Matter of People of the State of N.Y. v Trump Entrepreneur Initiative LLC

2014 NY Slip Op 32685(U)

October 8, 2014

Supreme Court, New York County

Docket Number: 451463/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

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

Petitioner,

Index No. 451463/13

DECISION/ORDER

-against-

THE TRUMP ENTREPRENEUR INITIATIVE LLC f/k/a TRUMP UNIVERSITY LLC, DJT ENTREPRENEUR MEMBER LLC f/k/a DJT UNIVERSITY MEMBER LLC, DJT ENTREPRENEUR MANAGING MEMBER LLC f/k/a DJT UNIVERSITY MANAGING MEMBER LLC, THE TRUMP ORGANIZATION, INC., TRUMP ORGANIZATION LLC, DONALD J. TRUMP and MICHAEL SEXTON,

Respondents.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :____________________

Papers	Numbered
Notice of Petition and Petition Annexed	1
Answering Affidavits	
Notion of Motion and Affidavits Annexed	2,3,4
Affidavits in Opposition to Motion	5,6,7
Replying Affidavits	8
Exhibits	9

Petitioner The People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York ("petitioner") commenced the instant special proceeding pursuant to Executive Law ("Exec. Law") § 63(12) seeking an Order (1) enjoining respondents

[* 2]

The Trump Entrepreneur Initiative LLC f/k/a Trump University LLC, DJT Entrepreneur Member LLC, DJT Entrepreneur Managing Member LLC, The Trump Organization, Inc., Trump Organization LLC and Donald J. Trump (collectively hereinafter referred to as the "Trump Respondents") and Michael Sexton ("Mr. Sexton") from violating Exec. Law § 63(12), General Business Law ("GBL") §§ 349 and 350, Education Law ("Educ. Law") §§ 224 and 5001-5010 and 16 C.F.R. § 429 and from engaging in specific fraudulent, deceptive and illegal acts; (2) directing respondents to provide petitioner the name and address of each former customer of respondents and the amount of money received from each such former customer; (3) directing respondents to make full monetary restitution and pay damages to all injured persons or entities; (4) directing respondents to produce an accounting of profits and to disgorge all profits resulting from the alleged fraudulent and illegal practices; (5) directing respondents to pay a civil penalty to the State of New York of up to $5,000.00 for each violation of GBL Article 22-A pursuant to GBL § 350-d; and (6) awarding petitioner additional costs of $2,000.00 against each respondent pursuant to CPLR § 8303(a)(6). In or around October 2013, the Trump Respondents and Mr. Sexton separately moved for an Order dismissing the petition or, in the alternative, for leave to serve and file answers in opposition to the petition. In a decision dated January 30, 2014, this court granted in part and denied in part the Trump Respondents' and Mr. Sexton's motions to dismiss and granted them leave to file answers as to those portions of the petition the court did not dismiss. Petitioner has since re-noticed the petition and seeks a summary determination against Mr. Sexton and the Trump Respondents on the petition's remaining causes of action for (1) violation of Exec. Law § 63(12); (2) violation of GBL § 349; (3) violation of GBL § 350; (4) violation of Educ. Law §§ 5001-5010; and (5) violation of 16 C.F.R. § 429 along with a permanent injunction enjoining all respondents "from engaging in the fraudulent, deceptive, and

[* 3]

illegal acts and practices alleged in the Verified Petition." The Trump Respondents move for an Order (1) pursuant to CPLR § 103(c) converting this special proceeding into a plenary action; or, in the alternative, (2) pursuant to CPLR §§ 408, 3101 and 3102(a) & (f) granting them leave to conduct discovery. Mr. Sexton moves separately for relief identical to that of the Trump Respondents. Finally, petitioner moves separately for an Order striking (1) the Trump Respondents' counterclaim alleging malicious prosecution; and (2) all of the affirmative defenses raised by the Trump Respondents and Mr. Sexton in their respective answers. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. In 2004, respondent Mr. Sexton, an entrepreneur, approached respondent Mr. Trump, a real estate developer, with the concept of developing a company that would primarily use technology to provide an instructional curriculum to small business owners and individual entrepreneurs across a broad range of business subjects such as marketing, finance, sales, entrepreneurship and real estate under the "Trump" name and brand. On October 25, 2004, "Trump University LLC" ("Trump University"), a New York limited liability company, was formed with the New York Department of State, Division of Corporations, with the stated purpose of providing "education-related and educational products and services to individuals and businesses."

Throughout its operation, Trump University allegedly offered instruction and training in various business topics across a variety of platforms, including on-line courses, in-person seminars and one-on-one mentorships. Specifically, the students took part in a free seminar at which Trump University instructors would recommend signing up for a three-day seminar which cost approximately $1,500 at which the instructors would teach certain real estate strategies. It was also at these seminars that the instructors recommended signing up for the Trump Elite

Programs, including the year-long mentorships which involved a Trump University mentor who allegedly would work with the student on real estate deals and cost upwards of $20,000. On May 27, 2005, Trump University received a letter, addressed to Mr. Trump, from the New York State Education Department ("SED") concerning its use of the word "University" in its name and the fact that it was not licensed by the SED. SED informed Trump University that it would not be subject to the licensure requirement if it maintained its place of business and its corporate organizations outside New York State and if it did not run live programs or other live training in New York State. Mr. Sexton, Trump University's President, responded that a new LLC would be created in Delaware which would be merged with the New York LLC and that Trump University would refrain from holding live programs in New York State.

Petitioner alleges that Trump University continued its operations and failed to abide by the conditions by failing to merge the New York and Delaware LLCs, continuing to operate its business out of its office in New York City and continuing to hold live programs in New York. On March 30, 2010, the SED, allegedly in response to a Trump University student's complaint, sent Trump University a letter, addressed to Mr. Trump, demanding that it cease using the word "University" in its name. On May 21, 2010, Trump University filed a certificate of amendment to its Articles of Organization formally changing its name to Trump Entrepreneur Initiative LLC ("TEI").

In early 2011, shortly after assuming office, Attorney General Eric T. Schneiderman (the "AG") commenced an investigation into for-profit universities and trade schools operating in New York State. On or about May 17, 2011, the AG issued TEI a subpoena *duces tecum* (the "Subpoena") seeking documents and information pertaining to its business practices. Over the next two years, TEI and the respondents complied with the Subpoena by turning over hundreds

of thousands of pages of documents and making certain employees of TEI available for deposition. On August 24, 2013, petitioner commenced the instant special proceeding against the Trump Respondents and Mr. Sexton seeking, *inter alia*, an injunction and damages, for alleged fraudulent behavior in the operation of TEI. Although the suit was filed on August 24, 2013, respondents previously agreed to toll the statute of limitations, effective May 31, 2013. After the Trump Respondents and Mr. Sexton moved to dismiss the petition on the ground that, *inter alia*, the causes of action are barred by the statute of limitations, this court issued a decision, dated January 30, 2014, dismissing petitioner's claims brought pursuant to GBL §§ 349 and 350 which accrued prior to May 31, 2010; dismissing petitioner's claims brought pursuant to Educ. Law § 224 in their entirety; dismissing petitioner's claims brought pursuant to Educ. Law §§ 5001-5010 which accrued prior to May 31, 2010 and denying petitioner's request for a summary determination on that cause of action on the ground that "there exists an issue of fact as to whether TEI was operating in New York State on or after May 31, 2010"; dismissing petitioner's claims brought pursuant to 16 C.F.R. § 429 which accrued prior to May 31, 2010; and denying those portions of respondents' motions which sought to dismiss petitioner's request for a permanent injunction.

