that preceded the Martin Act also did not require proof of scienter or reliance. *See e.g. Hutchinson v Young*, 80 AD 246, 248-49 [2d Dept 1903] (describing liability under earlier investor fraud statutes as "greater than that which existed at common law, where, in an action for deceit scienter was essential to the maintenance of the action," and covering losses suffered "whether or not incurred on the faith" of the false information); *Parsons v Johnson*, 28 AD 1, 4-5 [4th Dept 1898] (finding that a previous investor fraud statute holds an officer to "strict account for his statement, if false, whether knowingly made or otherwise").

nonexistent at common law and therefore governed by CPLR § 214(2)'s three-year statute of limitations.[13]

The Appellate Division incorrectly relied upon *Bronxville* when it reasoned: "§ 63(12) does not encompass a significantly wider range of fraudulent activities than were legally cognizable before the section's enactment." (Decision at 39 (A. 615).) *Bronxville*, however, specifically found that the Martin Act – as opposed to § 63(12) – did not create liability for investor fraud but codified liabilities that already existed before its enactment. 181 AD2d at 516.[14] *Bronxville* is not controlling authority here where this Court has held that the definition of fraud under § 63(12) encompasses not just common law fraud but also new liabilities created by statute.[15] *Cortelle*, 38 NY2d at 87.

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[13] The *Gaidon II* court expressly rejected the AG's "akin" argument when it attempted to argue that a statutory fraud claim that lacked the elements of scienter or reliance codified pre-existing common law fraud. *Gaidon II*, 96 NY2d at 209. *Gaidon II* applies equally here.

[14] *See also* 4C NY Prac, Com Litig in New York State Courts § 90:14 [4th ed] [2015] (noting existence of common law private right of action for securities fraud "that predated the passage of the Martin Act"); 72 NY Jur 2d Investment Securities § 258 ("[L]iability for investor fraud was recognized in case law predating the Act.").

[15] *See also Pharmacia Corp.*, 27 Misc 3d at 373 ("Thus, Executive Law § 63 (12) applies to fraudulent conduct actionable at common law, as well as to conduct for which liability arises solely from statute."); *Novartis Pharm. Corp.*, 50 F Supp 3d at 549-50 ("While it may be true that these statutes 'incorporate [ ] already existing standards applied to fraudulent behavior always recognized as such,' this factor is not dispositive, because these statutes 'may in part expand the definition of fraud so as to create a new liability in some instances,' such that C.P.L.R. § 213 applies instead.").

C. The Attorney General Has Argued Directly Contrary Positions In The Past That The § 63(12) Claim Existed At Common Law

Although the AG has argued to the lower courts that its fraud-like § 63(12) claim is a pre-existing common law claim, the AG has taken a directly contrary position against other parties.[16] For instance, in *People v First Am. Corp.*, 2011 NY Slip Op 33061[U], *4 [Sup Ct, NY County 2011], the AG successfully persuaded the New York Supreme Court to deny respondent its constitutional right to a jury trial because § 63(12) (and GBL § 349) "are primarily equitable in nature insofar as they are statutory creations that did not exist at common law." *See also* Plaintiff's Reply Memorandum of Law in Support of its Motion to Strike Defendants' Demand for a Jury Trial at 7, *People v First Am. Corp.*, 2011 NY Slip Op 33061[U] [No. 406796/07] [June 15, 2011] (Add. 47) ("Both [Executive Law § 63(12) and GBL §349] are broad remedial statutes that created new causes of action for fraudulent and deceptive conduct going far beyond common law

[16] Plaintiff's Memorandum of Law in Support of Its Motion to Strike Defendants' Demand for a Jury Trial at 5, *People v First Am. Corp.*, 2011 NY Slip Op 33061[U] [No. 406796/07] [May 24, 2011]. (Add. 33.) This Court can take judicial notice of the briefs cited herein. *Allen v Strough*, 301 AD2d 11, 18-19 [2d Dept 2002] (noting that New York courts "may take judicial notice of a record in the same court of either the pending matter or of some other action"); *Yuppie Puppy Pet Prods., Inc. v St. Smart Realty, LLC*, 77 AD3d 197, 202 [1st Dept 2010] (taking judicial notice of the party's brief in another case as an "undisputed court record or file," in part, to prevent the party from taking contradictory positions in the two present actions); *Edward J. Minskoff Equities, Inc. v Crystal Window & Door Sys., Ltd.*, 108 AD3d 488, 490 [1st Dept 2013] (taking judicial notice of the briefs in a different matter to resolve whether a legal issued was argued in that case).

fraud."); *id.* at 1, 3. (Add. 41, 43.) The AG should not be allowed to argue whatever best suits his agenda.

III. THE APPELLATE DIVISION ERRED IN HOLDING THAT FRAUD UNDER § 63(12) CAN BE ESTABLISHED WITHOUT PROOF OF SCIENTER AND RELIANCE

The Appellate Division erred when it held that the AG's § 63(12) claim can have the benefit of a common law fraud's six-year statute of limitations period without having to prove reliance and scienter. (Decision at 38 (A. 614).) That holding is directly contrary to *Cortelle*, which held the residual six-year limitations period under CPLR § 213(1) applied to the § 63(12) claim because all of the elements of common law promissory fraud were properly alleged. *Cortelle*, 38 NY2d at 89. *See also Gaidon II*, 96 NY2d at 208 (finding that a three-year statute of limitations applied to a misrepresentation that did not meet the requirements for common law fraud).

To seek the benefit of a six-year statute of limitations under § 63(12), based on fraudulent conduct, all the elements of common law fraud must be alleged – *i.e.* misrepresentation of a material fact, falsity, scienter, reliance and injury. *See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]; *New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 317 [1995]; *Barclays Arms, Inc. v Barclays Arms Assocs.*, 74 NY2d 644, 646-47 [1989]; *Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d

403, 407 [1958]. The Court of Appeals has never dispensed with these fraud requirements even before the enactment of § 63(12). *Ochs v Woods*, 221 NY 335, 338 [1917]; *Arthur v Griswold*, 55 NY 400, 410 [1874].

Significantly, the Appellate Division did not even cite to legal authority showing any type of fraud claim that exists at common law independent of § 63(12) and does not require proof of scienter or reliance. The Appellate Division's reliance on *People v American Motor Club*, 179 AD2d 277, 283 [1st Dept 1992] for the proposition that fraud under § 63(12) is a standalone claim that may be established without proof of scienter or reliance is unavailing. First, the Appellate Division selectively decided to reject *Schwab* which expressly held, based on *Cortelle*, that § 63(12) is not a standalone claim to instead embrace *American Motor*, which does not even address *Cortelle*'s holding. *See American Motor*, 179 AD2d at 277-83. Second, even if the AG can bring a standalone claim, which it cannot, *American Motor* never held, as the AG is attempting to do here, that a six-year statute of limitations period applies to a statutory fraud claim that does not require proof of all the elements of a common law fraud claim.

Additionally, while claims under the Martin Act are governed by a six-year limitations period even though they do not require proof of scienter and reliance, that reasoning does not apply equally to § 63(12) because the Martin Act explicitly allows for the AG to bring claims under that Act without proof of scienter and

reliance. N.Y. Gen. Bus. Law § 352-c; *People v Merkin*, 26 Misc 3d 1237[A], 2010 NY Slip Op 50430[U], *7 [Sup Ct, NY County 2010] (noting that the AG need not prove intent or reliance in a civil Martin Act claim based on 352-c(1)(c)); *People v Greenberg*, 95 AD3d 474, 483 [1st Dept 2012].[17]

Conversely, § 63(12) does not expressly allow for the AG to pursue claims under that provision without proof of scienter and reliance. The legislature was undoubtedly aware of § 352-c of the Martin Act when enacting § 63(12), and it deliberately mirrored some portions of the Martin Act, but not the portion dealing with scienter and reliance. Thus, the legislature did not intend to have § 63(12) operate similarly to the Martin Act in being a standalone claim that did not require proof of reliance and scienter. *See Cruz v TD Bank, N.A.*, 22 NY3d 61, 72 [2013] ("when interpreting a statute, courts typically do not rely on legislative silence to infer significant alterations of existing law on the rationale that legislative bodies generally do not hide elephants in mouseholes.") (citations omitted).[18]

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[17] Even though the definition of fraud (which does not require proof of scienter or reliance) is located in the criminal section of the Martin Act, courts have read this definition of fraud to apply to the Act as a whole and therefore apply to civil actions. *People v Barysh*, 95 Misc 2d 616, 621 [Sup Ct, NY County 1978]; *see also* William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 833 [3d ed 2001] (noting, as part of the Whole Act Rule, that readers should assume "the same meaning is implied by the use of the same expression in every part of the act.").

[18] *See also Davis v State*, 91 AD3d 1356, 1358 [4th Dept 2012] (refusing to infer a private right of action under a statute or infer that the Legislature intended to do so where the actual language was not included in the statute); *Whitfield v United States*, 543 US 209, 216 [2005] (holding that "Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to

Accordingly, the Appellate Division's holding that the AG can benefit from the six-year statute of limitations applicable to common law fraud claims without proving scienter and reliance must be rejected. If the AG wants a six-year limitations period to govern its claim, he must plead all the elements of fraud or otherwise be subject to the three-year limitations period of a statutory claim. The AG cannot have it both ways.

IV. THE APPELLATE DIVISION ERRED IN DISMISSING THE TRUMP APPELLANTS' AFFIRMATIVE DEFENSES

The Appellate Division erred in affirming the Supreme Court's decision, which incorrectly dismissed the Trump Appellants' third, fifth, sixth, eleventh, fifteenth, and sixteenth affirmative defenses on the basis that they did not "state proper affirmative defenses," and incorrectly dismissed the fourteenth affirmative defense on the basis that the disclaimers in the enrollment forms failed to provide a defense to the fraud claims. (Decision at 39 (A. 615); *Kern II* at 27-30 (A. 55-58).) The Appellate Division did not provide any analysis for its Decision but simply stated that the Supreme Court's dismissal was correct. (Decision at 39 (A. 615).)

A party responding to a pleading is required under CPLR § 3018(b) to "plead all matters which if not pleaded would be likely to take the adverse party by

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do so"); *Franklin Natl. Bank of Franklin Square v New York*, 347 US 373, 378 [1954] (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances"); *FCC v NextWave Personal Commc'ns, Inc.*, 537 US 293, 302 [2003] (holding that when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly").

surprise or would raise issues of fact not appearing on the face of a prior pleading." In instances where it is unclear if an affirmative defense is necessary, it has been the practice in New York for a party to "treat it as a defense and plead." *Sinacore v State of New York*, 176 Misc 2d 1, 4 [NY Ct Cl 1998] (citations omitted). Where an affirmative defense is pled and a denial would have been sufficient, the burden of proof does not shift. *See Beece v Guardian Life Ins. Co. of Am.*, 110 AD2d 865, 867 [2d Dept 1985].

The AG, in moving to dismiss the Trump Appellants' affirmative defenses, "bears the heavy burden of showing that the defense is without merit as a matter of law . . . [and] the court should not dismiss a defense where there remain questions of fact requiring a trial." *Granite State Ins. Co. v Transatlantic Reins. Co.*, 132 AD3d 479, 481 [1st Dept 2015] (citing *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]); *see also* CPLR § 3211(b). Further, on a motion to dismiss or strike an affirmative defense, "the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference." *Chestnut Realty Corp. v Kaminski*, 95 AD3d 1254, 1255 [2d Dept 2012].

Because, as discussed below, the AG did not meet its heavy burden of demonstrating that the affirmative defenses are without merit as a matter of law, and the lower courts failed to liberally construe the affirmative defenses in the

Trump Appellants' favor and give them the benefit of every reasonable inference, the affirmative defenses must be reinstated. *534 E. 11th St. Hous. Dev. Fund Corp.*, 90 AD3d at 541-42 (affirmative defenses reinstated because Defendant adequately pled the defenses).

A. The Third And Eleventh Affirmative Defenses Were Dismissed In Error

The third affirmative defense alleged that petitioner has failed to establish a pattern or practice of deceptive and/or fraudulent conduct to support any of its § 63(12) claims. (A. 401.) The Trump Appellants alleged that the purported conduct was the result of isolated or inadvertent errors and therefore the AG failed to satisfy the "repeated" or "persistent" conduct requirements under § 63(12). *See e.g. People ex rel. Cuomo v Dell, Inc.*, 21 Misc 3d 1110[A], 2008 NY Slip Op 52026[U], *5 [Sup Ct, Albany County 2008] (limited bad acts did not support imposition of penalty or injunctive relief because there was "no indication that these were anything other than isolated good faith errors"). For example, Appellants alleged and provided evidence that 10,000 student surveys reflected a 98% approval rating, and that customer testimonials collected by TEI also reflected high customer satisfaction. (A. 201, A. 358, A. 447.) By contrast, the AG submitted evidence pertaining to less than 1% of TEI students. (A. 197, A. 225, A. 315, A. 374, A. 446, A. 551, A. 586.)

Rather than accepting the Trump Appellants' allegations as true and not making factual determinations, the Supreme Court improperly dismissed the third affirmative defense. (*Kern II* at 27 (A. 55)); *Stopani v Allegany Co-op Ins. Co.*, 83 AD3d 1446, 1446-47 [4th Dept 2011]; *Capital Tel. Co. v Motorola Commc'ns & Elecs. Inc.*, 208 AD2d 1150, 1150 [3d Dept 1994].

For their eleventh affirmative defense, the Trump Appellants alleged that the acts were "isolated and limited, and do not establish a pattern or practice" to support any of the AG's § 63(12) claims. (A. 402.) The Trump Appellants would not be liable for "isolated and limited incidents of TEI's employees" because the employees were acting outside of the scope of their employment given that TEI had guidelines and procedures in place that ensured the instructors were properly trained and prohibited them from making false claims, including claims of success. (A. 235, A. 280, A. 281, A. 356-87, A. 617-65, A. 666-67.) Because the Trump Appellants cannot be liable for the actions of their employees which are done outside of the scope of their employment, and the Trump Appellants properly pleaded that defense, the Supreme Court erred in dismissing the eleventh affirmative defense. (*Kern II* at 27 (A. 55)); *see e.g. Prudential-Bache Sec., Inc. v Citibank, N.A.*, 73 NY2d 263, 276 [1989] (employers are not liable when their employees are acting outside of the scope of employment); *Considine v Southampton Hosp.*, 83 AD3d 883, 884 [2d Dept 2011] (employee acted outside of

the scope of employment when he violated his employer's policies); *Boggan v Abby Finishing Co.*, 11 AD2d 591, 592 [3d Dept 1960] (same).

Moreover, because the Trump Appellants were unable to deny allegations regarding a "pattern or practice" as those allegations were absent from the Petition, they properly defended by asserting the third and eleventh affirmative defenses. *See Granite State Ins. Co.*, 132 AD3d at 481.

B. The Fifth And Sixth Affirmative Defenses Were Dismissed In Error

The fifth and sixth affirmative defenses allege that the Petition failed to allege facts as of May 31, 2010. (A. 401.) In *Kern II*, the Supreme Court held that the AG "failed to provide any evidence of the alleged deceptive business practices . . ., which occurred after May 31, 2010, the relevant statutory period." (*Kern II* at 14 (A. 42).) Only one affidavit annexed to the Petition related to a consumer's attendance of a seminar after May 31, 2010. As the Supreme Court found, that affidavit did not "provide any evidence of the alleged deceptive business practices." (*Kern II* at 13-14 (A. 41-42).) Therefore, given that the Appellate Division erred in failing to apply a three-year limitations period to the § 63(12) claim and the Supreme Court correctly concluded there were no allegations of deceptive practices during the relevant time period, the fifth and sixth affirmative defenses were improperly dismissed. *See e.g. A. Morrison Trucking, Inc. v*

Bonfiglio, 13 Misc 3d 1211[A], 2006 NY Slip Op 51784[U], *7 [Sup Ct, Kings County 2006].

