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

PRESENT: O. PETER SHERWOOD PART 49
Justice

THE PEOPLE OF THE STATE OF NEW YORK
by ANDREW M. CUOMO, Attorney General
of the State of New York,

Plaintiff,

-against-

CHARLES SCHWAB & CO., INC.

Defendant.

INDEX NO. 453388/2009
MOTION DATE Sept. 20, 2011
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

Dated: October 24, 2011

O. P. Sherwood
O. PETER SHERWOOD, *J.S.C.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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DECISION AND ORDER

Index No. 453388/2009

O. Peter Sherwood, J.

On this motion to dismiss, defendant, Charles Schwab & Co., Inc. ("Schwab"), asserts that plaintiff, The People of the State of New York by Eric Schneiderman, Attorney General ("AG"), has not pleaded securities fraud claims with sufficient particularity as CPLR 3016 requires, and that the claims asserted by the AG fail to state causes of action upon which relief may be granted as CPLR 3211(a)(7) requires. Schwab argues that (1) plaintiff's complaint alleges fraud by hindsight, (2) the complaint fails to identify any material information that defendant withheld from investors, (3) General Business Law ("GBL) § 349 does not apply to securities related claims, and (4) claims under the Executive Law §63(12) are duplicative of the AG's Martin Act claims. The AG opposes the motion. The facts are taken from the complaint which for purposes of a motion to dismiss, must be accepted as true, and from the AG's responses to Schwab's interrogatories ("Interrogatory Answers").

OVERVIEW

This securities fraud action arises out of the collapse of the market for auction rate securities (ARS). ARS are long-term obligations, similar to bonds, with variable interest rates that reset through periodic auctions (known as "Dutch auctions" [Compl. ¶ 17]) held at intervals of, typically, every 7, 28 or 35 days, with interest paid at the end of the auction period. The issuer of an ARS selects a company to underwrite the offering and manage the auction process by which rates are set. If successful, each auction clears at the lowest rate bid that is sufficient to cover all the securities for sale, resets the rate until the next auction, and provides the holder with short term liquidity. If there

possession of the ARS with no access to their money and interest rates on the securities are set to a default rate of interest or "fail rate" set in the origination documents. In the latter event, ARS investors would be required to hold the security indefinitely or until maturity, which could be 30 years or more.

Underwriter broker-dealers supported the ARS market by purchasing ARS for their own inventories to make up shortfalls in the natural demand. These proprietary bids were known as "support bids" (Complaint ¶¶ 17-22). Support bids provided needed demand when auctions otherwise would have failed due to lack of investor interest. Interventions of this type created the illusion that ARS were highly liquid, low-risk investments. Without such interventions, there would have been widespread auction failures. Brokers-dealers who placed support bids were able to exert near complete control over the interest and dividend rates paid on ARS.

Within a few days in February 2008, the ARS market, which had grown to about $330 billion in outstanding securities, suffered a widely publicized collapse with almost all auctions failing. Over $300 billion of the ARS were rendered illiquid, leaving investors with no short term liquidity. Prior to the collapse, all major ARS broker-dealers had stopped submitting support bids and ended their support of auctions. This led to failure of 87% of all ARS auctions.

BACKGROUND

On August 17, 2009, the AG commenced this action on behalf of investors who purchased ARS through defendant, alleging that defendant engaged in fraudulent and deceptive conduct in the sale of hundreds of millions of dollars of ARS to the investing public and persistently failed to disclose or made misrepresentations that concealed to hundreds of its customers the risk involved in ARS. The AG contends that defendant repeatedly described ARS as liquid investments and concealed the risk that customers would not be able to sell their ARS and could lose liquidity if the auctions failed. Moreover, the AG also asserts that defendant knew that major underwriter broker-dealers in the ARS market were supporting the market with proprietary bids to keep the auctions from failing and could refrain from doing so at any time. This is essentially what occurred when the ARS market collapsed. The AG further alleges that defendant failed to ensure that its sales force was knowledgeable about the features and risks of ARS.

With respect to the collapse in the market, the AG contends that Schwab was reckless or negligent in not knowing about the rising problems in the ARS market beginning in August 2007, including information identifying liquidity risks, increasing pressures in the ARS that compounded those risks and a dramatic increase in the rate of auction failures in the ARS market.

