# APPENDIX 1

To Be Argued By:
RICHARD DEARING

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

CMMF, LLC,

Plaintiff-Appellant-Cross-Respondent,

-against-

J.P. MORGAN INVESTMENT MANAGEMENT, INC. and TED C. UFFERFILGE,

Defendants-Respondents-Cross-Appellants.

New York County Index
No. 601924/09

# BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE

ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway, 25th Floor
New York, New York 10271
(212)416-6685

BARBARA D. UNDERWOOD
*Solicitor General*
RICHARD DEARING
*Deputy Solicitor General*
ROBERT C. WEISZ
*Assistant Solicitor General*
*of Counsel*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES** **PAGE**

**STATUTES**

## REGULATIONS



## OTHER AUTHORITIES

## INTEREST OF THE ATTORNEY GENERAL

This case presents, inter alia, the question whether General Business Law article 23-a, commonly known as the Martin Act, which is enforceable exclusively by the Attorney General, preempts the private common law claims of plaintiff-appellant-cross-respondent CMMF against its former investment advisor for negligence, negligent misrepresentation, and breach of fiduciary duty. The Attorney General submits this brief *amicus curiae* to explain that the Martin Act has no such preemptive effect.[1]

Supreme Court correctly held that the Martin Act does not bar plaintiff's claims, but its analysis rests on the erroneous assumption that certain other common law claims, not present here, would be barred. Moreover, some state trial courts, like Supreme Court here, as well as various federal courts, have begun to advance an interpretation of the Martin Act that incorrectly finds preemption of private actions alleging fraud in the sale of securities, or tortious conduct similar in

---

[1] This brief does not address any of the other issues presented by the parties on this appeal.

other ways to the fraud that can be the subject of an enforcement action by the Attorney General under the Martin Act.

The Attorney General has a strong interest in correcting this mistaken understanding of the statute. The Martin Act, which is enforceable only by the Attorney General, neither increased nor diminished the remedies available to private litigants. First, there is no warrant in the text and history of the Martin Act for finding any intent to preempt existing common-law actions. Second, the policy argument most often advanced to support preemption is that it is needed in order to protect the exclusive authority of the Attorney General to enforce the Martin Act. But that argument is misplaced. Private common-law actions for the most part advance, and do not hinder, the Attorney General's fundamental mission under the Martin Act to eliminate fraudulent practices in the sale or purchase of securities across this State, because the Attorney General cannot possibly take sole responsibility for policing the marketplace in securities for fraud.

## STATEMENT OF THE CASE

### A. Overview of the Martin Act

The Martin Act authorizes the Attorney General to investigate whenever it appears that any person is, was, or will be engaged in "fraudulent practices" involving securities. General Business Law ("G.B.L.") § 352(1). "The words 'fraud' and 'fraudulent practice' in this connection [are] given a wide meaning so as to include 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 purpose of the law." *People v. Federated Radio Corp.*, 244 N.Y. 33, 38-39 (1926).

If the Attorney General concludes that a fraudulent practice has been, is being, or will be committed, he may bring a civil action for injunctive relief and restitution, among other remedies. G.B.L. §§ 352-i, 353. The Attorney General may also criminally prosecute any person who has engaged in a fraudulent practice in violation of the Martin Act. *Id.* § 352-c. In a civil claim under the Martin Act, the Attorney General need not prove traditional common-law fraud elements such as scienter or reliance. *See, e.g., People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d

588, 595 (1976); *State v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 (1st Dep't 1995).

The Martin Act does not require the registration of most securities before they are offered for sale. *People v. Landes*, 84 N.Y.2d 655, 660-61 (1994). Registration is, however, required in connection with sales of interests in real estate syndications, such as condominium ("condo") or co-operative ("co-op") housing. The Martin Act provides that before offering condo units or co-op shares for sale, the sponsor of such sales must first submit an offering plan to the Attorney General for review. *See* GBL § 352-e(1). The offering plan must disclose numerous items listed in the statute, as well as additional information prescribed in extensive regulations promulgated by the Attorney General. *See id.* § 352-e(6)(a); 13 N.Y.C.R.R. parts 16-25. The Attorney General's acceptance for filing of an offering plan does not constitute approval of the sale. G.B.L. § 352-e(4). The offering plan, as filed with the Attorney General, must be furnished to prospective purchasers. *Id.* § 352-e(5).

### B. The Nature of the Complaint at Issue Here

The gravamen of CMMF's complaint is that its investment advisor mismanaged its investment portfolio and misled it about the status of its portfolio. The allegations below are drawn from the complaint, which is assumed to be true for the purpose of defendants' motion to dismiss. *See, e.g., Depetris & Bachrach, LLP v. Srour*, 2010 N.Y. Slip Op. 01840, at *1 (1st Dep't Mar. 9, 2010).

The complaint alleges that CMMF is a "master feeder fund," an investment vehicle through which member funds can invest their assets (Joint Record on Appeal ["R."] 29-30). CMMF retained defendant J.P. Morgan Investment Management, Inc. ("J.P. Morgan") to act as its investment advisor (R. 33, 37-39), and defendant Ted C. Ufferflige was the J.P. Morgan employee assigned to manage CMMF's account (R. 30).

CMMF advised defendants that it wanted its portfolio to be diversified and relatively low risk (R. 33-36). Nonetheless, defendants invested CMMF's assets heavily in risky securities, particularly those based upon sub-prime and "Alt-A" residential real estate loans. Defendants increased CMMF's exposure to such securities even after J.P. Morgan concluded that it did not desire to hold them in its own

portfolio. (R. 37-48). When CMMF began to notice losses in its portfolio and ask questions, defendants falsely assured it that its assets were invested in high quality, government-backed securities (R. 48-56). As a result of defendants' actions, CMMF lost at least $98 million (R. 29, 58-61).

### C. Procedural History

CMMF filed this action in Supreme Court, New York County, in June 2009 (R. 25), asserting common-law claims for breach of contract, negligence, breach of fiduciary duty, and negligent misrepresentation (R. 56-61). Defendants moved to dismiss the complaint (R. 78-79), arguing among other things that CMMF's tort claims were preempted by the Martin Act.

By Order entered December 11, 2009, Supreme Court (Schweitzer, J.), dismissed the contract claim in part (R. 15-18), but refused to dismiss the tort claims for negligence, breach of fiduciary duty, and negligent misrepresentation as preempted by the Martin Act. Supreme Court reasoned that while the Martin Act preempts private common law tort claims that "mimic" Martin Act claims, CMMF's claims were not preempted because they did not assert fraudulent conduct within

the reach of the Martin Act, but rather alleged mismanagement of an investment portfolio. (R. 19-20).

