COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, *Plaintiff-Respondent*, - against - MAURICE R. GREENBERG and HOWARD I. SMITH, *Defendants-Appellants*.	Index No. 401720/05 **NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *and* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, *Amici Curiae*	

PLEASE TAKE NOTICE that, upon the annexed affirmation of Andrew J. Pincus, dated March 18, 2016, the Chamber of Commerce of the United States of America and the Securities Industry and Financial Markets Association will move this Court, at a term of the Court of Appeals, at the Courthouse located at 20 Eagle Street, Albany, New York on March 28, 2016, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting leave to file a brief as *amici curiae* in support of Defendants-Appellants Maurice R. Greenberg and Howard I. Smith.

Dated: March 18, 2016 MAYER BROWN LLP

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COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, *Plaintiff-Respondent*, - against - MAURICE R. GREENBERG and HOWARD I. SMITH, *Defendants-Appellants*.	:	Index No. 401720/05 **AFFIRMATION OF ANDREW J. PINCUS IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *and* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, *Amici Curiae*	:	

ANDREW J. PINCUS, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner at the law firm of Mayer Brown LLP, counsel for the Chamber of Commerce of the United States of America (Chamber) and the Securities Industry and Financial Markets Association (SIFMA). I am familiar with the legal issues involved in the above-captioned action. I submit this affirmation in support of the motion of the Chamber and SIFMA for leave to file the accompany-

ing brief as *amici curiae* in support of Defendants-Appellants Maurice R. Greenberg and Howard I. Smith.

2. The Chamber of Commerce of the United States (Chamber) is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in the courts on issues of concern to the business community.

3. The Securities Industry and Financial Markets Association (SIFMA) is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

4. The Appellate Division's summary decision in this case, holding that the Attorney General may seek disgorgement and a nationwide director and officer ban and a ban from participating in the securities industry under the Martin Act

and Executive Law § 63(12), is of great concern to the *amici*'s members because it significantly expands the scope of the Attorney General's powers under those statutes. That novel interpretation of these laws is likely to undermine New York's status as the center of our nation's and the world's capital markets by diverting capital market activities—and the large number of associated jobs—to financial centers in other nations.

5. In their brief, *amici* explain why permitting disgorgement and nationwide injunctive relief will make this State a less hospitable environment for business in general and the financial industry in particular, and impermissibly interfere with other states' commercial markets. They also explain how the ruling is likely to result in lower settlements for investors and consumers because of the diversion of resources to litigate and settle the Attorney General's disgorgement claims—which seek funds to be deposited into the State treasury. Finally, they present a detailed legal argument explaining why the Appellate Division's decision misinterprets the statutes at issue and conflicts with established New York law.

6. Participation of the *amici curiae* would be of particular assistance to this Court in view of the broad range of perspectives and experiences of the *amici* and their members, some of whom have been the targets of suits under the Martin Act and Executive Law § 63(12). *Amici* are ideally situated to explain the impact that an overbroad interpretation of those statutes will have upon New York's abil-

ity to maintain its status as a vital, growing financial center, as well as to identify institutional and policy arguments and authorities that might otherwise not be presented to the Court.

WHEREFORE, I respectfully request that this Court enter an order (i) granting the Chamber of Commerce of the United States of America and the Securities Industry and Financial Markets Association leave to submit this brief as *amici curiae* in support of Defendants-Appellants Maurice R. Greenberg and Howard I. Smith; (ii) accepting the brief that has been filed and served along with this motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: March 18, 2016

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COURT OF APPEALS OF NEW YORK

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[PROPOSED] *AMICI CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amici curiae the Chamber of Commerce of the United States of America and the Securities Industry and Financial Markets Association have no corporate parents, subsidiaries, or affiliates.

INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association (SIFMA) is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

This case is of particular importance to *amici* given the broad range of perspectives and experiences of their members, who have been or could be the targets of suits brought by the Attorney General under the Martin Act or Executive Law § 63(12). The Appellate Division's interpretation of those statutes would threaten businesses, including *amici*'s members, with significantly increased liability, could divert funds away from investors and consumers to the State Treasury, and—by further augmenting the Attorney General's already-significant powers under the Martin Act—would impose particularly severe burdens on financial services companies, notwithstanding the increased competition that New York faces in retaining those businesses and the significant number of jobs that they create.

SUMMARY OF ARGUMENT

The Appellate Division plainly erred in holding that the Attorney General may seek disgorgement of profits, a nationwide director and officer ban, and a nationwide ban from participating in the securities industry in every case brought under the Martin Act (N.Y. Gen. Bus. Law §§ 352-359) or New York Executive Law § 63(12). On their faces, *neither* statute authorizes such remedies—the decision below is irreconcilable with the text and purpose of those laws, and will have very substantive adverse practical and legal consequences.

I. The Attorney General's contention that disgorgement is authorized by the Martin Act and Section 63(12) is irreconcilable with elementary principles of statutory interpretation. It is hornbook law in New York that a statute that enumerates particular forms of relief permits *only* those forms of relief. In identifying the relief available, the Martin Act and Executive Law Section 63(12) do not mention disgorgement; thus, courts may not expand statutory remedies under those statutes and order disgorgement. The Attorney General's contention that a "catchall" provision in a different section of the Martin Act—which on its face is applicable only to actions in which Receivers are appointed—authorizes disgorgement is incorrect and should be rejected.

Moreover, the New York Legislature has amended these statutes multiple times to authorize additional remedies. The fact that the Legislature has paid special attention to the types of the remedies permitted under the Martin Act and Executive Law demonstrates that if the Legislature meant for disgorgement to be available, it would have said so. This Court should not second-guess the Legislature's judgment by reading into the statutes a disgorgement remedy that the Legislature has declined to enact.

