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

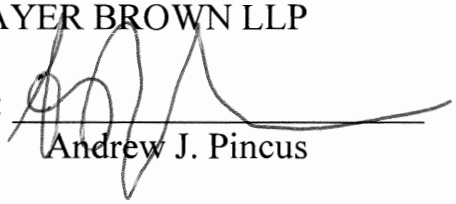
THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, *Plaintiff-Appellant,* - against - ERNST & YOUNG LLP, *Defendant-Respondent.*	Index No. 451586/2010 **NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*** THE BUSINESS COUNCIL OF NEW YORK STATE, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *and* BUSINESS ROUNDTABLE, *Amici Curiae*

PLEASE TAKE NOTICE that, upon the annexed affirmation of Andrew J. Pincus, dated April 21, 2014, The Business Council of New York State, Inc., Chamber of Commerce of the United States of America, and Business Roundtable will move this Court, at a term of the Appellate Division of the Supreme Court, First Department, at the Courthouse located at 27 Madison Avenue, New York, New York on Tuesday, April 29, 2014, at 10:00 a.m., or as soon thereafter as

counsel may be heard, for an order granting leave to file a brief as *amici curiae* in support of Defendant-Respondent Ernst & Young LLP's Motion for Leave to Appeal to the Court of Appeals.

Dated: April 21, 2014

MAYER BROWN LLP

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

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, *Plaintiff-Appellant*, - against - ERNST & YOUNG LLP, *Defendant-Respondent*.	Index No. 451586/2010 **AFFIRMATION OF ANDREW J. PINCUS IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***
THE BUSINESS COUNCIL OF NEW YORK STATE, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *and* BUSINESS ROUNDTABLE, *Amici Curiae*	

ANDREW J. PINCUS, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner at the law firm of Mayer Brown LLP, counsel for The Business Council of New York State ("the Council"), Chamber of Commerce of the United States of America ("the Chamber"), and Business Roundtable ("BRT").

I am familiar with the legal issues involved in the above-captioned action. I submit this affirmation in support of the motion of the Council, the Chamber, and BRT for leave to file the accompanying brief as *amici curiae* in support of Defendant-Respondent Ernst & Young LLP's Motion for Leave to Appeal to the Court of Appeals.

2. The Council is a statewide organization consisting of approximately 2,400 New York businesses and local chambers of commerce. The Council represents the interests of its members before the state legislature and state regulatory agencies; Congress and federal agencies; and before state and federal courts.

3. The Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in the courts on issues of concern to the business community.

4. Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies working to promote sound public policy and a thriving U.S. economy. Business Roundtable's CEO members lead U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees.

Through research and advocacy, Business Roundtable promotes policies to improve U.S. competitiveness, strengthen the economy, and spur job creation.

5. The Court's memorandum decision in this case is of great concern to the *amici*'s members because it significantly expands the scope of the Attorney General's powers under the Martin Act and Executive Law § 63(12). That novel interpretation of these statutes is likely to undermine New York's status as the center of our nation's and the world's capital markets by diverting capital market activities—and the large number of associated jobs—to financial centers in other nations.

6. In their brief, *amici* explain why this Court's decision will make the State a less hospitable environment for business in general and the financial industry in particular and, in addition, how the ruling is likely to result in lower settlements for investors and consumers because of the diversion of resources to litigate and settle the Attorney General's disgorgement claims—which seek funds to be deposited into the State treasury for the State's own use, not for distribution to any injured individuals. They also present a detailed legal argument explaining why this Court's decision misinterprets the statutes at issue and conflicts with established New York law.

7. Participation of the *amici curiae* on this motion would be of particular assistance to this Court in view of the broad range of perspectives and experiences

of the *amici* and their members, who have been the targets of suits under the Martin Act and Executive Law § 63(12). The *amici* are ideally situated to explain the impact of the Court's decision upon New York's ability to maintain its status as a vital, growing financial center, as well as to identify institutional and policy arguments and authorities that might otherwise not be presented to the Court.

8. Attached hereto as Exhibit A are Defendant-Respondent Ernst & Young LLP's notice of entry and Plaintiff-Appellant State of New York's notice of appeal in this case, evidencing this Court's jurisdiction over the matter.

