SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

QARIA OSMANZAI, ALFRED SANTANA, ROSALIND SANTANA, JULIO MORALES, ARNOLD DRAKES, YVONNE ELLIS, GLENDA STEWART, ANDERSON ANDREWS, FERNE MAYCOCK, BERNARD KILKENNY, CORA WILLIAMS, GERONIMO DELEON, JR., SHARENE CUMMINGS, FELICIA JOHNSON, KATIA LAPAIX-DORCELET, CHERYL FORDE, FINBAR FRANCIS, ROBERT YONKES, SUSAN YONKES, and JUDITH CUDJOE Plaintiffs, -against- SAVE MY HOME CORP., SAVE MY HOME NOW, INC., SAVE MY HOME TODAY, INC., SAVE MY HOME U.S.A., INC., HUMA HALIMI (a/k/a HELEN HALIMI), ANU SINGH, NAVIN MENON, EXPRESS HOME SOLUTIONS, INC. (a/k/a EXPRESS DEBT SETTLEMENT, a/k/a HOME MITIGATION HELP), EXPRESS MODIFICATIONS INC., EMPIRE HOME SAVER INCORPORATED (a/k/a EMPIRE HOME SAVINGS, a/k/a EMPIRE HOME SAVINGS CORP.), STEPHEN CROWLEY, DAVID J. GOTTERUP, JOSE ESCOBAR, LUIGI DELLAMONICA, YELENA TELESHOVA, MILADYS BOHORQUEZ, LLOYD DOE, KENNETH SAROSI, JASON GREEN, ALBERT KALASTEIN, and GREG GARVIN Defendants.	Index No. 9471/11 **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER, ORDER OF ATTACHMENT, AND PRELIMINARY INJUNCTION

LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW
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Pursuant to Sections 6301, 6311, 6201, 6210, and 6211 of the New York Civil Practice Law and Rules ("C.P.L.R."), Plaintiffs Qaria Osmanzai, Alfred Santana, Rosalind Santana, Julio Morales, Arnold Drakes, Yvonne Ellis, Glenda Stewart, Anderson Andrews, Ferne Maycock, Bernard Kilkenny, Cora Williams, Geronimo DeLeon, Jr., Sharene Cummings, Felicia Johnson, Katia Lapaix-Dorcelet, Cheryl Forde, Finbar Francis, Robert Yonkes, Susan Yonkes, and Judith Cudjoe (collectively, "Plaintiffs"), by their attorneys Linda H. Mullenbach and Hyon Min Rho, on behalf of the Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee"), and Davis Polk & Wardwell LLP, respectfully submit this Memorandum of Law in support of Plaintiffs' application for a temporary restraining order pending the hearing of Plaintiffs' motion for (1) an order of attachment with respect to Defendants Express Home Solutions, Inc. (a/k/a Express Debt Solutions, a/k/a Home Mitigation Help), Express Modifications Inc., Empire Home Saver Incorporated (a/k/a Empire Home Savings, a/k/a Empire Home Savings Corp.), David J. Gotterup, Kenneth Sarosi, and Jason Green (collectively, "Express Defendants") property and debts owing to the Express Defendants for the purpose of securing satisfaction of any judgment ultimately to be entered against the Express Defendants in the above-entitled action; and (2) a preliminary injunction enjoining Defendants Save My Home Corp., Save My Home Now, Inc., Save My Home Today, Inc., Save My Home U.S.A., Inc., Huma Halimi (a/k/a Helen Halimi), Anu Singh, Navin Menon, Express Home Solutions, Inc. (a/k/a Express Debt Solutions, a/k/a Home Mitigation Help), Express Modifications Inc., Empire Home Saver Incorporated (a/k/a Empire Home Savings, a/k/a Empire Home Savings Corp.), Stephen Crowley, David J. Gotterup, José Escobar, Luigi Dellamonica, Yelena Teleshova, Miladys Bohorquez,

Lloyd Doe, Kenneth Sarosi, Jason Green, Albert Kalastein, and Greg Garvin (collectively, "Defendants") from:

(a) Marketing, advertising, offering, selling or engaging in Mortgage Assistance Relief Services, as that term is defined in Plaintiffs' Order to Show Cause, or aiding and abetting the marketing, advertising, offering, selling, or carrying out of these services;

(b) Being employed by, or serving as a consultant to, any person or entity that sells or carries out Mortgage Assistance Relief Services as that term is defined in Plaintiffs' Order to Show Cause;

(c) Owning, managing, operating, creating, or assisting in the creation of any entity that markets, advertises, offers, sells, or carries out Mortgage Assistance Relief Services, as that term is defined in Plaintiffs' Order to Show Cause; and

(d) Engaging in any deceptive acts and practices or false advertising in violation of New York General Business Law §§ 349 or 350, including:

i. Charging consumers an upfront fee for Mortgage Assistance Relief Services, as that term is defined in Plaintiffs' Order to Show Cause;

ii. Misrepresenting to consumers the nature and mechanics of Mortgage Assistance Relief Services, as that term is defined in Plaintiffs' Order to Show Cause;

iii. Falsely promising to engage in negotiations with consumers' mortgage lenders or servicers;

iv. Misrepresenting the progress of loan modification applications;

v. Falsely representing that refunds will be issued if the offered Mortgage Assistance Relief Services, as that term is defined in Plaintiffs' Order to Show Cause, do not succeed;

vi. Encouraging consumers to stop either paying their monthly mortgage payments and/or communicating with their lenders or servicers; and

vii. Forming a business or organizational identity or operating as a "doing business as" organization as a method of evading consumers.

PRELIMINARY STATEMENT

Defendants have, as a practice, been defrauding and victimizing Plaintiffs and countless other vulnerable homeowners by operating a corrupt for-profit loan modification business. They have, for over a year, targeted low- and middle-income homeowners in danger of foreclosure and have pretended to have specialized knowledge that enables them to lower the homeowners' monthly mortgage payments. As a consistent practice, they have promised that, in exchange for a sizable upfront fee, they will re-negotiate the Plaintiffs' mortgages with their lenders and servicers. They have assured homeowners that they will be entitled to a full refund of this fee if they failed to obtain a modification. Each promise has been a false promise.

As summarized herein, and as fully detailed in the accompanying affidavits, the Defendants consistently have failed to honor the most basic terms of their agreements. They often fail to make contact with Plaintiffs' mortgage lenders or servicers for months, if at all. Where the Defendants have made initial contact, they have had few, if any, substantive discussions or negotiations with the lender or servicer. In cases where Plaintiffs' applications for loan modifications have been denied, Defendants systematically renege on their promise to refund the upfront fee. Not a single Plaintiff in this action has obtained a refund, despite the fact that Defendants orally and in written contracts guaranteed that money would be returned in the event that a mortgage modification could not be obtained.

The pernicious nature of schemes such as these has attracted the scrutiny of advocates, legislators, law enforcement officials, and regulators. A coordinated national

campaign – the Loan Modification Scam Prevention Network ("LMSPN") – has been created to strengthen the fight against these scammers. Led by the Lawyers' Committee, the Homeownership Preservation Foundation, Fannie Mae, and Freddie Mac, LMSPN includes members of the U.S. Department of Housing and Urban Development ("HUD"), the U.S. Department of the Treasury, and the Federal Trade Commission ("FTC"). In August 2008, Governor David A. Paterson signed into law a bill specifically targeting these types of scams, creating new rules for so-called "distressed property consultants" that prohibit upfront payments and require specifically-worded contracts. In November 2010, the FTC issued Final Rule 16 C.F.R. Part 322, which prohibits for-profit providers of Mortgage Assistance Relief Services from accepting upfront fees, making representations about the likelihood of results, or instructing homeowners to cease communications with their lender or servicer—the very same tactics employed here by Defendants.

In addition to the thousands of dollars that the victims lose in upfront fees, they suffer a variety of other damages, including bank fees and penalties, reduced credit scores, increased borrowing costs and, in some cases, loss of equity in their homes. Homeowners already facing serious financial problems are callously pushed to the breaking point.

Defendants are continuing to this day to victimize other vulnerable homeowners in the New York metropolitan area in flagrant violation of the law. Absent an order from this Court enjoining the Defendants from providing Mortgage Assistance Relief Services, as that term is defined in Plaintiffs' Order to Show Cause, from forming new

corporations to conceal their past deceptions, and from their myriad other deceptive practices, they will inevitably continue to defraud innocent homeowners statewide.

Defendants' deceptive acts and practices are prohibited by Sections 349 and 350 of the New York General Business Law ("GBL"), both of which expressly empower Plaintiffs to seek this preliminary injunction enjoining Defendants' deceptive conduct. Plaintiffs are further entitled to an attachment of Defendants' funds. Absent an order of attachment, Plaintiffs risk being unable to secure satisfaction of any judgment that may ultimately be entered against Defendants in this action.

FACTS OF THE CASE

Plaintiffs are a group of low- to middle-income homeowners in the greater New York metropolitan area.[1] They each suffered financial hardship in the wake of the global economic downturn and had trouble making their monthly mortgage payments. They turned to Defendants for assistance in reducing those payments.

I. The Beguiling Structure of Defendants' Businesses

Defendants have operated two nominally separate yet ultimately overlapping groups of companies that Plaintiffs understand worked together, and which changed their names and corporate identities frequently to hide from aggravated former customers and from law enforcement. Defendants Save My Home Corp., Save My Home Now, Inc., Save My Home Today Inc., and Save My Home U.S.A., Inc. (collectively, "SMH") were operated by Defendants Helen Halimi, Anu Singh, and Navin Menon. Q. Osmanzai Aff., at ¶¶ 4-6, 20-21.

[1] Details specific to each Plaintiff are found in the affidavits submitted by Plaintiffs in support of this motion for a preliminary injunction. Citations to Plaintiffs' affidavits in this memorandum of law shall appear in the form of "[Last Name] Aff."

Plaintiffs also understand that Defendants Express Home Solutions, Inc. (a/k/a Express Debt Settlement, a/k/a Home Mitigation Help), Express Modifications Inc., and Empire Home Saver, Inc. (a/k/a Empire Home Savings, a/k/a Empire Home Savings Corp.) (collectively, "Express Home") are all names for what is effectively a single loan modification company, located at 591-595 Stewart Avenue in Garden City, New York, which is owned and operated by Defendants David Gotterup and Kenneth Sarosi. Complaint, at ¶ 244; DeLeon Aff., at ¶ 17; Morales Aff., at ¶ 19; Williams Aff., at ¶ 25. Defendants Stephen Crowley, Jose Escobar, Luigi Dellamonica, Yelena Teleshova, Miladys Bohorquez, Lloyd Doe, Jason Green, Albert Kalastein, and Greg Garvin were all employed by or affiliated with Express Home, and communicated with customers on the company's behalf. Complaint, at ¶¶ 239, 353, 355; A. Santana Aff., at ¶ 4; Morales Aff., at ¶ 4; Williams Aff., at ¶ 5; Ellis Aff. at ¶ 14; Cudjoe Aff., at ¶ 4; Forde Aff., at ¶ 19.

In late 2009, SMH claimed to use Express Home as a "third Party processing company." A. Osmanzai Aff., at ¶ 24.[2] By late 2010, SMH and Express Home had abandoned any pretense of being separate entities: they were using the same phone number, operating out of the same office complex, and using many of the same employees. Magsood Aff., at ¶¶ 12, 18; R. Verna Aff., at ¶ 43; A. Osmanzai Aff., at ¶¶

[2] In March 2011, Angel Osmanzai, Gul Magsood, Rebecca Verna, and Mohammed Shukran, along with five other homeowners brought an action against several loan modification companies in Rush v. Save My Home (Index No. 3605/2011). Among those named in the Rush matter were many of the defendants named in this action, including Defendants Save My Home Corp., Save My Home Now, Inc., Save My Home Today Inc., Save My Home U.S.A., Inc., Huma Halimi (a/k/a Helen Halimi), Navin Menon, Express Modifications, Inc., David J. Gotterup, Express Home Solutions, Inc., Kenneth Sarosi, Miladys Bohorquez, and Empire Home Saver Inc. On June 20, 2011, in support of their motion for a default judgment order, the Rush plaintiffs submitted affidavits attesting to their experiences with the defaulting defendants. Some of these affidavits are referenced here to illustrate Defendants' long-running pattern of shifting, borrowing, and changing corporate identities. Each affidavit from the Rush matter cited herein is attached as an exhibit to the Affirmation of Hyon Min Rho.

24-33; Shukran Aff., at ¶ 20.[3] On more than one occasion, representatives of Express Home contacted homeowners who had originally engaged with SMH and falsely informed them that they—Express Home, not Save My Home—would continue working on their loan modifications. A. Osmanzai Aff. at ¶ 26; Magsood Aff. at ¶ 18. This combined entity was owned and controlled by Gotterup. Magsood Aff. at ¶¶ 18-20.

II. The Defendants' Scheme to Defraud Homeowners

A. Initiating the Relationship

The Defendants employ to this day, the same basic scheme to defraud homeowners. First, an SMH or Express Home employee contacts vulnerable homeowners facing either financial hardship or the risk of foreclosure. The employee may cold call the homeowner, see, e.g., Complaint, at ¶ 337; Morales Aff., at ¶ 4; Cudjoe Aff., at ¶ 4, or may make contact after the homeowner has filled out an online form. S. Yonkes Aff., at ¶ 4.[4] The company also actively recruits victims through a word-of-mouth system in which new clients are encouraged to refer their family and friends in exchange for a phantom $500 referral fee. The majority of Plaintiffs became involved with Defendants through a referral. E.g., Complaint, at ¶ 231; Francis Aff., at ¶ 4; Forde Aff., at ¶¶ 4, 8; DeLeon Aff., at ¶ 5; Stewart Aff., at ¶ 4; Andrews Aff., at ¶ 3.

Through its sales staff, which includes Halimi, Singh and Menon for SMH, and Crowley, Escobar, Dellamonica, Teleshova, Bohorquez, Green, Kalastein, and Garvin for Express Home, the company promises to "save" the victim's home and, by negotiating

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[3] Id.

[4] Express Home operated a website that has since been taken down. A copy of this website is attached to the Affirmation of Hyon Min Rho as Exhibit 3. The website for Express Home's "Empire Home Savings" identity is still available (http://empiresavings.com), but now refers to the company as "Home Preserve Law Group." Id., at Exh. 4-5.

with the mortgage lender, to reduce her monthly mortgage payments by as much as half. See, e.g., Williams Aff., at ¶ 6. The companies represent, orally and in writing, that they are working pursuant to the "Obama Plan," that they have "outstanding" success rates in securing modifications, that their "specialized knowledge" and "technical expertise" is rare "outside the banking world," and that they have special relationships with lenders that they can leverage to obtain modifications. Forde Aff., at ¶ 9; Stewart Aff., at ¶¶ 7, 8; Johnson Aff., at ¶ 8; Maycock Aff., at ¶¶ 6, 9; Morales Aff., at ¶ 5. They promise "speedy" results, assuring the victims that their modification can be completed in anywhere from two to three months. Complaint, at ¶ 233; Cummings Aff., at ¶¶ 5, 6; DeLeon Aff., at ¶ 6; S. Yonkes Aff., at ¶ 7.

Defendants charge each victim thousands of dollars in upfront fees for their services, and refuse to begin any work on the victim's behalf until the fee is paid. See, e.g., Stewart Aff., at ¶ 12. They assure their victims that they will refund the fee in full, or less a small processing fee, if their modification efforts should fail. Andrews Aff., at ¶ 5; Cudjoe Aff., at ¶ 9; Forde Aff., at ¶ 8; Stewart Aff., at ¶ 10; Morales Aff., at ¶ 11. At no point do the Defendants inform their victims that a government-approved counselor could provide the same modification assistance for free through HUD. Ellis Aff., at ¶ 11; Maycock Aff., at ¶ 7; Johnson Aff., at ¶ 6.

Once they have convinced their victims that they offer a legitimate service, the Defendants collect their money and usually enter into a contract to provide debt settlement and other financial consulting services. Cudjoe Aff., at ¶¶ 8-9; Cummings Aff., at ¶ 14; Stewart Aff., at ¶ 10; Morales Aff., at ¶ 11. These contracts typically

reiterate the promise to provide a refund if the Defendants are unable to obtain a modification. Cummings Aff., at ¶ 14; Stewart Aff., at ¶ 10.

B. "Advising" the Victims

The first piece of advice that the Defendants usually give to their victims, including Plaintiffs, is to cut off all contact with their lender and to stop making their mortgage payments. Defendants claim that this strategy will "demonstrate hardship" and speed up the modification process. Complaint, at ¶¶ 234, 238; Andrews Aff., at ¶ 4; Forde Aff., at ¶ 12; Stewart Aff., at ¶ 9. The victim, deceived into trusting the Defendants and seeking financial relief, usually follows this advice for some period of time. As a result, victims fall further and further behind in their mortgage payments and spiral deeper into debt, rapidly accumulating lender fees and missed-payment penalties and severely damaging their credit scores. Drakes Aff., at ¶ 24; Ellis Aff., at ¶ 22; Forde Aff., at ¶ 36; Stewart Aff., at ¶ 24. If their mortgage agreements include an "acceleration clause," as is commonplace for residential mortgages, they run the serious risk of foreclosure after as little as one missed monthly payment. Stewart Aff., at ¶ 2; S. Yonkes Aff., at ¶ 2.

Despite representations to the contrary in their oral and written contracts, the Defendants typically fail to engage in any substantive negotiations with the Plaintiffs' mortgage lenders or servicers to modify their loans. In the cases of Plaintiffs Anderson Andrews, Cheryl Forde, Finbar Francis, Glenda Stewart and Julio Morales, Defendant Express Home failed to make any contact with their lenders, much less submit loan modification applications. Andrews Aff., at ¶ 11; Forde Aff., at ¶ 25; Francis Aff., at ¶¶ 14, 16; Stewart Aff., at ¶¶ 14, 18; Morales Aff., at ¶ 21.

Defendants may in some cases submit a third-party authorization letter or an initial application packet to a victim's lender; they then fail to follow through with the remaining steps to secure a modification. Complaint, at ¶ 347-49, 351; Cudjoe Aff., at ¶ 16; Cummings Aff., at ¶¶ 16, 17; Ellis Aff., at ¶ 15; Williams Aff., at ¶ 19; S. Yonkes Aff., at ¶ 20. In such cases, Defendants misrepresent the progress of the modification application to the Plaintiffs. In the small number of cases where Defendants may have made a cursory effort toward obtaining a modification for the Plaintiffs, those modifications were denied. A. Santana Aff., at ¶ 22.

C. Refusing to Interact with Plaintiffs Once They Receive Their Illegal Upfront Payment

At the outset, Defendants usually assure their victims that they will be available to address questions and concerns throughout the modification process. Instead, after collecting Plaintiffs' payments, Defendants become increasingly difficult to reach, or see to it that they are not reached at all. E.g., Forde Aff., at ¶ 15; R. Santana Aff., at ¶ 14. For example, after Plaintiff Anderson Andrews made the upfront payment of $2,700.00 demanded by Defendant Dellamonica, he was unable to get in touch with anyone at Defendant Express Home, despite frequent phone calls over the course of four months. Andrews Aff., at ¶¶ 9-10. Frustrated by their inability to speak with anyone over the phone, some victims go to Defendant Express Home's offices in person, looking for answers. Even then, Defendants are difficult to find. For example, when Plaintiff Cheryl Forde went to Defendant Express Home's offices, she was told Defendant Dellamonica was not in, but then happened to spot him in the hallway. Forde Aff., at ¶ 18.

Often, Defendants refer victims to other employees, passing the victims' calls back and forth in order to avoid giving out any information. Stewart Aff., at ¶ 15;

Williams Aff., at ¶¶ 13, 21-22, 27-28; S. Yonkes Aff., at ¶¶ 14, 22, 28. In other cases, Plaintiffs have attempted to get in touch with their contact person only to find the phone number no longer in service. Plaintiff Susan Yonkes called Defendant Express Home and learned the number was disconnected; she was only able to track down Defendant Kalastein by calling his cell phone. S. Yonkes Aff., at ¶¶ 21, 22. Only then did she learn that Defendant Express Home had changed its name to Empire Home Savings and had a different phone number entirely. Id. at ¶ 22.

D. Breaking the Promise to Refund Their Victims' Money

Faced with spiraling debt, endless phone calls and letters from mortgage lenders and servicers, and the realization that they have been scammed, victims, including Plaintiffs, often demand a refund from Defendants. Many Plaintiffs signed a document in which it is promised that "[i]f EHS is unable to obtain any Solutions... client will receive a refund of the fee as provided herein" less "a non-refundable processing fee." See, e.g., DeLeon Aff., at ¶ 9; Morales Aff., at ¶ 11; Stewart Aff., at ¶ 10. Other Plaintiffs received a letter promising to "give [their] money back, less a $595.00 processing fee for the work [Defendants'] experts put into [their] file" in the event a loan modification failed. S. Yonkes Aff., at ¶ 8; R. Santana Aff., at ¶ 5. Still other Plaintiffs were told by Express Home employees that although a loan modification was virtually guaranteed, they would be entitled to a full refund if it should fail. See, e.g., Andrews Aff., at ¶¶ 4-5; Drakes Aff., at ¶ 7; Ellis Aff., at ¶¶ 6-7; Forde Aff., at ¶¶ 7-8; Williams Aff., at ¶ 7.

Despite these promises to refund the fee and despite the Plaintiffs' best efforts to secure one, none of the Plaintiffs who were denied a loan modification received a refund from Defendants. See, e.g., Cudjoe Aff., at ¶¶ 12-13, 15, 17-18; DeLeon Aff., at ¶¶ 16, 18; A. Santana Aff., at ¶¶ 15-17. Often, a request for a refund has resulted in either

hostility or an abrupt end to the conversation. S. Yonkes Aff., at ¶ 28; Maycock Aff., at ¶ 18.