C. The Fourteenth, Fifteenth And Sixteenth Affirmative Defenses Were Dismissed In Error

The fourteenth affirmative defense alleges that the AG's claims based on fraud are barred by the enrollment forms executed by participants which contain disclaimers. (A. 230, A. 279, A. 379, A. 402, A. 546-47, A. 572.) New York courts have recognized that disclaimers are an appropriate affirmative defense to common law fraud. *See e.g. Gaidon I*, 94 NY2d at 345, 349-50 (disclaimers that noted that interest rates were not guaranteed are sufficient to absolve defendants of fraud); *Flax v Lincoln Natl. Life Ins. Co.*, 54 AD3d 992, 994 [2d Dept 2008] (finding "that disclaimers contained in the policy and the promotional materials provided to [plaintiff] were sufficient to absolve the defendants of fraud.").

The Supreme Court incorrectly dismissed the fourteenth affirmative defense on the basis that the disclaimers do not provide a defense because they were "buried in small print." *Kern II* at 30 (A. 58). This is an improper finding of fact. The disclaimers at issue here varied in size including up to 9.5-point font size. (A. 573, A. 783, A. 786, A. 788, A. 790.) Under CPLR § 4544, only portions of documents less than eight point font size, or in the case of upper case type five and one-half point font size, are not admissible. *See* CPLR § 4544 (McKinney).

The Supreme Court also found that "such disclaimers do not specifically disclaim the particular facts petitioner alleges were misrepresented or undisclosed" and "such facts were only within the Trump Appellants' knowledge." (*Kern II* at 30 (A. 58).) Again, the Supreme Court was incorrect. Issues of fact exist to the extent that the disclaimers tracked the representations at issue. For example, the AG alleged the students purportedly relied on promises of success and profit but any such promises were specifically disclaimed in font size of eight point or larger. (A. 69, A. 296.) Accordingly, the fourteenth affirmative defense should not have been dismissed at the pleading stage. (A. 238, A. 572, A. 732, A. 734, A. 736, A. 738, A. 755, A. 785-86, A. 788, A. 790, A. 792, A. 794, A. 796-97, A. 799.)

For their fifteenth affirmative defense, the Trump Appellants alleged that the AG's fraud-based claims are barred or refuted by surveys and testimonials, which demonstrate a 98% approval rating, which undermines the AG's claims, including claims regarding the quality of the TEI programs and purported misrepresentations. (A. 201, A. 358, A. 402, A. 447.) At the motion to dismiss stage, the Supreme Court and Appellate Division erroneously failed to take those allegations as true and erroneously dismissed the affirmative defense. *Stopani*, 83 AD3d at 1446-47.

The Trump Appellants allege in their sixteenth affirmative defense that "participants' failure to put in proper efforts and comply with workbooks, homework, and/or market conditions" resulted in student dissatisfaction or lack of

success. (A. 403, A. 670.) Given that the AG is complaining about the quality of the program, the participants' ability to follow the program raises a factual issue about the participants' injuries which cannot be resolved at the motion to dismiss stage. *See Fed. Natl. Mtge. Assn. v Ricks*, 83 Misc 2d 814, 828 [Sup Ct, Kings County 1975] (noting that failure to follow Handbook and follow clear directives affects ability to get relief).

V. THE COURT BELOW ERRED IN DENYING APPELLANTS' MOTION TO CONVERT THE SPECIAL PROCEEDING INTO A PLENARY ACTION

The Appellate Division erroneously affirmed the Supreme Court's decision denying Appellants' motion to convert the § 63(12) special proceeding to a plenary action pursuant to CPLR § 103(c). (Decision at 40 (A. 616); *Kern II* at 33-34 (A. 61-62.).)

Under CPLR §103(c), the court, "in the interests of justice," can convert a special proceeding into a plenary action. Here, the lower courts abused their discretion in failing to convert the AG's action into a plenary action because the objectives for commencing a § 63(12) special proceeding – *i.e.* to "prevent the perpetration of continuing frauds [for a] present business" and provide "expeditious means for the Attorney General to prevent further injury and seek

relief"[19] – are not present here. Here, there are *no* "continuing frauds [for] a present business" as the now-defunct-TEI has ceased operations for over six years and this action involves sufficiently complex issues that vary from consumer to consumer.[20] (A. 193-94, A. 199, A. 215, A. 328, A. 333-34, A. 439; *Kern I* at 9 (A. 17); *Kern II* at 5-6 (A. 33-34).)

Here, the AG did not, as he could not, allege any ongoing wrongful conduct. Indeed, when the AG instituted his action, he did not seek a temporary restraining order or preliminary injunction. (A.29-30, A. 65-66, A. 104-05.) Nor could he given that the AG waited more than three years after TEI ceased its operations to file this proceeding. Because the AG is not enjoining any continuing conduct and there is no "present business," this is at most a monetary damages action dressed up as a special proceeding to prevent Appellants from obtaining the benefits of discovery to defend against the AG's claims. (A. 193-94, A. 199, A. 215, A. 328, A. 333-34, A. 439; *Kern I* at 9 (A. 17).) Further, there are numerous complex issues of fact relevant to the AG's claims. For instance, the AG claims to represent over 5,000 consumers that he may very well need to call as witnesses to try to prove damages as to each consumer who had their own unique experiences and

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[19] *People v Apple Health Sports Clubs, Ltd.*, 206 AD2d 266, 268 [1st Dept 1994]; 21 NY Jur 2d Consumer and Borrower Protection § 18.

[20] *See e.g. State v Seaport Manor A.C.F.*, 2003 NY Slip Op 30211[U], *11 [Sup Ct, Kings County 2003] (finding that the "numerous and complex issues of fact" warranted full discovery on, *inter alia*, petitioner's §63(12) claims).

aptitude, attended different seminars with different instructors, etc. (A.70, A. 115, A. 279, A. 291, A. 294, A. 484.)

Moreover, as the AG has not and cannot show any need to enjoin Appellants' current activities, this proceeding should be converted to a plenary action in which the AG can still seek injunctive relief. *See Diamond Asphalt Corp. v Sander*, 92 NY2d 244, 253 [1998] (turning special proceeding into declaratory judgment action and refusing injunction where work under awarded contract was completed or substantially completed); *People by Lefkowitz v Volkswagen of Am., Inc.*, 47 AD2d 868, 868 [1st Dept 1975] (affirming "Special Term's refusal to summarily grant the injunction [under GBL §§ 349 and 350] in view of the immediate correction of the advertisement and the passage of almost three years without repetition of the offense"); *see also Polzer v TRW, Inc.*, 256 AD2d 248, 249 [1st Dept 1998].

VI. THE COURT BELOW ERRED IN LIMITING APPELLANTS' DISCOVERY

The Appellate Division erroneously affirmed the Supreme Court's decision, which limited discovery. (Decision at 40 (A. 616); *Kern II* at 33-34 (A. 61-62).) To the extent that the Court rules, as shown above, that the AG's § 63(12) claim is statutorily created and subject to a three-year statute of limitations period, Appellants are entitled to discovery to the extent the surviving statutory claims are based on events that occurred after May 31, 2010. Further, to the extent that the

Court rules that the AG has a common law fraud claim that is subject to a six-year statute of limitations period, then the AG must prove individual scienter and reliance and therefore Appellants are entitled to full-scale discovery on those issues.

A. Appellants Properly Sought Discovery In The Special Proceeding

Appellants had properly moved before the Supreme Court, pursuant to CPLR §§ 408, 3101, and 3102(a), and (f), for leave to serve (i) discovery demands relating to the AG's claims, including disclosure from each student relating to any alleged misrepresentation that was made and any purported injury that was sustained, (ii) discovery demands and notices of deposition upon the AG regarding its investigation into the alleged claims against TEI, and (iii) an order directing the AG to produce all individuals identified for whom damages are sought in the remaining causes of action. (A. 434-35.)

In partially granting Appellants' motion for an order granting discovery, the Supreme Court correctly agreed that Appellants were entitled to take depositions as to "each individual student on behalf of whom petitioner is seeking to recover damages based on common law fraud within the six-year statutory period" if, and to the extent that, the AG must prove individual reliance and scienter. (*Kern II* at 33 (A. 61).) However, the Supreme Court nonetheless denied full-scale discovery, including paper discovery. (*Kern II* at 34, 35 (A. 62, 63).)

Even though the Supreme Court and Appellate Division have discretion in granting or denying discovery under CPLR §§ 408 and 3101, *Grossman v McMahon*, 261 AD2d 54, 57 [3d Dept 1999], that "discretion is not unlimited." *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] (reversing Appellate Division and holding that where information sought was "material and necessary" to a party's claims, party was entitled to interrogatory answers); *see also Lipson v Dime Sav. Bank of New York, FSB*, 203 AD2d 161, 163 [1st Dept 1994] ("[W]e find it was an abuse of discretion for the trial court to force the parties to trial without first providing them with a reasonable opportunity for the completion of discovery.").

B. Appellants Have Demonstrated Special Circumstances And Ample Need For Discovery Under CPLR § 408

Appellants have demonstrated the need for discovery under CPLR § 408, under which leave is granted upon a showing of special circumstances. *Matter of Greens at Washingtonville, Ltd. v Town of Blooming Grove*, 98 AD3d 1118, 1119 [2d Dept 2012] (affirming granting of motion to compel discovery pursuant to CPLR § 408 where "disclosure request sought information which was material and necessary to the litigation").

Here, it is clear there are special circumstances and ample need for depositions. (*Kern II* at 33-34 (A. 61-62).) Like a deposition, paper discovery is "material and necessary" for Appellants to defend against the AG's case. This

prosecution involves numerous and complex issues of fact, and damages in particular will be fact-driven. *See e.g. Seaport Manor*, 2003 NY Slip Op 30211[U] at *11. Appellants seek necessary information regarding the specific misrepresentation or deceptive business practice that each former student allegedly claims occurred on or after May 31, 2010 as the Petition fails to identify any injured person or facts supporting those claims. By improperly limiting Appellants' discovery and denying the benefit of paper discovery, Appellants are forced to defend a multi-million dollar damages action with zero opportunity to see the basis of or even challenge the damages prior to the CPLR § 410 hearing. (A. 69, A. 116, A. 444.)

Appellants also established that ample need and special circumstances require disclosure of communications between the students and the AG because that information is relevant to ascertain the reliability and credibility of the statements made in the numerous affidavits that the AG so heavily relies upon. As those communications were closer in time to the events, they will serve as better evidence of what the students actually recollected. Further, because the AG made statements regarding the lack of viability of his claims against TEI, Appellants should be entitled to discover what evidence prompted the AG to change its tune on this "very weak" case. (A. 189, A. 195, A. 198.)

Additionally, the Supreme Court erred by not properly balancing the needs of Appellants against the AG's opposing interest to avoid unnecessary delay. *Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 16 [2d Dept 1999] (granting leave where Board had not demonstrated that discovery "would be prejudicial or unduly burdensome, would violate confidentiality, or would unduly delay the case"). The balance favors granting broader disclosure as the affidavits submitted by the AG were prepared many years after the students attended the TEI program and after the inappropriate publicity tour raised serious issues of reliability and credibility, and necessitates discovery of what notes/documents the affiants had and/or relied upon to prepare the affidavits. Further, the concern of preventing undue delay in a summary proceeding does not apply here when (a) the proceeding is no longer summary in nature because a trial has been ordered to resolve numerous issues of fact, and (b) there is no exigency as there is no risk of ongoing fraud given that TEI ceased operations several years ago. (*Kern II* at 35-36 (A. 63-64)); *see Lev v Lader*, 115 AD2d 522, 523 [2d Dept 1985]. Moreover, if after disclosure is granted in this case, there is evidence of delay, the AG can easily obtain a protective order. *See Chester v Zima*, 41 Misc 2d 676, 677 [Sup Ct, Erie County 1964].

Appellants, however, unlike the AG, do not have a remedy if their interests are ignored and they are forced to proceed to trial without the benefit of material

and necessary disclosure. Appellants will undoubtedly be ambushed at trial, having to defend a case against the AG that involves tens of millions of dollars in damages without the benefit of discovery with respect to the 5,000 consumers that the AG claims to be representing. (A. 69, A. 70, A. 115, A. 116, A. 291, A. 294, A. 444, A. 484.) Because the summary proceeding is tantamount to a full-blown plenary action, Appellants should be entitled to discovery "to ascertain [the] truth and to accelerate the depositions of suits." *Allen*, 21 NY2d at 407 (citation omitted).

VII. THE APPELLATE DIVISION ABUSED ITS DISCRETION IN ALLOWING THE AG TO WITHHOLD NON-PRIVILEGED DOCUMENTS

The Appellate Division abused its discretion in affirming the Supreme Court's decision denying discovery of documents collected by the AG in connection with its investigation and communications with former students on the basis that the materials were protected as work product under CPLR § 3101(c). (*Kern II* at 35 (A. 63).)

First, the lower courts abused their discretion because they allowed the AG to withhold documents even though the AG – who bears the burden of proof under CPLR § 3101(d) – failed to show that the requested documents were created primarily, if not solely, in anticipation of litigation. *See JP Foodservice Distribs. v Sorrento, Inc.*, 305 AD2d 266, 266 [1st Dept 2003]; *Spectrum Sys. Intl. Corp. v*

Chemical Bank, 157 AD2d 444, 448 [1st Dept 1990], *affd as mod*, 78 NY2d 371 [1991].

Second, even assuming *arguendo* that the requested documents were protected as work product, the lower courts abused their discretion because Appellants made the necessary showing to overcome the work product doctrine, namely they showed that (a) there is a substantial need for the materials in the preparation of the case and (b) the failure to disclose will result in substantial injustice or undue hardship. *See e.g. Tucker v Weissman*, 89 AD2d 852, 853 [2d Dept 1982]. As detailed above and based on the fact that the Supreme Court had granted some discovery, Appellants have necessarily shown ample need for discovery related to the AG's § 63(12) fraud claim. Further, without the requested discovery, Appellants will be severely prejudiced defending fraud-related claims, which implicate numerous factual issues, particularly where the evidence submitted by the AG raises credibility, reliability and damages issues.

CONCLUSION

For the foregoing reasons, the Decision should be reversed.

Dated: New York, New York
October 21, 2016

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP

By: _____
Marc E. Kasowitz
Christine A. Montenegro
1633 Broadway
New York, New York 10019
(212) 506-1700 (telephone)
(212) 506-1800 (facsimile)

BELKIN BURDEN WENIG
& GOLDMAN, LLP
Jeffrey L. Goldman
Magda L. Cruz
270 Madison Avenue
New York, New York 10016
(212) 867-4466 (telephone)

Attorneys for Respondents-Appellants

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: October 21, 2016

Marc E. Kasowitz
Christine A. Montenegro
KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
1633 Broadway
New York, New York 10019
(212) 506-1700

Jeffrey L. Goldman
Magda L. Cruz
BELKIN BURDEN WENIG & GOLDMAN, LLP
270 Madison Avenue
New York, New York 10016
(212) 867-4466

Attorneys for Respondents-Appellants

ADDENDUM

ADDENDUM
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BILL JACKET FOR CH. 592 [1956] (CREATING 63(12) AND STATING IT WAS DONE TO EXTEND GENERAL CORPORATION LAW, ART. 8) [ADD1- ADD15]

CHAPTER 592

3d Rdg. 816 Nos. 3558, 4089 Int. 3289

IN SENATE

February 21, 1956

Eng

Introduced by Mr. TOMPKINS—read twice and ordered printed, and when printed to be committed to the Committee on Codes—reported favorably from said committee, committed to the Committee of the Whole, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

Ame

AN ACT

To amend the executive law, in relation to cancellation of registration of doing business under an assumed name or as partners for repeated fraudulent or illegal acts

Notes

Jurats and Enacting Clause

Compared by Lipsitz - Kaczmarek

State of New York
In Senate

MAR 20 1956

Ordered, That the Secretary deliver the bill entitled:

3d Rdg. 816 Nos. 3558, 4089 Int. 3289

AN ACT

To amend the executive law, in relation to cancellation of registration of doing business under an assumed name or as partners for repeated fraudulent or illegal acts

to the Assembly and request its concurrence in the same.

