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Supreme Court of the State of New York
Appellate Division: First Department

IFINEX INC., BFXNA INC., BFXWW INC., TETHER HOLDINGS LIMITED, TETHER OPERATIONS LIMITED, TETHER LIMITED, TETHER INTERNATIONAL LIMITED,
Respondents-Appellants,

-against-

IN THE MATTER OF THE INQUIRY OF LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Petitioner-Appellee.

REPLY MEMORANDUM IN FURTHER SUPPORT OF RESPONDENT-APPELLANTS' MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

Bitfinex and Tether moved to stay the trial court proceedings in this case in order to protect the ability of this Court to provide meaningful appellate review of the serious questions that this appeal raises on the merits. Nothing in OAG's opposition brief calls into question the powerful grounds supporting a stay.

First, the principal object of the Gen Bus. L. § 354 proceeding below is to compel the Companies to produce documents, and any appellate relief will be largely or completely meaningless if the very documents in dispute are turned over before the appeal is decided.

OAG's primary rejoinder is to argue that there is no real risk of the appeal being rendered moot. What OAG overlooks is that even in the unlikely scenario that there remains a live controversy when the appeal is decided several months from now (if, as OAG speculates, certain document requests remain outstanding), the Companies would still be irreparably harmed by having to produce massive volumes of material — which OAG will undoubtedly use against the Companies — in the interim. Any appellate victory would stop further document productions but would not undo the harm from having produced huge portions of the very material in dispute.

OAG also argues that a live controversy will persist regardless of the document productions because of the trial court's preliminary injunction. But

OAG failed to inform the Court that the injunction expires by its terms next month, well before this appeal can possibly be decided. The Companies thus face the serious risk of having this appeal rendered fully moot, and effectively losing their appellate rights altogether.

Second, OAG faces no corresponding prejudice. While OAG argues that a stay will impede its law enforcement function, that is untrue. OAG has been unable to identify a single "victim" of the suspected wrongdoing — the supposed impairment of the assets "backing" tethers. There are no victims because tether holders have been able to redeem their tethers at will with no interruption whatsoever. Tether holders have not lost a dime. Thus, there is no law enforcement function to impede. Further, OAG remains fully able to investigate through all available means, other than securing documents directly from the target of the investigation.

Third, this appeal has substantial merit, because OAG cannot justify the trial court having asserted subject matter jurisdiction or personal jurisdiction.

With respect to subject matter jurisdiction, OAG barely even tries to explain how tethers qualify as securities or commodities covered by the Martin Act, focusing instead on the claim that these questions can be delayed to another day. Yet no case supports the radical proposition that a court can wield its powers to

compel document production and enforce an injunction under Gen Bus. L. § 354 *before* even deciding if the government is acting within its statutory bounds.

OAG also claims subject matter jurisdiction based on a recent initial exchange offering for digital tokens called UNUS SED LEO ("LEO") issued by one of the Companies. But OAG fails to mention that the § 354 Order in dispute has nothing to do with LEOs whatsoever. LEOs did not exist at the time the Order issued.

With respect to personal jurisdiction, OAG concededly did not comply with the statutory requirement that service be completed via personal delivery of a certified copy of the § 354 Order upon the Companies (not their counsel). OAG argues that it was permitted to serve counsel with an uncertified copy because the regular methods of service were "impracticable" under CPLR 311(b). Yet it never even attempted to make such a showing to the trial court, and the trial court never made any findings on the subject. OAG never tried to serve the Companies by the regular methods, and so cannot show those methods were "impracticable."

Nor has OAG shown, as it must, that there is a nexus between the suspected wrongdoing and any purposeful conduct by the Companies in New York. There is none, since U.S. customers have been barred from the Companies' platforms for years. OAG has had the benefit of voluminous jurisdictional discovery, and yet cannot marshal evidence to support this basic, threshold requirement.

For all of the aforementioned reasons, the Court should grant the Companies' motion and stay the trial court proceedings pending appeal.

ARGUMENT

I. The Court Has Broad Discretion to Issue a Stay

CPLR 5519(c) authorizes this Court to "stay all proceedings to enforce the judgment or order appealed from pending an appeal." CPLR 5519(c). There are no restrictions on the grounds for a stay. This Court has described the granting of stays under CPLR 5519(c) as "a matter of discretion." *Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep't 1986), and, accordingly, "[a]ny relevant factor may be considered." David D. Siegel, New York Practice § 535 (6th ed. 2018).

OAG's opposition misstates the governing standard, arguing that a stay pending appeal is a "drastic" and "extraordinary" remedy that should be granted only in "narrowly defined" circumstances. (Opp. 19.) No authority is cited for these hyperbolic and inaccurate statements; we have located none.

