EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 31

THE PEOPLE OF THE STATE OF NEW YORK	:	
-against-	:	DECISION AND ORDER
HENRY 'HANK' MORRIS,	:	Ind. No. 0025/09
Defendant.	:	

Lewis Bart Stone, J:

At the request of the State Attorney General ("AG"), acting on behalf of the People, a Grand Jury convened in New York County, indicted defendants Henry Morris ("Morris") and David Loglisci ("Loglisci") on one hundred twenty-three felony and misdemeanor counts. Some of these counts applied only to Morris, some only to Loglisci and some to both. The crimes charged against Morris included twenty-three Class E felony counts and twenty-eight Class A misdemeanor counts under the Martin Act (General Business Law, ("GBL") §352-c(1), (2), (4) and (6), one count of Bribery in the Second Degree (Penal Law ("P.L.") §200.03), a Class C Felony, two counts of Rewarding Official Misconduct in the Second Degree (P.L. §200.20), a Class E Felony, one count of Grand Larceny in the First Degree (P.L. §155.42), a Class B Felony, one count of Grand Larceny in the Second Degree (P.L. §155.40), a Class C Felony, one count of Scheme to Defraud in the First Degree (P.L. §190.65(1)(b)), a Class E Felony, eight counts of Offering a False Instrument for

Filing in the First Degree (P.L. §175.35), a Class E Felony, fourteen counts of Falsifying Business Records in the First Degree (P.L. §175.10), a Class E Felony, one count of Enterprise Corruption (P.L. §460.20(1)(a)), a Class B Felony, and sixteen counts of Money Laundering in the Fourth Degree (P.L. §§470.05(1)(a)(i)(A) and (ii)(A)), a Class E Felony.

Following the unsealing of the indictment, Morris was arraigned before this Court on March 19, 2009. Because the People's case relied in substantial part on documentary evidence including over two million pages of disclosable material in the possession of the People, this Court established an extended motion schedule, with the consent of the parties, to accord Morris and Loglisci a fair opportunity to address issues appropriate in the Omnibus Motion phase of this criminal proceeding. During this period, Loglisci pled guilty to certain counts of the indictment. Accordingly, those counts of the indictment which charge only Loglisci, being Counts three, four, eight, nine, twelve, thirteen, fifteen, sixteen, twenty-five, twenty-six, twenty-eight, twenty-nine, forty-eight, forty-nine, fifty, fifty-one, fifty-three, fifty-four, sixty-nine, seventy, eighty-two, eighty-three, one hundred-one, one hundred-two, one hundred-three, one hundred-four, one hundred-five, one hundred-six, one hundred-seven, one hundred-eight, one hundred-nine, one hundred-eleven, and one hundred-twelve are

no longer part of this case.[1] In accordance with the motion schedule, which was once extended on consent of the parties, Morris and the People completed their submissions on June 10, 2010. Thus, notwithstanding Criminal Procedure Law ("CPL") §255.20 which contemplates the submission of defense motions within forty-five days of arraignment. Morris' Omnibus Motion is timely. This Decision on Morris' Omnibus Motion therefore relates only to the surviving ninety counts of the indictment charging Morris with crimes.

CONFLICTS OF INTEREST

Although raised by neither party, this Court has, as is proper, sua sponte considered its own potential conflicts of interest in this matter. Here, the People assert that Morris' criminal activity has inter alia resulted in the corruption of the investment program of the New York State Common Retirement Fund ("CRF,") a pension fund of which this Court is a beneficiary. Accordingly, this Court must initially address whether it is proper, appropriate and advisable, under New York Law and the Canons of Judicial Ethics for this Court to continue to preside over this case.

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[1] That is, as charges against Morris. However, proof of the allegations in such Counts may be admissible to establish elements of other counts of the indictment. The admissibility of such matters is left to the trial court as it may consider in limine motions.

Judiciary Law §14 provides that a "judge shall not sit as such in, or take any part in the decision of an action, claim, matters, motion or proceeding...in which he is interested." Accordingly, this Court must first address whether this Court is "interested" in this case within the meaning of Section 14.

Although CRF is the fund out of which retirement benefits are payable to retired State employees (or under certain circumstances, their families), including members of the judiciary, the State itself retains the obligation to pay benefits. New York Constitution ("NY Const.") Art. 5 §7. Thus, the full faith and credit of the State backs this Court's pension. Further, under United States Constitution ("US Const.") Art. 1 §10(1), New York may not pass any "Law impairing the Obligation of a Contract," and Courts enforce such provision. Trustees of Dartmouth College v. Woodward, 17 US 518 (1819). As the State by law, must fund the CRF in an actuarially sound manner to enable it to meet its pension obligations, any shortfall of assets or earnings of CRF by reason of Morris' actions would only act to impose upon the State an obligation to increase its contributions to CRF. Thus, short of the bankruptcy of the State,[2] this Court finds that it otherwise has in an economic sense, no more than a speculative personal financial interest in the subject matter of this

[2] Although the US Const. Art. 1, §8, empowers Congress to adopt uniform bankruptcy, laws and under such laws a bankruptcy trustee may abrogate contract of a bankrupt, it is not clear how such power may be applied to a contract of a State.

case. While this Court cannot find any material impact to its pension expectations by reason of Morris' acts or by any restitution or reparation which might be imposed upon Morris should he be convicted of one or more counts of the indictment,[3] the Court of Appeals has by expanding on the concept of impairment, found the State's obligation to fund shortfalls in a pension system "irrelevant in evaluating whether an 'impairment'" has occurred. Sgaglione v. Levitt, 37 NY2d 507 (1975).

The concept of "interest" for the purpose of this rule has been regularly held to involve a direct pecuniary gain or loss. At this time, this Court has not retired, has contributed no funds to CRF (as this Court is in Tier One of the State pension system) and by reason of the so called "death gamble" has no present pecuniary interest in the CRF but only an expectancy that if this Court retires before dying it will have a pension.

Other conflict issues arise under the New York Code of Judicial Conduct ("Code") which states that an "Economic Interest" denotes ownership of a legal or equitable interest, however small [emphasis added], in the affairs of a party." While the CRF is not a "party" here, thus making this provision inapplicable Canon 3(E)(c) also requires disqualification where the judge "has an economic interest in the subject

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[3] Any restitution paid to CRF would only reduce the size of the State's obligation to fund the CRF in an actuarially sound manner.

matter in controversy." Such Canon also bans "any other interest that could be substantially affected by the proceeding." Thus provision supports a conclusion that a substantiality or materiality test is to be applied to "any other interest" alone, thus making an "economic interest," even if *de minimus*, a conflict. Thus, this Court's expectancy of its pension to be funded by CRF may be deemed an economic interest which may have been impaired by Morris' acts.

Further, a Court must not only consider actual conflicts, but must consider whether this Court's continuance on this case would create an appearance of conflict. A review of the few cases construing these provisions and restrictions do not lead to a result which is clear and unambiguous.

Every New York State judge is statutorily a beneficiary of the CRF. Thus, to the extent a direct conflict or perception of conflict is based solely on the fact that a judge is a member or beneficiary of CRF, such conflict would apply to every member of the State judiciary. Other than such issue of this Court's membership in the CRF this Court is not aware of any other direct conflict or perception of conflict. However, based upon the decision of the Court of Appeals in Marion v. Silver, 14 NY3d 230 (2010), it is unnecessary for this Court to decide any of those difficult conflict issues. In Marion, the Court of Appeals, in considering whether it could rule on a constitutional challenge to the failure of the legislature to increase judicial

salaries, held where there is no other competent body to resolve constitutional issues, the Court of Appeals may, notwithstanding a clear conflict, consider and rule on the matter under the Rule of Necessity. As there is no court in New York which would not have the same conflict issues as discussed above, the same Rule of Necessity applies to this case.

By reason of all of the foregoing, this Court will continue to preside over this case and will now turn to rule on Morris' Omnibus Motion.

THE SCOPE OF MORRIS' OMNIBUS MOTION

Under New York criminal practice, defendants' Omnibus Motions routinely address the grand jury proceeding, challenging both procedures and sufficiency, and also seek suppression of statements and physical evidence, identifications, discovery and disclosure, and seek rulings on certain pretrial issues such as Sandoval rulings. Here no suppression issues are raised by Morris. Similarly, the massive initial disclosure made by the People has mooted most of the usual discovery issues.

Papers submitted on Morris' Omnibus Motion include a Notice of Motion, a supporting affidavit of counsel and an extensive Memorandum of Law, with exhibits and footnotes. Although it would be more appropriate and in keeping with the ordinary practice in this County for Morris' Notice of Motion to give notice in

summary form as to the relief sought, much of Morris' prayers for relief are found in his Affidavit and Memorandum of Law, and even a footnote raising the AG's standing to prosecute him. As the AG in his reply has briefed and addressed all issues raised by Morris, and has not objected to the form of Morris' motion, this Court will ignore matters of form and will address all material issues raised by Morris in his motion.

Initially, Morris moves this court to inspect and review the Grand Jury minutes for sufficiency. Such motion is granted, and this court has conducted such a review. The results of such review are set forth below. Morris also moves for disclosure to him of the Grand Jury minutes. Such motion is denied. As a fall back position, Morris moves, in the event this court denies his motion for a release of the Grand Jury minutes, that this court release to him the People's instruction to the Grand Jury. Such motion is denied.

Assuming the AG has jurisdiction to prosecute, the standard of proof submitted to the Grand Jury necessary to support an indictment is far lower than that required to convict at trial. The standard upon which Morris may be required to proceed to trial on any count is merely whether the competent evidence presented to the grand jury, considered in the light most favorable to the People and resolving all conflicts in testimony in their favor, provides reasonable cause that the crime charged in such

count had been committed by Morris. CPL §190.45.

Morris also challenges the AG's jurisdiction on the ground that although the AG may prosecute crimes under the Martin Act, the AG does not have plenary jurisdiction to prosecute all New York State-defined crimes. Here, the AG bases his jurisdiction to prosecute the non-Martin Act charges returned by the Grand Jury as pendant counts to Martin Act charges relating to the same transactions.

Thus, Morris addresses his first line of attack against the twenty-three felony and twenty-eight misdemeanor Martin Act counts as their dismissal would require the dismissal of any pendant non-Martin Act counts. Morris also challenges each and every non-Martin Act count on other grounds enumerated by him.

Because of the standard to be applied at this point in the proceeding in deciding Morris' Omnibus Motion, the "facts" against which Morris claims are to be tested are those presented to the Grand Jury and construed most favorably to the People. While Omnibus Motions challenging the Grand Jury adequacy of an indictment are commonly decided in a conclusory fashion without setting forth a recitation of such "facts," this Court will depart from such practice here to allow a proper record of the its determinations on the difficult (and not so difficult) issues raised by Morris and the People. In reciting "facts" for this purpose, however, this Court recognizes that at trial, should there be one, the jury or other trier of facts will only consider those

facts which have been proven by the People beyond a reasonable doubt from the evidence submitted at trial.

FACTS

This case and the relevant issues are better understood after a consideration of the facts before and after Morris' relationship with CRF began, i.e., to the period prior to Alan Hevesi's ("Hevesi") election as Comptroller in November 2002. Under NY Const. Art. V, §1, the Comptroller is an independently elected state-wide official, vested with audit and accounting functions. The Comptroller also serves as the Administrative head of the CRF. Retirement and Social Security Law ("R&SSL") §11 and the sole trustee of the funds held by CRF. R&SSL §313(b).

The CRF was established by L. 1920, ch 741 to secure retirement benefits payable to State employees and has been funded by State and employee[4] contributions. CRF's growth from its initial creation to date has been enormous. For example, in 1960 CRF had "more than $4 Billion in public pension funds[5] and now has over $100 Billion in assets.

[4] The original State retirement system required no employee contributions. In response to ever increasing benefits and changes in longevity, R&SSL has since been modified several times to create new "Tiers" for after employed employees who must also contribute their own friends to CRF to fund, in part, their retirement benefits.

[5] Governor's Memorandum approving L. 1960, ch. 816 and 817.

