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

In the Matter of the Inquiry by LETITIA JAMES, Attorney General of the State of New York, Petitioner, Pursuant to article 23-A of the New York General Business Law in regard to the acts and practices of iFINEX INC., BFXNA INC., BFXWW INC., TETHER HOLDINGS LIMITED, TETHER OPERATIONS LIMITED, TETHER LIMITED, TETHER INTERNATIONAL LIMITED Respondents, in promoting the issuance, distribution, exchange, advertisement, negotiation, purchase, investment advice or sale of securities or commodities in or from New York State.	:	Index No.: 450545/2019

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND FOR AN IMMEDIATE STAY

LETITIA JAMES
Attorney General of the State of New York
28 Liberty Street
New York, New York 10005

Petitioner

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PRELIMINARY STATEMENT

The Office of the Attorney General ("OAG") has now twice demonstrated that its investigation into Respondents' practices is appropriate under the Martin Act, and so the Court should decline Respondents' invitation, styled as a "motion to dismiss," to require the OAG to do so a third time. The Court of Appeals has squarely held that there is no basis to stop an ongoing investigation brought in good faith under the Martin Act. Because the materials sought by the OAG have a reasonable relationship to the subject matter under investigation, the OAG must be allowed to proceed without further delay. That should be the end of the Court's inquiry on this motion, including on the questions of "extraterritoriality" and whether tethers are securities. Those are, at best, issues that can be raised in response to a future complaint filed by the OAG at the conclusion of its investigation, as with any other defense in a civil action.

With respect to whether the Court may properly exercise its jurisdiction in this matter, even a cursory examination of the facts gathered to date in the OAG's investigation shows that Respondents have extensive and consistent contacts to New York concerning the matters under investigation. Among those facts: Respondents had, and continue to have, clients located in and doing business from New York; Respondents held accounts with two New York banks and at least one other New York-based financial institution during the relevant time period, which they used to transfer money to and from clients of the Bitfinex and Tether platforms; one of Respondents' most senior executives resided in and conducted work from New York for several years; Respondents have repeatedly engaged New York firms to assist them in their business objectives, including to make statements to the markets about the operation of the Bitfinex trading platform and the cash backing of tethers; and as recently as 2019, Respondents opened a trading account with at least one New York-based virtual currency firm. Contrary to

Respondents' statements to the Court that "[t]hey have steered clear of New York (and of the United States)," their ties to New York are many and deep.

Respondents have now had several full and fair opportunities to raise their objections. In the midst of their motions, they have avoided producing the core, substantive documents called for in 354 Order, which was granted in April. Such delay is a complete inversion of the purpose of section 354, which is meant to require parties to produce the materials sought by the OAG under the Court's aegis. Given the schedule on this motion, the OAG's investigation will have been set back almost four months. The delays must stop, and Respondents must produce the information they were originally directed to produce. Accordingly, the OAG respectfully requests that the Court deny this "motion to dismiss" in its entirety, direct Respondents to produce, without further delay, documents and information as required in the 354 Order, and inform the parties of the process by which it will hear the OAG on an extension of the injunction.

STATEMENT OF FACTS

A. The OAG's Investigation Concerns the Activities of the Bitfinex Trading Platform, and the Issuance and Redemptions of Tether

As set forth in the OAG's initial application to the *Ex Parte* Office, and to this Court in opposition to the Motion to Vacate, the OAG's investigation concerns, in part, Respondents' activities as operator of the Bitfinex trading platform, and as issuer of the tether "stablecoin," which for several years Respondents represented was backed 1-to-1 by U.S. dollars held in a bank account. The OAG's subpoenas, served in November 2018, sought materials regarding, among other things:

(i) The process by which Respondents determine whether, when, and how to issue and redeem tethers;

(ii) Banks, money transmitters, or other entities used by Respondents to transmit virtual or "fiat" currency;

(iii) Documents and communications regarding specific issuances and redemptions of tethers in October and November 2018; and

(iv) Trading activity on the Bitfinex trading platform regarding tethers and bitcoin.

Among other matters, the OAG's investigation determined that in mid-to-late 2018, Respondents began to suspect that their "payment processor" Crypto Capital had lost, stolen, or absconded with approximately $851 million dollars of co-mingled corporate and client funds. (354 Aff., ¶ 68.)[1] In the face of hundreds of Bitfinex client requests for cash withdrawals, including potentially from New York clients, Respondents represented to the market that withdrawals were operating normally. (*Id.* ¶¶ 62-67.) They were not. Respondents took hundreds of millions of dollars from Tether's cash reserves and allegedly used that money to satisfy the outstanding withdrawal requests and prop up Bitfinex, without disclosing any of that to Bitfinex traders or holders of tethers. In November 2018, Bitfinex executives transferred $625 million out of Tether's legitimate bank account and "credited" $625 million to Tether's accounts with Crypto Capital. (*Id.* ¶85.) That "credit" was illusory, because Bitfinex knew at the time that Crypto Capital was refusing or unable to process withdrawals or return funds. In effect, in November 2018 Respondents shifted most or all of Bitfinex's risk of loss of several hundred million dollars onto Tether's balance sheet, but continued to represent to the market that tethers were fully "backed" by U.S. dollars sitting safely in a bank account. They were not.

