SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

In the Matter of an Inquiry by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Index No.
451536/2014

Petitioner,

DECISION and ORDER

Pursuant to Article 23-A of the New York General Business Law in regard to the acts and practices of

IAN BRUCE EICHNER, LESLIE H. EICHNER, STUART P. EICHNER, SCOTT L. LAGER, T. PARK CENTRAL LLC, O. PARK CENTRAL LLC, PARK CENTRAL MANAGEMENT LLC, THE MANHATTAN CLUB MARKETING GROUP LLC, and NEW YORK URBAN OWNERSHIP MANAGEMENT LLC,

Respondents,

in promoting the issuance, distribution, exchange, advertisement, negotiation, purchase, investment advice or sale of securities in or from New York State.

----------X

HON. EILEEN A. RAKOWER, J.S.C.

On July 24, 2014, the Attorney General of the State of New York ("NYAG") commenced a pre-action proceeding under General Business Law ("GBL") section 354 against individual Respondents Ian Bruce Eichner, Leslie H. Eichner, Stuart P. Eichner (collectively, the "Eichners"), and Scott L. Lager ("Lager"); and against entity Respondents T. Park Central LLC ("T. Park") and O. Park Central LLC ("O. Park") (together, "Sponsor"); Sponsor's managing member, Park Central Management LLC ("Park Central Management"), Sponsor's selling agent, The Manhattan Club Marketing Group LLC ("Marketing Group"), and New York

Urban Ownership Management LLC ("Urban") (collectively, the "Respondent-Entities," and together with the Eichners, the "Eichner Respondents").

On July 24, 2014, Justice Arthur F. Engoron issued an *ex parte* order pursuant to GBL section 354 (the "Order"), requiring the Respondent-Entities to produce certain documents and the individual Respondents to appear and publicly testify. The Order provided preliminary injunctive relief on the following basis:

> [I]t is expedient and proper to grant certain preliminary injunctive relief against Respondents, pursuant to General Business Law § 354, because the alleged fraudulent practices threaten continued and immediate injury to the purchasing public, and that the potential dissipation of Respondents' assets would render a judgment directing restitution ineffectual[.]

The Order preliminarily restrained (i) all Respondents, their agents and employees, from violating Article 23-A of the GBL, and from engaging in the fraudulent, deceptive and illegal acts alleged by the NYAG; (ii) all Respondents, their agents and employees, including The Manhattan Club Timeshare Association, Inc. ("Timeshare Association") from engaging in any act directly or indirectly relating to the offer, purchase, sale, transfer or exchange of ownership interests in the Manhattan Club; (iii) Respondents, their principals and agents, including the Timeshare Association, from commencing any new foreclosure proceedings against timeshare owners for delinquent common charges or for failure to comply with their obligations pursuant to any purchase money mortgage, note, assignment or allonge; (iv) all Respondents, their principals and agents from making further withdrawals from any account in the name of Respondents T. Park, O. Park, Park Central Management, or Marketing Group at any bank, savings and loan association or other financial depository located inside or outside New York.

The Eichner Respondents now move for an order: (i) vacating in part the Order with respect to the Eichners and Urban; (ii) modifying the Order to allow new purchasers of timeshare interests whose contracts were placed on hold by the Order to finalize their purchases; and (iii) setting a discovery and deposition cut-off date and termination date for the Order, and prohibiting further "mass mailings" to timeshare owners.

Respondent Lager separately moves for an order, vacating in part the Order's injunctive relief with respect to Lager.

Petitioner NYAG cross moves for an order: (i) denying Respondents' motions; (ii) requiring that T. Park, O. Park, Park Central Management, Marketing Group, and Urban produce e-mails involving the Eichners; (iii) requiring that Urban escrow the fee it receives from the Timeshare Association with the Court each month for the duration of the NYAG's investigation; (iv) holding T. Park, Marketing Group, Park Central Management, and Lager in criminal contempt; (v) holding T. Park, Marketing Group, Park Central Management, and Lager in civil contempt and imposing a $368,738.35 fine.

Oral argument was heard on March 11, 2016. At oral argument, the cross motion to compel the production of e-mails and cross motion for criminal contempt were withdrawn. Following oral argument, the parties submitted supplemental briefs on the standard for preliminary injunctive relief under GBL section 354.

I

The Manhattan Club ("TMC") is a timeshare property located at 200 West 56th Street, New York, New York 10019. During its operation between 1997 and 2014, TMC realized a sales total of approximately $400,000,000. The majority of timeshare owners were sold "flex time" or "flexible ownership" interests, whereby owners have the ability to reserve any unit of a particular accommodation type at any time of the year, subject to availability, on a "*first come, first served*" basis.