After finding that CMMF's tort claims were not preempted, Supreme Court addressed them on the merits. The court dismissed the negligence and breach of fiduciary duty claims as duplicative of the surviving contract claim (R. 20-22), but held that the negligent misrepresentation claim adequately alleged the elements necessary to state a cause of action (R. 22-23).

CMMF appealed to the extent its claims were dismissed in whole or in part (R. 4-5), and defendants cross-appealed to the extent dismissal was denied (R. 8-9).

## ARGUMENT

### THE MARTIN ACT DOES NOT PREEMPT INDEPENDENT COMMON-LAW CAUSES OF ACTION IN THE AREA OF INVESTMENT SECURITIES

Preemption is a matter of legislative intent. *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 324 (1983). Nothing in the text or history of the Martin Act suggests that the Legislature intended to preempt private common-law causes of action in the

investment securities context. To the contrary, the Martin Act was intended to supplement existing causes of action and to expand the Attorney General's enforcement authority.

As the Court of Appeals has recognized, "when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute." *Id.* at 324 (quotation marks omitted). Thus when the Legislature authorized the Attorney General or other appropriate legal officer to enforce a statutory ban on strikes by public employees, that legislation neither created a private statutory right of action nor preempted existing private common-law remedies. *Id.* at 324-32.

So too here: the Martin Act creates no private right of action, but also does not preempt common-law remedies whose source is independent of the statute. In *CPC International, Inc. v. McKesson Corporation*, 70 N.Y.2d 268 (1987), the Court of Appeals held that there is no implied private right of action to enforce the Martin Act, resolving a division of authority among lower state and federal courts. *Id.* at 275-77. But *McKesson* did not suggest that the Martin Act preempts common-law remedies. To the contrary, *McKesson* reinstated the

plaintiff's common-law fraud claim against its investment banker. *Id.* at 284-85.

Nothing in the Martin Act suggests an intent to preempt private common-law causes of action, let alone the clear intent required to overcome the presumption against abrogation of common-law remedies. The text of the Martin Act does not address private common-law claims. Instead, it vests the Attorney General with powers to investigate and prosecute fraudulent practices involving securities. Nor does anything in the statute's legislative history indicate an intent to preempt common-law claims. And the purpose or design of the Martin Act is in no way impaired by private common-law claims that exist independently of the statute, since statutory actions by the Attorney General and private common-law actions both further the same goal, namely combating fraud and deception in securities transactions.

In fact, the history of the Martin Act refutes any suggestion that the statute was meant to supplant private common-law remedies. As originally enacted in 1921, the Martin Act conferred quite limited remedial powers on the Attorney General, authorizing the Attorney General only to restrain imminent fraud, not to redress frauds already

completed. *See* Act of May 7, 1921, ch. 649, 1921 N.Y. Laws 1989. Although the Legislature has since enlarged the Attorney General's civil enforcement powers from time to time through statutory amendments, it has never displayed any intention to displace the common law. In 1923, the Legislature extended the Attorney General's injunctive authority to reach completed frauds, Act of May 22, 1923, ch. 600, 1923 N.Y. Laws 899, 900, and two years after that, added the power for the Attorney General to seek receiverships, Act of April 1, 1925, ch. 239, 1925 N.Y. Laws 485, 487. And, in 1976 the Legislature codified the Attorney General's power to seek restitution for injured investors. *See* Act of July 20, 1976, ch. 559, 1976 N.Y. Laws (unpaginated); Memorandum for the Governor from Louis J. Lefkowitz, Attorney General (July 9, 1976), *reprinted in* Bill Jacket for ch. 559 (1976). At that time, the Office of Court Administration observed that the power for the Attorney General to seek restitution benefited "small investors who can not afford to maintain individual actions," thereby implicitly recognizing that private actions remained available. *See* Letter from Michael R. Juviler, Office of Court Administration, to

Judah Gribetz, Counsel to the Governor (July 15, 1976), *reprinted in* Bill Jacket for ch. 559 (1976).[2]

J.P. Morgan argues (J.P. Morgan Br. at 37-40) that while common law claims requiring scienter are not preempted, the Martin Act bars any common-law cause of action alleging deceit in securities transactions where the claim does not require proof of scienter as an element. J.P. Morgan's theory seems to be that non-scienter-based claims are the special province of the Martin Act, and private claims of that nature are barred because they "essentially mimic the Martin Act," whereas common-law fraud claims "require an additional element" beyond what the Attorney General must prove under the Martin Act, and are therefore not barred. *Nanopierce Techs., Inc. v. Southridge Capital Mgmt.*, No. 02 CV 0767 (LBS), 2003 WL 22052894, at *4 (S.D.N.Y. Sept. 2, 2003), *cited in* J.P. Morgan Br. at 38-39. While this theory has been adopted by a few state trial courts and federal courts,[3]

---

[2] In addition to these civil remedies, the Legislature added a provision authorizing the Attorney General to pursue criminal prosecutions, G.B.L. section 352-c, in 1955. Act of April 21, 1955, ch. 553, 1955 N.Y. Laws 1255, 1257.

[3] *See, e.g., Assured Guaranty (UK) LTD. v. J.P. Morgan Inv. Mgmt.*, Index No. 603755/08 (Sup. Ct. N.Y. County Jan. 28, 2010) (appeal to this Court perfected for June 2010 term); *Aris Multi-Strategy Offshore Fund v. Devaney*, 26 Misc. 3d 1221(A)

it has no support in the statute; the proposed distinction between claims that require scienter and those that do not is both legally irrelevant and premised on a mistake of fact.

The proposed distinction is irrelevant because even if private non-scienter-based common law claims had exactly the same elements as the Attorney General's claims under the Martin Act (and, as shown below, they do not), the common-law claims would not be barred because, as explained above, the legislature expressed no intent to preempt private common law claims. Non-scienter-based causes of action like breach of fiduciary duty and negligent misrepresentation have broad and deep roots at common law that are in no way derived from the Martin Act. *See, e.g., Meinhard v. Salmon*, 249 N.Y. 458 (1928) (fiduciary duty); *Colburn v. Morton*, 1 Abb. Dec. 378 (N.Y. Ct. of App. 1867) (fiduciary duty); *Batterson v. Raymond*, 87 Misc. 229 (Sup. Ct. N.Y. County) (stockbroker has fiduciary duty to client), *aff'd*, 165

---

(Sup. Ct. N.Y. County Dec. 14, 2009) (notice of appeal to this Court filed, but appeal not yet perfected); *Jana Master Fund v. JPMorgan Chase & Co.*, 19 Misc. 3d 1106(A) (Sup. Ct. N.Y. County Mar. 12, 2008); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171 (2d Cir. 2001); *Nanopierce Techs. v. Southridge Capital Mgmt. LLC*, No. 02 CV 0767, 2003 WL 22052894 (S.D.N.Y. Sept. 2, 2003); *Independent Order of Foresters v. Donaldson, Lufkin & Jenrette Inc.*, 919 F. Supp. 149 (S.D.N.Y. 1996).