Initially, CRF funds could only be invested in a narrow range of expressly defined low-yielding investments. Following a report of a State study committee, established by Governor Rockefeller in 1960 which found CRF's investment restrictions to be outmoded and unduly restrictive, the legislature, enacted R&SSL, Art. 4-A entitled "Investments of Public Pension Funds," to govern and broaden investment possibilities for public pension funds, including CRF granting them *inter alia*, investment powers similar to those powers accorded Savings Banks. L. 1960, ch. 817.[6]

Although these 1960 changes expanded the types of investments CRF could make, the rules under which such investments were permitted were still highly prescriptive. In 1982, Governor Carey proposed a series of additional reforms for CRF investments "into areas which private plans have found profitable, thus serving the interests of the beneficiaries and participants in all public retirement systems."[7] The legislature adopted certain of these recommendations, among them, an amendment to R&SSL Art. 4-A to add R&SSL §177(7) (now §177(9)), to authorize a public pension plan to invest up to five percent of its assets in investments not

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[6] Id.

[7] Approval message of Governor Carey, on signing L.1982, ch. 717

expressly specified by other provisions of R&SSL.[8] L. 1982, ch. 717. Section 177(7), however, also limited how the investment decisions in these "alternate investments' were to be made. In 1983, at the urging of Governor Cuomo, the legislature modified §177(7) (now §177(9)) to replace the proscriptive standards governing the alternate investments with the standard of the "prudent investor." L. 1983, ch. 569. As a result, while the list of "eligible investments" under R&SSL §177 remains a hodge podge of proscriptive requirements, under §177(9), "alternative investments" may be made under "prudent investor" standards.

Over time, both the specific rules for non-alternate investments were eased and the percentage of CRF assets which could be invested in alternate investments was raised. In 1991, the portion of CRF investments which could be placed in alternate investments was further expanded to 7 ½% as a partial implementation of Governor Cuomo's Task Force on Pension Fund Investments. L. 1991, ch. 603. Subsequent legislation through 1996 made technical changes and expanded other investment powers. In 1997, the Legislature, at the urging of the New York State Teacher's Retirement Board, which serves as trustee of the New York State Teachers Retirement System, a public pension fund also subject to R&SSL §177, raised the

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[8] These provisions are sometimes commonly referred to ad "alternate," "leeway" or "basket" investments.

portion of public retirement funds' assets which could be invested in alternate investments to 15%, and simplified and rationalized other provision of such section. L. 1997, ch. 560.

In 2005, Hevesi, as Comptroller, sought further legislation to amend R&SSL §177 to increase the portion of public pension funds which could be invested in alternate investments to 25%. While the Legislature adopted a bill to do so, Governor Pataki vetoed such measure on the grounds that because the Comptroller was the sole trustee of the CRF, "it would be appropriate to establish an independent board to provide greater transparency and accountability as to how CRF funds are invested." In his veto message, he noted that "[i]n the absence of governance and accountability reforms...I am unwilling to approve the bill." Governor's Veto Message #22 (2005). In 2006, when Governor Pataki was no longer Governor, a similar bill without the governance and accountability reforms sought by Governor Pataki was introduced, passed and signed into law at the request of Comptroller Hevesi. L. 2006, ch 22.

The concept of alternate investments allows the CRF to invest in any conceivable investment, provided that the investment would be appropriate under the "prudent investor" rule. The prudent investor rule is now set forth in Estates, Powers and Trust Law ("ETPL") §11-2.3, which substantially enacted the Uniform Prudent

Investors Act ("UPIA"), a Uniform Law now in force in forty-four states, the District of Columbia and the US Virgin Islands, promulgated by the National Conference of Commissioners on Uniform State Laws in 1994. L. 1994, c. 609. The UPIA represents the modern understanding that a trustee's responsibility is "to exercise reasonable care, skill and caution to make and implement enactment decisions as a prudent investor would for the entire portfolio, taking into account the purposes and the terms and provisions of the governing instrument." ETPL §11-2.3(b)(2).[9]

That standard authorizes a trustee "to invest in any type of investment consistent with the [prudent investor rule], since no particular investment is inherently prudent or imprudent for the prudent investor standard." ETPL §11-2.3(b)(4)(a). For the CRF, the R&SSL §177 limitations on unlimited discretion of the Comptroller now applies with respect to 75% of fund assets, the remainder, effectively being subject only to the prudent investor rule. R&SSL §177(9). These obligations of the Comptroller to act as a trustee apply to any deputy or agent empowered by the Comptroller, such as Loglisci, to carry out the Comptroller's duties.

[9] See the Prefatory Note to the UPIA which traces the evolution of trust investment law up to the UPIA. 6 U.L.A..3.

The alternate investments at issue in this case were in what are commonly known as private equity funds, hedge funds, and "fund of funds" which in turn interested in hedge and private equity funds.

A private equity fund in this context is an investment vehicle where a manager amasses a pool of money or commitments to fund money from investors, to be used in one or more equity investments in enterprises through direct ownership of the assets or through non-traded securities of the entity owning the assets. A hedge fund is an investment vehicle where a manager amasses a pool of money or commitments to fund money from investors to invest in financial assets or other assets or instruments with the power to borrow at the fund level to leverage such purchases, which the manager expects will provide superior returns by reason of the manager's understanding of market anomalies. In a "fund of funds," the manager invests the funds committed or to be committed by investors in a portfolio of private equity or hedge funds to diversify the investments being made.

To invest in these funds, investors commit their investments before the fund identifies the investments it makes. Thus the investor in such funds relies on the expertise and ability of the manager to understand the market to identify good direct investments or financial or other opportunities for greater return through proper management of business in which equity investments are made, or in the case of fund

of funds investments, in other funds which are expected to be good investors, rather than evaluating the ultimate investments itself.[10] All of these funds typically have long time horizons which on the one hand, reduce the liquidity of investments in them and on the other hand, may enhance the ultimate return to investors by reason of the Fund's ability to stay with an investment over an extended period. While there are successful Private Equity and Hedge funds, some are unsuccessful and some even fraudulent, and others have achieved spectacular returns by successfully reviving failing business or predicting market movements or trends. These funds generally do not raise money from the general public. Instead they are generally marketed to and purchased by institutional and "accredited" investors under Rule 144 of the Securities Act of 1934 which permits the market for such securities to be lightly regulated at the Federal level relying on the sophistication of institutional or accredited investors to

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[10] As part of CRF's "diligence" procedures, alternate investments in funds were purportedly vetted by outside consultants. Given that CRF investments in these funds were to be made before the fund made its own investments, such vetting could be no more than an inquiry into the legitimacy of the management of the fund and its track record and capacity to carry out their proposed investment program. While this vetting process undoubtedly protected CRF from making an investment in a phony or Ponzi fund, the process which assigned diligence tasks to at least two different consultants, could not serve as a check whether CRF complied with its mandate to make and allocate CRF investments among alternate investments and between alternate and "traditional investment categories, on a prudent investor standard. The consultants were not called upon to compare any proposed investments to other funds which may have been available for investment, whether the amount invested in a fund resulted in a prudent balance of investments or whether the balance between alternate and traditional investments was prudent, or whether the balance among the alternative investments was prudent. Further, because several consultants were employed, none had an overview or was in position to make such determination.

police the investments rather than the heavy hand of Federal security regulators to evaluate a fund's business model and the quality and experience of its managers. The explosive growth of these funds are evidence that sophisticated investors consider these funds to be proper and appropriate vehicles for their investments.

As the CRF is one of the largest institutional investors in the United States, it was not inappropriate for CRF to consider and perhaps, in its discretion as a prudent investor, invest in these funds, to the extent that the all over CRF portfolio is prudently invented to balance risk, gain and liquidity.

This history of the expansion of the Comptroller's discretionary investment authority over almost a half century tracks the expansion of narrow investment criteria for other trust funds under State Law.[11] However, the history of gubernatorial recommendation for the modification and approval of this authority as well as veto messages, show a continuing concern of many Governors, that although the standard under which CRF investments should be made should be regulated under a prudent investor rule, allowing the Comptroller as sole trustee to invest such funds without further oversight remained problematic.

In January 2002, Hevesi took office as the newly elected Comptroller. Morris was his long time political consultant and confidant. By such time, CRF had been

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[11] See Prefatory Note to UPIA, supra.

regularly investing in some, but not all types of "alternative investments" as authorized by R&SSL §177(9) and the Division of Alternate Investments had already been established to review and recommend which alternate investments should be made. Soon after Hevesi took office, Loglisci was appointed as Director of Alternate Investments, and subsequently was promoted to Chief Investment Officer of the entire CRF.

It is the theory of the AG's case that Morris, Loglisci and persons associated with them took control of the alternate investment process of the Comptroller's office to capture placement fees and management fees generated by the overwhelming majority of new alternate investments for their own benefit by conditioning the approval of most or all alternate investments on placement fees being payable or fund management fees being shared with a designee of Morris or persons associated with him or to their relatives or other persons as a compensation or reward for political or other services performed at Morris' request. The AG asserts that as a result of this scheme Morris committed the crimes for which he was indicted. It is the AG's further theory that Morris arranged the removal of the former Chief Investment Officer of the CRF who would not "play ball" with Morris and induced Hevesi to promote Loglisci to Chief Investment Officer to carry out the scheme.

Central to this matter is how "placement agents" function and how placement fees are paid to them. Any consideration of the issues raised by Morris' motion requires an understanding of what these entail.

Placement agents are essentially brokers and their fees are essentially brokerage commissions. To the extent, therefore, that brokers play an appropriate economic function and their fees represent an appropriate recompense for their services, a market economy, such as ours, should expend no effort in fretting about their propriety as a general matter.

Brokers function to match counter parties and to negotiate the terms of their match, in exchange for a fee. While the most obvious brokers are those who provide a matching service for buyers and sellers of real estate or stock or bonds, or between landlord and tenant, brokers, sometimes under other names, provide similar services to match parties seeking a relationship, as for example, the merger and acquisition functions of an investment bank which brokers transactions between companies, the head hunter who matches executives with businesses, universities or hospitals, or the employment agency which matches people with jobs. Placement agents in this context match Hedge funds or Private Equity funds seeking investors with capital sources seeking investments. Except for heavily regulated industries, the compensation of brokers is left to the market with the understanding that, except for

such regulated industries, any collusion among brokers to fix prices or rates would violate anti-trust laws.

As the market sets brokerage compensation levels, brokerage compensation should reach a general equilibrium, as those who pay brokers attempt to minimize payments, to retain more for themselves, and as those who are brokers may not accept assignment from those unwilling to pay what the broker feels is a fair compensation for his efforts, which he might receive from another customer. As there are differences in the abilities of brokers to close a deal, persons who are perceived of as more successful in consummating favorable transactions will command a higher fee. It is no secret that persons perceived of as successful brokers (as is true of those perceived of a successful doctors or lawyers) may be richly compensated. There was substantial evidence before Grand Jury of this dynamic in the setting of placement agent fees.

For a legitimate broker to be successful, the broker should understand the needs of the parties he is bringing together, and if entities, their decision making process and other concerns. In large scale financial transactions especially where a number of participants are sought, individuals with specific experience and understanding of different parties is useful. Thus, it is common for example, if placing securities with nationals or entities of a foreign country, that someone familiar with that country, its

culture and its financial and tax system would be employed or affiliated with the placement agent to make such sale. It is true also when dealing with governments that one with prior governmental or political experience would probably be better suited to understand governmental needs and culture in promoting and consummating a transaction with a governmental entity – while at the same time, such expertise could aid the Fund in formulating its product and approach to meet governmental requirements.

Because of the competitive nature of the business, fund managers seek out whatever brokers they believe will be successful to the extent fund management may not hire different brokers to pitch to specific capital sources and promiscuously and unsentimentally replace those unsuccessful with those who seem to be in a better position to secure investments in their fund. Multiple witnesses before the Grand Jury painted this industry as practice of musical chairs for placement agents and competition for investments, with scant regard for who the broker was or how he would be able to close the deal, as long as he was successful. If the placement agent was successful, his contingent fee was deemed earned and paid.

Thus, absent some legal restriction on Morris' activities, or some crime committed by him in the course of his activities in the placement of CRF investments, his acting as placement agent and the receipt of compensation therefor was not *per*

se criminal.

Alexander Wolcott, Jr, an American commentator and critic once observed that "all the things I really like to do are illegal, immoral or fattening." It is clear that the approximately $19 Million Morris received was fattening. It may be that his receipt of such funds while he continued as principal political consultant to Comptroller Hevesi, and hiding such fact, was immoral, at least to the political sensitivities of pundits.[12] However, the sole question before this Court is whether Morris' actions were illegal and whether at this stage of this case, the AG may proceed to prosecute Morris on any or all charges in the indictment.

