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

In the Matter of the Inquiry of

LETITIA JAMES, Attorney General of the State of New York,

Petitioner-Respondent,

v.

iFINEX INC., BFXNA INC., BFXWW INC., TETHER HOLDINGS LIMITED, TETHER OPERATIONS LIMITED, TETHER LIMITED, TETHER INTERNATIONAL LIMITED,

Respondents-Appellants.

Case No. 2019-03341

Supreme Court
New York County
Index No. 450545/19

MEMORANDUM OF LAW IN OPPOSITION TO EMERGENCY MOTION FOR A STAY PENDING APPEAL

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondent
28 Liberty Street
New York, NY 10005
(212) 416-8019

STEVEN C. WU
Deputy Solicitor General
SCOTT A. EISMAN
Assistant Solicitor General
of Counsel

Dated: August 30, 2019

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Respondents' motion for a stay pending appeal is their latest effort to prematurely halt a law-enforcement investigation that is expressly authorized under New York's Martin Act. The Martin Act empowers the Office of the Attorney General ("OAG") to combat securities and commodities fraud not only by authorizing OAG to bring charges, but also by conferring substantial and comprehensive powers on OAG to investigate suspected wrongdoing. Given that the Martin Act grants OAG broad investigatory powers, the baseline presumption is that OAG's investigations should continue unimpeded. Courts will thus decline to halt OAG's Martin Act investigations so long as OAG has reasonable grounds to investigate. The well-reasoned order under review here applied that settled principle and allowed OAG's investigation into respondents' businesses to proceed. A justice of this Court has already denied an interim stay of the order. This Court should do the same.

Respondents operate two closely related online businesses. The first business, Bitfinex, is a trading platform through which investors around the world—including in New York—can trade digitial units of stored value known as "virtual currency" or "cryptocurrency." The second business, Tether, is the issuer of a form of virtual currency known as "tethers," which respondents long represented were backed one-to-one by U.S. dollars in cash reserves held by Tether. Bitfinex and Tether are owned and operated by the same small group of insiders.

In late 2018, OAG began investigating whether respondents had violated the Martin Act by misrepresenting or omitting information in public disclosures,

including information about respondents' liquidity, ability to honor customer orders, and the actual financial backing of tethers. During that initial investigation, respondents' counsel requested and accepted service of a subpoena issued under the Martin Act, General Business Law ("GBL") art. 23-A (§§ 352–359-h). When respondents refused to produce certain information that OAG requested, OAG obtained a court order under GBL § 354 compelling respondents to produce documents and enjoining them from engaging in additional potentially conflicted intra-corporate transactions. Respondents have twice attacked that order—in a motion to vacate and a motion to dismiss. Supreme Court, New York County (Cohen, J.), denied both motions. Respondents now appeal only the denial of the motion to dismiss, and they seek a stay of only the order that they produce documents.

Respondents' motion fails because the equities strongly favor OAG. Respondents claim that they will suffer harm absent a stay because they will be forced to produce all the documents that Supreme Court ordered them to produce, thus mooting their appeal. But that argument is speculative. Supreme Court has not even set a production deadline, and nothing in respondents' motion suggests that they will be unable to have their appeal heard before they complete their production. And even if respondents do produce all their documents while the appeal is pending, the appeal would not be moot because respondents could still challenge the injunction that Supreme Court entered. That prospect of meaningful relief precludes a mootness finding.

OAG, on the other hand, will suffer significant harm if a stay issues. Respondents' delay tactics have already left OAG unable to obtain information

critical to its investigation for four months—information that respondents have largely been obligated to turn over since they first accepted service of a Martin Act subpoena last year. Without that information, OAG cannot effectively investigate respondents, who have during the past several months alone issued billions of dollars of new digital assets and repeatedly reassured investors about the state of their financial health. In short, the investigation must continue so that OAG can discharge its statutory duty to protect New York investors.

Respondents are also unlikely to succeed on the merits. Their argument that Supreme Court lacked subject-matter jurisdiction over this action because tethers are not "securities or commodities" under the Martin Act is both beside the point and incorrect. The argument is beside the point because, at the investigation stage, OAG need show only that its investigation is *reasonably related* to securities or commodities, and it did so here, as Supreme Court correctly found. And the argument is incorrect because the State Constitution and the Martin Act grant Supreme Court subject-matter jurisdiction over Martin Act proceedings generally and over applications for GBL § 354 orders specifically. The mere possibility that tethers are not securities or commodities may provide respondents a defense against any future claim by OAG under the Martin Act, but it does not deprive Supreme Court of subject-matter jurisdiction altogether.

Finally, Supreme Court properly denied respondents' request to dismiss for lack of personal jurisdiction. At this early juncture, OAG need show only reasonable grounds to believe that respondents violated New York law, and Supreme Court

found that OAG satisfied that standard. In any case, Supreme Court found that the evidence OAG has uncovered so far establishes that respondents purposefully directed toward New York at least some of the acts that OAG is investigating and operated in part from the State, making personal jurisdiction proper. Supreme Court also correctly concluded that OAG's service on respondents' counsel of the § 354 order requiring document production was sufficient to establish personal jurisdiction. Respondents forfeited their contrary argument by failing to raise it in their motion to vacate. And that argument would fail regardless because personal service on respondents would have been impracticable. The court-ordered method of service was thus a permissible means of serving corporate entities under both the Martin Act and the C.P.L.R., and gave respondents a full and fair opportunity to litigate.

BACKGROUND

A. The Attorney General's Broad Power to Detect and Remedy Securities and Commodities Fraud

The New York Attorney General is "the State's chief law enforcement officer." *People v. Grasso*, 54 A.D.3d 180, 204 (1st Dep't 2008) (quotation marks omitted). As head of OAG, she safeguards the public interest through investigations and enforcement actions to prevent and combat, among other things, securities and commodities fraud.

To that end, New York's longstanding securities- and commodities-fraud law—the Martin Act—vests OAG with broad authority to investigate suspected fraud in the offer, sale, or purchase of securities and commodities. *See* GBL art. 23-A. The

Martin Act grants OAG "broad regulatory and remedial powers to prevent fraudulent securities [and commodities] practices by investigating and intervening at the first indication of possible securities [or commodities] fraud on the public and, thereafter, if appropriate, to commence civil or criminal prosecution." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 18 N.Y.3d 341, 350 (2011) (quotation marks omitted); *see* GBL § 352(1).