WHEREFORE, I respectfully request that this Court enter an order (i) granting the Council, the Chamber, and BRT leave to submit this brief as *amici curiae* in support of Defendant-Respondent Ernst & Young LLP's Motion for Leave to Appeal to the Court of Appeals; (ii) accepting the brief that has been filed and served along with this motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: April 21, 2014

MAYER BROWN LLP

By: _____
Andrew J. Pincus

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EXHIBIT A

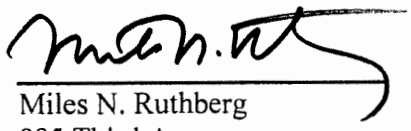
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, Plaintiff, - against - ERNST & YOUNG LLP. Defendant.	Index No. 451586/2010 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that a Decision and Order, of which the attached is a true copy, was duly entered in the office of the Clerk of the Court, Appellate Division of the Supreme Court of the State of New York for the First Judicial Department on the 20th day of February, 2014.

Dated: March 28, 2014
New York, New York

LATHAM & WATKINS LLP

By: 

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Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11666 The People of the State of New York, etc., Plaintiff-Appellant, Index 451586/10

-against-

Ernst & Young, LLP, Defendant-Respondent.

Eric T. Schneiderman, Attorney General, New York (Richard Dearing of counsel), for appellant.

Latham & Watkins LLP, New York (Miles N. Ruthberg of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about January 10, 2013, which granted defendant's motion to dismiss the claim for disgorgement of fees received from Lehman Brothers Holdings Inc., unanimously reversed, on the law, without costs, and the motion denied.

In this action by the Attorney General brought under New York's Executive Law and Martin Act (General Business Law art 23-A), it was error to dismiss a claim for the equitable remedy of disgorgement at the pleading stage (*see Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 125-126 [2008], *cert denied sub nom Cross Country Bank, Inc. v New York*, 555 US 1136 [2009]).

Defendant argues that the remedies provided in both General Business Law § 353 (the Martin Act) and Executive Law § 63 do not

include disgorgement. Rather, the statutes specify that the remedies available are injunctive relief, restitution and cancellation of a business certificate. It also avers that restitution may be obtained in a class action settlement that would be duplicative of remedies sought here.

However, where, as here, there is a claim based on fraudulent activity, disgorgement may be available as an equitable remedy, notwithstanding the absence of loss to individuals or independent claims for restitution (*see Applied Card Sys.*, 11 NY3d at 125-126). Disgorgement is distinct from the remedy of restitution because it focuses on the gain to the wrongdoer as opposed to the loss to the victim (*id.* at 125). Thus, disgorgement aims to deter wrongdoing by preventing the wrongdoer from retaining ill-gotten gains from fraudulent conduct. Accordingly, the remedy of disgorgement does not require a showing or allegation of direct losses to consumers or the public; the source of the ill-gotten gains is "immaterial" (*see SEC v Commonwealth Chem. Sec., Inc.*, 574 F2d 90, 102 [2d Cir 1978]; *see also Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408-409 [1st Dept 1990] [in a fiduciary duty context]).

Therefore, while the Attorney General does not allege direct injury to the public or consumers as a result of defendant's alleged collusion with Lehman Brothers in committing fraud, the

equitable remedy of disgorgement is available in this action, and it was premature to categorically preclude it at the pleading stage.

Nor would ordering disgorgement be tantamount to an impermissible penalty, since the "wrongdoer who is deprived of an illicit gain is ideally left in the position he would have occupied had there been no misconduct" (Restatement [Third] of Restitution & Unjust Enrichment § 51, Comment k; *see also Matter of Blumenthal [Kingsford]*, 32 AD3d 767, 768 [1st Dept 2006], *lv denied* 7 NY3d 718 [2006]).