All Plaintiffs in the present action have suffered financial harm through their contact with the Defendants. All paid an upfront fee, ranging in amount from $1,400.00 to $5,000.00, and none received their promised refund. See, e.g., A. Santana Aff., at ¶ 9; Williams Aff., at ¶¶ 7-8, 29. Because they followed Defendants' advice and stopped making their mortgage payments, many Plaintiffs also have been obliged to pay their lenders substantial penalties. Andrews Aff., at ¶ 17; Ellis Aff., at ¶ 22; Osmanzai Aff., at ¶ 19; Stewart Aff., at ¶ 24; Williams Aff., at ¶ 30.

E. The Multitude of Harms Suffered by Plaintiffs

Plaintiffs have also suffered injuries that cannot be measured in dollar amounts. Missing their mortgage payments not only subjected Plaintiffs to penalty payments, but caused nearly all to suffer drastic decreases in their credit scores. See, e.g., Anderson Aff., at ¶ 17; DeLeon Aff., at ¶ 20; Ellis Aff., at ¶ 22; Forde Aff., at ¶ 36. Plaintiff Glenda Stewart has lost her line of credit through Chase altogether. Stewart Aff., at ¶ 24. Because many Plaintiffs had "acceleration clauses" in their mortgages, missed payments exposed them to foreclosure proceedings and the very real possibility of losing their homes. See Complaint, at ¶ 359; DeLeon Aff., at ¶ 20; Q. Osmanzai Aff., at ¶ 31. Plaintiffs who were ultimately able to secure a loan modification on their own suffered from the delay created by Defendants' fraudulent mishandling of their applications. See, e.g., Complaint, at ¶¶ 243, 245-46; DeLeon Aff., at ¶¶ 14-15, 20; Forde Aff., at ¶¶ 22-24, 34.

III. The Defendants' Established Track Record of Swindling Homeowners

This is not the first time that the Defendants have scammed innocent homeowners. On April 23, 2009, the Massachusetts Attorney General permanently enjoined Defendant David Gotterup and his company, Express Modifications Inc., from offering Foreclosure-Related Services[5] in Massachusetts. Affirmation of Hyon Min Rho (the "Rho Aff.") Exh. 1. As part of the Final Judgment by Consent, Express Modifications Inc. and Gotterup admitted that they made "misleading, unfair and deceptive statements" to Massachusetts consumers. Id. Once he could no longer do business in Massachusetts, Gotterup moved his scam to New York.

On May 13, 2010, the Maryland Commissioner of Financial Regulation issued a Cease and Desist order against another Defendant, SMH, a/k/a Selig Law Group, for engaging in "willful conduct which was intended to deceive and defraud." The Commissioner concluded that SMH "demonstrated a complete lack of good faith and fair dealings." Rho Aff. Exh. 2. Despite these enforcement actions and orders in other states, the SMH Defendants continue the same fraudulent schemes in New York.

Because this interconnected web of companies continually shifts identities, it is virtually impossible for homeowners to follow up on the status of their modifications or to pursue their promised refunds. See, e.g., Complaint, at ¶ 352; Anderson Aff., at ¶ 12; Morales Aff., at ¶¶ 18-19; A. Santana Aff., at ¶ 30.

Counsel for Plaintiffs has learned that Defendant Express Home, owned and operated by Defendants Gotterup and Sarosi, has again changed its name in an effort to escape liability and to continue defrauding the public. Express Home, which had

[5] As defined under 940 Mass. Code Regs. § 25.01.

changed its name in late 2010 to Empire Home Savings, is now known as the Home Preserve Law Group ("Home Preserve"). Rho Aff., at ¶ 10. The URL used by Empire Home Savings, http://empiresavings.com, now directs viewers to the Home Preserve website, which shows that Home Preserve operates out of the same address at 591 Stewart Avenue in Garden City, and uses the same phone number, as Empire Home Savings. Rho Aff., at ¶ 10; Exh. 12, 13. Home Preserve holds itself out as a "Law Group" even though neither Defendant Gotterup nor Defendant Sarosi is an attorney. See id. Home Preserve has not yet filed incorporation documents with the New York Department of State. Rho Aff., at ¶ 11.

IV. The Continuing Danger of Defendants' False and Deceptive Practices

If the Defendants' actions are not immediately proscribed by this court, nothing will mitigate their penchant for deception, and nothing will protect low- and middle-income homeowners from their false representations. The Defendants have engaged in a clear and demonstrable pattern of false and deceptive practices, including:

- falsely promising to refund their victims' money;
- falsely promising to work diligently on behalf of their victims;
- falsely assuring their victims that they have unique and specialized skills which enable them to secure mortgage modifications;
- misrepresenting their victims' loan modification status; and
- abusing the corporate form to evade detection by law enforcement and angry customers.

The Defendants will continue to defraud innocent homeowners unless enjoined from creating new corporate identities to hide behind, and from making false or deceptive statements to the public.

Accordingly, as authorized by statute, upon the attached order to show cause and supporting affidavits, Plaintiffs now seek a preliminary injunction against Defendants, enjoining them from conducting loan modification services in New York State, from creating new corporate identities, and from using further deceptive practices and false advertising as defined under N.Y. Gen. Bus. Law §§ 349 and 350, respectively.

ARGUMENT

I. New York's Prohibitions on Deceptive Acts and Practices and False Advertising Broadly Empower Private Plaintiffs to Enjoin Defendants' Activities

From its inception, Section 349 of New York's General Business Law was intended as a broad and powerful safeguard for consumer rights. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 25 (1995). In 1980, the state legislature expanded the statute's reach, creating a private right of action and empowering consumers to patrol the marketplace as "private attorneys general." See Marcus v. Jewish Nat'l Fund, 158 A.D.2d 101, 107-108 (1st Dep't 1990) (Kupferman, J., dissenting) ("[T]he Attorney General of the State of New York is empowered to protect the public in the event there is any deception [by defendant]....[P]laintiffs cannot, as private attorneys general, engage in an enforcement venture except pursuant to General Business Law § 349(h)...") (emphasis added); see also Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200, 205 (2004) (referring to the addition of subsection (h), permitting a private right of action, "[t]he amendment was intended to afford additional protection for consumers, allowing them to bring suit on their own behalf without relying on the Attorney General for enforcement."); see also Horn's Inc. v. Sanofi Beaute Inc., 963 F. Supp. 318, 328 (S.D.N.Y. 1997). The statute protects a sweeping range of injured consumers, so long as they can demonstrate that their injury arose from a transaction in New York. See Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 325 (2002) (holding that GBL § 349 was not "intended to function as a per se bar to out-of-state plaintiffs' claims of deceptive acts leading to transactions within the state").

The same principles underlie Section 350 of the General Business Law, which protects consumers from false advertising. Goshen, 98 N.Y.2d at 324 n.1.

II. Plaintiffs Meet the Requirements for the Issuance of a Preliminary Injunction Under Sections 349 and 350 of the General Business Law

The decision to grant a motion for a preliminary injunction is committed to the discretion of the trial court. Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988); Jiggets v. Perales, 202 A.D.2d 341, 342 (1st Dep't 1994). Preliminary relief is appropriate only where: (1) the moving party is likely to succeed ultimately on the merits of its claim; (2) there exists the prospect of irreparable injury if the provisional relief is withheld; and (3) the balance of equities tip in the moving party's favor. Nobu Next Door LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005). However, as Plaintiffs are seeking a preliminary injunction under Sections 349 and 350 of the GBL, they are entitled to injunctive relief without a showing of irreparable harm.

A. Plaintiffs Are Likely to Succeed on the Merits of Their Sections 349 and 350 Claims

Section 349 of the General Business Law makes it unlawful to engage in "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New-York]." "A deceptive practice, however, need not reach the level of common-law fraud to be actionable under section 349." Stutman v. Chem. Bank, 95 N.Y.2d 24, 29 (2000). A claim under Section 349 of the GBL similarly does not require a showing of intent to defraud, or justifiable reliance. See Small v. Lorrillard Tobacco Co., 94 N.Y.2d 43, 55 (1999); Morrissey v. Nextel Partners, Inc., No. 3194-06, 2009 N.Y. Slip Op. 50260U, at *6 (Sup. Ct. Albany Cty. Feb. 19, 2009) (stating that there is "no requirement that plaintiffs [in a § 349 case] must demonstrate reliance, reasonable or otherwise"). Rather, to prove that a practice was deceptive within the

meaning of Section 349, injured consumers must show that (1) the act or practice was "consumer-oriented," (2) the act or practice was misleading in a material way, and (3) they suffered an injury as a result of the deceptive act. See Stutman, 95 N.Y.2d at 29. Plaintiffs' claims easily satisfy all three elements.

"The standard for recovery under [GBL § 350], while specific to false advertising, is otherwise identical to [GBL § 349]." Goshen, 98 N.Y. 2d at 324 n.1; see also Andre Strishak & Assoc., P.C. v. Hewlett-Packard Co., 300 A.D.2d 608, 609 (2d Dep't 2002) ("[P]laintiff must demonstrate that the advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury.").

1. Defendants' Deceptive Acts and False Advertising Were "Consumer-Oriented"

To be "consumer-oriented"—and therefore actionable—deceptive acts that are private in nature must nevertheless have ramifications for the public at large. See Oswego, 85 N.Y.2d at 25 ("Private contract disputes, unique to the parties . . . would not fall within the ambit of the statute."). "[T]he 'gravamen' of a section 349 claim [is] a 'consumer injury or harm to the public interest.'" City of New York v. Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 623 (2009) (quoting Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995)). Allegations that the acts complained of "potentially affect similarly situated consumers[]" are sufficient to show that deceptive acts have ramifications for the public at large and warrant injunctive relief. Oswego, 85 N.Y.2d at 27.

A deceptive practice or false advertisement will likely be "consumer-oriented" if it is the *standard practice* of a given individual or company. See, e.g., Exxonmobil Inter-America v. Advanced Info. Eng'g Servs. Inc., 328 F. Supp. 2d 443, 449 (S.D.N.Y. 2004)

(Section 349 liability "attaches primarily where a party's misrepresentations are boilerplate and have the potential to be repeated in order to deceive numerous similarly situated buyers." (citing Oswego, 85 N.Y.2d 20)); Ng v. HSBC Mortg. Corp., No. 07 Civ. 5434, 2009 U.S. Dist. LEXIS 125711, at *44 (E.D.N.Y. Dec. 15, 2009) (Report & Recommendation) ("Indeed, the mortgage transaction herein was likely 'not unique to the parties, nor [was it] private in nature or a 'single shot transaction.'" (quoting Oswego, 85 N.Y.2d at 26 (quoting Genesco Entm't v. Koch, 593 F. Supp. 743, 752 (S.D.N.Y. 1984)))).

In this case, Defendants were plainly focused on consumers when they drafted their deceptive contracts, and made false oral promises in initial meetings in order to obtain upfront payments. These deceptive acts and practices and cleverly-designed documents combined to seduced homeowners into unwitting participation in the loan modification scam. It is a critical part of Defendants' business plan that these misleading statements be easily repeated to deceive numerous similarly situated customers. Without the ability to disseminate their deceptive documents, it would be impossible for Defendants to find vulnerable homeowners to fleece.

Defendants' various deceptive acts and practices were a *standard practice*. Many Plaintiffs were provided with similar boilerplate forms that they were instructed by Defendants to complete as part of their initial enrollment. Forde Aff., at ¶ 9; S. Yonkes Aff., at ¶ 8; Francis Aff., at ¶ 6. These documents contained materially deceptive statements, including representations as to the expertise of the company, the company's success rate, and a money back guarantee. For example, the "introduction letter" provided to certain plaintiffs proclaimed that Defendants' "success rate is outstanding"

and that few people have Defendants' "specialized knowledge or technical expertise." Francis Aff., at ¶ 6.

Defendants also engaged in the standard practice of orally making deceptive promises to Plaintiffs during their initial meetings in order to induce these Plaintiffs to pay upfront fees for Defendants' services. These oral promises included false money back guarantees. See, e.g., Anderson Aff., at ¶ 5 (representing that Plaintiff would receive a full refund of his $2,700.00 fee should Express Home fail to secure a loan modification); Ellis Aff., at ¶ 7 (representing that Plaintiff would be entitled to a full refund if the loan modification failed). Defendants also frequently promised Plaintiffs a $500.00 cash bonus if they referred new clients. See, e.g., Forde Aff., at ¶ 8 (representing that Defendant Dellamonica would give a $500 bonus for each new client that Ms. Forde referred to him). In addition, Defendants regularly misrepresented their level of expertise, DeLeon Aff. at ¶¶ 6, 18, the time it would take to obtain a modification, Andrews Aff., at ¶ 4; Maycock Aff., at ¶ 6, and the results they would achieve, Williams Aff., at ¶ 6 (promising to cut Ms. Williams' mortgage payments in half and lower her credit card and car loan payments).

Crucially, a disparity in parties' bargaining position helps inform whether challenged deceptive practices were "consumer-oriented." Such disparity, as is present here between professional, for-profit loan modification companies and distressed homeowners, tends to favor a finding of "consumer-oriented" practice, because Section 349 "was intended to protect 'small-time individual consumers' and not sophisticated commercial entities." See Ng, 2009 U.S. Dist. LEXIS 125711, at *45 (citing Exxonmobil, 328 F. Supp. 2d at 449 (citing Genesco, 593 F. Supp. at 751-52)).

Given this confluence of factors, it is beyond cavil that Defendants' deceptive practices and false advertising were consumer-oriented.

2. Defendants' Deceptive Acts Were Misleading in Material Way

A practice is "misleading" if it is "'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 126 (2d Cir. 2007) (quoting Oswego, 85 N.Y.2d at 26).

"New York courts have held that collecting fees in violation of other federal or state laws may satisfy the misleading element of § 349." Cohen, 498 F.3d at 126 (citing Lum v. New Century Mortg. Corp., 19 A.D.3d 558, 559 (2d Dep't 2005) (holding "no materially misleading statement" under § 349 where yield spread premium disclosed to plaintiff was not "per se illegal"); Negrin v. Norwest Mortgage, Inc., 263 A.D.2d 39, 50 (2d Dep't 1999) ("Allegations of a bank's unilateral imposition of illegal and/or unwarranted fees upon its customers state a valid claim [under § 349]."); Bartolomeo v. Runco, 616 N.Y.S.2d 695, 699 (Yonkers City Ct. 1994) (holding representation that "cellar apartment was a legal apartment . . . was false, misleading and deceptive" under § 349); see also Rodriguez v. Lunch, No. 07 Civ. 9227 (SHS) (KNF), 2010 U.S. Dist. LEXIS 16622, at *29-30 (S.D.N.Y. Feb. 23, 2010) (Report & Recommendation) ("Given the New York attorney general's own conclusion, that IJLI and IJL New York City's practices violated NYGBL § 394-c(2), the plaintiffs' allegation, that IJLI and IJL New York City overcharged clients in violation of state law, satisfies the materially misleading element of the NYGBL § 349 claim.").

Defendants' collection of thousands of dollars in upfront fees for work either not performed or performed in derogation of their contractual duties, and in direct violation of N.Y. Real Property Law Section 265-b, should be treated no differently than the

imposition of other illegal fees. Real Property Law Section 265-b expressly forbids the acceptance of upfront fees prior to the completion of mortgage modification services, even by registered mortgage brokers, licensed mortgage bankers, or registered loan servicers . See N.Y. Real Prop. Law § 265-b(2)(b); N.Y. Real Prop. Law § 265-b(1)(e)(vii); Letter from Joy Feigenbaum, Bureau Chief, Bureau of Consumer Frauds & Protection, State of New York Office of the Attorney General (June 23, 2010) ("Under [New York Real Property Law § 265-b], distressed property consultants, as defined by N.Y. Real Property Law § 265-b(1)(e), must among other things: Not charge or collect upfront fees for consulting services prior to the full completion of such services. Under the 2009 Amendment, this prohibition on upfront fees was extended to apply to licensed mortgage bankers, registered mortgage brokers and registered loan servicers.")[6]; see also Schreiber v. Homesafe America, 2011 N.Y. Slip Op 31445U, at *3 (Sup. Ct. Nassau Cty. May 16, 2011) ("Pursuant to Real Property Law § 265-b(2) a 'distressed property consultant' is prohibited from charging or accepting any payment for consulting services before the full completion of such services."); People v. Amerimod, No. 402032/09, 2010 N.Y. Slip Op. 31360U, at *7 (Sup. Ct. Nassau Cty. Apr. 7, 2010) ("RPL § 265-b(2)(b) prohibits 'distressed property consultants' from charging fees prior to completion of their services. This section became law on September 1, 2008.").

Furthermore, other mortgage modification companies that engaged in practices similar to Defendants also were held liable under Sections 349 and 350 of the GBL. In People v. Amerimod, the court ruled that the Attorney General had established violations under Sections 349 and 350 of the GBL because of "numerous advertisements falsely

[6] A copy of this letter is attached as Appendix B to this memorandum of law.

claim[ing] that Amerimod has successfully addressed 7,000 claims, and has a success rate of 90% to 100%." Id. at 8. Similarly, here, Defendants claimed in their "Introduction Letter" – which was included in initial communications with homeowners – that their "success rate is outstanding" and that they are "specialists." See, e.g., Forde Aff., at 9.

In another communication directed at prospective customers, this time a letter from its "Legal Department," Defendants promise a refund minus a $595.00 processing fee if they are unsuccessful. S. Yonkes Aff., at 8. On more than one occasion, homeowners relied on this promised refund when agreeing to pay for Defendants' services. See R. Santana Aff. at ¶¶ 5-6; Andrews Aff., at ¶ 6.

It is well-established that failure to follow through on a money-back guarantee constitutes an actionable deceptive practice under GBL § 349. See, e.g., People v. Lipsitz, 663 N.Y.S.2d 468, 476 (Sup. Ct. N.Y. Cnty. 1997) (holding that respondent magazine seller's practice of providing "no magazines, no service, no refunds" constituted "a deceptive and fraudulent practice clearly falling within the consumer fraud statutes.").

Finally, failing to deliver as promised is itself materially misleading. See, e.g., Lipsitz, 663 N.Y.S.2d at 475 ("A business practice of failing to deliver as promised is recognized as fraudulent and illegal conduct violating General Business Law § 349"; enjoining a magazine subscription salesperson from falsely advertising the quality of his services because "any impartial recipient of the advertising should have been entitled to expect to receive exactly the subscription paid for, with reasonably timely and complete delivery, accompanied by the promised wonderful customer service."). None of the Plaintiffs in this action obtained their money back from Express Home, though many

made explicit oral or written demands for a refund. S. Yonkes Aff., at ¶¶ 23, 25, 28; A. Santana Aff., at ¶¶ 15-16; Maycock Aff., at 18.

In addition, Defendants were unable to obtain a mortgage modification for any of the twenty Plaintiffs in this action. See e.g., Drakes Aff., at ¶ 23; Maycock Aff., at ¶ 22; Williams Aff., ¶¶ 20, 29. Despite Defendants' promises that a typical mortgage modification takes between three and six months, Plaintiffs Julio Morales and siblings, Arnold Drakes and Yvonne Ellis, have yet to receive word from their mortgage servicer regarding whether they have been approved for or denied a mortgage modification. Indeed, Mr. Morales first paid Express Home on May 18, 2010. To this day—even though *thirteen* months have passed since he paid for Express Home's services—Mr. Morales has not heard anything from his lender indicating that Express Home performed any services on his behalf. Morales Aff., at ¶ 21. Mr. Drakes and Ms. Ellis paid Express Home in April 2010 and were still awaiting results a year later. Drakes Aff., at ¶ 23.

Without the above-described assurances, reasonable consumers—including Plaintiffs—would not have opted to employ the services of Defendants. Osmanzai Aff., at 7-10; R. Santana Aff., at ¶ 6.

3. Plaintiffs Each Suffered an Injury as a Result of Defendants' Deceptive Acts

For a deceptive act or false advertising claim to be actionable, the injury suffered must be a loss independent of the initial deceptive act; monetary loss is sufficient to state an injury under Section 349 of the GBL. See, e.g. Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009); Sokoloff v. Town Sports Int'l, Inc., 6 A.D.3d 185, 186 (1st Dep't 2004) (dismissing deceptive practice claim made by health club member because plaintiff alleged no other loss apart from the payment of her membership fee, and therefore had

"impermissibly 'set[ ] forth deception as both act and injury.'" (quoting Small, 94 N.Y.2d at 56)).

Here, Plaintiffs' losses extend far beyond their initial payments retaining the services of Defendants. Plaintiffs have accumulated additional debt because they heeded Defendants' instructions to stop making payments on their mortgages. See, e.g., Andrews Aff., ¶¶ 17 (falling deeper into arrears on mortgage payments and accruing late penalties for missing payments on the advice of Defendants). As described above, Defendants' verbal instruction to Plaintiffs to stop making payments on their mortgages—a core element of the deceptive transactions at issue in this litigation—resulted in Plaintiffs' being disqualified from numerous federal assistance programs, severely limiting their ability to obtain a successful mortgage modification.

Further, Plaintiffs have seen their credit scores damaged as a result of Defendants' deceptive acts and practices, which will have far-reaching effect on their creditworthiness and overall financial well-being. See, e.g., id. (attesting to an over 100-point drop in credit score due to missed mortgage payments advised by Defendants). In the most tragic cases, Defendants' deceptive acts led to foreclosure proceedings on their victims' homes. See, e.g., Drakes Aff., at ¶ 24. Plaintiffs were thus damaged by Defendants' deceptive acts in ways that are entirely independent of their initial payment of upfront fees.

B. Irreparable Harm Will Occur Unless a Preliminary Injunction Is Granted

Because Plaintiffs are seeking a preliminary injunction pursuant to Sections 349 and 350 of the GBL, the irreparable harm analysis in this case differs from a traditional preliminary injunction analysis. Sections 349 and 350 on their face entitle private plaintiffs to seek injunctive relief so long as they have suffered an injury as a result of a

defendant's deceptive acts or false advertising. See N.Y. Gen. Bus. Law § 349(h) ("[A]ny person who *has been* injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice . . . .") (emphasis added); N.Y. Gen Bus. Law § 350-e ("Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his or her own name to enjoin such unlawful act or practice."). Accordingly, courts have treated future irreparable harm to the public as sufficient to obtain a preliminary injunction under Sections 349 or 350 of the GBL. See Marcus, 158 A.D.2d at 105-06) (granting a preliminary injunction to private plaintiffs under Sections 349 and 350 on the grounds that "if [the defendant] were to be allowed to persist in its deceptive practices, there would be a significant risk that *people* would read defendant's literature and contribute moneys under the mistaken impression [as to how their money would be used], and thereby be irreparably injured.") (emphasis added).