Respondents then engaged in an undisclosed, conflicted transaction to give Bitfinex even more access to Tether's reserves, and did so in a way that hindered the OAG's investigation. In February 2019, Respondents told the OAG that they were contemplating extending a "line of

[1] References to "(354 Aff. ¶ __)" refer to the Affidavit of Brian M. Whitehurst, filed in support of the OAG's application for the 354 Order. That Affirmation appears at Docket No. 1.

credit" on the Tether reserves to Bitfinex in the amount of $600 to $700 million, and that the transaction was imminent. (*Id.* ¶¶ 72-84.) After promising to provide timely information about the transaction, Respondents informed the OAG in March that it had already closed, on substantially different terms: the "line of credit" was in fact for up to $900 million, and incorporated the November 2018 transfer of $625 million from Tether to Bitfinex. (*Id.* at ¶ 85.) Respondents have provided no explanation (much less evidence) of what the transferred funds have actually been used for, or to whom the funds ultimately went.

B. Respondents Have Extensive Ties to New York

The OAG has uncovered substantial ties between Respondents and New York concerning Respondents' corporate operations; trading on the Bitfinex platform; the issuance, redemption and trading of tethers; use of financial institutions to move money and process customer deposits and withdrawals; and representations to the market that might have been misleading:

- Respondents admit that under the Bitfinex Terms of Service, New York customers could access the trading platform and exchange virtual currencies until January 2017, which is within the relevant time period of the OAG's investigation (Motion to Dismiss, at 5);

- Respondents admit that under the Tether Terms of Service, New York investors could purchase and redeem tethers directly from the company until November 2017, which is within the relevant time period of the OAG's investigation (Motion to Dismiss, at 6);

- From 2014 until at least 2018, one of Respondents' most senior executives, who was also one of its largest shareholders, resided in and conducted his work from New York (Aff. at ¶ 38);[2]

- In December 2017, Respondents opened accounts at New York-based Metropolitan Commercial Bank and utilized those accounts for business transactions (Aff. Ex. M);

[2] References to "Aff.__" refer to the Affirmation of Brian M. Whitehurst, filed concurrently with this opposition brief.

- In February 2018, Bitfinex and Tether opened accounts at New York-based Signature Bank and utilized those accounts for client transactions (Aff. Ex. N);

- From approximately June 2017 to October 2018, Bitfinex and Tether utilized accounts at Noble Bank, a division of Noble Markets LLC headquartered in New York, to process client transactions (Aff. at ¶ 27);

- In December 2017, Respondents made a several-million dollar investment in a Noble-affiliated entity operated from New York (Aff. Ex. O);

- As late as 2019, Respondents loaned tethers to a New York based trading firm (Aff. at ¶ 22);

- In 2017, Respondents engaged Friedman LLP, an accounting firm with offices in New York, to conduct a review of the Tether cash reserves. The result of that review was published to the New York market on September 28, 2017 (Aff. at ¶ 40);

- In 2018, Respondents engaged Freeh Sporkin & Sullivan, LLP, a law firm with offices in New York, to conduct a review of the Tether cash reserves. The result of that review was published to the New York market on June 20, 2018 (Aff. at 42);

- In January 2019, Respondent Bitfinex opened an account with a New York-based virtual currency trading firm that is licensed by the New York Department of Financial Services ("DFS") (Aff. at ¶ 33);

- Tethers have been tradable on virtual currency trading platforms owned and operated by entities licensed by DFS (Aff. at ¶¶ 34-35.)

There are more contacts with New York. Despite claiming to have "banned" New York and United States traders in 2017 and 2018, evidence gathered to date demonstrates that some of the largest professional trading firms on Bitfinex, and holders of tethers, are located in, or conduct trading activity from, New York. In fact, documents suggest that Respondents assisted certain of those traders in establishing foreign shell entities to become the nominal account holders – a work-around of Respondents' purported "ban." (*See* Aff. Exs. F, G.) There is evidence that Respondents knew that those traders would continue to conduct their trading activity from New York. (*Id.* Ex. G.)

The contacts with New York continue. For instance, evidence gathered to date suggests that as late as January 2019, Respondents communicated with New York-based traders about their activity on the Bitfinex platform, including about the placement of funds with Crypto Capital. In one such exchange, Respondents' founder and Chief Financial Officer made representations to a New York trading firm concerning their repeated requests for a months-delayed cash withdrawal, and recommended using Crypto Capital to expedite withdrawals. (Aff. at ¶ 37.)