By order
William S. King,
Secretary.

Form No. 59
1-4-56

ADD2

IN ASSEMBLY

Passed without amendments

By order of ASSEMBLY

MAR 2 3 1956

CLERK

ADD3

SENATE INT. 3289

NEW YORK STATE BAR ASSOCIATION - DISAPPROVED

ADD4

BERNARD TOMPKINS
8TH DISTRICT

THE SENATE
STATE OF NEW YORK
ALBANY

165 BROADWAY
NEW YORK 6, N. Y.

MEMORANDUM TO THE GOVERNOR

In re: Senate Intro. 3289, Print 4089 - by Mr. Tompkins

AN ACT

To amend the executive law, in relation to cancellation of registration of doing business under an assumed name or aspartners for repeated fraudulent or illegal acts.

This bill, introduced at the request of the Attorney General, carries out one of the major recommendations of the Attorney General for the protection of consumers and others against fraud by unincorporated organizations. It conforms to the powers which now reside in the Attorney General with respect to corporations under Article 8 of the General Corporation Law.

This proposal authorizes the Attorney General to enjoin the continuation in business as partners or under a trade style name of persons who are guilty of repeated fraud or illegality.

The procedure set forth in the bill permits the Attorney General to apply to the Supreme Court upon five days notice for such injunction in appropriate instances.

Respectfully submitted,

Bernard Tompkins

SENATOR BERNARD TOMPKINS.

The Better Business Bureau of New York City Incorporated

DIgby 9-0470 280 Broadway, New York, 7, N. Y.

April 3, 1956

ACKNOWLEDGED APR 6 1956

Honorable Averell Harriman
Executive Chamber
State Capitol
Albany New York

Re: Senate Int. #3289;
Print Nos. 3550, 4069
By Senator Tompkins

My dear Governor Harriman:

On behalf of The Better Business Bureau of New York City I am writing in support of the above captioned bill and to recommend that it receive your approval.

Under the General Corporation Law the Attorney General of the State has the power to seek the dissolution or the securing of an injunction against a corporation which exceeds its corporate powers and which engages in fraudulent or illegal acts. The present bill would provide similar powers to the Attorney General with respect to businesses conducted as a partnership or under any name or designation other than the real name of the individual concerned.

In the experience of the Better Business Bureau, the availability of such powers to the State Attorney General over a period of many years has been most helpful in combating fraudulent advertising and selling practices on the part of certain corporations which have deceived or defrauded the consumers of this state. We have been acutely conscious of the fact that the Attorney General was powerless to take similar action with respect to unincorporated businesses. In the absence of such powers the only legal recourse has been prosecution under the Criminal Law which has often proved to be difficult, if not impossible, because of the slowness of criminal procedures and the necessarily strict interpretation which the courts apply to the Criminal Law.

5

ADD6

EXEC
BER

APR 5 4 55 PM 1956

STATE OF NEW YORK

6

ADD7

We believe that the enactment of the present bill is in the public interest and will serve to protect the consuming public of the state and legitimate business. We therefore urge that it receive your approval.

Sincerely yours,

HUGH R. JACKSON
President

HRJ:md

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

3289

PERSIA CAMPBELL
CONSUMER COUNSEL

April 3, 1956

Memo
To: Hon. Daniel Gutman
Counsel to the Governor
From: Dr. Persia Campbell
Consumer Counsel

Re.: Senate Intro. 3289, Prin. 3558, 4089

Recommend: approval

This bill will make it possible to put a stop to continuing practices of deceit and fraud by unincorporated businesses. In a recent case, the Kings County District Attorney obtained a conviction against a partnership involved in fraud and misrepresentation, but could not prevent a recurrence.

Had this bill been in effect the Attorney General on the basis of facts, could have petitioned the court to cancel the partnership registration.

Persia Campbell

RECEIVED
APR 3 19[illegible]
COUNSEL TO THE GOVERNOR

no card
no corp

S 3209
S 3558
S 4089

MEMORANDUM

To: Hon. Daniel Gutman

From: Sidney Squire,
Executive Deputy Secretary of State

Re: Senate Bill Int. 3209, Pr. 3558, 4089

An Act to amend the executive law, in relation to cancellation of registration of doing business under an assumed name or as partners for repeated fraudulent or illegal acts.

This bill does not concern the Department of State.

Dated: April 4, 1956

Sidney Squire S.S.
Executive Deputy
Secretary of State

EXECUTIVE CHAMBER

APR 9 9 24 AM 1956

STATE OF NEW YORK

10

S 3221

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY

JACOB K. JAVITS
ATTORNEY GENERAL

MEMORANDUM TO THE GOVERNOR

Re: Senate Int. 3289, Pr. 4089

This bill was introduced on the recommendation of this office. It amends the Executive Law to add a new subdivision to Section 63 thereof by which the Attorney General would be authorized to apply to the Supreme Court for an order cancelling the registration of doing business under an assumed name or as partners under Section 440 of the Penal Law, and for related relief.

Under this bill, the Supreme Court would have the authority to terminate the privilege of conducting business under an assumed name of those companies which engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business under an assumed name.

At present, the remedy of action for dissolution is available under Article 8 of the General Corporation Law to terminate the corporate existence of corporations engaged in fraudulent or illegal acts in the conduct or transaction of their business, but no similar remedy is available as respects unincorporated companies engaged in similar conduct which avail themselves of the permission to conduct business under an assumed name pursuant to the provisions of Section 440 of the Penal Law.

I recommend approval of the bill.

Dated: April 9, 1956

Respectfully yours,

11

JACOB K. JAVITS
Attorney General

ADD12

NEW YORK STATE BAR ASSOCIATION

COMMITTEE ON STATE LEGISLATION

1956 LEGISLATIVE SESSION

REPORT NO.

S. Pr. 3558, 4089 Int. 3289 Mr. Tompkins

AN ACT to amend the executive law, in relation to cancellation of registration of doing business under an assumed name or as partners for repeated fraudulent or illegal acts

THE BILL IS DISAPPROVED.

This bill would add a new subsection 12 to Section 63 of the executive law to provide that whenever any person shall "engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality "in the carrying on, conducting or transaction of business as a member of a partnership or under an assumed business name, then the attorney-general may apply to the supreme court upon notice of five days for an order cancelling the registration of such partnership or assumed business name and further enjoining "the continuance of such business activity or of any fraudulent or illegal acts".

At the present time, the State of New York has jurisdiction over corporations by reason of their having filed certificates of incorporation with the Department of State. This bill attempts to include the Attorney General's jurisdiction over partnerships and people doing business under an assumed business name. However meritorious the bill, the same has been drawn in too loose a manner. Who is to state what "repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality " means? In addition, how can any court enjoin the continuance of any "fraudulent or illegal acts"?

For the above reasons, the bill is disapproved.

12

Ch. 592

STATE OF NEW YORK
DEPARTMENT OF AUDIT AND CONTROL
ALBANY

ARTHUR LEVITT
STATE COMPTROLLER

April 16, 1956

IN REPLYING REFER TO

His Excellency Averell Harriman
Governor of the State of New York
Executive Chamber
Albany, New York

Re: Senate Bill, Int. 3289, Pr. 4089
By Mr. Tompkins

Sir:

This memorandum has been prepared at the request of your Counsel.

This bill, amending section 63 of the Executive Law, grants additional authority to the Attorney General.

Under the new section, the Attorney General may apply to the Supreme Court for an order cancelling any "filing or registration" made pursuant to section 440 of the Penal Law by any firm doing business as a partnership or under an assumed name when "any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying or conducting or transaction of business as a member of a partnership or under any name or designation other than his real name".

In addition, the Attorney General may obtain an order "enjoining the continuance of such business activity or of any fraudulent or illegal acts."

The provision for cancellation of any "filing or registration" and the provision authorizing obtaining an injunction against the continuance of business activity must be read together. Under the provisions of section 440 of the Penal Law, it would be a misdemeanor to continue in business under an assumed name after cancellation of any "filing or registration" pursuant to that section. If the statute is interpreted to mean that after cancellation, the guilty person or partnership can be enjoined from continuing in business under the assumed or partnership name, the potential effect of the statute hardly justifies its enactment. The guilty person or persons would merely have to change the firm name.

His Excellency Averell Harriman

Senate Bill, Int. 3289, Pr. 4089

The only logical interpretation of the statute is that the provision gives authority to enjoin the continuance of the "business activity" itself. Two questions naturally come to mind: Why restrict the application of the section to cases in which an assumed or partnership name is utilized? Why not grant the Attorney General authority to enjoin anyone from continuing in a business activity if such person has been guilty of frequent fraudulent dealings?

It may well be that in certain businesses in which partnerships or assumed names are frequent, as in the business of dealing in securities, such injunctions might be justifiable. Indeed, section 353 of the General Business Law authorizes the Attorney General to obtain permanent injunctions against persons guilty of fraudulent dealings in securities. If there are other such businesses, the imposition of such a severe penalty should be preceded by an independent legislative judgment in each case.

In a suit for an injunction, there is no need to prove the charge beyond a reasonable doubt, as in a criminal case--a mere preponderance of evidence would be sufficient.

This Department does not feel that such blanket authority to restrain business activity for improper practices should be granted. The amendment grants authority, in cases in which it applies, to the Attorney General to obtain injunctions against the continuance of any type of business activity without criminal conviction for any wrongdoing.

It is noted that the ultimate determination as to whether or not an injunction should issue remains with the courts. Judicial discretion provides a safeguard.

This Department does not feel that the judicial safeguard justifies enactment of such a far-reaching provision. It authorizes perpetual punishment of individuals without regard to the inherent dangers to the general public of the business activity involved. This Department respectfully recommends that this bill be disapproved. The bill takes effect immediately.

Very truly yours,

ARTHUR LEVITT
State Comptroller

By Joseph J. Kelly

Joseph J. Kelly
Deputy Comptroller

CHAPTER 666

Print. 1219 Intro. 1215

IN SENATE

February 15, 1965

Introduced by Mr. GORDON—read twice and ordered printed, and when printed to be committed to the Committe on Finance

AN ACT

To amend the executive law, in relation to clarifying the meaning of certain words used therein with respect to the general duties of the attorney general

Notes

Compared by

APPROVED

JUL 2 - 1965

Approved

Date 5/nh
No. of printed bills 1
No. of exposures exclusive of bills 9

B-203 (9/61)

10
~~30~~-DAY BILL

DIVISION OF THE BUDGET REPORT ON BILLS

Session Year 1965

SENATE

NO RECOMMENDATION

ASSEMBLY

Pr: 1219

Pr:

Int: 1215

Int:

Title To amend the executive law, in relation to clarifying the meaning of certain words used therein with respect to the general duties of the attorney general.

The above bill has been referred to the Division of the Budget for comment. After careful review, we find that (a) the bill does not affect State finances in any way, (b) the bill has no appreciable effect on State programs or administration, and (c) this office does not have the technical responsibility to make a recommendation on the bill.

We therefore make no recommendation.

Bachman '01

John W. Van Lear
Chief Budget Examiner

ADD17

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MEMORANDUM

Re: Senate Int. 1215 , Pr. 1219 - BERNARD G GORDON
Assembly Int. 2104 , Pr. 2104 - S. William Green

AN ACT to amend the executive law, in relation to clarifying the meaning of certain words used therein with respect to the general duties of the attorney general

This bill would amend subdivision 12 of Section 63 of the Executive Law (a) to equate the meaning of the words "fraud" and "fraudulent" as used therein with the provisions of the Martin Act (General Business Law, Art. 23-A, § 352), dealing with fraudulent acts in the sale of securities and commodities, and (b) to equate this statutory provision with the Uniform Commercial Code, § 2-302, effective September 24, 1964, which permits the Courts for the first time expressly to refuse to enforce an "unconscionable contract or clause".

This bill is part of the program of the Attorney General.

Dated: January 5, 1965

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

MEMORANDUM FOR THE GOVERNOR

Re: Senate Int. 1215, Pr. 1219

This bill, effective September 1, 1965, amends Executive Law, § 63, subdivision 12 to equate the meaning of the words "fraud" and "fraudulent" as used therein with the provisions of the Martin Act, General Business Law, Art. 23-A, § 352, dealing with fraudulent acts in the sale of securities and commodities, and to equate § 63 with the provisions of Uniform Commercial Code, § 2-302, which permits Courts for the first time expressly to refuse to enforce an unconscionable contract or clause.

The bill will assure all consumers involved in any sales contract equal protection in all transactions to the fullest extent allowed under the Uniform Commercial Code. The amendment of § 63 will allow my office to continue more efficiently its efforts to protect consumers more adequately from unscrupulous business practices.

This bill is part of the legislative program of my office and I strongly urge its approval.

Dated: June 30, 1965

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General

New York State Department of Commerce

June 24, 1965

S 1215

SENATE:
Intro 1215
Print 1219

Introduced by
Mr. Gordon

RECOMMENDATION: The Department of Commerce recommends disapproval of this bill.

STATUTES INVOLVED: Executive Law.

EFFECTIVE DATE: This act shall take effect September 1, 1965.

DISCUSSION:

1. Purpose of bill: The purpose of this bill is to provide that the word "fraud" or "fraudulent" as used with respect to the duties of the Attorney General regarding the enjoining of continuing or repeated fraud or fraudulent conduct in the transaction of business, to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretence, false promise or unconscionable contractual provisions."

2. Summary of provisions: This bill amends section 63 of the Executive Law, to effect the above purpose.

3. Prior legislative history: None.

4. Known position of others: This bill is sponsored by the Department of Law.

5. Budget implications: Unknown.

6. Arguments in support: This bill appears to be intended to assist the Attorney General in enjoining illegal and fraudulent business activities by more clearly defining what is meant by fraudulent. This Department is anxious that any illegal business activities be stopped, however, for the reasons stated in #7 below we do not believe that this particular bill would accomplish its intended purpose.

7. Arguments in opposition: The definitions of "fraud" or "fraudulent" proposed by this bill go well beyond the common law concept of a fraud, to wit, a false representation of a fact by one person which deceives and is intended to deceive another who acts upon it to his detriment. Under the definition proposed here a fraud would extend to such an unrelated matter as an unconscionable contractual provision. While such a provision goes to the validity of a contract it would not necessarily constitute a fraud. To include such a matter in this section does not appear in our opinion to be within the purview of the section. Furthermore, this proposed definition of these terms does not require a fraud to be an intentional act.

8. Reasons for recommendation: The Department of Commerce recommends disapproval of this bill for the reasons stated in #7 above.

Ronald B. Lehman
First Deputy Commissioner

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

S-1215

COMMITTEE ON STATE LEGISLATION

ALVIN H. SCHULMAN, CHAIRMAN
200 PARK AVENUE
NEW YORK 10017
TN 7-5500

LEONARD SCHAITMAN, SECRETARY
200 PARK AVENUE
NEW YORK 10017
TN 7-5500

June 18, 1965

Re: S. Int. 1215, Pr. 1219 - Approved

Dear Mr. Corbin:

Answering your inquiry with respect to the above bill, we wish to inform you that we approve the measure.

The bill, to take effect September 1, 1965, would amend section 63(12) of the Executive Law, which provides that whenever any person engages in repeated "fraudulent or illegal acts" in conducting or transacting business, the attorney general may apply to the supreme court for an order enjoining the business activity or fraudulent or illegal acts. The bill would add to section 63(12) the following sentence:

> "The word 'fraud' or 'fraudulent' as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretence, false promise or unconscionable contractual provisions."