A.D. 954 (1st Dept. 1914); *Int'l Prods. Co. v. Erie R.R. Co.*, 244 N.Y. 331 (1927) (negligent misrepresentation); *Glanzer v. Shepard*, 233 N.Y. 236 (1922) (negligent misrepresentation). Where well-recognized common-law causes of action exist entirely independently of the Martin Act, their assertion by a private plaintiff in a securities case cannot be described as a prohibited attempt to enforce the Martin Act itself. Any rule barring such claims would go beyond prohibiting private Martin Act actions and hold that the Martin Act affirmatively preempts the common law, which nothing in the statute supports.

In any event, the proposed distinction between common-law fraud and non-scienter-based common-law claims is based on the mistaken premise that Martin Act claims and non-scienter-based common law claims have exactly the same elements. Just like common-law fraud claims, common-law claims that do not require scienter nonetheless require a private plaintiff to prove one or more elements that the Attorney General need not establish under the Martin Act. For example, a claim for breach of fiduciary duty requires, among other things, proof of the existence of a fiduciary relationship, *see Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dep't 2007), *leave dismissed*, 62 A.D.3d

758 (2d Dep't 2009), which is not an element of a Martin Act claim. Similarly, a claim for negligent misrepresentation requires, among other things, proof of a special relationship of trust and confidence and proof of reasonable reliance on the defendant's misrepresentation, *Hudson River Club v. Consolidated Edison Co. of N.Y., Inc.*, 275 A.D.2d 218, 220 (1st Dep't 2000), and neither is an element of a Martin Act claim. While Martin Act claims and non-scienter-based common-law claims may overlap to varying degrees, they are not in fact identical.

The only two state appellate courts to consider the issue have held that the Martin Act does not bar claims for breach of fiduciary duty or negligent misrepresentation in the investment securities context. In *Scalp & Blade, Inc. v. Advest, Inc.*, 281 A.D.2d 882, 883 (4th Dep't 2001), for example, the Fourth Department reinstated negligent misrepresentation and breach of fiduciary duty claims against investment advisors over a claim of Martin Act preemption. The court held that "[n]othing in the Martin Act, or in the Court of Appeals cases construing it, precludes a plaintiff from maintaining common-law causes of action based on such facts as might give the Attorney General a basis for proceeding civilly or criminally against a defendant under

the Martin Act." *Id.* In *Rasmussen v. A.C.T. Envtl. Servs. Inc.*, 292 A.D.2d 710, 712 (3d Dep't 2002), the Third Department, citing *Scalp & Blade*, considered on the merits breach of fiduciary duty and negligent misrepresentation claims against an investment advisor, rejecting without discussion the defendant's argument of Martin Act preemption.[4]

Moreover, on the same day that it rejected a private right of action under the Martin Act in *McKesson*, the Court of Appeals considered on the merits a private breach of fiduciary duty claim involving securities, without giving any indication that the claim might be preempted by the Martin Act. In *Green v. Santa Fe Industries, Inc.*, 70 N.Y.2d 244 (1987), former minority shareholders of a company sued the majority shareholder and two of its affiliates for damages allegedly inflicted by a "freezeout" merger. *Id.* at 249-50. The Court held that the plaintiffs could not bring a claim under the Martin Act, *id.* at 256 (citing *McKesson*, 70 N.Y.2d 268), but did not find any bar to reaching the

---

4 *See* Brief of Defendant/Third-Party Plaintiff-Respondent Eslin Brace, Individually and d/b/a Stockade Investment Advisors at 15-17, *Rasmussen v. A.C.T. Envtl. Servs., Inc.*, App. Div. No. 90490 (3d Dep't undated) (arguing that Martin Act precluded claims for breach of fiduciary duty and negligent misrepresentation).

merits of their breach of fiduciary duty claim. The Court ultimately dismissed the claim on the merits, not because of any Martin Act preemption. *Id.* at 256-61.

The state trial court and federal court decisions finding that the Martin Act affirmatively preempts independent common-law claims in securities cases frequently rely on a handful of state appellate decisions addressing condo and co-op offerings. *See, e.g., Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236 (2009); *Whitehall Tenants Corp. v. Estate of Olnick*, 213 A.D.2d 200 (1st Dep't 1995); *Horn v. 440 East 57th Co.*, 151 A.D.2d 112 (1st Dep't 1989); *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Assocs.*, 191 A.D.2d 621 (2d Dep't 1993) (all cited by the court below or the parties in this appeal). But these decisions depend on features of the legal landscape that are unique to the field of condo and co-op regulation, and have no application here.

Because the Martin Act and the Attorney General's implementing regulations impose detailed disclosure requirements on condo and co-op sponsors, private claims in that field pleaded as common-law causes of action may in fact rely on disclosure obligations arising from the Martin

Act. In each of the cases cited above, the court found such reliance,[5] and therefore found that the private claim amounted to a violation of the well-settled rule that private parties may not enforce the Martin Act.[6]

Because the Martin Act creates no disclosure regime for investment securities – let alone a regime comparable to the detailed disclosure requirements for condo and co-op offerings – these real estate decisions shed no light on the questions presented here. In this case, there can be no doubt that CMMF's tort claims are properly before this

---

[5] Although the plaintiff's reliance on the Martin Act's disclosure obligations is not always clear from the face of these decisions, it is apparent from the relevant appellate briefs. *See* Brief of Plaintiff-Appellant at 22, *Whitehall Tenants Corp. v. Estate of Olnick*, N.Y. County Index No. 498/89 (1st Dep't Sept. 29, 1994) (arguing that reliance on misrepresentations in offering plan may be inferred from requirement that offering plan be filed); Brief for Plaintiff-Respondent-Appellant at 27 & n.14, *Horn v. 440 East 57th Co.*, N.Y. County Index No. 7017/88 (1st Dep't undated) (relying on sponsor's Martin Act obligations in support of claim that sponsor owed heightened duty to buyer); Brief of Plaintiff-Appellant at 15-18, *Rego Park Gardens Owners, Inc. v. Rego Park Gardens Assocs.*, App. Div. No. 90-05220 (2d Dep't undated) (relying on Martin Act offering plan requirement to establish special relationship).