Equally misleading, OAG argues that there are "special considerations" that weigh against a stay in matters involving OAG (*id*.), but the case cited, *State v. Fine*, 72 N.Y.2d 967, 968 (1988), did not address the question of a stay pending appeal at all. Instead, the Court of Appeals was discussing whether OAG had met the standard for a preliminary injunction under the Martin Act. The Court held that there might be "special considerations" in certain Martin Act cases to support an

injunction, but that OAG had failed to justify any injunction on the facts at hand. *Id*. The *Fine* case does not remotely support the proposition for which it was presented to this Court, *i.e.*, that stays should be more difficult in matters impacting OAG. More candor should be expected from OAG.

Under the correct standard, where this Court has broad discretion to consider any relevant factor, and where there is no special treatment given to OAG, there are three broad and well-accepted considerations that justify a stay here: (i) a stay is necessary to ensure that this Court can give meaningful appellate relief; (ii) OAG will suffer no prejudice; and (iii) the Companies' appeal has substantial merit. *See, e.g.*, *Herbert v. City of New York*, 126 A.D.2d 404, 406-07 (1st Dep't 1987); *Russell v. N.Y.C. Hous. Auth.*, 160 Misc.2d 237, 239 (Bronx Cty. Sup. Ct. 1992). These three points are discussed below.

II. A Stay Is Necessary to Ensure Meaningful Appellate Review

As detailed in the Companies' moving brief, a well-recognized ground for issuing a stay pending appeal is to preserve the appellant's right to meaningful review. (Cos. Br. 17-18.) That right is irreparably prejudiced if, during the appeal, the appellant is forced to, for example, "provide the very discovery it argues [on appeal] it has no obligation to produce." (*Id*. at 18 (quoting *First City, Texas-Houston, N.A. v. Rafidain Bank*, 131 F. Supp. 2d 540, 543 (S.D.N.Y. 2001).)

The underlying logic is straightforward. The "circumstances surrounding a controversy may change irrevocably during the pendency of an appeal," and "[n]o court can make time stand still." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9 (1942). A stay pending appeal may therefore be necessary to avoid "the premature enforcement of a determination which may later be found to have been wrong." *Id*. This rationale is why, for example, "in the FOIA context, courts have routinely issued stays" pending appeal. *People for the Am. Way Found.n v. U.S. Dep't of Educ*., 518 F. Supp. 2d 174, 177 (D.D.C. 2007) (collecting cases).

This Court has granted motions for stays in similar circumstances. For example, just recently in *Gliklad v. Deripaska*, Index No. 2019-4711, the Court granted a stay of a trial court order to unseal a confidential settlement agreement, where the appellant argued that his appeal would otherwise be "rendered academic." (Phillips Reply Aff. Ex. B ¶ 10 (motion); Ex. C (order).)

This case presents a paradigmatic example of where a stay should be issued, similar to FOIA cases and to *Deripaska*. The object of the underlying § 354 proceeding is to compel the Companies to turn over voluminous material whose production will render any appellate relief of little or no value. (Cos. Br. 17-20.)

OAG does not address or distinguish the case law cited by the Companies, instead arguing the Companies "will suffer no prejudice absent a stay." (Opp. 19.) According to OAG, forcing the Companies to produce the very documents in

dispute on this appeal is not prejudicial because the document production will not fully moot the appeal. (*Id*. at 20.)

OAG's argument both misses the point, and is wrong about the risk of mootness.

Where OAG misses the point is in taking for granted that the Companies will suffer no harm unless the appeal is mooted entirely and dismissed. Not so. Even assuming that there are still outstanding materials to be produced by the time a ruling is handed down several months from now — in other words, assuming a live, ongoing controversy remains — the Companies will have produced huge volumes of material in the intervening months.

In that scenario, OAG will have obtained a large portion of the relief at the heart of the § 354 proceeding — including information OAG could use in a civil action against the Companies, which OAG has already declared it will file — before this Court has had any opportunity to evaluate whether the proceeding was lawful in the first place. This is exactly the sort of "premature enforcement of a determination which may later be found to have been wrong," *Scripps-Howard*, 316 U.S. at 9, that amounts to irreparable harm and that merits a stay.

OAG cites no case, and we are aware of none, holding that a stay is appropriate only where the appeal would otherwise become fully moot and dismissed. While OAG cites to *Victor v. New York City Office of Trials &*

Hearings, 174 A.D.3d 455, 455 (1st Dep't 2019) (Opp. 20), that case had nothing to do with staying trial court proceedings pending an appeal. The Court dismissed as moot an appeal of a trial court's refusal to redact certain personal information from a government report because the report "[f]or several years" had "been publicly available from multiple sources." *Id*. Thus, *Victor* does not support OAG's position that a stay is appropriate only where a case would otherwise be completely mooted.