Illustrative of the political quandry created by this system of placement fees has been the different responses to the highly publicized disclosure of Morris' activities by Comptroller DeNapoli, Hevesi's successor in New York, by California Public

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[12] It is a reality of politics that elected officials often act to reward their supporters, whether by supporting legislation favored by them or appointing supporters to positions of power, trust or prestige. Similarly, it is not rare that supporters often win the award of government contracts especially where there are few if any objective standards for their award and great discretion in the person awarding them. Where such appointments or awards are made within legal parameters, it is fair game for political commentators or opponents to complain, and where such action seems excessive, to score political points with the public. Here, the disclosure of Morris' receipt of approximately $19 Million in placement and management fees while he was Hevesi's principal political consultant, was met with political outrage by Hevesi's opponents and by press and pundit commentary as at least "immoral." Whether such a course of action was immoral, however, is a determination left to the court of public opinion after hearing from the moral arbiters of our communities, and such judgment does not and may not bind this Court. Sanctions for immoral behavior are left to be imposed, if at all, by the court of public opinion and the ballot box. Whether such behavior was also criminal is to be determined in this case.

Employee Retirement System ("CALPERS") (the only State public pension system larger then CRF) and the United States Securities and Exchange Commission (SEC). The CRF has now banned placement agents, paid intermediaries and registered lobbyists from being involved in CRF investments. CALPERS has elected instead to regulate them extensively and to force public disclosure[13] and the SEC, after a full consideration, has decided to leave placement fees and placement agents to market discipline, as under present regulation, but instead prohibited, commencing September 13, 2010, recipients of placement fees, as well as employees of funds which have received public pension fund investments from making political contributions to public officials who oversee such public pension fund.[14] What these three well publicized regulatory changes reflect is that at the times relevant to this indictment, the payment of placement fees by funds to placement agents for the placement of CRF investments into such funds was not *per se* illegal nor was it *per se* illegal for a placement agent to be "involved" politically or to make political

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[13] A bill has also passed the California Assembly to ban contingent placement fees for CALPERS investments and to require placement agents doing business with California public pension funds to register as lobbyists. This bill, AB1743 of 2010, is pending in the California Senate for action on August 2, 2010.

[14] Rules 206(4)-5, and amendments to Rules 204-2 and 206(4)-3 under the Investment Advisors Act of 1940 (15 USC 80b). See SEC Release No. 1A-3043; File No. S7-18-09 RIN 3235=AK39 which discusses at great length the issues and basis of their decision to adopt such rules. Such report cites the transactions covered by this indictment as a major reason for the new rules adopted.

contributions or do political favors not otherwise proscribed by campaign finance laws.

Federal Law has long recognized that placement agents are brokers of securities and requires them to be registered as such with the SEC, and further requires individuals working for placement agents who may be compensated by a share of the placement agent fees, to also be licensed and tested as to their understanding of securities laws. This licensure process is currently carried out by Financial Industry Regulation Authority ("FINRA")[15] which has developed a testing protocol for individual brokers. FINRA issues a series of licenses; Morris applied for and received what are known as Series 7 and 63 Licenses which entitled him to act as an employee of a registered broker-dealer and to receive a share of brokerage commissions earned by such broker-dealer on business he generated. Shortly after Hevesi's election as Comptroller, and Morris' initial attempt to share in placement fees relating to a CRF investment, Morris, becoming aware of this regulatory protocol, affiliated with Searle & Co., ("Searle") an SEC registered broker-dealer, located in Connecticut, and took and passed the Series 7 and 63 License tests and therefore become eligible under Federal securities laws to share placement fees paid

[15] FINRA licensure took over and replaced a similar licensure program of the National Association of Security Dealers when FINRA was established by Congress.

to Searle, his "employer." Again, such activity was itself a lawful activity. Had Morris, by himself, merely proceeded in this new endeavor as a securities salesman to introduce funds to the CRF on behalf of Searle which had been commissioned as a placement agent by such funds, whose proposals were duly considered by CRF under the prudent investor rule and, where after such consideration, the CRF made an investment in one or more of such funds, which generated placement fees, payable to Searle, which were in part paid to Morris for his services, and otherwise complied with State and Federal law, there would be no basis for an indictment for such acts. However, the Grand Jury heard additional facts upon which the counts against Morris were based. While Morris challenges each count as to whether the "facts" could support a finding of criminality on such counts, issues which this Decision and Order will address below, the Grand Jury heard sufficient evidence of Morris' additional acts and behavior during the relevant period to sustain most of the charges against him.

This additional evidence showed supported that Morris and Loglisci, with the aid of at least one other senior official of the Comptroller's office and others created a corrupt operation by which decisions of the CRF to invest in a fund were based on whether such fund had agreed to pay placement fees or share management fees with Morris or his designees rather than solely on the prudent investor rule. For example,

in some cases Loglisci had already identified a fund which had otherwise sought a CRF investment, and letting it be known to the fund that an investment was possible only if the fund retained Searle as a placement agent. On other occasions funds seeking investments on "cold calls" to Loglisci as Director of Alternate Investments, or Chief Investment Officer, were returned to the Fund by Morris, "offering" his services as placement agent. Morris also agreed with other persons acting as placement agents for funds to share fees with Searle or another designee of Morris in exchange for securing CRF investments. During the course of this activity, Morris never publicly attended meetings between the funds and CRF personnel and failed to disclose his role, except where disclosure was made to Loglisci, who, as part of the arrangement, had such disclosures from the public.[16] Funds which would not hire Morris or his designees were shut out of CRF investments. Finally, Morris routed payments through other persons and chains of entities to disguise the trail of funds and payments to cover his tracks for payoffs to hide his activities and to allow the scheme continue, and made payments, disguised as loans to secure the participation of the other members of the Morris group. The Grand Jury found that as a result the corrupt operation created by Morris and his group within and without the

[16] This "non-public" file of disclosure letters to the Comptroller's office, maintained by Loglisci, "disappeared" when the Morris/Loglisci operation was disclosed and Loglisci left the Comptroller's office.

Comptroller's office constituted a Criminal Enterprise, and indicted Morris and Loglisci on the other counts of the indictment.

Martin Act Counts

Fifty-one counts charge Morris with violations of the Martin Act. The twenty-three Class E felony counts under GBL §352-c(6) relate to twenty-three investments made by the CRF during the period in question which generated placement fees paid or payable to Morris and persons acting in concert with him. The twenty-eight Class A misdemeanor counts against Morris allege separate theories of criminal violation, viz: –

– a violation of GBL §352-c(1) and (4) in that Morris (acting in concert with others);

> "used and employed (a) fraud, deception, concealment, suppression, false pretense and fictitious and pretended purchase and sale, and (b) promise and representation as to the future which are beyond reasonable expectation and unwarranted by existing circumstances, and (c) representation and statement which are false, where the person who made such representation and statement knew the truth, and with reasonable effort to ascertain the truth, and did not have knowledge concerning the representation and statement made, where engaged in to induce and promote the issuance, distribution, exchange, sale, negotiation and purchase within or from New York of securities,

– a violation of GBL §352-c(2) and (4) in that Morris (acting alone or in

concert with others):

> Engaged in artifice, agreement, device and scheme to obtain money, profit and property, by means prohibited by General Business Law §352-c."

The Misdemeanor charges relate to fourteen specific CRF investments. Of the twenty-eight misdemeanor counts, fourteen counts charge each theory of violation of the Martin Act for these investments.

In addition to seeking their dismissal, Morris addresses certain objections to all Martin Act counts, certain objections to all Martin Act felony counts, and certain objections to specific Martin Act felony counts.

Morris first asserts that Martin Act charges cannot be based solely on a non-disclosure, or to the extent that the Martin Act so allows, the act would be unconstitutionally vague. This assertion, however, has no basis in law. The Martin Act itself, in GBL §352-c(6) expressly proscribes "fraud deception, concealment, suppression [emphasis added]...while engaged in inducing or promoting the issuance, distribution, exchange, sale or purchase within or from this state of any securities." The Court of Appeals in State v. Rachmani Corp., 71 NY2d 718 (1988) found that material omissions by a person engaged in or promoting the sale of securities in or from New York were proscribed by the Martin Act. While the Court of Appeals in Rachmani (after adopting the materiality standards applicable to omissions under the

Federal Securities Laws), found that Rachmani in fact made no such material omission, noting that "an omitted fact is material if there were a substantial likelihood that a reasonable shareholder would have considered the omission important in making a decision." Accordingly, while a jury might find Morris not guilty on these counts on the ground that Morris' failure to disclose that CRF's decision to make investments was based on whether Morris was to receive a placement fee or control who was paid such a fee in connection with a particular CRF investment would not have been material to the CRF investment process or its decision makers acting properly under applicable prudent investor constraints, such would be a finding of fact, and this Court cannot as a matter of law, find that a trial jury may not find such non-disclosure to have been material.

While under other laws, the sale of goods may be subject to rules of caveat emptor, where a failure to disclose may not be deemed wrongful, here, the legislature by adopting the Martin Act, has expressly changed the common law rule of caveat emptor for persons inducing or promoting securities transactions. While a mere seller or buyer of securities himself may or not be required to disclose all he or she knows in a securities transaction, in the absence of a specific duty,[17] a promoter who

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[17] Which may include "insider" information, a special relationship to the counter-party, or a participant in a public offering.

may have a material economic interest in the consummation of such a transaction has such duty under the Martin Act.

Morris next asserts that the Martin Act, as a penal enactment, must be narrowly construed, citing People v. Shapiro, 4 NY2d 597 (1958) and People v. Farone, 308 NY 305 (1955) in support. These cases respectively involve violations of the Vehicle and Traffic Law ("VTL") §20(4)(a) and provisions of the former Penal Law relating to gambling. Morris also cites NY Statutes §271 in further support.

While the concept in New York that penal laws should be narrowly construed has a substantial history, the New York rule applicable to a specific statute is not a universal rule. The current Penal Law, enacted by L. 1963, ch 1030, subsequent to the Court of Appeals decision in Farone, states: "The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the object of the law." P.L. §5.00. Thus, the Penal Law which constitutes the greater part of New York's criminal statutes are no longer subject to the rule of narrow construction. See, also, NY Statutes §276 (uncited by Morris) which states: "In New York, by virtue of express statutory enactment, the Penal Law and all of its provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law, and the rule that penal statute is to be strictly construed,

discussed elsewhere, does not apply thereto." Thus, while Shapiro, supra, having been decided under the VTL might still have precedential value, the "narrow construction" rationale of Farone, a decision under the prior Penal Law, would not. In any event, Farone was decided on a series of alternate rationales of which "narrow construction" was only one, and which was unnecessary for the result which relied on the unreasonable construction of the statutory provision in question urged by the People in light of substantial judicial precedent construing such provision.

As the Martin Act is a part of the GBL and not the Penal Law, P.L. §5.00 does not expressly apply to the Martin Act counts. However, under New York law, another long standing principle of statutory construction requires that "remedial legislation," be "liberally construed." NY Statutes §275 states: "New York does not apply the rule of strict construction to those statutes which are only semi-criminal or remedial in nature, but on the contrary remedial statutes are liberally construed." In this context, New York Courts have consistently ruled that the Martin Act is remedial legislation and is to be liberally construed. See, e.g.: People v. Federated Radio Corp., 244 NY 33 (1926), All Seasons Resorts, Inc. v. Abrams, 68 NY2d 81 (1986); First Energy Leasing Corp., v., Attorney General, 68 NY2d 59 (1986); People v. Lexington Sixty-First Assoc., 38 NY2d 588 (1976); Gardner v. Lefkowitz, 97 M.2d 806 (Sup. Ct. NY Co., 1978); People v. First Meridian Planning Corp. 201 AD2d 145 (3rd Dep't 1994).

Of course, "liberal" construction does not grant a license to depart from the text of the statute beyond that which can be found by applying the ordinary rules of statutory construction or to extend the statute to the point where such construction would criminalize behavior where the statute has not given fair notice that such behavior would be criminal.