The court first turns to that portion of the Trump Respondents and Mr. Sexton's motions for an Order pursuant to CPLR §103(c) converting this special proceeding into a plenary action. Exec. Law § 63(12) grants the AG the authority to bring a special proceeding pursuant to Article 4 of the CPLR to enjoin ongoing fraudulent or illegal business practices targeted at consumers in New York State. Indeed, "[a] special proceeding, as authorized by Executive Law § 63(12), is intended as an expeditious means for the Attorney-General to prevent further injury and seek relief for the victims of business fraud." *People v. Apple Health & Sports Clubs*, 206 A.D.2d

[* 6]

266, 268 (1st Dept 1994). However, "if the court finds it appropriate in the interests of justice, it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including payment of fees and costs." CPLR § 103(c). Generally, the purpose and long-standing use of CPLR § 103(c) is to allow a court to avoid dismissals of cases that were mistakenly brought in the wrong form. *See Nationwide Mut. Ins. Co. v. Hausen*, 143 A.D.2d 577 (1st Dept 1988).

Here, that portion of the respondents' motions for an Order pursuant to CPLR § 103(c) converting this special proceeding into a plenary action is denied as respondents have not established a basis for such relief. As an initial matter, it is clear that petitioner was entitled to commence this action as a special proceeding pursuant to Exec. Law § 63(12) and that it was not improperly brought as such. Moreover, this action should proceed as a special proceeding, which allows for expeditious relief, based on this court's finding that the AG may be entitled to an injunction as it is unclear whether respondents intend to renew the alleged fraudulent conduct at a later date. Respondents' reliance on *Matter of State of New York v. Seaport Manor A.C.F.*, 2003 N.Y. Misc. LEXIS 2025 (Sup. Ct., Kings Cty, June 11, 2003)(*mod on other grounds by* 19 A.D.3d 609 (2d Dept 2005)) is misplaced as that case is distinguishable. *Seaport Manor* involved a special proceeding commenced by the AG pursuant to Exec. Law § 63(12) against Seaport Manor, an adult home facility, and its individual principals seeking, *inter alia*, injunctive relief and damages based on violations of, *inter alia*, GBL §§ 349 and 350. The court converted the proceeding to a plenary action based on the fact that there was no need for expeditious relief as Seaport Manor was officially closed and that the only cause of action left in the case was one for the recovery of unpaid penalties.

The court next turns to the petition which seeks a summary determination on its

[* 7]

remaining causes of action. Pursuant to Exec. Law § 63(12),

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York,...for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages...and the court may award the relief applied for or so much thereof as it may deem proper.

After providing respondent an opportunity to answer the petition, "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment." CPLR § 409(b). Indeed, in determining whether the summary determination of the petition is warranted, the court must apply the same standards as are applied in summary judgment motions. *See Port of N.Y. Auth. v. 62 Cortlandt St. Realty Co.*, 18 N.Y.2d 250 (1966); *see also People v. City Model & Talent Dev.*, 29 Misc.3d 1205 (Sup. Ct. Suffolk Co. 2010)("a special proceeding brought under CPLR article 4 is subject to the same standard of proof as a motion for summary judgment made in an action.") If the court finds a triable issue of fact exists with regard to any claim asserted in the petition, a hearing shall be conducted in order that such issue may "be tried forthwith and the court shall make a final determination thereon." CPLR § 410.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a

matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, respondents' assertion that petitioner's request for a summary determination on the remaining causes of action in the petition should be denied on the ground that "[t]his is the second time the AG has asked the Court for such relief," is without merit as this is the first time that petitioner has requested a summary determination on all of the causes of action asserted in the petition with the exception of its cause of action for a violation of Educ. Law §§ 5001-5010. Indeed, after petitioner commenced the instant special proceeding, respondents moved to dismiss the petition on statute of limitations grounds. Thus, the court addressed only respondents' motion to dismiss and did not address whether petitioner was entitled to a summary determination on all of its claims. Further, at the time this court addressed respondents' motion to dismiss, respondents had not yet interposed an answer to the petition and thus, the court could not determine at that time whether issues of fact existed to warrant a hearing pursuant to CPLR § 410.

In the instant proceeding, petitioner has failed to establish its right to a summary determination against TEI on its first cause of action alleging a violation of Exec. Law § 63(12) on the ground that there is no standalone cause of action for a violation of Exec. Law § 63(12). Thus, this court searches the record and finds that such claim must be dismissed pursuant to CPLR § 3212(b). The Court of Appeals has held that Exec. Law § 63(12) does not create an independent cause of action but rather provides the AG with standing to seek redress and specific remedies against fraudulent behavior. *See State of New York v. Cortelle*, 38 N.Y.2d 83 (1975) *Cortelle* involved an action brought by the AG pursuant to Business Corporation Law § 1101 and

Exec. Law § 63(12) to enjoin allegedly fraudulent practices and to obtain redress for defrauded persons. The issue before the court was whether certain causes of action were subject to a three-year statute of limitations on the ground that they rely on liabilities, penalties or forfeitures created or imposed by statute pursuant to CPLR § 214(2). The Court of Appeals found that the claims, which had been dismissed by the lower court, were not subject to a three-year statute of limitations on the ground that "[Exec. Law § 63(12)] did not 'make' unlawful the alleged fraudulent practices, but only provided standing in the Attorney-General to seek redress and additional remedies for recognized wrongs which pre-existed the statutes" based on the well-settled principle that "[s]tatutory provisions which provide only additional remedies or standing do not create or impose new obligations." *Id.* at 85. Specifically, the Court of Appeals held that there is no independent Exec. Law § 63(12) cause of action but rather such statute "only provide[s] particular remedies and standing in a public officer to seek redress on behalf of the State and others." *Id.* at 86.

Additionally, as recently as 2013, the First Department has also held that Exec. Law § 63(12) is not a standalone cause of action. *See People v. Schwab*, 109 A.D.3d 445 (1st Dept 2013). *Schwab* involved an action brought by the AG pursuant to the Martin Act, GBL § 349 and Exec. Law § 63(12) alleging fraudulent and deceptive conduct in the sale of action rate securities to the investing public. The issue before the court was whether the petition was properly dismissed on the ground that it failed to state a claim. The First Department, citing to *Cortelle*, held that "[t]he first cause of action was properly dismissed inasmuch as Executive Law § 63(12), upon which it is based, does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief on notice prescribed by the statute in cases involving persistent fraud or illegality." *Id.* at 449.

