SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK By LETITIA JAMES, Attorney General of the State of New York,	:	
Plaintiff,	:	
-against-	:	Index No.:
KEAN WIND TURBINES, INC. and KEAN W. STIMM	:	
Defendants	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Plaintiff Letitia James, Attorney General of the State of New York, respectfully moves the Court for an *ex parte* temporary restraining order ("TRO") and a preliminary injunction to immediately halt the ongoing illegal activities of (1) Kean Wind Turbines, Inc. ("Kean Wind"), a New York corporation engaged in design of wind turbines, and (2) Kean W. Stimm ("Stimm") formerly its chief executive officer and sole director (together "Defendants"). The Defendants (whose scheme goes back to 2013) continue to fraudulently market unregistered securities in violation of General Business Law ("GBL") § 352 *et seq*. (the "Martin Act") and Executive Law § 63(12) — even during the COVID-19 emergency. Given Defendants' ongoing conduct during the current crisis, this matter qualifies as essential pursuant to subdivisions C(6) and E(1) of Administrative Order 78/20 issued on March 22, 2020.

Plaintiff submits the Verified Complaint, this memorandum of law and the accompanying Affirmation of Tanya Trakht ("Trakht Affirmation") dated April 27, 2020, with exhibits,[1] in support of the order to show cause for a TRO and a preliminary injunction.

PRELIMINARY STATEMENT

The Office of the Attorney General (the "OAG") is seeking an *ex parte* TRO and a preliminary injunction to stop ongoing harm to the people of Western New York. For more than seven years Stimm and his company Kean Wind have been fraudulently selling unregistered securities to investors, specifically interests in Stimm's company Kean Wind. They continue to do so, even after representing to the OAG that they would stop, and even during the Coronavirus emergency.

Kean Wind is ostensibly engaged in development of a wind turbine called "the Newtonian Wind Turbine" that is meant to generate electricity. In selling shares in Kean Wind,

[1] References herein to "Ex. _" refer to exhibits attached to the Trakht Affirmation.

Stimm has made a series of false representations, which are alleged in detail in the complaint the OAG filed today. In short, Stimm:

- Falsely stated that the Newtonian Wind Turbine is 50 to 100 times more efficient than the existing wind turbines.
- Falsely stated the dates that production of the Newtonian Wind Turbine would begin. Specifically, every year from 2013 to 2018 Stimm represented that production was planned for "later this year." The turbine has never gone into production and is – even seven years later – not close to doing so.
- Falsely stated that the investment was "[v]irtually zero risk with an incredible potential yearly return for 17 years." There has never been any return.
- Falsely stated that the corporate net worth already exceeded the total investment of all shareholders. For these false statements to investors, the Defendants claimed that a patent for Newtonian Wind Turbine is valued at over $7.5 million, while carrying it on their internal records as but $280,000.
- Falsely stated that he was taking no salary or compensation from Kean Wind and that the company paid no personal expenses for him. In truth, investor money was used for personal expenses throughout, including to pay for Stimm's penthouse apartment, a personal assistant, medical bills, a cruise, a piano and a host of others.[2]

Through this fraud, Stimm has raised more than $3.5 million from 435 investors from Western New York. Apprised of the OAG's investigation and allegations, Stimm (through counsel) assured the OAG in January 2020 that he would register Kean Wind's securities with the OAG, that he would not sell any shares of stock, and that he would no longer use investor money for personal expenses. (Ex. 13.) Stimm also purportedly resigned as director and Chief Executive Officer of Kean Wind, and assumed the post of Chief Scientist, while a member of

[2] Stimm requires a personal assistant due to his advanced age. He is 96 years old.

Kean Wind's staff was appointed as chief financial officer. (Ex. 14.) And the very next month, in February 2020, Stimm made a written public admission to his shareholders about several of the OAG's allegations, including: (1) admitting that he sold unregistered securities, and (2) admitting using as much as $48,000 per year of shareholder money for personal expenses.[3] (Ex. 6.)