Morris' attempt to "narrowly construe" the Martin Act is further expanded upon by his argument that his actions as alleged by the People, cannot constitute criminal acts proscribed by the Martin Act. His initial objection is based on his contention that the Martin Act addressed only the sale of worthless securities or securities whose price exceed their value or created a risk of economic loss. Further, Morris argues that a mere failure to disclose actual or potential conflicts of interest "is not a legally sufficient basis for a violation of these statutes," and that "criminal violations of the Martin Act require proof of fraud in its conventional sense – some deceit or misrepresentation that deprives for attempts to deprive the victim of property."

Morris further argues that "unless Martin Act Fraud remains tethered to the concept of economic harm, the statute would be void for vagueness." Finally, Morris attacks the theory of "honest services fraud" used in various Federal prosecutions under the Federal mail fraud statute.

These arguments all fail because each is based on a false premise, either of law

or economics.

The existence and functioning of the international securities and capital markets and their principal location in New York is a major source of New York jobs, wealth and tax receipts. The location of such markets in the Untied States also significantly contributes to American wealth, jobs and tax receipts and to the United States balance of international payments. The health of a securities and capital market depends in substantial part on investors' confidence in the market's transparency and honesty. Where transparency or honesty is lacking, investors will not invest, seek markets elsewhere or will at least seek risk premiums so high as to stifle investment activities. Where such is lacking, the ability of New York market to function and efficiently allocate the always scarce capital of the world to its most effective use will be adversely impacted. There is therefore a rational basis for New York to legislate to promote the honesty and effectiveness of this market so as to promote wealth and jobs and the economic well being of its citizens.

The Federal Securities Acts were adopted in the 1930s to remedy market failures which were perceived to have caused or prolonged the depression of the 1930s and State Blue Sky[18] securities acts such as the Martin Act represent considered

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[18] State Securities Laws are generally referred to as "Blue Sky" laws. This name derives from the understanding that these laws were enacted to address the sale of stock by "fast talking [sellers] selling anything including the blue sky." 1 Hazen, Treatise or the Law of Securities Regulation U.S. 8.1 (5th ed.. 1995).

legislative judgments of individual States to preserve the honesty and therefore investor confidence and the efficacy of the securities and capital markets. These laws expressly expand existing common law theories and common law remedies, such as what constituted actionable common law fraud, to remedy gaps in the common law structure to police properly the securities business. Thus, Morris' attempt to limit the scope of the Martin Act to common law fraud flies in the face of the legislative history and purpose of the Martin Act, as set forth in its terms, and as it has been construed by the Courts.

Morris concedes that his claim that the Martin Act is void for vagueness and unconstitutional as applied here must fail if not "tethered to the concept of economic harm." As the above analysis clearly shows the potential of economic harm addressed by the Martin Act, Morris' concession moots his constitutional claim.

Morris' further attempt to limit the Martin Act to concepts of common law fraud are similarly unavailing. The beneficiaries of the Martin Act are not only "investors" and the "investing public," but the general public in terms of societal economic wealth, jobs and tax receipts by reason of the world's capital market center being located in New York, rather than elsewhere.

The text of the Martin Act reflects this distinction. Although, for example, Morris asserts that an element of the felony defined by the Martin Act requires proof

that the defendant has wrongfully obtained property worth more than $250 from the victim. The Martin Act does not, however, require that property be obtained "from the victim,"[19] only that, by reason of his acts (as defined in the Martin Act) the defendant "thereby wrongfully obtained property of a value exceeding $250." GBL §352-c(6). While requiring the People to prove that the property came from the "victim" could well enhance Morris' ability to gain an acquittal, the Martin Act does not include as an element of the crime any consideration of the source from which the property was obtained, only that by reason of Morris' acts, such property was "thereby" obtained. Such approach is consistent with the remedial purpose of the Martin Act viz: to enhance the effectiveness of the capital market and its primary location in New York, recognizing that those victimized by a defendant's wrongdoing may be a far larger group than a buyer or seller of securities in a single transaction.

Further, the misdemeanor Martin Act counts asserted against Morris do not require proof of any intent to commit a fraud (as defined) nor is it an element of such crimes that Morris or someone else profited from the transaction in any way. Increasing the punishment to a Felony for intentionally improperly acting in cases where the accused "thereby" received a material economic benefit is a rational distinction and one, which while criminalizing activities which may adversely affect

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[19] GBL §352-c(6)

the securities market and New York's interest therein, imposed more severe sanctions on one who intentionally acted to do so and profited therefrom.

Morris' further assertion that the Martin Act applies only to the sale of worthless securities or securities whose price far exceeded its value or whose purchase created a substantial economic risk of loss is also without basis. While such acts indeed are covered by the Martin Act, the Martin Act is not so limited. The value of securities to a buyer is their risk-adjusted potential for gain. A purchase of a security with a fraudulently undisclosed limit on gain is a wrong to the purchaser as well as a wrong to the integrity of the securities market as a sale of a security whose risk has been fraudulently concealed, which, as a result of serendipity or a general market movement, nevertheless returns a profit. For the securities market to function properly, the purchaser or seller should only have to shoulder future risk and not a built-in determent due to the fraudulent acts of a promoter. The Martin Act clearly covers this behavior by persons engaged in promoting security sales and properly does therefore not limit its coverage to situations of actual loss. It is equally harmful to an investor and to the perception of an honest market where an investor's return is positive, but limited to 1% where absent the fraud it should have been positive to 10%.

Thus, the Martin Act does not condition its applicability to the proof of "legal" loss[20] – but only on anti-social behavior which the legislature has found likely to cause economic or social loss.

In any event, an evaluation of Morris' behavior in light of real-world economics shows that his actions may also have had a substantial likelihood of causing a material economic loss to CRF. Morris' scheme was to create a "toll gate" for entry into the CRF alternate investment program where only those who paid Morris' toll could enter. While the Grand Jury was given no evidence as to how many alternative investment funds might have been suitable for CRF investment, ample evidence was presented that funds found it economically desirable to have CRF moneys invested in them. This is not surprising as managers of Hedge and Private Equity funds commonly receive a 2% annual fee for assets under management and a 20% carried interest in profits. Similarly, while fund of funds managers may receive a small percentage management fee, the size of such funds are often quite large, resulting in a potential of a large management fee. Thus a large additional investment (and there was Grand Jury testimony that CRF investments were quite large) would generate large fees and profit possibilities for a fund. The Grand Jury also heard evidence that many funds

[20] Economically, an investment of $100 for ten years which returns $100 after 10 years is an economic loss if there has been an inflation. Yet, common law theories of damage might not consider such an investment a loss.

sought a CRF investment because, in addition to directly enhancing the earnings of the fund manager, a CRF investment would constitute a seal of approval and endorsement of such fund to other investors thus aiding the fund to secure additional investments from other investors and thus also increase fund manager's profits.

Yet, the Grand Jury testimony showed that in spite of all economic benefits to a fund's manager arising from a CRF investment, not all fund applicants to CRF would agree to pay Morris's demanded toll. In fact, there was evidence that some of the funds who did receive investments from CRF only did so because their own placement agents, unknown to them, secretly colluded with Morris or persons working with him to pay his toll out of their own fees, which they received for obtaining CRF investment.

The effect of Morris' acts was to restrict the universe of alternate investments in which CRF could invest to only those funds where Morris' tolls were paid. It is basic economics that restricting CRF's choices of investment opportunities to an arbitrary limited subset of the potential investments in which CRF could otherwise properly consider for investment, is economically disadvantageous to CRF violates the duty of the CRF to follow the prudent investor rule and is therefore wrongful.

Under long standing rulings of New York Courts, the Martin Act has been construed to prohibit acts which would not be found to be improper under common

law fraud concepts. "Neither scienter nor an intent to defraud need be proven in order to establish liability under the Martin Act." People v. Sala, 238 AD2d 158, 193 (3d Dep't 1999). The standard of behavior of persons who engage in the promotion or facilitation of the sale and purchase of securities is, under the Martin Act, set between the poles of the "morals of the market place" and the responsibilities of a fiduciary which require "the punctilio of an honor most sensitive" as the standard of behavior. Meinhard v. Salmon, 249 NY 458, 464 (1928).

The standard imposed on such participants in the security market by the Martin Act is that they may not perform any deceitful practice "contrary to the plain rules of common honesty and all acts tending to deceive the public." People v. Sala, supra at 193. This enhanced level of obligation is part of the regulatory scheme imposed on persons in the business of selling, offering or dealing in securities or in their promotion or recommendation. Under Federal securities, regulations and laws, such persons must be licensed and pass qualifying examinations to assure their knowledge and the knowledge of the regulatory scheme under which they operate. Under the Martin Act and similar Blue Sky laws of many states, their behavior and responsibilities are set at a higher level. Given the complexities of securities and the concomitant opportunity for fraud or deception, the securities industry has become a regulated industry and its practitioners are held to higher standards than the ordinary

unregulated or unlicensed purveyor of goods and services.

There is no dispute that Morris was involved in the securities industry and in the promotion of the sale and purchase of securities. He became licensed under FINRA knowing he needed to do so to become eligible to share placement fees received by a registered broker-dealer, and became affiliated with Searle, a registered broker-dealer, which was authorized to receive placement fees. To do so Morris shared the placement fees received by Searle on a commission basis, which was set at 5% for Searle and 95% for Morris. Morris knew that placement fees were only, by Federal law, payable to a licensed broker-dealer, and shareable by one with a licensed person or other licensed broker-dealers and voluntarily became a part of the securities industry and thus had acceded to its rules and standard rules. CRF investments which are the subject of this indictment, as discussed below, all were investments by CRF in securities making Morris subject to the heightened obligations placed on persons engaged in promotion or sale of such securities in or from the State.[21]

Thus, the Martin Act charges here must be analyzed within the context of its statutory language as such it has been construed by the Courts, and where it has not yet been construed, liberally, and not narrowly as urged by Morris. The constitutional

[21] Morris asserts that five of the CRF investments covered by the indictment were not investments in "securities." To the extent such is true, such investments would not be subject to the enhanced obligations imposed on persons promoting their sale or purchase under Federal and State securities laws. This Decision and Order addresses such investments below.

test of vagueness asserted by Morris is substantially equivalent here to the fair notice problem above discussed, and this Court, in liberally construing the Martin Act, must also consider this fair notice causes.

"Securities"

Morris concedes, that most of CRF investments which are the subject of the indictment involved securities, and therefore are transactions facially subject to the Martin Act. Morris, however, asserts that five of such investments[22] do not involve investments in "securities," and therefore Martin Act counts relating as to such investments cannot be sustained. Both parties agree that the definition of securities under the Martin Act at least encompasses securities under the test enunciated by the United States Supreme Court in SEC v. W.J. Howey Co., 328 U.S. 293 (1946), which defined a security for the purpose of the Federal Securities acts. Under this test (commonly referred to as the Howey test), a security is "an investment of money in a common enterprise with profits to come solely from the efforts of others." In these five investments, CRF invested money as a limited partner in a limited partnership established to make the investment, which all of the investors hoped would be

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[22] Aldus/NY Energy Fund (Martin Act count 14); GKM/NY Venture Capital Fund (Martin Act counts 63-65); Access/NY European Fund (Martin Act counts 84-86); Liberty Oak Capital Fun/CSG (Martin Act counts 92-94); and Olympia John Street Fund (Martin Act counts 98-100)

profitable.

What Morris and the AG dispute is whether the third prong of the Howey test, i.e., that "profits were to come solely from efforts of others," was present for these five investments. Morris asserts that certain provisions in the limited partnership agreements governing them accorded CRF certain additional rights beyond the basic statutory powers accorded a limited partner under partnership laws, which resulted in giving CRF such extensive control over the affairs of the partnership as to negate any conclusion that the profits were to arise solely from the efforts of others. The People assert both that such additional rights do not cause such investments to fail to meet the third prong of the Howey test and that, in any event, that prong has been modified to expand the definition of security for Martin Act purposes by New York.