Moreover, OAG's all-or-nothing approach would make no logical sense. If, say, 90 percent of the material at issue here is produced by the time this Court is able to issue a decision on the merits several months from now, then any relief afforded to the Companies by this Court will be largely hollow (even if not completely so).

In any case, OAG's argument fails even on its own terms, as there *is* a substantial risk of the appeal becoming fully moot, once the material at issue is produced. In *Roadway Express, Inc. v. Commissioner of New York State Department of Labor*, 66 N.Y.2d 742, 744 (1985), the Court of Appeals dismissed an appeal challenging a subpoena where "the records were surrendered in accordance with the subpoena." *See also Henry St. Invs. Ltd. v. Brennan*, 153 A.D.3d 1403, 1404 (2d Dep't 2017) (dismissing as moot an appeal challenging a subpoena because "the petitioners produced the documents requested in the

subpoenas"). While OAG claims that it is "speculative" to believe that all the material will be produced by the time the appeal is decided (Opp. 20-21), that is incorrect. The soonest available term for this appeal is the December term, which would mean a ruling could issue no sooner than approximately January 2020 — four months from now. There is certainly a meaningful likelihood that the document production could be complete by then. (Weinstein Reply Aff. ¶ 21.)

Further, OAG's arguments in this regard are disingenuous, because OAG has been particularly aggressive in insisting on the fastest possible production schedule.

In May, the Companies alerted OAG that they intended to move to dismiss, and to seek an immediate stay. (Phillips Reply Aff. ¶ 5.) OAG was not willing to extend the courtesy of delaying the document production pending the motion, and the Special Referee told the Companies during an in-person conference that documents would be ordered to be produced immediately, unless within six days the Companies obtained a stay from the trial court — which they did. (*Id*.; Weinstein Reply Aff. ¶¶ 18-19.)

When the trial court lifted that stay in August, OAG emailed the next day to ask about scheduling a meeting with the Special Referee. (Phillips Reply Aff. Ex. A.) The parties appeared two days later to present this motion to this Court, and OAG stated during that appearance that it wanted to call the Special Referee the

same day, and complained of the Companies' delay (which at that point consisted of less than two days during which the Companies drafted this emergency motion). (*Id*. ¶ 7.)

Counsel for the Companies was unavailable to meet with the Special Referee the following week (the last week in August), but OAG wanted to schedule a meeting that week, anyway. (*Id*. ¶¶ 8-10.) OAG has repeatedly insisted that it expects the material at issue to be produced as promptly as possible. (*Id*. ¶¶ 4-10.)

This context was omitted entirely from OAG's brief. OAG has every right to argue that the document production could go slowly, but OAG ought to in due candor disclose that it has been pressing aggressively for the opposite.

OAG next argues that the appeal will remain a live controversy even if all the documents are produced because the § 354 Order also contains an injunction. (Opp. 21.) What OAG fails to tell the Court is that the injunction expires by its terms on October 14 (Michael Aff. Ex. 22, at 27) — well before this appeal could possibly be decided — and can only be extended if OAG meets its burden to show there is good cause to do so. (*Id*. Ex. 15, at 16.) The trial court has made clear that the injunction will not last beyond a "reasonable period" (*id*.), and has already been in place since April. There is therefore every reason to question whether the injunction will still persist when this appeal is decided several months from now.

If the documents are produced, and the injunction expires, the appeal will be dismissed as moot before this Court has a chance to address the merits, effectively depriving the Companies of their proverbial day in court. That is the "quintessential form of prejudice." *In re Country Squire Assoc. of Carle Place, L.P.*, 203 B.R. 182, 183 (B.A.P. 2d Cir. 1996). Only a stay can ameliorate that risk, and this Court should therefore grant the Companies' motion.

III. OAG Will Suffer No Prejudice from a Stay

OAG argues that a stay would cause it "meaningful" and "significant" prejudice by impairing OAG's "statutory duty to protect New York investors." (Opp. 3, 21-22.) This cannot be taken seriously. OAG already has a preliminary injunction relating to the line-of-credit transaction that gave rise to its § 354 application, and if it believed investors or others were facing imminent risk of any harm, OAG would surely have applied to modify the injunction or initiated a second proceeding focused on the specific issues uncovered. OAG has done nothing because there is no imminent risk of any harm.

Further, OAG's cloaking itself as the guardian of New York "investors" makes no sense in this context because this § 354 proceeding concerns tethers, which are not investments at all. They are a medium used to exchange other virtual currencies (Michael Aff. Ex. 2 ¶¶ 6-10.) Moreover, New Yorkers have not

been permitted to purchase tethers since 2017 (*id*. Ex. 16 ¶ 12), and so there are no New York "investors" to protect.