Fraud has been defined by the courts as

> "any trick or artifice by one, to induce another to fall into, or remain in an error, to his harm." Maher v. Hibernia Insurance Co., 67 N.Y. 283, 292 (1876)

Similarly:

> "Fraud has been variously defined. No all inclusive definition can be framed owing to the multiform character of fraud and the great variety of attendant circumstances. Each case must be determined on its particular and peculiar facts. The wisdom of an exact legal definition has frequently been questioned. (See DuFlon v. Powers, 14 Abb. Pr. [N.S.] 391.)

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> "Actual fraud is intentional fraud, and it has been frequently held that a promise made without any intention of performing it, if made to induce another to surrender some legal right and which accomplishes the end designed, is actual fraud. (26 C.J. 1060.)
>
> "'Fraud ***comprises all acts, omissions, and concealments involving a breach of a legal or equitable duty and resulting in damage to another." (26 C.J. 1059.)" Coppo v. Coppo, 163 Misc. 249, 252 (Sup. Ct. Dutchess Co. 1937)

With this interpretive background in mind, it could hardly be doubted that "fraud" and "fraudulent" have a sweep at least as broad as any definition, including that proposed in this bill. Further, as the Third Department in construing section 63(12) of the Executive Law, recently held:

> "The Attorney-General thus clearly is authorized to investigate alleged repeated acts committed in the course of the conduct of business activities in this state which are fraudulent within the meaning which the law by common usage attaches to that word. His power is not limited, as appellant contends, to inquiring into those which by express statute are either described as fraudulent or defined as illegal. We conclude that there was authority to issue the subpoena." Prudential Advertising Inc. v. Attorney General, 22 App. Div. 2d 737 (3rd Department 1964)

Thus the bill is not necessary to spell out the rule that "fraud" should be defined as in common usage. On the other hand, if the Department of Law believes it wise to define the scope of the Attorney General's power even at the risk of omitting some species of fraud comprised in the term as commonly used, we can see no objection.

For the reasons stated, the bill is approved.

Sincerely,

Chairman

Hon. Sol Neil Corbin
Executive Chamber
State Capitol
Albany, New York 12224

The Voice of Retailing

NEW YORK STATE COUNCIL OF RETAIL MERCHANTS, INC.

Telephone 465-1492

EXECUTIVE OFFICES — 30 LODGE STREET
ALBANY, NEW YORK 12207

S 1215

July 7, 1965

S. Int. 1215, Pr. No. 1219 - Gordon

"AN ACT to amend the executive law, in relation to clarifying the meaning of certain words used therein with respect to the general duties of the attorney general"

Honorable Nelson A. Rockefeller, Governor
State of New York
The Capitol
Albany, New York

Dear Governor Rockefeller:

This bill would revise the definition of "fraud or fraudulent" to include not only frauds of deception, misrepresentation, concealment and falsity, but also "unconscionable contractual provisions."

Such a definition, though requested by the Attorney General's offices, gives an "unconscionable" degree of power to the enforcement arm of government; a degree of power capable of swinging from enforcement to harassment to regulation. This is certainly not the function of the Office of the Attorney General. The Attorney General has performed a valuable role in protecting the consuming public from the fraudulent business practioner. His record is evidence that this provision is not necessary.

We urge that this bill be vetoed.

Respectfully yours,

Clifford A. Allanson
Executive Director

CAA:fa

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ADD23

Transportation corporations, foreign S. I. 2056, Pr. 2235, McCullough **Ch. 381**

General Corporation Law, § 211. Section 4 of the Transportation Corporation Law requires a corporation formed pursuant to that law, to set forth in the certificate of incorporation certain statements in respect to the territory, locality or routes of its operations. Section 5 of the Railroad Law requires a corporation formed pursuant to that law to state the kind of road to be operated and its length and termini. The principal purpose of the proposed bill is to make these requirements applicable to foreign corporations seeking authority to do business in New York as well as to domestic corporations.

The proposed bill also deletes the words "or corporations" from subdivision 1. As presently worded, it could be contended that a foreign corporation can obtain authority to engage in two or more businesses for which a domestic corporation could not be formed. Thus, a domestic corporation may not be formed to engage in the real estate business and in that of a telephone company. A foreign corporation should likewise not be permitted to engage in diverse businesses requiring incorporation under separate acts. The deletion of the indicated phrase would remove any doubt on that score.

State Department of Law Memorandum

Corporations, annulment for fraud S. I. 3288, Pr. 3557, Tompkins **Ch. 465**
Associations, cancel certificate, frauds S. I. 3289, Pr. 4089, Tompkins **Ch. 592**

General Corporation Law, § 92; Executive Law, § 63. These bills carry out recommendations of Attorney General Jacob K. Javits to strengthen the hand of his office in protecting the public against consumer frauds:

1. S. I. 3288 would amend the General Corporation Law to empower the Attorney General to subpoena witnesses and ascertain relevant facts relating to the Attorney General's existing powers to seek the dissolution of corporations engaging in fraudulent or illegal acts under Article 8 of the General Corporation Law.

2. As a counterpart to the foregoing, S. I. 3289 would authorize a court upon application of the Attorney General to cancel the certificate of doing business under a trade style name by an unincorporated association upon a finding of fraudulent practice.

The text of Mr. Javits' recommendations is as follows:

It will be recalled that at the 1955 session of the Legislature a departmental bill was introduced to tighten up on the remedies available to this office in its effort to protect consumers against frauds in the sale of articles, appliances and services and against fraudulent practices such as "bait advertising" in so far as sellers, their agents and representatives were concerned. Such legislation failed of passage but this office has done its utmost in the past year, utilizing the legal tools which were available to deal with consumer frauds. Numerous complaints

have continued to be received in this office, many investigations have been initiated and results have often been achieved. Consistent with the indicated policy of the Legislature, this office has continued its study of possible strengthening of the legal remedies available in such cases in view of the continued widespread incidence of consumer frauds so costly to consumers and honest business alike.

Illustrative of the successful action of the Attorney General are the decrees obtained to protect the consumer in the following areas:

1. Food Freezer Plans—In 1955 the Attorney General's office obtained consent injunctions against 12 major food freezer plan operators, restraining them from such unfair competitive practices as advertising freezer-food combinations in a misleading manner, representing that the freezer is a gift, and that freezer and food may be purchased for the price the customer was paying for food alone.

2. Storm Windows—Last year numerous complaints were received that consumers were unable to buy at the advertised price a storm window that had been widely advertised in the mass media. Prospective customers baited by the flood of advertising frequently paid up to eight times the advertised price of the "come-on" product. The situation was remedied to a great degree by the obtaining by this office of permanent injunctions against several storm window corporations to regulate advertising practices of the defendants. Unincorporated firms, using the same techniques, could not similarly be regulated because of the lack of jurisdiction of this office, a situation demanding remedial action along the lines I herein recommend.

3. Chinchillas—Mass media advertising was widely used to promote the sale of chinchillas for breeding purposes, leading prospective purchasers to believe that a fortune could easily be made in raising chinchillas. Misrepresentations were made as to the physical quality of the animals, their selling price, and the readiness of the selling company to repurchase animals raised. This matter was brought under control by a restraining order, consented to by the defendant corporation, to halt deceptive practices in promotion and sale of chinchillas.

4. Dishes—A permanent injunction was obtained to halt a firm specializing in door-to-door sale of dishes from misrepresenting to prospective customers that a $20 reduction in price could be obtained if the prospect had box tops of a leading detergent. Investigation by this office disclosed that the soap companies had no connection or knowledge of this practice and that the retail value of the dishes in leading department stores was approximately one-half the price set by the door-to-door salesman. I emphasize that in this case, too, my office discovered unincorporated firms using similar practices but because of statutory limitations we are powerless to enjoin them.

In the investigation of the complaints concerning consumer frauds, this office was hampered, and in many cases investigations were made extremely difficult because there is no provision in Article 8 of the General Corporation Law to empower the Attorney General to investigate and to subpoena witnesses to ascertain the relevant facts. This is an anomaly since the statute casts the

duty upon the Attorney General of moving to secure the termination of the activities of corporations engaged in illegal activities or in activities in excess of their corporate powers, and yet fails to arm the Attorney General with the satisfactory means of verifying the existence or non-existence of the statutory factors.

Regarding the complaints of consumer frauds involving firms engaged as unincorporated business under the fronts of imposing trade names and styles, these unincorporated firms were not and are not subject to action by the Attorney General under Article 8 of the General Corporation Law. Consequently, they were able to continue with their activities with immunity from prosecution by the Attorney General. The operation of such a business under a trade name and style is a privilege afforded by law to a business firm by the State and, if the privilege is abused by consumer frauds or otherwise, the exercise of the privilege by these unincorporated firms should be terminated in the same way as the annulment of the charter of a corporation under Article 8 of the General Corporation Law is allowed.[1]

Numerous complaints received by the Attorney General from consumers concern payment on account by members of the public of moneys to contractors for the construction of homes or for the improvement of existing dwellings. In most such cases, the contractors involved had either failed to undertake or had failed to complete the construction or improvement called for, while commingling the advances with their own funds and using such funds for purposes other than those for which they were intended. By the time the complaints reached the office of the Attorney General, the firms were no longer in business and the public's moneys dissipated, causing untold hardship.

Section 421 of the Penal Law now makes advertising with intent to sell any item "which is untrue, deceptive or misleading" a misdemeanor. The statute is now administered by the county district attorneys. This office has been giving and will continue to give study to this section and its enforcement in consultation with district attorneys and the Legislative Committee of the District Attorneys' Association.

In order to more effectively deal with such frauds against consumers, I recommend the following legislation:

1. A bill to amend Article 8 of the General Corporation Law, authorizing the Attorney General to obtain information relative to an inquiry thereunder and to subpoena witnesses and records.[2]

2. A bill to amend Section 440 of the Penal Law to authorize the Court to cancel the certificate of registration of a trade name and to issue an order restraining the continuance of fraudulent activities on the part of the registrant.[3]

3. A bill to amend Section 1314 of the Penal Law to provide that advances for the purchase of real property upon which improvements are to be constructed or for improving real property already owned are received in trust for the payment

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[1]Enacted as Chapter 592.
[2]Enacted as Chapter 465.
[3]Introduced as A. I. 3521, Savarese, which failed.

of the cost of such property or improvements, and that a violation of such trust is larceny in the appropriate degree.[1]

Memorandum of Senator Frank S. McCullough

Corporations, foreign, address S. I. 1957, Pr. 2117, McCullough **Ch. 144**

General Corporation Law, §§ 210, 214, 217; § 214-a, new; Executive Law, § 96. In 1923, the pertinent provisions of Section 210 of the General Corporation Law were adopted whereby a foreign corporation qualifying in New York was required to designate an office and to give its address in particular detail. Also, the Secretary of State was to be designated as the agent for service of process against a foreign corporation. Separately in Section 217 of the General Corporation Law, it is provided that the Secretary of State mail process to this office address. Because the location of the office and the mailing address are thus combined in a single statement, it is required that a foreign corporation file an amended statement and designation with a filing fee of $25.00 to change this address, thus ignoring the fact that this single statement of location of office serves a dual purpose:

1. To establish a venue for the purpose of local court jurisdiction, and
2. To establish a business mailing address for the convenience of the Secretary of State in disposing of process which may be served upon him as agent for the company.

Apparently no thought was given to this dual aspect at the time of the enactment of the law and the situation has remained static ever since. This may be partially attributable to the fact that the designation of the Secretary of State by previously qualified corporations was voluntary so that no immediate problem existed for the large number of companies which had previously qualified and, in a sense, had a choice of conforming to the new practice or continuing with their agent of record who had previously been designated.

In 1934, the legislature determined that henceforth the Secretary of State would be designated the agent of domestic corporations, thus extending to domestic corporations the practice which had been previously applied to foreign corporations in 1923. Contrary to the change with respect to foreign corporations, the domestic change was made mandatory, so that, at the end of the grace period, any domestic corporations which had failed to designate the Secretary of State as their agent were deemed to have done so as a matter of statute. However, provision was made for a voluntary designation of the Secretary of State, together with the designation of a mailing address which could be changed subsequently by a filing of a certificate under Section 24 of the Stock Corporation Law with a filing fee of $2.00.

It is believed that these two statutory events, ten years apart, have resulted in an inequity with respect to the treatment of foreign corporations

[1]Introduced as S. I. 3290, Tompkins; A. I. 3554, Amann, which failed.

By Order of Justice Ramos, these motion papers may not be taken apart or otherwise tampered with.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO, Attorney General of the State of New York, Plaintiff, - against - FIRST AMERICAN CORPORATION and FIRST AMERICAN EAPPRAISEIT, Defendants.	Index No. 406796/07 (Ramos, J.) Motion Sequence No. 8

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE DEFENDANTS' DEMAND FOR A JURY TRIAL

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Counsel for Plaintiff
120 Broadway
New York, NY 10271
Tel: (212) 416-8348

Of Counsel:

David Ellenhorn
Jeffrey Powell
Jane Azia
Ellen Fried

By Order of Justice Ramos, these motion papers may not be taken apart or otherwise tampered with.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO, Attorney General of the State of New York,[1] Plaintiff, - against - FIRST AMERICAN CORPORATION and FIRST AMERICAN EAPPRAISEIT, Defendants.	Index No. 406796/07 (Ramos, J.) Motion Sequence No. 8

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE DEFENDANTS' DEMAND FOR A JURY TRIAL

Preliminary Statement

Plaintiff, the People of the State of New York by Andrew Cuomo, Attorney General of the State of New York, submits this memorandum of law in support of its motion to strike defendants' Demand for Jury Trial. Defendants are not entitled to trial by jury in this action because the claims on which the action is based and the relief sought are equitable in nature and because the statutory claims did not exist at common law. Accordingly, defendants' demand should be stricken and the case should be placed on the court's non-jury trial calendar.

[1] Plaintiff has submitted a proposed order to substitute Eric T. Schneiderman, the current Attorney General of the State of New York, for Andrew Cuomo, the former Attorney General of the State of New York.

Facts

The Attorney General brought this action against defendants eAppraiseIT, LLC ("EA"), a real estate appraisal management company, and its corporate parent, First American Corporation ("First American") (collectively "defendants"). The action alleges that EA, one of the nation's largest appraisal management companies, engaged in fraudulent, deceptive and illegal business practices in connection with thousands of appraisals performed on New York properties for its client, Washington Mutual ("WaMu"). The complaint, a copy of which is annexed as Exhibit 1 to the Affirmation of Ellen J. Fried in Support of Plaintiff's Motion to Strike Defendants' Demand for a Jury Trial ("Fried Aff. Exh. 1"), alleges causes of action for fraudulent and illegal conduct in violation of New York Executive Law § 63(12), deceptive business practices in violation of New York General Business Law ("GBL") §349 and unjust enrichment. The complaint seeks injunctive relief, disgorgement of all profits obtained from defendants' fraudulent and illegal conduct, restitution, penalties, and "such other equitable relief as may be necessary to redress First American and EA's violations of New York law."

As set forth in the complaint, EA systematically allowed loan officers to pressure appraisers to return values high enough to permit mortgage loans to close. This violated federal and state laws incorporating professional standards that require an appraisal to present an independent and unbiased opinion of property value, free from lender coercion or influence. All the while, EA falsely represented that its appraisals were unbiased and satisfied professional standards.

From the outset of its relationship with WaMu, EA adopted and implemented appraisal assignment methods and other practices that undermined the integrity of the appraisal process. To quell loan officer complaints regarding low values, EA readily agreed to assign appraisals to

a pool of appraisers hand-picked by loan officers because they were more likely to deliver higher values. Senior EA executives knew that loan officers controlled the appraisal panel and that this assignment process violated applicable laws and professional standards. However, EA still adopted the assignment system to satisfy WaMu.