We further note that maintaining disgorgement as a remedy within the court's equitable powers is crucial, particularly where the Attorney General may be precluded from seeking restitution and damages if defendant settled the private class action against it (*see Applied Card Sys.*, 11 NY3d at 125-126).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 20, 2014

CLERK

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

THE PEOPLE OF THE STATE OF NEW YORK by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Plaintiff, - against - ERNST & YOUNG LLP, Defendant.	Index No. 451586/2010 The Hon. Jeffrey K. Oing IAS Part 48 **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiff, the People of the State of New York, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, from a Decision and Order of the Supreme Court of the State of New York, County of New York, (Hon. Jeffrey K. Oing, J.), granting Defendant Ernst & Young LLP's "Motion to Dismiss New York Attorney General's Claim for Recovery of Fees Received by EY from Lehman" (Motion Sequence No. 002), which was decided by the Court on the record on December 12, 2012, with the transcript of those proceedings so-ordered by the Court on January 2, 2013, and entered in the Office of the Clerk of the County of New York on January 10, 2013. The Notice of Entry was served on January 10, 2013.

[Remainder of Page Intentionally Left Blank]

Attached is a true copy of the Decision and Order appealed from.

Dated: February 8, 2013
New York, New York

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New York County Clerk's Index No. 451586/10

New York Supreme Court

Appellate Division—First Department

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff-Appellant,

– against –

ERNST & YOUNG, LLP,

Defendant-Respondent.

BRIEF OF *AMICI CURIAE* THE BUSINESS COUNCIL OF NEW YORK STATE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND BUSINESS ROUNDTABLE

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INTEREST OF THE AMICI CURIAE

The Business Council of New York State, Inc. ("the Council") is a statewide organization consisting of approximately 2,400 New York businesses and local chambers of commerce. The Council represents the interests of its members before the state legislature and state regulatory agencies; Congress and federal agencies; and before state and federal courts.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies working to promote sound public policy and a thriving U.S. economy. Business Roundtable's CEO members lead U.S. companies with $7.4 trillion in annual revenues and more than 16 million employees. Established in 1972, Business Roundtable applies the expertise and experience of its CEO members to the major issues facing the nation. Through research and advocacy,

Business Roundtable promotes policies to improve U.S. competitiveness, strengthen the economy, and spur job creation.

This case is of particular importance to the Council, the Chamber, and BRT given the broad range of perspectives and experiences of their members, who have been or could be the targets of suits brought by the Attorney General under the Martin Act or Executive Law § 63(12).

INTRODUCTION

This Court's memorandum decision that the Attorney General may seek disgorgement of profits in every case brought under the Martin Act (N.Y. Gen. Bus. Law §§ 352-359) or New York Executive Law § 63(12), even though neither statute mentions disgorgement as an available remedy, constitutes a dramatic change in New York law. Indeed, this Court is the *first court ever* to squarely address the issue and hold that a remedy not specifically mentioned in the Martin Act or Executive Law § 63(12) is available in a case brought under those statutes.

This significant expansion in the scope of the remedies provided under these already broad statutes will have very substantive adverse practical and legal consequences. The Court of Appeals should have the opportunity to decide a legal question of this magnitude, and permission by this Court is the only avenue for further review at this stage of the litigation.

First, this Court's memorandum decision rested largely on the Court of Appeals' statement in *People ex rel. Spitzer v. Applied Card Systems, Inc.*, that the Attorney General "*might* be able to obtain disgorgement," 11 N.Y.3d 105, 125-26 (2008) (emphasis added), notwithstanding the footnote accompanying that statement cautioning that the issue was not presented in the case because it would be "inappropriate" for the Court of Appeals to grant disgorgement relief where the Supreme Court had not done so (*id.* at 126 n.17). The Court of Appeals should decide whether that dictum—which unsurprisingly was not accompanied by any legal analysis given that the issue was not before the court—compels the unprecedented conclusion that disgorgement is a permissible remedy.

Second, this Court's ruling greatly expands the scope of both statutes. It empowers the Attorney General to bring a parallel lawsuit for monetary relief—in the new form of disgorgement—in *every* fraud case under *either* statute, even when New York residents have obtained compensation and res judicata precludes the Attorney General from seeking damages relief. That ruling threatens businesses with significantly increased liability, may divert funds away from investors and consumers to the State Treasury, and—by further augmenting the Attorney General's already-significant powers under the Martin Act—impose particularly severe burdens on financial services companies, notwithstanding the increased competition

that New York faces in retaining those businesses and the significant number of jobs that they create.