Respondents also claim that "[t]he Companies do not advertise or market to individuals or entities in the United States or New York." (Hoegner Aff. at ¶ 16.) Notwithstanding Respondents' careful tense usage, as recently as 2018 Respondents retained a New York-based communications firm to be its "PR Agency of Record" to make public statements to the market regarding the operation of the Bitfinex trading platform and the cash-backing of tethers, with the aim of influencing, among other things, New York-based publications and the broader New York virtual currency markets. (Aff. at ¶¶ 43-45.)

Finally, contrary to Respondents' assertion that the Bitfinex trading platform has not been available to New York-based traders since January 2017, the OAG has obtained additional evidence that the Bitfinex trading platform has in fact been available to New York-based traders. To protect aspects of the OAG's ongoing investigation, the OAG is willing to provide this evidence to the Court *in camera*. [3]

[3] *Sussman v. N.Y. State Organized Crime Task Force*, 39 N.Y.2d 227, 233 (1976) (allowing *in camera* review when "the delicacy of the particular investigation or the risk of and consequences attendant on premature disclosure" makes it "appropriate" to do so).

C. Following the Court's Order to Modify the Injunction, Respondents Issue a New Securities Offering to Redeem Up to One Billion Tethers

Despite Respondents' claim that this proceeding is highly disruptive to their business, Respondents seemingly have continued to draw in extraordinary sums from investors. *First,* since the parties were last before the Court, over 1.5 billion new tethers have been issued to the market, each purportedly in exchange for one U.S. dollar. *Second*, Respondents announced that they undertook a so-called "initial exchange offering" to raise capital by issuing a new virtual asset (symbol "LEO"), which could be purchased in exchange for U.S. dollars, bitcoin, or tethers. According to Respondents, one billion "LEOs" have been sold to the market. (Aff. Exs. X, Y.) The performance of "LEOs" are tied to the performance of Respondents' business efforts: "iFinex and its affiliates will buy back LEO from the market equal to a minimum of 27% of the consolidated gross revenues of iFinex." Notably, Respondents represented that "an amount equal to at least 95% of recovered net funds from Crypto Capital . . . will be used to repurchase and burn outstanding LEO tokens within 18 months from the date of recovery." (Aff. at ¶ 60.)

Based on statements by Respondents, their new issuance was an instantaneous success. Commitments were allegedly received for all one billion "LEO" tokens within ten days of the initial announcement (four days after the marketing document was published). Thereafter, "LEOs" began trading on the Bitfinex platform, and in the secondary market.

ARGUMENT

I. RESPONDENTS' MOTION TO DISMISS IS AN IMPROPER ATTEMPT TO IMPEDE A LAWFUL INVESTIGATION

A. Respondents' Pre-Complaint Challenge Is Premature

Respondents' motion to dismiss is premature, and the Court should deny it on that ground alone. The OAG's investigation is an executive action that is expressly authorized by the Legislature. *Carlisle v. Bennet*, 268 N.Y. 212, 217 (1935). Under section 354, the OAG is authorized to apply to Supreme Court for an order directing the production of documents and information, witness testimony, and an injunction as the court deems "proper and expedient."

Having made that application and demonstrated its general authority to investigate under the Martin Act, the OAG's ongoing investigation must not be impeded by constant review of its methods and scope of materials sought. *In re Edge Ho Holding Corp.*, 256 N.Y. 374, 381-82 (1931) ("Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ" to halt the investigation); *Lewis v. Lefkowitz*, 32 Misc.2d 434, 436 (Sup. Ct. N.Y. Cnty. 1961) ("[T]he law of this State is crystal clear – this court does *not* have the power to interfere with or control the discretion lodged in the Attorney-General of the State of New York – no more than this court has the power to substitute its judgment for that of the District Attorney as to whether or not a prosecution be instituted.") (italics in original), *aff'd* 17 A.D.2d 778 (1st Dep't 1962). That does not mean that the Court is without authority to supervise, for instance, the conduct of examinations under section 354. What this means is that court supervision must recognize the OAG's legitimate and independent exercise of its executive authority.

In reviewing the OAG's investigative methods, then, a court should intervene "[only] where the futility of the process to uncover anything legitimate is inevitable or obvious," or "where the information sought is utterly irrelevant to any proper inquiry." *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331-32 (1988); quoting *Edge Ho*, 256 N.Y. at 382. In that inquiry, the OAG "enjoys a presumption that [it] is acting in good faith . . . and must show only that the materials sought bear 'a reasonable relation to the subject matter under investigation and to the public purpose to be achieved.'" *Anheuser-Busch*, 71 N.Y.2d at 332; quoting *Carlisle*, 268 N.Y. at 217; *Matter of Hogan v. Cuomo*, 888 N.Y.S.2d 665, 667 (3d Dep't 2009) ("The information forming the factual basis need not be sufficient to establish fraud or illegality, or even provide probable cause, as long as the futility of the process is not inevitable or obvious").