[* 10]

In light of the clear and well-settled precedent from the Court of Appeals and the First Department, this court held in its January 2014 decision that there was no viable claim under Exec. Law § 63(12). However, based on a liberal reading of the petition, the court allowed petitioner to proceed instead on a common law fraud cause of action, even though the petitioner did not label the claim as such. The court even gave petitioner the opportunity to amend its petition to articulate that it was seeking to proceed on a claim of common law fraud but it declined to do so. The court made clear, relying on *Cortelle*, that as Exec. Law § 63(12) only allows the AG to obtain broader remedies, the AG must still fully make out any claim being asserted pursuant to said statute, including its claim for common law fraud.

Additionally, this court finds that petitioner has failed to establish its right to a summary determination against TEI on its claim alleging common law fraud. To recover on a claim of common law fraud, a party must establish "misrepresentation of a material fact, falsity, scienter, reliance and injury." *Barclay Arms, Inc. v. Barclay Arms Associates*, 74 N.Y.2d 644 (1989). It is well-settled that what constitutes reasonable reliance and material misrepresentation is generally an issue of fact for the jury and not one that can be determined on a motion for summary judgment. *See Gonzalez v. 40 W. Burnside Ave. LLC*, 107 A.D.3d 542, 544 (1st Dept 2013)("[w]hether the plaintiff could justifiably rely on the false representation is an issue of fact"); *see also Brunetti v. Musallam*, 11 A.D.3d 280, 281 (1st Dept 2004)("[t]he issues of material misrepresentation and reasonable reliance, essential elements of a fraud claim, are not subject to summary disposition"); *see also DDJ Mgt., LLC v. Rhone Group L.L.C.*, 15 N.Y.3d 147, 155 (2010)("[t]he question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive"); *see Talansky v. Schulman*, 2 A.D.3d 355, 361 (1st Dept 2003)("resolution of a reasonable reliance claim is generally left to a finder of fact.")

Additionally, scienter is established upon clear and convincing proof of a misrepresentation or a material omission of fact which was false and known to be false and made for the purpose of inducing the other party to rely upon it. *See Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413 (1996).

Here, petitioner has failed to establish its right to a summary determination against TEI on its common law fraud claim as there exist issues of fact as to whether any of the students on whose behalf petitioner seeks to recover justifiably relied on any of respondents' alleged misrepresentations and whether respondents' behavior exhibited scienter. Petitioner alleges that the Trump Respondents made certain misrepresentations to TEI's student consumers, including, *inter alia*, that TEI's instructors and mentors were handpicked by Mr. Trump, that TEI taught Mr. Trump's own business techniques and practices, that TEI's three-day seminars would provide students with insider access to financing for their real estate deals, that TEI's students would recoup their investments in as little as sixty days, that TEI would work with them until they recouped their investments and that TEI's instructors and mentors were successful real estate investors and experts. However, petitioner has failed to establish as a matter of law that each individual student consumer justifiably relied on such misrepresentations based on the circumstances or that such misrepresentations were known to be false by respondents but made anyway for the purpose of inducing the student consumers to rely upon them. Indeed, the case law makes clear that such issues are generally left to the trier of fact to determine. Thus, petitioner is not entitled to a summary determination on its common law fraud claim.

Petitioner's assertion that it is entitled to a summary determination on its common law fraud claim on the basis that it need not prove individual reliance by each consumer is without merit and contrary to this court's finding in its January 2014 decision. This court has already

found that to the extent the AG seeks to assert a claim for common law fraud against respondents, which would be entitled to a six-year statute of limitations, it must prove individual justifiable reliance on behalf of each student consumer. Petitioner's reliance on *FTC v. Figgie Int'l*, 994 F.2d 595 (9th Cir 1993) and other FTC actions is misplaced as they are distinguishable. *Figgie* involved an action brought by the FTC, not the AG, and for statutory violations only. Defendant Figgie asserted that only those consumers which could prove that they purchased Figgie's product in reliance on certain misrepresentations or misleading statements should be entitled to redress. However, the court explained that proof of individual reliance by each purchasing customer is not needed in a case for a violation of statutory fraud. The court noted that "[p]roof of reliance by the consumer upon the defendants' misrepresentations" is necessary when the case involves "recovery under common law fraud...." *Id.* at 605.

The court next turns to petitioner's request for a summary determination against TEI on its second cause of action for a violation of GBL § 349 and its third cause of action for a violation of GBL § 350 pursuant to Exec. Law § 63(12). "Sections 349 and 350 of the General Business Law provide that deceptive acts and practices and false advertising in the conduct of any business are unlawful." *City Model*, 29 Misc.3d at 1205. "When a proceeding is brought to obtain injunctive relief and restitution on behalf of a consumer, the Attorney General is required to establish that the respondents engaged in an act or practice which was deceptive or misleading and that the consumer was injured as a result." *Id.* "Intent to defraud and justifiable reliance by the [petitioner] are not elements of the statutory claim" but "proof that 'a material deceptive act or practice caused actual, although not necessarily pecuniary, harm' is required to impose compensatory damages." *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55-56 (1999) (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995)).

As an initial matter, petitioner has failed to establish its right to a summary determination against TEI on its third cause of action for a violation of GBL § 350 pursuant to Exec. Law § 63(12). The petition alleges that from the beginning of its operations, Trump University, and later TEI, "engaged in extensive advertising and marketing campaigns via, *inter alia*, publishing advertisements in newspapers, sending print and electronic mail to prospective students, and running advertisements on radio and television" and that such advertisements contained certain misrepresentations, such as, *inter alia*, the likelihood of success at three-day seminars, that TEI's speakers were handpicked by Mr. Trump, that Mr. Trump would appear at the three-day seminars and that Mr. Trump's own strategies and techniques for investing in real estate would be taught at said seminars. In support of such claims, petitioner has attached to the petition twenty-eight TEI advertisements which allegedly demonstrate that respondents falsely advertised TEI and that the consumers were deceived and injured as a result. However, all of the advertisements are undated and are directed toward events that occurred prior to May 31, 2010, and thus are outside the statute of limitations period. Indeed, petitioner has failed to provide any evidence that they were published after May 31, 2010.

Additionally, petitioner has failed to establish its right to a summary determination against TEI on its second cause of action for a violation of GBL § 349 pursuant to Exec. Law § 63(12). Of the twenty-eight student affidavits annexed to the petition, only one, the affidavit of Robert Jones, relates to events that occurred after May 31, 2010. Specifically, in his affidavit, Mr. Jones states that he received a flyer in the mail about TEI's free seminar in July 2010 and that he attended the seminar on July 31, 2010 in New York where he signed up for the Real Estate Investor Blueprint Program, a three-day seminar, for $1,495. He further affirms that he attended the three-day seminar in August 2010 in New York. However, Mr. Jones' affidavit does

not allege that any of the acts targeted by petitioner as deceptive occurred at that seminar. Indeed, Mr. Jones' affidavit does not present *prima facie* evidence that the three-day seminars were in fact a bait-and-switch tactic as petitioner alleges but rather it acknowledges that the TEI instructors "discussed how to make money from distressed real estate," "provided relevant information during the seminar" and led the attendees on a "market tour that was held on the second day." While Mr. Jones did affirm that the instructors gave some incorrect real estate information and that the instructors' direction to the attendees to increase their credit card limits to pay the steep tuition for TEI's advanced Trump Elite course and mentorship program was "crazy," he stated that he "did not sign up for a mentorship program because [he] felt that [he] learned enough during the three-day course to attempt to execute a deal." The remaining twenty-seven affidavits all involve events that occurred prior to May 31, 2010. Petitioner has failed to provide any evidence of the alleged deceptive business practices, such as, *inter alia*, TEI's bait-and-switch tactics, telling students that the mentors and instructors were "handpicked" by Mr. Trump and telling students that Mr. Trump's strategies and techniques would be used in the program, which occurred after May 31, 2010, the relevant statutory period for petitioner's GBL § 349 claims.