According to the Eighty-Third Amendment Eighth Restated Timeshare Offering Plan (the "Offering Plan"), accepted for filing in 2012 and certified by Sponsor and its principals, the Eichners, TMC consists of 286 physical units of four accommodation types: 129 one-bedroom units; 112 executive suites; 24 penthouse suites; and 21 metropolitan suites. Sponsor offered timeshare purchasers the option of financing up to 90% of the purchase price, at a rate of up to 18% per year. The Offering Plan represents that there are a total of 14,872 annual ownership interests (286 rooms * 52 weeks = 14,872). In addition to the purchase price and payment on any mortgage paid to Sponsor, TMC owners must pay annual maintenance fees and real estate taxes to the Timeshare Association.

The Timeshare Association, a not-for-profit corporation, is responsible for the maintenance of the timeshare units and the operation of the timeshare project. The affairs of the Timeshare Association are managed by a seven member board of directors (the "Board"). Four of the members of the Board are appointed by Sponsor: Stuart Eichner (President), Scott Lager (Vice-President), Salvatore Reale,

and Joshua Wirshba. The other three members of the Board are elected by TMC owners on an annual basis.

Sponsor sells timeshare interests through Marketing Group. The Eichners are the principals and owners of Marketing Group. O. Park (Sponsor of Phase IV) is managed by the Eichners, and T. Park (Sponsor of Phases I, II, III & V) is managed by Park Central Management. The Eichners are the managing members of Park Central Management.

Urban is the management company of the Timeshare Association. The Eichners and Hospitality Advisors, LLC, a company owned by Respondent Lager, are members of Urban. As the Offering Plan explains,

> [Urban] has been retained by the Timeshare Association pursuant to a management agreement dated as of November 12, 1996 ("Original Management Agreement"). The Original Management Agreement was amended by First Amendment dated as of October 7, 2002, Second Amendment dated as of June 15, 2005, Third Amendment dated as of November 17, 2006 and Fourth Amendment dated January 3, 2012. [Urban] will be responsible for the maintenance and operation of the Timeshare Project.
>
> Offering Plan at 91 ("Management").

The Offering Plan discloses that Urban is "affiliated with Sponsor and its principals[,]" stating that "Ian Bruce Eichner, Stuart P. Eichner, and Leslie H. Eichner are principals of Sponsor as well as principals of [Urban]" and that "Sponsor has the power to control decisions affecting the Management Agreement" because "Sponsor controls the Timeshare Board." Offering Plan at 93 ("Related Parties"). The Offering Plan further discloses that Urban was paid a Management Fee of $6,190,349 in 2009 and $6,861,911 in 2010, but notes that

> [Urban] has voluntarily agreed with the Timeshare Board to cap its Management Fee for the calendar years 2011, 2012, and 2013 to be no more than the $6,861,911 level collected in calendar year 2010 but in no event more than the twenty (20%) percent Management Fee permitted to be collected by the Management Company under the Management Agreement.
>
> Offering Plan at 92 ("Management Fees").

Under the Management Agreement executed by the Timeshare Association and Urban, the Timeshare Association delegates to Urban "all the powers and duties of the Timeshare Association as set forth in the Timeshare Documents (except those powers and duties that are specifically required to be exercised by the Timeshare Association's directors and/or members under New York law)," including, *inter alia*, timeshare plan operations, maintenance and repair, accounting and financial reporting, annual budget services, replacement of personal property, compliance with laws, coordination of annual and special meetings of owners, coordination of all timeshare board meetings, employment of professionals, insurance, and lockout and liens.

In 2014, NYAG commenced an undercover investigation after receiving numerous complaints from owners of timeshare interests at TMC. NYAG alleges that Sponsor's selling agents made representations concerning the "equity component" of the ownership interests being offered, in spite of the Offering Plan's representation that

> the purchase of an Ownership interest should be based on its value and as a vacation experience, for spending leisure time, or for other personal use, and not considered for purposes of acquiring an appreciating investment or with an expectation that the Ownership interest may be rented or resold at a profit.

Further, Sponsor's selling agents allegedly made misrepresentations concerning the resale value of ownership interests, TMC's rental of rooms to the general public, and the reservation policies applicable to owners of flexible interests. In addition, NYAG's investigators were not provided with the Offering Plan before purchase, the Offering Plan failed to disclose that Sponsor was selling the notes that purchasers executed in connection with their purchase of timeshare interests, and Sponsor was selling real estate securities without a valid broker-dealer registration statement or an active offering plan.