Respondents' pre-complaint challenge – including their personal jurisdiction challenge – is therefore improper at this stage. Indeed, the Court of Appeals has recognized that even if a court doubts that the OAG could ultimately establish personal jurisdiction in a future civil action, the court should not stop the OAG from investigating, including by compelling disclosure of documents. Thus, "even if the petitioner's contacts with this State were deemed to be less than necessary to justify the maintenance of a civil suit, it is our view that it would still be amenable to [a] subpoena . . . by the Attorney-General in connection with the investigation the latter seeks to initiate." *La Belle Creole Intl., S. A. v. Attorney General*, 10 N.Y.2d 192, 198 (1961). "A foreign corporation's immunity from civil suit in New York, on the ground that it is not doing business there, does not mean that it is immune from investigation by the Attorney-General in an inquiry to determine whether it is violating the laws." *Id.* "As long as [the OAG] has reasonable basis for believing that the corporation violated a New York statute, [it] is not prevented by the

due process clause of the Federal Constitution from exercising [its] power of subpoena and initiating an investigation designed to ascertain the facts." *Id.* (citing federal and state cases).

These cases make clear that Respondents cannot stop the OAG's investigation now. Because the OAG has shown that it is proceeding pursuant to a statutory grant of authority, and that it seeks materials not "utterly irrelevant" to its inquiry, the Court cannot halt the OAG's investigation. *See, e.g.*, *Edge Ho*, 256 N.Y. at 382; *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679 (S.D.N.Y. 2018) ("Agencies—and by extension, state officers like the AGs—are afforded latitude to conduct their investigations without interference and anticipatory jurisdictional challenges."); *Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 597, 611 (1980) (recipient of subpoena may not "avoid compliance by attacking the specific allegations upon which the investigation is based").

B. The Proper Vehicle to Challenge the 354 Order Was Respondents' Motion to Vacate, Which the Court Heard and Decided

In order to avoid the clear import of the law discussed above, and to avoid the implications of the Court's decision on the Motion to Vacate, Respondents cast their new motion as one to dismiss a special proceeding. (Motion to Dismiss at 6, *citing* C.P.L.R. art. 4.) However, there is no suggestion in section 354 of the Martin Act that a respondent, having been served with a court order to produce documents and information, may "dismiss" the Court's ongoing supervision of that process, beyond the regular right to move to vacate such order. Simply assuming, as Respondents do, that this matter is subject to C.P.L.R. § 103(b) and the full range of procedural provisions of article 4 is incorrect. If anything, the very quote that Respondents pull out of *Matter of Slisz v. Beyer*, a Fourth Department case under the Election Law, suggests why that is – Respondents obviously could not interpose an answer to the OAG's initial application for relief in this case. 92 A.D.3d 1238 (4th Dep't 2012) ("The procedures for

special proceedings are found in CPLR article 4, which permits a motion to dismiss in lieu of an answer but also provides for a hearing or a trial on issues of fact.") (internal citations omitted). Nor are Respondents entitled to fact disclosure, summary determination on undisputed facts, or judgment in their favor in the matter before the Court. While certain proceedings under the Martin Act are the kinds of "special proceedings" that lend themselves to full article 4 procedures, applications pursuant to section 354 are not among them. *Cf. People v. Levy*, 2011 NY Slip Op 31391[U] (Sup Ct. N.Y. Cnty. 2011) (entering judgment following evidentiary motions and hearings on the OAG's application for penalties, damages, and permanent injunctive relief).

Either way, there is little or no difference between the relief Respondents sought (or could have sought) when they moved to vacate the 354 Order, and the relief they seek now. Both are challenges to the legality of Justice James' (and this Court's) order granting an injunction and directing disclosure of materials. Respondents chose to assert their right to review of the 354 Order when they moved to vacate it on procedural and substantive grounds. This Court granted (in part) that motion, and denied it other respects. Respondents should not now have a second bite at the apple, styling another challenge in the guise of a "motion to dismiss." This is a delay tactic. The investigation should not be delayed further. Respondents must produce all the materials as they have been directed, since April, to do.

II. THE COURT HAS PERSONAL JURISDICTION OVER RESPONDENTS

The Court need not proceed further on this motion and should dismiss on those grounds. However, to the extent Respondents' motion raises deeper jurisdictional or due process questions regarding their lack of contacts with New York, such that they are not even subject to

investigation, any such suggestion is absurd. Respondents' contacts with New York go well beyond any minimum needed to establish personal jurisdiction.

C.P.L.R. 302 (a)(1) provides that "[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent … transacts any business within the state or contracts anywhere to supply goods or services in the state . . ." [4] "In order to obtain jurisdiction under this statute, the following conditions must be met: (1) the defendant must transact business in the State; and (2) the cause of action must be directly related to, and arise from, the business so transacted." *Storch v. Vigneau*, 556 N.Y.S.2d 342, 343 (1st Dep't 1990). "The key inquiry is whether [the respondent] purposefully availed itself of the benefits of New York's laws." *Courtroom Television Network v. Focus Media, Inc.*, 695 N.Y.S.2d 17 (1st Dep't 1999).

