SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Inquiry of LETITIA JAMES, Attorney General of the State of New York, Petitioner, *—against—* iFINEX INC., BFXNA Inc., BFXWW INC., TETHER HOLDINGS LIMITED, TETHER OPERATIONS LIMITED, TETHER LIMITED, TETHER INTERNATIONAL LIMITED, Respondents.	Index No.: 450545/2019 Part 3 Justice Cohen Motion Seq.: 002

RESPONDENTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION, BY ORDER TO SHOW CAUSE, TO VACATE OR MODIFY THE APRIL 24, 2019 *EX PARTE* ORDER

MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
(212) 309-6000

STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 506-3900

Counsel for Respondents

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INTRODUCTION

Bitfinex and Tether moved to vacate the *ex parte* April 24, 2019 Order in this case because it was issued based on incomplete or incorrect facts and the wrong legal standard. Nothing in the Attorney General's opposition papers justifies the *ex parte* Order having been issued in the first place, or persisting any longer.

First, as a threshold matter of jurisdiction, the Attorney General does not even try to explain how tethers qualify as securities or commodities covered by the Martin Act. The Attorney General addresses this point only in a footnote, without any evidence, suggesting that the "fact intensive" details are better sorted out later. This is backwards: the Attorney General should not be afforded the drastic remedy of a preliminary injunction, or an order requiring the Respondents to address blunderbuss document demands, without establishing the basis for its authority to even regulate in this sphere. For this reason, the Court should vacate the April 24, 2019 Order in its entirety (including as to the discovery aspects).

Second, the Attorney General argues that a preliminary injunction may issue so long as it would be "proper and expedient," a phrase the Attorney General interprets to supplant entirely the standards courts apply in every other context. While the Attorney General argues that this view has "decades" of case law behind it, that is false. There are only two nonbinding trial court decisions supporting the Attorney General's position — one from the Justice that signed the *ex parte* Order — both of which conflict with a Court of Appeals decision holding that the usual standards apply in Martin Act cases, and with the commonsense point that the traditional preliminary injunction standards give meaning to whether an injunction here would be "proper."

Third, the Attorney General cannot show an injunction is appropriate, regardless of the standard. The injunction is hugely disruptive because it freezes in place over $2 billion of the Tether's reserves, prohibiting any investment of any kind into the indefinite future. This massive

regulatory overreach has no corresponding benefit. The undisputed facts show that there was no ongoing fraud, and no "victims" in need of the drastic remedy of an injunction to protect them. Specifically, there is no dispute that Tether disclosed that its reserves could consist of loans to affiliates, and did so before the line of credit transaction the Attorney General challenges. Nor does the Attorney General dispute that tether holders, armed with this information — and now further armed with the information disclosed by this proceeding — have been free and able to redeem or sell their tethers at any point (including now), and that Tether has ample reserves to meet the demand. Given these facts, no useful purpose is served by the preliminary injunction.

The Court should grant the Respondents' motion and vacate the April 24, 2019 Order.

DISCUSSION

I. THE ATTORNEY GENERAL FAILED TO SHOW THAT THE MARTIN ACT'S JURISDICTIONAL SCOPE COVERS THE RESPONDENTS

The Martin Act does not purport to govern fraud or wrongdoing in all contexts. As is relevant here, it covers fraudulent conduct "engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities." N.Y. Gen. Bus. L. § 352-c(1). The Attorney General has not shown that tethers are securities or commodities under the Martin Act. (Respondents' Memorandum of Law in Support of Their Motion to Vacate, April 29, 2019 ("Resp. Br."), at 17-18.)

Rather than meaningfully addressing this basic problem of the Attorney General's jurisdiction, the Attorney General states in a footnote that this is a "fact intensive question" better left until another day, citing no evidence to support how tethers fall within the Martin Act. (Petitioner's Opposition to Motion to Vacate, May 3, 2019 ("NYAG Opp."), at 20 n.6.) The Attorney General's cavalier approach overlooks that the petitioner in a special proceeding bears the burden to establish jurisdiction, just as a plaintiff would in an ordinary lawsuit. *IMAX Corp.*

v. Essel Group, 154 A.D.3d 464, 465 (1st Dep't 2017) (dismissing petition for lack of jurisdiction). It should give the Court great pause that the Attorney General wants to obtain on day one significant coercive relief, without first establishing — or citing *any* evidence — that the Attorney General even has the statutory power to act in this area. On this threshold basis, the Court should vacate the April 24, 2019 Order in its entirety.

