SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- -X

THE PEOPLE OF THE STATE OF NEW YORK :
By ANDREW M. CUOMO, Attorney General of the State of New York, Index No. 451435/2010

-against- :

STEVEN L. RATTNER, :

Defendant. :

- -X

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE FOR PERMANENT INJUNCTION

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The Attorney General, on behalf of the People of the State of New York, submits this memorandum of law in support of his motion for a permanent injunction against defendant Steven L. Rattner pursuant to General Business Law § 353.

PRELIMINARY STATEMENT

Defendant Steven L. Rattner ("Rattner") is the former founding principal of private equity firm Quadrangle Group, LLC ("Quadrangle"). Rattner, while a principal of Quadrangle, caused Quadrangle to pay kickbacks to and at the direction of Henry "Hank" Morris ("Morris") in order to obtain a total of $150 million in investments from the New York State Common Retirement Fund ("CRF") in Quadrangle Capital Partners II ("QCPII"), a private equity fund managed by Quadrangle. Specifically, defendant engaged in a series of kickbacks aimed at influencing investment decisions by then-State Comptroller Alan Hevesi ("Hevesi") and then-Chief Investment Officer David Loglisci ("Loglisci"). These kickbacks included payment of over $1 million in sham placement fees to Morris, Hevesi's paid political adviser and campaign manager, despite the fact that Morris provided no legitimate placement services. Moreover, at Morris's request, Rattner arranged a DVD distribution deal for a movie, "Chooch," produced by Loglisci's brother, and arranged for others to contribute $50,000 to Hevesi's re-election campaign.

Rattner did not disclose and concealed from CRF investment staff and the CRF's outside consultants that he had paid, or had agreed to pay, these kickbacks and other inducements to get Hevesi and Loglisci to approve the CRF's investments in QCPII.

Rattner was a willing participant in the wide-ranging scheme whereby Morris and various political allies and friends reaped tens of millions of dollars in kickbacks, bribes and sham consulting and finders fees connected to CRF investments. In essence, the theories of fraud put

forth herein with respect to Rattner's conduct – involving concealment and failure to disclose material information relating to sham placement fees and other kickbacks – have already been upheld by the New York Supreme Court as legally sufficient to support the charges of Martin Act fraud in the Attorney General's case against Morris. See Exhibit D, Decision and Order, People of the State of New York v. Henry Hank Morris, Ind. No. 0025/09.

In addition to having engaged in conduct constituting fraud under the Martin Act, defendant has also refused to answer material questions concerning such conduct posed by an officer designated by the Attorney General pursuant to a Martin Act subpoena, in that he expressly declined to answer questions based upon his exercised of his Fifth Amendment privilege. By his refusal to answer material questions, defendant has impeded the Attorney General's responsibility to investigate, combat and remedy securities fraud and to protect the public from fraudulent practices in the offer and sale of securities within New York State.

As set forth more fully in the Complaint filed in this action on November 18, 2010 (the "Complaint") and the Affirmation in Support of an Application for a Permanent Injunction (the "Affirmation"), the Attorney General moves, by order to show cause, for a permanent injunction enjoining defendant from (i) selling or offering for sale to the public within this state, as principal, broker or agent, or otherwise, any securities issued or to be issued, and from any employment, consultation, or unpaid service as an investment manager or advisor, and from serving as a general partner, managing partner, officer, or director of any investment fund, or otherwise managing the investments of others; (ii) engaging in fraudulent practices in violation of Article 23-A of the General Business Law; and (iii) granting such other and further relief as the Court deems just and proper.

SUMMARY OF FACTS

The facts outlined herein, as set forth more fully in the Complaint, show that Rattner, while a principal of Quadrangle, caused Quadrangle to pay Morris in excess of $1 million in placement fees, that were kickbacks to Morris, in order to influence investment decisions by Hevesi and Loglisci with respect to QCPII. (Complaint at ¶ 2–3, 53-60, 84; Affirmation at ¶ 8.) Although Rattner understood that Morris provided no legitimate services as a placement agent for QCPII, Rattner agreed to pay Morris because he understood that Morris was a close political advisor to and fundraiser for Hevesi. Rattner intended to use Morris not for his services as a placement agent, but rather for his political connection to Hevesi and to affect Hevesi's and Loglisci's fiduciary consideration of QCPII. (Complaint at ¶ 58-60.)