[6] Although, in *Kerusa* the Court of Appeals concluded, unlike this Court, that the particular claims at issue in that case amounted to a prohibited private attempt to enforce the Martin Act, in view of the plaintiffs' reliance on Martin Act disclosure obligations, *Kerusa* did not undermine this Court's observation that a genuinely independent private cause of action would not be preempted merely because a parallel Martin Act proceeding could also be brought on the same facts: "to throw the plaintiff out of court merely because the Attorney General would be entitled to relief under the Martin Act on the strength of the same allegations, or a subset of those allegations, makes no sense." *Kramer v. W10Z/515 Real Estate Ltd. P'ship*, 44 A.D.3d 457, 459 (1st Dep't 2007), *rev'd sub nom. Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 12 N.Y.3d 236 (2009).

court on the merits, and are not preempted by the Martin Act. This result is consistent with all relevant New York precedent, and recognizes and maintains the separation between the Martin Act and the common law as independent bodies of law. If CMMF's complaint adequately pleads claims for negligence, breach of fiduciary duty, and negligent misrepresentation under common-law principles (a question on which this brief takes no position), those claims should be sustained. If the complaint does not, the claims should be dismissed. The Martin Act has no relevance to that question.

The various preemption rules advocated by the parties and by the court below would lead to unnecessary questions about the Attorney General's Martin Act enforcement powers in private lawsuits, whereas the simple and correct understanding that the Martin Act neither created nor destroyed any private rights of action will not. If claims were preempted when they are within "the reach of the [Martin] Act" and thus "mimic" claims that could be brought by the Attorney General under the Martin Act (R. 19), then courts would regularly be called upon to decide questions about the proper reach of the Martin Act in private litigation, without the participation of the Attorney General.

Indeed, Supreme Court's decision in this case, while reaching the correct result, engages in precisely that detrimental (and incorrect) form of analysis. In concluding that CMMF's claims were not barred by the Martin Act, Supreme Court suggested that the claims allege conduct that would not be actionable under the Martin Act (R. 20). The court should have rejected Martin Act preemption and evaluated CMMF's common-law claims solely under common-law principles, thereby avoiding any need to address the extent of the Attorney General's Martin Act powers.

## CONCLUSION

For the foregoing reasons, the Court should affirm the order below to the extent that it declined to dismiss CMMF's claims for negligence, negligent misrepresentation, and breach of fiduciary duty on the ground that they are preempted by the Martin Act.

Dated: New York, NY
April 7, 2010

Respectfully submitted,

ANDREW M. CUOMO
*Attorney General of the State of New York*

By: 
Richard Dearing
Deputy Solicitor General

120 Broadway
New York, NY 10271
Telephone (212) 416-6685

BARBARA D. UNDERWOOD
*Solicitor General*
RICHARD DEARING
*Deputy Solicitor General*
ROBERT C. WEISZ
*Assistant Solicitor General of Counsel*

## PRINTING SPECIFICATIONS STATEMENT

Pursuant to Appellate Division Rule 22 N.Y.C.R.R. § 600.10.3(d)(1)(v), I hereby certify that the foregoing brief was prepared on a computer (on a word processor). A monospaced typeface was used, as follows:

Typeface: Century Schoolbook

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 3,361.

# APPENDIX 2

To Be Argued By:
RICHARD DEARING

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

ASSURED GUARANTY (UK) LTD., in its own right and in the right of ORKNEY RE II PLC,

Plaintiff-Appellant,

-against-

J.P. MORGAN INVESTMENT MANAGEMENT INC.,

Defendant-Respondent.

New York County Index
No. 603755/08

# BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE


ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway, 25th Floor
New York, New York 10271
(212)416-6685

BARBARA D. UNDERWOOD
*Solicitor General*
RICHARD DEARING
*Deputy Solicitor General*
ROBERT C. WEISZ
*Assistant Solicitor General*
*of Counsel*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES** **PAGE**

**STATUTES**

## REGULATIONS



## OTHER AUTHORITIES

## INTEREST OF THE ATTORNEY GENERAL

This case presents, inter alia, the question whether General Business Law article 23-a, commonly known as the Martin Act, which is enforceable exclusively by the Attorney General, preempts the private common-law claims of plaintiff-appellant Assured Guaranty (UK) Ltd. ("Assured Guaranty") against an investment advisor for breach of fiduciary duty and gross negligence. The Attorney General submits this brief *amicus curiae* to explain that the Martin Act has no such preemptive effect.[1]

Supreme Court incorrectly held that the Martin Act bars plaintiff's common-law tort claims. Moreover, some state trial courts, like Supreme Court here, as well as various federal courts, have begun to advance an interpretation of the Martin Act that incorrectly finds preemption of private actions alleging fraud in the sale of securities, or tortious conduct similar in other ways to the fraud that can be the subject of an enforcement action by the Attorney General under the Martin Act.

---

[1] This brief does not address any of the other issues presented by the parties on this appeal.

The Attorney General has a strong interest in correcting this mistaken understanding of the statute. The Martin Act, which is enforceable only by the Attorney General, neither increased nor diminished the remedies available to private litigants. First, there is no warrant in the text and history of the Martin Act for finding any intent to preempt existing common-law actions. Second, the policy argument most often advanced to support preemption is that it is needed in order to protect the exclusive authority of the Attorney General to enforce the Martin Act. But that argument is misplaced. Private common-law actions for the most part advance, and do not hinder, the Attorney General's fundamental mission under the Martin Act to eliminate fraudulent practices in the sale or purchase of securities across this State, because the Attorney General cannot possibly take sole responsibility for policing the marketplace in securities for fraud.

## STATEMENT OF THE CASE

### A. Overview of the Martin Act

The Martin Act authorizes the Attorney General to investigate whenever it appears that any person is, was, or will be engaged in "fraudulent practices" involving securities. General Business Law ("G.B.L.") § 352(1). "The words 'fraud' and 'fraudulent practice' in this connection [are] given a wide meaning so as to include 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 purpose of the law." *People v. Federated Radio Corp.*, 244 N.Y. 33, 38-39 (1926).

If the Attorney General concludes that a fraudulent practice has been, is being, or will be committed, he may bring a civil action for injunctive relief and restitution, among other remedies. G.B.L. §§ 352-i, 353. The Attorney General may also criminally prosecute any person who has engaged in a fraudulent practice in violation of the Martin Act. *Id.* § 352-c. In a civil claim under the Martin Act, the Attorney General need not prove traditional common-law fraud elements such as scienter or reliance. *See, e.g., People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d

588, 595 (1976); *State v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 (1st Dep't 1995).

The Martin Act does not require the registration of most securities before they are offered for sale. *People v. Landes*, 84 N.Y.2d 655, 660-61 (1994). Registration is, however, required in connection with sales of interests in real estate syndications, such as condominium ("condo") or co-operative ("co-op") housing. The Martin Act provides that before offering condo units or co-op shares for sale, the sponsor of such sales must first submit an offering plan to the Attorney General for review. *See* GBL § 352-e(1). The offering plan must disclose numerous items listed in the statute, as well as additional information prescribed in extensive regulations promulgated by the Attorney General. *See id.* § 352-e(6)(a); 13 N.Y.C.R.R. parts 16-25. The Attorney General's acceptance for filing of an offering plan does not constitute approval of the sale. G.B.L. § 352-e(4). The offering plan, as filed with the Attorney General, must be furnished to prospective purchasers. *Id.* § 352-e(5).