But despite the assurances and the written public admissions, the Defendants have continued both to market and sell unregistered securities and to use investor money for Stimm's personal expenses.[4] The unlawful conduct has continued even during the Coronavirus emergency. Recently he announced to investors: "we will use this shut down period to continue marketing promotions." Stimm urged current shareholders to help identify new prospective shareholders. When those new prospects are found, said Stimm, "I will give them a personal presentation at the office with a six foot separation with just one other person present." Stimm also invoked patriotism during this time of crisis: "Our nation cannot recover without abundant low cost energy . . . . Energy from wind . . . is free." (Ex. 15.) In his most recent letter to investors on April 22, 2020, Stimm stated that "we need your enthusiasm and your continued investment in Certificates for Future Royalties … What you invest now has the potential to become a very remarkable investment." (Ex. 16.)

As recently as this past month, Stimm has continued to pay his rent, his personal assistant, his medical bills and to fund other personal expenses out of Kean Wind's accounts. (Ex. 12.) In addition, when the bank accounts of Kean Wind were closed on April 1, 2020, approximately $11,500 of cashier's checks were issued from the closing accounts to Stimm personally (before he deposited them into a corporate account at a different bank)—even though Stimm is now merely the Chief Scientist and he is purportedly no longer the CEO or a director of Kean Wind. (Trakht Affirmation ¶ 31; Ex. 14.)

[3] Stimm also sought in the communication to shareholders to minimize the seriousness of the unlawful conduct.

[4] The April 22 letter also contends that the OAG's allegations are "petty, silly, taken out of context, and/or technically wrong. We have denied every one," despite admitting many of the OAG's allegations, such as selling unregistered securities and using Kean Wind's funds to pay for personal expenses.

Consequently, even based solely on the violations of the Martin Act and Executive Law § 63(12) to which Stimm has admitted, the Attorney General is entitled to preliminary relief ordering Defendants (1) not to sell securities, (2) not to market securities, and (3) to preserve assets for potential restitution. There is a likelihood of success on the merits (Stimm has admitted illegal conduct), irreparable harm[5] (Defendants continue to offer and sell unregistered securities and using Kean Wind funds for Stimm's personal expenses) and the balance of equities is in the OAG's favor. *See State v. First Investors Corp*., 156 Misc. 2d 209, 213 (Sup. Ct. N.Y. Cnty. 1992).

I. STATEMENT OF FACTS

It is not controverted either that the Defendants marketed and sold unregistered securities or that they used shareholder money to pay Stimm's personal expenses. To the contrary, Stimm has admitted both in writing and said (through counsel) that he would stop. Yet in the past few weeks, even during the Coronavirus emergency, Stimm has continued to market securities and to pay for personal expenses using the company's funds.

A. Kean Wind is not registered as a dealer and Stimm did not register the Kean Wind's securities

Stimm and Kean Wind have sold unregistered securities to the public in violation of New York registration requirements since at least 2013.

There are two relevant registration requirements at issue. First, a "dealer" must file notices specified by statute and must register with the OAG before offering or selling securities to the public. GBL § 359-e (2, 3, 8). A "dealer" is "a person . . . or corporation selling or offering for sale from or to the public within or from this state securities issued by it." GBL § 359-e (1)(a). A violation of this provision of statute is specified as a "fraudulent practice" and an

[5] The Martin Act and Executive Law § 63(12) have slightly different standards for preliminary relief. In particular, there is no requirement under 63(12) that the OAG make a showing of irreparable harm. See *People v. Apple Health & Sports Clubs, Ltd.*, 174 A.D.2d 438, 438-39 (1st Dep't 1991).

illegality under the Martin Act. GBL § 352.[6] Such conduct is also persistent illegality in violation of Executive Law § 63(12).