As part of the broad grant of authority to OAG to investigate potential Martin Act violations, the Legislature enacted § 354, which allows OAG to obtain a court order requiring investigation subjects to appear and answer questions or "to produce such papers, documents and books concerning the alleged fraudulent practices" that OAG is investigating. GBL § 354. Along with that order, the court may issue a "preliminary injunction or stay as may appear to [the court] to be proper and expedient." *Id.* OAG obtains such an order by "present[ing] to any justice of the supreme court . . . an application," which the justice "shall" grant. *Id.*

B. Factual and Procedural Background

1. Respondents' involvement in the virtual-currency marketplace

Respondents are a group of closely related foreign-incorporated businesses that issue and facilitate the trading of virtual currencies. Virtual currencies, also called cryptocurrencies, are digital units used as a medium of exchange or a form of digitally stored value. Nearly two thousand virtual currencies have been created and trade around the world. The best known, most widely traded, and most highly valued

virtual currency is bitcoin. Depending on their specific characteristics and usage, virtual currencies have been determined by courts and various governmental agencies to be securities or commodities, and subject to applicable federal and state laws and regulations. *See, e.g.*, *CFTC v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, 495–98 (D. Mass. 2018). Virtual currencies are widely traded online through trading platforms. These trading platforms match buyers and sellers of virtual currencies. *See* Pet. for an Order Under GBL § 354 ("Pet.") ¶¶ 18–19 (Affirm. of Charles Michael in Supp. Mot. for a Stay Pending Appeal ("Michael Affirm."), Ex. 1).[1]

Respondent iFinex Inc., together with its wholly owned subsidiaries BFXNA Inc. and BFXWW Inc., operates one such trading platform, Bitfinex. *Id.* ¶¶ 7–12. (We refer to these three respondents collectively as "Bitfinex.") Traders of the approximately ninety currencies that can be exchanged on the Bitfinex platform access the platform through a website. *Id.* ¶¶ 21–22. Bitfinex allows users to store virtual currency and transfer their holdings to a different platform. *Id.* ¶ 22.

Bitfinex is one of the few virtual-currency trading platforms that allows investors to deposit fiat currency, such as U.S. dollars, euros, pounds, and yen. *Id.* ¶ 23. After depositing this fiat currency on the Bitfinex platform, investors can convert it into virtual currency at rates offered by Bitfinex, trade their virtual currency, convert their virtual currency back into fiat currency, and withdraw the funds.

[1] Supreme Court treated the affirmation of Brian Whitehurst dated April 24, 2019, as OAG's petition for a § 354 order.

Bitfinex must therefore have enough fiat currency, including U.S. dollars, on hand to fill withdrawal orders that traders submit. *Id.*

OAG's investigation has determined that, until August 2017, Bitfinex had virtually no restrictions on who could access its trading platform. *Id.* ¶ 24. In August 2017, Bitfinex announced that it would no longer permit U.S.-based individual investors to access the trading platform, but U.S.-based businesses could still trade. *Id.* In August 2018, Bitfinex purported to exclude U.S.-based businesses as well. *Id.*

Respondent Tether Holdings Limited is the holding company for respondents Tether Operations Limited, Tether Limited, and Tether International Limited. *Id.* ¶ 13. (We refer to these four respondents collectively as "Tether.") Tether is owned and operated by the same group of executives and employees who operate Bitfinex. *Id.* ¶ 15. Tether's primary function is to issue the virtual currency tether. *Id.* ¶ 26.

The tether currency is one of the most prominent and widely traded virtual currencies. *Id.* ¶ 35. As of April 2019, 2.6 billion tethers were outstanding and trading on the market (*id.*), and Tether has issued nearly two billion more since (Mem. of Law in Opp'n Resps.' Mot. to Dismiss at 7 (Michael Affirm., Ex. 19)). The tether currency is listed on at least several dozen virtual-currency trading platforms. Pet. ¶ 27. Unlike most virtual currencies, tether is a so-called stablecoin, meaning that its market value is not supposed to fluctuate. *Id.* ¶ 28. Each tether is always supposed to be valued at one U.S. dollar. *Id.* Because tethers are supposed to have stable value, virtual-currency traders use them to trade between different virtual currencies or across different trading platform with minimal short-term price risk. *Id.* ¶ 29.

Tether represents to investors that any holder can redeem each tether from the company for one U.S. dollar. *Id.* ¶ 33. To assure the market that each tether equals one U.S. dollar, Tether long represented that for every outstanding tether issued and trading in the market, the company itself held one U.S. dollar in reserve. *Id.* ¶ 30.

Until November 2017, tethers were available for purchase by New York investors directly from the Tether website. *Id.* ¶ 36. According to respondents' general counsel, "Tether ceased servicing U.S. Persons, including United States individual and corporate customers," in November 2017. Affirm. of Stuart Hoegner in Supp. Mot. to Dismiss ¶ 12 (Michael Affirm., Ex. 16). Despite that representation, Tether's terms of service did not specifically bar New York investors from redeeming tethers until November 2018. *See* Whitehurst Affirm. in Opp'n Mot. to Dismiss ("Whitehurst MTD Affirm.") ¶¶ 18–19 (Affirm. of Scott A. Eisman ("Eisman Affirm."), Ex. A); *see also* Tether Terms of Service (Nov. 27, 2018) (Eisman Affirm., Ex. B). From November 2017 to December 2018, investors could buy tethers only through the Bitfinex trading platform. Pet. ¶ 37. OAG's investigation has revealed that, during this time, New York investors could and did use the Bitfinex platform to buy and sell tethers. *Id.* According to respondents' counsel, investors could once again purchase tethers directly from the Tether website beginning in December 2018, but Tether claims to have barred U.S. investors from doing so. *Id.* ¶ 38; Hoegner Affirm. in Supp. Mot. to Dismiss ¶ 12 (Michael Affirm, Ex. 16).

Regardless of the purported bar on New York investors' transacting in tethers on the Tether website, New York investors may still trade tethers on several virtual-currency trading platforms licensed to do business in New York. Pet. ¶ 39.

2. Bitfinex's liquidity troubles

Because respondents allow clients to deposit and withdraw U.S. dollars in exchange for virtual currency, respondents hold large sums of U.S. dollars and must maintain relationships with banks that can hold the funds and process client deposits and withdrawals, including banks that can operate in the United States. Pet. ¶ 48. As respondents' counsel has explained to OAG, many U.S. banks and other financial institutions will not do business with unregulated or offshore companies, like respondents, that deal in virtual currencies. *Id.* ¶ 49.