The complaint alleges four causes of action: (1) fraud based upon violations of section 63 (12) of New York's Executive Law; (2) securities fraud in violation of Article 23-A of the General Business Law (GBL §§ 352 *et seq.*, commonly referred to as the "Martin Act"), specifically GBL §§ 352-c (1) (a) and 352-c (1) (c); and (3) consumer fraud in violation of GBL § 349. The AG seeks an order directing that Schwab (1) buy back ARS from defrauded customers at par; (2) disgorge ill-gotten gains; (3) pay restitution; (4) pay civil penalties; and (5) change its sales practices and advertising claims. The AG also seeks an order enjoining further violations of GBL § 349 and Executive Law § 63 (12).

MOTION TO DISMISS

Defendant moves pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action and pursuant to CPLR 3016 for failure to plead the fraud claims with sufficient particularity. As to the former, Schwab asserts that the complaint does not allege any statements that were false when made, that GBL§ 349 does not apply to securities transactions, that the Executive Law §63(12) claim must be dismissed as it is duplicative of the Martin Act claim and claims based on securities transactions having no connection with New York must be dismissed because the Martin Act is restricted to claims relating to securities transactions originating "within or from" New York (*see* GBL §352-c[1][c]; *People by Cuomo v Country First LLC*, 52 AD3d 345, 345-46[1st Dept 2008]). As to the latter, Schwab states that the complaint fails to state who made the misstatements, when and where they were made and how or why the few statements that are identified were misleading at all.

Plaintiff opposes the motion contending that the Martin Act and Executive Law §63(12) are not duplicative, that GBL §345 applies in this case because ARS are akin to bank savings accounts, that the court has jurisdiction over securities transactions involving non-New York investors and that Schwab brokers misrepresented the liquidity of ARS to customers and failed to disclose the risk that ARS could become illiquid. As to that branch of the motion that is based on the heightened pleading

standard set forth in CPLR 3016, the AG maintains that the Court of Appeals has never held that the particularity requirements of CPLR 3016 (b) apply to actions commenced by the AG pursuant to broad remedial statutes namely, the Martin Act, Executive Law § 63 (12) and GBL § 349. However, even if this court were to find that particularity in the pleading is required, the complaint satisfies that standard inasmuch as all that is required are "facts sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]).

ALLEGATIONS OF THE COMPLAINT

The AG alleges in the complaint that defendant made numerous misstatements and omissions regarding ARS and engaged in a systematic and widespread pattern of fraud. The AG contends (1) that defendant's brokers falsely represented to its customers that ARS were safe, liquid, short-term investments suitable for investors to use for cash management purposes (Compl. ¶¶ 30-70); (2) that defendant held itself out as a trustworthy financial advisor, yet recklessly failed to understand or properly inform and train its sales staff concerning ARS (¶¶ 71-85); and (3) that defendant's management knew or was negligent and reckless in not knowing of liquidity risks and developing problems in the ARS market beginning as early as August 2007.

The complaint alleges that audio recordings produced by Schwab in the course of the AG's investigation of conversations between members of defendant's fixed income sales force and defendant's customers, support the allegations that defendant falsely represented ARS as safe, liquid, short-term investments. For example, a supervisor of defendant's Northeast Regional Bond Desk, who supervised ten fixed income specialists, acknowledged that ARS were sold as suitable for short-term, cash management purposes; that he did not know how liquidity was provided in the ARS market or that there were any liquidity risks associated with ARS; that he and his colleagues believed ARS were appropriate for cash management purposes similar to money markets certificates and treasury bills; and that he sold ARS to as many as 50 customers as safe, cash management alternatives without addressing liquidity risks (Compl. ¶¶ 33-37).

Similar allegations concerning statements made and supported by audio recordings of conversations between four other of defendant's fixed income specialists regarding ARS's safety and liquidity are contained in the complaint (Compl. ¶¶ 38-51). The complaint also alleges that "of eight customer-facing Schwab employees questioned by the Attorney General's office, four admitted that

they sold auction rate securities variously as money market or cash management alternatives, and that they did not know about, did not fully understand, or did not discuss with customers the liquidity issues and risks associated with auction rate securities" (Compl. ¶ 52).

In addition, plaintiff alleges in the complaint that the audio recordings show that "[t]he frequency of instances of misinformation heard on these recordings suggests that Schwab's misrepresentations were systematic and a common feature of its nationwide sales practices" (Compl. ¶54; also ¶¶ 55-63). Schwab's customers also confirm the conduct evidenced in the audio recordings. As examples, the complaint refers to seven Schwab customers whose conversations with Schwab brokers were recorded (Compl. ¶¶ 64-70).

