Tom, J.P., Saxe, Feinman, Clark, Kapnick, JJ.

13989 The People of the State of New York, etc.,
Plaintiff-Respondent,

-against-

Maurice R. Greenberg, et al.,
Defendants-Appellants. Index 401720/05

Boies, Schiller & Flexner LLP, New York (Nicholas A. Gravante, Jr. of counsel), for Maurice R. Greenberg, appellant.

Kaye Scholer LLP, New York (Vincent A. Sama of counsel), for Howard I. Smith, appellant.

Eric T. Schneiderman, Attorney General, New York (Claude S. Platton of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 29, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The State's disgorgement claim was legally viable, despite the settlement of actions brought by American International Group, Inc. shareholders and by the corporation, and the accompanying releases (*see People v Ernst & Young LLP*, 114 AD3d 569, 570 [1st Dept 2014]). Defendants failed to carry their prima facie burden of demonstrating the lack of incentive compensation paid to defendants as a result of the sham

transactions in which they are alleged to have participated, so the burden never shifted to the State to raise an issue of fact to support the disgorgement claim (*see William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). Contrary to defendants' contention, the State did not waive the disgorgement claim by not seeking discovery on the issue and not mentioning it in the note of issue (*see generally Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]); indeed, at oral argument the motion court noted that had discovery regarding this remedy been sought prior to an adjudication of liability, it would have been appropriate to grant a protective order. Nor does the record support defendants' contention that the State had agreed at a discovery conference that it was not pursuing disgorgement.

Defendants failed to demonstrate conclusively that the claim for a permanent injunction under the Martin Act was not warranted under the circumstances, which at least raised issues of fact as to the imminence of harm. The existence of a federal consent judgment imposing a similar but more lenient injunction, and not providing for any acknowledgment of guilt (*see Securities & Exch. Commn. v Citigroup Global Mkts., Inc.*, 827 F Supp2d 328, 332-333 [SD NY 2011], *vacated and remanded* 752 F2d 285 [2d Cir 2014]),

does not preclude the injunction sought here by the State.

We have considered defendants' other contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2015

CLERK

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on June 18, 2015.

Present: Hon. Peter Tom, Justice Presiding,
David B. Saxe
Paul G. Feinman
Darcel D. Clark
Barbara R. Kapnick, Justices.

The People of the State of New York,
etc.,
Plaintiff-Respondent,

-against-

M-1743
Index No. 401720/05

Maurice R. Greenberg, et al.,
Defendants-Appellants.

Defendants-appellants having moved for reargument of or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court entered on April 16, 2015 (Appeal No. 13989),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion, to the extent it seeks reargument, is denied. So much of the motion which seeks leave to appeal to the Court of Appeals, is granted, and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Was the order of the Supreme Court, as affirmed by this Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

CLERK