In November 2018, after several failed relationships with other banks, Tether announced that it had established a banking relationship with Deltec Bank & Trust Limited. *Id.* ¶¶ 50–56. Tether also represented that tethers "in the market are fully backed by US dollars that are safely deposited in our bank accounts." Tether Banking Relationship Announcement (Eisman Affirm., Ex. C). Bitfinex also has a banking relationship with Deltec. *See* Pet. ¶ 85.

Unbeknownst to the general public, however, Tether and Bitfinex entrusted funds not only to banks like Deltec, but also to third-party payment processors that handled client withdrawals. *Id.* ¶ 57. One such payment processor was Crypto Capital Corp. According to documents that respondents provided OAG, Bitfinex placed more

than $1 billion of commingled customer and corporate funds with Crypto Capital. *Id.* ¶ 58; *see id.* ¶ 71.

By mid-2018, Bitfinex was having difficulty honoring its clients' requests to withdraw their money from the Bitfinex trading platform because Crypto Capital, which by then held all or almost all of Bitfinex's funds, refused to process withdrawal requests and refused or could not return any funds to Bitfinex. *Id.* ¶ 62. According to respondents' counsel, Crypto Capital represented to Bitfinex that U.S. and foreign authorities had seized $851 million of Crypto Capital's funds, thus preventing Crypto Capital from honoring withdrawal requests. *Id.* ¶ 68; *see id.* ¶¶ 63, 66–67, 69.

Despite its inability to access nearly $1 billion in funds—a major and potentially crippling liquidity problem—Bitfinex told the public that rumors that it was at risk of insolvency were "based on nothing but fiction" (Press Release, Bitfinex, A Response to Recent Online Rumours (Oct. 7, 2018) (Eisman Affirm., Ex. D)) and that "[a]ll cryptocurrency and fiat withdrawals are, and have been, processing as usual without the slightest interference" (Press Release, Bitfinex, Fiat Deposit Update (Oct. 15, 2018) (Eisman Affirm., Ex. E)).

In November 2018, in an apparent attempt to resolve Bitfinex's liquidity problem, Tether transferred $625 million from its Deltec account to Bitfinex's Deltec account. Pet. ¶ 85. In exchange, Bitfinex "transferred" $625 million to Tether by debiting that amount from its Crypto Capital account and crediting the same amount to Tether's Crypto Capital account. *Id.* By this time, however, respondents knew that Crypto Capital was not honoring withdrawal requests. *See id.* ¶¶ 62–63, 66–67. The

"transfer" from Bitfinex to Tether thus meant that Tether's books reflected $625 million (held by Crypto Capital) that Tether knew it could not access.

3. Respondents' undisclosed conflicted transaction

In November 2018, around the time of the $625 million transfer, OAG began investigating Bitfinex and Tether. OAG served subpoenas on respondents both under the Martin Act and Executive Law § 63(12), which allows OAG to investigate fraudulent business practices more generally. Respondents' counsel invited service of the subpoenas on them and soon after began making limited document productions. Pet. ¶¶ 43–44.

In February 2019, respondents' counsel first disclosed to OAG the $851 million that Crypto Capital refused to return and told OAG that, to make up for the loss, respondents were contemplating a transaction that would give Bitfinex access to hundreds of millions of dollars of Tether's cash reserves—and thereby deplete Tether's available cash—on an as-needed basis. *Id.* ¶ 72. To do so, counsel explained, Bitfinex would take a line of credit of $600 to $700 million on the reserve funds backing tethers. *Id.* ¶ 73. At that time, counsel did not disclose the $625 million purported transfer from Tether to Bitfinex that had occurred three months earlier. See *supra* at 10.

Counsel's description of the transaction caused OAG serious concern. The description suggested that Bitfinex needed hundreds of millions of dollars to continue operating, in stark contrast to its public representations that it could easily honor customer withdrawal requests; that Tether, which had long represented that it had

enough cash on hand to satisfy tether redemptions, could quickly have hundreds of millions of dollars drained from its treasury; and that Bitfinex and Tether, which were largely owned by the same small group of individuals, would transact on terms that would largely benefit them, rather than tether holders and users of the Bitfinex trading platform. *See* Pet. ¶ 76. Those concerns were especially troubling, given that counsel gave no indication that respondents would publicly disclose the transaction. *See id.*

OAG expressed its concerns about respondents' proposed transaction and asked respondents' counsel to provide more information about the circumstances surrounding the loss of funds to Crypto Capital and the contemplated line-of-credit transaction. *See id.* ¶ 77. OAG followed up in writing several days later. Letter from OAG to Resps.' Counsel (Feb. 26, 2019) (Eisman Affirm., Ex. F).

Although respondents made two document productions in response to OAG's requests, those productions largely contained information that was either in the public domain or had been previously produced to OAG—little or none of which was relevant to OAG's requests. *See* Pet. ¶¶ 82, 84. OAG continued to express concern about the proposed transaction—including concern that the transaction would close before respondents produced the information OAG requested—and asked respondents for more information. *See id.* ¶ 83.

In late March, more than a month after OAG first requested information about the contemplated transaction and expressed concerns about its nature, respondents' counsel informed OAG that the transaction had closed two days earlier. Counsel

explained that Tether had extended Bitfinex a $900 million line of credit (*id.* ¶ 85)—far exceeding the proposed $600 million transaction that had already triggered substantial concerns from OAG.

The transaction, as presented by counsel, would further dilute tethers' cash backing. As explained above, in the November 2018 transaction—which respondents disclosed to OAG for the first time in March 2019—between Bitfinex and Tether, Tether agreed to give Bitfinex $625 million in accessible funds in exchange for $625 million in funds entrusted to Crypto Capital, which respondents knew was at least temporarily inaccessible. See *supra* at 10–11. Under the terms of the line-of-credit transaction, respondents now purportedly reversed the $625 million "transfer" from Bitfinex's to Tether's Crypto Capital account. That reversal was effected so that the $625 million cash transfer from Tether's Deltec account to Bitfinex's could be characterized as a loan from Tether to Bitfinex. That is, the transaction documents treated Bitfinex's receipt of $625 million in November 2018 as though Bitfinex had drawn down $625 million of the $900 million of available credit. *See* Pet. ¶ 85. The net result was that Tether had, step by step, diminished the backing of tethers: first, in November 2018, by going from actual cash in hand to $625 million in an inaccessible Crypto Capital account; and then, in November 2018, by replacing even that questionable source of backing by nothing more than a $625 million IOU from Bitfinex—a related company with serious enough liquidity problems to require an emergency nine-figure loan.