According to the complaint, defendant, "in its zeal to compete with big Wall Street firms" (Compl. ¶ 72), wanted to participate in the fixed income market by offering ARS. Schwab's Vice President for Fixed Income Trading stated that if defendant did not offer ARS to its customers, they would buy ARS from other brokers. The AG alleges that defendant fell short of its advertising concerning the fixed income expertise of its bond traders and the investment guidance they would provide to customers by failing to provide its fixed income sales force with proper training in ARS before they sold them to customers. Plaintiff alleges that defendant's Vice President of Fixed Income Trading acknowledged that defendant knew that the liquidity of ARS came from the auctions, that auctions would fail if not supported by the underwriters' support bids and that the liquidity risk came from the fact that auctions could fail. However, such knowledge was not shared with defendant's sales force (Compl. ¶¶ 74-77) and defendant maintained no internal standards governing ARS, but left it to the discretion of individual members of its fixed income sales force. As a result, there was no consistency in how ARS were presented to customers and that defendant's managers testified that their view that ARS were a suitable alternative to other cash management vehicles such as money markets was passed from one broker to another. Defendant is alleged to have made no effort to evaluate or correct the erroneous views of its sales force regarding ARS.

The complaint alleges that one week before the ARS market failed in February 2008, defendant held a conference call with one of its major underwriter broker-dealers for the purpose of preparing its sales force to respond to the increasing number of inquiries from customers regarding troubles in the auction of ARS by then widely reported. However, even after the ARS market failed,

defendant did not fully disclose to its customers what it knew about ARS before the market failed or what it subsequently learned (Compl. ¶¶ 83-85).

Plaintiff also alleges that defendant knew about rising problems in the ARS market. Specifically, beginning in August 2007, defendant became aware of the number of auction failures in the broader market for ARS (Compl. ¶ 87). On August 13, 2007, defendant was notified that an issue of ARS by one of its institutional clients had failed because the underwriter broker-dealer could not support the deal given market conditions and the supply it already had (*id.*). Plaintiff contends that after learning of these failures defendant focused on protecting itself rather than on informing its customers of problems in the ARS market. On September 5, 2007, defendant learned of a failure of a municipal ARS held in its portfolio and commonly sold to its retail customers. Defendant allegedly focused on the public relations consequences of the failure. Indeed, as the volatility in the ARS market increased between September 2007 and February 2008, defendant understood the growing problems and knew that the inventories of ARS that the underwriters were holding and in turn offering to defendant to sell to its customers were increasing and the demand for such ARS was flagging (Compl. ¶ 94). Notwithstanding that it knew the ARS market was in trouble, defendant did nothing to make changes to its sales practices or to inform its retail customers. Even after the market failed, defendant, in a letter to its customers, downplayed the significance of the auction failures, describing them as a rare occurrence.

DISCUSSION

A. Standard of Review

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" [citation omitted] (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]).

Notwithstanding these principles, pursuant to CPLR 3211(c), "either party may submit any evidence that could properly be considered on a motion for summary judgment." Where documentary evidence conclusively establishes a defense, dismissal may be warranted under CPLR § 3211 (a) (1) but only where such documentary evidence submitted resolves all factual issues and definitively disposes of plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Wallach v Hinckley,* 12 AD3d 893 [3d Dept. 2004]). In order to prevail on a motion to dismiss pursuant to CPLR § 3211 (a) (1), such motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" [citation omitted] (*McCully v. Jersey Partners, Inc.,* 60 Ad3d 562, 562 [1st Dept. 2009]).

CPLR § 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action . . ." CPLR 3013 requirements are satisfied so long as the pleading gives notice to an adversary of the transaction or transactions giving rise to the claim (*see Colleran v Rockman,* 232 AD2d 322, 323 [1st Dept 1996]). Conversely, where a pleading merely identifies a transaction without supplying facts indicating how it gives rise to a claim it is insufficient (*id.* [pleadings failed to give notice of how attorney's malpractice proximately caused damages]).