Certain courts in New York have further suggested that Section 349 of the GBL is such a broad remedial statute – similar in nature to federal regulatory statutes – that a showing of irreparable harm is not even necessary to obtain an injunction. See People v. P.U. Travel, 2003 N.Y. Misc. LEXIS 2010, at *8 (Sup. Ct. NY Cty. June 19, 2003) (declining to rule on the bottom-line requirements for a preliminary injunction under § 349, but explaining that "in a case decided under federal regulatory statutes which are analogous to [§ 349], an appeals court held that the usual prerequisites for issuing a preliminary injunction (i.e. showing of irreparable injury) are not required." (citing Commodity Futures Trading Comm'n v. Muller, 570 F.2d 1296 (5th Cir. 1978)).

Regardless of whether Plaintiffs are in fact required to prove irreparable harm in this case, Plaintiffs can make such a showing. As will be demonstrated below, consumers will suffer irreparable injury unless Defendants' deceptive acts and false advertising are enjoined.

A preliminary injunction is available when plaintiffs can show that a defendant "threatens or is about to do, or is procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action." N.Y. C.P.L.R. § 6301. Irreparable harm will redound to both Plaintiffs and the public at large absent an order from this Court enjoining Defendants' deceptive and unlawful activities. Allowing Defendants to continue in their course of unlawful conduct will irreparably injure citizens both inside and outside of the State of New York.

1. Plaintiffs May Satisfy the Irreparable Injury Requirement by Demonstrating Irreparable Harm to Future Victims of the Scam

In cases brought under Sections 349(h) and 350, Plaintiffs may satisfy the irreparable injury requirement by demonstrating future injuries will accrue to the public. Because Plaintiffs are functioning as private attorneys general, they are broadly empowered to protect the general public against deceptive acts and practices, and false advertising. See Marcus, 158 A.D.2d at 105-06 (granting a preliminary injunction to private plaintiffs under Sections 349 and 350 on the grounds that "if [the defendants] were to be allowed to persist in its deceptive practices, there would be a significant risk that *people* would read defendant's literature and contribute moneys under the mistaken impression [as to how their money would be used], and thereby be irreparably injured.") (emphasis added); see also id. at 108 (Kupferman, J., dissenting) ("[T]he Attorney-General of the State of New York is empowered to protect the public in the event there is

any deception [by defendant] . . . . [P]laintiffs cannot, as private attorneys general, engage in an enforcement venture *except pursuant to General Business Law § 349(h).*") (emphasis added); State v. Colo. St. Christian Coll. of the Church of the Inner Power, 76 Misc. 2d 50, 54 (Sup. Ct. N.Y. Cnty. 1973) (quoting Comm. on N.Y.S. Antitrust Law Report 4) (noting that Section 349 was designed to allow the Attorney General to provide "adequate consumer protection" and combat "persistent fraud").

Marcus v. Jewish Nat'l Fund stands for the proposition that future harm to the public at large is a sufficient basis for granting a preliminary injunction to private plaintiffs under Sections 349 and 350 of the GBL. 158 A.D.2d at 105-06. In Marcus, supporters of certain groups whose aims included the development of Jewish life in both Israel and the territories acquired during the Six Day War (past the so-called "Green Line") asserted claims, inter alia, under Sections 349 and 350 of the GBL against a non-profit fundraising organization. Plaintiffs alleged that the defendant fundraising organization deceptively suggested in its advertising materials that it would distribute its donations to areas over the "Green Line" in Israel when it, in fact, did not distribute donations in this area. Id. at 103. The defendant charity sought to dismiss the claims in the trial court and the plaintiffs cross-moved for an order pursuant to C.P.L.R. 6301 to enjoin defendant from making, publishing or distributing and disseminating any of the allegedly deceptive advertisements. Id. The trial court granted the plaintiffs' motion for an injunction enjoining defendants from distributing the deceptive materials at issue. Id. at 104.

On appeal, the First Department determined that the plaintiffs had stated a valid cause of action under Sections 349 and 350. See id. at 105. The court then ruled that

plaintiffs had met all of the requisite elements for the issuance of a preliminary injunction, and in particular focused on the irreparable harm element:

> Clearly, if [defendant] were allowed to persist in its deceptive practices, there would be a significant risk that people would read defendant's literature and contribute moneys under the mistaken impression that their donations would be allocated to territories across the Green Line and, thereby be irreparably injured.

Marcus at 105-06. The Marcus court expressly considered the future harm that would accrue to the public would defendants be permitted to continue distributing their deceptive literature. The irreparable injury was, therefore, not tied directly to the plaintiffs asserting claims. Rather, the court considered the harm to the public as a sufficient harm to warrant granting the preliminary injunction.[7]

Justice Kupferman in dissent agreed that private plaintiffs were empowered to act as private attorneys general to enforce the provisions of Sections 349 and 350, and dissented on separate grounds. Id. at 107-08 (Kupferman, J., dissenting) ("[T]he Attorney General of the State of New York is empowered to protect the public in the event there is any deception [by defendant]....[P]laintiffs cannot, as private attorneys general, engage in an enforcement venture *except pursuant to General Business Law § 349(h).*") (emphasis added).

There is no reason to deviate from Marcus in this case. Nor is there any reason to require a showing of future irreparable injury to Plaintiffs prior to granting a preliminary injunction when the law requires only a showing of irreparable injury to the public at large; such a requirement would fly in the face of the Legislature's stated reasons for enacting the statutes. See Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 352 (1999) (Bellacosa, J., dissenting in part) (reciting the legislative history of Section 349,

[7] The court did not consider whether the irreparable harm requirement should apply.

which was designed to "strengthen the consumer protection powers of the Attorney General by enabling him to obtain injunctions against all deceptive and fraudulent practices" in order to provide consumers with an "honest market place" (quoting Governor's Mem. approving L 1970, chs 43 and 44, 1970 NY Legis Ann, at 472)); see also Blue Cross and Blue Shield of New Jersey, Inc., 3 N.Y.3d at 205 ("Though originally intended to be enforced by the Attorney General . . . the statute was amended in 1980 to include a private right of action. The amendment was intended to afford additional protection for consumers, allowing them to bring suit on their own behalf without relying on the Attorney General for enforcement." (citing Assembly Mem. in Support, Bill Jacket, L 1980, ch. 346)).

Were Defendants permitted to continue their deceptive practices and false advertising, in violation of Sections 349 and 350, the public would suffer significant irreparable injuries. Like the donors in Marcus who made donations under the mistaken impression that they were being used toward a specific purpose, here Plaintiffs have suffered a panoply of injuries, including late payment fees, damaged credit ratings, and mortgage default. If Defendants' deceptive acts and practices are not enjoined, future victims will be placed in substantial risk of suffering these same injuries, for which no adequate remedy at law exists. These are precisely the kinds of injuries that Sections 349 and 350 were created to guard against and which warrant preliminary relief from this Court.

Finally, Marcus comports with the plain reading of Sections 349 and 350 of the GBL, which authorize that the deceptive conduct at issue – the Defendants' entire business model of accepting upfront fees, falsely promising a money back guarantee,

falsely promising a swift modification process, and falsely pretending that work is being done that in fact is not occurring – may be enjoined by any person who has been the victim of the deceptive act or practice, or false advertising. Sections 349(h) and 350-e of the GBL do not require that a *future* harm accrue to the private plaintiff seeking injunctive relief. Rather, those provisions state plainly that "any person who *has been* injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice . . . .". N.Y. Gen. Bus. Law § 349 (h) (emphasis added); see also N.Y. Gen. Bus. Law § 350-e ("Any person who has been injured by reason of any violation of section three hundred fifty or three hundred fifty-a of this article may bring an action in his or her own name to enjoin such unlawful act or practice."). Accordingly, the plain meaning of the statutory text makes clear that past harm to a plaintiff is a sufficient basis for granting injunctive relief.

2. Absent A Preliminary Injunction, Future Victims Will Suffer Irreparable Injury to Their Creditworthiness

Under New York law, damage to one's creditworthiness or credit rating is an irreparable injury that justifies injunctive relief. Four Times Square Assocs., L.L.C. v. Cigna Invs., Inc., 306 A.D.2d 4, 6 (1st Dep't 2003) (holding that a "threat to [plaintiff's] good will and creditworthiness" was sufficient irreparable harm to warrant an injunction). In Four Times Square, the mortgage held by plaintiffs on the Conde Nast Building at 4 Times Square required them to maintain certain levels of insurance coverage. After the events of September 11, 2001, the property's insurer proposed certain reductions in the holder's insurance coverage, which led the property's mortgage trustee and special servicer to declare an event of default. On appeal, the First Department reversed the trial court and deemed equitable relief proper to prevent the declaration of default. Id. at 5.

The court reasoned that "the threat to [plaintiff's] good will and creditworthiness is sufficient irreparable injury warranting the granting of injunctive relief." Id. at 6.

So too with the injuries suffered by Plaintiffs. In case after case, Defendants' deception severely damaged Plaintiffs' credit ratings and overall creditworthiness. As part of their deceptive practices, Defendants explicitly instruct homeowners to stop making their monthly mortgage payments. Osmanzai Aff., at ¶ 9; Francis Aff., at ¶ 9; Forde Aff., at ¶ 12. This instruction, and Defendants' general inaction on behalf of homeowners, had a direct adverse impact on Plaintiffs' credit scores. E.g., Williams Aff., at ¶ 30.

In the worst cases, Plaintiffs faced foreclosure proceedings on their homes. Drakes Aff., at ¶ 24. Such injuries are not compensable by money damages, and no adequate remedy at law exists to make these victims whole. If Defendants are allowed to continue their deceptive practices, every homeowner they target in the future will be at great risk of suffering those same irreparable injuries.

3. Absent a Preliminary Injunction, Future Victims Will Suffer Irreparable Harm When Defendants Undermine Their Ability to Obtain Mortgage Modifications

A critical aspect of Defendants' deceptive scheme involves explicitly instructing homeowners to stop making payments to their mortgage servicer or lender. Defendant corporations likewise orally instruct their victims to stop making timely payments to their lender, causing them to fall significantly behind on their mortgage payments. See, e.g., Williams Aff., at ¶¶ 15, 18; Forde Aff., at ¶ 36.

These instructions cause devastating effects to Defendants' victims. Many standard form mortgage notes contain "acceleration" clauses which classify a borrower as in default after even a single missed payment. In New York State, such clauses entitle

the lender to begin foreclosure proceedings after one missed payment. See N.Y. Real Prop. Law § 258 (sample short form deed and mortgage containing an acceleration clause); Freddie Mac, Form 3200: Multistate Fixed Rate Note, available at http://www.freddiemac.com/uniform/doc/3200-MultistateFRNote.doc (last visited Jun. 15, 2011) (short-form Fixed-Rate note containing an acceleration clause used by Freddie Mac/Fannie Mae whenever they originate residential mortgage notes in all States and U.S. Territories).

Forcing homeowners into default likewise severely prejudices a borrower's ability to secure a mortgage modification, and those borrowers risk losing their ability to qualify for federal assistance with their home loans. In February 2009, the Federal government introduced the Making Home Affordable Program, a non-profit program designed to "stabilize the housing market and help struggling homeowners get relief and avoid foreclosure." Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages 10 (Dec. 2, 2010). To qualify for the Federal Housing Administration's Home Affordable Modification Plan ("FHA-HAMP") created under this program, one must be in arrears on their mortgage for no more than 12 months. See Making Home Affordable Program, available at http://www.hud.gov/offices/hsg/sfh/nsc/rep/hampfact.pdf. Similarly, the Home Affordable Refinance Program, which assists homeowners whose mortgages are held by Freddie Mac or Fannie Mae to refinance, requires participants to be "current on [their] mortgage payments" and that they "have not been more than 30 days late making a payment within the past 12 months." See Making Home Affordable, available at: http://www.makinghomeaffordable.gov/programs/Documents/MHA%20Brochure.pdf.

Accordingly, by requiring that homeowners stop making their monthly payments for considerable periods of time—or, depending on the degree to which a borrower is already in arrears, for even a single month—Defendants will render future victims of their scam incapable of participating in the government's free assistance programs. Defendants' requirement that their clients stop making their monthly payments will cause future victims of their scam irreparable harm that cannot be compensated by money damages. For this reason, Defendants' deceptive acts and practices must be enjoined by this Court.

C. The Balance of Equities Tips in Favor of Plaintiffs

Balancing the equities "simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." Ma v. Lien, 198 A.D.2d 186, 186-87 (1st Dep't 1993); City of New York v. Times' Up Inc., 11 Misc. 3d 1052A, at *13 (Sup. Ct. N.Y. Cty. 2006).

Here, the prejudice that Plaintiffs—and the public at large—will suffer absent a preliminary injunction is all too clear. There is simply no reason to allow Defendants to continue exploiting homeowners, nor is there any reason to permit Defendants' flagrant violations of Section 349 and 350 of the GBL to persist. Allowing these businesses to continue in any capacity creates an imminent risk of harm to consumers.

As has been amply demonstrated above, Defendants repeatedly have deceived vulnerable homeowners with false and misleading promises. In return, there is little evidence that Defendants' operations are providing necessary or legitimate services. Accordingly, the prejudice that Defendants will suffer as a result of an injunction is minimal. The only harm that will directly accrue to Defendants as a result of an injunction is that they will be restrained from doing what is already forbidden: running

an illegal company whose entire business model relies on deceiving unwitting consumers and providing no actual services in return.

Defendants Gotterup and Sarosi must likewise be restrained from concealing their illicit operations under a new name by starting any new businesses related in any way to the rendering of mortgage modification services. Any company with the imprimatur of Gotterup and Sarosi – given their track record in the industry – must be viewed with great skepticism.

Plaintiffs know all too well the personal and financial pain wrought by Defendants; they now seek an injunction in the hopes of preventing others from experience the same injuries they suffered. The balance of equities requires preliminary relief while the Court reaches its ultimate determination on the merits.

III. Plaintiffs Are Entitled to An Order of Attachment

A. Grounds for Attachment and Temporary Restraining Order

The State of New York provides for the remedy of attachment in Sections 6201, 6210, 6211, Rule 6212 and Section 6214(b) of the C.P.L.R. N.Y. C.P.L.R. Section 6210 provides in relevant part that:

> Upon a motion on notice for an order of attachment, the court may, without notice to the defendant, grant a temporary restraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of Section 6214.

Plaintiffs seek such a temporary restraining order in the instant matter.

The grounds for obtaining an order of attachment are set forth in C.P.L.R. § 6201, which provides the direct statutory basis for attaching Defendants' assets by making the remedy available when:

> The defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiffs favor, has

> assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.

See also Arzu v. Arzu, 579 N.Y.S.2d 322, 325 (1st Dep't 1993); First Nat'l Bank of Dansville v. Highland Hardwoods, 471 NYS.2d 360 (3rd Dep't 1983); N. Y. Credit Men's Adjustment Bureau, Inc. v. Lubin, 464 N.Y.S.2d 9 (1st Dep't 1993).

In addition to establishing grounds for attachment under C.P.L.R. § 6201, C.P.L.R. § 6212(a) requires that a party moving for an order of attachment must show the existence of a cause of action, a likelihood of probable success on the merits, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff. N.Y. C.P.L.R. § 6212(a); Ford Motor Credit Co. v. Hickey Ford Sales Inc., 476 N.Y.S.2d 791 (1984).

B. Defendants Have Transferred Assets with the Intent to Defraud and Frustrate Collection of Judgments in Plaintiffs' Favor

Under C.P.L.R. § 6201(3), a plaintiff must establish that the defendant has sought to hide or dispose of his or her assets. As will be discussed further below, Defendants have disposed of at least one known bank account to devastating effect.

Under C.P.L.R. § 6201(3), a plaintiff must also show that the defendant has sought to hide or dispose of his or her assets with the intent to defraud. Because "fraudulent intent, by its very nature, is rarely susceptible to direct proof," courts generally establish intent by inference from the circumstances of the allegedly fraudulent act. See Kreisler Borg Florman Gen. Constr. Co., Inc. v. Tower 56, LLC, 872 N.Y.S.2d 469, 471 (3rd Dep't 2009) (quoting Marine Midland Bank v. Murkoff, 508 N.Y.S.2d 17, 21 (2nd Dep't 1986)). Among the factors considered is whether defendant "has acted or will act with the intent to defraud his or her creditors, or to frustrate the enforcement of a

judgment in favor of the plaintiff." Mineola Ford Sales Ltd. v. Rapp, 661 N.Y.S.2d 281, 282 (2d Dep't 1997).

Since April 2010, Defendants Gotterup, Express Home, and Express Modifications Inc. have amassed over $25,000.00 in judgments against them. Creditors range from defrauded homeowners like Plaintiffs, suppliers, and the State of New York. One such defrauded consumer's experience clearly illustrates the harm Plaintiffs in this matter will encounter if an attachment were not issued.

Mr. Harry Santana, brother of Plaintiff Alfred Santana, paid $5,000.00 in upfront fees to Defendant Express Home in February 2010 for what he believed were loan modification services. H. Santana Aff. at ¶ 5. After over five months passed without any perceptible progress on his modifications, Mr. Santana filed a small claims lawsuit in July 2010. Id. at ¶¶ 14-16. In December 2010, Mr. Santana obtained a judgment of $2,300.00 against Gotterup and Express Home. Id. at ¶ 36. In February 2011, after numerous independent efforts to collect his judgment failed, Mr. Santana hired a marshal to collect the funds on his behalf, and gave the marshal a known bank account of Express Home at Capitol One Bank and the names of the defendants in his action. Id. at ¶ 38. On May 16, 2011, the marshal wrote Mr. Santana a letter, informing him that because the Capitol One account was closed, he would not be able to collect Mr. Santana's judgment. Id. at ¶ 39-40. This, coupled with the fact that Express Home had altered its identity to Empire Home Savings meant that Mr. Santana would have to file a new small claims action and hope against experience that Defendants will neither dispose of assets nor switch names in the upcoming months. Indeed, Mr. Santana was left with a meaningless piece of paper.

Defendants are capable of repeating these actions against other creditors. As described above, Defendants have switched identities yet again, for the second time within five months. And just as they moved from 595 Stewart Avenue to 591 Stewart Avenue without notifying any customers, it is only a matter of time before they flee again.

These facts are more than sufficient to satisfy the standard for an attachment and temporary restraining order. Courts have repeatedly granted attachments in similar cases, where, as here, Defendants have obtained Plaintiffs' assets by way of fraud and then either transferred or dissipated those assets. See, e.g., Societe Generale Alsacienne De Banque v. Flemingdon Dev. Corp., 500 N.Y.S.2d 278 (2d Dep't 1986) (finding that passing of a bad check, making misrepresentations and other efforts to prevent Plaintiffs from collecting their rightful funds, including attempting to transfer funds after the service of an ex parte order of attachment, warranted the granting of an order of attachment); Mineola Ford, 661 N.Y.S.2d at 281 (finding that defendant-employee's falsification of business records, diversion of funds for her personal use, and failure to offer any reasonable explanation for plaintiffs' missing assets, created a sufficient evidentiary showing of fraudulent intent for the issuance of an order of attachment); Se. Chrysler-Plymouth, Inc. v. Pieroni, 465 N.Y.S.2d 626 (4th Dep't 1993) (reaffirming an order of attachment on assets which the defendant had fraudulently obtained, transferred to another account, and failed to restore in spite of plaintiff's demands).

Additional circumstances surrounding the transactions only further establish the conclusion that Defendants acted with requisite intent for the issuance of an attachment,

and that, absent such an order, Plaintiffs face the imminent threat of being unable to collect their claims.

First, prior to the transfers, Defendants had already taken grossly fraudulent measures to prevent Plaintiffs from recovering the money they were fraudulently induced to part with. For example, to prevent discovery of the fraud, Defendants advised Plaintiffs to cease communication with their mortgage lenders and to withhold payments so that an "expert" could more effectively negotiate a modification on their behalf. Defendants, meanwhile, failed in most cases to make even the most minimal effort to process the promised loan modification applications. Shortly thereafter, Defendants cut off communication with Plaintiffs, declined to take or return calls and emails, and, despite numerous requests to do so, refused to grant the refunds they had been promised. As a result, Plaintiffs not only failed to recover their money, but suffered terrible consequences to their credit and the state of their mortgage loans.

Second, the timing of when Defendants disposed of its assets is critical, since "an attempt to dispose of assets, standing alone, will not justify an attachment, the timing of defendants' actions raises an inference that defendants intended to frustrate enforcement of a judgment." City of New York v. CitiSource, Inc., 679 F. Supp. 393, 397 (S.D.N.Y. 1988) (granting a continuance on original order of attachment, court noted that defendants sought to dispose of assets upon learning of an adverse judgment). Between July 2010, when Mr. Santana learned that Express Home held a bank account at Capitol One and initiated his small claims action, and May 2011, when Mr. Santana learned through the marshal that the account no longer existed, Defendants amassed over

$14,000.00 in judgments against them[8]. Courts have recognized that transfers of assets made in these circumstances—i.e., when the transferor knows of actual or imminent creditors' claims, and is unable to pay them—is quintessential evidence of fraudulent intent. See, e.g., Pen Pak Corp. v. LaSalle Nat'l Bank, 240 A.D.2d 384, 385-86 (2d Dep't 1997); Wall St. Assocs. v. Edward Brodsky et al., 257 A.D.2d 526, 529 (1st Dep't 1999); In re CIT Group/Commercial Servs., Inc., v. 160-09 Jamaica Ave. Ltd. P'ship et al., 25 A.D.3d 301, 306 (1st Dep't 2006) (recognizing that such transfers bear a "badge of fraud" that infers fraudulent intent). In addition, Plaintiffs' repeated requests for refunds, coupled with the dearth of evidence of any intention or ability to achieve a modification on behalf of homeowners, establishes that Defendants knew such liability would inevitably come due. Defendants' closing of its bank account and multiple shifts in identities demonstrates the Defendants' willingness to evade the many claims against them.