Permitting the Attorney General to seek disgorgement would also greatly expand the reach of both statutes. The Attorney General would be able to bring a parallel lawsuit for monetary relief—in the new form of disgorgement—in *every* fraud case under *either* statute, even when New York residents have obtained compensation in a separate lawsuit and *res judicata* precludes the Attorney General from seeking damages relief. This threat of significantly increased liability and limited efficacy of settlements in litigations concerning the same subject matter as

NYAG actions would upset the regulatory balance that the Legislature struck and would impose a severe burden on New York's financial services industry.

Finally, if there were any doubt whether these two statutes authorize disgorgement, the Court should hold they do not in order to avoid a conflict with federal law. Congress intended for securities lawsuits seeking money for investors to be brought in federal court under federal law, and it enacted the Securities Litigation Uniform Standards Act (SLUSA) in order to preclude any state-law actions that conflicted with that purpose. SLUSA precludes disgorgement actions like the Attorney General's here, which are designed to recover funds for classes of shareholders and investors.

II. The Attorney General's claim that he is authorized to obtain nationwide bans prohibiting the defendants from serving as directors or officers of any public company or from participating in the securities industry is equally unsupportable. The Commerce Clause, which gives Congress the exclusive authority to regulate interstate commerce, likewise prohibits states from applying their own laws to regulate extraterritorial conduct. The Attorney General has no authority to seek restrictions on defendants' conduct *outside* New York based on alleged violations of New York statutory law.

Even if it were permitted by the Constitution, a nationwide director and officer ban or a ban from participating in the securities industry under New York law would be preempted by the comprehensive federal laws designating the SEC as the nation's securities regulator. The SEC has express—and exclusive—authority to bring lawsuits seeking nationwide director and officer bans and bans from participating in the securities industry. Pursuant to that authority, the SEC investigated the transactions at issue here and, in a subsequent settlement with the defendants, defendants agreed to pay $8.25 million to the SEC in alleged disgorgement and the SEC concluded that only a three-year director and officer ban on one defendant (Mr. Smith) and no ban on either defendant from participating in the securities industry was warranted in the circumstances. The Attorney General may not second-guess the conclusion reached by the SEC; his request for a *permanent* director and officer ban and a ban from participating in the securities industry applicable to *both* defendants plainly conflicts with the SEC's resolution of this matter.

ARGUMENT

I. The Attorney General Is Barred From Seeking Disgorgement In This Case.

The Appellate Division's holding that disgorgement is available to the Attorney General under the Martin Act and Executive Law Section 63(12)—even where all other interested parties have already settled their claims against the defendants—is incorrect. Those statutes do not authorize any remedy they do not expressly mention. And even if the Appellate Division's reading were plausible, disgorgement would be unwarranted in the particular circumstances of this case, because defendants have already settled with investors and AIG. Permitting the Attorney General to disrupt these settlements would harm investors and the public.

A. Disgorgement is categorically unavailable under the Martin Act and Executive Law § 63(12).

In *People v. Ernst & Young LLP*, 114 A.D.3d 569, 569 (1st Dep't 2008), the Appellate Division held that "disgorgement may be available as an equitable remedy" under the Martin Act and Section 63(12). The *Ernst & Young* court appeared to rely on this Court's dictum in *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 125 (2008), that the Attorney General "might be able to obtain disgorgement" in certain Section 63(12) cases. *Ernst & Young*, 114 A.D.3d at 569. It also explained that "maintaining disgorgement as a remedy within the court's equitable powers is crucial." *Id.* at 570. The Appellate Division followed *Ernst & Young* without comment in this case, holding that the Attorney General's disgorgement claim was "legally viable." *People v. Greenberg*, 127 A.D.3d 529, 529 (1st Dep't 2015).

Ernst & Young's cursory analysis of the two statutes was wrong: neither permits the Attorney General to seek disgorgement. The only remedies available under either statute are those specifically enumerated, and neither statute's text authorizes disgorgement. In addition, permitting disgorgement in Martin Act and Executive Law Section 63(12) cases would clearly conflict with federal law.

First, the Appellate Division's analysis of the two statutes is inconsistent with the interpretive maxim *expressio unius est exclusio alterius*, which holds that "the expression of one subject, object, or idea is the exclusion of other subjects, objects, or ideas." Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 Marq. L. Rev. 191, 191 (1931). The *expressio unius* canon is not merely a helpful guide to interpreting New York laws; rather, it is a statutorily *mandated* principle of statutory construction. When a New York statute "expressly describes a particular act, thing or person to which it shall apply, an *irrefutable inference must be drawn* that what is omitted or not included was intended to be omitted or excluded." *See* N.Y. Stat. Law § 240 (emphasis added).

The *expressio unius* canon has accordingly guided this Court's interpretation of statutes in a variety of contexts involving remedies or sanctions. For example, this Court has declined to imply a private right of action in statutes that provide for an express remedy: "[w]here the Legislature has not been completely silent but has instead made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy, with broader coverage." *Sheehy v Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 636 (1989). This Court similarly held that the Attorney General has no general prosecutorial power in criminal cases, but may only bring prosecutions "where specifically permitted by statute." *Della Pietra v. State*, 71 N.Y.2d 792, 796 (1988).

The same reasoning controls here. The Legislature did not leave unaddressed the question of which remedies are available under Executive Law Section 63(12) and the Martin Act; rather, it specified particular remedies available to the Attorney General under each statutory provision. The Martin Act allows the Attorney General to obtain injunctive relief prohibiting a defendant from "selling or offering for sale to the public within this state . . . any securities," and to seek "restitution of any moneys or property obtained" by fraud. Gen. Bus. Law § 353(1), (3). And Section 63(12) provides that the Attorney General may sue for injunctive relief, "restitution and damages," and cancellation of a defendant's business certificate. Exec. Law § 63(12). It is the Legislature's prerogative, not the courts', to add to these available remedies. *See Sheehy*, 73 N.Y.2d at 634 ("[T]he Legislature has both the right and the authority to select the methods to be used in effectuating its goals.").