In a further effort to influence Loglisci, and at Morris's request, Rattner arranged a DVD distribution deal for a movie, "Chooch," produced by Loglisci's brother, through a Quadrangle portfolio company. (Complaint at ¶ 2-3, 36-52; Affirmation at ¶ 9.) In yet another attempt to influence and reward Morris and Hevesi, Rattner arranged for third parties to contribute at least $50,000 to Hevesi's re-election campaign. (Complaint at ¶ 2-3, 79-81; Affirmation at ¶ 10.) Rattner arranged for others to make these political contributions to avoid having his name appear in public donor records, thereby concealing his responsibility for the contributions. (Complaint at ¶ 2-3, 79-81; Affirmation at ¶ 10.)

Rattner concealed and failed to disclose to the consultants and investment staff who recommended the CRF's investment in QCPII that he had paid the aforementioned series of kickbacks to and at the direction of Morris. (Complaint at ¶ 61-66; Affirmation at ¶ 11.) Rattner did not disclose and concealed that he had paid, or had agreed to pay, kickbacks and other inducements in order to influence Hevesi's and Loglisci's decisions to approve a CRF

investment in QCPII. Specifically, Rattner concealed or failed to disclose to CRF investment staff and the CRF's outside consultants that he had: (a) arranged a DVD distribution deal for David Loglisci's brother at a discounted rate, and (b) negotiated a placement agent agreement with Morris to pay Morris a percentage of any CRF investment in QCPII in excess of $25 million. (Complaint at ¶ 64.) Moreover, these concealed and undisclosed kickbacks were material to the CRF's decision to invest in QCPII. (Complaint at ¶ 67 – 71; Affirmation at ¶ 11.) In addition, Rattner also filed and caused Quadrangle to file false disclosure statements with the CRF. (Complaint at ¶ 67-71; Affirmation at ¶ 11.)

Ultimately, the series of kickbacks paid and arranged for by Rattner, combined with his fraudulent concealment, his failures to disclose material information and his filing of false disclosure statements, paved the way for $150 million in total CRF investments in QCPII. (Complaint at ¶ 72-90). In January 2005, without knowing the aforementioned facts, CRF investment staff sent a memorandum to Loglisci recommending an initial investment of up to $100 million in QCPII. (Complaint at ¶ 66.) Thereafter, in May 2006, approximately one month after Rattner arranged for the aforementioned third party contributions to Hevesi's re-election campaign, Quadrangle received a verbal commitment from Loglisci that the CRF would increase its commitment to QCPII by $50 million. Subsequently, in an inter-office memorandum dated December 12, 2006, Loglisci recommended to Hevesi that the CRF increase its commitment to QCPII from $100 million to $150 million. Hevesi approved the recommendation, and the CRF increased its investment in accordance with the memorandum. (Complaint at ¶ 82.)

In connection with the People's investigation into the above-referenced allegations, on August 17, 2010, Rattner was served with a subpoena for his testimony (the

"Subpoena"). See Affirmation at ¶ 13 and Exhibit B attached thereto. The Subpoena commanded Rattner to appear and testify before the Attorney General and further stated that the Attorney General deemed Rattner's testimony relevant and material to an investigation and inquiry undertaken in the public interest. On September 16, 2010, Rattner appeared at the offices of the Attorney General, 120 Broadway, New York, New York, for testimony in the Attorney General's investigation. Rattner was duly sworn by a Notary Public within and for the State of New York, and he refused to answer sixty-eight material questions relevant to the Attorney General's inquiry, in that he expressly declined to answer based on his exercise of his Fifth Amendment rights. See Affirmation at ¶ 14 and Exhibit C attached thereto, a true and correct copy of the transcript of Steven Rattner's testimony dated September 16, 2010.

ARGUMENT

I. Rattner's Refusal to Answer Sixty-Eight Material Questions in a Martin Act Inquiry Constitutes Prima Facie Proof That he has Been Engaged in the Fraudulent Practices Set Forth in the Complaint

Section 353 of the Martin Act authorizes the Attorney General to bring a civil action to enjoin all fraudulent acts and practices as defined in the Martin Act. If the Attorney General believes that the act or practice complained of has already occurred, or is occurring, he may request that the court enter a permanent injunction barring the defendant from offering or selling any securities in any capacity. N.Y. Gen. Bus. Law § 353(1). If the Attorney General demonstrates that the defendant in such an action "refused … to answer a material question … relevant to the inquiry when duly ordered so to do by the officer … duly conducting an inquiry into the subject matter forming the basis of the application for such injunction, such refusal shall be prima facie proof that such defendant is or has been engaged in fraudulent practices as set

forth in such application and a permanent injunction may issue from the supreme court without any further showing by the attorney-general." Id.