C. Plaintiffs Are Likely to Succeed on the Merits

In discussing their probability of success in the context of their application for preliminary injunction enjoining Defendants' fraudulent conduct, the Plaintiffs have also established its likelihood of success on the merits with respect to GBL §§ 349 and 350. Plaintiffs are likely to succeed on all other claims asserted in the Complaint.

D. The Amount Demanded of Defendants Exceeds All Counterclaims Known to the Plaintiffs

Plaintiffs seek to attach $42,485 in assets, which to the Plaintiffs' knowledge, exceed any counterclaims brought by Defendants.

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[8] A listing of these judgments is attached hereto as Appendix C.

IV. Plaintiffs Require An Order For Expedited Discovery to Secure Access to Relevant Evidence

Plaintiffs seek limited, expedited discovery to ensure the preservation of highly relevant evidence and to establish facts necessary to obtain a preliminary injunction. Expedited discovery is particularly appropriate in this case, given Defendants' reckless disregard for record-keeping and document preservation.

Trial courts "have considerable discretion to supervise the discovery process." Parnes v. Parnes, No. 509617, 2011 N.Y. Slip Op. 136, at *2, (3rd Dep't 2011); see also Auerbach v. Klein, 816 N.Y.S.2d 376 (2d Dep't 2006) (holding that "the trial court is invested with broad discretion to supervise discovery"). Moreover, the rules governing discovery expressly permit trial courts to grant discovery on an expedited basis. See, e.g., N.Y. C.P.L.R. 3107 (authorizing courts to order that depositions be taken on less than 20 days' notice).

Pursuant to this broad discretion, New York courts routinely order expedited discovery, especially when the plaintiff seeks injunctive relief. See, e.g., In re Topps Co., Inc., No. 600715/07, 2007 N.Y. Slip Op 52543U, at * 1, 3 (Sup. Ct. N.Y. Cnty. June 8, 2007) (explaining that expedited discovery was granted to provide shareholder plaintiffs the opportunity to obtain discovery necessary to proceed to preliminary injunction hearing); Home & City Sav. Bank v. Rose Assoc. I., L.P., 572 N.Y.S.2d 458, 460 n.1 (3rd Dep't 1991) (noting that the trial court "granted plaintiff's request for expedited discovery and invited submissions from the parties relating to the request for a preliminary injunction hearing" and recognizing that the "need for expedited disclosure" was tied to request for preliminary injunction). In addition, courts are likely to order to expedited discovery when defendants have exclusive access to certain relevant

information, including cases involving fraud and the breach of a fiduciary duty. Geddes v. Zeiderman, 644 N.Y.S.2d 729 (1st Dep't 1996); Halitzer v. Ginsberg, 436 N.Y.S.2d 738, 739 (1st Dep't 1981) (affirming trial court's order granting plaintiff priority to conduct depositions because knowledge of alleged fraud and breach of fiduciary duty was "peculiarly within the custody of defendant").

Here, the Court should exercise its discretion to order expedited discovery so that Plaintiffs can obtain additional information to prove its entitlement to injunctive relief before Defendants can destroy, damage, or hide relevant documents. Defendants switched identities recently and they are known to move offices without notice. There is, therefore, no presumption that records will be kept safely amidst these changes. Given their practice for creating new corporate entities, it is entirely possible that Defendants will attempt to move relevant documents from Express Home to other sites or businesses they control in the future.

Many of the documents most relevant for this litigation are currently under Defendants' control. For example: in the enrollment packet it sends to consumers, Express Home asked customers to authorize the company as their "Designated Agent", which gave Defendants permission to exchange consumers' information directly with the relevant lenders. As a result, Plaintiffs cannot adequately assess their legal claims unless they are provided immediate access to relevant materials. Expedited disclosure will allow Plaintiffs to evaluate the work – or lack thereof – that Defendants performed for their customers.

The discovery that Plaintiffs seek on an expedited basis is limited and narrowly tailored to the specific issues that will be before the Court on Plaintiff's motion for preliminary injunction. The Document Requests seek information related to:

- Practices and internal procedures for document storage, management, and preservation at Express Home;
- Client files, including any handwritten notations or internal documents relating to Express Home's processing of Plaintiffs' loan modifications;
- Express Home's online, print, and tele-marketing strategies, including internal memoranda and strategy documents;
- Bank and merchant account records indicating payments by Plaintiffs for Express Home's services; and
- Bank and merchant account records indicating current state of Defendants' finances, including ability to satisfy judgment should Plaintiffs prevail in this matter.

Because the information sought in the Document Requests is limited in scope, Defendants should be able to collect and produce it in short order, with little burden.

Likewise, Plaintiffs do not seek a wide range of depositions at this point, but instead seek to depose only Defendants (i) Gotterup, (ii) Sarosi, (iii) Kalastein, (iv) Green, and (v) Menon. As such, any burden imposed on Defendants and Express Home by the shortened schedule is negligible and is far outweighed by Plaintiffs' compelling need for the documents and information sought.

CONCLUSION

For the reasons set forth above, and based on the affidavits, affirmations and exhibits submitted herewith in support of its application for a temporary restraining order pending the hearing of Plaintiffs' motion for an order of attachment and for a preliminary injunction, Plaintiffs respectfully request that the Court grant its application in all respects.

Date: June 26, 2011
New York, NY

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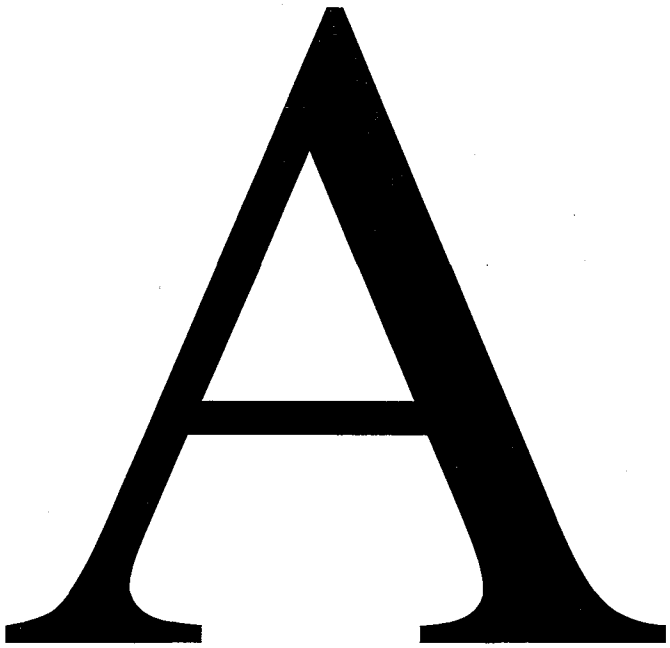

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[*1] **Daniel Morrissey, Timothy Ciarfello, individually and on behalf of all others similarly situated, Plaintiffs, against Nextel Partners, Inc., d/b/a "Nextel Partners," d/b/a "Nextel," and John Does 1-100, Defendants.**

3194-06

SUPREME COURT OF NEW YORK, ALBANY COUNTY

2009 NY Slip Op 50260U*; *22 Misc. 3d 1124A*; *880 N.Y.S.2d 874*; *2009 N.Y. Misc. LEXIS 322

February 19, 2009, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Affirmed in part and modified in part by *Morrissey v. Nextel Partners, Inc., 72 A.D.3d 209, 895 N.Y.S.2d 580, 2010 N.Y. App. Div. LEXIS 1545, 2010 NY Slip Op 1565 (N.Y. App. Div. 3d Dep't, Feb. 25, 2010)*

HEADNOTES

[**1124A] [***874] Actions--Class Actions--Class Certification.

COUNSEL: APPEARANCES: Dreyer Boyajian LLP, Attorneys for Plaintiffs (Donald W. Boyajian, William J. Dreyer, James R. Peluso and Kenneth Riddett, of counsel), Albany, New York.

Nixon Peabody LLP, Attorneys for Defendant (Christopher M. Mason, of counsel), New York, New York, (Andrew C. Rose, of counsel), Albany, New York.

JUDGES: RICHARD M. PLATKIN, A.J.S.C.

OPINION BY: RICHARD M. PLATKIN

OPINION

Richard M. Platkin, J.

This is a motion brought pursuant to *CPLR 901* for certification of this matter as a class action and recognition of the named plaintiffs as class representatives. This action seeks relief for alleged violations of *General Business Law §§ 349* (deceptive trade practices) and *350* (false advertising), as well as for alleged breaches of contract. In addition to class certification for these causes of action arising in the State of New York, plaintiffs also seek to represent individuals in as many as thirty other States in a multi-state class action that would include claims arising under the consumer protection statutes and contract laws of those States.

According to plaintiffs' complaint, as amplified by their submissions filed in support of the present motion, defendant, a provider of cellular telephone service, systematically overcharged many of its subscribers in violation of consumer protection statutes as well as principles of contract law. These alleged overcharges arose in two distinct areas: in the method of crediting so-called "bonus minutes" to customers' accounts, and in the assessment of additional fees from subscribers with poor credit ratings. Plaintiffs contend that the "bonus minutes" included in their contracts were in fact illusory, while those subscribers with low credit scores on "spending limit program" contracts were charged fees in excess of those for which they had bargained. More

particularly, plaintiffs' allegations are as follows:

"BONUS MINUTES"

Plaintiff Morrissey alleges that he and others similarly situated entered into subscriber agreements with defendant by which they were provided with one primary cell phone and one or more secondary "add-on" cell phones. Their contracts provide for a base level of 1,000 minutes of monthly usage as well as 200 so-called "bonus minutes". [1] The contracts were to run for a term of two years, with a two hundred dollar ($ 200.00) penalty to be assessed in the event the customer were to terminate the contract prior to the end of the specified period.

1 While Morrissey's specific plan was for 1,000 base minutes and 200 bonus minutes, defendant offered (and may continue to offer) promotional plans with differing allotments of base minutes and "bonus" minutes. In addition, subscribers also receive unlimited free nights and weekends and unlimited "direct connect" (also known as "walkie-talkie") service.

After signing the subscription agreement and other documents in November 2005, Morrissey retained the primary cellphone for himself and gave the "add-on" phone to his girlfriend. When the first month's bill arrived, he discovered that his account had been credited with only 1,000 minutes and that he had been charged forty cents ($ .40) per minute for each additional daytime minute used by the two phones. Nowhere on the billing statement was there any credit, or even mention, of the 200 "bonus minutes".

When Morrissey inquired about this apparent discrepancy, he was told that "bonus minutes" only were available for use on the primary phone and could not be shared with any add-on phones. Moreover, he also learned that defendant only would apply "bonus minutes" to the primary phone after that phone *alone* had used 1,000 minutes in the billing period. Additionally, defendant only made "bonus minutes" available for the first 12 months of the subscription period. Morrissey also discovered that defendant would increase the basic service charge on his plan by ten dollars ($ 10.00) per month after the first year of his two-year contract.

[*2] According to the complaint, subsequent to Morrissey's November 2005 subscription, defendant modified the terms of certain contract documents to include the statement, "Bonus minutes do not share" and to inform subscribers of "the terms of any special rate plan promotions and their expiration dates." Morrissey alleges that he was never provided with updated information consistent with these changes to the subscription agreement.

THE "SPENDING LIMIT PROGRAM"

When plaintiff Ciarfello applied for a cell phone subscription with defendant, he was required to undergo a credit check. Pursuant to defendant's policies, the results of the credit check could result in the assignment of a subscriber to a program in which an additional monthly fee would be assessed. The amount of this additional charge ranged from no fee at all to a maximum of nine dollars ninety-nine cents ($ 9.99), depending upon defendant's assessment of the subscriber's credit worthiness. Ciarfello's fee originally was assessed at two dollars ninety-nine cents ($ 2.99) per month. Like Morrissey, Ciarfello entered into a two-year contract with defendant for the use of one primary and one add-on cell phone.

The language of Ciarfello's subscription agreement allowed defendant to change the terms of the contract at any time, provided that advance notice was given. In late November 2005, Ciarfello's "Spending Limit Program" fee was increased from $ 2.99 per month to $ 4.99 per month. Notice of this rate increase, alleged by Ciarfello as inadequate, was placed at the end of a series of advertisements listed under the heading "Nextel News and Notices" in the previous month's bill.

The complaint also alleges that Ciarfello and other subscribers were not informed that they had the right to cancel their subscriptions without penalty should they not wish to pay the increased fees. The complaint further contends that the billing practices used by defendant were intended to mislead subscribers and conceal from them notices of unilateral changes in the subscription contracts. Plaintiffs allege that defendant's business practices, taken individually and collectively, evidence a conscious and concerted evidence to cheat consumers.

ANALYSIS

Plaintiffs seek certification of two classes, each with three proposed subclasses. Morrissey seeks to represent a "Bonus Minutes Class", consisting of "all persons who subscribed to a Nextel wireless communication service

plan with Bonus" minutes during the period June 1, 2005 to the present." The three subclasses would be defined as follows: [2]

> 1. Persons who subscribed to a bonus minute plan in which bonus minutes cannot be shared by add-on phones;
>
> 2. Persons who subscribed to a two-year service agreement in which bonus minutes are only valid for 12 months; and
>
> 3. Persons who subscribed to a service plan that is subject to an increase of $ 10.00 per month after 12 months.

2 This definitional language is taken directly from plaintiffs' complaint. It is mirrored verbatim in plaintiffs' proposed amended complaint. The Court notes that in the June 8, 2007 affidavit of Donald W. Boyajian, however (at pp 7-8), somewhat more detailed language is employed to describe the proposed sub-classes.

Ciarfello on the other hand seeks to represent a "Spending Limit Class" defined as "all [*3] persons who subscribed to Nextel's Spending Limit Program and were billed a new monthly charge or an increase of their monthly fee for the Spending Limit Program during the period December 1, 2004 to the present." His subclasses would be:

> 1. Persons charged a new monthly Spending Limit Program Fee after their enrollment in the Spending Limit Program;
>
> 2. Persons charged a Spending Limit Program Fee of $ 2.99 that increased to $ 4.99; and
>
> 3. Persons charged a Spending Limit Program Fee of $ 9.99 that increased to $ 12.99.

As noted, plaintiffs seek certification not only of a New York class action but also a multi-state class action. The proposed New York action will be discussed first; consideration of the multi-state aspect of the case follows.

The CPLR lists five prerequisites to class certification (*CPLR 901 [a] [1-5]*). The ultimate determination is discretionary, and the burden of proof lies with plaintiffs to show that each of the prerequisites has been met (*Beller v William Penn Life Ins. Co. of New York, 37 AD3d 747, 748, 830 N.Y.S.2d 759 [2d Dept 2007]*; *cf. Casey v Prudential Securities, Inc., 268 AD2d 833, 834, 702 N.Y.S.2d 670 [3d Dept 2000]*). The statutory criteria will be addressed *seriatim*.

NUMEROSITY

The first prerequisite to certification is that the class be "so numerous that joinder of all members . . . is impracticable" (*CPLR 901 [a] [1]*). With regard to the Spending Limit Class, plaintiffs have put forth information provided to them in discovery that shows more than 100,000 New York subscribers enrolled in defendant's "Spending Limit Program" between December 1, 2004 and the present. Additionally, plaintiffs have provided charts prepared by defendant demonstrating that the charges for all categories of subscribers in that program were increased during the applicable time period. The numerosity of this class is therefore manifest.

Defendant contends, however, that plaintiffs have not demonstrated the numerosity of the proposed subclasses to the Spending Limit Class. They point out that plaintiffs have not specified the number of subscribers who would be members of each of the three subclasses. Yet this objection exalts form over substance: with the total number of members of the three subclasses exceeding 100,000 it is reasonable to infer numerosity of each subclass from the present record (*see Consolidated Rail Corp. v. Town of Hyde Park, 47 F3d 473, 483 [2d Cir1995]* [numerosity presumed with a minimum of forty class members]). [3]

3 In any event, if it were later established that one of the three subclasses only has a handful of members it would be a simple matter either to redefine or decertify the subclass (*see e.g. Lauer, supra, at 130* quoting *Friar v Vanguard Holding Corp., 78 AD2d 83, 100, 434 N.Y.S.2d 698 [2d Dept 1980]*).

With regard to the question of numerosity of the proposed Bonus Minutes Class and its three subclasses, the analysis is somewhat more complex. Plaintiffs repeatedly sought from defendant in discovery specific information regarding the number of subscribers who would fit within plaintiffs' definition of the proposed class and subclasses. The only substantive response given by defendant was that "as of June 2006 approximately 127,000 customers had price plans with add-on phones and that over 850,000 customers had price plans with bonus minutes. Defendant does not currently know how many customers with add-on phones also have price plans with bonus minutes."

[*4] By letter dated April 16, 2007 defendant's counsel supplemented this discovery response with the following statement:

> Please note that your request for a similar state-by-state count of subscribers with plans including bonus minutes and add-on phones (your Interrogatory No. 6, as modified), has proven to be far more cumbersome and costly than we anticipated. We are not currently able to comply with that request. Nextel Partners will continue its efforts to seek this information, however. If we determine that the effort required to complete that task is unreasonably burdensome, we will notify you and, if necessary the Court.

To date defendant has neither provided the requested information nor has it notified the Court "that the effort required to complete that task is unreasonably burdensome." [4] Nonetheless, defendant seeks to defeat the present motion by asserting that plaintiffs have failed to meet their burden of proving numerosity. That plaintiffs' lack of more specific information regarding numerosity can be ascribed directly to defendant's failure to respond to discovery demands is a fact worthy of some consideration by the Court on a motion for class certification (*Galdamez v Biordi Const. Corp., 13 Misc 3d 1224(A), 831 N.Y.S.2d 347, 2006 NY Slip Op 51969(U), at *2 [Sup Ct NY Cty]*). [5]

4 Even as of the date of oral argument on this motion, defendant had neither provided the requested information nor affirmatively stated that to do so would be overly burdensome. In fact, when questioned on the issue by the Court, defendant's counsel stated, "We did not get an answer to that. . . . I mean, we can work on that" (Transcript at p 63).

5 To hold otherwise would provide an inappropriate temptation to this and future defendants to frustrate the discovery process. Here plaintiffs could not even be expected to resolve their dilemma by making a motion for an order compelling discovery, as defendant has stated through its counsel that it intends to comply with plaintiffs' demand and that it is taking the necessary steps to do so.

While the specific number of members of the proposed Bonus Minutes Class (as well as of the proposed subclasses) is not presently ascertainable with certainty, it is reasonable to infer from the large total number of subscribers with "bonus minute" plans and add-on phones that thousands of New Yorkers would fall within the proposed class and subclasses (*see Friar, supra, at 100* ["Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and commonsense assumptions from the facts before it."]; *see also Newman v. RCN Telecom Servs., 238 FRD 57, 72 [SDNY 2006]*). For present purposes, the Court is satisfied that plaintiffs have met their threshold burden on this motion of establishing numerosity.

PREDOMINANCE

The second prerequisite to class certification is that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members" [*5] (*CPLR 901 [a] [2]*). Plaintiffs must satisfy two distinct, but related, elements here: the commonality of issues and the predominance of those common issues over issues that require individualized consideration (*see e.g. Freeman v Great Lakes Energy Partners, LLC, 12 AD3d 1170, 1171, 785 N.Y.S.2d 640 [4th Dept 2004]*, citing *Friar, supra, at 98*). In order to apply this test, all four causes of action must be analyzed as to each of the proposed classes.

The first cause of action alleges deceptive acts and practices in violation of *GBL § 349*. The elements of this cause of action are "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff

suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank, 95 NY2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 [2000]* [citations omitted]).

Plaintiffs challenge numerous acts or practices of defendant relating to failures to disclose material terms, unilaterally changing terms, failing to notify subscribers of increases in fees and the like. That the acts challenged by plaintiffs were "consumer-oriented" is not in dispute. The issues surrounding this cause of action relate to whether defendant's practices, viewed objectively, were materially misleading and, if so, whether such acts and practices caused class members to sustain actual injury.

In seeking to establish the predominance of common issues, plaintiffs observe that the bulk of the *GBL § 349* claim involves defendant's allegedly deceptive and misleading contracts and billing statements. With few exceptions, the language of these documents is essentially the same for members of both proposed classes (and subclasses). With respect to the Bonus Minute Class, putative class members executed Subscriber Agreements ("Agreements") with defendant setting forth the name of the cellular service plan to which they subscribed (*e.g.* National Action) and the number of basic minutes and bonus minutes allocated each month under such plan (*e.g.* 1,000 minutes of cellular service plus 200 "bonus minutes"). Likewise, plaintiffs argue that members of the proposed Spending Limit Class were notified of rate increases in the same (deceptive) manner: by the imbedding of such information in the promotional section of defendant's billing statements.

Defendant, however, argues that the predominance test is not satisfied here because extensive individualized inquiries are nonetheless required to resolve the *GBL § 349* claims of class members. As to the Bonus Minute Class, defendant first contends that at issue here is whether the allegedly deceptive acts and practices caused particular customers to select a specific rate plan. Stated in other words, defendant argues that customers must demonstrate that they relied upon defendant's alleged misrepresentations and deceptive practices in choosing their particular cellular service plan.

Defendant's argument highlights the important distinction between reliance and causation in cases brought pursuant to *GBL § 349*. Reliance and causation, while "twin concepts", are not identical (*Stutman, supra, at 30*). Reliance is the causal link between an alleged deceptive practice and a consumer's decision to transact business with the defendant, whereas causation refers to the link between an alleged deceptive practice and an actual injury sustained by a consumer as a result of a such a practice. It is by now well established that proof of reliance is not necessary under *GBL § 349*, but a plaintiff seeking an award of monetary damages under the statute must prove that he or she suffered an actual injury caused by the alleged deceptive act or practice (*Stutman, supra, at 29*).