Nothing in New York law compels or even permits this result. On the contrary, the black-letter rule that courts may not expand statutory remedies beyond what the text specifically provides plainly governs this case.

In light of its significant implications for the State's economy and for the meaning of two important statutes, the legal question presented here is unquestionably a "novel" issue of broad "public importance." 22 N.Y.C.R.R. § 500.22. The Court of Appeals should be afforded the opportunity to review this Court's decision.

ARGUMENT

THE COURT OF APPEALS SHOULD RESOLVE WHETHER DISGORGEMENT IS AVAILABLE IN SUITS BROUGHT UNDER THE MARTIN ACT AND EXECUTIVE LAW § 63(12).

This Court's holding that the remedy of disgorgement is available under the Martin Act and Executive Law § 63(12) threatens to damage the State's economy and New York's status as a global financial center, and it is at odds both with general principles of statutory construction and with years of New York precedent. It also will have the inevitable practical effect of transferring settlement dollars to the State at the expense of investors and consumers. It is vital to the public at large, as

well as to New York businesses, that the Court of Appeals resolve this important legal question.

A. The Serious Implications Of This Court's Decision For Financial Markets, Investors, And Other New York Businesses Warrant Further Review.

This Court's ruling that the Attorney General may seek disgorgement in every case brought under the Martin Act and Executive Law § 63(12) will have serious practical implications, for three interconnected reasons. *First*, the decision dramatically and unjustifiably expands the scope of both statutes. *Second*, the effect of permitting claims for disgorgement in cases brought under these statutes will be to redistribute funds to the State at the expense of investors and consumers. *Third*, by exposing financial institutions to a new risk of potentially enormous legal liability, the Court's decision will make New York's capital markets less attractive places to issue and list securities, discourage financial institutions from operating in New York, and thereby divert jobs from New York to other capital-market centers.

1. To begin with, this Court's decision that the Attorney General may sue for disgorgement will significantly increase the number of cases in which the Attorney General can maintain a lawsuit in the first place.

The Attorney General recognized below that there is often a parallel private lawsuit for restitution and damages in cases where the Attorney General sues under

the statutes at issue, and "99.9" percent of such cases settle. Transcript of Supreme Court Hearing at 26, *People v. Ernst & Young LLP*, No. 451586/2010 (N.Y. Sup. Ct. Dec. 12, 2012), NYSCEF Doc. No. 34 (hereinafter "Transcript of Hearing"). And in *Applied Card*, the Court of Appeals held that, under principles of res judicata, such settlements bar the Attorney General from bringing his own claims for restitution or damages. 11 N.Y.3d at 124-25.

Similarly, the Attorney General often will be unable to seek injunctive relief in cases where there is no threat of continuing fraudulent activities or injunctive relief has already been obtained by a federal enforcement agency or in a parallel private action. *See State by Abrams v. Magley*, 105 A.D.2d 208, 211-12 (3d Dept. 1984) (remedy in § 63(12) case was "properly limited to damages and restitution" where "[t]he assertions of fraud and misrepresentation refer to past acts and do not contain any reference to continuing acts"); *see also, e.g.*, *Allen v. Pollack*, 289 A.D.2d 426, 427 (2d Dept. 2001) (stating that "injunctive relief should be prospective, and ordinarily should not be granted to operate on acts already performed").

In a significant number of cases, therefore, none of the statutory remedies specified by the Legislature will be available. Previously, consistent with the Legislature's determination, that meant that the Attorney General could not bring an action. Under this Court's ruling, however, the Attorney General almost always will be able to identify a defendant who supposedly received ill-gotten gains and

can be sued for disgorgement: either the company that allegedly committed a fraud, or its directors and officers, or (as here) a third party that provided professional services. Thus, the effect of this Court's decision that disgorgement is permitted will be to expand significantly—beyond what the Legislature contemplated when it created these causes of action—the Attorney General's ability to bring these actions.