The Martin Act confers broad investigative powers on the Attorney General. As the State's chief legal officer, the Attorney General is empowered to designate other officers to subpoena witnesses, compel their attendance, examine them under oath, and require the production of relevant documents. See N.Y. Gen. Bus. Law § 352(2).

Rattner was issued a Martin Act subpoena by an assistant attorney general ordering him to provide testimony that the Attorney General "deemed material to an investigation and inquiry undertaken in the public interest." (See Exh. B to Affirmation.)

On September 16, 2010, Rattner appeared at the offices of the Attorney General, pursuant to the Martin Act subpoena, and an assistant attorney general, the "officer … duly conducting the inquiry," asked him sixty-eight questions that were relevant and material to the Attorney General's inquiry into fraudulent practices in connection with the CRF's investment in QCPII. (See Exh. C to Affirmation.) Rattner refused to answer each of these sixty-eight questions, stating "on the advice of counsel I respectfully decline to answer and exercise my Fifth Amendment rights under the U.S. Constitution."

The questions asked of Rattner were material to a Martin Act inquiry into whether Rattner engaged in fraudulent practices with respect to the CRF's investment in QCPII. (Affirmation at ¶ 13-15.) For example, Rattner was questioned about whether he had arranged a DVD deal for Loglisci's brother, retained Morris as a placement agent, and made campaign contributions to Hevesi in an effort to influence Hevesi's and Loglisci's investment decisions with respect to QCPII. (See Exh. C to Affirmation.)

Rattner's fraudulent practices with respect to the CRF's investment in QCPII form the basis of the Attorney General's application for an injunction pursuant to General Business Law § 353. (Complaint at ¶ 36 – ¶ 90.) Thus, pursuant to General Business Law § 353, Rattner's refusal to answer these material questions constitutes prima facie proof that Rattner engaged in the fraudulent practices as set forth in the Complaint, and the Court should grant the requested permanent injunction without further showing by the Attorney General.

That Rattner cited his Fifth Amendment right against self-incrimination as his rationale for refusing to answer material questions before the Attorney General should have no bearing on the Court's analysis. "It is beyond cavil that an inference may be drawn against a witness in a civil proceeding because of his or her failure to testify, even where a constitutional privilege is invoked." Rauss v. Johnson, 243 A.D.2d 849, 674 N.Y.S.2d 135 (3d Dep't 1997) (citing Matter of Commissioner of Social Servs. Patricia A. v. Philip De G., 59 N.Y.2d 137, 141 (1983); Marine Midland Bank v. Russo Produce Co., 50 N.Y.2d 31, 42 (1980); Kuriansky v. Bed-Stuy Health Care Corp., 135 A.D.2d 160, 177-178 (2d Dep't 1988), aff'd 73 NY2d 875 (1988)). "When a party in a civil action, capable of testifying on the issues, refuses to testify by the claim of this [Fifth Amendment] privilege, he must thereupon bear all of the legitimate inferences flowing from the adverse evidence against him and this without regard to his reasons for silence." Eastern Airlines v. Stuhl, 65 Misc.2d 901, 318 N.Y.S.2d 996 (N.Y.City Civ. Ct. 1970), aff'd, 68 Misc. 2d 629, 327 N.Y.S.2d 752 (App. Term 1971).

II. The Fraudulent Practices Set Forth in the Complaint Constituted Fraud as Defined in General Business Law § 352 et seq

The Complaint asserts that Rattner engaged in fraudulent practices as defined in § 352-c(1)(a) & (c). (Complaint at ¶ 91 – 94.) A person violates § 352-c(1)(a) when he (1) uses or employs, inter alia, any "fraud, deception, concealment," or "suppression," (2) "where engaged

in to induce or promote," inter alia, the "exchange, sale, negotiation or purchase" (3) of securities or commodities, (4) within or from the State of New York. A person violates § 352-c(1)(c) when he makes "[a]ny representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made." N.Y. Gen. Bus. Law § 352-c(1)(c).

The Martin Act has been described as "one of America's premier securities fraud statutes," and is "a statute of enormous breadth and unique dimensions." Orestes J. Mihaly & David J. Kaufmann, Practice Commentaries to General Business Law Art. 23-A, 19 McKinney's Cons. Laws of N.Y. at 8 (1996) (hereinafter "Mihaly & Kaufmann"). As one of the first statutes of its kind in the Nation, the Act reflects this State's longstanding commitment to combat a broad range of fraudulent practices in connection with the sale of "securities"—a term of art under the Act. See N.Y. Gen. Bus. Law § 352(1). "The broad delineation of conduct prohibited and made illegal by the Martin Act itself makes New York's blue sky law one of the most stringent such statutes in the country." Mihaly & Kaufmann, supra, at 31.