Guided by the *expressio unius* principle, *every* New York court that had squarely addressed the question prior to *Ernst & Young* had held that remedies not expressly authorized by Section 63(12) are precluded. *See, e.g.*, *People v. Agip Gas, LLC*, 2013 N.Y. Slip Op. 32805(U), at *5 (Sup. Ct. Suffolk Co. Oct. 18, 2013) (noting that § 63(12) "make[s] no provision for disgorgement of profits to the State"); *People ex rel. Spitzer v. Direct Revenue, LLC*, 2008 N.Y. Slip Op.

50845(U), at *8 (Sup. Ct. New York Co. Mar. 12, 2008) (disgorgement not available under § 63(12) because the Attorney General is "strictly limited to recovery as specifically authorized by statute"); *State v. Solil Mgmt. Corp.*, 128 Misc. 2d 767, 773 (Sup. Ct. New York Co.) (punitive damages and treble damages not available because § 63(12) "does not provide for either of these extraordinary remedies"), *aff'd,* 114 A.D.2d 1057 (1st Dep't 1985); *State v. Hotel Waldorf-Astoria Corp.*, 67 Misc. 2d 90, 91 (Sup. Ct. New York Co. 1971) (treble damages not available).

Similarly, no court had held that disgorgement is a permissible remedy under the Martin Act. The *Ernst & Young* court erred by overlooking the *expressio unius* canon (which it never mentioned) and this consistent body of precedent.

Second, it was particularly inappropriate for the Appellate Division to hold that unenumerated remedies are available under the Martin Act, a statute that the New York legislature has "amended on a number of occasions to broaden its reach." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 350 (2011). As enacted in 1921, the Martin Act provided primarily for injunctive relief and criminal penalties. The Legislature amended the statute in 1955 to eliminate the need for the Attorney General to prove scienter; in 1960 to expand the statute's scope to encompass "securities consisting of participation interests in real estate"; and in 1976 to allow the Attorney General to sue for restitution. *Id.*

Where the Legislature has taken such an active role in controlling and adjusting a statute's scope, courts should be especially loath to take it upon themselves to add new remedies that the legislature has not made available. *See, e.g.*, *Steinberg v. Steinberg*, 46 A.D.2d 684, 684 (2d Dep't 1974) (in "an area comprehensively covered by the Legislature, courts may not fashion remedies not provided by statute").

Third, in an attempt to avoid the fatal problem that disgorgement is not authorized by the text of the Martin Act or Executive Law § 63(12), the Attorney General contends (NYAG Br. 32-36) that disgorgement is encompassed by certain language in the Martin Act allowing courts to order "such other and further relief as may be proper." Gen. Bus. Law § 353-a. But that provision has absolutely nothing to do with the remedies available to the Attorney General.

The language quoted by the Attorney General does not appear in Gen. Bus. Law § 353—the provision that authorizes the Attorney General to bring suit and enumerates the remedies that he may seek in such an action. Rather, it appears in an entirely separate section (§ 353-a) titled "Receivers," which establishes the ability of courts to appoint receivers to take title to property obtained through fraud and return it to victims. In context, therefore, the language relied on by the Attorney General authorizes courts to award such relief as is necessary to carry out the *restitutionary* function of a receiver—and has no bearing whatever on the relief permissible as punishment for the underlying violation. *See, e.g.*, *People v. Federated Radio Corp.*, 244 N.Y. 33, 37-38 (1926) (explaining that the "primary purpose of the [Martin Act] is remedial in its character" and that § 353-a thus allows the "appointment of a receiver to take title to all property derived by defendants by means of . . . fraudulent practices and liquidate the same *for the benefit of* [*victims*]" (emphasis added)).

Here, the Attorney General is not acting in any capacity as a receiver and Section 353-a is thus entirely inapplicable. The Appellate Division did not rely on Section 353-a when it concluded that disgorgement was available. That fact alone belies the Attorney General's assertion that Section 353-a "plainly" authorizes disgorgement and all other remedies in Martin Act cases—even cases that do not involve receivers. NYAG Br. 3.

The implausibility of the Attorney General's reading of Section 353-a is apparent in light of the fact that, as mentioned above, the Legislature has amended the Martin Act several times to authorize additional remedies. If Section 353-a made *all* conceivable remedies available in Martin Act cases, the language added by the Legislature would be redundant. The Legislature has specifically instructed courts *not* to find such redundancy in its enactments. *See* N.Y. Stat. Law § 231.

This Court should therefore reject the Attorney General's implausible reading of Section 353-a.[1]

Fourth, any ambiguity in the scope of the Martin Act and Executive Law Section 63(12) should be resolved in favor of noninterference with federal securities regulation. If, notwithstanding the two statutes' silence regarding the availability of disgorgement, the Court finds the provisions unclear, it should not construe them to allow the Attorney General to pursue disgorgement, because such an action would be in tension with federal securities laws.

Since the Great Depression, the securities markets have been the subject of pervasive federal regulation aimed at protecting this important sector of the economy. By providing national uniformity in securities regulation, federal laws "promote efficiency, competition, and capital formation in the capital markets," and "advance the development of national securities markets . . . by, as a general rule, designating the Federal government as the *exclusive* regulator" of national securi-

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[1] The Attorney General adverts to federal decisions permitting disgorgement under the federal securities laws and other statutes. *See* NYAG Br. 40-42, 45. But those decisions are not on point here. They rest on the fact that nothing in those laws "even implies a restriction on the equitable remedies of the [federal] courts." *E.g.*, *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). Federal courts have accordingly held that they have power to order disgorgement "simply because the relevant provisions of [the federal securities laws] . . . vest jurisdiction in the federal courts." *Id.* The Martin Act, by contrast, specifies the particular equitable remedies that are available to the Attorney General and, thus, the rationale of the federal-securities-law precedents is accordingly inapplicable.

ties markets. H.R. Rep. No. 104-622, at 16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3877, 3878 (emphasis added). Given the important role that the securities markets play in the growth and sustenance of the Nation's economy, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006).