In addition, throughout its business relationship with WaMu, EA exerted direct pressure on appraisers to increase values to WaMu's target amount without offering supporting information. This was done formally, through reconsideration of value ("ROV") requests, as well as informally, through repeated phone calls and inquiries. Aware that they risked losing WaMu business, many appraisers proceeded to return higher values that EA happily passed on to WaMu. If an appraiser stood firm on value, EA accommodated WaMu's desires by offering an alternative appraisal that hit value through "desk reviews," which involve very limited analyses and are typically reserved for quality control rather than value changes. EA also failed to stop WaMu loan officers from regularly contacting appraisers to pressure them for higher values.

Plaintiff filed a Note of Issue and Certificate of Readiness on March 10, 2011. (Fried Aff. Exh. 2) Defendants the served a demand for a jury trial, dated March 14, 2011, pursuant to C.P.L.R § 4102. (Fried Aff. Exh. 3) Because this enforcement action arising under Executive Law § 63(12), General Business Law § 349, and common law unjust enrichment raises claims for which no right to jury trial existed at common law and because those claims and the relief sought are equitable in nature, defendants' motion for a jury trial should be stricken.

ARGUMENT

DEFENDANTS ARE NOT ENTITLED TO TRIAL BY JURY

The New York Constitution confers the right to a jury trial in "cases in which it has heretofore been guaranteed by constitutional provision." N.Y. Const. art. I, § 2. This applies to only "cases afforded a jury trial under the common law prior to 1777" and "cases to which the Legislature extended a right a jury trial prior to 1894." Motor Vehicle Mfrs. Ass'n ("MVMA") v. State, 75 N.Y.2d 175, 181 (1990). Any issue that is not required to be tried to a jury must be decided by the court. C.P.L.R. § 4211. There is no right to a trial by jury in this case because the underlying claims and relief sought are entirely equitable and because the two causes of action under Executive Law § 63(12) and GBL § 349 were created by statute and unknown at common law.

It is well-settled law in New York that trial by jury does not attach to actions for equitable relief. In MVMA v. State, 75 N.Y.2d at 175, the Court of Appeals rejected a challenge to the constitutionality of GBL § 198a, known as the "New Car Lemon Law," on the ground that its compulsory arbitration provision deprived car manufacturers of the right to a trial by jury. The Court held that the remedies provided under the law, which are the equivalents of specific performance and restitution, are "equitable in nature." As a result, the Court concluded that such claims "would not have been triable by jury under the common law" and that the automobile manufacturers "were not entitled to a jury trial under article I, § 2 of the New York Constitution." Id. at 183; see also Jamaica Sav. Bank v. M.S. Investing Co., 274 N.Y. 215, 220 (1937) ("In an action in equity there is no right of trial by jury."); Siegel, New York Practice, § 377 (2d ed. 1991) (actions for which a jury trial is required under C.P.L.R. § 4101 are "the actions evolved

through the common law courts, as opposed to those developed in equity (chancery), which continue to be triable by the court"); Weinstein-Korn-Miller, New York Civil Practice: CPLR ¶ 4101.02 ("The general rule is that if the matter was historically cognizable in a court of equity, no right to a jury obtains, since equity courts operated without juries.").

In this case, the causes of action under Executive Law § 63(12) and GBL § 349 are both equitable in nature and unknown at common law. Executive Law § 63(12) empowers the Attorney General to bring an action or special proceeding for injunctive relief, restitution, damages, and costs where any person or business has engaged in repeated or persistent fraudulent or illegal conduct.[2] GBL § 349 similarly authorizes the Attorney General to bring an action to "to enjoin [deceptive] acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices," and GBL § 350-d authorizes the court to impose civil penalties of up to $5,000 for each deceptive practice. Both Executive Law § 63(12) and GBL § 349 are statutory creations not existent at common law. Thus, the traditional elements of common law fraud such as reliance, actual deception, knowledge of deception, and intent to deceive are not required under either statute. People ex rel. Spitzer v. Applied Card Sys., Inc., 27 A.D.3d 104, 106 (3d Dep't 2005); State v. Gen. Elec., 302 A.D.2d 314 (1st Dep't 2003); People ex rel. Cuomo v. Gagnon Bus Co., 30 Misc. 3d 1225A (Sup. Ct. Queens Co. 2011); see also Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 343 (1999) ("in contrast to common-law fraud, GBL § 349 is a creature of statute based on broad consumer-protection concerns"). Moreover, both Executive Law § 63(12) and GBL § 349 vest the court with broad equitable powers to redress fraudulent and illegal conduct. Remedial orders pursuant to both statutes are to be broadly fashioned. State v. Princess Prestige Co., 42 N.Y.2d

[2] Although a request for damages was included in the prayer for relief in the complaint in this action, plaintiff is no longer seeking damages.

104, 108 (1977) (applications for remedial relief under Executive Law § 63(12) are "addressed to the sound discretion of the court."); State v. Gen. Elec., 302 A.D.2d at 314; State v. Maiorano, 189 A.D.2d 766, 767 (2d Dep't 1993).

The third cause of action for unjust enrichment also sounds in equity. See, e.g., Waldman v. Englishtown Sportwear, Ltd., 92 A.D.2d 833, 836 (1st Dept. 1983) ("An action to recover on the theory of unjust enrichment is for restitution . . . and is based on the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another."); accord, Banco Popular N. Am. v. Lieberman, 75 A.D.3d 460, 463 (1st Dep't 2010).

Consistent with the underlying causes of action, the relief sought in the complaint -- a permanent injunction, restitution of improperly earned appraisal fees and disgorgement of unjustly earned profits -- are all equitable remedies. The issuance of a permanent injunction is clearly an equitable remedy. Porter v. Warner Holding Co., 328 U.S. 395, 397 (1946) (describing jurisdiction of court to enjoin acts and practices made unlawful by statute "equitable"); People v. Tellier, 7 Misc. 2d 43, 54 (Sup. Ct. N.Y. Co. 1956) (injunctive relief under the Martin Act, on which Executive Law § 63(12) was modeled, "essentially equitable in character"); see also, 12 Carmody-Wait 2d, New York Practice, Injunctions § 78:101 ("A suit seeking a judgment containing a permanent injunction is merely a type of suit in equity . . . ."); 67 N.Y. Jur. 2d Injunctions § 7 ("The authority of the court to award a judicial injunction after final trial of an action . . . is regulated by the rules and principles governing courts of equity.")

The power to award restitution also lies within the equitable jurisdiction of the court. Restitution is an equitable remedy intended solely to restore the status quo ante. Restitution is directed at "restoring the status quo and ordering the return of that which rightfully belongs to

the purchaser . . . ." Porter v. Warner Holding Co., 328 U.S. at 402; see also, MVMA v. State, 75 N.Y.2d at 182 (describing restitution as "equitable in nature").

Disgorgement has also long been recognized as an equitable remedy, distinct from restitution. People ex rel. Spitzer v. Applied Card Sys., Inc., 11 N.Y.3d 105, 125-26 (2008) (citing SEC v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir.1997) ("As an exercise of its equity powers, the court may order wrongdoers to disgorge their fraudulently obtained profits.")); accord Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73, 81 (2d Cir. 2006). Disgorgement is an equitable remedy "designed to deprive a wrongdoer of his unjust enrichment and to deter others" from future violations. SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989); FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996); see also New York City Econ. Dev. Corp. v. T.C. Foods Import and Export Co.,11 Misc. 3d 1087(A) (Sup. Ct. Queens Co. 2006) (disgorgement as a restitutionary remedy for unjust enrichment).

The majority of state courts that have considered the issue have determined that there is no right to a jury trial in actions for equitable relief and civil penalties under consumer protection statutes similar to New York's. 54 A.L.R.5th 631 § 2[a]. The courts do not differentiate civil penalties from other equitable relief but rather treat civil penalties as part of the statutory remedial scheme and incidental to injunctive relief, restitution, and other equitable remedies. See, e.g., Martin v. Heinold Commodities, Inc., 643 N.E.2d 734 (Ill. 1994) (no right to a jury trial under Illinois Consumer Fraud Act which created a new right not known at common law); State v. Ameritech Corp., 517 N.W.2d 705 (Wis. Ct. App. 1994), aff'd, 532 N.W.2d 449 (Wis. 1995) (no right to a jury trial in action for injunctive relief and civil penalties brought under the state's consumer act); State v. Alpine Prods., 490 N.W.2d 888 (Minn. Ct. App. 1992) (state action seeking injunctive relief, restitution, and civil penalties under state's consumer protection

and anti-trust statutes was "entirely equitable" and thus no right to a jury trial); State ex rel. Douglas v. Schroeder, 384 N.W.2d 626, 629-30 (Neb.1986) (no jury trial right in action by the Attorney General seeking an injunction, restitution, and civil penalties under the Nebraska Consumer Protection Act); Nei v. Burley, 446 N.E.2d 674 (Mass. 1983) (no right to a jury under Massachusetts's consumer protection statute because it is "equitable in nature" and created "new substantive rights in which conduct heretofore lawful under common law is now unlawful"); State ex rel. Dep't of Ecology v. Anderson, 620 P.2d 76 (Wash.1980) (no right to a jury trial in consumer protection actions brought by the Attorney General for an injunction, restitution, and civil penalties); Kugler v. Market Dev. Corp., 306 A.2d 489, 492 (N.J. Sup. Ct. Ch. Div. 1973) (no right to a jury trial in action for injunction, restitution and civil penalties under New Jersey Consumer Fraud Act on the grounds that the cause of action and right to seek redress were "foreign to the common law, being modern day creations of the Legislature for the life and cure of a current mischief.").

Although the Supreme Court in Tull v. United States, 481 U.S. 412 (1987), held that an action for a civil penalties under the Clean Air Act was a legal claim analogous to an 18th century action in debt and that a defendant in an action for penalties under the Act was entitled to a jury trial on the issue of liability under the Seventh Amendment of the United States Constitution, the Seventh Amendment does not apply to actions in state court. Curtis v. Loether, 415 U.S. 189 (1974); GTFM, LLC. v. TKN Sales, Inc., 257 F.3d 235, 240 (2d Cir. 2001) (citing Gasperini v. Ctr. for Humanities, Inc., 518 US. 415, 418 (1996) ("Seventh Amendment . . . governs proceedings in federal, but not in state court")); State v. Ameritech, Corp., 517 N.W.2d at 709. Moreover, state courts have rejected the application of Tull to statutory enforcement actions under state law, finding that such actions are primarily equitable and that civil penalties are a

necessary adjunct of remedial relief. State v. Irving Oil Corp., 955 A.2d 1098, 1107 (Vt. 2008) (claim for civil penalties in the context of a statutory environmental enforcement action "serve[s] a remedial purpose" and is "essentially equitable;" thus right to jury trial did not attach); State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n, 49 P.3d 894, 909 (Wash. 2002) (right to jury trial denied on ground that the "nature of the lawsuit was primarily equitable" and civil penalties were "incidental" to equitable relief); DiPirro v. Bondo Corp., 62 Cal. Rptr. 3d 722, 748 (Ct. App. 2007) ("statutory remedies afforded by the [Safe Drinking and Toxic Enforcement] Act, including civil penalties, are not damages at law, but instead constitute equitable relief . . . which do not entitle the plaintiff to a jury trial"); Comm'r of Envtl. Prot. v. Capozziello, 629 A.2d 1116 (Conn. 1993) (environmental enforcement statute for injunctive relief and civil penalties "primarily equitable" and do not provide right to jury trial); Ameritech, 517 N.W.2d at 709.

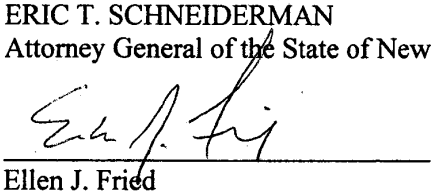
CONCLUSION

For the reasons set forth above, there is no right to trial by jury in this action. Accordingly, defendants' demand for a jury trial should be stricken and this action should be restored to the non-jury calendar of this Court.

Dated: New York, New York
May 24, 2011

Respectfully submitted,

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

By: 

Ellen J. Fried
Assistant Attorney General
Bureau of Consumer Frauds and Protection
120 Broadway
New York, N.Y. 10271

AFFIRMATION OF SERVICE

ELLEN J. FRIED, an attorney admitted to practice before the Courts of the State of New York, makes the following affirmation under penalty of perjury:

1. I am an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York, assigned to the Consumer Frauds and Protection Bureau located at 120 Broadway, New York, NY 10271. I am an attorney admitted to practice before the Courts of the State of New York.

2. On the 25th day of May, 2011, I caused to be served by electronic mail, to the below reference e-mail addresses, and by first-class mail in a properly enclosed post-paid wrapper, in a drop-box regularly maintained by the United States Postal Service at 120 Broadway, New York, the annexed Notice of Motion to Strike Defendants' Jury Demand, Affirmation of Good Faith in Support of Motion to Strike Defendants' Jury Demand and Plaintiff's Memorandum of Law in Support of Its Motion to Strike Defendants' Demand for a Jury Trial to the following addresses:

Richard F. Hans, Esq.
Jeffrey D. Rotenberg, Esq.
DLA Piper LLP
Attorneys for Defendants
1251 Avenue of the Americas
New York, New York 10020-1104
Richard.hans@dlapiper.com, Jeffrey.rotenberg@dlapiper.com

Dated: May 25, 2011
New York, New York

Ellen J. Fried
Assistant Attorney General
Consumer Frauds and Protection
120 Broadway, 3rd Floor
New York, New York 10271
ellen.fried@ag.ny.gov
(212) 416-8348

By Order of Justice Ramos, these motion papers may not be taken apart or otherwise tampered with.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Plaintiff, - against - FIRST AMERICAN CORPORATION and FIRST AMERICAN EAPPRAISEIT, Defendants.	Index No. 406796/07 (Ramos, J.) Motion Sequence No. 8

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE DEFENDANTS' DEMAND FOR A JURY TRIAL

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Jane M. Azia
Bureau Chief
Consumer Frauds and Protection Bureau
Counsel for Plaintiff
120 Broadway
New York, NY 10271
Tel: (212) 416-8348

Of Counsel:

David Ellenhorn
Jeffrey Powell
Ellen Fried

By Order of Justice Ramos, these motion papers may not be taken apart or otherwise tampered with.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,[1] Plaintiff, - against - FIRST AMERICAN CORPORATION and FIRST AMERICAN EAPPRAISEIT, Defendants.	Index No. 406796/07 (Ramos, J.) Motion Sequence No. 8

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE DEFENDANTS' DEMAND FOR A JURY TRIAL

Preliminary Statement

Plaintiff, the People of the State of New York by Eric T. Schneiderman, Attorney General of the State of New York, submits this Memorandum of Law in reply to defendants' memorandum of law in opposition to plaintiff's motion to strike defendants' Demand for Jury Trial and in further support of plaintiff's motion. Defendants cannot dispute that there is no right to a jury trial in New York where the underlying causes of action were unknown at common law and the relief sought is equitable in nature. Nor can they dispute that the causes of action in this case arise under Executive Law 63 § (12) and General Business Law ("GBL") § 349, both of which are statutory creations unknown at common law, and that the relief sought here for injunctive relief, restitution and disgorgement are equitable. Nevertheless, defendants argue that

[1] Plaintiff has submitted a proposed order to substitute Eric T. Schneiderman, the current Attorney General of the State of New York, for Andrew Cuomo, the former Attorney General of the State of New York.

plaintiff's request for civil penalties for defendants' fraudulent and deceptive appraisal practices -- relief authorized by GBL § 350-d and routinely sought in any deceptive practices law enforcement action -- somehow transforms the entire nature of this proceeding and affords them a right to a trial by jury.