NYAG states that it has uncovered new evidence of fraud during the public investigation following the issuance of the Order. NYAG reports (i) that rooms were rented to the general public in a manner than violated the Offering Plan; (ii) that the Offering Plan misrepresents TMC's reservation system and the number of units available to TMC owners; (iii) that Sponsor does not pay maintenance fees on time, while owners have been billed for yearly maintenance fees early; and (iv) that the Offering Plan's representations concerning the relationship between the Timeshare Association and Urban are misleading because Urban had no employees until August 2014 and was set up as a pass-through entity by which distributions

were made to Sponsor and individual Respondents using the Timeshare Association's monies. Furthermore, NYAG asserts that, in violation of the Order, Lager sent owners forbearance and deed-in-lieu of foreclosure agreements, and T. Park, Park Central Management, the Marketing Group, and Lager withdrew funds from frozen accounts.

II

Article 23-A of the GBL (the "Martin Act") empowers the Attorney-General to investigate and enjoin "fraudulent practices in respect to bonds, stocks, and other securities." GBL § 352 *et seq.* The Martin Act applies to the offering of securities consisting of participation interests in real estate, including interests in timeshare projects. GBL §§ 352-e, 359-e(5), 157(4) (defining "time share"); *see also* 13 NYCRR §§ 24.1 *et seq.* (regulations governing timeshare offering plans under the Martin Act).

The Martin Act authorizes the Attorney-General to conduct investigations in private or in public, to obtain a temporary injunction during such investigations, and to seek restitution of funds and institute criminal actions for the imposition of fines and penalties. *See* GBL § 352 *et seq.*; *see also Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 12 N.Y.3d 236, 244 (2009) ("[T]he Attorney General bears sole responsibility for implementing and enforcing the Martin Act; there is no private right of action under the statute.") (internal citations omitted); *Kralik v. 239 E. 79th St. Owners Corp.*, 799 N.Y.S.2d 433, 435 (2005).

The Act is broader than federal securities statutes in that it permits the Attorney General to take action against fraudulent conduct considered detrimental to the public without requiring proof of either scienter or intentional fraud, reliance, or damages. *See* GBL § 352-c(1)(c); *State v. Rachmani Corp.*, 71 N.Y.2d 718, 525 N.E.2d 704, 725 (1988) ("[U]nder the Martin Act, the Attorney-General need not allege or prove either scienter or intentional fraud[.]"); *State v. Sonifer Realty Corp.*, 622 N.Y.S.2d 516, 517 (1st Dept. 1995) (fraudulent practices need not constitute fraud in the classic common law sense, reliance need not be shown for the Attorney-General to obtain relief, and a false representation may be illegal regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted).

The Martin Act has been construed liberally to effect its remedial purpose. *State v. 7040 Colonial Rd. Associates Co.*, 176 Misc. 2d 367, 369 (Sup. Ct. 1998). Accordingly, "the word 'fraud' is broadly defined so as to embrace even acts which *tend* to deceive or mislead the purchasing public[.]" *People v. Charles*

Schwab & Co., 971 N.Y.S.2d, 267, 270 (1st Dept. 2013) (finding Martin Act causes of action sufficiently plead where brokers, employees and managers misled customers by representing securities as "safe, low risk, highly liquid investments, or cash management alternatives, or similar to money market funds" without disclosing the risks). As the Court of Appeals explained,

> The purpose of the law is to prevent all kinds of fraud in connection with the sale of securities and commodities . . . . The words 'fraud' and 'fraudulent practice' in this connection should, therefore, be 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, 38–41 (1926).

Under the provisions of the Martin Act setting forth "registration requirements," the offeror of securities, known as the sponsor, must file a broker-dealer registration statement disclosing the business history of the sponsor and every person or entity controlling the sponsor, each of whom is a "principal" of the sponsor. GBL § 359-e; *id.* § 359-e(d) ("A 'principal' shall mean and include every person or firm directly or indirectly controlling any broker or dealer."). The registration statement is effective for a period of four years from the date of filing. *Id.* § 359-e(3)(c). Unregistered sponsors may not sell securities. *Id.* § 359-e(3); *see also id.* § 359-e(14)(l) ("A violation of this subdivision shall constitute a fraudulent practice as that term is used in this article.").

The sponsor must also submit an "offering plan" containing certain required information and representations, *see* GBL § 352-e(1)(a)–(b), including, *inter alia*,

> the names, addresses and business background of the principals involved, the nature of their fiduciary relationship and their financial relationship, past, present and future, to the property offered to the syndicate and to those who are to participate in its management; the interests and profits of the promoters, offerors, syndicate organizers, officers, directors, trustees or general partners, direct and indirect, in the promotion and management of the venture; all restrictions, if any, on transfer of participants' interests[.]
>
> GBL § 352-e(1)(b).