"What constitutes 'doing business' in order to render a foreign corporation amenable to process is not susceptible of exact delineation . . . To justify a civil suit against it and to satisfy due process requirements, the foreign corporation must possess such 'minimum contacts' with the State that maintenance of the suit will not offend 'traditional notions of fair play and substantial justice.'" *La Belle Creole Intl.*, 10 N.Y.2d at 197; quoting *McGee v. Intl. Life Ins. Co.*, 355 U.S. 220, 222 (1957). The Court should examine the "minimum contacts" between the party and the state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *State v. McLeod*, 2006 N.Y. Misc. LEXIS 1227, at *62 (Sup. Ct. N.Y. Cnty. 2006) (citing cases). "[T]he analysis is satisfied where 'a defendant's conduct

[4] A court may also exercise jurisdiction over one who commits tortious activity within the state, or causes injury within the state upon establishment of certain conditions. As of now there is no "cause of action" to which C.P.L.R. 302 (a)(1) refers, underscoring why all of this is premature.

and connection with the forum State are such that it should reasonably anticipate being haled into court there.'" *Id.*, quoting *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 216 (2000) "Such reasonable anticipation arises, in turn, where the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *McLeod*, 2006 N.Y. Misc. LEXIS 1227, at *62 (internal quotations omitted).

New York courts have consistently found that even one instance of purposeful activity directed to the state is sufficient to create jurisdiction where that activity is related to a cause of action. *New York v. Samaritan Asset Mgt. Servs.*, 22 Misc. 3d 669, 676 (Sup. Ct. N.Y. Cnty. 2008) ("proof of a single transaction in New York is sufficient to invoke jurisdiction even where the defendant never physically enters New York"); *see also Alibaba Grp. Holding Ltd. v. Alibabacoin Found.*, 2018 U.S. Dist. Lexis 180884, at * 11 (S.D.N.Y. 2018) (finding personal jurisdiction over Dubai and Belarus-based virtual currency companies; "an investigation has revealed that at least one of these email addresses – connected to three transactions – belongs to an individual who overwhelmingly appears to be a New York resident").

In contrast with Respondents' claim that it is an "indisputable fact[]" that they "have nothing to do with New York investors . . . or otherwise do business here," (Motion to Dismiss at 7), the OAG has uncovered extensive contacts with the state of New York, over a period of several years, concerning essential aspects of Respondents' business operations, including the potential fraudulent conduct that the OAG is investigating. Among them:

- During the time period relevant to the OAG's investigation, Respondents acknowledge that the Bitfinex trading platform serviced users located in New York, *see People v. World Interactive Gaming Corp.*, 185 Misc. 2d 852 (Sup. Ct. N.Y. Cnty. 1999) (online gaming platform with New York users subject to personal jurisdiction in New York);

- Respondents held accounts with two New York banks and at least one other New York-based financial institution, which they used to transfer money to and from

clients, *see Banco Nacional Ultramarino, S.A. v. Chan*, 641 N.Y.S.2d 1006, 1009 (Sup. Ct. N.Y. Cnty. 1996) *aff'd sub nom. Banco Nacional Ultramarino, S.A. v. Moneycenter Trust Co.*, 659 N.Y.S.2d 734 (1st Dep't 1997) (finding personal jurisdiction; foreign defendant "elect[ed] to utilize a New York banking institution" through which fraudulent scheme was advanced);

- Tethers have for years been available to New York traders, both through over-the-counter markets and on trading platforms, within the relevant time period of the OAG's investigation, *see Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 170 (2d Cir. 2010) (single act of shipping an item into New York, combined with affiliate's substantial activity, give rise to personal jurisdiction; defendant "operated a highly interactive website offering [products] for sale to New York customers");

- In 2019 Respondents loaned tethers to at least one New York based trading firm; *see Alibaba Grp.*, 2018 U.S. Dist. Lexis 180884, at * 11;

- Respondents engaged a New York-based communications firm to make public representations to the market regarding the cash-backing of tethers, *see Corporate Campaign, Inc. v. Local 7837, United Paperworkers Int'l Union*, 697 N.Y.S.2d 37, 39 (1999) (use of public relations firm located in New York supported personal jurisdiction);

- In 2019, Respondents opened a trading account with at least one New York-based virtual currency firm, *see McLeod*, 2006 N.Y. Misc. LEXIS 1227, at *62 (trading through New York firms established jurisdiction).

There are a host of other connections to the state, several of which have been set forth in further detail in the accompanying Affirmation. Any one of them, standing alone, would suffice to establish the Court's jurisdiction. *Alibaba Grp.*, 2018 U.S. Dist. Lexis 180884, at * 11; *High St. Capital Partners, LLC v. ICC Holdings, LLC*, 2019 NY Slip Op 31361[U] (Sup. Ct. N.Y. Cnty. 2019) (Cohen, J.) ("New York courts have recognized CPLR 302(a)(1) long-arm jurisdiction over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions.") (internal quotation omitted).