Second, the Defendants had to register the securities themselves with the OAG, because the Defendants sold the securities exclusively within New York.[7] *See* GBL § 359-ff. In conjunction with this mandatory registration of the securities, the statute also requires the filing with the OAG of (1) an offering prospectus and (2) a balance sheet and profit and loss statement of the company. *Id*. Selling unregistered securities is both a fraudulent practice and an illegality. GBL § 359-ff (7), § 359-g (2).[8]

As set forth in the accompanying Trakht Affirmation, the OAG records show that Kean Wind did not register as a dealer. (Trakht Affirmation ¶ 7.) Similarly, the Defendants did not register Kean Wind's securities, nor did they file any prospectuses or balance sheets. (Trakht Affirmation ¶ 9.)

Stimm has admitted both of these registration violations. He has admitted that Kean Wind was never registered as a "dealer," and he has admitted that Kean Wind's securities were never registered with the State of New York. (Ex. 6, p. 8, Items 39-45.) Stimm also admitted never filing Kean Wind's offering prospectus and "P&L statements" with the OAG. *Id*. In his February

[6] *See People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 631 (2018) (holding that the definition of fraudulent practices includes GBL § 359-e, because "Section 359-e (14) (l) provides: 'A violation of this subdivision shall constitute a fraudulent practice as that term is used in this article' and a specific reference to GBL § 359-e was added to GBL § 352").

[7] Kean Wind's securities were offered and sold only to New York State residents. According to Kean Wind's website, all shareholders of Kean Wind "are required to have had residence within the eight Western counties of New York at the time they acquired stock." (Ex. 3.) Furthermore, "[s]tock cannot be sold without the approval of the corporation to limit investors from outside Western New York." *Id*. Similarly, according to the Private Placement Memorandum, "The offering is restricted to residents of the State of New York and, specifically, within the 8 counties of Western NY…Transfer of stock is restricted and may not be transferred to any person or entity not a resident of the State of New York." (Ex. 2, p. 3.)

[8] *See* GBL § 359-ff (7) ("The provisions of the following sections of this articles twenty-three-A shall be fully applicable to intrastate offerings described in subdivision one of this section; section three hundred fifty-two; section three hundred fifty-two-c…"); *see also 1983 N.Y. Op. Att'y Gen*. 34, at *3 ("If the offering of securities is being made only to New York residents on an intrastate basis, General Business Law, § 359-ff is applicable and there must be compliance with that section and the rules and regulations promulgated thereunder. A violation of any provision of Article 23-A is a misdemeanor (*id*., § 359-g[2]).").

25, 2020 letter to shareholders, Stimm stated "[t]he allegation states that we failed to register with New York registration laws. This accusation is correct." *Id*.

B. Stimm Treated Kean Wind as a Personal Piggy Bank

Stimm repeatedly told investors that he received no compensation from Kean Wind. This was untrue. Shareholder monies paid for rent on his penthouse apartment, a personal aide, car expenses, meals, a cruise, a piano, and medical expenses, among others. After being apprised of the OAG's investigation and allegations, Kean admitted in writing in February 2020, that he used $48,000 per year of Kean Wind's funds for personal expenses. (Ex. 6, p. 7, Items 33, 34.)

An example of the misleading statement appears in a letter to shareholders dated May 20, 2019, in which Stimm stated: "When a shareholder purchases a corporate asset in the form of a "Certificate," *every penny of cash received* goes to complete this project." (Ex. 7 (emphasis in the original).) Similarly, Stimm repeatedly stated at shareholder meetings and in his other communications with shareholders that he does not receive a salary and that he volunteers his time to work on the wind turbine. (*See, e.g.*, Ex. 4, p. 2; Ex. 8, p. 10.) A section in the Private Placement Memorandum titled "Arrangements with Officers and Directors and Key Personnel" states merely that "[t]here is no compensation at present until the Corporation produces a profit." (Ex. 2, p. 16.)

Despite these representations, Stimm used the company's funds for over six years to pay for his personal expenses and thus looted over a quarter of a million dollars from the company, while denying that Kean Wind paid for his personal expenses. For example, during the October 17, 2018, meeting, shareholders asked whether Kean Wind paid for Stimm's rent, doctors' visits, dinners, and personal homecare aide. Stimm falsely stated that "no personal expenses of Kean are paid by KWT." (Ex. 8, p. 1.)