In addition, as the facts of this case demonstrate, claims for disgorgement can dramatically increase the amount of liability to which a defendant is exposed under these two statutes: Ernst & Young settled Lehman investors' claims for monetary relief for $99 million (*see* Endorsed Letter to Judge Kaplan, *In re Lehman Bros. Equity/Debt Sec. Litig.*, No. 1:08-cv-5523-LAK-GWG (S.D.N.Y. Oct. 16, 2013) (Dkt. No. 513)), only to find itself facing a $150 million disgorgement claim by the Attorney General. Disgorgement is thus far from an ancillary remedy; rather, its availability significantly increases potential defendants' financial risk.

This Court's expansion of the remedies available under the two statutes at issue is particularly troubling because both laws provide for substantially eased burdens of pleading and proof. The Attorney General need only allege a practice that "tend[s] to deceive or mislead the [securities] purchasing public" to make out a claim under the Martin Act (*People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d

588, 595 (1976)), and he need not prove scienter or reliance. *People ex rel. Cuomo v. Charles Schwab & Co.*, 33 Misc. 3d 1221(A), 2011 WL 5515434, at *7 (Sup. Ct. Oct. 24, 2011), *aff'd in part,* 109 A.D.3d 445 (1st Dept. 2013). Executive Law § 63(12) similarly sets a low bar for the Attorney General: its test for fraud is simply "whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *People ex rel. Spitzer v. Gen. Elec. Co., Inc.*, 302 A.D.2d 314, 314 (1st Dept. 2003).

The Legislature defined both statutes broadly to facilitate suits by the Attorney General, but it did so on the understanding that the Attorney General could sue only for certain, specified remedies. By making an *additional* remedy available, this Court's decision upsets the careful balance that the Legislature incorporated into these statutes.

The Attorney General will surely make aggressive use of his newfound authority under this Court's decision. Even before this case was decided, the Attorney General's office had shown an increasing willingness to seek disgorgement in § 63(12) cases. After the Court of Appeals' 2008 decision in *Applied Card* foreclosed the possibility of the Attorney General's obtaining restitution or damages in high-profile cases where parallel class actions settled, his office shifted to making claims for disgorgement in a greater number of cases. *See, e.g.*, *People v. Trump Entrepreneur Initiative LLC*, 2014 N.Y. Slip Op. 30305(U), at *1 (Sup. Ct. Jan. 30,

2014); *People v. Agip Gas, LLC*, 2013 N.Y. Slip Op. 32805(U), at *1 (Sup. Ct. Oct. 18, 2013); *State v. Coalition Against Breast Cancer, Inc.*, 40 Misc.3d 1228(A), 2013 WL 4283360, at *2 (Sup. Ct. May 2, 2013); *Charles Schwab & Co.*, 33 Misc.3d 1221(A), 2011 WL 5515434, at *2; *People v. Tempur-Pedic Int'l, Inc.*, 30 Misc.3d 986, 988 (Sup. Ct. Jan. 14, 2011).

The Attorney General acknowledged this fact below, explaining that, after *Applied Card*, his office could not "get damages for the people" after a class action settlement, and that "it is for that reason . . . that we have th[e] power and th[e] right" to seek disgorgement. Transcript of Hearing at 26. This decision will only further encourage the Attorney General to pursue this strategy and routinely institute disgorgement claims.

2. Equally troubling is the fact that permitting disgorgement claims will have the inevitable practical effect of enriching the State at the expense of the very investors and consumers that the Martin Act and § 63(12) were intended to protect.

A defendant's decisions in settlement negotiations inevitably are driven by the total exposure that the defendant faces as a result of the challenged conduct. If settling one lawsuit will resolve all of the exposure, the defendant will be willing to pay more than if additional lawsuits relating to the same liability would remain pending. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 339 (3d Cir. 2011) (Scirica,

J., concurring) ("A defendant . . . may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits").

As a result of this Court's memorandum decision, a defendant who has settled a private damages action—as Ernst & Young LLP did here—remains subject to suit by the Attorney General for disgorgement. Consequently, defendants will reduce the amount they are willing to pay when settling lawsuits with consumers or investors so that they retain funds to defend (and perhaps at some point try to settle) a disgorgement action by the Attorney General. That will be especially true when the Attorney General retains the option to sue under the Martin Act, given the relaxed standards of proof (*see* pp. 7-8, *supra*) that give the Attorney General a significant advantage over private litigants in establishing liability.