### B. The Nature of the Complaint at Issue Here

The gravamen of Assured Guaranty's action is that an investment advisor mismanaged the investment portfolio of a debtor whose obligations plaintiff guaranteed. The allegations below are drawn from the amended complaint, which is assumed to be true for the purpose of defendants' motion to dismiss. *See, e.g.*, *Depetris & Bachrach, LLP v. Srour*, 2010 N.Y. Slip Op. 01840, at *1 (1st Dep't Mar. 9, 2010).

The complaint alleges that Assured Guaranty was asked to act as financial guarantor for certain notes issued by non-party Orkney Re II plc ("Orkney"), a special purpose entity established by non-party Scottish Re (U.S.) Inc. ("Scottish Re") (Record on Appeal ["R."] 128-132). Because Orkney's ability to pay interest on the notes depended heavily upon maintaining the value of its invested assets (R. 131), Assured Guaranty participated in the selection of an investment advisor for Orkney, and was expressly made a third-party beneficiary of Orkney's contract with J.P. Morgan (R. 132-135). Believing that J.P. Morgan would do a good job, Assured Guaranty agreed to issue the financial guaranty (R. 136).

J.P. Morgan was advised that goal of Orkney's investing was to earn reasonable income while protecting Orkney's capital, and that Orkney needed a diversified portfolio (R. 133-136). Nonetheless, J.P. Morgan invested Orkney's assets heavily in risky securities, particularly those based upon sub-prime and "Alt-A" residential real estate loans. J.P. Morgan failed to diversify Orkney's portfolio, or advise Orkney of the true level of risk, even after J.P. Morgan concluded that it did not desire to hold these risky securities in its own portfolio. (R. 139-142, 144-147). In addition, J.P. Morgan made investment decisions for the good of Scottish Re, which retained a residual interest in Orkney's assets, rather than for the benefit of Orkney and Assured Guaranty (R. 143-144). As a result of J.P. Morgan's actions, Orkney's assets decreased substantially (R. 147-148). Despite Orkney's and Assured Guaranty's efforts to mitigate the losses, Orkney has had insufficient cash to make all note payments and Assured Guaranty has been obligated to begin making payments under its guarantee (R. 148-151).

### C. Procedural History

Assured Guaranty filed this action in Supreme Court, New York County, in December 2008 (R. 27), asserting common-law claims for breach of fiduciary duty, gross negligence, and breach of contract (R. 50-53). Assured Guaranty's amended the complaint in May 2009, but continues to seek relief under the same three causes of action (R. 122-157). Defendants moved to dismiss the amended complaint (R. 169-170), arguing among other things that Assured Guaranty's tort claims were preempted by the Martin Act (R. 198-200).

By Order entered January 29, 2010, Supreme Court (Kapnick, J.), granted the motion in its entirety (R. 9-26). The court agreed with J.P. Morgan that the tort claims are preempted by the Martin Act (R. 17-20). It held that "the claims for breach of fiduciary duty and gross negligence fall within the purview of the Martin Act and their prosecution by plaintiff would be inconsistent with the Attorney General's exclusive enforcement powers under the Act. Accordingly, they are dismissed." (R. 20 (footnote omitted)). The court also dismissed the contract claim on the merits (R. 21-26). This appeal followed (R. 7-8).

## ARGUMENT

### THE MARTIN ACT DOES NOT PREEMPT INDEPENDENT COMMON-LAW CAUSES OF ACTION IN THE AREA OF INVESTMENT SECURITIES

Preemption is a matter of legislative intent. *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 324 (1983). Nothing in the text or history of the Martin Act suggests that the Legislature intended to preempt private common-law causes of action in the investment securities context. To the contrary, the Martin Act was intended to supplement existing causes of action and to expand the Attorney General's enforcement authority.

As the Court of Appeals has recognized, "when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute." *Id.* at 324 (quotation marks omitted). Thus when the Legislature authorized the Attorney General or other appropriate legal officer to enforce a statutory ban on strikes by public employees, that legislation neither created a private statutory right of action nor preempted existing private common-law remedies. *Id.* at 324-32.

So too here: the Martin Act creates no private right of action, but also does not preempt common-law remedies whose source is independent of the statute. In *CPC International, Inc. v. McKesson Corporation*, 70 N.Y.2d 268 (1987), the Court of Appeals held that there is no implied private right of action to enforce the Martin Act, resolving a division of authority among lower state and federal courts. *Id.* at 275-77. But *McKesson* did not suggest that the Martin Act preempts common-law remedies. To the contrary, *McKesson* reinstated the plaintiff's common-law fraud claim against its investment banker. *Id.* at 284-85.

Nothing in the Martin Act suggests an intent to preempt private common-law causes of action, let alone the clear intent required to overcome the presumption against abrogation of common-law remedies. The text of the Martin Act does not address private common-law claims. Instead, it vests the Attorney General with powers to investigate and prosecute fraudulent practices involving securities. Nor does anything in the statute's legislative history indicate an intent to preempt common-law claims. And the purpose or design of the Martin Act is in no way impaired by private common-law claims that exist

independently of the statute, since statutory actions by the Attorney General and private common-law actions both further the same goal, namely combating fraud and deception in securities transactions.

In fact, the history of the Martin Act refutes any suggestion that the statute was meant to supplant private common-law remedies. As originally enacted in 1921, the Martin Act conferred quite limited remedial powers on the Attorney General, authorizing the Attorney General only to restrain imminent fraud, not to redress frauds already completed. *See* Act of May 7, 1921, ch. 649, 1921 N.Y. Laws 1989. Although the Legislature has since enlarged the Attorney General's civil enforcement powers from time to time through statutory amendments, it has never displayed any intention to displace the common law. In 1923, the Legislature extended the Attorney General's injunctive authority to reach completed frauds, Act of May 22, 1923, ch. 600, 1923 N.Y. Laws 899, 900, and two years after that, added the power for the Attorney General to seek receiverships, Act of April 1, 1925, ch. 239, 1925 N.Y. Laws 485, 487. And, in 1976 the Legislature codified the Attorney General's power to seek restitution for injured investors. *See* Act of July 20, 1976, ch. 559, 1976 N.Y. Laws

(unpaginated); Memorandum for the Governor from Louis J. Lefkowitz, Attorney General (July 9, 1976), *reprinted in* Bill Jacket for ch. 559 (1976). At that time, the Office of Court Administration observed that the power for the Attorney General to seek restitution benefited "small investors who can not afford to maintain individual actions," thereby implicitly recognizing that private actions remained available. *See* Letter from Michael R. Juviler, Office of Court Administration, to Judah Gribetz, Counsel to the Governor (July 15, 1976), *reprinted in* Bill Jacket for ch. 559 (1976).[2]

J.P. Morgan is likely to argue, as it has below and in another pending appeal raising the same issue,[3] that while common law claims requiring scienter are not preempted, the Martin Act bars any common-law cause of action alleging deceit in securities transactions where the claim does not require proof of scienter as an element. J.P. Morgan's theory seems to be that non-scienter-based claims are the special

---

[2] In addition to these civil remedies, the Legislature added a provision authorizing the Attorney General to pursue criminal prosecutions, G.B.L. section 352-c, in 1955. Act of April 21, 1955, ch. 553, 1955 N.Y. Laws 1255, 1257.