Petitioner's assertion that respondents' operation of TEI without a license after May 31, 2010 is *prima facie* evidence of a deceptive business practice under GBL § 349 is without merit. Petitioner's reliance on *State v. Mgmt. Transition Res.*, 115 Misc.2d 489 (Sup. Ct. N.Y. Cty. 1982) is misplaced as that case is distinguishable. In *Mgmt. Transition*, the petitioner alleged that respondent was operating an unlicensed employment agency in violation of GBL § 172 and that respondent was engaging in deceptive and fraudulent practices in violation of GBL § 349. The court first analyzed petitioner's claims under GBL § 349 finding that many of the statements

made by respondents were deceptive and thus, unlawful. Separate and apart from the court's analysis of the GBL § 349 claim, the court determined that respondent also violated GBL § 172 by operating its employment agency without a license. Specifically, the court stated "[a]side from the fraudulent and deceptive representations of the respondents, it is clear that they are operating an employment agency, without a license, in violation of the laws of New York" and cited to GBL § 172. *Mgmt. Transition*, 115 Misc.2d at 491. However, nowhere in the court's decision is any statement that respondent's failure to be licensed was also a violation of GBL § 349. Additionally, petitioner's reliance on *Pavlov v. Debt Resolvers USA, Inc.*, 28 Misc.3d 1061 (Civ. Ct. Richmond Cty. 2010) is unavailing. The court in *Pavlov* stated that "this court has consistently held that the failure to be properly licensed constitutes a deceptive business practice under General Business Law § 349." *Id.* at 1076. However, this court declines to follow such a finding as it is not persuasive for a number of reasons. As an initial matter, the court in *Pavlov* did not cite any authority for its conclusory statement that the failure to be properly licensed constitutes a deceptive business practice under GBL § 349 even though it states that it has "consistently" held as such. Additionally, *Pavlov* is not binding on this court as it is a decision from the Civil Court of Richmond County. Moreover, the AG failed to cite any authority either citing to *Pavlov* or similarly deciding the issue and thus, the case has little, if any, persuasive value.

To the extent petitioner asserts that this court should rely on evidence other than the twenty-eight sworn affidavits and twenty-eight advertisements submitted with the petition as *prima facie* evidence of petitioner's GBL §§ 349 and 350 claims, such assertion is without merit. On a motion for summary judgment, the court declines to consider evidence that was not submitted in admissible form. "It is well-settled that on a motion for summary judgment, the

moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment." *Bendik v. Dybowski*, 227 A.D.2d 228 (1st Dept 1996). Thirty-six of the forty-three complaints submitted with the petition are unsigned and unverified and are thus, inadmissible. The remaining seven complaints contain only a boilerplate acknowledgment that false statements are punishable by law. However, unsworn complaints, even those signed with an acknowledgment that false statements are punishable by law, are not admissible and may not be considered. *See People v. City Model & Talent Dev.*, 29 Misc.3d 1205 (Sup. Ct. Suffolk Co. 2010) (citing *Sam v. Town of Rotterdam*, 248 A.D.2d 850 (3d Dept 1998); *see also People v. D.B.M. International Photo Corp.*, 135 A.D.2d 353 (1st Dept 1987). Petitioner's reliance on *People v. Sullivan*, 56 N.Y.2d 378 (1982) and *People v. McCulloch*, 226 A.D.2d 848 (3d Dept 1996) for the proposition that complaints signed under the penalties of perjury are the functional equivalent to sworn affidavits is misplaced. Both *Sullivan* and *McCulloch* are criminal cases which stand for the proposition that a statement made under the penalties of perjury is sufficient for an application for a search warrant. However, such decisions have no implication on the evidentiary standard in the context of a summary judgment motion made in a civil action. Additionally, the court declines to consider the thirty-nine additional affidavits and various advertisements submitted by petitioner annexed to its reply affidavit as such evidence was not submitted along with the petition in the first instance. Petitioner has specified that the additional evidence was submitted because "Respondents claimed in their motion to dismiss that there was no evidence they operated after May 31." However, it is well-settled that a movant cannot remedy basic deficiencies in his moving papers with new evidence on reply. *See Ford v. Weishaus*, 86 A.D.3d 421 (1st Dept 2011). Further, at the preliminary conference in this proceeding on April 8, 2014, this court gave petitioner the opportunity to amend its petition in

[* 17]

order to address any evidentiary deficiencies but it is undisputed that petitioner declined to do so. Thus, in determining petitioner's request for a summary determination, the court must rely only on the admissible evidence submitted along with the petition.

Additionally, petitioner's assertion that the court should consider evidence of fraud prior to May 31, 2010 on the ground that the statute of limitations acts only to bar remedies but not evidence is without merit. Petitioner's reliance on *Kent v. Papert Cos.*, 309 A.D.2d 234 (1st Dept 2003) and *People v. Lefkowitz*, 129 Misc.2d 21 (Sup. Ct. Kings Cty. 1985) is misplaced. *Kent* involved an action for wage discrimination, which the court determined was governed by a three-year statute of limitations, and thus, any incidents of discrimination alleged to have occurred more than three years prior to the date the action was filed were time-barred. However, the First Department held that evidence of greater wage payments made to the complainant's male counterparts for similar work occurring outside the limitations period could be used to prove the existence of discrimination in that plaintiff was paid less on account of her sex within the statutory period. Thus, *Kent* is distinguishable as the alleged discriminatory acts occurred *within* the statutory period but because of the nature of a wage discrimination claim, evidence from outside the limitations period was deemed admissible. Further, *Lefkowitz* involved a motion to dismiss a Grand Jury indictment on the ground that the evidence submitted to the Grand Jury included proof pertaining to a count that had been dismissed as time-barred. In finding that the submission of evidence pertaining to the time-barred charge was admissible and proper, the court explained that "wide latitude [is] accorded Grand Juries in terms of what evidence they may consider." *Lefkowitz*, 129 Misc.2d at 25. The court went on to state that based on such latitude, "a Grand Jury 'may investigate information of any kind derived from any source deemed reliable.'" *Id.* (citing *People ex rel. Livingston v. Wyatt*, 186 N.Y. 383, 391 (1906)). However,

the instant proceeding does not involve a Grand Jury; rather, it is a special proceeding that must be treated like a motion for summary judgment and thus, the wide latitude of evidence standard does not apply.