However, on November 14, 2018, a month after the 2018 shareholder meeting, Stimm executed a "Replacement Agreement" between himself and Kean Wind, which stated that the misplaced original agreement

> postulated that Kean would forego any salary in return for KWT providing an auxiliary office for Kean that would permit Kean to do critical creative work at all hours and particularly evenings and weekends... It was further stipulated that this auxiliary office would be a suitable living facility…It was anticipated that there would be special meetings at this location involving KWT staff and special visitors…Since the original agreement, Kean has suffered a serious balance problem about October 2015 that requires a special assistant. The special assistant provides all meals, does the basic shopping and runs required errands…the corporation has agreed to provide the services of a special assistant but… does not include Kean's personal expenses for food…"

(Ex. 10.)

According to Stimm, an alleged original agreement was stolen by a former employee in 2012. Stimm was unable to explain why this "Replacement Agreement" was not drafted until after the shareholder questioning in October 2018. He admitted that this Replacement Agreement was never disclosed to the shareholders. (Ex. 11.)

Despite Stimm's repeated assertions over the years that he takes care of his own expenses, (Ex. 8 at p. 1; Ex. 9 at p. 5), Kean Wind paid for Stimm's "personal aide," who cooked him meals and did his shopping, since at least November 2015 and has paid for his apartment (which Defendants' own documents refer to as "the penthouse") since at least 2013. The chart below illustrates some of Stimm's personal expenses paid for by Kean Wind in from 2013 through mid - 2019:

Medical Expenses (medical co-pays, dental co-pays and payments, etc.)[9]	$10,476
Car Expenses	$10,813
Norwegian Cruise line	$2,134
Piano	$1,943
Penthouse rent	$126,780
Personal aide	$82,754
Miscellaneous personal expenses	$7,514
Approximate total	**$242,414**

In a letter to shareholders dated February 25, 2020, Stimm (after denying it for years) finally admitted that he used $48,000 of Kean Wind's funds per year to pay for his personal

[9] No payments for medical insurance for Stimm or any employees of Kean Wind are included in this calculation.

expenses. (Ex. 6, p. 7, Items 33, 34.) Stimm also admitted that he purchased a piano and a cruise with Kean Wind's funds. (*Id*. at 7, Item 36.)

C. Stimm continues to market securities and continues to take Kean Wind funds

Even after assurances from his lawyer that the unlawful conduct would stop, Stimm and Kean Wind continued to market and sell unregistered securities. Similarly, Kean Wind continued to pay for Stimm's personal expenses.

Since February 1, 2020 (the date as of which Stimm promised to stop his unlawful conduct), Stimm sold at least $31,500 worth of unregistered securities, most in the form of certificates of future royalties of Kean Wind. (Trakht Affirmation ¶ 29.) Stimm's most recent marketing conduct took place during the current Coronavirus emergency. On March 31, 2020, Stimm sent a communication to investors writing "we will use this shut down period to continue marketing promotions" and urging them to assist in identifying new prospective shareholders. When they identify new prospects, said Stimm, "I will give them a personal presentation at the office with a six foot separation with just one other person present." Stimm also invoked patriotism during this time of crisis: "Our nation cannot recover without abundant low cost energy . . . . Energy from wind . . . is free." (Ex. 15.)

And just last week, on April 22, 2020, Stimm sent a letter to investors telling them that "we need your enthusiasm and your continued investment in Certificates for Future Royalties." Stimm extended his offer sell certificates in a "Two for One" special, telling investors to "Send us a check, we will do the paper work and return the documents to you. What you invest now has the potential to become a very remarkable investment." (Ex. 16.)