Employing a limited partnership as an investment vehicle is a common business practice, especially for sophisticated investors. A principle benefit of such entity is that for Federal and State income tax purposes, each partner's share of partnership earnings or losses are directly and individually taxable to or deductible by the partners without a separate tax being levied on such profits or losses being deductible only at the entity level. For CRF, a tax exempt entity, it is of enormous economic importance to avoid the income tax burden which would otherwise be imposed on an investment entity taxable at the entity level, such as an ordinary corporation. While CRF might

achieve the same tax result by investing directly or through a wholly owned tax-disregarded entity such as a single member Limited Liability Company ("LLC"), such direct investment would exclude CRF's ability to engage a partner with specific expertise who would be compensable on a profit share basis.[23] While the partnership form of investment can thus yield important tax benefits and access to professional investment expertise, acting through a general partnership, as distinct from a limited partnership, would subject all partners to liability for partnership obligations. By remaining a limited partner, CRF can enjoy the tax benefits and avoid liabilities or losses in excess of the amount CRF invested in the partnership. Under limited partnership laws, however, to achieve this protection from unlimited liability, a limited partner must be, in law, a limited partner, and not otherwise in control of the enterprise. Because State partnership laws cede significant powers to partners to negotiate the details of their partnership agreement, lawyers expert in the field of investment partnerships have over the years developed partnership provisions accord protections to limited partners against possibly rash or undesirable actions of general partners which do not, on the other hand, amount to moving the limited partner into

[23] The entire raison d'être of the "alternate investment" concept is to allow CRF to engage skilled financial services which as a practical matter, may be only available through people who would not "work" for CRF without the possibility of large gains and payments for success. Further, this format of the limited partnership also protects the CRF from merely following the advice of an advisor having no downside risk over his advice or "skin in the game."

such a control position so as to lose its limited liability protection as a limited partner. This control/non-control line is the same line which is appropriate to use in drawing the line in applying the third prong of Howey, as the same concept – i.e. – whether the ostensible limited partner has control or has ceded control applies. As is common among sophisticated investors, the limited partnerships through which these investments were made were all created under the Delaware Limited Partnership Law.[24] While these five investment partnerships may have restricted certain actions of the general partner, there was retention of a primary decision making in the general partner as to investments which met the standards established by the partners prior to its formation. For example, the agreement of limited partnership for Access/NY European Middle Market Buyout Fund L.P provides that:

> The management, operation and policy of the Partnership shall be vested exclusively in the General Partner, which shall have the power by itself and shall be authorized and empowered on behalf and in the name of the Partnership to carry out any and all of the objects and purposes of the Partnership and to perform all acts and enter into and perform all contracts and other undertakings that it may in its reasonable and good faith discretion deem necessary or advisable or incidental thereto. No Limited Partner shall take part in the management or control of the Partnership's business, transact any business in the Partnership's name or have the power to sign documents

[24] Four of the five partnership agreements were submitted to the Grand Jury. Such four were Delaware Limited Partnerships. Their common format a sophisticated language constituted sufficient evidence before the Grand Jury for this conclusion.

> for or otherwise bind the Partnership. The General Partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a general partner of a limited partnership, as provided in the [Delaware Limited Partnership Law].

The other three limited partnership agreements which were presented to the Grand Jury contain similar provisions.

While Howey defines a "security" for Federal Law, "security" is defined for more broadly by New York courts for Martin Act purposes. See, e.g., All Seasons Resorts, Inc. v. Abrams, 68 NY2d 87 (1986) Orestes J. Michaly and David J. Kaufman, McKinney's Practice Commentaries to GBL Art. 23-A(1986); Lehman Bros. v. Minnetals Int'l Non Ferrous Metals Trading Co., 179 F.Supp. 159 (S.D.N.Y. 2001). Under these broader concepts, sufficient evidence was submitted to the Grand Jury to sustain its finding that these five investments were "securities" for the purpose of the Martin Act.

Morris' challenge as to whether these five investments were securities continue with a challenge to sufficiency of the Grand Jury instructions on this issue. Again, at this point in the proceedings, it should be remembered that the evaluation of the Grand Jury's determination is addressed to issues of "reasonable cause," and not "probable

cause" or "beyond a reasonable doubt." To that extent, issues of control become relevant to whether these five investments are securities or not, involve factual questions, such issues are for the jury or other finder of the facts at trial. Based on this Court's review of the limited partnership agreements presented to the Grand Jury as Exhibits, this Court cannot find them to have crossed the control line so as to fail the Howey test as construed by New York courts. Accordingly, Morris' prayer for this Court to strike the counts asserting violations of the Martin Act with respect to these five investments on the grounds that the investments relating to these counts are not securities, (and to strike, as a result, Penal Law counts relating to such investments as no longer pendant to viable Martin Act counts) on the ground that such investments did not involve securities, is denied.

As his final attack on the Martin Act charges, Morris asserts that he expects the AG would urge an "honest services fraud" theory to prosecute him. While prosecutions under the "honest service fraud" theory have been long pursued under Federal Mail Fraud statutes, the validity of such theory and its scope has been recently addressed by the United States Supreme Court in Skilling v. United States, 561 US ____, 130 S. Ct. 2896 (2010), and has been found wanting. In Skilling, convictions of Jeffrey Skilling and Conrad Black, two high profile Federal defendants indicted and tried under Federal Mail Fraud Statutes were vacated and returned to the lower courts

on the ground that the concept of honest service fraud was too vague to pass constitutional muster. However, the instructions to the Grand Jury do not utilize or charge this theory and further, in his reply the AG has committed to not asserting such theory against Morris at trial. As Morris was not indicted and will not be tried on this now discredited theory, the decision of the United States supreme Court in Skilling has no relevance to this case.

Accomplice Liability

Many indictment counts asserted against Morris are at least partially based on a theory of accomplice liability – that Morris, acting in concert with Loglisci or others committed the charged crime. P.L. §20.00. Morris asserts that such accomplice liability cannot attach to him under certain counts because no single person committed all of the elements of the crime charged under such counts. Specifically, Morris directs his argument to the felony Martin Act charges by asserting that whatever Loglisci or others did, money did not end up with them, and accordingly, having not received $250 more, they could not be guilty of the Martin Act felony and as a result, neither could Morris, whatever his role, unless he personally committed all of the elements of such crime. It is an interesting theory, but one without basis under New York law. While it is clear that a person proven to be an aider or abettor who has not personally performed any of the elements of a crime may be, under P.L. §20.00, held

responsible for the entire crime, it is also true that where accomplices act together, with the appropriate common intent, all accomplices may be found guilty of a crime under a theory of acting in concert even where separate elements of the crime are performed by different persons and no one person performed all of the elements by himself or herself. All that New York requires is that, to convict a defendant, the People must prove that such defendant, alone, or acting in concert, committed each element of the crime.[25]

Morris further seeks dismissal of the Martin Act felony counts fifty-two, fifty-five, fifty-six, seventy-eight and eighty-one which relate to five specific CRF investments on the grounds that he never received any money as a result of such investments. The first three of these counts relate to investments by CRF in Paladin Homeland Security Fund, Pequot Private Equity IV and Pequot Diversified Offshore where finders fees were paid to Raymond Harding or his affiliates. Count seventy-eight relates to investments by CRF in Strategic Co-Investment. Morris' attorney's brief (but not an affidavit of Morris) disclaims that Morris received any proceeds of placement fees from this investment. The Grand Jury heard evidence that Barrett

[25] Neither Morris nor the People cite cases on this point. The lack of such authority, however, is more likely a result of no prior attempt to assert such a specious claim under long standing New York practices and understanding of New York accomplice law. This Court has found no appellate case finding this provision to be questionable. Morris' attempt to argue otherwise borders on the frivolous.

Wissman, acted in concert with Morris and received placement fees. Count eighty-one relates to the CRF investment in Falconhead Capital where Falconhead entered into a placement fee agreement with Searle, the broker-dealer with which Morris was affiliated. In such case, the fee "earned" under such agreement was not paid to Searle and Morris received no money.

As discussed above in considering accessorial liability, one may be convicted of a crime where one, alone or acting in concert with others aids or abets in the commission of the crime. In counts fifty-two, fifty-five, fifty-eight and seventy-eight, even if Morris did not personally receive moneys, sufficient evidence had been presented to the Grand Jury for it to find that Wissman or Harding as the case may be, received more than $250 as a result of these investments, and that Morris acted in concert with them. Thus, Morris' failure to receive, personally, any moneys in connection with these investments is no bar to his prosecution under the Martin Act relating to these investments.

Count eighty-one relates to CRF's investment in Falconhead. Falconhead paid no placement fees to Searle or Morris or anyone else as a result of such investment. While evidence before the Grand Jury shows that Falconhead was prepared to and had intended to pay a placement fee to Searle, and that Searle would have paid 95% of the

fees received to Morris, Falconhead required of an invoice from Searle before making such payment. Before Searle had sent an invoice which Morris would have undoubtedly advised Searle to send, Morris' participation in the scheme which is the basis of this prosecution had become public and Searle never sent an invoice, and no placement fee was paid. Even if the receipt of such agreement by Searle would have sufficed to meet the $250 test, no evidence was presented to the Grand Jury that Morris received the agreement or that Searle acted in concert with Morris so as to have Morris deemed to have received the agreement himself.[26] Therefore, there was insufficient evidence before the Grand Jury that Morris received $250 or more as a result of the Falconhead investment. Accordingly, Count eighty-one cannot be sustained.

Under CPL §210.20, where a Court finds a count in an indictment cannot be sustained by evidence presented to the Grand Jury, it must[27] reduce such count to "the

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[26] While Searle represents a link in many of the placement fee transactions, Searle's role, other than evidence that Searle received moneys and distributed Morris' share as Morris directed, is not well developed in the testimony before the Grand Jury. While Morris' deal with Searle gave Morris a 95% split of placement fees, with Searle routing Morris' share as Morris designated, no evidence was presented to the Grand Jury that Morris was a principal of Searle or that Searle knew of Morris' illegalities, or had violated its obligations, as a registered broker-dealer to supervise Morris. While other evidence of placement agency fee splits between the other broker and their employees who brought in the "deal" showed that the 95%-5% split was highly unusual, no law forbids such a split. Thus, to the extent that any count against Morris relies on a theory that Searle acted in concert with Morris or anyone else, there is insufficient evidence before the Grand Jury to sustain such a theory.

[27] Except where no remaining Count is more than a petty offense

most serious lesser included offense with respect to which the evidence before the Grand Jury was sufficient." Here, the three crimes may be possible lesser included charges under the Class E Felony Martin Act charge of Count eighty-one, viz, an Attempt to violate GBL §352-c(6), a violation of GBL §352-c(1) and (4); a violation of GBL §352-c(2) and c(4), all of which are Class A misdemeanors. Accordingly, any of these three qualify as the "most serious lesser included offense."

Here, while there was sufficient evidence before the Grand Jury that Morris had pursued the same course of conduct in concert with others, and other CRF transactions to receive placement fees and had intended to receive a placement fee from Falconhead through Searle. Accordingly, the People might have sought to indict Morris on the crime of an Attempt to violate GBL §352-c(6). Had they done so and had evidence been presented that Morris or persons with whom he acted in concert and had the Grand Jury indicted on such crime, this Court would have found the evidence presented to the Grand Jury sufficient to support such a charge. However, because an essential element of the crime of Attempt requires that additional elements "engaged in conduct which tends to effect the commission of such crime" P.L. §110.00, and such element had not been considered by the Grand Jury, this Court may not reduce Count eighty-one to charge the crime of Attempt to violate GBL §352-c(6).

While the other two Martin Act misdemeanors described above are possible lesser included charges under Count eighty-one, and as Class A misdemeanors are the most serious lesser included offense, CPL §210.20 does not instruct as to how this Court must select as between two equivalently serious charges. The Grand Jury also indicted Loglisci on counts eighty-two and eighty-three, for committing such crimes with "his agents, accomplices and co-conspirators," in connection with the Falconhead investments, charges this court would have sustained as against Loglisci.[28] As sufficient evidence was presented to the Grand Jury that Morris was Loglisci's principal accomplice to such acts and the Grand Jury could not have indicted Loglisci on such count had it not found Morris acting in concert, either charge would be sustainable as against Morris, had he been charged thereunder. As there is no basis for this Court under CPL §210.20 to reduce the charge to two separate charges under these circumstances, this Court must reduce Count eighty-one only to a single lesser included charge and as it is the only practical construction of such section which lesser included charge must be left to this Court's discretion. In exercising such discretion, this Court reduces Count eighty-one to charge a violation of GBL §352-c(2) and c(4),

[28] This statement is in the subjunctive as Loglisci has pleaded guilty, and because Morris was not charged in such counts, because such charges, being levied against Loglisci, are no longer present in this case, this Court cannot resurrect them. As a result, Morris has no standing to challenge the adequacy of such counts against Loglisci. Further, the finding of the adequacy of such charges as against Loglisci cannot be a "ruling or determination" of this Court on Morris' motion.

to read the same as such charge had been made against Loglisci in Count eighty-three.