Petitioner has established its right to a summary determination against TEI on its fifth cause of action for a violation of Educ. Law §§ 5001-5010 pursuant to Exec. Law § 63(12). Pursuant to Educ. Law § 5001(1),

> No private school which charges tuition or fees related to instruction...shall be operated by any person or persons, firm, corporation, or private organization for the purpose of teaching or giving instruction in any subject or subjects, unless it is licensed by the department.

As an initial matter, petitioner previously requested a summary determination of its fifth cause of action on the ground that it is undisputed TEI was operating without a license. This court's January 2014 decision denied such relief on the ground that "there exists an issue of fact as to whether TEI was operating in New York State on or after May 31, 2010" based on the fact that respondents had not yet interposed an answer to the petition. However, the court now reverses its determination and finds that petitioner has established its right to a summary determination on its fifth cause of action as it is undisputed that TEI was operating in New York State without a license after May 31, 2010. The court bases such finding on the answers interposed by respondents which admit that TEI was in fact operating until at least August 2010, that certain live programs were being run until as late as December 2010 and that TEI was never licensed by the SED.

To the extent respondents request that if the court finds that TEI violated Educ. Law §§ 5001-5010 by operating without a license after May 31, 2010, the calculation of damages be referred to the SED, such request is denied as respondents have not demonstrated that this court

lacks the authority to issue damages for violations pursuant to the Educ. Law. Indeed, it is within the court's discretion to issue damages on statutory claims brought pursuant to Exec. Law § 63(12). Additionally, as this court has already determined in its January 2014 decision that the SED's disciplinary process does not apply to TEI, there is no basis for referring the calculation of damages to the SED.

This court finds that respondents' request for summary judgment dismissing petitioner's sixth cause of action for a violation of 16 C.F.R. § 429 must be granted. Pursuant to CPLR § 3212(b), "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." Pursuant to 16 C.F.R. § 429, it is an unfair or deceptive practice for a seller to fail to furnish the buyer with a contract that discloses the right to cancel the transaction within three business days and fails to inform the buyer orally of the buyer's right to cancel for sales at a place other than the seller's place of business, including those made at hotels and other temporary locations. *See* 16 C.F.R. §§ 429.0(a) and 429.1. That statute also provides that sellers must honor any notice of cancellation made within three business days and refund all payments made within ten business days of receipt of such notice. *See* 16 C.F.R. § 429.1(g). The petition alleges that respondents violated 16 C.F.R. § 429 by failing to honor notices of cancellation certain students gave within three business days of signing the contract and to refund all payments within ten business days of receipt of such notice. In support of such assertion, petitioner submits nine affidavits from students that contain allegations of a violation of 16 C.F.R. § 429 for products and services purchased between July 2007 and April 9, 2010. However, any claim pursuant to said statute would accrue, at the latest, 13 business days after the purchase of the products or services, or on April 28, 2010, which accounts for notice by the buyer of cancellation within three days after

purchase and ten business days thereafter for a refund to be issued by the seller. As this court has already found that a claim pursuant to 16 C.F.R. § 429 which accrued prior to May 31, 2010 is time-barred on the ground that such cause of action has a three-year statute of limitations, petitioner cannot maintain any claim against respondents pursuant to 16 C.F.R. § 429. To the extent petitioner alleges violations of 16 C.F.R. § 429 on the ground that TEI "refused to provide refunds to students who complained of mentorships that were inadequate or incomplete," such allegations do not constitute valid claims pursuant to 16 C.F.R. § 429. 16 C.F.R. § 429 only obligates a seller to include in a contract of sale a three-day right of cancellation in favor of the buyer and does not obligate the seller to refund money to a purchaser who found the product inadequate or incomplete if the purchaser did not timely exercise his or her right of cancellation within the three-day period. As petitioner has not alleged any timely cancellations made by consumers which respondents failed to timely address after May 31, 2010, respondents are entitled to judgment dismissing petitioner's sixth cause of action.

Finally, petitioner's request for a summary determination against Mr. Trump, Mr. Sexton and the Trump Organization on the ground that they are individually liable for respondents' alleged illegal and fraudulent acts is resolved as follows. "As a general proposition, corporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it." *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 44 (1980). Indeed, if it is established that "the individual defendants profited personally from the alleged fraud..., such status as corporate agents is insufficient to shield the individual defendants from personal liability." *Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665, 666 (1st Dept 1983). *See also Buckley v. 112 Cent. Park S., Inc.*, 285 A.D. 331, 334 (1st Dept 1954)("when the corporate officer commits independent torts or predatory acts directed at

another, he may not seek refuge behind the mantle of immunity.") Additionally, "[i]n a proceeding pursuant to Executive Law § 63 (12), officers and directors of a corporation may be held liable for fraud if they participate in it or have actual knowledge of it." *People v. Court Reporting Inst.*, 245 A.D.2d 564, 565 (2d Dept 1997). "Individual corporate officers and directors are personally liable for fraud and, accordingly, for any money owed to members and any civil fines owed the State under Executive Law § 63(12), where...they personally participated in the misrepresentation or had actual knowledge of the misrepresentation." *Apple Health & Sports Clubs*, 206 A.D.2d at 267.

As an initial matter, this court finds that petitioner has failed to establish its right to a summary determination against the individual respondents Mr. Trump, the Trump Organization and Mr. Sexton on its common law fraud claim, its claims alleging a violation of GBL §§ 349 and 350 or its claim alleging a violation of 16 C.F.R. § 429. The individual respondents may only be held personally liable for the claims against TEI if they participated in or had actual knowledge of the misconduct perpetrated by TEI. *See Apple Health*, 206 A.D.2d at 267. This court has already found that there exist issues of fact as to whether TEI may be held liable for common law fraud and that petitioner has failed to establish its right to a summary determination against TEI for violations of GBL §§ 349 and 350. Additionally, this court has dismissed petitioner's claim brought pursuant to 16 C.F.R. § 429.

However, petitioner has established its right to a summary determination against the individual respondents Mr. Sexton and Mr. Trump on its claim alleging a violation of Educ. Law §§ 5001-5010 on the ground that said individual respondents had actual knowledge of the fact that TEI was operating without the required license and participated in such misconduct after May 31, 2010. Petitioner has provided letters sent to Mr. Sexton and Mr. Trump individually in

2005 from the SED notifying them of the University's violations and demanding that they be rectified or the University would have to stop operating in New York State. Specifically, the letter to Mr. Trump notified him that Trump University may not use the word "University" in its name and provided Mr. Trump with a hyperlink for instructions on proper licensing and specific requirements pursuant to the Educ. Law if Mr. Trump was planning to continue to operate the school under a different corporate name. It is undisputed that Mr. Trump never complied with the licensing requirements for TEI despite this notice. Further, the letter to Mr. Sexton notified him that Trump University must be licensed in accordance with the Educ. Law or else it "must cease operating" and provided Mr. Sexton with a hyperlink for instructions on proper licensing and the specific requirements. It is also undisputed that Mr. Sexton never complied with the licensing requirements for TEI despite this notice.