As a fallback, the Attorney General argues that, regardless of the status of tethers under the Martin Act, Bitfinex trades in "securities and commodities." (NYAG Opp., at 20 n.6.) But zero evidence is cited for that claim, for the claim that New York residents are platform customers, or that the Attorney General satisfies the Martin Act's statutory requirements. In any event, the allegedly "conflicted" transaction at the heart of the Attorney General's application allegedly defrauds only tether holders, whose reserves are supposedly reduced. Bitfinex users are not in any sense defrauded, as the transaction provides much-needed liquidity that is to their benefit. Thus, the relevant jurisdictional requirement for the Attorney General to show is that the products allegedly sold via fraud — tethers — are securities or commodities. The Attorney General has not even attempted to do so.[1]

II. THE ATTORNEY GENERAL'S *EX PARTE* APPLICATION SHOULD HAVE BEEN GOVERNED BY THE TRADITIONAL STANDARDS FOR A PRELIMINARY INJUNCTION

Respondents showed in their moving papers that the traditional preliminary injunction standards apply in Martin Act cases, exactly as the Court of Appeals ruled in *State v. Fine*, 72 N.Y.2d 967, 968-69 (1988). (Resp. Br., at 14-16.) The clause in Gen. Bus. L. § 354 authorizing

[1] In a conference Friday, May 3, 2019, Special Referee Liebman made clear that any challenge to the power of the Attorney General to compel document production should be heard before this Court. It is for that reason that Bitfinex and Tether hereby renew their request to vacate the April 24, 2019 Order in its entirety, not just as to the injunctive relief.

a preliminary injunction where "proper and expedient" does not replace the traditional standards; rather, those standards establish what is "proper and expedient." (*Id*.)

In opposition, the Attorney General advocates for a type of "proper and expedient" standard that is unmoored from the considerations ordinarily governing preliminary injunctions. (NYAG Opp., at 11-17.) The Attorney General's arguments for this view are wrong.

First, the Attorney General argues that "decades" of cases support this reading (*id*. at 12), but, in reality, the Attorney General's position is adopted only in two nonbinding trial court cases, one from 2016 and another from 2014 (an opinion from the Justice from whom the Attorney General sought the *ex parte* Order). *Schneiderman v. Eichner*, No. 451536/2014, 2016 WL 3057994 (N.Y. Sup Ct. May 26, 2016); *Schneiderman v. 15 Broad Street, LLC*, No. 450454/2014, 2014 WL 1682835 (N.Y. Sup Ct Apr. 29, 2014).

The allegation about this position having a "decades"-long pedigree is made possible by the Attorney General claiming support from a third case, *Matter of Attorney General (Cenvill Communities)*, 82 Misc.2d 418 (N.Y. Sup. Ct. Feb. 25, 1975). But far from supporting the Attorney General's position, the court in *Cenvill* observed that Gen. Bus. L. § 354 was adopted to "protect[] New York citizens from the danger of fraudulent practices which might create **irreparable injury**." *Id*. at 422 (emphasis added). This is exactly the showing that the Attorney General is trying to argue it need not make here.

The Attorney General also argues that the Respondents' position would require "rejecting the reasoning" of other courts that supposedly adopted the "proper and expedient" standard (NYAG Opp., at 13), but here again the Attorney General is not being transparent. These "authorities" are merely Orders that were obtained on an *ex parte* basis, signed without any alteration to the injunctive language proposed by the Attorney General. *See Matter of Edelstein*,

Index No. 450416/2019 (April 9, 2019); *Matter of Allen*, Index No. 452346/2018 (Dec. 28, 2018) (copies attached, respectively, as Exhibits A and B to the Reply Affirmation of Charles Michael, May 5, 2019 ("Michael Aff.").) Based on the dockets, it does not appear the respondents even challenged the preliminary injunction orders.[2]

It is misleading for litigants to cite "orders drafted by [counsel] and entered with minimal, if any, edits by judges," as if they were "caselaw." *Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014). Courts should be wary of these sorts of "orders masquerading as judicial opinions," especially by repeat litigants trying to "creat[e] [their] own caselaw." *Id*. In sum, contrary to the portrayal in the opposition papers, the Attorney General's position here is novel and untested.