Pendant Charges

Because this Court has found that at least one Martin Act charge remains in this case against Morris with respect to each CRF investment covered by the indictment, proper charges pendant to such Martin Act charged also remain,[29] notwithstanding any other limitations upon jurisdiction of the AG to prosecute crimes.

Morris has further challenged each and every non-Martin Act charge in his motion. These counts charge crimes which are routinely prosecuted by District Attorneys throughout the State and there are, in many instances, substantial bodies of law to define such crimes. The AG has countered that all such non-Martin Act counts supported by sufficient evidence before the Grand Jury and by proper Grand Jury action and after proper charges were given to the Grand Jury. These separate challenges to these counts are addressed below.

ENTERPRISE CORRUPTION

Count one of the Indictment charges Morris with Enterprise Corruption under P.L. §460.20(1)(a), a Class B felony. As a Class B felony it is the highest level crime

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[29] The reduction of the Martin Act felony charge in Count eighty-one to a misdemeanor Martin Act charge would have sustained any pendant non-Martin Act charge as a Martin Act charge remains. However, Count eighty-one is irrelevant to pendant jurisdictional issues as the indictment contains no non-Martin Act charges expressly pendant to Count eighty-one.

charged in the indictment.

Under P.L. §460.20(1), "[a] person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity."

P.L. §460.10 defines "criminal enterprise" as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents."

Count one charges Morris of conducting and participating in the affairs of a criminal enterprise, referred to in the indictment as the "Morris Group," by participating in a pattern of criminal activities including seventy "pattern acts" of criminal actions set forth in such count. The enterprise is described as including Morris, Loglisci, John Doe 1, an asset manager and family friend of Loglisci...[and] a placement agent finder and principal with respect to certain alternative investment transactions with the CRF sometimes in partnership with Morris, John Doe 2, a high-ranking official within the office of the State Comptroller and an advisor to the Comptroller, other persons known and unknown to the Grand Jury," who shared

Morris' criminal purpose.

Morris on the other hand, contends that the evidence before the Grand Jury was insufficient to establish either (a) a criminal enterprise with an independent and ascertainable structure distinct from a pattern of criminal activity, or (b) a criminal enterprise with a continuity of existence, structure and criminal purpose beyond the scope of the individual criminal incidents. Morris also asserts that this Count should be dismissed in the interest of justice because his prosecution under this Count would be inconsistent with the stated legislative findings accompanying the statute, see CPL §210.40(2). This Court finds such relief not warranted and denies Morris' request for the reasons below.

A. An ascertainable structure distinct from a patter of criminal activity

To substantiate the existence of a criminal enterprise under P.L. §460.10, the People must establish that a group of persons was associated in an ascertainable structure distinct from a pattern of criminal activity. That is, the evidence before the Grand Jury must show "[a] cognizable criminal enterprise that extend[s] beyond the common plan or scheme encompassing the alleged pattern acts." See People v. Besser, 96 NY2d 136, 143 (2001). It must demonstrate "[a] system of authority beyond what is minimally necessary to effectuate individual substantive criminal offenses," People v. Wakefield Fin. Corp., 155 M2d 775, 785 (Sup. Ct., NY County

1992), something more than and "[d]istinct from any *ad hoc* association entered into for the purpose of carrying out one or more of the criminal incidents relied upon to establish its existence." People v. Cantarella, 160 M2d 8, 14 (Sup. Ct. NY County 1993).

This Court finds that evidence presented to the Grand Jury was sufficient to sustain a finding that Morris conducted the criminal activities alleged in the indictment within the confines of an ascertainable structure with Morris at the top of the command structure and with Loglisci directly below him.

A criminal enterprise may be operated through a separate formal structure or by an organized cabal wholly or partially within a legitimate operation. Here the Office of the Comptroller is a governmental organization established by NY Const. Art.5, §1. The indictment does not charge it to be a criminal enterprise, but does accuse Morris and persons within and without the Comptroller's office with establishing an ongoing criminal enterprise within and outside of such office.

Because criminal enterprises rarely organize under written charters, agreements or by-laws, or keep extensive written minutes or records of their criminal activity, proof of the structure and continuity of the enterprise may be inferred through evidence of the actual activities of the group.

The courts have considered many different factors which may be used to prove the existence of a particular criminal enterprise. Among them have been evidence of the time frame over which the illegal acts occurred, patters of concealment, succession arrangements to replace individuals who may leave the group, explicit profit share arrangements with the group and other factors. None of these factors have been deemed to be a _sine qua non_ to establish the existence of a criminal enterprise under the statute, but merely factors from which a finder of fact may reach the factual conclusion that the statutory definition of "criminal enterprise" has been met.

Here, the Grand Jury found the Morris Group participated in seventy "pattern acts" of criminal activity during a five to six year period, involving nineteen large placements of CRF money in nineteen separate alternate investments which generated approximately $35 Million in placement fees or shared management fees of which approximately $19 Million was eventually received personally by Morris or by entities owned by him, with the remainder going to other members of the Morris Group, persons recruited by Morris to front for, or conceal payments or to compensate persons for the performance of future, current and past political favors for Morris and his political consulting clientele. This Court finds the evidence before the Grand Jury sufficient to support their finding of a criminal enterprise having an ascertainable structure.

The crime of enterprise corruption was designed to address the particular and cumulative harm posed by persons who ban together in complex "criminal organizations." People v. Besser, supra. Evidence before the Grand Jury was sufficient to show the complexity of the scheme, its maintenance over an extended period, and the regular commission of criminal acts, as well as finding the participants in the enterprise to have committed seventy "pattern" acts.

When adopting P.L. §460.00, the legislature acted to address the increasing sophistication of criminal enterprises run through organizations which could enhance criminal activity and concealment of their actions by division of labor among member of the enterprise, while at the same time, avoiding increasing criminal penalties for what might be considered ordinary to criminal acts or on persons with a minor role in a criminal enterprise. The crime of criminal enterprise therefore may only be charged when the Grand Jury has found at least three "separate criminal acts perpetrated by the enterprise as well as the existence of the enterprise." Here, the Grand Jury found seventy "pattern acts" which in the most part reiterate specific criminal acts as charged in other counts of the indictment. As this Decision and Order has sustained as supported by sufficient evidence before the Grand Jury at least three of such pattern acts and as there was sufficient evidence before the Grand Jury to establish that such acts arouse out of the joint activities of the Morris Group, this Court finds that this test

has been met.

While the Grand Jury must be advised of its discretion to decline to indict a person who may have actually participated in the enterprise where that person was involved in relatively minor or isolated acts of criminality which can be adequately and more fairly prosecuted as separate offenses, the Grand Jury was so advised under proper instructions and by indicting, exercised its discretion. On the evidence presented to the Grand Jury, this Court can find no basis to reject the Grand Jury's determination not to exercise such discretion when it indicted Morris as sufficient evidence had been presented to the Grand jury that Morris had been the central manager and primary beneficiary of the enterprise.

Morris further calls upon this Court to dismiss the Enterprise Corruption charge "in the interest of justice." Morris argues that, even if the Grand Jury was properly instructed that it may decline to indict Morris "in the interest of justice," and has elected, nonetheless, to indict him, this Court must independently exercise its own discretion to consider whether to dismiss the enterprise corruption count "in the interest of justice." In support, Morris cites the legislative findings of P.L. §460.10 which states that the

> "Carefully drawn definition of the terms 'pattern of criminal activity' and 'criminal enterprise' are not to be constructed either liberally or strictly, but in the context of the legislative purposes set forth in these findings. Within

> the confines of these and other applicable definitions, discretion ought still be exercised. Once the letter of the law is complied with, including the essential showing that there is a pattern of conduct which is criminal under existing statutes, the question whether to prosecute under those statutes or for the pattern itself is essentially one of fairness. The answer will depend on the particular situation, and is best addressed by those institutions of government which have traditionally exercised that function: the Grand Jury, the public prosecutor, and an independent judiciary."

This provision is both a legislative finding and an enacted portion of the Penal Law and therefore binds this Court as any other relevant Penal Law provision.

Accordingly this Court must follow such rule of construction. Such rule must also prevail over the general rule of construction in the Penal Law in PL §5.00. "Whenever there is a general and a particular provision in the same statute, the general does not overrule the particular but applies only where the particular enactment is inapplicable." NY Statutes §238.

Further, it is also clear that New York Courts retain an inherent power to dismiss a count of an indictment or even an entire indictment "in the interest of justice" under People v. Clayton, 41 AD2d 204 (2nd Dep't 1973). As PL §460 was enacted subsequent to Clayton, and as motions to dismiss invoking Clayton must be carefully structured to comply with the Court's gloss developed for "Clayton

Motions," P.L. §460 must be deemed to modify and ameliorate the requirements under Clayton which, while authorizing a dismissal in the interest of justice, circumscribe the exercise of such power with a series of tests. Any other construction of P.L. §460 would render P.L. §460 meaningless. As courts must commence their construction of a statute with the presumption that legislative enactments are intended to have an effect and to effect a change from prior law, this court will independently consider Morris' request to dismiss Count one "in the interest of justice" and in doing so, apply a "fairness" test.

Having reached this point, however, Morris proffers only two arguments why this Court should dismiss this Count under this theory: first that Morris' activities were totally different from those which were the basis for the original enactment of P.L. §460 – the problem of organized crime as personified by classic mafia-type operations,[30]- and second that even if Morris' behavior was criminal, "there are more than sufficient remedies available to address the conduct alleged in this case."

P.L. §460 is not by its own terms intended solely to cover crimes committed by classic mafias. P.L. §460.00 itself expressly states that "the concept of criminal enterprise should not be limited to traditional criminal syndicates or crime families,

[30] In his politically correct presentation, Morris does not mention the Mafia, but his references to the legislative history of "organized crime" and the Federal Racketeering Influenced and Corrupt Organization Act makes it clear as to what he means.

and may induce persons who join together in a criminal enterprise, as defined by subdivision three of Section 460.10 of this article for the purpose of corrupting legitimate enterprises or infiltrating and illicitly y influencing such enterprises."

The fairness exception is designed to shield a minor cog in the criminal machinery, such as a low level operative, or one who was involved only in a small portion of the criminal activities, from the strong penalties imposed on those convicted of Enterprise Corruption. Morris here was the central figure of the criminal enterprise, and as one who was involved in each of the CRF investments in question and who received approximately $19 Million for his alleged criminal efforts, he is hardly in a minor role. Accordingly, this Court finds the fairness exception inapplicable.

This Court also rejects Morris' argument that there are other "sufficient remedies." Enterprise Corruption is a B felony. The only other B felony charged in the indictment is one count of Grand Larceny in the First Degree. Morris also seeks dismissal of such count on various legal theories and this Court, as discussed below, has agreed and has dismissed such count. Thus, Morris' claim that the remaining counts of the indictment are adequate to punish him for Enterprise Corruption is no longer viable.

For the foregoing reasons, this Court declines to exercise its discretion to dismiss this count in the interest of justice.

Grand Larceny Counts

Count twenty-three of the indictment charges Morris with Grand Larceny in the Second Degree, in that he, acting in concert, "stole property, to wit, fees related to the CRF investment in Odyssey Investment Partners III, and the property had a value in excess of fifty thousand dollars." Count eighty-seven charges Morris with Grand Larceny if the First Degree, in that he, acting in concert, "stole property, to wit, management fees and carried interests related to the CRF investment in Access/NY European Fund, and the property had a value in excess of one million dollars."

Morris seeks dismissal of both counts on the ground that his actions did not constitute Larceny under New York law. He also seeks a dismissal of Count eighty-seven on the additional ground that property of a partnership cannot be stolen by a partner, as a matter of law. After reviewing the material submitted to the Grand Jury on these counts, and the arguments and memoranda of law submitted by counsel, this Court has determined that both counts must be dismissed.

A person commits larceny when "he wrongfully takes, obtains or withholds property from the owner thereof" P.L. §155.05(1). Here, the relevant fund manager who paid the placement fees or management fee share arising from these two investments to the recipient as a voluntary act. However, the People contend properly, that Larceny may occur where the property is acquired through false promises or

taken by false pretenses. P.L. §155.05(2). While the AG correctly notes that property may be wrongfully taken by "extortion or false promise," there was no evidence before the Grand Jury to show how extortion played a role in these transactions. Thus, at issue is whether sufficient evidence was presented to the Grand Jury that a false promise or false pretense within the meaning of the definition of Larceny occurred.