The offering plan must also include "such additional information as the attorney general may prescribe in rules and regulations . . . as will afford potential investors, purchasers and participants an adequate basis upon which to found their judgment[,]" and "shall not omit any material fact or contain any untrue statement of material fact." GBL § 352-e(1)(b).

Pursuant to the Martin Act regulations, the offering plan for a timesharing plan must include a certification, subscribed and sworn to by the sponsor and its principals, in the following form:

> We are the sponsor and the principals of sponsor of the offering plan for the captioned timesharing plan.
>
> We understand that we have primary responsibility for compliance with the provisions of article 23-A of the General Business Law, the regulations promulgated by the Department of Law in Part 24, and such other laws and regulations as may be applicable.
>
> We have read the entire offering plan. We have investigated the facts set forth in the offering plan and the underlying facts. We have exercised due diligence to form a basis for this certification. We jointly and severally certify that the offering plan does, and that documents submitted hereafter by us which amend or supplement the offering plan will: (1) set forth the detailed terms of the transaction and be complete, current and accurate; (2) afford potential investors, purchasers and participants an adequate basis upon which to found their judgment; (3) not omit any material fact; (4) not contain any untrue statement of a material fact; (5) not contain any fraud, deception, concealment, suppression, false pretense, or fictitious or pretended purchase or sale; (6) not contain any promise or representation as to the future which is beyond reasonable expectation or unwarranted by existing circumstances; (7) not contain any representation or statement which is false, where I/we: (i) knew the truth; (ii) with reasonable effort could have known the truth; (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made.
>
> This certification is made under penalty of perjury for the benefit of all persons to whom this offer is made. We understand that violations are subject to the civil and criminal penalties of the General Business Law and Penal Law.

N.Y. Comp. Codes R. & Regs. tit. 13, § 24.4.

"Principal" is broadly defined under the regulations as

> all individual sponsors, all general partners of sponsors that are partnerships, all officers, directors and shareholders of a corporate sponsor that are actively involved in the planning or consummation of the offering or who have decision-making authority to act, and all other individuals who both: (i) own an interest in or control the sponsor; and (ii) actively participate in the planning or consummation of the offering, regardless of the form of organization of sponsor.
>
> N.Y. Comp. Codes R. & Regs. tit. 13, § 24.1.

The sponsor and its principals are considered the "guarantors" of representations in the offering plan. *See Attorney-General v. Katz,* 104 Misc. 2d 846, 848 (Sup. Ct., Special Term, N.Y. Cnty.), *aff'd*, 77 A.D.2d 501 (1st Dept. 1980).

The Martin Act expressly prohibits the offering or sale of securities "except on the basis of information, statements, literature, or representations constituting the offering statement or statements or prospectus[,]" and "no information, statements, literature, or representations" may be used in the offering or sale of securities "unless it is first so filed and the prospective purchaser furnished with true copies thereof." GBL § 352-e(5). Furthermore, "[a]ll advertising in connection with an offering of securities" must be "consistent with the representations and information" set forth in the offering plan. GBL § 352-e(1)(c); *see also Federated Radio Corp.*, 244 N.Y. at 39 ("A complaint which alleges that defendants are putting forth untrue and misleading advertisements with intent to sell securities alleges a fraudulent practice, *i.e.*, a 'violation of law which has operated or which would operate as a fraud upon the purchaser.'") (citing § 352).

Under the Martin Act, false statements to promote the sale of securities are unlawful where the sponsor "made no reasonable effort to ascertain the truth" or "did not have knowledge concerning the representation or statement made[.]" *See* GBL § 352-c(1)(c)(iii)–(iv); *see also In re Cenvill Communities, Inc.*, 82 Misc. 2d 418, 420–21 (Sup. Ct. 1975) (noting that "fraudulent practices" include "devices and schemes, deceptions, concealments and suppressions" and involve "knowledge of improper methods of operations, with a concomitant duty to make reasonable effort to ascertain the facts"). GBL § 352-c(1)(c)(iii)–(iv).

Pursuant to its broad investigative powers under the Martin Act, the Attorney-General may undertake private investigations (section 352) or public investigations

(section 354) prior to filing an action (section 353). *See Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, 12 N.Y.3d 236, 244 (2009) ("[T]he specific purpose of the statute was to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers to prevent fraudulent securities practices by investigating and intervening at the first indication of possible securities fraud on the public and, thereafter, if appropriate, to commence civil or criminal prosecution[.]") (citing *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 277 (1987)); *Gonkjur Assocs. v. Abrams*, 451 N.Y.S.2d 747, 749–50 (1st Dept. 1982), *aff'd*, 58 N.Y.2d 878 (1983) (noting that the attorney general has "exceedingly broad—indeed, inquisitorial—powers under the Martin Act" to investigate "all kinds of fraud incident to the sale of securities and commodities and to seek to enjoin such acts").