Defendants argue that they are exposed to massive penalties and make little or no reference to the various forms of equitable relief which are equally or more important in any consumer protection lawsuit, including this one. Under defendants' reasoning, the right to a jury trial in a lawsuit asserting statutory claims and various forms of equitable relief turns solely on whether statutory penalties are sought and how the potential magnitude of those penalties compare to the potential amount of other monetary relief, such as restitution and disgorgement. Defendants offer no case law to support this position, which defies logic and is contrary to well-accepted state law finding no right to a jury trial in consumer protection law enforcement cases, even where penalties are sought. Defendants misconstrue both the nature of this action and the applicable case law. There is no right to a jury trial in this action.

For the reasons stated below and in Plaintiff's Memorandum of Law in Support of Its Motions to Strike Defendants' Demand for a Jury Trial ("Pl. Memo"), defendants' arguments should be rejected by the court, the demand for a jury trial should be stricken, and the case should be placed on the court's non-jury trial calendar.

ARGUMENT

DEFENDANTS ARE NOT ENTITLED TO TRIAL BY JURY

Defendants do not dispute the fundamental principle, as enunciated by the Court of Appeals in Motor Vehicle Mfrs. Ass'n ("MVMA") v. State, 75 N.Y.2d 175, 183(1990), that there is no right to a jury trial under New York law for claims that "would not have been triable by jury trial under the common law," including, in particular, claims for equitable relief. Nor do defendants dispute that plaintiff's claims for fraudulent and deceptive business practices under Executive Law § 63(12) and GBL § 349 are statutory creations not available under common law and that the relief sought here -- a permanent injunction to stop defendants' deceptive and fraudulent appraisal practices, restitution for approximately 10,000 consumers who paid millions of dollars in appraisal fees for tainted and falsely inflated appraisals and disgorgement of defendants' ill-gotten gains -- are quintessentially equitable in nature. Instead, defendants argue that plaintiff's request for statutory civil penalties as authorized under GBL § 350-d generates a right to a jury trial because defendants allege such relief is legal in nature. Defendants' attempt to minimize the equitable nature of this action and paint this case as one for civil penalties divorced from equitable relief is not supported by the facts or the applicable law.

A. A claim for civil penalties in an action to enjoin fraudulent and deceptive business practices under the State's consumer protection statutes does not covert an equitable action into a legal one.

It is well-established in New York that where, as here, the primary character of an action is equitable, a claim for monetary relief -- even where that relief is for money damages, a traditionally legal remedy -- is merely incidental to the equitable claims and does not give rise to right to a jury trial. See Lynch v. Metro. Elevated Ry., 129 N.Y. 274 (1891) (no jury trial when main relief is injunction against nuisance; damages for past injuries is "incidental to the equitable

relief sought"); Jamaica Sav. Bank v. M.S. Investing Co., 274 N.Y. 215 (1937); Adelstein v. City of New York, 212 A.D.2d 748 (2d Dep't. 1995)(jury trial denied in action for abatement, injunction and damages for nuisance); Homburger v. Levitin, 140 A.D.2d 583, 584 (2d Dep't 1988) ("Even where, as incidental to the main relief prayed for, the complainant asks for money damages, a separate trial by jury is not within the purview of the constitutional guarantee"); Pasqua v. Pasqua, 212 A.D. 2d 356, 356-57 (1st Dep't. 1995) (no right to a jury trial where essence of action is "equitable in nature" and "defendant's incidental request for money damages does not require otherwise"); Agrawal v. Razgaitis, 209 A.D.2d 566, 566 (2d Dep't. 1994) (jury request denied when "plaintiff's claims were essentially for equitable relief and damages demanded by him were merely ancillary") appeal denied, 85 N.Y.2d 803 (1995); Page v. Herkimer Lumber Co., 109 A.D. 391, 393 (4th Dep't. 1905) (no right to a jury trial in an action to enjoin a trespass; such an action was equitable and a claim for treble damages merely "incidental to the equitable relief sought")

Whether monetary claims are incidental to the equitable claims does not turn on the amount sought but rather on the overall nature of the underlying claims. Monetary claims are incidental to the equitable claims even where the amount sought is substantial. See 73A N.Y. JUR.2D *Jury* § 15; Kaufman v. Brenner, 63 A.D.2d 692 (2d Dep't 1978), aff'd, 46 N.Y.2d 787 (1978) (main thrust of action was in equity for specific performance and recovery of $1,350,000 in damages was subsidiary).

Although there is no reported New York case that directly addresses the right to a jury trial in an action under Executive Law § 63(12) or GBL § 349, courts construing comparable state consumer protection and deceptive practices acts have concluded, consistent with the long line of New York cases cited above, that statutory civil penalties are incidental to the equitable

and remedial nature of such statutes and do not entitle a defendant in such an action to a jury trial. Indeed, as cited in plaintiff's memorandum of law, there are numerous decisions finding no right to a jury trial in cases brought by state attorneys general to enforce consumer protection and deceptive practices acts, notwithstanding claims for statutory penalties. Pl. Mem. 7-8. Defendants relegate their discussion of these cases to a footnote, arguing that they are "not instructive" simply because defendants believe the penalties in this case are "paramount" and speculate that this was not so in those cases. Defs. Opp. Mem. 8, n.5.

As Nebraska's highest court stated in rejecting a claim that the defendant was entitled to a jury trial under Nebraska's deceptive practices act:

> While the act permits the recovery of an attorney fee, restoration of the purchase price, and the imposition of civil penalties, its principal thrust is to prevent unfair or deceptive acts or practices in trade or commerce. Consequently, the act is equitable in nature, in the sense that it seeks to prevent prejudicial conduct rather than merely compensate such damage as may flow therefrom. The monetary consequences imposed to discourage future like acts and practices are ancillary to the act's principal equitable thrust.

State ex rel. Douglas v. Schroeder, 384 N.W.2d 626, 629-30 (Neb.1986). See also State v. Alpine Prods., 490 N.W.2d 888 (Minn. Ct. App. 1992) (state action seeking injunctive relief, restitution, and civil penalties under state's consumer protection and anti-trust statutes was "entirely equitable" and thus no right to a jury trial); State of Washington v. State Credit Ass'n, 657 P.2d 327, 330 (Wash Ct. App. 1983) ("The relief available in a consumer protection action brought by the State is entirely equitable . . . and civil penalties are available once the court's equity jurisdiction is otherwise invoked.") reversed on other grounds, 689 P.2d 403 (Wash. 1984); Kugler v. Mkt. Dev. Corp., 306 A.2d 489, 491(N.J. Super. Ct. Ch. Div. 1973) ("The collection of a statutory penalty is neither the sole nor main relief sought"); cf. Martin v. Heinold

Commodities, 643 N.E.2d 734 (Ill. 1994) (court reinstates statutory punitive damages awarded by trial court and holds no right to a jury trial under state Consumer Fraud Act).

In contrast, none of the New York cases relied on by defendants supports their claim of a right to a jury trial. Defs' Opp. Memo 4-5, 7. None are governmental enforcement actions brought on behalf of the public for injunctive relief, restitution and disgorgement for violations of law but are rather actions that sound in law not equity. Thus, In re DES Mkt. Share Litig., 79 N.Y.2d 299 (1992), was a personal injury action for money damages by plaintiffs injured by defendant and plainly not an equitable action. State Farm Mut. Auto. Ins. Co. v. Sparacio, 25 A.D.3d 777 (2d Dep't. 2006) raised the issue of the obligation of plaintiff to provide uninsured or underinsured motorist benefits to the defendants. IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132 (2009), was an action for interference with contract, seeking primarily compensatory damages, a traditional legal remedy. Likewise, Rental & Mgmt. Assoc. v. Hartford Ins. Co., 206 A.D.2d 288 (1st Dep't 1984), which involved a private action for wrongful eviction, did not even consider civil penalties but rather the imposition of treble damages, which is a legal remedy. Thus, contrary to defendants' assertion, Hartford does not stand for the proposition that civil penalties amount to statutory punitive damages. Defs' Opp. Memo 7.

Defendants' reliance upon Fire Dep't v. Harrison, 17 How. Pr. 273 (N.Y.C. C.P. N.Y. Co. 1859), is equally misplaced. Harrison is cited by defendants for the proposition that civil penalties were established as a legal remedy and required a trial by a jury under common law (Defs. Opp Memo 5) proves no such thing. The decision in Harrison turned on the facts that the plaintiffs had not asked for an injunction and thus the action was not one in equity, and that the nature of the claim mirrored a common nuisance claim, where a right to a jury trial exists. As the court noted "the complaint does not seek the aid of equity jurisdiction and there is nothing in

the case which . . . forms the ground of equity jurisdiction; and when that is the case, the right of trial by jury is absolute." Id.

B. The federal precedents relied on by defendants are inapposite.

Given the complete absence of New York case law to support their claim for a jury trial in this action, defendants look to the Supreme Court's decision in Tull v. United States, 481 U.S. 412 (1987) (Defs' Opp. Memo 8-11), and some other federal case law. However, defendants' reliance on these cases is misplaced.

As defendants readily concede, Tull is not controlling here. Defs' Opp. Memo 8. In Tull, the Court held that an action brought by the federal government to obtain civil penalties for violation of the Clean Water Act was analogous to a common law action in debt traditionally triable in a court of law and further characterized the relief sought as essentially punitive in nature, a remedy also traditional available only at law. Thus, the Court held that the defendant was entitled to a trial by jury under the Seventh Amendment of the United States Constitution on the issue of whether a violation of the Act had occurred.[2] 481 U.S. at 420-23. However, as noted in plaintiff's original memorandum of law, Pl. Memo 8, the Seventh Amendment does not apply to actions in state court. See also Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916).

Moreover, claims under Executive Law § 63 (12) and GBL § 349 bear no similarity to an action in debt. Both are broad remedial statutes that created new causes of action for fraudulent and deceptive conduct going far beyond common law fraud. See Pl. Memo 5-6. Both also authorize a wide array of equitable relief, including injunctive relief, restitution, and

[2] However, the Court concluded that the court and not the jury should determine the amount of civil penalties. (noting that imposition of civil penalties involved "highly discretionary calculations" that are traditionally performed by judges). 481 U.S. at 425-26.

disgorgement. In contrast, an action in debt at common law in New York was considered "an appropriate remedy to enforce a bill or note, an account state, and obligations of record such as a judgment." Norwich Pharmacal Co. v. Barrett, 205 A.D. 749, 752 (3d Dep't. 1923). The idea of an action of debt is that "it is founded on a contract, express or implied, to pay money in a certain sum, or which can readily be reduced to a certainty." Id. at 752. Accord, Kelly v. L.L. Cool J., 145 F.R.D. 32, 39 (S.D.N.Y. 1992) (Under New York law, "debt is an action for a sum certain"). While plaintiff seeks the maximum penalties under GBL § 350-d for each deceptive business practice, the amount of any potential penalty awarded is not yet reducible to a sum certain, given that the court has yet to determine the number of tainted appraisals in question and other relevant factors.

Tull can also be distinguished on its facts. In Tull, the penalties sought were, in fact, the primary relief sought and were not incidental to broad equitable relief there. Because most of the properties had been sold prior to the Government's action, "the Government was aware when it filed suit that relief would be limited primarily to civil penalties." 481 U.S. at 424. There were no restitution or disgorgement claims in Tull. In contrast, here plaintiffs seeks millions of dollars in restitution for approximately 10,000 consumer victims, disgorgement of profits, and injunctive relief to ensure that defendants, who continue to render appraisals, render independent and unbiased appraisals in conformance with state and federal law and refrain from misrepresenting the nature of these appraisals.[3]

[3] Defendants' insistence that plaintiff's claims for injunctive relief are moot (Def. Mem. 2, 10) is unfounded. Defendants did not stop their unlawful and deceptive appraisal practices until the Attorney General brought this action. Moreover, the equitable claims for relief can hardly be characterized as insignificant or moot. Contrary to defendants' argument, a permanent injunction remains an important component of the equitable relief requested by the Attorney General. (Defs' Opp. Memo 10). Indeed, New York courts have consistently held that the voluntary discontinuance of fraudulent or illegal conduct is no defense to an action for an injunction because there is no assurance that such conduct will not be resumed. State v. Gen. Elec., 302 A.D.2d 314, 316 (1st Dep't. 2003); State v. Wilco Energy Corp., 284 A.D.2d 469 (2d Dep't 2001); State v. Midland Equities, 117 Misc. 2d 203, 207 (Sup. Ct.

In addition, numerous states have rejected the reasoning of Tull and its application to state statutory enforcement schemes. For example, in Comm'r of Envtl. Prot. v. Connecticut Bldg. Wrecking Co., 629 A.2d 1116, (Conn. 1993), the Connecticut Supreme Court rejected Tull's analogy to an action in debt. The court held that an "environmental enforcement action for injunctive relief and civil penalties . . . is not substantially similar to an action in debt" because the amount sought by the government is unliquidated and because the statute in question conferred discretion on the court to determine the amount of the penalty. Id. at 1122. In State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n., 49 P.3d 894, 908 (Wash. Ct. App. 2002), rev. denied, 66 P.3d 639 (Wash. 2002), the Washington court rejected Tull's analogy to an action in debt as "too broad" and concluded that a statutory claim for civil penalties did not have a common law equivalent. And, in State v. Irving Oil Corp., 955 A.2d 1098 (Vt. 2008), the Vermont Supreme Court likewise found that Tull was not persuasive. Rejecting Tull's conclusion that civil penalties are punitive, the Court held that civil penalties were "essentially equitable." Id. at 1107.

> The primary purpose of civil penalties is *not* punishment. Rather, these penalties serve a remedial purpose by making noncompliance at least as costly as compliance. They also reimburse the government for enforcement expenses and other costs generated by the violation.

Id. See also Pl. Memo 8-9.

New York courts have also rejected application of Tull on the grounds that the Seventh Amendment does not apply to the states. See Dept. of Hous. v. Deka Realty Corp., 208 A.D. 2d 37, 51 (2d Dep't. 1995) ("Seventh Amendment has never been held applicable to the States");

N.Y. Co. 1982). State v. Hotel Waldorf Astoria, 67 Misc. 2d 90, 91-92 (Sup. Ct. N.Y. Co. 1971); State v. Bevis Indus., 63 Misc. 2d 1088, 1092 (Sup. Ct. N.Y. Co. 1970); People v. Ludwig Baumann & Co., 56 Misc. 2d 153 (Sup. Ct. N.Y. Co. 1968).

Dept. of Hous. Preservation v. All-Boro Mgmt., 2005 N.Y. Misc. LEXIS 3577, at 3 (Civ. Ct. Kings Co. 2005) (same). These courts have also rejected Tull's characterization of civil penalties as punitive. See Deka Realty, 208 A.D.2d at 51 (no basis to landlord's conclusory assertion that civil penalties for housing code violations were punitive and afforded him right to jury trial); All-Boro Mgmt., 2005 N.Y. Misc. LEXIS 3577 at 4 (no right to a trial by jury under New York Constitution in "proceedings involving the imposition of civil penalties and the enforcement of housing standards.")