Two federal laws are particularly important to the issue of disgorgement: the Private Securities Litigation Reform Act (PSLRA) and the Securities Litigation Uniform Standards Act (SLUSA). Congress enacted these laws because by the mid-1990s, state-law securities class actions, governed by variable standards for liability from jurisdiction to jurisdiction, had "created a ripple-effect that . . . inhibited small, high-growth companies in their efforts to raise capital" and "damaged the overall efficiency of our capital markets." S. Rep. No. 105-182 (1998), 1998 WL 226714, at *4.

The PSLRA contained several procedural and substantive safeguards to counter this litigation abuse. Litigants, however, responded by simply moving to state courts and pursuing substantively identical, abusive claims via state law. Congress thus enacted SLUSA, just three years after it enacted the PSLRA, to preclude litigants from circumventing the PSLRA's carefully drawn limitations on private damages for securities fraud. SLUSA broadly and expressly precludes state law class actions that would hold a security issuer liable for claims of fraud, misrepresentation, or the like, requiring those suits instead to be brought under federal law. *See* 15 U.S.C. § 78bb(f)(1) ("No covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security"). Between its adoption of the PSLRA and SLUSA, Congress also enacted the National Securities Markets Improvement Act (NSMIA), the "primary purpose of [which] was to preempt state 'Blue Sky' laws" (*Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001)), in order to "promote efficiency, competition, and capital formation in the capital markets," and to "further advance the development of national securities markets * * * by, as a general rule, designating the Federal government as the exclusive regulator of national offerings of securities." H.R. Rep. No. 104-622, at 16,1996 U.S.C.C.A.N. 3877, 3878.

In light of the preclusion provision of SLUSA, this Court should not interpret the Martin Act and Executive Law Section 63(12) to permit the Attorney General to bring an action for disgorgement. The Attorney General himself explains in his brief that one function of disgorgement in Martin Act and Executive Law Section 63(12) cases, in his view, is to address situations in which his claim for restitution or damages is barred by the *res judicata* effect of a private settlement, but where he believes that the amount of the settlement was insufficient. *See* NYAG Br. 71. The Attorney General views disgorgement, in other words, as a stand-in for the damages that investors or shareholders could perhaps have obtained but did not because they chose to settle their claims.

SLUSA precludes such a disgorgement claim, which is essentially a surrogate claim for monetary relief on behalf of a class of private individuals for violations of state law in connection with publicly traded securities—*i.e.*, a class action precluded by SLUSA. The fact that the Attorney General, on behalf of the State, is the nominal party in interest, is irrelevant; courts have consistently held that "when the state merely asserts the personal claims of its citizens, it is not the real party in interest." *In re Baldwin-United Corp.*, 770 F.2d 328, 341 (2d Cir. 1985); *see also, e.g.*, *People of State of N.Y. by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) ("The state cannot merely litigate as a volunteer the personal claims of its competent citizens."). At bottom, the Attorney General's disgorgement claim is a shadow claim for class damages on behalf of investors.[2]

[2] The Supreme Court's recent decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), is not to the contrary. There, the Court carefully parsed the text of the Class Action Fairness Act: in defining a covered mass action, "the statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest.'" *Id*. at 742. "Had Congress intended the latter, it easily could have drafted language to that effect." *Id*. SLUSA, however, *does* contain such language. It defines a "covered class action" as a suit brought "on behalf of more than 50 persons or *prospective class members*" and, alternatively, as one in
(cont'd)

Allowing the Attorney General to assert such a claim under the Martin Act or Section 63(12) would make defendants potentially liable for huge sums without satisfying the standards established by the PSLRA and SLUSA—even though the very same action, raising the very same claims, predicated on the very same facts, would be precluded if brought directly by the beneficiaries of the suit themselves. That threat of liability would bring about the uncertainty and lack of uniformity that the PSLRA, SLUSA, and NSMIA were meant to eliminate. Any suit for disgorgement under the Martin Act and Section 63(12) is accordingly precluded.

B. Even if disgorgement were available in some circumstances, it would be impermissible in this case because the defendants settled with AIG and its shareholders.

Even if this Court concludes that the Attorney General can *sometimes* obtain disgorgement in Martin Act or Section 63(12) cases, it should hold that disgorgement is not available where, as here, the defendants have already settled with *all* the parties that allegedly lost money. Allowing disgorgement *in such cases* would excessively punish defendants and deter them from settling private lawsuits.

AIG and its shareholders have released any and all potential claims against the defendants arising out of the transactions at issue. The company's shareholders brought a securities class action against the defendants and subsequently settled

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which "one or more named parties seek to recover damages on a representative basis on behalf of themselves and other *unnamed parties* similarly situated." 15 U.S.C. § 78bb(f)(5)(B)(i).

that action in 2009, resulting in a release of all their claims against the defendants—including any possible claim for disgorgement of the funds that the Attorney General alleges (NYAG Br. 71) the defendants wrongly received.

Certain shareholders also brought a derivative lawsuit on behalf of AIG in the Delaware Court of Chancery against the defendants based on the allegedly improper transactions. AIG subsequently took direct control of a portion of the suit. That action, too, was settled in 2009, releasing any direct or derivative claims that AIG might have against the defendants, including any possible claim for disgorgement.