Where securities fraud is alleged, plaintiff's complaint must meet heightened pleading requirements of CPLR 3016 (b) which impose a more stringent rule than the generally applicable notice of the transaction rule of CPLR § 3013. It states that "[w]here a cause of action or defense is based upon fraud, misrepresentation, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail".[1] The section applies with equal

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[1]In one decision, the Appellate Division, 1st Dept. in *Weiner v Lazard Freres & Co.* (241 AD2d 114 [1998]) seems to have suggested a different standard when in finding that a breach of fiduciary duty claim was stated with sufficient particularity to satisfy the CPLR 3016 requirement, the court stated that "we have 'subordinated the threshold pleading requirement of CPLR 3016 (subd. [b]) to the notice standard of CPLR 3013'" quoting *Ackerman v Vertical Club Corp.*, 94 AD2d 665, 666 [1st Dept 1983]), *appeal dismissed* 60 NY2d 644 [1983]). Nevertheless, the general rule as applied by the Court of Appeals is that CPLR 3016 (b) requires more than the "notice pleading" of CPLR 3013 (*see Simcuski v Saeli,* 44 NY2d 442, 453 [1978]).

force to private parties and the AG (*see People v Katz*, 84 AD2d 381, 385 [1st Dept 1982]). However, the Court of Appeals has indicated that "CPLR 3016 (b) should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting the fraud'" (*Pludeman,* 10 NY3d at 491, quoting *Lanzi v Brooks,* 43 NY2d 778, 780 [1977]) and, therefore, the CPLR 3016 (b) requirements "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*id.* at 492).

The elements of fraud are (1) a representation of a material fact; (2) falsity; (3) scienter; (4) reliance; and (5) injury or damage (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *see also Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 488 [2007]). Each element must be supported by sufficient factual allegations to satisfy CPLR 3016 (b). Accordingly, for the complaint to be deemed sufficient to withstand a motion to dismiss, the name or names of the person or persons making the misrepresentations, when the misrepresentations were made and the circumstances constituting the wrong must be stated in sufficient detail to give defendant a fair opportunity to prepare a defense (*see New York Fruit Auction Corp.*, 81 AD2d 159, 161 [1st Dept 1981], *affd* 56 NY2d 1015 [1982]; *Glickman v Alter,* 236 AD2d 230, 231 [1st Dept 1997]).

B. Claims Involving Out of State Investors

Defendant's contention that the AG has no authority to recover on behalf of non-New York residents is without merit. Section 352 of the Martin Act applies to "the issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution within or from this state, of any...securities." Accordingly, so long as there is a nexus between a securities transaction and New York, the Martin Act applies. Here, plaintiff's alleges that defendant's misrepresentations and omissions led both in-state and out-of-state customers to invest in ARS in transactions executed in New York. The complaint alleges a sufficient nexus with New York to withstand a constitutional challenge (*see People v H&R Block, Inc.*, 58 AD3d 415, 417 [1st Dept 2009]; *State v General Motors Corp.*, 547 F Supp 703, 706 [SDNY 1982]).

C. The Martin Act Claims

Plaintiff's second and third causes of action allege that defendant violated, the Martin Act. The law grants the AG investigatory and enforcement powers to enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York and prescribing penalties. The statute provides in section 352-c that:

> It shall be illegal and prohibited for any person, partnership, corporation company, trust or association, or any agent or employee thereof, to use or employ any of the following acts or practices:
>
> (a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale;
>
> (c) Any representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made; where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section three hundred fifty-two of this article, regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted.

The Martin Act is remedial and should be liberally construed (*see People v Lexington Sixty-First Assocs.*, 38 NY2d 588, 595 [1976]). The AG need not allege or prove the elements of "reliance" or "scienter" in a Martin Act claim (*id.*). Under the Martin Act, the term is more broadly defined than it is at common-law and may encompass "all deceitful practices contrary to plain rules of common honesty, including all acts, even though not originating in any actual evil design to perpetrate fraud or injury upon others, which do tend to deceive or mislead the purchasing public" (*id.*). The AG is required to demonstrate simply that the challenged act or practice was misleading in a material way (*see State v Rachmani Corp.*, 71 NY2d 718, 726 [1988]). Where the Martin Act claim is based upon a failure to disclose, the omitted fact is material if it would have assumed actual significance in the deliberations of a reasonable investor and would have been viewed by the reasonable investor "as having significantly altered the total mix of information made available" (*id.* at 726).

Schwab asserts that the misstatements it is alleged to be responsible for were true when made and that where fraud by hindsight is alleged, the complaint must be dismissed (*see, e.g. Olkey v Hyperion 1999 Term Trust, Inc.*, 98 F3d 2,8 [2d Cir 1996]). The complaint, the AG's response to defendant's interrogatories and concessions made by the AG at oral argument reveal that the misrepresentations alleged were true when made and that the complaint contains no allegations that ARS were liquid at a time when they were illiquid. For these reasons, the second and third causes of action must be dismissed for failure to state a cause of action.