Second, the Attorney General argues the "*cf.*" citation in the following passage of *Fine* is meant to indicate that the CPLR governs in full-blown Martin Act actions under Gen. Bus. L. § 353, but not pre-action special proceedings under Gen. Bus. L. § 354:

> The Legislature made plain in the Martin Act that "[t]he provisions of the civil practice law and rules shall apply to all actions brought under this article except as herein otherwise provided" (General Business Law § 357), and it specified no other standard for preliminary injunction motions (cf., General Business Law § 354; *Matter of Ottinger v. State Civ. Serv. Commn.*, 240 N.Y. 435, 439, 148 N.E. 627).

Fine, 72 N.Y.2d at 969. (*See* NYAG Opp., at 14.) But it is far more likely that the "*cf.*" citation was intended to highlight that Gen. Bus. L. § 354 explicitly states that the CPLR "shall not apply" to the witness examinations authorized thereunder. Gen. Bus. L. § 354. The

[2] The Attorney General cites a third *ex parte* order, *Spitzer v. Merrill Lynch*, Index No. 401522/2002 (April 9, 2008), that is not available online and that the Attorney General has not provided. From the SCROLL system, it appears that, after the *ex parte* injunction was obtained, the parties stipulated to staying it. (Michael Aff. Ex. C.) As with the others, there is no indication that the court considered whether the "proper and expedient" language in § 354 overrides the traditional considerations.

point being made, it appears, is that where the Legislature intends to vary the normal CPLR procedures, it will say so plainly. Notably, the clause in Gen. Bus. L. § 354 authorizing preliminary injunctions does not include any similar language about the CPLR standards not governing.[3]

Third, the Attorney General argues against having to show a likelihood of success, because Gen. Bus. L. § 354 proceedings occur by definition while the investigation is ongoing, and before a claim is brought. (NYAG Opp., at 15-16.) But Gen. Bus. L. § 354 proceedings are authorized only where "the attorney general has determined to commence an action" under the Martin Act already. Gen. Bus. L. § 354. Thus, the Attorney General should not be proceeding under Gen. Bus. L. § 354 without knowing what the eventual claim will be.[4]

Fourth, the Attorney General argues that the reference in Gen. Bus. L. § 357 to the CPLR governing Martin Act "actions" indicates that the CPLR would not apply to Martin Act special proceedings under Gen. Bus. L. § 354. (NYAG Opp., at 12-13.) But the CPLR, which governs *all* civil proceedings, *see* CPLR 101, states explicitly that the terms "action" and "special proceeding" are interchangeable and that the procedures in the two types of matters are the same.

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[3] The other authority cited in the same "*cf.*" cite, *Matter of Ottinger v. State Civ. Serv. Comm'n.*, 240 N.Y. 435, 436 (1925), concerned a carve out to the requirements for civil service exams, not anything to do with preliminary injunctions. This confirms that *Fine* was making the broader point that the normal rules apply except where explicitly stated otherwise.

[4] On this point, the Attorney General quotes language in *Matter of Attorney General (Am. Research Coun.)*, 10 N.Y.2d 108, 113 (1961), that a Gen. Bus. L. § 354 proceeding can be authorized with less than "the measure of proof that would be required at a trial" (NYAG Opp., at 16), but fails to tell the Court that that case concerned discovery only, not an injunction. The Attorney General also cites *In re Abrams v. Long Beach Oceanfront Assoc.*, 136 Misc.2d 137, 141 (N.Y. Sup. Ct. 1987), which authorized an injunction based on "reasonable cause to believe that violations of the Martin Act have occurred." That appears quite similar to the ordinary likelihood-of-success standard, and the evidence in that case — testimony directly from condominium tenants about "secret" buyout offers intended to "circumvent the filing and disclosure provisions of the Martin Act" — is consistent with the Attorney General having a strong case on the merits. *Id.* Nothing in *Long Beach* indicated that the ordinary considerations for preliminary injunctions should be ignored.