This Court has recognized the weighty "public interest [in] judicial repose and [in] the orderly termination of controversy." *Am. Ins. Co. v. Messinger*, 43 N.Y.2d 184, 192 (1977). The familiar doctrine of res judicata promotes this public interest in finality by preventing relitigation of claims that have already been resolved.

Allowing the Attorney General to pursue disgorgement even after *every party* that was conceivably aggrieved by a defendant's alleged wrongdoing has settled with the defendant is inconsistent with res judicata. In such a case, the Attorney General seeks to stand in the shoes of parties that already have been made whole. The public interest weighs decisively against relitigating such claims.

Permitting disgorgement in these circumstances would not only frustrate the public interest in finality; it would also discourage defendants from settling claims in the first place. No rational defendant would choose to settle private investors' claims for damages if the Attorney General had the ability to bring a subsequent, "disgorgement" claim that was so vague as to encompass the same funds sought as damages by investors; defendants have no incentive to settle when the Attorney General can creatively fashion the relief he seeks and thus pursue the very relief a private settlement foreclosed. Nor would any defendant settle disgorgement claims brought by investors if the Attorney General could subsequently seek a *second* disgorgement of the same money. Thus, granting the Attorney General the expansive disgorgement power he seeks would serve only to discourage private settlements, making it harder for investors to obtain relief.

C. Permitting the Attorney General to pursue disgorgement would have serious adverse consequences for financial markets, investors, and other New York businesses.

Permitting the Attorney General to seek disgorgement in every case brought under the Martin Act and Executive Law § 63(12) will have serious practical implications, for three related reasons. *First*, the decision dramatically and unjustifiably expands the scope of both statutes. *Second*, the effect of permitting claims for disgorgement in cases brought under these statutes will be to redistribute funds to the State at the expense of investors and consumers. *Third*, by exposing financial institutions to a new risk of potentially enormous legal liability, the Court's decision will make New York's capital markets less attractive places to issue and list securities, discourage financial institutions from operating in New York, and thereby divert jobs from New York to other capital-market centers.

1. *Permitting disgorgement would dramatically expand the practical scope of the Martin Act and Section 63(12)*

To begin with, allowing the Attorney General to sue for disgorgement would significantly increase—beyond what the Legislature plausibly could have intended—the number of cases in which the Attorney General can maintain a lawsuit in the first place. The Legislature chose the remedies that it enumerated in the Martin Act and Section 63(12) after making a reasoned judgment about the proper balance between the Attorney General's ability to enforce the law on the one hand, and the free operation of capital markets on the other. Dramatically expanding the Attorney General's ability to bring suit would upset that balance.

There is often a parallel private lawsuit for restitution and damages in cases where the Attorney General sues under the statutes at issue and, as the Attorney General acknowledged in the *Ernst & Young* case, "99.9" percent of such cases settle. Transcript of Supreme Court Hearing at 26, *People v. Ernst & Young LLP*, No. 451586/2010 (N.Y. Sup. Ct. Dec. 12, 2012), NYSCEF Doc. No. 34. In *Applied Card*, this Court held that, under principles of res judicata, such settlements bar the

Attorney General from bringing his own claims for restitution or damages. 11 N.Y.3d at 124-25.

Similarly, the Attorney General often will be unable to seek injunctive relief in cases where there is no threat of continuing fraudulent activities or injunctive relief has already been obtained by a federal enforcement agency or in a parallel private action. *See State by Abrams v. Magley*, 105 A.D.2d 208, 211-12 (3d Dep't 1984) (remedy in Section 63(12) case was "properly limited to damages and restitution" where "[t]he assertions of fraud and misrepresentation refer to past acts and do not contain any reference to continuing acts"); *see also, e.g.*, *Allen v. Pollack*, 289 A.D.2d 426, 427 (2d Dep't 2001) (stating that "injunctive relief should be prospective, and ordinarily should not be granted to operate on acts already performed").

In a significant number of cases, therefore, none of the statutory remedies specified by the Legislature will be available. Previously, consistent with the Legislature's determination, that meant that the Attorney General could not bring an action. But the Attorney General almost always will be able to identify some defendant whom he can sue for disgorgement under the Appellate Division's reasoning: either the company that allegedly committed a fraud, or its directors and officers. Thus, the effect of permitting disgorgement will be to expand significantly—

beyond what the Legislature contemplated when it created these causes of action—the Attorney General's ability to bring these actions.

The facts of the *Ernst & Young* case demonstrate the way in which the Appellate Division's construction of the Martin Act and Section 63(12) dramatically increases the amount of liability to which a defendant is exposed under these two statutes: Ernst & Young settled Lehman investors' claims for monetary relief for $99 million (*see* Endorsed Letter to Judge Kaplan, *In re Lehman Bros. Equity/Debt Sec. Litig.*, No. 1:08-cv-5523-LAK-GWG (S.D.N.Y. Oct. 16, 2013) (Dkt. No. 513)), only to find itself facing a $150 million disgorgement claim by the Attorney General. Disgorgement is thus far from a minor or ancillary remedy; rather, its availability significantly increases a defendant's financial risk.

Expansion of the remedies available under the two statutes at issue would be particularly troubling because both laws provide for substantially reduced burdens of pleading and proof. The Attorney General need only allege a practice that "tend[s] to deceive or mislead the [securities] purchasing public" to make out a claim under the Martin Act (*People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d 588, 595 (1976)), and he need not prove scienter or reliance. *People ex rel. Cuomo v. Charles Schwab & Co.*, 33 Misc. 3d 1221(A), 2011 WL 5515434, at *7 (Sup. Ct. Oct. 24, 2011), *aff'd in part*, 109 A.D.3d 445 (1st Dep't 2013). Executive Law § 63(12) similarly sets a low bar for the Attorney General. *Lefkowitz v. Bull Inv.*

Grp., Inc., 46 A.D.2d 25, 27 (3d Dep't 1974) ("It is well-settled that the definition of fraud under subdivision 12 of section 63 of the Executive Law is extremely broad.").