These transactions meant that Tether had misrepresented, for at least several months, that each tether was backed by one U.S. dollar. Around the time of the line-of-credit transaction, Tether, for the first time, updated its website to reflect that "[e]very tether is always 100% backed by our reserves, which include traditional currency and cash equivalents and, from time to time, may include other assets and receivables from loans made by Tether to third parties, which may include affiliated entities." Tether Website Update (Eisman Affirm., Ex. G). But even so, that disclosure omitted the crucial fact that Tether had indeed extended such a loan to Bitfinex—granting Bitfinex access to nearly a billion dollars of Tether's cash. *See* Pet. ¶ 92.

Counsel's post-transaction disclosure also raised further suspicion that the transaction did not occur at arm's length. Transactional documents showed that Giancarlo Devasini, a director of Bitfinex and Tether, appeared on both sides of the deal, signing the agreement on behalf of each company. Excerpts from Mar. 2019 Facility Agreement (Eisman Affirm., Ex. H).

4. This proceeding under GBL § 354

Soon after respondents closed the transaction notwithstanding OAG's repeated requests for information, OAG filed an application for relief under GBL § 354. Supreme Court, New York County (James, J.), granted the application, ordering respondents to produce documents concerning, among other things, the operation of the Bitfinex trading platform and the sale and redemption of tethers. Section 354 Order at 2–3 (Michael Affirm., Ex. 10). In response to concerns that arose from the $900 million line-of-credit transaction (*see* Pet. ¶¶ 72–96), Supreme Court's order also

enjoined respondents from further encumbering Tether's U.S. dollar reserves, and from making any distributions to any Bitfinex or Tether officer or employee that would diminish or encumber Tether's U.S. dollar reserves. Section 354 Order at 4 (Michael Affirm., Ex. 10).

Respondents immediately moved to vacate the § 354 order. They argued that OAG was unlikely to succeed on the merits of its "contemplated Martin Act action" because OAG would ultimately be unable to prove that tethers are securities or commodities within the ambit of the Martin Act. Resps.' Mem. of Law in Supp. Mot. to Vacate or Modify at 17–18 (Michael Affirm., Ex. 14).

Supreme Court (Cohen, J.) largely denied the motion. Decision & Order on Mot. to Vacate or Modify (Michael Affirm., Ex. 15). The court explained that § 354 imposes on Supreme Court a "*duty*" to "grant the application" that OAG presents. *Id.* at 8. Given that duty, the court held, any ruling that tethers are not a security or commodity would be premature, since it would "interpose [the court] to truncate [OAG's] investigation." *Id.* The court also ruled that OAG's § 354 application satisfied the traditional preliminary-injunction standards, including by showing that OAG was likely to succeed on the merits of its claim. *Id.* at 11–12.

Supreme Court modified the existing § 354 injunction. As modified, the injunction bars respondents from, among other things, engaging in "transactions outside the ordinary course of Tether's business that would result in Bitfinex or other affiliated parties having claims on the U.S. dollar reserves being held by Tether"—such as the $900 million line-of-credit transaction that respondents closed without

first disclosing the details to OAG, as OAG had requested. *Id.* at 17. The court also put a ninety-day time limit on the injunction but allowed OAG to request that the time be extended. *Id.* at 18.

Five days after Supreme Court denied the motion to vacate, respondents moved to dismiss the § 354 proceeding and sought a stay of the § 354 order while the motion was pending. Respondents claimed that the court lacked personal jurisdiction over them because they were incorporated outside the United States and have no U.S. offices. Resps.' Mem. of Law in Supp. Mot. to Dismiss at 9–14 (Michael Affirm., Ex. 17). Respondents also argued that Supreme Court lacked subject-matter jurisdiction to oversee the § 354 proceeding, again claiming that tethers are not securities or commodities under the Martin Act. *Id.* at 14–16. And respondents contended that OAG had not properly served them with the § 354 order. Finally, respondents argued that requiring them to produce documents located on servers abroad would constitute an impermissible extraterritorial application of the Martin Act. *Id.* at 16–19.

Supreme Court stayed the § 354 order pending its ruling on the motion to dismiss, but directed respondents to produce documents relevant to their personal-jurisdiction argument. Order to Show Cause (Michael Affirm., Ex. 18).

Supreme Court ultimately denied the motion to dismiss.

First, the court held that respondents' contacts with New York satisfied New York's long-arm statute. Decision & Order on Mot. to Dismiss ("MTD Decision") at 11–17 (Michael Affirm., Ex. 22). Based on the evidence OAG presented, the court found that respondents "[a]llowed customers located in New York to transact on the

Bitfinex trading platform after January 30, 2017"; "[k]nowingly permitted New York-based traders to use Bitfinex"; "[o]pened accounts and utilized services at New York-based banks"; and "[h]ad a physical presence in New York until at least 2018, through an executive who resided in and conducted work from the state." *Id.* at 13–14.

Second, the court rejected respondents' challenge to its subject-matter jurisdiction. The court held that the State Constitution and the Martin Act both give Supreme Court subject-matter jurisdiction over § 354 proceedings. *Id.* at 17–19. The court also observed that respondents actually challenged not the court's jurisdiction but instead OAG's authority to investigate, given respondents' claim that tethers are not securities. The court then rejected that argument too. The court noted that, during the investigatory phase, OAG need show only that the information it seeks is not "utterly irrelevant to any proper inquiry" or "inevitabl[y]" futile. *Id.* at 20 (quotation marks omitted). And Supreme Court found that OAG had made such a showing here—not only because tethers arguably qualify as securities or commodities under the Martin Act, but also because OAG's investigation covers more than just tethers. *Id.* at 21–24. Indeed, while the motion to dismiss was pending, respondents engaged in a large-scale debt offering, issuing nearly one billion "LEOs," a new virtual asset resembling a security, which Supreme Court acknowledged "raise[d] new questions about Respondents' risk assumptions and relationships with third parties." *Id.* at 24.