In response, Mr. Sexton and Mr. Trump have failed to raise an issue of fact sufficient to defeat petitioner's request for a summary determination on said claim. To the extent Mr. Sexton asserts that he ceased his employment with TEI in mid-2010 and thus, cannot be held liable for any operation of TEI without a license after May 31, 2010, such assertion is without merit. In his Verified Answer, Mr. Sexton specifically admits that he "was President of Trump University until July 31, 2010, that he "participated in the operation of Trump University" up until that date, that he communicated with the SED regarding TEI's failure to be licensed and that he "never applied for any licenses or certifications from NYSED...during his employment with Trump University."

Further, to the extent Mr. Trump asserts that he cannot be held personally liable for TEI's operation without a license on the ground that he was not personally involved in the substantive programming of TEI, such assertion is without merit. Mr. Trump has not denied that he had

actual knowledge that TEI was operating without a license in violation of the Educ. Law and he has not denied that he received the 2005 letter from the SED notifying him that Trump University was in violation of the Educ. Law and that such violations would need to be rectified. However, petitioner has failed to establish its right to a summary determination against the Trump Organization on its claim alleging a violation of Educ. Law §§ 5001-5010 as it has not provided evidence that the Trump Organization knew that TEI was operating without the required license or that it participated in such misconduct.

This court also finds that petitioner has failed to establish its right to a summary determination against Mr. Trump, Mr. Sexton and the Trump Organization individually under a theory of piercing the corporate veil. Corporate officers and directors may be held liable if it is established that they pierced the corporate veil. *See Morris v. New York State Dep't. of Taxation & Fin.*, 82 N.Y.2d 135 (1993). The Court of Appeals has held that "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [petitioner] which resulted in [that petitioner's] injury." *Id.* at 141. "While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required." *Id.* at 141-142 (internal citations omitted). To determine domination and control, courts examine various criteria, including but not limited to:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e. issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes,

> (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131, 139 (2d Cir. 1991). "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." *Id.* at 142.

In the instant proceeding, this court finds that petitioner is not entitled to a summary determination against the individual respondents under the theory of piercing the corporate veil as there exist issues of fact as to whether the individual respondents exercised the required domination and control over TEI. Petitioner has asserted that Trump University and later, TEI, was nothing more than a legal fiction and thus, the corporate veil should be pierced. Petitioner bases such assertion on allegations that (1) TEI lacked the formalities of a separate corporate existence as "there have never been any meetings of the members, no votes ever taken, and no minutes of meetings ever prepared" and that major corporate decisions were made by individuals who were not officers, directors or employees; (2) there was substantial overlap in the ownership and personnel of Trump University and later, TEI, based on Mr. Trump's alleged dominant ownership stake in both the Trump Organization and TEI, that Mr. Trump was prominently featured throughout TEI's marketing materials and that personnel from the Trump Organization performed many of TEI's functions such as the handling of its bank accounts and finances; (3)

TEI had limited discretion over its core functions and major business decisions including, *inter alia*, that all checks and wire transfers had to be approved and signed off on by employees of the Trump Organization and that TEI was prohibited from having any corporate credit cards for routine expenses, which were instead charged to the personal credit cards of Mr. Sexton and other employees of TEI; and (4) TEI received a wide variety of services and support from the Trump Organization such as rent-free office space in the Trump Organization's building located at 40 Wall Street, New York, New York and management of TEI's corporate insurance policies and 401(k) employee retirement accounts. However, in response, respondents have put forth evidence raising an issue of fact as to whether such conduct actually occurred and if it did occur, whether it is sufficient to pierce the corporate veil. Respondents have submitted the deposition transcripts of Mr. Sexton and Steven Matejek, TEI's controller, in which they testified that (1) TEI was an independent LLC that had its offices located at 40 Wall Street, New York, New York, which was separate and apart from the Trump Organization's offices located at 725 Fifth Avenue, New York, New York; (2) that TEI paid for all of its own expenses including rent, utilities, office equipment, insurance, outside counsel, outside accounting, shipping expenses and payroll; (3) that TEI had three checking accounts separate from the Trump Organization which covered payments for payroll, payments to vendors and deposits from credit card payments and was handled by TEI's Administrative Staff; (4) that TEI outsourced and hired Administaff, an independent Human Resources company, to handle all aspects of human resources and payroll and that the Trump Organization never paid any of TEI's obligations; (5) that TEI obtained corporate insurance through Aon and that when it obtained coverage through an umbrella policy by the Trump Organization for certain insurance, TEI paid Aon directly and reimbursed the Trump Organization for any premium payments for certain umbrella coverage it may have made;

(6) that TEI owned its own furniture, office equipment and computer equipment; (7) that Mr. Sexton's credit card was reimbursed by TEI; (8) that TEI employees had a 401(k) with Fidelity through the Trump Organization out of legal necessity because there was 80% common ownership interest between Mr. Trump and both entities; and (9) that checks drawn on the account of TEI could not be paid unless reviewed by TEI managers, then Mr. Matejek and Mr. Sexton, who were both TEI officers and directors.

The court next turns to petitioner's motion for an Order striking the Trump Respondents' counterclaim for malicious prosecution and all affirmative defenses raised by the Trump Respondents and Mr. Sexton in their respective answers. As an initial matter, petitioner's motion to strike the Trump Respondents' counterclaim for malicious prosecution is granted on the ground that it is premature. On a motion addressed to the sufficiency of the pleadings, the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a [claim] should not be dismissed on a pleading motion so long as, when [defendant's] allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977), citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956). To state a claim for malicious prosecution, a party must plead the termination of a prior proceeding in favor of that party. *See Munoz v. City of New York*, 18 N.Y.2d 6 (1966). "That requirement precludes assertion of a cause of action for malicious prosecution, by way of counterclaim, in the very action alleged to be malicious since the foundation of the right to sue for malicious prosecution does not yet exist." *Flaks, Zaslow & Co. v. Bank Computer Network Corp.*, 66 A.D.2d 363, 366

(1st Dept 1979). In the instant proceeding, the Trump Respondents may not yet assert a counterclaim for malicious prosecution as the instant proceeding, which said respondents allege is malicious, is still pending and thus, there has been no "termination of a prior proceeding in favor of" respondents. To the extent the Trump Respondents seek a stay of their counterclaim for malicious prosecution pending the resolution of the instant proceeding, such request is denied as they have not provided a basis for such relief.

Petitioner's motion to strike the seventeen affirmative defenses raised by the Trump Respondents in their answer and the six affirmative defenses raised by Mr. Sexton in his answer is granted in part and denied in part. Pursuant to CPLR § 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." On such a motion, defenses that consist of bare legal conclusions without supporting facts will be stricken. *See Robbins v. Growney*, 229 A.D. 356, 358 (1st Dept 1996). However, the First Department has made clear that the assertion of the defense of failure to state a cause of action in an answer, while surplusage as it may be asserted at any time even if not pleaded, "should not be subject to a motion to strike." *Riland v. Todman & Co.*, 56 A.D.2d 350, 353 (1977).