The Legislature defined both statutes broadly to facilitate suits by the Attorney General, but it did so on the understanding that the Attorney General could sue only for certain, specified remedies. By making an *additional* remedy available, the Appellate Division has upset the careful balance that the Legislature incorporated into these statutes and created an overly harsh legal regime that the Legislature did not envision.

Expanding the scope of the Martin Act and § 63(12) to include disgorgement would be a major change that would dramatically affect how these statutes are enforced in practice. Indeed, the Attorney General's office has already shown an increasing willingness to seek disgorgement in § 63(12) cases. After the Court of Appeals' 2008 decision in *Applied Card* foreclosed the possibility of the Attorney General's obtaining restitution or damages in high-profile cases where parallel class actions settled, his office shifted to making claims for disgorgement in a greater number of cases. *See, e.g.*, *People v. Trump Entrepreneur Initiative LLC*, 2014 N.Y. Slip Op. 30305(U), at *3 (Sup. Ct. Jan. 30, 2014); *Agip Gas*, 2013 N.Y. Slip Op. 32805(U), at *1; *State v. Coalition Against Breast Cancer, Inc.*, 40 Misc. 3d 1228(A), 2013 WL 4283360, at *2 (Sup. Ct. May 2, 2013); *Charles Schwab &*

Co., 33 Misc. 3d 1221(A), 2011 WL 5515434, at *2; *People v. Tempur-Pedic Int'l, Inc.*, 30 Misc. 3d 986, 988 (Sup. Ct. Jan. 14, 2011). Affirming the incorrect holding of the Appellate Division would only further embolden the Attorney General to pursue this strategy and routinely institute disgorgement claims.

2. Permitting disgorgement will enrich the State, to the detriment of investors

Equally troubling is the fact that permitting disgorgement claims will have the inevitable practical effect of enriching the State at the expense of the very investors and consumers that the Legislature enacted the Martin Act and Section 63(12) to protect.

A defendant's decisions in settlement negotiations inevitably are driven by the total exposure that the defendant faces as a result of the challenged conduct. If settling one lawsuit will resolve all of the exposure, the defendant will be willing to pay more than if additional lawsuits relating to the same liability would remain pending. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 339 (3d Cir. 2011) (Scirica, J., concurring) ("A defendant . . . may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits").

As a result of the Appellate Division's interpretation of the statutes at issue, a defendant who has settled private claims for damages or disgorgement remains subject to suit by the Attorney General for disgorgement. Consequently, defendants will reduce the amount they are willing to pay when settling consumers' or investors' damages claims so that they retain funds to defend (and perhaps at some point try to settle) a disgorgement action by the Attorney General.[3] And defendants will be reluctant to settle private disgorgement claims *at all*, given that the Attorney General claims the right to recover the exact same funds.

Although the State could distribute potential disgorgement proceeds in a Martin Act or Section 63(12) case to consumers or investors, it could also keep the proceeds for itself if it concluded that investors were unaffected or had otherwise been compensated. In many cases, therefore, disgorgement will thus divert funds from investors and consumers, who will receive less in class-action settlements, to the State.

The purpose of both of these statutes is to protect the public rather than to fill the State's coffers. *See, e.g.*, *All Seasons Resorts, Inc. v. Abrams*, 68 N.Y.2d 81, 86-87 (1986) (Martin Act has "remedial purpose of protecting the public from fraudulent exploitation"); *State by Lefkowitz v. Bevis Indus., Inc.*, 314 N.Y.S.2d 60, 64-65 (Sup. Ct. 1970) (Executive Law § 63(12)'s standards exist "for the benefit of the public"). Disgorgement proceeds retained by the State are hardly a benefit to the public; on the contrary, they "effectively constitute punitive damages not au-

[3] That will be especially true when the Attorney General retains the option to sue under the Martin Act, given the relaxed standards of proof (*see* pp. 22-23, *supra*) that give the Attorney General a significant advantage over private litigants in establishing liability.

thorized by statute." *Direct Revenue*, 2008 N.Y. Slip Op. 50845(U), at *8. This Court should not permit the Attorney General to pursue a remedy that conflicts with the purposes of the statutes at issue.

3. Permitting disgorgement will impose a new, harmful burden on the financial industry

Finally, the new burdens created by the availability of disgorgement will have significant repercussions for the financial industry.

A 2007 report commissioned by then-New York City Mayor Michael Bloomberg and U.S. Senator Charles Schumer found that New York faces tough global competition in maintaining its current status as the world's preeminent financial center and that the legal and regulatory climate in New York has unquestionably been an influential factor driving the migration of financial activity away from the City. Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* (2007), *available at* http://goo.gl/dXumxO (hereinafter "*Sustaining New York's Leadership*"). The report explained that "the unpredictable nature of the legal system" was a key factor that "caused New York to be viewed negatively" by executives charged with choosing where to raise capital. *Sustaining New York's Leadership* at 73. The risk of liability under unpredictable legal rules and the different standards applied by multiple law enforcement entities (such as the SEC and the Attorney General) were cited as particular concerns. *Id*. at 76-77. As Mayor Bloomberg and Senator

Schumer explained, "the highly complex and fragmented nature of our legal system has led to a perception that penalties are arbitrary and unfair, a reputation that may be overblown, but nonetheless diminishes our attractiveness to international companies." *Id*. at ii.