As of 2007, the ARS market had been in operation for 20 years and was conducting hundreds of auctions every seven, twenty-eight and thirty-five days. There had been no failures of the auctions prior to August 13, 2007. The ARS market collapsed in February 2008. The first failure of a class of ARS that involved securities sold by Schwab to its customers occurred on September 5, 2007. To the extent the complaint (or the AG's interrogatory response) identifies the date of any alleged misrepresentation, none post-date August 5, 2007. In its opposition to the motion to dismiss, the AG states "[t]he complaint does not allege that Schwab told its customers that ARS were liquid at a time when the securities were illiquid. Rather, the Complaint alleges that Schwab failed to explain the risks of *future* illiquidity that were both knowable or known to Schwab at the time. Compl. 1,2,5,6,7,30,31,39,41, 52, 55-56, 58-59, 74, 75, 76, 81, 84, 86-88, 90, 92-95, 98, 99 and 104. Plaintiff's Memorandum of Law in Opposition to Defendant Charles Schwab & Co, Inc's Motion to Dismiss, p. 13 (emphases added). Despite the admission, the AG states in a letter submitted after oral argument on the motion to dismiss that the "complaint cites examples of misrepresentations made by Schwab brokers and alleges that Schwab continued to make similar misrepresentations until the collapse of the auction rate securities market in February 2008. *See, e.g.* Comp. ¶¶84, 95, 99, 101." None of the cited paragraphs of the complaint allege facts from which it could be inferred that Schwab brokers made representations after September 5, 2007 that these securities were liquid. Instead, the cited paragraphs allege generally that Schwab brokers failed to warn their customers of the risks associated with investing in ARS. However, this is not a failure to disclose case (*see* AG Letter dated September 30, 2011, n.5). Thus, despite having conducted an investigation for over a year prior to the filing of the complaint during which time the AG demanded and obtained documents more than 450,000 documents, received audio and call recordings involving more than

200 ARS transactions and deposed eleven witnesses, the complaint is devoid of any allegation of representations made that were untrue when made.[2]

The AG contends that by arguing that fraud by hindsight cannot be grounds for a Martin Act claim, Schwab seeks to import a scienter element into the Martin Act. Scienter is not an element of the Martin Act (*see State v Rachmani Corp.*, 71 NY2d 718, 725 [1988]) but Schwab's argument has force. In order to show misrepresentation, the complaint must offer more than allegations that an investment failed to perform as predicted. Fraud by hindsight alone will not sustain the complaint (*see Olkey*, 98 F3d at 8). The complaint cannot survive if it fails to allege facts demonstrating that a statement was false or misleading when made (*see Albert Corp. v Corbo Co.*, 182 AD2d 500 [1st Dept 1992]["The essential elements of a cause of action for common law fraud include the representation of a material *existing fact*, falsity, scienter, reliance and inquiry."]; *Pacnet Network, Ltd. v KDDI Corp.*, 2009 WL 2999200, *4[Sup Ct NY Cty Sept 16, 2009][holding that a representation cannot be deemed false unless it misstates "*present facts*"]; *Fisher v Ross*, 1996 WL 586345, at *7[SDNY Oct 11, 1996][emphasis added]).

D. Executive Law §63(12) Claim

Executive Law §63 (12) gives the AG the power to commence an action for restitution, damages and injunctive relief against any person or entity which engages in "repeated fraudulent or illegal acts" or "persistent fraud". Like the Martin Act, this statute "broadly construe[es] the definition of fraud to include acts characterized as dishonest or misleading and eliminating the necessity of an intent to defraud" (*State of New York v Apple Health & Sports Clubs, Ltd.*, 206 AD2d 266, 267 [1st Dept 1994], *lv dismissed in part, denied in part* 84 NY2d 1004 [1994]). The test for fraud under this statutory provision is whether the acts complained of have the tendency or capacity to deceive or create an atmosphere conducive to fraud (*see State of New York v General Electric Co.*, 302 AD2d 314 [1st Dept 2003]). Executive Law § 63 (12) imposes no geographical restriction upon

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[2]Mindful of the extensive investigation conducted by the AG and defendant having submitted evidence that could properly be considered on a motion for summary judgment (*see*, e.g. Interrogatory Answers), this motion to dismiss may also be treated as a motion for summary judgment pursuant to CPLR 3211(c). This is not a case where the party opposing the motion can justifiably claim that the motion should be denied because facts essential to justify opposition may exist but cannot be stated (*see* CPLR 3211[d]).

its application so long as there is a nexus with New York sufficient to comport with the requirements of constitutional due process (*see e.g. People v Coventry First LLC,* 53 AD3d at 346; *People v H&R Block, Inc.,* 16 Misc3d 1124 [A] [Sup Ct. N.Y. Co., 2007]).