CPLR 103(b), 105(b). If the Attorney General's reading were correct, there would be no reason for Gen. Bus. L. § 354 to state specifically that the CPLR does not govern witness examinations.

Fifth, the Attorney General emphasizes language in *In re First Energy Leasing Corp. v. Attorney General*, 68 N.Y.2d 59, 65 (1986), that, for purposes of Gen. Bus. L. § 354, the court should "determine in its discretion, considering in each instance what is fair and appropriate under the circumstances." (NYAG Opp., at 14-15.) The Attorney General fails to mention that this case concerned documents only, not an injunction. There is no hint in this case that courts have relaxed discretion to issue injunctions that are in some undefined sense "appropriate."

Finally, the Attorney General claims that its position is perfectly routine, since other states' law enforcement authorities can issue cease-and-desist orders. (NYAG Opp., at 17.) But the only authority cited is a website from the North American Securities Administration Association listing various orders from securities regulators halting unregistered securities offerings — exactly the type of ongoing, unlawful activity that irreparably harms investors. (*E.g.*, Michael Aff. Ex. D, at 7 (Conclusions of Law Item 6) (Texas State Securities Board Order: "Respondents' conduct, acts and practices threaten immediate and irreparable harm"); Ex. E, at 1 (Indiana Secretary of State Order stating "there is a risk of immediate and irreparable harm to Indiana residents").)

The cited orders enjoin the facially unlawful public offerings; they do not attempt to enjoin private business transactions, as here. Further, the orders in each instance give the affected company notice and an opportunity to be heard. The Attorney General has not pointed to any state's law that would allow an injunction against the unregistered offering to persist beyond the hearing based on the vague and lax standard of proof being proposed here.

III. THE APRIL 24, 2019 ORDER CANNOT BE JUSTIFIED UNDER THE TRADITIONAL PRELIMINARY INJUNCTION STANDARDS

A. The Attorney General Will Not Succeed on the Merits

Tether updated its terms of service to make clear that reserves could include loans to affiliates, and did so before the line of credit transaction that is at the heart of this case. (Hoegner Aff. ¶ 31 & Ex. B, at 6 (Item 1.1.32); Ex. C, at 2 (Item 7).) This disclosure gave anyone holding or considering buying tether the opportunity to take their money elsewhere if they so chose, defeating any allegation of fraud. (Resp. Br., at 18-20.)

In arguing that there was nonetheless fraud afoot, the Attorney General faults Bitfinex and Tether for (i) having "failed to disclose the loss of over $850 million" in connection with the Crypto Capital deposits, and of (ii) engaging in an "undisclosed, conflicted" transaction that their customers "would find material." (NYAG Opp., at 18.) Neither of these amounts to fraud.

First, as to the Crypto Capital situation, the Attorney General appears to assume that private companies like Bitfinex have a duty to inform their customers of all matters customers "would find material." That is not the law: "When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella v. United States*, 445 U.S. 222, 235 (1980).

Here, there is no duty for Bitfinex to disclose its internal financial matters to customers. In fact, there is generally "no duty to disclose" at all in the context of "non-fiduciary, arm's length transaction[s]." *Sehera Food Services Inc. v. Empire State Bldg. Co.*, 74 A.D.3d 542, 542 (1st Dep't 2010); *see also People ex rel. Cuomo v. Wells Fargo Ins. Services*, 919 N.Y.S.2d 481, 482 (2011) (holding that"an insurance broker does not have a common-law fiduciary duty to disclose to its customers 'incentive' arrangements that the broker has entered into with insurance companies").

The Attorney General's pervasive misuse of the term "investor" gives the false impression that the Attorney General is acting on behalf of shareholders of Bitfinex and Tether, who of course are owed certain duties of disclosure about their ownership stake. But here the Attorney General's ostensible constituents are *customers* of Bitfinex and Tether, who are not investors, and who not entitled to disclosure as if they were. *See, e.g.*, *Gujardin v. Liberty Media Corp.*, 359 F. Supp. 2d 337, 351 (S.D.N.Y. 2005) (no duty to disclose because while a "corporation owes a fiduciary duty to existing shareholders," it does not "owe a fiduciary duty to a prospective stock purchaser"); *Polak v. Cont'l Hosts, Ltd.*, 613 F. Supp. 153, 157 (S.D.N.Y. 1985) (dismissing securities fraud claim because company had no obligation to share financial information after it was de-registered).