And as to using Kean Wind funds for his personal expenses, since February 1, 2020, Stimm spent at least $6,515 of Kean Wind's funds on rent, personal aide and medical expenses. Finally, just this month, Kean Wind's corporate bank accounts were closed out. The few remaining funds (just in excess of $11,500) were paid by cashier's checks from Kean Wind to Stimm personally (before he deposited them into a corporate account at a different bank) even

though as of January 31, 2020, Stimm is purportedly no longer CEO or a director of Kean Wind, but only a Chief Scientist. (Ex. 14.)

In short, Defendants' fraud continues. A TRO and preliminary injunction are necessary to stop further solicitation and the continued conversion of investor funds. Notably, the proposed injunctive relief would still allow Stimm to access his legitimate income which consist of monthly social security and veterans' benefits. (Ex. 5.)

II. ARGUMENT

The evidence before this Court entitles the Attorney General to preliminary relief under both the Martin Act, GBL § 353, and Executive Law § 63(12). A preliminary injunction for a violation of the Martin Act is appropriate where, as here, the OAG has demonstrated that (1) it is likely to succeed on the merits of its claims; (2) irreparable injury to investors will occur without preliminary injunction; and (3) a balancing of the equities favors the OAG's position. CPLR § 6301; *see First Investors*, 156 Misc. 2d at 213. Because the purpose of the Martin Act is to "protect the public interest," the Attorney General may present "special considerations" as to what is irreparable injury and how the equities are to be balanced. *State v. Fine*, 72 N.Y.2d 967, 969 (1988).

Under Executive Law § 63(12), the OAG is entitled to a preliminary injunction merely upon a showing of "likelihood of success on the merits, and a balancing of the equities in petitioner's favor;" there is no need to offer "proof of irreparable injury." *People v. Apple Health & Sports Clubs, Ltd.*, 174 A.D.2d at 438-39; *see also People v. P.U. Travel, Inc*., 2003 N.Y. Misc. LEXIS 2010, at *7-8 (Sup. Ct. N.Y. Cnty. June 19, 2003) ("under federal regulatory statutes which are analogous to the Executive Law . . . an appeals court held that the usual prerequisites for the issuance of preliminary injunction (i.e., showing of irreparable injury) are not required.")[10]

[10] *Accord State v. Terry Buick, Inc*., 520 N.Y.S.2d 497, 500 (Sup. Ct. Dutchess Cnty. 1987) (holding, in the context of granting preliminary injunction sought by OAG, that "[t]raditional concepts of irreparable damage which apply to

A temporary restraining order may be granted pending a hearing for a preliminary injunction where "it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." CPLR § 6301. However, to obtain a TRO under Executive Law § 63(12), the showing of irreparable harm by the OAG is not required. *See People v. Fanduel, Inc*., 2015 N.Y. Misc. LEXIS 4521, *24, 2015 NY Slip Op 32332(U), (Sup. Ct. N.Y. Cnty. 2015) (grating request for a TRO and holding that "[t]he NYAG is not required to show irreparable harm under Executive Law §63[12], it is implied in the need to prevent the effects of fraudulent and illegal conduct on the general public.")

New York State courts have routinely used Executive Law § 63(12) and the Martin Act to impose equitable relief, such as temporary restraining orders, asset freezes, and other appropriate remedies, to protect investors. *See, e.g., People v. Apple Health & Sports Clubs*, 80 N.Y.2d 803, 807 (1992) (upholding trial court's grant of TRO freezing defendants' bank accounts); *People v. 21st Century Leisure Spa, Int'l*, 153 Misc. 2d 938, 942 (Sup. Ct. N.Y. Cnty. 1991) (enjoining owner of company (via TRO) from transferring, withdrawing or otherwise disposing of funds in bank accounts); *New York v. Abortion Info. Agency*, 323 N.Y.S.2d 597, 603 (Sup. Ct. N.Y. Cnty. 1971), *aff'd*, 37 A.D.2d 142 (1st Dep't 1971) (enjoining defendants "from transferring or otherwise disposing of corporate assets or property" and appointing receiver to preserve assets); *First Investors Corp*., 156 Misc. 2d at 213 (imposing an asset freeze injunction on the defendants); *People v Allen*, 2020 N.Y. Misc. LEXIS 443, *7, 2020 NY Slip Op 30292(U) (Sup. Ct. N.Y. Cnty., Feb. 4, 2020) (granting preliminary injunction against fund, halting distributions and freezing fund assets).