Disgorgement will thus divert funds from investors and consumers, who will receive less in class-action settlements, to the State, which keeps for itself the proceeds of any disgorgement in a Martin Act or § 63(12) case if it concludes that New York consumers and investors are unaffected or have otherwise been compensated. *See* Transcript of Hearing at 14 (Attorney General asserting if consumers are not affected by a fraud, any disgorgement can be kept by the State Treasurer); *id.* at 18 (asserting that "we may or may not give [disgorged profits] to the consumers").

That wealth transfer undermines the purpose of those two statutes, both of which were enacted to protect the public rather than to fill the State's coffers. *See, e.g.*, *All Seasons Resorts, Inc. v. Abrams*, 68 N.Y.2d 81, 86-87 (1986) (Martin Act has "remedial purpose of protecting the public from fraudulent exploitation"); *State by Lefkowitz v. Bevis Indus., Inc.*, 314 N.Y.S.2d 60, 64-65 (Sup. Ct. 1970) (Executive Law § 63(12)'s standards exist "for the benefit of the public"); *see also* Transcript of Hearing at 9 (Justice Oing commenting that Martin Act is "designed to protect consumers and the public"). Disgorgement proceeds retained by the State are hardly a benefit to the public; on the contrary, they "effectively constitute punitive damages not authorized by statute." *People ex rel. Spitzer v. Direct Revenue, LLC*, 2008 N.Y. Slip Op. 50845(U), at *8 (Sup. Ct. Mar. 12, 2008).

3. The new burdens created by this Court's decision will have significant repercussions for the financial industry.

The United States' financial markets "play[] a unique role in the global capital market" as the repository of 37% of global financial stock, and 45% of all global equities. McKinsey Global Inst., *$118 Trillion and Counting: Taking Stock of the World's Capital Markets* 86 (2010). These markets—of which New York has long been the epicenter—are the "hub in the global capital market" and "attract[] the lion's share of cross-border equity flows." *Id.* at 89.

The financial services sector's critical importance is well recognized. A 2007 report commissioned by then-Mayor Bloomberg and Senator Schumer found that the financial markets are vital to the economic health of both New York City and New York State: the financial services industry accounts for 15% of the gross product of both jurisdictions, and it is the source of 36% of New York City's business income tax revenues. Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 35-36 (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf (hereinafter "*Sustaining New York's Leadership*").

But New York faces tough global competition in maintaining its current status. The Bloomberg-Schumer report warned that "[u]nless we improve our corporate climate, we risk allowing New York to lose its preeminence in the global financial services sector. This would be devastating for both our City and nation." *Sustaining New York's Leadership* at 7 (quotation marks omitted).

Indeed, the nonpartisan Committee on Capital Markets Regulation recently reported that "measures of aversion to U.S. public equity markets remain[] at levels not seen since the 2007-08 financial crisis." Press Release, Comm. on Capital Mkts. Regulation, Continuing Competitive Weakness in U.S. Capital Markets (Jan. 31, 2014). The Committee's director, Hal S. Scott, grimly concluded that

"[n]othing indicates that our capital markets are on the road to competitive recovery." *Id.* (quotation marks omitted).

The legal and regulatory climate in New York has unquestionably been an influential factor driving the migration of financial activity away from the City. The Bloomberg-Schumer report found that "the unpredictable nature of the legal system" was a key factor that "caused New York to be viewed negatively" by executives charged with choosing where to raise capital. *Sustaining New York's Leadership* at 73. The risk of liability under unpredictable legal rules and the different standards applied by multiple law enforcement entities were cited as particular concerns. *Id.* at 76-77. As Mayor Bloomberg and Senator Schumer explained, "the highly complex and fragmented nature of our legal system has led to a perception that penalties are arbitrary and unfair, a reputation that may be overblown, but nonetheless diminishes our attractiveness to international companies." *Id.* at ii.