Nor would any "investors" need OAG's protection. OAG has not told the Court about a *single* victim of the Companies' alleged wrongdoing — whether in New York or otherwise — because there are none. Omitted from OAG's opposition papers is the fact that the Companies have produced as part of jurisdictional discovery all of the material concerning its New York customers (which were allowed on the platforms in earlier years). (Weinstein Reply Aff. ¶ 19.) If this material disclosed the existence of any "victims," OAG surely would have highlighted that fact.

OAG cannot do so because it well known that no customer has suffered any losses. When a customer purchases a tether from Tether, he or she is promised in return something very straightforward: the ability to redeem that tether for the equivalent fiat currency ($1 for ever U.S. Dollar tether, for example). (Michael Aff. Ex. 2 ¶ 6.) It is not disputed that Tether has been able to meet the demand for redemptions every time, with no exceptions. (*Id*. Ex. 20 ¶ 34.)

In fact, Tether has been able to meet demand despite OAG's reckless conduct that itself has roiled markets. When OAG ambushed the Companies' with its *ex parte* § 354 filing — despite having spent months in frequent contact with

the Companies' counsel[1] — OAG immediately issued a press release (Weinstein Reply Aff. Ex. 1), and then apparently spoke with the *Wall Street Journal*. Shortly thereafter, at 5:18 p.m., *Wall Street Journal* reporter Paul Vigna posted a link to an article about the 354 Order on Twitter, noting that it was an "Exclusive." (Weinstein Reply Aff. ¶ 16 & Ex. 2).) The article quoted "people close to the attorney general's investigation" — clearly indicating OAG's participation and interest in making a public "splash." (Weinstein Reply Aff. Ex. 3.) OAG succeeded in drawing attention to itself. Coverage of the action resulted in an approximate loss of $10 billion across dozens of cryptocurrencies within *one hour*. (Michael Aff. Ex. 2 ¶ 35.) Put simply, the only market harms here were wrought by OAG's desire for publicity.

OAG's press offensive also makes it difficult to take seriously any suggestion from OAG that there is any ongoing harm from the alleged nondisclosure at the heart of this proceeding. The core allegations in this matter is that tether holders were not given full disclosure as to the assets "backing" tethers. That allegation has always been untrue. When the Companies changed their Terms

[1] The Companies made several document productions and produced responses to multiple information requests before the § 354 Order issued. OAG's portrayal of the Companies as uncooperative is categorically false. (*See generally* Michael Aff. Ex. 9 (Affirmation of Jason Weinstein, Apr. 30, 2019).) Further, the core area in which OAG challenges the Companies' cooperation — the failure to produce the line-of-credit transaction documentation before completion of the transaction — is especially surprising. As OAG has acknowledged multiple times, it is not the Companies' regulator (*see, e.g.*, Opp. 28 n. 2; Opp. 30 n. 3), and so OAG had no authority to pre-clear or review the transaction.

of Service to allow for a different mix of assets to back tethers, the facts were timely disclosed and covered in the press contemporaneously, in February. (Michael Aff. Ex. 2 ¶¶ 31-32.)

Regardless, once OAG initiated this proceeding to such great public fanfare in April, any possible disclosure shortcoming was remedied. Tether customers concerned about tethers' backing, or about OAG's allegations, could at any time redeem their tethers for traditional currency (and can still do so today).

Shifting gears, OAG next argues that the trial court's earlier stay impeded its ability to investigate and protect investors in an initial exchange offering for the digital token LEO, and suggests that a further stay will make the problem worse. (Opp. 22.) This argument should be rejected out of hand because this § 354 proceeding has nothing to do with LEOs. LEOs were not offered to any U.S. customers and did not even exist when the § 354 Order in dispute here was issued. (Michael Aff. Ex. 20 ¶¶ 30-31.) Not surprisingly, the § 354 Order here does not contain *any* requests having anything to do with LEOs. (*Id*. Ex. 10, at 2-4.)

If OAG believes it somehow has authority over LEOs, it may issue a separate subpoena or initiate a separate proceeding under §354, and seek whatever relief it may be entitled to by law. OAG has long been aware of the LEO offering and has chosen to do nothing. It is highly misleading for OAG to suggest that a stay of the § 354 Order here will impede its efforts as to a product that did not even

exist at the time. That OAG has resorted to such a misleading argument about the prejudice it faces should confirm to this Court that OAG in fact faces no prejudice at all.

In the absence of any prejudice to OAG, a stay is especially justified.

IV. The Companies' Appeal Has Merit

Beyond the issue of the prejudice to the Companies (and the lack of any prejudice to OAG), a stay should issue because, as shown in the Companies' moving brief and herein, the appeal is highly meritorious.