Finally, defendants' reliance upon U.S. v. J.B. Williams, 498 F.2d 414 (2d Cir. 1974), and U.S. v. Dish Network, 754 F. Supp. 2d 1002 (C.D. Ill. 2010), federal actions for civil penalties under the Federal Trade Commission ("FTC") Act, is also unavailing. Both Williams and Dish Network were based under the Seventh Amendment of the United States Constitution, which, as discussed above, does not apply to the states. Dish Network, decided after Tull, was bound to follow the Supreme Court's decision, which states are not. In addition, the FTC in Williams was not seeking an injunction, restitution or disgorgement but only civil penalties for the company's violation of an existing consent order. It is also significant to note that Williams, decided pre-Tull, received virtually no support. Judge Oakes issued a vigorous dissent, and the decision was criticized in legal commentaries and was directly rejected by the Third Circuit. See, e.g., *Note, Constitutional Law*, 53 Tex. L. Rev. 387 (1975); U.S. v. Reader's Digest Ass'n., 662 F.2d 955 (3d Cir. 1981) (court awards $1.75 million in penalties for company's deceptive mailings, holding no jury trial required). And, although it is true that New York's deceptive practices law, like most other states' similar acts, was modeled on the FTC Act, this fact does not lead to the conclusion that defendants are entitled to a trial by jury in this case. The FTC Act is looked to as a guide for determining what constitutes deceptive practices and the appropriate remedies for redressing

such practices. See State v. Feldman, 210 F. Supp. 2d 294 (S.D.N.Y. 2002); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20 (1995). It does require states to adopt all the procedural requirements under the federal law, including the application of the Seventh Amendment of the United States, and states have not done so. Indeed, there are significant differences between federal and state deceptive practices laws. For example, the Attorney General enforces state consumer protection laws solely through the courts, while the FTC is an administrative agency that uses the administrative process to investigate and adjudicate issues involving deceptive practices. In addition, GBL § 349 provides a private right of action which the FTC Act does not. See GBL § 349(h).

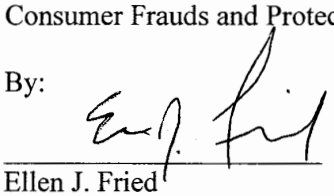
CONCLUSION

For the reasons set forth above, there is no right to trial by jury in this action. Accordingly, defendants' demand for a jury trial should be stricken and this action should be restored to the non-jury calendar of this Court.

Dated: New York, New York
June 15, 2011

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Jane M. Azia
Bureau Chief
Consumer Frauds and Protection Bureau

By: 

Ellen J. Fried
Assistant Attorney General
Bureau of Consumer Frauds and Protection
120 Broadway
New York, N.Y. 10271

AFFIRMATION OF SERVICE

ELLEN J. FRIED, an attorney admitted to practice before the Courts of the State of New York, makes the following affirmation under penalty of perjury:

1. I am an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York, assigned to the Consumer Frauds and Protection Bureau located at 120 Broadway, New York, NY 10271. I am an attorney admitted to practice before the Courts of the State of New York.

2. On the 15th day of June, 2011, I caused to be served by electronic mail, to the below referenced e-mail addresses, and by first-class mail in a properly enclosed post-paid wrapper, in a drop-box regularly maintained by the United States Postal Service at 120 Broadway, New York, the annexed Plaintiff's Reply Memorandum of Law in Support of Its Motion to Strike Defendants' Demand for a Jury Trial to the following addresses:

Richard F. Hans, Esq.
Jeffrey D. Rotenberg, Esq.
DLA Piper LLP
Attorneys for Defendants
1251 Avenue of the Americas
New York, New York 10020-1104
Richard.hans@dlapiper.com, Jeffrey.rotenberg@dlapiper.com

Dated: June 15, 2011
New York, New York

Ellen J. Fried
Assistant Attorney General
Consumer Frauds and Protection
120 Broadway, 3rd Floor
New York, New York 10271
ellen.fried@ag.ny.gov
(212) 416-8348

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO, Attorney General of the State of New York,

Plaintiff-Appellant,

-against-

CHARLES SCHWAB & CO., INC.,

Defendant-Respondent.

New York County
Index No.
453388/2009

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REARGUE

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Appellant
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8096
(212) 416-8962 (f)
Dated: September 26, 2013

RICHARD DEARING
Deputy Solicitor General
BRIAN A. SUTHERLAND
Assistant Solicitor General of Counsel

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PRELIMINARY STATEMENT

The Attorney General seeks reargument pursuant to Rule 600.14(a) and respectfully requests that the Court delete the sentence in its decision and order stating that the cause of action under Executive Law § 63(12) was properly dismissed.

The Attorney General's complaint asserts four causes of action: a cause of action alleging persistent fraud or illegality under Executive Law § 63(12); two causes of action alleging securities fraud under the Martin Act; and a cause of action alleging deceptive practices under General Business Law (GBL) § 349. All of the causes of action rest on allegations that defendant Charles Schwab & Co. made actionable misrepresentations to retail brokerage customers in its marketing of auction rate securities. Supreme Court, New York County (Sherwood, J.) dismissed the entire complaint, holding that the Martin Act and Executive Law claims failed because the Attorney General had not pleaded actionable misrepresentations, and the GBL § 349 claim failed because that statute does not apply to securities transactions.

On appeal, this Court reinstated the Attorney General's causes of action under the Martin Act, concluding that the complaint adequately

alleged that Schwab made actionable misrepresentations regarding auction rate securities. The Court nevertheless affirmed the dismissal of the Attorney General's first cause of action under Executive Law § 63(12), which was based on the very same misrepresentations.[1] The Court said that the § 63(12) cause of action should be dismissed because the statute "does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief . . . in cases involving persistent fraud or illegality." Ex. A, Slip Op. at 7, *reported at* 109 A.D.3d 445, 449 (1st Dep't 2013).[2]

The Attorney General respectfully asks the Court to grant reargument and delete the sentence in its decision concerning the cause of action under Executive Law § 63(12). Schwab did not argue in this appeal that, even if the Martin Act causes of action were reinstated, the

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[1] The Court also affirmed the dismissal of the GBL § 349 cause of action. This motion does not contest that ruling. In our opening brief in this appeal, we acknowledged that the § 349 cause of action appeared to be foreclosed by precedent of this Court, holding that securities transactions are not consumer-oriented conduct within the scope of § 349. See Br. at 25 n.7 (citing *Fesseha v. TD Waterhouse Inv. Servs.*, 305 A.D.2d 268, 268 (1st Dep't 2003)).

[2] The exhibits referenced in this memorandum of law are attached to the Affirmation of Brian A. Sutherland, submitted herewith.

§ 63(12) cause of action should still be dismissed. The trial court had rejected an argument by Schwab to that effect below, and Schwab abandoned the argument on appeal. This Court therefore dismissed the § 63(12) cause of action on grounds that were neither briefed nor argued by the parties. Moreover, the Court's dismissal of the § 63(12) cause of action in this case is inconsistent with numerous prior decisions of this Court upholding complaints asserting a cause of action or causes of action under Executive Law § 63(12) that are not distinguishable in any relevant sense from the cause of action asserted under § 63(12) in this case. Further, the Court's assertion that § 63(12) "does not create independent claims" is mistaken, at least in any sense that is relevant to whether the Attorney General's § 63(12) cause of action should go forward here.

The Court's holding that the complaint pleads actionable misrepresentations by Schwab means that the § 63(12) cause of action should not be dismissed. And the Court's discussion of § 63(12) in its decision may breed confusion about that vitally important statute in the lower courts. To the extent that the Court perceives a question as to whether the Attorney General's cause of action under § 63(12) is viable,

we ask that the Court leave the question to be addressed in a future appeal in which the Attorney General has a full opportunity to brief and respond to the issue.

REASONS TO GRANT REARGUMENT

Section 63(12) is one of the Attorney General's most important enforcement tools in protecting the integrity of the commercial marketplace in New York. The statute authorizes the Attorney General—and only the Attorney General—to apply to Supreme Court, on five days' notice, for an injunction, restitution, damages, and other relief when a person or entity engages in "repeated fraudulent or illegal acts or otherwise demonstrate[s] persistent fraud or illegality" in the carrying on of business. The statute therefore establishes liability where a defendant commits persistent fraud or persistent illegality (which generally refers to violation of a state or federal statute or regulation). The Attorney General may plead a § 63(12) cause of action by itself or together with other causes of action supported by the facts.

In securities cases, the Attorney General commonly pleads parallel claims under the Martin Act and Executive Law § 63(12), as

the complaint in this case does, to obtain all remedies available under the statutes. Section 63(12) defines "fraud" broadly, in virtually identical terms to the definition under the Martin Act. *State v. Rachmani Corp.*, 71 N.Y.2d 718, 721 n.1 (1988); *People v. Greenberg*, 95 A.D.3d 474, 482-83 (1st Dep't 2012), *aff'd*, 21 N.Y.3d 439 (2013). As this Court has held, "[u]nder section 63(12), the test for fraud is whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *People v. General Elec. Co.*, 302 A.D.2d 314, 314 (1st Dep't 2003). Neither the Martin Act nor § 63(12) requires the Attorney General to prove intent to defraud (scienter) or reliance. *See, e.g., Greenberg*, 95 A.D.3d at 482-83; *State v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 (1st Dep't 1995).

Because a finding of fraud under the Martin Act also establishes fraud under Executive Law § 63(12), and also because violations of the Martin Act are actionable under § 63(12)'s illegality prong, courts often resolve parallel claims under the Martin Act and § 63(12) in a single analysis. *See, e.g., Rachmani*, 71 N.Y.2d at 721 n.1; *Greenberg*, 95 A.D.3d at 484-85. The same approach is appropriate here: while Schwab has contested whether the complaint adequately pleads fraud, it has

never contested that the alleged fraud, if properly pleaded, qualifies as repeated or persistent, within the meaning of § 63(12).[3] Therefore, this Court's holding that the complaint here adequately pleads actionable fraud under the Martin Act also means that the complaint adequately pleads actionable fraud under § 63(12).

Consequently, by this motion for reargument, the Attorney General requests that the Court delete the following sentence in its opinion affirming the dismissal of the cause of action under Executive Law § 63(12):

> The first cause of action was properly dismissed inasmuch as Executive Law § 63(12), upon which it is based, does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief on notice prescribed by the statute in cases involving persistent fraud or illegality (*see State of New York v Cortelle Corp.*, 38 NY2d 83, 86 [1975]).

Ex. A., Slip Op. at 7.

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[3] The provision defines "persistent fraud or illegality" to include "continuance or carrying on of any fraudulent or illegal act or conduct." It defines "repeated" to include "repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person."

This sentence acknowledges that the Attorney General may seek the remedies that § 63(12) authorizes in this action, but nonetheless holds that the § 63(12) cause of action should be dismissed as a separately pleaded cause of action. The Court should grant reargument and delete the sentence because (i) Schwab raised no contention specific to the pleading of the § 63(12) cause of action in this appeal; (ii) the conclusion that the § 63(12) cause of action here should be dismissed is inconsistent with numerous decisions of this Court; and (iii) the Court is mistaken in relying on the Court of Appeals' decision in *Cortelle* for the proposition that the § 63(12) cause of action here should be dismissed because the statute "does not create independent claims."

1. Schwab did not argue that the § 63(12) cause of action should be dismissed even if the Martin Act causes of action were reinstated.

In this appeal, Schwab raised no argument that would support dismissal of the § 63(12) cause of action alone, in the event that the Martin Act causes of action were reinstated. The Attorney General consequently had no reason to brief any such issue, and he did not do so. Nor was any such issue discussed at the oral argument.

Schwab declined to raise any argument specific to the § 63(12) cause of action on appeal, even though it had raised—and lost—such an argument in the trial court. In the court below, Schwab had argued that the Executive Law claim should be dismissed because it was "duplicative" of and "identical" to the Martin Act claims (R. 334, 400-401). The trial court squarely rejected that argument under the well-settled principle that a party is entitled to assert multiple claims for relief based on the same facts: the Court held that "the AG is entitled to assert claims under the Executive Law, the Martin Act, and GBL § 349 even though the AG's claims under those statutes may be related" (R. 19). By declining to challenge that aspect of the trial court's ruling or its reasoning on appeal, Schwab abandoned any argument concerning it. *See, e.g.*, *People v. Degondea*, 3 A.D.3d 148, 161 (1st Dep't 2003) (arguments not raised in briefs on appeal deemed abandoned); *People v. American Motor Club, Inc.*, 179 A.D.2d 277, 283 (1st Dep't 1992) (same); *Horney v. Tisyl Taxi Corp.*, 93 A.D.2d 291, 292 (1st Dep't 1983) (same).

2. *The conclusion that the § 63(12) cause of action here should be dismissed is inconsistent with numerous decisions of this Court.*

In addition to addressing an issue that was not briefed in this appeal, the Court's sentence discussing the § 63(12) cause of action is contrary to numerous decisions in which this Court has upheld the Attorney General's pleading of distinct causes of action under Executive Law § 63(12). The Court's dismissal of the § 63(12) cause of action here is at odds with these materially indistinguishable prior decisions, and it is likely to breed confusion in the lower courts.

For example, in *People v. American Motor Club, Inc.*, this Court reversed the trial court's denial of the Attorney General's motion for leave to amend his petition to the extent it sought to add a cause of action for persistent fraud under Executive Law § 63(12). *See* 179 A.D.2d at 282; Ex. J (proposed amended petition). The Attorney General had asserted three causes of action in his proposed petition, all of them under his § 63(12) authority. The first two causes of action alleged persistent violations of the Insurance Law, and the third cause of action alleged persistent fraudulent conduct as defined in § 63(12) itself. The trial court concluded that the third cause of action was "duplicative" of

the other two causes of action asserted under § 63(12), and denied leave to add it to the petition. *See id.* In reversing, this Court explicitly concluded that the third cause of action for persistent fraud under § 63(12) should be "reinstat[ed] *as a cause of action* and remand[ed] for further proceedings." *Id.* at 284 (emphasis added).

This Court has also reviewed and upheld the validity of causes of action brought under Executive Law § 63(12) in a large number of other cases. These include several prior decisions of this Court upholding complaints in which the Attorney General asserted claims for fraud under both Executive Law § 63(12) and the Martin Act, as the complaint here does. *See Greenberg*, 95 A.D.3d 474; *People v. Coventry First LLC*, 52 A.D.3d 345 (1st Dep't 2008), *aff'd*, 13 N.Y.3d 108 (2009); *State v. Fashion Place Assocs.*, 224 A.D.2d 280 (1st Dep't 1996); *Sonifer Realty Corp.*, 212 A.D.2d 366. In many other cases not presenting Martin Act causes of action, the Court has likewise upheld causes of action pleaded under § 63(12). *See General Elec. Co.*, 302 A.D.2d 314; *American Motor Club, Inc.*, 179 A.D.2d 277; *People v. Apple Health & Sports Clubs, Ltd.*, 206 A.D.2d 266 (1st Dep't 1994); *People v. Helena*

VIP Personal Introductions Servs. of N.Y., Inc., 199 A.D.2d 186 (1st Dep't 1993).[4]

3. The Court of Appeals' decision in *Cortelle* does not support the dismissal of the § 63(12) cause of action in this case.

In the sentence in question, this Court relied solely on *State of New York v. Cortelle Corp.*, 38 N.Y.2d 83 (1975), which it cited for the proposition that the § 63(12) cause of action here should be dismissed because § 63(12) "does not create independent claims." *See* Ex. A, Slip Op. at 7. The decision in *Cortelle* provides no support for the dismissal of the § 63(12) cause of action here, and indeed no party cited *Cortelle* in this appeal.

Cortelle addressed a question about the applicable statute of limitations for the Attorney General's causes of action under § 63(12) in that case. The Court's analysis of that statute-of-limitations question has no bearing on the viability of the Attorney General's § 63(12) cause of action in this case. In *Cortelle*, the Court of Appeals held that the

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[4] Each of the complaints filed in the actions referenced in the above paragraph is attached to the Affirmation of Brian A. Sutherland, submitted herewith.

Attorney General's causes of action brought under Executive Law § 63(12) were subject to a six-year statute of limitations, rather than a three-year statute of limitations. On this basis, the Court reversed the lower court's dismissal of the Attorney General's causes of action brought under Executive Law § 63(12). *See* 38 N.Y.2d at 89-90. If anything, given that the Court ordered reinstatement of the causes of action in *Cortelle*, the decision *supports* the reinstatement of the Attorney General's § 63(12) cause of action here.