Far from remedying this competitive disadvantage, this Court's decision *increases* it by making a new and substantial remedy available under both Executive Law § 63(12) and the Martin Act. That expansion of the Martin Act, which grants extensive investigatory powers to the Attorney General while restricting defendants' ability to raise customary defenses to fraud claims (*see* pp. 7-8, *supra*), poses a particular threat to the financial institutions subject to the Act's coverage. Global companies are less likely to choose to list themselves on U.S. markets, and finan-

cial institutions similarly less likely to invest in New York operations, if their potential liability under the Martin Act is *further* multiplied.

Instead, many global businesses are likely to move to other markets. That, in turn, will make less capital domestically available for new and growing companies. And it will reduce employment in New York. In the long run, meanwhile, financial institutions themselves may deemphasize New York in favor of expanding their presence in other financial centers.

Such serious harms should not be inflicted on the entire State on the basis of a decision by a single department of the Appellate Division. But because the financial industry is centered predominantly in New York County and thus within this Court's jurisdiction, the Attorney General can continue to bring disgorgement actions within this Department, based on the decision in this case. It is therefore critical that the Court of Appeals be given the opportunity to decide the important question presented here.

B. This Court's Ruling That Disgorgement Is Available Under The Martin Act And Executive Law § 63(12) Is Incorrect.

Review is warranted for the additional reason that this Court's decision is incorrect. The ruling conflicts with both New York precedent and well-established principles of statutory interpretation.

1. The long-recognized maxim *expressio unius est exclusio alterius*—"the expression of one subject, object, or idea is the exclusion of other subjects, objects,

or ideas" (Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 Marq. L. Rev. 191, 191 (1931))—is a mandatory principle of statutory construction in New York. *See, e.g.*, N.Y. Stat. Law § 240 (McKinney 2014) (when a statute "expressly describes a particular act, thing or person to which it shall apply, an *irrefutable inference must be drawn* that what is omitted or not included was intended to be omitted or excluded.") (emphasis added); *Morey v. Farmers' Loan & Trust Co.*, 14 N.Y. 302, 306 (1856).

The well-established *expressio unius* principle has guided New York courts interpreting statutes in a variety of contexts involving remedies or sanctions. For example, the Court of Appeals has declined to imply a private right of action in statutes that provide for an express remedy: "[w]here the Legislature has not been completely silent but has instead made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy, with broader coverage." *Sheehy v Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 636 (1989). The Court of Appeals has similarly held that the Attorney General has no general prosecutorial power in criminal cases, but may only bring prosecutions "where specifically permitted by statute." *Della Pietra v. State*, 71 N.Y.2d 792, 796 (1988).

The same reasoning controls here. The legislature did not leave the question of which remedies are available under Executive Law § 63(12) and the Martin Act

open to judicial exposition; rather, it specified certain remedies that the Attorney General may seek under each of those statutory provisions. Courts may not import additional remedies beyond what the two statutes expressly authorize. *See, e.g.*, *Bender v. Jamaica Hosp.*, 40 N.Y.2d 560, 562 (1976) ("The courts are not free to legislate" but rather "must apply the plain import of [a] statute").[1]

Until this Court issued its decision in this case, *every* New York court that had squarely addressed the question whether remedies not expressly authorized by Executive Law § 63(12) are available to the Attorney General had rightly concluded that they are not. *See, e.g.*, Transcript of Hearing at 29-32 (disgorgement not available); *Agip Gas*, 2013 N.Y. Slip Op. 32805(U), at *5 (disgorgement not available); *Direct Revenue*, 2008 N.Y. Slip Op. 50845(U), at *8 (disgorgement not available); *State v. Solil Mgmt. Corp.*, 128 Misc.2d 767, 773 (Sup. Ct.) (punitive damages and treble damages not available), *aff'd,* 114 A.D.2d 1057 (1st Dept. 1985); *State v. Hotel Waldorf-Astoria Corp.*, 67 Misc.2d 90, 91 (Sup. Ct. 1971) (treble damages not available). Similarly, no court had held that disgorgement is a permissible remedy under the Martin Act. This Court erred when it disagreed with that consistent body of precedent.

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[1] *Excelsior 57th Corp. v. Lerner*, 160 A.D.2d 407, 408-09 (1st Dept. 1990), a fraudulent-concealment case which this Court cited in its opinion, is not to the contrary. Whether or not courts have the equitable power to compel disgorgement in common-law cases has no bearing on the question here, which is whether they have that power under a statute that specifies particular remedies.