Third, the court held that OAG had properly served respondents. OAG had served respondents' counsel, rather than respondents themselves, because the § 354

order directed them to do so. *Id.* at 17 n.8. Because "OAG had been working extensively with Respondents' counsel" before serving the order, the court explained, service on counsel "provided Respondents with notice reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford [them] an opportunity to present their objections." *Id.* (quotation marks omitted).

Finally, the court held that OAG's request that respondents "produce documents located outside the United States do[es] not constitute an improper extra-territorial application of the Martin Act." *Id.* at 25 (quotation marks omitted).

The court also declined to stay its order pending appeal. The court explained that "the prospect of burdensome or expensive discovery alone is not sufficient to demonstrate irreparable injury warranting a stay." *Id.* at 27 (alteration and quotation marks omitted). In addition, the court extended the injunction embodied in the § 354 order to October 14, 2019. *Id.*

Respondents then filed a notice of appeal, moved for a stay of their production obligations pending appeal, and sought an interim stay while that motion is pending. Justice Gesmer declined to issue an interim stay. Interim Stay Denial (Eisman Affirm., Ex. I).

ARGUMENT

A stay pending appeal is a drastic remedy that should not lightly be granted, particularly when, as here, such a stay would interfere with Supreme Court's carefully considered decision that OAG's investigation should proceed and that a stay is not warranted—a disposition that a justice of this Court upheld as an interim matter. Consistent with this principle, this Court has narrowly defined the circumstances under which the extraordinary remedy of a stay pending appeal is appropriate. Respondents have not met that standard.

In considering a stay request, this Court is "duty-bound to consider the relative hardships that would result from granting (or denying) a stay." *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990). "As a general matter, the party seeking a stay must establish that it is necessary to prevent some serious harm, injustice, prejudice, loss, etc." *Bovis Lend Lease LMB, Inc. v. Garito Contr., Inc.*, 2008 N.Y. Slip Op. 32828(U) (Sup. Ct. N.Y. County 2008) (Gische, J.) (citing *Merola v. Bell*, 47 N.Y.2d 985 (1979)). Here, the equities heavily favor OAG because respondents will suffer no prejudice absent a stay, whereas OAG would be unable to fully pursue its investigation and safeguard New York investors. Indeed, the Martin Act's remedial and public-protective purpose are "special considerations" counseling against a stay of OAG's investigation in this context. *State of New York v. Fine*, 72 N.Y.2d 967, 969 (1988).

Moreover, if "the appeal is meritless or taken primarily for the purpose of delay," the Court will deny a stay pending appeal. *Herbert v. City of New York*, 126 A.D.2d 404, 407 (1st Dep't 1987). This factor favors OAG too. Respondents' appeal

contravenes first principles of New York law, on which Supreme Court relied, requiring that Martin Act investigations proceed except in the extraordinary circumstance that the investigation is inevitably futile.

A. The Equities Tilt Sharply Against a Stay.

Respondents have failed to show that they will suffer prejudice absent a stay. OAG, by contrast, will suffer further delay of its investigation, which has languished for months while respondents have repeatedly and unsuccessfully tried to end OAG's investigation. No more delay is warranted. OAG should be entitled to exercise its investigatory authority as the Legislature intended.

Respondents' claim of harm rests on a fundamental misunderstanding of mootness. Respondents contend that their appeal will be rendered moot if they have to produce documents under the § 354 order. *See* Mem. of Law in Supp. of Resp.-Appellants' Emergency Mot. for a Stay Pending Appeal ("Stay Mem.") at 17–18. But an appeal becomes moot only if this Court "cannot afford [the appellant] *any* meaningful relief." *Matter of Victor v. New York City Off. of Trials & Hearings*, 2019 N.Y. Slip Op. 05627, at *1 (1st Dep't 2019) (emphasis added). Until production is complete, this Court could still grant respondents meaningful relief by ruling in their favor on appeal, thus halting any remaining production. And respondents' own description of the production process (Stay Mem. at 18–19) as "hugely burdensome" and being "unprecedented in size" suggests that, in their view at least, production will not be immediately completed. At any rate, there is currently no deadline for document production, meaning that any claim that the appeal will necessarily be

moot is the sort of "speculative" harm that does not warrant provisional relief. *See Matter of G Bldrs. IV, LLC v. Madison Park Owner, LLC*, 84 A.D.3d 694, 695 (1st Dep't 2011).

Even if respondents managed to produce every document sought under the § 354 order, their appeal still would not be moot. The § 354 order that they challenge is not limited to discovery; it also contains an injunction preventing respondents from engaging in certain intra-corporate transactions. Respondents can continue to raise their arguments on appeal to challenge the injunction even if they have completed the document production.

The only other prejudice respondents claim (Stay Mem. at 18–19)—ordinary litigation burdens—do not justify a stay. Courts have long held that "'[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *Founders Ins. Co. Ltd. v. Everest Natl. Ins. Co.*, 41 A.D.3d 350, 351 (1st Dep't 2007) (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)).

In contrast to these ordinary litigation expenses, the prejudice to OAG from further delay will be meaningful. The Martin Act reflects the Legislature's judgment that OAG should discharge its broad powers to combat securities and commodities fraud with minimal intrusion from the courts. Indeed, § 354 is designed to provide OAG pretrial discovery "almost upon mere request." *Matter of Ottinger v. State Civ. Serv. Commn.*, 240 N.Y. 435, 439 (1925); *accord Matter of Gonkjur Assoc. v. Abrams*, 88 A.D.2d 854, 856 (1st Dep't 1982), *aff'd on op. below*, 58 N.Y.2d 878 (1983). Yet OAG has spent the past four months—from the time the § 354 order issued until now—

warding off respondents' serial motions. For almost all of that time, the bulk of the § 354 order has been stayed. Respondents have thus been able to engage in practices relating to this investigation, such as issuing nearly a billion LEO tokens and nearly two billion tethers (Mem. of Law in Opp'n Resps.' Mot. to Dismiss at 7 (Michael Affirm., Ex. 19)), and repeatedly assuring investors of respondents' financial health. Disclosure responsive to the § 354 orders would have helped OAG understand the nature of these issuances and statements—and to ensure that they, too, were not fraudulent, deceptive, or otherwise illegal.