III

In the initial motion papers, NYAG argued that the proper standard for injunctive relief under GBL section 354 is the "proper and expedient" standard. Eichner Respondents did not challenge the "proper and expedient" standard, arguing that NYAG had failed to meet the "proper and expedient" standard because there was no "proper" basis for a preliminary injunction against the Eichners or Urban at the time the Order was issued, and the investigation demonstrated that a preliminary injunction was not "expedient" as to the Eichners or Urban. At oral argument, Eichner Respondents added that they "do not concede that [the 'proper and expedient' standard] is the correct standard." Oral Argument Transcript at 58. The Court requested supplemental briefing from the parties on the issue of the applicable standard for preliminary injunctive relief under section 354.

Pursuant to GBL section 354,[1] prior to commencing an action, the Attorney-General may apply to any justice of the supreme court seeking a court order to

[1] Section 354, entitled "Examination of witnesses and preliminary injunction," provides:

> Whenever the attorney-general has determined to commence an action under this article, he may present to any justice of the supreme court, before beginning such action, an application in writing for an order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and answer such questions as may be put to them or to any of them, or to produce such papers, documents and books concerning the alleged fraudulent practices to which the action which he has determined to bring relates, and it shall be the duty of the justice of the supreme court to whom such application for the order is made to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person or persons is material and necessary.

compel the appearance of witnesses to answer questions or produce documents in connection with the Attorney-General's investigation and "it *shall be the duty* of the justice of the supreme court . . . to grant such application." GBL § 354. The Attorney-General need only show "upon his information and belief" that the witness's testimony is "material and necessary." GBL § 354; *see also Ottinger v. Civil Serv. Comm'n*, 240 N.Y. 435, 439 (1925) (Cardozo, J.) ("[A]lmost upon mere request, [the Attorney-General] may have an examination before trial of parties or of witnesses (§ 354)."). The examination is to be held before a "justice or referee" and "[t]he testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed." GBL §§ 354, 355; *First Energy Leasing Corp. v. Attorney-Gen.*, 68 N.Y.2d 59, 64, 496 N.E.2d 875, 878 (1986) ("It is apparent that the Legislature, in granting to the Attorney-General the extraordinary enforcement powers under section 354, found it appropriate to give the subjects of those proceedings the added protection of judicial supervision."). The Attorney-General is not required to make a final decision "to commence an action" before seeking judicially ordered examinations pursuant to section 354. *Gonkjur Associates v. Abrams*, 88 A.D.2d 854, 856 (1982), *aff'd,* 58 N.Y.2d 878 (1983).

Section 354 also authorizes the court to grant a preliminary injunction or stay in conjunction with the order for the examination of witnesses before the commencement of an action. GBL § 354 ("The order shall be granted . . . with such preliminary injunction or stay as may appear to such justice to be proper and expedient."). Because "the purpose of the inquiry is to preserve the status quo while determining whether a case can be made out[,]" the Attorney-General need not establish a *prima facie* case to obtain a section 354 order. *Abrams v. Long Beach Oceanfront Associates Ltd. P'ship*, 136 Misc. 2d 137, 140 (Sup. Ct. 1987) (denying respondents' motion to vacate the *ex parte* order where the Attorney-

---

> The provisions of the civil practice law and rules, relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient and shall specify the time when and place where the witnesses are required to appear. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed.
>
> GBL § 354.

General "set forth reasonable cause to believe that violations of the Martin Act have occurred").

In their supplemental briefing, Eichner Respondents argue that the CPLR standard should apply to preliminary injunctive relief under section 354, while maintaining that under *any* standard, the Order should be vacated as to the Eichners and Urban. In response, NYAG argues that the statutory text of section 354 is unambiguous in supplying the "proper and expedient" standard to preliminary injunctive relief sought by NYAG under section 354.

Eichner Respondents point out that, in contrast to section 354's carve-out of witness examinations from the CPLR's coverage, section 354 does not suggest that the CPLR does not apply to preliminary injunction applications. *See* GBL § 354 ("The provisions of the [CPLR], relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination, shall not apply except as herein prescribed."). Eichner Respondents propose that the most logical reading of the "proper and expedient" clause in section 354 is a general authorization for a court to issue whatever injunction—under the appropriate CPLR standard—as may be "proper and expedient" under the facts of the individual case at the pre-action stage.