III. RESPONDENTS' REMAINING ARGUMENTS DO NOT PROVIDE A BASIS FOR DISMISSAL

Respondents' Motion makes a number of additional arguments concerning the OAG's ongoing investigation. None provide a basis for dismissal.

A. The Martin Act Empowers the OAG to Investigate Matters Concerning Securities and Commodities

Respondents suggest that the Court lacks "subject matter jurisdiction because the cryptocurrency tether does not fall within the ambit of the Martin Act." (Motion to Dismiss at 14.) As an initial matter, Supreme Court has subject matter jurisdiction over section 354 proceedings: "[OAG] may present to any justice of the supreme court, before beginning such action, an application in writing . . ." The Court also has subject matter jurisdiction over plenary actions asserting Martin Act claims. What Respondents seem, then, to be arguing is that the Martin Act does not confer authority on the OAG to investigate their activities because, in their view, tethers are not securities. That argument challenges the substance of the OAG's anticipated claims: namely, that the OAG in pursuing a Martin Act claim must plead and prove a connection to a security or commodity. Gen. Bus. L. § 352; 353. But because the OAG has not alleged a Martin Act violation yet, Respondents' challenge comes too soon. *Gardner v. Lefkowitz*, 97 Misc. 2d 806, 812 (Sup. Ct. N.Y. Cnty. 1978) (denying motion to quash; "One of the reasons for [a Martin Act] inquiry is to adequately develop a factual basis for a determination . . . as to whether or not the subject being investigated comes within the scope of [OAG's] authority within the Martin Act."). Indeed, the Court has already ruled that Respondents' arguments that tethers are not securities is "premature" and that ruling on it would be "inconsistent with section 354." (Decision at 17.) At this stage, the OAG must be permitted to conduct its investigation and gather the factual record. *Gardner*, 97 Misc. 2d at 811-12.

Respondents' challenge to the applicability of the Martin Act would fail at any rate. As the OAG has previously explained, Respondents facilitate the trading of, and themselves deal in, assets such as bitcoin, ether, and other virtual currencies that have been held consistently to be commodities (which are explicitly covered by the Martin Act), as well as other assets that would be determined to be securities, tether only one among them. The OAG's investigation concerns the operation of the Bitfinex trading venue. *People v. Barclays Cap. Inc.*, 1 N.Y.S.3d 910, 917 (Sup. Ct. N.Y. Cnty 2015) (rejecting argument that Martin Act did not apply to statements about functioning of trading venue; "the Court of Appeals' guidance on the Martin Act to be that doubts in favor of the Martin Act's applicability should be resolved in the NYAG's favor").[5]

Indeed, the OAG continues to uncover evidence of securities activity, highlighting why the investigation must proceed. Respondents' recent "initial exchange offering," for instance, has every indicia of a securities issuance subject to the Martin Act, and there is reason to believe that the issuance is related to the matters under investigation. *First*, its timing and structure appears to have been prompted by the Court's entry of the injunction prohibiting U.S. dollar transfers out of the Tether cash reserves. *Second*, "LEO" holders will ostensibly be repaid in "an amount equal to at least 95% of recovered net funds from Crypto Capital . . ." (Aff. at ¶ 60.) The funds given over to Crypto Capital are central to the OAG's ongoing investigation, and Respondents' representations in connection with this issuance raise serious questions regarding matters under investigation, including what information Respondents have suggesting any ability to locate and recover those funds. *Third*, and relatedly, if Respondents have now pledged essentially all of any funds they "recover" from Crypto Capital ($851 million), as well as a

[5] Respondents cite no case supporting the novel argument that New York's anti-fraud laws do not apply to them because they (purportedly) do not control where tethers are traded in the secondary market. (Motion to Dismiss at 6.)

significant portion of Bitfinex's ongoing gross revenues, to the repayment of "LEO" holders, there are serious questions regarding how, when, and from what source Bitfinex plans to pay back the $750 million it transferred from the Tether cash reserves in the ostensibly arm's length "line of credit" transaction, while also honoring new withdrawal requests made in the ordinary course (which, as recently as March, Respondents admitted having difficulty meeting).

Ultimately, questions about the timing and nature of Respondents' new issuance underscores the impropriety of forcing the OAG to respond to seriatim motions about the precise scope of its investigation and entitlement to ultimate relief in a future civil action. This is an ongoing law enforcement investigation. The OAG is entitled to pursue it, without further impediment or delay.

B. Federal "Extraterritoriality" Case Law is Not Implicated by the OAG's Investigation

Even at this early stage, it is apparent that the OAG's investigation does not concern matters entirely outside the United States. Moreover, Respondents have waived any arguments about production of materials responsive to the November 2018 subpoenas because Respondents accepted service and produced documents, thus estopping them from arguments regarding jurisdiction or the locality of those materials. [6]

Respondents nevertheless argue that the 354 Order improperly compels production of documents and information because such materials allegedly reside abroad. (Motion to Dismiss at 16.) Respondents' argument then seems to transition into a demand that the 354 Order, and the OAG's investigation itself, be dismissed in its entirety on the basis of "extraterritoriality."