Contrary to defendant's contentions, the first cause of action alleging violation of the Executive Law §63 (12) is not duplicative of the Martin Act claims. Nothing in the Martin Act makes its remedies exclusive of other remedies available under New York law. Indeed, the AG is entitled to assert claims under the Executive Law, the Martin Act and GBL § 349 even though the AG's claims under those statutes may be related (*see e.g. People American Motor Club,* 179 AD2d 277 [1st Dept 1992]; *see also People v Frink America, Inc.,* 2 AD3d 1379 [4th Dept 2003]).

The facts alleged in the complaint in support of this cause of action are the same as those alleged in relation to the Motion Act claim. For the reasons stated above, the facts alleged do not adequately state a violation of the Executive Law 63 (12).

E. GBL § 349 Claim

GBL § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful". Although at first blush it would seem that a properly pleaded claim of a violation of the Martin Act and Executive Law would also be sufficient to support a GBL § 349 cause of action, the Appellate Division, First and Fourth Departments, have held that GBL § 349 does not cover securities transactions (*see e.g., Dweck v Oppenheimer & Co.,* 30 AD3d 163 [1st Dept 2006]; *Gray v Seaboard Securities, Inc.,* 14 AD3d 852 [3d Dept 2005], *lv dismissed* 4 NY3d 846 [2005]; *Fesseha v TD Waterhouse Investor Servs., Inc.,* 305 AD2d 268 [1st Dept 2003]; *Schwartz v Bear Stearns Cos.,* 266 AD2d 133 [1st Dept 133 [1st Dept 1999]; *Smith v Triad Mfg. Group, Inc.,* 255 AD2d 962 [4th Dept 1998] [dismissing a GBL § 349 claim brought by holders of shares of preferred stock in defendant corporation]; *but cf. B.S.L. One Owners Corp. v Key Ont'l Mfg. Inc.,* 225 AD2d 643 [2d Dept 1996] [declining to dismiss GBL § 349 claim alleging deceptive practices in the sale of securities in a cooperative corporation to residential shareholders]; *Scalp & Blade, Inc. v Advest, Inc.,* 281 AD2d 882 [4th Dept 2001] [upholding GBL § 349 claim against an investment advisor and the firm for which the advisor worked finding no blanket exception under the statute for securities transactions]). The federal district courts in New York have similarly applied New York law and held that GBL §

349, as a consumer fraud statute, was not intended to reach securities-related claims (*see e.g. Pew v Cardarelli,* 2009 WL 3165759 [N.D.N.Y. 2009]; *In re Evergreen Mut. Funds Fee Litigation,* 423 F. Fupp 2d 249, 264-265 [S.D.N.Y. 2006]; *Morris v Gilbert,* 649 F. Supp 1491 [E.D.N.Y. 1986]).

Defendant, in reliance upon the Court of Appeals' broad characterization of GBL § 349 as applying to "virtually all economic activity" (*Small v Lorillard Tobacco Co., Inc.,* 94 NY2d 43, 55 [1999]; *Karlin v IVF Am. Inc.,* 93 NY2d 282, 290 [1999]) seeks to avoid the rule in the First Department by arguing that since ARS are marketed as cash equivalents, they are therefore the equivalent of bank accounts and should be governed by the Court of Appeals' decision in *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20, 26 (1995) (holding that the latter came within the ambit of GBL§ 349). Defendant cites no authority in support of this position and this court declines the invitation to treat ARS as bank accounts.

CONCLUSION

Defendant's motion to dismiss is GRANTED in its entirety. It is

ORDERED that the complaint is DISMISSED and the Clerk of the Court is directed to enter judgment accordingly in favor of defendant, Charles Schwab & Co., Inc.

This constitutes the decision and order of the Court.

DATED: October 24, 2011

E N T E R,

O. PETER SHERWOOD
J.S.C.