A. The Trial Court Lacked Subject Matter Jurisdiction

1. Tethers Are Not Securities or Commodities

OAG concedes that the relevant Martin Act provisions here govern "securities" and "commodities" — not other products — and does not dispute that OAG made no attempt to even argue to the trial court that tethers qualified under either definition. (Cos. Br. 20-27.) OAG argued to the trial court only that the question of whether tethers qualified as securities or commodities could be decided later. (*Compare* Michael Aff. Ex. 19, at 15-17 *with* Ex. 22, at 17-24.)

Trying to change course, OAG now argues, albeit in a conclusory fashion, that the facts "strongly suggest that tethers are securities or commodities." (Opp. 28.) This argument should be rejected out of hand because it is being improperly

"raised for the first time on appeal . . . ." *Mehmet v. Add2net Inc.*, 66 A.D.3d 437, 439 (1st Dep't 2009). The argument is wrong, in any event.

As detailed in the Companies' moving brief, tethers are not securities, because they are not purchased with the expectation of profit from the efforts of the promoters; buyers are promised only the ability to redeem tethers on a one-for-one basis with fiat currency — no more, no less. (Cos. Br. 23-24.)

To suggest otherwise, OAG states that tether holders "rely on respondents' skill and judgment in selecting" the assets backing tethers. (Opp. 29.) But, even assuming that to be true (and there is no record evidence for it), that does not change the fact that purchasers of tether are not "led to expect profits" from those efforts. *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 159, 163 (S.D.N.Y. 2001) (FX swaps are not securities). Tether holders are led to expect only the ability to redeem tethers for the price paid. That is how "stablecoins" work. (Michael Aff. Ex. 2 ¶ 6.)

OAG also suggests that tethers qualify as "foreign currency orders," which are listed within the definition of "securities" in Gen. Bus. L. § 352(1). That, too, is wrong. As discussed in the Companies' moving brief, the term "foreign" refers to currency issued by a foreign sovereign, not a private, virtual stablecoin like tether. (Cos. Br. 25-36 & n.5 (collecting authorities).)

That tethers' value is pegged to foreign currency does not mean that tethers themselves are foreign currency (or foreign currency "orders"). The court in *Lehman Bros*. concluded that FX swaps were not "foreign currency orders" under the Martin Act because they represented "contracts that relate to foreign-currency prices," and did not contemplate "foreign-currency positions changing hands." 179 F. Supp. 2d at 163. The same is true with respect to tethers.

Nor are tethers commodities. (Cos. Br. 24-25.) OAG's opposition brief does not bother to explain how tethers could qualify except to point back to the trial court's tentative statement that they "could" potentially qualify (Opp. 25), without even addressing the Companies' arguments for why the trial court's tentative analysis was inconsistent with the plain statutory text. (Cos. Br. 24-25.)

2. The Question of Subject Matter Jurisdiction Cannot Be Deferred Until After OAG Has Obtained All the Relief It Seeks in this Proceeding

OAG next argues that it need not demonstrate that tethers are securities or commodities because, for now, it suffices to show that there are some grounds to believe that they may qualify. The true facts, according to OAG, can be sorted out later. (Opp. 27-21.) That is incorrect.

In *Gardner v. Lefkowitz*, 97 Misc. 2d 806 (Sup. Ct. N.Y. Cty. 1978), a case OAG itself cites generously, the court correctly concluded that "a **precondition for the issuance**" of an OAG subpoena was "subject matter jurisdiction on which

the issuance can rest." *Id*. at 810 (emphasis added). The subpoena was enforced in that case only because the court found that the diamonds at issue qualified as securities under the Martin Act. In other words, the *Gardner* court undertook the very analysis that OAG argues can be brushed aside here.

Quoting the *Gardner* case, OAG argues that the § 354 Order must be enforced unless it is "crystal clear" that there is "no way" tethers fall within the Martin Act. (Opp. 31.) But those quoted phrases were used to describe the arguments of the diamond company resisting the subpoena, not the court's own conclusions, or any standard of law. 97 Misc. 2d at 812 ("Although the **petitioners believe** that it is **crystal clear** that the subject matter of sales by Diamond Resources Corporation are in the same nature as the sale of any item of personal property . . . .") (emphasis added); *id*. at 814 ("**Petitioners contend** that there is **no way** in which their sale of diamonds can be seen as a common enterprise in which purchasers participate.") (emphasis added). Yet again, more candor with the Court should be expected from OAG.