As an initial matter, petitioner's motion to strike the Trump Respondents' third, fifth, sixth, seventh, eighth, tenth, eleventh, fifteenth and sixteenth affirmative defenses and Mr. Sexton's fifth and sixth affirmative defenses is granted on the ground that they do not state proper affirmative defenses. Further, petitioner's motion to strike the Trump Respondents' fourth affirmative defense for failure to properly plead each element necessary to establish common law fraud is granted based on this court's finding that petitioner has sufficiently pled common law fraud in the petition. Petitioner's motion to strike the Trump Respondents' ninth

cause of action that the claims in the petition are barred by documentary evidence is granted as the Trump Respondents have failed to point to any documentary evidence that conclusively disposes of petitioner's claims. Additionally, petitioner's motion to strike the Trump Respondents' twelfth affirmative defense that the petition fails to allege facts to establish injunctive relief is granted as this court has granted petitioner a summary determination on its cause of action alleging a violation of Educ. Law §§ 5001-5010 and thus, petitioner at the very least may be entitled to an injunction pursuant to Exec. Law § 63(12).

Petitioner's motion to strike the Trump Respondents' thirteenth affirmative defense that in the event of any breach found by this court as to petitioner's fifth cause of action pursuant to Educ. Law §§ 5001-5010, the amount of damages should be referred to the SED, is granted as the Trump Respondents have failed to provide a basis for such defense. This court has already found that petitioner has standing to assert a claim against respondents pursuant to Educ. Law §§ 5001-5010 and that the SED's disciplinary process does not apply to unlicenced proprietary schools such as TEI. Thus, there is no basis for referring the penalty determination to the SED. Moreover, it is the court's role to ascertain damages in a special proceeding brought pursuant to Exec. Law § 63(12).

Further, petitioner's motion to strike the Trump Respondents' fourteenth affirmative defense that petitioner's claims are barred by the enrollment forms executed by the students which contain certain disclaimers is granted. Courts have recognized the need to "carefully examine the reality of educational contracts...to guard against predatory practices calculated to take advantage of the unwary consumer." *Brown v. Hambric*, 168 Misc.2d 502, 506-07 (N.Y. Civ. Ct. 1995), *citing Joyner v. Albert Merrill School*, 97 Misc.2d 568, 574 (N.Y. Civ. Ct. 1978). Further, it is well-established that the existence of such disclaimers in such contracts is not a

defense to statutory claims of false, deceptive and fraudulent practices. *See Goshen v. Mutual Life Ins. Co.*, 98 N.Y.2d 314 (2002)(documentation including the contractual terms and product disclaimer does not establish a defense to deceptive practices as a matter of law); *see also Matter of People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 108 (3d Dept 2005)(deceptive representations not cured by limitations "embedded in the fine print.") Moreover, it has long been held that disclaimers hidden in written agreements are also not a defense to a claim for common law fraud. *See Sabo v. Delman*, 3 N.Y.2d 155 (1957) (citing *Bridger v. Goldsmith*, 143 N.Y. 424, 428 (1894))("there is no authority that we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may, nevertheless, contract with him in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice.") Indeed, the general rule in New York is that a buyer's disclaimer cannot preclude a common law fraud "claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge." *BasisYield Alpha Fund v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128 (1st Dept 2014). The First Department in *BasisYield* went on to explain that "only where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying on representations or omissions as to the specific matter, is a plaintiff precluded from later claiming fraud on the ground of prior misrepresentations as to the specific matter." *Id. See also Joyner v. Albert Merrill School*, 97 Misc.2d at 575(the language in the contract "fails to constitute a

specific disclaimer by plaintiff of reliance upon defendants' fraudulent misrepresentation. Absent a sufficiently specific disclaimer which would negate the element of reliance, plaintiff cannot be barred from asserting his claim of fraud against defendants...Even if a specific disclaimer of reliance were contained in defendants' contract, plaintiff's cause of action for fraud would not be barred unless he also had an opportunity to discover the true facts.")

Here, the disclaimers in the enrollment forms executed by TEI's students do not provide a defense to respondents' alleged conduct. The disclaimers, which are buried in small print, provide, *inter alia*, that "[t]his training is provided for education only and no guarantees, promises, representations or warranties of any kind regarding specific or general benefits...have been or will be made by the Program...I acknowledge that none of the Principals is responsible for, and they shall have no liability for, my business success or failure...or my use of or reliance on Program Information." However, such disclaimers do not specifically disclaim the particular facts petitioner alleges were misrepresented or undisclosed, such as, *inter alia*, that the curriculum for TEI was developed by Mr. Trump, that the instructors and mentors were handpicked by Mr. Trump and that TEI's mentors and instructors would provide the students with access to hard money lenders and sources of private money. Additionally, such facts were only within the Trump Respondents' knowledge. Thus, such disclaimers fail to provide a defense to petitioner's claims of fraud.

Petitioner's motion to strike the Trump Respondents' seventeenth affirmative defense which asserts that petitioner comes to this court with unclean hands and Mr. Sexton's fourth affirmative defense which asserts the doctrine of laches is also granted. "The doctrine of unclean hands is based on the principle that 'since equity tries to enforce good faith in defendants, it no less stringently demands the same good faith from the plaintiff.'" *Dunlop-McCullen v. Local 1-S,*

149 F.3d 85, 90 (2d Cir. 1998)(quoting 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure*, § 2946, at 108 (1995)). "Generally, 'the doctrine of unclean hands may not be invoked against a governmental agency which is attempting to enforce a congressional mandate in the public interest.'" *SEC v. KPMG LLP*, 2003 WL 21976733 *3 (S.D.N.Y. 2003). Indeed, "[e]quitable defenses against government agencies are strictly limited." *SEC v. Electronics Warehouse, Inc.*, 689 F.Supp. 53, 73 (D.Conn. 1988), *aff'd*, 891 F.2d 457 (2d Cir. 1989). However, the doctrine of unclean hands, like other equitable defenses, may be raised against the government where "the agency's misconduct [was] egregious and the resulting prejudice to the defendant r[o]se to a constitutional level." *Electronics Warehouse, Inc.*, 689 F.Supp. at 73. Furthermore, "courts have permitted the defense only where the alleged misconduct occurred during the investigation leading to the suit and the misconduct prejudiced the defendant in the defense of the action." *Id.* The defense of laches "is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. The essential element of this equitable defense is delay prejudicial to the opposing party." *Capruso v. Village of Kings Point*, 2014 WL 2608464 (N.Y. 2014). However, "[i]t is settled that the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest." *Matter of Cortlandt Nursing Home v. Axelrod*, 66 N.Y.2d 169, 178 (1985).

As an initial matter, the Trump Respondents' defense of unclean hands must be stricken as they have not alleged such egregious behavior that rises to a constitutional level or any specific conduct perpetrated by petitioner during its investigation that would prevent the Trump Respondents from putting forth their defenses to this proceeding. Moreover, as this court has

already found, to the extent respondents seek to assert a claim for malicious prosecution based on any alleged wrongdoing during petitioner's investigation and commencement of the instant proceeding, such claim is premature as they may only do so after the proceeding is terminated in their favor. Additionally, Mr. Sexton's defense of laches must be stricken as it may not be asserted against the petitioner in this proceeding. Here, the State is acting in its governmental capacity to protect a public interest, and thus, the defense of laches does not apply.