Second, as to the line-of-credit transaction, it sufficed for Tether to inform its customers that reserves could include related party loans. The Attorney General cites no authority for why disclosure needed to include all the details of the transaction itself. (The Attorney General persists in alleging that this was a "conflicted" transaction, failing to address, let alone rebut, the fact that it was undertaken with safeguards to ensure arm's length terms. (Hoegner Aff. ¶ 25.))

In an analogous case, *Wilson v. Merrill Lynch & Co., Inc.*, 671 F.3d 120 (2d Cir. 2011), Merrill Lynch disclosed that it "may routinely" place bids at auctions for its own auction rate securities, and investors argued that this disclosure was "incomplete and misleading" because it "failed to apprise investors" that Merrill placed bids "as a matter of course in every single auction" and knew that the market would collapse unless it continued doing so. *Id.* at 132. The Second Circuit found the disclosure sufficient, however, because it "sufficiently alerted investors" to the risks at hand, even if it did not recite the details of the underlying transactions. *Id.* at 139. The same is true here.

B. There Is No Harm, Much Less Harm that Is Ongoing or Irreparable

The Respondents' initial brief explained that an injunction is inappropriate because there has been no harm to tether holders supposedly being defrauded, much less harm that is either ongoing or irreparable. (Resp. Br., at 21-22.) This is particularly so because the details of the line of credit transaction are now fully public. Holders of tether are doing so with eyes wide open. They may redeem at any time, and Tether has ample assets to honor those requests. (Hoegner Aff. ¶¶ 33-35.) This is not disputed.

The Attorney General argues that there is no need to show "fraudulent conduct is ongoing" (NYAG Opp., at 19), but fails to address that statutory language or case law the Respondents cited showing that injunctions are inappropriate for wrongdoing that is cured or that has discontinued. (Resp. Br., at 20-21.) The Attorney General's position also defies common sense: what is the point of an injunction absent an ongoing harm to stop?

The only injury identified by the Attorney General that resembles "irreparable" harm is the speculation that "dissipation" of Tether's reserves will "render a judgment directing restitution ineffectual." (NYAG Opp., at 18-19.) But contrary to the Attorney General's inflammatory rhetoric, nothing is being "dissipated"; there is no allegation of company officials diverting funds for personal use or self-dealing. In any case, the Attorney General has given no hint as to how restitution could possibly be appropriate, given that tether holders have been able at all times to obtain the most that they could have expected from the outset — the ability to exchange each USDT for $1 in fiat currency. Tethers still trade at par to this day, despite this proceeding. *See* https://coinmarketcap.com/currencies/tether/ (last visited May 5, 2019). Who is

possibly harmed? It is striking that the Attorney General cannot identify any "victim" here, or explain who would be protected by its actions.[5]

C. The Balance of the Equities Favors Bitfinex and Tether

The balance of equities strongly favors Bitfinex and Tether, because a preliminary injunction would not protect anyone but would instead cause great disruption to Bitfinex and Tether — ultimately to the detriment of market participants on whose behalf the Attorney General purports to be acting.

The Attorney General argues that the preliminary injunction is "narrow" because it "does not prevent Bitfinex from engaging in the regular course of its business" (NYAG Opp., at 19), but that is misleading, at best. Bitfinex negotiated for the line of credit because it needs the "liquidity for normal operations." (Hoegner Aff. ¶ 25; *see also id*. ¶ 40.) For its part, Tether has a keen interest in ensuring that Bitfinex, as a dominant platform for Tether's products and known affiliate, can operate as normal. (*Id*. ¶ 25.)

The Attorney General's attempt to downplay the scope of the injunction also ignores that the sweeping language is not limited to the supposedly "conflicted" line-of-credit transaction. The injunction bars *any* "encumber[ance]" or "claim" whatsoever "on the U.S. dollar reserves held by Tether." (Weinstein Aff. Ex 1, at 4 (Item (i)).) This means that Tether must hold its $2.1 billion cash (and equivalent) reserves as is, without deploying those funds for any investment or other useful purpose, for the indefinite future.