Consistent with *Gardner*, the D.C. Circuit in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386 (D.C. Cir. 1981), quashed a subpoena directed to various "draft Kennedy" groups that the court concluded fell outside the definition of "political committees" within the Federal Election Commission's statutory authority. OAG tries to distinguish *Machinists* on the

ground that "OAG is a law-enforcement office, not a regulatory body." (Opp. 30 n.3.) But OAG gives no reason why that should make a difference. The FEC in *Machinists* was gathering information so that it could enforce a statute setting forth contribution limits of "political committees," 655 F.2d at 383; here, OAG is attempting to enforce a statute relating to "securities" and "commodities." In both cases, there is every reason to ensure that an arm of the government is acting within its proper statutory scope *before* a company is subjected to judicial compulsion. In fact, there is even *more* reason to safeguard the statutory boundaries in the § 354 context, where OAG not only has the power to obtain documents but also the power to obtain (and here has obtained) injunctive relief.

OAG next quotes *La Belle Creole Int'l S.A. v. Attorney General*, 10 N.Y.2d 192, 196 (1961), yet again in a misleading fashion, to suggest that OAG has subject matter jurisdiction unless its requests are "inevitabl[y] or obvious[ly]" futile. (Opp. 26.) That standard would be met here, but, in any case, that is not what the Court in *La Belle* held. The Court in *La Belle* granted broad leeway as to the scope of the particular document requests within the subpoena — permitting investigation into matters not "inevitabl[y] or obvious[ly]" futile — but that had nothing to do with the more fundamental question of whether the target of OAG's investigation fell within its statutory mandate.

As detailed in the Companies' moving brief, the subpoena target in *La Belle* was a liquor distributor indisputably "subject to regulation under the Alcoholic Beverage Control Law" at issue. 10 N.Y.2d at 198-99. The Court doubtfully would have reached the same result if the subpoena was focused on, for example, a non-alcoholic product. That is analogous to the situation here, where the product allegedly sold via fraud simply does not fall within the Martin Act.

For this same reason, OAG's argument that the § 354 Order should be enforced so long as it bears "a reasonable relationship to the subject matter under investigation" (Opp. 25) misses the point. While courts should enforce particular document requests within an investigatory order or subpoena that has a "reasonable relationship" to the matters at hand, that presumes that the subject matter of the inquiry is within the statutory reach of the agency. Here, the subject matter of the inquiry — tethers — is outside the Martin Act altogether.

Finally, OAG argues that whether tethers qualify as securities or commodities "will turn on facts that OAG is still gathering." (Opp. 29.) Which facts? OAG does not say. The way tethers work is public knowledge, and is not the subject of OAG's document requests. The Companies' moving brief pointed out that the discovery in dispute "is not aimed at" whether tethers are securities or commodities. (Cos. Br. 25.) Tellingly, OAG has not responded by identifying a

single request in the § 354 Order that will somehow bear on that question. OAG cannot do so, because there are none.

3. OAG Cannot Premise Jurisdiction on Other Products Outside the § 354 Order in Dispute

OAG's fallback argument is to try to premise its jurisdiction on products other than tethers. OAG argues that the "recent issuance of LEO tokens has every indicia of a securities offering" (Opp. 26), but, as mentioned, the § 354 Order in dispute was issued before LEOs even existed and has nothing to do with LEOs. (Michael Aff. Ex. 20 ¶¶ 30-31; *id*. Ex. 10, at 2-4.) If OAG wants to initiate a new § 354 proceeding, seeking documents relating to LEOs, the parties can address then whether there is or is not subject matter jurisdiction. But that has nothing to do with the matters now before this Court.

Along similar lines, OAG argues that its investigation "covers the Bitfinex trading platform, which facilitates trades of nearly one hundred virtual currencies." (Opp. 26.) Yet OAG has not identified a single one of those virtual currencies that it has reason to believe could be the subject of any Martin Act claims, or that is the subject of the § 354 proceeding actually before the Court. OAG initiated this proceeding based on specific allegations concerning tether, and it should not be permitted to ground jurisdiction on the vague, hypothetical assertion that unspecified other securities are somehow at issue. OAG's argument would suggest that it can secure documents from any entity in perpetuity if it could claim some

possible connection to the Martin Act might be found in the future. There is no authority for such a sweeping claim.

B. The Trial Court Lacked Personal Jurisdiction

1. Service Was Defective

As detailed in the moving papers, OAG failed to comply with the Martin Act's requirement that § 354 orders "be served upon the person named in the endorsement aforesaid by delivering to and leaving with him a certified copy thereof . . . ." Gen Bus. L. § 355. (Cos. Br. 27-29.)

OAG's opposition papers ignore the requirement that it serve a "certified" copy of the Order, Gen Bus. L. § 355, which OAG concededly did not do. On this basis alone, service was defective, and this proceeding should be dismissed.

Nor has OAG complied with the requirement of "delivering to and leaving" the § 354 Order with the "the person[s] named." *Id.* OAG only delivered the § 354 Order *to counsel*, which is simply not authorized by statute. This Court has rejected a § 354 Order on this exact basis before, *see Abrams v. Lurie*, 176 A.D.2d 474 (1st Dep't 1991), and the outcome here should be no different.