Far from remedying this competitive disadvantage, permitting disgorgement under both Executive Law Section 63(12) and the Martin Act would exacerbate it. Expanding the Martin Act, which grants extensive investigatory powers to the Attorney General while restricting defendants' ability to raise customary defenses to fraud claims (*see* pp. 7-8, *supra*), poses a particular threat to the financial institutions subject to the Act's coverage. Global companies are less likely to choose to list themselves on U.S. markets, and financial institutions are similarly less likely to invest in New York operations, if their potential liability under the Martin Act and Executive Law is *further* multiplied.

Instead, many global businesses may move to other markets. That, in turn, would make less capital domestically available for new and growing companies. And it would reduce employment in New York. In the long run, meanwhile, financial institutions themselves may deemphasize New York in favor of expanding their presence in other financial centers.

It is inconceivable that the Legislature intended for the Martin Act and Executive Law Section 63(12) not only to *regulate* New York's securities market but *undermine* it. This Court should accordingly reject the Appellate Division's interpretation of these laws and hold that the Attorney General is not authorized to pursue disgorgement here.

II. The Attorney General Cannot Seek Nationwide Injunctive Relief Against the Defendants.

In addition to disgorgement, the Attorney General seeks a permanent injunction barring the defendants from serving as officers or directors of any public company or participating in the securities industry—whether in New York or elsewhere. As the defendants argue in their opening brief (at pp. 58-61), this relief is not authorized by the Martin Act or Section 63(12) and therefore is not available to the Attorney General. Even if the statutes purported to allow the Attorney General to obtain such an injunction, it would be impermissible for New York courts to grant one. Both the Constitution's Dormant Commerce Clause and federal statutes prohibit New York from attempting to apply its securities laws extraterritorially.

A. The Dormant Commerce Clause bars New York from exporting its securities regulations to other states.

There can be no doubt that, by asking the courts to prohibit the defendants from participating in the securities industry or serving as directors and officers of *any* public company anywhere in the entire nation, the Attorney General proposes to regulate the commercial markets of other states. The director and officer ban sought is not dependent in any way on whether a company is located in New York, or even has a presence or does business here. If the proposed injunction were granted, therefore, the defendants could be subject to restrictions on their conduct nationwide—even in states whose blue-sky laws have different standards of liability[4] or would not impose a director or officer ban in similar circumstances. The Constitution does not permit New York to export its securities regulations to other states in this manner.

The Supreme Court has long recognized that the federal Constitution's Commerce Clause "is more than an affirmative grant of power [to Congress]; it has a negative sweep as well." *Quill Corp. v. N.D. ex rel. Heitkamp*, 504 U.S. 298, 309 (1992) (citing *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 231-32 (1824) (Johnson, J., concurring)). This negative sweep prohibits the states from taking "actions that interfere with interstate commerce." *Id.* This strikes a balance between two important constitutional goals: "the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce," and "the autonomy of the individual States *within their respective spheres*." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989) (emphasis added).

The U.S. Supreme Court has explained that the Dormant Commerce Clause "stand[s] at a minimum" for the proposition that a state "statute that directly con-

[4] For example, although the Martin Act does not require a showing of scienter, other state blue sky laws do require scienter as a prerequisite to liability. *See, e.g.*, *Keogler v. Krasnoff*, 601 S.E.2d 788, 791 (Ga. Ct. App. 2004).

trols commerce occurring wholly outside the boundaries of [the] State exceeds the inherent limits of the enacting State's authority and is invalid." *Healy*, 491 U.S. at 336 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). A state may adopt regulations that control its own market, but it may not reach into other states and regulate conduct that occurs wholly in those states. *See, e.g.*, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont."); *Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (en banc) (invalidating California statute that regulated "sales that take place outside California" because the court "easily conclude[d] that the [law] . . . violates the dormant Commerce Clause").

Allowing the Attorney General to obtain nationwide injunctive relief would violate this core prohibition. By imposing such a ban, New York would be regulating corporations created by, located in, and subject to the jurisdiction of other states—effectively extending the Martin Act and Section 63(12) to every other state in the country. The Dormant Commerce Clause protects the right of each state to decide for itself who may participate in the securities industry, or serve as directors or officers of corporations, within that state. *Cf. CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations.”).

The Supreme Court’s decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (plurality opinion), confirms that the Attorney General’s attempt to impose nationwide consequences for alleged violations of New York securities laws is impermissible. In *Edgar*, the Court applied the Dormant Commerce Clause to invalidate an Illinois statute that required takeover offers for Illinois companies to be registered with the state government and gave the state government the ability to veto the takeover offer if it found it to be “inequitable.” *Id.* at 627. The plurality decision noted that “States have traditionally regulated *intrastate* securities transactions” and that blue-sky laws were generally permissible under the Dormant Commerce Clause. *Id.* at 641 (emphasis added). But it explained that the “rationale for upholding blue-sky laws was that *they only regulated transactions occurring within the regulating States*.” *Id.* (emphasis added). The Illinois law, in contrast to a typical blue-sky law, applied to “commerce that takes place wholly outside of the State’s borders” and was therefore invalid. *Id.* at 642.

As the Attorney General does here, Illinois attempted to justify its extraterritorial regulation by citing the need to protect investors. But the Court rejected that justification: “While protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders.” *Id.*

at 644. Investor protection, the Court explained, is not a permissible reason for applying state regulations to extraterritorial conduct.

Under the reasoning of *Edgar* and other precedents, an injunction prohibiting the defendants from engaging in certain conduct *anywhere* in the country is patently overbroad. New York has the ability to regulate its own marketplace, but it may not regulate business activities occurring in other states. Thus, the injunction sought by the Attorney General is barred by the Dormant Commerce Clause. *See, e.g., Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1359 (Fed. Cir. 2013) (holding that a nationwide injunction under California's Unfair Competition Law violated the Dormant Commerce Clause because although "California may, as it has in this case, conclude that its own unfair competition law has been violated, and it may prohibit any future conduct within its borders . . . . California is not permitted[] . . . to extend its unfair competition law to other states." (citing *Healy*, 491 U.S. at 336, and *Edgar*, 457 U.S. at 642-43)).