Eichner Respondents cite *State v. Fine*, 72 N.Y.2d 967 (1988) for the proposition that the CPLR standard applies to preliminary injunctions under the Martin Act. *Id.* at 968–69 ("[A] preliminary injunction under the Martin Act, as under CPLR article 63, should be granted only upon a showing of a likelihood of success on the merits, irreparable injury if the relief is not granted, and a balancing of the equities.").

In *Fine*, the Court of Appeals reversed the order of the Appellate Division, First Department affirming the trial court's grant of a preliminary injunction under the Martin Act. The Appellate Division held that the Attorney General had satisfied his burden of "show[ing] *prima facie* that respondents' actions fell within the purview of the act" (citing *People v. Michael Glenn Realty Corp.*, 106 Misc. 2d 46, 47 (Sup. Ct. 1980)), and also met the "higher standard for injunctive relief under Article 63 of the CPLR" because the prospectuses omitted material facts. *State v. Fine*, 133 A.D.2d 304, 305 (1987), *rev'd,* 72 N.Y.2d 967 (1988). The Court of Appeals held that the majority had erred by not considering "the necessary discretionary elements for preliminary injunctions" but indicated that the Martin Act "may present its own special considerations in determining what is irreparable injury and in balancing equities." *Fine*, 72 N.Y.2d at 969.

NYAG notes that, while *Fine* applied the CPLR standard for a preliminary injunction, *Fine* concerned an *action* under section 353, not an investigatory *proceeding* under section 354. NYAG suggests that the *Fine* Court recognized the distinction when it cited section 354, by way of comparison, in the following passage:

> The Legislature made plain in the Martin Act that "[t]he provisions of the civil practice law and rules shall apply to all actions brought under this article except as herein otherwise provided" (General Business Law § 357), and it specified no other standard for preliminary injunction motions (*cf.* General Business Law § 354; *Matter of Ottinger v State Civ. Serv. Commn.*, 240 NY 435,439).

NYAG notes that *Schneiderman v. 15 Broad Street, LLC*, 2014 WL 1682835 (Sup. Ct. N.Y. Cnty. April 24, 2014) squarely addressed this issue and held that the preliminary injunction standard under the CPLR does not apply in section 354 proceedings.

After reviewing the statutory text and relevant cases, this Court finds the petitioner's analysis and the analysis of the *15 Broad Street* Court persuasive. Section 357 supplies the default rule that "[t]he provisions of the civil practice law and rules shall apply to all *actions* brought under this article *except as herein otherwise provided*." GBL § 357 (emphasis added). Section 357 therefore expressly applies to "actions" brought by NYAG under section 353; it does not apply to a section 354 investigatory proceeding in connection with an action that NYAG has not yet commenced. *See 15 Broad* Street, 2014 WL 1682835, at *2. Notably, in other sections of the Martin Act, the Legislature distinguishes between "actions" and "proceedings." *See, e.g.*, GBL § 352 ("Such power of subpoena and examination shall not abate or terminate by reason of any action or proceeding brought by the attorney-general under this article."); *id.* § 359-g ("Nor shall anything contained in this subdivision be construed to deny to or interfere with the power of the attorney-general to bring any other action or proceeding, civil or criminal, against the applicant at any time.").

Moreover, the plain reading of the statutory text does not support the application of the CPLR standard. Section 354 states that "[t]he order shall be granted by the justice of the supreme court to whom the application has been made *with such preliminary injunction or stay as may appear to such justice to be proper and expedient*." GBL § 354 (emphasis added). The foregoing clause clearly indicates that the Legislature intended to supply a "proper and expedient" standard for preliminary injunctive relief at the pre-action stage. *See Tall Trees Const. Corp.*

v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 91 (2001) ("Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning[.]"). Substituting the CPLR standard would read the "proper and expedient" clause out of the statute. *See Matter of Yolanda D.*, 88 N.Y.2d 790, 795 (1996) ("[C]ourts must, where possible, give effect to every word of a statute[.]"). Furthermore, it would be impractical to apply both standards—the CPLR standard and the "proper and expedient" standard—as Respondents propose, at the pre-action stage, where the court indisputably has a "duty" to grant NYAG's application for the examination of witnesses and production of documents. It simply runs counter to the remedial purposes of the Martin Act to interpret section 354 as imposing a more exacting standard than "proper and expedient" before an action has been commenced. *See id.* ("[Courts] must interpret statutes in a manner consistent with and in furtherance of the legislative intent behind the enactment[.]"). Accordingly, this Court concludes that the "proper and expedient" clause—not the CPLR—supplies the applicable standard for injunctive relief under section 354.