These harms are significant. The Martin Act's "broad remedial purpose to protect the public interest . . . may present its own special considerations in determining what is irreparable injury and in balancing equities." *Fine*, 72 N.Y.2d at 969. Allowing respondents to continue to raise money through public offerings while painting a rosy financial picture and cutting off OAG's ability to investigate jeopardizes the public interest that the Legislature charged OAG with protecting. And the risk of additional public harm will only increase if OAG cannot investigate before Supreme Court's time-limited injunction—which prevents respondents from further depleting the cash supposedly earmarked for their investors—expires.

Respondents' contrary assertions miss the mark. Their claim (Stay Mem. at 19) that OAG has not alleged "that investors are facing imminent harm" only underscores the need for OAG to investigate. The § 354 order requires respondents to produce documents identifying their customers, as well as documents about customer demands to withdraw funds from the Bitfinex trading platform and

documents reflecting purchases, issuances, and redemptions of tethers. Section 354 Order at 3 (Michael Affirm., Ex. 10). Delaying receipt of those documents makes it difficult for OAG even to identify all of respondents' investors, let alone identify all of those who might be harmed.

Nor will OAG's "other investigative tools" (Stay Mem. at 19), including its subpoena power under other statutes such as Executive Law § 63(12), eliminate the prejudice it will suffer if a stay issues. Those tools proved insufficient to compel respondents to disclose in advance the terms of their undisclosed and conflicted line-of-credit transaction, despite OAG's multiple attempts to understand the transaction before it closed, confirming the need for an order under § 354. See *supra* at 11–13.

In any event, respondents' concession that OAG could obtain the same information by other means undermines rather than supports their request for a stay: if OAG would be entitled to this information through other, overlapping sources of authority, then respondents can hardly be prejudiced by disclosing documents that OAG is authorized to receive one way or another. If anything, the fact that respondents invited service of OAG's Martin Act subpoenas, under which they are obligated to produce many of the same materials that the § 354 order requires, shows that they do not actually view themselves as prejudiced by the mere production of those materials.

Respondents' contention (Stay Mem. at 20) that OAG already has enough information to file a complaint gets matters exactly backwards. Even if OAG has enough information to file *a* claim, it may still investigate to understand the full scope

of wrongdoing or, alternatively, to learn that the wrongdoing it initially believed supported its claim is in fact explained away by additional facts uncovered during its investigation. Put differently, § 354's requirement that OAG have already determined "to commence an action" under the Martin Act means only that OAG has made a "broadly defined determination" to pursue such an action—not that it has made "a final decision" to do so. *Matter of Gonkjur*, 88 A.D.2d at 856 (quotation marks omitted). Its investigation should therefore proceed.

B. This Court Will Likely Uphold Supreme Court's Decision.

1. The Attorney General has a reasonable basis to investigate respondents.

Supreme Court's decision rightly recognizes the vast scope of OAG's power to root out securities and commodities fraud. Given that scope, OAG need show only that the information it seeks bears "a reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." *Carlisle v. Bennett*, 268 N.Y. 212, 217 (1935); *accord Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (1988). That showing is minimal. An investigatory target can defeat that showing only by establishing that OAG seeks "documents which are utterly irrelevant to any proper inquiry" or that the inquiry's "futility to uncover anything legitimate is inevitable or obvious." *Matter of La Belle Creole Intl., S.A. v. Attorney-General of State of N.Y.*, 10 N.Y.2d 192, 196 (1961) (ellipsis and quotation marks omitted).

Supreme Court correctly held that respondents came nowhere close to satisfying the stringent standards.

First, Supreme Court ruled (MTD Decision at 21–24) that OAG's inquiry bears a reasonable relationship to the subject matter under investigation. *See Carlisle*, 268 N.Y. at 217. OAG is investigating, among other things, what representations respondents have made about the cash reserves backing tethers, the facts and circumstances of Bitfinex's undisclosed transfer of Tether's cash reserves in 2018, and Bitfinex's statements that it had enough liquidity to honor customer withdrawal requests. OAG has a reasonable basis to believe that some or all of these representations may have been false. For instance, respondents' private acknowledgement in mid-2018 of their inability to access nearly a billion dollars of funds entrusted to Crypto Capital (see *supra* at 10) arguably rendered false or misleading their statements about Tether's cash reserves, Bitfinex's ability to honor withdrawal requests, the process by which tethers are issued, and the potential for tethers to be used to manipulate the price of other virtual currencies. The § 354 inquiry would shed additional light on these statements and their impact on investors—for example, by obtaining documents concerning the customers "whose funds were provided to Crypto Capital" (Section 354 Order at 3 (Michael Affirm, Ex. 10)).

Second, OAG has reasonable grounds to believe that respondents' statements were made in connection with the purchase or sale of securities or commodities, giving rise to potential Martin Act liability. *See* GBL § 352(1). For one thing, the statements may have affected tethers, which, as Supreme Court recognized, are plausibly securities or commodities. *See* MTD Decision at 21–23. To take just one example cited by Supreme Court, purchases and sales of tethers may qualify as

"foreign currency orders"—securities under the Martin Act. *See* GBL § 352(1); *see also* MTD Decision at 21–22. Or, as Supreme Court explained, tethers might qualify as securities because their price fluctuation shows that they are held for investment purposes rather than simply as a "stablecoin." MTD Decision at 22–23. For another, OAG's investigation, as OAG made clear in its § 354 application (Pet. ¶¶ 48–95), is not limited to tethers, but also covers the Bitfinex trading platform, which facilitates trades of nearly one hundred virtual currencies (see *supra* at 6), any of which may also be a security. Moreover, respondents' recent issuance of LEO tokens has every indicia of a securities offering and relates to the facts OAG was already investigating. *See* Whitehurst MTD Affirm. ¶¶ 60–62; Mem. of Law in Opp'n Resps.' Mot. to Dismiss at 7 (Michael Affirm., Ex. 19); MTD Decision at 24. These facts establish, at a minimum, that OAG's Martin Act investigation is not "inevitabl[y] or obvious[ly]" futile. *See Matter of La Belle Creole*, 10 N.Y.2d at 196.

Third, OAG satisfied the relaxed standard for personal jurisdiction in the investigative context. A court will not halt an inquiry merely because a corporation that is the subject of that inquiry may ultimately be able to show that it is "immun[e] from civil suit in New York, on the ground that it is not doing business there." *Id.* at 198. "As long as [OAG] has reasonable basis for believing that the corporation violated a New York statute, [it] is not prevented by the due process clause of the Federal Constitution from exercising [its] power of subpoena and initiating an investigation designed to ascertain the facts." *Id.*; *see also Abrams v. Lurie*, 176 A.D.2d 474, 476 (1st Dep't 1991) (§ 354 order is "closely analogous" to a subpoena).