[3] *See* Brief For Defendants-Respondents-Cross-Appellants J.P. Morgan Investment Management, Inc. and Ted C. Ufferfilge, at 37-40, *CMMF, LLC v. J.P. Morgan Inv. Mgmt., Inc.*, N.Y. County Index No. 601924/09 (1st Dep't, filed Mar. 24, 2010).

province of the Martin Act, and private claims of that nature are barred because they "essentially mimic the Martin Act," whereas common-law fraud claims "require an additional element" beyond what the Attorney General must prove under the Martin Act, and are therefore not barred. *Nanopierce Techs., Inc. v. Southridge Capital Mgmt.*, No. 02 CV 0767 (LBS), 2003 WL 22052894, at *4 (S.D.N.Y. Sept. 2, 2003).[4] While this theory has been adopted by a few state trial courts and various federal courts,[5] it has no support in the statute; the proposed distinction between claims that require scienter and those that do not is both legally irrelevant and premised on a mistake of fact.

The proposed distinction is irrelevant because even if private non-scienter-based common law claims had exactly the same elements as

---

[4] *See* Brief For Defendants-Respondents-Cross-Appellants J.P. Morgan Investment Management, Inc. and Ted C. Ufferfilge, at 38, *CMMF, LLC v. J.P. Morgan Inv. Mgmt., Inc.*, N.Y. County Index No. 601924/09 (1st Dep't, filed Mar. 24, 2010) (citing *Nanopierce Techs.*).

[5] *See, e.g.*, *Aris Multi-Strategy Offshore Fund v. Devaney*, 26 Misc. 3d 1221(A) (Sup. Ct. N.Y. County Dec. 14, 2009) (notice of appeal to this Court filed, but appeal not yet perfected); *CMMF, LLC v. J.P. Morgan Inv. Mgmt., Inc.*, Index No. 601924/09 (Sup. Ct. N.Y. County Dec. 11, 2009) (appeal to this Court perfected for May 2010 term); *Jana Master Fund v. JPMorgan Chase & Co.*, 19 Misc. 3d 1106(A) (Sup. Ct. N.Y. County Mar. 12, 2008); *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171 (2d Cir. 2001); *Nanopierce Techs. v. Southridge Capital Mgmt. LLC*, No. 02 CV 0767, 2003 WL 22052894 (S.D.N.Y. Sept. 2, 2003); *Independent Order of Foresters v. Donaldson, Lufkin & Jenrette Inc.*, 919 F. Supp. 149 (S.D.N.Y. 1996).

the Attorney General's claims under the Martin Act (and, as shown below, they do not), the common-law claims would not be barred because, as explained above, the Legislature expressed no intent to preempt private common law claims. Causes of action like breach of fiduciary duty and gross negligence have broad and deep roots at common law that are in no way derived from the Martin Act. *See, e.g.*, *Meinhard v. Salmon*, 249 N.Y. 458 (1928) (fiduciary duty); *Colburn v. Morton*, 1 Abb. Dec. 378 (N.Y. Ct. of App. 1867) (fiduciary duty); *Batterson v. Raymond*, 87 Misc. 229 (Sup. Ct. N.Y. County) (stockbroker has fiduciary duty to client), *aff'd*, 165 A.D. 954 (1st Dept. 1914); *Weld v. Postal Telegraph Cable Co.*, 210 N.Y. 59 (1913) (gross negligence); *Rieser v. Metro. Express Co.*, 45 Misc. 632 (App. Term 1904) (gross negligence). Where well-recognized common-law causes of action exist entirely independently of the Martin Act, their assertion by a private plaintiff in a securities case cannot be described as a prohibited attempt to enforce the Martin Act itself. Any rule barring such claims would go beyond prohibiting private Martin Act actions and hold that the Martin Act affirmatively preempts the common law, which nothing in the statute supports.

In any event, the proposed distinction between common-law fraud and non-scienter-based common-law claims is based on the mistaken premise that Martin Act claims and non-scienter-based common law claims have exactly the same elements. Just like common-law fraud claims, common-law claims that do not require scienter nonetheless require a private plaintiff to prove one or more elements that the Attorney General need not establish under the Martin Act. For example, a claim for breach of fiduciary duty requires, among other things, proof of the existence of a fiduciary relationship, *see Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dep't 2007), *leave dismissed*, 62 A.D.3d 758 (2d Dep't 2009), which is not an element of a Martin Act claim. Similarly, a claim for gross negligence requires, among other things, proof of "'a reckless disregard for the rights of others, bordering on intentional wrongdoing,'" *Horwitz v. Camelot Assocs.*, 66 A.D.3d 1299, 1302 (3d Dep't 2009), which is not an element of a Martin Act claim. While Martin Act claims and non-scienter-based common-law claims may overlap to varying degrees, they are not in fact identical.

The only two state appellate courts to consider the issue have held that the Martin Act does not bar non-scienter-based common-law claims

in the investment securities context. In *Scalp & Blade, Inc. v. Advest, Inc.*, 281 A.D.2d 882, 883 (4th Dep't 2001), for example, the Fourth Department reinstated negligent misrepresentation and breach of fiduciary duty claims against investment advisors over a claim of Martin Act preemption. The court held that "[n]othing in the Martin Act, or in the Court of Appeals cases construing it, precludes a plaintiff from maintaining common-law causes of action based on such facts as might give the Attorney General a basis for proceeding civilly or criminally against a defendant under the Martin Act." *Id.* In *Rasmussen v. A.C.T. Envtl. Servs. Inc.*, 292 A.D.2d 710, 712 (3d Dep't 2002), the Third Department, citing *Scalp & Blade*, considered on the merits breach of fiduciary duty and negligent misrepresentation claims against an investment advisor, rejecting without discussion the defendant's argument of Martin Act preemption.[6]

Moreover, on the same day that it rejected a private right of action under the Martin Act in *McKesson*, the Court of Appeals considered on