2. This Court relied largely on a dictum from the Court of Appeals' opinion in *Applied Card* as a basis for ignoring the *expressio unius* canon of statutory construction and holding that the Martin Act and Executive Law § 63(12) impliedly authorize the Attorney General to sue for disgorgement. That reliance was misplaced. As Justice Oing recognized below, *Applied Card* was a "preemption case" that did not present the question whether the Martin Act or § 63(12) provides for disgorgement. *See* Transcript of Hearing at 15. The *Applied Card* court merely mentioned, in a dictum, that the Attorney General "*might* be able to obtain disgorgement" under § 63(12); the Court of Appeals did not decide the question one way or the other and, indeed, expressly declined to do so. 11 N.Y.3d at 125-26 & n.17 (emphasis added).

This Court's opinion also looked to federal cases holding that federal courts may order disgorgement in cases brought by the SEC (*see People v. Ernst & Young, LLP*, 980 N.Y.S.2d 456, 457 (1st Dept. 2014)), but it does not follow that state courts have the same power under the Martin Act and Executive Law § 63(12). Although it is true that federal securities-law decisions are "persuasive" authority in New York courts interpreting the Martin Act[2] (*see All Seasons Resorts*, 68 N.Y.2d at 87), New York courts have also acknowledged that "there are im-

[2] *Amici* note that there is *no* New York authority for the proposition that federal securities-law cases have even persuasive weight with respect to interpretation of Executive Law § 63(12).

portant differences between the [Martin Act] and its Federal counterpart." *People v. Landes*, 84 N.Y.2d 655, 660 (1994). Federal decisions, therefore, are certainly not *binding* authority with respect to the Martin Act, and state courts are free to disregard them in appropriate circumstances.

Federal decisions permitting disgorgement under the federal securities laws are, in any event, distinguishable here. Those decisions rest on the fact that nothing in those laws "even implies a restriction on the equitable remedies of the [federal] courts." *E.g.*, *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). Federal courts have accordingly held that they have power to order disgorgement "simply because the relevant provisions of [the federal securities laws] . . . vest jurisdiction in the federal courts." *Id.* The Martin Act, by contrast, specifies particular equitable remedies that are available to the Attorney General and the rationale of the federal securities-law precedents is thus entirely inapposite.

3. It is particularly inappropriate for this Court to hold that unenumerated remedies are available under the Martin Act—a statute that the New York legislature has "amended on a number of occasions to broaden its reach." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 350 (2011). As enacted in 1921, the Martin Act primarily provided for injunctive relief and criminal penalties. The legislature amended the statute in 1955 to eliminate the need for

the Attorney General to prove scienter, and it acted again in 1976 to allow the Attorney General to sue for restitution for investors. *Id.*

Where the legislature has taken such an active role in controlling and adjusting a statute's means of enforcement, courts should be especially loath to take it upon themselves to recognize new remedies that the legislature has not seen fit to make available. *See, e.g.*, *Steinberg v. Steinberg*, 46 A.D.2d 684, 684 (2d Dept. 1974) (in "an area comprehensively covered by the Legislature, the courts may not fashion remedies not provided by statute").

4. At a minimum, this Court erred by holding that disgorgement is available under the Martin Act and § 63(12) in cases in which the State does not allege that a defendant's purportedly ill-gotten gains came from either the public or the State. As one New York court has previously observed, the monetary remedies expressly mentioned in § 63(12)—restitution and damages—relate to harm to the public, or the State; thus, even if disgorgement *were* available under § 63(12), it would similarly not extend to "profits received from sources other than the public." *Direct Revenue*, 2008 N.Y. Slip Op. 50845(U), at *8. Similarly, the Court of Appeals' dictum in *Applied Card*—the basis for this Court's decision here—concerned only the possibility of disgorgement of profits "derived from . . . New York consumers." 11 N.Y.3d at 125. This Court therefore had no basis for holding that dis-

gorgement is available when, as here (*see* Transcript of Hearing at 9-10), no loss to either the State or the public is alleged.

CONCLUSION

The Court should grant the motion for leave to appeal.

Respectfully submitted,

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