A. The OAG Has Demonstrated Likelihood of Success on the Merits Under Both the Martin Act and Executive Law § 63(12)

The facts set forth in the Trakht Affirmation show that it is far more than "likely" that the Attorney General will successfully establish violations of both the Martin Act and Executive

private parties do not govern this public interest field."); *People v. Empire Prop. Sols., LLC*, 2012 NY Slip Op 30346(U), ¶ 6 (Sup. Ct. Nassau Cnty. 2011) (same).

Law § 63(12). Indeed, Defendants have already admitted the central elements of these claims: (1) that the securities of Kean Wind were never properly registered and (2) that Stimm was lying for years when he told investors he took no compensation from the company.

The Martin Act makes it unlawful to engage in misleading or fraudulent practices in connection with the promotion or sale of securities (GBL § 352-c). Under the Martin Act, "fraud" and "deceptive acts or practices" are given the widest possible meaning and include "all deceitful practices contrary to the plain rules of common honesty." *People v. Federated Radio Corp.*, 244 N.Y. 33, 37-39 (1926), *accord People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d 588, 595 (1976). Moreover, "given the liberal construction to be accorded the Martin Act, an omission as well as a concealment or suppression of information may be actionable as a fraudulent practice." *State v. Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988). "The purpose of the law is to prevent all kinds of fraud in connection with the sale of securities … and to defeat all unsubstantial and visionary schemes in relation thereto whereby the public is fraudulently exploited." *Federated Radio*, 244 N.Y. at 38.

To establish a Martin Act violation, the OAG must allege that "the challenged act or practice was misleading in a material way." *People v. Greenberg*, 2010 N.Y. Misc. LEXIS 5575, 33 (Sup. Ct. N.Y. Cnty. Oct. 21, 2010). The OAG is not required to allege scienter or reliance. *Rachmani Corp*., 71 N.Y.2d at 725, n.6; *State v. Sonifer Realty Corp*., 212 A.D.2d 366 (1st Dep't 1995).

First, it is likely that the OAG will be able to show that the Defendants violated the two relevant registration requirements under the Martin Act. The defendants were (a) required to register as dealers with the OAG and (b) required to register the securities themselves with the OAG. OAG records show that they did not. Trakht Affirmation ¶¶ 7, 9. And, indeed, Stimm has admitted in writing that they did not. In a February 25, 2020 letter to shareholders, Stimm stated "[t]he allegation states that we failed to register with New York registration laws. This accusation is correct." (Ex. 6, p. 8, items 39-45.)

Second, it is likely that the OAG will be able to show that, also in violation of the Martin Act, Stimm misled investors about how Kean Wind funds were being used for his personal use (including a cruise and a piano) after stating repeatedly that he received no compensation and that every penny of shareholder funds would go to the development of the turbine. *See Allen*, 2020 N.Y. Misc. LEXIS 443, *5 (granting OAG's request for a preliminary injunction where company was "utilized as a piggy bank" by one of its partners). This case does not require extensive factual findings or legal analysis. After years of denying that corporate funds were used for his personal use, Stimm finally admitted it in writing in February 2020. Stimm stated that "Kean Winds [sic] does pay certain business expenses that are required for Stimm to serve as CEO and chief scientist. These are a live-in second office . . . . Stimm also requires a personal assistant . . . . [t]he assistant prepares all meals and shopping, runs errands and drives him at night . . . ." (Ex. 6, p.7, items 33, 34.)

Stimm's admissions similarly establish a violation of the Executive Law. Executive Law § 63(12) gives the OAG the power to bring an action against any person or entity that engages in "repeated fraudulent or illegal acts" or "otherwise demonstrate[s] persistent fraud or illegality in the carrying on . . . or transaction of business." There are thus two prongs in the statute: acts that are "fraudulent" and acts that are "illegal."