[*6] In arguing that the Court must individually adjudicate whether defendant's deceptive practices caused particular customers to select a specific rate plan, defendant mistakenly seeks to interject the element of reliance into *GBL § 349*. If plaintiffs can demonstrate that defendant's representations regarding bonus minutes were objectively misleading in a material way to a reasonable consumer, they will be entitled to recover damages for actual injuries sustained by reason thereof. There is no requirement that plaintiffs must demonstrate reliance, reasonable or otherwise, upon anything said or done by defendant in purchasing their cellular service plan.

As an alternative argument against a finding of predominance, defendant asserts that its customers received an individualized explanation of the terms and conditions associated with the "bonus minutes" promotion as part of a "customized" consumer transaction. This need for individualized consideration of the oral and written representations made to customers regarding the "bonus minutes" promotion demonstrates, according to defendant, that resolution of the claims of the Bonus Minute class will require the testimony of customers and sales representatives to establish what words were actually spoken and what concepts were actually conveyed to class members in connection with their purchase of cellular service from defendant.

Defendant's contentions regarding the individualized nature of the sales transaction including extensive oral representations by sales representatives and the use of in-store promotional materials find considerable support in the evidentiary record compiled to date. It is clear that each of the nominative plaintiffs participated in a lengthy, unscripted "back and forth" with the sales representative from whom they purchased cellular service, including a discussion of the "bonus minutes" promotion. One of the nominative plaintiffs testified that he was told by his sales representative that "bonus minutes" were unrestricted; the other testified that some (but not all) of

the restrictions associated with "bonus minutes" were disclosed to him orally during the sales process.

It also is clear that each of nominative plaintiffs were exposed to different written promotional materials relating to the terms and conditions of defendant's "bonus minute" promotion during the sales process. Indeed, one of the nominative plaintiffs acknowledges viewing written materials at the time of his purchase setting forth restrictions associated with the use of "bonus minutes". And while both nominative plaintiffs purchased defendant's cellular service from the same retail outlet (through different sales representatives), it is apparent that the proposed Bonus Minute Class implicates the sales practices of hundreds, or even thousands, of defendant's authorized retailers.

Plaintiffs respond that defendant's argument runs afoul of both the express language of its contract documents as well as settled principles of contract interpretation. As plaintiffs correctly observe, the "Terms and Conditions" section of defendant's form Subscriber Agreements states: "This Agreement sets forth all of the agreements between the parties concerning the Service and purchase of the Equipment, and there are no oral or written agreements between them other than as set forth in this Agreement." Moreover, the parol evidence rule generally bars evidence of oral representations that would modify the unambiguous terms of a written agreement (*Madison Ave Leasehold, LLC v Madison Bentley Assoc's LLC, 8 NY3d 59, 66, 861 N.E.2d 69, 828 N.Y.S.2d 254 [2006]* [citations omitted]).

While plaintiffs are correct that the Subscriber Agreement disclaims the existence of other oral or written agreements between the parties, another contemporaneously executed writing signed by both the customer and the sales representative demonstrates the centrality [*7] of extrinsic oral and written representations regarding promotional rate plans, including the "bonus minutes" promotion, to the sales process.

As part of the transaction, each plaintiff was presented with a document entitled New Customer Checklist ("the Checklist"). The purpose of the Checklist was to "ensure [] that [the customer's] Nextel representative has fully explained important information about Nextel handsets and service." The Checklist begins by directing the customer to "read the following and signify [his] understanding and acceptance by placing [his] initials in the box next to [each] statement."

The fifth item on the checklist reads as follows: "My rate plan has been fully explained to me and I understand the terms of any special rate plan promotions and their expiration dates." Following this statement is hand-written information regarding the specific promotional plan promised to the customer (regular text is pre-printed material; italics is handwritten):

Rate Plan: *National Action 100/1 add on*

Minutes Call *1,000* DC: (illegible)
Bonus: *200*

Promotion: *49.99/*

Plaintiffs initialed each item of the Checklist, including the acknowledgment that they received a full explanation of the terms of any promotional rate plans, such as the bonus minute plan. In addition, plaintiffs signed the Checklist, as did a sales representative.

This contemporaneously signed writing acknowledging that customers had received an explanation of the "bonus minutes" promotion and understood its terms and conditions is sufficient to negate plaintiffs' reliance on the merger clause set forth in the Subscriber Agreement. "Where several instruments constitute part of the same transaction, they must be interpreted together. In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument" (*BWA Corp. v. Alltrans Express U.S.A., Inc., 112 AD2d 850, 852, 493 N.Y.S.2d 1 [1st Dept 1985]*). Thus, through the contemporaneously executed Checklist, the parties agreed and acknowledged as part of single integrated transaction that the terms and conditions of the "bonus minutes" promotion were explained to customers through oral representations and written materials.

This conclusion is consistent with the fact that the Subscriber Agreement does not define the term "bonus minutes" or otherwise set forth the terms and conditions associated the "bonus minutes" promotion. While plaintiffs argue that the absence of such language from the Subscriber Agreement makes "bonus minutes" the

equivalent of the customer's basic allotment of unrestricted minutes (*i.e.* the plaintiffs would receive a total of 1,200 unrestricted minutes), the Court is not persuaded that this construction is, as a matter of law, the only reasonable understanding of the term "bonus minutes". In fact, one of the nominative plaintiffs testified during his deposition that he understood at the time of his purchase that "bonus minutes" were subject to restrictions not applicable to his basic allotment of minutes.

Thus, even confining itself to the four corners of the Subscriber Agreement, the Court would conclude that the parties' Agreement is ambiguous with respect to the meaning of "bonus minutes" (*see Van Wagner Adv. Corp. v S & M Enters., 67 NY2d 186, 191, 492 N.E.2d 756, 501 N.Y.S.2d 628 [1986]).* Therefore, parol evidence could in any event be received with respect to parties' intended meaning of such [*8] term, notwithstanding the merger clause set forth in the Agreement (*see County of Broome v. Travelers Indem. Co., 58 NY2d 753, 762, 445 N.E.2d 209, 459 N.Y.S.2d 33 [1982]).*

Accordingly, the Court concludes that individualized consideration of the representations made to members of the proposed Bonus Minute Class during the sales process is necessary to determine whether such customers were subject to deceptive representations regarding "bonus minutes" and, if so, whether such representations caused such customers to sustain actual injury. After all, if the terms and conditions associated with the use of "bonus minutes" were fully disclosed to customers prior to their purchase, it cannot be said that such customers sustained an injury caused by the alleged deceptive practices (*Gale v. IBM, 9 AD3d 446, 781 N.Y.S.2d 45 [2d Dept 2004]*; *Sands v. Ticketmaster-New York, 207 AD2d 687, 616 N.Y.S.2d 362 [1st Dept 1994] lv dism. in part and den in part, 85 NY2d 904, 650 N.E.2d 1320, 627 N.Y.S.2d 318 [1995]*; *Deen v. New Sch. Univ., 2007 US Dist LEXIS 25295 [SDNY 2007]* ["A claim under *Section 349* cannot be maintained where the defendant fully disclosed the allegedly deceptive practice."]). To hold otherwise would allow deception to serve both as act and injury, which it may not (*Small v. Lorillard Tobacco Co., 94 NY2d 43, 56, 720 N.E.2d 892, 698 N.Y.S.2d 615 [1999]*; *see Donahue v. Ferolito, Vultaggio & Sons, 13 AD3d 77, 786 N.Y.S.2d 153 [1st Dept 2004]).* [6]

> 6 The Court recognizes that *GBL § 349* does authorize relief in certain circumstances without a demonstration of actual injury caused by the alleged deceptive trade practices. However, capacity to maintain such an action is limited to the New York State Attorney General, and the relief available therein is limited to an injunction and the "restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices" (*id. [b]*). While the 1980 amendments to *GBL § 349* did authorize a private right of action, such an action may only be maintained by a "person who has been injured by reason of a [] violation of this section" (*id. [h]*).

Further, based on the need for individualized inquiries concerning the specific oral and written representations regarding "bonus minutes" provided to customers during the sales process, it cannot be said that the issues common to members of the Bonus Minute Class predominate (*Gaidon v. Guardian Life Ins. Co., 2 AD3d 130, 130, 767 N.Y.S.2d 599 [1st Dept 2003]*; *DeFilippo v. Mut. Life Ins. Co., 13 AD3d 178, 180-181, 787 N.Y.S.2d 11 [1st Dep't 2004]*; *Solomon v. Bell Atl. Corp., 9 AD3d 49, 52, 777 N.Y.S.2d 50 [1st Dept 2004]).* [7]

> 7 Ths conclusion follows even if, as plaintiffs appear to contend, causation may be presumed under *GBL § 349*. Even if plaintiffs could rely upon such a presumption, defendant would be entitled to seek to rebut this resumption through the examination of individual consumers.

Similar individualized inquiries as to the causal connection between defendant's alleged deceptive practices and actual injury on the part of class members are necessary to resolve the *GBL § 349* claim of the Spending Limit Class. This claim is premised on the contention that defendant's practice of imbedding notification of rate increases in the promotional section of the customer's bill constitutes a deceptive practice. Plaintiffs correctly observe that the inquiry as to whether this practice is deceptive is an objective one: whether the method chosen by defendants is misleading to a reasonable consumer acting in a reasonable manner (*see Samuel v Time Warner, Inc., 10 Misc 3d 537, 540, 809 N.Y.S.2d 408 [Sup Ct, NY Cty 2005]).* As part of this cause of action, [*9] plaintiffs will need to establish, *inter alia*, that the form of notice provided by defendant would not have alerted a reasonable person that his Spending Limit Plan rates were about to increase.

But proof of deception is only part of the necessary inquiry. For members of the Spending Limit class to recover an award of monetary damages, they must prove that they sustained an actual injury caused by defendant's allegedly deceptive form of notification. The theory of injury put forward by plaintiffs is that the manner in which they were notified of the proposed rate increases denied them the opportunity to cancel their service without penalty, thereby subjecting them to increased fees of which they lacked prior notice.

For class members who were, in fact, misled by the imbedded form of notice, such a claim will lie (*cf. Dupler v. Costco Wholesale Corp., 249 FRD. 29, 36-37 [EDNY 2008]* [actionable omissions]). However, class members who read the entire bill statement (including the notification of rate increases) and nonetheless decided to continue cellular service with defendant pursuant to the Spending Limit Plan cannot be said to have suffered an actual injury caused by the alleged deceptive form of notice (*see Whalen v. Pfizer, Inc., 9 Misc. 3d 1124A, 862 N.Y.S.2d 812, 2005 NY Slip Op 51779U, 3 (NY Sup Ct 2005]).* Such customers are in no different position than if they had received "perfect" notice. And any increase in subscriber fees imposed upon them was caused solely by their voluntary decision to continue service with defendant, notwithstanding the rate increase. This need for numerous individualized inquiries is fatal to plaintiffs' predominance argument.

The second cause of action alleges violations of *GBL § 350*. Here the essential elements require proof of false advertising, *knowing reliance by the plaintiff* on that false advertising and injury caused by that reliance (*see Klein, supra, at 72, and cases cited therein*). Plaintiffs' burden of proving that class members knew of the allegedly false advertising and relied upon it in choosing to purchase their service contracts will entail individualized proof (*id.*). As seen above, this militates against class certification on this cause of action (*cf. Strauss v Long Island Sports, Inc., 60 AD2d 501, 506, 401 N.Y.S.2d 233 [2d Dept 1978]*). [8]

> 8 Not surprisingly, in light of the element of reliance attendant upon any *GBL § 350* claim, this Court's research has failed to disclose a single reported New York case in which a class certification motion for such a cause of action was ultimately successful.

The third cause of action alleges a breach of the implied covenant of good faith and fair dealing. Where, as here, such a cause of action merely reiterates claims brought under a separate cause of action for breach of contract, it is subject to dismissal as duplicative (*see id., citing Jacobs Private Property LLC v 450 Park LLC, 22 AD3d 347, 803 N.Y.S.2d 14 [1st Dept 2005], Cerberus Int'l Ltd. v Banctec, Inc., 16 AD3d 126, 791 N.Y.S.2d 28 [1st Dept 2005]*, and *Parker East 67th Assocs. v Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York, 301 AD2d 453, 754 N.Y.S.2d 255 [1st Dept 2003]*). Accordingly, in the interest of judicial economy, this cause of action is dismissed *sua sponte*.

Finally, plaintiffs have failed to demonstrate predominance with respect to their fourth cause of action, alleging breach of contract. As explained, *supra*, resolution of the claims of members of the proposed Bonus Minute Class will require the Court to delve into the oral and written representations provided to customers during the sales process. Similarly, the issue of [*10] whether members of the proposed Spending Limit class have viable claims for monetary damages based on defendant's alleged failure to provide adequate notice of rate increases also requires considerable individualized consideration (*see Dillon v. U-A Columbia Cablevision of Westchester, Inc., 100 NY2d 525, 526, 790 N.E.2d 1155, 760 N.Y.S.2d 726 [2003]* [voluntary payment document "bars recovery of payments voluntarily made with full knowledge of the facts"]).

In reaching the foregoing conclusions, the Court recognizes that the need for some individualized treatment of damages generally does not bar class certification (*see e.g. Englade v Harper Collins Publishers. Inc., 289 AD2d 159, 160, 734 N.Y.S.2d 176 [1st Dept 2001] and cases cited therein; cf. In re Nassau County Strip Search Cases, 461 F3d 219 [2d Cir 2006]).* However, at issue here is more than determining the amount owed to particular class members. Rather, the issue is whether members of the proposed classes can legitimately claim to have suffered injury caused by defendant's allegedly deceptive practices. Accordingly, the Court concludes that plaintiffs have failed to demonstrate that questions of law or fact common to the class predominate over issues affecting only individual members.

TYPICALITY

The third prerequisite to class certification is that

"the claims or defenses of the representative parties are typical of the claims or defenses of the class" (*CPLR 901 [a] [3]*). In order to satisfy this requirement, plaintiffs need not share every claim asserted on behalf of every member of every class (*see Pruitt v Rockefeller Center Properties, Inc., 167 AD2d 14, 22, 574 N.Y.S.2d 672 [1st Dept 1991]*). Further, "it is not necessary that the claims of the named plaintiffs be identical to those of the class" (*id*, quoting *Super Glue Corp. v Avis Rent-A-Car Systems, 132 AD2d 604, 607, 517 N.Y.S.2d 764 [2d Dept 1987]*). Typicality is satisfied so long as the named plaintiffs' claims "arise [] out of the same course of conduct as the class members' claims and [are] based on the same cause[s] of action" (*id. at 22*).

Here plaintiffs' claims are typical of the claims of the classes they seek to represent. Morrissey entered into a subscription agreement with defendant by which he purchased two cell phones on a "shared" plan only to learn that the bonus minutes for which he had contracted were allegedly not credited to him in accordance with the terms of his contract. Likewise, Ciarfello subscribed to a two-year "Spending Limit" plan and learned that the monthly fee for that plan was unilaterally increased by defendant, allegedly without adequate notice to him. While these claims do not encompass every single situation experienced by every member of each class, plaintiffs' claims are "typical" in that they "arise out of the same course of conduct" and are "based on the same cause[s] of action." The typicality prerequisite to class certification is therefore satisfied.

ADEQUACY OF REPRESENTATION

The fourth prerequisite to class certification is that "the representative parties will fairly and adequately protect the interest of the class" (*CPLR 901 [a] [4]*). To meet this requirement plaintiffs must show both that class counsel is qualified and capable of seeing this litigation through to its ultimate conclusion and that no conflict of interest exists that would pit the nominative plaintiffs against other members of the classes or subclasses (*see In re Drexel Burnham Lambert Group, Inc., 960 F2d 285, 291 [2d Cir 1992]*, citing *Eisen v Carlisle and Jacquelin, 391 F2d 555, 562 [2d Cir 1968]*). Both prongs of this test have been met here.

Plaintiffs' counsel has considerable experience with complex litigation in general and [*11] class actions in particular. Their professional adequacy is therefore apparent. In addition, in plaintiffs' counsel's reply affidavit, counsel asserts that the firm has agreed to advance the funds necessary to finance the litigation. This obviates any necessity for a detailed analysis of plaintiffs' personal financial status as a factor to be used in determining plaintiffs' own adequacy to represent the classes zealously (*see Wilder v May Department Stores Co., 23 AD3d 646, 648, 804 N.Y.S.2d 423 [2d Dept 2005]*).

Defendant contends, however, that plaintiffs' counsel are not fit to represent the class members. Specifically, defendant questions the means by which counsel was retained by the two nominative plaintiffs and alleges some impropriety. A review of the record shows that Ciarfello found counsel through an advertisement in a telephone book. This is hardly evidence of improper conduct. Morrissey, on the other hand, testified to having been contacted by counsel through a letter. Absent more, this does not establish wrongdoing. Moreover, it is only where egregious unethical behavior is demonstrated on the part of counsel that a court may use this as grounds for denying class certification (*see e.g. Meachum v Outdoor World Corp., 171 Misc 2d 354, 359, 654 N.Y.S.2d 240 [Sup Ct Queens Cty 1996] and cases cited therein*). Defendant's proof falls well short of meeting this standard.

Defendant also contends that Morrissey and Ciarfello are not fit to represent class members due to their perceived lack of intimate knowledge of the procedural and legal details of the litigation. This is not the standard, however. It is sufficient that a nominative plaintiff have, "at the very least, a general awareness of the nature of the underlying dispute, the ongoing litigation, and the relief sought on behalf of the class" (*Wilder, supra, at 648* [citations omitted]). As is clear not only from the supporting affidavits of plaintiffs but from their deposition testimony, both Morrissey and Ciarfello clearly understand what factual issues are at the center of this controversy, what the nature of class litigation is and what ultimate relief is sought on behalf of the class members. The adequacy requirement has therefore been met.

SUPERIORITY

The final prerequisite to class certification is that plaintiffs must prove that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (*CPLR 901 [a] [5]*). In the present case the only alternative "available method"

for the adjudication of class members' claims, as conceded, would be the prosecution of individual actions. Plaintiffs argue, with some force, that the prosecution of hundreds or thousands of separate actions can hardly be deemed "superior" to a single class action, particularly given the limited amount of damages alleged sustained by each customer.

However, it must be noted that in enacting *GBL § 349*, the State Legislature specifically crafted remedies targeted to the needs of consumers who possess claims of modest dollar value. Thus, the statute authorizes both a minimum level of statutory damages and an award of treble damages (up to $ 1,000) upon proof of scienter (*see id. [h]*). Neither such remedy is available in a class action lawsuit (*see CPLR 901 [b]*; *Ridge Meadows Homeowners' Ass'n v. Tara Dev. Co., 242 AD2d 947, 665 N.Y.S.2d 361 [4th Dept 1997]*). Notably, the statute also authorizes a prevailing consumer to obtain an award of attorney's fees from the defendant, an extraordinary remedy designed to assist victims of deceptive trade practices in obtaining the representation of counsel.

And even more fundamentally, "the necessity of conducting the above-discussed individual inquiries would render the litigation extremely difficult if not impossible to manage, [*12] and an inefficacious means of adjudicating any underlying common issue" (*Solomon v. Bell Atlantic, supra, at 56*).

Under these circumstances, the Court is not persuaded that a class action would be a superior means of resolving the claims of class members.

OUT OF STATE CLAIMS

In view of the foregoing, the Court need not delve into plaintiff's request to concentrate the litigation of claims arising in thirty other states in this forum. The undesirability of this is, in any event, manifest: precluded from applying New York consumer protection laws to claims arising out-of-state, (*see e.g. Montgomery v New Piper Aircraft, Inc., 209 FRD 221, 228 [SD FL 2002]*, citing *Healy v Beer Institute, 491 US 324, 109 S. Ct. 2491, 105 L. Ed. 2d 275 [1989]*), the Court would be required to apply the law of the particular state in which a given claim arose. Moreover, it would be a New York fact-finder who would ultimately determine the rights of out-of-state class members based upon its particular interpretation of the other state's laws. As the United States Supreme Court has recognized, "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute" (*BMW, Inc. of North America v Gore, 517 US 559, 572, 116 S. Ct. 1589, 134 L. Ed. 2d 809 n 17 [1996]*). A New York court or jury forcing its interpretation of a sister State's laws upon out-of-state class members would not be a superior remedy.

Furthermore, if this matter were to proceed to trial as a multi-state class action the difficulties to be encountered would be virtually insurmountable. Would one jury be instructed to consider each of the two causes of action under the laws of thirty-one different States? Would up to thirty-one separate trials be required instead? Or would the Court be required to engage in the Herculean task of reviewing the consumer protection statutes of the various States and the common law of contracts in those States and then segregating claims into groups based upon legal similarities? Whatever the answers to these questions, it is obvious that a multi-state class action lawsuit prosecuted in New York under the laws of more than two dozen different jurisdictions would not be superior to other available methods for the fair and efficient adjudication of the controversy.

CONCLUSION

The Court concludes that plaintiffs have failed to meet their burden of demonstrating that each of the prerequisites to class certification has been satisfied (*see CPLR 901 [a] [1-5]*). Had these prerequisites been satisfied, consideration of the additional factors enumerated in *CPLR 902* would also have been necessary (*Fleming v Barnwell Nursing Home & Health Facilities, 309 AD2d 1132, 1134, 766 NYS2d 241 [3d Dept 2003]*). However, this analysis is obviated by plaintiffs' failure to have established the basic criteria of *CPLR 901*.

Accordingly, it is

ORDERED that plaintiffs' motion for class certification is denied in all respects.

This constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to defendant's counsel. The signing of this Decision and Order shall not constitute entry or filing under *CPLR Rule 2220*. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York

February 19, 2009

RICHARD M. PLATKIN

A.J.S.C.