However, petitioner's motion to strike the Trump Respondents' and Mr. Sexton's first affirmative defenses that petitioner's first, second, third, fifth and sixth causes of action fail to state claims is denied as such affirmative defense is not subject to a motion to strike. *See Riland*, 56 A.D.2d at 353. Additionally, petitioner's motion to strike the Trump Respondents' second affirmative defense that petitioner's cause of action pursuant to Exec. Law § 63(12) fails to state a claim on the ground that it is not a standalone cause of action is denied as this court, along with the Court of Appeals and the First Department, has found that there is no independent, standalone cause of action pursuant to Exec. Law § 63(12). Further, petitioner's motion to strike Mr. Sexton's second affirmative defense which asserts that petitioner's right to maintain its first cause of action for conduct that occurred more than six years prior to May 31, 2013 is time-barred by the statute of limitations for common-law fraud is denied as this court has already determined that petitioner's common-law fraud claims may only go back six years from May 31, 2013 and no earlier. Finally, petitioner's motion to strike Mr. Sexton's third affirmative defense that petitioner's right to maintain its second, third, fifth and sixth causes of action for conduct that occurred more than three years prior to May 31, 2013 is time-barred by CPLR § 214(2) is denied as this court has already determined that such causes of action may only go back three years from May 31, 2013 and no earlier.

Finally, the court turns to that portion of respondents' motions which seek an Order pursuant to CPLR §§ 408, 3101 and 3102(a) & (f) granting them leave to conduct discovery. Pursuant to CPLR § 408, in a special proceeding, "[l]eave of court shall be required for disclosure...." "This requirement was intended to preserve the summary nature of a special proceeding." *Matter of Shore*, 109 A.D.2d 842, 843 (2d Dept 1985). In a proceeding where disclosure is available only by leave of court, the Supreme Court has broad discretion in granting or denying disclosure, although it must balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality. *See Grossman v. McMahon*, 261 A.D.2d 54 (3d Dept 1999). Generally, leave of court will be granted upon a showing of special or unusual circumstances. *See People v. Bestline Products, Inc.*, 41 N.Y.2d 887 (1997); *see also Lefkowitz v. Raymond Lee Org.*, 94 Misc.2d 875 (Sup. Ct. N.Y. Co. 1978), *aff'd*, 66 A.D.2d 656 (1st Dept 1978). What constitutes special circumstances is a fact specific inquiry and is left to the sound discretion of the trial court. *See Bestline*, 41 N.Y.2d at 888. Courts have found discovery should be made available "if the allegations were very broad, the factual issues complex, and there was a lack of material available to the defendant." *Lefkowitz*, 94 Misc.2d at 878. However, it is the burden of the party seeking discovery to show "ample need" for said discovery. *See Matter of Shore*, 109 A.D.2d at 843.

In the instant action, respondents' motion for an Order granting them discovery is resolved as follows. As an initial matter, respondents are entitled to take the deposition of each individual student on behalf of whom petitioner is seeking to recover damages based on common law fraud within the six-year statutory period. This court has already found that in order for petitioner to establish its common law fraud cause of action against respondents, a hearing must be held at which petitioner must establish, *inter alia*, justifiable reliance on behalf of each of

TEI's students. Thus, respondents should be entitled to depose said individuals in order to adequately prepare a defense to such cause of action. However, respondents are not entitled to any further paper discovery or to depose any other individuals to aid in their defense of the petition's remaining statutory causes of action as petitioner need not show individual reliance to establish a claim pursuant to those statutes.

Finally, respondents are not entitled to depose the Assistant Attorney General (the "AAG") handling the prosecution of the instant litigation as they have failed to set forth special or unusual circumstances warranting such discovery. New York courts have routinely rejected requests for such depositions, particularly in cases where the AG is acting in its representative or "protective" capacity. *See People v. Volkswagen of Am.*, 41 A.D.2d 827 (1st Dept 1973); *see also Lefkowitz v. Raymond Lee Org.*, 94 Misc.2d 875 (Sup. Ct. N.Y. Cty. 1978). Indeed, courts are reluctant to compel the deposition of opposing counsel "because the practice of calling opposing counsel as a witness at trial is so offensive to our conception of the adversarial process. Courts have made clear that attorneys should, only in rare circumstances, be forced to testify against their own clients." *Giannicos v. Bellevue Hospital Medical Center*, 7 Misc.3d 403, 406-07 (Sup. Ct. N.Y. Co. 2005). Respondents assert that the deposition of the AAG is necessary in order to prove their malicious prosecution claim, that the true purpose and intent of this special proceeding is to harass respondents rather than to protect the public and enjoin any alleged fraudulent conduct. However, respondents are not entitled to depose the AAG on that basis as this court has already granted petitioner's motion to dismiss respondents' counterclaim for malicious prosecution on the ground that it is premature. Respondents' reliance on *People v. Katz*, 84 A.D.2d 381 (1st Dept 1982) for the proposition that they are entitled to depose the AAG is misplaced as the First Department in *Katz* was not examining the request for discovery under

CPLR § 408 as it was a plenary action and not a special proceeding.

Further, to the extent respondents seek documents which include communications between the AAG and TEI's individual students, respondents are not entitled to said documents as they are materials prepared in anticipation of litigation and reflect the mental impressions and opinions of counsel, thus constituting attorney work product, which is not subject to disclosure. *See* CPLR § 3101(c)("the work product of an attorney shall not be obtainable.")

Accordingly, it is hereby

ORDERED that respondents' motion for an Order converting this special proceeding into a plenary action pursuant to CPLR § 103(c) is denied; and it is further

ORDERED that petitioner's request for a summary determination against respondent the Trump Entrepreneur Initiative LLC f/k/a Trump University LLC is granted only as to petitioner's fifth cause of action for a violation of Educ. Law §§ 5001-5010; and it is further

ORDERED that respondents are entitled to summary judgment dismissing petitioner's first cause of action for a violation of Exec. Law § 63(12); and it is further

ORDERED that respondents are entitled to summary judgment dismissing petitioner's sixth cause of action for a violation of 16 C.F.R. § 429; and it is further

ORDERED that respondents' motion for an Order granting them leave to conduct discovery is granted only to the extent described herein; and it is further

ORDERED that petitioner's motion for an Order striking the affirmative defenses asserted in respondents' answers is granted only to the extent described herein; and it is further

ORDERED that petitioner's motion for an Order dismissing the Trump Respondents' counterclaim for malicious prosecution is granted; and it is further

ORDERED that a hearing shall be conducted pursuant to CPLR § 410 to resolve

petitioner's remaining claims; and it is further

ORDERED that a determination as to what relief petitioner is entitled to, both equitable and monetary, is stayed pending the final disposition of the instant proceeding.

This constitutes the decision and order of the court.

Dated: 10/8/14

Enter: ______________________
J.S.C.

CYNTHIA S. KERN
J.S.C.