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[6] Those subpoenas are not the subject of this proceeding. The Court should note, however, that accepting Respondents' argument here would lead to an absurd result: the OAG could move the Court to compel compliance with the subpoenas, but could not seek the Court's intervention to require production under section 354, part of which expressly incorporates the requests in the subpoenas.

(Motion to Dismiss at 19.) Both arguments are miscast. The OAG has set forth significant reason to believe, at this early stage, that relevant conduct has taken place in and from New York, and had a direct effect on New York and U.S.-based users of the Bitfinex platform, holders of tether, and participants in the broader virtual currency markets. The OAG has provided evidence that Respondents used New York-located and licensed banks, financial institutions, and had New York-based trading partners. Respondents have produced thousands of pages of materials suggesting that they have had a significant number New York trading clients. (Aff. ¶¶ 47-49.)

In that context, the notion of "extraterritoriality" is simply inapplicable as that concept exists in federal law. In 2008, the Supreme Court held in *Morrison v. Natl. Austl. Bank Ltd.* that Section 10(b) of the federal Securities Exchange Act did not authorize a private securities fraud suit based on so-called "foreign-cubed" transactions: (i) foreign plaintiffs suing (ii) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (iii) foreign countries. 561 U.S. 247, 283 (2010). There is nothing in *Morrison* or the significant body of federal case law applying it that suggests that any presumption of domestic application of laws precludes an investigation of fraud in connection with, for example, a trading platform with U.S. customers, or an issuer with U.S. holders trading on U.S. platforms.[7] Indeed, if there is any presumption to be applied to a Martin Act investigation, it is that the Act must be liberally construed to effect its purpose of stopping fraud. *People v. Federated Radio Corp.*, 244 N.Y. 33 (1926); *All Seasons Resorts, Inc. v. Abrams*, 68 N.Y.2d 81 (1986); *First Energy Leasing Corp., v. Attorney General*, 68 N.Y.2d 59 (1986).

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[7] Respondents' brief does not mention *Morrison*, or discuss the 2010 Dodd-Frank amendments in which Congress responded to the *Morrison* decision by clarifying the SEC's enforcement authority – matters which would be essential to any meaningful analysis of federal extraterritoriality issues in this context.

While Respondents dedicate much discussion to the Supreme Court's 2016 decision in *RJR Nabisco, Inc. v. Eur. Community*, 136 S. Ct. 2090 (2016), that case concerned the permissible scope of a private action under the federal Racketeer Influenced and Corrupt Organizations Act. What relevance that federal law in particular has to Respondents' conduct in this case is a question best directed to Respondents. It has no application to the investigatory power of the OAG under the Martin Act.[8] More instructive are cases applying *Morrison* and *RJR* to government actions, which have recognized that extraterritoriality concepts do not bar investigations or enforcement actions under the federal anti-fraud statutes, especially when significant relevant activity has occurred in the United States. *See, e.g., United States v. Buck*, 2017 U.S. Dist. LEXIS 158080, at *19 (S.D.N.Y. Aug. 28, 2017) (denying dismissal of indictment, given overt acts in United States), citing *United States v. Zarrab*, 2016 U.S. Dist. LEXIS 153533, at *27 (S.D.N.Y. Oct. 17, 2016) (rejecting extraterritoriality argument when defendant caused an international wire transfer processed by a United States bank); *SEC v. Gruss*, 859 F. Supp. 2d 653 (S.D.N.Y. 2012) (*Morrison* did not apply, and even if it did, SEC's claims could proceed); *SEC v. Scoville*, 913 F.3d 1204 (10th Cir. 2019).

To the extent Respondents wish to raise extraterritoriality arguments, as inapplicable as they might be, they can do so in response to a future complaint, at which point a meaningful discussion could be had regarding the claims the OAG is asserting, and the nature of the facts on which those claims are based. *See Morrison*, 561 U.S. at 254 (the conduct reached by section

[8] The analysis in *RJR Nabisco* proceeds from the Court's view that "***federal*** laws will be construed to have only domestic application." 136 S. Ct. at 2100 (emphasis added). The Court did not consider whether and how its extraterritoriality framework applies to state laws, much less a state executive's investigative authority.