[5] The Attorney General argues that a recent federal indictment relating to Crypto Capital makes it "all the more important" to continue the injunction (NYAG Opp., at 10), but, in fact, the indictment confirms the Respondents' view that the funds have to some meaningful degree been seized by governments and will eventually be recovered. (Hoegner Aff. ¶ 18; Michael Aff. Ex. H ¶¶ 7-8 (indictment referring to funds seized in five bank accounts).)

In effect, the Attorney General's office is attempting to arrogate to itself the powers akin to the Federal Reserve supervising a bank, but without any statutory authority for assuming those extraordinary powers. In this regard, the Attorney General's repeated mantra that it is simply trying to maintain the "status quo" is false. The Attorney General is attempting to dictate how two private companies may deal with one another, and deploy their funds.

The Attorney General's brief also ignores the harm wrought by the injunction already in the markets generally. In the weeks leading up to the April 24, 2019 Order, the cryptocurrency market was rallying after an extended downturn. *See* Todd White, *Bitcoin Climbs to Highest This Year as Volatility Recedes*, Bloomberg (Apr. 1, 2019) (copy attached as Michael Aff. Ex. F). This rally was halted by this case, which resulted in an approximate loss of $10 billion across dozens of cryptocurrencies within *one hour* of the April 24, 2019 Order becoming public. (Hoegner Aff. Ex. I.)

The impact on Bitfinex has also been significant. As reported by The Wall Street Journal, the balance of some of Bitfinex's "cold wallets" — the digital equivalent of a bank vault for customer funds — "have fallen sharply, an indication that customers have been drawing down their holdings. Since the attorney general's report became public, about 30,000 bitcoin worth about $170 million, has come out of one wallet. About 1 million ether, worth about $165 million, has come out of the other wallet." *See* Paul Vigna, *Bitcoin's Rise May Be Bad News for Bitfinex*, The Wall Street Journal (May 3, 2019) (copy attached as Michael Aff. Ex. G).

IV. A PRELIMINARY INJUNCTION IS NOT "PROPER AND EXPEDIENT"

Even if the Court concludes that the "proper and expedient" standard governs here, the Court should still vacate the April 24, 2019 Order.

That is because there is nothing "proper" about issuing a preliminary injunction that will only create mischief, for no corresponding good. A preliminary injunction imposes "a

substantial limitation on the defendant's interests prior to any adjudication . . . on the merits." *Margolies v. Encounter*, 42 N.Y.2d 475, 479 (1977), which is why a preliminary injunction is considered "one of the most drastic tools in the arsenal of judicial remedies," *Grand River Enters. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007), and normally will not issue absent a "clear right to that relief." *New York Yankees P'ship v. SportsChannel Assocs.*, 126 A.D.2d 470, 472, 510 (1st Dep't 1987).

Here, the drastic remedy of an injunction cannot possibly be appropriate because, as discussed, there is no ongoing fraud, and nothing to be gained by halting the line of credit transition that ultimately ensures the smooth and normal operations of Bitfinex and Tether — all to the benefit of the customers the Attorney General claims to want to protect.

CONCLUSION

For the stated reasons, and those in the Respondents' moving papers, the Court should vacate or modify the April 24, 2019 *Ex Parte* Order.

Dated: New York, New York
May 5, 2019

Respectfully submitted,

STEPTOE & JOHNSON LLP

By: */s/ Jason Weinstein*
Jason Weinstein
Charles Michael
1114 Avenue of the Americas
New York, New York 10036
(212) 506-3900
jweinstein@steptoe.com
cmichael@steptoe.com

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ David I. Miller*
David I. Miller
Zoe Phillips
101 Park Avenue
New York, New York 10178
(212) 309-6000
david.miller@morganlewis.com
zoe.phillips@morganlewis.com

Counsel for Respondents

RULE 17 CERTIFICATION

I am the attorney who is filing this document. I hereby certify that this document, exclusive of the caption, table of contents, table of authorities, and signature block contains 4,191 words as counted by the word-processing system used to prepare the document.

/s/ Charles Michael
Charles Michael