As to the "fraud" prong, Executive Law § 63(12) broadly construes fraud "so as to include acts characterized as dishonest or misleading." *People v. Apple Health and Sports Clubs, Ltd*., 206 A.D.2d 266, 267 (1st Dep't 1994), *dismissed in part, denied in part* 84 N.Y.2d 1004 (1994). Traditional elements of common law fraud such as reliance, actual deception, knowledge of deception, and intent to deceive are not required to establish liability for statutory fraud. *Id.* The test of fraudulent conduct under § 63(12) "is whether the targeted act has the capacity or tendency to deceive or creates an atmosphere conducive to fraud." *State v. Gen. Elect. Co.*, 302

A.D.2d 314, 314 (1st Dep't 2003). Section 63(12) is "meant to protect not only the average consumer, but also "the ignorant, the unthinking and the credulous." *Id.*

As to the "illegal" prong, an "illegal act" under the statute includes any violation of a federal, state, or local law. *See State v. Princess Prestige*, 42 N.Y.2d 104, 105 (1977); *People v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731, 732-733 (3d Dep't 1996). Specifically, violations of the Martin Act constitute repeated illegality redressable under Executive Law § 63(12).

Here, both prongs of Executive Law § 63(12) are satisfied. The conduct that Defendants engaged in is both dishonest under § 63(12) (thus meeting the "fraud" prong) and is independently a repeated violation of the Martin Act (thus meeting the "illegal" prong). The Defendants' own admissions establish the merits of the OAG's claims.

B. Irreparable Harm to Investors Will Result if the Injunction is Denied

Investors will be irreparably harmed if Defendants are permitted to continue selling securities and dissipating investor assets. While evidence of irreparable harm is not a necessary element to obtain an injunction under Executive Law § 63(12), the evidence here is overwhelming. Stimm's conduct, and his own statements, demonstrate that, absent an injunction, he will continue to mislead new and existing shareholders to invest more money into his company, which they will be unlikely to recover, by selling unregistered securities in the form of shares, certificates of future royalties and promissory notes.[11] It is entirely likely that Stimm will continue taking money out of Kean Wind to pay for personal expenses unless he is stopped by a court order. *See State v. Kozak*, 91 Misc. 2d 394, 395-396 (Sup. Ct. N.Y. Cnty. 1977) (enjoining Martin Act defendants from engaging in the offer or sale of securities and from transferring or

[11] Promissory notes and certificates of future royalties are securities because investors invest their money in Kean Wind with an expectation of profits from the success of Kean Wind's turbine through the efforts of Defendants. *See People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 618-619 (1995) (holding that New York courts use the test enunciated in *Securities & Exch. Commn. v. Howey Co.*, 328 U.S. 293 (1946) to determine whether a given property interest constituted a "security"); *see also People v. Van Zandt*, 981 N.Y.S.2d 275, 283 (Sup. Ct. Bronx Cnty. 2014) (holding that promissory notes in that case were securities).

disposing of their allegedly fraudulently derived assets in where the OAG "has shown irreparable injury to the public in the form of fraud and the possibility of financial instability on the part of defendants"); *see also Allen*, 2020 N.Y. Misc. LEXIS 443 at *2 (awarding injunctive relief to the OAG and finding that "if the requested injunction is not ordered, Mr. Allen will remain in control of the assets of ACP, and the wind-down of the fund will likely proceed in a manner that furthers Allen's self-interest to the detriment of the Limited Partners.")

Indeed, Stimm has continued soliciting and accepting new shareholders even after he admitted that he was violating New York law by failing to register. Courts have repeatedly acknowledged that "the commission of past illegal conduct is highly suggestive of the likelihood of future violations," and is grounds for immediate injunctive relief. *See FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000). Without an order from this court enjoining Stimm's marketing and sales of unregistered securities, investors will continue to be defrauded with little chance of recompense.