In its decision in this case, this Court cited *Cortelle* for the proposition that § 63(12) "does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief on notice prescribed by the statute in cases involving persistent fraud or illegality." Ex. A, Slip Op. at 7. But the sentence's very description of § 63(12) shows that the statute does "create independent claims," in the only sense that matters here. The sentence acknowledges that the statute (1) confers standing on the Attorney General ("authorizes the Attorney General" to sue); (2) provides for remedies ("injunctive and other relief"); and (3) describes a standard of liability ("persistent fraud or illegality"). These are the essential ingredients of a

cause of action. And the Court's decision itself establishes that the complaint here properly pleads the elements of the § 63(12) cause of action. Because the Court concludes that the Attorney General's complaint adequately alleges fraud, the cause of action under § 63(12) should not have been dismissed.

The Court's sentence about § 63(12) seems to be based on a statement in *Cortelle* observing that, "[a]s applied to the allegations in [that] case," Executive Law § 63(12) "create[d] no *new* claims but only provide[d] particular remedies and standing in a public officer to seek redress on behalf of the State and others." 38 N.Y.2d at 86 (emphasis added). But as the opinion in *Cortelle* makes clear, the reference to "no new claims" was aimed solely at refuting the notion that the Attorney General's causes of action in that case were based on "*wrongs* not [previously] recognized in the common or decisional law." *Id.* (emphasis added). That was the relevant question in determining whether the three-year statute of limitations of C.P.L.R. 214(2), for wrongs newly created by statute, would apply.

The Court held that the Attorney General's causes of action were based on a previously recognized wrong, and thus were not subject to

the three-year limitations period of C.P.L.R. 214(2), because the causes of action alleged willful misrepresentations that constituted "a now classic wrong on a common-law theory of promissory fraud." 38 N.Y.2d at 87. It was in this narrow and specific sense that the Court said that § 63(12), as relevant to that case, "create[d] no new claims." The Court elsewhere expressed the same point by saying that "defendants' alleged actions are and were wrongful prior to and independent of the Executive Law." *Id.* This analysis in *Cortelle* pertained only to the issue whether the three-year statute of limitations in C.P.L.R. 214(2) applied, and it casts no doubt on the viability of the Attorney General's § 63(12) cause of action here.

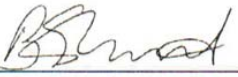
CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Court grant reargument, delete the sentence on page 7 of the slip opinion dismissing the first cause of action under Executive Law § 63(12), and modify its decision to reinstate the first cause of action, to the same extent that it reinstated the second and third causes of action under the Martin Act.

Dated: New York, NY
September 26, 2013

Respectfully submitted,

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

By: 
BRIAN A. SUTHERLAND
Assistant Solicitor General

RICHARD DEARING
Deputy Solicitor General
BRIAN A. SUTHERLAND
Assistant Solicitor General of Counsel

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8096
brian.sutherland@ag.ny.gov

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO, Attorney General of the State of New York,

Plaintiff-Appellant,

-against-

CHARLES SCHWAB & CO., INC.,

Defendant-Respondent.

New York County
Index No.
453388/2009

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REARGUE

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Appellant
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8096

RICHARD DEARING
Deputy Solicitor General
BRIAN A. SUTHERLAND
Assistant Solicitor General of Counsel

Dated: October 24, 2013

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THE COURT SHOULD GRANT REARGUMENT

The Attorney General respectfully requests that the Court reinstate its cause of action under Executive Law § 63(12) and delete the sentence in its decision dismissing that cause of action on the ground that "§ 63(12) . . . does not create independent claims." *People v. Charles Schwab & Co.*, 109 A.D.3d 445, 449 (1st Dep't 2013).

Schwab's opposition only confirms that reargument is warranted. Schwab concedes that its brief on appeal did not argue that the § 63(12) cause of action should be dismissed because the statute does not create "independent claims." And though Schwab makes a halfhearted effort to defend that position now, it principally argues that the § 63(12) cause of action should be dismissed on a ground *different* from that given in the Court's ruling. Schwab says that the real reason the § 63(12) cause of action here fails is that the claim is duplicative of the Martin Act cause of action, which is another argument that Schwab did not raise in this appeal, is incorrect, and in any event should not be entertained for the first time on this reargument motion.

A. Schwab Abandoned the Issue in Question on Appeal.

Schwab concedes that it did not argue on appeal that the Executive Law § 63(12) cause of action should be dismissed even if the Martin Act claim were reinstated. *See* Schwab's Mem. of Law in Opp. to Plaintiff-Appellant's Mot. to Reargue ("Opp. Mem.") at 2 (Schwab "did not expressly renew that argument"). It argues that (1) a respondent never abandons any issue raised below, even if not argued on appeal, and (2) the Appellate Division may affirm on any ground raised below. *See id.* at 10-12. But the first point is incorrect, and the second is irrelevant.

A respondent, just like an appellant, abandons issues when it fails to raise them in its brief on appeal. *See Matter of Matarazzo v. Safir*, 261 A.D.2d 142, 143 (1st Dep't 1999) ("We note respondents' abandonment on appeal of their argument that the proceeding is time-barred."). Otherwise opposing parties and the court would always have to address every point a respondent raised below, even if it did not brief the point on appeal. Instead, to conserve judicial resources and focus matters, a party is entitled to limit its response to the issues raised. *See Matter of Miller v. Captain Brereton*, 98 A.D.3d 824, 825 n.* (3d Dep't

2012) (Attorney General properly "limited his brief to the two issues raised on appeal by petitioner").

The principle that the Appellate Division may affirm on any ground raised below (*see* Opp. Mem. at 10-11) does not relieve the respondent of the obligation to raise such a ground in its appellate brief. Although the appellate courts are not confined by the trial court's reasoning, they are generally confined to the issues that the parties present on appeal, for the simple reason that it is unfair to rule on points that an opposing party had no meaningful opportunity to address during briefing or oral argument.

Schwab's only rejoinder is that the Attorney General had the opportunity to address the issue in the trial court and in the papers on this motion to reargue. Opp. Mem. at 10 n.8. But Schwab did not argue below that Executive Law § 63(12) creates no independent claims. It made the different argument that the § 63(12) claim was "duplicative" of the Martin Act claim (R. 334). Moreover, the trial court rejected that argument (R. 19), and Schwab admittedly did not "renew" it on appeal. Opp. Mem. at 2.

And it is axiomatic that addressing a point in a reargument motion is no substitute for having an opportunity to brief and argue it before a decision is issued. Schwab itself asserts that "[r]eargument is extraordinary relief," and insists that the Attorney General bears the "heavy burden" of identifying "controlling authority" that was overlooked. Opp. Mem. at 1-2. These standards do not apply at the merits stage, so the prejudice is obvious. And the absence of briefing and argument on the § 63(12) issue here has produced an erroneous and confusing ruling, as shown by the fact that even Schwab tries to defend the ruling on a ground different from that stated in the decision.

B. Schwab All But Admits That the Court's Stated Rationale for Its Ruling Is Incorrect.

Citing solely *State v. Cortelle Corp.*, 38 N.Y.2d 83 (1975), a decision that *reinstated* causes of action brought pursuant to Executive Law § 63(12), this Court dismissed the § 63(12) cause of action here on the ground that "§ 63(12) . . . does not create independent claims." 109 A.D.3d at 449. The Court seems to have relied on the sentence in *Cortelle* saying: "As applied to the allegations in this case, [§ 63(12) and Business Corporation Law § 1101(a)(2)] create no new claims . . . ." 38

N.Y.2d at 86. In recasting this sentence as a purported reason to dismiss the § 63(12) cause of action here, this Court altered it in two key ways. First, while *Cortelle* referred to an absence of "*new* claims," meant there to signify that the particular § 63(12) claims in that case rested on an accepted common-law theory of promissory fraud, this Court changed the phrase to say here that § 63(12) does not create "*independent* claims," and said that this was a ground for dismissal, which *Cortelle* never suggested. Second, while *Cortelle* was speaking about the effect of § 63(12) specifically "[a]s applied to the allegations in th[at] case," again referring to the particular promissory fraud theory asserted there, this Court transformed it into a general statement about § 63(12).

These critical differences render the sentence in the present decision inaccurate. Even Schwab essentially admits that the Court's statement conflicts with First Department precedent. Schwab concedes that this Court's decision in *People v. American Motor Club*, 179 A.D.2d 277 (1st Dep't 1992), held that "an *independent* cause of action under Executive Law § 63(12)" should have been allowed, and ordered that cause of action reinstated. *See* Opp. Mem. at 8 (emphasis added). The

Court's statement here that § 63(12) "does not create independent claims," and its dismissal of the § 63(12) cause of action for that reason, is directly at odds with *American Motor Club*.

Schwab argues that *American Motor Club* is different because the Attorney General did not assert Martin Act claims in that case. *See id.* at 8-9. But the Court's sentence in the decision here does not refer to the fact that the Attorney General has asserted Martin Act claims. Nor were Martin Act causes of action asserted in *Cortelle*. Thus, in an attempt to reconcile this Court's decision here with its decision in *American Motor Club*, Schwab has severed any connection to *Cortelle*.

These contortions not only demonstrate that the Court's ruling here is incorrect, but also prove the Attorney General's point that the ruling will inevitably cause confusion in other § 63(12) cases. Schwab says the rationale here is limited to cases where the Attorney General also brings Martin Act causes of action, but the decision does not say that. And defendants in other cases that do not include Martin Act claims are already citing the decision here for the proposition that "independent causes of action based on . . . § 63(12) should be

dismissed."[1] The Court should grant reargument, delete the inaccurate and confusing sentence from its decision, and reinstate the § 63(12) cause of action in this case.

C. The New and Different Ground Given by Schwab for Dismissing the § 63(12) Cause of Action Is Also Incorrect.

In any event, Schwab's entirely different argument that "it is appropriate to dismiss an Executive Law claim where the Attorney General also asserts claims under a comprehensive statutory scheme, like the Martin Act" (Opp. Mem. at 6) is manifestly incorrect, and Schwab provides no support for its theory. To determine whether the Martin Act is such an exclusive statute, the Court would have to examine whether the Legislature intended to make it exclusive. Certainly, there is nothing in the statute or its history to suggest any such intention, and Supreme Court held directly to the contrary, stating

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[1] Respondents' Mem. of Law in Support of Their Mot. to Dismiss at 42 n.29, *People v. Western Sky Financial, LLC*, No. 451370/2013 (Sept. 17, 2013). The Court may take judicial notice of its own records, including briefs filed in another case. *See, e.g.*, *RGH Liquidating Trust v. Deloitte & Touche LLP*, 71 A.D.3d 198, 207 (1st Dep't 2009), *rev'd on other grounds*, 17 N.Y.3d 397 (2011).

that "[n]othing in the Martin Act makes its remedies exclusive of other remedies available under New York law" (R. 19). *See Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 350 (2011) (holding that nothing in the Martin Act indicates an intent to displace common law claims in the field of securities). Schwab does not acknowledge *Assured Guaranty*, and it lacks any case law support of its own for its "comprehensive scheme" argument. Schwab relies only on two *dissenting* opinions, and on three trial court decisions that do not involve the Martin Act in any way. *See* Opp. Mem. at 6-7 & n.2.

In any event, Schwab's argument that any purportedly "comprehensive scheme" bars claims under Executive Law § 63(12) is directly refuted by *American Motor Club*, which confirms that the Attorney General may bring an independent cause of action for persistent fraud under § 63(12) alongside claims for persistent illegality under the Insurance Law, *see* 179 A.D.2d at 282-83—even though courts have also described New York's insurance law as a "comprehensive scheme." *City of N.Y. v. Britestarr Homes, Inc.*, 150 Misc. 2d 820, 823 (Sup. Ct. Bronx County 1991). Other decisions likewise directly affirm the Attorney General's authority to bring claims

based on violations of other statutory schemes that defendants have argued should be viewed as exclusive. *See also People v. Frink Am., Inc.*, 2 A.D.3d 1379-82 (4th Dep't 2003) (rejecting argument that "remedies afforded by Labor Law article 6 are exclusive" and permitting § 63(12) petition based on violations of the Labor Law); *State v. Winter*, 121 A.D.2d 287, 288 (1st Dep't 1986) (rejecting argument that Attorney General lacked jurisdiction under § 63(12) to sue for repeated violation of housing laws); *State v. Solil Mgmt. Corp.*, 128 Misc. 2d 767, 768-69 (Sup. Ct. N.Y. County 1985) (same). Schwab's contention is also inconsistent with longstanding practice: the Attorney General frequently files complaints asserting causes of action under both the Martin Act and the Executive Law, and this Court frequently upholds the validity of such complaints. See Attorney General's Mem. of Law in Support of Mot. to Reargue ("AG Mem.") at 10.

Schwab also argues that the Executive Law claim should be dismissed because it is "redundant" with and "duplicates" the Martin Act claim. *See* Opp. Mem. at 8-10. But Schwab concedes that claims are not duplicative if they have different elements of liability or provide different remedies. *See id.* at 8 (identifying reasons why persistent

fraud cause of action was not duplicative of persistent illegality cause of action under § 63(12) in *American Motor Club*). Under Schwab's own test, the Executive Law claim is not duplicative because it requires the Attorney General to prove elements that he need not prove in connection with a Martin Act claim—namely, that the fraud or illegality be "repeated" or "persistent," something that is not in dispute on this appeal.

Schwab attempts to avoid this obvious difference by claiming that "the Attorney General's brief here repeatedly confirms that [his] Martin Act and Executive Law claims are completely redundant." Opp. Mem. at 8. But of course the Attorney General did not assert that the claims are redundant; rather, our brief argues that the Executive Law § 63(12) claim should be reinstated, because under the facts of this case, an actionable representation under the Martin Act is also an actionable misrepresentation under Executive Law § 63(12), and the remaining distinct elements of liability under § 63(12) are not at issue on this appeal. *See* AG Mem. at 5-6 & n.3. Moreover, though Schwab implies that it is clear that the remedies available under § 63(12) and the Martin Act are identical, defendants frequently dispute that

proposition. Executive Law § 63(12) expressly enumerates "damages" as an available remedy, whereas the text of the Martin Act does not expressly enumerate "damages." And the Martin Act expressly discusses receiverships as a remedial device, whereas § 63(12) does not. The Attorney General's position is that both statutes invoke the full sweep of the courts' inherent remedial authority, such that the remedies available under them are the same, but defendants have contested that position in Martin Act and § 63(12) cases.

Indeed, Schwab argued below that the only remedies authorized under the Martin Act, and thus available to the Attorney General here, were injunctive relief and restitution of any money obtained directly or indirectly by the proscribed conduct (R. 338). Precisely because defendants often make this type of argument, the Attorney General commonly pleads parallel claims under the Martin Act and Executive Law § 63(12) to protect the public with all remedies available. And this Court's recognition in its decision that § 63(12) "authorizes the Attorney General to seek injunctive and other relief" strongly implies that the *Attorney General may continue to pursue those remedies in this case*, notwithstanding the dismissal of the § 63(12) count as a separate cause

of action. This is yet another important way in which the position Schwab is advancing differs from the Court's actual ruling.

At bottom, Schwab's attempt to introduce a brand-new issue of such potential significance now only underscores the reasons to grant reargument and delete the sentence in the Court's decision concerning § 63(12). The Attorney General does not ask the Court to affirmatively resolve in our favor any question about the scope of § 63(12), but rather only respectfully requests that the Court leave any such question open for a future appeal that properly and fairly presents it.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Court grant reargument, delete the sentence on page 7 of the slip opinion dismissing the first cause of action under Executive Law § 63(12), and modify its decision to reinstate the first cause of action, to the same extent that it reinstated the second and third causes of action under the Martin Act.

Dated: New York, NY
October 24, 2013

Respectfully submitted,

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

By: _____
BRIAN A. SUTHERLAND
Assistant Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8096
brian.sutherland@ag.ny.gov

RICHARD DEARING
Deputy Solicitor General
BRIAN A. SUTHERLAND
Assistant Solicitor General of Counsel

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