A "false promise" in this context is defined as follows:

> "A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in a particular conduct, and when he does not intend to engaged in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct." P.L. §155.05(2)(d).

In Count eighty-seven, the claimed false promise was that Wissman promised Access/NY European Fund that he would not share his placement fee with any other placement agent. Sufficient evidence was presented to the Grand Jury that Wissman had from the inception of this relationship intended to share the placement fees with Morris through the joint ownership of Flandana, the entity designated to receive the fees, and had no intent to keep his promise not to share such fees with any other placement agent.

Larceny by False Pretense requires that the money be paid or the property parted

with in reliance upon false statements about some prior or existing facts. People v. Norman, 85 NY2d 609, 618 (1995). Count twenty-three was based on Morris' false representation to Odyssey Partners that "Searle was the official placement for the CRF."

Thus, while both counts may be sustainable on the ground that sufficient evidence had been presented to the Grand Jury for them to find the respective false promise or false representation, Morris asserts that the counts must be dismissed because no property had been taken, withheld or retained, another essential element of larceny.

While larceny traditionally is committed by a taking of property where nothing is left in return, in a transaction where an exchange is performed, larceny may also be committed in an exchange where the property received is of no value, such as where counterfeit money was used or where the diamond is fake. Where the exchange had a shortfall, as where a proposed sale of one hundred shares of stock was consummated, but the seller delivered seventy-five shares, only the agreed value of the missing twenty-five shares would be stolen. There would, however, as Morris asserts, be no taking if the property received was what the alleged victim bargained for. Here Morris asserts that Odyssey bargained to pay placement fees contingent only on the agreement by CRF to invest its moneys in Odyssey and as that is what occurred, there was no

larceny, whether or not the inducement or promise were false or misleading.

Although not explicitly stated, Morris' contention implies that an ordinary breach of a contract does not necessarily constitute a crime. While a breach of a material representation may constitute a ground for rescission of a contract, or a breach of covenant may form a basis for damages, routine contract violations do not constitute criminal acts per se. No evidence was presented to the Grand Jury that either fund acted to terminate the CRF's investment as a result of "false statements" or "false promises" of Morris or those acing in concert with him, nor has either fund acted to recover any placement fee or management fee share paid, either from the named placement agent, Morris or Falconhead.

In the case of Odyssey, the evidence before the Grand Jury showed that Odyssey was earlier unsuccessful in obtaining CRF investments and jumped at the chance of becoming successful by retaining Searle. As the AG points out, the evidence before the Grand Jury showed Searle was formally retained by Odyssey and paid by Odyssey, thus belying Morris' statement that Searle was the "official" placement agent of the fund. The Grand Jury also heard evidence that Odyssey was no "widow or orphan" but a sophisticated Private Equity fund operated by highly educated partners, some of who had political experience at the highest levels of government, who had their documentation negotiated and reviewed by sophisticated

lawyers. The evidence before the Grand Jury established that in the fund industry, funds employed whatever placement agents were necessary to secure investors, often limiting a placement agent to a single institution, where necessary, to secure an investment, and without much concern whether the agent was a large investment bank such as Merrill Lynch, or Credit Swisse, or an insignificant one such as Searle, or whether the Fund had a long-term relationship with a placement agent, or had never used such agent before.

In this context, Morris' statement, coming from the Comptroller's closest political advisor, to a partner of Odyssey with substantial political experience, could have been no more than an advisory signal[31] that the way to get an investment was to hire Searle, which Odyssey did. Odyssey did not rely on the representation to pay money to Searle, it protected itself from loss by conditioning the payment of the placement fee on the receipt of a CRF investment, and only paid when it received the investment, what it had bargained for. Given this background, this Court finds that there was insufficient evidence presented to the Grand Jury to establish that Odyssey parted with its money on the basis of its reliance on Morris' representation, or that it did not get the full bargained for benefit which it sought for its payment which was the

[31] Ironically, based on the evidence presented to the Grand Jury which this Court has found to be sufficient to support Count one, Enterprise Corruption, and the majority of the other counts, Morris' statement that Searle was the "official" placement agent was substantively, if not cynically, true, even if literally false.

CRF cash investment.

As noted, above, Count twenty-three is based on the theory of Larceny by False Promise. While the evidence before the Grand Jury was sufficient to establish that Wissman made a false promise to Access, and that Morris acted in concert with Wissman, again, the amount of money paid to Wissman or his entity which was shared with Morris did not vary by one cent from the amount Access had agreed to pay Wissman or his entity, had he not "shared" the fees with Morris. Such amount, again, was contingent on the CRF investment, a contingency designed to protect Access from loss on a payment to an agent should no investment appear.

While in the Access/CRF Amended and Restated Limited Partnership Agreement presented to the Grand Jury, Access agrees in paragraph 13.19 to disclose all fees such as placement fees "to any placement agent, finder or other individual or entity "within 10 days of signing the Agreement and to represent and warrant that such disclosure "will be true, correct and complete," the sole sanction for any violation of such agreement was for CRF to cease making further capital contributions "and to pursue all remedies that may be available to" CRF. While the CRF has been aware of this situation for a substantial time, no evidence was presented to the Grand Jury that CRF ceased contributions or sought other remedies against the limited partnership or

Access by reason[32] of the sharing of Wissman's fees. Given the passage of time, it is highly unlikely that CRF could now act to do so. Thus, again, Access received what it had bargained for and had not sustained any material loss or risk of loss.

While larcenies may occur by reason of false promises or false pretense, most contract misrepresentations and false promises are commonly resolved as contract disputes under civil law where a contracting party who has suffered by reason of such improper acts by his contracting counter party is accorded a contract remedy under law. However, the law does not criminalize every breach of contract, and will only call it a larceny when a party has effectively obtained property by a fraud to the detriment of the other party. Because of the nature of the relationship between civil and a criminal wrong, the civil standard for recovery of loss arising out of false representation or false promise is far lower than that required for the criminalization of such behavior with a substantive standard and as a standard of burden of proof. Here, while this Court recognizes that the behavior of Wissman and Morris was wrongful in that it corrupted the CRF from carrying out its obligations as a prudent investor and could form the basis for prosecution under the Martin Act, which sets a

[32] While theoretically Access, which falsely but unwittingly did not disclose Morris' sharing of the placement fees in the ten-day disclosure letter might have been prosecuted or sued under some Federal Securities law fraud provision, there was sufficient evidence before the Grand Jury of Access' substantial diligence to verify the veracity of Wissman's false promise not to share fees, which diligence would under Federal securities laws have protected Access from damages liabilities for its false disclosure.

behavioral standard for stricter than under contract law, the Court cannot find any basis for Odyssey or Access to recover damages against either, as there has been no loss. As the criminal standard for Larceny looks to loss to a victim; and as there could not be recovery under contract law,[33] these Counts cannot be sustained as there was insufficient evidence before the Grand Jury to establish any loss to Access or Odyssey, the supposed victims of the Grand Larceny.

As these counts must be dismissed, this Court need not address Morris' additional objection relating to whether a general partner may commit larceny against a limited partner.

Bribery and Rewarding Official Misconduct

Count one hundred-thirteen charges Morris with Bribery in the Second Degree in violation of PL §200.03. Such crime occurs when a defendant confers or offers to confer a benefit of the value of more than ten thousand dollars upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant would be therefore influenced.

Morris seeks the dismissal of this count on the grounds there was no agreement

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[33] That is, on the merits, as distinct from collateral issues such as jurisdiction, venue, statute of limitations, diplomatic immunity and other similar issues.

or understanding as to any quid pro quo for Morris giving $100,000 to Peggy Lipton Jones, sometimes accomplished by the delivery of cash-filled envelopes placed on the chair of her "friend" who was a senior decision-making official in the Comptroller's office, for delivery to Ms. Jones. While these payments were documented by Morris as interest bearing loans to Ms. Jones evidenced by notes signed by her, Morris and Ms. Jones understood that the notes were not required to be repaid, and that in fact, interest payments made by her were reimbursed.. The Grand Jury also heard evidence that the senior official cooperated with Loglisci in carrying out the scheme to control placement fees.

While Morris notes correctly that the crime requires the relationship between the payment and the action of the official to be proven, the law is not so naive to believe that bribery may only be shown by proof of a formal written contract setting forth the quid pro quo of the parties to the bribe as to the payment on the one hand, and the official misconduct on the other. Bribery is, instead, "often perpetrated subtly with winks, nods and walks in the park" and that proof may be from circumstantial and inferential evidence. People v. Bac Tran, 80 NY2d 170 (1992). Here this Court finds that the Grand Jury was presented with sufficient evidence for it to have concluded, both from inferences, which may be properly drawn from such evidence to support Morris' indictment on this count.

Count one hundred-fourteen charges Morris with the crime of Rewarding Official Misconduct relating to the same sham "loans" made by Morris to Ms. Jones. Such crime is the temporal doppleganger of Bribery, in that it criminalizes payments made after the public official goes into the tank for the defendant, rather than before. As was the evidence before the Grand Jury sufficient to support the indictment of Morris on Count one hundred-thirteen for Bribery in the Second Degree, this Court finds it to be equally sufficient to support the indictment of Morris on Count one hundred-fourteen for Rewarding Official Misconduct in the Second Degree.

Count one hundred-ten also charges Rewarding Official Misconduct in the Second Degree. This charge relates to Morris' $100,000 "investments" in Chooch LLC, a company established by Loglisci's brother Steven to produce a movie, "Chooch," which was so unsuccessful as to return nothing to investors.

While this Court has found that the evidence of the Grand Jury also sufficient to establish the elements of this third Count of Rewarding Official Misconduct in the Second Degree, when taking into account evidence of the deep involvement of the entire Loglisci family in the venture and that the vast majority of non-Loglisci family funding of Chooch came from people doing business with CRF, this Court does take notice that "angel" funding of plays and movies are often not made with the expectation of economic benefits, but of the psychic benefit of an investor being a

"player" in the theater or movie community.[34] Thus, the mere fact of an investment in such a venture which is, even at the best of times, highly speculative, which results in a full loss of an investment, no proof per se of the mere making of such investment being a reward for official misconduct.[35] Morris' motion to dismiss these three counts is denied.

Scheme to Defraud

Count one hundred twenty-three charges Morris with Scheme to Defraud in the First Degree, in violation of P.L. §190.65(1)(b), a Class E Felony.

This count charges that Morris, Loglisci and others, acting in concert, "engaged in a scheme constituting a systematic course of conduct with intent to defraud one or more persons and to obtain property and obtained over $1,000 from one or more such persons. The persons listed are the State, the CRF, the CRF Staff, CRF members, CRF pensioners and beneficiaries and thefunds involved in the scheme.

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[34] One hedge fund manager who received CRF investment which generated fees to Morris testified that he regularly invested in film deals and was intrigued by the film and the possibility of an investment.

[35] The commonly understood fact that so many of these "arts" ventures return nothing to their investors was the basis for Mel Brooks' comic movie "The Producers," whose story had the producers sell 300% of their cost of production for 300% of the interests in a play, hoping, by selecting the worst turkey of a play they can find, that it will fail, so that the investors will be satisfied in their loss of their investments, while the producers walk away with 200% of the cost of production. Unfortunately for "The Producers," their selected "world's worst play" the musical "Springtime for Hitler," is a success, and their plan unravels, sending them to jail. There was no evidence before the Grand Jury as to the comic value of Chooch or what the aggregate percentage of interests in Chooch were sold to Morris and other CRF related investors.

P.L. §190.65, in defining the crime Scheme to Defraud in the First Degree, sets forth three separate "scheme[s] constituting a systematic course of conduct with intent to defraud" under which this crime may be charged. Based on the language of Count one hundred twenty-three and the People's Affirmation and Memorandum in Opposition to Morris' motion, this Court finds such count to be based on P.L. §190.65(1)(b) which finds a person guilty of this crime when he:

> "(b) engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtains property with a value in excess of one thousand dollars from one or more such persons."