Furthermore, an asset freeze here is essential to prevent dissipation or waste during the pendency of this litigation and to prevent Stimm from using shareholder funds for personal expenditures. Defendants' assets are far smaller than their likely legal obligations. Whatever assets Defendants do have should be preserved to ensure that some funds will be available for restitution for the victims of Defendants' frauds. Courts routinely grant the OAG's request for an asst freeze in similar circumstances. *See, e.g.*, *Apple Health*, 80 N.Y.2d at 807; *21st Century Leisure Spa*, 153 Misc. 2d at 942; *First Investors*, 156 Misc. 2d at 213. Accordingly, the Court should order an asset freeze in this case to ensure the possibility of equitable monetary relief and that funds are available for redress to consumers.

C. The Balance of Equities Favors Preliminary Relief

The balance of the equities is also in OAG's favor. On the most fundamental level, "there is no oppressive hardship to defendants in requiring them to comply with the [law], refrain from

fraudulent representation or preserve their assets from dissipation or concealment." *FTC v. World Wide Factors, Ltd*., 882 F.2d 344, 347 (9th Cir. 1989). Defendants have no compelling equitable interest in continuing to violate the law.

Moreover, the balance of equities favors the issuance of a TRO and of preliminary injunction because the Martin Act and Executive Law § 63(12) were specifically designed to protect the public, and the equities favor preservation of assets for the benefit of defrauded investors. *See New York v. Smart Apts. LLC*, 959 N.Y.S.2d 890, 898 (Sup. Ct. N.Y. Cnty. 2013) (granting preliminary injunction against an illegal hotel operator and holding that "the equities lie in favor of shutting down an illegal, unsafe, deceptive business, rather than in allowing said business to continue to operate (to defendants' presumed financial advantage)"); *see also First Investors Corp*., 156 Misc. 2d at 214-215 (granting preliminary injunction and finding that the equities balance in favor of plaintiff, where it appears likely that defendants violated the Martin Act, and plaintiff is attempting to protect public interest in lawsuit).

In an action brought by the Attorney General on behalf of the People, "the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief." *People v. Greenberg*, 27 N.Y.3d 490, 497 (2016) (citations omitted).

D. The Requested *Ex Parte* Relief Is Necessary to Protect Investors and to Prevent Dissipation of Funds

The proposed TRO is tailored to the continuing violations. It would: (1) enjoin the Defendants from engaging in illegal sale of securities; (2) enjoin Stimm from engaging in the illegal solicitation of investors, and (3) preserve Defendants' assets to allow for potential restitution to defrauded investors.

Stimm claims that he has a list of potential investors and he is trying to come up with "creative" ways to continue soliciting funds in violation of the Martin Act. *See, e.g*., Ex. 6, p. 1.

His most recent letter to investors extended his invitation for investors to send him a $500 check to get a "Two for One" deal on certificates of future royalties. (Ex. 16, p. 2.) An *ex parte* order will stop these illegal security sales and prevent Stimm from diverting the funds he already illegally solicited and collected. Providing Defendants with notice of this motion before granting a TRO would likely result in continued solicitation and asset dissipation. An *ex parte* order will prevent that result. *See FTC v. Campbell Capital LLC*, 2018 U.S. Dist. LEXIS 186728, *12 (W.D.N.Y. Oct. 24, 2018) (granting the FTC and OAG an *ex parte* TRO where there was "substantial risk of asset dissipation").

Given the overwhelming evidence of Defendants' illegal actions, including Stimm's own admissions to violating the law, the Court may grant the relief requested by Plaintiff without the need for a hearing. *See Inc. Vill. of Plandome Manor v. Ioannou*, 863 N.Y.S.2d 241, 242 (2d Dep't 2008).

CONCLUSION

For the above reasons, the Court should treat this matter as essential, grant the requested TRO, issue the proposed Order to Show Cause, and ultimately grant Plaintiff's request for a preliminary injunction.

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Respectfully submitted,

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