IV

Eichner Respondents argue that the Order should be vacated as to the Eichners and Urban because there was no allegation that the Eichners personally engaged in any wrongful conduct, or that Urban was engaged in wrongdoing. Eichner Respondents allege that the Eichners had "no day-to-day involvement in the operation of [TMC]" and "no contact with the sales or reservation staff." Eichner Respondents' Reply Memorandum at 4. They further allege that it is industry standard for a timeshare to employ a management company consisting of a very small staff of decision makers. Eichner Respondents point out that Urban's management fees are not only transparent in the Offering Plan but also approved annually by unanimous vote of the Timeshare Association's Board. Lager similarly argues that the Order should be vacated as to him because NYAG failed to identify any basis for naming Lager as a respondent when petitioning for the Order, and the continuation of the proceeding against him is improper and inexpedient.

NYAG argues that the Order was "proper and expedient" as to the Eichners, Lager, and Urban. NYAG asserts that Order's injunctive relief against the Eichners is proper based on (a) the Eichners' primary responsibility for compliance with the Martin Act, as principals of Sponsor, (b) the evidence of fraud in the oral sales presentations, (c) a material omission in the Offering Plan—the failure to disclose the hypothecation loans, and (d) the fact that Sponsor was engaging in sales activity as an unregistered broker-dealer. NYAG argues that Urban is properly named in the Order based on Urban's role as the purported management company

for the Timeshare Association, where approximately 15–20% of the revenue generated by the Timeshare Association is distributed through Urban to the Eichners and Lager each year.

NYAG asserts that Lager was properly named in the Order because he controlled Sponsor and was actively involved in the offering. *See* GBL § 353(1) (NYAG may bring an action against "any other person or persons theretofore concerned in or in any way participating in or about to participate in such fraudulent practices"). 13 NYCRR § 24.1(c)(2) (defining "principal" as all individuals who both "own an interest in or control the sponsor" and "actively participate in the planning or consummation of the offering, regardless of the form of organization of sponsor"). NYAG alleges that Lager was in charge of Sponsor's sales, managed the sales staff, subjecting the sales staff to close scrutiny, authorized incentives that the sales staff used to encourage purchasers to buy timeshare interests, and was aware that the sales staff required prospective purchasers to make the decision to buy on the same day as the sales presentation.

As outlined above in sections II and III, the Martin Act empowers NYAG to investigate securities fraud prior to commencing an action. The purpose of preliminary injunctive relief pursuant to section 354 is to preserve the status quo while NYAG conducts an investigation of alleged violations of the Martin Act. Upon NYAG's commencement of a public investigation, the role of the supreme court is to grant NYAG's application for the examination of witnesses and production of documents, with such preliminary injunctive relief as the court deems "proper and expedient."

Vacating the Order's preliminary injunctive relief would be appropriate only if such injunctive relief was not "proper or expedient" at the time the Order was issued. Thus, to the extent that respondents' argue that the Order should be vacated based on the investigation being "inexpedient" or the investigation demonstrating that the Order was "inexpedient," such arguments are misplaced. *See 15 Broad Street*, 2014 WL 1682835, at *3 ("It cannot be gainsaid that the preliminary injunction made pursuant to General Business Law § 354 appeared 'proper and expedient' to the justice to whom the application was made."). This Court cannot find that the provisional relief in the Order did not appear "proper and expedient" to the justice who issued the Order, and therefore, the Court will not disturb the Order's injunctive relief with respect to the Eichners, Urban, or Lager.

The Court notes that the examinations of Lager and the Eichners, who remain subject to examination pursuant to the Order, have yet to take place. It would be premature to lift the Order's injunctive relief before those court-ordered

examinations have taken place. Because fundamental elements of the section 354 proceeding have not yet been completed, the Court declines the Eichner Respondents' request to modify the Order to allow new timeshare purchasers to complete their purchases. The Court also declines to issue an order setting discovery and deposition cut-off dates, a termination date for NYAG's investigation, and prohibiting NYAG from sending "mass mailings" to timeshare owners. At oral argument, NYAG represented that it is prepared to commence an action under section 353 of the Martin Act following completion of the remaining court-ordered examinations. Respondents may of course move to vacate the preliminary injunction upon NYAG's commencement of the action under section 353. *See Attorney-Gen. of State of N.Y. v. Katz*, 55 N.Y.2d 1015 (1982).