While the People contend that the evidence supporting the count of Enterprise Corruption also supports this count, Scheme to Defraud in the First Degree is more narrowly defined. To convict, there must be, for example, an intent to defraud or obtain property from more than one person by false or fraudulent pretenses as well as the receipt of more than $1000 from <u>such</u> person or persons. The evidence before the Grand jury was sufficient to sustain the element of this crime that Morris, acting in concert with others, "engaged in a scheme constituting a systematic course of conduct." However, whether he had the intent to defraud more than one person, and to intend to obtain more than $1,000 from more than one such person by fraudulent

pretenses, representations or promises is more problematic.

Morris' scheme essentially defrauded the CRF by controlling CRF alternative investments so as to generate placement fees and management fee shares for himself and his group, thus depriving CRF of its right, under law to have its trustee act to invest in alternative investments only under the prudent investor rule, and therefore, its opportunity to have in a safer, better or more balanced portfolio. As analyzed under the Grand Larceny counts above, the funds received gladly what they paid for, CRF investments, and paid no more for such investments than they had expected and agreed to pay. As they got what they wished and expected, they were hardly defrauded. While the CRF was clearly wronged by the scheme, reading the term "intent to defraud" in P.L. §190.65 to encompass those fraudulent practices which are proscribed by the Martin Act GBL §352-3(b), there was sufficient evidence presented to the Grand Jury that Morris engaged in acts of systematic fraud against CRF to deprive it of the rights and benefits of having its investments made under the prudent investor standard. Such subsumption of Martin Act fraud definitions to support a conviction for Scheme to Defraud in the First Degree is supported by the Court of Appeals decision in People v. First Meridien Planning Corp., 86 NY2d 608 (1995).

However, unlike the Martin Act felony counts which, for conviction, only require the defendant to have obtained money from any source as a result of his

wrongful act, to convict for Scheme to Defraud in the First Degree requires that the money received by the Defendant be proven to come "from one or more of such [emphasis added] person," being the persons who the defendant intended to defraud or to obtain property from by false or fraudulent pretenses representations or promises.

As is true under the Grand Larceny counts, which this Court has dismissed because the evidence before the Grand Jury showed that thefunds received their expected quid pro quo for the payments of fees, there is insufficient evidence that Morris "so obtained," money i.e., by "false or fraudulent pretenses representations or promises" to the funds. In addition to this definitional problem with respect to the funds, no evidence was presented to the Grand Jury that money flowed from CRF or any of its constituents to Morris or his group, thus, even if others of such constituency could be added to CRF to meet the more than one person standard, Morris and his group did not obtain funds from "such persons."

For all of the above reasons, Morris' motion to dismiss Count one hundred twenty-three is granted.

Cover-up charges

Thirty-one of the counts of the indictment charge Morris with "cover-ups" of his and his group's activities so as to prevent their discovery and to prolong his and

their ability to continue their scheme. These counts charge the making and filing of false disclosure statements relating to the receipt of placement agent fees and management fee shares and the utilization of a number of shell corporations and other conduits and devices to hide the identity of recipients of placement and shared management fees and the falsification of documentation to hide bribe or gratuity payments.

Offering False Instruments for Filing

Counts thirty-nine, forty-one, sixty-one, seventy-one and eighty-eight, charge Morris, alone or acting in concert, with Falsifying Business Records in the First Degree in violation of P.L. §165,19, Counts forty, forty-two, sixty-two, seventy-two and eighty-nine, charge Morris, alone or acting in concert, with Offering a False Instrument for Filing in the First Degree, in violation of P.L. §175.35. Morris seeks dismissal of these ten counts, for various express reasons set forth in his motion as well as challenging the sufficiency of the evidence and charge to the Grand Jury to support these counts. This Court finds the evidence submitted to the Grand Jury insufficient to sustain these ten counts and they are hereby dismissed. As these counts are dismissed on the insufficiency of the evidence before the Grand Jury, this Court need not address Morris' other objections to such counts or to the AG's responses thereto.

Of these ten counts, five counts relate to the preparation and five counts relate to the filing of disclosures to CRF or its consultants by five funds which had received or wished to receive investments from CRF.[36] Four of these funds were required under their agreements with CRF to disclose to CRF "all fees, bonuses and other compensation paid by or in behalf of [them]..."to any placement agent, finder or other individual or entity." The other fund was required to disclose the same in connection with its diligence review by a CRF consultant. For each of these five funds the fund involved had prepared and filed a letter with CRF or a CRF consultant but because the fund was unaware that its placement agent would be sharing fees with others, or, in the case of Access, was unaware that Wissman, who had agreed with the fund not to share his portion of management fees with anyone, had not intended to honor his agreement, the disclosure was false.

The evidence before the Grand Jury showed that such records and statements were prepared and filed by the funds themselves, and not by Morris, thus rendering Morris free from criminal responsibility, for creating or filing such documents absent evidence to sustain that Morris acted in concert with the fund involved, to prepare or

[36] Counts thirty-nine and forty relate to Carlyle/Riverstone Global Energy & Power Fund II, ("Carlyle II"), counts forty-one and forty-two relate to Carlyle/Riverstone Renewable Energy Infrastructure Fund I, ("Carlyle I"), counts sixty-one and sixty-two relate to Pequot Diversified Offshore Fund ("Pequot"), counts seventy-one and seventy-two relate to Hicks, Muse, Tate & Furst European Fund II/Lion Capital Fund I ("Lion") and counts eighty-eight and eighty-nine relate to Access/NY European Middle Market Buyout Fund ("Access")

file such documents or make such filings, within the meaning of PL §20.00.

P.L. §20.00 provides that "[w]hen one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct." Thus, for Morris to be held criminally responsible for the preparation or filing of one of these disclosure documents of a fund, sufficient evidence must have been submitted to the Grand Jury that Morris had solicited, requested, commanded, importuned, or intentionally aided such fund to prepare such document or make the filings in question. That standard required a showing that Morris performed a positive act to urge or help the fund to prepare and file the disclosure letters. While Morris may have been aware that incorrect letters were prepared and filed, and that the filing of incorrect letters would be advantageous to him to cover up his activities, there was no evidence of Morris doing anything more than "standing by" when such letters were prepared or filed.

While the AG properly instructed the Grand Jury as a general matter, that under PL §15.00(5) "to act may include a failure to act," such instruction could not be overcome the requirement for positive action to impose criminal liability under PL §20.00, which specifically defines the type of action necessary to come under such

provisions, all of which are active as distinct from passive. As PL §20.00 sets a specific requirement for a positive action, it must supercede the general rule under P.L. §15.00 which equates an act with a failure to act. NY Statutes §240.

While a failure to act may in some cases lead to criminal liability where there is a duty to act, criminalization in those instances are expressly set out in the statute defining such crime. A relevant example is found under the Martin Act where a failure to disclose may as discussed above, constitute a basis for criminal liability for the passive act of a failure to disclose, under which Act, Morris has also been indicted. The six additional counts charging Falsifying Business Records in the First Degree relate to documents prepared by Morris to document "loans" he made to Peggy Lipton Jones ("Jones"), a "friend" of a senior official of the Comptroller's office. The evidence presented to the Grand Jury was sufficient to sustain these counts.

Money Laundering

Morris is charged with eight counts of Money Laundering in the Fourth Degree in violation of PL §470.05(1)(a)(i)(A). This crime, commonly referred to as "promotional money laundering," is committed when, "knowing that the property involved in one or more financial transactions represents the proceeds of criminal conduct,...[the defendant]..conducts one or more" of such "transactions involving the

proceeds of specified criminal conduct...with intent to promote the carrying on of criminal conduct."

Morris is also charged with eight counts of Money Laundering in the Fourth Degree in violation of PL §470.05(1)(a)(ii)(A). This crime, commonly referred to as "concealment money laundering," is committed when "knowing that the property involved in one or more financial transactions represents the proceeds of criminal conduct [the defendant]...conducts one or more" of such transactions involving proceeds of specified criminal conduct "knowing that the transaction or transactions in whole or in part are designed to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of criminal conduct." To convict under either of such provisions, the amount of proceeds involved must exceed $5,000. "Specified criminal conduct" is defined in PL §470.00(5) to include Enterprise Corruption, violation of the Martin Act, scheme to defraud, larceny and bribery.

These charges relate to placements fees generated by seven separate CRF investments and to payments relating to the bribe charged in Count one hundred-thirteen. Each of such eight incidents is separately charged under both theories.

Morris seeks the dismissal of all sixteen of these counts on the grounds that insufficient evidence was presented to the Grand Jury and that the Grand Jury was improperly charged. Morris further argues that various elements of these crimes did

not exist. In objecting to the fourteen counts relating to placement fees, Morris responds to such counts as if he was accused in such counts of acting alone in routing the placement fees to himself, and building upon such response asserts that he was therefore not guilty of Money Laundering because he did not act upon the proceeds, he eventually received to secret them further or to utilize the diversions as part of a scheme to promote criminal activity. However, the indictment charges Morris on each of such fourteen Money Laundering Count of having acted in concert with others to commit the crime. It is this circuitous route taken by the placements fees or shared management fees at the instance of Morris and those with whom he acted in concert, which is the core of the behavior charged to have been criminal under these Counts. The crime of Money Laundering may, like other crimes be committed either by a defendant acting alone or by a defendant acting in concert with others P.L. §20.00. The proof required by law to support an acting in concert to support such a charge are clear, both at the Grand Jury proceeding and for the trial itself. This Court's inspection of the Grand Jury minutes finds that the evidence presented to the Grand Jury was sufficient to sustain Morris' indictment on the sixteen charges of Money Laundering, and that to the extent that Morris did not commit such crimes solely by himself, the Grand Jury minutes were sufficient to establish that he had committed such crime acting in concert with others.

Summation

In summation, after the inspection of the Grand Jury minutes, this court finds that they are legally sufficient to support all charges against Morris and that the proceeding was properly conducted, except that counts twenty-three, thirty-nine, forty, forty-one, forty-two, sixty-one, sixty-two, seventy-one, seventy-two, eighty-seven, eighty-eight, eighty-nine, and one hundred twenty-three are dismissed, and Count eighty-one is reduced to a lesser included crime.

Bill of Particulars

Morris seeks a Bill of Particulars to expand upon the charges in the indictment, claiming such is necessary to enable him to prepare his defense. Morris cites two cases. People v. Fitzgerald, 45 NY2d 574 (1978) and People v. Villani, 59 NY2d 781 (1983).

Here the indictment, the document giving notice to Morris of the charges against him, set forth in Count one, which charged Enterprise Corruption, a seventeen page narrative which the Grand Jury found to have been the scheme Morris engaged in, followed by a list of seventy criminal acts performed by the enterprise, running an additional forty-two pages. This indictment was served on Morris at his arraignment. Such narrative more than satisfied the need to specify the "scheme or business" which was not specified in People v. Villani, supra, and was the basis for the Court of

Appeals decision in such case. Further the AG turned over two million documents it had in its possession from its investigation into the defendants and their co-conspirators' activities. Morris' extensive 134 page Memorandum of Law, prepared after this Court allowed Morris an extended period to submit his motions indicates a level of understanding of the transactions involved, the charges arising therefrom and the possible defenses as extensive as this Court has seen. As compared to the ordinary practice of this Court for cases great and small, Morris cannot in good faith complain that he needs a bill of particulars in order to prepare for trial. The People's reply Memoranda of 205 pages, plus its 44 page appendix explaining the charges with reference to specific Grand Jury testimony, and 12 page chart of support for the charges, with cross reference to Grand Jury testimony, prepared for this Court's consideration, further disclose the AG's theory of the case and refines further notice and disclosure to Morris. Such appendices far exceed the practice in this Court for permissible voluntary disclosure at this stage of the case.

People v. Fitzgerald, supra, is also inapposite. Fitzgerald involved an indictment for criminally negligent homicide. The Court of Appeals held that because the required disclosure required in a charging document "presents special difficulties in cases charging criminal negligence" more than a conclusory statement was required in the indictment. However, the Court of Appeals noted that it was a

matter of disclosure which could be accomplished either by a bill of particulars or by the indictment itself. Here, the recitation of the charges in the Enterprise Corruption count provided such disclosure in any event, making a bill of particulars unnecessary.

Morris' motion for a bill of particulars is denied.

The People are reminded of their continuing duty to supply all Brady material. Any Molineaux and Ventimiglia motions will be heard immediately before trial.

Morris' motion is granted in part and denied in part in accordance with this Decision and Order.

This is the Decision and Order of the Court.

DATED: JULY 29, 2010
NEW YORK, NEW YORK

Hon. Lewis Bart Stone
Justice of the Supreme Court