OAG claims that it has complied with CPLR 311(b), which authorizes court-ordered service methods where the regular methods are "impracticable." But OAG's § 354 application contained not one word about any efforts to serve the Companies under the normal methods (Michael Aff. Ex. 1), and the trial court

never made any findings to suggest that service under the regular methods would be impracticable. The trial court did not even cite CPLR 311(b). (Michael Aff. Ex. 10 (*ex parte* order); Ex. 22 at 17 n.8.)

OAG misleadingly states that it served the § 354 Order on counsel "because Supreme Court ordered service in that fashion" (Opp. 33), failing to mention that the trial court merely signed, on an *ex parte* basis, the draft Order OAG had prepared. That Order contained no findings about whether regular service would be impracticable.

Absent any showing of impracticability by OAG, the trial court was "without power to direct" service by other methods. *David v. Total Identity Corp.*, 50 A.D.3d 1484, 1485 (4th Dep't 2008) (internal citation and quotation marks omitted). This is what doomed OAG in *Abrams*. There, as here, OAG simply overlooked the "requirement that some manner of showing be made that a customary method of service is 'impracticable.'" 176 A.D.2d at 474-75.

OAG next argues to this Court for the first time that regular service was impracticable because the "respondents are foreign corporations that are unlicensed to conduct business in New York, and their employees are scattered throughout the world." (Opp. 33.) But that point was never presented to the trial court when it purportedly authorized service on counsel. OAG cannot reach back in time to

justify a finding of impracticability that it never advanced to the trial court, and that the trial court never actually addressed.

Regardless, this same ground for impracticability was also rejected in *Abrams.* This Court found that the impracticability showing is not met by the service recipient's "failure 'to reside or abide in or maintain an actual place of business within this state' . . . ." *Abrams*, 176 A.D.2d at 475. That does not amount to "impracticability." What OAG needed to show instead was that it was "having serious difficulty making service under the existing statutory methods . . . ." CPLR 311(b), Practice Commentaries § C311:3.

Finally, OAG argues in passing that the Companies waived their service challenge because they first moved to vacate OAG's *ex parte* preliminary injunction on other grounds. (Opp. 33) The trial court correctly found there was no waiver because this point "was expressly preserved" in the Companies' papers on the motion to vacate (which, it should be noted, were drafted on an emergency basis just days after the *ex parte* injunction). (Michael Aff. Ex. 22, at 8 n.4.)

Even if the Companies had not made an explicit reservation of rights in their motion to vacate, there would still be no waiver, since the Companies raised the point in their first CPLR 3211 motion to dismiss. CPLR 3211(a)(8) provides that waiver occurs when a party "has either made a CPLR 3211(a) motion without objecting to jurisdiction or served an answer that omits the jurisdictional objection.

Only then should there be a finding of waiver of jurisdictional objections."

CPLR 320, Practice Commentaries, § C320:4 (emphasis added).

When a party includes its jurisdictional challenge in its motion to dismiss, there is no waiver, and it does not matter "what [it] may have done prior to making that motion." *Coleman Capital Corp. v. Trans Urban Constr. Co.*, 53 Misc. 2d 70, 72 (N.Y. Civ. Ct. 1967); *see also, e.g.*, *Gliklad v. Cherney*, 97 A.D.3d 401, 402 (1st Dep't 2012) (summary judgment motion was not a waiver "given that defendant had previously raised the jurisdictional defense"). Thus, for example, an "appearance in opposition to the petitioner's application for a preliminary injunction" — effectively what occurred here — does "not constitute a waiver of his jurisdictional objection." *Town of Clarkstown v. Howe*, 206 A.D.2d 377, 377 (2d Dep't 1994).[2]

2. OAG's Claims Do Not Arise from Conduct Purposefully Directed Towards New York

The Companies' moving brief sets forth the multiple errors in the trial court's analysis of personal jurisdiction, and demonstrates that the OAG's claims in this matter do not arise from the Companies' purposeful activities in New York. (Cos. Br. 30-33.) Quite the contrary, the Companies have purposefully *avoided*

[2] Federal law has substantially similar waiver rules, *see* Fed. R. Civ. P. 12(h), and the federal case law is the same: parties that timely challenge jurisdiction in a motion to dismiss do not "waive[] their right[s] . . . simply because they argued or presented evidence regarding the preliminary injunction." *Melt Franchising, LLC v. PMI Enterprises, Inc.*, 2008 WL 4414638, at *2 (C.D. Cal. Sept. 25, 2008).

New York (and the United States) for two years now. None of the various arguments in OAG's opposition brief can undo the trial court's errors, or justify the assertion of jurisdiction.