The Court of Appeals has adopted an expansive interpretation of the Martin Act, which it has instructed "should be liberally construed" to serve its purpose of preventing "all kinds of fraud in connection with the sale of securities and commodities" and defeating "all related schemes whereby the public is exploited." Lexington Sixty-First Assocs., 38 N.Y.2d at 595 (citing, inter alia, People v. Federated Radio Corp., 244 N.Y. 33, 38, 39 (1926)). Thus, "[t]he concept of 'fraud' in a Martin Act claim is much more broadly defined than it is at the common-law." State v. McLeod, 12 Misc. 3d 1157(A), 2006 N.Y. Slip Op. 50942(U), 2006 WL 1374014, at *4 (Sup. Ct. New York County Feb. 9, 2006). And "the terms 'fraud' and

'fraudulent practices'" must be given a "wide meaning" to encompass acts that do not "originat[e] in any actual evil design" but rather "tend to deceive or mislead the purchasing public." Lexington Sixty-First Assocs., 38 N.Y.2d at 595. See also Gardner v. Lefkowitz, 97 Misc. 2d 806, 813 (Sup. Ct. New York County 1978) (Martin Act "must not be strictly interpreted but should be given a pliable yet resilient construction").

Furthermore, as the Appellate Division has noted, "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." Sala, 258 A.D.2d at 193-194 (affirming felony conviction under GBL § 352-c(6) for, inter alia, defendants' failure to disclose commissions, fees and risks associated with investments, and noting that "[a] finding of fraudulent practice may be based upon an omission if there is a substantial likelihood that disclosure of the omitted fact would have been significant to a potential investor").

As alleged in the Complaint, Rattner's concealment and failure to disclose the series of kickbacks that he had paid to and at the direction of Morris constituted fraudulent practices under the Martin Act, and specifically constituted violations of General Business Law § 352 et seq. Moreover, Rattner's conduct as alleged in the Complaint falls well within the ambit of securities fraud as it has been broadly defined under the Martin Act. See, e.g., People v. Federated Radio Corp., 244 N.Y. 33, 39-40 (1926) (fraud under the Martin Act "include[s] all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public" come within the meaning of "fraud" and "fraudulent practice."); People v. Sala, 258 A.D.2d 182, 193-194 (3d Dep't 1999) (fraud under the Martin Act "includes all deceitful practices contrary to the plain

rules of common honesty and all acts tending to deceive or mislead the public") (citation and quotation marks omitted), aff'd, 95 N.Y.2d 254 (2000).

Additionally, defendant's fraudulent conduct, as detailed above and set forth more fully in the Complaint, consisted of concealment and non-disclosure of material information that any reasonable investor would want to know. And where, as here, such fraud is committed to induce or promote the sale of securities, it violates the Martin Act. See, e.g., People v. Sala, 258 A.D.2d 182, 193-194 (3d Dep't 1999) (fraud under the Martin Act "includes all deceitful practices contrary to the plain rules of common honesty and all acts tending to deceive or mislead the public") (citation and quotation marks omitted), aff'd, 95 N.Y.2d 254 (2000).

Furthermore, the theories of fraud put forth herein with respect to defendant's conduct – involving concealment and failure to disclose material information relating to sham placement fees and other kickbacks – have already been upheld by the New York Supreme Court as legally sufficient to support the charges of Martin Act fraud in the Attorney General's criminal case against Morris. See Affirmation, Exhibit E, Decision and Order, People of the State of New York v. Henry Hank Morris, Ind. No. 0025/09 (the "Opinion").

For all of the foregoing reasons, the facts as described herein and detailed more fully in the Complaint, establish that defendant Rattner has engaged in fraudulent practices in violation of the Martin Act, N.Y. Gen. Bus. Law §352 et seq.

CONCLUSION

The People have established prima facie proof that Rattner engaged in the fraudulent practices set forth in the Application for a Permanent Injunction in that he refused to answer material questions relevant to the Attorney General's Inquiry when commanded to do so by the Attorney General in a Martin Act inquiry. Based on this prima facie proof, the Court should

grant the People's application for a permanent injunction against Rattner pursuant to General Business Law § 353.