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[*1] SCOTT SCHREIBER, a shareholder of HOMESAFE AMERICA, INC., suing in the right of HOMESAFE AMERICA, INC, and SCOTT SCHREIBER individually, as a creditor of HOMESAFE AMERICA, INC, Plaintiffs, -against- HOMESAFE AMERICA, INC, GUY SAMUEL and CONSUMER FIRST CORP. d/b/a CONSUMER FIRST LAW GROUP, Defendants. INDEX No. 002344/11

002344/11

SUPREME COURT OF NEW YORK, NASSAU COUNTY

2011 NY Slip Op 31445U; 2011 N.Y. Misc. LEXIS 2591

May 16, 2011, Decided
May 20, 2011, Entered

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [**1] Present: HON. STEPHEN A. BUCARIA, Justice.

OPINION BY: STEPHEN A. BUCARIA

OPINION

Motion by plaintiff for injunctive relief is **denied**, except that the temporary relief previously granted is continued pending further order of the court. Cross-motion by defendants to dismiss the complaint on the ground of *in pari delicto* is **granted**. The matter is referred to the New York State Attorney General for appropriate action.

This is a shareholder derivative action seeking an accounting. Plaintiff Scott Schreiber is a 50 % shareholder of Home Safe America, Inc. Defendant Guy Samuel is the [*2] other 50% shareholder. Home Safe was formed in December 2008. The corporation was engaged in the business of assisting financially distressed homeowners to restructure their loans and avoid foreclosure. Plaintiff alleges that he initially contributed $18,000 to the capital of the corporation. Although it appears that Samuel did not contribute any initial capital, in July of 2009 he obtained a $50,000 loan to Home Safe from Leonid and Anna Grossfeld, who are presumably relatives of Samuel.

Plaintiff alleges that between November 29 and December 6, 2010 Samuel withdrew $181,000 of Home Safe's funds. Plaintiff further alleges that Samuel [**2] used this money to form a competing company, defendant Consumer First Corporation.

This action was commenced on February 16, 2011. Plaintiff sues derivatively on behalf of Home Safe. Plaintiff asserts various claims, including waste of corporate assets and breach of fiduciary duty. Plaintiff seeks various forms of relief, including an accounting and the setting aside of fraudulent conveyances.

Plaintiff moves for a preliminary injunction restraining Samuel from disposing of any of the funds diverted from Home Safe, restraining Consumer First Corporation from disbursing assets except in the ordinary course of business, and restraining Consumer First from distributing any funds to Samuel. Plaintiff also seeks an order setting aside the transfer of the $181,000 as a fraudulent conveyance and removing Samuel as an officer or director of Home Safe. Finally, plaintiff seeks attorney's fees pursuant to *§ 276-a of the Debtor and*

Creditor Law.

Samuel admits that he withdrew $175,000 of Home Safe's funds and took three of the company's personal computers. Samuel asserts that he used the money to pay off loans to the company, pay himself a share of the profits, and retire his "equity interest" in [**3] the corporation. Samuel does not identify which loans were paid other than the $50,000 loan made by the Grossfeld's. While Samuel acknowledges that Home Safe paid the Grossfeld's $35,000, he insists that the payment was interest rather than principal.

Defendants cross-move to dismiss the complaint for lack of capacity pursuant to *CPLR 3211(a)(3)* and for failure to state a cause of action pursuant to *CPLR 3211(a)(7)*. Defendants argue that because the parties conducted their business in violation of *Real Property Law § 265-b* plaintiff seeks to enforce an illegal agreement and does not come to court with clean hands.

[*3] Pursuant to *Real Property Law § 265-b(2)* a "distressed property consultant" is prohibited from charging for or accepting any payment for consulting services before the full completion of such services. Samuel frankly admits that, "We collected fees up front" (Aff at ¶ 5). For his part, Schreiber asserts that he has issued $28,480 in "customer refunds" (Aff at ¶ 11) but "almost 1,000 families ...prepaid for loan modification services" (Reply aff at ¶ 2). Thus, the parties do not dispute that Home Safe flagrantly violated the statutory prohibition on accepting payment for consulting [**4] services before the services were complete.

The doctrine of *in pari delicto* mandates that courts will not intercede to resolve a dispute between two wrongdoers (***Kirschner v KPMG***. *15 NY3d 446, 464, 938 N.E.2d 941, 912 N.Y.S.2d 512 [2010]*). The doctrine serves important public policies, i.e. deterring illegality and avoiding entangling courts in disputes between wrongdoers. "No court should be required to serve as paymaster of the wages of crime, or referee between thieves." The doctrine applies where a willful wrongdoer sues someone who is alleged to be merely negligent and where both parties acted willfully. The doctrine should not be "weakened by exceptions" and applies even in "difficult cases" (Id).

Not every regulatory misstep by an entrepreneur will disqualify him from suing his partner for breach of fiduciary duty. However, where the parties' method of doing business is in willful violation of a statute designed to protect a class of vulnerable consumers from abuse, public policy requires that the partners each be barred from seeking an accounting. *Real Property Law § 265-b* became effective September 1, 2008, only two months before Home Safe was formed. However, neither Schreiber nor Samuel denies that he had knowledge [**5] of the prohibition on advance distressed home loan consulting fees. Moreover, Samuel worked as a loan officer for mortgage bankers since 2006. Thus, it may be inferred that Samuel was aware of mortgage industry regulations. Samuel's knowledge of the prohibition on accepting home loan consulting fees in advance must be imputed both to Home Safe and the other 50 % shareholder (*15 NY3d at 466*). The court concludes that Schreiber's violation of *Real Property Law § 265-b* was willful.

Plaintiff argues that because part of the recovery would accrue to the benefit of homeowners, the class sought to be protected by the statute, the court should allow an exception to the principle of *in pari delicto* for derivative actions. The court notes that *Real Property Law § 265-b* contains a penalties and remedies provision. Subdivision four provides that if the court finds that a distressed property consultant has violated any provision of the statute, the court may make null and void any agreement between the distressed homeowner and the distressed property consultant. The statute also provides that the homeowner may commence an action against the distressed property consultant to recover [*4] actual and consequential [**6] damages and, for an intentional or reckless violation, the court may award treble damages and attorney's fees (*Real Property Law § 265-b[4][b]*).

In addition to these remedies, the Attorney General may commence a special proceeding and obtain injunctive relief restraining any further violation of the statute (*Real Property Law § 265-b[4][d]*). In such a proceeding, the court may grant the Attorney General an allowance of up to $2,000 per defendant and direct restitution to the homeowners (Id). In addition, the court may impose a civil penalty of not more than $10,000 for each violation. Finally, the penalties of *Real Property Law § 265-b[4]* are not exclusive and are in addition to any other remedies and penalties provided by law (*Real Property Law § 265-b[4][e]*).

In view of the availability of an action by the Attorney General, the large number of potential

restitution claims, and the parties' interest in retaining Home Safe's funds, the court determines that the present action is not an ideal method for reimbursing defrauded homeowners. Accordingly, there is no reason to depart from the principle of *in pari delicto* in the present case. Defendants' cross-motion to dismiss the complaint [**7] on the ground of unclean hands or *in pari delicto* is **granted**. Plaintiff's motion for injunctive relief is **denied**. except that the temporary restraining orders issued by the court in its order to show cause dated February 16, 2011 shall continue pending further order of the court. The matter is referred to the New York State Attorney General for whatever action he deems appropriate.

So ordered.

Date: MAY 16 2011

/s/ Stephen A. Bucaria

J.S.C.

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2 of 2 DOCUMENTS

Analysis
As of: Jun 25, 2011

[*2] THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW M. CUOMO, Attorney General of the State of New York, Petitioner, -against- AMERIMOD INC., THE AMERICAN MODIFICATION AGENCY INC., and SALVATORE PANE, JR., INDIVIDUALLY and as principal of AMERIMOD INC., and THE AMERICAN MODIFICATION AGENCY INC., Respondents.

402032/09

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2010 NY Slip Op 31360U; 2010 N.Y. Misc. LEXIS 2433

April 7, 2010, Decided
April 21, 2010, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Motion denied by *People v. Amerimod Inc., 2011 N.Y. Misc. LEXIS 2283 (N.Y. Sup. Ct., May 2, 2011)*

JUDGES: [**1] PRESENT: Emily Jane Goodman, J.S.C.

OPINION BY: Emily Jane Goodman

OPINION

[*2] **Emily Jane Goodman, J.S.C.**:

Petitioner the People of the State of New York, by Andrew M. Cuomo, Attorney General of the State of New York (petitioner) brings this special proceeding, pursuant to *Executive Law (EL) § 63 (12)*, *Real Property Law (RPL) § 265-b*, and *General Business Law (GBL) §§ 349 (a)* and *350-d*, to enjoin respondents Amerimod Inc., The American Modification Agency Inc. (together, Amerimod) and Salvatore Pane, Jr., individually, and as a principal of Amerimod and American Modification Agency Inc. from engaging in numerous fraudulent acts in connection with respondents' loan modification business, whereby, according to petitioner, some thousand or more homeowners were victimized. Petitioner also seeks restitution, damages, penalties and costs. Respondents [*3] cross-move for an order vacating the existing temporary restraining order (TRO).

I. Background

Amerimod claims to be in the business of obtaining loan modifications for homeowners whose mortgages are threatened with, or already in, foreclosure. Amerimod's mission is, allegedly, to find the means to allow its clients to remain in their homes, by obtaining forgiveness, [**2] or restructuring of, debt, by, among other things,

obtaining more favorable loan terms, such as reducing the amounts homeowners are required to pay to their mortgage lenders, and reducing interest rates. Petitioner maintains that, instead of helping clients in their time of distress, Amerimod has preyed on homeowners in a number of ways which violate both *RPL § 265-b* and GBL Article 22-A, often leaving its clients in worse positions than they were before Amerimod's intervention.

Among Amerimod's alleged wrongdoing is its illegal collection of up-front fees in exchange for services which are often not provided; the making of numerous false claims in advertising its services, including that it is "licensed" by the State; the failure to make required disclosures in its contracts, including the client's right to walk away from the contract within five days of its execution; the failure to provide its [*4] clients, especially Spanish-speaking clients, [1] with contracts in their own language; the holding out of itself to be a law firm, or to retain lawyers on behalf of clients; grossly misleading clients as to its success rates; falsely informing clients that they could not obtain any form of [**3] loan restructuring from their banks without Amerimod's intervention; misleading clients as to how long the loan modification process will take; and making itself unavailable to its clients once it has obtained fees up-front. Petitioner claims that the individual respondent, Salvatore Pane, Jr. (Pane) has, as Amerimod's principal, participated in Amerimod's acts of wrongdoing and fraud, in such a manner as to make himself personally liable for Amerimod's misdeeds.

1 Apparently, Amerimod focused a large part of its advertizing on Spanish-speaking customers.

On August 13, 2009, another judge of this court issued a TRO enjoining respondents from engaging in the above-described fraudulent acts. Respondents seek to vacate the TRO on the grounds that petitioner does not have proof of the misrepresentations and wrongful acts of which Amerimod has been accused, and that the instigation of the TRO has forced it to cease all business, placing its clients in jeopardy, and making it unable to pay its employees.

[*5] **II. Discussion**

EL § 63 (12) permits the Attorney General to commence a proceeding to enjoin acts of "fraud or illegality in the carrying on, conducting or transaction of business ... ." The Attorney [**4] General may also seek restitution and damages under this section. The terms "fraud" or "fraudulent" include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." *Id.*; *see also People v Apple Health and Sports Clubs, Ltd., Inc., 80 N.Y.2d 803, 599 N.E.2d 683, 587 N.Y.S.2d 279 (1992)*. Fraud under *EL § 63 (12)* is established if "the targeted act has the capacity or tendency to deceive, or creates as atmosphere conductive to fraud." *People v General Electric Co., Inc., 302 AD2d 314, 314, 756 N.Y.S.2d 520 (1st Dept 2003)*. The statute is broadly construed so as to protect "not only the average consumer, but also 'the ignorant, the unthinking and the credulous.'" *Id.*, quoting *Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 273, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977)*. And, while injunctive relief is ordinarily not appropriate to "operate on acts already performed" (*Allen v Pollack, 289 AD2d 426, 427, 735 N.Y.S.2d 147 [2d Dept 2001]*), injunctive relief calling for the cessation of further deceptive practices in consumer-related matters is appropriate in the context of a proceeding pursuant to *EL § 63 (12)*. *See People v General Electric Company, Inc., 302 AD2d 314, 756 N.Y.S.2d 520, supra.*

[*6] Matters brought [**5] pursuant to *EL § 63 (12)* are brought as special proceedings under *CPLR 409 (b)*, and "are subject to the same standards that apply to a motion for summary judgment." *Matter of People v Applied Card Systems, Inc., 27 AD3d 104, 106, 805 N.Y.S.2d 175 (3d Dept 2005)*; *see also Matter of Port of New York Authority v 62 Cortlandt Street Realty Co., 18 NY2d 250, 219 N.E.2d 797, 273 N.Y.S.2d 337 (1966)*. "[W]here the petition and supporting papers contain sufficient allegations of fact to merit the relief requested and the respondents have raised no triable issues of fact by an evidentiary showing, but only assert conclusory statements in a general denial, judgment without trial is proper [internal citation omitted]." *Matter of People v Telehublink Corp., 301 A.D.2d 1006, 1007, 756 N.Y.S.2d 285 (3d Dept 2003)*; *see also Matter of State of New York v Daro Chartours, Inc., 72 A.D.2d 872, 422 N.Y.S.2d 146 (3d Dept 1979)*.

GBL § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state ... ." *See also Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d 20, 24, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995)*. *GBL § 349 (b)*

allows the Attorney General to bring an action or proceeding to enjoin such acts on behalf of the people [**6] of the State, and to obtain restitution.

To state a claim under *GBL § 349 (a)*, "a plaintiff must allege that the defendant engaged 'in an act or practice that is deceptive or misleading in a material way and that plaintiff has [*7] been injured by reason thereof.'" *Small v Lorillard Tobacco Co., Inc., 94 NY2d 43, 55, 720 N.E.2d 892, 698 N.Y.S.2d 615 (1999)*, quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d at 25*. "Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim." *Small v Lorillard Tobacco Co. Inc., 94 NY2d at 55*.

GBL § 350 finds unlawful "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state ... ." *GBL § 350-a* invokes

> not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity or employment to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

GBL § 350-d permits the Attorney General to seek civil penalties for violation [**7] of any part of Article 22-A of the GBL, including *GBL § 350*.

RPL § 265-b (2) (b) prohibits "distressed property, consultants" from charging fees prior to completion of their services. This section became law on September 1, 2008. *RPL § 256-b (3) (a) (iii)* requires that the contract be "written in the same language that is used by the homeowner and was used in discussions between the consultant and the homeowner ... ." *RPL § 265-b (3) (a) (viii)* requires that distressed property consultants provide their clients with contracts which, among [*8] other things, contain a right to cancel the contract without penalty within five days of execution of the contract, in a form set forth in the section.

Petitioner has provided ample evidence that Amerimod has conducted itself fraudulently under *EL § 63 (12)*, and violated both the RPL and GBL in its business practices. Amerimod has only claimed, in conclusory fashion, that there are substantial factual issues in dispute, and has alleged bad faith on petitioner's part, which is also conclusory.

Respondents claim that the advertisements which form the part of the case against Amerimod were placed by unnamed "independent contractors" acting without Amerimod's [**8] approval. These claims are wholly unsupported by any evidence whatsoever, and belie credibility. There is no basis to believe that the advertisements were placed by anyone other than Amerimod, or without Amerimod's blessing.

Further, the petitioner has established that Amerimod's numerous advertisements falsely claim that Amerimod has successfully addressed 7,000 claims, and has a success rate of 90% to 100%. *See* Aff. in Support, Ex C, exs. 1-24. Although Amerimod, in defense of this petition, attests to having successfully modified 1,300 loans, out of 3,000 applications (Aff. of Pane, P 5), this claim merely illuminates that its advertisements are materially misleading.

[*9] Amerimod has also not attempted to refute the charge that it claimed to be "licensed" by some governmental agency, a claim made in many of its advertisements. Nor has it addressed the claim made in its advertisements that it was affiliated with "legal experts."

Not all of the petitioner's claims are conclusive, however. Amerimod now claims that it informed its representatives in an e-mail never to tell a borrower not to make a mortgage payment (Amerimod Opp. Ex C). Although it does not deny sending "thank you" letters [**9] informing customers that they should not deal with calls for collection, and should refer all such communications to Amerimod (Petition, Ex AA), advising clients not to deal with collection calls is not the same as advising them to ignore the requirement to keep abreast of their mortgage payments. Regardless, Amerimod does not seriously challenge the numerous accusations that it failed to attend to its clients after it received payment of its initial fee.

In response to respondents' claim that this proceeding was brought in bad faith, the petitioner has provided a great deal of evidence as to a meticulous investigation of Amerimod's business, bringing in a mass of testimony and other evidence that shows that

Amerimod misled its customers concerning its ability to help them modify their mortgages, and did, in fact, fail to make good on its promises. In total, Amerimod has failed to avert the [*10] charges that it breached *GBL §§ 349* and *350*.

Amerimod have also violated *RPL § 265-b*. There is no question that, after the inception date of the statute, Amerimod took up-front fees, failed to provide contracts in the language of the customer, especially Spanish, and failed to allow for the five-day [**10] notice of rescission. While Amerimod maintains that it only found out about the statute two months after it went into effect, and changed its policies accordingly, the evidence presented by the petitioner shows that Amerimod was still taking in up-front fees into 2009; was not offering contracts in any language other than English; and was not providing a five-day rescission period in the form required by the statute (although some contracts alluded to a five-day rescission period). Therefore, the petitioner has established a violation of statute under *RPL § 265-b*, as well as under the GBL, and pursuant to *EL § 63 (12)*.

Additionally, respondent Pane (the President, CEO and sole principal and the sole shareholder of Amerimod) is personally liable for engaging in fraudulent and illegal acts. *EL § 63 (12)* is directed against "any person" who "engage[s] in repeated fraudulent or illegal acts." Corporate officers and directors are liable for illegal or fraudulent acts if they personally participate in those acts or have knowledge of them. *See People v Apple Health and Sports Clubs, Ltd., 80 N.Y.2d 803, 599 N.E.2d 683, 587 N.Y.S.2d 279 (1992)*; *see* [*11] *also Peguero v 601 Realty Corp., 58 AD3d 556, 873 N.Y.S.2d 17 (1st Dept 2009)* (corporate officer [**11] who participated in tort may be held individually liable). Notably, respondents fail to separately address the issue of Pane's personal liability. Pane, who appeared on numerous commercials touting Amerimod's services (Ex E), does not deny statements that he "was clearly the person in charge at Amerimod" and was the only decision maker (Ex H-13; Ex P at 22), who approved all of the expenditures on marketing and advertising and approved the content (Ex P at 68, 70); nor does he deny that he made the statements attributed to him in the press to the effect that Amerimod helped more than 7,000 homeowners and did not violate law by taking upfront fees because the money was "placed in escrow" (Ex Q). Accordingly, as petitioner has submitted evidence of Pane's fraudulent and illegal acts, and, as respondents have failed to differentiate the acts of Amerimod from the acts of Pane, who is undisputedly in charge of Amerimod, it is proper to hold Pane personally liable for the violations found herein. [2]

2 Banking records indicate that since May 1, 2008, nearly $ 1.25 million dollars has been transferred from respondents' checking accounts to accounts in the name of three other entities connected [**12] with respondents, including one entity operated by Pane's brother, although respondents contend that this was done in the ordinary course of business.

As a result of the foregoing, respondents' cross motion to lift the TRO is denied. Respondents further request to release [*12] $ 4,800 from its accounts to notify customers whose files remain open is denied, but the parties are free to agree to such release for that purpose, and in fact, may have already agreed to the release. [3]

3 Due to the issues raised herein, the Court will forward the Decision and Order, and the Judgment, to the office of the District Attorney.

Accordingly, it is

ORDERED that the petition is granted in accordance with the terms herein; and it is further

ORDERED that the respondents Amerimod Inc., The Amerimod Modification Agency Inc., and Salvatore Pane, Jr., individually and as principal of Amerimod Inc. and Amerimod Modification Agency Inc. are hereby permanently enjoined from violating *EL § 63 (12)* and *GBL §§ 349-d* and *350* by engaging in the fraudulent, deceitful and illegal acts as set forth in the petition; and it is further

ORDERED that the matter of the amount of restitution, costs and fees, and civil penalties under [**13] *GBL § 349-d*, and any discovery issues related thereto, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by *CPLR 4317*, the Special Referee, or other person designated by the parties to serve as referee shall determine the aforesaid issue; and it is further

[*13] ORDERED that resolution of the matter of

the amount of restitution, costs and fees, and civil penalties is held in abeyance pending receipt of the report and recommendation of the Special Referee, and a motion pursuant to *CPLR 4403*; and it is further

ORDERED after decision on a motion to confirm and or reject the report of the Special Referee, the Court will issue Judgment in this matter; and it is further

ORDERED that the cross motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: April 7, 2010

ENTER:

Emily Jane Goodman

J.S.C.

EMILY JANE GOODMAN

4

[*1] LINDA L. PARNES, Appellant, v STEVEN M. PARNES, Respondent. PAUL VAN RYN, Respondent.

509617

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

2011 NY Slip Op 136; 80 A.D.3d 948; 915 N.Y.S.2d 345; 2011 N.Y. App. Div. LEXIS 156

January 13, 2011, Decided
January 13, 2011, Entered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff wife brought a divorce proceeding against defendant husband. The wife then amended the complaint to reflect that the husband had conspired with his counsel to cause the wife anguish. The Supreme Court, Rensselaer County (New York), granted the husband's motion to, among other things, quash a subpoena issued to the husband's counsel and disqualify the wife's counsel. The wife appealed.