With respect to NYAG's cross motion, the Court finds that additional injunctive relief against Urban is "proper and expedient" in light of Urban's significant role in managing the timeshare project. At the time NYAG initially sought injunctive relief, NYAG believed Urban was a "real management company" with "real assets, real expenses, real employees and a real payroll." Oral Argument at 35. The Eichners and Lager own and manage Urban. Urban had no employees until August 2014. Thus, the Eichners and Lager "provide[d] the oversight, organization and coordination that a major timeshare property requires[,]" performing "high-level managerial work" and "top level decision-making" and "hir[ing] and direct[ing] supervisors that ultimately instruct the salaried day-to-day employees." Eichner Respondents' Reply at 6. The record reflects that TMC owners pay timeshare charges to the Timeshare Association, a percentage of which end up in Urban's accounts as its "management fee." The "management fee" does not go toward paying the salaries of the Timeshare Association's employees or maintenance costs; rather, the fee goes directly to the Eichners and Lager (through Hospitality Advisors). Insofar as Urban's operation and management of the timeshare allegedly involves "fraudulent practices" in violation of the Martin Act, it is proper and expedient to include Urban's bank accounts in the Order's injunctive relief because the potential dissipation of respondents' assets would render a judgment directing restitution ineffectual.

Finally, NYAG argues that this Court should hold T. Park, Park Central Management, the Marketing Group, and Lager in civil contempt pursuant to CPLR section 5104, which authorizes this Court to punish for civil contempt a party who "refuses, or wilfully neglects to obey" a judgment or order. CPLR § 5104. In its initial papers, NYAG alleged that more than $694,996.62 was improperly withdrawn from Respondent-Entities' bank accounts between July 25 and

November 30, 2014. In its reply, NYAG adjusted the amount to $368,738.55 in unauthorized withdrawals.

To succeed on a motion to punish for civil contempt, the moving party must show that the alleged contemnor violated a clear and unequivocal court order and that the violation prejudiced a right of a party to the litigation. *See* Judiciary Law § 753(a)(3); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073, 1074 (2d Dept. 2008). Contempt is a drastic remedy that should not be granted unless it is established "with reasonable certainty." *Usina Costa Pinto, S.A. v. Sanco Sav Co. Ltd.*, 171 A.D. 2d 487 (1st Dept. 1991). Civil contempt requires clear and convincing evidence that a clear and unequivocal court order was knowingly disobeyed. *Simens v. Darwish*, 104 A.D. 3d 465 (1st Dept. 2013). While an evidentiary hearing is not mandated "in every instance where contempt is sought," *Bowie v. Bowie*, 182 A.D.2d 1049, 1050 (3d Dept. 1992), "a hearing must be held if issues of fact are raised." *Mulder v. Mulder,* 191 A.D.2d 541, 541 (2d Dept. 1993).

Here, issues of fact have been raised by Lager's affidavit, the Eichner Respondents' Reply Memorandum, and NYAG's submissions concerning the nature of the withdrawals from bank accounts subject to the Order and the total amount of unauthorized withdrawals. An evidentiary hearing must be held because such factual disputes cannot be resolved on the papers alone. *See McDonnell v. Frawley*, 23 A.D.2d 729, 730, 257 N.Y.S.2d 689 (1965) ("Before punishment can be determined or imposed under section 773 of the Judiciary Law a hearing is mandated unless it so clearly appears that its provision have been violated, and the extent of such violation, unless there is no room for reasonable doubt or dispute."). Further, under the circumstances here, it is appropriate to delay the evidentiary hearing until the completion of NYAG's investigation.

Wherefore, it is hereby

ORDERED that respondents' motions to vacate the Order's injunctive relief with respect to Ian Bruce Eichner, Leslie H. Eichner, Stuart P. Eichner, New York Urban Management LLC, and Scott L. Lager, are denied, and it is further

ORDERED that respondents' motion to modify the Order to allow new purchasers of timeshare interests whose contracts were placed on hold by the Order to complete their purchases is denied; and it is further

ORDERED that respondents' motion for a new order, setting discovery and deposition cut-off dates and a termination date for the Order, and prohibiting future "mass mailings" to timeshare owners is denied; and it is further

ORDERED that all Respondents, their principals and agents are restrained from making further withdrawals from any account in the name of Respondent New York Urban Management LLC at any bank, savings and loan association or other financial depository located inside or outside New York; and it is further

ORDERED that Petitioner's cross motion seeking to hold Respondents T. Park Central LLC, Park Central Management LLC, The Manhattan Club Marketing Group LLC, and Scott L. Lager, in civil contempt, is adjourned pending an evidentiary hearing following the completion of NYAG's investigation.

Dated: May 26, 2016

Eileen A. Rakower, J.S.C.