B. Conflict preemption bars the Attorney General's attempt to obtain a director and officer ban and a ban from participating in the securities industry that the SEC declined to impose.

Allowing the Attorney General to pursue a permanent director and officer ban and a ban from participating in the securities industry—bans that the SEC declined to pursue—would also undermine the uniform system of federal regulation of the national securities market that Congress has crafted and thus would trigger the doctrine of conflict preemption.

Congress has imposed comprehensive regulatory requirements on the securities market through a series of statutes dating back more than 80 years, including the Securities Act of 1933, the Securities Exchange Act of 1934, the PSLRA, SLUSA, NSMIA, and the Dodd-Frank Act. These laws provide one common set of standards for actors in the securities market to follow.

Perhaps the most important feature of Congress's regulatory scheme for securities is the Securities and Exchange Commission. "Congress has granted to the SEC broad authority to regulate the practices of the national securities markets," including both rulemaking and enforcement authority. *See, e.g.*, *Gilman v. BHC Secs., Inc.*, 1995 WL 747738, at *5 (S.D.N.Y. Dec. 18, 1995), *vacated on other grounds*, 104 F.3d 1418 (2d Cir. 1997). The SEC has expansive powers to investigate, prosecute, and punish violations of the securities laws—including, as relevant here, the *express statutory authority* to seek director and officer bars on defendants found to have violated the law. *See* 15 U.S.C. § 78o(b)(4)(D) (SEC may bar person who violates the securities laws from participating in the industry); *id.* § 78u(d)(2) (court may impose a director and officer bar on defendants found to have violated Section 10(b) of the '34 Act); *id.* § 77t(e) (court may impose a director and officer bar on defendants who violate Section 17(a) of the '33 Act). Congress gave the

SEC the power to seek such bars because, as a national regulator of the securities market, the SEC is best positioned to determine whether a nationwide ban on a defendant's serving as a director or officer in a public company is warranted—and to enforce that ban should it become necessary to do so.

Pursuant to its express authority, the SEC investigated the transactions at issue in this case and eventually reached a settlement with the defendants. Defendant Smith agreed to a three-year bar on his serving as a director or officer in a public company, which expired in 2012. The SEC did not seek to impose any such bar against Defendant Greenberg. Neither defendant was banned from participating in the securities industry and defendants agreed to pay $8.25 million in alleged disgorgement. The SEC has therefore already determined the appropriate amount of disgorgement for the allegations at issue here and obtained injunctive relief. In the SEC's judgment, no further nationwide bans on either defendant are warranted.

The Attorney General seeks to second-guess the SEC's judgment by imposing the very sort of lifetime, nationwide bans that the SEC declined to impose. Indeed, the Attorney General expressly proposes to have a court reexamine the *same* equitable factors that are used to determine when a director and officer ban is warranted in an SEC action, with the hope of obtaining what the Attorney General views as a better result: a permanent ban. *See SEC v. Patel*, 61 F.3d 137, 141 (2d

Cir. 1995) (listing six factors bearing on appropriateness of a director and officer ban); NYAG Br. 75 (citing *Patel*).

But this attempt is preempted by the federal regulatory scheme just described. Even where Congress has left States some ability to regulate intrastate activities within a certain field (such as securities law), a state's actions are nonetheless subject to conflict preemption. That is triggered when, "under the circumstances of [a] particular case, [it] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Here, the Attorney General's pursuit of a director and officer ban and a ban on participating in the securities industry against the defendants irreconcilably conflicts with Congress's "purpose[] and objective[]," *id.*, to make the federal government, in the form of the SEC, the "the *exclusive* regulator" of national securities markets. H.R. Rep. No. 104-622, at 16. Congress authorized the SEC to seek those bans in order to concentrate decision-making authority in one place and prevent "a single state [from] impos[ing] the risks and costs of its peculiar litigation system" on all actors in the securities markets. S. Rep. 105-182, at 5. By pursuing additional bans that the SEC chose not to impose, the Attorney General is impermissibly interfering with the SEC's right to make a single and authoritative determination as to whether a ban is warranted.

Allowing the Attorney General to pursue nationwide director and officer bans and bans on participation in the securities industry would also impede the SEC's operations in future cases, creating another problematic conflict with Congress's purpose. The prospect of obtaining release from further liability is often a key consideration for defendants deciding whether or not to settle with the SEC. If a settlement with the SEC did not authoritatively resolve whether an individual will be subject to a nationwide ban from serving as an officer or director of a public company or from participating in the securities industry, defendants might be less likely to cooperate with the SEC, producing more protracted litigation over alleged securities law violations and consuming government resources. The Attorney General should not be permitted to impose this burden on the SEC.

Congress's express grant of authority to seek director and officer bans and bans on participation in the securities industry to the SEC, and the SEC's careful exercise of that authority in this matter, preempt any attempt by the Attorney General to obtain additional bans that the SEC did not impose. *Cf. Lanier v. Bats Exch., Inc.*, 2015 WL 1914446, at *11 (S.D.N.Y. Apr. 28, 2015) (holding that plaintiff's breach of conflict claims were preempted because the SEC had determined that the conduct at issue was not improper; "the SEC and not this Court must determine whether the defendant[s] . . . have . . . violate[d] their obligations"). This Court should accordingly hold that the Attorney General's request for a nationwide director and officer ban against the defendants and a ban on their participating in the securities industry is preempted by federal law.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

Dated: March 18, 2016

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