OVERVIEW: The wife discovered and used a password to access the husband's e-mail account, printed e-mails between him and his counsel, and turned them over to her counsel. The wife's counsel then, among other things, questioned the husband about those e-mails during a deposition and subpoenaed the husband's counsel for a deposition and to produce documents. The trial court quashed that subpoena and disqualified the wife's counsel. The appellate court found that the e-mails were privileged under *CPLR 4503(a)*. However, the husband waived the privilege as to one page of one e-mail. Leaving a note with his user name and password on the desk in the parties' common office was not a waiver of the privilege. The husband still maintained a reasonable expectation that no one would find the note and enter that information into the computer in a deliberate attempt to access his password-protected documents. The crime-fraud exception did not preclude confidentiality. Nevertheless, the trial court should not have disqualified the wife's counsel. The less severe sanction of suppression of the e-mails was a sufficient remedy for the problem and also protected the wife's right to counsel of her choosing.

OUTCOME: The order was modified by reversing so much thereof as disqualified the wife's counsel and found that one page of a five-page e-mail from the husband's counsel to the husband was privileged. As so modified, the order was affirmed.

COUNSEL: Whiteman, Osterman & Hanna, L.L.P., Albany (Christopher E. Buckey of counsel), for appellant.

Maynard, O'Connor, Smith & Catalinotto, L.L.P., Albany (Stephen C. Prudente of counsel), for Steven M. Parnes, respondent.

Maxwell & Van Ryn, Delmar (Paul Van Ryn of counsel), for Paul Van Ryn, respondent Pro se.

JUDGES: Before: Mercure, J.P., Malone Jr., Stein and McCarthy, JJ. Mercure, J.P., Malone Jr. and Stein, JJ., concur.

OPINION BY: McCarthy

OPINION

[**949] [***348] MEMORANDUM AND ORDER

McCarthy, J.

Appeal from an order of the Supreme Court (Zwack, J.), entered April 13, 2010 in Rensselaer County, which, among other things, granted defendant's motion to, among other things, disqualify plaintiff's counsel.

When the parties began experiencing marital difficulties, defendant contacted Paul Van Ryn, an attorney who had represented him in a prior divorce and related proceedings (*see Parnes v Parnes, 41 AD3d 934, 837 N.Y.S.2d 777 [2007]*). Van Ryn had also represented and dealt with both parties in their capacities as principals in a limited liability company. Defendant and Van Ryn exchanged e-mails discussing a strategy for defendant to gain advantage in future matrimonial and custody litigation. Defendant acted in response to some of these e-mails, including sending a letter to plaintiff's physician stating that defendant -- also a physician -- disagreed with certain medication being prescribed and would no longer pay for this treatment, which was considered medically unnecessary as evidenced by an insurance company's refusal to cover the medication. [*2]

Plaintiff commenced this divorce action. At defendant's deposition, plaintiff's trial counsel questioned defendant about his e-mails with Van Ryn. Plaintiff apparently discovered a page of one of the e-mails on defendant's desk and, while searching for the remainder of the letter, discovered the user name and password for defendant's e-mail account. She used the password to gain access to defendant's account, printed the e-mails between him and Van Ryn, and turned them over to her counsel. Plaintiff then amended the complaint to reflect that defendant conspired with Van Ryn to cause plaintiff anguish. Counsel subpoenaed Van Ryn for a deposition and to produce documents.

Van Ryn moved to quash the subpoena. Defendant cross-moved to, among other things, quash the subpoena of Van Ryn, preclude plaintiff from using any privileged communications between defendant and Van Ryn, strike the portions of the amended complaint based on privileged information and disqualify plaintiff's counsel. Supreme Court found that the [**950] e-mails between Van Ryn and defendant were protected by the attorney-client privilege, prohibited plaintiff from using those documents or any information gleaned from them, struck the offending paragraphs of the amended complaint, quashed the subpoena issued to Van Ryn [1] and disqualified plaintiff's counsel. Plaintiff appeals.

1 Supreme Court required Van Ryn to comply with one paragraph of the subpoena. That paragraph is not at issue on appeal.

Supreme Court correctly determined that the e-mails were privileged. Initially, a trial court has considerable discretion to supervise the discovery process, and we will not disturb its determinations absent an abuse of that discretion (*see Superintendent of Ins. of State of N.Y. v* [***349] *Chase Manhattan Bank, 43 AD3d 514, 516, 840 N.Y.S.2d 479 [2007]*). Defendant met his burden of demonstrating that he and Van Ryn communicated as an attorney and client and "that the information sought to be protected from disclosure was a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services" (*Matter of Priest v Hennessy, 51 NY2d 62, 69, 409 N.E.2d 983, 431 N.Y.S.2d 511 [1980]*; *see CPLR 4503 [a]*; *Clark v Schuylerville Cent. School Dist., 57 AD3d 1145, 1146, 870 N.Y.S.2d 493 [2008]*). Defendant averred that, while he had been friends with Van Ryn for many years, he contacted Van Ryn in his capacity as an attorney to seek advice about a potential divorce and custody battle. The context of the e-mails shows that Van Ryn was giving legal advice, sent from his law firm e-mail address, and billed defendant for his time. Van Ryn provided defendant with a retainer agreement; although they never executed it, Van Ryn averred that he did not require an executed agreement from clients until the matter proceeded to litigation or negotiations, and clients frequently sought advice before those stages without an executed retainer agreement.

Despite the e-mails being privileged, defendant waived the privilege with respect to one page of one e-mail. As the proponent of the privilege, defendant bore the burden of proving that he did not waive it (*see Oakwood Realty Corp. v HRH Constr. Corp., 51 AD3d 747, 749, 858 N.Y.S.2d 677 [2008]*). Plaintiff averred that she discovered a single printed page of a five-page e-mail on a desk in the marital residence. The parties acknowledge that this desk was located in a room used as an office and the parties, their nanny and babysitters all used that room. Defendant contends that the desk contained only his papers and plaintiff had her own desk in the same room, but plaintiff appears to disagree. Regardless of whether the parties had separate desks, by leaving a hard copy of part of a document on the desk in a room used by multiple people, defendant failed to prove [*3] that he took [**951] reasonable steps to maintain the confidentiality of that page (*see Bower v Weisman, 669 F Supp 602, 605 [SD NY 1987]*; *compare Marriage of Amich and Adiutori, 192 P3d 422, 424-425 [Colo App 2007]*). Hence, defendant waived the privilege as to that one page, and plaintiff may use that single page in litigation.

On the other hand, defendant took reasonable steps to keep the e-mails on his computer confidential. Defendant set up a new e-mail account and only checked it from his workplace computer. Leaving a note containing his user name and password on the desk in the parties' common office in the shared home was careless, but it did not constitute a waiver of the privilege. Defendant still maintained a reasonable expectation that no one would find the note and enter that information into the computer in a deliberate attempt to open, read and print his password-protected documents (*see Pure Power Boot Camp v Warrior Fitness Boot Camp, 587 F Supp 2d 548, 560-562 [SD NY 2008]*). Plaintiff admits that after she found the one page, she searched through defendant's papers in an effort to find the rest of the document, instead found the note, then purposely used the password to gain access to defendant's private e-mail account, without his permission, to uncover the remainder of the e-mail. Under the circumstances, defendant did not waive the privilege as to the e-mails in his private e-mail account (*see Leor Exploration & Prod., LLC v Aguiar, 2010 WL 2605087, *18, 2010 US Dist LEXIS 76036, *63-65 [SD Fla 2010]*; *cf. Stengart v. Loving Care* [***350] *Agency, Inc.., 201 NJ 300, 321-324, 990 A.2d 650, 663-665 [2010]*).

We reject plaintiff's argument that the crime-fraud exception precludes confidentiality. The attorney-client privilege will not prevent disclosure or use of any communications made "in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct" (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 1 AD3d 223, 224, 767 N.Y.S.2d 228 [2003]*; *see Superintendent of Ins. of State of N.Y. v Chase Manhattan Bank, 43 AD3d at 516*). Defendant's letter to plaintiff's physician did not constitute a fraud upon plaintiff or the physician. Defendant expressed his personal opinion that plaintiff should not be taking human growth hormones, an opinion supported by the insurance company's refusal to cover that treatment. Defendant also informed the physician that defendant would no longer pay for this treatment. While plaintiff contends that defendant had evil motives for sending this letter and providing her a copy -- namely to deprive her of necessary medicine and cause her mental anguish -- defendant's actions [**952] did not constitute a fraud regardless of his intentions. The alleged breach of fiduciary duty must be on the part of the client, rather than the attorney (*see Woodson v American Tr. Ins. Co., 280 AD2d 328, 328-329, 720 N.Y.S.2d 467 [2001]*) [2]. Based on the insurance company's refusal, presumably due to its determination that the treatment was not medically necessary, Supreme Court did not err in finding that defendant, as plaintiff's former physician, did not breach a fiduciary duty to her by sending the letter. Although she describes the strategy discussed by defendant and Van Ryn as an attempt to make her "snap," defendant was not doing [*4] so by breaching a fiduciary duty. Plaintiff offers only speculation that defendant conspired to commit the crime of assault upon her, without any probable cause to support her assertion (*compare Superintendent of Ins. of State of N.Y. v Chase Manhattan Bank, 43 AD3d at 516*). Although case law also applies the crime-fraud exception to "other wrongful conduct," such conduct must usually be of a criminal or dubious nature, not merely mean or dishonorable (*see e.g. Surgical Design Corp. v Correa, 284 AD2d 528, 529, 727 N.Y.S.2d 462 [2001]*).

2 In any event, although Van Ryn represented plaintiff and defendant in their capacities as principals of a limited liability company, Van Ryn never represented plaintiff individually. While there may have been a conflict of interest due to the prior joint representation, no confidential information was gleaned from plaintiff that was used against her so as to constitute a breach of the attorney's fiduciary duty to her.

Supreme Court should not have disqualified plaintiff's counsel. When considering a motion to disqualify counsel, the court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation (*see Matter of Schachenmayr v Town of N. Elba Bd. of Assessors, 221 AD2d 884, 885-886, 634 N.Y.S.2d 239 [1995]*; *Demis v Demis, 168 AD2d 840, 841, 564 N.Y.S.2d 515 [1990], lv dismissed 78 NY2d 1007, 580 N.E.2d 1061, 575 N.Y.S.2d 458 [1991]*). The right to representation by counsel of one's own choosing is not absolute and may be overridden, but courts must "carefully scrutinize[]" any restriction of that valuable right (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 443, 508 N.E.2d 647, 515 N.Y.S.2d 735 [1987]*; *see Matter of Advent Assoc., LLC v Vogt* [***351] *Family Inv. Partners, L.P., 56 AD3d 1023, 1024, 867 N.Y.S.2d 569 [2008]*). We have already determined that the e-mails between defendant and Van Ryn were privileged communications, and we certainly do not condone the failure of plaintiff's counsel to promptly notify defendant's counsel that she had obtained the e-mails or her tactic of surprising defendant at his deposition by questioning him regarding those privileged documents. On the other hand, contrary to Supreme [**953] Court, we have determined that the privilege was waived as to part of one document, meaning that counsel was able to properly ask defendant some of the questions posed at his deposition. Although a substantial right of defendant was prejudiced by plaintiff's uncovering of and her counsel's use of the privileged documents, the less severe sanction of sup-

pression of the e-mails is a sufficient remedy for the problem (*see CPLR 3103 [c]*), and also protects plaintiff's valuable right to counsel of her choosing (*see Surgical Design Corp. v Correa, 21 AD3d 409, 410, 799 N.Y.S.2d 584 [2005]*). Considering all of the circumstances here, we find that Supreme Court abused its discretion in imposing the harsh sanction of disqualification of plaintiff's counsel in addition to suppressing the confidential e-mails (*see id.*; *compare Matter of Carey v Carey, 13 AD3d 1011, 1012, 788 N.Y.S.2d 210 [2004]*; *Campolongo v Campolongo, 2 AD3d 476, 476-477, 768 N.Y.S.2d 498 [2003]*).

Supreme Court properly quashed the subpoena of Van Ryn. The privileged documents and testimony about attorney-client conversations were clearly not discoverable through a subpoena. To obtain disclosure from a nonparty, plaintiff was required to demonstrate a showing of special circumstances, namely that the information sought "is material and necessary and cannot be discovered from other sources or otherwise is necessary to prepare for trial" (*King v State Farm Mut. Auto. Ins. Co., 198 AD2d 748, 748, 604 N.Y.S.2d 302 [1993]*; *see Cerasaro v Cerasaro, 9 AD3d 663, 665, 781 N.Y.S.2d 375 [2004]*). Van Ryn averred that certain demanded documents, such as executed retainer agreements, do not exist. Some of the demanded documents have already been provided. Most of the documents sought were presumably available from defendant, defeating plaintiff's need for disclosure from a nonparty. Although plaintiff made broad claims that this subpoena was required because disclosure from defendant has not been forthcoming, the record does not indicate that she has made any motions to compel his compliance with demands (*see CPLR 3124*), and defendant indicated a willingness to produce demanded documents. Under the circumstances, Supreme Court appropriately quashed the subpoena (*see Sand v Chapin, 246 AD2d 876, 877, 667 N.Y.S.2d 800 [1998]*).

Plaintiff's remaining contentions have been reviewed and are unpersuasive. [*5]

Mercure, J.P., Malone Jr. and Stein, JJ., concur.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as disqualified plaintiff's counsel and found that the third page of a five-page e-mail from Paul Van Ryn to defendant is privileged, and, as so modified, affirmed.

5

[*1] In the Matter of The Topps Co., Inc. Shareholder Litigation

600715/07

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2007 NY Slip Op 52543U; *19 Misc. 3d 1103A*; *859 N.Y.S.2d 907*; *2007 N.Y. Misc. LEXIS 8973*; *237 N.Y.L.J. 117*

June 8, 2007, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

HEADNOTES

[**1103A] [***907] Actions--Stay--Foreign Action Pending. Civil Practice Law and Rules--§ 3211 (a) (Motion to dismiss cause of action).

JUDGES: Herman Cahn, J.

OPINION BY: Herman Cahn

OPINION

Herman Cahn, J.

Defendants The Topps Company, Inc. (Topps), Arthur T. Shorin, Allan A. Feder, Stephen D. Greenberg, Ann Kirschner, David M. Mauer, Jack H. Nussbaum and Richard Tarlow (the Topps defendants) move, pursuant to *CPLR 3211(a)(4)* and *2201*, to dismiss or stay this consolidated shareholder class action in favor of similar class action litigation pending in Delaware Chancery Court.

On March 6, 2007, a private equity group led by former Disney CEO Michael Eisner announced that it had entered into an agreement (the Merger Agreement) to purchase Topps, a publicly-traded corporation incorporated in Delaware and head-quartered in New York, at $ 9.75 per share for a total transaction value of $ 384.5 million. The Merger Agreement provides for a 40-day "Go-Shop Period" for Topps to actively solicit and entertain other proposal(s) to acquire the company. Three of the company's ten directors voted against adoption of the Merger Agreement. Arnaud Ajdler, one of the dissenting directors and Managing Director of Crescendo Partners, L.P., the second largest Topps' stockholder, publicly objected to the buyout, claiming that it does not maximize shareholder value. This transaction is currently scheduled to be submitted for stockholder approval on June 28, 2007.

On March 7th, one day after the announcement, a shareholder class action was filed in this court, entitled *Lipscomb v The Topps Company, Inc.*, Index No. 600715/07. The complaint seeks to enjoin the buyout on the ground that Topps and the individual director defendants breached their fiduciary duties to Topps' shareholders by agreeing to a buyout at a price that materially undervalues the company and does not represent the true value of the stock. Three other shareholder class actions were filed in this court on March 9, 14 and 15, 2007, under Index Nos. 600768/07, 600822/07 and 600837/07, respectively. On March 20th, plaintiffs filed a motion seeking expedited discovery in this action, which was granted by this court on March 30th. These four class actions were consolidated on April 20th, and a consolidated amended class action complaint was served on May 3rd. A Confidentiality Stipulation and Order has

been entered. A briefing schedule for preliminary injunctive relief has been set and the court has scheduled a hearing on that motion for June 18th.

However, litigation was also commenced in Delaware. On March 8, 2007, the first of five virtually identical shareholder class actions was filed in Delaware Chancery Court, entitled *Freiman v The Topps Company, Inc.*, C.A.No. 2777-VCS (Del Ch March 8, 2007). Between March 8th and 16th, four more actions were filed in Delaware Chancery Court. On March 26th, the Delaware Chancery Court signed an order consolidating the five actions pending in that court.

[*2] The court has been informed that the parties in this action and the Delaware action have agreed to coordinate discovery. As of May 4, 2007, the defendants have produced approximately 39,000 pages of documents, and are currently working to schedule depositions. Every deposition that has thus far been scheduled has been scheduled to take place in New York.

On April 27, 2007, the Topps defendants moved to dismiss, or in the alternative, stay the Delaware action in favor of this New York action. By Opinion dated May 9, 2007, the Chancery Court denied the motion, concluding, among other things, that Delaware was the appropriate venue because the claims asserted in both consolidated actions are governed by Delaware law and may involve novel questions of law. Interestingly, the Vice Chancellor devotes a substantial portion of his Opinion to arguments urging this court to dismiss or stay the first-filed action in deference to the purported paramount interest of the Delaware courts. However, as discussed more fully below, the Chancery Court's belief that New York law requires this court to dismiss or stay this action in deference to the Delaware action is based on outdated and incorrect legal principles.

After the Chancery Court's ruling and argument on this motion,[1] an additional lawsuit was filed in the Delaware Chancery Court relating to a competing offer made on April 12, 2007 during the go-shop period by The Upper Deck Company (Upper Deck) to acquire Topps at $ 10.75 per share. On June 5th, Upper Deck and Northwood Investors LLC commenced an action in Delaware against the Topps defendants and the Eisner entities alleging that the Topps defendants breached a Confidentiality Agreement dated March 19, 2007 between Upper Deck and Topps, committed fraud and breached their fiduciary duties to Topps' shareholders by failing to negotiate with Upper Deck in good faith. In addition, Upper Deck alleges that the director defendants' refusal to declare Upper Deck's offer a "Superior Proposal" and thus Upper Deck an "Excluded Party" under the Merger Agreement was a further breach of their fiduciary duties.[2] Upper Deck seeks an injunction preventing Topps from enforcing the standstill provisions of the Confidentiality Agreement that prohibit Upper Deck from engaging in a direct tender offer to Topps' shareholders or the direct solicitation of proxies from Topps's shareholders in order to vote against approval of the Merger Agreement. The Chancery Court has added Upper Deck's preliminary injunction motion to its calendar June 11th.

1 This new development has been brought to the court's attention by the Topps defendants and plaintiffs in sur-reply letters to the court dated June 5 and 6, 2007, respectively, each side presenting arguments as to how it supports their position.

2 Under the Merger Agreement, if Topps receives a Superior Proposal during the go-shop period, Topps' board may designate the party submitting that acquisition proposal an Excluded Party, entitling it to receive certain non-public information and allowing Topps to participate in discussions or negotiations with that party.

CPLR 3211(a)(4) authorizes a court to dismiss or stay an action on the ground that there is another action pending between the same parties for the same cause of action in another court. The rule gives courts discretion, which should be exercised "to avoid vexatious litigation and duplication of effort, with the attendant risk of divergent rulings on similar issues." *White Light* [*3] *Productions, Inc. v On The Scene Productions, Inc., 231 AD2d 90, 96, 660 N.Y.S.2d 568 (1st Dept 1997)*. The court must consider in which jurisdiction litigation was first commenced, how far each litigation has progressed and which forum has a more significant and substantive nexus to the controversy, and thus is the most appropriate forum for its resolution. *Certain Underwriters at Lloyd's, London v Accident and Indemnity Co., 16 AD3d 167, 168, 791 N.Y.S.2d 90 (1st Dept 2005)*; *San Ysidro Corp. v Robinow, 1 AD3d 185, 186, 768 N.Y.S.2d 191 (1st Dept 2003)*; *Seneca Ins. Co. v Lincolnshire Management, Inc., 269 AD2d 274, 703 N.Y.S.2d 127 (1st Dept 2000)*. Basically, New York courts undertake an analysis similar to that employed in consideration of a forum non conveniens motion (*White Light Productions, Inc., 231 AD2d at 93*, citing *Flintkote Co. v American Mutual Liability Co., 103 AD2d 501, 506, 480 N.Y.S.2d 742 [2d Dept 1984], affd 67 NY2d 857, 492 N.E.2d 790, 501 N.Y.S.2d 662 [1986]*), by considering and balancing such factors as the situs of the underlying transaction, residency of the parties, potential hardship to the defendants, location of documents and of a majority of the witnesses, and burden on the New York courts. *Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), cert denied 469 U.S. 1108, 105 S. Ct. 783, 83 L. Ed. 2d 778 (1985)*;

World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153, 158-59, 649 N.Y.S.2d 689 (1st Dept 1996).

It is still the general rule in New York that "the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere.' " *White Light Productions, Inc., 231 AD2d at 96*, quoting *City Trade & Industries, Ltd. v New Central Jute Mills Co., 25 NY2d 49, 58-59, 250 N.E.2d 52, 302 N.Y.S.2d 557 (1969).* Although priority in the commencement of the action is a factor to be considered in determining whether dismissal pursuant to *CPLR 3211(a)(4)* is appropriate, it is not necessarily dispositive. *Roberts v 112 Duane Associates LLC, 32 AD3d 366, 368, 821 N.Y.S.2d 33 (1st Dept 2006)*; *Certain Underwriters at Lloyd's, London, 16 AD3d at 168*; *San Ysidro Corp., 1 AD3d at 186.* Exceptions to the first-filed rule are recognized where the action sought to be restrained is vexatious, oppressive or instituted by duplicity or to obtain some unjust or inequitable advantage. *Certain Underwriters at Lloyd's, London, 16 AD3d at 168*; *San Ysidro Corp., 1 AD3d at 186*; *White Light Productions, Inc., 231 AD2d at 96-97.*

The fact that the *Lipscomb* action was commenced in New York on the day after the announcement of the Topps' going private transaction shows the tenacity and ability of this plaintiff and his counsel to act quickly and forcefully to challenge what they believe to be improper actions by the Topps' board of directors. Forum shopping is not at issue if New York is a logical and proper place to go forward. *Seneca Ins. Co. v Lincolnshire Management, Inc., 269 AD2d 274, 275, 703 N.Y.S.2d 127 (1st Dept 2000)*, citing *Fischer & Porter Co. v Moorco International, Inc., 869 F Supp 323, 325 (ED Pa 1984).* The plaintiffs' choice of forum should not be disturbed unless the balance strongly favors the jurisdiction in which the Topps' defendants seek to litigate the claims (*Anagnostou v Stifel, 204 AD2d 61, 611 N.Y.S.2d 525 [1st Dept 1994]*), otherwise it would be the Topps defendants who would benefit from shopping for what they perceive to be the most favorable forum. In addition to the fact that litigation was first commenced in New York, the Delaware action has not progressed any farther or faster than this action. Discovery has proceeded in tandem in both actions, in order not to unfairly burden defendants with duplicate demands, and briefing schedules for preliminary injunction motions to be heard later this month are in place.