As Supreme Court found here, OAG had reasonable grounds to believe that respondents violated a New York statute. According to Supreme Court's factual findings, respondents had numerous New York contacts during the time period under investigation, including knowingly allowing New York–based customers to use Bitfinex, operating in part through an executive who worked from New York, and using New York–based banks to conduct their business. MTD Decision at 13–14. OAG thus reasonably believed that respondents' potential misconduct occurred, at least in part, "within or from" New York, in violation of the Martin Act, *see* GBL § 352(1)—as Supreme Court rightly ruled (MTD Decision at 10–11).

In sum, OAG's reasonable belief that respondents committed securities or commodities fraud within or from New York was all that was needed to sustain the § 354 order.

2. Respondents' contrary arguments miss the mark.

a. Supreme Court had subject-matter jurisdiction over this § 354 proceeding.

Respondents err in arguing (Stay Mem. at 20–27) that Supreme Court lacked jurisdiction over this § 354 proceeding because tether is not a security or commodity covered by the Martin Act. That argument is both beside the point and incorrect.

The argument is beside the point because, at this early stage, the § 354 order "issued pursuant to the Attorney-General's broad powers to investigate possible violations of the [Martin Act] must be sustained" if OAG establishes that a security or

commodity is even "arguabl[y]" at issue.[2] *Anheuser-Busch*, 71 N.Y.2d at 332. Indeed, as discussed above (at 24), all that OAG must show is a reasonable basis for its investigation. And respondents can defeat such a showing only by proving that "the legality" of the investigated conduct under the Martin Act "is so well established, either by the plain language of the statute or by existing judicial interpretation, as to be free from doubt." *Anheuser-Busch*, 71 N.Y.2d at 332. *Matter of Gardner v. Lefkowitz*, on which respondents rely (Stay Mem. at 20–21), stands for the same proposition—that a court may impede a Martin Act investigation only if "there is *no way* in which" the investigative subject's activities "can be seen" to have violated the Act. 97 Misc. 2d 806, 814 (Sup. Ct. N.Y. County 1978) (emphasis added).

Respondents have not cleared that high bar. Although they assert that tethers are not securities or commodities, they have made no offer of proof to establish that assertion. To the contrary, respondents have steadfastly refused to produce any documentation establishing when and how tethers are issued and redeemed. Even so, the facts OAG has gathered so far strongly suggest that tethers are securities or commodities. For instance, respondents have admitted that the financial support for tethers has changed over time, from readily accessible U.S. dollars to a mix of assets

---

[2] It is no answer that the Donnelly Act, the source of OAG's investigative power in *Anheuser-Busch*, undisputedly "applied to the beer business" (Stay Mem. at 23), in which the investigatory target there participated. OAG is a law-enforcement agency, not a regulator, and so does not regulate the beer business any more than it regulates the virtual-currency business. Instead, OAG is empowered to stamp out illegal restraints of trade (under the Donnelly Act) and securities and commodities fraud (under the Martin Act). And if the conduct under investigation arguably violates either act, a court must allow the investigation to proceed.

including different fiat currencies, other cryptocurrencies, and loans to related parties. See *supra* at 13. That tether holders face a risk of loss and rely on respondents' skill and judgment in selecting this collection of assets may well mean that tethers are securities. *See, e.g.*, *People v. First Meridian Planning Corp.*, 86 N.Y.2d 608, 620–21 (1995). As Supreme Court correctly observed, the question whether tethers are indeed securities or commodities will turn on facts that OAG is still gathering. And the need for OAG to continue gathering those facts only underscores that respondents cannot yet conclusively establish that tethers are exempt from the Martin Act.

Nor have respondents shown that the other aspects of OAG's investigation—including into respondents' operation of the Bitfinex platform, which *does* involve securities, or their issuance of LEOs, which may be securities as well—definitively fall outside the scope of the Martin Act. The existence of such questions supports rather than undermines the need for the investigation to continue to resolve these factual questions. Supreme Court properly recognized as much here. MTD Decision at 20–21.

Respondents' jurisdictional argument is also incorrect. A court has subject-matter jurisdiction if it has the "competence to entertain an action." *Lacks v. Lacks*, 41 N.Y.2d 71, 75 (1976). And Supreme Court unquestionably has subject-matter jurisdiction to entertain Martin Act proceedings, including requests for relief under GBL § 354. The State Constitution makes Supreme Court a court of general jurisdiction, N.Y. Const. art. VI, § 7, and the Martin Act makes Supreme Court the

exclusive jurisdiction to oversee § 354 orders, *see* GBL § 354, like the one at issue in this case.

Respondents' disputes about whether tethers constitute a security or commodity (Stay Mem. at 20) thus do not go to Supreme Court's subject-matter jurisdiction. Instead, at most, this argument raises a defense that respondents may raise to any future Martin Act claims that OAG may bring. *See, e.g.*, *First Meridian*, 86 N.Y.2d at 618 (existence of security was an element in Martin Act prosecution). But as the Court of Appeals has held, a failure to establish "substantive elements of a cause for relief" does not deprive a court of subject-matter jurisdiction. *Lacks*, 41 N.Y.2d at 77.

Respondents ignore this holding and focus instead (Stay Mem. at 20–21) on a trial-court case that referred to the Martin Act's securities-or-commodities requirements as establishing the Attorney General's "subject matter jurisdiction on which the issuance [of an investigative subpoena] can rest," *Matter of Gardner*, 97 Misc. 2d at 810. But that case, read in context, makes clear that the court was referring not to Supreme Court's subject-matter jurisdiction but to the Attorney General's "investigative jurisdiction of the statute."[3] *Id.* at 809. And as noted above

[3] Respondents also misplace reliance (Stay Mem. at 21–22) on *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981). The court there quashed an administrative subpoena, in part because the FEC, as a regulatory body, lacked subject-matter jurisdiction over the subpoena recipients. *Id.* at 386–87. But OAG is a law-enforcement office, not a regulatory body. It thus does not exercise jurisdiction over its targets; it investigates (and in some cases sues) them. *See, e.g.*, GBL §§ 352, 353. In any event, the *Machinists* court applied a higher standard than the "deferential" one that courts typically apply to investigation challenges. 655 F.2d

(at 28), *Gardner* correctly held that OAG has "jurisdiction" to investigate securities and commodities fraud unless there is "no way" the subject matter of the investigation falls within the Martin Act's purview, making it "crystal clear" that the investigation is improper. 97 Misc. 2d at 811–12, 814. Respondents have not made such a showing.

b. Supreme Court properly rejected respondents' personal-jurisdiction objections.