10(b) of the Exchange Act "is a merits question," not a question of subject matter jurisdiction); *Buck*, 2017 U.S. Dist. LEXIS at *5 (raising arguments on motion to dismiss indictment).[9]

C. Service of the 354 Order Was Proper

1. Respondents Have Waived Arguments About Service

The Court should not entertain arguments as to method of service on this motion, which have been waived. *See Addesso v. Shemtob*, 70 N.Y.2d 689 (1987) (improper service argument waived when not made in initial motion challenging complaint); *Enright v. Vasile*, 657 N.Y.S.2d 901, 902 (2d Dep't 1997) ("In his first motion to vacate the default judgment the defendant failed to raise the claim that the court lacked personal jurisdiction over him because of improper service. Thus, the defendant waived this issue."); *Hodges v. Beattie*, 893 N.Y.S.2d 289, 291 (3d Dep't 2009) ("defendant waived any contention that he was not properly served with the order to show cause by failing to raise that issue in his cross motion"). Here, Respondents not only raised several objections in their Motion to Vacate, they went well beyond: they participated in this matter for over a month, appeared several times for argument, filed a letter motion to narrow the injunction, made proposals to the Special Referee regarding production, and have now produced documents relevant to personal jurisdiction. Respondents have participated fully in this matter when it suited them, and may not now raise arguments about how they were served. [10]

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[9] The Court of Appeals has, to be sure, enforced subpoenas issued by the OAG to overseas entities. For instance, in *La Belle Creole*, the OAG sought disclosure under the Executive Law of books and records from a Panamanian corporation with its principal place of business in Haiti. 10 N.Y.2d at 196.

[10] Oral invocations by counsel of reserving rights to move for various types of relief does not relieve Respondents of their obligation to raise service arguments in their initial motion. In any event, when counsel for Respondents did purport to reserve rights, service was not mentioned. (*See* May 6, 2019 Transc. at 65-66; May 16, 2019 Transc. at 21; 26-27; 32.)

2. *The Court Properly and Specifically Ordered Service on Counsel, With Which the OAG Complied*

While the Court need not go further, it should reject Respondents' service argument if it chooses to consider it, because service was proper. Respondents' brief leaves out facts relevant to the issue at hand. Upon application to Supreme Court on April 24, 2019, Justice James ordered service of the papers on counsel for Respondents no later than April 26, 2019. The OAG complied with that order. Beyond providing "a pdf version of the Order sent by email," (Motion to Dismiss at 8), Respondents' counsels were hand-delivered copies of the Order and supporting papers. An additional copy was delivered overnight to one of counsel's other offices in Washington, D.C., and a public docket was immediately created. (Aff. at ¶¶ 65-66.) *Invar Intl., Inc. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi*, 934 N.Y.S.2d 34 (Sup. Ct. N.Y. Cnty. 2010), *aff'd* 927 N.Y.S.2d 330 (1st Dep't 2011) (service of preliminary injunctive papers on U.S. counsel for overseas respondent was proper); *Alibaba Grp.*, 2018 U.S. Dist. Lexis 180884, at * n.1 (finding "frivolous" argument that court-ordered service on counsel via email and Federal Express was not "reasonably calculated to give notice" given that defense counsel "entered an appearance just days after service").

Here, where the OAG's application for relief was sought to prevent the imminent dissipation of assets, and where "[n]either Bitfinex nor Tether has a single headquarters or home office," anywhere in the world (Hoegner Aff. ¶ 6), cases like *Invar* and *Alibaba* demonstrate the propriety of the court's order of service upon counsel. *Invar*, 934 N.Y.S.2d 34 ("petitioners knew . . . that [respondent] was represented by its United States-based counsel [in the underlying proceeding]. . . Under the circumstances . . . it was reasonable to expect that service in Washington D.C., upon the very counsel which was representing [respondent] . . . would provide it with 'notice reasonably calculated, under all the circumstances, to apprise [it] of the pendency

of the action and afford [respondent] an opportunity to present their objections"). Having complied with the Court's order, service was proper.

Respondents' other arguments are meritless. As no witness examination was ordered, no witness or mileage fees were due. Indeed, witness and mileage fees would not be required to be paid to employees of Respondents pursuant to Gen. Bus. L. §§ 355 and 352(3).[11] And Respondents' arguments regarding C.P.L.R. § 308, entitled "Personal service upon a natural person," are not apposite, because Respondents are not natural persons. (Motion to Dismiss at 9.)[12]

CONCLUSION

The OAG respectfully requests that the Court deny Respondents' Motion to Dismiss in its entirety, direct the immediate production of all materials called for in the 354 Order, and inform the parties of the process by which it will hear the OAG on an extension of the injunction.

Dated: July 8, 2019
New York, New York

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

By: 
John D. Castiglione
Senior Enforcement Counsel

[11] Gen. B. Law. § 352(3) ("The provisions for payment of witness fee and/or mileage do not apply to any officer, director or person in the employ of any person, partnership, corporation, company, trust or association whose conduct or practices are being investigated.").

[12] For the same reason, *Abrams v. Lurie* is not instructive, insofar as that case considered the effectiveness of service on a natural person for examination testimony, interpreting C.P.L.R. § 308. 176 A.D.2d 474 (1st Dep't 1991).

Brian M. Whitehurst
Assistant Attorney General
Investor Protection Bureau

Johanna Skrzypczyk
Assistant Attorney General
Bureau of Internet and Technology

Office of the Attorney General of the
State of New York
28 Liberty Street
New York, New York 10005
Tel. (212) 416-6210

Petitioner

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 6,995 words as counted by the word-processing system used to prepare the document.

Brian M. Whitehurst