New York clearly has an overwhelming nexus to this controversy and is a highly appropriate forum for its resolution. Topps has substantial ties to New York and plaintiffs' claims arise out of conduct that took place in this state. Topps was founded in Brooklyn, New [*4] York in 1938. Its present corporate headquarters and principal place of business is in Manhattan, where its books and records are kept. The majority of Topps' officers and directors either reside or do business in New York. The company's transfer agent, American Stock Transfer & Trust company, is also located in New York, and Topps scheduled its shareholder meetings in New York. Topps' stock is traded on the NASDAQ, which is based in New York. The company's corporate counsel and investor relations firm are similarly located in New York.

The conduct giving rise to the claims in this action involve conduct that occurred almost exclusively in New York. The Merger Agreement was principally negotiated in New York. The meetings of the Topps' board where the merger was discussed and ultimately approved took place in New York, and the closing of the merger is scheduled to take place in Manhattan.

The Merger Agreement has a choice of law clause mandating the application of New York law and a choice of forum clause requiring any suit to be heard in the state or federal courts of New York.

In addition, Topps' independent auditors, legal and financial advisors on the buyout deal and proxy solicitation firm are all located in Manhattan. As such, this court has personal jurisdiction over most of the witnesses who are likely to be called to testify or produce documents.[3]

> 3 While Delaware has jurisdiction over the director defendants (*see 10 Del Code § 3114[a]*), compulsory process over many non-party witnesses may be lacking.

This is not the typical situation where a defendant claims that it is inconvenient to litigate in New York. Indeed, in their motion to dismiss or stay the Delaware action, the Topps defendants themselves acknowledged that New York is not an inconvenient forum because Topps is located in New York, as are a majority of the director defendants, relevant documents and witnesses. This acknowledgment by the Topps defendants weighs strongly in favor of maintaining this action in New York. *Mionis v Bank Julius Baer & Co., Ltd., 9 AD3d 280, 282, 780 N.Y.S.2d 323 (1st Dept 2004).*

In contrast, the only connection with Delaware is that Topps is presently incorporated in that state.[4] Thus, there is no question that Delaware law will apply to certain aspects of this dispute. *Venturetek, L.P. v Rand Publishing Co., Inc., 39 AD3d 317, 833 N.Y.S.2d 93 (1st Dept 2007)* ("the law of the state in which an entity was incorporated is controlling as to matters relating to its internal affairs"); *Hart v General Motors Corp., 129 AD2d 179, 182, 517 N.Y.S.2d 490 (1st Dept 1987)* (the issue of corporate governance is governed by the law of the state of incorporation), *lv denied 70 NY2d 608, 515 N.E.2d 910, 521 N.Y.S.2d 225 (1987).* However, the

Merger Agreement contains a New York choice of law provision. As demonstrated by the recent lawsuit filed by Upper Deck, a key issue in this dispute will be whether Upper Deck should have been designated an "Excluded Party" under the Merger Agreement and whether Upper Deck's $ 10.75 per share proposal is a "Superior Proposal" under [*5] that agreement. This issue may well entail the application and interpretation of New York law contract law.

> 4 Although the Chancery Court stated that Topps has been incorporated in Delaware for "generations" (Opinion, at 18), in fact, it has only been incorporated in Delaware since 1987. The company is successor to Topps Chewing Gum, Inc., which was established as a partnership in Brooklyn, New York in 1938 and was incorporated under the laws of New York in 1947. Kupilas Affirm., Exh. E thereto: Topps' 2006 S.E.C. Form 10-K.

In its Opinion denying the Topp defendants' motion to dismiss or stay the Delaware action, the Chancery Court cited *Langfelder v Universal Laboratories (293 NY 200, 56 N.E.2d 550 [1944])* and *Rogers v Guaranty Trust Co. of New York (288 U.S. 123, 53 S. Ct. 295, 77 L. Ed. 652 [1933])*, for the proposition that jurisdiction must be declined in a case where the determination of the rights of the litigants involves regulation and management of the internal affairs of a corporation incorporated in another state. *See* Opinion, at 2-3. However, the internal affairs doctrine as expressed in these older cases is now viewed as a discretionary doctrine allowing courts to balance convenience and the relative interests of the states involved. *Hart v General Motors Corp., 129 AD2d at 186, supra*; *Broida v Bancroft, 103 AD2d 88, 90-92, 478 N.Y.S.2d 333 (2d Dept 1984)*; *Berger v Scharf, 11 Misc 3d 1072(A), 816 N.Y.S.2d 693, 2006 NY Slip Op 50519(U), 2006 WL 825171 *2 (Sup Ct, NY County Mar. 29, 2006)*; *Application of Dohring, 142 Misc 2d 429, 431-32, 537 N.Y.S.2d 767 (Sup Ct, Monroe County 1989)*.

In *Broida*, the Second Department refused to dismiss a shareholders' derivative action concerning a proposed recapitalization stock split plan by Dow Jones & Company, a corporation that was incorporated in Delaware, but based in New York. The court found that *Langfelder* and *Rogers* represented an outdated viewpoint, and one that was subject to numerous exceptions. *103 AD2d at 90-92*.

The doctrine was questioned by the Supreme Court of the United States in *Williams v Green Bay & Western R. R. Co. (326 U.S. 549, 66 S. Ct. 284, 90 L. Ed. 311)* and abrogated entirely in the Federal courts a year later in *Koster v Lumbermens Mut. Co. (330 U.S. 518, 527, 67 S. Ct. 828, 91 L. Ed. 1067)*, the court holding, in effect, that the "internal affairs" rule is not entitled to separate status and should be treated as one facet under general principles of forum non conveniens. The *Restatement of Conflict of Laws, Second (§ 84, Comment d)*, and numerous commentators, take the same position [citations omitted] * * *

"The vague principle that courts will not interfere with the internal affairs of a corporation whose foreignness is at best a metaphysical concept, must fall before the practical necessities of the modern business world" (Note, 44 Harv L Rev 437, 439). We therefore hold that a suit which concerns the internal affairs of a foreign corporation should be entertained unless the same factors that would lead to dismissal under forum non conveniens principles suggest that New York is an inconvenient forum and that litigation in another forum would better accord with the legitimate interests of the litigants and the public (*see Royal China v Regal China Corp., 304 NY 309, 312-313, 107 N.E.2d 461*; *Goldstein v Lightner, 266 App Div 357, 42 N.Y.S.2d 338, affd 292 NY 670, 56 N.E.2d 98, supra*; Weintraub, Conflict of Laws [2d ed], § 4.33, p 211). *As succinctly put in the Restatement, "[a] court will exercise jurisdiction over an action involving the internal affairs of a foreign corporation unless it is an inappropriate or an inconvenient forum for the trial of the action" (Restatement, Conflict of Laws 2d, § 313)*. (underlining added) *Id. at 91-92*. After considering Dow Jones' numerous and substantial contacts with New York, which far exceeded the nature and degree of the company's one contact with Delaware -- its incorporation in that state -- the Second Department held that the substantial nexus of the litigation with New York rendered New York the appropriate forum.

The Topps defendants rely on *Hart v General Motors Corp. (129 AD2d 179, 517 N.Y.S.2d 490, supra)*, in which a New York shareholder derivative action challenging a decision of the board of directors of General Motors Corporation, a Delaware company with its principal place of business in [*6] Michigan, was dismissed on forum non conveniens grounds in favor of a related pending action in Delaware.

Hart is distinguishable on several important grounds. First, the company at issue, General Motors, was located in Michigan, not New York, and did not have the same substantial ties to New York as does Topps. Second, two derivative actions were filed in Delaware Chancery Court the day before the New York action was commenced, and thus Delaware was the first-filed action. *Id. at 181-82*. In addition, four additional state court actions were filed in Delaware shortly thereafter, and nine federal court actions filed in five different states had been transferred by the Judicial Panel on Multi-District Litigation to the District of Delaware. *Id. at 182, 517 N.Y.S.2d*

490. Accordingly, in that case, Delaware was the most logical choice for the action. Third, the trial court had accepted the plaintiff's argument that New York law, not Delaware law, should be applied, leading to the very likely possibility of inconsistent judgments in the two forums. *Id. at 186-87*. In contrast, the New York plaintiffs in this consolidated action did not commence litigation in this forum to circumvent the requirements of Delaware corporate law.

There has been no showing that retention of the action would unduly burden the Commercial Division, a specialized commercial court that has been successfully handling complex commercial and corporate litigation since its inception in 1993. *See A History of the Creation and Jurisdiction of Business Courts in the Last Decade, 60 Business Lawyer 79, 147, 152-58 (2004)*. The Commercial Division was not established merely to hear contractual disputes. This court is empowered to hear cases involving breach of fiduciary duty claims arising out of corporate restructuring, shareholder derivative actions, and disputes concerning the internal affairs of business organizations; and the dissolution of corporations and other business organizations. Uniform Rules of the Supreme and County Court, *22 NYCRR § 202.70(b)(1), (4), (7)* and *(11)*. Shareholder derivative and shareholder class actions concerning Delaware companies are not an unknown phenomena is the Commercial Division. *See, e.g., David Shaev Profit Sharing Account v Cayne, 24 AD3d 154, 806 N.Y.S.2d 17 (1st Dept 2005)*; *Simon v Becherer, 7 AD3d 66, 775 N.Y.S.2d 313 (1st Dept 2004)*; *Pallot v Peltz, 289 AD2d 85, 734 N.Y.S.2d 62 (1st Dept 2001)*; *Wilson v Tully, 243 AD2d 229, 676 N.Y.S.2d 531 (1st Dept 1998)*; *Berger v Scharf, 11 Misc 3d 1072(A), 816 N.Y.S.2d 693, 2006 NY Slip Op 50519(U), 2006 WL 825171, supra*; *Spear v Conway, 6 Misc 3d 1023(A), 800 N.Y.S.2d 357, 2003 NY Slip Op 51749(U), 2003 WL 24012118 (Sup Ct, NY County Oct. 17, 2003)*.

Indeed this court is frequently called upon to apply the laws of Delaware. *See, e.g., Venturetek, L.P. v Rand Publishing Co., Inc., 39 AD3d at 317, supra*; *Herzog, Heine, Geduld, Inc. v NCC Industries, Inc., 251 AD2d 173, 673 N.Y.S.2d 910 (1st Dept 1998)*; *Zoo Holdings, LLC v Clinton, 11 Misc 3d 1051(A), 814 N.Y.S.2d 893, 2006 NY Slip Op 50167(U), 2006 WL 297730 (Sup Ct, NY County Jan. 24, 2006)*; *Johnson v Chase Manhattan Bank USA, N.A., 2 Misc 3d 1003(A), 784 N.Y.S.2d 921, 2004 NY Slip Op 50086(U), 2004 WL 413213 (Sup Ct, NY County Feb. 27, 2004), affd 13 AD3d 322, 786 N.Y.S.2d 302 (1st Dept 2004)*. Even Delaware courts have determined they are not necessarily the most appropriate forum merely because the application of Delaware law is at issue. *See In re Chambers Development Co., Inc. Shareholders Litigation, 1993 Del. Ch. LEXIS 79, 1993 WL 179335 *3 (Del Ch May 20, 1993)*. Nor is there any basis for the assumption by the Chancery Court that "random litigation results" will occur if a New York commercial court, applying Delaware law, addresses legal issues concerning the fiduciary duties of corporate management with respect to going private transactions involving private equity buyers. *See* Opinion, at 16. The Commercial Division is as equally capable of dismissing non-meritorious shareholder derivative lawsuits "without rewarding plaintiffs' lawyers for the simple fact that they filed a lawsuit" (*id.*) as is the Vice Chancellor.

[*7] Another factor which the court must address is the residency of the parties. The Chancery Court noted that the initial New York plaintiff, William Lipscomb, is not a resident of New York but hails from Ohio, and that none of the other plaintiffs in the consolidated action are New York residents. Opinion, at 16. It is equally true that none of the representative plaintiffs in the Delaware action are Delaware residents. However, this action has been brought on behalf of all of Topps' shareholders, who are more likely to be residents of New York than of Delaware. The court notes that four of the company's six largest shareholders are located in New York. Kupillas Affirm., Exh. C thereto: Topps' S.E.C. Schedule 14-A at 93. As noted above, all of the director defendants reside or work in New York.

The court is mindful that its ruling may require the defendants, absent a reversal on appeal either here or in Delaware, to defend the fairness of the buyout in two jurisdictions. However, this court is bound to follow and apply New York law, and should not be controlled by the Chancery Court's decision to retain jurisdiction over the parallel litigation in Delaware. *Cf. National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enterprises, Inc., 205 AD2d 341, 613 N.Y.S.2d 161, 162 (1st Dept 1994)*. Accordingly, since New York was the first-filed action, Topps is a New York-based company with numerous New York shareholders, New York is a more convenient forum for most of the parties, non-party witnesses and their attorneys than Delaware, plaintiffs' claims arise out of conduct that took and is taking place in this state, the Merger Agreement is governed by New York law, and this court is prepared to and fully capable of applying Delaware law where it applies, the Topps' defendants motion to dismiss and/or stay this action in deference to the action pending in Delaware is denied.

For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss or stay this consolidated shareholder class action, pursuant to *CPLR 3211(a)(4)* and *2201*, is denied.

Dated: June 8, 2007

B

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

June 23, 2010

COMPANY NAME
ADDRESS
CITY, STATE ZIP CODE

Dear Sir or Madam:

As you may know, the New York State Attorney General's Office ("OAG") is conducting an ongoing investigation into the so-called "mortgage rescue" industry. To date, we have issued subpoenas to more than 20 mortgage loan modification companies, entered into settlement agreements, and pursued enforcement actions against several companies which have been unwilling to end their illegal and deceptive practices. It has been brought to OAG's attention that your company may be offering services to New York residents to help them avoid foreclosure or obtain a loan modification. Therefore, I want to share with you some preliminary findings of OAG's investigation and urge you to promptly review your company's practices to ensure that they do not violate applicable laws.

Our investigation has revealed widespread violations of New York Real Property Law § 265-b, which went into effect on September 1, 2008 and was amended effective December 15, 2009. Under this law, distressed property consultants, as defined by New York Real Property Law § 265-b(1)(e), must, among other things:

- Not charge or collect upfront fees for consulting services prior to the full completion of such services. Under the 2009 Amendment, this prohibition on upfront fees was extended to apply to licensed mortgage bankers, registered mortgage brokers and registered loan servicers.

- Enter into a written, fully executed contract with homeowners that fully discloses the exact nature of the service to be provided and the fee to be collected.

- Provide homeowners with contracts that are written in the language that the homeowner uses and was used in discussions with the homeowner to describe the consultant's services or to negotiate the contract.

- Allow homeowners to cancel the contract, without any penalty or obligation, within five business days after signing and provide the homeowner with notice of this right in the contract.

The law sets forth other requirements that you should carefully review. In OAG's investigation, it was uncovered that loan modification companies routinely fail to comply with the provisions of this law. Violators of the law may be subject to a civil penalty of up to $10,000 for each violation of Section 265-b, and will be required to refund all fees improperly collected. You may review the text of the statute at my office's website, www.nyprotectyourhome.com.

OAG's investigation also has revealed instances where companies have developed various arrangements with attorneys in an apparent attempt to circumvent the requirements of Section 265-b, which exempts from the definition of distressed property consultant "an attorney admitted to practice in the state of New York **when the attorney is directly providing consulting services** to a homeowner **in the course of his or her regular legal practice.**" (Emphasis supplied.) Please note that this exemption **only** applies when attorneys are "directly" working on the client's loan modification file as part of their "regular legal practice." Merely having an attorney on staff does not exempt a company from the requirements of Section 265-b.

In addition to violations of Section 265-b, OAG's investigation has also identified companies that may be marketing their services with advertisements or claims that are deceptive or misleading to homeowners. Some of the problematic practices include:

- Unsubstantiated guarantees or representations regarding success rates, the likelihood of obtaining a loan modification, or the time it will take to obtain a loan modification.
- False 100% money-back guarantees.
- Fabricated consumer testimonials.
- Advertisements and solicitations designed to give consumers the false impression that a company is affiliated with the government or a government-sponsored program.

Such conduct violates New York State General Business Law §§ 349 and 350 and will subject violators to additional penalties and remedies.

The Attorney General is committed to aggressively enforcing the law against "mortgage rescue" companies that engage in illegal conduct and attempt to take unfair advantage of homeowners facing possible foreclosure. Recently, the New York Supreme Court issued a favorable decision in one case filed by this Office, finding that one of the largest foreclosure rescue companies and its president had violated Section 265-b as well as General Business Law §§ 349 and 350. Specifically, the Court found that the company violated Section 265-b by charging illegal, upfront fees for its loan modification services, failing to provide contracts in the language of its customers, especially Spanish, and failing to provide homeowners with the legally required notice of their right to cancel within five business days. The Court also ruled that the

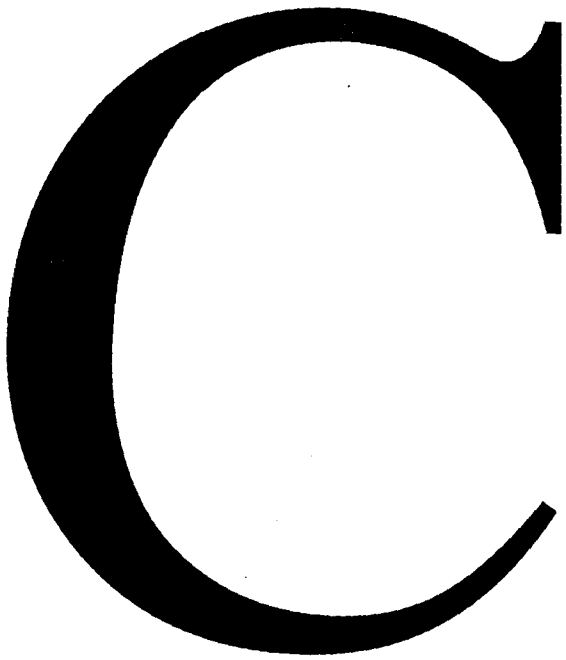
company made numerous false claims in its advertisements, including misrepresenting the number of homes it had saved, falsely claiming to have a 90% to 100% success rate, falsely claiming to be "licensed" by a government agency, and falsely claiming that it was affiliated with "legal experts." The decision holds the company's president personally liable for engaging in fraudulent and illegal acts, and permanently prohibits the respondents from engaging in the illegal, fraudulent and deceptive business practices and false advertising described in OAG's lawsuit.

I encourage you to review your company's practices and, where applicable, to cease and desist engaging in any unlawful, fraudulent, or deceptive practices. If you have any questions, please do not hesitate to contact our office at 212-416-8300 or 212-416-8250.

Very truly yours,

Joy Feigenbaum

Joy Feigenbaum
Bureau Chief
Bureau of Consumer Frauds & Protection



APPENDIX C:
Judgments Entered against Defendants Express Home Solutions Inc., and Express Modifications Inc., between July 2010 and May 2011 (Source: Lexis)

No.	Type	Debtor	Address	Details	Creditor
1.	Lien/Judge	EXPRESS HOME SOLUTIONS	591 STEWART AVE GARDEN CITY, NY 11530-4763 NASSAU COUNTY	Filing Date:12/22/2010 Amount:$2,287 CIVIL JUDGMENT Filing Number:201103032309 Original Filing Date:12/22/2010 Filing Office:NASSAU COUNTY CLERK, NY	HARRY SANTANA
		D AND M MARKETING LLC	591 STEWART AVE GARDEN CITY, NY 11530-4763 NASSAU COUNTY		
2.	Lien/Judge	EXPRESS HOME SOLUTIONS	595 STEWART AVE GARDEN CITY, NY 11530-4787 NASSAU COUNTY	Filing Date:7/1/2010 Amount:$500 CIVIL JUDGMENT Filing Number:201008101058 Original Filing Date:7/1/2010 Filing Office:NASSAU COUNTY CLERK, NY	JOHN BLACKSHEAR
3.	Lien/Judge	EXPRESS HOME SOLUTIONS	595 STEWART AVE GARDEN CITY, NY 11530-4787 NASSAU COUNTY	Filing Date:8/19/2010 Amount:$1,000 CIVIL JUDGMENT Filing Number:201009231824 Original Filing Date:8/19/2010 Filing Office:NASSAU COUNTY CLERK, NY	PORTIA LAWSON
4.	Lien/Judge	EXPRESS HOME SOLUTIONS INC	125 WILBUR PL STE 161 BOHEMIA, NY 11716-2415 SUFFOLK COUNTY	Filing Date:3/4/2011 Amount:$1,694 STATE TAX WARRANT Filing Number:E033824320W0018 Original Filing Date:3/4/2011 Filing Office:SUFFOLK COUNTY CLERK, NY	STATE OF NEW YORK
5.	Lien/Judge	EXPRESS MODIFICATIONS INC	595 STEWART AVE STE 720 GARDEN CITY, NY 11530-4725 NASSAU COUNTY	Filing Date:9/27/2010 Amount:$9,477 CIVIL JUDGMENT Filing Number:201012084 Original Filing Date:9/27/2010 Filing Office:NASSAU COUNTY CLERK, NY	WB MASON COMPANY INC