As discussed above, Supreme Court made findings that respondents knowingly allowed New York–based customers to use Bitfinex, operated in part through an executive who worked from New York, and used New York–based banks to conduct their business. MTD Decision at 13–14. Those facts, along with the additional evidence of New York contacts that OAG offered (Whitehurst MTD Affirm. ¶¶ 7–46), demonstrate that respondents personally availed themselves of New York to conduct the very activities OAG is investigating—such as the promotion and operation of the Bitfinex trading platform, and the issuance and redemption of tethers. Those facts are more than enough to satisfy the standard at this early stage: "that facts 'may exist'" showing that respondents are subject to personal jurisdiction, *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 467 (1974). And OAG's investigation, including its

---

at 387. It did so because (1) FEC oversight "raise[s] weighty constitutional" concerns about infringing on protected speech; (2) the FEC has limited investigatory authority, requiring it "expeditiously to conduct a confidential investigation"; and (3) FEC investigations necessarily intrude on "political expression and association." *Id.* at 387–88 (quotation marks omitted). None of those concerns applies here.

continued review of the documents respondents produced during jurisdictional discovery (*see* Whitehurst MTD Affirm. ¶ 49), may uncover even more facts.

Respondents err in arguing (Stay Mem. at 31–32) that Supreme Court lacked personal jurisdiction over them because their representations about the financial backing of tethers may have occurred outside New York. The financial backing of tethers is but one piece of OAG's investigation. That investigation, as reflected in its § 354 application, also includes, for instance, the operation of the Bitfinex trading platform. And though respondents assert (*id.* at 31–32) that the "claim" OAG will eventually bring if it sues will be based on the financial backing of tethers, it is OAG, not respondents, that decides which causes of action to pursue, *see* GBL § 353.

Respondents are also wrong that, for Supreme Court to have personal jurisdiction over them under the long-arm statute, their conduct must relate to a specific cause of action. When, as here, a court is considering an investigation *before* any complaint has been filed, the question is not about any specific cause of action, but instead whether respondents' New York activities were connected to "the central areas of inquiry covered by the Attorney General's investigation." *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 315 (2018) (alteration and quotation marks omitted), *cert denied sub nom. Exxon Mobil Corp. v. Healey*, 139 S. Ct. 794 (2019); *see Matter of American Dental Coop. v. Attorney-General of State of N.Y.*, 127 A.D.2d 274, 281 (1st Dep't 1987) (relevant "nexus" was between in-state activities and acts under investigation); *SEC v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996) (finding personal

jurisdiction because subpoena recipient's contacts with the forum "directly related to matters in the underlying SEC investigation").

Finally, respondents' service argument fails. As a threshold matter, respondents forfeited this argument by failing to raise it in their initial response to the § 354 order: their motion to vacate. *See, e.g.*, *Addesso v. Shemtob*, 70 N.Y.2d 689, 690 (1987).

At any rate, OAG properly served respondents. OAG served the § 354 order on respondents' counsel—by hand-delivery, overnight mail, and email—because Supreme Court ordered service in that fashion. *See* Section 354 Order at 5 (Michael Affirm., Ex. 10). Although a § 354 order must ordinarily "be served upon the person named in the [order] by delivering and leaving with him a certified copy thereof," GBL § 355, exceptions exist. Because § 354 orders are "closely analogous" to a subpoena, which, "under the CPLR, must be served in the same manner as a summons," this Court has held that § 354 orders may be served the same way the C.P.L.R. would allow a summons to be served. *Lurie*, 176 A.D.2d at 476. And C.P.L.R. 311(b) allows a party to effect "service upon a domestic or foreign corporation . . . in such manner . . . as the court, upon motion without notice, directs," if service by the other prescribed methods would be "impracticable."

That provision allowed service on counsel here. As OAG noted in its § 354 application, respondents are foreign corporations that are unlicensed to conduct business in New York, and their employees are scattered throughout the world. Pet. ¶¶ 7–14. Respondents' submissions have only confirmed that service directly on

respondents would have been impracticable. Respondents' general counsel has acknowledged that "[n]either Bitfinex nor Tether has a single headquarters or home office," operating instead through "decentralized operations in different countries." Hoegner Affirm. in Supp. Mot. to Dismiss ¶ 6 (Michael Affirm, Ex. 16). These facts make clear that service on respondents directly would have been impracticable. Accordingly, "service on Respondents' counsel—using three different methods of service [ordered by the court]—satisfies CPLR 311." MTD Decision at 17 n.8.

Moreover, the court's directive to serve respondents' counsel "was reasonably calculated" to provide respondents with "sufficient notice" of the § 354 order to allow them to contest it. *See Invar Intl., Inc. v. Zorlu Enerji Elektrik Üretim Anonim Şirketi*, 86 A.D.3d 404, 405 (1st Dep't 2011). Respondents' robust ability to litigate this GBL § 354 proceeding only confirms the point. Respondents' counsel had been communicating with OAG and providing document for six months before Supreme Court issued the § 354 order (Pet. ¶ 43), and respondents hotly contested the § 354 order—through motion practice and repeated in-person court appearances—for another month before raising any service objection. Given the tremendous effort that the parties and the court devoted to litigating the § 354 order, Supreme Court rightly recognized that "[d]ismissing the proceeding at this stage based on a question of service of process would be a dramatic waste of resources." MTD Decision at 17 n.8.

CONCLUSION

For these reasons, the Court should deny respondents' motion for a stay pending appeal.

Dated: New York, New York
August 30, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Petitioner

By: _____
SCOTT A. EISMAN
Assistant Solicitor General

28 Liberty Street
New York, NY 10005
(212) 416-8019
scott.eisman@ag.ny.gov

STEVEN C. WU
Deputy Solicitor General
SCOTT A. EISMAN
Assistant Solicitor General
of Counsel

Reproduced on Recycled Paper