---

[6] *See* Brief of Defendant/Third-Party Plaintiff-Respondent Eslin Brace, Individually and d/b/a Stockade Investment Advisors at 15-17, *Rasmussen v. A.C.T. Envtl. Servs., Inc.*, App. Div. No. 90490 (3d Dep't undated) (arguing that Martin Act precluded claims for breach of fiduciary duty and negligent misrepresentation).

the merits a private breach of fiduciary duty claim involving securities, without giving any indication that the claim might be preempted by the Martin Act. In *Green v. Santa Fe Industries, Inc.*, 70 N.Y.2d 244 (1987), former minority shareholders of a company sued the majority shareholder and two of its affiliates for damages allegedly inflicted by a "freezeout" merger. *Id.* at 249-50. The Court held that the plaintiffs could not bring a claim under the Martin Act, *id.* at 256 (citing *McKesson*, 70 N.Y.2d 268), but did not find any bar to reaching the merits of their breach of fiduciary duty claim. The Court ultimately dismissed the claim on the merits, not because of any Martin Act preemption. *Id.* at 256-61.

The state trial court and federal court decisions finding that the Martin Act affirmatively preempts independent common-law claims in securities cases frequently rely on a handful of state appellate decisions addressing condo and co-op offerings. *See, e.g., Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236 (2009); *Whitehall Tenants Corp. v. Estate of Olnick*, 213 A.D.2d 200 (1st Dep't 1995); *Horn v. 440 East 57th Co.*, 151 A.D.2d 112 (1st Dep't 1989) (all cited by the court below or the parties in this appeal). But these

decisions depend on features of the legal landscape that are unique to the field of condo and co-op regulation, and have no application here.

Because the Martin Act and the Attorney General's implementing regulations impose detailed disclosure requirements on condo and co-op sponsors, private claims in that field pleaded as common-law causes of action may in fact rely on disclosure obligations arising from the Martin Act. In each of the cases cited above, the court found such reliance,[7] and therefore found that the private claim amounted to a violation of the well-settled rule that private parties may not enforce the Martin Act.[8]

---

[7] Although the plaintiff's reliance on the Martin Act's disclosure obligations is not always clear from the face of these decisions, it is apparent from the relevant appellate briefs. *See* Brief of Plaintiff-Appellant at 22, *Whitehall Tenants Corp. v. Estate of Olnick*, N.Y. County Index No. 498/89 (1st Dep't Sept. 29, 1994) (arguing that reliance on misrepresentations in offering plan may be inferred from requirement that offering plan be filed); Brief for Plaintiff-Respondent-Appellant at 27 & n.14, *Horn v. 440 East 57th Co.*, N.Y. County Index No. 7017/88 (1st Dep't undated) (relying on sponsor's Martin Act obligations in support of claim that sponsor owed heightened duty to buyer).

[8] Although, in *Kerusa* the Court of Appeals concluded, unlike this Court, that the particular claims at issue in that case amounted to a prohibited private attempt to enforce the Martin Act, in view of the plaintiffs' reliance on Martin Act disclosure obligations, *Kerusa* did not undermine this Court's observation that a genuinely independent private cause of action would not be preempted merely because a parallel Martin Act proceeding could also be brought on the same facts: "to throw the plaintiff out of court merely because the Attorney General would be entitled to relief under the Martin Act on the strength of the same allegations, or a subset of those allegations, makes no sense." *Kramer v. W10Z/515 Real Estate Ltd. P'ship*,

Because the Martin Act creates no disclosure regime for investment securities – let alone a regime comparable to the detailed disclosure requirements for condo and co-op offerings – these real estate decisions shed no light on the questions presented here. In this case, there can be no doubt that Assured Guaranty's tort claims are properly before this court on the merits, and are not preempted by the Martin Act. This result is consistent with all relevant New York precedent, and recognizes and maintains the separation between the Martin Act and the common law as independent bodies of law. If Assured Guaranty's complaint adequately pleads claims for breach of fiduciary duty and gross negligence under common-law principles (a question on which this brief takes no position), those claims should be sustained. If the complaint does not, the claims should be dismissed. The Martin Act has no relevance to that question.

The preemption rules advocated by J.P. Morgan and by the court below would lead to unnecessary questions about the Attorney General's Martin Act enforcement powers in private lawsuits, whereas

---

44 A.D.3d 457, 459 (1st Dep't 2007), *rev'd sub nom. Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 12 N.Y.3d 236 (2009).

the simple and correct understanding that the Martin Act neither created nor destroyed any private rights of action will not. If private claims were preempted when they "fall within the purview of the Martin Act" (R. 20), then courts would regularly be called upon to decide questions about the proper reach of the Martin Act in private litigation, without the participation of the Attorney General. Indeed, Supreme Court's decision in this case engages in precisely that detrimental (and incorrect) form of analysis (R. 20). The court should have rejected Martin Act preemption and evaluated Assured Guaranty's common-law claims solely under common-law principles, thereby avoiding any need to address the extent of the Attorney General's Martin Act powers.

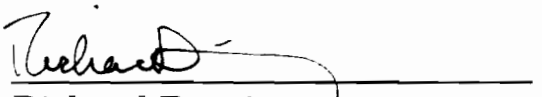
## CONCLUSION

For the foregoing reasons, the Court should reverse the order below to the extent that it dismissed plaintiff's claims for breach of fiduciary duty and gross negligence on the ground that they are preempted by the Martin Act.

Dated: New York, NY
April 7, 2010

Respectfully submitted,

ANDREW M. CUOMO
*Attorney General of the*
*State of New York*

By: 
Richard Dearing
Deputy Solicitor General

120 Broadway
New York, NY 10271
Telephone (212) 416-6685

BARBARA D. UNDERWOOD
*Solicitor General*
RICHARD DEARING
*Deputy Solicitor General*
ROBERT C. WEISZ
*Assistant Solicitor General*
*of Counsel*

## PRINTING SPECIFICATIONS STATEMENT

Pursuant to Appellate Division Rule 22 N.Y.C.R.R. § 600.10.3(d)(1)(v), I hereby certify that the foregoing brief was prepared on a computer (on a word processor). A monospaced typeface was used, as follows:

Typeface: Century Schoolbook

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 3,328.

# APPENDIX 3

71 A.D.3d 935, 898 N.Y.S.2d 564, 2010 N.Y. Slip Op. 02499
**(Cite as: 71 A.D.3d 935, 898 N.Y.S.2d 564)**

H

Supreme Court, Appellate Division, Second Department, New York.
BOARD OF MANAGERS OF MARKE GARDENS CONDOMINIUM, etc., respondent,
v.
240/242 FRANKLIN AVENUE, LLC, et al., appellants, et al., defendants.
March 23, 2010.