First, OAG argues that it need only show at this stage that facts "may exist" to justify jurisdiction (Opp. 31), but the case it cites, *Peterson v. Spartan Indus.*, 33 N.Y.2d 463 (1974), authorized jurisdictional discovery where none had yet occurred. Here, by contrast, OAG has already completed jurisdictional discovery — comprising over 70,000 pages of material (Michael Aff. Ex. 20 ¶ 28) — and so it is long past the time when bare allegations will suffice.

Second, OAG argues that its investigation goes beyond the issue of tethers' backing, and extends to "the operation of the Bitfinex trading platform" more generally. (Opp. 32.) But OAG's § 354 application did *not* contain any hint of wrongdoing beyond the issue of tethers' backing (Michael Aff. Ex. 1), and, even if it did, New Yorkers have been banned from the Bitfinex platform for years. (Michael Aff. Ex. 16 ¶¶ 8-10.) OAG has yet to, and cannot, point to *any* suspected wrongdoing dating back to the time when New Yorkers were allowed to use Bitfinex that was the basis for the § 354 Order.

Finally, OAG argues that personal jurisdiction for purposes of an investigative subpoena requires only a "nexus" between the target's in-state activities and the "acts under investigation," not the (as yet unpleaded) causes of

action that may be lodged later. (Opp. 32 (citing *Am. Dental Coop. v. Attorney General*, 127 A.D.2d 274, 281 (1st Dep't 1987)). The Companies of course agree that no Martin Act civil action has been filed yet with the precise contours of OAG's claims. But there are nonetheless particular allegations that gave rise to OAG's § 354 proceeding — and that have even formed the basis for an injunction. For jurisdictional purposes, there must be a nexus between conduct in New York and those allegations.

The only New York case OAG cites on this point, *American Dental Coop. v. Attorney General*, 127 A.D.2d 274, 281 (1st Dep't 1987), confirms this essential requirement. There, this Court enforced an OAG subpoena in an antitrust investigation because there was a nexus between the target company's in-state activities and its "suspected agreement to engage in a concerted refusal to buy from [certain] manufacturers." *Id.* Critically, this Court did not accept OAG's bare say-so that the material was relevant to some unspecified wrongdoing, but, instead, stated plainly what allegations were at issue, and how the subpoena target's conduct in New York was connected to those allegations. This demonstrated nexus is precisely what is missing here.

The other cases OAG cites are from outside New York, but are nonetheless consistent with this Court's decision in *American Dental*.

In *Exxon Mobil Corp. v. Attorney General*, 94 N.E.3d 786 (Mass. 2018), the court upheld the Massachusetts Attorney General's subpoena to Exxon as part of an investigation into whether Exxon "misled Massachusetts residents about the impact of fossil fuels on both the Earth's climate and the value of the company." *Id.* at 792. These allegations had a sufficient nexus to Exxon's in-state activities because "Exxon communicate[d] directly with Massachusetts consumers about its fossil fuel products. . . ." *Id*. at 794. Similarly, in *SEC v. Knowles*, 87 F.3d 413 (10th Cir. 1996), the Tenth Circuit upheld an SEC subpoena against an individual who engaged in "active trading" of securities within the forum, because that trading was "directly related to matters in the underlying SEC investigation." *Id*. at 417, 419.

The common thread in these cases is the requirement that the subpoena target engage in purposeful conduct within the forum, giving rise to the suspected wrongdoing under investigation. Here, the *only* suspected wrongdoing OAG has articulated involves the alleged impairment of tethers' backing, which indisputably occurred long *after* U.S. customers were banned from the Companies' platforms.[3]

[3] OAG misleadingly states that "Tether's terms of service did not specifically bar New York investors from redeeming tethers until November 2018." (Opp. 8.) As OAG well knows, as of November 2017, Tether ceased servicing customers other than Bitfinex, and so customer purchases and redemptions were possibly only through the Bitfinex platform, which had already prohibited access by New York customers. (Michael Aff. Ex. 20 ¶¶ 16-20 (correcting this same misleading assertion by OAG).)

While OAG claims that it may decide to bring claims on other subjects, it gives no hint as to what those allegations may be. The nexus requirement — and the very notion of specific personal jurisdiction — would be meaningless if OAG could satisfy it by simply asserting that the materials it seeks are relevant to an investigation of unbounded and unspecified scope. Without any showing of a nexus between the suspected wrongdoing underlying the § 354 Order and the Companies' activities in New York, the trial court never should have asserted personal jurisdiction. This is yet another reason why the Companies' appeal is highly meritorious, and why a stay should issue.

CONCLUSION

For all of these reasons, and those in the Companies' moving papers, the Companies respectfully request that the Court stay all proceedings until this Court resolves the Companies' appeal.

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