**Background:** Condominium board sued sponsor that contracted to develop new condominium, as well as general contractor and sponsor's manager, who was also general contractor's president, claiming common-law fraud, fraud in inducement, and violations of General Business Laws arising from alleged construction defects in condominium development. The Supreme Court, Kings County, Starkey, J., denied defendants' motion to dismiss. Defendants appealed.

**Holding:** The Supreme Court, Appellate Division, held that causes of action against general contractor's president were sufficiently alleged and not precluded by Martin Act.
Affirmed.

West Headnotes

**Antitrust and Trade Regulation 29T 282**

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)1 In General
29Tk281 Exclusive and Concurrent Remedies or Laws
29Tk282 k. In general. Most Cited Cases

**Fraud 184 31**

184 Fraud
184II Actions
184II(A) Rights of Action and Defenses
184k31 k. Nature and form of remedy. Most Cited Cases

**Securities Regulation 349B 278**

349B Securities Regulation
349BII State Regulation
349BII(A) In General
349Bk278 k. Fraudulent or other prohibited practices. Most Cited Cases
Condominium board's factual allegations against general contractor's president regarding construction defects in condominium development were sufficient to fit within cognizable legal theories for causes of action for common-law fraud, fraud in inducement, and violations of General Business Laws and were not precluded by Martin Act, where allegations were based on president's purported fraud and material misrepresentations contained in condominium offering plan, brochures, advertisements, purchase agreements, and oral statements, and allegations did not rely entirely on purported omissions from filings required by Martin Act and Attorney General's implementing regulations. McKinney's General Business Law §§ 349, 350, 352 et seq.
***564** Gabor & Marotta, LLC, Staten Island, N.Y. (Daniel C. Marotta of counsel), for appellants and defendant Royal Roofing and Construction, Inc.

Daniel F. Spitalnic, Great Neck, N.Y. for respondent.

MARK C. DILLON, J.P., FRED T. SANTUCCI, RUTH C. BALKIN, and SANDRA L. SGROI, JJ.

In an action, inter alia, to recover damages for common-law fraud, fraud in the inducement, and violations of General Business Law §§ 349 and 350, the defendants 240/242 Franklin Avenue, LLC, and Namik Marke, a/k/a Mike Marke, appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Starkey, J.), dated November 6, 2008, as denied those branches of the motion of the defendants Royal Roofing and Construction, Inc., and Namik Marke, a/k/a Mike Marke, which were pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against Namik Marke, a/k/a Mike Marke.

***565** ORDERED that the appeal by the defendant

71 A.D.3d 935, 898 N.Y.S.2d 564, 2010 N.Y. Slip Op. 02499
**(Cite as: 71 A.D.3d 935, 898 N.Y.S.2d 564)**

240/242 Franklin Avenue, LLC, is dismissed, as it is not aggrieved by the portions of the order appealed from (*see* CPLR 5511); and it is further,

ORDERED that the order is affirmed insofar as appealed from by the defendant Namik Marke, a/k/a Mike Marke; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff payable by the defendant Namik Marke, a/k/a Mike Marke.

In 2003, the defendant sponsor, 240/242 Franklin Avenue, LLC (hereinafter the sponsor), contracted to develop a new four-story condominium containing eight apartments, to be known as the Marke Gardens Condominiums, located on Franklin Avenue in Brooklyn. In 2004 the sponsor filed a condominium offering plan, as required by the Martin Act, with the New York State Attorney General (*see* General Business Law § 352 *et seq.*) which was signed personally by the defendant Namik Marke, a/k/a Mike Marke (hereinafter the defendant), who is the Sponsor's manager and the president of the defendant Royal Roofing and Construction, Inc. (hereinafter Royal), hired as the development's general contractor.

Based upon alleged defects in the development's construction, the plaintiff condominium board commenced the instant action, inter alia, to recover damages for common-law fraud, fraud in the inducement, and violations of General Business Law §§ 349 and 350, against, among others, the defendant, Royal, and the sponsor. Among other causes of action, the complaint alleged that the defendant made statements and representations orally, in the purchase agreements, and in brochures and advertisements published in connection therewith, that were false, fraudulent, and contained misrepresentations and material omissions. More specifically, the plaintiff alleged, among other things, that, pursuant to the offering plan, advertisements, brochures, and purchase agreements, the building was to be constructed with an elevator, which was never installed, and that the building was to be "a first class luxury building," but, in fact, contained numerous design and construction defects as detailed in an evaluation prepared by an engineering firm.

The defendant and Royal moved, inter alia, pursuant to CPLR 3211(a)(1) and (7) to dismiss the causes of action alleging common-law fraud, fraud in the inducement, and violations of General Business Law §§ 349 and 350 insofar as asserted against the defendant. In the order appealed from, the Supreme Court, inter alia, denied the motion to dismiss. We affirm the order insofar as appealed from.

The causes of action against the defendant were based upon the alleged fraud and material misrepresentations contained not only in the offering plan, but in brochures, advertisements, and purchase agreements, as well as oral statements made by the defendant. As such, viewing the allegations in the complaint as true, and resolving all inferences in favor of the plaintiff (*see Goldson v. Walker*, 65 A.D.3d 1084, 885 N.Y.S.2d 133, citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511), the facts as alleged fit within a cognizable legal theory, and are not precluded by the Martin Act, as they do not "rel[y] entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations" (*Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236, 247, 879 N.Y.S.2d 17, 906 N.E.2d 1049; *see CPC Intl. v. McKesson Corp.*, 70 N.Y.2d 268, 286-287, 519 N.Y.S.2d 804, 514 N.E.2d 116; ***566***Goldson v. Walker*, 65 A.D.3d at 1085, 885 N.Y.S.2d 133; *cf. Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v. Holiday Org., Inc.*, 65 A.D.3d 1284, 1287, 887 N.Y.S.2d 125). In addition, contrary to the defendant's contention, the documentary evidence does not utterly refute the plaintiff's factual allegations, nor conclusively establish a defense as a matter of law (*see Birnbaum v. Yonkers Contr. Co.*, 272 A.D.2d 355, 707 N.Y.S.2d 662; *Zanani v. Savad*, 228 A.D.2d 584, 644 N.Y.S.2d 527; *see also State of New York v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367, 622 N.Y.S.2d 516; *see generally Rubinstein v. Salomon*, 46 A.D.3d 536, 539, 849 N.Y.S.2d 69).

The defendant's remaining contention is without merit.

N.Y.A.D. 2 Dept.,2010.
Board of Managers of Marke Gardens Condominium v. 240/242 Franklin Ave., LLC
71 A.D.3d 935, 898 N.Y.S.2d 564, 2010 N.Y. Slip Op. 02499

END OF DOCUMENT